

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.347 of 1995

=====

Mahendra Yadav son of Govind Yadav, resident of Village- Mahakar, Police
Station- Roh, District - Nawadah

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with
CRIMINAL APPEAL (DB) No. 348 of 1995

=====

1. Biru Yadav son of Mangru Yadav
2. Balak Yadav alias Ram Balak Yadav, son of Sital Yadav, Both resident of
Village- Mahakar, Police Station- Roh, District – Nawada

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

Appearance :

(In CRIMINAL APPEAL (DB) No. 347 of 1995)

For the Appellant/s : Mr.Prince Kumar Mishra (Amicus Curiae)

For the Respondent/s : Mr. Bipin Kumar, APP

(In CRIMINAL APPEAL (DB) No. 348 of 1995)

For the Appellant/s : Mr. Prince Kumar Mishra (Amicus Curiae)

For the Respondent/s : Mr. Binod Bihari Singh, APP

=====

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 02-09-2022

Both these appeals filed in the year 1995, i.e., around 27
years ago, arise out of the same judgment and order. Hence, both
these appeals were heard together and are being disposed of by a
common judgment.



2. By order dated 22.06.2022, a report was called for from the Superintendent of Police, Nawadah in respect of the appellants of both the appeals, as to whether the appellants are alive or dead. The Superintendent of Police, Nawadah vide letter No.690/Law Branch dated 21.07.2022 has reported that appellant Mahendra Yadav of Criminal Appeal (DB) No.347 of 1995 and appellant Biru Yadav of Criminal Appeal (DB) No.348 of 1995 are alive. However, appellant Balak Yadav alias Ram Balak Yadav has already died in the year 2015 and hence Criminal Appeal (DB) No.348 of 1995 stands abated with regard to appellant Balak Yadav alias Ram Balak Yadav. Therefore, Criminal Appeal (DB) No.348 of 1995 is now confined to appellant Biru Yadav only.

3. Both the appeals have been preferred against the judgment of conviction dated 27.09.1995 and the order of sentence dated 28.09.1995, passed by the 1st Additional Sessions Judge, Nawadah in Sessions Trial No.89 of 1992, arising out of Roh P.S. case No.48 of 1992, whereby and whereunder the appellants have been convicted under Sections 302/34 of the Indian Penal Code and sentenced to undergo R.I. for life.

4. Prosecution case, in brief, is that on 20.09.1992 at about 8:00 p.m. while the deceased Sanichar Yadav, brother of the informant Rohan Yadav, was returning back after having Jitiya



feast from the house of his cousin brother Saukhi Yadav (P.W.6) and when reached near the heap of *straw* (*Newari Punj*) of appellant Biru, said appellant Biru Yadav having *tangi* in his hand gave *tangi* blow on the head of deceased, namely, Sanichar Yadav, on account of which he fell down and blood started oozing out. Thereafter appellant Mahendra Yadav having *lathi* in his hand gave one *lathi* blow to deceased Sanichar Yadav and appellant Balak Yadav having *garasa* in his hand threatened the informant and others not to come forward to save the deceased, otherwise they would also be killed. On arrival of villagers, appellants fled away and the injured succumbed to the injuries. The motive behind the murder is said to be an old enmity.

On the statement of informant Rohan Yadav (P.W.3), F.I.R. (Ext.2) was drawn up. The police after investigation submitted charge-sheet against the accused persons and the jurisdictional Magistrate took cognizance in the matter and then committed the case to the Court of Sessions. Charges were framed against the appellant Biru Yadav under Section 302 of the Indian Penal Code, whereas against appellants Mahendra Yadav and Balak Yadav charges were framed under Sections 302/34 of the Indian Penal Code. The appellants pleaded not guilty and claimed to be tried.



5. In course of trial, the prosecution has examined altogether six witnesses. Out of whom, P.W.1 Karu Yadav is son of the informant, P.W.2 Munarik Yadav is son of deceased, P.W.3 Rohan Yadav is the informant, P.W.4 is Dr. Bimal Prasad Singh, who conducted postmortem of the deceased, P.W.5 Baleshwar Prasad is a formal witness, who has proved F.I.R. (Ext.2), seizure list (Ext.3), inquest report (Ext.4), police case diary (Ext.5) and P.W.6 Saukhi Yadav is cousin brother of deceased. The prosecution has also brought on record the documents, like postmortem report (Ext.1), F.I.R. (Ext.2), seizure list (Ext.3), inquest report (Ext.4) and police case diary (Ext.5). The Defence has examined only one witness, namely, Chandrika Prasad in support of its case.

6. By order dated 24.11.2021 passed by a Co-ordinate Bench of this Court, Mr. Prince Mishra, learned advocate, was appointed as Amicus Curiae to represent the appellants at the cost of the State, as none had appeared on that date on behalf of the appellants.

7. Mr. Prince Kumar Mishra, learned advocate, appearing as Amicus Curiae on behalf of the appellants, submitted that the judgment of conviction and order of sentence are bad in the eyes of law, as the same has been rendered by appreciating the evidence in the improper manner. It has been argued by Mr. Mishra that the



prosecution has not been able to prove the manner of occurrence, rather the medical evidence brought by the prosecution, available on record, completely belies the ocular evidence. Therefore, in this background he submits that the manner of occurrence as narrated in the ocular evidence cannot be relied upon. Further, he submits that the Investigating Officer of this case has not been examined, which has prejudiced the trial of the appellants. It has also been contended that the prosecution has failed to prove the source of identification in which the appellants have been identified, which makes the entire case of prosecution doubtful. Lastly, it has been argued that there is material contradiction in the evidence brought on record with regard to the time of death of the deceased.

8. Per contra, learned A.P.P appearing for the State has submitted that there is sufficient evidence brought on record by the prosecution to prove the guilt of the appellants. The learned trial court has after appreciating the entire evidence rightly convicted the appellants. Therefore, the judgment of conviction and order of sentence require no interference.

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



(i) Whether the prosecution has been able to prove the manner of occurrence, in light of the fact that the medical evidence do not support and is contrary to the oral evidence brought on record by the prosecution?

(ii) Whether in the facts of the present case, non-examination of the Investigating Officer has prejudiced the trial of the appellants?

(iii) Whether there is material contradiction in the evidence brought on record by the prosecution with regard to the time of death of the deceased?

(iv) Whether the prosecution has established and proved the source of identification under which the appellants have been identified?

10. In order to deal with the first issue, from perusal of the material available on record, it appears that it is the case of the prosecution that the deceased was hit on his head by *Tangi* by appellant Biru Yadav because of which the head of the deceased got cut. After sustaining the *Tangi* blow the deceased fell on the ground and then appellant Mahendra Yadav gave a lathi blow upon the deceased. However, from perusal of the post-mortem report of the deceased, we find that the deceased had sustained the following injuries- Lacerated wound 3 ½ inches x ¾ inches bone



deep at frontal region at scalp. Bone exposed (Longitudinal). On dissection it was found that the frontal bone depressed fracture at the site at injury with intra cranial haematoma. The doctor had not found any other external or internal injury on the body of the deceased. The cause of death as opined in the post-mortem report is shock produced by the injury discussed above. The doctor has further opined that the said injury has been caused by hard and blunt substance. It is very much clear that the ocular evidence is not supported by the medical evidence, as the weapon alleged, by the prosecution, in commission of offence is said to be *Tangi* which has sharp ends and a lacerated wound cannot be caused by a weapon like *Tangi*. Further, it is apparent from the post-mortem report of the deceased that there is no injury found on the body of the deceased, so far the allegation of assault by *lathi* is concerned. Therefore, this itself makes the case of the prosecution doubtful. However, to rule the possibility, that the blunt side of *Tangi* might have hit the deceased causing the abovementioned injury, we would like to rely upon the judgment rendered by the Hon'ble Supreme Court in the case of ***Hallu and Others vs. State of Madhya Pradesh*** reported in ***(1974) 4 SCC 300*** wherein the Hon'ble Supreme Court has in paragraph 11 observed as follows:-

“11. The postmortem report prepared by Dr. N.L. Jain shows that on the body of Jagdeo were found



three bruises and a hematoma. On the body of Padum were found four lacerated wounds and two bruises. According to the eye-witnesses the two men were attacked with lathis, spears and axes but that clearly stands falsified by the medical evidence. Not one of the injuries found on the person of Jagdeo and Padum could be caused by a spear or an axe. The High Court however refused to attach any importance to this aspect of the matter by saying that the witnesses had not stated that the miscreants dealt axe blows from the sharp-side or used the spear as a piercing weapon". According to the High Court axes and spears may have been used from the blunt side and therefore the evidence of the eye-witnesses could safely be accepted. We should have thought that normally when the witness says that an axe or a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used. If that be the implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as blunt weapon."

(emphasis supplied)

In another case of **Gurmej Singh and Ors. Vs.State of Punjab** reported in **1991 Supp (2) SCC 75** the Hon'ble Supreme Court after discussing the case of **Hallu (Supra)** has in paragraph 8 has held as follows:-



“8. Counsel for the appellants next submitted that according to the prosecution appellant Gian Singh was armed with a Gandasi and he is alleged to have given a blow therewith on the chest of the deceased. Ordinarily a Gandasi blow would cause an incised wound whereas the deceased had an abrasion 5" x 1" on the chest caused by a hard and blunt substance. According to counsel normally when a witness deposes to the use of a particular weapon there is no warrant for supposing that the blunt side of the weapon was used by the assailant. In support of this contention counsel invited our attention to two decisions, namely, Hallu and Ors. v. State of MP 1974CriLJ1385 and Nachhattar Singh and Ors. v. The State of Punjab AIR1976SC951 . In his submission, therefore, the injury found on the chest could not be attributed to Gian Singh who is stated to have used the Gandasi. We see no merit in this contention for the simple reason that the prosecution witnesses have categorically stated that Gian Singh used the blunt side of the Gandasi. If the prosecution witnesses were silent in this behalf the submission of counsel would have carried weight. But where the prosecution witnesses categorically state that the blunt side of the weapon was used there is no room for believing that the sharp side of the weapon which would be normally used had in fact been used...”



After examining the record of this case, we find that neither any witness has specified that which side of *Tangi* was used in the occurrence nor the prosecution has obtained any clarification from any witness as to which side of the *Tangi* was used in causing the injury upon the deceased. Therefore, in the facts of the present case, we are of the opinion that there is no requirement for supposing that the blunt side of *Tangi* was used in the occurrence. Hence, the prosecution has not been able to prove the manner of occurrence, in light of the fact that the medical evidence does not support and is contrary to the oral evidence brought on record by the prosecution.

11. Adverting to the second issue, it is evident from the record that the prosecution has not produced and examined the Investigating Officer as a prosecution witness. The Investigating Officer is the only competent witness who can prove the place of occurrence. It is well settled that the non-examination of the Investigating Officer would not *ipso facto* discredit the entire case of the prosecution. However, it is needless to point that the right of the accused to bring on record, the contradictions in the statement of witnesses made before the Investigating Officer during investigation, is a very valuable right. By way of questions put to the Investigating Officer, the defence demonstrates that the witness



has deposed contradictory to his earlier statement made before the Investigating Officer and, as such, the defence is able to satisfy the Court that the said witness is not reliable. In the present case, non-examination of the Investigating Officer has definitely prejudiced the accused since the place of occurrence has not been proved and the accused has not got the opportunity to discredit the reliability of prosecution witnesses by putting questions to the Investigating Officer. Thus, in our opinion, non-examination of the Investigating Officer in the present case is a serious infirmity resulting in prejudice being caused to the appellants. Hence, on this score also the conviction of the accused persons cannot be sustained.

12. For the purpose of deciding the third issue, we have examined the deposition of P.W.6, who claims to be an eye-witness to the alleged occurrence, wherein he has stated in his examination-in-chief that when the deceased fell on the ground after sustaining the assault of *Tangi*, at that time the deceased was alive, but later he died. He has further stated that he cannot say after how much time the deceased died. However, from perusal of his cross-examination, it appears that the deceased was alive for the entire night and succumbed to the injury in the wee hours, next morning. This statement of P.W.6 is in variance with the deposition of the informant, who in his examination-in-chief has categorically



stated that after sustaining the injuries the deceased died on the spot. The informant lifted dead body of the deceased and brought it to his house. This material contradiction in the evidence of prosecution witnesses creates doubt on the time of death of the deceased. Therefore, we find that there is material contradiction in the evidence brought on record by the prosecution with regard to the time of death of the deceased.

13. So far the fourth issue is concerned, from perusal of the fard-beyan, it is apparent that the informant has not disclosed any source of identification under which the appellants have been identified. However, few of the prosecution witnesses during the course of trial have deposed that many people including the wife of appellant Biru Yadav came with a lantern. From the record, it appears that neither the said lantern was seized during investigation nor the same was produced during the trial by the prosecution as material exhibit to substantiate this fact. Furthermore, P.W.1 and P.W. 3 (informant) in their examination-in-chief have also not disclosed regarding presence of any lantern or any other source of identification. At this juncture, we would rely upon the judgment of the Hon'ble Supreme Court in the case of ***Kapildeo Mandal and Ors. Vs. State of Bihar*** reported in (2008)



16 SCC 99, wherein the Hon'ble Supreme Court in paragraph 9 has observed as follows:

“9. ... The incident happened that 11.00 0'clock in the night. The witnesses have stated that they have seen the incident and recognized 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, in the light of the above referred decision of the Hon'ble Supreme Court, in the facts of the present case we find that the prosecution has failed to establish and prove the source of identification under which the appellants have been identified.

14. 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 guilt of the appellants beyond all reasonable doubts. Therefore, both the appeals are allowed and the judgment of conviction dated 27.09.1995 and the order of sentence dated 28.09.1995, passed by the 1st Additional Sessions Judge, Nawadah in Sessions Trial No.89 of 1992, arising out of Roh P.S.



case No.48 of 1992, are set aside. Since the appellants are on bail, they are discharged from the liabilities of their respective bail bonds.

15. We would fail in our duty, if we do not record a word of appreciation for the able assistance rendered by Mr. Prince Kumar Mishra, learned advocate, appointed as Amicus Curiae by a Co-ordinate Bench of this Court. Mr. Mishra was not only thorough on the facts of the case but was also acquainted with the relevant case laws. He has indeed assisted us in a dexterous manner. Therefore, we direct the Patna High Court Legal Services Committee to pay a sum of Rs.5000/- to Mr. Prince Kumar Mishra, learned advocate, appointed as Amicus Curiae to represent the appellants at the cost of the State, by a Co-ordinate Bench of this Court by order dated 24.11.2021.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	07.09.2022
Transmission Date	07.09.2022

