

**(1987) 03 PAT CK 0042**

**In the Patna High Court**

Brahmdeo Hazra and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

**Date of Decision :** 24-03-1987

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 172  
Penal Code, 1860 (IPC) — Section 147, 148, 149, 161, 172

**Citation :** (1988) CriLJ 734

**Hon'ble Judges :** M.P. Varma, J;Abhiram Singh, J

**Bench :** Division Bench

## Judgement

1. There are two appeals. Criminal Appeal No. 376/84 has been filed by accused Harendra Prasad and Mahadeo Hazra and Criminal Appeal No. 329/84 has been filed by other six accused, namely, Brahmdeo Hazra, Ramdeo Hazra, Sonelal Hazra, Jamuna Rai, Ramashish Rai and Charitar Rai. Since both appeals arise out of the same judgment, dt. 30-3-1984 passed by the First Additional Sessions Judge, East Champaran at Motihari, with the consent of the learned Counsel for the parties and for the sake of convenience they have been heard together and are being disposed of accordingly.

2. Appellants accused Harendra Prasad and Mahadeo Hazra of Criminal Appeal No. 376/84 have been convicted for the charge u/s 302 of the I.P.C. (hereinafter referred to as the "Code") and both of them have been sentenced to suffer rigorous imprisonment for life. They have been further convicted u/s 148 of the Code and under this charge both of them have been sentenced to suffer rigorous imprisonment for three years whereas the other accused of Criminal Appeal No. 329/84 have been found guilty by the trial court of the charges u/s 302 read with Section 149 of the Code and each one has been sentenced to suffer rigorous imprisonment for life. They have been further found guilty of the charge u/s 147 of the Code and under this charge each one has been sentenced to suffer rigorous imprisonment for two years.

3. The case against them arose on the statement of informant Ramjee Sah (P. W.

6). The incident of murder as reported by him took place on 12-8-1977 at about 8 A.M. In the morning, he lodged report regarding it at the Police Station Dhaka. The murder took place in a field in village Baghmarwa Sareh. This village falls under the Police Station of Dhaka in the district of East Champaran. All these accused persons in the company of each other caused the murder of Langtu Sah, the father of the informant (P.W. 6). The specific case against accused Harendra Prasad and Mahadeo Hazra is that both assaulted the deceased (Langtu Sah) with garsa on the neck as a result of which the head of Langatu Sah was severed from the trunk.

4. The prosecution case is that, in the morning, the informant (P.W. 6) and his father were working in the field. All of a sudden, all the accused persons came over. Accused Mahadeo Hazra was carrying a "gupti", where as other accused persons were found with garsa. No sooner they reached near Langatu Sah, accused Harendra Prasad gave order for assault and at the same time he threw his gupti and took the garsa from the accused Mahadeo Hazra and hit Langatu Sah on his neck. Thereafter Mahadeo Hazra again took back the garsa from the hand of Harendra Prasad and then he too gave garsa blow on the neck of Langtu Sah. Langatu Sah's head got severed from the trunk of the body. All the accused then had fallen upon the informant (P.W. 6) as well and one of the accused Ramdeo Hazra had assaulted him with farsa which hit his right thumb. His case is that he ran away and straight went to the police station for lodging a report regarding the occurrence. First information report was recorded and the case registered against the accused persons.

5. The police came to the village, took up investigation, prepared the inquest report, despatched the dead body to hospital and got the post mortem examination done and after completing investigation, submitted charge-sheet sending up all the accused named above for taking their trial on the charge of murder of Langatu Sah.

6. In the trial stage, the prosecution examined nine witnesses, out of whom P. Ws. 1 and 6 are said to be eye-witnesses, P.Ws. 7 and 8 are the two doctors. P.W. 7 examined the injury found on the body of the informant P.W. 6 and it was doctor (P.W. 8) who conducted the post mortem examination. The post mortem report has been proved as Exhibit

5. The other witnesses P.Ws. 2, 4 and 5 have been declared hostile by the prosecution and it appears that the trial court did not place reliance on their testimony. P.W. 3 is also a formal witness. He has proved the first information report (Ext.1) which was in the pen of the investigating officer. P.W. 9 is also a formal witness. He has proved the carbon copy of the inquest report (Ext.5) and the seizure list (Ext.6) prepared by the police officer. Thus, we find that the investigating officer has not been examined in this case and the prosecution relies on the testimony of two alleged eye-witnesses P.Ws. 1 and 6.

7. The accused also examined two defence witnesses. They pleaded their

innocence in the court below and took specific defence that it was P.W. 6 Ramji Sah himself who killed his father Langatu Sah and falsely implicated them and he has concocted the case of causing the death of his father by accused Harendra Prasad and Mahadeo Hazra.

8. In appeal before us the learned Counsel contended that the two witnesses P.Ws. 1 and 6 did not see the act of killing of Langatu Sah. On getting information of his death, P.W. 6 ran to the police station and lodged a false case. While attacking the credibility of P.W. 1, it has been urged that his name did not find mention in the first information report. It has been further said that the informant has given a detailed version of the incident and has named a few persons alleged to have seen the incident. He has named one Mahesh Ram (P.W. 2), a school teacher of village Jhauwa Ram Bakhari, and one Ram Singh and Wotu Singh who have seen the incident. He has said that in the north of his field both Ram Singh and Wotu Singh were cultivating their field and they might have seen the incident. Mahesh Ram, a school teacher, has been examined as P.W. 2 but he did not support the prosecution case at all. The other witnesses named in the first information report were not produced in the court. The learned Counsel has pointed out some serious contradictions even with regard to the manner of occurrence as alleged by the prosecution. The court P.W. 1 has given out that accused Harendra Prasad after throwing away his gupti gave two garsa blows on the neck of Langatu Sah and thereafter Mahadeo Hazra taking the same garsa from Harendra Prasad, gave three blows on the neck of Langatu Sah. The doctor (P.W. 8) who conducted the post mortem examination found the head severed but he did not find any such cut injuries of five garsa blow dealt over the neck of the deceased. P.W. 6 also did not say that four or five blows were inflicted on the deceased. His statement is that Harendra Prasad after snatching garsa from Mahadeo Hazra hit his father from behind and it was thereafter that Mahadeo Hazra gave another blow on his neck causing severance of the head from the body so Langatu Sah was hit only twice.

9. There is another serious infirmity which also cannot be lost sight of. P.W. 1 did not speak that the accused persons came from two different directions. His statement is that he was working in a nearby paddy field of Jodha Singh. According to him Ramdeo Hazra hurled garsa on P.W. 6 Ramji Sah whereupon Ramjit Sah ran towards south whereas Ramji has said that when he ran for safety, he saw a mob of 8 to 10 persons of Bakhari and they surrounded him to kill but he escaped running south. Among the members of mob, he identified accused Yamuna Rai, Charitar Rai and Raniashish Rai. In this sequence of the evidence a? given by the informant Ramji Sah the trial court took the view that three persons, namely, Yamuna Rai, Charitar Rai and Remashish Rai did not share the common object of causing the murder of Langatu Sah and the learned Judge, therefore, recorded an order of acquittal in their favour under this head of this charge. Material contradictions exist in between the statements of P.Ws. 1 and 6 even with regard to the manner of occurrence and that naturally creates further doubt in the mind of the court whether P.W. 1 was ploughing the field of

Jodha Singh and had occasion to see the occurrence. There is further contradiction in the evidence even with regard to the weapons held by accused Harendra Prasad and Mahadeo Hazra. The attention of this witness was drawn to his previous statements made before the investigating officer to contradict him and that appears to be an important contradiction but the said statement made u/s 161 of the Cr. P.C. could not be proved in court on account of the non-examination of the investigating officer and this has caused serious prejudice to the accused.

10. The learned Counsel for the State-respondent Mr. Sen sharply reacted to the aforementioned argument and submitted that failure on the part of the prosecution to examine the investigating officer does not mean the failure of the whole case. He has submitted that it was open for the court to look into the case diary and to make the use of the same in appreciating the evidence as envisaged, u/s 172 of the Cr. P.C.

11. Non-examination of the investigating officer is a serious lapse on the part of the prosecuting agency which we find in this case. The obscurity appearing in the case remained unexplained. We could not get what were the objective findings noted by the police officer which would have been helpful in appreciating the correctness or otherwise of the prosecution version. We have seen some important contradictions elucidated in the statements of the witnesses made earlier before the police u/s 161 of the Cr. P.C. and remained on the record of the deposition of those witnesses without clarification to the great prejudice to the accused. Not only that the investigating officer was not examined, even the police diary was not put in evidence or proved to enable the court to consider the admissible part of the record to analyse and appreciate and to test the credibility of oral testimony of the witness.

12. In order to overcome this hurdle, the learned Counsel for the State-respondent Mr. Sen argued, as referred to above, that it was open for the court to use the police diary u/s 172 of the Cr. P.C. in aid to appreciate the evidence for taking a conclusive decision in the trial and that the appellate court is also not precluded from taking similar stand. Appreciation or non-appreciation is not the point. The question is regarding its permissive and legitimate use by a court. We are of the view that the police diary cannot be used for any purpose other than to be taken in aid to assist the Presiding Judge in an enquiry or trial but as evidence in i. a case. The police diary substantially must contain the proceedings of day to day investigation, the time at which the information reached the police, time at which the investigation was started and the time when investigation was closed. The police diary must show the places visited by the police, the statement of the witnesses recorded, the documents relating to seizure, inquest, site map and should contain all other subjective and objective findings circumstances found and observations gathered and ascertained in course of investigation.

13. The police gets the jurisdiction and proceeds with the investigation on the

first information report registered at the police station and the investigation u/s 154 of the Cr. P.C. proceeds on such statements collected to trap a criminal, which follows, on the commission of the crime. Now it is for the court during the trial to find out correctness or falsity of the disclosure made by the witnesses during the course of investigation. The use of the police diary cannot go beyond the legitimate limits provided u/s 172 of the Cr. P.C. The Court cannot take out facts from the police diary as material evidence to arrive at any finding. In absence of any proof, the police diary can never be taken as evidence. If a court discovers any material in the diary or any matter which may be important for a just decision of a case, then it is open for a court to call for necessary material evidence and document and to have the same legally proved in evidence. It is not open for a court to read the diary and to take out a few facts and the statements made in it as evidence and to use it to come to a finding. In any case the entries in a diary are in the shape of secondary evidence and cannot be used either as substantive or corroborative evidence in a case and even the objective findings or circumstances entered in the diary cannot be used unless they are legally admissible and proved by the witnesses recording the same. In the instant case, we find that grave error has been committed by the court below in using the extracts from the diary as substantive evidence to a great prejudice to the accused. The court could have asked the parties concerned to bring such fact in the evidence by legal proof, if so found and elucidated in diary, and in absence thereof, it was wrong for the court to accept and use the same in evidence in support of its judgment of conviction recorded against the accused on trial. We may quote some of the finding from the judgment impugned to show how the mind of the court below was working and how the statements of diary were taken into consideration. At one stage the court has observed as follows:

that from a perusal of the case diary it would appear that the objective facts found by the investigating officer lend support to the prosecution....

At another stage the court further held:

I have perused the case diary. Even if the investigating officer would have been examined and narrated the objective facts found by him at or near the place of occurrence it would not have materially affected the case of the prosecution... and the facts which the investigating officer might have noticed at the spot during local inspection were not of any material significance affecting the case of the prosecution...It cannot, therefore, furnish a ground for acquittal of the accused persons.

It may causally be again noticed here that the defence witness D.W. 2 has said that he reached to the police station and gave statement to the police at 1Q.30 A.M. The court while discussing these statements of the witnesses has observed in the judgment impugned as follows:

A perusal of the case diary reveals that the Chawkidar Mewalal Singh came to police station at 11 A.M. and his statement was recorded there.

Thus, we are constrained to observe that the court below committed a serious error by using the case diary as evidence in the case which certainly caused prejudice to the accused in their trial. The investigating officer was not examined. The prosecution made attempts to prove the inquest report and also the first information report but did not take steps to get proved that admissible part of the case diary for its use by the court in appreciating the oral testimonies of the witnesses examined by the prosecution.

14. There is another aspect of the case. Some of the prosecution-witnesses have been declared hostile. They are P.Ws. 2, 4 and 5 on the ground that they made different statements at the earlier stage u/s 161 of the Code of Criminal Procedure. Here again the same situation has arisen. The police officer did not come to court. The earlier part of the oral statements of those witnesses recorded by the police have not been brought on the record to contradict them. It is not clear at all from the impugned judgment how the evidence of other witnesses i.e. P.Ws. 2, 4 and 5 have been discarded by the court below. So far P.Ws. 1 and 4 are concerned, who claim to be the eye-witnesses, there is serious contradiction in their statements as well with regard to the manner of occurrence. P.W. 6 is the son of the deceased. His case is that one of the accused Harendra Prasad dealt a garsa blow on him. If the accused had come over with the intention or having the common object of causing any murder, this informant P.W. 6 would have been the first victim. He was surrounded by all the accused while he attempted to run away but it is not clear how he could manage to escape with a minor scratch 1/2" in length and slight swelling over the right thumb. The learned Counsel for the appellants has argued, and in our view rightly that the nature of injury does not indicate that it was caused by a hostile-hand. This is another circumstance on account of which we feel reluctant to accept his evidence. No reason has been assigned for non-production of other witnesses named in the first information report. We have seen that one named Mahesh Rai, a school teacher, did not come forward to support the case of the prosecution. According to him there was no such incident.

15. Next, we find that P.W. 1 has talked of some motive on the part of the accused persons to commit this offence whereas the informant himself is silent about it. We could not get from his evidence what was the immediate cause or compelling reason for these accused to embark upon such a ghastly crime of killing Langatu Sah and old man of 70 years by giving fatal blows on his neck and left his son untouched with a minor scratch. P.W. 1 has, of course, stated that Ram Rijha Sah was the purchaser of land which was in mortgage of these accused and there was a civil litigation. A suit for redemption was filed and the decree was in favour of the accused. The trial court has commented upon it that the judgment of the redemption suit was not brought in evidence in this case, but the same was filed along with written statement purported to have been made u/s 313 of the Cr. P.C. even assuming that the decree of the redemption suit is taken into consideration, it speaks as held by the trial court that the decree was in favour of the accused and that Ram Rijha San was made

defendant in the suit at a later stage. This circumstance also speaks in favour of the accused and it does not in any way help in proving the guilt of the accused in the murder of Langatu Sah.

16. In the end we may state that all the six accused were jointly charged u/s 302 read with Section 149 of the Code because they were members of an unlawful assembly for prosecuting a common object viz. to commit the murder of Langatu Sah. Two of them, accused Harendra Prasad and Mahadeo Hazra, caused the murder of Langatu Sah. We have already seen that the trial judge recorded an order of acquittal in favour of the accused, namely, Yamuna Rai, Charitar Rai and Ramashish Rai. The finding of the trial court is that those three accused were not members of the unlawful assembly and did not share the common object of causing the murder of Langatu Sah and finally took the view that the prosecution failed to prove the charge u/s 302 read with Section 149 of the Code against them. In view of that position the other three accused could not reasonably be held guilty for the charge u/s 302 read with Section 149 of the Code. This is an error in the finding of the trial court in convicting these three of the said charges. For the view that we have taken in the case as discussed above, we do not feel inclined to make a further discussion with regard to the error committed by the court below with reference to the charge in convicting the accused under the said charge.

17. Thus on consideration of the evidence on discussion above we are of the view that the prosecution has failed to prove its case beyond the shadow of reasonable doubt. The appeal, therefore, succeeds. All the appellants of both the appeals, referred to above, are acquitted of the charges. We are told two of them are in jail they may be released forthwith if not wanted in other case. The other accused are on bail, if so they are discharged of their bail bond, if any.