

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.68 of 2004

Arising Out of PS. Case No.-29 Year-1983 Thana- AMNAUR District- Saran

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1. Noor Hassan Ansari, S/O Late Ebrahim Ansari R/O Village- Chandpura Tola Naliyapar, P.S- Amnaur, Dist.- Saran.
 2. Tahir Ansari, S/O Late Ebrahim Ansari R/O Village- Chandpura Tola Naliyapar, P.S- Amnaur, Dist.- Saran.
 3. Suleman Ansari, S/O Late Ishaq Ansari R/O Village- Chandpura Tola Naliyapar, P.S- Amnaur, Dist.- Saran.
 4. Hanif Ansari S/O Late Ishaq Ansari R/O Village- Chandpura Tola Naliyapar, P.S- Amnaur, Dist.- Saran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant	:	Mr. Maria Nazir, Amicus Curiae
For the Respondent	:	Mr. Anita Kumari Singh, APP

CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY

ORAL JUDGMENT

Date: 18-12-2024

1. This appeal is arising out of the judgment dated 21.01.2004 and sentenced dated 23.01.2004 on the file of Learned Additional Sessions Judge, Fast Track Court No. 4, Saran, Chapra in Sessions Trial No. 84/91/184/2003, whereunder the appellants have been convicted for the offence punishable under Section 307 r/w 34 of the Indian Penal Code (hereinafter referred to as I.P.C.) and the sentence to undergo rigorous imprisonment for a period of six years.



2. Altogether there are four appellants in this case. As the criminal appeal pertains to the year 2004, this Court has called for the report of the Superintendent of Police, Saran, Chapra to verify whether the appellants are alive or not? It is also important to note that there is no assistance from the Learned counsel for the appellants and this Court has appointed Ms. Maria Nazir as *Amicus Curiae*, to assist the Court *vide* order dated 04.12.2024. This Court has also received an e-mail communication dated 18.11.2024 from the Superintendent of Police, Saran which disclose that appellant No. 1, namely, Noor Hussan Ansari, appellant No. 2, namely, Tahir Ansari and appellant no. 3, namely, Suleman Ansari died long back and therefore, this court has abated the criminal proceedings against these three appellants. However, as per the report of the Superintendent of Police Saran, Chapra, the fourth appellant, namely, Hanif Ansari is still alive and, therefore, Ms. Maria Nazir, the Learned Amicus curiae, has submitted her arguments on behalf of the appellant No. 4, namely, Hanif Ansari.



3. Heard the arguments of Ms. Anita Kumari Singh, Additional Public Prosecutor for the State and perused the records.

4. The case of the prosecution as per the *Fardbeyan* is that one Serajul Haque/informant made his *Fardbeyan* on 03.05.1983 at 10:00 P.M. to one A. Ahmad Assistant Sub-Inspector, Parsa Police Station, while he was at Government Hospital, Parsa. The contents of the *Fardbeyan* disclose that on 03.05.1983, at about 06:00 P.M., while the informant was sitting at his door, all the appellants came to his door and asked to compromise the case, which was pending before the Court, relating to land dispute, for which the informant disagreed and there was heated argument between the informant and the appellants. On hearing the verbal arguments, his uncle, namely, Asgar Ali ran in fear, thinking that the appellants would kill him. Further, all the appellants came with weapons i.e. appellant No. 1 with *farsa* in his hand, appellant No. 2 with spear in his hand and appellant Nos. 3 and 4 with *lathis* in their hands. During the altercation,



the 1st appellant caught hold of the informant/Serajul Haque and pushed him towards the vacant land, with an intention to kill and hacked with *farsa* on his head. When his uncle Asgar Ali tried to ran away, the 4th appellant caught hold of him and the 2nd appellant gave a blow with a spear, which hit his right thigh. The *Fardbeyan* further disclose that the 3rd appellant hit the informant with *lathi* on his right hand, on that Serajul Haque and Asgar Ali were drenched with blood with the said injuries. The incident was witnessed by Shamsul Haque, Rustam Ali, Anwar Ali along with other villagers.

5. Basing on the *Fardbeyan* of Serajul Haque, the case was registered against all the appellants in P.S. Case No. 29 of 1983 for the offences punishable under Sections 447/324/34 of the I.P.C. The police investigated the case and charge-sheet was laid against the appellants for the offences punishable under Sections 307, 326, 324, 323, 447 r/w Section 34 of the I.P.C. During the course of trial, charges were framed on 08.01.2001 against the appellants for the offence punishable under Section 307 r/w Section



34 of I.P.C. read over and explained to them, for which all the appellants pleaded not guilty and claimed to be tried.

6. During the course of trial the prosecution has examined altogether seven witnesses and Exhibits 1 to 4 were marked, which are as follows:

<u>S.No.</u>	<u>Prosecution Witness's Number</u>	<u>Prosecution Witness's Name</u>
1.	P.W.-1	Anwar Ali
2.	P.W.-2	Mumtaj Ali
3.	P.W.-3	Shamshul Haque
4.	P.W.-4	Awdhesh Kumar
5.	P.W.-5	Dr. K.K. Sharan Sinha
6.	P.W.-6	Rakesh Kumar
7.	P.W.-7	Abdullah Ansari

<u>S.No.</u>	<u>Exhibit Nos.</u>	<u>Description</u>
1.	Exhibit-1	Signature of Bipin Bihari Sinha on the forwarding letter.
2.	Exhibit-2	Carbon copy of the Injury Report of Asgar Ali
3.	Exhibit-2/A	Carbon copy of the Injury Report of Serajul Haque
4.	Exhibit-3	<i>Fardbeyan</i>
5.	Exhibit-4	F.I.R.
6.	Exhibit-1/A to 1/B	Signature of S.P. on Letter No. 65
7.	Exhibit- 1/C	Signature of Serajuddin on <i>Fardbeyan</i>
8.	Exhibit-1/D	Signature of Md. (illegible) Hussain on <i>Fardbeyan</i>



7. Considering the entire material on record, the trial Court convicted the appellants for the offence punishable under Section 307 r/w 34 of the Indian Penal Code. As stated supra, the criminal appeal against three of the appellants i.e., appellant Nos. 1 to 3, namely, Noor Hassan Ansari, Tahir Ansari and Suleman Ansari was abated *vide* order of this Court 04.12.2024. The present appeal only deals with appellant No. 4, namely, Hanif Ansari. The overt act against appellant No. 4 in the *Fardbeyan* is that he caught hold of Asgar Ali and the 3rd appellant hacked Asgar Ali with the spear. The point for determination in this appeal is that:

(i). Whether the trial Court is right in convicting and sentencing the appellant No. 4 for the offence punishable under Section 307 r/w Section 34 of the I.P.C.?

(ii). Whether the prosecution is able to prove the guilt of the appellant for the offence punishable under Section 307 r/w Section 34 of the I.P.C., beyond reasonable doubt?



8. In order to decide the aforesaid points for determination, it is just necessary to re-appropriate the evidence on record.

9. P.W.-1, namely, Anwar Ali is a co-villager and his evidence disclose that he did not witness the incident, but came to the place of occurrence and found Serajul Haque in injured condition. His evidence further disclose that he did not witness any one of the appellant assaulting the injured.

10. It is important to note that the evidence of P.W.-1 disclose that the informant Serajul Haque was only injured in the incident, and not Asgar Ali. Further, his evidence disclose that the civil case, which was pending between the Serajul Haque and appellant No. 1 ended in a compromise. The evidence of P.W.-1 is nowhere helpful for the prosecution to prove that the appellant has committed the offence punishable under Section 307 r/w Section 34 of the I.P.C.

11. P.W.-2, namely, Mumtaz Ali testified that he was standing along with his brother near the door and saw



the appellants, confronting Serajul Haque for filing a compromise petition in the pending case. He further testified that all the appellants brought weapons i.e. spear, *farsa* and *lathi* with them from their respective homes and appellant No. 1 gave a *farsa* blow to Serajul Haque with an intention to kill him and further appellant Nos. 3 and 4 caught hold of Asgar Ali and appellant No. 2 gave a spear blow on the right thigh of Asgar Ali and the said incident was also witnessed by one Rustam Ali and Anwar Ali.

12. In the cross-examination, it is admitted by P.W.-2 that he has not gone to the hospital, the S.I. has not come to the village and that his statement was not recorded by the Police. He also testified that Serajul Haque was his cousin. The evidence of P.W.-2 further disclose that compromise has not been affected in the civil case. Admittedly, the name of P.W.-2 was not found in the *Fardbeyan* as a witness. His evidence also disclose that he was not examined by the Police. In spite of non-examination by Police u/s 161 Cr.P.C. statement, his name



was mentioned in the list of witnesses and was examined before the Court.

13. P.W.-3, namely, Shamsul Haque is the co-sharer and relative of the informant. He also testified before the Court, as if he was the eye-witness to the incident. However, his name was not found in the *Fardbeyan*. Furthermore, it is admitted by P.W.-3 that his statement was not recorded under 161 of Cr.P.C., therefore, the evidence of P.W.-2 and P.W.-3 cannot be considered to prove the case of the prosecution, as the Investigating Officer did not examine these witnesses under Section 161 of Cr.P.C. and their names were not mentioned as witnesses in the *Fardbeyan*.

14. PW4, Awadesh Kumar is a compounder, who works under Dr. Bipin Bihari Sinha. His evidence disclose that in compliance of the Court order, the Officer-In-Charge i.e. Dr. Bipin Bihari Sinha, submitted the injury register, including the photocopy and attested copy of the injured persons, i.e., Asgar Ali and Serajul Haque. His evidence further disclose that the presentation order is



written in the pen and bears the signature of one Shri Ramanand Prasad and it bears signature of Dr. Bipin Bihari Sinha, which is marked as Exhibit-1 and the carbon copies of the injury reports are marked as Exhibit-X and X/1.

15. It is pertinent to mention that followings are criteria for marking a document:-

In order to have a documents marked by the Court as an Exhibit, a party must satisfy the Court that there is sufficient material in order for the Court to arrive at a prima facie view that:-

“It is evident that in order to have the documents marked by the Court as Exhibits, a party must satisfy the Court that there is sufficient material in order for the Court to arrive at a prima facie view that :

(a) The "contents" of the document are proved (i.e. the document exists).

(b) The signature or handwriting on the document, if any, are proved (i.e. the document is genuine).

(c) In some cases, the witness who seeks to tender the document in evidence has personal knowledge of the document (i.e. that the witness is in a position to



prove the accuracy or truth of the contents of the document);

(d) The document is not inherently or ab initio inadmissible on some other legal ground (e.g. irrelevance, privilege, non-registration) and

(e) The document has been appropriately stamped, if so required by law.

16. *(i). In order to prove contents of a document, the witness through whom the document is sought to be tendered must produce the document in court. The Evidence Act provides, in essence, that the "contents" of documents must ordinarily be proved by "primary" evidence.*

(ii). As the second step in getting a document marked, the witness who introduces the document must identify the signature or handwriting on the document, if there is any. 19 The mere production of a document is not sufficient for the document to be marked as an exhibit.

(iii). Thirdly, in order to lay a foundation for marking a document, if the document contains any statement(s) of fact, and the party propounding the document relies on the truth or accuracy of those statements, then the witness. who tenders the document must demonstrate personal knowledge and the familiarity of the document.



(iv). Fourthly, in some cases, irrespective of a party's ability to satisfy the criteria set out above, a law might prohibit some documents from being considered admissible in evidence. Such documents cannot be marked in evidence. Once a document is marked, it becomes the part of the record but has to be considered by the Court about its admissibility and relevancy of the such document. Marking of document alone will not give any right to read the contents of the documents or about the admissibility of the documents.”

17. Furthermore, Rule 58 of the Criminal Rules Of Practice and Circular Orders, 1990 envisages about marking of exhibits which reads as follows:-

“58 Marking of exhibits:-

(1) Exhibits admitted in evidence shall be marked as follows:-

(i) if filed by the prosecution with the capital letter ‘P’ followed by a numeral, P1, P2,P3 and the like;

(ii) if filed by defence with the capital letter ‘D’ followed by a numeral, D1, D2, D3 and the like;

(iii) in case of Court exhibits with the capital letter ‘C’ followed by a numeral C1, C2, C3 and the like;



(2) All the exhibits filed by the several accused shall be marked consecutively.

All material objects shall be marked in Arabic numbers in continuous series as M.O. 1, M.O.2 and M.O.3 and the like, whether exhibited by the prosecution or the defence or the Court.”

18. This Court is unable to understand as to why the trial Court has not followed the procedure, while marking the Exhibits as per Rule 58 of Criminal Rules of Practice. Admittedly, the documents was said to be marked in ‘X’ series through P.W.-4.

19. At this juncture, it is relevant to rely on the judgments of Hon’ble Division Bench of this Court in the case of ***Sukhi Yadav v. The State of Bihar*** reported in ***2014 SCC OnLine Pat 5721*** wherein their Lordships have held as follows:-

“9. We fail to appreciate as to which law permits such a thing and how a Judge of standing of Additional Sessions Judge could do such a thing. First thing we must notice that P.W.9 is an Assistant to an Advocate Clerk, who has nothing to do with



the case, yet the Court permits him to step in as a prosecution witness. Moreover we have coined such witness as “Sankat Mochan witness”. What more scandalized us is the trial court, which permits a person, who was nobody, to pick up the entire case diary from paragraphs 1 to 121 and prove it and make it a part of evidence. The court then proceeds further to mark it as Ext. 3 and then the court sits down to read entire case-diary in order to appreciate evidence. Nothing can be more scandalous. No such step is permissible in law. The trial court forgot the true import of section 172(2) of the Code of Criminal Procedure (for short ‘Cr.P.C.’), which clearly states that any criminal Court may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. What the trial court has done is using it as evidence, making it as evidence and appreciating it as evidence, which is wholly impermissible in law. The diary can never be proved in a Court, for it cannot be used as evidence. No part of diary can be proved because if any one is proving it for the purposes of making it an evidence, such act



is prohibited by law. The law contemplates a reference to the diary only for the purposes of refreshing memory or contradicting the statements of witnesses in the Court with the statements made during the course of investigation. Only when it is used for refreshing memory, the procedure as envisaged under section 145 of the Evidence Act is to apply but that does not mean that diary can become evidence. Law prohibits such thing. We have found in cases after cases that in the State of Bihar, the Sessions Courts do not know or understand this distinction in law and in cases after cases the statements of witnesses recorded under section 161 of the Cr.P.C. are proved as evidences or other materials in the case-diary are proved as evidence and marked as exhibits. This is a practice that should end, the sooner the better. The other thing is that as to who is permitted to prove a document. It appears that in this State every Tom, Dick and Harry, the expression we have formed now "Sankat Mochan Witness", could come and prove any official document. In this case, an Assistant to Clerk of an Advocate,



who has nothing to do in the case, has been permitted by the trial court to prove the entire case-diary and mark it as exhibit. This practice is deprecated and it must come to an end. A person, who is author of a document or in absence of author, whose absence has to be explained, a person familiar with the handwriting of the author can only prove the document. The procedure adopted by the trial court is unknown to law. No sooner this practice ends than better it would be.”

20. The above citation squarely applies to the facts of the present case. Their Lordships have held that a person who is author of the document, or in absence of the author, (whose absence has to be explained), a person familiar with the hand-writing of author can prove the documents. Their Lordships have further held that the procedures adopted by the trial Court are unknown to law, and such practices have to be ended.

21. Admittedly, P.W.-4 has no knowledge about the facts of the incident or of the treatment allegedly provided by the Dr. Bipin Bihari Sinha. However, through



P.W.-4, the Exhibit-X and X/1 were marked. In the cross-examination, P.W.-4 specifically admitted that he had been working under Dr. Bipin Bihari Sinha since 1993. The alleged offence in this case occurred on 03.06.1983. Dr. Bipin Bihari Sinha did not examine the injured i.e. Serajul Haque and Asgar Ali, in this case. Therefore, the evidence of P.W.-4 is not helpful to the prosecution.

22. The crucial evidence in this case is that of the doctor i.e. P.W.-5. His evidence disclose that on 03.05.1983, he examined Serajul Haque and noted the following injuries:

- 1. One incised wound on vertex 1 ½ inch X ¼ inch X Bone cut.*
- 2. One bruise on the middle finger of right palm 1 inch X 1 inch.*
- 3. Complaint of pain over the body.*
- 4. Complete paralysis of right leg.*

23. He opined that injury no. 1 sustained by Serajul Haque was caused by a sharp cutting weapon such as a *farsa* while the other injuries were caused by a hard



blunt object such as *lathi*. He further deposed that injury No. 1 was grievous in nature. Exhibit-2/A is the carbon copy of the medical report of Serajul Haque.

24. His evidence also disclose that he examined Asgar Ali and found one incised wound on the front of the right thigh in the middle measuring 1 inch X $\frac{1}{2}$ inch X $\frac{1}{2}$ inch. He opined that the injury was simple in nature caused by a sharp cutting instrument such as *Bhala*. The carbon copy of the injury report of Asgar Ali is marked as Exhibit-2. The trial Court concluded that P.W.-5, the Doctor, is an expert and that the injuries found on both individuals i.e. the informant and Asgar Ali are corroborated by the documentary evidence, the *Fardbeyan* and the oral evidences of P.W.-2 and P.W.-3. Accordingly, all the appellants were convicted for the offences punishable under Section 307 r/w Section 34 of the I.P.C. and sentenced to rigorous imprisonment for six years.

25. Admittedly, both the injured individuals were not examined in the Court, as they were not alive at the time of trial. Furthermore, the *Fardbeyan* clearly disclose



that Asgar Ali was unconscious, that is why Serajul Haque lodged the *Fardbeyan* while in the hospital. However, the evidence of P.W.-5 does not disclose that Asgar Ali was unconscious. As per the injury report i.e. (Exhibit-2), the injury sustained by Asgar Ali is simple in nature, contradicting the contents of the *Fardbeyan*.

26. The evidence of P.W.-6, namely, Rajesh Kumar, disclose that on 03.05.1983, A. Ahmad, Assistant Sub-Inspector of Mashrakh Police Station, had written the *Fardbeyan*, which is Exhibit-3. It is pertinent to note that Rajesh Kuamr is a scribe by profession working in the Chapra Civil Court and as to how he identified the handwriting of A. Ahmad, Assistant Sub-Inspector is not properly explained by the prosecution. As stated supra, the scribe/P.W.-7 can also be referred as a '*Sankat Mochan*' witness. Further, the F.I.R. was marked as Exhibit-4, and P.W.-6 also identifies the signatures marked as Exhibit-1/A and 1/B of Shri Ramanand Prasad, Inspector of Police, on a forwarding letter dated 11.05.2003, in which



the carbon copy of the case diary presented before the Court.

27. The marking of case diary is discussed in the judgment of Division Bench of this Court in the case of *Shukhi Yadav (supra)*. Additionally, in *Ajay Kumar Yadav Vs. State of Bihar* reported in *2016 SCC Online Patna*, their Lordships held at para 8 that an Advocate Clerk has been described as “*Sankat Mochan* witness”. Therefore, the evidence of P.W.-6 holds no evidenciary value.

28. The rest of the witness in this case is P.W.-7, who is the son of the informant. On perusal of his evidence, it is evident that he did not speak about the incident, except mentioning that the injured were treated at Parsa Government Hospital, where he was present during their treatment. The signature of his father, namely, Serajul Haque and Md. Alam Ansari were marked as Exhibit-1/C and 1/D. Exhibit-1 is the signature of Dr. Bipin Bihari Sinha on the forwarding letter addressed to the Court. It is surprising to note as to how the signatures



of Md. Alam Ansari and Serajul Haque were found on the forwarding letter. Prosecution has miserably failed to explain it except the *Fardbeyan* and the F.I.R. which were marked through the Scribe/P.W-6, there is no corroborative evidence on record.

29. The evidence of the Doctor/P.W.-5 can only be taken into consideration to the affect that he examined the injured persons in the hospital and of the injury report given by him. The Doctor cannot be an expert to speak about the weapons alleged to have been used in committing the offence. Basing on the injury report, the Doctor can only state to the effect that the nature of the injury, but not the manner of the attack or about the weapons.

30. Under Section 307 of the I.P.C., it is for the prosecution to prove that the appellants have done an act with an intention or knowledge and that their acts would cause death of the injured. In the present case, there is no evidence on record that the appellants had the intention or



knowledge that their acts would cause the death of the injured.

31. Therefore, this Court is of the considerable view that the trial Court erred in convicting the appellants for the offences punishable under Section 307 r/w Section 34 of the I.P.C. The prosecution has miserably failed to prove the guilt of the appellants for the offences punishable under Section 307 r/w Section 34 of the I.P.C., therefore, it is liable to be set aside.

32. In view of the aforesaid discussions, the conviction of the appellant No. 4 for the offence punishable under Section 307 r/w Section 34 of the I.P.C. is not tenable and the judgment and sentenced dated 21.01.2004/23.01.2004 of the trial Court in connection with Sessions Trial No. 84/91/184/2003 on the file of Learned Additional Sessions Judge, Fast Track Court No. 4, Saran, Chapra is hereby set aside and the appellant No. 4 is hereby acquitted.

33. In result, the criminal appeal against appellant No. 4, namely, Hanif Ansari is allowed.



34. The record reveals that the appellant No. 4 was enlarged on bail along with the other appellants on 05.04.2004, therefore, the bail bonds of the appellant No. 4 shall stand cancelled.

(G. Anupama Chakravarthy, J)

Shanu,Jyoti/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	23.01.2025.
Transmission Date	23.01.2025.

