IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.6 of 1996

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1. Md. Rabbul Mian S/o Gani Mian
2. Md. Rakib alias Rakin S/o Bechu Mian alias Abdul Mian
3. Md. Jawed Mian S/o Late Muzaffar Mian,
   All residents of village Mancholi, P.S. Atri, District Gaya

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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with

CRIMINAL APPEAL (DB) No. 63 of 1996

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1. Taiyab Mian Son of Khalil Mian
2. Tahir Mian Son of late Ismail Mian (appeal against appellant No.2 has abated vide order dated 30.08.2022)
3. Mokhtar Mian Son of late Wakeel Mian,
   All residents of village Manijholi, P.S. Atri, District Gaya

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Appearance :
(In CRIMINAL APPEAL (DB) No. 6 of 1996 & CRIMINAL APPEAL (DB) No. 63 of 1996

For the Appellants	:	Mr. Ansul, Advocate Mr. Md. Sufiyan, Advocate
For the Respondent	:	Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
and
HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 09-09-2022

Both these appeals filed in the year 1996, i.e., around 26 years ago, arise out of the same judgment and order. Hence, both

these appeals were heard together and are being disposed of by a common judgment.

2. By order dated 30.08.2022, the appeal against Tahir Mian (appellant No.2 in Criminal Appeal (DB) No.63 of 1996) has already got abated. Therefore, Criminal Appeal (DB) No.63 of 1996 is now confined to appellants Taiyab Mian and Mokhtar Mian only.

3. Both the appeals have been preferred against the judgment of conviction dated 20.12.1995 and the order of sentence dated 21.12.1995, passed by the Additional District and Sessions Judge I, Gaya in Sessions Trial No.597 of 1993/76 of 1995, arising out of Atri P.S. case No.142 of 1992, whereby and whereunder all the appellants have been convicted under Sections 302/34 of the Indian Penal Code and appellant Mokhtar Mian has also been convicted under Section 27 of the Arms Act and all the appellants have been sentenced to undergo life imprisonment under Sections 302/34 of the Indian Penal Code and appellant Mokhtar Mian has further been sentenced to undergo R.I. for a period of three years under Section 27 of the Arms Act. The sentence of the appellant Mokhtar Mian has been directed to run concurrently.

4. Prosecution case, in brief, is that on 23.11.1992 when the informant Kallu Mian (P.W.11) was sitting along with Rasid

Mian, Salim Mian, Sabir Mian, Tahir Mian, Gulam Mian, Butai Mian and 2-3 ladies in the north of the village in the barren land of one Khalil Mian near Chauraha, his nephew Mokhtar (deceased) came and sat there. Appellant Taiyab was standing there covering his body by a bedsheet. Thereafter, the informant left for his home. When he reached at his doorstep, he heard sound of firing. He got perplexed. In the meanwhile, he saw Mokhtar (deceased) running towards his house. On his arrival, he told the informant that appellants Taiyab, Tahir and Mokhar, all of village Majhauri, have injured him. He also told that accused Nasim, Mausam and Sahzad were involved in cospiracy and in course of uttering the same, he fell down. He again uttered that appellants Taiyab, Tahir and Mokhtar had fired upon him. His utterances have been heard by other family members also. Thereafter, he succumbed to the injuries. The informant went to the place, where he was sitting and found that people were running here and there and appellants Taiyab, Tahir and Mokhtar had fled away after firing. The occurrence was seen by the persons, who were sitting there. The sound of firing was heard twice from the place where they were sitting and the third sound of firing was heard coming from the lane.

On the statement of informant Kallu Mian (P.W.11), F.I.R. (Ext.4) was drawn up. The police after investigation submitted charge-sheet against the accused persons and the jurisdictional Magistrate took cognizance in the matter and then committed the case to the Court of Sessions. Charges were framed against the appellants. The appellants pleaded not guilty and claimed to be tried.

5. In course of trial, the prosecution has examined altogether twelve witnesses. Out of whom, Md. Yusuf is P.W.1, Akhtar Ali is P.W.2, Asgar Ali is P.W.3, Md. Ali Daj is P.W.4, Sk. Naim is P.W.5, Md. Sabir Ali is P.W.6, Smt. Jainab Khatoon is P.W.7-mother of the deceased, Yugal Prasad is P.W.8, Abdul Rashid is P.W.9, Mithilesh Kumar Sinha is P.W.10-Doctor, who conducted the postmortem of the deceased, Kallu Miyan is P.W.11-informant of the case, Jai Narain Prasad is P.W.12-Investigating Officer. The prosecution has also brought on record the documents, like postmortem report (Ext.3), inquest report (Ext.5). The Defence has examined only one witness, namely, Md. Neshar Ahmad in support of its case.

6. Learned counsel for the appellants submits that the judgment of conviction and order of sentence of the learned trial court is bad in law as the same suffers from several infirmities. The

learned trial court has ignored the fact that the prosecution has not been able to prove the place of occurrence. Further, the learned trial court has wrongly relied upon the oral dying declaration of the deceased. He has argued that the deceased was not in a position to speak at the time when he is alleged to have given oral dying declaration, which is evident from the evidence of the doctor (P.W.10). The presence of the mother of deceased (P.W.7), at the time when the deceased is alleged to have given his dying declaration, is also doubtful in the light of the oral evidence of P.W.6.

7. Learned A.P.P. appearing for the State, on the other hand, submits that the prosecution has satisfactorily proved the guilt of the appellants beyond all reasonable doubts and the judgment assailed in these appeals requires no interference. He has argued that the oral dying declaration made by the deceased is sufficient to convict the appellants in the present case.

8. After hearing the arguments advanced by both the sides and perusing the material available on record, following issues arise for consideration: -

(I) Whether the prosecution has been able to prove the place of occurrence beyond all reasonable doubt?

(II) Whether in the light of the evidence adduced in this case, the oral dying declaration of the deceased can be relied upon?

(III) Whether the learned trial court was right in convicting all the appellants under Section 302/34 of the Indian Penal Code?

9. In order to deal with the first issue, apparently there are two place of occurrence in this case. The first place of occurrence is the barren land of one Khalil Miyan and the second place of occurrence is lane near the house of one Aleem Miyan. So far the first place of occurrence is concerned, we would first like to examine the evidence of P.W.6, who has stated that he was present along with the deceased and Appellants Taiyab and Tahir, at the place of occurrence, which is said to be barren land of one Khalil Miyan, at the relevant point of time when the said occurrence is alleged to have taken place. In his deposition, he has stated that he heard sound of firing at the place of occurrence but does not state as to who fired. Thereafter, he states that the deceased said that bullet has been hit and asked him to run. Thereafter, P.W.6 ran away from the place of occurrence. While running away, he heard another sound of firing. Now, in contrast to what has been deposed by P.W.6, the Investigating Officer (P.W.12) in paragraph 12 of his

cross-examination stated that he has not found any blood-stain or empty cartridges from the place of occurrence. It gets further clarified that by the term ‘place of occurrence’ he meant the barren land of Khalil Miyan. Therefore, in light of the deposition of P.W.12 that there was no incriminating material found at the barren land of Khalil Miyan, it would not be safe to rely upon the evidence of P.W.6. Hence, the first place of occurrence is not proved by the prosecution beyond reasonable doubt.

So far the second place of occurrence is concerned, which is alleged to be lane near house of Aleem Miyan, it is relevant to note that the prosecution has not brought on record any evidence, which could suggest that the deceased also got hit by bullet at the second place of occurrence i.e., the lane near house of Aleem Miyan. The only evidence to prove the second place of occurrence is that blood-stain along with one empty cartridge and one live cartridge was seized from the lane near house of Aleem Miyan by the Investigating Officer. However, there is no ocular evidence on record to show that the deceased got injured by the bullet in the lane near the house of Aleem Miyan. In absence of the same, the second place of occurrence is not proved. Therefore, we are of the considered opinion that the prosecution has failed to prove the place of occurrence beyond reasonable doubts.

10. While adverting to the second issue, we would first like to discuss the post-mortem report (Ext.3) of the deceased. The doctor in the post-mortem report has found three oval wounds of entry, which have been caused by fire-arm. The first wound of entry was located on front of lower part of the neck adjacent to the suprasternal notch. The second wound of entry was located in front of right chest. The third wound of entry was located in the abdomen at level of xiphoid process. The doctor in his deposition has replied to the Court question that injury no.1 is vital and affects the vocal capacity of the injured and virtually he cannot speak clearly but he may speak with unclear voice *(Phusphusahat)*. Further, in his deposition he has stated that the organ, which plays vital role in vocal capacity, was also injured. However, as per the prosecution case, the deceased has narrated the entire incident to the Informant, which was also heard by other family members. In view of the medical evidence, which has come on record, it is highly improbable that a person, who has sustained three bullet injuries on his vital organ, would walk for about 50 yards i.e. the distance from the place of occurrence to the house of the deceased and would be in a condition to disclose the manner of occurrence to the Informant as to when his vital capacity is impaired by bullet injury. Further, it is also not the case of the prosecution that the

deceased spoke in unclear voice. Here, we would like to rely upon the judgment of the Hon'ble Supreme Court in the case of ***Vishram and Ors. vs. State of Madhya Pradesh*** reported in ***1993 Supp(2) SCC 274*** wherein it has been observed that:-

> *"5. ...The Doctor who examined Kamal Kishore, on being cross-examined, no doubt stated that ordinarily injuries found on the head of Kamal Kishore could cause unconsciousness but it could not positively be said that they would have caused immediate unconsciousness. Relying on this admission, the learned Counsel submitted that it is not safe to rely on the oral dying declarations. It must be noted that the Doctor did not categorically state that Kamal Kishore would have been unconscious immediately after receipt of the injuries and could not have been in a position even to speak that much."*
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> (emphasis supplied)

However, in this case, as discussed above, the doctor has categorically stated that the deceased after sustaining injury No.1 wound not be in a position to speak clearly and could only speak in unclear voice, whereas it is not the case of the prosecution that the deceased narrated the incident in unclear voice.

So far the presence of the mother of the deceased (P.W.7), at the time when the deceased allegedly gave his dying declaration is concerned, P.W.6 in his deposition has categorically stated that

when he reached the house of the deceased, he only saw the Informant (P.W.11) weeping and nothing was said to him about the said incident. Thus, the presence of P.W.7 at the house of the deceased at the relevant time appears to be doubtful. There is one more aspect, which is required to be examined. The exact words spoken by the deceased in his alleged oral dying declaration has not been reproduced by the Informant in his *fard-beyan*. At this juncture, we would like to refer to the judgment of the Hon'ble Supreme Court rendered in the case of ***Darshana Devi vs. State of Punjab*** reported in ***(1995) 4 SCC 126*** wherein it has been observed as follows: -

> *"10. ...Even though an oral dying declaration can form basis of conviction, in a given case, but such a dying declaration has to be trustworthy and free from every blemish and inspire confidence. The reproduction of the exact words of the oral declaration in such cases is very important. The difference in the exact words of the declaration in this case detract materially from the value of the oral dying declaration."*
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> (emphasis supplied)

In the facts of the given case, there is no reproduction of the exact words of the oral dying declaration. Therefore, in light of the evidence adduced in this case and judgments of the Hon'ble

Supreme Court referred above, the dying declaration of the deceased cannot be relied upon.

11. So far the third issue is concerned, from the record it appears that there is no direct evidence regarding the presence of Appellants namely Md. Rakib Mian, Md. Rabbul Mian and Md. Jawed Mian at the first place of occurrence. However, P.W.2 has stated that he has seen the above-mentioned appellants running away with two others from the second place of occurrence. The presence of Appellant Mokhtar Mian is also doubtful, as nothing has been stated by P.W.6 in his evidence regarding presence of Appellant Mokhtar Mian at the first place of occurrence. Further, there is also no evidence brought by the prosecution, which could show that the appellants shared common intention to kill the deceased. Therefore, the trial court was not justified in convicting all the appellants under Section 302/34 of the Indian Penal Code, in absence of any substantial evidence on the point of common intention.

12. In view of the findings arrived at on the issues formulated above, we are of the considered opinion that the prosecution has failed to prove the charges against the appellants and, therefore, the appellants deserve to be given benefit of doubt.

13. Accordingly, both the appeals are allowed. The judgment of conviction dated 20.12.1995 and the order of sentence dated 21.12.1995, passed by the Additional District and Sessions Judge I, Gaya in Sessions Trial No.597 of 1993/76 of 1995, arising out of Atri P.S. case No.142 of 1992, are set aside. Since the appellants are on bail, they are discharged from the liabilities of their respective bail bonds.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

AFR/NAFR	NAFR
CAV DATE	
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