IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.325 of 2017

Arising Out of PS. Case No.-242 Year-2013 Thana- KARAKAT District- Rohtas

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Shankar Chaudhary Son of Sri Brij Raj Chaudhary, Resident of Village- Malpura, P.O. - Sakala, P.S. Karakat (Gorari), District- Rohatas.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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with

CRIMINAL APPEAL (DB) No. 456 of 2017

Arising Out of PS. Case No.-242 Year-2013 Thana- KARAKAT District- Rohtas

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Sukesh Sah Son of Bindeshwari Sah, Resident of Village- Malpura, Police Station- Gorari (Karakat), District- Rohtas.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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with

CRIMINAL APPEAL (DB) No. 481 of 2017

Arising Out of PS. Case No.-242 Year-2013 Thana- KARAKAT District- Rohtas

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Davindra Kumar Choudhary Son of Ram Parichhan Choudhary, R/o- Malpura, P.S.- Karakat, District- Rohtas.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Appearance :
(In CRIMINAL APPEAL (DB) No. 325 of 2017)
For the Appellant : Mr. Arvind Kumar Pandey, Advocate
Mr. Abhishek, Advocate
For the Respondent : Mr. Dilip Kumar Sinha, APP
(In CRIMINAL APPEAL (DB) No. 456 of 2017)
For the Appellant : Mr. Arvind Kumar Pandey, Advocate
Mr. Abhishek, Advocate
For the Respondent : Mr. Satya Narayan Prasad, APP
(In CRIMINAL APPEAL (DB) No. 481 of 2017)
For the Appellant : Mr. Shambhu Narayan Singh, 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
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 09-10-2023

The criminal appeals arise out of common judgment of conviction dated 15.02.2017 and order of sentence dated 22.02.2017, therefore, to have been heard together and are being disposed of by this common judgment.

2. All the appellants named above have preferred these appeals against the common judgment of conviction dated 15.02.2017 and the order of sentence dated 22.02.2017, passed by Shri Prabhu Nath Singh, Sessions Judge, Rohtas, Sasaram in Sessions Trial No.378 of 2014 arising out of Karakat P.S. case No.242 of 2013, whereby and whereunder the appellants have been convicted under Sections 302/34 of the Indian Penal Code (referred to 'I.P.C.') and have been sentenced to undergo life imprisonment with fine of Rs.50,000/- each for the offence under Sections 302/34 of the I.P.C. and in default of payment of fine, further undergo rigorous imprisonment for one year.

3. The prosecution case, as per the written report of informant Vikesh Kumar (PW 5), is that on 26.10.2013 at around 7.30 P.M. his elder brother Ramesh Kumar Sah went to attend

natural call towards road. In the meantime he heard cry of his brother whereupon he run towards the road and he had seen in the torch light, accused persons-appellants Davindra Kumar Choudhary, Sukesh Sah and Shankar Choudhary armed with knife and they were blowing knife repeatedly. The accused persons seeing the informant also asked to do away his life. Then he ran away from there towards village making alarm. The accused persons threw the brother of the informant in the water and fled away. The brother of the informant was taken out from the water with the help of the villagers, then the informant saw the injury on the person of his brother making by knife. His brother asked him that Sukesh Sah, Davindra Kumar Choudhary and Shankar Choudhary assaulted him badly by means of knife and further asked him to take him to the Hospital for his treatment. Then he was rushed to the Hospital, but his brother died in the way to the Hospital. Then they rushed to the police station along with dead body of his brother. It has been claimed by the informant that the accused persons with common intention committed death of his brother by means of knife.

4. On the basis of fardbeyan of the informant, Karakat P.S. case No.242 of 2013 was registered. After completion of investigation, the Investigating Officer submitted charge sheet

under Sections 302/34 of the I.P.C. and thereafter cognizance was taken by the Jurisdictional Magistrate and thereafter the case was committed to the court of Sessions. Charges were framed against the appellants to which the appellants pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined altogether nine witnesses, namely, Rajesh Kumar Sah @ Rajesh Kumar (PW 1), Nathuni Sah (PW 2), Rajendra Sao (PW 3), Amrawati Devi @ Umrawati Devi (PW 4), Vikesh Kumar @ Vikash-informant (PW 5), Dr. K.D. Pujan (PW 6), Rajindar Yadav (PW 7), Ajit Choudhary (PW 8) and Bam Bahadur Choudhary (PW 9). In support of its case, the prosecution has also produced exhibits as Ext.1 (fardbeyan), Ext.2 (written report), Ext.3 (postmortem report), Ext.4 (formal F.I.R.), Ext.5 (seizure list) and Ext.6 (inquest report). In support of its case, the defence has produced exhibit, viz. Ext.A (c.c. of final form/report of Karakat P.S. case No.148/2009). After conclusion of the trial, the learned Trial Court convicted and sentenced the appellants in the manner as indicated above.

6. Learned counsel for the appellants has submitted that the trial suffers from several infirmities that have been overlooked by the learned trial Court and, therefore, the impugned judgement is

not sustainable in the eyes of the law. It has been contended that the prosecution has miserably failed to prove the place and manner of occurrence beyond reasonable doubt, as the material contradictions and discrepancies in the testimony of the prosecution witnesses cast doubt on the case of the prosecution. To buttress this contention, attention has been drawn to the deposition of the eyewitnesses, asserting that severe discrepancies exist in the ocular testimony of PW 1, PW 2, PW 3, PW 4 and PW 5. It has been pointed out that their testimonies suffer from inconsistencies and deserve rejection. Moreover, PW 5 (Informant), who is alleged to be an eyewitness, doesn't mention the presence of other witnesses as eyewitnesses to the offence. The attention of this Court has also been drawn to the absence of any source of light, and thereby, the possibility of identification made by the deceased in his oral dying declaration regarding the participation of appellants in the alleged crime can be considered as a mistaken identity. Moreover, the testimony of a doctor casts doubt on the oral dying declaration, stating that the patient would have died immediately after sustaining multiple injuries. Furthermore, the Investigating Officer did not seize the light alleged to be the source of identification by PW 5. Additionally, the Investigating Officer testified that there were no cut marks on the clothes of the

deceased, despite multiple stab injuries. Therefore, it has been argued that there are severe lacunae in the prosecution's case, and the chain of circumstances does not unequivocally point to the guilt of the appellants. Hence, the findings of the learned trial Court are legally flawed, incorrect in terms of facts, lacking in legal reasoning, and devoid of merit, making the judgement of conviction fit to be set aside.

7. Learned APP for the State, on the other hand, has submitted that the judgement of conviction and order of sentence under challenge require no interference as the prosecution has been able to prove the case beyond all reasonable doubts. It has been submitted that the prosecution witnesses have remained consistent in the testimony during the course of trial and there does not remain any lacuna in the case of the prosecution. The minor inconsistencies in the testimony of the witnesses cannot be a ground to reject their evidence as a whole. It has been further contended that there does not lie any hiatus in the chain of circumstances and all the evidence points towards the guilt of the appellants. Therefore, it has been argued that guilt of the appellants has been satisfactorily proved by the evidence adduced during the course of trial and there is no infirmity in the judgement of conviction of the learned trial Court.

8. After perusing the record and hearing the arguments advanced by the parties, following issues arise for consideration in these appeals: -

(I) Whether the oral dying declaration can be relied upon in the absence of a source of identification and considering the testimony of the doctor?

(II) Whether the presence of the alleged eyewitnesses (PW1 to PW4) at the place of occurrence becomes doubtful in the light of the statement made by the Informant (PW5)?

(III) Whether the presence of PW5 at the alleged place of occurrence can be considered admissible in light of the fact that he heard the voice of the deceased from 800 gaj which is equivalent to 0.728Km?

(IV) Whether the absence of cut marks on the clothing of the deceased despite the presence of multiple stab injuries is fatal for the prosecution's case?

(V) Whether non-examination of the material witnesses (Rahul Paswan, Ghamri Ansari and Sanju Singh), who helped the Informant to take out the deceased from the pond and in front of whom it is alleged that the deceased made oral testimony, has caused prejudice to the appellants?

9. With reference to issue no. I, it is evident from the perusal of the records that the occurrence occurred between 7:00 and 7:30 PM during the month of October. Further, it has been found from the fardbeyan, which has been marked as Exhibit 1 and

from the testimony of alleged eyewitnesses that the deceased made an oral dying declaration in front of the alleged eyewitnesses and co-villagers, alleging that the appellants have badly assaulted him with knife and asked to quickly take him for treatment. These given facts hold significant relevance to the manner in which oral dying declaration is made. It is relevant to take note that the prosecution has not produced any evidence regarding the source of identification in which the deceased identified the appellants. Additionally, PW5 (Informant) mentions in para 12 of his deposition that it was a dark night. Considering the time of occurrence (7-7:30 pm on October 26th), it raises questions about the possibility of accurate identification under such conditions. At this juncture, it is relevant to take note of the principles cited for dying declaration by Hon'ble Supreme Court in the case of ***Khushal Rao v. State of Bombay*** reported in ***AIR 1958 SC 22*** at para 16 that:

> *"On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid,*
>
> *(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;*

(2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;

(4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;

(5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and

(6) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the

statement had been made at the earliest opportunity and was not the result of tutoring by interested parties."

In the light of the facts of the present case and being mindful of the governing principles regarding dying declaration, we find it difficult to rely upon the oral dying declaration made by the deceased. Moreover, through the evidence of the Doctor (PW6), who conducted the post mortem stated in para 19 of his deposition that after sustaining injuries as mentioned in the post mortem report, the person will die immediately.

Hence, the oral dying declaration made by the deceased cannot be relied upon in the light of no evidence regarding the source of identification and the testimony of the doctor regarding the injuries suffered by the deceased.

Accordingly, the issue no. I is decided in negative.

10. With reference to issue no. II, it is relevant to take note that the prosecution alleged to have five eye-witnesses including the informant, to this case, who all are related witnesses. Though the PW1 to PW5 contends to be an eyewitness to the alleged occurrence. It is relevant to note that, unfortunately from the paper-book it is evident that there are two persons examined as PW3. As far as the evidence of 1st PW3, Rajiv Sao S/o Nathuni Sao is concerned. Since he has not been put up for cross

examination by the defence and reasons best known to the prosecution. His evidence cannot be looked at. Coming to the PW3 Rajendra Sao S/o Late Kashinath Sao, who also claims to be an eyewitness to this case.

The presence of the PW1 to PW4 at the alleged place of occurrence becomes doubtful in light of the testimony of PW5 (Informant) where in para 13 of his deposition, he categorically stated that he saw that the deceased was lying on the road, he goes back shouting and thereafter the rest PW1 to PW4 came together at the place of occurrence. So, as per the deposition of PW5, none of the eye-witnesses had occupied him earlier, rather after shouting, when the informant again went to the place of occurrence then the deceased was in the pond. At this point, it is imperative to consider the decision of the Hon'ble Supreme Court passed in the case of ***Sunil Kumar Shambhudayal Gupta and others versus State of Maharashtra***, reported in ***(2010) 13 SCC 657***, where in para no. 16 the following has been observed:

> "*The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting that evidence. In such circumstances witnesses may not inspire confidence if the evidence is found to be in conflict and contradiction with the other evidence and the statement already recorded. In such a*

case, it cannot be held that the prosecution proved its case beyond reasonable doubt."

In light of the discussions made above, we are of the considered opinion that there exist reasonable doubts, contradictions, and inconsistencies in the testimony of the witnesses which casts doubt on the presence of the eyewitnesses (PW1 to PW4) at the place of occurrence.

Accordingly, the issue no. II is decided in affirmative.

11. With reference to Issue No. III, when assessing the credibility of the (PW5) Informant's testimony, it becomes paramount to evaluate the plausibility of his claim to have heard the deceased's shouts from a substantial distance of 800 gaj, equivalent to 0.728 kilometres. The Investigating Officer (PW9) has acknowledged that the distance between the deceased's residence and the alleged place of occurrence spans 800 gaj, equivalent to 0.728 kilometres. Such an extensive distance warrants a comprehensive evaluation of the acoustic conditions at the alleged site. The prosecution contends that the Informant, PW5, asserts hearing the deceased's voice while positioned on the road in front of his residence. Moreover, it has come to light, through the testimonies of PW5 and corroborating statements from other witnesses, that PW5 was present at his door where 4-5 other individuals were engaged in unloading grills. This assertion,

however, raises significant doubts within the purview of this Court. The Court finds it implausible that an ordinary person could perceive audible sounds from such a considerable distance, particularly amidst the potential ambient noise of daily life. In light of these concerns, the Court is compelled to cast doubt upon the reliability and credibility of PW5's testimony in this context.

Hence, it is the considered opinion of this Court that, given the circumstances involving individuals surrounding PW5 while unloading grills, his claim of hearing the deceased's shouts from a distance of 800 gaj (equivalent to 0.728 kilometres) appears unreasonable. Consequently, the credibility of PW5's presence at the place of occurrence and being eyewitness to this case is subject to doubt.

Accordingly, the issue no. III is decided in negative.

12. In addressing issue no. IV, it is crucial to underscore the assertion that the deceased sustained multiple stab injuries which resulted in his demise. However, upon careful examination of the inquest report, it is evident that there is no reference to cut marks on the clothing of the deceased. This critical information is further substantiated by the deposition of the Investigating Officer (PW9) in paragraph 14, where he confirms the absence of any cut marks on the vest and jeans worn by the deceased. Moreover, the inquest

report, which has been marked as Exhibit 6, explicitly notes the deceased as being attired in jeans and a vest, yet no mention of any cut marks or alterations on the clothing. Of particular relevance is the testimony of the Doctor (PW6) in the post-mortem report, which delineates the presence of multiple stab injuries on the deceased's body. Notably, the deceased was wearing jeans and vest, and it is evident that these injuries coincide with the sharp cut injuries, specifically injury no. (iii) on the left side of the chest, injury no. (iv) on the epigastric region, injury no. (v) on the left side of the abdomen, injury no. (vii) on the back of the chest in five locations, and injury no. (viii) on the front of the chest near the heart. Consequently, it stands to reason that cut marks should have been discernible on the clothing of the deceased.

In light of the foregoing analysis and the issues raised herein, this Court is compelled to scrutinize the prosecution's case with meticulous attention. The absence of any mention of changes in the clothing of the deceased, despite the presence of multiple stab injuries, poses a formidable challenge to the prosecution's narrative. The inquest report, testimonies of witnesses, and the post-mortem findings collectively raise serious doubts regarding the veracity and completeness of the evidence presented. This Court underscores that the prosecution carries the burden of proving its case beyond a

reasonable doubt, and the inconsistencies surrounding the condition of the deceased's clothing and absence of cut marks on it create significant ambiguity. In the absence of concrete evidence supporting the presence of cut marks on the clothing, a fundamental gap in the prosecution's case emerges.

Accordingly, the issue no. IV is decided in affirmative.

13. With reference to issue no. V, it is evident from the fardbeyan, which has been marked as Exhibit 1 that three persons namely, Rahul Paswan, Ghamri Ansari and Sanju Singh helped the Informant to take out the deceased from the pond, could have been the Independent Witness to the oral dying declaration and non-examination of these material witnesses cast doubt on the prosecution. In this context, it becomes imperative to refer to the Hon'ble Supreme Court judgement in the case of ***Takhaji Hiraji v. Thakore Kubersing Chamansing*** reported in ***(2001) 6 SCC 145***, in paragraph 19 of the judgement, it has been observed that the non-examination of a material witness, who could provide essential information or fill gaps in the prosecution's case, may lead the Court to draw an adverse inference against the prosecution. However, if overwhelming evidence has already been presented, the non-examination of additional witnesses may not be significant. In such cases, the Court must scrutinise the value of the evidence

already presented and consider whether the witness in question was available but withheld. Thus, in light of the above referred decision of the Hon'ble Supreme Court, in the facts of the present case we find that the persons named in the FIR who helped the informant to take out the deceased from the pond and who would have listened to the oral dying declaration if made and could be a material independent witness to this case if not withheld. Thereby, adverse inference can be drawn against the prosecution in this case. Hence, non-examination of the material witness who has been withheld by the prosecution caused prejudice to the appellants.

Accordingly, the issue no. V is decided in affirmative.

14. In light of the above mentioned legal positions and on the basis of the findings arrived at on the issues formulated above, we are of the considered opinion that the conviction of the appellants in all the appeals is not sustainable in the eyes of law and the prosecution has failed to prove its case beyond all reasonable doubts.

15. Therefore, all the criminal appeals stand allowed and the judgment of conviction dated 15.02.2017 and order of sentence dated 22.02.2017, passed by Shri Prabhu Nath Singh, Sessions Judge, Rohtas, Sasaram in Sessions Trial No.378 of 2014 arising out of Karakat P.S. case No.242 of 2013, are set aside.

16. Since the appellant Shankar Chaudhary of Criminal Appeal (DB) No.325 of 2017 and appellant Davindra Kumar Choudhary of Criminal Appeal (DB) No.481 of 2017, are in jail custody, they are directed to be released from custody forthwith, if not wanted in any other case.

17. The appellant Sukesh Sah of Criminal Appeal (DB) No.456 of 2017 is on bail, he is discharged from the liability of his bail bonds.

18. Pending application (s), if any, stand disposed of.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

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