

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.76 of 1996

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Ishtiaq Khan Son of Izhar Khan, Resident of Village-Samanpura, Police
Station-Shastri Nagar, District Patna.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with
CRIMINAL APPEAL (DB) No. 124 of 1996

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Md. Hafiz Khan Son of Md. Manin Khan, resident of Village-Samanpura,
Police Station-Shastrinagar, District-Patna.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

Appearance :

(In CRIMINAL APPEAL (DB) No. 76 of 1996)

For the Appellant : Mr. Chitranjan Sinha, Senior Advocate
Ms. Anukriti Jaipuriyar, Amicus Curiae
Ms. Surya Nilambari, Advocate
Mr. Pratyush Pratap Singh, Advocate

For the Respondent : Mr. Bipin Kumar, A.P.P.

(In CRIMINAL APPEAL (DB) No. 124 of 1996)

For the Appellant : Mr. Krishna Prasad Singh, Senior Advocate
Ms. Anukriti Jaipuriyar, Amicus Curiae
Mrs. Meena Singh, Advocate
Mr. Mohit Raj, Advocate
Mr. Shantanu Kumar, Advocate

For the Respondent : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

**HONOURABLE MR. JUSTICE CHANDRA PRAKASH
SINGH**

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 14-07-2023

Heard the learned counsels for the appellants and learned
counsel for the State.



2. Both the criminal appeals arise out of common judgment of conviction and order of sentence, hence they have been heard together and are being disposed of by this common judgment.

3. When the present appeals were taken up on 24.11.2021, none had appeared on behalf of the appellants and by order dated 24.11.2021, Ms. Anukriti Jaipuriyar, Amicus Curiae, was appointed by another Co-ordinate Bench of this Court to assist the Court at the costs of the State. Subsequently, when the appeals are being taken up today on 27.06.2023, learned counsels for the appellants have appeared.

4. Considering the same, with the consent of the parties, Ms. Anukriti Jaipuriyar, Amicus Curiae, is permitted to lead the argument.

5. Both the criminal appeals have been preferred against the judgment of conviction dated 31.01.1996 and the order of sentence dated 01.02.1996 passed by Shri Gopal Jee, 3rd Additional Sessions Judge, Patna in Sessions Trial No.113 of 1994 arising out of Gardanibagh P.S. case No.1002 of 1992, whereby and whereunder the appellants have been convicted under Sections 302/34 and 120B of the Indian Penal Code (referred to 'I.P.C.') and Section 27 of the Arms Act and have been sentenced to undergo imprisonment for life with fine of Rs.10,000/- each for the offence under



Sections 302/34 of the I.P.C. and in default of payment of fine, further simple imprisonment for five years. The appellants have further been sentenced to undergo rigorous imprisonment for seven years with fine of Rs.5,000/- for the offence under Section 27 of the Arms Act and in default of payment of fine, further simple imprisonment for one year. No separate sentence has been awarded to the appellants under Section 120B of the I.P.C. All the sentences have been directed to run concurrently.

6. The prosecution case, as per the fard beyan of informant Aslam Khan (P.W.6) recorded by S.I. of Gardanibagh P.S. on 26.12.1992 at 10:00 a.m. is that the informant alongwith his father Zaffruddin Khan and uncle Munnu Khan took tea near Jang Bahadur Market. After having tea, informant's father proceeded towards east from his Rajdoot motorcycle bearing registration No.BH-1-9259 in order to meet doctor and also to meet the Director, P.R.D.A. at Yarpur. Thereafter informant's uncle, namely, Munnu Khan saw that one white colour Ambassador car bearing registration No.W.B.C.1008, which was being driven by Hafij Khan, and Babban Khan and Ishtiyaque Khan were sitting on front seat by the side of the driver and three persons were sitting on rear seat, went towards east. On seeing this, informant's uncle suspected and he asked him to follow them. The informant



took the scooter of his Fufa (husband of father's sister) and followed them. When he reached near Aerodrome, he saw that the motorcycle of informant's father was dashed by the said car from behind, as a result his father fell down. Thereafter, the persons seated in the car also came out of the car and started firing. The informant saw that Babban Khan and Ishtiyaque Khan having pistols in their hand were firing shots from the same. They fired five-six rounds of shots. His father became injured and also cried. The way was an isolated place and on account of that they were firing on his father without any hesitation. When they became satisfied that his father was dead, then they again came in the car and proceeded towards east. When they went away, the informant immediately rushed to the father and saw his father dead. The informant informed the Police Officer, who came to record his fardbeyan and also sent information to his family members, who also came at the place of occurrence. The cause of occurrence is said to be that about a year ago, there was a quarrel in between Babban Khan, Ishtiyaque Khan and his family members on one side and the family members of the informant on other side. Both parties had lodged cases in Shastrinagar Police Station and those cases were pending in the Court. The informant further stated that Babban Khan is a veteran criminal of the area and he always used



to threaten the deceased (father of the informant) to withdraw the cases otherwise he would be killed. Ijhar Khan @ Tunu Khan, who is father of Babban Khan, is Hawildar in Bankipore Central Jail, who used to say that he will teach lesson on coming back of Babban Khan from jail. Babban Khan being accused of a loot case came out from jail one week ago and since then he was threatening the informant and his family members and in a pre-planned manner Ijhar Khan, Shambhu Khan, Babban Khan and Ishtiyaque Khan alongwith others after hatching conspiracy committed murder of the father of the informant.

7. On the basis of aforesaid fardbeyan of informant Aslam Khan, an F.I.R. bearing Gardanibagh P.S. case No.1002 of 1992 was registered. After investigation, charge sheet was submitted whereafter 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.

8. During trial, the prosecution examined altogether eight witnesses, namely, Md. Irfan (P.W.1), Md. Safi Ahmad Khan (P.W.2), Md. Ashraf Khan (P.W.3), Ram Jani Khan (P.W.4), Md. Saifuddin Khan (P.W.5), Aslam Khan-informant (P.W.6), Dr. A.P.N. Deo (P.W.7) and Jogendra Prasad Singh (P.W.8). In



support of its case, the prosecution has also produced exhibits as Ext.3 (postmortem report), Ext.4 (fardbeyan), Ext.5 (formal F.I.R.), Ext.6 and 6/1 (seizure lists), Ext.7 (inquest report). The prosecution has also produced certain material Exhibits. The defence has not produced any oral or documentary evidence in support of its case. After conclusion of the trial, the learned Trial Court convicted and sentenced the appellants in the manner as indicated above.

9. Learned counsel for the appellants has submitted that the judgment of conviction 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 no independent witness has supported the case of the prosecution. Furthermore, PW 1 to PW 5 are hearsay witnesses to the manner of occurrence and as such, their testimony is inadmissible in the eyes of law. In order to buttress this contention, the attention of this Court has been drawn towards the deposition of the prosecution witnesses wherein they have stated that they received information about the incident. It has been further contended that the presence of PW 6 at the place of occurrence is highly doubtful considering the fact that the scooter which is said to have been used by him to reach the place



of occurrence from the tea stall has not been produced before the police. The prosecution is completely silent regarding the whereabouts of any such scooter and even the registration number or the ownership of the scooter has not been brought on record at any stage of the proceedings. The learned counsel for the appellants thus contended that the prosecution has miserably failed to adduce any direct or circumstantial evidence so as to prove beyond reasonable doubts the involvement of the appellants in the occurrence. Therefore, it is argued that there are severe lacunae in case of the prosecution and the chain of circumstances does not unerringly point towards the guilt of the appellants. The finding of the learned trial Court is bad in law, wrong on facts, bereft of legal reasoning, devoid of merit and the judgment of conviction and order of sentence are fit to be set aside.

10. 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 proved the case beyond all reasonable doubts. It has been contended that the informant (PW 6) is an eye witness to the occurrence and he has specifically deposed during the course of trial that his father (deceased) was done to death by the appellants herein along with others. As such, the testimony of PW 6 is sufficient to form the



sole basis of conviction, as in criminal law, it is the quality and not the quantity of the witnesses that is material. Furthermore, minor inconsistencies in the testimony of the witnesses cannot be a ground to reject their evidence as a whole. It is further asserted that non-production of the scooter as an exhibit during the course of trial cannot be ground to raise doubts on the case of the prosecution. Accordingly, it is contended that the guilt of the appellants has been satisfactorily proved by the evidence adduced during the course of trial and there does not remain any hiatus in the chain of circumstances. Hence, there is no infirmity in the judgment of conviction of the learned trial Court.

11. 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 presence of the informant at the alleged place of occurrence becomes doubtful in light of the fact that the scooter, which is said to have been used by the informant to reach the place of occurrence, has not been produced as a material exhibit in the case?
- (II) Whether there is any other substantive evidence to hold that the guilt of the appellants has been proved beyond reasonable doubts?



12. With reference to issue no. I, upon thorough examination of the entire material available on the record, it is found that the informant has specifically stated in the *fardbeyan* that on 26.12.1992 at 09:00 am, he along with his father (hereinafter referred as 'deceased') and uncle was having tea near Jung Bahadur Market situated in Raja Bazar and thereafter, the deceased got on his motorcycle bearing registration no. BH1-9259 and took a right turn and proceeded to meet the doctor and the director of P.R.D.A. Thereupon, the informant's uncle (PW 5) intimated the informant that a white ambassador car bearing registration no. WBC 1008 had also gone in the same direction and asked the informant to follow the vehicle. Thereupon, the informant took a scooter parked near the Jung Bahadur Market and began chasing the said car. It is apparent from the inquest report (Exhibit 7) that the deceased person was done to death at Airport Road, near *Chidiya Khana* which is situated at a far off distance from the place where the informant was having tea. At this juncture, we find it pertinent to consider that save and except making an assertion in the *fardbeyan* about having used a scooter to reach the place of occurrence, no material whatsoever has been brought on record to prove the existence of the said scooter. It is quite startling that neither was the said scooter produced during



the course of investigation before the police, nor did the Investigating Officer (PW 8) make any seizure of the said scooter. We have also taken note of the fact that though the PW 6 has deposed during the course of trial that the said scooter belonged to his *Fufa* (PW 4) and it was parked in front of the *Jung Bahadur Market*, but no such statement was ever made before the Investigating Officer during the course of investigation. Moreover, the PW 6 has specifically deposed in para no. 9 that he did not show the scooter to the police. Also, we find that PW 4 has not stated in his deposition that the scooter that is said to have been used by PW 6 belonged to him and that he had given the scooter to PW 6. At this juncture, it would be pertinent to take note of the decision of the Hon'ble Supreme Court passed in the case of ***Sunil Kumar Sambhudayal Gupta and Ors. versus State of Maharashtra*** reported in ***(2010) 13 SCC 657***, wherein para nos. 31 and 37, it has been observed that:

“Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the Court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence The omissions which amount to contradictions in material particulars i.e. go the roots of the case/materially affect the trial or core



of the prosecution case, render the testimony of the witness liable to be discredited.”

In our considered opinion, such conduct of the prosecution clearly indicates that the informant's assertion about using a scooter to reach the place of occurrence is a made up story, narrated as a cementing material, so to facilitate the prosecution's attempt of filling in the wide gaps that remain present in the case of the prosecution. Thus, not only the presence of the informant at the place of occurrence becomes doubtful, but also his credibility as a witness gets deeply shaken. It is trite principle of criminal jurisprudence that the testimony of an eye witness must not be dangling and their testimony must be free from blemish and devoid of any ambiguity, uncertainty and loopholes. In criminal law loose and contradictory statements cannot be relied upon, much less than forming the basis of conviction. In the case of ***Sunil Kumar Shambhudayal Gupta and others versus State of Maharashtra*** reported in ***(2010) 13 SCC 657***, it has been observed that:

“The discrepancies in the evidence of eye witnesses, if found to be not minor in nature may be a ground for disbelieving and discrediting that evidence. In such circumstances witnesses may not inspire confidence if the evidence is found to be in conflict and contradiction with



the other evidences and the statement already recorded. In such a case, it cannot be held that the prosecution proved its case beyond reasonable doubt.”

Therefore, in light of the factual matrix of the case and in light of the discussions made above, we are of the opinion that the non-production of the scooter makes the presence of the informant at the place of occurrence highly doubtful. Furthermore, such conduct of the prosecution of not bringing on record material evidence casts darks clouds of suspicion on the genuineness of the assertions, eventually causing an irreparable dent in the case of the prosecution.

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

13. With reference to issue no. II, the attention of this Court has been drawn towards non-examination of the material witnesses in the instant case. It is apparent from perusal of the case record that neither the owner nor any worker of the tea stall were examined at any stage of the proceedings. They would have been the most competent and independent witnesses to testify regarding the presence of the informant and other persons at the tea stall, that is the place wherefrom the entire incident began to unfold. Additionally, their examination during the course of trial would have provided valuable information regarding the use of



the scooter by the informant to reach the place of occurrence. We have also given our anxious consideration towards the fact that though PW 5 and PW 6 have stated that they had been frequently visiting the tea stall for the past some time, but they have not given any description about the name of either the owner or any helper present at the tea stall. To the contrary, it has been stated that after the incident, the said tea stall never operated again. Thus, the assertion that the tea stall was operative on the date of the incident is itself doubtful. We have also taken note of the fact that the Investigating Officer of the case has not made any statement about any tea stall in the case diary. In this context, it becomes imperative to refer the Hon'ble Supreme Court judgment delivered in the case of ***Takhaji Hiraji v. Thakore Kubersing Chamansing*** reported in ***(2001) 6 SCC 145***, wherein para 19 it has been observed 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 of facts must ask itself — 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 examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise... ..”

Moreover, it is apparent that PW 1 to PW 5 are hearsay witnesses to the manner of occurrence. It has been specifically deposed by PW 1 and PW 5 that they were informed about the occurrence by one Dil Mohammad, but Dil Mohammad has not been examined as a witness in this case. the PW 2 obtained information about the incident from the commotion in the village, whereas PW 4 learned about it from the commotion upon reaching *Raja Bazar*, and PW 3 arrived at the scene after the police had already arrived. These testimonies highlight that the information provided by these witnesses is based on the hearsay



account. In this regard, it is pertinent to take note of the rule of evidence as stipulated in section 60 of the Indian Evidence Act, 1872, which states that “*oral evidence must, in all cases, whatever, be direct; that is to say- if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it.*” It has also been observed by the Hon’ble Supreme Court in the case of ***Sakatar Singh versus State of Haryana*** reported in ***(2004) 11 SCC 291*** that “*the statement of witness not based on his personal knowledge but on what he heard from others is “hearsay” evidence and such evidence is inadmissible.*” In the quest of holding the culprits accountable, the court cannot become overzealous to the extent of basing conviction on inadmissible evidence.

In light of the discussions made above, we are of the considered opinion that there is absence of any cogent legal evidence to prove guilt of the appellants beyond all reasonable doubts.

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

14. Every trial is a voyage of discovery in which truth is the ultimate quest. In the present case, on the basis of the discussions made above, we are of the considered opinion that the prosecution has utterly failed to adduce sufficient evidences so as to prove



guilt of the appellants. The presence of the informant (PW 6), who contends to be the sole eye witness, at the place of occurrence is itself doubtful in light of the fact that the assertion about using the scooter is not corroborated by any other material available on the record. The prosecution has also failed to bring on record the testimony of the tea stall owner/worker, who would have been the most competent witnesses to testify about the presence of PW 6 or PW 5 or the deceased and about the use of scooter by PW 6 to reach the place of occurrence. Non-examination of such material witnesses, is in our view, indicative of falsehood and suggests suppression of true version about the occurrence. Furthermore, there are severe lapses and loopholes in the testimony of the other prosecution witnesses and they have failed to make out a foolproof case for conviction. There is complete absence of any material to establish the missing causative link to hold the appellants guilty. There are yawning gaps in the chain of circumstances and the prosecution has failed to elevate the case from the realm of 'may be true' to 'must be true' as is the requirement set out by the Hon'ble Supreme Court in the case of *Santosh @ Bhure versus State (G.N.C.T) of Delhi*, bearing *Criminal Appeal No. 575 of 2011*. The prosecution has miserably failed to adduce sufficient evidences to prove the



connecting chain of circumstances as to unerringly point towards the guilt of the appellants. Conviction on the basis of conjectures and surmises is unreasonable, unwanted, undesirable, not sought for, arbitrary, whimsical and alien to the concept of our criminal jurisprudence. Holding the appellants hostage to the uncorroborated allegations and latches on part of the prosecution is against justice, fairness and reasonableness. As such, we are of the firm view that the dark clouds of suspicion looming large on the story of the prosecution have poured down heavily to wash away the entire dust ridden allegations. Hence, the conviction of the appellants in the present case is not sustainable in the eyes of law.

15. Therefore, we are of the considered opinion that the conviction of the appellants is not sustainable in the eyes of law. Both the criminal appeals stand allowed and the judgment of conviction dated 31.01.1996 and the order of sentence dated 01.02.1996 passed by Shri Gopal Jee, 3rd Additional Sessions Judge, Patna in Sessions Trial No.113 of 1994 arising out of Gardanibagh P.S. case No.1002 of 1992 are set aside.

16. Since the appellants of both the criminal appeals are on bail, they are discharged from the liabilities of their respective bail bonds.



17. Before parting with the appeals, we record our appreciation towards Ms. Anukriti Jaipuriyar, learned advocate appointed as Amicus Curiae to represent the appellants, who has rendered her able assistance to this Court in the appeals. Therefore, we direct the Patna High Court Legal Services Committee to pay a sum of Rs.10,000/- to Ms. Anukriti Jaipuriyar, 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/-

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