

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.92 of 1996

1. Jai Kishore Singh, Son of Late Suresh Prasad Singh
2. Bullu Singh, Son of Ramanand Singh
3. Raj Kumar Singh, Son of Jagdish Singh
4. Binay Kumar Singh, Son of Siya Ram Singh,
all resident of Village-Baurne Asthan, Police Station-Chautham, District
Khagaria.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellants	:	Mr. Rajesh Kumar Singh, Sr. Advocate Mrs. Priya Gupta, Amicus Curiae
For the Respondent	:	Mr. Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 26-08-2022

The present appeal has been preferred against the judgment of conviction and the order of sentence dated 08.02.1996, passed by the IInd Additional District and Sessions Judge, Khagaria in Sessions Trial No.163 of 1994, arising out of Chautham P.S. case No.23 of 1994, whereby and whereunder the appellants have been convicted under Sections 148, 302, 201, 342



of the Indian Penal Code and Section 27 of the Arms Act and have been sentenced to undergo R.I. for life under Section 302 of the Indian Penal Code, 7 years R.I. under Section 201 of the Indian Penal Code, R.I. for 2 years under Section 148 of the Indian Penal Code, R.I. for one year under Section 342 of the Indian Penal Code and R.I. for 5 years under Section 27 of the Arms Act. The appellants have been sentenced to pay each Rs.10,000/- to the next of the deceased and to undergo R.I. for one year in default of payment. The sentences have been ordered to run concurrently.

2. By order dated 29.11.2021 passed by a Co-ordinate Bench of this Court, Mrs. Priya Gupta, 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. However, later on, learned counsel for the appellants has appeared.

3. Prosecution case, in brief, is that the fard-beyan of informant Shambhu Kumar Singh was recorded by A.S.I. Chandeshwar Paswan of Chautham P.S. on 09.02.1994 at 18:00 hours, wherein he has narrated that on 08.02.1994 the informant alongwith his father Lalbahadur Singh, brothers Kaushal Kumar Singh, Deokumar Singh, villager Makhru Mahton and Chalitra



Mahton had been to Khagaria to depose in Sessions case No.637 of 1990 and on 09.02.1994 after deposition in the court of Shri R.P. Chaudhary, the informant alongwith aforesaid persons started for Borne and at about 5:00 p.m. reached at northern bank of Borne river. It further reveals that the agnates of informant, namely, Jaikishore Singh armed with rifle, Binay Kumar Singh armed with rifle, Hareram Singh armed with *threenut*, Bullu Singh armed with *threenut*, Raj Kumar Singh armed with *threenut* and garasa, all of a sudden came out of fencing situated at a distance of 30 steps north from aforesaid ghat and Jaikishore Singh with rifle in his hand fired at Kaushal Kumar Singh and Binay Kumar Singh with rifle in his hand fired at Deo Kumar Singh and Kaushal and Deo Kumar got down from the boat. It further reveals that Kaushal and Deo Kumar sustained fire arm injury and fell down. Lalbahadur Singh, father of the informant, tried to shirk away but Bullu Singh and Rajkumar Singh with gun and *threenut* in their hands fired indiscriminately at Lalbahadur Singh, who sustained fire arm injury, got injured and fell down. It further reveals that the accused, after they fell down, pounced upon the informant but the informant jumped into the water of the river, but accused Hareram Singh opened fire at the informant with intention to do away with life of the informant, but the informant took a dive into water and



swam across the river and came out of southern bank. It further reveals that the informant saw the accused loading the bodies of his father and two brothers on the boat and tearing neck and abdomen of the bodies on the boat. The motive behind the occurrence as alleged by the informant was that about four and half years ago, accused Binay Kumar Singh had assaulted Kaushal Kumar Singh leading to institution of a criminal case pending in the court of Shri R.P. Chaudhary and the accused persons were putting pressure on the informant to compromise the case and had threatened that in the event of non-compromise the accused will eliminate all the family members of the informant.

4. On basis of the fard-beyan of the informant, Chautham P.S. case No.23 of 1994 was registered against the appellants and one Hareram Singh. The investigation proceeded and the police submitted charge-sheet against them. The Chief Judicial Magistrate took cognizance of the offences and then committed the case to the Court of Sessions. Charges were framed against the appellants. The appellants pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined altogether eleven witnesses, namely, Motilal Mahto (P.W.1), Charitra Mahto



(P.W.2), Makloo Mahto (P.W.3), Lalita Devi (P.W.4-wife of deceased Kaushal Kumar Singh), Karuna Devi (P.W.5-wife of the informant), Shambhu Kumar Singh (P.W.6-the informant of the case), Dr. Mohan Sharma (P.W.7, who conducted postmortem on the dead body of Lalbahadur Singh), Dr. Awadhesh Kumar Yadav (P.W.8, who conducted postmortem on the dead body of Deo Kumar), Dr. Anil Kumar Singh (P.W.9, who conducted postmortem on the dead body of Kaushal Kumar Singh), Dr. Mukhdeo Sharma (P.W.10) and Manager Ram (P.W.11). Out of which, P.W.1, P.W.2 and P.W.3 have been declared hostile. The prosecution has brought on record the inquest report of deceased Deo Kumar Singh (Ext-5), Inquest report of deceased Kaushal Kumar Singh (Ext-6) and Inquest report of deceased Lal Bahadur Singh (Ext-7), the signature and writing of Dr. S.M. Thakur over the postmortem report (Ext-2), signature and writing of Dr. Awadhesh Kumar Yadav over postmortem report of Deo Kumar Singh (Ext-2/1) and signature and writing of Dr. Anil Kumar Singh over postmortem report of Kaushal Kumar Singh (Ext-2/2). Ext.8 is charge-sheet of G.R. No.670 of 1989. Ext.9 is order sheet of S.C. case No.637 of 1989. The defence has not examined any witness in support of its case.



6. Learned Counsel for the appellants and learned Amicus Curiae have submitted that the judgment of conviction and order of sentence passed by the trial court is bad in law and deserves to be set aside. The learned trial court has not appreciated the evidence brought on record by the prosecution properly. The prosecution has deliberately chosen not to examine all the witnesses, which has prejudiced the trial of the appellants. Had all the charge-sheeted witnesses been examined, the true story would have been unfurled. Further, it has been argued that there is delay in sending the F.I.R. to the court which casts doubt on the entire case of the prosecution. The learned Trial Court has also not appreciated the fact that there is contradiction in the deposition of witnesses and has convicted the appellants in a cursory and perfunctory manner. It also been argued that the A.S.I., who recorded the fardbeyan of the Informant has also not been examined which has caused prejudice to the appellant. The trial court has also not considered the fact that P.W.1, P.W.2 and P.W.3 have been declared hostile during trial, which is fatal to the case of the prosecution, as the same amounts to making the entire prosecution story doubtful.

7. Learned A.P.P. appearing for the State has submitted that the prosecution has been able to prove its case beyond all



reasonable doubts and therefore learned trial court has rightly convicted the appellants on relying upon the evidence brought on record by the prosecution during trial. The case of the prosecution has been consistent and deposition of the informant corroborated with the medical evidence is sufficient enough for the conviction of the appellants. The prosecution has also been able to successfully prove motive in this case. Therefore, the judgment and order assailed in this appeal requires no interference and appeal is liable to be dismissed.

8. After perusing the record and hearing the arguments advanced by the parties, following issues arise for consideration in this appeal: -

- (I) Whether the prosecution has been able to prove the manner of occurrence beyond all reasonable doubt?
- (II) Whether the medical evidence corroborates the ocular evidence?
- (III) Whether the prosecution has been able to prove motive as alleged in this case?
- (IV) Whether the non-examination of all the charge-sheet witnesses, as prosecution witness, will lead to drawing of adverse inference as per illustration (g) of



Section 114 of the Evidence Act, in given facts of the present case?

(V) Whether the evidence of a hostile witness is required to be looked into, in the facts of the present case?

9. In order to deal with the first issue, we would like to consider the evidence adduced by the informant (P.W.6). From perusal of his deposition it is clear that he is an eye-witness to the alleged occurrence. He has given a very clear and vivid description of the occurrence. He has specifically stated that the appellant No.1 Jai Kishore Singh had fired upon the deceased Kaushal, appellant No.4 Binay Kumar Singh had fired upon deceased Deo Kumar Singh. Thereafter, appellant No.3 and 4 made indiscriminate firing which led to causing fire-arm injury on the father of informant. Thereupon, appellant No.3 and one co-accused chased the Informant due to which he jumped into the river. This clearly shows that the informant had jumped into the river after seeing the occurrence. The informant then crossed the river by swimming had saw after reaching to the southern side of the river that the accused persons, including the appellants, were beheading deceased Kaushal by way of Kudal. The accused persons then put the dead bodies on boat and the Informant also saw that the



accused persons were beheading and tearing the abdomen of the dead bodies. From the record it appears that out of three dead bodies, two dead bodies i.e., the dead body of Kaushal and Deo Kumar have been recovered from the river and the third dead body i.e., dead body of Lal Bahadur has been recovered from the western bank of Dhumri Ghat. Therefore, the recovery of dead bodies also corroborates the evidence adduced by the Informant. We are of the opinion that there is no reason to disbelieve the evidence adduced by the Informant. The Informant has explained the manner of occurrence in great detail and his version also finds support from the fact that the dead bodies have been recovered from and around the river. The informant and appellants are agnates and therefore they are well known to each other. In view of the discussion made, we find that the prosecution has proved the manner of occurrence beyond all reasonable doubts.

10. Now adverting to the second issue, from the record it transpires that post-mortem report of the deceased Kaushal shows that his dead body contained external injuries in the following manner- his head was separated from the body at the level of neck by lacerated wound above the root of neck, cutting all things skin, muscles, vessels, vertebrae, spinal cord in the neck. Another lacerated wound was found on the left side of the interior chest



wall below middle of clavicle. Another lacerated wound was on below medial to angle of left scapula on back of left chest wall and left to mid-line. One incised wound into peritoneal cavity deep on interior abdominal wall in mid-line just below umbilicus with part of bowel protruding from the wound. Further internally there was blood clots in association with injury no.1, 2 and 3 but there was no blood clot in association with injury no.4. The injuries were found communicating with each other. A bullet was found lodged in association with injury No.3. The doctor had opined that both sharp cutting weapon and fire arm have been used in causing injury upon him. Injury No. 1 and 4 was opined to have been caused by sharp weapon and Injury 2 and 3 is said to be caused by fire-arm. Similarly, post-mortem report of Deo Kumar shows that he sustained three external injuries. Out of which two are lacerated wounds communicating to each other and one is incised wound. The lacerated wounds are opined to have been caused by fire-arm and the incised wound is opined to have been caused by sharp cutting object. Likewise, the post-mortem report of deceased Lal Bahadur shows that he sustained four injuries out of which two were caused by sharp cutting weapon and the remaining two were caused by fire-arm weapon. Therefore, we are of the opinion that



from perusal of the post-mortem report it is apparent that it corroborates the ocular evidence adduced by the prosecution.

11. So far the third issue is concerned, after going through the record, from Ext.8 and 9 it is apparent that there was criminal case between the informant and appellants. Ext.8 is the charge-sheet submitted in G.R. Case No. 670 of 1989 and Ext.9 is the order-sheet of Sessions Trial No. 637 of 1990, which arose out of Ext.8. The said criminal case was lodged against Appellant Nos.2, 3 and 4 by Informant side as the appellants had assaulted the deceased Kaushal four and a half years prior to the occurrence of the present case. The Informant has alleged in his fardbeyan that the appellants used to put pressure on the Informant side to get the matter compromised. Even on the date of occurrence of this case the deceased persons were returning from court as on the date of occurrence of this case the date for adducing evidence in Sessions Trial No. 637 of 1990 was fixed. This fact is supported by Ext.9 which is order dated 09.02.1994 wherein it has been mentioned that Makhra Mahto was examined on that date by the court in Sessions Trial No. 637 of 1990. The informant in his fardbeyan itself has also stated this fact which stands corroborated by Ext.9 order dated 09.02.1994 of Sessions Trial No.637 of 1990.



Therefore, in our view the prosecution has been able to prove the motive beyond all reasonable doubts.

12. As far as the fourth issue is concerned, it is true that the prosecution has not produced all the charge-sheeted witnesses as prosecution witnesses. It is settled law that evidence is not to be counted but to be weighed. A conviction can be based also on the basis of the evidence of solitary witness, if it is of sterling quality and inspires the confidence of the court. Non-examination of all the chargesheet witnesses will not go in favour of accused in every case. It will depend upon the facts of each and every case. The Hon'ble Supreme Court in the case of **Deny Bora vs. State of Assam** reported in (2014) 14 SCC 42 has dealt in detail on this aspect. In paragraph 9 to 12 of the judgment it has been held as follows:-

*9. The question that arises for consideration is whether the prosecution has been able to establish the involvement of the Appellant in the crime in question. As is manifest, neither the wife nor the daughter of the deceased has been examined. Submission of Mr. Goswami is that they are natural witnesses and no explanation has been given for their non-examination and hence, adverse inference against the prosecution deserves to be drawn. He has drawn inspiration from the authority in **Surinder Kumar v. State of Haryana** (2011) 10 SCC 173 wherein it has been held, though in a different context, that a failure on the part of the*



*prosecution in non-examining the two children, aged about six and four years respectively, when both of them were present at the site of the crime, amounted to failure on the part of the prosecution. In this context, reference to the decision in **State of H.P. v. Gian Chand** (2001) 6 SCC 71 would be profitable. The Court while dealing with non-examination of material witnesses has expressed that:*

14 ...Non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution.

The three-Judge Bench further proceeded to observe that the court is required first to assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined.

*10. In **Takhaji Hiraji v. Thakore Kubersing Chamansing** (2001) 6 SCC 145 and Ors. the Court has ruled that it is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or*



made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The Court should pose the question 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 examine and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses.

*11. In **Dahari v. State of U.P.** (2012) 10 SCC 256, while discussing about the non-examination of material witness, the Court expressed the view that when he was not the only competent witness who would have been fully capable of explaining the factual situation correctly and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution.*



*12. From the aforesaid authorities, it is quite vivid that non-examination of material witnesses would not always create a dent in the prosecution's case. However, as has been held in the Case of **Gian Chand** (supra) the charge of withholding a material witness from the Court levelled against the prosecution should be examined in the background of facts and circumstances of each case so as to find out whether the witnesses were available for being examined in the Court and were yet withheld by the prosecution. That apart, the court has first to assess the trustworthiness of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could also have been examined but were not examined. Another aspect which is required to be seen whether such witness or witnesses are the only competent witnesses who could have been fully capable of explaining correctly the factual situation. As we have noticed in the case at hand, the daughter was the eye witness and the wife was slightly away from the scene of occurrence. They are the most natural and competent witnesses. They really could have thrown immense light on the factual score, but for the reasons best known to the prosecution, they have not been examined. It is also not the case of the prosecution that they had not been cited as their evidence would have been duplication or repetition of evidence or there was an apprehension that they would have not supported the case of the prosecution. In the absence of any explanation whatsoever and also regard being had to the presence of wife and daughter of the deceased at the place of*



*occurrence, we are of the considered opinion that it has affected the case of the prosecution. We are obliged to hold so as we find the prosecution has otherwise not been able to establish the case against the Appellant and, therefore, non-examination of the material witnesses cannot be regarded as inconsequential. As we find, the conviction wholly rests on the sole testimony of PW-14. It is well settled in law that conviction can be based on the testimony of a singular witness. It has been held in **Sunil Kumar v. State (Govt. of NCT of Delhi)** (2003) 3 SCC 169 that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But, if there are doubts about the testimony the courts will insist on corroboration. The same principle has been reiterated in **Namdeo v. State of Maharashtra** (2007) 14 SCC 150 by stating that it is open to a competent court to fully and completely rely on a solitary witness and record conviction, if the quality of the witness makes the testimony acceptable.*

(emphasis supplied)

13. Now coming to the last issue, from perusal of record it appears that P.W.1, P.W.2 and P.W.3 have been declared hostile. The act of witness turning hostile should not be the only reason to let the accused go scot free. There are several reasons because of which a witness turns hostile. Bentham has said that the witnesses are the eyes and ears of justice. The Hon'ble Supreme Court has



elaborately dealt with this aspect of a witness turning hostile in the case of ***Ramesh vs. State of Haryana*** reported in ***(2017) 1 SCC 529***. The witness turning hostile has been described by the Supreme Court in this case as “*culture of compromise*”. The Hon’ble Apex Court in paragraphs 40 and 44 of the judgment has held as follows:

“40. On the analysis of various cases, following reasons can be discerned which make witnesses retracting their statements before the Court and turning hostile:

(i) Threat/intimidation.

(ii) Inducement by various means.

(iii) Use of muscle and money power by the accused.

(iv) Use of Stock Witnesses.

(v) Protracted Trials.

(vi) Hassles faced by the witnesses during investigation and trial.

(vii) Non-existence of any clear-cut legislation to check hostility of witness.

44. Apart from the above, another significant reason for witnesses turning hostile may be what is described as 'culture of compromise'. Commenting upon such culture in rape trials, Pratiksha Bakshi has highlighted this problem in the following manner:

During the trial, compromise acts as a tool in the hands of defence lawyers and the accused to pressurise complainants and victims to change their testimonies in a courtroom. Let us turn to a



recent case from Agra wherein a young Dalit woman was gang-raped and the rapist let off on bail. The accused threatened to rape the victim again if she did not compromise. Nearly a year after she was raped, she committed suicide. While we find that the judgment records that the victim committed suicide following the pressure to compromise, the judgment does not criminalise the pressure to compromise as criminal intimidation of the victim and her family. The normalising function of the socio-legal category of compromise converts terror into a bargain in a context where there is no witness protection programme. This often accounts for why prosecution witnesses routinely turn hostile by the time the case comes on trial, if the victim does not lose the will to live.

In other words, I have shown how legality is actually perceived as disruptive of sociality; in this instance, a sociality that is marked by caste based patriarchies, such that compromise is actively perceived, to put it in the words of a woman judge of a district court, as a mechanism for 'restoring social relations in society'.

In the facts of the present case, we are of the considered opinion that there is enough evidence to support the charges framed against the accused. Therefore, P.W.1, P.W.2 and P.W.3 turning hostile will not be fatal to the case of the prosecution. The manner of occurrence, place of occurrence and motive has already been established and proved by the prosecution by adducing evidence of the informant and bringing on record Exts.8 and 9. In presence of abundant evidence brought on record by the prosecution to bring home the guilt of the appellants, there is no



requirement to look into the evidence of hostile witnesses in the facts of the present case.

14. In view of the findings arrived at on the issues formulated above, we are of the considered opinion that the prosecution has been able to prove the guilt of the appellants beyond all reasonable doubts and, therefore, the trial court has rightly convicted the appellants.

15. Hence, the appeal stands dismissed. Further, the judgment of conviction and the order of sentence dated 08.02.1996, passed by the IInd Additional District and Sessions Judge, Khagaria in Sessions Trial No.163 of 1994, arising out of Chautham P.S. case No.23 of 1994, requires no interference and are accordingly upheld. Since the appellants are on bail, their bail bonds are hereby cancelled and they are directed to be taken into custody forthwith, for serving the remaining part of their sentence.

16. Before parting with this appeal, we record our appreciation towards Mrs. Priya Gupta, learned advocate appointed as Amicus Curiae to represent the appellants, who has rendered her able assistance to this Court in this appeal. Therefore, we direct the Patna High Court Legal Services Committee to pay a sum of Rs.5000/- to Mrs. Priya Gupta, 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 29.11.2021.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

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