

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No. 512 of 2013

Arising Out of PS. Case No.-297 Year-2007 Thana- Pirbahor District- Patna

Mahesh Gope, Son of Vishwanath Rai @ Golden Rai, resident of Tikiya Toli,
P.S. - Pirbahore, District Patna.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 510 of 2013

Arising Out of PS. Case No.-297 Year-2007 Thana- Pirbahor District- Patna

Arun Gope, Son of Vishwanath Rai @ Golden Rai, resident of Tikiya Toli,
P.S.- Pirbahore, District- Patna.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 512 of 2013)

with

(In CRIMINAL APPEAL (DB) No. 510 of 2013)

For the Appellant(s) : Sri Gouranga Chatterjee, Advocate
Sri Sanjay Kumar, Advocate
Sri Amresh Kumar, Advocate

For the State : Sri Ajay Mishra, A.P.P.
Sri Abhimanyu Sharma, A.P.P.

For the Informant : Sri Uma Shankar Pd. (Sr. Adv.)
Smt. Rekha Prasad, Advocate

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 29-03-2019

Both appellants in aforesaid two appeals were tried together and by a common judgment, they have been held guilty, convicted and sentenced and as such, both the appeals were taken



up together under the heading “For Hearing” and are being disposed of by this common judgment.

2. Both the appellants by judgment dated 16th April, 2013 were held guilty and convicted for commission of offence under Section 302/34 of the Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.') and Section 27 of the Arms Act, 1959 (hereinafter referred to as 'Arms Act'), however; they were acquitted from the charge under Sections 3 & 4 of the Explosive Substances Act, 1908 (for short “Explosive Substance Act”). By order dated 18th April, 2013 under Section 302/34 of the I.P.C., both appellants were sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/- (ten thousand) each. In default of payment of fine, they were directed to further undergo simple imprisonment for two years. By the same order i.e. order dated 18-04-2013, under Section 27 of the Arms Act, both were sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 5,000/- (five thousand) each. In case of default in payment of fine, they were directed to further undergo simple imprisonment for six months. The judgment of conviction and sentence was passed in Sessions Trial No. 985 of 2008 (arising out of Pirbahore P.S. Case No. 297 of 2007) by Sri Choudhary



B.K.Rai, learned Additional Sessions Judge – 14, Patna (hereinafter referred to as the 'Trial Judge').

3. Short fact of the case is that on 08-12-2007 at 12.15 hrs. in Emergency Block of Patna Medical College & Hospital, Patna (for short 'P.M.C.H.'), the Assistant Sub-Inspector of Police Sri B.N.Singh recorded *fardbeyan* of Premnath Rai (P.W.6). The said *fardbeyan* was recorded in presence of his elder brother Raghuvansh Rai (P.W.2). In the *fardbeyan*, he stated that on the same date at 8:30 AM, he with his elder brother Raghuvansh Rai (P.W.2) and brother Vidyanand Rai (deceased) were present near the bank of Ganges (घाट). At that very time, Vidyanand Rai (deceased) was doing दातुन (cleaning teeth) and informant with his elder brother Raghuvansh Rai (P.W.2) was sitting near his tractor, which was being loaded by Ganga sand. Earlier, his elder brother Vish Rai was given gun shot injury and for which, a case was going on and in that case, his brother Vidyanand Rai (deceased) was a prosecution witness. Due to the pendency of the said case, on 08-12-2007 at 8:30 in the morning, suddenly Mahesh Gope {appellant in Cr.Appeal (DB) No. 512 of 2013} and Arun Gope {appellant in Cr.Appeal (DB) No. 510 of 2013}, both carrying pistol in their hands with other three unknown accused persons, arrived there and thereafter, they caught hold of the brother of the



informant Vidyanand Rai (deceased) and with intent to kill him, gave shot of firing on his left temporal region. Due to said injury, he fell down. Subsequently, Arun Gope {appellant in Cr.Appeal (DB) No. 510 of 2013} gave second shot of firing on the temporal region. After noticing the said occurrence, the informant, his brother Raghuvansh Rai and others, who were present on घाट (*ghaat*), started running to catch the accused persons, however; the accused persons, after exploding bomb, fled away. While fleeing away, they were speaking that it was the consequence of being a witness. Subsequently, the informant lifted his injured brother. He was loaded on ठेला (*thela*) and thereafter, he was carried to P.M.C.H. In P.M.C.H., he was shown to the doctor, however; the doctor after seeing him declared dead. The informant claimed that due to old animosity, the accused persons conspiring with each other carrying pistol, had shot on temporal region of his brother Vidyanand Rai and injured him. While he was unconscious and was being carried to P.M.C.H., he died. The said *fardbeyan* was read over to him and after finding it correct, he put his signature in presence of his elder brother Raghuvansh Rai. His brother Raghuvansh Rai, as a witness to the *fardbeyan*, put his signature.

4. On the basis of said *fardbeyan*, on the same date i.e. on 08-12-2007 at 1:00 PM, a formal F.I.R., vide Pirbahore P.S.



Case No. 297 of 2007, was registered for offence under Section 302, 34 of the I.P.C., Section 27 of the Arms Act and Sections 3/4 of the Explosive Substance Act against both the appellants with their name and three other unknown persons. During investigation, accusation against Mahesh Gope {appellant in Cr.Appeal (DB) No. 512 of 2013} and one Pankaj Mahto was found true and as such, on 08-03-2008 chargesheet was submitted against Mahesh Gope {appellant in Cr.Appeal (DB) No. 512 of 2013} and Pankaj Mahto keeping investigation pending against others. After submission of chargesheet, on 11-03-2008, the learned Chief Judicial Magistrate, Patna took cognizance of the offence. Subsequently, supplementary chargesheet was submitted against Arun Gope {appellant in Cr.Appeal (DB) No. 510 of 2013} on 19-04-2008. In the meanwhile, case of Mahesh Gope {appellant in Cr.Appeal (DB) No. 512 of 2013} was committed to the court of sessions on 07-06-2008 and it was numbered as Sessions Trial No. 985 of 2008 and thereafter, on 01-09-2008, charge under Section 302/34 of the I.P.C., Section 27 of the Arms Act and Sections 3 & 4 of Explosive Substance Act was framed against Mahesh Gope (appellant in Cr.App.DB No. 512/13), which he denied and claimed to be tried. The case of Arun Gope (appellant in Cr.App.DB No. 510/13) was committed to the court of sessions on



29-09-2008 and it was numbered as Sessions Trial No. 2404 of 2008. After commitment in the case of Arun Gope (appellant in Cr.App.DB No. 510/13), charge under Section 302/34 of the I.P.C., Section 27 of the Arms Act and Sections 3 & 4 of Explosive Substance Act was framed on 02-07-2009. Since aforesaid two sessions trials were arising out of same F.I.R., on 02-07-2009, before commencement of evidences, both the cases were amalgamated and as such, only one trial proceeded, vide Sessions Trial No. 985 of 2008.

5. During the trial, to establish its case on behalf of prosecution, altogether 8 witnesses were examined. Out of 8 witnesses, P.W.1 Shyamnandan Rai (brother of the deceased), P.W.2 Raghuvansh Rai (elder brother of the deceased & witness to the *fardbeyan*), P.W.4 Om Prakash (son of deceased), P.W.5 Jai Prakash Rai (another son of deceased) and P.W.6 Premnath Rai (brother of the deceased, who is also informant of the present case) were examined as eye-witnesses to the occurrence. Dr. Vishnudeo Prasad, who conducted *post-mortem* examination on the dead body of the deceased, was examined as P.W.7. The investigating officer of the case Sanjiv Kumar Gupta was examined as P.W.8. However, only independent witness namely Dinanath Mahto, who was



examined as P.W.3, since did not support the prosecution case, was declared hostile.

6. After completion of the prosecution evidence, both the appellants were questioned with incriminating circumstances and evidences against them and their statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') was recorded firstly on 25-06-2012. Since on recall, the investigating officer/P.W.8 was examined subsequent to recording of statement under Section 313 of the Cr.P.C., again new circumstance was explained to both the appellants and their statement under Section 313 of the Cr.P.C. was recorded in the month of August, 2012. In statement recorded under Section 313 of the Cr.P.C., both the appellants claimed that they were falsely charged, however; on behalf of defence, neither oral nor documentary evidence has been brought on record. However, on going through the trend of cross-examination, it appears that defence was taken, as if, occurrence was not seen by any of the witnesses and the appellants were falsely implicated.

7. Sri Gouranga Chatterjee, learned counsel assisted by Sri Sanjay Kumar, learned counsel for appellant in both the appeals, after placing entire evidence, has argued that the prosecution has miserably failed to establish its case beyond all



reasonable doubt and even though, there was no plausible evidence on record, the learned Trial Judge has incorrectly passed the judgment of conviction and sentence. He submits that on examination of evidence in totality, it appears that none of the witnesses, who have been examined as eye-witnesses, had seen the occurrence. He submits that it appears that since the deceased was a dreaded criminal, he might have been killed in a different manner by different accused persons, but since there was one pending case against the appellant Mahesh Gope (in Cr.App.DB No. 512/13) filed by the prosecution side, it appears that subsequently with due deliberation, the case was instituted, in which, both the appellants were framed as accused.

8. To elaborate the submission regarding false implication, it has been argued by Sri Gouranga Chatterjee, learned counsel for the appellants that though, it was case of the prosecution that occurrence had taken place at 8.30 in the morning on 08-12-2007 and on examination of the evidence, it is apparent that after getting such injury, the injured died instantaneously, his dead body was lying at the place of occurrence, subsequently the family members were involved and this is the reason that *fardbeyan* was shown to be recorded in the P.M.C.H. at 12.15 hrs. He submits that the distance from the place of occurrence to the



P.M.C.H. was very short and it hardly consumes half an hour, but even then, without any plausible reason, *fardbeyan* was shown to be recorded at 12.15 hrs. (12:15 PM). Sri Chatterjee further submits that it is case of the prosecution that on the basis of *fardbeyan*, a formal F.I.R. was drawn on the same date at 1:00 PM, but to the reasons best known to the prosecution, the said F.I.R. was received in the court i.e. court of learned C.J.M., Patna on 11-12-2007, whereas, the distance from Pirbahore Police Station to the court of C.J.M., Patna was very short.

9. It has also been argued by Sri Chatterjee, learned counsel for the appellants that in the case, though right from the very beginning genesis was shown, as if, due to pendency of the criminal case, in which deceased was a prosecution witness, he was done to death, but during cross-examination, the informant was not specific on the point regarding the status of the said criminal case. He submits that had it been a genesis for committing murder, there was possibility of a fixed date, on which, deceased was required to be deposed, whereas, informant in his cross-examination has stated that he was not aware regarding the exact status of the said case. According to learned counsel for the appellants, such situation suggests that genesis alleged was having no connection with the present case, which has shown to be



created by the prosecution. He further submits that it is case of the prosecution that the accused persons firstly gave shot of firing and while fleeing away, they exploded bomb to terrorize the witnesses. During investigation, at the time of inspection of place of occurrence, the investigating officer had not noticed any mark of explosion of bomb and this was the reason that though appellants were charged with Sections 3 & 4 of the Explosive Substance Act besides offences for which they have been convicted, both the appellants were acquitted from the charge under Sections 3 & 4 of the Explosive Substance Act.

10. As per learned counsel for the appellants, non-witnessing of the occurrence by any of the so called eye-witness is further proved on examination of evidence of P.W.7 (Dr. Vishnudeo Prasad), the doctor, who conducted *post-mortem* examination, as well as prepared *post-mortem* report. The prosecution right from the very beginning had come out with a case that deceased was firstly caught hold by three accused persons and thereafter, by putting the gun on temporal region, the appellant Mahesh Gope (in Cr.App.DB No. 512/13) gave shot of firing, which hit the deceased and thereafter, he fell down. The second shot of firing on left temporal region itself was given by Arun Gope (appellant in Cr.App.DB No. 510/13), however; in



post-mortem examination, only one fire-arm injury was noticed. Ofcourse, entry and exit wound was noticed, but entry and exit wound was by one gun shot injury. In the injury, at the entry point, no charring mark was noticed. According to learned counsel for the appellants, had it been a case of firing from close range, there was every possibility of noticing charring mark or tattooing at the entry point of wound. Non-finding of such mark demolishes the case of prosecution that deceased was fired from close range. Besides this, only one gun shot injury was found on the person of the deceased, whereas, it is consistent case of the prosecution that deceased was given two shot of firing, both on temporal region. He further submits that during *post-mortem* examination, one lacerated wound i.e. injury no. 3 was noticed by the doctor, which according to the P.W.7, was caused by hard and blunt substance, whereas, none of the eye-witnesses had said that any hard and blunt substance was used on the deceased by any of the appellants.

11. Learned counsel for the appellants has further argued that no material exhibit has been brought on record by the prosecution. The investigating officer has not seized either blood soaked sand or soil, but during evidence, the investigating officer (P.W.8) has stated that he had noticed blood mark at the place of occurrence on sand and soil. In the case, the investigating officer



was not shown the place of occurrence by any of the witnesses and as such, according to learned counsel for the appellants, the prosecution has miserably failed to establish the place of occurrence also. According to learned counsel for the appellants, evidence of the investigating officer does not inspire confidence, since he is not clear as to how without recording any station diary entry, firstly he reached at the place of occurrence, whereas, in his evidence, he has stated that he went to the P.M.C.H. only after he had taken charge of investigation at 1:00 PM. On aforesaid grounds, it has been argued that the prosecution has not been able to establish its case beyond all reasonable doubt and as such, it is a fit case for interference with the judgment of conviction and sentence.

12. Sri Uma Shankar Prasad, learned senior counsel assisted by Smt. Rekha Prasad, learned counsel for the informant submits that oral evidence i.e. evidence of all the eye-witnesses is consistent. He submits that it is settled that once oral evidence is otherwise credible, the case of prosecution may not be overlooked only on the ground of some inconsistency in the medical evidence. He submits that it was quite natural that at the time of occurrence, all the witnesses, who have been examined as eye-witnesses, were present near the bank of Ganges. The tractor was being loaded



with the sand and in that context, they were present at the place of occurrence and in their presence, both appellants with three unknown accused persons arrived. They caught hold of the deceased and in presence of those witnesses, from close range, firing was made on temporal region and after receiving said injury, he fell down. Sri Prasad, learned senior counsel submits that immediately after the occurrence, the injured was carried on a *thela* to P.M.C.H., which took about half an hour and in between 9.00 to 9.30 AM, they arrived P.M.C.H. In the P.M.C.H., firstly the doctor took step to save the deceased and oxygen cylinder was provided, but all efforts went in vain and as such, the injured was declared dead. Thereafter, *fardbeyan* of P.W.6 was recorded by the Assistant Sub-Inspector of Police at the P.M.C.H. According to Sri Prasad, in carrying the injured to P.M.C.H. and after death declared by the doctor, some delay had occurred, but such delay was natural and immediately thereafter, *fardbeyan* was got recorded. The fact disclosed in the *fardbeyan* was corroborated by informant, as well as other witnesses, who were shown in the F.I.R. itself, as eye-witness to the occurrence. According to learned senior counsel for the informant, since all those witnesses have consistently deposed during the trial as to how the accused persons had participated in the occurrence, the evidence of those eye-



witnesses may not be ignored only on the ground of some inconsistency in the medical evidence.

13. According to Sri Uma Shankar Prasad, learned senior counsel for the informant, during evidence as well as in the F.I.R. itself, the fact has come that prior to the present occurrence, elder brother of the informant namely Vish Rai was shot at by Mahesh Gope (appellant in Cr.App.DB No. 512/13) and one Guddu and due to said injury, he became blind by one eye and case was pending, in which, deceased was one of the witness. During evidence, the fact has come that the deceased was being regularly threatened not to depose and even after the occurrence while fleeing away, the accused persons had stated that the occurrence was the consequence of being witness in the earlier case and as such, the prosecution has been able to establish the motive for the occurrence and the said motive has been supported by the oral evidence. He further submits that it is true that though occurrence had taken place in presence of number of independent witnesses, but since in the present occurrence, the brother of the informant was done to death because of the fact that he was one of the witness, it was quite natural that in such situation, none of the independent person would have dared to come out as a witness. This is the reason that only family members of the deceased have



deposed in the present case and their evidences may not be ignored only on the ground that they are family members of the deceased.

14. Sri Prasad, learned senior counsel submits that the investigating officer in his evidence has stated that while he inspected the place of occurrence, he had noticed blood mark, but merely on the ground that no seizure list was prepared, the case of the prosecution may not be treated as 'doubtful'. He submits that it is settled that on the lapses committed by the investigating officer, if the prosecution case is otherwise credible, the case may not be ignored. However, Sri Prasad, learned senior counsel for the informant though tried to justify that on such technical ground i.e. medical ground prosecution case may not be ignored, on being asked, he was not in a position to show as to why in a case, in which, there was specific evidence that two shots of firing were made on the deceased and both hit, under what circumstances, only one fire-arm injury was noticed.

15. Sri Ajay Mishra, learned Addl. Public Prosecutor, adopting the argument advanced by Sri Uma Shankar Prasad, learned senior counsel for the informant, has argued that it is true that F.I.R. was received in the court of learned C.J.M., Patna on 11-12-2007, whereas F.I.R. was lodged on 08-12-2007, but since at the time of evidence, the investigating officer (P.W.8) was not



questioned by the defence, there was no reason for the prosecution to give explanation of such delay. Sri Mishra has argued that in such situation, benefit would have been given only when such questions were asked from the investigating officer at the time of evidence. He further submits that the witnesses, who have been examined as eye-witnesses, were cross-examined at length, but nothing could be extracted to create doubt on their evidence. Accordingly, it has been argued that the judgment of conviction and sentence requires no interference.

16. Besides hearing learned counsel for the parties, we have minutely examined entire evidence, both oral and documentary and after going through the same, *prima facie*, we are of the opinion that prosecution has not been able to establish its case beyond all reasonable doubt and as such, by way of extending benefit of doubt, it is a fit case for interference with the judgment of conviction and sentence, however; it is necessary to cursorily refer to the evidences, which have been brought on record.

17. In the case, the informant Premnath Rai has been examined as P.W.6. In his evidence, he has proved his signature on the *fardbeyan*, which was marked as Ext. 1. In his evidence, he has reiterated the fact, which he had stated in the F.I.R. However, on going through his evidence as well as examining the F.I.R., it is



evident that according to the informant, at the time of occurrence besides informant, his brother P.W.2 and deceased and other unknown persons were present, whereas P.W.1 Shyamnandan Rai (another brother of deceased), P.W.4 Om Prakash and P.W.5 Jai Prakash Rai (both P.W.4 & P.W.5 sons of deceased) have claimed themselves to be present along with informant, P.W.2 and deceased.

18. On examination of evidence of P.W.4 Om Prakash (son of deceased), it appears that he has given entirely different story. Informant and other so-called eye-witnesses have claimed that two shot of firing was made on left side of temporal region of deceased, whereas P.W.4 has come out with a case, as if, on right temporal region, both shot of firing was made. Besides this, in his evidence, it has come that while his father in injured condition was being carried to P.M.C.H., instead of going to P.M.C.H, he preferred to go to his residence. This appears to be quite unnatural. In such injured condition rushing to house leaving the injured father by a son appears to be not probable.

19. Similarly, P.W.5 Jai Prakash Rai (another son of deceased) though in his examination-in-chief has deposed like other witnesses, but in paragraph-5 of his cross-examination, he



has come out with a case that he has not seen the accused persons while they were coming there, but he saw the accused persons, after committing crime, while they were fleeing away by way of exploding bomb. This suggests that he had not seen the actual occurrence.

20. Moreover it is consistent case of the prosecution that deceased was given two shot of firing on the temporal region, that too from very close range, however, on examination of the evidence of P.W.7 Dr. Vishnudeo Prasad, as well as Ext.2 i.e. *post-mortem* report, it is evident that it was not a case of firing from close range nor second fire-arm injury was found on the person of the deceased, whereas, P.W.1 in his evidence has specifically stated that Mahesh Gope (app.in Cr.App.DB No. 512/13) putting pistol on the left temporal region of the deceased fired, whereafter, Vidya Rai (deceased) fell down and Arun Gope (app.in Cr.App.DB No. 510/13) also on left temporal region of Vidya Rai (deceased) gave shot of firing.

21. During evidence, it has come that deceased was a veteran criminal and he was accused in number of cases. This fact is evident from the cross-examination of informant/P.W.6 in paragraph – 7 that deceased Vidya Rai was accused in Sonapur P.S. Case No. 33 of 2004. It has also come in the same paragraph



that Vidya Rai (deceased) was accused in other cases also. Moreover, in the whole case, save and except close family members of the informant and deceased, none of the independent witness has come forward to support the prosecution case, whereas, occurrence had allegedly taken place where number of independent witnesses were present near the bank of Ganges.

22. One another big question as to how the third injury was noticed on the person of the deceased, which was inflicted by hard and blunt substance. It is also not believable as to why when an occurrence had taken place in the morning at 08:30 AM, in which after examination of the injury, there can be no second opinion that deceased died instantaneously, why *fardbeyan* was shown to be recorded at 12:15 PM, whereas distance from place of occurrence to the P.M.C.H. was very lesser. In evidence, it has come that carrying the injured to P.M.C.H. from the place of occurrence took only 25 to 30 minutes and they reached P.M.C.H. at 09:15 AM. Once at 09:15 AM, the deceased was already brought dead in P.M.C.H., there was no reason for declaring him further dead by the doctor. At this juncture, it would be necessary to examine as to what at the time of conducting *post-mortem* examination, P.W.7 had noticed.



23. P.W.7 Dr. Vishnudeo Prasad on 08-12-2007 was posted as Associate Professor in the department of F.M.T. at P.M.C.H., Patna and on the same date at 1:20 PM, he conducted *post-mortem* examination on the dead body of the deceased. During *post-mortem* examination, he noticed following facts:-

- “1. Entry wound of size 2” x 3” x cavity deep was present on the left temporal region adjacent to left ear.
2. Exit wound of size 4” x 3½” x cavity deep was present on the right occipital region of the head.
3. Lacerated wound of size ½” x ¼” x ¼” was present at the outer corner of left eye socket.

On dissection of head, chest and abdomen:- the brain was found lacerated. The stomach contained about 100 ml. of watery fluid. The urinary bladder was found empty. The liver, spleen and both kidneys were found pale.

Opinion

(1) - Cause of death was shock and hemorrhage due to head injury.

(2) - Nature of violence:- injury no. 1 and 2 caused by fire, injury no. 3 caused by hard and blunt substance.

(3)-Time since death- 3 hrs. to 12 hrs. approx.”

24. He proved the *post-mortem* report, which was marked as Ext.2. In paragraph-3 of his cross-examination, he had categorical stated that he did not find any charring, blackening and signing of hairs. He has further stated that it was a case of single shot and was not a case of double shot. On examination of the evidence of P.W.7 and *post-mortem* report, it is evident that size of entry wound was 2” x 3”, whereas exit wound was 4” x 3½” x cavity deep. This injury is itself reflective of the fact that on such injury, the injured would have instantaneously died. In that situation, carrying the dead body to the P.M.C.H., instead of going



to Pirbahore Police Station, which was on way from the place of occurrence to the P.M.C.H., creates serious doubt and in such situation, it appears that there is force in the submission of learned counsel for the appellants that none had seen the occurrence and dead body was subsequently carried and *fardbeyan* was recorded belatedly.

25. In the case, it is also a fact that though formal F.I.R. was shown to be recorded on 08-12-2007 at 1:00 PM, but the F.I.R. in the court of C.J.M., Patna was received on 11-12-2007. Ofcourse during trial, defence had not asked any question to investigating officer, but if such fact is brought to the notice of the Appellate Court, the Appellate Court is not bound to shut their eyes. Accordingly, the lodging of the F.I.R. appears to be suspicious. Moreover considering the fact that there is apparent inconsistencies in between medical evidence and oral evidence, which is otherwise not credible, it would not be appropriate to rely on such evidence and approve such judgment of conviction and sentence. There is also reason to doubt the prosecution case on examination of evidence of investigating officer. The investigating officer had not noticed any incriminating material at the place of occurrence. Had he noticed such thing, he would have prepared seizure list, but in the case, no seizure list was brought on record.



26. The investigating officer, in his evidence, contrary to the provisions as contained in the Indian Evidence Act, 1872, has proved oral confession of one of the accused recorded under Section 161 of the Cr.P.C., whereas confession had not led to any recovery. The investigating officer, in his evidence, has proved his signature on the formal F.I.R. marked as Ext.4. Further, he has proved the *fardbeyan* marked as Ext.5, inquest report as Ext.6 and formal F.I.R. marked as Ext.4/1. The investigating officer has not deposed that he was shown the place of occurrence by any of the eye-witness. Even witnesses are not consistent on this very point. Ofcourse, the prosecution is not very much specific regarding place of occurrence, but since we have examined the entire evidence and found the same as doubtful on the basis of manner of occurrence as well as inconsistency with the medical evidence, it would not be appropriate for this Court to approve the judgment of conviction and sentence. The possibility of false implication may not be ruled out, since it was a case of animosity in between the appellants' side and prosecution side.

27. In view of aforesaid facts and circumstances, we are of the considered opinion that the prosecution has not been able to establish its case beyond all reasonable doubt and as such, by way



of extending benefit of doubt, it is desirable to interfere with the judgment of conviction and sentence.

28. Accordingly, the judgment of conviction and sentence dated 16-04-2013 and 18-04-2013 respectively passed in Sessions Trial No. 985 of 2008 (arising out of Pirbahore P.S. Case No. 297 of 2007) by learned Additional Sessions Judge – 14th, Patna is, hereby, set aside and both appeals are allowed.

29. In view of the fact that the judgment of conviction and sentence has been set aside and since the appellant Mahesh Gope {in Cr. Appeal (DB) No. 512 of 2013} is in custody, he is directed to be released forthwith, if not wanted in any other case. The appellant Arun Gope {in Cr. Appeal (DB) No. 510 of 2013} is on bail and as such, he is discharged from the liability of his bail-bond.

(Rakesh Kumar, J.)

(Prakash Chandra Jaiswal, J.)

Anay

AFR/NAFR	AFR
CAV DATE	NA
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