

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) NO.94 OF 2014
WITH
CRIMINAL APPEAL (DB) NO. 252 OF 2014

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AGAINST THE JUDGMENT OF CONVICTION, DATED 18.01.2014,
AND THE ORDER OF SENTENCE, DATED 22.01.2014, PASSED BY
SHRI SHAILENDRA KUMAR PANDEY, SPECIAL JUDGE, SIWAN, IN
SESSIONS TRIAL NO. 561 OF 2011, ARISING OUT OF DARAULI
POLICE STATION CASE NO. 13 OF 2007

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1. BABBAN RAJBHAR S/O LATE RAM CHANDRA RAJBHAR R/O
VILL- AMARPUR, P.S- DARAULI, DISTT- SIWAN

.... **APPELLANT (IN CR. APP. (DB) NO. 94 OF 2014**
WITH

1. BIRENDRA GOND SON OF SRI RAMASHRYA GOND RESIDENT
OF VILLAGE-AMARPUR, P.S.-DARUALI, DISTRICT-SIWAN

...**APPELLANT (IN CR. APP. (DB) NO. 252 OF 2014**
VERSUS

1. THE STATE OF BIHAR

.... **RESPONDENT (IN BOTH THE APPEALS)**

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Appearance :

(In BOTH THE APPEALS)

For the Appellants : Mr. Ajay Kumar Thakur, Advocate
Mr. Msd. Imteyaz Ahmad, Advocate
Mr. Ravi Ranjan, Advocate
Mr. Amit Kumar, Advocate
For the State : Mr. Ajay Mishra, A.P.P.

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

AND

**HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

JUDGMENT AND ORDER

ORAL

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date: 23-05-2016

Under challenge, in the present appeals, are the
judgment of conviction, dated 18.01.2014, passed, in
Sessions Trial No. 561 of 2011, by learned Special Judge,
Siwan, and the order, dated 22.01.2014, whereby various
sentences have been passed against the accused-appellants.



2. By the impugned judgment, learned trial Court has convicted the accused-appellants, under Sections 302 and 120B read with Section 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959. Following their conviction, under Sections 302 and 120B read with Section 34 of the Indian Penal Code, the accused-appellants have been sentenced to undergo life imprisonment and pay fine of Rs.5,000/- each and, in default of payment of fine, further to undergo rigorous imprisonment for a period of one year. This apart, upon their conviction under Section 27 of the Arms Act, 1959, the accused appellants have been sentenced to undergo rigorous imprisonment for a period of three years. Both the sentences have been directed to run concurrently.

3. The case of the prosecution, as unfolded by the First Information Report, may, in brief, be described thus:

(i). Two days before the occurrence, which had taken place on 24.01.2007, while the informant, Subhawati Devi, was with her brother, accused Birendra Gond and Muykhiya Baban Rajbhar came to the house and, in presence of the informant, they threatened her brother, Shiv Narayan Rai, that he would be killed unless her brother compromised the case which was pending between them, but her brother did not agree. In consequence thereof, on 24.01.2014, at about 07:30 PM, while she (informant) was sitting in front of fire by the side of the door of the *baithka* of the house of Hari



Choudhary, four persons, covering themselves with *chadar* (pieces of clothe), came and, among them, accused Birendra Gond and Baban Rajbhar were also present. On their arrival, accused Mukhiya Baban Rajbhar asked the informant's brother, Shiv Narayan Rai, if he would compromise the case or not. When the conversation between Shiv Narayan Rai, on the one hand, and Mukhiya, Baban Rajbhar, accompanied by their associates, on the other hand, was going on, Shiv Narayan's wife, Ramwati Devi, and his mother, Saraswati Devi, also came to the place, where the accused persons and Shiv Narayan Rai were present. When Shiv Narayan Rai refused to compromise the case, accused Baban Rajbhar told Birendra Gond that since he (Shiv Narayan Rai) would not compromise the case, it would be better to send him up and, reacting to the statement so made, accused Birendra Gond took out a country made pistol, which he had kept covered by the chadar. Noticing the fire-arm, as Shiv Narayan Rai stood up, accused Birendra Gond fired on the chest of Shiv Narayan Rai, whereafter Shiv Narayan Rai fell down and accused persons fled away.

(ii). On *hulla* being raised by the informant and others, many co-villagers came and one of their co-villagers informed the police, whereon the Officer-in-Charge (PW 3), Darauli Police Station, came to the place of occurrence, where the informant lodged the *fardebayan*, which was recorded by

PW 3.

(iii). Treating the said *fardbayan* as *First Information Report*, Darauli Police Station Case No. 13 of 2007, under Sections 302/120B/34 of the Indian Penal Code read with Section 27 of the Arms Act, 1959, was registered against the present two accused-appellants, namely, Birendra Gond and Baban Rajbhar, along with two other unknown accused persons.

(iv). *Inquest* was held over Shiv Narayan Rai's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, *charge sheet* was laid, under Sections 302/120B/34 of the Indian Penal Code read with Section 27 of the Arms Act, 1959, against the two accused-appellants, namely, Birendra Gond and Baban Rajbhar.

4. At the trial, when charges, under Section 302 and 120B read with Section 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959, were framed against both the accused aforementioned, they pleaded not guilty thereto.

5. In support of their case, prosecution examined altogether 4 (four) witnesses including the doctor and the Investigating Officer. The accused were, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure and, in their examinations aforementioned, 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 implication in the false case due to politics. No evidence was adduced by the defence.

6. Having, however, reached the finding that the accused-appellants were guilty of the offences as indicated above, learned trial Court has convicted them accordingly and consequent thereupon, sentences have been passed against the accused-appellants as have been mentioned above.

7. Aggrieved by their conviction and the sentences, which have been passed against them, the two accused aforementioned, as convicted persons, have preferred these appeals.

8. Both these appeals having arisen out of the impugned judgment of conviction, dated 18.01.2014, and the impugned order of sentence, dated 22.01.2014, these appeals have been heard together and are being disposed of by this common judgment and order.

9. We have heard Mr. Ajay Kumar Thakur, learned Counsel, for the appellants, and Mr. Ajay Mishra, learned Additional Public Prosecutor, for the State.

10. While considering the present appeals, what attracts the attention, most prominently, is that according to the evidence of the Investigating Officer (PW 3), while (PW 3) was functioning as the Officer-in-Charge, Darauli Police Station, he (PW 3) received information, on 24.01.2007, on

telephone, that one person had been killed in the firing and it was in order to verify the correctness of the information so received that he (PW 3) reached the place of occurrence and came across the dead body of Shiv Narayan Rai.

11. It is, thus, abundantly clear that even before the informant (PW 1) gave her *fardbayan*, which became basis for registration of the police case aforementioned, the police had already been informed of the commission of a *cognizable offence* of murder, though the identity of the deceased as well as the accused had not been known. Nonetheless, if we may repeat, PW 3 already stood informed that a person had been shot dead and it was to verify the correctness of this information that PW 3 visited the place of occurrence.

12. In the circumstances pointed out above, it is clear that investigation into the present case has commenced even before the statement (Exhibit-2/1), which Subhawati Devi (PW 1) had given to the police, describing the occurrence, was recorded as *fardbayan* and treated by the police and the learned trial Court as the *First Information Report*.

13. What logically follows from the above discussion is that the *information*, which had been received by PW 3 (Officer-in-Charge, Darauli Police Station), and set the machinery of law into motion for determination of the

question as to who had been killed, how he had been killed and who had killed him, must be regarded to have given rise to investigation. Consequently, the statement of PW 1, which has been recorded as *fardbayan*, must be treated as PW 1's statement recorded, under Section 161 of the Code of Criminal Procedure, during the course of investigation.

14. In the light of what has been discussed above, it becomes abundantly clear that the telephonic *information*, received by the Investigating Officer (PW 3), ought to have been treated as the *First Information Report* and the informant's statement (Exhibit-2/1), which has been treated as the *First Information Report*, ought to be regarded in law as a statement recorded under Section 161 of the Code of Criminal Procedure and can be used only for the purpose of contradiction by the defence and with, of course, leave of the Court, by the prosecution too.

15. Bearing the above legal aspect in mind, let us come to the evidence of the informant, namely, Subhawati Devi (PW 1). What needs to be pointed out, at the very outset, is that it is the evidence of the informant (PW 1), around which revolves the entire case of the prosecution and, in fact, it is on her evidence that prosecution's case comes to rest. According to her evidence, on 24.01.2007, between 06:30 PM and 07:30 PM, the informant, her brother, Shiv Narayan Rai (since deceased), and Choudhary People, Dadan



Rai, Santosh Rai and Ramawati Devi, were present and at that time, four to five persons, including accused Birendra Gond and Baban Rajbhar, came and told her (informant's) brother, Shiv Narayan Rai, to comprise the case, or else, he would be killed and, then, Shiv Narayan Rai (since deceased) tried to flee away, but accused Baban Rajbhar caught hold of him and gave order to his associates to kill him and, on his order, accused Birendra Gond fired from his fire-arm on the chest of Shiv Narayan Rai, who, having sustained bullet injury, fell down and, then, the accused persons fled away.

16. While considering the veracity of the evidence, so given by the informant (PW 1), it may be noted that according to the First Information Report, the place of occurrence was by the side of the door of the *baithka* of the house of Hari Choudhary. However, since the contents of the First Information Report has not been put to PW 1, we need to ignore the description of the place of occurrence, which PW 1 had given in the First Information Report. What must, however, be taken note of is that according to her evidence, the occurrence took place in front of the door of her house; whereas the evidence of the Investigating Officer (PW 3) shows that place of occurrence is situated at the *bathan* of Dhrub Narayan Choudhary, where the dead body was found, and on the north of the place, where the dead body was found, it is the house of Rambali Choudhary, and on the

eastern side of the place, where the dead body was found is the house of Sahannuma Jamin and *bathan* of Hari Choudhary.

17. We might have, perhaps, ignored the inconsistency in the place of occurrence, which has so appeared in the evidence of the informant, what cannot be, and must not be, ignored is that according to the evidence of the informant (PW 1), at the time, when her brother, Shiv Narayan Rai, was sitting, her sister-in-law (Ramwati Devi) and her mother-in-law (Saraswati Devi) were present. In fact, the informant has further deposed that at the time, when the occurrence took place, Dadan Rai and Santosh Rai were also present; but none of these witnesses was examined by the prosecution. No explanation has been offered or is discernible from the materials available on record. There is, therefore, no escape from the conclusion that adverse inference needs to be drawn, in the facts and attending circumstances of the present case, against the prosecution, the inference being that had these witnesses been examined, their evidence would not have supported the case of the prosecution and that is why, they have been withheld. This inference gets strengthened for two more reasons. Firstly, the informant, according to her own evidence, came to her parental house after about 7 (seven) years of her marriage. Whether she was really present, at her parental house or not on the day and

time of the occurrence, could have been best proved by the evidence of her sister-in-law and her mother, but none of these two persons was examined by the prosecution, and there is neither any explanation for their non-examination nor is there any explanation available on the materials on record in this regard.

18. Coupled with the above, we notice from the evidence given by PW 1, that she identified, at the trial, an accused person as accused Baban Rajbhar.

19. However, it is the submission made on behalf of the appellants that on 20.02.2013, when the evidence was so given by the informant, accused Baban Rajbhar was not present at all in the Court and it was accused Birendra Gond, who was present on being produced from custody by the Police. This position could not be disputed, in the light of the orders made by the learned trial Court, on 20.02.2013, meaning thereby that though the informant had identified one person as accused Baban Rajbhar, she did not really know accused Baban Rajbhar inasmuch as accused Baban Rajbhar was not present in the Court; rather it was accused Birendra Gond, who was present in the Court and wrongly identified by PW 1 as accused Baban Rajbhar.

20. Logically extended, it would mean that she (informant) did not know even accused Birendra Gond; or else, she would not have identified accused Birendra Gond as

accused Baban Rajbhar.

21. Because of the nature of evidence, which is available on record, the least, which ought to have been done by the learned trial Court, was to accord benefit of reasonable doubt to the accused persons inasmuch as we are clearly of the view that in the light of the evidence on record, which we have discussed above, it was too hazardous to convict any of the accused-appellants, particularly, when we find that the evidence, which the prosecution has adduced, is an admixture of half-truth and untruth and it is not only difficult, but wholly impossible to disengage the truth from the falsehood. The benefit of such a situation ought to have been given to the accused-appellants.

22. In the backdrop of what have been discussed and pointed out above, we are firmly of the view that the prosecution had failed, in the present case, to bring home the charges against the accused-appellants beyond reasonable doubt and that the accused-appellants were entitled to be accorded benefit of doubt.

23. In the result, and for the reasons discussed above, these appeals stand allowed. The impugned conviction of the accused-appellants and the sentences passed against them by the judgment and order, under appeal, shall accordingly stand set aside. Both the accused-appellants are held not guilty of the offences, which they were charged with,

and they are acquitted of the same under benefit of doubt.

24. Let accused-appellants, Birendra Gond and Baban Rajbhar, be set at liberty, forthwith, unless they are required to be detained in connection with any other case.

25. The Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Courts Record.

(I. A. Ansari, ACJ.)

(Chakradhari Sharan Singh, J.)

Prabhakar Anand/-

AFR/NAFR	NAFR
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