

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.125 of 2010

[Against the judgment dated 16.12.2009 and the order of conviction dated 17.12.2009 passed by the Additional Sessions Judge, Fast Track Court No.5, Patna, in Sessions Trial No.1128 of 2006 & 977 of 2008 arising out Barh P.S. Case No.242 of 2004.]

1. Vivekanand Singh @ Viveka Pahalwan, &
2. Arvind Kuamr Singh, both sons of late Krishan Baldeo Singh, resident of village-Nadawan, P.S.-Barh, District- Patna.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance:

For the Appellant/s : Mr. Surendra Singh, Sr. Advocate
Mr. Akhileshwar Pd. Singh, Sr. Advocate with
Ms. Anita Kumari Singh, Advocate
Mr. Abhishek Anand, Advocate
For the State : Mr. S. N. Prasad, APP
For the Informant : Mr. V. N. P. Sinha, Sr. Advocate with
Mr. Shailesh Kumar Sharma, Advocate

CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH
&
HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA
ORAL JUDGMENT
(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)
Date: 10-09-2015

1. The Appellants have been convicted under Section(s) 302 and 149 Indian Penal Code and sentenced to undergo rigorous imprisonment for life as also under Section(s) 307/149 Indian Penal Code and Section 27 of the Arms Act but no separate sentence has been awarded under the above two counts by the Additional Sessions Judge, FTC 5, Patna, in Sessions Trial No.1128 of 2006 & 977 of 2008 vide judgment and order of

conviction dated 16.12.2009 and 17.12.2009 respectively.



2. The case of the prosecution, according to PW 3, Rajnesh Kumar, son of PW 8, Parmanand Singh, is that on the date of occurrence i.e. 01.07.2014 at about 6.30 AM while PW 7, Anant Singh, along with Parmannd Singh were present near the *Samudayik Bhawan* suddenly from the house of the Appellant Vivekanand Singh, he himself, Arbind Singh, Appellant No.2, Kamlesh Singh and Sanjay Singh emerged armed with AK 47 along with 10-12 unknown persons. Sanjay Singh fired at Anant Singh, whereas, Appellant, Vivekanand Singh, is said to have fired which hit the deceased Umesh Ram, servant of PW 7. He started to run away in an injured condition but fell down at a little distance. Arvind Singh is said to have fired on injured Ram Uchit Mistri but he too ran for his life. PW 8, his father, was shot by Kamlesh Singh on account of which he fell down in injured condition. The accused persons thinking that all the accused persons had died fled away towards south. All the injured were removed to Sub-Divisional Hospital, Barh, where they were given primary treatment and sent to Patna Medical College & Hospital. He stated that a number of persons, who had gathered around, had seen the occurrence.

3. Before adverting to the evidence adduced on behalf of the prosecution, it would be important to note the

submission of the respective counsel(s) so as to test the evidence on its basis.

4. Counsel for the Appellants, submits that, in fact,
- (i) The deceased had not been shot at in front of *Samudayik Bhawan* but in front of the house of Rameshwar Sah, which was not visible to any of the eye witnesses. The story in regard to witnessing the same has been concocted by the witnesses later on.
 - (ii) The *fard beyan* is ante dated document, inasmuch, as it reached the Court two days later and, hence, should not be relied upon.
 - (iii) The evidence of PWs 7 and 8 is not fit for reliance, inasmuch, as where PW 7 names only one person in his statement under Section 161 Cr. P. C. and PW 8 has not been examined at all.
 - (iv) Further submission is that PW 3, the Informant, was not an eye witness for the reason that his version about assault on Ram Uchit Mistri is not supported by medical evidence. The fact that he did not take his own



father (PW 8), who was injured, to the hospital also makes his presence suspicious. He was also unable to give details about the persons, who had taken his father and other injured to the hospital for this reason.

- (v) The evidence of PW 6, the Investigating Officer, suggests that none of the witnesses were present at the place of occurrence and the entire story has been concocted later on. As per the records, the *fard beyan* of the Informant was recorded after the Inquest Report was prepared and, therefore, it is hit by Section 162 Cr. P.C.
- (vi) Further since enmity was previously going on between the parties, there is every chance of them having been falsely implicated.
- (vii) In reply to the citation of the counsel for the Informant that the investigation was unfair, he submits that nowhere PW 6 has been suggested to this effect as also in the Protest Petition (Ext.2) which was filed much later on 04.03.2005, there is no corroboration of the



allegations. Submission is that accused should be given the benefit of the lapses having been committed by the Investigating Officer. It was because there are major contradictions in the statements recorded under Section 161 Cr. P.C. the Informant is now raising the claim with regard to collusive investigation.

5. He relies upon the decisions reported in *AIR 1977 SC 381 (Namdeo Daulata Dhayagude & Ors. Vs. The State of Maharashtra)* on the proposition that when there are serious contradictions in the prosecution case the evidence of the witnesses should be rejected. In a decision reported in *AIR 2012 SC 280 (Shivlal and another Vs. State of Chhatisgarh)*, the effect of late reaching of the First Information Report in the Court had been considered and in the circumstances it had to be seen with certain amount of suspicion. Moreover, as held in the decision reported in *AIR 1988 SC 1158 (Awadhesh and another Vs. State of Madhya Pradesh)* paragraph 10 and *AIR 2006 SC 2500 (Budh Singh and others Vs. State of UP)* paragraph 33 and 36, when medical evidence is contrary to the ocular evidence the prosecution case should be rejected as a whole.

6. On the other hand, submission of the counsel for



the Informant, which submission has been adopted by the State, is that right from the start the Investigating Officer had been gained over by the accused persons. The First Information Report is fully supported by the Injury Report, Post Mortem Examination Report and the objective evidence and hence, there is no reason to discard the prosecution case. Moreover, the absurd suggestion that the deceased died on account of police firing further goes to show how flimsy the defence of the Appellants was. Even conceding that both the parties were criminals, their evidence has to be tested on the anvil of truth and thereafter acted upon in accordance with law. The fact that Investigating Officer for some reason or the other was gained over is evident from the fact that the statement of PW 7, who had been injured and hospitalized, had been recorded after much delay. PW 8, Parmanand Singh, who had been removed to Barh Sub-Divisional Hospital, was not examined for the reasons best known to the Investigating Officer. The conduct of the Investigating Officer further shows that right from the start his intent was not to investigate the case with honesty and somehow botch-up the prosecution case. Minor contradictions like the evidence of the witnesses that the deceased had been shot at while he was running away should be viewed as a minor contradiction and in the light of the Post Mortem Examination Report. Further,



the statements under Section 161 Cr. P. C. were only for general corroboration and minor contradictions should not be gone into. The fact that Ram Uchit Mistri (PW 4) does not himself support the fact of being shot at by the Appellant No.2 should not be viewed harshly since other witnesses, who had seen the occurrence, have supported the fact of his sustaining injury at the hands of the accused. He further relies upon some decisions on various proposition i.e. (2012) 8 SCC 263 (*Dayal Singh and others Vs. State of Uttaranchal*) where it was held that if the Investigating Officer's evidence is found untrustworthy, it does not necessarily mean that the prosecution case has to be thrown out. Further, in a decision reported in (1999) 5 SCC 96 (*State of Haryana Vs. Bhagirath and others*), it has been held that if the medical evidence supports the prosecution case no further corroboration is required.

7. It is in the above context that we proceed to examine the prosecution case. The prosecution has examined altogether 13 witnesses. PW 1, Sujeet Kumar, PW 2, Tripti Singh, PW 3 Rajnesh Kumar, PW 4, Ram Uchit Mistri, PW 7, Anant Singh, and PW 8, Parmanand Singh, are eye witnesses out of whom PW 4, Ram Uchit Mistri, PW 7, Anant Singh, and PW 8, Parmanand Singh, are injured. It would be relevant to note herein itself that injured PW 4, Ram Uchit Mistri, did not support the fact

of identification and was declared hostile on this point.

8. PW 5, Dr. Moti Lal Das, is said to have held Post Mortem Examination of the deceased, whereas, PW 9, Dr. Narendra Prasad, is the person, who had operated upon PW 7 and PW 13, Dr. Kumar Mahendra Pratap, was the doctor at Sub-Divisional Hospital, Barh, who had examined the three injured i.e. PW 4, PW 7 and PW 8. .

9. PW 6, Chandra Shekhar Kr. Sinha, is the main Investigating Officer, whereas, PW 10, Nisar Ahmad, is the second Investigating Officer, who is merely formal in nature.

10. PW 11, Rajeev Kumar, and PW 12, Rakesh Kumar, are the witnesses on the point of Inquest Report and seizure of articles at the place of occurrence respectively.

11. Now to examine the evidence of the eye witnesses. It would be important to note that PW 1 has not been named in the First Information Report. He has stated that on the date of occurrence while he was standing near *Samudayik Bhawan* next the well where PW 2, Tripti Singh, PW 7, Anant Singh, PW 8, Parmanand Singh, and PW 4, Ram Uchit Mistri, were sitting around, the accused persons suddenly came from the house of Vivekanad Singh. He describes that four of the persons were holding AK 56. Sanjay Singh is said to have fired on Anant Singh



which hit him on the chest. Vivekanand Singh (Appellant No.1) is said to have fired at Umesh Ram which hit him and then he started to run towards south. Then Arvind Singh is said to have fired at Ram Uchit Mistri (PW 4) which also hit him and then Kamlesh Singh is said to have fired at Parmanand Singh which hit him on the arm. He fell down and his hand was broken. In his cross-examination, he stated that he had helped the injured to be transported to the car from where they were taken to the hospital and also that the occurrence had taken place within 1½ -2 minutes. He also explains that Umesh Ram had been shot at within four seconds. In his cross-examination, his attention was drawn towards the place of occurrence and to the earlier statement before the police to which he had denied that he had not stated that Umesh Ram had been shot at in front of the door of Rameshwar Sah or that Parmanand Singh had broken his hand on falling down.

12. PW 2, Tripti Singh, is the next eye witness, who stated that he was present at the well of *Samudayik Bhawan*, where, PW 1, PW 4, PW7, PW 8 were also present. It was then suddenly the Appellants along with some others came out of the house of Appellant No.1 and once again repeats that Appellant No.1 fired at Umesh Ram and that Sanjay Singh fired at Anant Singh which hit him on the chest and Kamlesh Singh fired at Parmanand Singh and



Arbind Singh fired at Ram Uchit Mistri (PW 4). His attention was also drawn to the place of occurrence. It appears an attempt has been made by the defence to demonstrate that the house of Rameshwar Sah could not have been visible from the *Samudayik Bhawan*. Importantly, his attention was drawn to his earlier statement under Section 161 Cr. P. C. to the effect that he was not an eye witness and, in fact, he had heard merely from the villagers as to how the three were injured and the deceased had been shot at by the accused persons.

13. PW 3, Rajnesh Kumar, is the Informant and an eye witness. He has stated in his evidence that on the date of occurrence while they were sitting around near the well at the *Samudayik Bhawan* the accused persons came out of the house of Vivekanand Singh and Vivekanand Singh is said to have fired at the chest of the deceased at which he ran towards the house of Rameshwar Sah and fell down in the Gali. Sanjay Singh is said to have fired at Anant Singh, Kamlesh Singh at PW 8, Parmanand Singh, and Arbind Singh at PW 4, Ram Uchit Mistri. He tried to describe the place of occurrence as also the house of Rameshwar Sah. He stated that the dead body of Umesh Ram was in the Gali of Rameshwar Sah. He explains as to how the injured were removed to the hospital and he himself did not go along with his father to the



hospital. His attention was drawn to his further statement that he himself had tried to run into the Gali where Vivekanand Singh fired at Umesh Ram due to which he died. He explains that the deceased in a fit had started to run and fell down in front of house of Rameshwar Sah. His attention was drawn to the Protest Petition (Ext.2) but that does not materially affect the prosecution case.

14. PW 4, Ram Uchit Mistri, an injured was declared hostile and hence, his evidence does not need any discussion.

15. PW 7, Anant Singh, next eye witness stated that while he was sitting at the well of the *Samudayik Bhawan* along with PW 3, PW 8, the accused persons came out of the house of Appellant Vivekanand Singh and thereafter Sanjay Singh fired at him on the chest, whereas, Appellant No.1 fired at Umesh Ram, his servant which hit him on the chest at which he started running towards south. Arbind Singh fired at Ram Uchit Mistri and Kamlesh at Parmanand Singh which hit him on the hand. He stated that as to how he was removed to the hospital at Barh where he was given first aid and then referred to Patna. He stated that PW 8, Parmanand Singh, had been treated at Barh, whereas, he himself was treated in the clinic of PW 9. He stated that his statement was not recorded by the police so he had given an application before the Court only then his statement was recorded. No doubt, his cross-



examination is lengthy but it is more in the reference to the earlier history of dispute between the two parties. Once again his attention was also drawn to the topography of the place where occurrence took place and that he had not stated about the presence of PW 4 and the deceased at the place of occurrence. He stated that about 20-25 shots had been fired. He stated that he had seen the police car at the Barh Hospital, but how they had reached there, he did not know and he did not give there any statement to them. His attention was also drawn to the earlier statement in regard to Appellant No.1 having fired at the deceased. Once again, suggestion was given to this witness that, in fact, the occurrence had taken place when the police picket had fired at the injured and the deceased and the occurrence had not taken place in the manner as suggested by the prosecution.

16. PW 8, Parmanand Singh, who is also an injured eye witness, has stated that on the date of occurrence while he was sitting at the *Samudayik Bhawan* near the well along with Anant Singh, deceased Umesh Ram etc., suddenly the accused persons came out of the house of Vivekanand Singh and started to fire. Anant Singh is said to have sustained injury by the shot fired by Sanjay Singh, whereas, the deceased by Appellant No.1 Vivekanand Singh and Ram Uchit Mistri by Arbind Singh and he



himself by Kamlesh Singh. He stated that immediately thereafter he was taken to Barh Hospital in a car where the injured were checked up. In cross-examination, attempt was made to ask about the topography of the place and he describes it as the earlier witnesses had done. He stated in his cross-examination that when he was in Barh Hospital, the police had gone there and he had given statement to the Police Officer. However, there is no record of any statement. It appears that he was not an indoor patient and used to visit the hospital as outdoor patient for treating his wounds.

17. This is all the discussion on the eye witnesses from which it appears that evidently PW 2, Tripti Singh, was a hearsay witness in his earlier statement,

PW 4, Ram Uchit Mistri, an injured did not support the prosecution case,

Parmanand Singh (PW 8) was never examined by the Investigating Officer. The effect of the aforesaid shall be considered at the relevant stage.

18. Thus, as of now we find that PW 1, Sujeet Kumar, PW 3, Rajnesh Kumar, and PW 7, Anant Singh, have fully supported the case of the prosecution as given out in the First Information Report.

19. As for medical evidence, we find that PW 5, Dr.

Moti Lal Das, held post mortem examination of the deceased and found following injuries on his person:

1. Rigor mortis was present on the whole body. Mouth and eye closed
 2. External injuries:- Following ante mortem injuries were found:
 - (i) Lacerated wound $\frac{1}{2}$ " radius with inverted black margin over chest on the left side below left cavical, track of wound deep to chest cavity, being wound of entry.
 - (ii) Lacerated wound 1" radius with everted margin over back on the left side at level of scapular spine, track deep to chest cavity, being wound of exit.
- Injury No.(i) communicated to injury no.(ii) on dissection

20. We, thus, find that the Post Mortem Examination Report also fully supports the prosecution case

21. The next doctor, PW 9, Dr. Narendra Prasad, is the Surgeon, who had held operation of PW 7. He stated that he had found following injuries:

- (i) The bleeding through wound of entry and exit.
- (ii) 4th rib was excised.
- (iii) Also part of 6th rib was excised
- (iv) There was injury to lower lobe of right lung
- (v) There was also large hemothorax with large amount of clotted blood.

The blood clots were removed. Haemostasis was secured and lower lobe of right lung was sutured; two drains (i) through the 7th space in posterior auxiliary line and (ii) through 5th space in anterior auxiliary line were made and the drains were provided with water seal connection.

Wound of entry was at anterior parasternal region 2 cm x 1 cm x cavity deep with bleeding and wound of exit was 4 cm x 3 cm with bleeding plus.

22. His evidence also corroborates the version given by the eye witnesses, inasmuch, as an injury on the chest was found on his person caused by fire arm.

23. PW 13, Dr. Kumar Mahendra Pratap, the doctor at Barh Sub-Divisional Hospital has proved Ext.12 which was injury report of PW 8. He stated that he found following injuries:

- (i) One lacerated wound of entry 1" radius with inverted margin tract size over anterior surface of right arm.
- (ii) One lacerated wound of exit of injury No.1 with everted margins 2" x 1" over lateral surface of right arm. Injury No.2 was communicated to the Injury No.1.
- (iii) Swelling and tenderness left shoulder.

24. It appears that subsequently he proved the entries in the medical registers maintained at the hospital with regard to PW 4, Ram Uchit Mistri, PW 7, Anant Singh, and PW 8, Parmanand Singh. Where, the injuries of Anant Singh (PW 7) is concerned, he stated that entries were made to the following effect:

- (i) One lacerated wound of entry ½" radius with charred and inverted margin right back of chest tract size
- (ii) One lacerated wound of exit of injury no.1 of 1" radius on right front of chest with everted margin. It was cavity deep.

Injuries of Ram Uchit Mistri (PW 4) were as follows:

- 
- (i) One lacerated wound of entry ½” radius with charred and inverted margin track size on right side of the back of the chest.
 - (ii) One lacerated wound exit of injury No.(i) 1” radius cavity deep on right front of chest.

25. He appears to have been recalled to explain as to how there was disparity as of his opinion and the opinion of PW 9 in regard to the injuries of PW 7. He stated that he had noted the injuries in the register only on memory and his urgency was only to ensure that after having given first aid the injured be removed for better medical treatment. In such circumstances, the contradiction between the two Doctors in regard to injuries on PW 7 is immaterial. Also we find that all that PW 13, the Doctor, at Barh had done was to pack the injuries with gauge. He does not seem to have closely examined the injuries which is understandable since he immediately referred him to PMCH.

26. PW 12, Rakesh Kumar, was a witness on the articles gathered at the place of occurrence and proved Ext.5.

27. PW 11, Rajiv Kumar, son of Parmanand Singh and brother of the Informant was a witness of the Inquest Report, who proved the Ext.10.

28. This is the analysis of the evidence with regard to the eye witnesses and other corroborative witnesses adduced on

behalf of the prosecution.

29. Only the evidence of PW 6 and PW 10, the two Police Officers is left to be scrutinized now.

30. We find from the evidence PW 6, Investigating Officer, that he reached the place of occurrence when he got information at Athmalgola Police Station that an occurrence of firing had taken place in the village. He learnt that Dy. Superintendent of Police, Barh, had already proceeded there and so, he immediately went to the place of occurrence. He stated that he recorded the statement of Rajnesh Kumar (PW 3) and marked the First Information Report as Ext.1. He learnt that all the injured had already been removed. He also stated that while he was in the village, he learnt that crying was coming out from the house of Umesh Ram at which he entered into the courtyard and found his dead body there. He prepared Inquest Report in presence of two witnesses and inspected the place of occurrence which in his opinion was located at two spots; one at *Samudayik Bhawan* and the other in the Gali where the house of Rameshwar Sah is situated. He prepared the sketch map which is marked Ext. B by the defence. He stated that he went to Barh Hospital as also visited PMCH looking for PW 4 and the clinic of PW 9 where PW 7 was admitted. His attention was drawn to the earlier statements of PW 1, PW 2



and PW 7 to the effect which has already been discussed earlier. His evidence is interesting since it indicates as to how the investigations are done by the supposedly responsible Police Officers which goes so blatantly against the interest of justice.

31. We also find from his evidence that even though he had prepared the Inquest Report on which he had got two witnesses to sign but he did not examine them. Similarly, when he prepared seizure list, he got affixed signature of two witnesses but he did not think it necessary to examine them. He stated that he had missed examining them. Surprisingly, even though he goes to Barh Sub Divisional Hospital, he does not examine PW 8, an injured, who had been examined there. The positive statement of PW 8 is that he had met the Investigating Officer and given him statement but there is no record of the same in the Case Diary. Also we find that he had gone to PMCH where he had heard that PW 4, Ram Uchit Mistri, was treated and he looked around for him but did not find him there and hence, did not examine him. He did not even make an attempt to procure the Injury Report and asserted that he had made such an effort but did not make entries of the same in the Case Diary. Further, he examined PW 7 on 06.08.2004 i.e. more than a month later. He did not send the cartridges and arms of the fire arm collected at the place of occurrence for specialized testing.

He stated that he had made sketch map of the place of occurrence and on going through the Ext.B, we find that the most important point as to where the house of Rameshwar Sah was located upon which so much argument has been advanced by the defence has not been mentioned.

32. No doubt, in the conventional wisdom of the Court every such disadvantage should ordinarily go to the accused but as time has progressed this view has undergone a change since now it is understood that interest of the prosecution and the Investigating Officer may be distinct and sometimes even opposing hence, the prosecution should not suffer for the lapses of the Investigating Officer.

33. In the present case, we find that there are overtones of political persons being involved on both sides and there appears a third force was working behind the scenes. In such circumstances, it is difficult for us to place any reliance on the statement of Investigating Officer even where contradictions of the eye witnesses are concerned. These contradictions have no meaning when we view the collusive conduct of the Investigating Officer.

34. The argument of the accused that prosecution should have suggested to the Investigating Officer that he had done collusive investigation is not acceptable, inasmuch, as the

prosecution has not declared him hostile where the contents of his recording are concerned. It is only when this Court looks at the manner in which he had conducted investigation, we find that he was not above suspicion.

35. Under such circumstances, we have to even disregard the fact that First Information Report reached Court two days later. We cannot attribute it to the lapses of the prosecution but to the conduct of the Investigating Officer. Further, with regard to the witnesses not having been able to see the actual shooting of the deceased at the hands of the Appellant Vivekanand Singh also has to be rejected because we did not find any contradiction in this regard. The consistent story of the prosecution is that Ram Uchit Mistri was shot at by the Appellant No.1 whereafter he started running towards Gali of Rameshwar Sah and fell down. No doubt there are minor contradictions as to where the deceased was shot but when there is no material to suggest that whether the 'Gali' was not visible to the witnesses, such contradictions have to be ignored. We cannot possibly speculate on this point and if, at all, the witnesses have given minor variations in their version in regard to the actual place where shooting of Umesh Ram had taken place that would not materially affect the prosecution case. More so, because the consistent evidence is that the occurrence took place within

minutes where there is every possibility of not recording the exact manner of the occurrence visually, and reproducing the same in the Court minutely.

36. In the light of the above discussion which meets the arguments of the Defence and finding that the decisions relied upon by the Appellants also does not have any bearing on the facts of the present case, we are inclined to hold that there is no merit in the appeal and hence, the same is **dismissed**.

37. Bail bond of the Appellant No.2, Arvind Kumar Singh, who is on bail, is hereby cancelled. He is directed to surrender before the Court below to serve out the sentence.

38. The Court below is also directed to ensure appearance of Appellant No.2-Arvind Kumar so that he may serve out the sentence.

(Anjana Prakash, J)

(Rajendra Kumar Mishra, J)

AFR
J.Alam/-

U		T	
---	--	---	--