

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No 616 of 2017

Arising Out of PS.Case No. -63 Year- 2008 Thana -MOTIHARI TOWN District-
EASTCHAMPARAN(MOTIHARI)

=====

Umesh Sahani S/o Ramashish Sahni, resident of Village- Sukhlahiya, P.S.- Darpa,
District- East Champaran.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

WITH
Criminal Appeal (DB) No 460 of 2017

Arising Out of PS.Case No. -63 Year- 2008 Thana -MOTIHARI TOWN District-
EASTCHAMPARAN(MOTIHARI)

=====

Krishna Giri Son of Late Kapildeo Das, Resident of Village- Ramgarh Maha, P.S.-
Pipra Kothi, District- East Champaran (Motihari).

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

WITH
Criminal Appeal (DB) No 513 of 2017

Arising Out of PS.Case No. -63 Year- 2008 Thana -MOTIHARI TOWN District-
EASTCHAMPARAN(MOTIHARI)

=====

Muslim Miyan, son of Sahebjan Miyan, resident of Village- Bali Chak, P.S.-
Chakiya, District- East Champaran.

.... Appellant/s

Versus

The State of Bihar.

.... Respondent/s

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Appearance :
For the Appellant/s : Mr Surendra Singh, Sr Advocate
Mr Sangeet Deokuliar, Mr Rajesh Kr,
Mr Raj Shekhar, Advocates
For the S t a t e : Mr S N Prasad, APP
For the I n f o r m a n t : Mr Ajay Kr Singh, Advocate

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CORAM: HON'BLE MR JUSTICE KISHORE KUMAR MANDAL
And
HON'BLE MR JUSTICE MADHURESH PRASAD

CAV JUDGMENT

(Per: HONOURABLE MR JUSTICE KISHORE KUMAR MANDAL)

Date: 20-09-2017

Appellant Umesh Sahani (A1), Krishna Giri (A2) and Muslim Miyan (A3) stand convicted under Sections 302/34, 307/34 of Indian Penal Code, Section 27 of the Arms Act and Sections 3 of the Explosive Substances Act. They were sentenced to undergo rigorous imprisonment for life with fine having default clause and rigorous imprisonment for 10 years having default clause under Sections 302/34 of IPC and Sections 307/34 of IPC respectively. Rigorous imprisonment for 4 years was inflicted on them under Section 27 of Arms Act. Further, rigorous imprisonment for 10 years under Sections 3 of the Explosive Substances Act and rigorous imprisonment for 7 years having default clause under Section 4 of the Explosive Substances Act was also imposed. They were ordered to run concurrently. Aggrieved by the judgment of conviction recorded against them, the present appeals have been filed.

2 The occurrence had taken place inside the jail premises. The deceased, the informant and the accused appellants were then lodged in the Motihari Jail. PW 9 gave the *Fardbayan* (Exhibit 6) on 15.03.2008 at 9 pm alleging, inter alia, that on the date



of occurrence, both the informant and the deceased had been taken to Court for their appearance. The informant had returned to the jail premises earlier and was waiting for the arrival of the deceased Anil Singh @ Munna Singh. At about 4 pm, the deceased arrived at the jail gate in a different police van. Both of them entered into the jail premises and were proceeding towards their respective wards. The deceased was then lodged in Ward No 3. After entering the inner gate of the jail, the deceased was walking few paces ahead of the informant. Suddenly, the informant noticed A1 and A2 along with other accused appeared from behind Ward No 10. Seeing the accused persons, the informant gave a warning to the deceased but before he could be alerted, A2 and A3 hurled bomb(s) on him. Co-accused Mauje Lal Sahani then fired on him with his pistol as a result whereof he fell on the ground. As the victim was trying to recover, co-accused Sujay Pandey and A2 gave gunshot injuries to him from a close range causing injury on his head. Seeing the assault, PW 9 fled from the spot but he was chased by the appellants and other accused persons who resorted to firing on him. He, however, managed to run away and enclosed himself inside the jail ward and saved his life.

3 PW 10 is the Judicial Magistrate who was summoned to hold the inquest proceeding over the dead body of the deceased witnessed by PWs 2 and 7. Later, as it appears, the statements of some of the eye witnesses under Section 164 of Criminal Procedure



Code were recorded by him. Those statements are Exhibits-4 to 4/8. The autopsy on the dead body was performed within the jail premises itself by Dr R P Singh (PW 11) on 15.03.2008 at 11.10 pm. His post mortem report is Exhibit 5. The Investigating Officer seized four shells of empty cartridges, two live cartridges and also nuts, bolts and other pieces of bomb from near the place of occurrence. Such seizure was effected in presence of PWs 3 and 7. The Fardbayan (Exhibit 6) was recorded by Sub Inspector Roshan Kumar but was investigated by Ashok Kumar Sinha (PW 12). On conclusion of investigation, chargesheet was filed which ultimately led to the present trial. The judgment of conviction was recorded by Additional Sessions Judge XIV, East Champaran at Motihari in Sessions Trial No 494 of 2011.

4 The prosecution, with a view to prove the charges leveled against the appellants, examined 13 witnesses. A brief resume of the witnesses produced by the prosecution is as follows:-

5 PW 1 Munna Singh, PW 2 Nishant Kumar Singh, PW 3 Sanjay Singh, PW 7 Raju Singh and PW 9 Surendra Narayan Singh (the informant) are the jail inmates who have supported the prosecution case as an eye witness. PW 4 Pratap Narayan Singh was then posted as the Jail Superintendent. He was not present inside the jail when the occurrence was committed. According to him, he reached inside the jail premises after hearing the assault on the deceased. PW 6 Vishwanath Singh is the father of the deceased. He



too reached the jail gate after hearing the occurrence. His evidence does not throw much light on the case. He has narrated the background of the case. PW 8 S S Choudhary was then posted as the Jailor of the Motihari District Jail. He was at his quarters located outside the jail when he heard about the incident and reached the jail gate. After great difficulty, he could enter the jail premises two hours after his arrival at the jail gate as there was protest and brick batting. PW 10, as stated above, is the Judicial Magistrate who had conducted the inquest proceeding (Exhibit 15) inside the jail premises and had also recorded the statements of the eye witnesses. PW 11 Dr Rajendra Prasad Singh is the autopsy surgeon. During relevant time, he was posted as the jail doctor. He conducted the post mortem examination and proved the report (Exhibit 5). PW 12 Ashok Kumar Sinha is the Investigating Officer of the case. PW 13 Rajan Verma is a formal witness who has proved the inquest report (Exhibit 15).

6 While abjuring the charge, the appellants took a plea that they were not present at or near the place of occurrence. They had been implicated due to deep groupism and rivalry amongst the jail inmates which then prevailed inside the jail.

7 We heard Mr Surendra Singh, learned Senior Counsel for the appellants of Cr Appeals (DB) No 616 and 460 of 2017, Mr Raj Shekhar for the appellant of Cr Appeal (DB) 513 of 2017 and Mr S N Prasad, learned APP for the State assisted by Mr Ajay Kumar



Singh appearing for the informant.

8 The conviction of the appellants has principally been challenged by Mr Singh on the ground that the post mortem report and the evidence of the doctor (PW 11) completely discredits the prosecution case. The contradictions in the medical evidence are so fundamental that they completely disapprove the prosecution case as presented by the prosecution through the evidence of PWs 1, 2, 3, 7 and 9. He next urged that the evidence of two independent witnesses, who were the jail authorities, namely, PW 5 (Jail Warden) and PW 8 (Jailor) gives credence to the case of the defence that the manner of occurrence, as consistently described by the eye witnesses, has not firmly been established. They claimed to have heard only two sounds of explosions/firings. The counsel, however, has not much disputed the fact that the deceased died inside the jail premises on the relevant date and time of occurrence on receiving injuries caused by explosive substance and firearm. He only challenged the manner of occurrence. The learned Senior Counsel further argued that there is no convincing material to prove the charge leveled against the appellants under Sections 307/34 of Indian Penal Code. He drew attention of the Court to the relevant evidence of PWs 7 and 9 (informant) as also the statement of the accused recorded under Section 313 of Cr P C. It is also submitted that the prosecution case becomes very shaky as the seized articles from the place of occurrence were neither sent for



examination and opinion of the ballistic experts nor those articles were produced at the trial as the material exhibits. He relied on the judgment rendered in the case of *Bhajan Singh @ Harbhajan Singh & Others –Versus- State of Haryana (AIR 2011 Supreme Court 2552)* and also on the case of *Devilal & Another –Versus- State of Rajasthan (AIR 1971 Supreme Court 1444)* in order to contend that if the pivotal aspects of the prosecution case is not firmly established, the Court is not expected to propound a new story or theory to the imperil of the defence. Mr Raj Shekhar, learned Advocate appearing in one of the appeals adopted the submissions advanced by Shri Surendra Singh.

9 Mr S N Prasad, learned APP for the State supported the finding of guilt recorded by the trial Court. It has been submitted that the ocular account of the prosecution case described by PWs 1, 3, 7 and 9 proves the manner of occurrence beyond any doubt. In a case like this where several accused are assaulting the deceased, the witnesses, while deposing in Court, are bound to give evidence at some variance. They are either minor omissions or minor contradictions. If the core of the prosecution case is substantiated by their evidence, the Court should rely on the ocular account given by the eye witness even, to some extent, undermining the evidence of the doctor.

10 The main thrust of the defence is that the version with which the prosecution has come up is not supported by the



medical evidence. The defence has drawn our attention to the evidence of PWs 5 and 8 wherein they have stated about hearing two sounds of explosions from inside the jail premises. The eye witnesses, on the contrary, have stated about hurling of bombs followed by at least three firings at the deceased and of course firings while chasing the informant (PW 9).

11 We propose to first examine the contention of the appellants with respect to the guilt under Sections 307/34 of IPC. The prosecution case is that after the assault inflicted on the deceased, the accused persons ran after the informant with a view to kill him. There was also firing at him. PWs 1 and 2, who have been witnessing the occurrence from very inception, have, however, not said about the chase of the informant (PW 9) and resorting to firing on him by the accused appellants. Apart from PW 9 (informant), it is only PW 7 who has stated about the chase of the informant (PW 9) by the accused appellants. PW 9 of course has stated about an attempt by the appellants to kill him. He could save his life by securing himself inside the ward when the Constables and other persons present there retaliated and forced the accused to retreat without any assault on him. There is no evidence produced by the prosecution to support this part of the case narrated by PW 9 (informant) even though the attempt to assault him was allegedly made in presence of the Constables and other inmates present near the gate/door of the ward in which PW 9



had enclosed himself. That apart, the prosecution, while placing all relevant incriminating evidence before the appellants to solicit their response under Section 313 of Cr P C, only stated about a chase offered to PW 9 by the appellants. The relevant part of the evidence of PW 9 incriminating them for offences under Sections 307/34 of IPC was not put to the appellants. If that be so, then the prosecution cannot rely on the said part of the evidence. The criticism made by the counsel for the defence on this point, in our view, appears to be well founded.

12 As the main plank of the defence to challenge the conviction of the appellants is on the ground that the medical evidence fully discredits the prosecution case, it is apt to first notice the relevant findings of the autopsy surgeon (PW 11) in the post mortem report (Exhibit 5). The autopsy surgeon found the following ante mortem injuries:-

*“External examination – (i)
Extensive lacerated wound of 8” x 4” x soft tissue
upper bone deep with blackening and irregular
margin and there was blackening of skin around
the wound 8” in diameter. Foreign body was
recovered embedded in soft tissue on the spine.*

*(ii) Lacerated wound on left pinna 1-
1/2” x 1/4” x cartilage deep with margin blackened.*

*(iii) Wound of entry – Lacerated
wound of 1/4” x 1/4” x cavity deep over the left side
of bade of parietal region of the scalp, margin was
blackened and inverted.*

(iv) Wound of exit – Lacerated



wound of 1/3" x 1/3" x cavity deep over right temporal region of the scalp above and behind right ear. Both the wounds were communicating with each other [(iii) and (iv)] Margin everted.

(v) Lacerated wound of 1/3" x 1/4" x scalp deep on left side of occipital region of scalp.

On Dissection – Head and Neck – There was fracture of temporal and parietal bone with laceration of brain matter and intra cerebral haemorrhage.

Chest, lungs pale. Heart – Chamber of heart empty

Abdomen – All the abdominal viscera were pale and intact. Stomach – containing semi digested food materials. Bladder – empty.

Cause of injury – Injury No (i) caused by explosive material.

Injuries No (ii), (iii), (iv) and (v) were caused by firearm.

Time elapsed since death – within 12 hours.

Opinion – In our opinion, death was caused by haemorrhage and shock due to above mentioned injuries."

13 Having noticed the findings of the doctor in the post mortem report, we turn to the evidence of the eye witnesses. The evidence of PWs 1, 2, 7 and 9 firmly establish that as soon as the deceased walked up to the ward near the jail kitchen, A1 and A3 first appeared and hurled bombs on the deceased whereafter co-accused Mauje Lal Sahani fired at him as a result whereof he fell on the



pathway. As the victim was trying to recover, co-accused Sujay Pandey and A2 went close to him and fired at his head which resulted in his death. It has been submitted that if their evidence is accepted with regard to the manner of occurrence, the deceased should have received at least two injuries caused by bomb explosion and three injuries caused by firearm weapon whereas the doctor found only two injuries caused by firearms and one injury on the back caused by explosive substance. Injuries No (iii) and (iv) were found communicating to each other caused by firearm. It is stated that injury No (i) can well be associated with Injury No (ii). Injury No (v), although opined to have been caused by firearm, was only scalp deep and could have been caused by fall of the victim after receipt of the first injury caused by hurling of bomb on him as propounded by the prosecution at the trial. It was only a case of two firings and one bomb explosion. The defence has further relied on the evidence of PWs 5 and 8. They have spoken about hearing of two sounds, one was louder whereas another was minor/lesser. Relying heavily on their evidence, it is stated that louder sound could have been produced by bomb explosion whereas the lesser sound was due to the firing made by pistol. The doctor, however, found only one injury caused by bomb explosion and at least three injuries caused by firearm. Such contradictions in the evidence would render the evidence of the eye witnesses to a great extent irreconcilable.



14 Many of the eye witnesses, except PW 3, have consistently stated that A1 and A3 first appeared armed with firearms and explosives and hurled bomb on the deceased. He received injury in his back whereafter A3 fired from his pistol. Subsequently, A2 and co-accused Sujay Pandey also arrived and fired on the head of the deceased from a close range. No witness, however, has emphatically stated about receipt of two bomb injuries by the victim. In a situation like this, which was unexpected and terrifying, the Court shall not expect a graphic detail of the manner of occurrence from the eye witnesses while narrating the incident several years after the occurrence. In *Nand Kumar –Versus- State of Chattisgarh (2015 (1) PLJR 47 (SC)*, the Supreme Court, in the matter of appreciation of evidence by the Court, in paragraph 33 of the judgment, stated thus:

“33. In our considered view, when several people participate in commission of an offence with deadly weapons and attack one or more persons with an intention to kill them then the witnesses who are closely related to the victim(s) are not expected to describe the incident in graphic detail and with such precision that which member and in what manner he participated in the commission of offence. Their evidence is required to be appreciated in its totality.”

15 Turning to the medical evidence, the doctor found the dimension of Injury No (i) such which could have been caused by the explosive substance. In fact, he found the said injury caused by explosive substance. The foreign body was recovered embedded in



the soft tissue on the spine. Injury No (ii) was again caused by firearm which, however, only injured the left pinna of the deceased. Injuries No (iii) and (iv) received by the deceased on the parietal region of the scalp, having blackened margin, were opined to be one of entry and one of exit. There is yet another lacerated wound of 1/3” x 1/4” x scalp deep on the left side of the occipital scalp which again was found caused by firearm. The defence has submitted that Injury No (ii) should not be treated as a separate injury. It must have been caused while the victim was inflicted Injury No (iii) which was communicating to Injury No (iv). We are not prepared to accept the said proposition in view of the specific finding of the doctor. Injury No (ii) was opined a distinct injury caused by firearm causing not much damage.

16 Seen thus, in our view, the findings of the doctor would not be totally irreconcilable with the ocular account given by the witnesses. We may usefully refer to support the said view expressed by Supreme Court in the case of *Darbara Singh –Versus- State of Punjab (2012) 10 Supreme Court Cases 476*).

17 Mr Singh has relied on the case of *Bhajan Singh @ Harbhajan Singh (supra)*. That was a case where the appellant was acquitted by the trial Court. On appeal, the judgment of acquittal was set aside by the High Court. The accused appellants had approached the Supreme Court. While appreciating the entire evidence, the Apex



Court, in relation to the appreciation of evidence running to some extent counter to the medical evidence, held as under in paragraph 23:

“23. Thus, the position of law in such a case of contradiction between medical and ocular evidence can be crystallized to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. [Vide: Abdul Sayeed (AIR 2011 SC (Cri) 964 : 2010 AIR SCW 5701) (supra)].”

18 We have noticed and held above that the objective finding of the doctor is reconcilable to the prosecution case. It is settled legal proposition that while appreciating the evidence of a witness, minor discrepancy on trivial matters, which do not affect the core of the prosecution case, should not prompt the Court to reject the evidence in its entirety. We are also mindful of the situation created inside the jail. An inmate of the jail was attacked by several co-inmates. An unexpected scene was created. The witnesses must have been petrified. They are not expected in such situation to give the account of the incident with precision. Some sorts of contradictions or improvements are bound to occur in the statement of the witness which the Court should ignore if they do not completely improbablise the prosecution case. For the reasons aforementioned, we negate the



contention of the defence.

19 Incidentally, we may also notice the contention of the defence that PWs 5 and 8 have stated about hearing of only two sounds of explosion/firing. Indisputably, they were not present either in the office or within the jail precincts. Their evidence about hearing two sounds of explosion/firing, in our view, does not corrode the prosecution case. One who is present and witnessing the occurrence is expected to say about the manner in which assault was made whereas a person, who is not available around the place of occurrence and not attentive to the situation, is not expected to be vigilant enough to notice and memorize the number of explosions/gunshot's firings. The witnesses have stated about firings on several occasions. It was due to the fact that the informant was also chased and some firing in the air was also resorted by the accused appellants. Furthermore, the non-production of the material objects and the report of the expert do not subvert the prosecution case in view of the objective findings of the autopsy surgeon.

20 On a careful scrutiny of the evidence on record and in the light of the criticism thereof advanced by the defence, the Court has no hesitation in holding that the prosecution case is well proved by reliable evidence in so far as the assault on the deceased while walking inside the ward of the jail at the hands of the appellants is concerned.



21 Resultantly, we uphold the conviction of the appellants under Sections 302/34 of Indian Penal code, Section 27 of Arms Act and Sections 34 of Explosive Substances Act. The conviction of the appellants under Sections 307/34 of Indian Penal Code is set aside.

22 In the result, the appeals are allowed in part.

23 The lower Court records be transmitted to the Court below forthwith.

(Kishore Kumar Mandal, J)

I agree

(Madhuresh Prasad, J)

M.E.H./-

AFR/NAFR	NAFR
CAV DATE	11.09.2017
Uploading Date	20.09.2017
Transmission Date	20.09.2017

