

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) NO.641 OF 2009
WITH
CRIMINAL APPEAL (DB) NO. 557 OF 2009

Against the judgment of conviction and the order of sentence,
dated 25.05.2009, passed by Shri Birendra Mohan Srivastava,
Additional Sessions Judge XI, Patna, in Sessions Trial No. 1302 of
1997, arising out of Fatuha Police Station Case No. 88 of 1997

Guddu Singh, son of Ajay Singh, resident of village Sotichak,
Police Station Fatuha, District Patna

..... Appellant **(In Criminal Appeal No. 641/2009)**

WITH

Ajay Singh, son of Ram Prayag Singh, resident of village-Sotichak,
Police Station Fatuha, District Patna

.... Appellant **(In Criminal Appeal No. 557/2009)**

Versus

The State of Bihar Respondent **(In both the appeals)**

Appearance :

(IN BOTH THE APPEALS)

For the Appellants : Mr. Kanhaiya Prasad Singh, Senior Advocate

For the State : Mr. Ajay Mishra, A.P.P.

Ms. Soni Srivastava, learned Counsel, as Amicus Curiae

CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE JUSTICE SMT. NILU AGRAWAL

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 20-05-2015

Under the judgment and order, dated 25.05.2009,
passed, in Sessions Trial No. 1302 of 1997, by learned 11th
Additional Sessions Judge, Patna, the accused-appellants,
Guddu Singh and Ajay Singh, stand convicted under Section
302 read with Section 34 of the Indian Penal Code and
accused-appellant, Guddu Singh, stands further convicted



under Section 27 of the Arms Act, 1959. Following their conviction under Section 302 read with Section 34 of the Indian Penal Code, the accused-appellants, Guddu Singh and Ajay Singh, have been sentenced to suffer imprisonment for life and pay fine of Rs. 2,000/- each and, in default of payment of fine, to undergo rigorous imprisonment for a period of 6 (six) months. For his conviction, under Section 27 of the Arms Act, 1959, the accused-appellant, Guddu Singh, has been sentenced to undergo rigorous imprisonment for a period of three years.

2. The case of the prosecution, as unfolded by the First Information Report, lodged by Awadhesh Singh (PW 2), may, in brief, be described as under:

(i) On 25.04.1997, at about 1:30 AM, the informant, Awadhesh Singh (PW 2), was cutting onion flowers at Kharkhat Khanda and his nephew, Upendra Singh (since deceased), was irrigating his nearby onion field. At that time, there were several farmers, who were also working near the land of the informant. In the meanwhile, accused Ajay Singh and his son, Guddu Singh, of village Soti Chak, came, on the pretext of drinking water, to Upendra Singh's *boring* machine, meant for irrigation purpose, and called Upendra Singh, who went to the *boring* machine.

(ii) As soon as Upendra Singh reached the *boring*

machine, accused Ajay Singh caught Upendra Singh and asked his son, Guddu Singh, to fire, whereupon accused Guddu Singh fired from a pistol on Upendra Singh shooting on the left side of Upendra Singh's head.

(iii) On being so shot by the bullet, Upendra Singh fell on the ground and the two accused aforementioned fled away. As the two accused had threatened the informant and others with dire consequences, nobody could catch hold of the accused and the accused fled away. As soon as the accused fled away, everyone came near Upendra Singh and found him lying dead.

(iv) The motive, assigned for the killing of Upendra Singh, was that Upendra Singh had been working as a driver of a tractor belonging to accused Guddu Singh and as the tractor was found missing in August, 1996, the accused suspected that Upendra Singh was behind the disappearance of the tractor.

(v) On being informed about the occurrence, a police party, headed by S.I. Ram Jeevan Prasad Singh (PW 5), the then Officer-in-Charge, Fatuha Police Station, came to the place of occurrence, where Awadhesh Singh (PW 2) orally informed the police party about how his nephew, Upendra Singh, happened to be shot dead.

(vi) The occurrence, so reported, was reduced into



writing, in the form of *fardbayan* of Awadhesh Singh (PW 2), by S.I. B. Barha, who was a *probationer* at that time. This *fardbayan* was, however, written, according to what PW 5 had dictated. Treating the said *fardbayan* as the First Information Report, Fatuha Police Station Case No. 88 of 1997, under Sections 302/34 of the Indian Penal Code and Section 27 of the Arms Act, 1959, was registered against the two accused persons, namely, Ajit Singh and Guddu Singh.

(vii) During investigation, inquest was held over Upendra Singh's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, *charge sheet* was laid, under Sections 302/34 of the Indian Penal Code and Section 27 of the Arms Act, 1959, against the accused aforementioned.

3. At the trial, a charge, under Section 302 read with Section 34 of the Indian Penal Code, was framed against accused, namely, Ajit Singh and Guddu Singh. A charge was further framed, under Section 27 of the Arms Act, 1959, against accused Guddu Singh. To the charges so framed, the accused pleaded not guilty.

4. In support of their case, prosecution examined altogether 10 (ten) witnesses including the doctor (PW 6), who had, admittedly, conducted the *post mortem* examination. The accused were, then, examined under Section 313 (1)(b) of the

Code of Criminal Procedure, wherein the accused denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being that of denial and the accused having been implicated, because of suspicion. The defence has also adduced evidence by examining three witnesses.

5. Having, however, found the two accused, namely, Ajit Singh and Guddu Singh, guilty of the offence under Section 302 read with Section 34 of the Indian Penal Code and having also found accused Guddu Singh guilty under Section 27 of the Arms Act, 1959, learned trial Court convicted them accordingly and passed sentences against them as mentioned above.

6. Aggrieved by their conviction and the sentences, which have been passed against them, both the convicted persons have preferred the appeals.

7. Both these appeals having, thus, arisen out of the judgment of conviction and the order of sentence, dated 25.05.2009, these appeals have been taken up for hearing together and are being disposed of by this common judgment and order.

8. We have accordingly heard Mr. Kanhaiya Prasad Singh, learned Senior Counsel, appearing on behalf of the appellants, and Mr. Ajay Mishra, learned Additional Public

Prosecutor, appearing on behalf of the State. We have also heard Ms. Soni Shrivastava, learned Counsel, appearing as Amicus Curiae.

9. While considering the present appeals, it may be noted that according to the evidence of Dr. N. K. Singh (PW 6), on 26.04.1997, at 12 noon, he (PW 6) had conducted *post mortem* examination on the dead body of Upendra Singh and found as follows:

"Average built, rigor mortis present only on lower limbs, no decomposition, blood stands discharged from both nostrils.

(i) Fire arm wound of entry 1¼" x 1" on left side of occipital region behind left ear with brain matter escaping through the wound. No wound of exit was found. Margin of wound black.

On dissection: - All viscera were found pale. Heart both side empty. Stomach contained undigested rice about 4 ounce. Bladder empty. Presence of extra cranial haematoma all over occipital region with fracture of occipital bone with hole on left side of occipital bone. One distorted bullet about 1¼" long was recovered from the wound of entry which was lodged on occipital bone left side."

10. In the opinion of the doctor (PW 6), the cause of

death was head injury suffered by the said deceased from a fire-arm.

11. Neither the finding of the doctor nor his opinion, with regard to the cause of death of the said deceased and/or his opinion with regard to the nature of weapon, which might have been used, for causing the death of the said deceased, were disputed by the prosecution or by the defence. This apart, we, too, do not notice anything inherently incorrect or improbable in the evidence given by the doctor (PW 6).

12. So situated, it becomes clear that Upendra Singh's death was *homicidal* in nature.

13. The question, however, remains: whether the accused-appellants were the ones, who had caused the death of Upendra Singh and, if so, whether the prosecution had succeeded in proving the charges brought against the accused-appellants?

14. Our quest for answer to the questions, posed above, brings us back to the evidence of the informant, Awadhesh Singh (PW 2), whose evidence is that on 25.04.1997, at about 11:00 AM/12 noon, he was cutting onion flowers in his field with his nephew, Upendra Singh, who was irrigating onion field, situated by the side of the field of PW 2 accused Ajay Singh, accused Guddu Singh came there on the pretext of drinking water and accused Ajay Singh called



Upendra and when Upendra went near Ajay Singh, both of them began to talk with each other for a while and, suddenly, accused Ajay Singh caught hold of Upendra and exhorted accused Guddu Singh to shoot Upendra, whereupon accused Guddu Singh took out his country-made pistol and fired from his pistol a bullet, which hit the left side of the head of Upendra and when PW 2 raised alarm, the two accused pointed pistols towards him and threatened to kill him. It is in the evidence of PW 2 (Awadhesh Singh) that having shot Upendra in the manner as indicated hereinbefore, both the accused fled away. It is also in the evidence of PW 2 that his co-villagers assembled there and after the accused fled away, he (PW 2) went near Upendra and found him dead. It is the further evidence of PW 2 that Upendra was the driver of accused Ajay Singh, whose tractor was stolen away and accused Ajay Singh suspected that Upendra was the person involved in the commission of theft of the said tractor.

15. Close on the heels of the evidence of PW 2, PW 1 has deposed that on 25.04.1997, at about 11:00 AM/12 noon, when he was cutting gram in his field, situated on the west of the place of occurrence, accused Ajay Singh and accused Guddu Singh came there from northern direction and called Upendra and when Upendra reached near them, they started conversation and, in the meanwhile, accused Ajay Singh



exhorted accused Guddu Singh to shoot Upendra, whereupon accused Guddu Singh took out his country-made pistol and fired from his pistol a bullet, which hit the left side of the head of Upendra, and Upendra fell down. It is in the evidence of PW 1 that when he (PW 1) raised alarm, both the accused threatened him to leave or else, they would shoot him (PW 1) too, and then, both the accused fled away. It is also in the evidence of PW 1 that Upendra was the driver of accused Ajay Singh, whose tractor was stolen and accused Ajay Singh was demanding the cost of stolen tractor and Upendra, being poor, could not give money to accused Ajay Singh.

16. As far as PW 3 (Savita Devi), widow of deceased Upendra Singh, and co-villagers, namely, Jitendra Singh (PW 4), Vijay Singh (PW 7) and Sarbanand Singh (PW 8) are concerned, they, admittedly, came to the place of occurrence on the *hulla* being raised. Though PW 3 claims, in her evidence, that Ajay Singh and Guddu Singh had shot Upendra dead, the fact remains that neither PW 1 nor PW 2 has claimed that they had reported the occurrence to PW 3 and, hence, the evidence, so given by PW 3, is nothing, but *hearsay*.

17. Similarly, PW 4, PW 7 and PW 8 claim that on coming to the place of occurrence, they heard that Ajit Singh and Guddu Singh had shot Upendra Sing dead, but they have not deposed as to who had told them that Upendra Singh had

been shot dead by the two accused aforementioned.

18. Thus, the evidence of PW 4, PW 7 and PW 8 are nothing, but *hearsay*. On no better footing stands the evidence of PW 10 (Ram Raj Singh) inasmuch as he (PW 10) has merely deposed that he had heard that Upendra Singh had been shot dead.

19. So far as PW 9 (Sunil Kumar Singh) is concerned, he has proved his signature as well as the signature of PW 9's brother, Ramesh Singh, on the inquest report as Exhibit-4/1 and Exhibit 4/2 respectively,

20. When we closely examine the evidence on record, what attracts our eyes, most prominently, is that the occurrence allegedly took place on 25.04.1997 at about 11:30 AM and the *fardbayan* was, at the place of occurrence, recorded on 25.04.1997, at 03:45 PM.

21. The question, however, is: what information had really brought the police to the place of occurrence? This question has not been answered by the prosecution nor is there any answer or explanation discernible, in this regard, from the evidence on record.

22. Situated thus, it remains unknown till date as to what information had, in fact, been received at Fatuha Police Station, which impelled police to come to the place of occurrence.

23. Necessarily, therefore, the question arises as to whether the names of the assailants of Upendra Singh had at all been disclosed at the first point of time, when the police were informed about the occurrence at Fatuha Police Station. The answer to this momentous question is not available from the evidence on record.

24. The above limitations with which suffer the prosecution's case, we come to the First Information Report and suffice it to point out, in this regard, that since the police arrived at the place of occurrence having been informed about Upendra Singh's death, it clearly follows that the police had already received information with regard to the commission of a *cognizable offence* and, logically speaking, therefore, Awadhesh Singh's statement, which has been recorded as *fardbayan*, is nothing, but his statement made under Section 161 of the Code of Criminal Procedure. The occurrence took place on 25.04.1997 at about 11:30 AM and this statement is shown to have been recorded on 25.04.1997 at 03:15 PM under Section 161 of the Code of Criminal Procedure.

25. What is also extremely important to note, now, is that the date of dispatch of the First Information Report to the Magistrate has been left blank, but the same was received by the Magistrate, on 28.04.1997, as the endorsement on the First Information Report discloses. The Investigating Officer

(PW 5) has confirmed that the distance between the Police Station and the Court is approximately 12 kms. and the road are in good condition; whereas the distance between the place of occurrence and the Police Station is, admittedly, 10 kms.

26. From what have been pointed out above, it becomes clear that the initial information given to the police with regard to the occurrence has been suppressed by the prosecution and even the belated statement of the informant (PW 2) recorded, in the form of First Information Report, on 25.04.1997, reached the Court on 28.04.1997 and the date of dispatch of the First Information Report to the Magistrate was left blank despite the fact that Section 157 of the Code of Criminal Procedure requires that the First Information Report shall be '*forthwith*' transmitted to the nearest Judicial Magistrate.

27. Referring to Section 157 of the Code of Criminal Procedure, the Supreme Court has pointed out, in **Arjun Marik and Others v. State of Bihar**, reported in **1994 Supp (2) SCC 372**, that the provisions, embodied in Section 157 of the Code of Criminal Procedure, direct sending of the First Information Report *forthwith* to the nearest Magistrate without any delay and immediately. Further, Section 159 of the Code of Criminal Procedure envisages that on receiving such report, the magistrate may direct an investigation or, if he thinks fit,



to proceed at once or depute any other Magistrate subordinate to him to proceed to hold a preliminary inquiry into the case in the manner provided in the Code of Criminal Procedure. The forwarding of the occurrence report is indispensable and absolute and it has to be forwarded with earliest dispatch, which intention is implicit with the use of the word '*forthwith*' occurring in Section 157 of the Code of Criminal Procedure, which means promptly and without any undue delay. These provisions, observes the Supreme Court, in **Arjun Marik** (supra), serves dual purpose, firstly to avoid the possibility of improvement in the prosecution story and introduction of any distorted version by deliberations and consultation and, secondly, to enable the Magistrate concerned to have a watch on the progress of the investigation.

28. There is, therefore, considerable force in the submission, made on behalf of the appellants, that the suppression of the initial information received by the police as well as the belated transmission of the so-called First Information Report to the Magistrate having not been explained, the possibility that the accused-appellants were named belatedly by the informant in his statement recorded in the form of *fardbayan* after due deliberate and mutual consultations cannot be confidently ruled out.

29. The above inference gets reinforced from the fact



that the initial information given to the police, which brought the police to the place of occurrence, has been kept shrouded in mystery and the possibility, therefore, that in the initial information, the names of the assailants had not been mentioned cannot be, boldly and confidently, ruled out. To a specific query made by the defence, the Investigating Officer (PW 5) has, in fact, conceded that the reason for belated dispatch of the First Information Report to the Magistrate has not been mentioned in the case diary.

30. Yet another feature of the alleged manipulation of the First Information Report, which cannot be ignored, is that it is admitted by the Investigating Officer that although the *fardbayan* is shown to have been recorded by the Investigating Officer (PW 5), the *fardbayan* was, as a matter of fact, recorded not by PW 5, but by a *probationer*, S.I. B. Barha, who, we find, has not been examined as a witness at the trial and the Investigating Officer (PW 5) has, nowhere, certified, in the *fardbayan*, that the said *fardbayan* was recorded in terms of the dictation or direction of PW 5. To our surprise, though B. Barha has written the *fardbayan*, there is no endorsement in this regard.

31. Coupled with the above, even the *post mortem* report (Exhibit-5), which is, dated 26.04.1997 (i.e., on the succeeding day of the alleged occurrence), does not bear the

Police Station Case Number, which leaves no option to the Court, but hold that the First Information Report was *ante dated* or, at least, the possibility of the so-called First Information Report, having been *ante dated*, cannot be confidently ruled out.

32. From the objective findings of the Investigating Officer (PW 5), it transpires that there was no sign of trampling at the place of occurrence, though as many as 10-12 persons, according to the evidence on record, had come to the place of occurrence, which is a field, where onion flowers had grown up. Even the onion flowers remained intact in the field as against the evidence of PW 2, who has deposed that the field had been irrigated 4 to 5 times before the occurrence and the deceased was irrigating the field after entering into the field and his hands and feet were smeared with mud and that he (the said deceased) had gone to accused-appellant, Ajay Singh, in that condition and the deceased was also shot at, when he was smeared with mud. However, the Investigating Officer (PW 5) has admitted that he did not find any mud on the deceased.

33. Although the Investigating Officer (PW 5) claimed that blood was found at the field, but blood stained earth was not seized and the same was, consequently, not sent for chemical examination. Why the blood-stained earth was not

sent for chemical examination remains an unanswered query.

34. What can also not be ignored and must not be ignored is the fact that neither the inquest report nor the evidence of the doctor, who performed the autopsy, shows that there was mud on hands, legs and/or clothes of the said deceased, although the specific evidence of PW 2 is that the field, where the occurrence had taken place, was freshly irrigated and watered and there was mud on the hands and legs of the said deceased.

35. What have been pointed out above strengthens the defence case that the assailants were not known and that the actual place of occurrence has been shifted and it was for this reason why the blood-stained earth was not seized and sent for chemical examination so as to prove that what had been seized was blood of the said deceased.

36. The motive, which has been introduced, is that the said deceased was a driver of the tractor owned by the appellants, the tractor had been stolen away about six months before the occurrence had taken place and the appellants suspected that the deceased was involved in the commission of theft of the tractor. Noticeably, however, no case was filed against the deceased for theft of the tractor. The motive, so assigned for the commission of the offence alleged, is too weak and stale.

37. Although motive is not a significant factor in a case of direct evidence of murder, the fact remains that once motive is assigned for commission of an offence, conscious of the Court has to be satisfied that there was motive for commission of a heinous crime, such as, murder.

38. Admittedly, PW 1 and PW 2 are the only eye-witnesses to the alleged occurrence. What is required to be borne in mind is that PW 1 and PW 2 are father and son and obviously they are grand-father and uncle respectively of the said deceased. Though the evidence of PW 1 and PW 2 show that they raised alarm and the appellants threatened them with dire consequences, yet when the co-villagers of the deceased started rushing to the place of occurrence, the accused fled away. Surprisingly, however, none of the witnesses, who had allegedly come to the place of occurrence, claim to have seen the appellants at the place of occurrence or in the vicinity thereof. This apart, neither in his *fardbayan* nor in his entire evidence, PW 2 has even faintly mentioned about the presence of PW 1 at the place of occurrence. Far from this, PW 2 mentioned of only his own presence at the place of occurrence and as the person, who had raised alarm, whereupon other co-villagers arrived at the place of occurrence.

39. There is, therefore, great substance, in the

submission made on behalf of the appellants, that in the light of evidence of PW 2 and the concomitant circumstances appearing from the evidence on record, PW 1 cannot be safely regarded as an eye-witness.

40. What is also curious to note is that the informant (PW 2) has deposed that he covered the body of the deceased by the *dhoti* of the deceased; whereas the Investigating Officer (PW 5) has clearly recorded, in the inquest report (Exhibit-4), that the deceased was wearing a full shirt and an underwear and that a towel was found wrapped around him. There is, in fact, no mention, in the inquest report or in the evidence of the Investigating Officer (PW 5), of the fact that the said dead body was kept covered by a *dhoti*. This is yet another significant discrepancy in the evidence adduced by the prosecution.

41. Important to note it is that according to PW 1, he went to the Police Station and called the police. However, the relevant station diary, which has been proved as Exhibit-A, shows that it was the village Chowkidar, one Sheetal, who had gone to the Police Station and reported the occurrence there. If the village chowkidar had come to know about the occurrence, there is no reason that being the village chowkidar, he would not have known the names of the assailants if the assailants had already been recognized at the

time of commission of the alleged occurrence. This apart, the Investigating Officer (PW 5) does not support the assertion of PW 1 that he (PW 1) came to the Police Station and reported the occurrence nor is there any such fact, admittedly, mentioned in the relevant case diary.

42. Situated thus, there can be no escape from the conclusion that at the earliest possible time, the names of the assailants had not been disclosed to the police even though PW 1 claims to be an eye-witness to the occurrence and claims to have gone to, and reported the occurrence at, the said Police Station.

43. Coupled with the above, the evidence of DW 2 and DW 3 clearly show that they were the ones, who had gone and had called the informant to the place of occurrence. Thus, their evidence, which could not be shaken by the prosecution, belie the presence of PW 2 at the place of occurrence, when the alleged occurrence had taken place.

44. Considering the fact that according to the evidence of PW 1, an altercation had taken place between the deceased and the appellant, Ajay Singh, about 6-7 months before the occurrence and PW 2 claims that he was not on talking terms with the appellants from before the occurrence, it is obvious that the relationship of PW 1 and PW 2 was far from cordial with the appellants.

45. In the circumstances indicated above, the possibility of the accused-appellants having been implicated out of suspicion or animosity cannot be ruled out.

46. Because of what have been discussed and pointed out above, it clearly emerges that there was not credible, clinching and reliable evidence on record, adduced by the prosecution, which could have been made foundation for conviction of the accused-appellants. At any rate, in the face of evidence on record, which was nothing, but an admixture of half-truth and untruth, the accused-appellants ought to have been accorded, at least, benefit of doubt, when it was impossible, and remains impossible, to disengage the truth from half-truth and untruth.

47. In the result and for the forgoing reasons, we allow the appeals. The impugned conviction of the accused-appellants and the sentences passed against them by the judgment and order, under appeal, are hereby set aside. The accused-appellants are held not guilty of the offences, which they stand convicted of, and they are hereby acquitted of the same under benefit of doubt.

48. Since the accused-appellant, Ajay Singh, is on bail, his bail bonds are hereby cancelled and his sureties shall stand discharged.

49. As the accused-appellant, Guddu Singh, is in

custody, he is directed to be released, forthwith, unless he is required to be detained in connection with any other case.

50. Let the Amicus Curiae be paid a fee of Rs. 5,000/-.

51. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the lower Court record.

(I. A. Ansari, J.)

Nilu Agrawal, J. : I agree.

(Nilu Agrawal, J.)

Prabhakar
Anand/AFR

U	✓	T	✓
---	---	---	---