

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.193 of 1996

(Against the judgment of conviction and order of sentence dated 8th May, 1996 passed by the 1st Additional Sessions Judge, Saran in Sessions Trial No. 1062/94)

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Md. Firoz, son of Md. Hanif Mian, resident of village Baharwa Gachhi, P.S.-
Nayagaon, District- Saran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

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Appearance :

For the Appellant/s	:	Mr. Surendra Kishore Thakur, Advocate Mr. Manoj Kumar Pandey, Advocate Mrs. Kumari Pallavi, Advocate
For the Respondent/s	:	Mr. Bipin Kumar, APP
For the Informant	:	Mr. Manoj Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 30-09-2022

Heard learned counsel for the appellant and learned A.P.P.
for the State who has been assisted by the learned counsel
appearing for the informant.

2. The present criminal appeal was preferred in the year
1996 i.e., 26 years ago, against the judgment of conviction and
order of sentence dated 8th May, 1996 passed by the 1st
Additional Sessions Judge, Saran in Sessions Trial No. 1062/94
(arising out of Nayagaon P.S. Case No. 29 of 1994), whereby and
whereunder the appellant has been convicted under Section 302



of the Indian Penal Code and Section 27 of the Arms Act and sentenced to undergo imprisonment for life under Section 302 of Indian Penal Code and to undergo rigorous imprisonment for three years under Section 27 of the Arms Act with direction that both the sentences shall concurrently. The Trial court has further ordered that the period of custody undergone by the appellant during trial shall be set off from the period of sentence under the provisions of Section 428 of the Cr.P.C.

3. The prosecution story, in brief, is that Md. Mukhtar gave his *fardbeyan* before the S.I. A.P.Singh of Nayagaon Police Station on 11.04.1994 at 2.30 a.m. at Sadar Hospital, Hajipur wherein the informant stated that he works as *Mistri* in Hotel Republic, Exhibition Road, Patna and on 10.04.94 being Sunday he went to his village home and on 10.04.94 itself, in the evening he along with his cousin Abdul Gaffar (deceased) had gone to Nayabazar to take tea and purchase domestic articles and remained there for half an hour. Thereafter, the informant along with Abdul Gaffar, who was having his bicycle, were returning home in the evening at 7 p.m. When they arrived at railway crossing near the road turning towards village, the deceased was about 6-7 feet in front of informant and the informant saw three persons coming from east who came near to them about a



distance of 8-10 feet out of whom the informant identified only Md. Firoz (appellant) in the flash light of a three cell torch which he was holding at the time of said incident. The informant further stated that he was not able to identify other two persons. The informant further stated that the appellant fired from his revolver at Abdul Gaffar (deceased) on which the informant chased them but Md. Firoz (appellant) along with two others fled away towards east. Abdul Gaffar (deceased) sustained gun shot injury on his head due to which he fell down. The informant raised *hulla* on which Shahid Mian (P.W.5), Rafique Mian (P.W.1) and many other people arrived at the place of occurrence. At that time, Abdul Gaffar (deceased) told the Informant that the appellant had shot him. The informant along with others took the deceased, first went to bazar and thereafter took the deceased to Sadar Hospital, Hajipur where the doctor declared him dead. The informant further stated that the deceased was his brother. The informant further claimed that the appellant and two unknown accused persons, in a preplanned manner, killed the deceased. It is also stated that he does not know anything regarding the motive behind committing the murder. However, if there was an internal enmity between the deceased and the appellant, he is unaware of the same.



4. On the basis of fardbeyan of the informant (P.W.2), Nayagaon P.S. Case No. 29/1994 was registered under Sections 302/34 of the I.P.C. and Section 27 of the Arms Act and investigation was taken up.

5. After investigation, the police submitted charge-sheet and cognizance was taken by the Jurisdictional Magistrate and thereafter the case was committed to the Court of Sessions. Charges were framed against the appellant to which the appellant pleaded not guilty and claimed to be tried.

6. During trial, the prosecution examined altogether ten witnesses, namely, Md. Rafique (P.W.1), Md. Mukhtar (P.W.2) (informant) (eye witness), Anwari Begum (P.W.3) (wife of the deceased), Rasul Mian (P.W.4) (father of the deceased), Md. Shahid (P.W.5), Md. Taiyab (P.W.6) (tendered witness), Harun Rashid (P.W.7) (seizure list witness), Dr. Kumar Parmeshwar Rai (P.W.8) (doctor who conducted post-mortem of the deceased), Awadhesh Prasad Singh (P.W.9) (I.O. of the case) and Jaleshwar Singh Hawildar (P.W.10). Prosecution has also produced exhibits, namely, Ext. 1 (signature of the informant on the fardbeyan) Ext.1/1 to Ext.1/2 (signature of Md. Shahid and Md. Taiyab respectively on the inquest report), Ext.1/3 to 1/4 (signature of the witnesses Harun Rashid and Vijay Kumar Singh respectively on



the seizure list. Ext. 2 is the carbon copy of the post-mortem report. Ext. 3 is the seizure list and Ext. 4 is the fardbeyan in writing with signature of I.O. Awadhesh Prasad Singh. Ext. 5 is the inquest report. Ext. 6 is formal F.I.R.. Ext. 7 and 7/1 are Nayagaon P.S.Sanha No. 174 and 179 both dated 10.4.94. Besides this, two material exhibit were also on record i.e. Material Ext. 1, pair of *chappal* seized by I.O. at place of occurrence and Material Ext. 2, sealed cover *dabiya* containing the blood stained soil and pieces of stones seized by the I.O.. The defence has also examined one witness in support of its case namely D.W. 1 Rajeshwar Rai. After conclusion of the trial, the learned Trial Court convicted and sentenced the appellant in the manner indicated above.

7. Learned counsel for the appellant Mr. Surendra Kishore Thakur submitted that the learned Trial Court has failed to appreciate the evidence properly and has wrongly convicted the appellant. It has been argued that the source of identification i.e., the three-cell torch, in light of which the informant (P.W.2) and P.W.1 claimed to have identified the appellant at the place of occurrence, is neither seized nor produced before the court as material exhibit. Therefore, the source of identification has not been proved by the prosecution and the same becomes fatal to the case of prosecution. The counsel further submits that the so-called



oral dying declaration of the deceased made to the Informant cannot be relied upon as the same stands belied by the evidence adduced by the doctor (P.W.8) with respect to the capability of speech of the deceased after having sustained serious injuries on vital organ of the body. The counsel has, moreover, argued that the learned Trial Court has failed to appreciate that there has been material contradiction in the deposition of the prosecution witness and the statement made by them before the investigating officer under Section 161 of the Cr.P.C, in course of investigation, regarding which attention of the witnesses have been drawn. The counsel, in course of his arguments, further submitted that the Trial Court has given undue weightage on the fact that during investigation a sniffer dog, after sniffing the slippers seized from the place of occurrence, had come to the house of the appellant. It has been argued that the same cannot be used as a piece of evidence against the appellant. Therefore, the prosecution has failed to prove the case beyond reasonable doubt and the Trial Court has failed to appreciate the evidence brought on record by the prosecution.

8. Learned A.P.P. for the State assisted by learned counsel appearing for the Informant has submitted that the judgment of conviction and order of sentence under challenge requires no



interference as the prosecution has been able to prove its case beyond all reasonable doubts. From the evidence, which has been adduced by the prosecution, the guilt of the appellants is satisfactorily proved and there is no infirmity in the judgment of conviction and order of sentence rendered by the Trial Court.

9. After hearing the arguments advanced by the learned counsels appearing for the parties and perusing the materials available on record, following issues arise for consideration in this appeal:-

1. Whether the failure on the part of the prosecution to prove the source of identification, is fatal to the case of the prosecution?
2. Whether the oral dying declaration of the deceased, can be relied upon to sustain the conviction of the appellant?
3. Whether the identification by sniffer dog can be taken as evidence for the purpose of establishing guilt of the appellant?

10. Now, we advert ourselves to the first issue. The informant (P.W.2), in his *fardbeyan*, has categorically stated that he identified the appellant, in light of three-cell torch which he was carrying in his hand when the incident is alleged to have taken place. The informant in paragraph 1 of his deposition (examination-in-chief) has stated that he identified the appellant in the light of torch and in paragraph 15 of his deposition (cross



examination), he categorically mentioned that he has stated before the police that he had three-cell torch in his hands at the time of incident. Further, P.W.5, in paragraph 1 of his deposition (examination-in-chief) has stated that he identified the appellant in the light of three-cell torch, which he was carrying at the time of incident. (P.W.1) has also stated in his deposition that he has seen the appellant in the light of torch. But, neither the sources of identification have been seized nor it has been produced as material exhibit before the court, by the prosecution in order to prove the truthfulness of its case. Further, there appears to be material contradiction between the deposition of P.W.1 and the deposition of the investigating officer (P.W.9), in regard to the statement made by the witness during the course of investigation. The Investigating Officer (P.W.9) in paragraph 20 of his deposition (cross-examination) states that P.W.1 in his statement recorded before police, did not mention that while returning from the market he heard the sound of firing. P.W.1 did not state that he saw three persons running and identified the appellant in the light of torch. Therefore, in light of non-production of material evidence and material contradiction arising in the deposition, the source of identification becomes doubtful, which is fatal to the case of prosecution. At this juncture we would gainfully rely on the



decision rendered by the Hon'ble Supreme Court in the case of ***Kapildeo Mandal an Ors. vs. State of Bihar*** reported in (2008) 16 SCC 99, wherein the Hon'ble Supreme Court in paragraph 9 has observed the following: -

“9....The incident happened at 11.00 o'clock in the night. The witnesses have stated that they have seen the incident and recognised the appellants either in the torch-light 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 or the lantern was seized by the I.O. during the course of investigation nor was it produced before the court. In the circumstances, it is difficult to believe that the appellants have been identified in the torch-light or in the lantern-light.”

Therefore, applying the aforesaid view of the Hon'ble Supreme Court in the give facts of the case, we reach to the conclusion that source of identification is not proved by the evidence brought on record by the prosecution.

11. Now coming to the second issue, before taking into consideration the evidence brought on record by prosecution, this court deems it appropriate to briefly discuss the law relating to the appreciation of evidence in case of oral dying declaration. The



Hon'ble Supreme Court, in ***Heikrujam Chaoba Singh vs. State of Manipur, AIR 2000 SC 59***, in paragraph 3 observed as under:

“3. An oral dying declaration no doubt can form the basis of conviction, though the Courts seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the Court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability.”

Therefore, the important question that arise is whether the deceased was in a fit condition to make the statement. In order to find that whether the deceased was in fit condition to make the oral dying declaration, we deem it appropriate to appreciate the evidence of the doctor (P.W.8) and post-mortem report (Ext.2). The doctor in paragraph 1 of his deposition mentions the injuries, which also founds place in the post-mortem report of the deceased, which are as follows:

- (i) Lacerated wound with inverted blackened margin on right side of forehead 3/4' X 1/2" X cranial cavity directed backward slightly to left side.
- (ii) Lacerated wound with converted regular margin on back of scalp left side size 2 1/2" X 2" X communicating with injury no 1 with



fracture of occipital bone and left parietal bone.
Brain matter is coming out through wound.

The doctor in his deposition further stated that the Injury No. (i) is wound of entry. Injury No. (ii) is wound of exit. The doctor opined that the death has been caused due to shock and haemorrhage as injuries to brain, due to aforementioned injuries which are sufficient to cause death in ordinary course of nature. The doctor in paragraph 3 of his deposition (cross examination) further deposed the following:

“Brain is the vital organ of the human body which controls sense and speech. If one sustain serious injury in brain, he cannot speak. In the present case, the deceased had sustained serious injuries in brain because the brain matter was coming out through the wound, parietal bone, frontal bone and occipital bone. After sustaining the above injuries, the injured become senseless.”

Therefore, from the perusal of the said deposition, it appears that after sustaining the injuries on forehead, person become senseless and is not in a fit state of mind therefore, becomes unfit to make statement and as such, the oral dying declaration of the deceased cannot be relied upon to sustain the conviction of the appellant.

12. Now, we advert ourselves to the last issue, on the reliability and admissibility of the evidence of identification by



sniffer dog. The Hon'ble Supreme Court, in ***Dinesh Borthakur vs. State of Assam, AIR 2008 SC 2205***, referred to its earlier settled precedents in regard to the evidentiary value of sniffer dog or tracking dog evidence in sustaining the conviction of appellant, wherein in Paragraph 20-22 observed as under:

“20.... So far as the evidence relating to the reaction of sniffer dog is concerned, this Court in Abdul Rajak Murtaja Dafedar v. State of Maharashtra 1970 CriLJ 373 stated the law, thus:

There are three objections which are usually advanced against reception of the evidence of dog tracking. First since it is manifest that the dog cannot go into the box and give his evidence on oath and consequently submit himself to cross- examination, the dog's human companion must go into the box and the report the dog's evidence and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inference....

21. Yet again in Gade Lakshmi Mangaraju alias Ramesh v. State of A.P. 2001 CriLJ 3317 , this Court opined:

There are inherent frailties in the evidence based on sniffer or tracker dog. The possibility of an error on the part of the dog or its master is the first among them.... The possibility of a misrepresentation or a wrong inference from the behaviour of the dog could not be ruled out. Last, but not the least, is the fact that from scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable police dogs to track and identify criminals.... Investigation exercises can afford



to make attempts or forays with the help of canine faculties but judicial exercise can ill afford them.

22. The law in this behalf, therefore, is settled that while the services of a sniffer dog may be taken for the purpose of investigation, its faculties cannot be taken as evidence for the purpose of establishing the guilt of an accused.”

The Hon'ble Supreme in Court ***Gade Lakshmi Mangraju vs. State of Andhra Pradesh, AIR 2001 SC 2677*** while referring to its earlier settled decision wherein the evidence of the tracker dogs has been tested, observed in Paragraphs 15 to 17 as under:

“15. In Abdul Razak Murtaza Dafadar vs. State of Maharashtra 1970 CriLJ 373 a three Judge Bench of this Court declined to express any concluded opinion or to lay down any general rule with regard to tracker dog's evidence or its admissibility against the accused, as it was not necessary to do so on the fact situation. However, their Lordships made the following observations on the usefulness or otherwise of such evidence:

"It was argued that the tracker dog's evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behavior of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But dogs are intelligent



animals with many thought process similar to the thought processes of human beings and wherever you have you have thought processes there is always the risk of error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight."

16. In Surinder Pal Jain vs. Delhi Administration 1993 CriLJ 1871 a two Judge Bench expressed the opinion that "the pointing out by the dogs could as well lead to a misguided suspicion that the appellant had committed the crime, so save their Lordships sidelined that item of evidence from consideration."

17. We are of the view that criminal courts need not bother much about the evidence based on sniffer dogs due to the inherent frailties adumbrated above, although we cannot disapprove the investigating agency employing such sniffer dogs for helping the investigation to track down criminals."

Therefore, the liberty of accused person, which is sacred to the foundational principles of our criminal jurisprudence and whose protection is guaranteed by the letters of the constitution cannot be restricted solely on the basis of the evidence of sniffer dogs as it is true that "*Investigation exercises can afford to make attempts or forays with the help of canine faculties but judicial exercise can ill afford them.*". Therefore, the evidence of sniffer dogs cannot be taken for purpose of establishing the guilt of an



accused. Thus, we must consider and appreciate the evidence in light of the settled decision of the Hon’ble Supreme Court referred above and the same cannot be taken as evidence for the purpose of establishing the guilt of the appellant.

13. On the basis of findings arrived at on the issues formulated above, we are of the considered opinion that the conviction of the appellant is not sustainable in the eyes of law as the prosecution has failed to prove its case beyond all reasonable doubt.

14. Therefore, the present appeal stands allowed and judgment of conviction and order of sentence dated 8th May, 1996 passed by the 1st Additional Sessions Judge, Saran in Sessions Trial No. 1062/94 (arising out of Nayagaon P.S. Case No. 29 of 1994), are set aside. Since the appellant is on bail, he is discharged from the liabilities of his bail bonds.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Pankaj/-

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