IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.213 of 2013

Arising Out of PS. Case No.-114 Year-2000 Thana- SHAMBHUGANJ District- Banka

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Girdhar Singh, S/o Ram Ratan Prasad Singh, Resident of Village- Chatma Bazar, Police Station- Shambhuganj, District- Banka.

... ... Appellant

Versus

The State of Bihar

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr. Anil Kumar Singh, Advocate.
For the Respondent/s : Smt. Abha Singh, APP.

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT
Date : 28-11-2018

Heard learned counsel for the appellant and learned APP for the State on this criminal appeal.

2. This criminal appeal has been preferred against the Judgment and Order of conviction dated 25.02.2013 and Order of sentence dated 02.03.2013 passed by Ad hoc Additional Sessions Judge-IV, Banka in Sessions Trial No. 911 of 2005 arising out of Shambhuganj P.S. Case No. 114 of 2000 whereby the learned trial court convicted the accused Girdhar Singh for the offence punishable under Sections 3 and 4 of the Explosive Substance Act and sentenced him to undergo R.I. for five years and also slapped him with the fine of Rs. 5000/- and in case of default of payment of fine to further undergo S.I. for four months under Section 3 of the Explosive Substance Act and also sentenced him to undergo R.I. for five years and also slapped

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him with the fine of Rs. 5000/- and in case of default of payment of fine to further undergo S.I. for four months under Section 4 of the Explosive Substance Act. Both the sentences were directed to run concurrently.

3. Factual matrix of the case is that Shambhuganj P.S. Case No. 114 of 2000 was instituted under Sections 307 of the Indian Penal Code and Sections 3 and 4 of the Explosive Substance Act against the accused Girdhar Singh on the basis of the fardbeyan of Ram Kishore Chaudhary, Son of Late Satyanarayan Chaudhary recorded by S.I. R. S. Thakur of P.S. Shambhuganj on 25.12.2000 at 06:00 PM at Gyan Mandir Pustak Bhandar located in Shambhuganj Bazar with the allegation in succinct that Murlidhar Singh was tenant in his house. There was scuffling between them on 12.12.2000 over demand of rent. Regarding the aforesaid occurrence, he has lodged a case against him and his brother Girdhar Singh. On 25.12.2000 at around 05:30 PM while his nephew Dipak Kumar Singh was sitting in his book shop, in the meantime Girdhar Singh descended at his shop taking bag in his hand and directed his nephew to shut down his shop and not to open the same in future. In the meantime, the informant and his son Shivtosh Choudhary arrived at the shop and found Girdhar Singh

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standing on the main road with a bag in his hand in front of his shop. Spotting the informant and his son, said Girdhar Singh taking out bomb from the bag hurled it on them due to previous animosity which hit the wall of his shop. In the meantime again he hurled another bomb on them which also hit the wall of the shop. However, they were left unhurt. On congregation of the locals responding the sound of the explosion of the bomb and seeing smoke, Girdhar Singh made good his escape tossing bomb on the road. Several persons of the market had witnessed the occurrence.

4. Aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against the accused Girdhar Singh under Section 307 of the Indian Penal Code and Sections 3 and 4 of the Explosive Substance Act.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions and after commitment and on transfer finally the case came in the seisin of Ad hoc Additional Sessions Judge-IV, Banka for trial.

6. Charge against the accused Girdhar Singh was framed under Section 307 of the Indian Penal Code and Sections

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3 and 4 of the Explosive Substance Act. Charges were read over and explained to him by the Court to which he pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether ten prosecution witnesses namely, Dharmendra Thakur as PW-1, Sattan Sao as PW-2, Muni Lal Singh as PW-3, Manoj Kumar Thakur as PW-4, Lal Mohan Mandal as PW-5, Shivtosh Kumar Choudhary as PW-6, informant Ram Kishore Choudhary as PW-7, Ashutosh Kumar Choudhary as PW-8, Renu Devi as PW-9 and Dipak Kumar Singh as PW-10. All the aforesaid witnesses barring PW-2 and PW-7 turned hostile. One more witness has been examined by the Court as court witness namely Mahendra Prasad Yadav (CW-1) who happens to be formal witness of the case and has proved signatures on the seizure list. Prosecution has also filed and proved some documents by way of documentary evidence in the case.

8. Statement of the accused was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming himself to be innocent. Accused neither adduced any ocular nor documentary evidence in buttress of his case.

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9. After hearing the parties and perusing the record, the learned trial court passed the aforesaid Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid Judgment and Order of conviction and sentence, convict Girdhar Singh has preferred this Criminal Appeal.

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

12. It is submitted by learned counsel for the appellant that all the independent witnesses of the occurrence besides the son of the informant namely Shivtosh Choudhary (PW-6) who was present with the informant at the time of occurrence at the place of occurrence and his nephew Dipak Kumar Singh (PW-10) who was present in the book shop of the informant have turned hostile. It is further submitted that the informant has also not supported the prosecution case of witnessing the occurrence committed by the appellant as in his examination-in-chief itself he has stated that when he arrived near his shop, he listened sound of the explosion of the bomb and found wall and gate of his shop damaged by the bomb and in his examination-in-chief

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itself, he has stated that he could not disclose as to how many people had lobbed bomb. In the said examination-in-chief, he has even denied to have identified the assailant. Though PW-2 Sattan Sao has supported the prosecution case claiming himself to be eye witness of the occurrence, but the informant in Para-5 of his cross-examination has denied to have witnessed the said Sattan Sao at the place of occurrence at the time of occurrence. I.O. of the case has also not been examined by the prosecution and hence objective evidence has not been brought on record. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charges levelled against the appellant beyond all reasonable doubts by adducing consistent, trustworthy, reliable and worth credence evidence. Hence, aforesaid judgment and order of conviction and sentence passed against the appellant is liable to be set aside and the appellant is entitled to be acquitted from the charges levelled against him.

13. On the other hand, learned APP for the State advocating the correctness and validity of the impugned Judgment and Order of conviction and sentence submitted that the informant in his examination-in-chief has stated that bomb was hurled upon him and his son with intention to eliminate

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them and it hit the wall of the shop and damaged the wall and gate of his shop and PW-2 Sattan Sao who happens to be eye witness of the occurrence has also corroborated the occurrence. Remains of the exploded bomb was seized from the place of occurrence and sent to the FSL for its chemical examination and as per the report of the FSL, it was found to be remains of the country made bomb. Thus, the prosecution has succeeded to substantiate the prosecution case and learned trial court correctly appreciating the facts and evidence available on record has rightly passed the impugned Judgment and Order of conviction and sentence which is liable to be upheld and this criminal appeal is shorn of merit and is liable to be dismissed.

14. From perusal of the record, it appears that to substantiate its case in ocular evidence, the prosecution has examined altogether ten material witnesses in the case. But all the witnesses barring PW-2 and PW-7 have turned hostile. From perusal of the testimony of PW-2 Sattan Sao, it appears that he has made an abortive bid to support the prosecution case by stating in his examination-in-chief in consonance to the prosecution case claiming himself to be eye witness of the occurrence but the informant PW-7 has denied the presence of PW-2 at the place of occurrence at the time of occurrence by

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stating in Para-5 of his cross-examination that he has not witnessed his villager Sattan Sao (PW-2) at the place of occurrence. Moreover, PW-2 Sattan Sao has himself stated in Para-11 of his cross-examination that listening the bomb sound, he did not arrive at the place of occurrence. Moreso, from perusal of the testimony of the said witness (PW-2), it appears that he happens to be on inimical terms with the appellant as in Para-8 of his cross-examination he has stated that the appellant Girdhar Singh used to reside in the house of the informant Ram Kishore Choudhary as a tenant. There was dispute between them over rent and due to aforesaid dispute there was litigation between them. Two cases are pending between them in his knowledge and he has deposed in favour of Ram Kishore Choudhary in the aforesaid two cases. Attention of the said witness towards contradiction between his statement given before the Court and that given before the I.O. under Section 161 Cr.P.C. has been drawn by the defence in para-18 of his cross-examination regarding emerging of Girdhar Singh taking bag from Shiv Mandir, squabbling at the shop of Ram Kishore Choudhary and hurling bomb upon the informant Ram Kishore Choudhary and his son Shivtosh Choudhary by Girdhar Singh while they were coming to their shop from their house. I.O. of

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the case has not been examined by the prosecution to corroborate the aforesaid contradiction. From perusal of the case diary, I find that there is vital contradiction between the statement of the aforesaid witness given before the Court and that given before the I.O. under Section 161 Cr.P.C. regarding aforesaid material aspect of the case. Thus, the aforesaid witness appears to have taken altogether different stand before the Court regarding the aforesaid material aspect of the case and he is not worth credence.

15. When the I.O. of the case is not examined by the prosecution and the attention of the witness has already been drawn towards his earlier statement and the Investigating Officer could not be brought to give his evidence, then in my considered opinion, the Court can peruse the case diary and find out as to whether or not the attention of the witness towards his previous statement was correctly drawn and to satisfy itself as to whether or not he had given similar statement before police. There are two parts of the case diary. First part contains such portion of the diary in which the Police Officer has recorded statement of the witnesses, about the incident or about other relevant facts which to that Police Officer, would be hearsay. The Second party of the case diary contains that

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portion in which the Police Officer has himself seen or heard a particular fact and has recorded a fact out of his own perception. To this category would come recording about the inspection of place of occurrence making of seizure of certain incriminating articles or in some cases, when the Police Officer reaches the place of occurrence where the occurrence has not finished and he sees himself whole or part of the occurrence, recording of that. The latter part of the case diary cannot be used by the Court unless the Investigating Officer is examined because that would amount to using that portion of the case diary as evidence. Only the Investigating Officer can tell the Court in witness box as to what were his findings out of his own perception, so that he can be put to cross-examination over that. However the first part of the case diary consists, as already noted, the statement recorded by the witnesses. If the Investigating Officer comes to the Court for evidence and if he is asked to confirm those portion of the statement of the witnesses to which the attention of the witnesses was drawn, the Investigating Officer will say only what he has recorded as his statement in the case diary and cannot go beyond that. Now, the question is, whether that portion of the case diary can be looked into by the Court and used in the trial to aid the Court in

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reaching at a correct decision when the Investigating Officer is not brought before the Court. Sub-Section (2) of Section 172 of Cr.P.C. provides that the Court cannot only call for the case diary but may also use such diary to take aid in such trial. If the Court only has the power to look into the case diary and whatever it peruses to keep it only in mind and then to proceed to record the judgment keeping such impression only in mind that, in my opinion, cannot be the intention of the legislation. In my considered opinion, if the Court peruses any such things and uses it to its aid in trial, this must go in black and white as part of the judgment. The only limitation is that the court cannot use any portion of the case diary as evidence. In view of the aforesaid proposition of law and in view of the contradiction between the statement of the witness, as recorded before the court and that given before the I.O. under Section 161 Cr.P.C., the testimony of the aforesaid witness given before the court does not inspire my confidence to hold the conviction of the appellant relying upon the same.

16. From perusal of the testimony of the informant (PW-7), it appears that the informant has not witnessed the occurrence of hurling of the bomb by the appellant at the place of occurrence as in his examination-in-chief he has stated that

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while he was coming to his shop from his house and arrived near the shop he listened sound of explosion of the bomb. The bomb had hit the wall and gate of his shop and wall and gate of his shop was damaged. Moreover, in the said examination-in-chief itself, he has stated that he could not disclose as to how many persons had hurled bomb. In Para-3 of his examination-in-chief, he has further stated that he does not identify the person hurling bomb. In Para-4 of his cross-examination, he has also stated that he had not divulged to the I.O. about identification of any accused in the occurrence. Thus, from perusal of the aforesaid testimony of the informant, it appears that informant has not supported the prosecution case and complicity of the appellant in the occurrence.

17. As per the prosecution case, nephew of informant namely Dipak Kumar Singh was in the book shop of the informant at the time of occurrence and his son Shivtosh Kumar Choudhary was with the informant at the time of occurrence at the place of occurrence, but said Dipak Kumar Singh and Shivtosh Choudhary examined in this case as PW-10 and PW-6 respectively have turned hostile and not supported the prosecution case.

18. As per the prosecution case, several persons of the

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market had witnessed the occurrence. But barring PW-2 Sattan Sao, no independent witness has been examined by the prosecution in corroboration of the prosecution case and no plausible and convincing reason has been assigned by the prosecution for their non-examination. Hence, adverse inference is drawn against the prosecution.

19. From perusal of the record, it appears that the prosecution has proved the remains of the exploded bomb as that of country made bomb by bringing on record the FSL report marked as Exhibit-3. But from perusal of the seizure list of the remains of the bomb, it appears that the seizure list has not been proved by the seizure list witnesses namely the informant Ram Kishore Singh and his son Shivtosh Choudhary. Thus, the seizure of the aforesaid remains of the bomb from the place of occurrence also does not stand established by the prosecution.

20. I.O. of the case has not been examined by the prosecution and due to non-examination of the I.O., objective evidence could not be brought on record.

21. In the facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charges levelled against the appellant beyond all reasonable doubts by

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adducing consistent, convincing, reliable and worth credence evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned trial court against the appellant is set aside and the appellant is acquitted of the charges levelled against him. As the appellant is on bail, he is discharged from the liability of his bail bond.

22. Accordingly, this criminal appeal is allowed.

(Prakash Chandra Jaiswal, J)

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