

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.632 of 2013

Arising Out of PS. Case No.-114 Year-1997 Thana- CHANDI District- Nalanda

Munna Gope Son of Bahuri Prasad, Resident of Village-Rupanbigha, Police Station Tharthari, District-Nalanda.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

Criminal Appeal (DB) No. 506 of 2013

Arising Out of PS. Case No.-114 Year-1997 Thana- CHANDI District- Nalanda

Ranjeet Kumar Gope @ Ranjeet Gope, S/o Sindhu Gope R/o Village-Rupanbigha, P.S. Tharthari, District-Nalanda

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 632 of 2013)

For the Appellant/s : Mr. Rajendra Narain, Sr. Advocate
Mr. Anant Kumar Sinha, Advocate
Mrs. Anju Kumari, Advocate
Mr. Umesh Kumar Roy, Advocate
Mr. Pranav Bardhan, Advocate

For the State : Mr. Ajay Mishra (App)

(In Criminal Appeal (DB) No. 506 of 2013)

For the Appellant/s : Mr. Ankit Katriar, Advocate

For the Respondent/s : Mr. Ajay Mishra (App)

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

And

HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL)

Date : 08-01-2019

As both the aforesaid criminal appeals have cropped up from the same judgment and order of conviction and



sentence, hence, they are taken up together for consideration and disposed of by this common judgment.

2. Heard Mr. Rajendra Narain, learned senior counsel assisted by Mr. Anant Kumar Sinha, learned counsel for the appellant (in Cr. Appeal (DB) No. 632 of 2013), Mr. Ankit Katriar, learned counsel for the appellant (in Cr. Appeal (DB) No. 506 of 2013) as well as Sri Ajay Mishra learned Addl. Public Prosecutor in both the appeals.

3. The aforesaid two criminal appeals have been preferred against the judgment and order of conviction dated 08.05.2013 and order of sentence dated 14.05.2013 passed by learned 3rd Addl. Sessions Judge, Hilsa (Nalanda) in Sessions Trial no. 48 of 1998 arising out of Chandi (Tharthari) P.S. Case No. 114 of 1997 whereby the learned trial court convicted the accused Ranjeet Gope and Munna Gope for the offence punishable under Section 307/34 of the Indian Penal Code and further convicted Munna Gope for the offence punishable under Section 27 of the Arms Act and sentenced them to undergo R.I. for life and also slapped them with a fine of Rs. 5000/- each and in default of payment of fine to further undergo R.I. for two months under Section 307 of the Indian Penal Code and further sentenced convict Munna Gope to undergo R.I. for four years



under Section 27 of the Arms Act. All the sentence were directed to run concurrently.

4. The factual matrix of the case is that Chandi (Tharthari) P.S. Case No. 114 of 1997 was initially instituted under Sections 341, 323, 307 of the Indian Penal Code and subsequently added with Section 302 of I.P.C. and Section 27 of the Arms Act against Ranjeet Kumar Gope and Munna Gope on the basis of fardbeyan of Kamlesh Gope S/o Lakhan Gope recorded by A.S.I. R.P. Singh of P.S. Pirbahore, District-Patna at emergency ward of P.M.C.H. Patna on 26.03.1997 at 12:45 hours with the allegation, in succinct that on 25.03.1997 at around 08:00 PM, while the informant was regressing to his house after defecation and arrived near the house of Sarjug Gope, in the meantime, Ranjeet Kumar Gope and Munna Gope abruptly emerged there and encircled him. Ranjeet caught him hold while Munna resorted firing upon him by means of pistol which hit left side of his neck. Sustaining bullet injury, he fell down on the ground. Responding hulla made by them and the firing sound, Sarjug Prasad, Agnu Gope and others rushed there then the accused persons left the scene. Thereafter, he fell senseless and regained sense on the way to the hospital. The informant is on litigation term with the accused persons since



before.

5. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against Ranjeet Gope and Munna Gope under Section 302/34 of I.P.C. and Section 27 of the Arms Act.

6. On receiving the charge-sheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions, and after commitment and on transfer finally the case came in seisin of the learned 3rd Addl. Sessions Judge, Hilsa (Nalanda) for trial.

7. Charge against the accused Munna Gope was framed under Sections 302, 302/34 of I.P.C. and Section 27 of the Arms Act while charge against accused Ranjeet Gope was framed under Section 302/34 of the Indian Penal Code. Charge was read over and explained to them by the court to which they pleaded not guilty and claimed to be tried.

8. To substantiate its case, in ocular evidence, the prosecution has examined altogether seven prosecution witnesses namely, Agnu Prasad as PW-1, Sarjug Prasad as PW-2, Ramadhin Prasad @ Ramadhin Yadav as PW-3, Chandrika Devi as PW-4, Lakhan Gope as PW-5, Dr. Aftab Kalim, who



had examined the victim as PW-6 and A.S.I. Ramesh Prasad Singh, who had recorded the fardbeyan of the victim as PW-7. The prosecution has also filed and proved some documents by way of documentary evidence in the case.

9. The statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence. The accused persons have neither adduced any ocular nor documentary evidence in buttress of their case.

10. After hearing the parties and perusing the record, the learned trial court passed the impugned judgment and order of conviction and sentence as detailed in the earlier paragraph.

11. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convict Munna Gope and Ranjeet Kumar Gope @ Ranjeet Gope have preferred Cr. Appeal (DB) No. 632 of 2013 and Cr. Appeal (DB) No. 506 of 2013 respectively.

12. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellants beyond all reasonable doubts or not.



13. It is submitted by Mr. Rajendra Narain, learned senior counsel assisted by Mr. Anant Kumar Sinha, learned counsel for the appellant (in Cr. Appeal (DB) No. 632 of 2013) that there is no eye witness of the occurrence. PWs-2, 3 and 5 have given altogether different statement before the court than given before the I.O. under Section 161 Cr.P.C. claiming themselves to be eye witnesses of the occurrence. Hence, the aforesaid witnesses are not worth credence and reliable. PW-1 (Agnu Prasad) and PW-4 (Chandrika Devi) have also not witnessed the occurrence rather they had arrived at the place of occurrence after culmination of the occurrence. It is further submitted that the I.O. of the case has not been examined by the prosecution and due to non-examination of the I.O. the objective evidence could not be brought on record and great prejudice has been caused to the defence. It is also submitted that the fardbeyan of the informant cannot be treated as dying declaration as the informant had sustained bullet injury in his neck and the bullet had traversed through his back. He was bleeding profusely and as per witnesses account, he fell senseless frequently while the fardbeyan was recorded after 17 hours of the occurrence, so it was not possible for the victim to give such a graphic statement before the police in such a mental



and physical state. As a matter of fact, the police has put the statement as given by the witnesses in the mouth of the informant. It is submitted by Mr. Ankit Katriar, learned counsel for the appellant (in Cr. Appeal (DB) No. 506 of 2013) that no independent witness has been examined by the prosecution and all the witnesses examined are the family members and interested witness of the case. It is further submitted that the weapon used in the assault has not been recovered by the police and moreover police has not recovered any cartridge from the place of occurrence and I.O. of the case has also not been examined by the prosecution. Besides, the aforesaid submission, learned counsel for the appellants of both the appeals have submitted that the prosecution has utterly and miserably failed to substantiate the prosecution case against the appellants beyond all reasonable doubt by adducing trustworthy, worth credence and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed against the appellants by the learned trial court is liable to be set aside and the appellants are entitled to be acquitted.

14. On the other hand, Mr. Ajay Mishra learned APP advocating the correctness and validity of the impugned judgment and order of conviction and sentence submitted that



the informant, who happens to be victim of the case has given fardbeyan before the police and after giving the fardbeyan during the course of treatment, he succumbed to his injury. Hence, the fardbeyan be treated as dying declaration of the deceased. It is further submitted that all the witnesses examined by the prosecution have fully supported the prosecution case and the ocular evidence stands corroborated by the medical evidence and learned trial court correctly appreciating the facts and evidence on record has rightly passed the impugned judgment and order of conviction and sentence which is liable to be upheld and these appeals are shorn of merit and are liable to be dismissed.

15. From perusal of record, it appears that to substantiate its case, the prosecution has examined five material witnesses of the case, namely, PW-1 (Agnu Prasad), PW-2 (Sarjug Prasad), PW-3 (Ramadhin Prasad @ Ramadhin Yadav), PW-4 (Chandrika Devi) and PW-5 (Lakhan Gope). From perusal of the testimony of the aforesaid witnesses, it appears that though PWs-2, 3 and 5 have made an abortive bid to support the prosecution case by stating in consonance to the prosecution case in their respective examination-in-chief to the effect that while at the time of occurrence, Kamlesh Gope was



regressing to his house, Munna Gope and Ranjeet Kumar Gope intercepted him on the way, Ranjeet Kumar Gope caught hold Kamlesh Gope while Munna Gope resorted firing on the neck of Kamlesh Gope which traversed through his back. After sustaining injury, Kamlesh Gope fell senseless on the ground and then the accused persons left the scene. But, attention of the aforesaid three witnesses have been drawn by the defence in paragraphs 11, 16 and 17 respectively of their cross-examination regarding their statement given before the court and that given before the I.O. under Section 161 Cr.P.C. regarding witnessing of the occurrence by them as eye witness of the occurrence. I.O. of the case has not been examined by the prosecution, hence, for want of non-examination of I.O. we are compelled to peruse the case diary and from perusal of the case diary, we find that the aforesaid witnesses have given altogether different statement regarding the aforesaid material aspect of the case viz. witnessing the occurrence as eye witness of the case before the court than given before the I.O. under Section 161 Cr.P.C. As in the court, they have unanimously stated to have witnessed the occurrence as eye witness of the occurrence while in their statement under Section 161 Cr.P.C. they have unanimously stated that they had arrived at the place of occurrence after



culmination of the occurrence. Thus, the aforesaid three witnesses appear to have taken altogether different stand before the court regarding the aforesaid material aspect of the case and they do not happen to be credible and trustworthy witnesses.

16. When the I.O. of the case is not examined by the prosecution and the attention of the witnesses has already been drawn towards their earlier statements and the Investigating Officer could not be brought to give his evidence, then in our considered opinion, the Court can peruse the case diary and find out as to whether or not the attention of the witnesses towards their previous statements were correctly drawn and to satisfy itself as to whether or not they had given similar statement before police. There are two parts of the case diary. First part contains such portion of the diary in which the Police Officer has recorded statement of the witnesses, about the incident or about other relevant facts which to that Police Officer, would be hearsay. The second part of the case diary contains that portion in which the Police Officer has himself seen or heard a particular fact and has recorded a fact out of his own perception. To this category would come recording about the inspection of place of occurrence making of seizure of certain incriminating articles or in some cases, when the Police



Officer reaches the place of occurrence where the occurrence has not finished and he sees himself whole or part of the occurrence, recording of that. The latter part of the case diary cannot be used by the Court unless the Investigating Officer is examined because that would amount to using that portion of the case diary as evidence. Only the Investigating Officer can tell the Court in witness box as to what were his findings out of his own perception, so that he can be put to cross-examination over that. However, the first part of the case diary consists, as already noted, the statement recorded by the witnesses. If the Investigating Officer comes to the Court for evidence and if he is asked to confirm those portion of the statement of the witnesses to which the attention of the witnesses was drawn, the Investigating Officer will say only what he has recorded as his statement in the case diary and cannot go beyond that. Now, the question is, whether that portion of the case diary can be looked into by the Court & used in the trial to aid the Court in reaching at a correct decision when the Investigating Officer is not brought before the Court. Sub-section (2) of Section 172 of Cr.P.C. provides that the Court cannot only call for the case diary but may also use such diary to take aid in such trial. If the Court only has the power to look into the case diary & whatever



it peruses to keep it only in mind and then to proceed to record the judgment keeping such impression only in mind that, in our opinion, cannot be the intention of the legislation. In our considered opinion, if the Court peruses any such things and uses it to its aid in trial, this must go in black and white as part of the judgment. The only limitation is that the Court cannot use any portion of the case diary as evidence. In view of the aforesaid proposition of law and in view of the contradiction between the statements of P.Ws. 2, 3 and 5, as recorded before the Court and that given before the I.O. under Section 161 Cr.P.C., the testimonies of the aforesaid witnesses given before the Court do not inspire our confidence to hold the conviction of the appellants relying upon the same.

17. Moreover, PW-2 (Sarjug Prasad) and PW-3 (Ramadhin Prasad @ Ramadhin Yadav) happen to be uncle of the victim and PW-5 (Lakhan Gope) is the father of the victim and they are interest witnesses of the case. Though, it is settled principle of law that the evidence of the interested witnesses should not be discarded outrightly rather it should be scanned and scrutinized carefully and cautiously, but on careful scanning of the testimony of the aforesaid witnesses, we find that their testimonies are not worth credence and reliable in view of the



discussion made by us hereinabove.

18. From perusal of testimony of PW-4 (Chandrika Devi), who happens to be mother of the victim, it appears that she does not happen to be eye witness of the occurrence as the said witness in her examination-in-chief itself has stated that at the time of occurrence, she was in her house. Responding the firing sound, she went at the place of occurrence and found her husband, Sarjug, Agnu, Ramadhin present there from before. Her son Kamlesh divulged her that Ranjeet caught hold him while Munna resorted firing on his left neck and requested her to rush him to the hospital to accord him medical aid at the earliest. In paragraph 13 of her cross-examination, she has further stated that she had arrived at the place of occurrence 2-3 minute later to listening the firing sound. From perusal of the aforesaid statement of the said witness, it appears that she had arrived at the place of occurrence after culmination of the occurrence and decamping of the accused persons from there.

19. Though, PW-4 (Chandrika Devi) in paragraph 2 of her examination-in-chief has stated that her son Kamlesh (victim) divulged her about catching hold his hand by Ranjeet and resorting firing on his left neck by Munna, but the said testimony does not appear to be reliable as the informant



(victim) in his fardbeyan has stated that after sustaining injury, he fell down on the ground and became senseless, he regained sense on the way to the hospital. So as per the aforesaid fardbeyan, if the victim had fallen senseless after sustaining injury and regained sense on the way to the hospital then there was no question of divulgence of the occurrence by him to his mother PW-4 at the P.O. Moreover, the said witness has stated in paragraph 6 of her examination-in-chief that police had quizzed her six days later to the occurrence at her village. But, in quite contradiction to the aforesaid statement, said witness has stated in paragraph 16 of her cross-examination that police had not grilled her about the occurrence. Thus, in view of the aforesaid aspect of the case, the aforesaid witness also does not appear to be worth credence and reliable.

20. PW-1 (Agnu Prasad) though has also made an abortive bid to support the prosecution case as an eye witness of the occurrence by stating in his examination-in-chief that at the time of occurrence while he was regressing after defecation, he witnessed that Ranjeet Gope and Munna Gope caught hold Kamlesh and Munna Gope resorted firing on the left side of the neck of Kamlesh by means of pistol and then both the accused persons left the scene. Sustaining injury, Kamlesh fell down on



the ground. But, PW-4 (Chandrika Devi), who had arrived at the place of occurrence after 2-3 minute later to the occurrence responding the firing sound has stated in paragraph 13 of her cross-examination that none of the villager had arrived at the place of occurrence till her presence there and moreover PW-3 (Ramadhin Prasad) has stated in paragraph 8 of his cross-examination that after his arrival at the place of occurrence more than 20 villagers named in the aforesaid paragraph including PW-1 arrived there, but as discussed by us earlier that the said witness as per his statement given before the I.O. under Section 161 Cr.P.C. had arrived at the place of occurrence after culmination of the occurrence responding the firing sound and as per the said witness, PW-1 (Agnu Prasad) had arrived at the place of occurrence after his arrival which means that PW-1 Agnu Prasad had also arrived at the place of occurrence after culmination of the occurrence and had not witnessed the occurrence and he does not happen to be eye witness of the occurrence. Moreso, PW-1 in paragraph 3 of his examination-in-chief has stated that he had given statement before the police at the place of occurrence on arrival of police there, but in quite contradiction to the aforesaid statement in paragraph 9 of his cross-examination, he has stated that the police had not grilled



him about the occurrence. Moreover, the said witness appears to be on inimical term with the accused persons as in paragraph 11 of his cross-examination, he has stated that the case was fought between them and the accused persons in his childhood. Thus, the testimony of PW-1 (Agnu Prasad) also does not appear to be worth credence and reliable and does not inspire our confidence to hold the conviction relying upon the same.

21. The prosecution has led much emphasis on the fardbeyan of the informant claiming it to be dying declaration submitting that the informant had given the aforesaid fardbeyan at P.M.C.H. and subsequently he succumbed to his injury. So the aforesaid fardbeyan may be treated as dying declaration. But in our considered opinion, the aforesaid fardbeyan does not happen to be dying declaration of the deceased as the occurrence is said to be of 25.03.1997 at around 08:00 PM, but the aforesaid fardbeyan was recorded on 26.03.1997 at around 12:45 hours i.e. after around 17 hours of the occurrence and death of victim has also not been established by the prosecution by bringing on record the postmortem report and examining its author. From perusal of testimony of PW-2 (Sarjug Prasad) in paragraph 15 of his cross-examination, PW-3 (Ramadhin Prasad) in paragraph 10 of his cross-examination and PW-5



(Lakhan Gope) in paragraph 9 of his cross-examination, it appears that the informant was not given any medical aid either in the village or on the way at Hilsa or Fathua. While as per the witnesses account, he was bleeding since sustaining injury by him and as he had sustained bullet injury on the left side of his neck and the bullet had traversed through his back and his fardbeyan was recorded after 17 hours of the occurrence, huge amount of blood might have been oozed out from his person. As per account of PW-5 as given in paragraph-9 of his cross-examination, Kamlesh (informant) used to fall senseless intermittently on Hilsa, so in such circumstances of the case, in our considered opinion, the victim must not have been in a position to give such a graphic statement before the police as adumbrated in the fardbeyan. Hence, the aforesaid aspects of the case creates serious doubt about sanctity of the fardbeyan and the prosecution case.

22. As per the witnesses account, the wound of the informant (victim) was bleeding and the blood had fallen on the place of occurrence as well as on his attire. But, I.O. of the case has not been examined by the prosecution and due to non-examination of the I.O. objective evidence could not be brought on record.



23. As per the fardebeyan itself both parties are on litigation term since before the occurrence and as per the account of PW-2 (Sarjug Prasad) in paragraph 5 of his examination-in-chief litigation is pending between the parties since before the occurrence and as per account of PW-4 as given in paragraph-7 of her examination-in-chief, they had animosity with the accused persons since before occurrence as father of Munna had eliminated her brother-in-law (Bhaisur). Thus, both parties happen to be on inimical term. Animosity cuts both the edges. But, in view of the non-reliability of PWs-2, 3 and 5 as eye witness of the occurrence and PW-1 and PW-4 not being the eye witness of the occurrence, non-examination of the I.O., not-bringing on record the postmortem report and examining its author and not bringing on record objective evidence of the case, false implication of the appellants at the hand of the prosecution party due to aforesaid animosity cannot be ruled out.

24. In the aforesaid facts and circumstances of the case, we find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case and complicity of the appellants in the occurrence beyond all reasonable doubt by adducing convincing, cogent, consistent



and worth credence evidence. Hence, the impugned judgment and order of conviction and sentence passed by learned trial court against the appellants is set aside and the appellants are acquitted of all the charges levelled against them. As the appellant Munna Gope {in Criminal Appeal (DB) No. 632 of 2013} is in custody, he is directed to be released forthwith from the custody, if not wanted in any other case, whereas the appellant Ranjeet Kumar Gope @ Ranjeet Gope {in Criminal Appeal (DB) No. 506 of 2013} is on bail, he is discharged from the liability of the bail bonds. Accordingly, the aforesaid two Criminal Appeals are allowed.

(Rakesh Kumar, J)

(Prakash Chandra Jaiswal, J)

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