

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.124 of 2020

Arising Out of PS. Case No.-48 Year-2012 Thana- HUSSAINGANJ District- Siwan

Prabhavati Devi W/o Gautam Yadav, resident of Village - Hathaura Chhotka
Tola, P.S.- Hussainganj, District- Siwan.

... .. Appellant

Versus

1. The State of Bihar
2. Jang Bahadur Yadav Son of Late Jagan Yadav
3. Manager Yadav Son of Kishundeo Yadav
4. Javed Akhtar @ Sonu Son of Nazare Hussain, All resident of Village -
Hathaura, P.S.- Hussainganj, District- Siwan.

... .. Respondent/s

Appearance :

For the Appellant	:	Mr. Ramchandra Sahni, Advocate
For the State	:	Mr. Abhimanyu Sharma, APP
For Respondent Nos.2 to 4 :	:	Mr. Ajay Kumar Pandey, Advocate

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
and
HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH
C.A.V. ORDER

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

6 09-10-2023 This appeal under Section 372 of the Code of Criminal Procedure, 1973 has been filed by the informant of Hussainganj P.S. case No.48 of 2012 against the judgment of acquittal dated 15.10.2019, passed by Shri Saroj Kumar Srivastava, Additional Sessions Judge, Fast Track Court No.2, Siwan in Sessions Trial No.472 of 2012 arising out of Hussainganj P.S. case No.48 of 2012, whereby and whereunder the learned trial Court has acquitted the respondent Nos.2 to 4 from the charges under Sections 302, 120B/34 of the Indian Penal Code (referred to



‘I.P.C.’) and Section 27 of the Arms Act.

2. In the present criminal appeal, by order dated 18.07.2023, notice was issued to respondent Nos.2 to 4 under both processes and the lower Court record was called for.

3. In pursuance of the aforesaid order dated 18.07.2023, on behalf of the respondent Nos.2 to 4, Mr. Ajay Kumar Pandey, Advocate is appearing in this appeal. The lower Court record has already been received from the learned trial Court.

4. The prosecution case as per the fardbeyan of the informant (PW 3), in brief, is that on 10.03.2012 at about 6:00 a.m. the husband of the informant was sleeping with his two sons in Dalan (out-house), while the informant herself was sleeping in the house with other family members. In the morning, at around 5:00 a.m., she heard a commotion that dead body of her husband is lying in the wheat field of Lalan Yadav situated in the east side of her house. She alongwith her family members went there and saw that the dead body of her husband was lying with pool of blood. The husband of the informant had been killed with sharp weapon and firearms. The informant raised suspicion that accused Jang Bahadur Yadav, Manoj Kumar Yadav and Ramesh Yadav with the help of others had killed and thrown the dead body of her husband due to prior



enmity.

5. On the basis of fardbeyan of the informant, Hussainganj P.S. case No.48 of 2012 was registered and the police after investigation submitted charge sheet against the accused/respondent Nos.2 to 4 under Sections 302, 120B/34 of the I.P.C. and Section 27 of the Arms Act. Thereafter cognizance was taken by the learned Jurisdictional Magistrate and then the case was committed to the Court of Sessions. Charges were framed against the respondent Nos.2 to 4, on which they pleaded not guilty and claimed to be tried.

6. During the trial, the prosecution examined as many as five witnesses, namely, Ram Naresh Yadav (PW 1), Rahul Kumar (PW 2), Prabhawati Devi (PW 3), Harinath Yadav (PW 4) and Dr. Sanjay Kumar (PW 5). The statements of the respondent Nos.2 to 4 were recorded under Section 313 of Cr.P.C. and after conclusion of the trial, the learned trial Court acquitted the respondent Nos.2 to 4.

7. In criminal appeal against acquittal what the appellate court has to examine is whether the finding of the learned court below is perverse and prima facie illegal. Once the appellate court comes to the finding that the grounds on which the judgment is based is not perverse, the scope of appeal against



acquittal is limited considering the fact that the legal presumption about the innocence of the accused is further strengthened by the finding of the court. At this point, it is imperative to consider the decision of the Hon'ble Supreme Court passed in the case of ***Prandas v. State***, reported in **1950 SCC 62**, wherein it was observed that:

*15. In our opinion, the true position in regard to the jurisdiction of the High Court under Section 417 of the Criminal Procedure Code in an appeal from an order of acquittal has been stated in Sheo Swarup v. King Emperor [Sheo Swarup v. King Emperor, (1933-34) 61 IA 398 : 1934 SCC OnLine PC 42] , in these words : (IA p. 404) "Sections 417, 418 and 423 of the Code [Ed. : Code of Criminal Procedure, 1898.] give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. **But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a***



presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice.”

8. Grounds considered by the learned trial court for acquittal are as follows:

(i) None of the witnesses claimed to have been the eye witness of the occurrence, instead, they raised suspicions that the respondents-accused persons had conspired and killed the deceased due to prior enmity.

(ii) PW 2 asserted that he saw respondent no. 3 on the intervening night of the occurrence, who came to the *dalan* and took the deceased with him. However, he himself acknowledged that the night was dark and did not disclose the source of his identification.

(iii) The testimony of the informant (PW 3) is marred by inherent inconsistencies and contradictions. While the informant had filed the F.I.R. against respondent no. 2 (Jang Bahadur Yadav), Manoj Yadav, Ramesh Yadav and



unknown accused persons, she stated during her deposition that she could not recall the names of the accused individuals she had mentioned in her *fardbeyan* and restatement to the police. Importantly, upon scrutinizing her evidence, it becomes evident that she had not implicated respondent nos. 3 and 4 in her initial *fardbeyan*.

(iv) The Investigating Officer in this case has not been examined and no explanation whatsoever has been provided. His non-examination has caused serious prejudice to the defense of the respondents accused individuals.

9. After hearing the arguments advanced by the learned counsels appearing for the parties and upon thorough examination of the entire material available on the record, the following issues arise for consideration in the present appeal:

(I) Whether, in light of the material contradictions and discrepancies, the oral testimony of the informant can be relied upon?

(II) Whether the prosecution has cogently established the circumstance of “last seen” through the evidence presented in the present case?

(III) Whether the prosecution has led any substantial evidence to establish the motive as alleged against the accused respondents?

(IV) Whether the non-examination of Investigating Officer has caused prejudice to the



trial of accused respondents?

10. With regard to the first issue, it is crucial to assess the reliability and consistency of the informant's (PW 3) testimony regarding the alleged involvement of the respondents in the killing of the deceased. Upon a meticulous review of the *fardbeyan* provided by PW 3, as well as her subsequent testimony during the trial, several contradictions and discrepancies emerge. First and foremost, the *fardbeyan* of PW 3 initially implicates respondent no. 2 (Jang Bahadur Yadav), Manoj Yadav, Ramesh Yadav and unknown miscreants as being involved in the crime. However, a closer examination reveals that respondent no. 3 (Manager Yadav) and respondent no. 4 (Javed Akhtar @ Sonu) were not named in her initial statement (*fardbeyan*). Moreover, during cross-examination, PW 3 unequivocally affirmed in paragraph 6 that she did not mention the name of respondent no. 4 in her *fardbeyan* or in her restatement to the police. She further stated that she did not remember all the names she had provided in her *fardbeyan* and restatement to the police, which compounds the uncertainty surrounding her allegations. Notably, PW 3's naming of respondent no. 4 for the first time in the Court significantly undermines the reliability of her testimony. Furthermore, PW 3 in her oral evidence stated that her son, PW 2, informed her that



respondent no. 3 had visited the *dalan* around 2-3 a.m. at night, where PW 2 was sleeping with his father (the deceased) and his brother, and that the deceased had gone along with respondent no. 3. However, this significant disclosure did not find mention in her *fardbeyan*. Moreover, PW 3 in her deposition affirmed that she did not encounter the Investigating Officer on the day of the incident; instead, their meeting occurred on the subsequent day, and that her statement was also recorded on that same following day. However, a significant inconsistency arises when comparing this timeline to the details in the *fardbeyan* itself. The *fardbeyan* of PW 3 indicates that the incident occurred on the intervening night of 09.03.12 and 10.03.12, and it was recorded in the morning of 10.03.12 at 6:00 a.m. In contrast, PW 1, in his deposition, stated that the S.H.O. (*Daroga ji*) arrived at 5:30 a.m. in the morning and took his statement first, which was read over to him before he signed it. PW 1 further mentioned that the said statement was recorded against unknown accused persons. Therefore, in light of such material contradictions and discrepancies, it is legally prudent to question the reliability of PW 3's evidence. His conflicting statements undermine the confidence of the Court in the accuracy and truthfulness of his testimony. At this juncture, we



would gainfully rely on the decision of the Hon'ble Supreme Court in the case of ***Mritunjoy Biswas v. Pranab***, reported in ***(2013) 12 SCC 796***, wherein it has been observed:

*“28... It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (see *Leela Ram v. State of Haryana [(1999) 9 SCC 525 : 2000 SCC (Cri) 222]*, *Rammi v. State of M.P. [(1999) 8 SCC 649 : 2000 SCC (Cri) 26]* and *Shyamal Ghosh v. State of W.B. [(2012) 7 SCC 646 :**



(2012) 3 SCC (Cri) 685]).”

Therefore, considering these discrepancies, we are hesitant to accord full credence to his evidence. Accordingly, the first issue is decided in the *negative*.

11. With regard to the second issue formulated above, this Court has closely examined the testimony of PW 2, a child witness. The evidence of a child witness is required to be evaluated with great circumspection, for the reason that a child is susceptible to be swayed by what others tell him and thus becomes an easy prey to tutoring. During the trial, PW 2 stated that he was 9 years old at the time of the incident. In his deposition, PW 2 narrated that he, along with his younger brother and his father (the deceased), had been sleeping in the *dalan*. Around 2-3 a.m. at night, there was a knock on the door, which prompted the deceased to wake up and open the door. As a result, his sleep was disrupted, and he saw respondent no. 3 at the door, engaging in a conversation with the deceased before taking him along. Notably, during his cross-examination, PW 2 mentioned that he had informed his family members in the morning, prior to seeing the deceased's body, about the incident involving respondent no. 3 visiting and taking the deceased away. However, it is crucial to address a significant inconsistency. Despite this revelation by PW 2, PW 1



acknowledged in paragraph 10 of his oral evidence that he had given a statement to the police implicating unknown accused individuals. Furthermore, upon scrutinizing the *fardbeyan* provided by PW 3, it becomes evident that neither the fact that respondent no. 3 was 'last seen' with the deceased nor the inclusion of respondent no. 3's name was present in her statement. This omission raises doubts about whether PW 2 indeed witnessed respondent no. 3 at the *dalan* that night. If such an occurrence had taken place, it would naturally follow that PW 1 and PW 3 would have included the name of respondent no. 3 in their statements to the police. Furthermore, from the records it is apparent that the incident occurred on the intervening night of 09.03.2012 and 10.03.2012. PW 2 has specifically stated in his cross-examination that night was dark. However, the prosecution has not brought anything on record regarding the source of identification in which the respondent no. 3 was identified. It would be relevant here to refer to the judgment of the Hon'ble Supreme Court rendered in the case of ***Ram Narain Singh versus State of Punjab*** reported in (1975) 4 SCC 497, wherein it has been held as follows:

"On the day of the occurrence i.e. October 2, 1972, it would be quite dark at 8-00 P.M. and unless there was some light burning in the house it



would be difficult for the witnesses to have identified the assailants and to have given such a graphic description of the occurrence... .. There also the accused could not be identified because there is no evidence of any witness to show that any light was burning there, nor does any of the eye witnesses say that he had identified the accused by voice. For these reasons, therefore, we are convinced that even accepting the prosecution case at its face value, if the occurrence took place at 9-00 P.M. the possibility of mistake in identification cannot be excluded in the present circumstances.”

Admittedly, the prosecution’s case is based on circumstantial evidence. In cases built on circumstantial evidence, it is well-established legal principle that “***the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established***” as emphasized by the Hon’ble Supreme Court in the case of ***State of Goa vs Sanjay Thakran & Anr.*** reported in ***(2007) 3 SCC 755***. In view of the given facts of the case, it becomes evident that the source of identification has not been adequately demonstrated by the evidence presented by the prosecution. Consequently, the crucial aspect of “last seen” cannot be considered as firmly and conclusively established.

Accordingly, the second issue is decided in the ***negative***.



12. Now adverting to the third issue as formulated above, we find that the prosecution witnesses, namely, PW 1, PW 3 and PW 4, have attested in their testimonies that the father of respondent no. 2, namely, Jagan Yadav, was killed by unknown assailants in Siwan, but no case was registered in connection with that incident. These witnesses have further stated that respondent no. 2 strongly believed that the deceased was responsible for his father's death. Consequently, respondent no. 2 had previously made a lethal attempt on the deceased's life, but the deceased managed to save himself. However, it is evident from the testimony of PW 1 that he himself admitted that there was no report made to the police regarding the alleged lethal attack, and there is no documented evidence of any injuries sustained by the deceased from such an incident. Additionally, PW 1 did not provide specific details regarding when and where this attack supposedly occurred. Furthermore, although respondent no. 2 had reportedly complained to PW 1 on several occasions about his suspicions regarding his father's death, no formal information or complaint was ever filed. Moreover, both PW 1 and PW 3 stated that no *panchayati* or inquiry was conducted to investigate the suspicions of respondent no. 2 surrounding his father's death. In light of these



facts, there is a lack of substantial evidence to firmly establish that respondent no. 2 indeed harboured suspicion against the deceased for his alleged involvement in his father's death. Furthermore, the prosecution has failed to provide any concrete evidence that respondent no. 2 had actually made a lethal attempt on the deceased's life. Consequently, the prosecution has not presented substantial evidence to establish a motive on the part of the respondent accused individuals.

Accordingly, the third issue is decided in the *negative*.

13. Now adverting to our last issue, it is a matter of record that the Investigating Officer of the present case has not been examined. It is a trite principle of law that mere non-examination of the Investigating Officer (I.O) would not entail any benefit to the accused unless it is shown that such non-examination has caused prejudice to the case of the accused. However, in the facts of the present case, the respondents accused have also been deprived of the opportunity to bring on record the material contradictions and improvement made by the witnesses in their depositions as several of the prosecution witnesses have asserted in their depositions that they disclosed the name of the respondent nos. 3 and 4. The informant claimed that her statement was recorded on the subsequent day after the



date of occurrence whereas, the *fardebayan* states otherwise. Furthermore, PW 2 (a child witness), during the trial, explicitly testified that his statement was recorded with an unreasonable delay of 10-15 days. Since the I.O had not been examined, no questions could be posed to the Investigating Officer as to why there had been a delay in recording his 161 Cr. P.C. statement. In the case of ***Banti v. State of M.P.***, reported in ***(2004) 1 SCC 414***, it has been held by the Hon'ble Supreme Court that when some advantage is sought to be taken from the fact that the child witness was examined after some delay, explanation is to be sought from the Investigating Officer as to why there was delay in interrogating the witness. Moreover, there is no evidence on record to suggest that the I.O inspected the *dalan* from which the deceased was taken away. Whether the I.O seized any blood from the place of occurrence, recovered any cartridges, or obtained any incriminating material remains undisclosed. Therefore, in such circumstances, the examination of the Investigating Officer becomes important as he would have been the most competent witness to throw light on the manner in which the investigation was carried out and to explain the entire gamut of evidence brought on record. However, the prosecution has, without any explanation, not examined the



Investigating Officer of this case which has caused prejudice to the case of the defence and is fatal to the case of prosecution.

Accordingly, the issue no. IV, is decided in the *affirmative*.

14. In light of the discussions made above, we are of the considered opinion that the trial court has taken a plausible view based on the evidence available on the record. The view taken by the trial court cannot be held to be perverse. Under such circumstance, no case for interference with the impugned judgment of acquittal is made out.

15. Accordingly, the appeal against the judgment of acquittal dated 15.10.2019, passed by Shri Saroj Kumar Srivastava, Additional Sessions Judge, Fast Track Court No.2, Siwan in Sessions Trial No.472 of 2012 arising out of Hussainganj P.S. case No.48 of 2012, is dismissed at the admission stage itself.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

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