

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1125 of 2017**

Arising Out of PS. Case No.-44 Year-2009 Thana- MORKAHI District- Khagaria

1. Alam Sarwar @ Md. Alam Sarwar, Son of Gulam Sarwar;
2. Gulam Sarwar, Son of Late Md. Shafique;
Both resident of Village-Sabalpur, P.S.-Morkahi, District-Khagaria.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Surendra Kishore Thakur, Adv. Mr. Y. Madhavi, Adv. Mr. Priyam Kumari, Adv. Mr. Ashutosh Kumar, Adv.
For the State	:	Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE NANI TAGIA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 16-01-2024

Heard Mr. Surendra Kishore Thakur, the learned Advocate for the appellants and Mr. Abhimanyu Sharma, the learned APP for the State.

2. Alam Sarwar @ Md. Alam Sarwar (appellant No. 1), who is the son of Gulam Sarwar (appellant No. 2), has been convicted under Section 302/34 of the Indian Penal Code (*in short, the I.P.C.*) and Section 27 of the Arms Act, whereas appellant No. 2



has only been convicted under Section 302/34 of the I.P.C. *vide* judgment dated 16.08.2017 passed by the learned Sessions Judge, Khagaria in Sessions Trial No. 310 of 2010, arising out of Morkahi P.S. Case No. 44 of 2009 (G.R. No. 998 of 2009). By order dated 22.08.2017, both the appellants have been sentenced to undergo imprisonment for life, to pay a fine of Rs. 10,000/- each and in default of payment of fine, to suffer R.I. for six months for the offence under Section 302/34 of the I.P.C. Appellant No. 1 has also been sentenced to undergo R.I. for three years with a fine of Rs. 1,000/- and in default of payment of fine, to further suffer R.I. for one month for the offence under Section 27 of the Arms Act.

3. There is no stipulation in the order as to whether the sentences as against appellant No. 1 would run concurrently or consecutively.

4. Appellant No. 1 was married to the deceased on 01.10.1996. As the allegation stands, he



along with his father (appellant No. 2) had come to the house of the deceased at 02:30 A.M. in the night intervening between 06th and 07th of July, 2009 and had shot at Nusrat Khatoon (his wife) and fled away along with his father. The deceased appears to have died immediately. While she was shot at, she was sleeping on a cot along with her mother.

5. The mother of the deceased, namely, Madina Khatoon (P.W. 1), had lodged the F.I.R. about the occurrence at about 07:20 A.M. on 07.07.2009 at her house. She has alleged that after dinner, the entire family had gone to sleep. She heard a knock at her door at about 02:30 in the morning. She opened the gate but only to find the appellants. Appellant No. 1 is alleged to have been carrying a small weapon in his hand by which he fired at the deceased. The deceased was hit in her ear. On the sound of firing, all the family members were awakened. She informed all of them about the occurrence. The cause of murder as stated by



P.W. 1 is the insistence of the appellants to compound the case which the deceased had lodged against appellant No. 1 in connection with the failed marriage.

6. On the basis of the *fardebayan* of P.W. 1, a case *vide* Morkahi P.S. Case No. 44 of 2009, dated 07.07.2009, was instituted for investigation for the offences under Sections 302/34 of the I.P.C. and Section 27 of the Arms Act against the appellants.

7. The police, after investigation, submitted *charge-sheet* against both the appellants, whereafter they were put on Trial.

8. The Trial Court, after having examined eight witnesses on behalf of the prosecution and one on behalf of the defence, convicted and sentenced the appellants as aforesaid.

9. The contention of the appellants is that the Trial Court completely misdirected itself in appreciating the evidence in its correct perspective. The deposition of P.W. 1 is palpably false, which appears on face of it.



There is no sync in the story narrated by P.W. 1 and the father of the deceased, namely, Md. Sakim (P.W. 5) on one hand, and of Md. Farukh Alam (P.W. 4) as well as Nisha Praveen (P.W. 2), who are brother and sister of the deceased respectively, on the other. The *post-mortem* report revealed that the time of occurrence was definitely much before 02:30 A.M. in the night of 06th and 07th of July, 2009.

10. The investigation of this case, it has been argued, is absolutely faulty and the I.O. has offered no assistance to the Court as he had neither seized the cot on which the deceased was found shot dead nor had collected blood stains to be examined forensically. All this definitely created a doubt about the accusation.

11. The countervailing arguments on behalf of the State is that almost all the witnesses saw the occurrence and, therefore, minor lapses in the investigation ought not to be over-exaggerated. The consistent case of the prosecution is that appellant No. 1



shot at the deceased because of failed marriage and the resistance of the deceased in not compounding the case which she had lodged against appellant No. 1.

12. Madina Khatoon (P.W. 1) in her deposition before the Trial Court has reiterated that there was an insistence on the part of the appellants to compound the case lodged by the deceased against the appellants. Though she has expressed ignorance about the case having been disposed off finally in the year 2005 only, but the documentary evidence clearly establishes that the dowry case *vide* Complaint Case No. 452C of 2000 was finally disposed off in the year 2005 and the appellants were acquitted of the charges.

13. This fact has been confirmed by the sister of the deceased, namely, Nisha Praveen (P.W. 2) and the Investigating Officer of this case, namely, Mukesh Kumar (P.W. 7).

14. So far as the manner of occurrence is concerned, we have found from the deposition of P.W. 1



that she had opened the door when both the appellants came inside and appellant No. 1 shot at the deceased. It was only on the sound of firing that other members of the house, namely, the father, brother and the sister of the deceased got up, who were informed by P.W. 1 about the occurrence.

15. As opposed to the afore-noted version, Md. Sakim (P.W. 5), who is the father of the deceased, has stated that while the occurrence had taken place, namely, shooting of the deceased, P.W. 1 was lying on the bed alongside the deceased. According to P.W. 5, it was he who saw the occurrence first and rest others were not present there.

16. This makes the deposition of both, P.W. 1 and P.W. 5, highly suspect.

17. Nisha Praveen (P.W. 2), who is the sister of the deceased, got up from her sleep on the sound of firing. There is every likelihood of her not seeing the occurrence.



18. Similarly, Md. Farukh Alam (P.W. 4), who is the brother of the deceased and was sleeping in the same house on the fateful night, got up from his sleep and came out of his house. He saw appellant No. 1 running away after killing the deceased.

19. These versions are substantially different and, therefore, it appears that none of them were deposing correctly. Surprisingly, both the parents of the deceased and her brother have expressed their ignorance about the disposal of the criminal complaint which the deceased had lodged against the appellants; notwithstanding the judgment of acquittal in favour of the appellants being on record as an exhibit on behalf of the defence.

20. Janisha Khatoon (P.W. 6), whose house is situated nearby the P.O., claims to have only learnt that deceased has been killed in the night intervening between 06th and 07th of July, 2009.

21. Apart from P.W. 6, no other independent



person has been examined at the Trial except one Md. Sami Ahmad (P.W. 3), who also is a neighbour of the deceased and also stands in some relation to P.W. 1.

22. A suggestion had been given to the sister of the deceased (P.W. 2) that perhaps the deceased did not like the over familiarity of Md. Sami Ahmad (P.W. 3) with her mother (P.W. 1). However, it was only a vague suggestion, which was denied by P.W. 2.

23. Md. Sami Ahmad (P.W. 3) has also not stated anything worthwhile which would have thrown any light on the prosecution case.

24. We have very carefully examined the deposition of Dr. Purushottam Kumar Sinha (P.W. 8), who had conducted the *post-mortem* examination. He began the examination on 07.07.2009 at 10:00 A.M. in the day. He found one lacerated wound of the size of 1/2" x 1/2", circular in shape, cranial cavity deep with inverted margin over the right temporal region of the scalp near pinna. The other wound was a lacerated



wound of the size of 1½" x 1", which also was cranial cavity deep with inverted margin over left parietal region of the scalp. Perhaps, this was the wound of exit. Blood and blood clots were found in the cranial cavity. The right temporal lobe and left parietal lobes were lacerated. The injury Nos. 1 and 2, referred to above, were communicating with each other. There was fracture of right temporal and left parietal bones. The injuries were *ante-mortem* in the nature and were opined to have been caused by firearm. The cause of death, as reported by P.W. 8, was shock and hemorrhage due to above-noted injuries caused by firearm. The time elapsed since death was fixed at twenty four hours from the *post-mortem* examination.

25. This assessment of the timing of the occurrence assumes importance.

26. On the perusal of the *post-mortem* report, it appears to us that necessary inputs were not given by P.W. 8. There is no reference of either *rigor*



mortis having started; present or; having vanished. This, perhaps, would have been, though a rudimentary test, a clincher for fixing the timing of death. On specific question, P.W. 8 has replied that it appeared to him that the death may have been caused before twenty four hours of the *post-mortem* examination. He has also observed in his deposition that the bullet had passed from the right to the left ear, through and through, and in such a case, profuse bleeding is a normal phenomena. P.W. 8 has repeated in his deposition that the death might have occurred prior to twenty four hours of the *post-mortem* examination.

27. This makes us even more suspicious about the prosecution version.

28. The occurrence had taken place, as claimed by the witnesses, at about 02:30 A.M. in the morning of 07.07.2009 and the *post-mortem* examination began on the same day at about 10:00 A.M.



29. The doctor, missing out on an important input like presence or absence of *rigor mortis*, leaves much space to speculate.

30. Did the deceased die some times earlier than claimed by the prosecution? In that case, the other question would be whether it was the correct accusation against the appellants by P.W. 1 and others?

31. There does not appear to be any motive for killing the deceased.

32. The marriage had failed and the complaint lodged by the deceased against the appellants had ended in acquittal in the year 2005 only. Evidence suggests that appellant No. 1 was married again thereafter. There was no necessity for the appellants to have raked up the issue again.

33. The allegation of prior threats by the appellants could not be proved as the *Sanha* which was lodged by P.W. 1 has not been placed on record.

34. On top of it, we have found the



investigator to be highly unprofessional in his approach. The deceased had died on the cot and her dead-body was found in the same position by the I.O. when he had visited the house. He had been informed about the occurrence by an unknown person on telephone. What other information had he received in the police station before proceeding for the P.O., thus, remains unknown.

35. The inquest report further confirms that the body of the deceased lay on the cot. According to the doctor, with such an injury, there would be copious bleeding. It was only natural and prudent for any investigator to have seized the blood stained bed-sheet, mattress etc.; collected blood samples and the clothes of the deceased as also of P.W. 1 who was sleeping by her side, for forensic examination.

36. Not having done so has caused a definite dent in the prosecution story.

37. A single fact about difference in the narration of events by the witnesses, may not have been



all that cringe-worthy, but for a set of facts, namely, the *post-mortem* report, the assessment of the time of death by the doctor and the completely unprofessional approach of the investigator, believing the prosecution story to be implicitly correct, would result in a folly.

38. We have given our anxious consideration to the entire facts and records of the case and have found the prosecution version to be highly deficient in evidence.

39. There remains a gnawing doubt about the witnesses resorting to mendacity.

40. The appellants are, therefore, required to be given benefit of doubt.

41. For the afore-noted reasons, we set-aside the judgment of conviction and order of sentence of the appellants, referred to above, and acquit them of the charges levelled against them.

42. The appeal stands allowed.

43. The appellants No. 1/Alam Sarwar @ Md.



Alam Sarwar is said to be in Jail. He is directed to be set at liberty forthwith unless his custody is required or wanted in any other case.

44. The appellant No. 2/Gulam Sarwar is on bail. He is discharged of his liabilities under the bail-bonds.

45. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

46. The records of this case be returned to the Trial Court forthwith.

47. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Nani Tagia, J)

Praveen-II/-

AFR/NAFR	NAFR
CAV DATE	N/A
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