

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.79 of 1994

(Against the judgment of conviction and order of sentence dated 11.02.1994 passed by Shri J.P. Paul, 5th Additional Sessions Judge, Patna in S.T. No. 27/84/24/87, arising out of Naubatpur P.S. Case No. 47/82)

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Nagendra Singh, son of Sant Singh, resident of village-Sawarshak, P.S.-Naubatpur, District-Patna.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

with

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Criminal Appeal (DB) No. 160 of 1994

Arising Out of PS.Case No. -null Year- null Thana -null District- PATNA

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Deo Narayan Singh

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (DB) No.79 of 1994)

For the Appellant/s : Mr. Ajay Kumar Thakur, Sr. Advocate
Mr. Jagjit Roshan, Advocate
Mr. Apul, Advocate
Mr. Kumar Virendra Narayan
Mr. Rajeev Ranjan, Advocate

For the Respondent/s : Mr. Binod Bihar Singh, A.P.P.
(In CR. APP (DB) No.160 of 1994)

For the Appellant/s :
For the Respondent/s :

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

Date: 12-12-2017

Two criminal appeals (Cr. Appeal No. 79 of 1994 and
Cr. Appeal No. 160 of 1994) were filed by the two appellants against



the judgment of conviction and order of sentence dated passed by 5th Additional Sessions Judge, Patna in Sessions Trial No. 27/84/24/87 whereby the appellants were convicted for the offence under section 302/34 of the Indian Penal Code and they have been sentenced to undergo R.I. for life and a fine of Rs. 2500/- and during the pendency of the appeal, the sole appellant of Cr. Appeal No. 160 of 1994, Deo Narayan Singh died and as such Cr. Appeal No. 160 of 1994 stands abated.

1. The prosecution case, in brief, is that A.S.I., H.N. Singh of Naubatpur P.S. camping at village-Sabarchak recorded Fard-beyan of Raj Ballan Singh at 21.30 hours on 17.3.82. The informant Raj Ballan Singh, in his Fard-beyan stated that on this very date at about 9.00 P.M. he was sitting at the door of his house alongwith with his wife. He saw in the flash of his torch light that Nagendra Singh, Dev Narayan Singh, Chhotan Singh and other two or three persons coming from southern side in the lane situated in front of his house. He saw Nagendra Singh and Deo Narayan Singh armed with country made pistols and they caused shot from their pistols which hit his father Hanslal Singh who was coming in the house from northern side through the lane. He and his wife began to make Hulla. The accused persons fled away from there. On his Hulla his elder brother Mahima Singh came out running from inner courtyard of his house. He lifted



his injured father and took him to the house and saw fire arm injury. The injury on the person of his father was tied with clothes. After some time, A.S.I. H.N. Singh with police force came to his house where he gave his fard-beyan in respect to the occurrence. The genesis for the occurrence is enmity between him and Nagendra Singh in respect of wall and two days before the occurrence there had been hot discussion between his father and the accused Nagendra Singh.

2. The police after investigation submitted charge-sheet for offence under section 302/307/34 of the Indian Penal Code and the case was committed to the court of sessions. On framing of charge, the accused pleaded not guilty and claimed that they have been falsely implicated in this case on account of land dispute. They also pleaded that the deceased was killed by unknown at a different place and as such on account of previous enmity they have been falsely implicated in this case.

3. On behalf of the prosecution, five witnesses were examined.

P.W.1 is the wife of the informant. P.W.2 is the doctor who conducted post-mortem. P.W.3 is the informant of the case. P.W.4 is I.O. of the case and P.W.5 is the then Officer-in-charge of the Naubatpur Police Station.

4. The trial court on scrutiny of the evidence convicted



the appellants for offence 302/34 of the Indian Penal Code.

5. Mr. Ajay Kumar Thakur appearing on behalf of the appellant has submitted that in the instant case Fard-beyan was allegedly recorded at the place of occurrence on 17.3.82 but formal FIR was drawn on 18.3.82 at 8:15 and it took six days time to reach the SDJM., Danapur as only on 24.3.82 the SDJM, Danapur has seen the FIR and on account of unexplained inordinate delay in sending the FIR to the court.

6. Mr. Thakur submitted that the appellant has been falsely implicated in this case at the instance of Ramprit Yadav against whom a case for committing murder of uncle of the appellant Nagendra Singh was lodged and he was convicted in the said case.

7. Mr. Thakur further submitted that in the instant case Vinay Prasad and Mahima Singh were cited as eye-witnesses in the Fard-beyan but neither Vinay Prasad nor Mahima Singh was examined on behalf of the prosecution and there is absolutely no explanation for non-examination of the two FIR witnesses in the instant case and as such he submits that non-examination of the FIR witnesses in the instant case renders prosecution case doubtful.

8. Mr. Thakur next submitted that police was camping at the residence of Vinay Prasad Singh and even Magistrate was posted but surprisingly enough no effort was made by the prosecution to



record statement of the Magistrate who was stationed in the same village where the occurrence took place. Mr. Thakur submitted that there is a major contradiction in the version of the witnesses as to the occurrence in the Fard-beyan. The informant has stated that the occurrence took place in the night and he alongwith his wife sitting at the door of the house have seen the occurrence in the torch light. The appellants Nagendra Singh, Dev Narayan Singh and Chhotan Singh equipped with Desi pistols fired from their pistols which caused injury and on raising alarm by the informant and his wife, the accused persons fled away. The motive behind the crime was land dispute. The informant in his deposition in the court has stated a different story that only Nagendra Singh and Dev Narayan Singh equipped with pistols and Chhotan Singh was empty hand in the court he introduced a new story that on hearing sound he flashed torch and saw 4-5 persons including the appellants Nagendra Singh and Deo Narayan Singh and Chhotan Singh he saw his father was coming from northern and he was shot by appellant Nagendra Singh and Deo Narayan Singh which caused injury and the incident was seen by his uncle Mahima Singh. He further stated before the court that his wife and Mahima Singh took the injured to inside the house and given first aid then the ASI alongwith police reached the place of occurrence and recorded his Fard-beyan. This witness was confronted with the previous



statement before the DSP where he has stated that his father was found dead near a tree and he has not seen anyone fleeing away after the place of occurrence. In his cross-examination, he has admitted that Ramprit Yadav was accused for committing murder of uncle of appellant Nagendra Singh and he was convicted in the said case. This witness has admitted that the place from where he has stated to have seen the occurrence, there are two walls and place of occurrence is not visible. This witness has admitted in paragraph 16 the previous enmity. He has admitted that he has not met Vinay Prasad on the date of occurrence. In paragraph-18 he has stated that there was no civil dispute pending in the court and the dispute was resolved in the village itself. Vinay Prasad met him at Patna junction.

9. Mr. Thakur referring to the deposition of P.W.1 submitted that this witness in her deposition admitted that Chhotan Singh was empty hand which contradicts the statement of the informant in the Fard-beyan. In her statement, this witness has admitted in paragraph-11 that a dispute with Nagendra Singh is pending for the last 7-8 years for erecting boundary. This witness has stated that on the date of occurrence none has actually seen the crime post-mortem report indicates some doubt as it runs contradictory to deposition of the P.W.-1. Referring to the deposition of P.W.-1 para-5 Mr. Thakur submitted that conduct of the P.W.1 is most artificial as



she has stated that when deceased fell down after sustaining gun-shot injury no blood stained came. She has also stated that she has not disclosed to anyone about the occurrence of the assailants. She was suggested that place of occurrence is not visible from the place of scene where they were sitting they alleged to have seen the occurrence due to the boundary wall. The defence has made specific suggestion that the occurrence took place at a different place near a tree and they (witnesses) have not seen the occurrence and appellants was falsely implicated after due consultation with Ramprit Yadav and his son Vinay Prasad.

10. Mr. Thakur submitted that in the instant case the place of occurrence as suggested by the prosecution has not been proved. Referring to the deposition of the P.W.1 and P.W.3 he submitted that alleged place of occurrence is not visible in the night from the place where the P.W.1 and P.W.3 claimed to have seen sitting at door as in between place of occurrence and door there is a wall and as such it was not possible for them for see the place of occurrence in the dark.

11. Mr. Thakur submitted that the prosecution has not been able to explain the reason for non-examination of the two Fard-beyan witnesses to the contrary the deposition of P.W.-3 that he has not met Vinay Prasad makes the prosecution case mysterious. As per



P.W. 3 on the date of occurrence and after the occurrence he met Vinay Prasad at Patna Junction creates serious doubt about the prosecution case. He submits that enmity is the reason for false implication in a case where the informant and other witnesses have not seen the actual occurrence and in such a situation when real miscreants who committed the crime was not known to the prosecution, the chance of false implication is most probable and in the instant case account of admission of the witnesses that the place of occurrence is not visible from the place from the door of the house where P.W.1 and P.W.3 were allegedly sitting in the night, the admitted fact of previous enmity and non-examination of the material witnesses renders the prosecution case under serious doubt. The improbability of the prosecution case of not finding any blood stain at the place of occurrence where the deceased shot at also creates serious doubt.

12. Mr. Binod Bihari Singh, learned counsel appearing on behalf of the State submitted that trial court has committed no error in convicting the appellant in commission of crime as eye-witnesses have claimed to have seen the occurrence and identified the appellants committing the crime.

13. We have gone through the materials and the arguments of Mr. Ajay Kumar Thakur appearing on behalf of the



appellant and counsel for the State. We have also gone through the materials available on record including the deposition of the prosecution witnesses only two witnesses are relevant for the purpose of actual account of the occurrence and identification of the accused. From the deposition of P.W.1 and P.W.3 who claimed to be eye-witnesses there are contradictions firstly in the definite statement before the police in the Fard-beyan and the statement before the court there is variation in the manner of identifying the accused in the Fard-beyan there was definite story that Chhotan Singh was equipped with pistols but in the court P.W.1 and P.W.3 have admitted that he was empty hand. They have admitted in the Fard-beyan as well as in the court there is previous enmity. The deposition of P.W.1 creates serious doubts about the place of occurrence as the place where the deceased was shot and deceased fell down on account of sustaining gun-shot injury the story of P.W.1 that blood was oozing out of the injury nor any blood was found at the place where the deceased was fell down is again suspicious. This account is most unrealistic. In addition thereto, the prosecution has not explained the reason for non-examination of the Fard-beyan witnesses namely, Vinay Prasad and Mahima Singh. The statement of the P.W.3 in paragraph-9 that Vinay a Fard-beyan witness has signed on the Fard-beyan at Patna junction also falsifies the prosecution story. Thus, the cumulative effect of



non-examination of the Fard-beyan witnesses who could have unfolded the true narratives of the incident goes against the prosecution as there is no explanation for non-examination of the two Fard-beyan witnesses. In fact, non-examination of the material witnesses adversely affect the prosecution case as in the instant case due to non-examination of the Fard-beyan witnesses the defence has suffered prejudice.

14. In fact, the Apex Court has the occasion to consider effect for non-examination of the material witnesses in the case of Takhaji Hiraji vs Thakore Kubersing Chamansing & Ors. : (2001) 6 SCC 408, in para 19 of which it has been held as follows:-

“So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent

witnesses, it is true that if a material witness, which Patna High Court CR. APP (DB) No.358 of 1994 dt.25-11-2017 would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution



by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinize the worth of the evidence adduced. The court of facts must ask itself whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is



apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of Thakores was hurt leading into a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not premeditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed the mind opened the assault near the house of the accused persons then it could probably be held to be a case of

self-defence of the accused persons in which case non- explanation of the injuries sustained by the accused persons would have assumed significance.

The learned Sessions Judge has on appreciation of oral and circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village people or the party of tight rope dance performers.

The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tight rope danceperformers took to their heels. They could not



have seen the entire incident. The learned Sessions Judge has minutely scrutinized the statements of all the eye-witnesses and found them consistent and reliable. The High Court made no effort at scrutinizing and analyzing the ocular testimony so as to doubt, if at all, the correctness of the several findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eye-witnesses consistent and reliable in their narration of the incident. In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case.”

15. In the instant case there is unexplained inordinate delay of six days in sending the formal FIR to the court.

16. The delay in sending the FIR in the instant case is very crucial. In fact, the Apex Court has the occasion to consider the effect of delay in sending the FIR.

17. A reference in this connection may be made to the case of **State of Punjab vs. Tarlok Singh** reported in (1972) 3 SCC 869 reads as follows :-

First, the High Court noticed the suspicion created by the circumstance that the copy of the First Information Report purported to have been lodged at 3.45 p.m. did not reach the Magistrate at Dasuya till 8 a.m. the next date even though it was sent through a special messenger. The distance between the scene of occurrence and Dasuya was



only 15 or 16 miles. The inference sought to be drawn is that, in fact, the report was not lodged at 3.45 p.m., but at a much later hour, after the police had arrived at the scene of occurrence and there were consultations to decide what version should be put forward and who should be implicated for the murder. The prosecution, in fact, made no attempt to explain this delay. Such delay, thus, casts doubt on the prosecution version that the report was lodged at 3.45 p.m. without lapse of unnecessary time.

18. The Apex Court has reiterated the same principle in AIR 1976 SC 2423 para-5 and 9 which reads as follows:-

Mr. Frank Anthony appearing for appellant Ishwar Singh submitted that in affirming the Judgment of the trial Court, the High Court also overlooked certain important aspects of the case that the Sessions Judge had failed to consider. He pointed out that the F.I.R. which is stated to have been lodged at 9.05 A. M. on February 14, 1973 was sent out from the police station the next day, February 15; the time when it was despatched is not stated, but it appears from the record that the Magistrate received it on the morning of February 16. The Court of the Magistrate was nearby, which makes it difficult to understand why the report was sent to him about two days after its stated hour of receipt at the police station. [Section 157](#) of the CrPC, 1898 as well as of 1973 both require the first information report to be sent "forthwith" to the Magistrate



competent to take cognizance of the offence. No explanation is offered for this extraordinary delay in sending the report to the Magistrate. This is a circumstance which provides a legitimate basis for suspecting, as Mr. Anthony suggested, that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In this case the suspicion hardens into a definite possibility when one finds that the case made in Court differs at least in two very important particulars from that narrated in the F.I.R. Mahabir Singh, who lodged the first information report, stated in-Court that he had invited some people to his house to effect a settlement between him and Ishwar Singh, and that he had also sent Ghanshyam to call Ishwar Singh there. The F.I.R. does not mention anything like this. From the F.I.R. it appears as if the accused persons came uninvited to his house, demanded why he had demolished the drain, and started assaulting him and the other persons who were present there. It is also difficult to understand why Mahabir should invite anyone to his house for a settlement, if really Ishwar Singh had permitted him to demolish the drain as he claimed. Further, the F.I.R. does not mention that Mahabir and Satyapal wielded lathis in their defence when attacked and that this resulted in some of the



accused getting injured; but that is what both Mahabir (P.W. 1) and Satyapai (P.W. 2) stated in their evidence in Court. These variations relate to vital parts of the prosecution case, and cannot be dismissed as minor discrepancies. In such a case, the evidence of the eye-witnesses "cannot be accepted at its face value", as observed by this Court in *Mitter Sain v. State of U.P.* .

We have pointed out that the trial Court in convicting the appellants overlooked certain significant features of the case, namely, the inordinate and unexplained delay in despatching the first information report to the Magistrate; the difference in the account given by the prosecution witnesses and as appearing from the first information report of the occurrence; the absence of any statement in the first information report as to the injuries received by some of accused, and the non-examination of material witnesses. The High Court in affirming the Judgment of the trial Court also failed to advert to these circumstances. We do not therefore think that the case against the appellants has been proved beyond reasonable doubt. The appeals are accordingly allowed and the Order of conviction and the sentences passed on the appellants are set aside We direct that the appellants be set at liberty forthwith.

19. Considering the totality facts situation, the non-



examination of Fard-beyan witnesses and unexplained inordinate delay of six days in sending the FIR coupled with previous enmity and the improbability of seeing the occurrence from the place of where the two witnesses were sitting and the unrealistic story of no blood stain at the place of occurrence creates serious doubts about the prosecution case, we find substance in the submission of Mr. Thakur that the deceased was killed at a different place near a tree and the actual account of the crime was not seen by the P.Ws. 1 and 3 and due to previous enmity the appellant was implicated in this case.

20. In view of the Apex Court judgment discussed hereinabove and on consideration of the totality of the facts situation, we are of considered view that the conviction of the appellant in the aforesaid circumstances where there is motive of false implication due to previous enmity and improbability of the witnesses seeing the actual account of crime from the door of their house and absence of blood stain at the place of occurrence and non-examination material witnesses and unexplained inordinate delay of six days in sending the FIR are definite circumstance which creates serious doubt in participation of the appellant in the crime and under the aforesaid circumstances, it is not safe to convict the appellant and extending the benefit of doubt, we set aside judgment of conviction passed by the by Shri J.P. Paul, 5th Additional Sessions Judge, Patna in S.T. No.



27/84/24/87 and allow the appeal.

21. Since the appellant is on bail, he is discharged from the liability of bail bonds.

Ravi/-

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

AFR/NAFR	NAFR
CAV DATE	N/A
ploding Date	23.12.2017
Transmission Date	23.12.2017

