

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1228 of 2019**

Arising Out of PS. Case No.-529 Year-2017 Thana- PURNEA SADAR District- Purnia

Md. Kaleem @ Rinku Son Of Md. Azmad Resident of Village - Khuskibagh,
Ward No.41, P.S.- Sadar, Distt.- Purnea.

... .. Appellant

Versus

1. The State of Bihar
2. Virendra Kumar Chaudhary @ Virendra Chaudhary Son of Hari Chaudhary Resident of Village - Khusibagh, P.S.- Sadar, Distt.- Purnea.
3. Mohit Chaudhary Son of Damodar Chaudhary Resident of Village - Khusibagh, P.S.- Sadar, Distt.- Purnea.

... .. Respondents

Appearance :

For the Appellant	:	Mr. Ranjeet Kumar, Advocate Mr. Kanishk Kaushtubh, Advocate Mr. Ayush Kumar, Advocate
For the State	:	Mr. Ashwani Kumar Sinha, APP Mr. Abhimanyu Sharma, APP
For Respondent No. 2 and 3	:	Mr. Y.V. Giri, Sr. Advocate Mr. Pranav Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 12-08-2022

In the present appeal filed under the proviso to Section 372 of the Code of Criminal Procedure, 1973 (Cr.P.C., for brevity), the appellant has assailed a judgment dated 07.09.2019 passed by the learned Additional District and Sessions Judge-III, Purnea in Sessions Trial No. 91 of 2018 (T.R. No. 02/2018), whereby, the respondents No. 2 and 3 herein have been acquitted



of charge of commission of offences punishable under Sections 148, 341, 323, 302 read with 149 of the Indian Penal Code ('I.P.C.' for short) and Section 27 of the Arms Act.

2. We have heard Mr. Ranjeet Kumar, learned counsel appearing on behalf of the appellant and Mr. Y.V. Giri, learned Senior Counsel appearing on behalf of respondents No. 2 and 3. Mr. Abhimanyu Sharma, learned Additional Public Prosecutor has represented the State.

3. The appellant herein is the informant (P.W.-4) of Sadar P.S. Case No. 529 of 2017, registered on 04.10.2017, based on written report of the informant/appellant addressed to the officer-in-charge, Sadar, Police Station, Purnea. It is manifest from the lower court records that the information was received by the police at 4:30 a.m. on 04.10.2017. Distance of the police station from the place of occurrence as mentioned in the first information report (FIR, for brevity) is one kilometre. The appellant/informant (P.W-4), in the aforesaid written report asserted that on the date of occurrence i.e. 3.10.2017 at 8 p.m., his brother Md. Jamal (the deceased) had left for a nearby Santosh Pal Market for shave and had instructed the informant to come there after 15 minutes to the said market. The informant, nearly 20-21 minutes thereafter, while proceeding towards the



said Santosh Pal Market, saw his brother, Md. Jamal (the deceased), who, by then, had reached the main road nearby the market. During the time when the deceased was handing over some money to the informant, miscreants, riding in three different motorcycles, arrived there and encircled them. He identified all those six persons as Virendra Kumar Chaudhary (respondent No. 2), Jitendra Kumar Choudhary, Md. Chameli Khureshi, Raju Poddar, Mohit Choudhary (respondent No. 3), Kailash Choudhary and Vilash Choudhary. On the instigation of accused Vilash Choudhary, respondent No. 2 opened fire on the deceased. The informant was thrashed by the accused Jitendra Choudhary and before he could regain his balance, the miscreants had escaped after having shot at the deceased. The deceased is said to have sustained fire arm injury in his chest with blood oozing out from his chest. On *hulla* having been raised by the appellant, Md. Aftab Alam arrived there and with the help of others, the informant took the deceased to Sadar Hospital where he was declared dead. However, thereafter the deceased was taken to Max-7 Hospital, Purnea as they doubted the opinion of the Doctor at Sadar Hospital. At Max-7 Hospital also, the deceased was declared dead.

4. Upon completion of investigation, charge-sheet was



submitted, whereafter, upon taking cognizance, the case was committed to the Court of Sessions for Trial. The charges were framed for commission of the offences punishable under Section 148, 323, 341, 302/149 of the I.P.C. and 27 of the Arms Act. Altogether, 7 witnesses were examined at the trial including the informant (P.W.-4), the Doctor (P.W.-5), Investigating Officers (P.W.-6 and P.W.-7). The prosecution got exhibited as evidence, certain documents including the post-mortem report. It is noted that two witnesses, namely P.W.-3 and P.W. 4 claimed to be the eye witnesses during the course of trial. Statement of the persons put on trial was recorded by the Trial Court under Section 313 of the Cr.P.C.. The defence got exhibited as evidence, certain documents to establish that there were certain criminal cases against deceased. It is evident from the trial court records as well as the impugned judgment of the Trial Court that the occurrence had taken place beside a market in a populated area and the distance of the police station from the place of occurrence has been shown in the first information report to be one kilometre.

5. P.W.-1 is said to have reached the place of occurrence after having heard the sound of gunshot. When he reached the place of occurrence, he found the deceased lying on the road. There was fire arm injury visible in his chest. He also



deposed that when he reached the place of occurrence, there were several persons assembled there.

6. One of the full brothers of the deceased and the informant, Mohd. Nihal P.W.-2, evidenced that when he learnt about the occurrence, he went to the place of occurrence near Mishra Line Hotel. He is a hearsay witness who learnt from the informant (P.W.-4) and Aftab Alam (P.W.-3) that respondents No. 2 and 3 and other persons named in the F.I.R. had killed the deceased. He deposed that the deceased was taken to Sadar Hospital where the deceased was declared dead. He clearly deposed that in the hospital, a police officer (*Daroga Ji*) had come, who had prepared the inquest report, on which he (P.W.-2) had put his signature.

7. P.W.-3 (Aftab Alam) in his deposition claimed to be an eye witness who supported the prosecution's case including the accusation against the respondent No. 2 of having shot at the deceased. He further deposed that the police station and hospital, both are 1-1.5 kilometre away from the place of occurrence. The police reached the place of occurrence, according to him, on the next date in the evening at about 3-4 pm.

8. P.W.-4 (the informant), *per contra*, deposed that the deceased was firstly taken to the Sadar Hospital and as he did not



rely on the opinion of the doctor there, the deceased was taken to Hope Hospital in Rambagh. It is pointed out, at this juncture, that in the F.I.R., P.W.-4 had disclosed that the deceased was taken to Max-7 hospital after he was declared by the doctor in Sadar Hospital dead. In the cross-examination, he could not give specific reply to the query as to how long he had stayed with the deceased in Sadar Hospital. He was unable to say as to in which vehicle he had taken the deceased from Sadar Hospital to Hope Hospital. It is noted that statement of P.W.-3 (Aftab Alam) and P.W.-4 (Md. Kalim @ Renku) was recorded under Section 164 of the Cr.P.C. on 12.10.2017 in which they supported the prosecution's case as disclosed in the FIR.

9. The investigating officer, who was examined as P.W.-7, in his cross-examination deposed that statement of P.W.-2 (Md. Nihal) was not recorded by him under Section 161 of the Cr.P.C. though he learnt from the case diary that said P.W.-2 had given a written statement to the police.

10. The Doctor has proved following *ante-mortem* injury as proved by him during the course of trial:

“On external examination-

*a. One lacerated wound oval in shape $\frac{3}{4}$ ”
dimetre on anterior chest wall below second rib (second inter
coastal space), edge of the wound inverted. Surrounding skin
-scrotched. Tattoed present, singing on hairs, in area of 2”of*



wound.

b. The wound communicate through thoracic cavity

3. On dissection-

(i) Head & Neck-Brain matter congested

(ii) Thorax-Clots and blood in thoracic cavity, ruptured of both lungs loops and heart, both Lungs pale, Heart both ventricular chambers empty.

(iii) Fracture of the fourth ribs,

(iv) In postero lateral position of chest wall. One metallic bullet lodged under the muscle plain in left chest wall.

(v) Liver, spleen, kidney all are pale

(vi) Stomach- semi digested food material.

(vii) Gut-Faecal matter and gases.

4. Dead bullet properly sealed and leveled in vessel, handed over the police personnel of concern p.s

5. Time elapsed since death-within 24 hours.

6. Cause of death- In our opinion the cause of death is due to haemorrhage and shock caused by fire arm injury.

7. This postmortem report is written in my pen and bears my signature. Entire P.M. report with his signature marked as exhibit-5.

8. Both the conducting doctor have put their signature on postmortem report before me. Signature of Dr. Subhash Kumar Singh and Dr. Sudhanshu Kumar are marked as exhibit-5/1 and 5/2 respectively.”

11. From the impugned judgment of the Trial Court, it is evident that the Trial Court has discussed in detail the deposition of the witnesses at the trial. P.W.-1 and P.W.-2 are not eye witnesses. It is evident that P.W.-3 and P.W.-4 (the informant)



claimed to be the eye witnesses. The Trial Court has discussed apparent inconsistencies in the evidence of the P.Ws- 3 and 4. The Trial Court has taken into account the crucial aspect of non-examination by the police during the course of investigation of the owner or staff of Mishra Line Hotel adjacent to which the occurrence had taken place as per the prosecution's case. The investigating officer deposed that he had not recorded the statements of the owner or the employees of the nearby shops which were open at the time of occurrence. The P.W.-4 deposed in paragraph 3 that when the deceased and the P.W.-4 were together, accused Vilash Choudhary started abusing the deceased, whereas, P.W.-3 in his evidence deposed that suddenly the accused persons came, and at the instance of Vilash Choudhary, accused Virendra Choudhary (Respondent No. 2) shot at the deceased. Deposition of P.W.-2 is in the same line as of P.W.-4 who too has not disclosed about any occurrence of altercation/use of abusive language before the occurrence.

12. The Trial Court has discussed the prosecution's evidence to the effect that whereas according to P.W.-2, the police officer had come to the hospital where the inquest report was prepared, on which P.W.-2 had put his signature, the place where the dead body was found, as recorded in column 3 of the inquest



report (exhibit-1/1) is contrary to the evidence of P.W.-2. The place where inquest report was prepared at 01:55 am has been described as 'in front of the house of the deceased'. The Trial Court, therefore, has reached a conclusion that the dead body of the deceased was found by the police in front of the house of the deceased and not in the hospital and from the house of the informant/deceased, the dead body of the deceased was sent to the hospital for postmortem examination to Sadar Hospital.

13. The Trial Court has, thus, recorded a finding that the dead body was found by the Sub-Inspector, Firoz Alam in front of the house of the deceased and after preparing the inquest report at 01:55 am, disbelieving contrary evidence of P.W.-2, according to whom, the inquest report was prepared in the hospital.

14. Significantly, P.W.-3, in his evidence in paragraph 33 deposed that he had given a written report to the police. After the said written report was submitted, his statement was not recorded by the police under Section 161 of the Cr.P.C..

Section 161 of the Cr.P.C. reads as under:

“161. Examination of witnesses by police.—

(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of



such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer; other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

[Provided that statement made under this sub-section may also be recorded by audio-video electronic means:]

[Provided further that the statement of a woman against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.]”

(emphasis added)

15. The Trial Court after having noticed this aspect of submission of written report to the police by P.W.-3, has held that P.W.-3 was deposing before the Trial Court for the first time without having been examined under Section 161 of the Cr.P.C..

16. Mr. Ranjeet Kumar, learned counsel appearing on behalf of the appellant has submitted that P.W.-3 is a witness of



the written report filed by P.W.-4 which is the basis for registration of F.I.R.. P.W.-3 and P.W.-4 have fully supported the case of the prosecution in their statement recorded under Section 164 of the Cr.P.C.. Further, they proved the case against the respondents by oral evidence before the Trial Court. The medical evidence of the Doctor corroborates the oral evidence of P.Ws 3 and 4. On analysis of evidence of eye witnesses, P.Ws 3 and 4, evidence of the Doctor (P.W.-5) and postmortem report, it is amply clear that the deceased was shot at by the respondent No. 2 leading to fire arm injuries sustained by the deceased and his subsequent death stands established beyond all reasonable doubt and, therefore, the finding of acquittal recorded by the Trial Court is unsustainable.

17. Mr. Y.V. Giri, learned Senior Counsel appearing on behalf of the private respondents, on the other hand, has submitted that the Trial Court has rightly noticed the inconsistencies in the evidence of the prosecution witnesses, particularly that of P.Ws- 3 and 4 and has rightly given the respondents benefit of doubt. He has submitted that non-examination of the eye witnesses present nearby the alleged place of occurrence, which the informant claims to be situated in a densely populated area casts a serious doubt and the Trial Court's



finding cannot be said to be suffering from any legal infirmity. He has argued that recording of *fardbayan* next day, which is the basis for registration of F.I.R. when the occurrence had taken place at a place only one kilometre away from the police station indicates concoction of a false story and false implication of the respondents because of pending disputes between respondents and the informant's family.

18. We have carefully perused the impugned judgment of the trial court and the LCR which had been called for. We have given our anxious consideration to the rival submissions made on behalf of the parties.

19. Based on the disclosure made by the informant (P.W.-4) in his written report submitted at 04:30 am on 04.10.2017 in respect of the occurrence which is said to have taken place on 03.10.2017 at 8:00 -8:30 pm and the evidence of the prosecution's witnesses 2, 3 and 4, the scenario which emerges is that they claim to have taken the deceased after the occurrence to the Sadar Hospital, Purnea where he was declared dead. From Sadar Hospital, Purnea, according to them, the deceased was taken to Hope Hospital, as deposed at the trial by P.W.-3 and P.W.-4, and since there also the deceased was declared dead, they returned home. P.W.-4, in his evidence has deposed



that when he and P.W.-3 returned from hospitals with the dead body, the police team had already come at their residence and inquiries were going on. His testimony is inconsistent with that of P.W.-2 who deposed that police officer had reached the hospital and inquest report was prepared in the hospital itself. P.W.-6, the first investigating officer deposed in his evidence that the inquest report was prepared on 04.10.2017 at 1:55 am and he could not explain the circumstance in which the belated time of receipt of the information in the F.I.R. has been mentioned as 4:30 am. The second investigating officer (P.W.-7) in his evidence has deposed that after preparation of inquest report at 1:55 am, it was sent to the Sadar Hospital. Other than the deposition of P.Ws 3 and 4, there is no evidence on record to support the case of the informant that deceased was taken to two hospitals before the dead body was brought back to their residence. P.Ws 2 and 4 are full brothers of the deceased. Contradictions in the evidence of the witnesses and the case of the prosecution as disclosed in the F.I.R., as have been noticed by the Trial Court for recording acquittal, for giving the respondents 2 and 3 benefit of doubt. The contradictions/inconsistencies in the evidence cannot be termed as minor.

20. It is well settled that if the view of the Trial Court,



recording acquittal is found to be reasonable, such view should not be interdicted. In our view, in the present case, the acquittal is a possible view.

21. It would be apt to notice the Supreme Court's decision rendered in case of ***Hakeem Khan v. State of M.P.*** reported in ***(2017) 5 SCC 719*** paragraph 9 of which read thus:-

“9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Penal Code.”

22. The said decision in the case of **Hakeem Khan** (supra) has been relied by the Supreme Court in the case of **N. Vijayakumar v. State of T.N.** reported in ***(2021) 3 SCC 687***. In case of **N. Vijayakumar** (supra), the Supreme Court has held that an appellate court, while dealing with the appeal against judgment of acquittal recorded by the Trial Court, must bear in mind that there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, presumption of his innocence is further reenforced,



reaffirmed and strengthened by the Trial Court. In a recent decision in the case of *Ravi Sharma v. State (NCT of Delhi)* reported in **2022 SCC OnLine SC 859**, the Supreme Court has noted with approval, the decision in case of **N. Vijayakumar** (supra).

23. In our view, on complete analysis of all the facts and circumstance noted hereinabove, the finding of acquittal recorded by the Court below by giving respondents No. 2 and 3 benefit of doubt cannot be said to be suffering from such legal infirmity, as would require this Court to interfere with the same. The view of Court below appears to be reasonable and not unfounded.

24. We do not find any merit in this appeal, which is accordingly dismissed.

(Chakradhari Sharan Singh, J)

I agree
Khatim Reza, J:

(Khatim Reza, J)

K.K.RAO/-

AFR/NAFR	N/A
CAV DATE	04.08.2022
Uploading Date	22.08.2022
Transmission Date	22.08.2022

