

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.435 of 2021

Arising Out of PS. Case No.-253 Year-2015 Thana- ARA NAGAR District- Bhojpur

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JITENDRA KUMAR @ JITENDRA CHOUDHARY @ MITHAI Son of Sri Krishna Choudhary Resident of Mohalla- Aanand Nagar, Ara, P.S.- Ara Town, District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 297 of 2021

Arising Out of PS. Case No.-253 Year-2015 Thana- ARA NAGAR District- Bhojpur

=====

MUNNA TIWARI SON OF UMA SHANKAR TIWARI RESIDENT OF VILLAGE- BASAURI, P.S. SANDESH, DISTRICT- BHOJPUR, ARRAH

... .. Appellant/s

Versus

The State of Bihar BIHAR

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 412 of 2021

Arising Out of PS. Case No.-253 Year-2015 Thana- ARA NAGAR District- Bhojpur

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SANTOSH KUMAR RAI @ RAJU RAI S/o Prahlad Rai R/o Village-Bartiyar P.S.- Sandesh, District- Bhojpur at Arrah.

... .. Appellant/s

Versus

The State of Bihar Bihar

... .. Respondent/s

Indian Penal Code – Section 302,34 IPC

Arms Act – Section 27(1)

Appellants were convicted u/s-302 r/w 34 IPC and section 27(1) of the Arms Act by Judgment of conviction dated 23.02.2021 passed by the Ld. Addl. Sessions Judge XI, Bhojpur at Ara, and were sentenced to undergo imprisonment for life and to pay fine of Rs. 10,000/- for the offence u/s-302 r/w 34IPC, and imprisonment for a term of five(5) years along with a fine of Rs. 10,000/- for the offence u/s-27(1) of the Arms Act.

The deceased had died of two(2) gunshots. --- Neither of the two signatories on the F.I.R. has been examined at the trial. --- There appears to be some doubt about the timelines, and the suggested names of the appellants. --- The statements of the Informant(PW-3) who claims to be the witness to the occurrence is doubtful --- The names of the appellants --- Munna Tiwary and Santosh Kumar [Rai@Raju](#) Rai were absent in the fardhyan which casts serious doubt on the truthfulness of the prosecution version --- The prosecution story though appears to be based on eyewitness account, but the deposition of that witness raised doubts and leaves too many questions and too many unexplained circumstances, which have induced a reasonable doubt in our minds as to the prosecution having discharged the onerous burden of proving the guilt to the hilt --- Delay in lodging the F.I.R. often results in embellishments which is more often than not a creation of an afterthought on account of delay, and the F.I.R. not only gets bereft of the advantage of the spontaneity, but danger also creeps in regarding the introduction of a colored version of an exaggerated story – Trial Court has wrongly ignored a number of reasonable doubts --- No option but to give benefit of doubt to the appellants - The judgment and order of the conviction are thus set aside – The appellants are acquitted of the charges --- All the appeals are allowed – Appellants are in jail, they are directed to be released forthwith. ***Mehraj Singh vs. State of U.P. 1994(5)SCC 188*** relied on.

[Para 3, 11, 34, 35, 39]

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JITENDRA KUMAR @ JITENDRA CHOUDHARY @ MITHAI Son of Sri
Krishna Choudhary Resident of Mohalla- Aanand Nagar, Ara, P.S.- Ara
Town, District- Bhojpur.

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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CRIMINAL APPEAL (DB) No. 297 of 2021

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MUNNA TIWARI SON OF UMA SHANKAR TIWARI RESIDENT OF
VILLAGE- BASAURI, P.S. SANDESH, DISTRICT- BHOJPUR, ARRAH

... ... Appellant/s

Versus

The State of Bihar BIHAR

... ... Respondent/s

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with

CRIMINAL APPEAL (DB) No. 412 of 2021

Arising Out of PS. Case No.-253 Year-2015 Thana- ARA NAGAR District- Bhojpur
=====

SANTOSH KUMAR RAI @ RAJU RAI S/o Prahlad Rai R/o Village-Bartiyar
P.S.- Sandesh, District- Bhojpur at Arrah.

... ... Appellant/s

Versus

The State of Bihar Bihar

... ... Respondent/s

=====

Appearance :
(In CRIMINAL APPEAL (DB) No. 435 of 2021)
For the Appellant/s : Mr. Ajay Kumar Thakur
For the Respondent/s : Mr. Abhimanyu Sharma
(In CRIMINAL APPEAL (DB) No. 297 of 2021)



For the Appellant/s : Mr.Prateek Kumar
For the Respondent/s : Mr. Abhimanyu Sharma
(In CRIMINAL APPEAL (DB) No. 412 of 2021)
For the Appellant/s : Mr.Harsh Singh
For the Respondent/s : Mr.Abhimanyu Sharma

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE NANI TAGIA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 22-01-2024

1. All the three appeals have been taken up together and are being disposed of by this common judgment.
2. We have heard Shri Ajay Kumar Thakur, the learned Advocate for the appellant /Jitendra Kumar @ Jitendra Choudhary @ Mithai in Cr. Appeal (DB) No. 435/2021; Mr. Prateek Kumar, Advocate for the appellant /Munna Tiwari in Cr. Appeal (DB) No. 297/2021; and Mr. Harsh Singh, Advocate for the appellant/Santosh Kumar Rai @ Raju Rai. Mr. Abhimanyu Sharma, the learned Additional Public Prosecutor has appeared on behalf of the State in all the three appeals.
3. The appellants have been convicted for the



offences under Section 302/34 of the Indian Penal Code and Section 27(1) of the Arms Act by judgment dated 23.02.2021 passed by the learned Additional Sessions Judge -XI, Bhojpur at Ara in Sessions Trial No. 304 of 2016 arising out of Ara Town P.S. Case No. 253 of 2015. By order dated 03.03.2021, they have been sentenced to undergo imprisonment for life, to pay a fine of Rs. 10,000/- for the offence under Section 302/34 IPC and imprisonment for a term of five years along with a fine of Rs. 10,000/- for the offence under Section 27(1) of the Arms Act. The sentences have been ordered to run concurrently.

4. The brother of the informant (P3), namely, Mukesh Yadav @ Vikki is said to have been shot dead by the appellants.

5. It is the illustrious case where the un-professionalism of the police and prevaricating as well as mendacious depositions of the witnesses have provided a slam dunk to the appellants.



6. The informant/Lokesh Yadav (PW3) has lodged the First Information Report, which has been recorded by Satyendra Kumar Shahi (PW5), the I.O. of the case at 9.26 hours on 05.06.2015, alleging that on the same day at about 2.30 P.M. in the day, there was a brawl in the salon of one Dhananjay Pandit where appellant / Jitendra Kumar @ Jitendra Kumar Choudhary @ Mithai and one Munna Sonar (an absconder) had fought with afore-noted Dhananjay Pandit and his elder brother. After about an hour, appellant /Jitendra Kumar @ Jitendra Kumar Choudhary @ Mithai, aforesaid Munna Sonar and three others again came to the salon of Dhananjay Pandit and started pelting stones. Some of the stones hit the shutter of the mobile shop of PW3, which was being run under the name and style of 'Mobile Museum'. Two of the employees of PW3, namely, Vikash Kumar Gupta and Satish Kumar objected, which led to an altercation with them as well. Vikash Kumar Gupta thereafter telephoned the



deceased (Mukesh Yadav @ Vikki) and narrated about the occurrence to him. The deceased along with PW3 and a cousin of the deceased, namely, Sunny reached the mobile shop and interceded with the miscreants. The issue was pacified. Later, as the allegation in the F.I.R. goes, at about 5.45 P.M., about 5 -6 persons from different locality came near the shop of the deceased; talked amongst themselves and thereafter scarpered. At about 6.00 P.M. again, appellant / Jitendra Kumar @ Jitendra Kumar Choudhary @ Mithai, Munnar Sonar (an absconder) and three others came at the mobile shop of the informant and Jitendra Kumar @ Jitendra Kumar Choudhary @ Mithai and Munna Sonar started firing indiscriminately. To save himself, PW3 hid himself behind the desk. The deceased was standing outside his shop along with Vikash Kumar Gupta. In the shop, Satish Kumar and Vinay Kumar were also present. The informant has further alleged that the appellant / Jitendra Kumar



@ Jitendra Kumar Choudhary @ Mithai approached near the deceased and fired from his weapon from a close range. Thereafter, all the miscreants ran away. The victim was taken to local hospital at Ara, from where he was referred to PMCH for better treatment. While on the way to PMCH, the deceased succumbed to the injuries.

7. On the basis of the afore-noted fardbeyan statement, a case vide Ara Town P.S. Case No. 253/2015 was registered on 05.06.2015 for investigation for the offences under Sections 302/34 of the Indian Penal Code and Section 27 of the Arms Act.
8. Be it noted that Vikash Kumar Gupta, Sunny, Dhananjay Pandit and his elder brother with whom the miscreants had fought earlier, Satish Kumar and Vinay Kumar were never examined at the Trial.
9. It is also relevant to note here that the F.I.R. was signed by Jitendra Yadav, one of the uncles of the deceased, about whom PW3 has said nothing in



the F.I.R. The other signatory to the F.I.R. is Vikash Kumar Gupta, an employee of the deceased, who at the time of occurrence was standing close to the deceased and who too has not been examined at the trial.

10. These facts have been mentioned only to demonstrate that the persons who could have really unravelled and decrypted the story, have been chosen to be left behind; the reason remaining unknown to us.

11. The deceased had died of two gunshots. He had been injured in his head. The dead body was subjected to postmortem examination on the same day at 9.25 P.M., which fact is discerned from the deposition of Md. Moibul Haque Ansari, the doctor who had conducted the postmortem examination. The post-mortem chart (Ext. 2/1), however, does not state as to when the dead body was brought to the morgue for postmortem examination and at what time, the postmortem examination began. It appears



from the timeline suggested by the prosecution that the recording of the F.I.R and the post-mortem examination was almost contemporaneous.

12. A reference, therefore, was taken by the learned Advocates that not without any reason, the inquest report was never brought on record.

13. According to the deposition of Investigator (PW5), the inquest was performed at around 8.40 P.M. i.e. before the lodging of the First Information Report. Since the inquest report is not on record and we were desirous of looking at the timelines, we looked at it from the police papers and it was apparent that necessary details in the inquest report were not furnished, namely, the persons who had killed the deceased and the registration of the F.I.R. prior to starting the inquest proceedings.

14. Equally important would be the omission of the prosecution to bring on record, the first information which was received by the Investigator at the police station regarding the occurrence. It was much prior



to the recording of the F.I.R. That information, if revealed during the trial, would surely have given some certitude to the accusation against the appellants. Apart from this, we have also noticed that the police arrived at the P.O., which is the mobile shop of the deceased, but the I.O. did not consider it necessary to record in the police papers about the presence of any blood or of fixing the place where the murder had taken place i.e. whether the deceased was shot at outside his shop or inside the shop. However, contemporaneous with the inquest report, there is a seizure list (Ext. 4), which depicts that two empty/used cartridges were recovered from the place of occurrence. All these facts have been noted by us and stated here for the reason that there appears to be some doubt about the timelines and, therefore, the suggested names of the appellants.

15. To test it further, we have carefully examined the deposition of the informant / Lokesh Kumar



Yadav (PW3), who according to the F.I.R, is a witness to the occurrence. The statement of PW3 that he sat down in order to avoid being hit by the firing, makes his story a bit doubtful with respect to his identifying the deceased having been shot from a close range by appellant / Jitendra Kumar @ Jitendra Kumar Choudhary @ Mithai.

16. We say so also for the reason that though the deceased was hit twice but there was no exit wound and there were no burning or any soot over the wound. The entire skull was lacerated. The firing had begun by the miscreants from outside. If PW3 and several others, who have been named above, held on to the banister for saving themselves, it appears to be rather unusual that the deceased would have stood outside the shop and be a sitting-duck or cannon fodder to the miscreants. Apart from this, we have also found the deposition of PW3 to be full of gaping holes and yawning gaps which are not explicable and, therefore, not without



scintilla of doubt.

17. In his deposition before the Trial Court, PW3, of his own, alleged that appellant/ Jitendra Kumar @ Jitendra Kumar Choudhary @ Mithai, Munna Sonar (an absconder) and appellants/Munna Tiwary and Santosh Kumar Rai @ Raju Rai had fought with Dhananjay Pandit and his brother at about 2.30 P.M in the day of the occurrence.

18. P.W. 3 was never a witness to the afore-noted dust-up as the real fight had begun an hour later when the stone pelting by the miscreants also hit the shutter of the shop of the deceased. It was at that point of time that Vikash Kumar Gupta, one of the signatories to the FIR, informed the deceased about the occurrence. It was only then that the deceased, accompanied by P.W. 3 and others, came to the shop and brought about an armistice with the miscreants.

19. Therefore, the opening accusation of P.W. 3 about the appellants fighting with Dhananjay Pandit



or his brother in his salon is something which P.W. 3 cannot have vouched for. In his later part of the examination-in-chief, he has stated that the miscreants had come on two vehicles, one of which was used by appellants/Jitendra Yadav @ Mithai and Munna Sonar, whereas the other by the two other appellants. Firing, according to P.W. 3, was resorted to by appellant / Jitendra Yadav @ Mithai and aforesaid Munna Sonar (an absconder). The specific assault on the deceased was made by appellant/Jitendra Yadav @ Mithai.

20. As noted above, it appears to be rather doubtful that P.W. 3 was present there at the P.O. The reason for us to doubt his presence as also his having witnessed the occurrence is not only because of the gaps in his version but also because of Ranjit Kumar and Jitendra Yadav, P.Ws. 1 and 2 respectively of having deposed before the Trial Court that the informant (P.W. 3) had not gone to the hospital along with the deceased. This assumes



significance as P.W. 3 was present in the house when Ranjeet Kumar, the maternal-uncle of the deceased, had come to the house on the asking of his sister, at about 06:30, when he had learnt that his nephew had been killed. It was only later that he learnt about the assailants. If P.W. 3 knew about the assailants, there was no reason why their names were not referred to in the inquest proceedings or in their statements before the police or for that matter the names of the two other appellants, namely, Munna Tiwary and Santosh Kumar Rai @ Raju Rai in the FIR.

21. The fardbeyan was recorded at 9:26 PM.
22. We do not reject the claim of P.W. 3 only on account of the absence of the names of appellants/ Munna Tiwary and Santosh Kumar Rai @ Raju Rai in the fardbeyan but on an overall assessment of the evidence, which casts a serious doubt on the truthfulness of the prosecution version.
23. The inquest report was a document which



would have cleared the cob-webs with respect to the timing of the occurrence and the names of the assailants, if P.W. 3 had actually seen the occurrence.

24. Vikash Kumar Gupta, Sunny and two others, who were stated to be there at the P.O. had not been examined at the Trial. In that event, only P.W. 3 and Jitendra Yadav, an uncle of the deceased and about whom there is no reference in the fardbeyan, are the available so-called eye-witnesses of the occurrence.

25. Jitendra Yadav claims to be standing in front of the shop when the firing took place as he was getting his mobile telephone repaired. How did he escape from being hurt? What did he do to save his own nephew ?

26. All these facts have remained under wraps. Even otherwise, he claims to have gone to the local hospital at Ara, where first aid treatment was given to the deceased, while still alive, for about fifteen



minutes; whereafter he was referred to P.M.C.H. for better treatment. He had accompanied the deceased from the Sadar Hospital to P.M.C.H. and back to Sadar Hospital mid-way, when the deceased had died. He has named three of the persons (none of whom have been examined at the Trial) to be along with him while taking the deceased to the hospital. Till such time, there was no whisper of the names of the assailants. Even the Investigator claims to have gone to the hospital and stayed there for whole time. This was obviously before 09:26 P.M. when the fardbeyan was recorded.

27. We are not hinting at any delay in recording of the fardbeyan, but only highlighting the circumstances where late in the night, fardbeyan was recorded with one appellant being named and two others as unknown. Had P.W. 3, or for that matter P.W. 2, been witnesses to the occurrence, this would not have been the case.

28. From the scenario which appears from a



conspectus of the entire materials against the appellants, it appears that few of the persons had fought at 02:30 P.M. with Dhananjay Pandit and his brother. An hour later, they have come back for some kind of reprisal. It was at that time that Vikash Kumar Gupta, one of the employees of P.W. 3, informed the deceased about the occurrence. The issue was resolved. The miscreants had gone away. There was no recrimination from the side of the deceased or the informant.

29. What would have possibly enraged the appellants?

30. Thereafter, five to six persons again congregated near the salon of Dhananjay Pandit. They have not been identified by any one of the witnesses. They talked amongst themselves and then scooted away. It is then that appellant/JitendraYadav @ Mithai and Munna (an absconder) and the two other appellants arrived at the scene and the accused persons started firing indiscriminately.



31. This, therefore, reflects that perhaps appellant/Jitendra and others may have been spotted by P.W. 3 or perhaps P.W. 2 but only at 02:30 P.M. and thereafter, when they had come again. Later, there could be somebody else in the group who had resorted to firing or at least there is no certainty that the appellants were part of the marauding crowd.

32. The learned Advocates for the appellants have submitted that the failure of the prosecution to produce necessary documents at the Trial, about which affirmation has been made by the witnesses, leaves much space for speculation. Additionally, it gives rise to an adverse inference that had it been produced, it would have disproved the case of the prosecution (refer to ***Sheikh Meheboob @ Hetak and others v. State of Maharashtra; 2005 (10) SCC 387***).

33. The prosecution story though appears to be based on an eye-witnesses account but the deposition of that witness raises serious doubts and



leaves too many questions and too many unexplained circumstances, which have induced a reasonable doubt in our minds as to the prosecution having discharged the onerous burden of proving the guilt to the hilt.

34. It has further been submitted that the FIR in a criminal case and particularly in a murder case is very vital and valuable piece of evidence for the purposes of appreciation of evidence laid at the Trial. The object of insistence on prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the roles played by them, the weapons, if any used, as also the names of the eye-witnesses, if any. Delay in lodging the FIR often results in embellishments which is more often than not, a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of the spontaneity. Danger also creeps in regarding the introduction of a



colored version or an exaggerated story.

35. With a view to determine whether the FIR was lodged at the time when it is alleged to have been recorded, the Courts normally look for certain external checks and once such check would be the inquest report and the recording of statements of witnesses, who had perhaps seen the occurrence (refer to ***Meharaj Singh v. State of U.P.; 1994 (5) SCC 188***).

36. Similar caution has been sounded by the Hon'ble Supreme Court in ***Ramesh Baburao Devaskar and Ors. v. State of Maharashtra; 2007 (13) SCC 501*** that if the external checks to the correctness to the prosecution version result in failed validation, it ought to catch the attention of the Courts appreciating the evidence (also refer to ***State of Rajasthan v. Teja Singh; 2001 (3) SCC 147***).

37. Thus, to tie the strings together, the learned advocates for the appellants have submitted that



the absence of the name of appellants/Munna Tiwary and Santosh Kumar Rai @ Raju Rai in the fardbeyan of P.W. 3, who is an eye-witness to the occurrence; non-production of inquest report; the post-mortem report being not in-concord with the ocular testimony of shooting from a close range; and the Investigator completely denying having been told the circumstances, namely, of miscreants having come on two motorcycles the prosecution case falters at the seams.

38. We have also examined the reasons adduced by the learned Trial Court for accepting the so-called eye-witness account of P.Ws. 2 and 3 and have found that perhaps the Trial Court wrongly ignored a number of reasonable doubts and even though, it could not enter into the dark space which had eclipsed the truth, it recorded conviction of the appellants and saddled them with sentence.

39. We have no option but to give benefit of doubt to the appellants.



40. The judgment and order of conviction is thus set aside.
41. The appellants are acquitted of the charges.
42. All the appeals are allowed.
43. Since all the appellants are in jail. They are directed to be released forthwith, unless their detention is required in any other case.
44. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.
45. The records of this case be returned to the Trial Court forthwith.
46. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Nani Tagia, J)

sunilkumar/-

AFR/NAFR	AFR
CAV DATE	N/A
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