

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No. 307 of 1996

1. Siya Ram Singh son of late Janhak Singh
2. Satyendra Singh @ Jata Singh S/o Jagdeep Singh
3. Jagadeep Singh @ Jagdeep Singh S/o Moongali Singh
4. Ramadhar Singh son of Jasan Singh
5. Bindeshwar Singh @ Bineshwar Singh son of Ramadhar Singh
6. Awadh Singh son of late Nanhak Singh
7. Tapeswar Singh @ Butan Singh son of late Nanhak Singh
8. Gupteshwar Singh son of late Nanhak Singh,
Sl. No. 1, 4, 5, 6, 7, 8 R/O village – Charwahi, Police Station- Jagdishpur,
District Bhojpur at Arrah.
Sl. No. 2, 3 R/O village – Bhagwanpur, Police Station – Sandesh, District
Bhojpur at Arrah.

(Appeal against appellant Nos.1, 4 and 5 stands
abated vide order dated 13.09.2023)

... .. Appellants

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 434 of 1996

Nand Kishore Singh son of late Nanhak Singh, Resident of village- Charwahi,
Police Station – Jagdishpur, District Bhojpur at Arrah.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 307 of 1996)

For the Appellants : Mr. Baxi S.R.P. Sinha, Sr. Advocate
Mr. Brajesh Prasad Gupta, Advocate

For the Respondent : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 434 of 1996)

For the Appellant : Mr. Baxi S.R.P. Sinha, Sr. Advocate
Mr. Brajesh Prasad Gupta, Advocate

For the Respondent : Mr. Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)



Date : 25-09-2023

The criminal appeals arise out of common judgment of conviction dated 17.07.1996 and order of sentence dated 18.07.1996, hence they have been heard together and are being disposed of by this common judgment.

2. Both the criminal appeals have been preferred against the judgment of conviction dated 17.07.1996 and order of sentence dated 18.07.1996, passed by Shri Devi Dayal Prasad, 1st Additional Sessions Judge, Arrah in Sessions Trial No.44 of 1991 arising out of Jagdishpur P.S. case No.121 of 1990, whereby and whereunder the appellant Nos.2, 3, 6, 7 and 8 of Criminal Appeal (DB) No.307 of 1996 have been convicted under Sections 302 read with 149 of the Indian Penal Code (referred to 'I.P.C.') and have been sentenced to undergo rigorous imprisonment for life with fine of Rs.200/- each for the offence under Sections 302 read with 149 of I.P.C. and in case of default of payment of fine, further undergo simple imprisonment for one month. They have also been convicted under Section 148 of I.P.C. and have been sentenced to undergo rigorous imprisonment for one year each under Section 148 of I.P.C. They have further been sentenced to undergo rigorous imprisonment for one year each under Section 27 of the Arms Act. The appellant of Criminal Appeal (DB) No.434 of 1996 has been



convicted under Section 302 of I.P.C. and has been sentenced to undergo rigorous imprisonment for life with fine of Rs.200/- for the offence under Section 302 of I.P.C. and in case of default of payment of fine, further undergo simple imprisonment for one month. He has also been convicted under Section 148 of I.P.C. and has been sentenced to undergo rigorous imprisonment for one year under Section 148 of I.P.C. He has further been sentenced to undergo rigorous imprisonment for one year under Section 27 of the Arms Act. The sentences of the appellants were directed to run concurrently.

3. The prosecution case, as per the fardbeyan of informant Sabha Singh (PW 4), is that on 04.07.1990 at 7:00 p.m. the informant was sitting on his double storied building situated 50 yards west of his zenani kita (house for women) with his son Gajjan Singh (now deceased), Lal Babu Singh, brother Gangadaya Singh and grand son Harendra Kumar Singh (P.W.1). At that time accused Siyaram Singh, Nand Kishore, Gupteshwar Singh, Tapeswar Singh alias Butan Singh, Awadh Singh, Ramadhar Singh and Bindeshwar Singh of village Charwahin and accused Jagdeep Singh and Satyendra Singh of village Charwahin and accused Jagdeep Singh and Satyendra Singh of village Bhagwanpur along with 8-10 unknown being armed with rifle and



gun came from east and confined the *dalan* and blocked all the ways of the said building and the aforesaid named accused entered into the house of the accused Nand Kishore Singh. The unknown persons confining the informant threatened them not to move. The informant and other persons went upon the roof through ladder. The miscreants started firing in the air. As soon as the informant reached his roof with his relatives, the aforesaid named accused came at his roof from the roof of accused Nand Kishore Singh with the help of a ladder and started indiscriminate firing and started shouting to kill Gajjan Singh. Accused Nand Kishore Singh aimed at Gajjan Singh and fired at him, who fell down and bathed in blood and died at the spot. When the informant and his relatives tried to raise alarm, the aforesaid accused after putting their firearms on their chest threatened with dire consequences. Thereafter the said accused went away after 15 minutes and again threatened the informant and his relatives from the roof of Nand Kishore Singh to keep mum. The informant and his relatives raised no alarm out of fear and remained at the roof near the dead body of Gajjan Singh. When the rain was over at 2:00 a.m. the miscreants went away towards north and east. Thereafter co-villagers Rishi Muni Singh, Bharat Singh came to informant and he divulged them about the entire occurrence. The



aforesaid occurrence took place due to the land dispute with accused Nand Kishore Singh.

4. On the basis of fardbeyan of the informant, Jagdishpur P.S. case No.121 of 1990 dated 05.07.1990 was registered. After completion of investigation, the Investigating Officer submitted charge sheet under Sections 147, 148, 149, 302 of I.P.C. and Section 27 of the Arms Act and thereafter 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 six witnesses, namely, Harendra Kumar Singh (PW 1), Lal Babu Singh (PW 2), Ganga Dayal Singh (PW 3), Sabha Singh-informant (PW 4), Nasrullah Khan (PW 5) and Dr. Kailash Bihari Sinha (PW 6). In support of its case, the prosecution has also produced exhibits as Ext.1 (F.I.R.), Ext.2 (inquest report), Ext.3 (challan for sending dead body for postmortem), Ext.4 (seizure list), Ext.5 (search and seizure list) and Ext.6 (postmortem report). The defence also examined two witnesses, namely, Jaglal Roy (DW 1) and Lalan Prasad (DW 2). In support of its case, the defence has produced exhibits, viz. Ext.A (c.c. of Commissioner's



report) and Ext.B (complaint petition case No.301 of 1990). After conclusion of the trial, the learned Trial Court convicted and sentenced the appellants in the manner as indicated above.

6. Learned counsel for the appellants has submitted that the trial suffers from several infirmities that have been overlooked by the learned trial Court and, therefore, the impugned judgment is not sustainable in the eyes of law. It has been contended that the prosecution has miserably failed to prove the manner of occurrence beyond reasonable doubts. In order to buttress this contention, attention of this Court has been drawn towards the deposition of the eye-witnesses to assert that their testimony must be considered in totality and from their deposition, it is apparent that the appellants had no connection with the alleged offence. The attention of this Court has also drawn towards vital factors like absence of any source of light, non examination of any independent witnesses, non examination of seizure list witnesses, and thereby, the possibility of participation of appellants in the alleged crime cannot be believed to be true. Thus, it was contended that appellants had been falsely implicated in the case and had no role to play whatsoever in the commission of the alleged offence. It has been argued that there are severe lacunae in case of the prosecution and the chains of circumstances do not



unerringly point towards the guilt of the appellants. Hence, the findings of the learned trial Court are bad in law, wrong on facts, bereft of legal reasoning, devoid of merit and the judgment of conviction is fit to be set aside.

7. Learned APP for the State, on the other hand, has submitted that the judgment of conviction and order of sentence under challenge require no interference as the prosecution has been able to prove the case beyond all reasonable doubts. It has been submitted that the prosecution witnesses have remained consistent in their examination-in-chief regarding the involvement of appellants in the alleged offence and there does not remain any lacuna in the case of the prosecution. The minor inconsistencies in the testimony of the witnesses cannot be a ground to reject their evidence as a whole. It has been further contended that there does not lie any hiatus in the chain of circumstances and all the evidence points towards the guilt of the appellants. Therefore, it has been argued that guilt of the appellants has been satisfactorily proved by the evidence adduced during the course of trial and there is no infirmity in the judgment of conviction of the learned trial Court.

8. 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 the evidence of prosecution witnesses who were not declared 'Hostile witness' nor re-examined or cross-examined by the prosecution, can be relied upon by the defence?

(II) Whether the prosecution has been able to establish the source of identification under which the appellants have been identified?

(III) Whether the non production of FSL Report regarding blood soaked cloth and mud/soil collected from the alleged place of occurrence has caused prejudice to the appellants?

9. With reference to issue no. I, from the perusal of the testimony of eye-witnesses of the present case, it is found that the eye-witnesses have completely turned turtle in their cross examination. The PW 1 in para no. 6 of his cross examination has stated that on the date of occurrence he was sleeping in a house which was at a distance of 100 to 150 *gaj* from the *dalan* (out house) of the informant's house. He further deposed in the same para that it was raining, the night was dark and cloudy, and on hearing the sound of firing he did not go outside and thereby, he did not see any accused persons firing or running away from the alleged place of occurrence. He even stated and accepted the fact



that he had given his earlier testimony at the behest of the village people. The PW 2 in para no. 6 of his cross examination has stated that on hearing the sound of firing, he hid in the room and came out of the room only in the morning and thereby, he did not see any accused persons firing or running away from the alleged place of occurrence. He has also stated and accepted the fact that he had given his earlier testimony at the behest of the village people. The PW 4 in para no. 8 of his cross examination has stated that at the time of incident it was dark and cloudy night. He has further deposed that he did not identify the culprits as he hid in the room after hearing the sound of firing and came out of the room in the morning. He has also accepted the fact that the appellants are his *gotiya* and he had given their names on the insistence of the village people. At this juncture, it would be relevant to take note of the decision of the Hon'ble Supreme Court in the case of ***Raja Ram versus State of Rajasthan***, reported in ***(2005) 5 SCC 272***, wherein it was observed that:

“But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the



Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution.”

In the case of ***Javed Masood versus State of Rajasthan*** reported in **(2010) 3 SCC 538**, the Hon’ble Supreme Court observed that :

“In the present case the prosecution never declared PWs 6, 18, 29 and 30 "hostile ". Their evidence did not support the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence.”

In the case of ***Virendra versus State of Madhya Pradesh*** reported in **AIR 2022 SC 3373**, the Hon’ble Supreme Court observed that :

“Both the courts shifted the burden on the defence. The evidence rendered by the prosecution witnesses was rejected, either as that of indifferent witnesses or as irrelevant evidence. We may note that these are all prosecution witnesses who were not treated as hostile. No attempt whatsoever was made either to treat them as hostile or to re-examine them except that of PW10. Not even a suggestion was put to them on the presence of PW15. In such a scenario, the statement made by the prosecution witnesses in favour of the accused would certainly inure to his



benefit. Our view is fortified by the decision of this Court in Raja Ram v. State of Rajasthan, (2005) 5 SCC 272.”

In the case of ***Suresha versus State of Karnataka*** reported in **2020 SCC OnLine SC 597**, the Hon’ble Supreme Court observed that :

“4. We now turn to the evidence of the prosecution and note the important aspects of PW-1/complainant having turned hostile in his cross-examination. While the earlier part of the story relayed by him, of the interaction among the parties, was supported by him in his cross-examination, but insofar as the incident in question is concerned, a different narrative took place.

5. The surprising part is that the prosecution did not declare him hostile, nor further cross-examined him. This remained a major infirmity in the prosecution story. It has been held that when a witness is not declared hostile by the public prosecutor, and Section 154 of the Evidence Act is not resorted to, subsequent testimony of such witness remains uncontroverted.”

In the case of ***Mukhtiar Ahmed Ansari versus State (NCT of Delhi)*** reported in **(2005) 5 SCC 258**, the Hon’ble Supreme Court observed that :

“In the present case, evidence of PW 1 Ved Prakash Goel destroyed the genesis of the prosecution that he



had given his Maruti car to the police in which the police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, the accused can rely on that evidence.”

The proposition of law stated in the above mentioned judgement is equally applicable to the case at hand. Thus, in the present case, the deposition of eye-witnesses in their examination-in-chief cannot be read in isolation when all the eye-witnesses have clearly stated in their cross examination that they have not witnessed the incident, and they have given their earlier testimony just because of the insistence of village people, coupled with the fact that the prosecution did not declare them hostile, nor re-examined or cross-examined them in terms of Section 154 of the Evidence Act. Therefore, the statement of these witnesses are binding upon the prosecution and the defence can rely on their statement.

Accordingly, the issue no. I is decided in affirmative.

10. With reference to issue no. II, it is pertinent to take note of the fact that PW 1 and PW 4 have deposed in para no. 6 and 8, respectively, of their cross examination that at the time of the incident, it was dark and cloudy night. The prosecution's case gets further hammered in light of the fact that no evidence has been brought on record by the Investigating Officer (PW 5) to show the



presence of any source of light which could have been used for the identification of the appellants. It would be relevant to take note of the decision of Hon'ble Supreme Court in the case of *State of Madhya Pradesh versus Ghudan* reported in (2003) 12 SCC 485 wherein it was observed that if any source of light was present at the place of occurrence, then the investigating agency would have mentioned or shown the existence of such source and the benefit of such omission should be given to the accused.

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.

Accordingly, the issue no. II is decided in negative.

11. With reference to issue no. III, it is relevant to note that PW 5 (Investigating Officer) has deposed in para no. 1 of his examination-in-chief that he had seized blood stained cloth, blood soaked soil, part of pellet, weds of plastic, bullets and cartridges from the alleged place of occurrence and seizure lists (Exhibit 4 & Exhibit 5) had been prepared. Moreover, the Seizure list (Exhibit 4) witnesses, namely, Kanhaiya Singh & Birendra Singh and Search cum Seizure list (Exhibit 5) witnesses, namely, Shiv Balak Singh & Satyendra Singh have not been even examined by the



prosecution. However, upon minute examination of the entire material available on the record, it is found that the prosecution has not brought on record any FSL report in relation to the seized items so as to prove the missing causative link. In the case of *A. Shankar versus State of Karnataka* reported in *(2011) 6 SCC 279* wherein it has been held that the non-production of the FSL report by the prosecution is fatal, as in the absence of such report, it was difficult for the Court to reach to a definite conclusion.

Thus, non-production of the FSL report in the present case by the prosecution is fatal as in the absence thereof it is not possible to ascertain as to whether the seized items at the instance of appellants was actually used in commission of crime or not and as to whether the blood found was human blood and that too of the blood group of the deceased.

Accordingly, issue no. III is decided in affirmative.

12. From perusal of the material available on the record, it is found that PW 3 is a tendered witness and as far as the testimony of this prosecution witness is concerned, this Court by relying on the case of *Sukhwant Singh versus State of Punjab* reported in *(1995) 3 SCC 367* and *Tej Prakash versus State of Haryana* reported in *(1996) 7 SCC 322*, is of the considered opinion that the evidence which has come in the cross-examination



of the PW 3 (tendered witness) cannot be looked into or relied upon by this Court.

13. We at all levels must seriously engage ourselves in the journey of discovering the truth. It is the duty of the prosecution to prove the case beyond reasonable doubts by establishing that the chain of evidence that they unerringly point towards the guilt of the accused persons and no other hypothesis is possible. However, in the present case, the super-structure of the prosecution case, based on the testimony of three alleged eye witnesses, has crumbled in the case before us and we find it impossible not to give the appellants the benefit of doubt as there is absence of concrete material to make out a foolproof case against the appellants.

14. In the light of the above discussed legal propositions and on the basis of the findings arrived at on the issues formulated above, we are of the considered opinion that the conviction of the appellants in both the appeals is not sustainable in the eyes of law and the prosecution has failed to prove its case beyond all reasonable doubts.

15. Therefore, both the criminal appeals stand allowed and the judgment of conviction dated 17.07.1996 and order of sentence dated 18.07.1996, passed by Shri Devi Dayal Prasad, 1st



Additional Sessions Judge, Ara in Sessions Trial No.44 of 1991
arising out of Jagdishpur P.S. case No.121 of 1990, are set aside.

16. Since appellant Nos.2, 3, 6, 7 and 8, named above, of
Criminal Appeal (DB) No.307 of 1996 and appellant Nand
Kishore Singh of Criminal Appeal (DB) No.434 of 1996 are on
bail, they are discharged from the liabilities of their respective bail
bonds.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

AFR/NAFR	AFR
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