

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (DB) No.441 of 2017**

Arising Out of PS. Case No.-311 Year-2013 Thana- SIWAN CITY District- Siwan

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1. Abhishek @ Chhotu  
2. Rahul Kumar  
Both Sons of Rohit Kumar, Resident of Mohalla - Kagazi Mohalla,  
Brahmasthan Siwan, P.O. and P.S. - District - Siwan.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with  
**CRIMINAL APPEAL (DB) No. 309 of 2017**

Arising Out of PS. Case No.-311 Year-2013 Thana- SIWAN CITY District- Siwan

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Raju Yadav, Son of Late Ram Briksh Yadav, Resident of Village - Bidurti  
Hata, Police Station - Siwan Mufassil, District - Siwan.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with  
**CRIMINAL APPEAL (DB) No. 336 of 2017**

Arising Out of PS. Case No.-311 Year-2013 Thana- SIWAN CITY District- Siwan

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Sanjeet Kumar, Son of Nirmal Yadav, Resident of Village - Tarwan, Police  
Station - Siwan Muffasil, District - Siwan.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with  
**CRIMINAL APPEAL (DB) No. 1447 of 2018**



Arising Out of PS. Case No.-311 Year-2013 Thana- SIWAN CITY District- Siwan

Sonu Kumar, S/o Shambhu Yadav @ Shambhu Chaudhary, Resident of  
Village - Tarwan, P.S. - Siwan Muffasil, District - Siwan.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

**Appearance :**

(In CRIMINAL APPEAL (DB) No. 441 of 2017)

For the Appellant/s : Mr. Ansul, Adv.  
Ms. Priyanka Singh, Adv.

For the State : Mr. Dilip Kumar Sinha, APP  
(In CRIMINAL APPEAL (DB) No. 309 of 2017)

For the Appellant/s : Mr. Harsh Anuj, Adv.  
Mr. Prashant Kumar, Adv.

For the State : Mr. Dilip Kumar Sinha, APP  
(In CRIMINAL APPEAL (DB) No. 336 of 2017)

For the Appellant/s : Mr. Ansul, Adv.  
Ms. Priyanka Singh, Adv.

For the State : Mr. Dilip Kumar Sinha, APP  
(In CRIMINAL APPEAL (DB) No. 1447 of 2018)

For the Appellant/s : Mr. Ansul, Adv.  
Ms. Priyanka Singh, Adv.  
For the State : Mr. Dilip Kumar Sinha, APP

**CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR  
and**

**HONOURABLE MR. JUSTICE HARISH KUMAR**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)**

**Date : 16-05-2023**

All these appeals, arising out of the same  
occurrence but with two different sessions trial, have  
been taken up together and are being disposed off by  
this common judgment.



2. In Cr. Appeal (DB) No. 309 of 2017, we have heard Mr. Harsh Anuj and Mr. Prashant Kumar for the appellant, whereas Mr. Ansul, assisted by Ms. Priyanka Singh, has appeared in all other three appeals on behalf of the appellants.

3. The State has been represented by Mr. Dilip Kumar Singh, the learned APP.

4. The appellants have been charged for murdering one Mainuddin @ Laddu @ Dhudhu. The appellants are alleged to have taken the deceased away from his house and killed him by stabbing several times.

5. The F.I.R. has been registered by the brother of the deceased, namely, Jainuddin Ahmad, who has been examined in both the sessions trial as P.W.-5 (Sessions Trial No. 123 of 2014 and Sessions Trial No. 283 of 2017). He has alleged that on 03.08.2013, at about 6:30 A.M. in the morning, the deceased along with one Sajid Khan had gone to a gym, where he met appellants/Sanjeet Kumar and Sonu Kumar. At the



gym, one person informed the deceased that a plan has been made for killing him. The deceased ignored such information and came back to home along with appellants/Sanjeet Kumar and Sonu Kumar. After having his meal, the deceased left the house with aforesaid Sanjeet and Sonu on a motorcycle. At about 6:30 P.M., in the evening, the grandmother of the informant inquired from the deceased regarding his whereabouts when he had disclosed that he shall be coming back shortly. A little later, the informant (P.W.-5) learnt that in order to settle a fight in the town, the appellant/Raju Yadav and Sajid Khan had called the deceased and, thereafter, the appellants/Sanjeet Kumar and Sonu Kumar took him out of the house on a motorcycle. At about 8:00 P.M., a villager of the informant by name of one Bindu told him on telephone that the deceased has been attacked by knife and he is being treated in the hospital. On this information, the informant reached the hospital along with many others



only to find his brother dead. He, therefore, suspected that the appellants have killed the deceased. The reason for the occurrence is said to be old enmity.

6. On the basis of the afore-noted *fardbeyan* statement, a case *vide* Siwan Town P.S. Case No. 311 of 2013 was registered for investigation under Sections 302/34 and 120B/34 of the Indian Penal Code (*in short the I.P.C.*) against the appellants/Sanjeet Kumar/Sonu Kumar/Raju Yadav and one Sajid Khan, who has not been put on trial as he was discharged under Section 227 of the Code of Criminal Procedure.

7. The police submitted charge-sheet against the appellants, whereupon cognizance was taken and the case was committed to the Court of *Sessions* for trial. Two trials were held, *viz.*, Sessions Trial No. 123 of 2014 in which appellants/Raju Yadav/Sanjeet Kumar, Abhishek @ Chhotu and Rahul Kumar were tried, whereas in the other, *viz.*, Sessions Trial No. 283 of 2017, appellant/Sonu Kumar was tried.



8. By two different judgments and orders dated 31.01.2017 and 08.02.2017 (Sessions Trial No. 123 of 2014) and 04.10.2018 and 12.10.2018 (Sessions Trial No. 283 of 2017), the appellants were convicted and sentenced for the offences under Sections 302/34 and 120B/34 of the I.P.C. The appellants have been sentenced to undergo rigorous imprisonment for life, to pay a fine of Rs. 10,000/- each and in default of payment of fine, to further suffer simple imprisonment for six months for the offence under Sections 302/34 of the I.P.C. and rigorous imprisonment for five years, to pay a fine of Rs. 10,000/- each and in default of payment of fine, to further undergo simple imprisonment for six months for the offence under Sections 120B/34 of the I.P.C. All the sentences have been ordered to run concurrently.

9. Seven prosecution witnesses have been examined in both the trials with the only difference of their serial number in two different trials. We would be



henceforth referring to the prosecution witnesses by their names in Sessions Trial No. 123 of 2014.

10. The learned Advocates for the appellants have attempted to assail the judgments and orders of conviction and sentence on various counts with special focus on the fact that none of the witnesses including the informant had seen the occurrence and that only on guess work, the appellants have been framed in this case. They have also urged before us that the Investigating Officer of this case did not investigate the case properly and left many gaps, making the prosecution case redolent with doubt and suspicion. The witnesses tried to improve their testimony before the Court by resorting to falsehood and that most important witnesses, who could have really unraveled the mystery, have not been examined and that also without any explanation.

11. The informant/Januddin Ahmad (P.W.-5) has though supported the prosecution case, but has



stated that at the hospital in the emergency ward where he saw his brother dead for the first time, he was informed by one Sri Bhagwan that twelve persons including the appellants had killed the deceased at J.P. Chowk. The appellants/Raju Yadav and Sanjeet Kumar had caught hold of the hands of the deceased, whereas the appellants/Rahul and Abhishek continuously assaulted the deceased by knife and dagger. The other accused persons had surrounded the deceased and were exhorting each other for killing him. He had made such statement before the police in the hospital. Several suggestions were given to him about the criminal antecedents of his family members to which P.W.-5 expressed ignorance.

12. What is important is that one Abdul Kadir and Md. Muslim, who had signed the seizure-list and who were not examined, were not seen by P.W.-5 in the hospital. There is nothing in the record which would let us know as to where and when the seizure-list was



prepared. However, what is relevant is that the afore-noted two persons are stated to be the relatives of the informant and the deceased, but the Investigating Officer of this case, namely, Ram Pravesh Oraon (P.W.-7) has asserted that they are independent persons and not related to the informant or the deceased. His attention was drawn to the earlier and different statement made by him before the Investigating Officer, which he denied, but the Investigating Officer has categorically stated that he did not state about Sri Bhagwan having informed him at the hospital about the manner of occurrence as also the participation of the appellants in the crime. But for the information derived from Sri Bhagwan, who has not been examined in the trial, there is no other source of information to P.W.-5. He has not claimed to be the eye-witness to the occurrence either.

13. Ful Mohammad (P.W.-1) is the grandfather of the informant and the deceased, who



claims to have seen the occurrence. He in his examination-in-chief has asserted that on 03.08.2013, while he was purchasing fruits from a shop at J.P. Chowk, he heard some noise and he went near the place from where the noise was coming. He saw that twelve persons had surrounded his grandson out of whom, he identified the appellants. He also saw appellants/Rahul and Abhishek assaulting the deceased by means of knife and dagger. He ran towards the accused persons for rescuing his grandson, but he was chased away. Out of fear, he ran towards municipality and on going to some distance, he fainted. He could recover his sense only after one and half hours, whereafter he visited the place of occurrence again where he found plenty of blood on road. One Hashim Mian told him that his grandson has been killed. Thereafter, he reached the Sadar hospital. On the next day of the occurrence, the same Sri Bhagwan told him that twelve persons had assaulted his grandson, who had been studying Engineering and was



in the final year of the course. Though he claimed to have identified the appellants in the dock, but the identification was not correct, which plodded the Trial Court to seek clarification from P.W.-1. As an explanation for wrongly identifying the appellants in the dock, P.W.-1 stated that he is suffering from paralysis. Several suggestions were given to him about the deceased and the informant being persons of criminal proclivity, but he has denied such suggestions. He has also denied the suggestion of Court that the police first recorded his statement on 06.08.2013, *i.e.*, after three days of the occurrence, which fact has been confirmed by the Investigating Officer in his deposition before the Court, which we shall examine later.

14. Another relative of the deceased, namely, Abdul Najir (P.W.-2) also claims to have seen the occurrence. At the trial, he has stated that on 03.08.2013 at about 7:30 P.M., he was also purchasing fruits at J.P. Chowk along with P.W.-1 when he heard



that there was some pandemonium somewhere near the fruit shops. He and P.W.-1 went there and found in the light of the bulb that the deceased was being assaulted by the appellants. The deceased was held by the appellants/Raju Yadav and Sanjeet Kumar, whereas the appellants/Abhishek and Rahul were giving dagger blows to him. P.W.-2, thereafter, claims to have started his two-wheeler and went away from the place of occurrence to Maharajganj and returned only after two days. It was after his return from Maharajganj that the same Sri Bhagwan told him that the deceased was killed by twelve persons including the appellants. He had never given any statement to the police before appearing in the witness-box. He too stood in the relation of grandfather to the deceased.

15. One Ali Akbar (P.W.-3) though was present at the place of occurrence and saw that the deceased was being assaulted, but he did not identify any of the accused persons. When he went for the



rescue of the deceased, he too was assaulted but he could any how run away from the place and went to the authorities to make a complaint. He claimed to have identified the appellants in the dock, but did not know their names. He claims to have seen them at the place of occurrence. On being questioned, he admitted that he is also related to the deceased. There was no reason, he claims at the trial, for him to go to the place of occurrence, but he was there.

16. Similarly one Md. Kamruddin (P.W.-4) also saw the deceased being assaulted by the appellants. He learnt about the fact of death of the deceased on the next day from the newspapers.

17. In this context, it would be profitable to refer to the deposition of the Investigating Officer/Ram Pravesh Oraon (P.W.-7). He claims to have gone to the hospital after he received an O.D. slip from Siwan Sadar Hospital. In the hospital, he found P.W.-5, whose *fardbeyan* statement was recorded by him. During the



course of investigation, he claims to have visited the spot, took the statements of the witnesses, recorded the further statement of P.W.-5, prepared a seizure-list, which he did not send with the F.I.R. and also prepared the inquest report at the hospital only. He further stated before the Trial Court that most of the witnesses told him during the course of investigation that the sun was not in the sky when the occurrence had taken place. The articles, namely, slippers and a sack, which were recovered from the place of occurrence was neither seized, sealed nor sent for any forensic examination by him. Not even bloodstained earth, which was seized, was sent for any chemical/forensic examination. During the course of investigation, there was no reference by any witness regarding the source of light at the place for the appellants to have been identified by the witnesses/onlookers.

18. The First Information Report, according to him (P.W.-7) was registered at 10:30 P.M. in the



night and, simultaneously, the inquest report was prepared. There was some confusion in the mind of P.W.-7 about the time when the inquest was prepared but later, such mistake with respect to time was rectified by him. He has confirmed the fact that neither P.Ws.-3 or 4 or 5 gave any statement to him which could be referable as the occasion for these witnesses to be present at the place of occurrence or knowing about the cause of occurrence or that their source of information was Sri Bhagwan. In fact, the name of Sri Bhagwan was not even entered in the case diary by him.

19. Thus, from the deposition of P.W.-7, we find that during the course of investigation, the only statement of the witnesses was that the deceased had been killed and the dead-body was lying in the hospital. Some of the witnesses, during the course of investigation, claimed to have seen the occurrence, but their statements were absolutely laconic and nothing was recorded by the Investigating Officer which could lend



credence to the witnesses to be even called chance-witnesses at the place of occurrence.

20. Dr. Nawal Kishore Prasad (P.W.-6), who conducted the *post-mortem* on the deceased, has deposed that the *post-mortem* was conducted at around 10:45 P.M. on 03.08.2013. Thirteen incised wounds were found on the person of the deceased, which were sufficient in the ordinary course of nature to have caused the death of a human being. Rigor mortis was present in all the limbs of the deceased and the time of death was assessed by him to be within 6 – 24 hours of the *post-mortem* examination. What is of importance to note in his deposition is the time of the *post-mortem* examination and the time of the occurrence, which according to evidence is some times between 6:30 P.M. to 7:00 P.M. and his observation that rigor mortis was present in all limbs. The presence of rigor mortis, thus, shifts the time of the occurrence before the time what has been projected or else, there would not have been



any rigor mortis in the entire limbs.

21. From a careful perusal of the evidence of the witnesses, it becomes evident that neither the informant (P.W.-5) nor P.Ws. 1, 2, 3 and 4 can, with certainty, be said to have witnessed the occurrence. We say so for the reason that the deposition of P.W.-1 appears to be very shaky with respect to identification. Similar is the position with the deposition of the other three witnesses. P.W.-2, who is also one of the grandfathers of the deceased, after witnessing the occurrence, left for Maharajganj only to return two days later. One Sri Bhagwan who told P.Ws.-1 and 2 about the assailants and the manner of occurrence and which is perhaps the only source of information to them.

22. Even at the cost of repetition, it is being recorded that aforesaid Sri Bhagwan was never examined and his name was not entered in the list of witnesses in the case diary also during the course of investigation as has been confirmed by the Investigating



Officer of this case.

23. Few questions remain unanswered, namely, who brought the deceased from the place of occurrence to the hospital? Was he brought alive or dead? If P.Ws.-1 and 2 were chased by the murderers/appellants, why were they spared, especially when P.W.-1 fell on the ground and remained unconscious for about one and half hours? What was the reason for such old persons to have gone somewhere near the place of occurrence? If their deposition is correct, they should have come forward with such story before the investigating agency without loosing any time. From the evidence of Investigating Officer, it appears that the statement of P.W.-1 was recorded only after three days of the occurrence. There is no reference of any statement having been recorded of P.W.-2 by the Investigating Officer during the course of investigation.

24. Similarly, even if P.Ws.-3 and 4, who also claim to have seen the occurrence, are believed,



they did not know as to who were those killers. No doubt, they have identified the appellants in the dock, but not knowing their names, further makes their deposition doubtful. If the identification itself becomes questionable, there would be the certainty that they were speaking the truth.

25. Another aspect of the matter which perhaps has not been taken into consideration by the Trial Court is that the occurrence took place when darkness had already set in. The place where the assault took place is dotted by trees from both sides, the branches of which trees had spread across, making the throw of the sunlight, howsoever weak it was at that time, almost nugatory. The Investigating Officer does not refer to any source of light during the entire course of investigation nor have the witnesses talked about the source of light in which the appellants were identified by them.

26. If enmity was the reason for killing the



deceased, two of the appellants, admittedly, came along with the deceased to the house and again took him away. The deceased would not have accompanied them if there was any doubt about their good feelings for him. Nobody would leave for an unknown destination in the company of his enemies.

27. Assuming the fact that two of the appellants were seen by the informant accompanying the deceased from his house to some destination which was never made known and, thereafter, the deceased was found dead, but before saddling those appellants with the obligation of telling the Court as to what had happened, the prosecution had to prove the basic facts, which does not appear to have done in this case. After all, if all the witnesses came to learn about the occurrence including the participation of the appellants through Sri Bhagwan, why was he not examined?

28. We do reckon that it is not always necessary to examine the person who first gave the



information to the witnesses, but in the present case when the presence of the witnesses at the place of occurrence at the nick of the time is being doubted, the absence of examination of such person who communicated about the occurrence to the other witnesses becomes fatal for the prosecution case.

29. Thus, we find that the evidence against the appellants is very shaky for the reason of (a) the presence of the witnesses at the time of the occurrence being doubtful; (b) no source of light at the place of occurrence to clearly identify the assailants and (c) non-examination of such witnesses, namely, Sri Bhagwan and one Bindu, who first telephonically informed P.W.-5 that the deceased had suffered stab injuries, and that also without any explanation.

30. In ***Vijaybhai Bhanabhai Patel Vs. Navnitbhai Nathubhai Patel and Ors.; (2004) 10 SCC 583***, the Supreme Court, while hearing an appeal against acquittal, affirmed the judgments of acquittal on



the ground that there had been a delay of two days in questioning the eye-witnesses. It was held to be a serious mistake on the part of the prosecution and if this along with other reasons weighed with the Courts below in disbelieving the prosecution version, no fault could have been found with such judgments.

31. The two of the appellants were not required to make any statement explaining as to what had happened when the deceased had accompanied them from home to the place where the occurrence is said to have taken place. We say so for the reason that the prosecution had the first responsibility of proving the facts as the burden of proof is always on the prosecution.

32. The provisions contained in Section 106 of the Indian Evidence Act, 1872, namely, the burden of proving facts especially within the knowledge of a person gets triggered only when the prosecution has proved its case beyond reasonable doubts. The exception to the



principle of burden of proof under Section 106 of the Indian Evidence Act, 1872 does not alter that position. Even otherwise, the circumstances of this case do not pass the test set forth by the Supreme Court with respect to the evidence of last seen. The circumstance from which the conclusion of guilt is to be arrived is required to be fully established and it should be consistent only with the hypothesis of guilt of the accused. It should be of such a conclusive nature and tendency which would exclude every possible hypothesis except the guilt of the accused.

33. As noted above, we have no material before us to know as to who brought the deceased to the hospital and under what condition. The presence of rigor mortis in all the limbs of the deceased definitely proves that the occurrence must have taken place approximately 7 - 8 hours before the dead-body was subjected to *post-mortem* examination, which does not appear to be the case here.



34. We, thus, have serious doubts about the conviction and sentence against the appellants to be condign for it to be affirmed.

35. All the appeals thus stand allowed.

36. The impugned judgment of conviction dated 31.01.2017 and the consequent order of sentence dated 08.02.2017 (*in Cr. Appeal (DB) Nos. 441 of 2017, 309 of 2017 and 336 of 2017*) and the impugned judgment of conviction dated 04.10.2018 and the consequent order of sentence dated 12.10.2018 (*in Cr. Appeal (DB) No. 1447 of 2018*) passed by the learned Additional District and Sessions Judge-II, Siwan in connection with Sessions Trial No. 123 and 2014 and Sessions Trial No. 283 of 2017, arising out of Siwan Town P.S. Case No. 311 of 2013, are, accordingly, set-aside.

37. The appellants, viz., Abhishek @ Chhotu and Rahul Kumar (*Cr. Appeal (DB) No. 441 of 2017*), Raju Yadav (*Cr. Appeal (DB) No. 309 of 2017*), Sanjeet



Kumar (*Cr. Appeal (DB) No. 336 of 2017*) and Sonu Kumar (*Cr. Appeal (DB) No. 1447 of 2018*) are acquitted of the charges levelled against them. They are directed to be set at liberty forthwith unless their detention is required in any other case.

38. The records of these appeals be sent back to the Trial Court and the copy of the judgment be transmitted to the Superintendent of the concerned jail for record and compliance.

**(Ashutosh Kumar, J)**

**(Harish Kumar, J)**

Praveen-II/-

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