

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.255 of 1995

1. Shiv Chandra Tiwari, son of Late Baijnath Prasad Tiwari
2. Kumod Kumar Tiwari @ Mantu, son of Shiv Chandra Tiwari,
Residents of village Sonepur Gor Toli, Police Station-Katra, District-
Muzaffarpur. Appellants

Versus

The State of Bihar Respondent

with

CRIMINAL APPEAL (DB) No. 287 of 1995

Pramod Kumar Tiwari @ Munna De, son of Sheo Chandra Tiwari, resident of
village -Sonpur Goartoli, Police Station- Katara, District- Muzaffarpur.
... .. Appellant

Versus

The State of Bihar Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 255 of 1995)

For the Appellants : Mr. Ajay Kumar Thakur, Mr. Ritwik Thakur and
Mrs. Vaishnavi Singh, Advocates

For the Respondent : Mr. Sujit Kumar Singh, APP

(In CRIMINAL APPEAL (DB) No. 287 of 1995)

For the Appellant : Mr. Ajay Kumar Thakur, Mr. Ritwik Thakur and
Mrs. Vaishnavi Singh, Advocates

For the Respondent : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 29-03-2023

The aforesaid criminal appeals have been filed in the year
1995 i.e. 27 years ago. They arise out of common judgment of
conviction and order of sentence dated 16.08.1995. Therefore,
after being heard together, they are being disposed of by a
common judgment.



2. By the judgment of conviction and order of sentence dated 16.08.1995 passed by Sri Mishri Lall Choudhary, 2nd Addl. District and Sessions Judge, Muzaffarpur in Session Trial No. 267/90 / 76/94, arising out of Katra P.S. Case No. 1/90 corresponding to G.R. No. 11/90, Tr. No. 394 of 1994, the appellants namely Shiv Chandra Tiwari, Kumod Kumar Tiwari @ Mantu (appellants in Cr. Appeal (DB) No. 255 of 1995) and Pramod Kumar Tiwari @ Munna De (appellant in Cr. Appeal No. 287 of 1995) have been convicted under sections 302/34 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and have been sentenced to undergo rigorous imprisonment for life. The Trial Court has further convicted the appellant Pramod Kumar Tiwari @ Munna De (appellant in Cr. Appeal No. 287 of 1995) under section 27 of the Arms Act and under section 323 of I.P.C. and has directed the appellant to undergo R.I. for one year under section 27 of the Arms and R.I. for one month under section 323 of I.P.C. All the sentences awarded to the appellant Pramod Kumar Tiwari @ Munna De have been directed to run concurrently.

3. The prosecution case, as per the fardbeyan of informant Manish Kumar Tiwari recorded on 01.01.1990 at 07.15 p.m. is that on the same day when the informant was at his darwaza at



about 06:00 p.m. in the evening, accused Manoj Kumar Tiwary, Pramod Kumar Tiwary, Kumod Kumar Tiwari, Shiv Chandra Tiwari and three unknown persons came there and accused Manoj Kumar @ Chunu Tiwari went into the angan of the informant and opened fire which was heard by the informant. It has been further stated that informant Manoj Kumar Tiwari @ Chunu came out of his house stating that Krishna Chandra Tiwari is not at home and thereupon, Shiv Chandra Tiwari asked to search and kill him. The informant further stated that he went out of the house near the Ghur whereafter all the accused persons came there and asked him regarding the whereabouts of his father on which the informant showed his ignorance and thereafter the accused persons assaulted him with fists. The informant's elder brother was also there on which accused Pramod Kumar @ Manna De fired with his gun, but the same did not hit him. Thereafter, all the accused persons went away from there. The further case of the prosecution is that on hearing the sound of firing, the informant and others reached near the house of Radhe Shyam Mishra where the informant saw his father Krishna Chandra Tiwari lying in injured condition and blood was oozing out from his eyes and also saw that Manoj Kumar Tiwari @ Chunu Tiwari, Pramod Kumar Tiwari @ Manna De and Kumod



Kumar Tiwari @ Mintu were fleeing away. On *hulla*, many people of the village reached at the place of occurrence and the informant's father told that the accused Manoj Kumar Tiwari @ Chunu fired at him due to which he sustained injury. It is further case of the prosecution that the occurrence is witnessed by Ram Swaroop Tiwari and Vinod Jha and the reason for the occurrence is partition of land. Thereafter, the elder brother of the informant took his father to the hospital for treatment at Darbhanga Hospital.

4. The police after registration of the case carried investigation. On account of the death of the injured, Section 302 I.P.C. was added. After completion of investigation, the police submitted charge-sheet against the accused persons under Sections 147, 148, 149, 323, 307 and 302 of I.P.C. The cognizance of the offence was taken by the learned jurisdictional Magistrate and thereafter the case was committed to the Court of Sessions. Charges were framed against the accused persons who pleaded not guilty and claimed to be tried.

5. During the trial, in order to substantiate the charges against the accused persons, the prosecution examined as many as fourteen witnesses, namely, P.W.-1 Naresh Singh, P.W.2 Ram Swarath Tiwari, P.W.3 Ram Narain Tiwari, P.W.4 Vinod Jha,



P.W.5 Ramji Purve, P.W.6 Lalu Bhandri, P.W.7 Sharda Devi, P.W.8 Navin Kumar Tiwari, P.W.9 Manish Tiwari, P.W.10 Dr. Atul Kumar Malik, P.W.11, Braj Kishor Prasad, P.W.12 Jaglal Ram, P.W.13 Ram Kumar Singh and P.W.14 Ram Janam Thakur. The prosecution has also produced exhibits namely Ext. 1 signature of Ram Narain Tiwary on seizure list. Ext. 1/1 signature of Pheku Mishra on seizure list dated 1.1.90, Ext. 1/2 signature of Ram Narain Tiwary on seizure list on 2.1.90, Ext. 1/3 signature of Pheku Mishra on seizure list dated 2.1.90, Ext. 2 signature of Manish Kr. Tiwary (informant) on F.I.R., Ext. 3 post-mortem report, Ext. 4 complete F.I.R., Ext. 5 seizure list, Ext. 5/1 seizure list, Ext. 6 Inquest report, Ext. 7 certified copy of order of Ceiling Case No. 506/74-75/114/74-75 dated 4.6.76, Ext. 8 certified copy of B. Petition No. 118/90, Ext. 8/1 certified copy of petition of B.P. No. 255/90, Ext. 8/2 certified copy of petition of B.P. No. 334/90, Mark 'X' for identification forwarding report of empty cartridge, Ext. 9 inquiry report in the handwriting and signature of Sri Ram Kumar Singh, Ext. 10 request letter in the handwriting and signature of B.K. Prasad, Ext. 11 certified copy of order of 107 Cr.P.C., Ext. 12- full contents of page No. 92-93 of D.P.D. Register 1989-90. The defence has produced two witnesses viz. D.W.1 Bhola Mishra and D.W.2 Ramashish Mahto



in support of its case. In support of its case, the defence has also produced exhibits such as Ext. A Power executed by Manish Kr. Tiwary, Ext. B signature of Manish Kumar Tiwary on petition dated 29.5.90 in Hindi and English with date, Ext. C statement of Navin Kumar recorded by on 02.01.90 at D.M.C.H., Ext. D forwarding letter No. 553/91 dated 14.5.91, Ext. E order regarding deputation, Ext. F page 89 and 90 of Ext. G page No. 89 and 90 of Admission & discharge register, Ext. H OPD register, Ext. H/a page 96 of OPD register, Ext.H/b page 142 of OPD register dated 16.1.90, Ext. I Discharge certificate. Thereafter, the statements of the appellants were recorded under section 313 of the Cr.P.C and after conclusion of the trial, the learned trial Court convicted the appellants.

6. Heard learned counsel for the appellants and learned A.P.P. for the State.

7. Learned counsel for the appellants 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 is contended that the oral dying declaration has not been proved to the judicial satisfaction of the court, in light of the material contradiction between the deposition of the prosecution witnesses



and the fardbeyan of P.W.8 recorded by A.S.I. of Beta O.P. (marked as Ext. C). It has been argued that the oral dying declaration is not credible and does not inspire confidence. Moreover, the oral dying declaration becomes doubtful in light of Ext. C document which narrates a different version of the alleged incident. The learned counsel for the appellants further asserts that FIR lodged in connection with the present case is an ante dated document as there has been an unreasonable delay of three days in dispatching the FIR to the area Magistrate. It has been further contended that the deposition of the prosecution witnesses regarding presence of electric bulbs on electric poles, which serve as source of identification in the present case, is nothing but improvement in their previous statements made before the police under section 161 of Cr.P.C. Such improvements are a result of deliberations, planning and afterthought. Also, there are material contradictions in the testimony of the prosecution witnesses regarding the manner of occurrence and the prosecution has miserably failed to prove its case. Thus, it has been contended that there is absence of sufficient material to sustain the conviction of the appellants and therefore, 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.

8. 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 is asserted that oral dying declaration is a reliable piece of evidence and that in itself is sufficient to form the sole basis of conviction of the appellants in the present case. Moreover, minor inconsistencies in the testimony cannot be a ground to disbelieve and discard the witnesses. It is, therefore, contended that guilt of the appellants has been satisfactorily proved from the evidence adduced during the course of trial and there is no infirmity in the impugned judgment of conviction and order of sentence of the learned trial court.

9. After hearing the arguments advanced by the learned counsels appearing for both 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 oral dying declaration is a valid piece of evidence in the present case?



II) Whether the delay, if any, in dispatching the FIR to the area Magistrate is fatal to the case of the prosecution?

III) Whether the prosecution has proved the manner of occurrence beyond reasonable doubts?

IV) Whether the statement of witnesses regarding the source of identification made firstly during the trial is an improvement/contradiction to their previous statement under section 161 Cr.P.C. and is thus, fatal for the case of the prosecution?

10. With reference to issue No. I, it is apparent from perusal of the case record that there is sharp contradiction between the deposition of the P.Ws and the Ext. C i.e. fardbeyan given by Navin Kumar Tiwary (P.W. 8) recorded by A.S.I. of Beta O.P. (PW 12). It is evident that the prosecution witnesses have made specific deposition before the learned trial court that they saw the deceased in an injured condition at the place of occurrence and thereupon, Krishna Chandra Tiwari (now deceased) gave an oral dying declaration stating that Manoj Kumar Tiwary had shot upon and injured him. However, in sharp contrast to this, there is no statement about the deceased making any oral dying declaration in the said Ext. C, even though the said P.W.8 who gave the fardbeyan, remained with the deceased



right after the alleged incident till his death on his way to D.M.C.H. It has also been brought to the attention of this Court that the said Ext.-C has been regarded as a genuine document by the learned trial Court. It is well established legal position that dying declaration can form the sole basis of conviction. Nonetheless, establishing the genuineness of the dying declaration is a condition precedent to placing reliance and forming it the sole basis of conviction. Also, in cases involving oral dying declaration, the courts should seek corroboration as a matter of prudence. In this regard, it is relevant to take note of the landmark decision of ***Atbir versus Govt. of NCT of Delhi (2010) 9 SCC 1***, wherein Division Bench of the Hon'ble Supreme Court propounded the guidelines as to the evidentiary value of dying declaration. It was held that:

"(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the Court.

(ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.



(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.”

Considering the factual position as discussed above, this Court is of the view that there exists sufficient doubts regarding oral dying declaration and the same does not inspire confidence of this Court and thus, cannot be relied upon to convict the appellants.



Accordingly, the issue No. I is decided in the negative.

11. With reference to issue No. II, it would be pertinent to take note that the F.I.R. in connection with the present case was lodged on 01.01.1990 at about 06:00 p.m., but it was received by the jurisdictional Magistrate on 05.01.1990 after a lapse of three days. During the course of trial, attention of P.W.11 i.e. the investigating officer was drawn with regard to such delay in dispatching of FIR, but no explanation whatsoever has been given. Such unexplained delay of three days in dispatching FIR to the Magistrate is in teeth of section 157 of Code of Criminal Procedure, 1973 which provides that the F.I.R. must be dispatched to the area Magistrate 'forthwith'. The objective behind insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the incident and to make the investigation just and fair and to avoid any possible foul play. With the passage of time and delay in lodging of FIR, the spontaneity gets lost and there is always a chance of an exaggerated version of the incident being presented. The requirements of section 157 Cr.P.C. cannot be considered to be mere technical formalities. Rather, the procedural requirements are the procedural safeguards provided to prevent excesses by the



police machinery. Non-compliance with such procedural requirements *per se* amounts to failure of justice.

In the case of ***Meharaj Singh and Ors. vs. State of U.P. and Ors. (1994) 5 SCC 188***, the Hon'ble Supreme Court observed that :

“Delay in lodging the FIR often results in embellishment, which is a creature of an after thought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR, was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in dispatching or receipt of the copy of the FIR by the local Magistrate.”

In the case of ***Arjun Marik and Ors. vs. State of Bihar 1994 Supp(2) SCC 372***, the following observation was made by the Hon'ble Apex Court :



“24.The matter does not stop here. There is yet another serious infirmity which further deepens the suspicion and casts cloud on the credibility of the entire prosecution story and which has also been lost sight of by the trial court as well as the High Court and it is with regard to the sending of occurrence report (FIR) to the Magistrate concerned on 22-7-1985 i.e. on the 3rd day of the occurrence. Section 157 of the Code of Criminal Procedure mandates that if, from information received or otherwise, an officer in charge of police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to the Magistrate empowered to take cognizance of such offence upon a police report. Section 157, CrPC thus in other words directs the sending of the report forthwith i.e. without any delay and immediately. Further, Section 159 CrPC envisages that on receiving such report, the Magistrate may direct an investigation or, if he thinks fit, to proceed at once or depute any other Magistrate subordinate to him to proceed to hold a preliminary inquiry into the case in the manner provided in the Code of Criminal Procedure. The forwarding of the occurrence report is indispensable and absolute and it has to be forwarded with earliest dispatch which intention is implicit with the use of the word "forthwith" occurring in Section 157, which means promptly and without any undue delay. The purpose and object is so obvious which is spelt out from the



combined reading of Sections 157 and 159 CrPC. It has the dual purpose, firstly to avoid the possibility of improvement in the prosecution story and introduction of any distorted version by deliberations and consultation and secondly to enable the Magistrate concerned to have a watch on the progress of the investigation.”

In light of the discussions made above, this Court is of the view that such unreasonable delay as aforesaid casts dark clouds of suspicion and is certainly fatal to the case of the prosecution..

Accordingly the issue no. II is decided in the affirmative.

12. With reference to issue No. III, the attention of this court has been drawn towards the inconsistency in the statements of the prosecution witness. From perusal of the material available on the record, it is apparent that the P.W.11 i.e. the I.O. had deposed during trial that the witnesses in their statement under section 161 Cr.P.C. had stated that the deceased was shot from behind. However, in sharp contradistinction, the prosecution witnesses have deposed during course of trial that the miscreants shot Krishna Chandra Tiwary from the front. Thus, there is evident inconsistency and contradiction in the testimony of the witnesses. It is trite principle of criminal jurisprudence that the testimony of an eye witness must not be dangling. There should



be no major inconsistency or contradiction and the testimony must be free from blemish and devoid of any ambiguity, uncertainty and loopholes. In criminal law loose, contradictory and uncorroborated statements cannot be relied upon, much less than forming the basis of conviction. In light of the material contradiction as indicated above, this court is of the view that the prosecution has not been able to prove the manner of occurrence beyond reasonable doubts.

Accordingly, issue No. III is decided in the negative.

13. With reference to issue No. IV, it is noteworthy that the alleged incidence took place on 01.01.1990 at 06:00 p.m. There is also specific deposition about the presence of fog at the place of occurrence, it being the winter season. It has been stated by the witnesses during the trial that they identified the appellants and others at the place of occurrence in light of two electric bulbs hanging on two separate electric poles. However, the P.W. 11 i.e. the investigating officer of the case has made no statement about the presence of the electric bulbs or the electric poles at the place of occurrence. The P.W. 11 has also made specific deposition that none of the witnesses had made any statement during the course of investigation regarding the presence of the bulbs or poles at the place of occurrence. Such variations in the statements of the



witnesses cannot be considered to be mere explanations or elaboration. Rather, they tantamount to material improvements and vital contradictions. At this juncture, it would be pertinent to take note of the case of ***Sunil Kumar Sambhudayal Gupta and Ors. Vs State of Maharashtra (2010) 13 SCC 657***, wherein the Hon'ble Supreme Court observed as follows:

“In such a fact-situation, it is not safe to rely on his testimony for the simple reason that he had made a lot of improvements/embellishments while deposing in court and vital contradictions exist with his earlier recorded statement We find it difficult to sustain the conviction of the appellants on the aforesaid counts based upon the inconsistent, embellished and improved statements of the witnesses, which materially contradict their respective statements recorded earlier.”

In the case of ***State Represented by Inspector of Police, Tamil Nadu v. Sait @ Krishnakumar (2008) 15 SCC 440***, it was observed that:

“In case, the complainant in the FIR or the witness in his statement under Section 161 Cr.P.C., has not disclosed certain facts but meets the prosecution case first time before the court, such version lacks credence and is liable to be discarded.”



In light of the legal position as discussed above, this Court is of the view that the version given by the witnesses in the Court is different in material particulars from that disclosed in their earlier statements under section 161 Cr.P.C. Such omissions amount to material improvements/contradictions and they create serious doubts about the genuineness of the evidence and truthfulness of witnesses.

Accordingly, issue No. IV is decided in the negative.

14. Every trial is a voyage of discovery in which truth is the ultimate quest. In the present case, there are severe contradictions and material improvements in the testimony of the witnesses which are indicative of afterthought, deliberations and planning. The Ext. C to this case presents a different version to the occurrence thereby deepening the suspicion as to the genuineness of the case of prosecution. Furthermore, the unreasonable, inordinate and unexplained delay in forwarding the F.I.R. to the Magistrate clearly indicates that the procedural requirements have been blown to the winds. As such, this Court is of the view that there is no sufficient evidence worth its salt to make out a fool proof case for conviction. The prosecution has failed to pull the ropes sufficiently tight so as to sustain conviction at the doorsteps of the appellants. The dark clouds of suspicion looming



large on the story of the prosecution have poured heavily only to wash away all the dust ridden allegations.

15. In light of the legal position as discussed above and on the basis of the findings arrived at on the issues hereinbefore formulated, 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.

16. Therefore, both the appeals stand allowed and the judgment of conviction and order of sentence dated 16.08.1995 passed by Sri Mishri Lall Choudhary, 2nd Addl. District and Sessions Judge, Muzaffarpur in Session Trial No. 267/90/76/94, arising out of Katra P.S. Case No. 1/90 corresponding to G.R. No. 11/90, Tr. No. 394 of 1994, are set aside. Since the appellants of both the appeals are on bail, they are discharged from the liabilities of their bail bonds.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Pankaj/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	05.04.2023
Transmission Date	05.04.2023

