

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.661 of 2019

Arising Out of PS. Case No.-107 Year-2010 Thana- Bihar District-Nalanda

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Anjay Kumar, Son of Satyendra Singh, R/o Village-Khandakpar, P.S.-Bihar,
District-Nalanda (Bihar).

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 687 of 2019

Arising Out of PS. Case No.-107 Year-2010 Thana- Bihar District-Nalanda

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Md. Gulab, Son of Md. Siraj, R/o Mohalla-Aziz Ghat, P.S.-Bihar, District-
Nalanda.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 760 of 2019

Arising Out of PS. Case No.-107 Year-2010 Thana- Bihar District-Nalanda

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Babloo Kumar, Son of Rajendra Rajak, R/o Village-Sakunat, P.S.-Bihar,
District-Nalanda.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 817 of 2019

Arising Out of PS. Case No.-107 Year-2010 Thana-Bihar District-Nalanda

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Alok Kumar @ Sandeep Kumar, Son of Banke Lal Gupta, R/o Mohalla-
Qamaruddin Ganj, P.S.- Laheri, District-Nalanda.



... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 661 of 2019 and 760 of 2019)

For the Appellant/s : Mr. Bijendra Kumar Singh, Adv.
Mr. Rajeev Kumar, Adv.

For the State : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 687 of 2019)

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.
Md. Imteyaz Ahmad, Adv.
Mr. Purushottam Kumar, Adv.
Ms. Preshy, Adv.

Mr. Mudit Meet, Adv.
Mr. Shadab Akhter, Adv.

For the State : Mr. Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 817 of 2019)

For the Appellant/s : Mr. Rikesh Sinha, Adv.
Mr. Rakesh Kumar, Adv.

For the State : Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI

and

HONOURABLE MR. JUSTICE RANA VIKRAM SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI)

Date : 08-07-2026

All the afore-mentioned four appeals have been preferred by the four convicts/appellants for setting aside the judgment of conviction dated 15.05.2019 and the order of sentence dated 21.05.2019 passed by the learned 2nd Additional Sessions Judge, Nalanda at Bihar Sharif (hereinafter referred to as the '*learned Trial Court*') in connection with Sessions Trial No. 310 of 2011, arising out of Bihar P.S. Case No. 107 of 2010.



2. By the judgment of conviction dated 15.05.2019, the appellants, namely, Anjay Kumar [*Cr. Appeal (DB) No. 661 of 2019*]; Md. Gulab [*Cr. Appeal (DB) No. 687 of 2019*]; Babloo Kumar [*Cr. Appeal (DB) No. 760 of 2019*] and Alok Kumar @ Sandeep Kumar [*Cr. Appeal (DB) No. 817 of 2019*] have been convicted for the offences punishable under Sections 302/34 of the Indian Penal Code (in short, the 'IPC') and Section 27 of the Arms Act read with Section 34 of the IPC. By the order of sentence, they have been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 7,000/- each for the offences under Sections 302/34 of the IPC and to undergo rigorous imprisonment for three years and to pay a fine of Rs. 3,000/- each for the offences under Section 27 of the Arms Act read with Section 34 of the IPC. In default of payment of the amounts of fine, they shall be further directed to undergo simple imprisonment for six months and three months respectively. Both the sentences have been directed to run concurrently.

3. It is not in dispute that on the night of 18th/19th of May, 2010, one Karu Gope was murdered, for which, a case vide Bihar P.S. Case No. 107 of 2010 was registered for the offences punishable under Sections 302/34 of the IPC. On the



basis of the statement made by one Upendra Narayan Bharti (the informant), the Sub-Inspector of Police, Bihar Police Station, stating, *inter alia*, that on 19th of May, 2010, he along with other police personnel, namely, Om Prakash Chauhan, Mahendra Ram, Kailash Paswan, and the driver of the vehicle, namely, Uday Paswan, were on patrolling duty within the jurisdiction of the Police Station. While they were proceeding from Mohalla-Khandak Par towards the Station, in front of Sharda Gas Agency, they found an unknown person lying on the road. The informant, namely, Upendra Narayan Bharti, stopped the vehicle and examined the said person and noticed that he was lying dead by gunshot injury on the back of his head. He informed the incident telephonically to the Bihar Police Station and immediately started preliminary inquiry and also preparing the inquest report of the dead-body of the said unknown person. In the meantime, another police personnel came to the spot and the said Upendra Narayan Bharti (the informant) made a statement before him. The statement made by aforesaid Upendra Narayan Bharti was recorded an F.I.R., bearing Bihar P.S. Case No. 107 of 2010, under Sections 302/34 of the IPC was registered against unknown persons.

4. The police took up the case for investigation and



finally submitted *charge-sheet* against all the appellants under Sections 302/34 of the IPC and Section 27 of the Arms Act read with Section 34 of the IPC.

5. Since the offence under Section 302 IPC is exclusively triable by the learned Court of *Sessions*, the case was committed from the Court of learned Magistrate to the Court of learned Principal Sessions Judge, Nalanda at Bihar Sharif. Subsequently, the case was transferred to the Court of learned 2nd Additional Sessions Judge, Nalanda at Bihar Sharif for trial and disposal, which was registered as Sessions Trial No. 310 of 2011.

6. The learned Trial Court framed charge against the accused persons/appellants under Sections 302/34 of the IPC and Section 27 of the Arms Act read with Section 34 of the IPC as they pleaded not guilty. When the charge was read over and explained to the accused persons/appellants, the trial of the case commits.

7. In course of trial, the prosecution has examined altogether eight (8) witnesses. The accused persons/appellants were also examined under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.).

8. However, no witness on behalf of the defence



was examined, whereafter, the learned Trial Judge proceeded to pass the impugned judgment of conviction and order of sentence, referred to above, against the accused persons/appellants.

9. The same is challenged by the appellants separately *vide* aforementioned four appeals.

10. Since all the aforesaid four appeals arise out from a common judgment and order, we proposed to dispose of the same by passing a composite judgment, taking all the appeals together for hearing.

List of the Prosecution Witnesses:

P.W. 1	Kailash Paswan;
P.W. 2	Adra Devi;
P.W. 3	Kanti Devi;
P.W. 4	Anita Devi;
P.W. 5	K.K. Kshitiz;
P.W. 6	Mahendra Yadav;
P.W. 7	Rajendra Yadav; and
P.W. 8	Bare Yadav

11. P.W. 1, namely, Kailash Paswan, is a police constable and claimed to be the member of the patrolling party; P.W. 2, namely, Adra Devi, is the mother of the deceased; P.W. 3, namely, Kanti Devi, is the maternal aunt of the deceased; P.W. 4, namely, Anita Devi, is the cousin sister of the deceased, P.W. 5, namely, K.K. Kshitiz, is the Doctor/Autopsy Surgeon; P.W. 6, namely, Mahendra Yadav, is the neighbour of the deceased; P.W.



7, namely, Rajendra Yadav, is the grandfather of the deceased and P.W. 8, namely, Bare Yadav, claimed to be a friend of the deceased.

12. P.W. 1, namely, Kailash Paswan, being a member of the patrolling party, corroborated the statement made in the FIR, stating, *inter alia*, that on 19th of May, 2010 at about 12:45 A.M., they found a dead-body lying on the road near a godown of L.P.G. Gas at Khandak Par.

13. P.W. 2, namely, Adra Devi, who is the mother of the deceased, asserted in her evidence that her youngest son, namely, Karu Gope, was in his house with her. He was lying on a bed and at about 06:00 P.M., he received a phone call. She has stated that it was the phone call of Gulab Miyan, who was calling the deceased to come to play some games. Karu Gope (the deceased) denied such call of Gulab Miyan as his mother was there in the home. She has further stated that after about half an hour, 8-9 young men came to her house and insisted Karu Gope to come to play and, thereafter, they all took him to some place in order to play. Amongst them, there were Gulab Miyan, Anjay Kumar/Kahar, Alok, Babloo Rajak, Pappu, Sunil, Ranjan and Amit. Subsequently, the deceased did not return and P.W. 2 along with her sister and sister's husband left the house



to conduct a search. In paragraph 4 of her examination-in-chief, P.W. 2 has stated that she found her son lying smeared with blood on the southern side of Khandak Par at Bihar Sharif on the road and Gulab, Alok, Ranjan, Anjay, Babloo, Pappu, Sunil and Amit were fleeing away with pistol in their hands. Seeing this, she became unconscious and regained her sense on the next day. Thereafter, she went to the local hospital to receive the dead-body of her son, but police denied to handover the dead-body as it was an unclaimed dead-body.

14. In paragraph 9 of the evidence, P.W. 2 has clearly stated that police did not record any statement of her or her other relatives. She filed a protest petition in the Court through a learned Advocate. However, the said protest petition was not exhibited during trial. The examination-in-chief was contradicted during her cross-examination. In cross-examination, she has stated that on 18th of May, 2010 at about 12:00 noon, the driver of the tractor of Karu Gope informed about some mechanical disorder in the tractor and her son left the house with a sum of Rs. 5,000/- for repairing of the tractor and returned home at about 05:00 P.M. In the meantime, her son received a phone call and left the house, saying his mother that he would be coming within five minutes. After some time



of his departure, P.W. 2 heard a sound of firing, first she thought that it was the sound of some fire crackers. Thereafter, her son did not return back during the said night and as it was dead-hours of night, she did not leave the house to find out her son. If the statement of P.W. 2 in the cross-examination is believed, then her claim in examination-in-chief that on the very date of the occurrence she saw her son lying in pool of blood on the southern side of the gas godown at Khandak Par and the accused persons were fleeing away with pistol in their hands, is found to be a false statement. Secondly, she further has further stated in her cross-examination that she came to know in the next morning that Karu was murdered by gunshot injury. Thirdly, she heard that Suraj and Basiya Saran took him to some unknown place on the date of occurrence and she told that her son was murdered by Suraj Gope. There is absolutely no evidence as to how P.W. 2 came to know about the involvement of Suraj Gope. The cross-examination belies the statement made by her during examination-in-chief. According to her, her statement was not recorded under Section 161 of the Cr.P.C. Again, she, in paragraph 18 of the cross-examination, has stated that she conducted a search for her son along with her relatives. She left her house at about one and half hours after her son left



the house. She did not go to the place where the gas godown is situated and, therefore, she did not have any occasion to see the dead-body of the deceased/victim.

15. Now, if such evidence is accepted by this Court, it is absolutely an absurd proposition that the accused persons will wait for about two to three hours after allegedly causing murder of the deceased/victim, for P.W. 2 to see that they were fleeing away with pistol in their hands.

16. P.W. 3, namely, Kanti Devi, has also stated that Karu was murdered by Gulab, Anjay, Babloo, Alok, Ranjan, Pappu and Sunil. She also told that she heard the sound of firing at about 08:45 P.M. and her sister left the house to find out her son towards the eastern side of the house where the godown was situated. She also followed her and identified Babloo, Gulab, Alok, Sunil and Ranjan. She has also stated that she did not find the deceased on the date of the occurrence. However, she identified the accused persons under the street light.

17. It is important to note here that the informant/P.W. 1 has stated that the place of occurrence was dark and they found the dead-body under torch light and, thus, there is a discrepancy between the statements of the



informant/P.W. 1 and P.W. 3 with regard to source of light. It is also found from the evidence of P.W. 3 that her statement was not recorded by police. Again, in paragraph 5 of the cross-examination, she has stated that she made a statement to the police that Karu was murdered by Gulab, Ajay/Anjay, Babloo and Sunil. In paragraph 3 of the cross-examination, she has stated that she met one Mukesh and Sharda Gope after two months of the incident and came to know about the names of the assailants of the deceased/Karu.

18. Thus, it is absolutely not safe to rely on the evidence of P.W. 3 because she went on making different statement at different points of time regarding her knowledge about the death of Karu and the name of the assailants.

19. P.W. 4, namely, Anita Devi, who is the cousin sister of the deceased, unequivocally admitted in her examination-in-chief that she did not see anybody assaulting or causing injury by gunshot to Karu. However, other witnesses saw Gulab and Anjay running away with pistol in their hands. In her cross-examination, she has stated that after two days of the occurrence, she came to know from her maternal aunt that the victim was murdered. Therefore, her claim that she saw Gulab and Anjay fleeing away with pistol in their hands, cannot



be accepted as a true version of the incident.

20. P.W. 5, namely, Dr. K.K. Kshitiz, has conducted the *post-mortem* examination over the dead-body of the deceased and found the following injuries:-

“A lacerated wound margin inverted and charred scar having size 1.5” x 1.5” cranial cavity deep on occipetal region of scalp i.e. wound of entry. The injury is anti-mortem in nature.

On Dissection- Skull-Occipetal bone was fractured. Brain & meninges were lacerated and foreign body of size 1¼” spherical lodged in left frontal(illegible) was recovered(illegible) bullet.

Thorax- Both lungs intact & pale. Heart- All chambers were empty. Abdomen- Stomach contained about 3 ounce food material. U.B. empty. All other Viscera are intact & pale.

In my opinion, death occurred due to hemorrhage & shock due to above noted injury on Scalp caused by firearms weapon.”

21. P.W. 6, namely, Mahendra Yadav, is the neighbour of the deceased and P.W. 2. It is asserted from his evidence that he also took part in conducting search of the victim and in course of search, he found Gulab, Anjay, Alok and Babloo, who are fleeing away with pistol in their hands. P.W. 6 heard the sound of firing even prior to identifying the above-named accused persons. However, he also did not find out the dead-body. In cross-examination, he has clearly stated that the



victim/deceased did not receive gunshot injury in his presence and he cannot say as to who fired at the victim/deceased.

22. P.W. 7, namely, Rajendra Yadav, is the grandfather of the deceased. According to him, the incident took place on 12th of May, 2010 at about 07:00 P.M. Though according to the *fardbeyan*, the incident took place during the night of 18th/19th of May, 2010. P.W. 7 has also stated that he saw Gulab and Anjay running away with pistol in their hands. In paragraph-5 of the cross-examination, he has stated that he is deposing for the first time in Court, meaning thereby, he was not examined by the I.O. during the investigation of the case. He has also stated that he came to know in the hospital that his grandson was murdered, so he did know prior to 19th of May, 2010 that his grandson was murdered.

23. P.W. 8, namely, Bare Yadav, who claimed to be the only eye-witness to the occurrence, has stated, on oath, that on 18th of May, 2010 at about 09:00 P.M., he was proceeding towards his house from Bihar Sharif Railway Station by a motorcycle and when he reached near the gas godown, he saw Gulab Miyan, Anjay, Babloo and another person with pistol in their hands. Gulab Miyan and Anjay opened fire at the deceased and all of them fled away towards the northern side of the



locality. He did not state the matter to anybody due to fear. From his cross-examination, it is asserted that the victim/deceased was murdered at a distance of about 15 - 20 meters away from his house and he was shot from a distance of about 20 - 25 feet. This fact also cannot be believed in view of his own statement in paragraph 5 of his cross-examination, wherein, he has stated that the accused persons fired at him, touching a firearm on the back side of his head. If the victim/deceased was murdered, there must be blackening and tattooing around the wound of the deceased, but the *post-mortem* report does not suggest any such evidence with respect of the injury of the victim/deceased.

24. The learned Trial Court held the appellants' guilty on the theory of last seen together. According to him, the evidence of the witnesses was consistent that all the appellants/accused persons called the victim over phone to come with them to play and when he denied the same, they came to their house and took him away. Thereafter, the victim was murdered. Therefore, the theory of last seen together is applicable against the accused persons and it was within the special knowledge of the accused persons to explain the death of the deceased. Failure on their part would prove the culpability



of the appellants in the instant case.

25. Before we embark upon the theory of last seen together, it is important to note that neither the informant nor the Investigating Officer were examined in this case and, therefore, both the prosecution and the defence could not ascertain the veracity of contradictions in the evidence of the witnesses against the appellants. Under such circumstances, when there are material contradictions with regard to the identification of the accused persons as well as the time when the witnesses saw the deceased, examination of the I.O. was absolutely necessary. Furthermore, his/her examination was necessary because the witnesses have stated that Gulab and Anjay fired at the victim. If that be so, there must be two injuries on the person of the deceased. However, the Autopsy Surgeon (P.W. 5) found only one bullet injury on the body of the deceased. The I.O. did not take any attempt to recover the seized weapon. The recovered bullet was not produced before the Trial Court. It was not consented with the Autopsy Surgeon to ascertain his view as to whether the bullet was sufficient to cause the death of the victim in ordinary and natural course of business. Absence of such evidence, remains to be fatal for the prosecution

26. With regard to the circumstantial evidence, the



Hon'ble Supreme Court in the celebrated judgment of *Sharad Birdhichand Sarda vs. State of Maharashtra*; reported in (1984) 4 SCC 116 held in paragraphs 153 and 154 as follows:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the following observations were made: [SCC para 19, p. 807 SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,



(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”

27. In the instant case, there is absolutely no evidence as to who actually committed murder of the victim/deceased. The evidence is also absent on the point as to when the deceased was allegedly taken by the accused persons away from his home and as to when he was murdered. His dead-body was found by the informant (P.W. 1) at about 12:45 A.M. on 19th of May, 2010. Thus, there was a considerable time gap between his leaving the house and finding him dead. There is no evidence that, in the meantime, where the deceased had met with another person; in other words, the theory of last seen together is applicable when the deceased is found in association with the appellants soon before his death. There must be close



proximity between last seen together and the death. The evidence on record is absolutely absent on this point.

28. From the evidence of the witnesses, it is found that they were fleeing away. However, P.W. 2, P.W. 3 and others started searching out the victim about 2-2½ hours of his departure from his house. It is not reasonably possible that after committing the offence, the appellants will wait for 2-2½ hours only to afford the opportunity to the witnesses to see them fleeing away.

29. Last but not the least, the evidence on record, contains glaring contradictions, adds to the destruction of the prosecution case by non-examination of the Investigating Officer.

30. Surprisingly enough, though the Investigating Officer submitted *charge-sheet* under Section 27 of the Arms Act read with Section 34 of the IPC, but there cannot be any *charge-sheet* under Section 27 of the Arms Act read with Section 34 of the IPC, in view of the fact that Section 27 of the Arms Act is applicable only against the person who used the firearm to commit the offence.

31. Section 27 of the Arms Act reads as hereunder:-

“[27. *Punishment for using arms, etc.—(1) Whoever uses any arms or ammunition*



in contravention of section 5 shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

(2) Whoever uses any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.

(3) Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any other person, shall be punishable with death.]”

32. Therefore, the charge under Section 27 of the Arms Act read with Section 34 of the IPC shall also fail.

33. For the reasons stated hereinabove, we do not find any merit in these appeals and, therefore, we set aside the judgment of conviction and order of sentence referred to above and acquit the appellants, namely, Anjay Kumar [Cr. Appeal (DB) No. 661 of 2019]; Md. Gulab [Cr. Appeal (DB) No. 687 of 2019]; Babloo Kumar [Cr. Appeal (DB) No. 760 of 2019] and Alok Kumar @ Sandeep Kumar [Cr. Appeal (DB) No. 817 of 2019] of the charges levelled against them.

34. The appeals stand allowed.

35. The appellants, above-named, are said to be in



custody; therefore, they are directed to be released forthwith, if their custody is not required/wanted in any other matter.

36. Let the Trial Court Records and a copy of this judgment be sent immediately to the learned Trial Court and the concerned Jail authority for information and needful compliance.

37. The interlocutory application(s), if any, in all the four appeals stands disposed off accordingly.

(Bibek Chaudhuri, J)

(Rana Vikram Singh, J)

Praveen-II/Saurabh

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