

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1482 of 2019

Arising Out of PS. Case No.-115 Year-2013 Thana- BIBHUTIPUR District- Samastipur

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Gaurav Kumar Rai @ Shubham Son of Late Girish Rai Resident of Village-
Belsandi Tara, P.S.-Vibhutipur, District-Samastipur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

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Appearance :

For the Appellant	:	Mr. Surendra Singh, Sr. Adv. Ms Fauzia Shakeel, Adv. Mr. Kaushal Kishore, Adv. Mr. Ranjit Yadav, Adv.
For the Respondent	:	Ms Shashi Bala Verma, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date: 20-09-2021

This appeal is directed against the judgment of conviction dated 26.10.2019 and the order of sentence dated 05.11.2019 passed by the learned Additional District & Sessions Judge-I, Rosera, Samastipur in Sessions Trial No. 172 of 2014 arising out of Vibhutipur P.S. Case No. 115 of 2013 whereby and whereunder the sole appellant has been convicted under Section 302 of the Indian Penal Code (for short 'IPC') and Section 27(1) of the Arms Act. He has been sentenced to undergo imprisonment for life and a fine of Rs.10,000/- and in default of payment of fine



to undergo rigorous imprisonment for a further period of six months under Section 302 IPC and rigorous imprisonment for three years and to pay a fine of Rs.3,000/- and in default of payment of fine to undergo rigorous imprisonment for a further period of three months under Section 27(1) of the Arms Act. Both the sentences have been ordered to run concurrently.

2. The prosecution case was launched based on the *fardbeyan* of the father of the deceased Ram Dev Das, which was recorded by the Assistant Sub-Inspector of Police of Pirbahore Police Station A.P. Yadav at PMCH, Patna at 01:00 PM on 27.05.2013. In his *fardbeyan*, the informant has stated that on 26.05.2013 while his son Arun Das was sleeping in his house after taking dinner, at about 11:00 PM, his co-villager Gaurav Kumar Rai @ Shubham (appellant) came at his door and called out his son Arun Das. When his son came out of his doorstep, the appellant fired at him causing injury in his head as a result of which he fell on the ground. The incident was witnessed by his daughters-in-law Manju Devi and Sunita Devi. The informant has further stated that the injured Arun Das was then taken to Sadar Hospital, Samastipur where he was treated and was then taken to PMCH, Patna where he died while undergoing treatment at around



05:00 AM. The *fardbeyan* was signed by the informant Ram Dev Das and his daughters-in-law Manju Devi and Sunita Devi.

3. Since the offence was committed within the jurisdiction of Vibhutipur Police Station in the district of Samastipur, the Assistant Sub-Inspector of Police, Pirbahore Police Station, who had recorded the *fardbeyan*, forwarded the same to the S.H.O., Vibhutipur Police Station, Samastipur through the S.H.O., Pirbahore Police Station, Patna for registration of the first information report (for short 'FIR') and investigation.

4. On receipt of the *fardbeyan* dated 27.05.2013, the S.H.O., Vibhutipur Police Station registered Vibhutipur P.S. Case No. 115 of 2013 dated 28.05.2013 under Section 302 of the IPC and Section 27 of the Arms Act and handed over the investigation of the case to Rajeev Kumar Azad, a Sub-Inspector of Police. The Investigating Officer (for short 'I.O.') inspected the place of occurrence, recorded the statements of the witnesses, arrested the appellant and on completion of investigation submitted a charge sheet under Sections 302/34 of the IPC and 27 of the Arms Act against him before the court vide charge-sheet no. 42/14 dated 28.08.2019 and kept the investigation pending in respect of involvement of other accused persons in the offence.



Subsequently, a supplementary charge-sheet was submitted before the court of jurisdictional Magistrate against one Yashwant Singh.

5. The learned Magistrate took cognizance of the offence and after complying with the requirements of Section 207 of the Code of Criminal Procedure (for short 'Cr.P.C') committed the case to the court of sessions for trial.

6. The Sessions Court (hereinafter referred to as the 'Trial Court') framed charges under Sections 302/34 of the IPC and 27(1) of the Arms Act against the appellant and Yashwant Singh to which they pleaded not guilty and claimed to be tried.

7. The prosecution in order to bring home the charges examined altogether seven witnesses. They are Manju Devi (P.W.1), wife of the deceased and an eye-witness; Sunita Devi (P.W.2), sister-in-law of the deceased and an eye-witness; Ram Dev Das (P.W.3), father of the deceased and an eye-witness; Kiran Kumari (P.W.4), niece of the deceased and an eye-witness; Dr. Arun Kumar Singh (P.W.5), the doctor, who conducted the post-mortem examination on the body of the deceased; Vishnu Paswan (P.W.6), the second I.O. and Rajeev Kumar Azad (P.W.7), the I.O. of the case.

8. Besides the oral evidence, the prosecution has also brought on record the following documentary evidence:



S.Nos.	Documents	Exhibits
1.	Signature of Manju Devi on the <i>fardbeyan</i>	1
2.	Signature of Sunita Devi on the <i>fardbeyan</i>	1/1
3.	Signature of the informant Ram Dev Das on the <i>fardbeyan</i>	1/2
4.	Post-mortem report	2
5.	Seizure list	3
6.	Signature on the formal FIR	4
7.	Inquest report	5

9. **Ram Dev Das (P.W.4)** stated in his testimony that on 26.05.2013 at 11:00 PM while he was sleeping at his door, the appellant called out for his son Arun Das, who was sleeping in his house. His son woke up and enquired from him the purpose for which he was calling him. The appellant told him that there he has some urgent work. On hearing this, his son Arun Das came out of his doorstep. At that moment, the wife of Arun Das, namely, Manju Devi and his sister-in-law Sunita Devi also came out. He stated that his granddaughter Kiran Kumari, aged about 14 years and Manju Devi were carrying a torch in their respective hands. In the torchlight, he saw that Yashwant was sitting on a motorbike and the appellant was sitting behind him on the motorbike. He stated that the appellant told his son to come with him upon which when his son took some steps with him, the appellant took out a pistol from his waist and shot his son Arun Das in his head and sped away riding the motorbike with Yashwant. His son fell on the



ground and was writhing in pain. He was immediately taken to Samastipur for treatment. Since the doctor at Samastipur referred him to PMCH, Patna, he was taken to PMCH, where he died at 05:00 AM while undergoing treatment. He stated that his *fardbeyan* was recorded by the police officer at PMCH on 27.05.2013 at 01:00 PM. He identified his signature on the *fardbeyan*, which was marked as Exhibit-1/2. He stated that both his daughters-in-law were present with him while he had given his *fardbeyan*.

10. In cross-examination, he admitted that the witnesses Manju Devi, Sunita Devi and Kiran Kumari are his family members. He admitted that at the relevant time of the incident it was a dark night. His attention was drawn to his statement recorded under Section 161 of the Cr.P.C. He admits that he had not read the statement recorded at Patna and Samastipur till the date of deposition. He admitted that at Patna he had not told the police officer that he had seen the occurrence. He stated that the seizure list was prepared before him on which Manoj and Surendra had put their signature. He stated that he cannot say which doctor had examined his son at Samastipur.

11. **Manju Devi (P.W.1)**, the wife of the deceased stated in her examination-in-chief that on 26.05.2013 at 11:30 PM she



was sleeping with her husband and child on the terrace of her house when someone called her husband. On being asked by her husband, he disclosed his name as Gaurav Kumar Rai. Her husband came down to meet him. She followed her husband. Her *gotni* Sunita Devi and niece Kiran Kumari also came out of the house. She saw in the torchlight that the appellant and one Yashwant Singh were sitting on the motorcycle. Her husband was asked to walk some steps. As he took few steps, the appellant fired causing injury to him. She along with her *gotni* and niece rushed to the spot. She further stated that the appellant and Yashwant Singh fled away on the motorcycle. On *hulla* raised by her, the neighbours and co-villagers assembled at the place of occurrence. Her husband was taken to Sadar Hospital, Samastipur in an injured condition. However, the doctor treating him at Samastipur referred him to PMCH, Patna for better treatment. She stated that her husband was then taken to PMCH, Patna where he succumbed to the injury on 27.05.2013 at 05:00 AM. She stated that there was some transaction of money between her husband and the appellant. It is because of that the appellant killed him. She identified her signature on the *fardbeyan*, which was marked as Exhibit-1.

12. In cross-examination, she admitted that all the eye-witnesses are family members. She stated that her father-in-law



Ram Dev Das and *gotni* Sunita Devi had mentioned the name of the two accused when the *fardbeyan* was being recorded. She denied that in the *fardbeyan* only the appellant has been named as an accused. She denied the knowledge about the criminal antecedent of her husband. She admitted in para 14 that the police did not seize the torch. She stated that the *fardbeyan* was recorded at Patna and her re-statement was recorded at Vibhutipur Police Station. She admitted that she is employed as Asha Bahu on the recommendation made by the uncle of the appellant, who was the then Mukhiya. She stated that after being injured, her husband was lying on the ground for about half an hour. She further admitted that on *hulla* after the incident more than 100 people had assembled at the place of occurrence. She denied the defence suggestion that under a deep-rooted conspiracy the appellant has been falsely implicated in the case.

13. **Sunita Devi (P.W.2)** has also repeated the prosecution version in her examination-in-chief. She admitted in her cross-examination that at the time of occurrence there was no supply of electricity in the village. She admitted that the torch used for identification of the accused at the time of the commission of the offence was never shown to the police and the police did not seize the same. When her attention was drawn towards her



previous statement made before the police, she stated that it is not true that she had not stated before the police that when she came to her doorstep her father-in-law Ram Dev Das also came out of the house. She further stated that it is not true that she had not stated before the police earlier that she identified the accused persons in the torchlight. She stated that she does not know that her father-in-law was accused in a case of rape, which was numbered as Samastipur P.S. Case No. 249 of 2015. She denied that the deceased Arun Das was a criminal and was facing trial.

14. **Kiran Kumari (P.W.4)**, the niece of the deceased supported the prosecution case as an eye-witness. She stated that the accused persons took her uncle 20 meters away from her house on the pretext of discussing some issue. Thereafter, they shot him and went away on the motorcycle. She stated that she did not go to the police station. She further stated that on 27.05.2013 in the morning when the police came to her residence, she narrated the entire incident to them.

15. In cross-examination, she described that adjacent to her house, the house of Mahendra Das and adjacent to the house of Mahendra Das, the house of Umesh Das is situated. She admitted that on the date of occurrence there was a marriage of the son of Umesh Das in which more than 500 people had assembled in the



village. She admitted that on 27.05.2013 at 10:00 AM the police had come to her residence and recorded her *fardbeyan* on which she had put her signature. She also admitted that when her uncle was being taken to hospital a large number of co-villagers had assembled. She admitted that immediately after the incident, the police were informed by her family members, but the police had arrived the next morning. She stated that when her *fardbeyan* was being recorded, several persons were present at her house. She denied the defence suggestion that she was deposed falsely before the court.

16. **Dr. Arun Kumar Singh (P.W.5)**, who prepared the post-mortem report has stated in his evidence that on 27.05.2013 he was posted as Associate Professor in the PMCH, Patna. On that day at 02:00 PM, he conducted a post-mortem examination on the body of the deceased Arun Das. He found an entry wound on the right side of the forehead. According to him the area surrounding the entry wound was found lacerated, inverted and blackened having tattoo mark. According to him, the time elapsed since death was 12 hours approximately. The cause of death was haemorrhage and shock due to head injury caused by a firearm. He stated that one metallic bullet was recovered from the cranial cavity and was handed over to the constable in a clean glass vial. He identified his



writing and signature on the post-mortem report, which was marked as Exhibit-2.

17. In cross-examination, he admitted that there was only one injury on the person of the deceased. He admitted that the bullet recovered from the cranial cavity was not before him.

18. **Rajeev Kumar Azad (P.W.7)** proved the *fardbeyan* and the pagination done over in the writing of A.S.I. A.P. Yadav, which was marked as Exhibit-1/3. He also proved the inquest report prepared in the writing of A.S.I. A.P. Yadav, which was marked as Exhibit-5. He was entrusted with the investigation of the case on 28.05.2013. He stated that the police came to know on 27.05.2013 at 06:05 AM about the incident which took place in which Arun Das was shot at in village Phulwaria and was taken to Patna for treatment. He stated that as disclosed by the villagers, he recovered an empty cartridge and a blood-stained shirt. He prepared the seizure list of the seized articles and kept them in the Malkhana. He proved his writing and signature on the seizure list, which has been marked as Exhibit-3. He stated that he recorded the statements of Manju Devi, Sunita Devi, Kiran Kumari, Surendra Kumar and Manoj Kumar Rai during the investigation. He further stated that he came to know that on 27.05.2013 at 11:00 PM the appellant called out Arun Das and took him about 20



meters south-east to his house on a brick-soling PCC road and shot at him as a result of which he became seriously injured and during treatment died at PMCH, Patna. On completion of the investigation, he submitted charge-sheet no.42/14 dated 28.03.2014 under Sections 302/34 of the IPC and 27 of the Arms Act against the appellant keeping the investigation pending against the co-accused Yashwant Singh. He stated that since he was transferred on 30.11.2015, he handed over the investigation of the case to the S.H.O. of Vibhutipur Police Station.

19. In cross-examination, he admitted that the empty cartridge and the blood-stained shirt were recovered from the house of the deceased. He stated that it is not mentioned in the case diary as to when he reached the place of occurrence on 27.05.2013. He admitted that at the place of occurrence no mark of blood was found. He admitted that the seized articles are not before him. He stated that he did not send the seized empty cartridge for forensic test. He further stated that the bloodstains found on the seized shirt were not matched with the blood of the deceased. He admitted that the witnesses, who claimed to have identified the appellant in the torchlight, did not hand over the torch to him and he did not prepare any seizure list in this regard. He further admitted that he did not examine the witnesses residing



in the neighbourhood. He admitted that he received the inquest report of the deceased and the *fardbeyan* on 28.05.2013 at 01:00 PM. In further cross-examination, he stated that when he received information that Arun Das was shot at village Phulwaria, though he knew it to be a cognizable offence, he did not record any *fardbeyan* in this regard. He further stated that he was entrusted with the investigation of the case on 28.05.2013, but even before that, he had prepared the seizure list. He admitted that he has not recorded the date and time when the statements of Manju Devi, Sunita Devi and Kiran Kumari were recorded. He stated that he did not enquire about the vehicle in which the victim was first taken to Samastipur and then to Patna. He did not inquire about the name of the driver of the vehicle in which the victim was taken to Patna for treatment.

20. **Vishnu Paswan (P.W.6)** is the second I.O. of the case. He had recorded the statements of some of the witnesses after taking charge of the investigation and submitted a charge sheet against Yashwant Singh vide charge-sheet no.207/15 dated 31.12.2015.

21. After the closure of the prosecution case, the Trial Court recorded the statement of the appellant under Section 313 of



the Cr.P.C. The appellant pleaded his innocence and denied that he had killed the son of the informant, namely, Arun Das.

22. After the prosecution case was closed, the defence adduced four witnesses regarding the claim of false implication.

23. **Yogendra Mahto (D.W.1)** stated that on 26.05.2013 at 11:00 PM he along with his brother was going to his house and when he reached Phulwaria chowk, he saw two persons coming on a motorcycle out of whom one got down and went towards the house of Ram Dev Das. He heard the sound of firing and when he and others went to the house of Ram Dev Das, he saw Arun Das in an injured condition. He stated that he could not identify the person who had gone towards the house of Ram Dev Das. He stated that at that time Arun Das was alive. When he enquired from him about the person, who fired upon him, he stated that he could not identify him. He stated that at that point in the time none of the family members of Arun Das or Ram Dev Das was present there and they all came after 20-25 minutes of the incident. He stated that the police recorded his statement as well as the statement of his brother the next day.

24. In cross-examination, he denied saying to the police that the pillion rider on the motorcycle was Yashwant Singh. He stated that he had disclosed to the police in his statement that Arun



Das had sustained an injury in his head and was bleeding profusely and his family members took him for treatment. He denied the suggestion made by the prosecution that he has deposed falsely.

25. **Manoj Kumar Rai (D.W.2)** is on the point that his signature was taken on a blank sheet of paper. He stated that subsequently, he came to know that it was used for the preparation of the seizure list. He stated that no seizure of any article was made in his presence. In his cross-examination, he stated that his statement was not recorded by the police during the investigation.

26. **Suresh Mahto (D.W.3)** is the own brother of Yogendra Mahto (D.W.1). He has corroborated the testimony of D.W.1. He stated that when he along with his brother Yogendra Mahto came near the injured Arun Das after the assailant shot at him, he was alive and conscious. When his brother asked him the name of the assailant, he replied that he could not identify him. He stated that his statement was recorded by the police during the investigation. In cross-examination, he stated that he could not identify the assailant of Arun Das.

27. **Arun Kumar Mahto (D.W.4)** is the owner of the Bolero vehicle in which the deceased was taken for his treatment. He stated that when the deceased was being taken to hospital in the Bolero vehicle, 4-5 persons enquired from the informant about the



identity of the assailant on which the informant asked the name of the assailant from his injured son, but he stated that he could not identify him as he was covering his face by a *gamchha*. In cross-examination, he admitted that his statement was never recorded by the police during the investigation.

28. After the closure of the defence case, the Trial Court heard the arguments advanced on behalf of the parties and passed the impugned judgment convicting the appellant and acquitting the co-accused Yashwant Singh.

29. Assailing the impugned judgment, Mr. Surendra Singh, learned senior advocate being assisted by Ms. Fauzia Shakeel, learned advocate submitted that it has come in evidence that there was no electricity in and around the place of occurrence on the date of occurrence and it was a dark night. The incident occurred 20 meters away from the house. There was no reason for the eye-witnesses to have followed the victim Arun Das and to go behind him. He stated that it was a case of blind murder and none had identified the assailant. Even the victim was alive after being shot in the head and was conscious, but he could not disclose the identity of the assailant. He argued that the assailant was not identified would be established from the fact that no FIR was lodged immediately after the incident took place. He contended



that it would be manifest from the evidence of the prosecution witnesses that the injured was lying at the place of occurrence for half an hour. A large number of villagers had assembled at the place of occurrence. The witnesses examined during the trial were also present there. Therefore, they could have given the name of the accused persons immediately after the incident. He contended that though the evidence is that the victim was first taken to Samastipur Sadar Hospital, no information was given to the police at Samastipur. There is no document to suggest that the victim was ever treated at Samastipur. The victim was then taken to PMCH, Patna where he was admitted and was undergoing treatment. Even there the *fardbeyan* was not recorded promptly. The evidence suggests that the victim died at 05:00 AM on 27.05.2013, but the *fardbeyan* was recorded by the A.S.I. of Pirbahore Police Station at 01:00 PM on 27.05.2013. He contended that the name of the appellant has been introduced in the *fardbeyan* belatedly after due deliberations and consultations.

30. Mr. Surendra Singh, learned senior advocate further contended that Kiran Kumari (P.W.4) stated in her deposition that someone from the family had telephonically informed the police immediately after the incident took place. The I.O. has corroborated this part of the story put by P.W.4 and admitted that



no name of the assailant was disclosed when the police were informed on the telephone. He argued that it is conclusive proof of the fact that the identity of the assailant was not known to the informant or any of the family members of the deceased initially.

31. Mr. Singh further argued that the evidence would suggest that the I.O. came to the village on 27.05.2013 in the morning and recorded the statement of Kiran Kumari (P.W.4), which was signed by her. It should have been treated as the FIR. Its suppression raises an adverse inference against the prosecution.

32. Mr. Singh submitted that had the identity of the assailant been known, it is not conceivable that the I.O. would not have registered the *fardbeyan* then and there when he visited the place of occurrence in the morning of 27.05.2013.

33. He argued that P.W.s 1, 2 and 3 claimed themselves to be the eye-witnesses. They took the victim to Patna. The deceased succumbed at 05:00 AM. The Pirbahore Police Station at Patna is at a distance of half a kilometre from the PMCH. Therefore, the delay of eight hours after the demise of the deceased in recording the *fardbeyan* is fatal to the prosecution case especially when a police outpost is situated at PMCH, Patna.

34. He contended that the police officer, who prepared the inquest report and recorded the *fardbeyan*, was not examined



by the prosecution. During the trial, only three highly interested witnesses were examined. The non-examination of the independent witness would lead to adverse inference under Section 114(g) of the Evidence Act. In support of his submissions, he has placed reliance on the judgment of the Supreme Court in ***Hem Raj Vs. State of Haryana***, since reported in ***(2005) 10 SCC 614*** and ***Takhaji Hiraji Vs. Thakore Kubersing Chamansing***, since reported in ***(2001) 6 SCC 145***.

35. He contended that even the place of occurrence has not been proved. He submitted that the version of the defence witnesses cast serious doubt on the prosecution story and their credibility has not been impeached by the prosecution during cross-examination.

36. Mr. Singh further argued that the I.O. had no clue as to who the perpetrators of the crime were nor had the witnesses any idea about the perpetrators of the crime. He argued that the FIR has belatedly been instituted after due deliberations and consultations and the same is fatal to the prosecution case. In support of his submission, he placed reliance on the judgments of the Supreme Court in ***Dilawar Singh Vs. State of Delhi***, since reported in ***(2007) 12 SCC 641*** and ***P. Rajagopal Vs. State of Tamil Nadu***, since reported in ***(2019) 5 SCC 403***.



37. Mr. Singh submitted next that the incident took place at 11:00 PM when it was a dark night and there was no electricity. Kiran Kumari (P.W.4) has deposed that she identified the appellant in the torchlight, but the torch has not been seized by the police. He submitted that the means of identification was, thus, not proved by the prosecution. In this regard, he has placed reliance on a judgment of the Supreme Court in ***Kapildeo Mandal Vs. State of Bihar***, since reported in ***(2008) 16 SCC 99***.

38. Lastly, Mr. Singh argued that the Trial Court has not given any weightage to the deposition of the defence witnesses. He submitted that they being independent witnesses were entitled to equal treatment as that of the prosecution witnesses. He submitted that the version of the defence witness casts serious doubt on the prosecution story. According to him, the Trial Court has grossly erred in not relying upon their evidence. In support of his submission, he has placed reliance on the judgment of the Supreme Court in the ***State of U.P. Vs. Babu Ram***, since reported in ***(2000) 4 SCC 515***; ***Munshi Prasad Vs. State of Bihar***, since reported in ***(2002) 1 SCC 351*** and, ***Dudh Nath Pandey Vs. State of U.P.***, since reported in ***(1981) 2 SCC 166***.



39. On the other hand, Ms. Shashi Bala Verma, learned Additional Public Prosecutor appearing for the State submitted that the delay in the institution of the FIR is properly explained. The condition of the victim was precarious. The priority of the family members was to save the life of the victim. Hence, immediately after the occurrence, they arranged for a vehicle and took the victim to Sadar Hospital, Samastipur from where he was referred to PMCH, Patna for better treatment. She contended that at PMCH, Patna the victim succumbed to his injury at 05:00 AM. The informant and his family members are not residents of Patna. Hence, the delay of eight hours after the death of the deceased in recording the *fardbeyan* is not unreasonable. She contended that there are four eye-witnesses to the prosecution. Even though they are related to the deceased, their presence at the time of occurrence cannot be doubted. They are all consistent in the manner of occurrence and the place of occurrence. Their evidence has been rightly found credible by the Trial Court. The ocular testimony of the witnesses examined during the trial has been corroborated by the doctor, who conducted the post-mortem examination on the body of the deceased. She contended that even the place of occurrence has been fully established.



40. She contended that non-examination of the independent witnesses would not be fatal to the prosecution case as it is well known that these days independent witnesses are reluctant to depose before the court because of many reasons. Moreover, it is not necessary to examine independent witnesses in every case.

41. We have heard the submissions made on behalf of the parties and carefully perused the materials on record.

42. In a criminal case, FIR is an important document even though it is not a substantive piece of evidence. A prompt FIR lends credence to the prosecution version and often prevents the possibility of a coloured version being put by the informant. Section 154 contained in Chapter XII of the Cr.P.C deals with the information to the police and their powers to investigate. The Cr.P.C classifies the offences in two categories, namely, (a) cognizable offence and (b) non-cognizable offence. Registration of an FIR is mandatory under Section 154 of the Cr.P.C if the information discloses the commission of a cognizable offence.

43. In the instant case, the incident took place at 11:00 PM on 26.05.2013. Kiran Kumari (P.W.4) stated in her deposition that information was immediately sent to the police station by her family members in the night itself. The I.O. (P.W.7) stated in his



testimony that the information regarding injury caused to Arun Das in the night at village Phulwaria was received in the police station at 06:05 AM on 27.05.2013. Thereafter, he proceeded to the place of occurrence where he seized an empty cartridge and blood-stained shirt. Further, the I.O. has stated in his testimony that on 27.05.2013 an information regarding gunshot injury caused to Arun Das in the incident was received in the police station pursuant to which he proceeded to the place of occurrence. The said *sanha* has intentionally been withheld. Since the information given to the police was of a cognizable offence that Arun Das has been shot at in village Phulwaria, the same ought to have been treated as an FIR. Whether the information was cryptic or it was detailed one could have been known if the *sanha* would have been produced before the court. In the ordinary course, the S.H.O. would have immediately recorded the FIR based on the information of a cognizable offence. However, if the information was cryptic and the police proceeded to the place of occurrence based on that information to find out the details of the nature of the offence, then it cannot be said that the information which has been received shall be deemed to be the FIR. On the other hand, if the information received at the police station was not cryptic and based on that information the Officer-in-Charge would have been



prima facie satisfied about the commission of a cognizable offence and the police proceeded from the police station after recording such information to investigate such offence, then such information given by any person in respect of the said offence would have been treated as an FIR. We are not sure about the nature of the information given to the police on 27.05.2013 at 06:05 AM because the *sanha* has not been proved by the prosecution during the trial. The court would draw an adverse inference against the prosecution for suppressing the *sanha* from the court.

44. It would further be evident from the evidence that after making *sanha* entry at 06:05 AM on 27.05.2013, the I.O. (P.W.7) reached the village, inspected the place of occurrence, recovered a blood-stained shirt and a cartridge from the house of the informant and prepared the seizure list. The I.O. also took the statement of Kiran Kumari (P.W.4), who narrated the entire incident and she signed on the statement and other papers which the police prepared. This statement by P.W. 4 has also been suppressed. In his testimony, the I.O. admitted that he had prepared the seizure list at 09:00 AM on 27.05.2013. Kiran Kumari (P.W.4) stated in her deposition that the police came to her residence at 10:00 AM on 27.05.2013 and prepared certain papers on which she



put her signature. She stated that she gave her statement to the police.

45. In case, the message received by the police at the police station based on which *sanha* entry was made was cryptic and the I.O. had proceeded from the police station to verify the veracity of the information, when he reached the place of occurrence and prepared the seizure list at 09:00 AM and recorded the statement of P.W.4, the same was definitely an information relating to a cognizable offence and based on that the FIR ought to have been instituted. The said statement of P.W.4 on which the police had obtained her signature has also been withheld by the prosecution.

46. Not only this, the I.O. admitted in cross-examination that he recorded the subsequent statement of the informant, Ram Dev Das, at 11:00 AM on 27.05.2013. In case, the informant was present in his village on 27.05.2013 at 11:00 AM, it is difficult to concede as to how he gave his *fardbeyan* at PMCH, Patna at 01:00 PM on 27.05.2013.

47. In the instant case, the FIR was registered on 28.05.2013 at 11:00 AM. Much before the registration of the FIR, the I.O. had reached the village where the occurrence took place, inspected the place of occurrence, prepared the seizure list,



recorded the statements of Kiran Kumari (P.W.4) and the informant Ram Dev Rai (P.W.3) and went back to the police station. Surprisingly, no FIR was registered on 27.05.2013. The I.O. seems to be ill-trained, ignorant of law and procedure. He did not realize the importance of getting a police case registered in the police station concerned even before recording the statements of the witnesses to the occurrence, inspecting the place of occurrence and seizing the incriminating articles from the place of occurrence. We find force in the submission made on behalf of the appellant that the FIR has belatedly been instituted after due deliberations and consultations and the same is fatal to the prosecution case.

48. In ***Dilawar Singh Vs. State of Delhi*** (*supra*), while holding that unexplained delay in lodging of the FIR is fatal, the Supreme Court held as under: -

“9. In criminal trial one of the cardinal principles for the court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the court at the earliest instance. That is why if there is delay in either coming before the police or before the court, the courts always view



the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case.

10. In Thulia Kali v. State of T.N. [(1972) 3 SCC 393 : 1972 SCC (Cri) 543 : AIR 1973 SC 501] it was held that the delay in lodging the first information report quite often results in embellishment as a result of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation.

11. In Ram Jag v. State of U.P. [(1974) 4 SCC 201 : 1974 SCC (Cri) 370 : AIR 1974 SC 606] the position was explained that whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay can be condoned if the witnesses have no motive for implicating the accused and/or when plausible explanation is offered for the same. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness or authenticity of the version of the prosecution.”



49. In ***P. Rajagopal Vs. State of Tamil Nadu*** (*supra*), the Supreme Court held as under:

12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely. [See Apren Joseph v. State of Kerala [Apren Joseph v. State of Kerala, (1973) 3 SCC 114 : 1973 SCC (Cri) 195] and Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673]

50. There are other glaring loopholes in the prosecution case. It defeats the reason as to how the I.O. would have recorded the further statement of the informant at 11:00 AM on 27.05.2013 at the place of occurrence when the *fardbeyan* of the informant itself was recorded later on that day at 01:00 PM at PMCH, Patna. The seizure list (Exhibit-3) is said to have been prepared at the place of occurrence at 09:00 AM on 27.05.2013. Though P.W.4 in her testimony said that she had signed on the papers prepared by the police and non-else had signed over it, her signature is missing on the seizure list. The witnesses to the seizure are Surendra Kumar and Manoj Kumar Rai. Surendra Kumar has not been



examined by the prosecution and Manoj Kumar Rai has been examined as a defence witness. The recovery of the blood-stained shirt and cartridge was not true. They were not produced before the court. The forensic examination of the empty cartridge or its matching with the bullet recovered from the body of the deceased was not carried. Further, the chemical examination of the blood-stained shirt was not done. A sketch map of the place of occurrence was not prepared.

51. Apart from the aforestated glaring loopholes in the investigation, the prosecution has also failed to prove the place of occurrence. As per the *fardbeyan*, the incident is said to have taken place at the doorstep of the informant. The witnesses during the trial have deposed that the incident took place 20 meters away from the house of the informant. It is the case of the prosecution that after the deceased was shot at, he lay on the spot for half an hour after which he was rushed to the hospital. However, it is strange that the I.O., who had inspected the place of occurrence the next morning, did not find any blood at the place of occurrence. As the deceased was shot in the head and blood was oozing at the place of occurrence, this can only lead to an inference that this may not be a place of occurrence where the murder had taken place.



52. Furthermore, the means of identification was not proved, as the torch was not seized by the police. Since the incident took place at 11:00 PM when it was a dark night and there was no electricity, the prosecution witnesses could not have seen the occurrence as the place of occurrence was 20 meters away from the house of the deceased.

53. In an identical case in ***Kapildeo Mandal Vs. State of Bihar*** (*supra*), the Supreme Court held as under:

“19. In the present case, we find from the evidence of the witnesses examined by the prosecution as already noticed that the witnesses are related and their relations were strained with the appellants on account of the litigation. The incident happened at 11 o'clock in the night. The witnesses have stated that they have seen the incident and recognised the appellants either in the torchlight or in the lantern light which was burning at their house. It has come in evidence of the witnesses as well as the investigating officer that neither the torch nor the lantern was seized by the investigating officer during the course of investigation, nor were they produced before the court. In the circumstances, it is difficult to believe that the appellants have been identified in the torchlight or in the lantern light.”



54. Furthermore, the independent witnesses though present were not examined by the prosecution. We have seen that the incident took place in a densely populated village at 11:00 PM in the month of May when there was a wedding in the neighbourhood and about 500 people had assembled that night. Several persons had assembled at the place of occurrence in the night and the residence of the informant when the I.O. visited in the morning of 27.05.2013, but the I.O. chose not to examine them. Non-examination of independent witnesses, who were available, in the facts and circumstances of the present case would lead to an adverse inference under Section 114(g) of the Evidence Act.

55. In ***Hem Raj Vs. State of Haryana*** (*supra*), the Supreme Court held as under:

“Non-examination of independent witness by itself may not give rise to adverse inference against the prosecution. However, when the evidence of the alleged eyewitnesses raises serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witness Kapur Singh, would assume significance. ...”

56. In ***Takhaji Hiraji Vs. Thakore Kubersing Chamansing*** (*supra*), the Supreme Court held as under:



“... 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....”

57. In the instant case, the evidence of the eye-witnesses examined on behalf of the prosecution raises serious doubt on their presence at the time of actual occurrence. The witnesses have categorically stated that there was a wedding in the neighbourhood and about 500 people had assembled in the wedding. The witnesses have also stated that in the morning when the police had arrived at the place of occurrence, a large number of people were present.

58. In the facts and circumstances of the case, we are of the opinion that when the other witnesses were available, it was necessary to examine them. However, they have been withheld from the court. The Court would draw adverse inference under Section 114(g) of the Evidence Act for non-examination of independent witnesses.

59. In the present case, Yogendra Mahto (D.W.1) and Suresh Mahto (D.W.3), who are independent witnesses deposed



that the deceased was shot by an unknown person and none of the prosecution witnesses has seen the occurrence. They have also deposed that the deceased told them that he did not recognize the person who shot at him. From the trend of cross-examination, it would appear that these witnesses were also examined by the police during the investigation. Manoj Kumar Rai (D.W.2) is the seizure list witness. The prosecution has not been able to impeach their credibility during cross-examination. There was no reason for the Trial Court not to have given due weightage to their testimony while deciding the case. It has been rightly submitted on behalf of the appellant that equal weightage should have been given to the defence witnesses as that of prosecution witnesses.

60. In *Munshi Prasad Vs. State of Bihar* (*supra*), the Supreme Court held as under:

“... Before drawing the curtain on this score, however, we wish to clarify that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution — a lapse on the part of the defence



on record the availability of the defence witnesses cannot be differentiated and be treated differently than that of the prosecutors' witnesses.”

61. In ***Dudh Nath Pandey Vs. State of U.P.*** (*supra*), the Supreme Court held as under:

“Defence witnesses are entitled to equal treatment with those of the prosecution. And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses.”

62. In ***State of U.P. Vs. Babu Ram*** (*supra*), the Supreme Court held as under:

“Depositions of witnesses, whether they are examined on the prosecution side or defence side or as court witnesses, are oral evidence in the case and hence the scrutiny thereof shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a court witness. It is judicial scrutiny which is warranted in respect of the depositions of all witnesses for which different yardsticks cannot be prescribed as for those different categories of witnesses.”

63. In the light of the discussions made hereinabove, we are of the opinion that the FIR is not the first version of the occurrence and has been made after consultations and



deliberations. The unexplained delay in lodging of the FIR is fatal to the prosecution case. There are glaring loopholes in the prosecution case and the investigation is grossly defective. The place of occurrence has not been proved and identification of the accused is doubtful. The non-examination of the independent witnesses in the facts and circumstances of the case is also fatal to the prosecution case. We are of the opinion that the eye-witnesses examined in the case are not reliable and their presence is doubtful. We are also of the opinion that the Trial Court has failed to appreciate that the defence witnesses are entitled to equal treatment as that of the prosecution witnesses.

64. Thus, on consideration of the entire evidence, we are of the opinion that the prosecution has miserably failed to prove its case beyond reasonable doubt against the appellant.

65. For all these reasons, appeal is allowed. The impugned judgment of conviction dated 26.10.2019 and the order of sentence dated 05.11.2019 passed by the learned Additional District & Sessions Judge-I, Rosera, Samastipur in connection with Sessions Trial No. 172 of 2014 arising out of Vibhutipur P.S. Case No. 115 of 2013 are, accordingly, set aside. The appellant Gaurav Kumar Rai @ Shubham is acquitted of the charges levelled against him.



He shall be released from jail forthwith if he is not required in any other case.

(Ashwani Kumar Singh, J)

(Arvind Srivastava, J)

Pradeep/-

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	20.09.2021
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