

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr. Appeal (DB) No.646 of 2018

(Against the judgment of conviction dated 04.05.2018 and the order of sentence dated 09.05.2018 passed by the learned 4th Additional Sessions Judge, Jamshedpur in Sessions Trial No.329 of 2011)

Binod Kumar Khatri, S/o:- Late Rajendra Prasad Khatri, R/o:- Lohar Line, Golmuri Bazar, P.O. & P.S- Golmuri, Town: - Jamsedpur, Dist:- East Singhbhum, Jamshedpur, (Jharkhand) Appellant

[In Cr. Appeal (DB) No.646 of 2018]

With

Manish Agarwal, S/-:- Satya Narayan Lal Agarwal, Resident of 25/B, Shiv Singh Bagan, Agrico East, P.O. & P.S. Sidhgora, Town: Jamshedpur, District East Singhbhum Appellant

[In Cr. Appeal (DB) No.628 of 2018]

With

Mantu Agarwal @ Mantu @ Alok Aarwal, S/o:- Late Nagarmal Agarwal, Resident of Flat No.21, Tarun Apartment, Post Office Road, P.O. & P.S.:- Mango, Mango, Town: Jamshedpur, District East Singhbhum.

..... Appellant

[In Cr. Appeal (DB) No.640 of 2018]

Versus

The State of Jharkhand

..... Respondent
[In all cases]

CORAM:

**SRI ANANDA SEN, J.
SRI SUBHASH CHAND, J.**

For the Appellant(s)

: Mr. Arwind Kumar, Advocate
[In Cr. Appeal (DB) No.646 of 2018]
Mr. A.K. Kashyap, Sr. Advocate
Mr. Amit Kumar, Advocate
[In Cr. Appeal (DB) No.628 of 2018]
Mr. Amit Kumar, Advocate
[In Cr. Appeal (DB) No.640 of 2018]

For the State

: Mrs. Nehala Sharmin, APP
[In Cr. Appeal (DB) No.646 of 2018]
Mr. Saket Kumar, APP
[In Cr. Appeal (DB) No.628 of 2018]
Mrs. Vandana Bharti, APP
[In Cr. Appeal (DB) No.640 of 2018]

C.A.V. on: 02/04/2024

Pronounced on:16/04/2024

J U D G M E N T

Per: Subhash Chand, J.

1. These Criminal Appeals have been preferred against the judgment of conviction dated 04.05.2018 and the order of sentence dated 09.05.2018 passed by the learned 4th Additional Sessions Judge, Jamshedpur in Sessions Trial No.329 of 2011, whereby the learned trial Court has convicted the appellants under Sections 302/34 and 120-B of the Indian Penal Code and under section 27/35 of the Arms Act and sentenced them to undergo imprisonment for life along with fine of Rs.20,000/- for the offence under Sections 302/34 and 120-B of the Indian Penal Code. In case of default in payment of fine, the appellants were directed to undergo RI for six months. They have been further sentenced to undergo RI for seven years along with fine of Rs.5,000/- under Section 27/35 of the Arms Act. In case of default in payment of fine, the appellants were directed to undergo RI for three months.

2. Since all these three Criminal Appeals have been directed against the common impugned judgment, hence, these appeals are being decided by this common judgment.

3. The brief facts of the prosecution case leading to these Criminal Appeals are that the informant Harish Kumar Talwani had given the written information with the police station concerned with these allegations that his younger brother Kiran Talwani and he himself on 10.12.2010 in the night at 09:30 pm having closed the shop left for house but his younger brother Kiran Talwani went ahead by his Hero Honda Glamour Motorcycle and while he took his mother who was purchasing vegetables with him and left

for the house by his Scooter. As they reached near the house, he heard the cry of the wife of Kiran Talwani stating that someone has shot her husband. He immediately went inside the house and found his younger brother Kiran Talwani in injured condition. However, with the help of the neighbours, he was rushed to TMH Hospital, Jamshedpur for treatment. It was told by the wife of Kiran Talwani that the assailants had fired thrice while the neighbour Gopal, whose shop was adjoining to his house told that the shooters were two in number and came by the bike. After having shot Kiran Talwani, the assailants fled away opening fire in the air. There was no enmity of his brother but in the year 2009, the miscreants had opened fire for ransom, of which, at that time, case was also registered with the police station concerned. On this written information, Golmuri PS Case No. 312 of 2010 was registered against unknown miscreants under Section 324, 326, 307/34 of the Indian Penal Code and under Section 27 of the Arms Act and during treatment, injured died and Section 302 of the Indian Penal Code was added.

4. The Investigating Officer after having concluded the investigation, filed charge-sheet against the accused persons under Sections 302/34 and 120-B of the Indian Penal Code and under Section 27/35 of the Arms Act against the accused Binod Kumar Khatri and Manish Agarwal and separate charge-sheet was also filed against Mantu Agarwal @ Mantu @ Alok Agarwal under the same sections. The cognizance was taken by the Magistrate concerned, who committed the case for trial to the Court of Sessions Judge, Jamshedpur, who subsequently, transferred the same to the Court of learned 4th Additional Sessions Judge, Jamshedpur.

5. The learned Trial Court framed the charge against all the accused persons under Sections 302/34 and 120-B of the Indian Penal Code and

under Section 27/35 of the Arms Act and the same was explained to them, they denied the charge and claimed to face the trial.

6. On behalf of the prosecution to prove the charge against the accused in oral evidence examined altogether nineteen witnesses i.e. P.W.-1, Harish Kumar Tilwani; P.W.-2, Chandra Prakash Tilwani; P.W.-3, Rajesh Tilwani; P.W.-4, Brindalal Ram; P.W.-5, Reetu Tilwani; P.W.-6, Chandra Bhushan Singh; P.W.-7, Kamaljeet Ram; P.W.-8, Dr. Sunil Kumar; P.W.-9, Dr. Ashish Jain; P.W.-10, Sheo Narayan Ram; P.W.-11, Sima Tilwani; P.W.-12, Yashika Tilwani; P.W.-13, Rajesh Prakash Sinha; P.W.-14, Sudhir Kumar; P.W.-15, Subhash Kumar; P.W.-16, Gopal Kharbanda; P.W.-17, Kanhaiya Prasad Singh; P.W.-18, Taufique Ahmad and; P.W.-19, Rajesh Kumar Ranjan and in documentary evidence the prosecution has adduced Exhibit-1, Fardbeyan except forwarding report; Exhibit-1/1, Fardbeyan; Exhibit-1/2, Endorsement on fardbeyan; Exhibit-1/3, Forwarding on fardbeyan; Exhibit-2, T.I.P. Chart of motorcycle; Exhibit-3 Statement of PW-7 recorded u/s 164 Cr.P.C.; Exhibit-4, Slip of TMH regarding treatment of deceased dated 10th December 2010 prepared by Dr. Anwita; Exhibit-5, Slip of TMH regarding treatment of deceased prepared by Dr. Malika Arjun; Exhibit-6, Slip of TMH regarding treatment of deceased prepared by Dr. Anwita on 13th December, 2010; Exhibit-7, Slip of TMH regarding treatment of deceased dated 16th December 2010 prepared by Dr.Y.Perwez; Exhibit-8, Medical slip of TMH regarding treatment of deceased dated 16th December 2010 at 1:10 pm - 3:30 pm written and prepared by Dr.P.Samaddo; Exhibit-9, Postmortem; Exhibit-10, Challan regarding production of firearm produced by PW-10; Exhibit-11,

Seizure list dated 25.01.11 regarding material recovered from Binod Khatri; Exhibit-12, Seizure list dated 25.01.11 regarding material recovered from rented house of Binod Khatri; Exhibit-13, Confessional statement of Binod Khatri (marked exhibit on basis of deposition of pw14); Exhibit-14, Confessional statement of Manish Agarwal (marked exhibit on basis of deposition of pw14); Exhibit-15 & 15/1, Sign of PW-15 & PW-16 on Exhibit 15/2; Exhibit-15/2, Seizure list dated 10.12.2010 of three empty cartridges; Exhibit-16, Confessional statement of Binod Khatri (marked exhibit on basis of deposition of pw17); Exhibit-17, Seizure list dated 28.01.11 regarding recovered firearm and cartridge from house of Sunil Yadav; Exhibit-18, Seizure list dated 29.01.11 regarding material recovered from possession of Manish Agarwal; Exhibit-19, Confessional statement of Manish Agarwal (marked exhibit on basis of deposition of pw17); Exhibit-20, Production-cum-seizure list dated 29.01.11 regarding motorcycle no.JH05K-3533; Exhibit-21, Confessional statement of Mantu Agarwal; Exhibit-22, F.S.L Report; Exhibit-23 & 23/1, Forwarding of Challan regarding production of material by PW-19.

7. The statement of the accused persons was recorded under Section 313 of the Code of Criminal Procedure, in which, all the accused persons denied the incriminating circumstances in the evidence against them and stated themselves to be innocent. On behalf of the accused persons in defence evidence examined two defence witnesses i.e. D.W.-1, Sumit Kumar Agarwal and D.W.-2, Saroj Mishra.

8. The learned trial Court after hearing the rival submissions of the learned counsel for the accused and learned counsel for the State, passed the

impugned judgment of conviction dated 04.05.2018 and the order of sentence dated 09.05.2018 holding the accused persons guilty for the offence under Sections 302/34 of the Indian Penal Code and under Section 27/35 of the Arms Act and sentenced them as stated hereinabove.

9. Aggrieved from the impugned judgment of conviction dated 04.05.2018 and the order of sentence dated 09.05.2018, these three Criminal Appeals have been preferred on behalf of the appellants on the ground that the impugned judgment of conviction and the order of sentence passed by the learned Trial Court is bad in the eyes of law and the same is not based on proper appreciation of evidence. The finding recorded by the learned Trial Court is perverse. In view of the above, prayed to allow all three Criminal Appeals and set aside the impugned judgment of conviction and the order of sentence.

10. We have heard the rival submissions of the learned counsel for the appellants and learned APPs for the State and perused the materials available on record.

11. In order to decide the legality and propriety of the impugned judgment of conviction and the order of sentence passed by the learned Trial Court, we scrutinize the evidence oral as well as documentary adduced on behalf of the parties on record, which are reproduced hereinbelow:

11.1 P.W.-1, Harish Kumar Tilwani, in his examination-in-chief says that his fardbeyan was recorded by the In-charge of Golmuri Police Station. It is in the handwriting and signature of the station In-charge Police Station concerned marked Exhibit-1. On 10.12.2010, he along with his younger brother Kiran Kumar Tilwani after having closed the shop at 09:30 O'clock in the night left for the house. His brother was on the bike and he was on the

scooter. His brother went ahead of him and he after having taken his mother, who was purchasing vegetables, left for house thereafter. As he reached nearby the house, he heard the cry and screamings of the wife of his younger brother saying that someone has shot her husband. He went inside the room and found Kiran Tilwani in injured condition. He was taken to TMH Hospital, Jamshedpur and during treatment on 22.12.2010, his brother died. In the year 2009, demand of ransom was also made, for the same, case was also registered at that time. It appears that this occurrence was also caused for ransom. In cross-examination, this witness says that his brother had been shot before he reached his house and he did not see the occurrence. This FIR was lodged by him against unknown persons.

11.2 P.W.-2, Chandra Prakash Tilwani, in his examination-in-chief says that Kiran Tilwani was his cousin. On 10.12.2010, he was shot and thereafter died in the hospital during treatment. He was admitted in TMH Hospital, Jamshedpur from 10th to 19th December, 2010. Thereafter, he was referred to Delhi, where he died. In between 10th to 19th December, 2010, on 16th December, 2010, Kiran Tilwani regained senses and he has told to him while he was in ICU that two persons came by the bike. The pillion rider was Binod Kumar Khatri while who shot him, another was driving the motorcycle. Police recorded his statement on 14.12.2010. In cross-examination, this witness says that he did not see the occurrence. On 16.12.2010, Kiran Tilwani disclosed him the name of the assailant, at that time, Rajesh Tilwani was there. None else was there. Police did not record his statement in regard to this fact. He is telling this fact for the first time in the Court.

11.3 P.W.-3, Rajesh Tilwani, in his examination-in-chief says that on

10.12.2010, Kiran Tilwani was shot. He was admitted to TMH Hospital and remained there admitted from 10th to 19th December, 2010. On 16th December, 2010, Kiran Tilwani regained senses and he told that the assailants came by the bike. Binod Khatri shot him, who was a pillion rider and Mantu Agarwal was driving the bike. At that time, he and Chandra Prakash Tilwani were present. None else was there. In cross-examination, this witness says that there was no entry in any register in regard to his presence in the ICU of the Hospital. In the ICU, he and Chandra Prakash were present. The members of the family of Kiran Tilwani were not there. In this regard, he did not tell the police.

11.4 P.W.-4, Brindalal Ram, in his examination-in-chief says that he produced the material Exhibit-I, Hero Honda motorcycle in the Court by the order of Station Officer of the Police Station concerned which he had brought from the *Malkhana* by the order of the Officer-in-Charge of the Police Station concerned.

11.5 P.W.-5, Reetu Tilwani, in her examination-in-chief says that on 10.12.2010, it was 10:00 or 10:15 O'clock of night. She was inside the room and was waiting for her husband. When her husband came out, blown the horn of bike, thereafter, she heard the sound of bullet and she saw on the road, two persons on a black colour bike, one of whom shot to her husband. She identifies the motorcycle during investigation in TIP. There was electric light of the pole at the time of occurrence. The accused, who shot, was Binod Khatri and another, who was on the bike, was Mantu Agarwal. After sustaining the gunshot injury, her husband fell down and he named the assailant Binod. In TMH hospital, her husband remained from 10th to 19th December, 2010. Thereafter, he was taken to Delhi and in Delhi, during

treatment on 22.12.2010, her husband died in Apollo Hospital. In cross-examination, this witness says that she came out of the house after hearing the sound of horn. As she opened the door, her husband fell down on the floor. She cried. Her daughter, her son, *gotni*, and son of brother-in-law came there. Her husband was taken to TMH Hospital. The number of motorcycle was 3533. None of the accused was identified neither in the Court nor in the Jail before the Magistrate. She was not familiar with any of the assailant. She had seen only the two assailants who had come by the motorcycle. The number of motorcycle was 3533 and there was red colour mark on that motorcycle. She had told to her brother-in-law Harish Tilwani in regard to number of motorcycle and mark of red colour thereon and also told that her husband had told the name of Binod while falling on the floor.

11.6 P.W.-6, Chandra Bhushan Singh, in his examination-in-chief says that TIP was conducted by him. It was in his pen and signature. The motorcycle was identified by Reetu Tilwani. TIP is marked Exhibit-2. At that time, he was Circle Officer. In cross-examination, this witness says that in the TIP chart, no time is mentioned. There were nine other motorcycles. No registration number of other nine motorcycles was recorded by him in the TIP chart. It was not identified by any independent witness.

11.7 P.W.-7, Kamaljeet Ram, in his examination-in-chief says that on 10.12.2010, in between 10:00 to 11:00 O'clock, Binod Khatri and Mantu Agarwal both came in his house. Both were in drunken state of mind. They asked him to stay at his house. At that time, he was alone in his house. He permitted them to stay, after half an hour, Manish Agarwal also came there. Thereafter, all slept overnight there and in the morning, they left his house. His statement under Section 164 of Cr.P.C. was recorded during

investigation by the Magistrate. He identifies his signature thereon. In cross-examination, this witness was declared hostile. He stated that he does not recollect whether in his statement under Section 164 of Cr.P.C. and statement to police as well, all the three accused persons had told him that they had committed murder of Kiran Tilwani. Since all the three accused were familiar to him, so he permitted them to stay there.

11.8 P.W.-8, Dr. Sunil Kumar, in his examination-in-chief says that between 10th to 19th December, 2010 he was posted as HOD Surgery in TATA Main Hospital. On 10th December, 2010 patient Kiran Tilwani was admitted in the ward. There was gunshot injury on the body of the patient. He was admitted about 10:30 pm. The patient was examined by junior doctor i.e., Dr. Anwita, who was surgeon on call. This slip has been prepared by Dr. Anwita, it is in two sheets. It is in her pen and signature marked Exhibit-4. In the intervening night of 10th and 11th December, 2010 at 01:00 am the patient was operated by his team comprising Dr. Y. Parwez, Dr. Anwita, Dr. Mallikarjun, Dr. Korhey and Dr. U.K. Singh. It is in three pages marked Exhibit-3. Again, the patient was operated on 13th December, 2010 by this team also, this operation slip is marked Exhibit-6. On 16th December, 2010 at 10:15 am, the patient was examined by Dr.Y.Parwez. This investigation slip is in his handwriting and signature marked Exhibit-7. In this report, doctor has written G.C.S. is conscious. On that day again, Dr. D.P. Samddar also examined the patient. The continuation slip is in his handwriting and signature marked Exhibit-8. At that time, patient was also conscious and alert. The patient was taken to higher centre on 19th December, 2010 for better treatment. In cross-examination, this witness says that the patient was treated in his care.

11.9 P.W.-9, Dr. Ashish Jain, in his examination-in-chief says that he was posted at Senior Residence, Department of Forensic Medicine, AIIMS, New Delhi. He conducted the postmortem of the body of Kiran Tilwani. It is in his handwriting and signature marked Exhibit-9. Body was brought by his relative Harish Kumar and Azad Kumar and it was also identified by ASI, Suresh Chand and Constable, Mukesh. There were following antemortem injuries:

- “(i) Firearm (entry) wound of size 1cm x 1cm present over lateral aspect of left thigh over middle 1/3rd.*
 - (ii) Firearm (entry) wound of size 2cm x 1cm vertically oval was present over right side of anterior abdominal wall.*
 - (iii) Firearm (exit) wound stelled shape of size 3cm x 3cm was present over midaxillary line on the left side.*
 - (iv) Horizontally over wound of size 3cm x 1cm muscle deep was present over interior abdominal wall on the right side.*
- The injury no. 5 to 13 were the surgical wound.”*

In cross-examination, this witness says that the injury no. 1 to 4 were caused by the firearm and rest of the injuries were surgical wound created for surgical purpose.

11.10 P.W.-10, Sheo Narayan Ram, in his examination-in-chief says that he has produced that pistol marked Exhibit-10 by the holder of the police station concerned. It was countrymade pistol. It bears signature of witness Raghu Yadav and also the signature of accused Binod Khatri. It also bears the signature of CJM, marked Exhibit-1 and 2. The F.S.L. number is also tagged with it. The empty cartridge is also tagged. This witness says that this pistol does not bear the signature of anyone. There is no paper or signature of on empty cartridge.

11.11 P.W.-11, Sima Tilwani, in her examination-in-chief says that at the time occurrence she was inside the kitchen. Her *gotni* opened the door hearing the horn of the motorcycle and heard the sound of firing twice. In

cross-examination, this witness says that at the time of occurrence, she, her husband and her children were inside the room.

11.12 P.W.-12, Yashika Tilwani, in her examination-in-chief says that after hearing the sound of bullet, she also came out and saw her father lying on the ground. She was inside the room. Only her mother came outside the house.

11.13 P.W.-13, Rajesh Prakash Sinha, in his examination-in-chief says that Kiran Tilwani was shot dead. A task force was prepared to nab the accused. He headed the Task Force. On the basis of CDR, he nabbed the accused Binod Khatri and Manish Agarwal. The mobile phone was also recovered from Binod Khatri and on the basis of same, Manish was nabbed.

11.14 P.W.-14, Sudhir Kumar, in his examination-in-chief says that he by the order of Senior Officer, left for Kolkata to conduct the raid with the help of Spy and nabbed Binod Khatri. From whose possession, ATM card, PAN card, shopping card, one mobile phone and a Diray were recovered. The seizure memo of the same is Exhibit-11. It is in his pen and signature. He reached Mandal Pada where in the house of Renuka Mandal, Binod was a tenant. From there eight SIM cards and some mobile phones were recovered which was in the name of Manoj Singh and a Driving Licence, which was in the name of Manoj Singh was also recovered but the same was bearing photograph of Binod Khatri. Seizure memo was also prepared marked Exhibit-12. On 27.01.2011, he left Kolkata and on 28.01.2011 and handed over the accused Binod Khatri to the Investigating Officer, Kanhaiya Prasad Singh. His confession was also recorded by Kanhaiya Prasad Singh and Binod Khatri had confessed that on 10.12.2010, Mantu Agarwal was driving the bike and he shot Kiran Tilwani and both fled away from there and he

hidden the pistol in the house of Sunil Yadav and the motorcycle was handed over to Manish Agarwal. This confessional statement of Binod Khatri is marked Exhibit-13. The pistol, which was recovered on the confessional statement of Binod Khatri from the house of Sunil Yadav marked Exhibit-X. On the basis of secret information, Manish Agarwal was also arrested. His arrest memo is Exhibit-15. Manish Agarwal confessed that motorcycle was parked by him in JMH parking. After 48 hours of the same, the bike was taken by the police station concerned being unwarranted. The memo of the same is Exhibit-17. During four days in his custody, Binod Khatri never confessed before him rather these confessions were made before the Investigating Officer, Kanhaiya Prasad Singh. He had the transit remand of Binod Khatri from the Kolkata Court from 25.01.2011 to 29.01.2011 and was handed over to the IO, Kanhaiya Prasad Singh. The confessional statement of Manish Agarwal and Binod Khatri were recorded in his presence. He also put his signature thereon.

11.15 P.W.-15, Subhash Kumar, in his examination-in-chief says that at the time of occurrence after hearing hue and cry, he also reached to the place of occurrence. The police was also present there. Police had recovered the empty cartridges nearby the house of Kiran Tilwani. The seizure memo of empty cartridges also bears his signature and marked Exhibit-15. In cross-examination, this witness says that on the seizure memo, he simply put his signature.

11.16 P.W.-16, Gopal Kharbanda, in his examination-in-chief says that he is also the witness of seizure memo of the empty Cartridges. He identifies his signature thereon marked Exhibit-15/1. He says that the empty cartridges were kept in the Jeep of the police and asked him to put his signature. He put

his signature thereon.

11.17 P.W.-17, Kanhaiya Prasad Singh, in his examination-in-chief says that he recorded the fardbeyan of Harish Kumar Tilwani in TMH Hospital. It is in his handwriting and signature. It was signed by the Station Officer, Rangnath Sharma marked Exhibit-1/1. It was also endorsed by Rangnath Sharma for registration of the case marked Exhibit1/2. On the basis of this fardbeyan, the Formal FIR was prepared by Harinandan marked Exhibit-1/3. The endorsement is marked and the Formal FIR is marked Exhibit-11. It is in pen and signature of Harinandan. He recorded the re-statement of Harish Kumar Tilwani. He also found the injured at the place of occurrence in injured condition and also recovered three empty cartridges from there. The recovery memo of the same was also prepared by him. The recovery of the memo of the same also bears his signature, which was prepared by Rangnath Sharma marked Exhibit-15/2. Gopal Kharbanda and Subhash Kumar were also put their signature on the exhibit of empty cartridges. By the order of the Superintendent of Police, a Task Force was constituted. On 28.01.2011, Police Officer, Sudhir Kumar handed over Binod Khatri to him. Binod Khatri confessed his guilt in presence of Mukhtar Singh and Surendra Thakur. His confessional statement is marked Exhibit-16. The pistol was recovered on the confessional statement of Binod Khatri from the house of Sunil Yadav and prepared the seizure memo of the same marked Exhibit-11. He also nabbed Manish Agarwal, from his possession, recovered one Samsung Mobile Phone and recovery memo of the same marked Exhibit-18. Manish Agarwal also confessed his guilt; his confessional statement is Exhibit-19. Manish Agarwal stated that the motorcycle, which was given to him, the same was parked by him in the parking and it was taken away by

the police after 48 hours being unwarranted and unclaimed, the recovery memo of the motorcycle is marked Exhibit-20. The recovered empty cartridges were also sent for examination to FSL. The CDR details of the mobile phones were also collected by him. The charge-sheet was also filed against Binod Khatri and Manish Agarwal, thereafter, filed charge-sheet against Mantu Agarwal. The statement of Kamaljeet was also recorded by the Magistrate under Section 164 of the Code of Criminal Procedure. TIP of motorcycle was conducted by the S.D.O. In cross-examination, this witness says that during the investigation he did not record the fardbeyan or statement of injured since he was in operation theater. During whole investigation, he did not see Kiran Tilwani and he did not record his statement and came to know that he was taken from TMH hospital to Delhi, where he died on 22.12.2010. From the place of occurrence, he did not take in his possession the bloodstained soil. All the three empty cartridges were sent for examination to FSL and the Motorcycle was not recovered from the possession of Manish Agarwal. He did not conduct the TIP of motorcycle. Pistol was also sent for examination to FSL. During examination, no one witness has stated to him that on 16.12.2010, in TMH hospital Kiran Tilwani had told the name of accused Binod Khatri in regard to opening fire upon him. He recorded the statement of Harish Tilwani on 18.12.2010. In her statement, Reetu Tilwani also did not say that injured had told the name of the assailant as Binod Khatri. During investigation, neither Rajesh Tilwani nor Chandra Prakash Tilwani had told him that on 16.12.2010, the injured being in conscious condition had told the name of the assailant as Binod Khatri and the another as Mantu Agarwal. The doctor of TMH hospital did not inform him that Kiran Tilwani had regained senses.

11.18 P.W.-18, Taufique Ahmad, in his examination-in-chief says that he was the Judicial Magistrate, 1st Class. On 27.07.2011, in Jamshedpur Civil Court, he recorded the statement of Kamaljeet Singh under Section 164 of the Code of Criminal Procedure marked Exhibit-3/1.

11.19 P.W.-19, Rajesh Kumar Ranjan, in his examination-in-chief, says that the material exhibit received from FSL to the police station of this case crime was handed over to him. The material exhibit is the empty cartridges market kept in sealed envelope marked Exhibit A1, A2 and A3, which are produced in the Court by him marked Exhibit-III, III/1 and III/2. The box, in which, these exhibits were contained is marked Exhibit-24. On these empty cartridges, at the bottom, it is mentioned KF 7.65. 18 SIM Cards were also produced in the Court marked exhibit accordingly. Driving Licence was also produced marked Exhibit-25. Samsung Mobile Phone and Debit Card were also produced.

12. The FIR of this case was lodged by **P.W.-1, Harish Kumar Tilwani** in regard to the murder of his younger brother Kiran Tilwani against the unknown persons. As per FIR case, **P.W.-1, Harish Kumar Tilwani** came to know from the wife of Kiran Tilwani, namely, **P.W.-5, Reetu Tilwani** that two miscreants came by the motorcycle and one pillion rider had shot her husband while she opened the door of the house hearing the sound of the motorcycle of her husband and her husband fell down in injured condition. **P.W.-1, Harish Kumar Tiwani** also saw his brother in injured condition, immediately, he was taken to TMH Hospital and was admitted there on 10.12.2010 and remain admitted there up to 19.12.2010. As per the prosecution case, it was **P.W.-5, Reetu Tilwani**, who is the star witness, had seen two assailants came by the motorcycle and one, who was pillion rider

had shot to her husband. The occurrence is of 10.12.2010 and **the FIR of this occurrence was lodged with the police station concerned on 11.12.2010 against the unknown persons, therefore, till the date of lodging FIR, name of the assailants was not known.**

13. The name of Binod Khatri, Mantu Agarwal and Manish Agarwal came into light. A task force was also prepared and the task force headed by **P.W.-14, Sudhir Kumar**, who reached to Kolkata and with the assistance of spy arrested Binod Khatri, from whose possession, one mobile phone and PAN, ATM and Shopping Card were also recovered. He took the transit remand of Binod Khatri from the Court of learned Magistrate of Kolkata Civil Court and on 28.01.2010 he brought the accused Binod Khatri and handed over to **P.W.-17, Investigating Officer, Kanhaiya Prasad Singh** in the Golmuri Police Station.

14. **P.W.-17, Kanhaiya Prasad Singh, the Investigating Officer of this case** recorded the confessional statement of the accused Binod Khatri, who confessed his guilt and stated that he and Mantu Agarwal both went by the Motorcycle and shot Kiran Tilwani on 10.12.2010 in the night and he handed over the pistol to Sunil Yadav, which was used in commission of the alleged offence. The very pistol was also recovered on the confessional statement of this accused Binod Khatri from the house of Sunil Yadav. Thereafter, this witness also confessed that the motorcycle was given by them to Manish Agarwal. Manish Agarwal was also nabbed and he told that the said motorcycle was parked by him in the parking area, which was also taken in custody by the police being unclaimed after more than 48 hours. Thereafter, that motorcycle used in the alleged commission of offence was also taken in custody by the Investigating Officer from the police station

concerned. As such, on the basis of confessional statement of the accused Binod Khatri, Mantu Agarwal and Manish Agarwal and the call details of the mobiles, which was recovered from them, their name came into light in commission of the alleged offence.

15. The motorcycle, which was used in commission of the alleged offence was identified by the wife of the deceased **P.W.-5, Reetu Tilwani** during TIP but this TIP, which was conducted by **P.W.-5, Chandra Bhushan Singh**, who conducted the TIP of this motorcycle, has stated that during TIP, there was 9 more motorcycles but in TIP chart, he did not mention the number of nine other motorcycles, which were used in TIP. He also admits that there was no signature of any independent witness on TIP chart. Therefore, the TIP of this motorcycle also becomes doubtful. Though, this motorcycle is alleged to have been identified by **P.W.-5, Reetu Tilwani** she has stated that she identified the motorcycle by its registration number but in her statement recorded under Section 161 of the Code of Criminal Procedure, where she did not disclose the number of motorcycles. Even she did not disclose the number of motorcycles, which was used in commission of the alleged offence to her brother-in-law, **P.W.-1, Harish Kumar Tilwani**, who had lodged the FIR, as such, the TIP of this motorcycle also becomes doubtful and the same cannot be relied upon.

15.1 The Hon'ble Supreme Court in the case of *Varun Chaudhary vs State of Rajasthan* reported in *AIR 2011 SC 72* has held that that the identification of a vehicle used in offence, prosecution must show that the tyre marks found at the place of offence were that of motorcycle used by the accused, tyre marks are to be lift from the place of offence compare to tyre marks of the motorcycle recovered. Paragraph No. 22 reads as under:

“22.It is pertinent to note that there is no evidence or even there is no reference to the fact that any one from Forensic Science Laboratory or from the police personnel had lifted marks of the motor cycle tyre from the place of the offence so that the same can be compared with the tyre marks of the motor cycle alleged to have been used in the offence. Unless tyre marks are lifted from the place of the offence and upon comparison with the tyre marks of the motor cycle recovered are found to be the same, it cannot be said that the motor cycle recovered was used in the offence. So as to establish the presence of the motor cycle at the place of the offence, the prosecution must show that the tyre marks which were found at the place of the offence were that of the motor cycle used by the accused. It is also pertinent to note that marks of the motor cycle tyre which were received by the FSL were not in a sealed condition. Aforestated facts clearly denote that the marks of the motor cycle tyre could not have been relied upon either by the Trial Court or by the High Court for establishing that the motor cycle having particular tyre marks was used in the alleged offence.”

16. So far as the recovery of pistol is concerned, which is alleged to have been recovered on the confessional statement of Binod Khatri from the house of Sunil Yadav to whom this Binod Khatri is alleged to have handed over, the recovery memo of the same has been proved by **P.W.-17, Kanhaiya Prasad Singh, the Investigating Officer**. All the three empty cartridges, which were recovered from the place of occurrence marked Exhibit-15 are also proved by **P.W.-17, Kanhaiya Prasad Singh** but the witnesses of the recovery memo of all the three empty cartridges i.e. **P.W.-15/2, Subhash Kumar and P.W.-16, Gopal Kharbanda** both have stated that they were put their signature on the recovery memo but these empty cartridges were in the Jeep in custody of the police. The empty cartridges and the pistol, which were recovered on the confessional statement of Binod Khatri, was also sent for examination to FSL. As per the opinion of this FSL report marked Exhibit-22, wherein it has been opined that all the three empty cartridges i.e. A1, A2 and A3 have been fired from the country-made pistol of 7.65 mm marked Exhibit-‘A’ is of **Sidhgora P.S. Case No.08 of 2011**. The pistol, which was recovered on the confessional statement of accused Binod Khatri

was also produced in Court. The recovery memo of this pistol is also marked as **Exhibit-17** on the chamber of the pistol mentioned 7.65 mm. In the chamber of the pistol one kartoos of 7.5mm was also found loaded. **The recovery memo of this was prepared in presence of Raghu Yadav and Om Prakash Tiwari both these independent witnesses of the recovery memo were not examined on behalf of the prosecution. This pistol was not sent for examination to FSL whether these three empty cartridges were shot by this pistol to prove that the said pistol was used in the commission of said offence. Only the empty cartridges were sent to FSL but this pistol was not sent to FSL to connect whether these empty cartridges were fired by this pistol.**

17. As per the prosecution case, the conviction of the appellant is based on the testimony of **P.W.-2, Chandra Prakash Tilwani; P.W.-3, Rajesh Tilwani and; P.W.-5, Reetu Tilwani. P.W.-2, Chandra Prakash Tilwani and P.W.-3, Rajesh Tilwani** both have stated that the injured Kiran Tilwani was admitted in TMH hospital on 10.12.2010 and remained there up to 19.12.2010 and on 16.12.2010 the injured Kiran Tilwani, who was admitted in ICU regained senses and told to these witnesses that it was Binod Khatri, who had shot him on the fateful night and the another accused was Mantu Agarwal but the testimony of these two witnesses is not found reliable since they have stated that they have not told this fact during investigation to **P.W.-17, Kanhaiya Prasad Singh, the Investigating Officer. P.W.-17, Kanhaiya Prasad Singh** has stated that during investigation **P.W.-3, Rajesh Tilwani and P.W.-2, Chandra Prakash Tilwani had not stated him that the injured Kiran Tilwani on 16.12.2010 had told them that the assailants were Binod Khatri and Mantu Agarwal.** Therefore, the

testimony of these two witnesses i.e. **P.W.-2 and P.W.3** is not trustworthy and cannot be relied upon since they did not say this fact in their statement to the Investigating Officer, Kanhaiya Prasad Singh.

17.1 So far as the testimony of **P.W.-5, Reetu Tilwani** is concerned, she in her statement stated that her husband when shot by the appellant, fell down on the floor and while falling down on the floor he told the name of Binod but surprisingly, on the very date of occurrence i.e. **10.12.2010**, she told to **P.W.-1, Harish Kumar Tilwani**, her brother-in-law that two assailants had came by the motorcycle and one, who was pillion rider had shot her husband but she did not disclose to **P.W.-1, Harish Kumar Tilwani** that her husband had disclosed the name of any of the assailant in injured condition. Even this witness did not disclose the number of motorcycle though she simply stated to **Harish Kumar Tilwani** that the motorcycle was of black colour. **P.W.-17, Kanhaiya Prasad Singh**, the Investigating Officer has also stated that during investigation **P.W.-5, Reetu Tilwani** had not disclosed to him that her husband while sustaining bullet injury had disclosed the name of any of the assailant, as such, the statement of **P.W.-5, Reetu Tilwani** up to this extent cannot be relied upon.

17.2 The Hon'ble Supreme Court in the case of *Sampath Kumar v. Inspector of Police*, reported in *(2012) 4 SCC 124* held that the testimony of witness in a Court without he woke up he saw the appellant standing near the deceased no such statement was given to the police under Section 161 of the code of Criminal Procedure. The witness did not disclose to anyone for five long years wholly unsafe to base conviction on such testimony in absence of any other evidence. Paragraph No.19 reads as under:

“19. In his statement before the police under Section 161 CrPC,

Palani (PW 7) made no such accusations against the appellants nor did he disclose to anyone that he had seen the accused persons on the spot around the time of the commission of the offence. It was only five years after the occurrence that the witness for the first time disclosed in the court the story about his having seen the appellants standing near the deceased when the former woke up on account of the noise of a stone falling hard on the ground.”

18. P.W.-8, Dr. Sunil Kumar, in his statement, has stated that on 16.12.2010, the patient Kiran Tilwani was in conscious condition during his admission from 10.12.2010 to 19.12.2010 in TMH Hospital but this witness has stated that the patient has not given any statement to him even **P.W.-8, Dr. Sunil Kumar** has also stated that the patient in his presence had not given any statement to anyone.

18.1 Herein, the statement of **P.W.-17, Kanhaiya Prasad Singh, who is the Investigating Officer** also becomes relevant. He has specifically stated that during investigation neither **P.W.-3, Rajesh Tilwani** nor **P.W.-2, Chandra Prakash Tilwani** nor **P.W.-5, Reetu Tilwani** had stated to him that the deceased while in injured condition disclosed the name of any of the assailant. **He also stated that even no doctor of the TMH Hospital informed him that the deceased in injured condition in TMH Hospital had regained any senses.** He also stated that even **P.W.-5, Reetu Tilwani** has not stated to him that her husband on the date of occurrence while falling down on the ground after sustaining bullet injury had told the name of any of the assailant. Therefore, the testimony of **P.W.-17, Kanhaiya Prasad Singh, P.W.-2, Chandra Prakash Tilwani, P.W.-3, Rajesh Tilwani and P.W.-5, Reetu Tilwani** cannot be relied upon.

19. So far as the testimony of **P.W.-9, Dr. Ashish Jain**, who conducted the postmortem report of the deceased, is concerned, it is proved that there were two entries wound of the bullet and two exit total 4 lacerated wound were

antemortem in nature. So far as surgical wounds are concerned, it is stated that these wounds were created for surgical purpose by the doctor. **It is also pertinent to mention here that the accused Binod Khatri, Mantu Agarwal and Sunil Yadav all three have been acquitted in Trial No.231 of 2015 (State Vs. Binod Khatri & two Ors.), copy of the judgment passed by the Judicial Magistrate, 1st Class, Jamshedpur dated 20.07.2015, in which, the accused Binod Khatri, Mantu Agarwal and Sunil Yadav all three were acquitted for the offence under Sections 25(1-B)a/35, 26 of the Arms Act.** Moreover, this pistol, which is alleged to have been recovered on the confessional statement of Binod Khatri was never sent for examination to FSL and there is no FSL report to that effect that it was used in commission of the said offence.

20. The FIR of this case, which was registered against the unknown persons during investigation, no TIP was conducted to identify the complicity of the appellants in commission of the said offence. **P.W.-17, Kanhaiya Prasad Singh, the Investigating Officer has admitted that during investigation, no TIP was conducted in regard to identity of the accused persons in commission of the said offence.** Identification for first time in Court is not reliable.

20.1 The Hon'ble Supreme Court in the case of *Amrik Singh Vs. the State of Punjab* reported in *2022 LiveLaw (SC) 582* held that it is not prudent to convict an accused solely on the basis of the identification for the first time in Court without TIP. Paragraph No. 6.7 reads as under:

“6.7 Even applying the law laid down by this Court in the aforesaid decisions and looking to the facts narrated hereinabove, we are of the opinion that it would not be safe and/or prudent to convict the accused solely on the basis of their identification for the first time in the Court.”

21. In view of the above analysis of the evidence on record, we are considered view that the prosecution has failed to prove its case beyond all shadow of reasonable doubt and the judgment of conviction and the order of sentence passed by the learned Trial Court needs interference and these Criminal Appeals deserves to be allowed.

22. Accordingly, these Criminal Appeals are **allowed** and the impugned judgment of conviction dated 04.05.2018 and the order of sentence dated 09.05.2018 passed by the learned 4th Additional Sessions Judge, Jamshedpur passed in Sessions Trial No. 329 of 2011 are **set aside**.

23. These appellants are **acquitted** from the charges levelled against them and they are directed to be released forthwith, if not wanted in any other case.

24. Pending Interlocutory Application(s) also stands disposed of.

25. Let a copy of this judgment be communicated to the learned Trial Court.

(Subhash Chand, J.)

Per Ananda Sen, J. : I agree

(Ananda Sen, J.)

*Jharkhand High Court, Ranchi
Dated: the 16th April, 2024,
Madhav/- **A.F.R.***