

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.24 of 1994

Arising Out of the judgment of conviction dated 13th January, 1994 passed by the 2nd Additional Sessions Judge, West Champaran, Bettiah in Sessions Trial No. 122 of 1989.

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1. Surender Singh, Son of Khadu Singh, Resident of Village – Khantari, P.S.- Chiraiya, District – West Champaran.
 2. Kanhaiya Pathak, Son of Feku Pathak, Resident of Village - Narayanpur, P.S. – Patahi, District – East Champaran.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellants : Mr. Kanhaiya Prasad Singh, Sr. Advocate.
Mr. Pratik Mishra, Advocate.
For the Respondent : Mr. Abhimanyu Sharma, APP.

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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: 31-10-2017

This appeal has been preferred by the appellants against the judgment of conviction dated 13th January, 1994 passed by the 2nd Additional Sessions Judge, West Champaran, Bettiah in Sessions Trial No. 122 of 1989 whereby learned trial court convicted three accused persons for the offences under Sections 302 and 34 of the Indian Penal Code and they have been sentenced to undergo rigorous imprisonment for life and also directed to pay compensation of Rs. 75,000/- under Section 357 of the Code of Criminal Procedure and in the event of default rigorous imprisonment for three years.



2. Out of the three appellants, Appellant No. 1 Ramjee Singh died during the pendency of the appeal and vide order dated 11.01.2010 his appeal was abated. The present appeal is confined to Appellant No. 1 Surender Singh and Appellant No. 2 Kanhaiya Pathak.

3. The prosecution case in brief is that one Abulaish, informant (P.W. 5) lodged a written report addressed to the officer incharge of Town P.S. Bettiah on 06.03.1989, alleging precisely that on the previous night, when the informant came out of Janta Cinema, situated at Bettiah, after watching last show of film Khilauna, he found 3 police men assaulting a person with stick. The person, who was being assaulted, was identified as Dr. Majhar Alam and a crowd had congregated there. It is further stated that the police men abused the crowd also and asked them to go away from that place. The informant identified the police constable as Havildar of Naka No. 1 and, thereafter, fled away out of fear to his house and informed his relatives namely, Jainul Abdin (P.W. 8). The relative of the deceased Dr. Majhar Alam searched for him in the night and learnt in the morning that, his dead body was lying in Bettiah hospital and was further learnt that the deceased was brought to the hospital by the police. On the basis of the aforesaid written report, Bettiah Town P.S. Case No. 69/89, dated 06.03.1989 under Sections 302/34 of the



Indian Penal Code was registered for investigation.

4. The police after investigation, submitted charge sheet for the offence under Sections 302/34 of the Indian Penal Code. The case was committed to the court of Sessions and on framing of charge, the appellants have pleaded not guilty and, they faced the trial. The trial court on the basis of scrutiny of the evidence, convicted the appellants for the offences registered under Sections 302/34 of the Indian Penal Code.

5. Mr. Kanhaiya Prasad Singh, learned senior counsel appearing on behalf of the appellants has submitted that the judgment of conviction by the trial court is based on conjectures and surmises and in totality of the fact and situation of this case conviction of appellants only on the basis of circumstance of alleged last seen is unsustainable as the tall claim of last seen by the prosecution witness is not worthy of any credence in view of the conduct of the witnesses which is most artificial and unnatural.

6. Mr. Singh submitted that in the instant case out of eleven witnesses, P.W. 2 and P.W. 3 have been declared hostile. P.W. 5 is the informant of this case. P.W. 11 is the father of the deceased. P.W. 10 is the investigating officer of the case. P.W. 9 is the doctor who conducted the post-mortem. P.W. 7 Abdul Hafiz who claimed to have seen the quarrel between Dr. Majhar Alam with



police personnel in connection with accompanying/dropping the lady at her destination. Whereas P.W. 6 and 8 are brother and brothers-in-law of the deceased. He has first drawn the attention of the Court towards the discrepancy in the version of the informant of the case. In the fardbeyan, the definite case was that after seeing the last show of film Khilona from Janta Cinema Hall, he came out and saw the occurrence, whereas in his deposition in the court, he has stated that at the time of interval when he came out he saw three police personnel were beating the deceased doctor with cane and there was large crowd. Since the doctor was known to him he returned back. He has stated in his cross-examination that, he has seen the film only up to the interval, whereas in the fardbeyan his version was that he came out of the Janta Cinema Hall after seeing the last show. This contradiction in the version of P.W. 5, the informant, makes the case of the prosecution as to last seen doubtful. Mr. Singh has referred to the statement of P.W. 5, where he has stated that he has reported the matter to Jainul Abedin, who is the brother-in-law of the deceased Dr. Majhar Alam and, thereafter, he left for his residence and he slept over and in the morning he learnt about the death of the doctor and also learnt that his dead body is lying in the Bettiah hospital. P.W. 5 claimed that after seeing the dead body in the hospital he moved towards the police station and lodged the fardbeyan.



7. Mr. Singh has submitted that Jainul Abedin was brother-in-law of the deceased. His conduct in the instant case is not natural rather most artificial, as he has submitted in his cross-examination that he has not reported the family members of the deceased doctor. His conduct of not reporting the matter to the police or to the family of the deceased who was his close relative creates a doubt about the manner of occurrence of incident. Referring to the cross-examination P.W. 5 in paragraph-21, he submitted that according to informant he and many other persons have tried to rescue the doctor, but failed and he has admitted that he has no introduction with the police personnel from before. He has stated in paragraph – 25, that in the morning from Janta Cinema Hall Chowk he learnt about the name of the accused persons, the two Constables and one Havildar. He has admitted in paragraph-29 that he has seen the Magistrate and the police in his presence the inquest report was prepared, but he has not stated anything about the occurrence before the Magistrate in the hospital.

8. Referring to the deposition of P.W. 7, Mr. Singh submitted that this witness has stated that at about 11:00 in the night on 05.03.1989, he saw the doctor standing on the betel shop with one old lady, this witness deposed that when the lady told that she has to go to Station then he (deceased) told her he will drop her as she has



to go on the same route. Then the police personnel said that it is our job. The doctor said, so what he will drop as he is going that way and, that is why altercation took place and the doctor was beaten by the police personnel. This witness has stated that the police personnel have taken the doctor and the lady on the rickshaw to the police station and thereafter the witnesses stated that he left for his residence. In his deposition he said that the doctor and the lady was taken on one rickshaw and on the another rickshaw the police personnel were sitting. Referring to his deposition, Mr. Singh has submitted that this witness has stated that 100-200 persons have assembled there and the doctor was claiming that he will drop the lady whereas the police personnel were saying that they will take her drop her at her destination and that is why the altercation took place and in the midst of the scuffle the doctor fell down.

9. Referring to the deposition of P.W. 8, Mr. Singh submitted that at about 12:00 in the night, the informant came to his residence informed that two Police Constables and one Havildar were beating Dr. Majhar Alam and they have taken the doctor to the western side and the informant discloses the name of the assailant as Kanhaiya Pathak, Surendra Singh and one more. In his deposition, he said that in the morning when he reached near Janta Cinema Hall where there is a Tea stall and 30-40 persons were taking tea. He



enquired from them, they told him that Havildar and the Constables have killed the doctor and thereafter, he rushed to the hospital where he saw the dead body of Dr. Majhar Alam. Referring to his statement in paragraph-10, Mr. Singh submitted that it is most unnatural conduct of the close relative of the deceased, that when the informant (the brother-in-law of the deceased) and this witness another brother-in-law of the deceased were aware of the beating of the victim by the police personnel, they have not made any attempt to search out the doctor or to report to the police. He has not mentioned in his statement that who has disclosed the name of the assailants at the Tea shop before Janta Cinema Hall. P.W. 8 has admitted that when he reached the hospital he talked with the Magistrate, but he has not gone to the police station. He has admitted that he remain in the hospital for 4-5 and after post-mortem, he left for his residence. He has stated in paragraph-24, before the court that the name of the assailant was disclosed by Abulaish, the informant.

10. Mr. Singh submitted that the informant as per his deposition has stated that, he learnt about the assailant from the people assembled at the Tea shop near Janta Cinema Hall, whereas the witness Jainul Abedin has stated that the name of the assailant was disclosed to him by the informant. This is apparent contradiction in the versions of P.W. 5 and P.W. 8 as to identification of assailants.



In fact, their version is not reliable in view of the fact, that P.W. 8 claims the source of information as to the assailant was P.W. 5 who disclosed the name of assailant in the night itself whereas P.W. 5 claimed that he learnt from the people at Tea shop near Janta Cinema Hall in the next morning. Thus, their versions are contradictory and as such not reliable.

11. Mr. Singh has submitted that apart from the family members of the deceased no independent witness has deposed in this case against the appellants. The two independent witnesses who were said as prosecution witness in the said case have been declared hostile namely P.W. 2 and P.W. 3. It is submitted that in the instant case, in fact, no one has seen the occurrence and these appellants have been fallen victim to this case as they are the police personnel.

12. Mr. Singh has submitted that there was inordinate delay in lodging the FIR and, there is no explanation for the delay by the prosecution. He submitted that according to P.W. 5, the informant of the case, the police personnel were caning the victim in his first version, in the fardbeyan at 12:00 night i.e. after the last show approximately 12:00 in the night, whereas the P.W. 5 in his statement before the court said that the time was 10:30, yet the fardbeyan was lodged at 01:00 P.M. on the next day. Admittedly, according to the version of the prosecution, the witnesses were aware



of the death of Dr. Majhar Alam at around 06:00 in the morning, but there is no explanation why the fardbeyn was lodged only at 01:00 P.M. The conduct of the prosecution witnesses namely the informant and other relatives of the deceased, in not reporting the matter to the police and other higher officials in the night of the alleged occurrence, their claim as to seen the occurrence appears to be doubtful. There is no explanation why the witnesses who claimed that they learnt about the death of the doctor in the morning has not lodged fardbeyan. Informant has stated that he learnt about the death of the doctor in the morning approximately at 07:00 A.M. The witness Jainul Abedin P.W. 8 has stated before the court, that he learnt about the death of the doctor and he reached the hospital at 5-6 in the morning. It is most unnatural on the part of the prosecution witnesses that, they learnt about the murder of the doctor definitely at around 06:00 in the morning, but there is no explanation why they took seven hours in lodging the alleged fardbeyan in the instant case.

13. Mr. Singh, next submitted that the trial court has committed error in considering the evidence of P.W. 2 and 3 before I.O. under Section 161 Cr.P.C. although they have been declared hostile by the prosecution. He has submitted that the trial court has committed error of law as under Sections 145 and 147 of the Evidence Act the previous statement can be used for contradiction



under Section 145 or for corroboration under Section 147 of the Evidence Act. Hostile witnesses' previous statement cannot be taken as evidence other than for the purpose of contradiction or corroboration which the court has ignored and the learned court below has committed error in relying on the part of the story allegedly made by P.W. 2 and 3 during the course of investigation. Such error committed by the trial court is a grave error of law.

14. Mr. Singh submitted that the statement of P.W. 5, the informant of the case, suffers from various infirmities and his conduct in not protesting and interfering at the time of quarrel, between the doctor and the police personnel, and his conduct of not reporting the matter to the police instead of quietly going back to his residence and sleeping in the night, is most unnatural. He submitted that since there was no clue of commission of crime, the prosecution implicated these people at the instance of informant and others in the case as they are police personnel.

15. Mr. Singh submitted that the informant version in the fardbeyan and in the court contains many contradictions which cannot be reconciled. He submitted that in one go, he said that he can identify the accused by face and on the other go he said that in the next morning when he reached Janta Cinema Hall Chowk he learnt about the name of the assailant, whereas he has named the appellants



as assailant in fardbeyan and as per P.W. 8 P.W. 5 has disclosed the name of assailant to P.W. 8 in the night itself, therefore, the whole case of the prosecution in this FIR is patently false and create serious doubt about the prosecution case.

16. Mr. Singh has also highlighted the mystery in the prosecution case, referring to the prosecution witnesses he said that the prosecution witness no. 7 has stated in his deposition about the genesis of the quarrel between the doctor and the police personnel that is a lady. This witness claims that he has seen quarrel between the doctor and the police personnel whereas the P.W. 5 who claimed to be the eye witness of the occurrence has not mentioned about seeing the lady at the place of occurrence. There is apparent contradiction in the version of the P.W. 5 and P.W. 7 about the quarrel. Mr. Singh submitted that in the instant case, the identification of the witnesses, for the first time was done in the court when the witnesses claimed that as per their own saying that the appellants were not knowing to them. No test identification parade was conducted during the investigation and as such it is most unsafe to place reliance on the deposition of the witnesses for identification of the appellants.

17. Mr. Singh then submitted that in the instant case, looking at the post-mortem report which indicates that the nature of



injury was only bruises and no injury can be made responsible for causing death. He has referred to the deposition of P.W. 8, the doctor who conducted the post-mortem examination, submitted that all the injuries were simple in nature and thus by no stretch of imagination, it can be concluded that the appellants were responsible for causing death of the deceased. Even if the prosecution case is accepted that the appellants have assaulted the deceased by cane stick yet none of the injuries were on the vital part of the body.

18. Mr. Singh next submitted that in the instant case the prosecution has made a pick and chose of the witnesses and has not examined the lady Jabunissa for whom the quarrel took place between the doctor and the police as per the version of P.W. 7. In such a situation, absence of explanation by the prosecution for non-examination on such an important witness namely Jabunissa, who could have testify the truth of the prosecution case and could have unfolded the true narratives of the case leads to only one conclusion, that the prosecution has deliberately withheld that witness as the deposition of jabunissa could have unfolded the true story and, as such, the court should draw the adverse inference of non-examination of such witness.

19. Mr. Abhinmanyu Sharma, learned counsel appearing on behalf of the State submitted that, it is true that in the



instant case the post-mortem report indicates that injuries were simple in nature and none of the injury was independently sufficient to cause death. He submitted that there are contradictions in the versions, but those contradictions are not very much material to disbelieve the prosecution case. Referring to the judgment of the trial court, he submitted that the trial court has considered the entire case and conducted the trial in most fair manner and the judgment of the trial court is very reasoned.

20. We have considered the rival submission of the appellant and the State. We find that the prosecution in the instant case has not explained the reason for lodging of the FIR at 01:00 P.M., when the incident of killing was known to the informant in the night itself. The fact of death and discovery that the dead body is lying in the hospital, according to the prosecution, was known to them at about 06:00 in the morning then there is no explanation why Jainul Abedin, P.W. 8 has not lodged the fardbeyan immediately after knowledge about the death. The conduct of the P.W. 5 and P.W. 8 appears to be artificial in not taking step for search of the deceased in the night or not reporting the matter to the police or the higher police officials in the morning and there is no explanation that why the fardbeyan was lodged at 01:00 P.M. Who and what prevented them from lodging the fardbeyan immediately after definite



knowledge about the murder of the deceased Dr. Majhar Alam at 6:00 A.M. The conduct of P.W. 5 and P.W. 7 in this case is not natural rather artificial and as such Mr. Singh submitted that the veracity of their version can be tested from their conduct. In fact, the Apex Court has discussed this aspect in the case reported in (2011) 11 SCC 140 in paragraph-47 which reads as follows:

47. With great respect to the Division Bench, we differ with the rather broad proposition highlighted above. It must be remembered that the best check on the veracity of a witness is the test of normal human behaviour. To our mind, if the behaviour of a witness is unnatural and grossly against normal human conduct that itself is a strong circumstance in doubting the story projected by him. The conduct of PW 4 and PW5 in not coming forth as witnesses for about 4 years is, thus, unacceptable measured by any yardstick.

21. We also find substance in the submission of Mr. Singh that the informant has mentioned the name of the assailant in the fardbeyan, but in the court he has stated that in paragraph-2, that he can identify the police personnel by face. This appears to be a major contradiction in the fardbeyan and statement in Court. If he has identified the assailants by name then in court his claim, that he can identify by face does not appears to be reasonable. In paragraph - 25 of his deposition he has said he learnt the name of the assailants of two Constables and one Havildar in the morning from the people



assembled at Janta Cinema Hall Chowk. The statement of P.W. 8 Jainul Abedin that the name of the assailant was disclosed in the night itself by the informant, this version of P.W. 8 run contrary to the version of P.W. 5. So the contradiction in the version of P.W. 5 in the fardbeyan and in the court as to the manner of identification of the appellants and delay of seven hours in lodging of the fardbeyan, after the knowledge of the informant and others about the murder of the doctor in the morning at 06:00 AM creates doubt. As per the case of the appellants that there was deliberation and, thereafter, they have been picked up in this case. We also find substance in the submission of Mr. Singh that as per P.W. 7 the quarrel between the doctor and the police party started in connection with a lady Jabunissa apart from the contradiction in the versions of P.W. 5 and P.W. 7 as to the account of scuffle between the deceased doctor and the police. We find substance in the submission of Mr. Singh that the prosecution has made a pick and chose of the witnesses in the instant case. If the version of P.W. 7 is accepted then, in that situation the reason of the quarrel is the lady Jabunissa who was taken alongwith the doctor by the police on rickshaw, but prosecution has not examined the said lady Jabunissa. The dead body of the deceased Dr. Majhar Alam was found in the hospital by the prosecution witnesses. Mr. Singh is correct in his submission that if the genesis of the quarrel is lady,



who was taken by the police along with Dr. Majhar Alam on rickshaw then she was the most important and competent witness to explain (1) who has committed murder of Dr. Majhar Alam and (2) where he was done to death. The failure of the prosecution to examine Jabunissa in the instant case goes against the prosecution as it would amount to withholding the material witnesses without any cogent justification. The Apex Court in numerous judgment has held that withholding of the material witnesses who could have unfolded the two narratives of the evidence goes against the prosecution.

Paragraph Nos. 37 to 40 of the judgment reported in case of ***Joginder Singh v. State of Haryana*** (2014) 11 SCC 335 are illustrating on this point and as such, quoted hereinbelow:

37. At this juncture, we may note with profit another aspect that has been highlighted by the learned counsel for the respondent. The prosecution has not examined Chander, husband of the deceased, a relevant eyewitness, Bala, Murti and Bimla, three other injured witnesses. No explanation has been given by the prosecution. Though there have been certain suggestions to PW 16 in the cross-examination, but his answer is evasive. It is well settled in law that non-examination of the material witness is not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for



being examined in the court and were yet withheld by the prosecution. (See State of H.P. v. Gian Chand.)

38. *In this context, we may also note with profit a passage from Takhaji Hiraji v. Thakore Kubersing Chamansing: (SCC p. 155, para 19)*

“19. ... It is true that if a material witness, who 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 who 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, a non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise 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.”

39. *Recently in Manjit Singh v. State of*



Punjab, this Court, after referring to earlier decisions, has opined thus: (SCC p. 757, para 24)

“24. ... it is quite clear that it is not the number and quantity but the quality that is material. It is the duty of the Court to consider the trustworthiness of evidence on record which inspires confidence and the same has to be accepted and acted upon and in such a situation no adverse inference should be drawn from the fact of non-examination of other witnesses. That apart, it is also to be seen whether such non-examination of a witness would carry the matter further so as to affect the evidence of other witnesses and if the evidence of a witness is really not essential to the unfolding of the prosecution case, it cannot be considered a material witness (see State of U.P. v Iftikhar Khan).”

40. In the case at hand, non-examination of the material witnesses is of significance. It is so because PW 11 is really an interested witness though the High Court has not agreed with the same. It appears from the material apart, Chander, who was present from the beginning, would have been in a position to disclose more clearly about the genesis of the occurrence. He is the husband of the deceased and we find no reason why the prosecution had withheld the said witness. Similarly, the other three witnesses who are said to be injured witnesses when available should have come and deposed. Therefore, in the obtaining factual matrix that their non-examination gains significance.

22. In the totality of the fact and situation, we find major contradictions in the versions of the prosecution in the manner of commission of crime, manner of participation of these appellants



and their identification in commission of the crime, unexplained delay in lodging of the FIR, non-examination of the most important witness Jabunissa for whom the quarrel between the doctor Majhar Alam and the police took place, creates reasonable doubts about the commission of crime by these appellants. We also find that the nature of injury as per the opinion of the doctor, was simple and none of the injury independently enough to cause death. And as such, even if their conviction is sustained, it cannot be a case under Section 302 of the Indian Penal Code. The instant case is of the year 1989, the appellants were convicted vide judgment dated 13.01.1994. One of the appellants has died during the pendency of the appeal. When the materials available on the record does not lead to only one conclusion that the appellants have committed the crime of murder beyond all reasonable doubt as there are contradictory version in the identification of appellants in commission of the crime, variance in the source of identification of the appellant in the commission of the crime and withholding of the most crucial witness namely Jabunissa creates reasonable doubt about the commission of crime by the appellants as the appellants have been convicted only on the basis that prosecution witnesses at the best claims to have seen the deceased was carried by the police personnel in the night at Janta Cinema Chowk. We find that is not safe to uphold the conviction of



the appellant based on the material of last seen by P.W. 5 and P.W. 7 that the deceased was carried by the police personnel.

23. Accordingly, extending the benefit of reasonable doubt the conviction of appellants is set aside and the appeal is allowed. Since the appellants are on bail they are discharged of the liability of their bail bonds.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

KKSINHA/-

AFR/NAFR	NAFR
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