IN THE HIGH COURT OF JUDICATURE AT PATNA
GOVT. APPEAL (DB) No.7 of 2019

Arising Out of PS. Case No.-4 Year-2014 Thana- GOPALPUR District- West Champaran

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THE STATE OF BIHAR

... ... Appellant/s

Versus

1. GIRISH LAL @ GIRISH KUMAR, Son of Mohan Lal, Resident of Village- Mohchhinain, P.S.- Gopalpur, District- West Champaran.
2. Sukhen Sah, Son of Late Mahanth Sah, Resident of Village- Ghogha, P.S.- Gopalpur, District- West Champaran.
3. Manbodh Sah, Son of Late Mahanth Sah, Resident of Village- Ghogha, P.S.- Gopalpur, District- West Champaran.
4. Jakir Mian @ Jakir Ansari, Son of late Atullah Ansari, Resident of Village- Bankat Puraina, P.S.- Chanpatia, District- West Champaran.
5. Vinod Singh, Son of Late Surya Singh, Resident of Village- Banwa Tola, P.S.- Majhaulia, District- West Champaran.
6. Mithu Singh @ Diwakar Singh, Son of Chuman Singh, Resident of Village- Choubey Tola, P.S.- Chanpatia, District- West Champaran.

... ... Respondent/s

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Appearance :

For the Appellant/s : Mr. Dilip Kumar Sinha

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)

Date : 28-09-2020

Heard learned counsel for the appellant and learned counsel for the respondents.

I.A. No. 1 of 2019

The above mentioned Interlocutory Application has been filed for condonation of delay of 8 months 15 days in filing the present appeal.

Considering the grounds taken in the interlocutory application showing sufficient cause for not filing the present appeal in time, the delay in filing the appeal is hereby condoned.

Govt. Appeal (DB) No. 7 of 2019

The present appeal has been preferred by the State of Bihar against the judgement of acquittal dated 2.6.2018 passed by the learned Additional Sessions Judge FTC II, Bettiah, West Champaran in S.T. No. 542 of 2014 arising out of Gopalpur P. S. Case No. 4 of 2014, whereby and whereunder the respondents have been acquitted for the charges under Sections 302/120B of the Indian Penal Code and Section 27 of the Arms Act.

The prosecution case got initiated on the fardbeyan of the informant Janak Mishra recorded on 10.1.2014 to the effect that the informant P.W. 11 Janak Mishra, the father of the deceased and P.W.1 Hridya Nand Mishra brother of informant were going to see their ailing relative in village Pakrihar. In the meantime, the informant saw that his son Anil Mishra was also leaving

the house for some work, on his motorcycle. On enquiry, the son of the informant Anil Mishra conveyed to him that he was going to participate in a Panchayati at village Bakulahar diversion. Thereafter, all the three left their house together but when they reached near Bakulahar chowk, the informant P.W. 11 and his brother P.W. 1 turned towards the western side whereas his son turned towards the village Bakulahar. After an hour, while the informant P.W. 11 and his brother P.W. 1 Hridya Nand Mishra were returning after visiting their ailing relative, they reached near Fazihatowa basic school, at about 12.30 P.M., they heard the sound of gun firing. They got scared and saw several persons on three motorcycles armed with pistol. The informant P.W. 11 and his brother P.W. 1 identified four persons, namely, Manbodh Sah , Mithu Singh, Vinod Singh and Jakir Mian alias Ansari. Thereafter the informant and his brother proceeded further and saw the motorcycle of his son Anil Mishra in parked position. However, the son of the informant was lying in a pool of blood in injured condition.

It is further claimed by the informant P.W. 11 that his son stated to him and his brother P.W. 1 that he was shot at at the behest of Girish Lal, respondent no. 1 who wants to became Mukhiya. On hearing the sound of gun firing, the villagers

reached on the spot and thereafter the injured was brought to MJK Hospital, Bettiah where the doctor declared him dead.

The motive of the occurrence is alleged to be political one as the son of the informant got elected as Mukhiya, which was not liked by the respondent no.1 Girish Lal and hence, in conspiracy with respondent no. 6, Mithu Singh, respondent no. 5, Vinod Singh, and others, the son of the informant has been killed.

On the basis of the aforesaid fardbeyan Gopalpur P.S. Case No. 4 of 2014 was registered under Section 302 of the IPC. On conclusion of investigation, the police submitted chargesheet. Consequently, after taking cognizance, the learned Judicial Magistrate committed the case to the Court of Sessions vide order dated 31.7.2004. Consequently, charges wre framed.

In order to substantiate its charges, the prosecution examined 17 witnesses whereas the defence examined 3 witnesses. Apart from that, the prosecution and the defence also exhibited several documentary evidence.

Except P.W. 1 Hridya Nand Mishra and P.W. 11, Janak Mishra, the informant, all are hear say witnesses.

Considering the evidence of PW-1 Hridaya Nand Mishra

and PW-11 Janak Mishra, who are only the eye witnesses of the occurrence, the learned trial Court doubted their credibility on the ground that the occurrence took place in an open place but no independent witness has witnessed the occurrence. P.Ws. 1 and 11, being uncle and father of the victim, respectively, suggested that they reached the place of occurrence hearing gun-shot firing and found the victim Anil Mishra, who conveyed to them that at the behest of repondent No.1, Girish Lal, he has been shot at, but the postmortem report and the nature of injury coupled with the evidence of doctor PW-12 suggests that, the victim was not in a position to state anything. On the basis of CDR and tower location of the mobile phone of PW-1, who is an Advocate's clerk, being found in an around Bettiah Civil Court at the relevant time, the learned Court below has doubted his presence at the place of occurrence. Hence, the learned Court below recorded the judgement of acquittal of respondents.

P. Ws 1 and 11 are witnesses to the circumstance that they saw the accused persons fleeing away with arms from the place of occurrence, but this circumstance has not been proved by any other witness.

The learned trial Court has doubted the presence of P. Ws 1 and 11 at the P.O., because Rinku Ojha and Umesh Sah, the

owner and driver, respectively, of the Bolero vehicle on which the victim was taken to the hospital, have been examined as D. Ws 1 and 2 and they, in their evidence, have stated that none of the family members of the victim, were present to take the victim to hospital. Hence, the evidence of these two witnesses completely demolishes the claim of P.Ws 1 and 11 that they reached at the P.O. immediately after occurrence, and accordingly, the learned trial Court has recorded the acquittal of respondents.

Learned counsel for the appellants submits that P. Ws 1 and 11 deposed on the basis of oral dying declaration and hence their credibility cannot be impeached due to certain inconsistencies. The CDR and mobile tower locations, though exhibited, but have not been proved as per the procedure prescribed under Section 65 B of the Indian Evidence Act. P.Ws 1 and 11 saw the accused persons fleeing away with arms on motorcycles immediately after the occurrence, hence, the evidence of P.Ws 1 and 11 was enough for the trial Court to record the judgement of conviction.

Learned counsel for the respondents submits that after meticulously analysing the evidence, the learned trial Court has recorded the judgement of acquittal. The evidence of P. Ws 1

and 11 is not trustworthy as they are interested witnesses being uncle and father of the victim.

P.W 12 who conducted the autopsy on the dead body of the victim, has clearly stated that after receiving said injury, no injured can remain conscious which is corroborated by the evidence of P.W. 11 to the effect that once the victim fell unconscious, he never regained consciousness or came back to his senses. The presence of P. Ws 1 and 11 on the place of occurrence becomes doubtful in view of the evidence of D. Ws. 1 and 2, on whose vehicle the victim was taken to the hospital. The presence of P.Ws. 1 and 11 at the P.O. further becomes doubtful in view of the evidence of of PW-6, Rajesh Das who said that none of the family members were present at the place of occurrence.

Having heard learned counsel for the parties, no doubt the prosecution has examined 17 witnesses but out of them P.W.6 Rajesh Das is a witness to the seizure, P.W-10, Jagdish Das who is a formal witness who has proved the signature of the seizure list witness on the seizure list, but has been declared hostile, P.W.12 is the Dr. Ashok Kumar Chaudhary who conducted the autopsy. P. W. 13 Md. Rafikur Rahman is the S.H.O. of Gopalpur Police Station who recorded the fardbeyan of the

informant. PW-14, Ajay Kumar Mishra is the first IO. PW-15, Manmohan Singh is the dafadar of Circle Office who proved the Sanha filed by the deceased. P. W-16 is the second I.O. who submitted chargesheet and PW-17 is a formal witness who proved the FSL report.

P.W.1, Hirdya Nand Mishra and P.W.-11, Janak Mishra are the uncle and father of the victim, who have claimed to be the direct witness, have deposed that they saw accused persons fleeing on motorcycle with arms and when they reached on the spot, they found the victim in an injured condition who conveyed that the occurrence had taken place at the behest of respondent no.1, Girish Lal.

From perusal of the entire evidence, it is evident that not even a single witness saw the actual occurrence of assault. The occurrence took place in an open area but no independent witness has come forward to support the prosecution case. No doubt, even the interested witness's evidence cannot be ignored if they are creditworthy.

From the evidence on record, it appears that P. Ws. 1 and 11 claimed to have gone to meet some ailing relative. On return journey, they heard gun-short firing and thereafter first they saw the motorcycle of the victim parked and thereafter they found

the victim in an injured condition. Prior to that, they saw few accused persons fleeing away with arms on motorcycle.

So far as the medical evidence is concerned, the doctor who conducted the postmortem has found two injuries, which are as follows :-

> "Injury No.1 -One lacerated wound over back of the chest middle part near vertebral column with inverted margin size 1 CM column with inverted margin size 1 C.M. in diameter circular wound of entry.
>
> Injury No. II, One lacerated wound over in front of the chest left side 2" below left limb with inverted margin size 2 C.M. in diameter circular wound of exit.
>
> Injury No. III.- One lacerated circular wound with inverted margin over left side abdomen 2" below last rib size 1 C.M. in diameter wound of entry.
>
> Injury No. IV : One lacerated circular wound over right side of back 3" above ilisecrest with inverted margin size 2 CM in diameter wound of exit."

Injury no.1 reflects that it is over back of the chest, right in middle of vertibral column while injury no. 2 is wound of exit on the left side of the chest. The size of wound of entry is

1 cm and size of wound of exit is 2 cm which shows that some rifle like weapon was used. The other injury was inverted margin over left side of abdomen of which wound of entry is 1 cm and its wound of exit on the right side of back. Hence it suggests that both the injuries have been caused not by small weapon but rifle like weapon. Moreover, the doctor PW-12 in his deposition in paragraph 9 has stated that after receiving such injuries, the injured met his instantaneous death. PW -12, in paragraph 18 of his evidence, has further stated that after receiving such injury the person cannot remain conscious. The informant PW-11, in his evidence has stated that once the victim became unconscious, he never regained consciousnesses. On bare scrutiny of the injury receipt, it appears that the victim was not in a state of making any statement. Hence, the evidence of P.Ws 1 and 11 over dying declaration of the victim becomes absolutely doubtful.

So far as the evidence of P.Ws 1 and 11 with regard to circumstance of accused being seen fleeing away from the place of occurrence is concerned, it is a settled law that only on the basis of an isolated circumstance, conviction cannot be recorded unless the chain of circumstances are established and unerringly proved, which has not been done in the present case.

The circumstances must point towards the guilt of the accused only and nothing else.

The parameters for relying upon the circumstantial evidence has been laid down in the case of Sharad Birdhichand Sarda Vs. State of Maharastra reported in AIR 1984 SC 1622. Paragraph no. reads 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* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the 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."

PW-6 in paragraph 4 of his evidence has clearly stated that none of the family members were present at the P.O. The relevant portion of the statement reads as :-

> "Mukhiya Anil Mishra ke parivar walo ko mai pahchanta hu. Ghatna asthal par mukhiya ji ke parivar ka us samay koi nahi tha jab mai waha pahucha."

The motive of the occurrence is that the victim, defeated respondent no.1, Girish Lal in panchayat election for the Mukhiya and hence in the backdrop of such political rivalry, the son of the informant has been killed. The evidence of the wife of the deceased, Punita Mishra, who has been examined as P.W 5 is relevant where she has stated that her husband never said about any political rivalry with the respondents,

particularly respondent no.1, hence, the motive or the genesis of the occurrence has also not been proved.

The specific case of P.Ws. 1 and 11 is that they went to see one of the relatives immediately before the occurrence but they have not disclosed the name of such relative, nor have they given any explanation for withholding such material witness, as the evidence of such witness would have cleared the mist with regard to their claim of being eye witness to the occurrence.

The postmortem report further clouds the prosecution version with regard to the time of occurrence. The doctor PW 12 in paragraph 21 of his evidence has stated that rigor mortis was found around the neck of the victim whereas the occurrence is said to have taken place at 12.30 PM on 10.01.2014 and postmortem was conducted for little over two hours at 2.55 P.M. and usually the rigor mortis sets in, within 6-7 hours of death, it remains in the body for next 6-7 hours and it evaporates in next 6-7 hours. It appears that rigor mortis was only found in the neck of the victim.

It is trite law that medical evidence cannot override the ocular evidence but when it completely negates the ocular evidence, then it changes its character from opinionative to

direct evidence. Ordinarily, the value of medical evidence is only corroborative as has been held by the Hon'ble Supreme Court in the case of Solanki Chimanbhai Ukabhai Vs. State of Gujrat, reported in (1983) 2 SCC 174. Paragraph 13 of the judgement reads as follows:

> **"13.** Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

Further, it has been held by the Supreme Court in the case of State of U.P. Vs. Hari Chand (2009) 13 SCC 542 that unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy. Part of paragraph 13 of the judgement reads as follows:

> "13..... In any event unless the oral evidence is totally irreconcilable with the medical

evidence, it has primacy."

In the present case, the nature of injury suggests that the victim was not able to speak when the entire prosecution is based on oral dying declaration to have been heard by P. Ws. 1 and 11.

The CDR and tower location of PW-1, exhibited as Ext. X, clearly suggests that PW-1 being Advocate's clerk, his mobile phone was traced in and around the premises of Civil Court, Bettiah at the relevant time, though this report has not been exhibited in accordance with the procedure prescribed under 65B of the evidence Act, but these reports were called in exercise of jurisdiction under Section 91 of the Cr. P.C. Such report also does not lend credence to the version as detailed by the prosecution.

The cardinal principle of criminal jurisprudence pertaining to burden of proof is that the same is on the prosecution. The guilt of accused must be proved beyond reasonable doubt. However, the burden on the prosecution is only to establish its case beyond reasonable doubt and not all doubts. The reasonable doubt has been defined by the Hon'ble Supreme Court in the case of State of U.P. Vs. Krishna Gopal

and Anr., reported in (1988) 4 SCC 302. Paragraph 25 of the judgment reads as follows:

> **"25.** A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to "proof" is an exercise particular to each case. Referring to the interdependence of evidence and the confirmation of one piece of evidence by another a learned Author says [See: "The Mathematics of Proof-II" : Glanville Williams: Criminal Law Review, 1979, by Sweet and Maxwell, p. 340 (342)] :
>
> "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts

are not to be multiplied together. The one piece of evidence may confirm the other."

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

26. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimisation of trivialities would make a mockery of administration of criminal justice."

It is well settled law that in an appeal against acquittal, if two views are reasonably possible on the basis of evidence on record, then the view supporting the acquittal of the accused should be inferred as has been held in the case of Dwarka Dass and Ors. Vs. State of Haryana reported in (2003) 1 SCC 204. Paragraph 2 of the judgment reads as follows:

> "**2.** While there cannot be any denial of the factum that the power and authority to appraise the evidence in an appeal, either against acquittal or conviction stands out to be very comprehensive and wide, but if two views are reasonably possible, on the state of evidence: one supporting the acquittal and the other indicating conviction, then and in that event, the High Court would not be justified in interfering with an order of acquittal, merely because it feels that it, sitting as a trial court, would have taken the other view. While reappreciating the evidence, the rule of prudence requires that the High Court should give proper weight and consideration to the views of the trial Judge. But if the judgment of the Sessions Judge was absolutely perverse, legally erroneous and based on a wrong appreciation of the evidence, then it would be just and proper for the High Court to reverse the judgment of acquittal, recorded by the Sessions Judge, as otherwise, there would be gross

miscarriage of justice — so said Pattanaik, J. in *Hari Ram* v. *State of Rajasthan* [(2000) 9 SCC 136 : 2000 SCC (Cri) 1178] .”

In view of the discussions made above, we find that the prosecution has failed to prove the case beyond reasonable doubt and to this extent the finding of the learned trial Court does not require any interference.

Accordingly, this appeal dismissed.

(Dinesh Kumar Singh, J)

(Arvind Srivastava, J)

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