

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.349 of 2020

Arising Out of PS. Case No.-4 Year-2000 Thana- KHUDAGANJ District- Nalanda

-
1. Ramanand Chauhan @ Ramanand Noniya, S/o Late Babulal Nonia, R/o village- Bauri Dih, P.S.- Khudaganj, District- Nalanda
 2. Hriday Chauhan, S/o Late Babulal Nonia, R/o village- Bauri Dih, P.S.- Khudaganj, District- Nalanda

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Binit Kumar, Advocate Mr. Rakesh Ranjan, Advocate
For the Respondent/s	:	Ms. S.B. Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 04-09-2023

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, putting to challenge a judgment of conviction dated 23.01.2020 and an order of sentence dated 31.01.2020, Ist Additional Sessions Judge, Hilsa, Nalanda in Sessions Trial No. 395 of 2000, arising out of Khudaganj P.S. Case No. 4 of 2000, whereby the appellants have been convicted and sentenced as under:-

Appellant	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Ramanand Chauhan @ Ramanand Noniya	302/34 of the IPC	RI for life	5,000/-	SI for one month
	307/34 of the IPC	RI for five years	5,000/-	SI for one month
	27 of the Arms Act	RI for three years	2,000/-	SI for one month
Hriday Chauhan	302/34 of the IPC	RI for life	5,000/-	SI for one month
	307/34 of the IPC	RI for five years	5,000/-	SI for one month
	27 of the Arms Act	RI for three years	2,000/-	SI for one month

2. A *fardbayan* of the informant Krishna Prasad who came to be examined as PW-13 at the trial, recorded by Sub-Inspector of Police, Khudaganj Police Station on 19.01.2000 at 2:00 PM at the house of the informant, is the basis for registration of the concerned Khudaganj P.S. Case No. 04 of 2000. It is his case as disclosed in his *fardbayan* that there was some land dispute between one Nagina Mahto and Parmanand Chauhan continuing since long. On the date of occurrence i.e., 19.01.2000 at about 11:00 AM Parmanand Chauhan came along with his accomplices, namely, Hriday Chauhan (appellant No. 2), Dayanand Chauhan, Ramanand Chauhan (appellant No. 1), Awadh Prasad Chauhan in front of the house of the informant, with an intention to kill Nagina Mahto (PW-1). They were variously armed. They positioned themselves under a big

banyan tree and resorted to firing. Nagina Mahto immediately went inside his house and closed the door. In course of indiscriminate firing being made by the accused persons, the informant's aunt (father's sister, *fua*) who was cooking food on the terrace of the house, out of curiosity, attempted to see from the terrace, what was happening. In the meanwhile, one of the accused persons namely Parmanand Chauhan opened a fire which hit the informant's aunt in her stomach. She fell down on the stairs and died. Further, the accused persons open fired targeting the house of a relative of Nagina Mahto (PW-1), namely, Ramadhin Mahto which causing firearm injury in the hand of the wife of Ramadhin Mahto, namely, Kanti Devi (PW-12). Arjun Prasad (PW-11) also sustained firearm injury, in his leg. Arjun Prasad, according to the *fardbayan*, happened to be a relative of Nagina Mahto (PW-1). He also disclosed that apart from the aforesaid accused persons 10 other unknown persons were also accompanying the miscreants. He also named the persons who had seen the occurrence.

3. In nutshell, it was the informant's case in his *fardbayan* that in relation to a dispute with Nagina Mahto, the accused persons were making indiscriminate firing from a position which resulted into his aunt receiving a gunshot injury

in her stomach leading to her death and two other persons, namely, Arjun Prasad (PW-11) and Kanti Devi (PW-12) sustaining firearm injuries, as noted above.

4. The police upon completion of investigation submitted chargesheet against Parmanand Chauhan, Hriday Chauhan (appellant No. 2), Ramanand Chauhan (appellant No. 1) and Awadh Prasad Chaurasia for the offences punishable under Section 302, 307, 324/34 of the IPC and Section 27 of the Arms Act. The accused Dayanand Chauhan died during the course of investigation whereas the accused Awadh Prasad Chaurasia came to be declared a proclaimed offender. The accused Parmanad Chauhan died during the course of trial. After taking cognizance of the offences charges were framed against these two appellant's on 21.06.2001 for commission of the offences punishable under Section 302 and 307 of the IPC, both read with Section 34 thereof and Section 27 of the Arms Act. The appellants denied the charges and claimed to be tried. Accordingly, they were put to trial.

5. At the trial, the prosecution examined fourteen witnesses including the informant (PW-13), Nagina Mahto (PW-1) and two injured witnesses namely Arjun Prasad (PW-11) and Kanti Devi (PW-12). These witnesses claimed to be eye

witnesses to the occurrence. In addition, three other witnesses namely Shyam Kishore Prasad (PW-6), Anil Kumar (PW-7), Shiv Kumar Chaurasia (PW-8) also claimed to be the eye witnesses. Satyendra Yadav (PW-2) and Lakshmi Chandra Prasad (PW-5) did not support the prosecution's case and accordingly they came to be declared hostile at the instance of the prosecution. Three other witnesses namely Pavitar Prasad (PW-4), Mahavir Mahto (PW-9) and RamLagan Prasad (PW-10) are hearsay witnesses. There are two formal witnesses i.e., Md. Shamshul Haque (PW-3) who proved the charge-sheet and Vasudev Singh an advocate clerk who proved the postmortem report etc. The IO was not examined. Neither the doctor who had conducted the postmortem examination nor the doctor who had examined the injured witnesses were examined at the trial. In addition to the oral evidence of the prosecution's witnesses the prosecution proved following documentary evidence at the trial by getting them marked as Exhibits :-

1. Signature and handwriting of the Officer-in-Charge of the Police Station (Exhibit-1)
2. Signature of the Officer-in-Charge on the inquest report (Exhibit-2)
3. Signature of seizure list witness Anil Kumar (Exhibit-3)
4. Signature on the inquest report (Exhibit-4)
5. Signature of the informant on *fardbayan* (Exhibit-5)

6. Formal FIR (Exhibit-6)
7. Postmortem report (Exhibit-7)
8. Seizure list relating to blood (Exhibit-8)
9. Injury Report in respect of Kanti Devi (PW-12) (Exhibit-9)
10. Injury report of Arjun Prasad (PW-11) (Exhibit 9/1)
11. Case diary (paragraph 1 to 57) (Exhibit-10)

6. After closure of the evidence of the prosecution's witnesses the appellants were questioned under Section 313 of the CrPC so as to give them an opportunity to explain the incriminating circumstances emerging against them based on the evidence of the prosecution's witnesses. The appellants denied the said incriminating circumstance against them. No defence witness was produced in defence.

7. The trial court, after having appreciated and evaluated the evidence adduced at the trial, reached a conclusion that the prosecution was able to establish beyond all reasonable doubts commission of offence by these appellants punishable under Sections 302/34 and 307/34 of the Indian Penal Code and Section 27 of the Arms Act. After having convicted them of the aforesaid offences the trial court sentenced them to imprisonment and fine as has been noted hereinabove.

8. Mr. Binit Kumar, learned counsel appearing on behalf of the appellants has submitted that non-examination of

the Investigating Officer and the doctor at the trial has seriously prejudiced the defence of the appellants. He submits that non-examination of the doctors who had conducted postmortem examination upon the victim Gauri Devi resulted into denial of an opportunity to the appellants to cross examine them. The trial court has accepted the findings in the postmortem report which were not duly proved in the absence of examination of an expert. He has further submitted that non-examination of doctor who had treated the injured witnesses namely Arjun Prasad (PW-11) and Kanti Devi (PW-12) has also seriously prejudiced the appellants' case. He further submits that in facts and circumstances of the present case, because of non-examination of the Investigating Officer the appellants could not obtain contradictions from the depositions of the prosecution's witnesses and thus the appellants' defence stood seriously prejudiced. He has further submitted that there is no explanation on record as to why the Investigating Officer and the doctors could not be examined at the trial. Drawing the Court's attention to the deposition of PW-13, the informant, he has submitted that though according to him Nagina Mahto (PW-1) had closed his door, when the accused persons had started firing and, had locked himself inside his house, he (PW-1) in his deposition

testified that he was away in his agricultural field and he had rushed to his *Khaliyaan* (open barn/ granary) after hearing the sound of firing, whereafter, he had seen the occurrence and identified the accused persons participating in the occurrence. In order to contend that PW-1 is not a trustworthy witness, he has submitted that his signature also figured on the *fardbayan* of the informant and narration of the occurrence by the informant in the *fardbayan* is materially different from the evidence of (PW-1) at the trial who claimed to be an eye witness. He has further submitted that the injured witnesses i.e., PW-11 and PW-12 have not named these appellants as the persons who had participated in commission of the offence. Further, PW-13 deposed in his cross-examination that at the time of firing he was inside the house and had not seen any person known to him though, he claimed that he had seen Parmanad Chauhan, a co-accused who died during the course of trial. He further submits that the evidence of PW-6 and PW-7 do not in any manner prove the complicity of these appellants in commission of the offence for the reason that PW-7 deposed in his cross-examination that he had went to the place of firing when it had stopped. PW-6 in his cross-examination deposed that he had not seen any person participating in commission of the offence. PW-8 also cannot be

treated to be an eye- witness as it is evident from his cross-examination that he had gone inside the house and had come out of the house one hour after the occurrence had taken place. He has concluded his submissions with an argument that considering the nature of the depositions of the witnesses, none of them can be treated to be an eye witnesses and those who have claimed to be the eye witnesses are either untruthful or they have contradicted the prosecution's case by their own depositions.

9. Learned Additional Public Prosecutor appearing on behalf of the State, defending the finding of conviction recorded by the trial court, has submitted that the prosecution's witnesses particularly, PW-1 and PW-13 proved at the trial the motive behind the occurrence. She has further submitted that inconsistencies in the depositions of the prosecution's witnesses are minor and not material. She submits that it is highly improbable that all the prosecution's witnesses would have spoken in the same voice and it is because of human perception of an occurrence that the deposition's of witnesses in relation to same occurrence may slightly differ at times. She has submitted that taking into account cumulative effect of the oral evidence of the prosecution's witnesses the trial court has rightly recorded

the finding of conviction in the impugned judgment. Further, non-examination of the Investigating Officer and the doctor cannot be said to be of such nature as would have prejudiced the defence of these appellants.

10. We have perused the impugned judgment and order of the trial court as well as the trial court's records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties. In the facts and circumstances of the case, we consider it useful to address first the issue of consequence of non-examination of the Investigating Officer and the doctors who had conducted the postmortem examination and examined/treated the injured witnesses, namely, Arjun Prasad (PW-11) and Kanti Devi (PW-12).

11. We must notice at this stage itself that there is no explanation on record as to why the Investigating Officer and the doctors were not examined. There is no evidence/explanation to the effect that the Investigating Officer or the doctors were either dead or their attendance could not be procured without an amount of delay or expense which under the circumstances of the case might have appeared to the Court to be unreasonable, so as to attract Section 32 of the Evidence Act.

12. In the present case, the postmortem report has been proved by PW-14, an Advocate's clerk. In case of **Vijender vs State of Delhi** reported in (1997) 6 SCC 171 a clerk of the hospital had produced the postmortem report, though the doctor was available. The Supreme Court in the said case remarked that though the medical report was proved by a clerk of the hospital, the same would not be admissible, as the doctor, who had held the postmortem examination, was available in the hospital. The Supreme Court emphasized in the case of **Vijender** (supra) that only in exceptional cases where any of the prerequisites of Section 32 of the Evidence Act are fulfilled, the postmortem report can be admitted in evidence as relevant fact in terms of sub-section (2) thereof, by proving the same through other competent witness. The Supreme Court laid down in paragraph 19 in case of **Vijender** (supra) as follow :-

"19. It passes our comprehension how the trial Judge entertained the post-mortem report as a piece of documentary evidence on the basis of the above testimony of a clerk in spite of legitimate objection raised by the defence. In view of Section 60 of the Evidence Act, referred to earlier, the prosecution is bound to lead the best evidence available to prove a certain fact; and in the instant case, needless to say, it was that of Dr U.C. Gupta, who held the post-mortem examination. It is of course true that in an exceptional case where any of the

prerequisites of Section 32 of the Evidence Act is fulfilled a post-mortem report can be admitted in evidence as a relevant fact under sub-section (2) thereof by proving the same through some other competent witness but this section had no manner of application here for the evidence of PW 21 clearly reveals that on the day he was deposing Dr Gupta was in that hospital. The other reason for which the trial Judge ought not to have allowed the prosecution to prove the post-mortem report is that it was not the original report but only a carbon copy thereof, and that too not certified. Under Section 64 of the Evidence Act document must be proved by primary evidence, that is to say, by producing the document itself except in the cases mentioned in Section 65 thereof. Since the copy of the post-mortem report did not come within the purview of any of the clauses of Section 65 it was not admissible on this score also."

13. A Division Bench of this Court in case of **Rajeev Singh @ Rajeev Kumar vs. The State of Bihar** [Criminal Appeal (DB) No. 1310 of 2010] decided on 02.03.2017 had occasion to deal with the probative value of postmortem report proved by a person, not an author of such report and not an expert in medical science. The Division Bench in case of **Rajeev Singh @ Rajeev Kumar** (Supra) has considered several decision of various High Court's, e.g., **Hadi Kirsani vs. State** (AIR 1966 Orissa 21), Rajasthan High Court (State of

Rajasthan vs. Mathura Lal Tara Chand reported in **1971 Cr.L.J 1816**), Jharkhand High Court (**Sowam Kisku & Ors. vs. The State of Bihar** reported in **2006 Cri.L.J. 2526**) and has concluded with reference to Section 32 of the Evidence Act that where the prosecution has withheld the doctor and, the injury report or postmortem report was exhibited formally by a person not acquainted with the medical science, the same would be inadmissible in evidence as the contents of the report would not stand proved. The Court further held that when the doctor is dead or cannot be found or who has become incapable of giving evidence or his attendance cannot be procured without a prolonged delay or much expense which, to Court may appear to be unreasonable in the circumstances of the case, the same would become admissible in evidence in terms of Section 32 of the Evidence Act, if it is proved by a person conversant with the handwriting and signature. This Court emphasised in case of **Rajeev Singh** (supra) that to protect the right and liberty of an individual guaranteed under Article 21 of the Constitution of India, in case any prejudice is caused to the accused in a criminal trial, the benefit will go to him and not to the prosecution. The Court further held that even if a postmortem or injury report is proved by a witness in terms of any of the

circumstances enumerated under Section 32 of the Evidence Act, such evidence would be admissible in evidence. However, such evidence would not have any probative value unless and until the same is proved by any other doctor who is well-equipped in medical science and competent to answer the question on merits of the report as the defence could be deprived of cross-examination on the contents of the report, which would be prejudicial to its interest.

14. In the present case, as has been noticed hereinabove, the prosecution did not lead any evidence that the doctor, who had conducted the postmortem examination of the deceased could not be found or he had become incapable of giving evidence or whose attendance could not be procured without an amount of delay or expense, which could have been a basis for the trial court to reach a conclusion that such delay or expense would be unreasonable. The person who proved the postmortem report (PW-14) was an Advocate's Clerk. He was not at all aware of medical science. Unfortunately, the prosecution did not take care to examine an expert to prove the contents of the postmortem report at the trial so as to enable the appellants to cross-examine them, for putting up their defence and countering the prosecution's case.

15. We are, thus, of the considered opinion, that the postmortem report brought on record by way of exhibit at the trial by PW-14 does not have any probative value and it caused serious prejudice to the defence, it having no opportunity to cross-examine an expert with reference to the contents of the postmortem report.

16. Similar is the consequence of non-examination of the Investigating Officer in the present set of facts as the defence did not have the opportunity to obtain contradictions from him in the light of the nature of depositions made by the witnesses at the trial *vis-a-vis* their statements recorded by the Investigating Officer under Section 161 of the CrPC during the course of investigation.

17. After having seen the evidence of the prosecution's witnesses we notice that attempts were made by the defence to obtain contradictions. For example, PW-7 in his evidence denied a suggestion that he had told the police during the investigation that Hriday Chauhan (appellant No. 2) had fired at the injured Arjun Prasad (PW-11), which he denied. It is, thus, not a case where the defence did not intend to obtain contradictions in order to make out a case on behalf of the prosecution that the case of the defence was not prejudiced. In any event, a plea has

been taken on behalf of the appellants in the present appeal that their defence stood prejudiced because of non-examination of the Investigating Officer in the present set of facts and circumstances of the case. We find substance in the said stand taken on behalf of the appellants.

18. Now, coming to the evidence of the witnesses, we notice that in the *fardbeyan* it was specifically mentioned that PW-1 Nagina Mahto had, in order to secure his safety had rushed into his house and had closed the door. Signature of PW-1 figures on the *fardbeyan*, which is the initial version of the prosecution's case. At the trial, PW-1 claimed to be an eye-witness of the entire occurrence by deposing that at the time of occurrence he had gone to the agricultural field and he had come to his *khaliyaan* after hearing the sounds of firing from where he seen these appellants with other accused persons making indiscriminate firing. The injured witnesses PW-11 and PW-12 have not claimed to be eye-witnesses. No reliance can be placed on the depositions of the hearsay witnesses, such depositions having no evidentiary value. Two of the witnesses, namely, PWs. 2 and 5 have been declared to be hostile at the instance of the prosecution. PW-6 in his cross-examination deposed that he had not seen any person known to him when the

occurrence was taking place.

19. Taking into account the circumstances emerging from the aforementioned discussions, it can be easily culled out that non-examination of the doctor who had conducted the postmortem examination or an expert to prove the contents of the postmortem report at the trial, seriously prejudiced the defence of these appellants as they stood deprived of their right to cross-examine the doctor/ medical expert. Secondly, in the present set of facts and circumstances, non-examination of the Investigating Officer has also seriously prejudiced the case of the defence, inasmuch as, it could not obtain contradictions. Further, evidence of PW-1 adduced at the trial is materially different from the contents of the *fardbeyan*. In our considered view, he cannot be treated to be an eye-witness to the occurrence.

20. In the facts and circumstances noted above, we are of the view that the prosecution's witnesses 7 and 8 also cannot be treated to be eye-witnesses though they have claimed to be eye-witnesses.

21. Taking into account the cumulative effect of all the circumstances, in our opinion, the appellants deserves to be acquitted by extending to them benefit of doubt.

22. Accordingly, the impugned judgment of conviction and the order of sentence dated 23.01.2020/ 31.01.2020, passed by learned Ist Additional Sessions Judge, Hilsa, Nalanda in Sessions Trial No. 395 of 2000, arising out of Khudaganj P.S. Case No. 4 of 2000 are set aside. The appellants stand acquitted of the charge of offence punishable under Sections 302/34 and 307/34 of the Indian Penal Code and Section 27 of the Arms Act.

23. The appeal is accordingly allowed.

24. The appellants are in jail custody. Let them be released forthwith, if they are not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Rajesh/Sudha

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	11.09.2023
Transmission Date	11.09.2023