

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction and order of sentence dated 27.09.1995 passed by Sri Birendra Singh, learned Additional Sessions Judge-II, Barh in Sessions Trial No. 316 of 1993, arising out of Mokama P.S. case no. 223 of 1991)

Criminal Appeal (DB) No. 340 of 1995

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1. Baleshwar Mahto, son of Sri Jitan Mahto,	
2. Brijnandan Mahto, son of Sri Bhimlal Mahto	
3. Dinesh Mahto @ Utia, son of Sri Hemraj Mahto	
All residents of village- Kanhaipur, P.S.- Mokama, District- Patna.	 Appellant/s
	Versus
The State of Bihar	 Respondent/s

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Appearance :

For the Appellant/s : Ms. S. B. Verma, Amicus Curiae
For the Respondent/s : 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: 18-01-2018

The present appeal has been filed against the judgment of conviction and order of sentence dated 27.09.1995 passed by learned Additional Sessions Judge-II, Barh in Sessions Trial No. 316 of 1993, arising out of Mokama P.S. case no. 223 of 1991, whereby all the appellants have been convicted under Sections 302/149 and 147 of the Indian Penal Code. The appellant no.1, namely, Baleshwar Mahto, has been convicted under Section 3 of the Explosive Substance Act and appellant no.2, namely, Brijnandan Mahto, has been convicted under Section 27 of the Arms Act. All the three appellants have been sentenced to undergo imprisonment for life for



offence under Sections 302/149 of the Indian Penal Code and R.I. for one year for offence under Section 147 of the Indian Penal Code. The appellant no.1, namely, Baleshwar Mahto, has further been sentenced to undergo R.I. for one year for offence under Section 3 of the Explosive Substance Act and appellant no.2, namely, Brijnandan Mahto, has further been sentenced to undergo R.I. for one year for offence under Section 27 of the Arms Act. However, all the sentences have been ordered to run concurrently.

2. The prosecution case in brief is that on 19.11.1991 at about 7.00 P.M. the informant was at his house and the appellants along with 7 - 8 persons came and began to abuse him upon which he and Shital Mahto forbade them. In the meantime, appellant no.2 fired with his country made gun in front of his door. There was immense halla and in the meantime appellant no.3 took bomb from appellant no.1 and hurled the same on them, which exploded hitting Gangia Devi, as a result of which she sustained injury and fell down. On explosion of bomb Yogendra Mahto, Krishna Mahto, Nandlal Mahto, son of informant, Suresh Mahto and several other persons assembled there and witnessed the occurrence and from the side of the informant they began to pelt stone and brick-bats then they fled away towards north-west. The 7-8 persons accompanying the appellants had been instigating the appellants to abuse and assault whom the informant



can identify as their names are known to him. The cause of dispute is the previous dispute in respect of land in between the informant and Bimal Mahto, the brother of appellant no.1, due to which the accused persons attacked the house of the informant with bombs resulting in death of Gangia Devi.

3. On the basis of the fardbeyan, formal F.I.R. was registered, being Mokama P.S. case no. 223 of 1991.

4. The police after investigation submitted charge-sheet and after taking cognizance, the case was committed to the Court of Sessions on 29.01.1993. Charges were framed on 15.09.1993. The appellants pleaded that they are innocent and have been falsely implicated in this case and as such they claimed to be tried.

5. The prosecution examined 8 witnesses in support of the case. P.W. 1 is Tulsi Mahto, P.W.2 is Jogendra Mahto, P.W.3 is Kailash Mahto, P.W. 4 is Suresh Prasad, P.W.5 is Bisho Prasad, P.W.6 is Nand Kishore Prasad Singh, P.W.7 is Dr. Ramesh Kumar Singh and P.W.8 is Ram Swaroop Mahto. Out of which P.W.3 is the formal witness, P.W.6 is the investigating officer of the case and P.W.7 is the Medical Officer. P.W. 8 is the informant. P.W.1, P.W.2, P.W.4 and P.W.5 have been examined as eye witness of the occurrence. However, P.W.1 and P.W.5 were not named in the F.I.R. as witness of the occurrence. In the charge-sheet also P.W.1 was not



cited as witness. P.W.4 is the son of the informant. In addition thereto documentary evidence was adduced in the nature of Ext. i.e. fardbeyan, protest petition, post-mortem report, sanction order. However, the formal F.I.R. and inquest report were not proved and tendered in the present case.

6. The defence pleaded that they have been falsely implicated in the case. Their contention before the trial court was that the incident of bomb explosion never took place, rather during Atishwaji in reception of Barat in the house of Majhar Imam the deceased got fire in her clothes and following the fire out of Atishwaji there was panic and stampede in which the deceased fell down and died during the stampede.

7. The trial court on scrutiny of the evidence held out that the appellants are guilty for commission of the offence and convicted the appellants for the commission of offence under Section 302/149, 147 of the Indian Penal Code and Section 27 of the Arms Act as well as Section 3 of the Explosive Substance Act.

8. In this case appellant nos. 1 and 2 were granted bail vide order dated 01.11.1995, while appellant no.3 was granted bail only on 05.01.2001. On the date of judgment of the trial court, the appellant no.1 was aged about 58 years and as such today he has



become now above 80 years old. When the appeal was listed for regular hearing, no one appeared on behalf of the appellants and, as such, this Court requested Ms. Shashi Bala Verma on 16.01.2018 to appear as Amicus Curiae for assistance of this Court.

9. Ms. S. B. Verma, learned counsel appearing as Amicus Curiae, has highlighted the fallacy in the decision of the trial Court. Ms. Verma at the very outset submitted that the appellants in the present case were convicted for the offence of killing Gangia Devi, but on scrutiny of the evidence available on record would indicate that the prosecution has miserably failed to bring home the charges against the appellants. She submitted that in the present case, the prosecution has deviated from the original case set out in the F.I.R. and developed the story and introduced altogether new case in the court, which cause serious prejudice to the appellants. Ms. Verma submitted that the post-mortem report does not indicate that the bomb was exploded by the appellants, which cause death of the deceased. She submitted that the story of receiving fire/burn injury in Atiswaji is most probable, as no gun powder or substance, which can be identified as splinter of the explosive substance was found during course of post-mortem. To the contrary, the story that the deceased sustained burn injury out of fire in the clothe, tallies with the defence case that the deceased was witnessing demonstration of Atiswaji during reception of Barat and as



such she received the injury from fire work (Atiswaji), as the explosive substance cannot cause fire to the clothe of the deceased. In addition thereto the absence of gun powder or splinter like substance, which can co-relate the injury with the explosive substance (bomb), creates serious doubt about the prosecution case.

10. Ms. Verma next submitted that the prosecution has not been able to establish the case beyond reasonable doubt that the deceased sustained bomb injury and in the absence of explosive material on record, the case of use of explosive substance cannot be established and relied upon for convicting the appellants. She submitted that explosive substance and crackers used in Atiswaji are two different substances and the injury caused by the crackers in the Atiswaji in the reception of Barat cannot be used to prove the case of use of explosive substance against the appellants. Ms. Verma next submitted that the prosecution has not collected any substance at the alleged place of occurrence to even remotely establish the use of explosive substance (bomb) for killing the deceased and in absence of report as to the explosive substance under the Explosives Act, 1884 the trial court has committed gross illegality in convicting the appellants. Section 3 of the Act defines explosive, which read as follows:

“3 (d) “explosive” means gunpowder,



nitroglycerine, nitroglycol, guncotton, di-nitro-toluene, tri-nitro-toluene, picric acid, di-nitro-phenol, tri-nitro-resorcinol (styphnic acid), cyclo-tri-methylene-tri-nitramine, penta-erythritol-tetranitrate, tetryl, nitro-guanidine, lead azide, lead styphynate, fulminate of mercury or any other metal diazo-di-nitro-phenol, coloured fires or any other substance whether a single chemical compound or a mixture of substances, whether solid or liquid or gaseous used or manufactured with a view to produce a practical effect by explosion or pyrotechnic effect; and includes fog-signals, fireworks, fuses, rockets, percussion-caps, detonators, cartridges, ammunition of all descriptions and every adaptation or preparation of an explosive as defined in this clause;”

11. Referring to the definition of the Explosive under Explosive Act, 1884, she submitted that in the absence of proof of explosive, the conviction of the appellants is unsustainable. Ms. Verma next submitted that in the present case, the prosecution has made a pick and choose in the examination of the material witnesses. She submitted that the prosecution has not examined the material witness without any explanation. She submitted that the prosecution has examined those witnesses, who were not even named in the F.I.R., as eye witness or charge-sheeted witness, on the other hand, the eye witnesses named in the F.I.R., namely, Sheetal Mahto, Krishna Mahto, Balram Mahto, Brahamdeo Mahto and Nandlal Mahto have



been withheld by the prosecution and non-examination of such material witness creates serious doubt about the prosecution case. Ms. Verma submitted that withholding of the material witness goes against the prosecution and as such the trial court was required to draw adverse inference of non-examination of the material witness including the F.I.R. witness. Ms. Verma referred to the deposition of the witness to highlight the inconsistency and conflict in the case of the prosecution witness. She submitted that the prosecution story is highly absurd, improbable and unreliable, as it is unnatural. The trial court has committed error in convicting the appellants. She next submitted that there is inconsistency in the ocular evidence and the medical evidence and submitted that in view of the apparent contradiction and conflict between the ocular evidence and the medical evidence, the trial court was required to extend the benefit of doubt to the appellants in view of the apparent contradiction, which renders the prosecution case most improbable. In the present case, the witnesses are highly interest and the independent witnesses, whose names figured in the fardbeyan were not examined by the prosecution and as such this Court should consider the deposition of the highly interested witness with utmost care and circumspection. The trial court has committed error in placing reliance on inadmissible evidence while convicting the appellants. The witnesses are at



variance in the matter of explosion, as per the witness only one bomb was hurled on the informant and the Sheetal Mahto as per the F.I.R., but Sheetal Mahto was not examined without assigning any reason. In the earlier version, there was no story of second bomb blast, but the story of second bomb blast was developed by the prosecution witnesses in the Court, which creates serious doubt about the prosecution case. The material available on record would indicate that the bomb exploded by the appellants hit the informant and Sheetal Mahto and not the deceased. The prosecution in order to cover up that lacuna has introduced the story of second bomb blast to connect the appellants in the commission of murder of deceased.

12. Ms. Verma next submitted that in the present case, the prosecution has miserably failed to prove the motive for commission of crime. The story of Dinesh taking the bomb from the hand of Baleshwar Mahto is most improbable and unnatural. The story of enmity points by the prosecution was against Bimal Mahto, but Bimal Mahto was not made accused with whom they have land dispute. Ms. Verma referring to the deposition of the investigating officer of the case submitted that the investigating officer has not found any blood stain on the door of the informant, which is the place of occurrence. The investigating officer has not seized the burnt clothe and blood stain earth, which goes to the root of the prosecution case.



No injury on the deceased was relatable in any manner to bomb blast, the injury found on the deceased does not support the prosecution case of bomb blast. Even on the spot no sign of bomb blast, brick bats was found by the investigating officer and in the totality of the facts situation, the conviction of the appellants is based on mere suspicion and is not sustainable as such. She submitted that in a situation like, present conviction of the appellants was most unsafe and as such the appellants deserve benefit of doubt.

13. Mr. Abhimanyu Sharma, learned A.P.P. appearing on behalf of the State conceded that in the present case there is no conclusive material to establish that the explosive substance (bomb) was thrown by the appellants, which cause death of the deceased. He could not dispute the fact that no material was collected by the investigating officer at the spot, which can be conclusively held to be an explosive substance. He also admitted the fallacy in the investigation in not sending the substance for opinion of the expert whether the substance was explosive or not. He could not dispute the fact that from the body of the deceased no material was collected to indicate that gunpowder or splinter was found from the person of the deceased.

14. We have examined the entire materials on record. We find substance in the submission made by the learned Amicus Curiae



that the prosecution has made pick and choose and without any rational justification the F.I.R. and charge-sheet witnesses were not examined. In this regard, the judgment of the Apex Court in the case of **Takhaji Hiraji vs Thakore Kubersing Chamansing & Ors.**, reported in **(2001) 6 SCC 145**, para 19 is settler on the point, which is quoted for ready reference:

“19. 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, 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, 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 to 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 them and 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 dance performers 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. On scrutiny of the materials, we find that the independent witnesses were not examined in this case, although they were named in the F.I.R. and even cited as charge-sheet witness and only highly interested witnesses and the family members were examined on behalf of the prosecution. We also find substance in the



submission of the learned Amicus Curiae that explosive substance could not cause fire on the clothes of the victim. The submission of Ms. Verma, learned Amicus Curiae appears to be most probable that while watching Atiswaji, she might have got fire on her clothe and in that situation there was panic and stampede in which the victim died. The burn injury and the fire on the clothes of the deceased indicate that the story of the defence of sustaining injury of cracker during Atiswaji, if not more probable then equally probable with the prosecution case. The motive behind the cause as to previous enmity does not cut much ice in the present case in view of the fact that the prosecution has enmity not against the appellants but one Bimal Mahto, who was not made accused in the present case. In the present case, the appellant no.3 has suffered imprisonment for more than six years. The prosecution case suffers from many infirmities. We also find many errors in the appreciation of evidence by the trial court. When two views of commission of crime is possible then the court is required to accept that view, which goes in favour of the accused. In the present case, the two version of death of Gangia Devi surfaced during trial. The story of sustaining burn injury while watching Atiswaji is equally probable in view of the fact that the counter version of murder of the Gangia Devi is not supported by the medical evidence, as neither the gunpowder nor splinter was found on the



body of Gangia Devi, which rules out the injury by fire arm or explosive substance. In addition thereto, we find that the investigating officer has not collected any evidence or material to indicate that explosive substance was used while killing Gangia Devi. The prosecution has not collected any material to safely conclude that explosive substance was used for killing Gangia Devi. There is no scientific evidence to prove that the explosive substance (bomb) was used. The medical report does not conclusively indicate that the deceased has sustained bomb injury. In addition thereto in the present case, there is contradiction in the earlier version of the prosecution with subsequent version developed in court. In the earlier version they developed the story of throwing one bomb, which caused injury on the informant and the other and the same story was subsequently developed by the introducing the case of second bomb blast and such improvement goes against the prosecution case.

16. Thus, the cumulative effect of the infirmity indicated hereinabove and in view of the absence of gunpowder or splinter on the body of the deceased, withholding of the material independent witnesses, pick and choose of the witnesses and examination of only highly interested witnesses and contradiction in the ocular evidence and the medical evidence creates serious doubt about the commission of crime in the matter pleaded by the prosecution and as such in the



totality of the facts situation the appellants deserve benefit of doubt.

17. Considering the totality of the facts situation, we are constrained to hold that the conviction of the appellants in the instant case is not beyond all reasonable doubt and as such they deserve benefit of doubt. Accordingly, the present appeal is allowed and set aside the judgment of conviction and order of sentence passed by the trial court and acquit the appellants from the charges leveled against them. Since the appellants are on bail, they are discharged from the liabilities of their bail bonds.

18. Before we part with, we record our sincere appreciation for the assistance rendered by Ms. S. B. Verma, learned Amicus Curiae.

19. Let a copy of the judgment be handed over to Ms. S. B. Verma, learned Amicus Curiae to raise bill for payment for rendering the assistance in the present appeal from the Patna High Court Legal Services Authority.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Uday/-

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