

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.346 of 1995
(Against the judgment of conviction dated 30.08.1995 and
order of sentence dated 31.08.1995 passed by 3rd Additional
Sessions Judge, Aurangabad in Sessions Trial No. 127/93/9/93)

1. Bigan Dom, son of Brahamdeo Dom, resident of village Maneka, P.S.- Madanpur, District- Aurangabad.
2. Maksudan Dom, son of Deo Nandan Dom, Daudnagar, District- Aurangabad.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Mr. Prince Kumar Mishra, Amicus Curiae.
For the Respondent/s : Mr. Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE SHAILENDRA SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 04-11-2022

The present criminal appeal has been preferred in the year 1995 i.e. 27 years ago against the judgment of conviction dated 30.08.1995 and order of sentence dated 31.08.1995 passed by 3rd Additional Sessions Judge, Aurangabad in Sessions Trial No. 127/93/9/93 (arising out of Madanpur P.S. Case No. 104/92), whereby and whereunder the appellants have been convicted under Section 302/34 and 380 of the Indian Penal Code and sentenced to undergo imprisonment for life under Section 302/34 of Indian Penal Code and to undergo imprisonment for a period of three years under Section 380



of the Indian Penal Code with direction that both the sentences shall run concurrently.

2. It is the case of the prosecution as narrated by the informant (P.W.4) in his fardbeyan that on previous night i.e. .27.07.92, he was sleeping in a room facing east side and affixed *taati* on the gate. His father was sleeping on the south facing side of the room and his brothers were sleeping on the west facing side of the room. In the said house, there was another room facing north in which his mother (P.W.6), step mother Kamla Devi (P.W.7) and his wife Shanti Devi (P.W.8) were sleeping together. At about 10 p.m., the informant awoke after hearing the sound of removing the *taati* and also by the sound of feet of some persons and saw that with the help of torch light, four persons entered into the room and the informant identified the accused persons in the light of *dhibri* as Brahamdeo Dome, Gora Dome, Bigan Dome and Maksudan Dome. He also identified that Brahmdeo Dome have a *tangi* in his hand, his sons Bigan Dome having *farsa* in his hand, Gora Dome having iron rod in his hand and his son-in-law Maksudan dome having *walam* in his hand. Sound of 4-5 persons was also coming from outside. The informant further stated that Brahamdeo Dome, his two sons and son-in-law attacked on his father with *tangi* and other weapons in their hand. In the meantime, informant's brothers Adhar Dome (P.W.3) and Arjun Dome (P.W.5) also awoke and were also assaulted with *tangi* by Brahamdeo Dome due to which they sustained injuries. Thereafter, all the four persons



came out of the room. Due to the injuries, the father of the informant was groaning then Brahamdeo Dome stated that if he would remain alive, he would implicate them, the accused persons again came inside the room and assaulted the father of the informant with *tangi* on his face due to this, the face, cheek and eye of the father of the informant got damaged and he died. Thereafter, all the accused persons went into the room situated in the eastern side in which the mother and the wife of the informant were sleeping. Few minutes thereafter, they came out of the room and went towards south west. The informant stated that he was not assaulted by them because of the reason that he hid his face with bed-sheet (*chadar*) at the time when his father was being assaulted. The informant further stated that thereafter his mother came in the courtyard and told that the accused persons took all the articles with them. The informant told her that the accused persons killed his father. The reason behind this occurrence has been stated that earlier Brahamdeo Dome purchased a pig from the deceased for one hundred. He paid Rs. 50/- at the time of purchase but he paid rest Rs. 50/- after much demand. Due to repeated demand, Brahamdeo Dome became annoyed and threatened to get his life.

3. On the basis of fardbeyan of the informant (P.W.4), Madanpur P.S. Case No. 104/92 was registered under Sections 147, 148, 149, 448, 323, 324, 380, 307, 302 of the Indian Penal Code and investigation was taken up.



4. 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 appellants to which the appellants pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined altogether twelve witnesses, namely, Dr. Raj Kumar Prasad (P.W.1), Dr. A Sultan Ansari (P.W.2), Adhar Dome (P.W.3) Ram Pravesh Dome (P.W.4), Arjun Dome (P.W.5), Sugiya Dome (P.W.6), Kamla Devi (P.W.7), Shanti Devi (P.W.8), Binod Paswan (P.W.9), Rajroop Yadav (P.W.10) Mokhtar Ahmad (P.W.11) and Sachidanand Sinha (P.W.-12) (investigating officer of the case). Prosecution has also produced exhibits as Ext. 1 (post-mortem report in handwriting and signature of Dr. Raj Kumar), Ext. 2 (injury report of Adhar Dome), Ext. 2/1 (injury report of Arjun Dome), Ext.3 (carbon copy of inquest report in the signature of Vinod Paswan), Ext. 3/1 (carbon copy of inquest report in the signature of Ambika Thakur), Ext. 3/2 (carbon copy of seizure list in the signature of Shivshankar Bhagat), Ext. 4 (station Diary No. 644 dated 28.7.92), Ext. 5 (copy of fardbeyan), Ext. 6 (formal F.I.R.), Ext. 7 (carbon copy of inquest report), Ext. 8 (injury report of Adhar dome), Ext. 9 (injury report of Arjun dome), Ext. 10 (seizure list dated 28.7.92). The defence has also examined two witnesses in support of its case namely D.W. 1 Gopal Singh and D.W. 2 Shiv Narayan Singh. After conclusion of the



trial, the learned Trial Court convicted and sentenced the appellants in the manner indicated above.

6. On account of no representation being made on behalf of the appellants on 07.09.2022, this court in the interest of justice, deemed it appropriate to appoint Mr. Prince Kumar Mishra as Amicus Curiae to represent the appellants at the cost of the State.

7. Mr. Prince Kumar Mishra, learned Amicus Curiae representing the appellants submits that the judgment of conviction and order of sentence passed by the learned trial court is bad in the eyes of law. The learned Trial Court has not appreciated the evidence available on record in proper manner and has wrongly convicted the appellants. It has been argued that the prosecution has not been able to establish and prove the source of identification. Further, the manner of occurrence has also not been proved by the prosecution. It has also been pointed out that from the evidence brought on record by the prosecution it is evident that the prosecution has suppressed the earliest version of the prosecution which was narrated by P.W.3 before the S.H.O. It has been argued that the suppression of the earliest version of the prosecution story itself creates doubt over the entire prosecution story and is fatal to the case of the prosecution.

8. Learned A.P.P. for the State, on the other hand, has argued that the learned Trial Court has rightly convicted the appellants after proper appreciation of evidence available on record. The witnesses are consistent in their depositions and sufficient evidence has been brought



on record by the prosecution to bring home the guilt of the appellants. The judgment of conviction and order of sentence, passed by the learned trial court, needs no interference.

9. After hearing the rival submissions advanced by both the sides and perusing the material available on record, following issues arise for consideration :

(i) Whether the prosecution with the aid of evidence adduced has been able to establish and prove the source of identification in which the Informant and other prosecution witnesses identified the appellants?

(ii) Whether the manner of occurrence has been duly proved by the prosecution by adducing sufficient evidence?

(iii) Whether the suppression of the earliest version of the F.I.R by the prosecution will draw an adverse inference making the entire case doubtful?

10. Now adverting ourselves to the first issue, the informant (P.W.4) in his fardbeyan has stated that, he identified the accused person in the light of *Dhibri*. But the informant neither in his examination-in-chief nor in cross-examination has deposed anything in relation to the source of identification. P.W.3, in paragraph 1 and P.W.5 in paragraph 3 of their deposition (examination-in-chief) have stated that they identified the accused persons in the light of the torch which



one of the accused persons, namely Brahamdeo Dome was carrying in his hands. P.W.6 in paragraph 1 of her deposition (examination-in-chief) has stated that he identified the accused persons in the light of *Dhibri* as well as from the light that was coming out from the torch which was being carried by one of the accused person namely, Brahamdeo Dome. She further states in paragraph 15 of her deposition (cross-examination) that she had shown the place to the Investigating Officer, where the *Dhibri* was kept and in paragraph 20 of her deposition (cross-examination) she stated that, at the time of recording of her statement before the police she mentioned that she identified the accused person in the light of *Dhibri*. With respect to the source of light being *Dhibri*, the Investigating officer (P.W.12), in paragraph 20 of his deposition (cross-examination) has categorically stated that he had not been shown any place where Lantern or *Dhibri* was kept in the house. In light of the material contradictions arising from the deposition of P.W.4, P.W.5 and P.W.12 the presence of *Dhibri*, as a source of identification becomes doubtful. With respect to the source of identification being the torch carried by one of the accused persons, we would like to rely upon the decision of the Hon'ble Supreme Court in *Tamilselvan v. State* reported in (2008) 7 SCC 755, wherein the Hon'ble Apex Court in paragraphs 8 and 9 has observed that:

“8. Before dealing with these glaring inconsistencies it may be pointed out that the incident occurred at 10.30 p.m. on 27.1.1996. It is alleged by the prosecution witnesses that they identified the accused in moonlight. We find it difficult to accept this version



of the prosecution witnesses that they could have identified any of the accused merely by the moonlight. In the evidence of the prosecution witnesses it is stated that the accused were carrying torches, but there is no indication whether the victims, including the Forest Guard Swaminathan (deceased) and Raju, Gardener, who sustained fire injuries, carried torches.

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9. Since it was the accused who allegedly carried torches, we find it difficult to believe how the prosecution witnesses could have identified the assailants. The position would have been different if the forest guards had been carrying torches and had been pointing them at the assailants, but here the position is just the reverse. In fact due to the torches of the assailants the prosecution witnesses would have been partially blinded by the light of the torch light, and would not have been able to identify anybody.

(Emphasis supplied)

The principle stated hereinabove has also been relied upon by a Co-ordinate Bench of this Court in the case of ***Sheo Chandra Paswan and Ors. vs State of Bihar*** reported in **2019 (3) BLJ 44**. In the light of the deposition of P.W.4, P.W.5 and P.W.6, it was one of the accused persons namely Brahamdeo Dome, who was carrying the torch light and the witnesses have identified the accused persons in the light of the said torch light. Therefore, applying the aforesaid principle as laid down in ***Tamilselvan (Supra)*** it would not be safe to rely upon the said statements of the prosecution witnesses regarding the source of identification. Thus, the prosecution has failed to establish and prove the source of identification in which the appellants were identified by the prosecution witnesses.



11. In order to deal with the second issue, we find it important to take note of the fact that the Informant (P.W.4) in his fardbeyan has stated that while the accused persons were assaulting his father he had hid his face by a bed-sheet. In his deposition (cross-examination), he states that he hid his head by a *gamchha*. When the Informant (P.W.4) had hidden his face when the assault was made on the deceased, the narration of the informant regarding the manner of assault attributed to the accused persons cannot be relied upon in the said facts of the case. Similarly, as discussed in the preceding issue the incident has occurred at 10 P.M. in the night without any source of identification, therefore, the manner of occurrence as narrated by the other prosecution witnesses cannot be relied upon. Thus, the prosecution has failed to prove the manner of occurrence beyond reasonable doubts.

12. So far the third issue is concerned, we have perused the deposition of P.W.3 and from his deposition we find that the P.W.3 and his family members on the night of the said incident sat together where they discussed and deliberated as against whom the case should be registered. This statement speaks volumes regarding the manner in which the present case has been instituted. It appears that implicating the present appellants in this case is an afterthought which has been done after much deliberation and discussion due to ulterior motive. Further, perusal of the deposition (cross-examination) of P.W.3 reveals that he alongwith his brother Arjun Dome (P.W.5) and Ram Pravesh Dome (P.W.4) had gone to police station. By that time, the local



chowkidar was already informed regarding the incident. However, upon asking of the local chowkidar, P.W.3 told him that the details of the occurrence would be disclosed to him at the police station only. Thereafter, when they reached the police station the S.H.O. asked him the details of the occurrence and then P.W.3 revealed the details of the occurrence to the S.H.O. It is of utmost importance to take note of the fact that P.W.3 narrated the entire incident in detail to the S.H.O. at the police station and he was the first person whose statement (*beyaan*) was recorded by the S.H.O at the police station. P.W.3 has categorically mentioned that the statement given by him was duly recorded by the S.H.O and the same was read over to him, upon which he affixed his thumb impression. However, surprisingly the present case has not been instituted on the basis of the aforesaid statement of P.W.3, which was the earliest version of the present case, rather it has been instituted on the basis of fardbeyan of the Informant (P.W.4) recorded on the doorstep of the house of informant. The prosecution has not brought on record the statement of P.W.3 which was recorded at the police station and was the earliest version of the present case. At this juncture, we would like to rely upon the judgment of the Hon'ble Supreme Court rendered in the case of ***State of Madhya Pradesh vs. Ratan Singh and Ors.*** reported in (2020) 12 SCC 630, wherein the Hon'ble Supreme Court in paragraph 7 has observed as follows: -

“7.In the matter on hand, the distance of the Police Station from the house of the complainant is only 5 kms. PW-9, Gangola, the Chowkidar of the village



was present in the village. Patwari was also present in the village. From the evidence of the eye witnesses we found that the FIR was lodged after due consultation and deliberations among the witnesses. PW-9 admits in Paragraph-7 of his cross-examination that the FIR came to be lodged by Khilan Singh after due consultation with him and Ors. in the village. He admits in the evidence that the deceased, Devi Singh, was very much alive at least till 8.30 pm on that day and his information was recorded by the Police prior to the FIR on hand (Ext. D/3). The FIR lodged by Devi Singh, which was prior in time and which we feel, would have been the most important document in this case, has been suppressed by the prosecution. The prosecution should have come before the Court with clean hands. Since, Ext. D/3 lodged at 8.30 pm on the date of the incident was later in point of time as compared to the suppressed information lodged by Devi Singh before his death, Ext. D/3 cannot be considered as the FIR. At the most, it can be considered as a statement of Khilan Singh recorded Under Section 161 of the Code of Criminal Procedure. It is a clear case of suppression of earliest information which was of vital importance.

(Emphasis supplied)

In the present case also the prosecution has withheld and suppressed the actual version of the occurrence without assigning reasons for it. Hence, we are of the opinion that an adverse inference is required to be drawn against the prosecution which goes to the root of the case of the prosecution making the entire prosecution story doubtful.

13. In view of the findings arrived at on the issues formulated above, we are of the considered opinion that the prosecution has failed to prove the charge against the appellants. Therefore, the present



appeal is allowed. The judgment of conviction dated 30.08.1995 and order of sentence dated 31.08.1995 passed by 3rd Additional Sessions Judge, Aurangabad in Sessions Trial No. 127/93/9/93 (arising out of Madanpur P.S. Case No. 104/92) are set aside. Since the appellants are on bail, they are hereby discharged from the liabilities of their respective bail bonds.

14. Before parting away with this appeal we appreciate the sincere efforts taken by Mr. Prince Kumar Mishra, who has ably assisted this court in this appeal. Therefore, we direct the Patna High Court Legal Services Committee to pay a sum of Rs. 5,000/- to Mr. Prince Kumar Mishra, learned Advocate, appointed as Amicus Curiae by order dated 07.09.2022 passed in this appeal.

(Sudhir Singh, J)

(Shailendra Singh, J)

Pankaj/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	15.11.2022
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