

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.621 of 2008

Sk. Lal Babu, son of Sk Mir Hassan, resident of village-Jatwa P.S- Banjaria,
District-East Champaran

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (SJ) No. 687 of 2008

SK. Iliyas Hussain @ Sheikh Alias, Son of Sk. Khalil, Resident of Village-
Gokhula, P.S. Banjaria, District- East Champaran

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 621 of 2008)

For the Appellant/s : Mr. Mahendra Thakur, Advocate
Mr. Shashi Bhushan Pandey, Advocate

For the Respondent/s : Mr. Mukeshwar Dayal, APP

(In CRIMINAL APPEAL (SJ) No. 687 of 2008)

For the Appellant/s : Mr. Sangeet Deokuliar, Advocate

For the Respondent/s : Mr. Mukeshwar Dayal, APP

**CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND
MALVIYA**

ORAL JUDGMENT

Date: 15-04-2025

Heard Mr. Mahendra Thakur assisted by Mr. Shashi Bhusan Pandey for the appellant in Cr. Appeal (SJ) No. 621 of 2008, Mr. Sangeet Deokuliar learned counsel for the appellant in Cr. Appeal (SJ) No. 687 of 2008 and Mr. Mukeshwar Dayal learned APP for the State.

2. The present appeal has been filed under Section 374(2) of Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C') challenging the judgment of



conviction dated 19.05.2008 and order of sentence dated 31.05.2008 passed in Sessions Trial Case No. 763 of 2006 arising out of Banjaria P.S. Case No. 49 of 2005 dated 10.01.2005 passed by the learned Additional District and Sessions Judge (FTC)-I, Motihari, whereby and where-under the appellants have been convicted for the offence punishable under Sections 363 and 364/34 of Indian Penal Code (hereinafter referred as 'IPC') and have been sentenced to undergo rigorous imprisonment for ten years under Sections 364/34 of the IPC and fine of Rs. 5000 and in default of payment of fine, further simple imprisonment for 1 year.

3. As per the *fardbeyan* of the informant, on 09.01.2005 at 9:50 PM to the police alleging that on the same day at about 7.00 PM his brother Sah Alam (victim) was sitting at his door when a commander jeep came and three persons got down from the jeep and came near the brother of the informant, meanwhile the informant came out from his house. The informant identified those persons as Md. Mustafa, Illiyas and Sk. Lal Babu the brother of the informant and on the point of pistol forcibly taken him on the jeep in which 5-6 other persons were also present who have concealed their faces due to which he couldn't identified them. The brother of the Sah Alam raised



alarm also but all the accused persons fled away by the jeep taking his brother. The reason behind the occurrence is alleged to be previous enmity.

4. Further on the basis of *fardbeyan*, Banjaria P.S. Case. No. 06 of 2005 has been registered against three named persons including the appellants and some unknown persons under Section 363 and 364 of IPC and accordingly after investigation the police submitted charge-sheet against the appellants and four others keeping investigation pending for other accused persons, under Sections 363 and 364/34 of IPC. After due process the learned CJM, Moltihari took cognizance of the offence on 18.06.2005 against seven accused persons and accordingly after due process of law the case has been committed to the Court of Session's. The statement of the accused persons was taken under Section 313 of the Cr.P.C where the appellants have denied the allegations leveled against them.

5. On behalf of prosecution altogether 12 witnesses were examined to substantiate the charges levelled against the appellants, who are namely, PW-1 Brija Bhar Singh, PW-2 Sk Khairati, PW-3 Md. Alam, PW-4 Sk Arif, PW-5 Basudev Prasad, PW-6 Md. Inzaz, PW-7 Aftab Alam, PW-8



Raushan Ara, PW-9 Zohra Khatoon, PW-10 Sk Shafi-ullah, PW-11 Naima Khatoon and PW-12 Pravez Alam (informant).

6. All the prosecution witnesses have been declared hostile by the prosecution except PW-12 informant of the present case.

7. PW-12 in his examination-in-chief stated that the occurrence is of 09.01.2005 in the evening, he was standing at his door when Musatfa, Sheikh Ilyas and Shev Lal Babu came to his brother Shah Alam in a commander jeep and took Shah Alam away by pointing the pistol on him. He further stated that they were sitting on the jeep with their face covered and 2-3 shots were fired from the jeep itself. He has identified his and Om Prakash Tiwari's signatures given on the statement which have been marked on Exhibit I and Page II respectively. In paragraph 3 he stated that the incident took place due to enmity in the past. He further stated that there was a kidnapping in the past regarding the marriage of the girl. The accused persons have been identified in the court. He further in paragraph 3 of his deposition stated that Om Prakash Tiwari is from his village.

7.i. In his cross-examination he stated that from his house 50-60 *gaj* there is a mosque. He further stated that at the time of occurrence it was very dark and his brother was



talking with his friends when he was inside the house. He further stated in para 5 of his deposition that he did not saw the face of the accused persons nor he saw the occurrence taking place. Om Prakash Tiwari is from his village and from his family, the family of the accused persons were having dispute. He further said that before filing the case he had consulted Om Prakash Tiwari.

8. The learned counsel appearing on behalf of the appellants submitted that the impugned judgment of conviction and order of sentence are not sustainable in the eye of law or on facts. Learned trial Court has not applied its judicial mind and erroneously passed the judgment of conviction and order of sentence from the perusal of the evidences adduced on behalf of the prosecution it is crystal clear that out of 12 prosecution witnesses 11 prosecution witnesses were declared hostile and informant has admitted that there was enmity between appellants and one Om Prakash Tiwari and informant consulted with Om Prakash Tiwari before filing the present case which indicates that appellants have been falsely implicated in this case due to previous enmity. Investigating Officer also has not been examined in this case by the prosecution which implies that prosecution has failed to prove its case beyond all



reasonable doubt against the appellants.

8.i. The Learned trial Court has failed to appreciate the evidence its right perspective and impugned judgment of conviction is bad in law as well as on fact and such to set aside. Learned counsel further submitted that this appeal is of the year 2013 and occurrence is of the year 2008, where, the appellants have suffered and undergone persistent agony on the account of the same and are struggling for the defence since last 16-17 years. So, the appellants should have been acquitted from the conviction as sentenced against them.

9. On the other hand, learned Additional Public Prosecutor has vehemently opposed these appeals and submits that there is direct allegation against the present appellants, for committing an offence under Sections 364/34 of IPC. Further it is submitted that in view of the aforesaid statements and the evidence on record, learned trial Court has rightly convicted the appellants and the present appeals should not be entertained.

10. At this stage, I would like to appreciate the relevant extract of entire evidence led by the prosecution and defence before the Trial Court.

11. On deeply studied and scrutinized all evidences, it is evident to note here that there are material



inconsistencies in the deposition of the witnesses as out of 12 prosecution witnesses 11 have been declared hostile. The prosecution case has not been supported by anyone other than the informant himself.

12. Further, the contents of the FIR has also not been proved as the IO has not been examined during the course of trial and non-examination of Investigating Officer is fatal to the case of the prosecution. The Supreme Court in ***Habeeb Mohammad vs The State of Hyderabad 1954 AIR 51, 1954 SCR 475*** pointed out that-

“It was the duty of the prosecution to examine all material witnesses who could give an account of the narrative of the events on which the prosecution is essentially based and that the question depended on the circumstances of each case. In our opinion, the appellant was considerably prejudiced by the omission on the part of the prosecution to examine Biabani and the other officers in the circumstances of this case and his conviction merely based on the testimony of the police jamedar, in the absence of Biabani and other witnesses admittedly present on the scene, cannot be said to have been arrived at after a fair trial, particularly when no satisfactory explanation has been given or even attempted for this omission. A police Jamedar, in the absence of Biabani and other witnesses admittedly present on the



scene, cannot be said to have been arrived at after a fair trial, particularly when no satisfactory explanation has been given or even attempted for this omission.”

13. The Hon’ble Apex Court in the case of ***Munna Lal Vs. State of Uttar Pradesh***, reported in **2023 SCC OnLine SC 80**, whose relevant paragraph Nos.- 28 and 39 of the said judgment are reproduced here-in-below:

“28. Before embarking on the exercise of deciding the fate of these appellants, it would be apt to take note of certain principles relevant for a decision on these two appeals. Needless to observe, such principles have evolved over the years and crystallized into ‘settled principles of law.’ These are:

(a).....

(b).....

(c). A defective investigation is not always fatal to the prosecution where ocular testimony is found credible and cogent. While in such a case the court has to be circumspect in evaluating the evidence, a faulty investigation cannot in all cases be a determinative factor to throw out a credible prosecution version.

(d). Non-examination of the Investigating Officer must result in prejudice to the accused; if no prejudice is caused, mere non-examination would not render the prosecution case fatal.

(e).....

“39. Secondly, though PW-4 is said to have reached the place of occurrence at 1.30 p.m. on 5th September, 1985 and recovered



a bullet in the blood oozing out from the injury at the hip of the dead body, no effort worthy of consideration appears to have been made to seize the weapons by which the murderous attack was launched. It is true that mere failure/neglect to effect seizure of the weapon(s) cannot be the sole reason for discarding the prosecution case but the same assumes importance on the face of the oral testimony of the so-called eye- witnesses, i.e., PW-2 and PW-3, not being found by this Court to be wholly reliable. The missing links could have been provided by the Investigating Officer who, again, did not enter the witness box. Whether or not non-examination of a witness has caused prejudice to the defence is essentially a question of fact and an inference is required to be drawn having regard to the facts and circumstances obtaining in each case. The reason why the Investigating Officer could not depose as a witness, as told by PW-4, is that he had been sent for training. It was not shown that the Investigating Officer under no circumstances could have left the course for recording of his deposition in the trial court. It is worthy of being noted that neither the trial court nor the High Court considered the issue of non-examination of the Investigating Officer. In the facts of the present case, particularly conspicuous gaps in the prosecution case and the evidence of PW-2 and PW-3 not being wholly reliable, this Court holds the present case as one where examination of the Investigating Officer was vital since he could have adduced the expected evidence. His non-examination creates a material lacuna in



*the effort of the prosecution to nail the appellants, thereby creating reasonable doubt in the prosecution case.”
emphasis applied*

14. Further, Investigating Officer has also not been examined during the course of trial as it was fatal since he could have adduced the expected evidence and his non-examination creates a material lacuna in the effort of the prosecution to nail the appellant, thereby creating reasonable doubt in the prosecution case and the learned trial Court failed to scrutinize the evidence brought on record regarding deficiencies, drawbacks and infirmities crept during course of trial and passed the impugned judgment in complete ignorance of criminal jurisprudence. Further, there is no eyewitnesses to the said occurrence and all the PW's were declared hostile and have not seen the occurrence. Informant in his deposition himself stated that it was dark night and could not see the accused persons.

15. The learned trial Court failed to scrutinize the evidence brought on record regarding deficiencies, drawbacks and infirmities crept during course of trial and passed the impugned judgment in complete ignorance of criminal jurisprudence and passed absurd judgment. Moreover, there are discrepancies regarding the sequence of events and the presence



of individuals at the place of occurrence. Considering this fact, prosecution has failed to establish this case beyond all reasonable doubt, therefore, in such circumstances, it may not be proper to convict the appellant/accused on the materials available on record. Hence, the judgment of conviction and order of sentence in this present matter is fit to be set aside.

16. Hence, the Judgement of conviction dated 19.05.2008 and order of sentence dated 31.05.2008 passed in Sessions Trial Case No. 763 of 2006 arising out of Banjaria P.S. Case No. 49 of 2005 dated 10.01.2005 passed by the learned Additional District and Sessions Judge (FTC)-I, Motihari, is set aside and the accused/appellants are acquitted from the charges leveled against them. As the appellants are on bail, they are discharged from liability of their bail bonds.

17. Accordingly, this appeal stands allowed.

(Ramesh Chand Malviya, J)

Brajesh Kumar/-

AFR/NAFR	NAFR
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