IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.636 of 2016

Arising Out of PS. Case No.-2 Year-2007 Thana- SANHAULA District- Bhagalpur

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Rishi Mandal, son of Shankar Mandal, resident of Dovi, P.S.- Sanhola, District- Bhagalpur.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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with

CRIMINAL APPEAL (DB) No. 521 of 2016

Arising Out of PS. Case No.-2 Year-2007 Thana- SANHAULA District- Bhagalpur

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Subhash Singh son of Late Ram Bilash Singh, resident of Jagarnathpur, P.S.- Amdanda, District- Bhagalpur

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Appearance :
(In CRIMINAL APPEAL (DB) No. 636 of 2016)
For the Appellant : Ms. Shashi Priya Pathak, Advocate
Mr. Ambrish Kumar Jha, Advocate
For the Respondent : Mr. Abhimanyu Sharma, APP
(In CRIMINAL APPEAL (DB) No. 521 of 2016)
For the Appellant : Mr. Pratik Mishra, Advocate
Mr. Vikash Kumar Jha, Advocate
Mr. Davendra Kumar Pandey, Advocate
For the Respondent : Mr. Abhimanyu Sharma, 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 : 16-10-2023

Both the criminal appeals arise out of common judgment of conviction dated 29.04.2016 and order of sentence dated

03.05.2016, therefore, to have been heard together and are being disposed of by this common judgment.

2. The appellants named above have preferred these appeals against the common judgment of conviction dated 29.04.2016 and the order of sentence dated 03.05.2016, passed by Shri Janardan Tripathi, 1st Additional District and Sessions Judge, Bhagalpur in Sessions Trial No.1056 of 2013 arising out of Sanhola P.S. case No.02 of 2007, 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.1,00,000/- each for the offence under Sections 302/34 of the I.P.C. and in default of payment of fine, further to undergo imprisonment for five years.

3. The prosecution case, as per the F.I.R., is that on 01.01.2007 at 6:30 p.m. when the informant was at his house, at that time from the side of Gerua river, Rishi Mandal, Bhola Mandal, Vidya Mandal and Bindu @ Vinod came to the house of the informant after abusing, upon which the informant hide himself in the northern side of his house, which is adjacent to the land of Tanti. The children and woman of the house also ran away. Seeing the wife of informant running away, the accused chased her by hitting the eastern gate and firing. They caught her

near the Bathan of Vishundev Tanti and injured her by inflicting the blow of Kunda over face. The accused pushed her on the land, where the wife of informant, namely, Babli Devi, who was 65 years, died and thereafter they went towards Gerua River. During the assault, Vishundev Tanti had asked the accused to leave the old lady, but they did not listen. The informant was seeing every thing by hiding beside. In the morning of 02.01.2017, the informant came to know that the mother of Hareram Mandal and Mahadeo Mandal were also killed and after getting this information, the informant went to see the dead body. He saw the dead body of Pago Devi. Meena Devi, daughter-in-law of Pago Devi, told that yesterday i.e. 01.01.2007 at 5:30 p.m. the named accused persons armed with katta came and started abusing and thereafter Meena Devi hide herself and she further told that Rishi Mandal after breaking handle of Handpump assaulted Pago Devi and other assaulted by fists and legs and killed Pago Devi. Thereafter the informant went to the house of Mahadeo Mandal and found him dead. Archana Devi, daughter-in-law of deceased, informed that on 01.01.2007 at about 5 p.m. Rishi Mandal, Murari Mandal, Suchit Mandal, Bindu @ Vinod Mandal, Salil @ Saligram Mandal, Vikas Mandal came abusing there and entered in the house. The mother-in-law of Archna Devi was injured by

butt of katta and her father-in-law Mahadeo Mandal was taken on the roof, where he was shot dead. The cause of occurrence was disclosed as the fight for supremacy between Rishi Mandal and Hare Ram Mandal.

4. On the basis of fardbeyan of the informant, Sanhaula P.S. case No.02 of 2007 was registered under Sections 302, 307/34 of the I.P.C. After completion of investigation, the Investigating Officer submitted charge sheet under Sections 302/34 of the I.P.C. and Section 27 of the Arms Act and thereafter cognizance was taken by the Jurisdictional Magistrate and thereafter the case was committed to the court of Sessions. Charges under Sections 302/34 of the I.P.C. were framed against the appellants to which the appellants pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined altogether ten witnesses, namely, Anita Devi (PW 1), Shamli Paswan (PW 2), Jantu Paswan (PW 3), Kaili Devi (PW 4), Archana Devi (PW 5), Mina Devi (PW 6), Jhaksu Paswan (PW 7), Renu Devi (PW 8), Dr. Arun Kumar Singh (PW 9) and Satya Narayan Mandal (PW 10). In support of its case, the prosecution has also produced exhibits as Ext.1 (postmortem report of Babli Devi), Ext.1/1 (postmortem report of Mahadeo Mandal), Ext.1/2 (postmortem report of Pago Devi), Ext.2 (fardbeyan), Ext.3 (F.I.R.), Ext.4, 4/1, 4/2 (three

inquest reports), Ext.5 (charge sheet). The defence has not produced any oral or documentary evidence in support of its case. After conclusion of the trial, the learned Trial Court convicted and sentenced the appellants in the manner as indicated above.

6. For the clarity of the facts and further references in this judgement, we simplified the aforementioned facts as follows:

> Occurrence - 1: The first place of occurrence (P.O. I) is the land belonging to Vishnudev Tanti, where the deceased 1, *Babli Devi* got hit by the gun butt and thrown to the floor by the accused persons. The time of occurrence was approximately 6:30 p.m. The witnesses for this case include PW1 (the informant), PW3, and PW7.
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> Occurrence - 2: The second place of occurrence (P.O. II) is the *aangan* (courtyard) of the deceased's house, where the deceased 2, *Phago Devi* got hit by the handle of handpump by the appellant Rishi Mandal and other accused scuffled. The time of occurrence was approximately 5:30 p.m. The witnesses for this case are PW14, PW6, and PW8.
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> Occurrence - 3: The third place of occurrence (P.O. III) is the roof of the deceased's house, where the deceased 3, *Mahadeo Mahto* shot by gun on his head. The time of occurrence was approximately 5 p.m. The witness for this case is PW5.

7. Learned counsels for the appellants have submitted that the judgement of conviction suffers from several infirmities that were overlooked by the learned trial court. 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 both the place and manner of occurrence beyond a

reasonable doubt. Material contradictions and discrepancies in the testimonies of prosecution witnesses cast doubt on the prosecution's case. To reinforce this contention, attention has been drawn to delay in lodging the FIR, to which the prosecution has responded with a different version. This raises suspicion of the suppression of the correct version of events. Further, attention of this court has also been drawn to the material discrepancies regarding all the places of occurrence as the prosecution witnesses from all the places of occurrence stated in their depositions that the appellants came and fired, however, the Investigating Officer, in his deposition, mentioned the absence of marks of violence and any bullet cartridge or evidence related to the appellants at the scene. Furthermore, regarding the occurrence-1, learned counsel mentioned the existence of a material witness, Vishundev Tanti, who could have been the sole independent witness to this case. His presence has been substantiated by the fardbeyan and the deposition of witnesses. Moreover, it has been argued that the testimony of the Informant (PW2) casts doubt on the presence of PW3 and PW7, in light of the deposition of PW 2. It has been further submitted by the learned counsel that their claim to be eyewitnesses may be an afterthought. Additionally, all eyewitnesses to the place of occurrence-1 have acknowledged that

the incident took place at 6:30 pm during winter, when it was dark. Notably, the Investigating Officer has not produced or marked any material exhibit regarding the source of identification. Further, concerning the occurrence-2, the learned counsel mentioned that, based on the fardbeyan and the testimony of PW6, the deceased was struck by the handle of a hand pump. However, the Investigating Officer stated in paragraph 22 that the hand pump was in working condition, and no blood or blood-stained earth was found at the place of occurrence. Regarding the occurrence-3, learned counsel pointed out that all witnesses stated that the deceased-3 was shot in the head. This fact was corroborated by the fardbeyan. However, the postmortem report, i.e. medical evidence contradicts the ocular evidence. Moreover, witnesses regarding occurrence-3 testified that the wife of the deceased-3 was also injured. However, the prosecution did not call her as a witness in this case. Therefore, it has been argued that there are significant gaps 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.

8. 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.

9. After hearing the arguments advanced by the learned counsels appearing for the parties and upon thorough examination of the entire material available on the record, the following issues arise for consideration in the present appeals:

1)Whether the inordinate delay in lodging FIR is fatal for the prosecution in light of the evidence of PW1 and PW8 where they claim that PW2(Informant), PW5 and PW6

have filed separate complaints to the police, which has not been brought on record?

2) Whether all the three place of occurrence is doubtful in the light of the manner of occurrence described by the prosecution that appellants entered at the place of occurrence and fired there in?

3) Regarding the deceased 1, Babli Devi at Place of Occurrence-1:

3.a) Whether the non examination of Vishundev Tanti (who was the owner of first place of signatory to the FIR) causes prejudice to the appellants?

3.b) Whether the identification of the accused made by the informant in regard to the deceased-1, *Babli Devi* can be believed in the light of absence of any source of identification?

3.c) Whether the presence of PW 3 and PW7 both sons of PW2 (informant) is doubtful in the light of the fardbeyan, where there is no mentioning of these witnesses as an eyewitness to the 1st offence regarding the deceased 1 and the informant also don't mention about them in his deposition?

4) Regarding the deceased 2, Fago Devi at Place of Occurrence- 2:

4.a) Whether the second place of occurrence has been proved, when the alleged weapon used for murder i.e., the handle of the hand pump is found to be intact by the Investigating Officer?

5) Regarding the deceased 3, Mahadeo Mandal at Place of Occurrence- 3:

5.a) Whether there is inconsistency between ocular and medical evidence regarding the third deceased?

5.b) Whether the non examination of Faguni Devi wife of deceased-3, Mahadev Mahto causes prejudice to the appellants, given the suggestion of potential memory loss without supporting evidence of her medical report regarding her mental health condition?

10. With reference to issue no. 1, it is evident from the perusal of the records that there is a delay of approximately 14 hours in lodging FIR. Notably, the FIR indicates that the distance between the police station and the place of occurrence is only 8km. However, the prosecution has presented a different account concerning lodging of the Complaint/FIR. PW 1 deposes in para 17 and 18 that there were three different complaints filed by PW6, PW2 and PW5 respectively. This is corroborated by PW8 in paragraph 15, where she states that PW6 filed this case. However, it is noteworthy that there is no record of any complaint filed by PW6 or PW5.

Additionally, PW2 in para 3 of his deposition mentions in continuation of the fact that his wife died at that time, he went to the police station and the body was taken to the police station, which means that PW2 lodged the FIR/Complaint immediately after the death of his wife. This fact is further substantiated by PW3 in para 16 that his testimony was recorded by the police on

01.01.2007. Additionally, in paragraph 18 of the deposition of PW3, he mentioned that when he reached after an hour of his mother's death (Deceased-1, Babli Devi), there were 10 persons and police were there for an hour and at 8 am he returned from the police station. However, it is relevant to take note that the inquest report of all the deceased were prepared at the place of occurrence at 9 am i.e. on 02.01.2007. Meaning thereby that the police took the body on 02.01.2007. Thus, based on the facts of this case, it appears that either there is a delay in lodging the FIR or there is a separate, accurate version of this case. At this juncture, it is relevant to take note of the Hon'ble Supreme Court finding in the judgement of ***Kishan Singh v. Gurpal Singh*** reported in ***(2010) 8 SCC 775*** wherein it has been observed that:

> "***21.*** *Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding the truth of its version. In case there is some delay in filing the FIR, the complainant must give explanation for the same. Undoubtedly, delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained. However, deliberate delay in lodging the complaint is always fatal. (Vide Sahib Singh v. State of Haryana [(1997) 7 SCC 231 : 1997 SCC (Cri) 1049 : AIR 1997 SC 3247] .)*

Also, Hon'ble Supreme Court in the case of ***Thulika Kali v. State of Tamil Nadu***, reported in ***(1972) 3 SCC 393*** wherein at para 12, it has been observed that:

> *"... ... First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of after-thought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. ... ..."*

Considering the legal position discussed above, along with the substantial delay in lodging the FIR and the testimonies of the witnesses regarding the filing of separate complaints not brought on record, this Court is of the opinion that the allegations in the

FIR present a coloured version of the case. Therefore, the inordinate delay is fatal to the prosecution.

Accordingly, the issue no. 1 is decided in ***affirmative***.

11. With reference to issue No. 2, a thorough examination of the testimony of the prosecution witnesses that the appellants came at their places and fired therein. In regard to the place of occurence-3, PW5 in para 21 said that a total 10-20 firing was done. Further, PW1 (regarding the place of occurrence-2) in para 7 stated that the accused came into the house with indiscriminate firing and PW2 (Informant) (regarding the place of occurrence-1) said that a total 2-3 firing was made and he saw the cartridges. However, the Investigating Officer (PW 10) in para 28 said that he did not recover any cartridge or bullet at any place of occurrence, further, he even did not see bullet marks on the walls etc. at the place of occurrence. In the present instance, it is evident that substantial disparities and contradictions exist within the accounts provided by the prosecution witnesses who are alleged to be the eyewitnesses. It is imperative, at this point, to consider the significant precedent set by the esteemed Supreme Court in the matter of ***Sunil Kumar Shambhudayal Gupta and others versus State of Maharashtra***,reported in ***(2010) 13 SCC 657***, wherein 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."*

Consequently, taking into account the statements of all the eyewitnesses and the investigation made, the manner in which this case transpired appears dubious.

Accordingly, the issue no. 2 is decided in the ***affirmative***.

Regarding the deceased 1, Babli Devi at Place of Occurrence – 1:

12. In order to address issue no. 3. a), it is imperative to thoroughly examine fardbeyan, which has been marked as *Exhibit 2*. In the fardbeyan, it has been mentioned that the deceased-1 got caught by the appellants on the *bathan* (cattle shed) of Vishundev Tanti and when Vishundev Tanti tried to defend the deceased, he was scolded by the appellants. Additionally, PW7 in para 3 corroborated this fact by mentioning that both the appellants slapped Vishundev Tanti. Furthermore, it is worth noting that Vishundev Tanti is a signatory to the fardbeyan, and he could have provided an accurate account of the case. He could have been the sole independent eyewitness had the prosecution not withheld him.

This witness could have been an independent witness to this case, if not withheld by the prosecution. The non-examination of this witness not only has a critical impact on the prosecution's version but also gives rise to doubts regarding the veracity of the case. It is noteworthy that the prosecution has not provided any justifiable reason for their failure to examine this material witness and hence, non-examination of such material witness also raises doubts regarding the suppression of material facts by the prosecution. In this context, it becomes imperative to refer to the Hon'ble Supreme Court judgement delivered in the case of ***TakhajiHiraji v. Thakore Kubersing Chamansing***, reported in ***(2001) 6 SCC 145***, wherein para 19 it has been observed that:

> *"... ... if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would*

only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise… …"

In light of the discussions made above, we are of the view that the prosecution has failed to present a complete case, as the crucial witnesses, who could potentially provide much relevant information and would have illuminated essential aspects of the case were not examined. The withholding or non-examination of these witnesses assumes significant importance in the overall evaluation of the prosecution's case.

Accordingly, the issue no. 3.a) is decided in the ***affirmative***.

13. With reference to issue no. 3.b), upon a thorough examination of the case record, it is evident that the offence occurred at approx 6:30 pm on 01.01.2007. It is relevant to note that PW2 (Informant) in para 6, of his deposition said that it was dark then and further, mentions nothing about the source of light. This fact is further substantiated by the PW7 (Son of the deceased-

1) in para 12 that it was winter time and during winter the sunset was at 5 - 5:15 pm. Moreover, PW10 (Investigating Officer) in para 19 said that the witnesses have told the source of identification, i.e, Lantern and Dibbiya were burning there. However, he didn't seize the material nor produce it as a material exhibit. It would be relevant to take note of the decision of Hon'ble Supreme Court in the case of ***State of Madhya Pradesh versus Ghudan*** reported in ***(2003) 12 SCC 485*** wherein it was observed that if any source of light was present at the place of occurrence, then the investigating agency would have mentioned or shown the existence of such source and the benefit of such omission should be given to the accused. Therefore, in the light of the above referred decision of the Hon'ble Supreme Court, in the facts of the present case we find that the prosecution has failed to establish and prove the source of identification under which the appellants have been identified.

In light of the discussions made above, we are of the considered opinion that in absence of any material exhibit and substantial record regarding the source of identification, the identification of the appellants as made is doubtful.

Accordingly, the issue no. 3.b) is decided in the ***negative***.

14. With reference to issue no. 3.c), it is essential to examine the evidence pertaining to the witnesses PW3 and PW7, both sons of PW2 (the informant). Although PW3 and PW7 contend to be eyewitnesses to the alleged occurrence, it is relevant to note that PW3, in paragraph 2 of his deposition, has stated that they ran from the house when the appellant arrived, implying that he claimed to be present at the place of occurrence-1. Similarly, PW7, in paragraph 9 of his deposition, has stated that he was at the house (place of occurrence-1), near the river. However, the presence of these eyewitnesses at the place of occurrence-1 is contradicted by the testimony of PW2 (the Informant) in paragraph 8 where, PW2 stated that during the incident, only he, his grandchild (aged 5-6), and the deceased-1 were present at the house. This inconsistency between PW2's statement and the claims of PW3 and PW7, who say that they were also present, raises doubts about their credibility as eyewitnesses. Furthermore, it is relevant to highlight that in the fardbeyan (complaint), marked as *Exhibit-2*, there is no mention whatsoever regarding the presence of PW3 and PW7 as eyewitnesses to occurrence-1. This omission in the initial complaint further adds to the uncertainty surrounding their roles as eyewitnesses.

In light of the discussions made above, we are of the considered opinion that the claims of PW3 and PW7 being eyewitnesses to occurrence-1 are not adequately supported by the available evidence and are therefore subject to doubt.

Accordingly, the issue no. 3.c), is decided in the ***affirmative***.

Regarding the deceased 2, Fago Devi at Place of Occurrence – 2:

15. In order to address issue no. 4 a), upon a thorough examination of the case record, it becomes evident that the alleged murder weapon for the deceased-2 was the handle of the handpump. It is further highlighted in the deposition of PW6 in para 1 that the appellant Rishi Mandal killed her mother-in-law with the handle of the handpump. However, it is crucial to emphasise the pivotal role of the Investigating Officer in determining the location of the occurrence. In paragraph 22, the Investigating Officer (PW10) stated that the hand pump was in working condition, and he did not find any blood or blood-stained earth on the hand pump. Thus, considering the facts of this case as indicated above, the place of occurrence as narrated by the prosecution is doubtful. Such a fundamental defect casts reasonable doubts as to the genuineness of the prosecution’s case. In this regard, it is pertinent to take note of the decision of Hon’ble

Supreme Court, passed in the case of ***Syed Ibrahim versus State of Andhra Pradesh,*** reported in ***(2008) 10 SCC 601***, wherein it has been held that when the place of occurrence itself has not been established, it would not be proper to accept the version of the prosecution.

In light of the facts of the case and considering the inconsistencies in the testimony of the prosecution witnesses, coupled with non-finding of blood stain or blood stained earth on the alleged murder weapon at the alleged place of occurrence-2 makes the case doubtful and is certainly fatal for the case of the prosecution.

Accordingly, the issue no. 4. a) is decided in the negative.

Regarding the deceased 3, Mahadeo Mandal at Place of Occurrence-3:

16. With reference to issue no. 5. a), it is found that there is a complete mismatch between the version of the prosecution witnesses narrated regarding the murder of deceased-3 and the Post Mortem Report, which has been marked as *Exhibit 1/1*. It has been stated by PW5 in para 1 and 2 of her deposition mentions that her father-in-law Mahadev Mandal was in the verandah and every accused together dragged him to the roof where the appellant Rishi Mandal shot in his ear. Further, she stated that she also listened to

the firing sound. Additionally, Investigating Officer in paragraph 4 mentions that he found the deceased-3 body at the roof of his house, where it was alleged that the deceased-3 received gunshot. The Investigating Officer in paragraph 33 also deposes that the injured wife of deceased-3 said that the appellant took the deceased-3 to the roof where they shot him with a gun. However, in sharp contrast to such contention of the prosecution, it is found that in the Post Mortem Report, which has been marked as *Exhibit 1/1*, there is no gunshot injury on any part of the deceased. At this juncture, we put reliance upon the case of ***Ram Narain Singh versus State of Punjab and Ama Singh & Ors. versus State of Punjab*** reported in ***(1975) 4 SCC 497*** wherein the Hon'ble Supreme Court has held that inconsistency between the ocular and medical evidence is a fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case.

Accordingly, the issue no. 5. a) decided in ***affirmative***.

17. With reference to issue no. 5. b), it is evident from the perusal of the records that the wife of deceased-3, Mahadev Mahto, namely, Faguni Devi has not been examined as a prosecution witness in this case. It is relevant to note that PW5 in para 18 has said that her mother-in-law, Faguni Devi lost her

memory after the occurrence. However, except this statement of PW5, none of the prosecution witnesses mentioned anything regarding the medical condition of Faguni Devi. It is relevant to note that the Investigating Officer in para 33 of his deposition stated that he took the statement of injured Faguni Devi, where she stated about the occurrence but the Investigating Officer nowhere mentioned about the medical condition regarding her mental health. Moreover, there is no medical report exhibited by the prosecution in support of the medical report regarding the mental health condition of Faguni Devi. 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***, where 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 non-examination of Faguni Devi causes prejudice to the case when there is no material proof exhibited to withhold her because of medical condition, where she lost her memory. 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. 5. b) is decided in ***affirmative***.

18. 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.

19. Therefore, both the criminal appeals stand allowed and the judgment of conviction dated 29.04.2016 and the order of sentence dated 03.05.2016, passed by Shri Janardan Tripathi, 1st Additional District and Sessions Judge, Bhagalpur in Sessions Trial No.1056 of 2013 arising out of Sanhola P.S. case No.02 of 2007, are set aside.

20. Since the appellant Rishi Mandal of Criminal Appeal (DB) No.636 of 2016 and appellant Subhash Singh of Criminal Appeal (DB) No.521 of 2016, are in jail custody, they are directed to be released from custody forthwith, if not wanted in any other case.

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

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

AFR/NAFR	AFR
CAV DATE	07.10.2023
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