

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.38 of 2013**

Arising Out of PS. Case No.-125 Year-1987 Thana- ARA MUFFSIL District- Bhojpur

Banshidhar Singh @ Banshi Singh S/O Late Mangal Singh Resident Of
Village And Post- Bakhorapur, Police Station- Barahara, District- Bhojpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Shashank Shekhar Sinha, Advocate
: Mr.Makardhwaj Upadhyay, Advocate
For the Respondent/s : Mr.A.M.P.Mehta, APP

**CORAM: HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA
CAV JUDGMENT**

Date :06-05-2024

Heard Mr.Shashank Shekhar Sinha, learned counsel
for the appellant and Mr.A.M.P.Mehta, learned APP for the State.

2. The present appeal is directed against the judgment and sentence dated 17.12.2012 and 18.12.2012 passed by learned Adhoc Additional Sessions Judge, F.T.C.-II, Bhojpur in S.Tr.No.22/1990 (arising out of Ara Muffasil P.S.Case No.125/1987) whereby and whereunder the appellant has been convicted under Section 396 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.5,000/-.

3. The prosecution case, in short, is that an armed dacoity was committed in the house of the informant situated in village Basantpur, Police Station - Arm Muffasil, District Bhojpur



on 22.11.1987 in night. A number of dacoits armed with big Double Barrel Guns, Gun and Small country Pistols broke open the door, entered in the house and looted properties worth Rs. 40,000/- Informant's Grand Father Visheshwar Rai told him as he was slept at his dalan, on the noise his brother Bhola Rai came out with Torch from his courtyard (Angan) and said as I have come then he heard about the saying of Vijay Bahadur as Bhola has come, shot fire; as such his brother fell down due to bullet shot, he (Visheshwar Rai) reached near his brother then Bhola told that "Kameshwar Singh shot fired him". After that Dacoits escaped. In the course of occurrence, Bhola shot dead.

4. Learned counsel for the appellant submits that the genesis of case is the FIR bearing Ara Muffasil P.S.Case No.125 of 1987 which was registered on 23.11.1987 based on the fardbeyan of informant, namely, Ram Dular Yadav as recorded on 23.11.1987 at 5.30 A.M. against 09 named accused persons including the appellant. The prosecution after completion of investigation, chargesheet against eight accused persons (Except this appellant) was submitted vide chargesheet No.12 of 1988 dated 23.02.1988 by stating this appellant as absconder, and accordingly cognizance was taken on 23.02.1988 for the offence punishable under Section 396 of Indian Penal Code. The case was committed for split trial



by separating the case of this appellant, Yogendra Singh and other suspects against whom the investigation was still going on and accordingly S.Tr.No.436 of 1988 was registered. The said 08 accused persons were convicted by the judgment dated 19.03.1990 passed by the learned 7th A.D.J., Ara and each accused were sentenced to undergo rigorous imprisonment for life. The convicted eight accused persons preferred Cr.Appeal before this Hon'ble Court vide Cr. Appeal No. 179 of 1990 (D.B.) (Jagnarayan Singh and Others vs. The State of Bihar). The Division Bench of this Court after hearing the parties have been pleased to acquit all the 08 convicted persons by allowing the appeal vide order/judgment dated 06.05.1993.

5. The Investigating Officer filed a petition before the learned Court below concerned to the separate trial on 23.02.1988 for the permission to continue further investigation and the same was accorded by the learned C.J.M., Ara vide order dated 23.02.1988. Hence supplementary Charge-sheet vide Charge-sheet No. 124/89 dated 15.11.1989 was submitted under Section 396 of I.P.C. against the appellant. The case was committed for sessions trial and Sessions Trial No. 22/1990 was registered. The appellant pleaded his innocence in respect to contents of the charge as framed, hence trial of the appellant has commenced. The



prosecution examined two witnesses, namely, P.W.1 Dev Narayan Rai, who is full brother of the informant and claimed as eye witness, P.W.2 Ram Ram Dular Rai informant himself claimed as eye witness. The evidence of the prosecution had been closed on 20.07.2012, thereafter the statement under Section 313 of appellant accused was recorded on 24.07.2012. The appellant stated about his innocence and totally denied the allegation regarding alleged occurrence and the appellant adduced the judgment passed by the Division Bench of this Court in Cr.Appeal No. 179 of 1990 arising out from Sessions Trial No. 436/1988 and the same is marked as Exhibit-A.

6. Learned counsel for the appellant submits that in course of argument, the prosecution exhibited some documents such as FIR, fardbeyan, postmortem report and the same serial i.e. the documents which had been exhibited and marked as Exhibit in the Sessions Trial No. 436/2018 arising out from the same Ara Mufassil P.S Case No. 125/ 87. Later on, certified copy of those documents has been submitted and upon the same substituted Exhibit marks were made, which are as follows:-

Sl.No.	Exhibit Mark No.	Description
1.	Ext.1	Seizure list
2.	Ext.2	Signature of informant on his fardbeyan
3.	Ext.3	Injury report of Bhushan Yadav



4.	Ext.4	Postmortem report of Bhola Yadav
5.	Ext.5	Fardbeyan of informnat
6.	Ext.6	Formal FIR
7.	Ext.7	Inquest Report
8.	Ext.8	Judgment of case No.G.R. 1577/85,T.R. 61/89 (State Vs. Chhali Yadav

7. Learned counsel for the appellant submits that the defence raised the contention both examined witnesses are full brother and also interested witnesses, the other witnesses mentioned in the Fardbeyan are not examined, an injured person namely Bhushan Yadav also has not been examined, which cast serious doubt on the prosecution version, Investigating Officer and Doctor of the case are not examined, in absence of medical report, a case U/S 396 of IPC cannot be proved as the cause of death of Bhola Rai has not been proved , the document of the case of Session Trial No. 436/1988 cannot be admissible permissible as evidence in this case, and in Cr. Appeal No. 179/1990, this Hon'ble High Court has pleased to acquit the other accused person of this case and also observed that the Fardbeyan is ante-dated, and the identification of the accused person as participants in the alleged dacoity by the eye witnesses who are all of the same family does not inspire confidence, and the entire prosecution case has no leg to stand but the learned trial court gave weightage of the plea as advanced by the prosecution in response to the aforesaid contention of the defence. The plea of prosecution before the



learned trial court the accused persons in FIR named accused and appellant was absconder and whose absconding shows his guilty mind. Independent witnesses and other cited witnesses have concerned were examined in previous case (Sessions Trial No. 436/1988) which was the basis of conviction of the 8 accused persons in which I.O.and Doctor also examined and exhibit has been marked in respect to the FIR, Fardbeyan, Postmortem report and Inquest report, and on the basis of the aforesaid, the learned trial court held the guilty of the appellant for the offence as alleged by the prosecution and learned trial court convicted the appellant for the offence punishable under Section 396 of IPC vide order/judgment dated 17.12.2012 and further passed the order of sentence on 18.12.2012as rigorous imprisonment of 10 years and fine to a tune of Rs. 5,000/-

8. Learned counsel for the appellant submits that from a bare perusal of the evidence of P.W.1 and P.W.2 it appears that both the witnesses are belonging to same family and their evidence is not inconsistency and in view of the version of P.W.2 with regard to the location and situation of the house and sleeping position of P.W.1, the evidence of P.W.1 in respect to the identification of the accused person cannot be relied because the entry and exit of the dacoits was taken place in the back of head of



P.W.1 and no explanation has been given by him in respect to substantiate the injury as allegedly caused to Bhola and his brother in law.

9. The explanation of injury caused to Bhola Rai, Bhushan Yadav and son-in-law of Bhola could not be substantiated by the evidence of P.W.1 and P.W.2 and in the facts and circumstances, the investigating officer of the case who had taken part in the investigation and submitted the charge sheets was necessitated for the purpose of corroboration the location and situation of the house of the informant but the Investigating Officer has not been examined in the present case and further corroboration in the present case with respect to postmortem of alleged deceased is required, which test amounts the examination of doctor who conducted the postmortem for proper explanation of the injury but the Doctor has not been examined in the present case and in view of the aforesaid, the inquest seizure list and postmortem report have not been proved and it would cause prejudice to the appellant.

10. Learned counsel for the appellant has relied upon the judgment of the Hon'ble Apex Court in the case of **Munna Lal Vs. State of Uttar Pradesh**, reported in **2023 SCC OnLine SC**



80, paragraph Nos.-28,39 and 40 of the said judgment are reproduced hereinbelow:

“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). Section 134 of Indian Evidence Act, 1872, enshrines the well-recognized maxim that evidence has to be weighed and not counted. In other words, it is the quality of evidence that matters and not the quantity. As a sequitur, even in a case of murder, it is not necessary to insist upon a plurality of witnesses and the oral evidence of a single witness, if found to be reliable and trustworthy, could lead to a conviction.

(b). Generally speaking, oral testimony may be classified into three categories, viz.:

- (i) Wholly reliable;*
- (ii) Wholly unreliable;*



(iii) Neither wholly reliable nor wholly unreliable.

The first two category of cases may not pose serious difficulty for the court in arriving at its conclusion(s). However, in the third category of cases, the court has to be circumspect and look for corroboration of any material particulars by reliable testimony, direct or circumstantial, as a requirement of the rule of prudence.

(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). Discrepancies do creep in, when a witness deposes in a natural manner after lapse of some



time, and if such discrepancies are comparatively of a minor nature and do not go to the root of the prosecution story, then the same may not be given undue importance.”

“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”.

“40. As far as non-obtaining of ballistic report is concerned, it is no doubt true that its essentiality would depend upon the circumstances of each case. Here, since no weapon of offence was seized, no ballistic report was called for and obtained. Although Mr. Giri contended that Munna Lal had a licensed gun, this Court has not been able to trace any evidence in the records in regard thereto.



However, nothing turns on it. The failure/neglect to seize the weapons of offence, on facts and in the circumstances of the present case, has the effect of denting the prosecution story so much so that the same, together with non-examination of material witnesses constitutes a vital circumstance amongst others for granting the appellants the benefit of doubt”.

11. Learned counsel for the appellant submits that the Cr. Appeal No. 179/1990 arose from the S.Tr.No. 436 of 1988 (arising out of Ara Muffasil P.S.Case No.125 of 1987) are genesis of the case was the fardbeyan as recorded and upon the same FIR was registered. The genesis of the S.Tr.No.22 of 1990 is the same as the Fardbeyan upon which the same FIR has been registered and the judgment passed in the trial is under challenge in the present Cr. Appeal No. 38/2013. The Division Bench of this Hon'ble Court held that the said fardbeyan is ante dated and further impeached the credibility of the identification of the named accused in the FIR which also includes this appellant. And in the aforesaid, the judgment passed in Cr. Appeal No. 179 of 1990 would operate as estoppel in regard all finding which are essential to sustain the judgment and both prosecution witnesses are not



trustworthy witnesses and so the prosecution has failed to prove the case beyond reasonable doubt.

12. The appeal filed by the appellant is allowed, the impugned judgment and sentence dated 17.12.2012 and 18.12.2012 passed by learned Adhoc Additional Sessions Judge, F.T.C.-II, Bhojpur in S.Tr.No.22/1990 (arising out of Ara Muffasil P.S.Case No.125/1987) are hereby set aside. The appellant is acquitted from all the charges levelled against him in the present case.

13. Let the appellant be set free at once, if he is not warranted in any other case.

(Rajesh Kumar Verma, J)

Nitesh/-

AFR/NAFR	NAFR
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