

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.489 of 2012

Arising Out of PS. Case No.-110 Year-2008 Thana- BIDUPUR District- Vaishali

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1. KUNAL KUMAR SINGH @ KUNAL KUMAR S/O LATE DIWAKAR SINGH R/O VILL- PANAPUR, DILAOPUR(GOVARDHAN), P.S- BIDUPUR, DISTT- VAISHALI.
 2. KUNDAN KUMAR @ GAUTAM S/O LATE DIWAKAR SINGH R/O VILL- PANAPUR, DILAOPUR(GOVARDHAN), P.S- BIDUPUR, DISTT- VAISHALI.

... .. Appellant/s

Versus

THE STATE OF BIHAR

... .. Respondent/s

Criminal Appeal (DB) No. 419 of 2012

Arising Out of PS. Case No.-110 Year-2008 Thana- BIDUPUR District- Vaishali

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1. BRIJ NANDAN SINGH S/O LATE RAM PAVITRA SINGH R/O VILLAGE AND P.O.- PANAPUR, DILAWARPUR, P.S.- BIDUPUR, DISTRICT- VAISHALI
 2. PAPPU KUMAR S/O BRIJ NANDAN SINGH R/O VILLAGE AND P.O.- PANAPUR, DILWARPUR, P.S.- BIDUPUR, DISTRICT- VAISHALI

... .. Appellant/s

Versus

THE STATE OF BIHAR

... .. Respondent/s

Criminal Appeal (DB) No. 460 of 2012

Arising Out of PS. Case No.-110 Year-2008 Thana- BIDUPUR District- Vaishali

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1. SURENDRA SINGH S/O LATE AMBIKA SINGH RESIDENT OF VILLAGE- PANAPUR DILWARPUR (GOVERDHAN), P.S.- BIDUPUR, P.O.- PANAPUR, DISTRICT- VAISHALI AT HAJIPUR
 2. SUJIT KUMAR @ BABUAN SINGH S/O SRI SURENDRA SINGH RESIDENT OF VILLAGE- PANAPUR DILWARPUR (GOVERDHAN), P.S.- BIDUPUR, P.O.- PANAPUR, DISTRICT- VAISHALI AT HAJIPUR

... .. Appellant/s

Versus

THE STATE OF BIHAR



... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 489 of 2012)

For the Appellant/s : Mr. Bikramdeo Singh

For the State Mr. S.N.Prasad, APP

(In Criminal Appeal (DB) No. 419 of 2012)

For the Appellant/s : Mr. S.K.Lal

Mr. Shyameshwar Kumar Singh

Mr. Chaitanya Swaroop

For the State Mr. S.N.Prasad, APP

(In Criminal Appeal (DB) No. 460 of 2012)

For the Appellant/s : Mr. Birendra Kumar Sinha, Sr. Advocate

Mr. Rajnandan Kumar

For the State Mr. S.N.Prasad, APP

**CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR
MANDAL**

and

**HONOURABLE MR. JUSTICE MADHURESH PRASAD
CAV JUDGMENT**

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date : 06-10-2017

The three appeals filed by altogether six appellants assailing the judgment of conviction and order of sentence dated 30.03.2012 and 04.04.2012, respectively, passed by the learned Additional Sessions Judge, FTC-II, Vaishali at Hajipur in S.T.No. 181/10/182/10, whereby they have been held guilty under section 302/34 IPC and section 387/34 IPC and directed to suffer R.I. for life with fine and R.I. for 03 years with fine having default clause respectively. The appellant Kunal Kumar Singh @ Kundan @ Gautam was also held guilty under section 27 of the Arms Act and sentenced to undergo R.I. for 03 years with fine having default clause. Appellants Pappu Kumar and Sujit Kumar @ Babuan Singh were also charged



and held guilty under section 3 of the Explosives Substance Act and sentenced to undergo R.I. for 10 years and fine with default clause.

2. Be it noted, in course of trial, one of the co-accuseds of the present trial namely Kundan Kumar Singh was declared juvenile in conflict with law and his case was separated. During hearing of the appeal, a claim of juvenility was raised on behalf of the appellant Kundan Kumar @ Gautam. On an inquiry having been ordered and made by the Juvenile Justice Board, the appellant no.2 was also declared juvenile in conflict with law vide order dated 12.03.2013. For the sake of convenience, appellant Kunal Kumar Singh @ Kunal Kumar shall hereafter be referred as A-1. Similarly, appellant(s) Kundan Kumar @ Gautam, Brijnandan Singh, Pappu Kumar, Surendra Singh and Sujit Singh @ Babuan Singh (A-6) shall hereafter be referred as A-2, A-3, A-4, A-5 and A-6 respectively.

3. The prosecution case put succinctly in the FIR lodged on 27.05.2008 at 11.00 A.M. by Nagendra Prasad Singh (P.W.9) and unfurled at the trial is that on the date of occurrence at about 8.00 P.M. the informant, his brother (P.W.10) and few other villagers were at Panapur Dilawarpur Chowk when his



brother Randir Singh (deceased) who was running a provision store/shop at the Chowk by the side of Hajipur-Mahnar road was pulling down the shutter. The appellants arrived there, dragged him and started demanding Rangdari. It was protested by the informant and his brother(s) whereafter A-5 ordered the other appellants to kill him. A-4 and A-6 then exploded bomb which caused pandemonium/chaos. The appellants then dragged the deceased to some distance on the Kachha road where A-2 and co-accused Kundan Kumar Singh (since declared juvenile in conflict with law) fired at the deceased causing injuries to him which resulted in his death. It is further alleged some other accused persons were also present armed with Lathis and sickles. The lodging of the case ignited the investigation. The I.O. arrived at the house of the deceased and carried out the death inquest proceeding (Ext.1/1) on the cadaver on 27.05.2008 at 11.45 P.M. which was witnessed by P.Ws 4 and 10. The deadody was sent for post mortem examination. P.W.11 Dr. Hari Prasad with the assistance of another doctor held autopsy on 28.05.2008 at 8.00 A.M. The post mortem report is Ext.4. On conclusion of Investigation, the charge-sheet was laid whereon cognizance was taken and the case was committed to the court of session which, on transfer,



came on the file of the learned trial Judge where charges were framed against the appellants and read over/explained to the appellants to which they pleaded not guilty and claimed trial. The defence of the appellants is complete denial of the occurrence as alleged by the prosecution and their false implication. They relied on the documents filed in defence.

4. In order to bring home the charges, the prosecution examined 11 witness. P.Ws 1,2,3 and 9 have supported the prosecution case as eye-witnesses. P.W.10 is the own brother of the deceased and the informant. According to the prosecution case, he was present along with the informant at the scene of occurrence. He has conspicuously not given out the ocular account of the occurrence and preferred to take the dock merely as a formal witness to prove the seizure of the Sutli (Ext.B) from near the place of occurrence. P.W.10 is the doctor who, with the assistance of another doctor, had performed the post mortem examination and proved the post mortem examination report (Ext.4). P.Ws 4,5,6,7 and 8 have been declared hostile by the prosecution. It may be noted that P.W.6 Satyendra Pd. Singh and P.W.8 Ashok Kumar were also running shop(s) at the Chowk in question where the occurrence had taken place. P.W. 9 is the informant of the case and full brother of the deceased.



5. On analyzing the evidence, the learned trial court held the charges levelled against the appellants proved beyond shadow of reasonable doubts and found the appellants guilty.

6. Heard Mr. B.K.Sinha, Sr. Counsel in support of Cr. Appeal No. 460 of 2012, Mr. Vikramdeo Singh in support of Cr. Appeal No. 489 of 2012, Mr. S.K. Lal in support of Cr. Appeal No. 419 of 2012 and Mr. S.N. Prasad, learned APP for the State.

7. Counsel for the appellants have criticized the judgment on several counts. It is submitted that the prosecution has miserably failed to prove the genesis and the manner of the occurrence. The case as projected by the prosecution is wholly doubtful as the Fardbayan recorded by the informant at the police station soon after the victim was declared dead at Biddupur Hospital has not been produced. Instead, the prosecution relies on the Fardbayan of the informant (P.W.9) recorded by the police at the house of the informant. It has also been urged that the autopsy report furnished by the doctor completely contradicts the prosecution case. The doctor did not find any injury on the deceased caused by bomb explosion which is the consistent case of the prosecution. If the ocular evidence is to be believed, the deceased was fired at by A-1, A-2 and co-accused Kundan Kumar whereas the doctor found only



two gunshot injuries on his person. The prosecution case becomes doubtful as one of the own brothers of the deceased viz. P.W.10 has not supported it. Four other witnesses who can be termed as independent witnesses of the case have turned hostile. The evidence of the remaining witnesses have been criticized on several counts. It is submitted that the consistent case projected by the prosecution is that the victim was taken/dragged to a fairly long distance on a secluded place where the assault was perpetrated on him. Although there is evidence that there is/was sufficient light at the Chowk but there is no evidence that the place where actual assault was made had any source of light. For this reason, it is urged, the prosecution witnesses, in course of trial, have made discernible improvement in their deposition(s). Referring to the cross-examination(s) of P.Ws 1,2,3 and 9 with reference to their C.D. statements on material aspects including the manner of occurrence, the disclosure of name(s) of the accused(s) and the particular overt act assigned to the appellants it is contended that the non-production/examination of the I.O. by the prosecution has caused serious prejudice as the defence was completely hamstrung in drawing contradiction(s) in their deposition(s) on these pivotal aspects which completely debase



their evidence.

8. Mr. B.K. Sinha also criticized the conviction of A-4 & A-6 on technical ground. It is urged that the conviction of these two appellants under the Explosives Substance Act shall be wholly untenable in law as the prosecution has failed to obtain sanction and produce in court as required under section 7 of the Explosives Substance Act. He placed before us the relevant provision which reads thus:-

“7. Restriction on trial of offenses.- No Court shall proceed to the trial of any person for an offense against this Act except with the consent of the District Magistrate.

9. Arguing further, he would urge that the main charge showing participation of A-5 in the crime was of exhortation. If this was an incriminating circumstance showing his complicity along with other co-accused(s)/co appellants the prosecution was required to put the same in course of recording his statement under section 313 Cr. P.C. This was the solemn occasion where the court interacts directly with the appellants. This was not so done. He relied in support of the aforesaid contention on **Ashraf Ali vs. State of Assam (2008) 16 SC 328; paras 21,22, & 24).**

10. Mr. Lal appearing in another appeal also attacked



the judgment of conviction on various counts.

11. In contra, the counsel for the State supported the findings of guilt recorded by the trial court against the appellants. He would urge that no prosecution witness was even suggested of their false implication in this case. The genesis of occurrence is the demand of Rangdari and refusal by the deceased. To counter the submission of the defence that the prosecution case has not been able to prove that any such demand of Rangdari was earlier made from the deceased or any other shopkeeper at the Chowk, he drew our attention to the cross examination of P.W.9(informant) where he has stated that the accused(s) had demanded ransom from different shopkeepers in the past but out of fear the case was not lodged. Even such demand was made from P.W.6 who has been produced in the present case but declared hostile as he was not ready to support the prosecution case. From the record, it would appear that the Fardbayan of P.W.9 was recorded at the house of the deceased at 11.00 P.M. whereafter the inquest proceeding was also drawn by the I.O. at the house itself. The prosecution rely on those two documents which are duly proved. The statement of P.W.9 of having made such Fardbayan at the police station signed by him should be treated as a mere



omission and not a contradiction. It is further submitted that although the allegation of A-5 of having exhorted the other accuseds was not put to the said appellant while recording his statement under section 313 Cr. P.C but his presence although along with the co-accuseds has been proved by cogent evidence which was put to the appellant while recording his statement under section 313 Cr. P.C. It is further pointed out that no charge was framed against A-5, and for that matter any of the appellants, of having abetted the crime. The prosecution has presented a case that in furtherance of common intention, the appellants arrived at the place of occurrence, hurled the bombs, dragged out the deceased, demanded the Rangdari and thereafter assaulted him by fire-arms causing his death. The incriminating circumstance(s) appearing on record against the appellants were distinctly pointed out and placed before the appellants soliciting their reply.

12. Before dealing with the contention made on behalf of the appellants it is apposite to first notice the salient features of the case. The deceased was running a provisions shop (kirana shop) in a remote area. The appellants belong to one family. Some of them are fathers of other appellants. They reside not far off from the place of occurrence. Ext.A and B have been



filed by the defence to show that in relation to the occurrence committed on the same date/day and probably at the same time an FIR was lodged against the deceased and P.W.10 by co-accused Kundan Kumar Singh of the present case under section 307 IPC. The charge-sheet submitted by the police in the said case is present as Ext.D. The case is under trial. In the said FIR (Ext.A) the deceased and P.W. 10 (two brothers) are the only named accuseds. What infers from these documents and also from the prosecution evidence that presence at the scene of occurrence of PW 10 is well established. Keeping in view the aforesaid, the Court shall analyze the evidence on record.

13. The Court shall deal first with the challenge of the defence to the conviction of A-4 and A-6 recorded by the trial court under Section 3 of the Explosives Substance Act. As seen, the law forbids the trial of offences under the Explosives Substance Act without the consent of the District Magistrate. The prosecution indisputably has not produced anything on record to prove such sanction or consent was obtained by the prosecution from the competent authority before proceeding with the trial. On this score itself, the challenge to their conviction under the Explosives Substance Act is well sustainable in law. Moreover, even on merit it is found that the



evidence led by the prosecution, particularly the informant (P.W.9) who has only stated about the exploding of bomb by some of the co-accuseds does not find support from the evidence of P.W.1 Sanjay Prasad Singh, P.W.2 Sudeep Rai and P.W. 3 Saroj Kumar. The doctor (P.W.11), in the post-mortem report (Ext.4) did not find any injury caused by explosives substance. That apart, we find the evidence of P.Ws 1 and 9 at much variance so far as the hurling of bomb is concerned. In the FIR, such allegation has been attributed to A-6 and A-4. P.W.9, in court, has attributed such allegation to the co-accuseds A-1, A-2 & A-4 whereas P.W.1 Sanjay Prasad Singh has not stated anything about explosion of bomb. Same is the evidence of P.W.2 Sudip Rai & P.W.3 Saroj Kumar. In view of what has been noticed above, we find substance in the challenge of the defence to the conviction of A-4 and A-6 under section 3 of the Explosives Substance Act.

14. The counsel for the appellants in one of the appeals, has fiercely submitted that conviction of A-5 (Surendra Singh) under section 302/34 IPC would not be sustainable as several witnesses have said about the exhortation first made by A-5 whereafter other accused/appellant(s) started the assault on the deceased. The prosecution did not put the aforesaid



circumstance to the said appellant and, as such, the said allegation cannot be relied by the prosecution. In Ashraf Ali (supra), the Apex Court emphasized the object and extent of mandatory compliance of the provision under section 313 Cr. P.C. Every incriminating circumstance, under the said provision, appearing against the accused must be put to him specifically and distinctly. The State has conversely submitted that no separate charge of abetment of the offence was framed against the said appellant and, for that matter, any of the appellants. Reference of the particular overt act of exhortation to other accused even if not put to the appellant/accused as incriminating circumstance shall not vitiate the conviction. The prosecution relies on the fact proved at the trial that he was althrough present with other accused persons when the deceased was dragged and shot on three occasions. Actual participation in the assault is not a sine qua non for sharing the common intention. On going through the relevant evidence, we find force in the submissions of the counsel for the State. Merely on this ground the conviction of A-5 shall not vitiate.

15. P.W. 9 is the informant who claims his presence at the shop along with P.W.10 from the inception of the occurrence when the appellants arrived there, dragged out the deceased



and demanded extortion/ransom which was objected by him as well as the deceased. After having narrated the prosecution case he has stated that the victim was taken to Biddupur Hospital for treatment where he was declared brought dead. The informant along with the dead body then went to the police station where his Fardbayan was recorded by the police on which he signed, and P.Ws 2 and 3 signed as attesting witnesses. From the hospital itself, the dead body was dispatched for post mortem. Turning to the evidence of P.W.1 at para 10, this witness has shuffled the place where the police arrived to record the statement. Firstly, he said that the police arrived at the place of occurrence and recorded the statement. In the next breath, he corrects himself and says that the I.O. did not come to the place of occurrence. The dead body was carried to the house where the police arrived and recorded the statement. Quite strangely, P.W.2 has stated that soon after the occurrence, the deceased was carried on a motorcycle to the hospital as stated by the informant (P.W.9). FIR was recorded at the house of the informant. What happened to the statement made by the informant at the Biddupur Hospital is not on record. Shadow of doubt is cast on the prosecution case. It diffinitely adulterates the evidence of the informant (P.W.9). It has been urged on



behalf of the defence that the prosecution case be viewed with doubt as the statement, if any, made by the informant and recorded by the police at the Biddupur police station has been suppressed by the prosecution. On a close scrutiny of the evidence, it is found that a statement was given by the informant when he carried the injured to the hospital and then to the police station. The prosecution has not produced the said statement of the informant. The law mandates a presumption raised against the veracity of the prosecution case. Unfortunately, the prosecution has also not produced the I.O. for examination. His presence and deposition could have unravelled the mystery and removed the doubts created on the prosecution case. The counsel for the defence in the aforesaid circumstance has emphatically asserted that non-production of the I.O. without any explanation not only imprints the prosecution case with a deep scar but has also caused grave prejudice to the defence.

16. Turning to the genesis of the occurrence, it is found from the evidence the place of occurrence (Chowk) is although located on Hajipur-Mahnar road but it is a remote place where only few shops exist. P.Ws 1 and 2 have been criticized as chance witnesses. P.W. 1 was there to have Pan (betel)



whereas P.W.2 had travelled one kilometer and was present at the Chowk to purchase medicines. P.W.3 was also present at the Chowk while travelling from Hajipur to Panapur. As serious criticism has been made by the defence of the prosecution having not proved the genesis of occurrence, we examined the evidence on record to find out whether the genesis of occurrence has been well proved or not. The informant has said that as soon as the accused persons came, they demanded Rangdari. He has admitted that any such demand of Rangdari was not made earlier, although the shop was running for the last six years. It has been submitted that there is no evidence that the accused persons had earlier demanded the Rangdari either from the deceased or from any other shopkeepers. P.Ws 1,2 and 3 have, however, not said about the demand of Rangdari by the accused persons. They claim to have heard about instigating some of the accused persons but not about the demand of Rangdari. From the evidence of P.W.9 (at para 17), it is limpid/pellucid that no enmity from before existed between the parties. The defence would argue that in a remote place, like the one where only few shops existed, the prosecution case of having demanded Rangdari of Rs. 1.5 lac cannot be easily digested. The deceased was after all carrying



a small provisions shop.

17. P.W.10 is full brother of the informant and the deceased. If the evidence of P.W.9 (informant) is read between the lines, P.W.10 was present at the shop with the informant from very inception. In court, he has maintained a stoic silence in narrating any part of the prosecution case casting a serious doubt. Why was it so? It is already seen from the defence exhibits that his presence with the deceased has been accepted by the appellants although when they named P.W.10 and the deceased as accused(s) in the case lodged by one of the accuseds of the present case. Apart from the sharp inconsistency/discrepancy in the evidence on the point of demand of Rangdari, the court, on appraisal of the relevant evidence, applying the test of probability also finds that if the attack on the deceased was on account of non-payment of Rangdari, there should be a convincing evidence that such Rangdari was earlier made from the deceased which was not heeded to. The evidence on this point is silent. At this juncture, it may again be noted that the appellants belong to one family. Some of them are fathers of the other appellants. They reside close to the place of occurrence. It is unbelievable that the entire family members including minors would form a gang and



demand Rangdari. The prosecution has come out with the specific case that on account of non-payment of Rangdari the crime was committed. The genesis of occurrence is not clearly discernible from the evidence.

18. Coming to the manner of occurrence, the consistent case of the prosecution is that two bombs were exploded/detonated causing injury to the deceased whereafter he was dragged up to 50 to 100 yards to a secluded place where there was no source of light and fire arm injuries were inflicted. The doctor (P.W.11) in the post-mortem report (Ext.4) found two gunshot injuries on the person of the deceased. There was no sign of any injury caused by explosion of bomb on the victim. No splinters of bomb was/were present on the body or the cloth of the deceased. The doctor did not find any injury possibly caused by dragging of the deceased inasmuch as not even a single drop of blood was found present at the place of occurrence. If the deceased received bomb injury close to his shop before being dragged, in all probability, a trail of blood from the shop to the Kacha road where he was inflicted fire arm injury would have been present. Incidentally, it may also be noted that according to the prosecution one jute rope(sutli) was seized by the I.O. in front of the Jai Matadi Telephone Booth.



Whether it was sent for examination by the forensic science laboratory (FSL) and actually found splinters of the bomb is also not well proved by the prosecution.

19. Adverting once again to the evidence on record, it appears from the FIR that the three accuseds had fired which is supported by the informant (P.W.9). P.W.2 has, however, stated about the two firings made on the deceased. P.W.1 and 3 have again stated about the firings on three occasions at the deceased by the accused persons. The autopsy surgeon, as indicated above, found only two injuries on the person of the deceased caused by fire arm. The manner of occurrence as presented by the prosecution gets a serious jolt and deeply corrodes the veracity of the prosecution case. In this connection, the Court may also notice the discrepancy/inconsistency in the description of the manner of occurrence as deposed by the witnesses. Although P.Ws 1 and 9 have stated about the dragging of the deceased by Kundan Kumar, KunaL Kumar and Brijnandan Singh whereas P.W.3 has stated about such dragging by Kunal Kumar (A-1) and Kundan Kumar @ Gautam (A-2). We have already noticed the vital discrepancies in the evidence with regard to hurling of bomb. Similar is the discrepancy in relation to the allegation of



firing at the deceased in the evidence of P.Ws 1,2 and 9. P.W. 3 has, however, not stated specifically about who fired at the deceased. Our attention has been drawn to the evidence of P.W.1 (at para 4), P.W.2 (at para 5) and P.W. 3 (at para 4) with respect to their respective statements made before the I.O. in course of investigation. On the strength of these suggestions given to these P.Ws. The defence has submitted that non examination of the I.O. has caused a real prejudice to the defence.

20. In view of the above discussions of the relevant evidence on the point of lodging of the Fardbayan and drawing up of the inquest report, material contradictions in the evidence on the manner of occurrence and non proving the genesis of the occurrence, in our view, the non examination of the Investigating Officer has indeed caused a serious prejudice to the defence.

21. To top it all, what perturbs/disquiets the Court is complete silence of P.W.10. He surprisingly without delineating on these aspects of the prosecution case has chosen to take the dock as a formal witness. His studied/stoic silence on the prosecution case raises a serious doubts on the case presented by the prosecution, apart from the fact that the first version of the prosecution case was withheld by the



prosecution.

22. In such circumstance, it is difficult for the Court to arrive conclusively on the guilty of the appellants. They are entitled to be given the benefit of doubts. The finding(s) of guilt and order of sentence recorded against the appellants by the learned trial court are set aside. Since A-2 Kundan Kumar @ Gautam of Cr. Appeal (DB) No. 489 of 2012 is on bail, he is discharged from the liability of the bail bonds.

23. The appeal(s) are allowed.

(Kishore Kumar Mandal, J)

I agree (Madhuresh Prasad, J)

HR/-

AFR/NAFR	NAFR
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