

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.882 of 2014

Arising Out of PS. Case No.-153 Year-2002 Thana- KATORIYA District- Banka

Ganauri Turi Son of Late Jhodil Turi , Resident of Village - Pipra Dih, P.S. -
Katoria, District - Banka.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant	:	Mr. Ram Sumiran Rai, Advocate
For the Respondent	:	Mr. Abhimanyu Sharma, A.P.P.

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 07-04-2023

The present appeal has been preferred against the judgment of conviction dated 27.12.2010 and order of sentence dated 10.01.2011 passed by the Additional District & Sessions Judge, Fast Track Court IInd, Banka in connection with Sessions Trial No.471 of 2006/ Tr. No.714 of 2010/ 250 of 2011 arising out of Katoria P.S. case No.153 of 2002, G.R. case No.1278 of 2002, whereby and whereunder the appellant has been convicted under Sections 395 and 396 of the Indian Penal Code (hereinafter 'I.P.C.') and has been sentenced to undergo imprisonment for life and fine of Rs.10,000/- for offence under Section 396 of the I.P.C. and in default of payment of fine, the appellant has been sentenced to undergo rigorous imprisonment for one year. No separate



sentence has been passed for the offence under Section 395 of the I.P.C.

2. Prosecution case, as per fard-beyan of informant Masudi Turi, in brief, is that on 04.10.2002 at about 10.30 p.m. in the night while the informant was asleep in his house in a room and his sons and daughter-in-law were also sleeping in other rooms, he heard barking of his dog, whereupon his wife opened the door and went to her sons, who were sleeping in the courtyard and awoke them and told them that some thieves might have entered the house. In the meantime, some miscreants entered into his house by removing the bamboo coverings but in the meantime his son, namely, Yogender Turi @ Jago and other sons also woke up and they caught one of the thieves and started raising alarm. It was further alleged that in the meantime 8 to 10 miscreants entered into his courtyard and after removing the bamboo coverings called their accomplices standing outside and then all the accused, who were variously armed with swords, bhujali and big guns and had covered their faces with 'Galmochha', caught his son Yogender Turi and one of the criminals gave blows of sword on the head, back, chest and legs of his son Yogendra Turi, due to which he sustained injuries and fell down. When his another son Devender Turi came to his rescue, the criminals also assaulted him with



sword and bhujali on his back, head, hands and legs, thereby seriously injuring him. Thereafter the criminals locked him inside a room and he heard noises of three shots being fired in which two bullets were sustained by his son Yogender Turi, who instantly died there and one bullet hit his son Devender Turi on his back due to which he became seriously injured. After killing his son, all the criminals by brandishing gun and pistols and threatening his wife demanded 'Maal' (valuables) whereupon his wife pleaded for mercy and asked them to take whatever they want but to spare her life. In the meantime one of the criminals gave a tight slap to informant's wife and in course of slapping the face of the criminals covered with galmochha, got unveiled due to falling down of Galmochha and then informant's wife identified that miscreant as Ganauri Turi (appellant). Thereafter the accused persons carried away various articles from the house and broke the suite cases and took away a sum of Rs.50,000/- cash, half kg silver ornaments and golden jewellery from the wife and daughter-in-laws of the informant.

3. On the basis of the fard-beyan of the informant, Katoria P.S. case No.153 of 2002 was registered against the appellant and 20 to 25 unknown persons for the offence under Section 396 of the Indian Penal Code. After investigation, the



police submitted charge-sheet. The learned C.J.M. took cognizance and committed the case to the Court of Sessions. Charges were framed against the appellant. The appellant pleaded not guilty and claimed to be tried.

4. During trial, the prosecution examined altogether thirteen witnesses, namely, Kunti Devi @ Kunna Devi (P.W.1), Surendra Prasad (P.W.2), Chhaya Devi (P.W.3), Ashok Turi (P.W.4), Arjun Turi (P.W.5), Uma Devi (P.W.6), who is wife of informant, Masudi Turi (P.W.7-informant), Nemender Turi (P.W.8), Meena Devi (P.W.9), Shobha Devi (P.W.10), Devendra Turi (P.W.11), Arbind Kumar (P.W.12) and Gopal Turi (P.W.13). The prosecution has brought on record documents like the signature of Surendra Prasad on inquest report (Ext.1), signature of Upendra Prasad on inquest report (Ext.2), signature of Masudi Turi on fard beyan (Ext.3) and the postmortem report (Ext.4). Defence has neither examined any witness in support of its case nor any document has been produced.

5. Learned counsel for the appellant submits that the judgment of conviction rendered by the learned trial court suffers from several infirmities and the learned trial court has overlooked relevant points of consideration which fall in favour of the appellant. He next submits that the learned trial court has taken



into consideration that the prosecution has miserably failed to prove the guilt of the appellant as the prosecution has not been able to connect the appellant with the offence alleged to have taken place. In support of his contention, learned counsel has drawn the attention of this Court on the fact that from perusal of the entire gamut of evidence, brought on record, by the prosecution, it would manifest that there is no evidence whatsoever to show that the appellant was properly identified by the Informant or other eye-witnesses, as there is no whisper of any source of identification in the deposition of any of the prosecution witnesses. Another argument advanced by learned counsel for the appellant is that the learned trial court has also failed to appreciate that during trial, the prosecution has not produced the Investigating Officer of the case for examination as a prosecution witness and no explanation in this regard has been put forth, which has caused prejudice to the defence of the appellant. Therefore, it has been argued that on these scores the judgment of conviction, assailed in the present appeal, be set aside, the appellant be acquitted of the charges and set free from custody.

6. On the other hand, learned A.P.P. appearing for the State has rebutted the arguments advanced by learned counsel for the appellant. It has been submitted that non-examination of the



Investigating Officer would *per se* not make the appellant liable for acquittal and there has been no demonstration of any prejudice which has been caused to the appellant due to non-examination of the Investigating Officer. So far the non-revelation of source of identification by the prosecution witnesses is concerned, the same has not been controverted by learned A.P.P. However, it has been submitted that the appellant could have been identified by the P.W.6 (wife of Informant) when the appellant had allegedly slapped her.

7. After hearing both sides and perusal of the material available on record, following issues arise for consideration in the present appeal:-

- (I) Whether the prosecution, by adducing evidence, has been able to prove the identification of the appellant, so as to connect him to the present crime, beyond reasonable doubt?
- (II) Whether non-examination of the Investigating Officer has caused prejudice to the defence of the appellant, in the given facts of the present case?

8. While adverting to the first issue, we find that according to the case of the prosecution, the alleged offence is said to have taken place at night. In the F.I.R. the time of occurrence is mentioned as 10:30 P.M. Further, P.W.6 in her deposition has also stated that the occurrence took place at 10:30 P.M. There is minor



inconsistency with regard to time of occurrence in the deposition of P.W.11 and P.W.4 as P.W.11 has stated that the occurrence took place at 10:00 P.M. whereas P.W.4 has stated that the occurrence took place at 11 P.M. Nonetheless, there is no dispute that the occurrence took place when it was dark and the Informant and his family members were asleep. In such a view of the matter, the revelation of source of identification by the prosecution witnesses, in other words the light in which the prosecution witnesses identified the appellant, becomes very significant. However, from perusal of the deposition of the prosecution witnesses, we find that none of the prosecution witnesses in their evidence has even whispered, much the less described, any source of light in which the appellant has been identified. Such a vital omission on the part of the prosecution in the given facts of the present case cannot be ignored. It would be relevant here to refer to the judgment of the Hon'ble Supreme Court rendered in the case of ***Ram Narain Singh versus State of Punjab*** reported in (1975) 4 SCC 497, wherein it has been held as follows:

“On the day of the occurrence i.e. October 2, 1972, it would be quite dark at 8-00 P.M. and unless there was some light burning in the house it would be difficult for the witnesses to have identified the assailants and to have given such a graphic description of the occurrence... .. There also the



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

At this juncture, we make haste to take note of the fact that it is only the appellant who has been named in the F.I.R on the basis of identification done by P.W.6. No other miscreants were identified or named. Even the investigation failed to catch hold of the other co-accused persons, who are said to be 20-25 in number. It is only P.W.6, who identified and named appellant against whom the charge-sheet was submitted. Therefore, it can be safely gleaned that the appellant was implicated in the present case on the basis of identification made by P.W.6 and thus identification of the appellant in the present case should be based on rock-solid evidence and not weak evidence. We find that in absence of revelation of any source of light by the prosecution, the evidence with regard to identification of the appellant is not sufficient so as to connect the appellant to the said offence.



Therefore, in view of the discussion made hereinabove, we are of the considered opinion that the prosecution has not been able to prove the identification of the appellant, so as to connect him to the present crime, beyond reasonable doubt.

9. So far the second issue is concerned, it is a matter of record that the Investigating Officer of the present case has not been examined. It is a trite principle of law that mere non-examination of the Investigating Officer would not entail any benefit to the accused unless it is shown that such non-examination has caused prejudice to the case of the accused. However in the facts of the present case, when the investigation with regard to the rest of the co-accused persons has failed, it becomes relevant to examine the Investigating Officer of the case to elicit the incriminating material, which has been gathered against the appellant during investigation and the mode thereof. Further, Due to non-examination, the appellant has also been deprived of the opportunity to bring on record the material contradictions and improvement made by the witnesses in their depositions. Therefore, in such circumstances, the examination of the Investigating Officer becomes important as he would have been the most competent witness to throw light on the manner in which the investigation was carried out and to explain the entire gamut of



evidence brought on record. However, the prosecution has, without any explanation, not examined the Investigating Officer of this case which has caused prejudice to the case of the defence and is fatal to the case of prosecution. At this stage we would gainfully refer to the case of ***State Of Karnataka vs Bhaskar Kushali Kotharkar And Ors.***, reported in ***Cr. Appeal No.- 498 of 1998***, wherein the Hon'ble Supreme Court on the importance of examination of Investigating Officer, has observed that :

“It is true that as a part of fair trial the investigating officer should be examined in the trial cases especially when a serious sessions trial was being held against the accused. If any of the prosecution witnesses give any evidence contrary to their previous statement recorded under Section 161 Cr. P.C. or if there is any omission of certain material particulars, the previous statement of these witnesses could be proved only by examining the investigating officer who must have recorded the statement of these witnesses under Section 161 Cr. P.C.”

Therefore, in view of the discussion made in the foregoing paragraph and in the light of the decision of the Hon'ble Supreme Court in the case of ***State Of Karnataka vs Bhaskar Kushali Kotharkar And Ors. (supra)***, we are of the considered opinion that in the given facts of the present case the non-



examination of the Investigating Officer, without any explanation, is fatal to the case of the prosecution and has caused prejudice to the defence of the appellant.

10. In view of the findings arrived at on the issues formulated above, we are of the considered opinion that the prosecution has failed to prove the guilt of the appellant beyond all reasonable doubts.

11. In the result, the criminal appeal is allowed and the judgment of conviction dated 27.12.2010 and order of sentence dated 10.01.2011 passed by the Additional Sessions Judge, Fast Track Court IIInd, Banka in connection with Sessions Trial No.471 of 2006/ Tr. No.714 of 2010/ 250 of 2011 arising out of Katoria P.S. case No.153 of 2002, G.R. case No.1278 of 2002 are set aside. Since the appellant is in custody, he be released from jail, if not required in any other case.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

AFR/NAFR	NAFR
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