

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.755 of 2012

Arising Out of PS.Case No. -187 Year- 1997 Thana -null District- SIWAN

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1. Shakir Mian S/O Akbar Mian R/O Village - Khodai Bari, P.S. Hussainganj, District – Siwan.
 2. Zakir Mian S/O Shakir Mian R/O Village - Khodai Bari, P.S. Hussainganj, District – Siwan. Appellants.

Versus

The State of Bihar

.... Respondent.

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Appearance :

For the Appellants : Mr. Ajay Kumar Thakur, Advocate.
Mr. Amir Alam, Advocate.

For the Respondent : Mr. A. K. Sinha, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH
AND
HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL**

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL)

Date:28-07-2017

This appeal has been preferred against the judgment and order of conviction dated 26.06.2012 and order of sentence dated 03.07.2012, passed by the learned Additional Sessions Judge (Fast Track Court No.1) Siwan, in Sessions Trial No.354 of 1998, whereby both the appellants were awarded life imprisonment and were also slapped with a fine of Rs.5000/- each and, in default of payment of fine, they were further sentenced to simple imprisonment for three months under Section 302/34 of the Indian Penal Code. Appellant No.2-Zakir Mian was further sentenced to undergo simple imprisonment for five years and was slapped with a fine of Rs.2000/- and, in default of payment of fine, he was further ordered to undergo simple imprisonment for two months under Section 27 of the Arms Act. Appellant no.2 was



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further sentenced to simple imprisonment for five years under Section 4 of the Explosive Substance Act. Both the sentences were directed to run concurrently.

2. The factual matrix of the case is that informant, Najboon Nisa (P.W.3), wife of Md. Hanif gave her fardbeyan before the Officer-in-Charge of Hussainganj Police Station on 21.10.1997 at 8:15 PM at her house with the allegation in succinct that on 21.10.1997 at about 6 PM when her husband returned from Siwan after marketing and purchase for marriage of her daughter and they all were in house and were seeing the articles, in the meantime, appellant no.1-Shakir Mian and appellant no.2-Zakir Mian along with two unknown miscreants approached her husband and took him with them. On misgiving, she along with her elder son followed them and started hearing the interaction amongst them hiding in the bush of Moonj standing on the road side. Meanwhile, appellant no.1-Shakir Mian gave order to kill the husband of the informant. On this, appellant no.1-Zakir Mian gunned down her husband by resorting two firing on him and also hurled a bomb. Thereafter, her husband fell down and was taken to hospital but he died. The informant witnessed Zakir Mian and Shakir Mian armed with country made pistol in the torch light flashed by him. She also witnessed two more persons to whom she could not identify. Her husband was writhing lying



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on the ground. The bone of contention is said to be animosity due to performance of second marriage by her husband with the sister of Zakir Mian.

3. The case was investigated. During course of investigation, the police recorded the further statement of the informant and statement of witnesses and inspected the place of occurrence. On conclusion of investigation, the police submitted the chargesheet under Section 302/34 of the Indian Penal, Section 27 of the Arms Act and Section 3/4/5 of the Explosive Substance Act against the appellant. The learned Magistrate took cognizance of the offence under Section 302/34 of the Indian Penal, Section 27 of the Arms Act and Section 3/4/5 of the Explosive Substance Act and committed the case to the Court of Sessions for its trial.

4. The trial Court framed charge under Section 302/34 of the Indian Penal Code, Section 27 of Arms Act and Section 4 of the Explosive Substance Act. Charges were read over and explained to the appellants to which they pleaded not guilty and claimed to be tried.

5. During course of trial, the prosecution has examined altogether 11 witnesses, namely, P.W.1-Rustam Ali, P.W.2-Asghar Ali, P.W.3-Narsingh Chaudhary, P.W.4-Imamuddin, P.W.5-Anna Khatoon, P.W.6-Asma Khatoon, P.W.7-Khalik Anwar @ Pappu, P.W.8-Tabasoom Khatoon, P.W.9-



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Nagboon Nisa (informant), P.W.10-Dr. Uma Shankar Pandey and P.W.11-Anirudh Singh. Out of the aforesaid witnesses, P.Ws.1, 2, 3, 4, 5 and 6 turned hostile, while P.W.11 is a formal witness who has proved the formal F.I.R. The prosecution has also filed and proved the documents in support of its case.

6. The statements of the accused persons were recorded under Section 313 of the Cr.P.C. The case of the defence is complete denial of the occurrence. The defence did not produce either any ocular or documentary evidence in support of its case.

7. After hearing the parties and perusing the record, the learned lower Court convicted the appellants under Section 302/34 of the Indian Penal, Section 27 of the Arms Act and Section 4 of the Explosive Substance Act vide its judgment and order of conviction dated 26.06.2012 and sentenced him vide order dated 03.07.2012 as mentioned in the earlier paragraph.

8. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellants beyond all reasonable doubt or not.

9. It has been submitted by learned counsel for the appellants that all the material witnesses, being P.Ws.1 to 6 turned hostile, while P.Ws.7, 8 and 9, being the son, daughter and wife of the deceased respectively are highly interested and



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partisan witnesses. Moreover, their testimonies are full of contradictions inter se intra se and also with prosecution case and cannot be relied upon for conviction of the appellants. Medical evidence also does not corroborate the prosecution case and the ocular testimony of the aforesaid witnesses. The I.O. of the case has also not been examined by the prosecution and for the want of examination of I.O., the place of occurrence does not stand established and the contradiction between the statement of the aforesaid witnesses given before the Court and that before the I.O. under Section 161 Cr.P.C. also does not stand corroborated causing great prejudice to the appellants. Admittedly, there was animosity between the appellants and the deceased and the appellants have been falsely implicated in this case due to spite and grudge. It has been further submitted by learned counsel for the appellants that the source of witnessing the occurrence by the informant, P.W.9 and his son, P.W.7 has also not been established by the prosecution as the torch under which flash light they had allegedly witnessed the occurrence was neither produced before the police nor seized by it.

10. On the other hand, learned A.P.P. for the State advocating the correctness and validity of the impugned judgment and order of conviction and sentence passed by the learned Court below, has submitted that the impugned judgment



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and order of conviction and sentence has been passed correctly & rightly appreciating the evidence on record and the facts of this case and the same is liable to be upheld and this criminal appeal has no force and substance and is liable to be dismissed.

11. From perusal of records, it transpires that Khalik Anwar @ Pappu (P.W.7) happens to be the son of the deceased, Tabasoom Khatoon (P.W.8) happens to be the daughter of the deceased and Nazboon Nisa (P.W.9), informant happens to be the wife of the deceased. Thus, these three witnesses are highly interested witnesses of the case. But it is the settled principle of law that testimony of the interested and partisan witnesses could not be discarded out-rightly, rather it should be scanned and scrutinized with great care and caution and, if after scanning his testimony is found reliable, trustworthy and inspire the confidence of the Court then the conviction can be made even on the basis of testimony of the interested witnesses.

12. As per the prosecution case as stated in the fardbeyan, there were four accused persons, i.e. the appellants and two unknown miscreants involved in the occurrence but in quite contradiction to the aforesaid case Nazboon Nisa (P.W.9), informant in paragraph-3 of her examination-in-chief, has stated that there was none with the appellants at the time of occurrence. Tabasoom Khatoon (P.W.8) has also stated in paragraph-3 of her



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examination-in-chief that she had seen the appellants escaping from the place of occurrence. As per the prosecution case and account of P.Ws.7, 8 & 9 when the appellants took the deceased with them on road P.Ws.7 & 9 had followed them and had witnessed the occurrence hiding themselves behind the Moonj bush standing adjacent to the road, but in quite contradiction to the aforesaid prosecution case and the statement of the witnesses, informant (P.W.9) has stated in paragraph-13 of her cross-examination that when she arrived at the place of occurrence around 100 villagers were present there. They were loading her husband on the jeep which means that P.W.9 was not present in the vicinity of the place of occurrence at the time of occurrence and witnessed the occurrence, rather she had arrived there after the congregation of the villagers following the occurrence. The said statement of the informant also rules out the presence of her son Khalik Anwar @ Pappu (P.W.7) in the vicinity of the place of occurrence and witnessing the occurrence by him, as per the prosecution case and statement of P.W.7 he was present there with P.W.9 at the time of occurrence. The aforesaid aspect of the case also goes to suggest that both these witnesses i.e. P.Ws.7 & 9 are not eye witnesses of the occurrence and they were not present in the vicinity of the place of occurrence at the time of occurrence.

13. From perusal of the testimony of Tabasoom



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Khatoon (P.W.8), it appears that she also does not happen to be eye-witness of the occurrence as in paragraphs-2 & 3 of her examination-in-chief she has stated that she had arrived at the place of occurrence listening the screaming of her mother and brother and sound of gun firing & explosion of bomb and witnessed her father injured, which means that she had not seen the appellant no.2-Zakir Mian assaulting the deceased by means of fire arm & bomb on the order of appellant no.1-Shakir Mian. Though in paragraph-3 of her examination-in-chief, she has stated that she has witnessed the appellants escaping, but in paragraph-7 of her cross-examination she has candidly stated that there was stampede in the village by explosion of bomb. She stepped out of her house amid the said stampede and rushed to the place of occurrence and when she arrived there, besides her family members 50 to 60 villagers were present there. They were loading her injured father on the jeep. The aforesaid statement of P.W.8 rules out witnessing of the occurrence by her.

14. Thus, on perusal of the aforesaid testimony of P.Ws.7, 8 & 9 and the prosecution case, it appears that there is vital contradiction between the prosecution case and statement of the aforesaid witnesses and in the statement of the witnesses inter se and also in the statement of witnesses intra se regarding number of accused persons involved in the occurrence and witnessing of



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occurrence and on the basis of aforesaid contradictions, the testimonies of the aforesaid witnesses does not appear to be reliable, convincing and worth credence and it does not inspire our confidence to hold the conviction of the appellants relying upon it.

15. Informant, P.W.9, in paragraph-3 of her examination-in-chief, has stated that her husband had died around at 8 PM. In paragraph-11 of her cross-examination she has further stated that her husband had died on the way to hospital but as they were not assured of his death they took him to the hospital. She has further stated in the said paragraph that she had divulged the occurrence to the constable and S.I. at the Sadar Hospital, Siwan and put her thumb impression thereon. P.W.8 in paragraph-9 of her cross-examination has stated that Sadar Hospital, Siwan is 20 Km. away from her village. She has further stated that her mother had regressed to the house from the hospital in the night. Which means it must have taken considerable time in reaching hospital from village, giving her statement before the police in the hospital and then regressing to the house from the hospital. But from perusal of the fardbeyan of the informant, it appears that it was recorded on the same day at 8:15 PM at her house. So this aspect of case creates serious doubt about the sanctity of the fardbeyan and the prosecution case.

16. As per the prosecution case & the



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statement of P.Ws.7, 8 & 9, appellant no.2-Zakir Mian resorted two firing on the deceased. He also assaulted him by means of bomb. But the doctor, who has conducted the autopsy of the dead body of the deceased, has opined the injuries found on the person of the deceased caused by explosive substance, resulting into his death. Thus, the medical evidence also does not go to corroborate the prosecution case.

17. P.W.7 has stated in paragraph-5 of his examination-in-chief that they witnessed the occurrence in the torch light flashed by him. In paragraph-19 of his cross-examination, he has further stated that he did not handover the said torch to the I.O. The I.O. has also not seized the said torch. Thus, the source of witnessing the occurrence has also not been proved by the prosecution.

18. Informant (P.W.9) has stated in paragraph-11 of her cross-examination that she had divulged the occurrence to the constable and S.I. at the Sadar Hospital, Siwan and put her thumb impression thereon. But, from perusing the fardbeyan of the informant, it appears that it was recorded at her house. Further, P.W.8 has stated in paragraph-4 of her examination-in-chief that she had given statement to the police at 8 PM earlier to that of her mother (informant). She put her signature on her statement. Thus, the said statement happens to be earlier to that of



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the informant given at the Sadar Hospital, Siwan and also at her house. The aforesaid aspect of the case candidly indicate that the F.I.R. lodged in the case on the basis of the fardbeyan of the informant recorded at her house at 8:15 PM does not happen to be the first information report regarding the occurrence, rather the first information report of the occurrence is that given by her daughter (P.W.8) earlier to her but the said first information report has not been brought on record to the best of knowledge of the prosecution, which creates serious doubt about the sanctity of the F.I.R. and the prosecution case.

19. The I.O. of the case has not been examined by the prosecution and for the want of examination of I.O. place of occurrence does not stand established. Moreover, the contradictions between the statements of the witnesses given before the Court and that given before the I.O. under Section 161 Cr.P.C. has also not been corroborated by non-examination of the I.O. causing great prejudice to the defence.

20. Thus, on perusal of the aforesaid evidence of the prosecution, it appears that the prosecution has utterly and miserably failed to substantiate its case and guilt of the appellants by adducing cogent, convincing, reliable and worth credence evidence. Hence, the appellants are acquitted from the charges levelled against them. As the appellant no.1- Sakir Mian is on



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bail, he is discharged from the liability of his bail bond while appellant no.2-Zakir Mian is directed to be released forthwith from the custody, if not wanted in any other case. Accordingly, this appeal is allowed and impugned judgment and order of conviction and sentence passed by the learned Lower Court is set aside.

(Prakash Chandra Jaiswal, J.)

Samarendra Pratap Singh, J. I agree.

(Samarendra Pratap Singh, J.)

Trivedi/-

AFR/NAFR	AFR
CAV DATE	12.07.2017
Uploading Date	28.07.2017
Transmission Date	28.07.2017

