IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.168 of 2012

Arising Out of PS. Case No.-25 Year-1994 Thana- MOTIPUR District- Muzaffarpur

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HANS LAL RAI S/O Late Mulahi Rai R/O Vill-Morsandi, P.S. Motipur, Distt-Muzaffarpur ... ... Appellant/s

Versus

THE STATE OF BIHAR ... ... Respondent/s

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Appearance :

For the Appellant/s : Mr.Bhavesh Kumar, Advocate

For the Respondent/s : Mr.S.N.Prasad, App

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CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH
CAV JUDGMENT

Date : 05-05-2026

Heard learned counsel appearing on behalf of the appellant and, learned APP for the State.

2. The present appeal has been filed under Section 374 (2) and 389(1) of the Code of Criminal Procedure challenging the judgment of conviction dated 15.02.2012 and order of sentence dated 18.02.2012 passed by the learned 3rd Addl. Sessions Judge, Muzaffarpur in Sessions Trial No.139/2000 arising out of Motipur P.S. Case No. 25/94 whereby and whereunder the appellant has been convicted for the offence punishable under Section 395 of the Indian Penal Code and has been sentenced to undergo Rigorous Imprisonment for 10 years.

BRIEF FACTS OF THE CASE

3. As per the allegation made in the FIR, the informant,

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Ram Ashray Rai of village Meghua, P.S. Motipur, District Muzaffarpur, recorded his *fardebyan* before Sub-Inspector of Police Sri R.N. Tiwary on 15.03.1994 at about 9:00 P.M. at the informant's house, stating therein that on the same day at about 7:00 P.M., while the informant was watching television in his room with open door about, 6-7 dacoits and 50 unknown variously armed with guns, pistols, *lathis* and *pharsas* suddenly entered into his house and forcibly demanded the licensed gun of the informant and, upon his resistance assaulted him with *lathis*. Out of fear, the informant disclosed that the gun was kept in the upstairs room, whereupon 2-3 *dacoits* went to the upper floor and took away the gun, while the other accused persons, had confined the informant. During the occurrence, the informant also heard the sounds of firing and bomb explosions outside his house. Further case is that the dacoits had also demanded cash and jewellery, which they looted after breaking the lock of the jewellery box. The accused also looted clothes and other articles. It has been alleged that about 40-50 other dacoits had entered the house and were committing loot in different rooms. According to the informant, some dacoits had covered faces to whom he could not identify, however, the accused persons, namely Hans Lal Rai (appellant), Kailash Rai, Nandan Rai, Ram Chandra Rai and Lalos Rai, were identified

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by him in the light of the lantern and by their voices and their face being not covered. It is further alleged that due to firing and bomb explosions caused by the dacoits, the cattle shed (*bathan*) of the informant was burnt to ashes. On alarm being raised by the villagers, the dacoits fled away towards the west-north direction. The occurrence allegedly continued for about 15-20 minutes. On the basis of information, a case of dacoity/loot of gold ornaments, clothes, utensils and other household articles, worth several thousand rupees, including a licensed gun standing in the name of his brother Ramdeo Rai and had assaulted the son of the informant during the occurrence.

4. On the basis of the statement of the informant, the F.I.R being Motipur P.S. Case No. 25/94 was registered for the offences under sections 395/397 of the Indian Penal Code. After institution of the FIR, the police proceeded with the investigation and after completion of investigation, charge-sheet was submitted. Thereafter, the trial court took cognizance against the appellants and the case was committed to the Court of Sessions for trial.

ARGUMENT ON BEHALF OF THE APPELLANT

5. Learned counsel appearing on behalf of the appellant submitted that the impugned judgment of conviction

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and order of sentence passed by the learned Trial Court is wholly unsustainable in the eyes of law, as the conviction of the appellant is based solely upon single identification of the informant/PW3. The FIR has been lodged against 50 accused persons, out of whom, the informant has identified only four persons, including the present appellant. It has been submitted that P.W.1 and P.W.2, who are own brothers of the informant and the eyewitnesses to the occurrence, have categorically stated in their deposition that they could not identify any of the accused persons during the alleged occurrence. He submitted that the appellant has falsely been implicated due to village politics. Learned counsel further submitted that there are contradictions between the *fardbeyan* and the deposition of P.W.3., the informant, who in his *fardbeyan*, has claimed that he had identified several accused persons in lantern light by their voices, including Ram Chandra Rai and others, whereas during trial, he failed to identify the co-accused persons present in Court and identified only the appellant. It has thus been urged on behalf of the appellant that the material contradictions and improvements render the evidence of P.W.3 wholly unreliable and unsafe to convict the appellant on such testimony.

6. Learned counsel further submitted that except the testimony of P.W.3, no corroborative evidence has been brought

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on record to connect the appellant with the alleged occurrence. No independent witness has been examined by the prosecution though the alleged occurrence took place in a village locality where independent witnesses were naturally available. It has further been contended that neither the Investigating Officer nor the doctor has been examined in the present case, which has caused serious prejudice to the defence. Due to non-examination of the Investigating Officer, the defence was deprived of proving contradictions and omissions in the statements of prosecution witnesses recorded during investigation and could not effectively challenge the manner of investigation. It has also been submitted that no incriminating article was recovered from the possession of the appellant and even the FIR has not been formally exhibited by the prosecution. Learned counsel submitted that the prosecution has miserably failed to prove the charge against the appellant beyond all reasonable doubts and as such the appellant is entitled to the benefit of doubt and deserves to be acquitted. He further contended that the other accused persons against whom similar allegations have been levelled, have already been acquitted by the impugned judgment.

ARGUMENT ON BEHALF OF THE STATE

7. *Per Contra,* learned APP appearing for the State

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while opposing the appeal submitted that the learned District court, after considering all the evidences on record and exhibits submitted on behalf of the parties during the course of trial, has rightly convicted the appellants for said offences.

ANALYSIS AND CONCLUSION

8. Heard the parties.

9. I have perused the lower court records and proceedings and also taken note of the arguments canvassed by learned counsel appearing on behalf of the parties.

10. The learned trial court, on the basis of materials as collected during the course of investigation, passed the Judgment of conviction dated 15.02.2012 and order of sentence dated 18.02.2012 for the offences under Section 395 IPC.

11. During the trial, the prosecution has examined altogether 3 witnesses, namely:

(i) (P.W.-1),- Ram Deo Rai (brother of the informant)

(ii) (P.W.-2),- Ramautar Rai (brother of the informant)

(iii) (P.W.-3),- Ramashray Rai

12. The prosecution has also relied upon following document exhibited during the course of trial:-

(i) Signature of S.I. of Motipur P.S. (Exhibit-1),

(ii) Fardbeyan of (Exhibit-1/1),

(iii) Signature of witness (Exhibit-3)

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13. Upon a meticulous examination of the record, the evidence of the prosecution witnesses (PWs) can be summarised as follows:

I. P.W.1 Ram Deo Rai, the elder brother of the informant, supported the occurrence of dacoity alleged to have taken place on 15th March, 1994 at about 7:00 P.M. He deposed that 25–30 unknown persons, armed with weapons, committed dacoity and looted household articles, including his licensed gun. However, in cross-examination, he categorically stated that he did not identify any of the accused persons and further asserted that the accused present in court were not participants in the occurrence. He also stated that his statement was not recorded by the police.

II. P.W.2 Ram Autar Rai, the younger brother of the informant, also supported the occurrence in general terms, stating that 30–35 unknown persons, armed with guns and lathis, committed dacoity. However, he too failed to identify any of the accused persons and clearly stated that the accused persons present in court, namely Lal Babu Rai, Ram Chandra Rai, and Harendra Thakur, were not involved in the occurrence. He further stated that his statement was not recorded by the Investigating Officer.

III. P.W.3 Ramashray Rai, the informant, supported the

occurrence and his fard-beyan. He deposed that 6–7 armed persons entered his house, took his licensed gun, and looted cash and jewellery. He further stated that about 25–30 persons were involved in the occurrence. Though he claimed to identify certain accused persons, his testimony reveals inconsistency, as he identified only accused Hans Lal Rai/appellant among those present in court and failed to identify the others. He also claimed to identify accused Haren Rai, who was not named in the FIR, without any Test Identification Parade being conducted. In cross-examination, he admitted inability to specify which accused took which articles.

14. On the basis of materials surfaced during the trial, the appellants/accused was examined under Section 313 of the Cr.PC by putting incriminating circumstances/evidences surfaced against them, which they denied and shows their complete innocence.

15. In the present case, the Investigating Officer has not been examined by the prosecution. During the course of trial, whether the same will vitiate the prosecution case? Undoubtedly, the Investigating Officer is a material witness, being essential to explain the manner in which the investigation was conducted and the steps taken during the investigation. However, it is well settled that the mere non-examination of the

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Investigating Officer does not *ipso facto* vitiate the prosecution case. The effect of such omission has to be assessed in the facts and circumstances of each case, particularly with regard to whether any prejudice has been caused to the accused and where the ocular and other substantive evidence is otherwise found to be cogent, reliable and trustworthy, therefore, the prosecution case cannot be rejected on that ground alone. In this regard, I find it gainful to draw the proposition of law laid down by the Apex Court in the case of ***Ram Gulam Chaudhary v. State of Bihar*****,** reported in ***(2001) 8 SCC 311*** in para no. 18, which is *inter alia* reproduced hereinafter:

> ***"****26. In the case of Ram Dev v. State of U.P. [1995 Supp (1) SCC 547 : 1995 SCC (Cri) 402 (2)] this Court has held that it is always desirable for the prosecution to examine the investigating officer. However, non-examination of the investigating officer does not in any way create any dent in the prosecution case much less affect the credibility of the otherwise trustworthy testimony of the eyewitnesses.*
>
> *27. In the case of Behari Prasad v. State of Bihar [(1996) 2 SCC 317 : 1996 SCC (Cri) 271] this Court has held that for non-examination of the investigating officer the prosecution case need not fail. This Court has held that it would not be correct to contend that if the investigating officer is not examined the entire case would fall to the ground as the accused were deprived of the opportunity to effectively cross-examine the witnesses and bring out contradictions. It was held that the case of prejudice likely to be suffered must depend upon the facts of each case and no universal straitjacket formula should be laid down that non-examination of investigating officer per se*

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vitiates the criminal trial.

28. In the case of Ambika Prasad v. State (Delhi Admn.) [(2000) 2 SCC 646 : 2000 SCC (Cri) 522] it was held that the criminal trial is meant for doing justice not just to the accused but also to the victim and the society so that law and order is maintained. It was held that a Judge does not preside over the criminal trial merely to see that no innocent man is punished. It was held that a Judge presides over criminal trial also to see that a guilty man does not escape. It was held that both are public duties which the Judge has to perform. It was held that it was unfortunate that the investigating officer had not stepped into the witness box without any justifiable ground. It was held that this conduct of the investigating officer and other hostile witnesses could not be a ground for discarding evidence of PWs 5 and 7 whose presence on the spot was established beyond any reasonable doubt. It was held that non-examination of the investigating officer could not be a ground for disbelieving eyewitnesses.

29. In the case of Bahadur Naik v. State of Bihar [(2000) 9 SCC 153 : 2000 SCC (Cri) 1186] it was held that non-examination of an investigating officer was of no consequence when it could not be shown as to what prejudice had been caused to the appellant by such non-examination..''

16. Now before I proceed to deal with facts of the case and analyze the evidences both oral and documentary in background that the conviction is under Section 395 and the FIR is both under Sections 395 and 397, I find it appropriate to reproduce the provision of Sections 390, 395, 391, 392 and 396 of Indian Penal Code for the sake of convenience and better understanding of the facts, which are as under:-

(a) Section 390 of Indian Penal Code (IPC), 1973 defines "Robbery" as theft or extortion committed with use of

force, violence or arms or redhandedness or fear of such consequences as would under reasonable means likely to feel them.

(b) Section 391 of Indian Penal Code (IPC), 1973 defines "Dacoity" as a robbery committed or attempted by five or more persons acting together. It specifically targets group robbery where three or more accused persons either attempt, aid in committing robbery by putting the victim in fear of death, hurt or wrongful restrain. It can be said that robbery is an aggravated form of theft or extortion.

(c) Section 392 of Indian Penal Code (IPC), 1973 defines if robbery is committed on the highway between sunset and sunrise, the punishment may be enhanced more than 10 years.

(d) Section 395 of Indian Penal Code (IPC), 1973 prescribes punishment of life imprisonment with rigorous imprisonment or up to 20 years of imprisonment along with fine.

(e) Section 396 of Indian Penal Code (IPC), 1973 prescribes death penalty, where death or grievous hurt happens during dacoity.

Whether The Offence Alleged Is Proved Under Section 395 Of Ipc, If Not, Under 397 Of Ipc Can The Appellant Be

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Convicted?

17. The appellant has been convicted under Section 395 of IPC. Now I proceed to analyze whether case of robbery is made out. From perusal of provisions of Section 391/395 of IPC, for robbery, individual responsibility is required to be assessed with regard to the individual action of the offenders, whereby in cases of several people being doing the robbery, liability will be then depend on the role each offender plays with force or intimidation. The FIR is under Section 395/397 of IPC.

18. The Hon'ble Bombay High Court in case of ***State of Maharashtra Vs. Joseph Mingel Koli,*** reported in ***1997(1) BOMCR 362*** emphasized that immediate use of force during theft is essential to constitute robbery. The offenders intention to induce fear in the victim was recognized as a crucial factor, distinguishing robbery from other form of theft.

19. The Apex Court explaining the provision of Section 397 IPC in the case of in ***Shri Phool Kumar VS Delhi Administration*** reported in ***(1975) 1 SCC 797,*** has held *inter alia* in paragraphs 5 to 7 as under:

> ***"5.*** *Section 392 of the Penal Code provides:*
>
> *"Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years."*

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The sentence of imprisonment to be awarded under Section 392 cannot be less than seven years if at the time of committing robbery the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person: vide Section 397. A difficulty arose in several High Courts as to the meaning of the word "uses" in Section 397. The term "offender" in that section, as rightly held by several High Courts, is confined to the offender who uses any deadly weapon. The use of a deadlyof sentencing the appellant with the aid of Section 397. So far as he is concerned he is said to be armed with a knife which is also a deadly weapon. To be more precise from the evidence of PW 16 "Phool Kumar had a knife in his hand". He was therefore carrying a deadly weapon open to the view of the victims sufficient to frighten or terrorize them. Any other overt act, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code.

6. *Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also seven years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of seven years under Section 398 if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum punishment under Section 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections viz. "uses" in Section 397 and "is armed" in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in*

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> *committing the robbery.*
>
> *7. If the deadly weapon is actually used by the offender in the commission of the robbery such as in causing grievous hurt, death or the like then it is clearly used. In the cases of Chandra Nath v. Emperor [AIR 1932 Oudh 103] ;Nagar Singh v. Emperor [AIR 1933 Lah 35] and Inder Singh v. Emperor [AIR 1934 Lah 522] some overt act such as brandishing the weapon against another person in order to overawe him or displaying the deadly weapon to frighten his victim have been held to attract the provisions of Section 397 of the Penal Code. J.C. Shah and Vyas, JJ. of the Bombay High Court have said in the case of Govind Dipaji More v. State [AIR 1956 Bom 353] that if the knife* "was used *for the purpose of producing such an impression upon the mind of a person that he would be compelled* ***to part with his property, that would amount to 'using' the weapon within the meaning of Section 397.***" *In that case also the evidence against the appellant was that he carried a knife in his hand when he went to the shop of the victim. In our opinion this is the correct view of the law and the restricted meaning given to the word "uses" in the case of Chand Singh [ILR (1970) 2 Punj and Har 108] is not correct." (emphasis supplied)"*

20. The aforesaid view has been subsequently reiterated by the Apex Court in para no. 20 in the case of ***Dilawar Singh vs. State of Delhi*** reported in ***(2007) 12 SCC 641,*** which *inter alia* is reproduced hereinafter:

> ***"20.*** *As noted by this Court in Phool Kumar v. Delhi Admn. [(1975) 1 SCC 797 : 1975 SCC (Cri) 336 : AIR 1975 SC 905] the term "offender" under Section 397 IPC is confined to the offender who uses any deadly weapon. Use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon. There is distinction between "uses" as used in Sections 397 IPC and 398 IPC. Section 397 IPC connotes something more than merely being armed with deadly weapon.****"***

21. Admittedly, the FIR was lodged under Section

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395/397 of IPC, it can be concluded that for an offence under Section 397 IPC, if at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, for or attempts to cause death or grievous hurt to any person, to part with his property the imprisonment with which such offender shall be punished shall not be less than seven years. Similarly, if, at the time of committing robbery or dacoity, the offender is armed with any deadly weapon, frighten his victim or some overt act of brandishing the weapon against another person in order to overawe him and compel the person to part with his person would mean using weapon within the meaning of Section 397 IPC. The imprisonment with which such offender shall be punished shall not be less than seven years.

22. The above distinction made by the Apex Court shows that there is no difference between Sections 391/395 and Sections 392/397 IPC, so far as, sentence/punishment except the difference in case of Section 397 IPC, the punishment shall not be less than seven years. Otherwise, the ‘robbery’ and ‘dacoity’ are *sine qua non*. ‘Dacoity’ is nothing but an exaggerated version of ‘robbery’ with a difference in number of accused. Therefore, also even in a case where the accused is not convicted for the offence under Section 397 IPC, still he can be

punished under Section 395 IPC and no prejudice is caused to him as ultimately the prosecution has to prove the ‘robbery’ and ‘dacoity’ either for the offence punishable under Section 395 IPC or under Section 397 IPC. However, to bring the case against the accused under Section 397 IPC, the prosecution has to prove one additional fact that the offender has used any deadly weapon or has caused grievous hurt to any person, or has attempted to cause death or grievous hurt to any person, which it failed.

23. In the present case, the learned trial Court has not found that five or more persons conjointly committed the robbery, and thus the essential ingredients of the offence of dacoity have not been established. Only four persons were put on trial, and consequently, the learned trial Court did not record a conviction of the accused for the offence under Section 391, punishable under Section 395 of the IPC. Therefore, once a case under Section 391 IPC, punishable under Section 395 IPC is made out, they can be convicted for the offence under Section 391 IPC punishable under Section 395 IPC as no prejudice has been shown to have caused to the accused.

24. Applying the aforesaid settled principles of law to the facts of the present case, a clear distinction emerges between the applicability of Sections 395 and 397 of the Indian Penal

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Code. In order to attract Section 395 IPC, the prosecution is required to establish that five or more persons conjointly committed or attempted to commit robbery, thereby constituting the offence of *dacoity*. The law is well settled that the Section 395 IPC is attracted only when the individual offender is proved to have "used" a deadly weapon during the commission of the offence. Mere presence in the company of other offenders or general allegations of use of weapons by the group would not suffice to fasten the liability under Section 395 IPC, unless a specific overt act of use of deadly weapon is attributed to the accused concerned. In the present case, although there are general allegations of firing and use of weapons by the *dacoits*, there is no cogent and reliable evidence to establish that the present appellant himself used any deadly weapon within the meaning of Section 395 IPC. The solitary assertion of P.W.3 regarding the role of the appellant is limited to taking away the licensed gun and don't satisfy the legal requirement of "use" of a deadly weapon, so as to attract the rigour of Section 395 IPC.

25. It is also clear from the prosecution case that a large number of miscreants had participated but only a limited number of accused persons came to be put on trial but the evidence on record and particularly the testimonies of P.W.1 and P.W.2 don't support the identification of the accused persons as

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participants in the occurrence.

26. The learned trial court has concluded that the other accused persons are not guilty and has accordingly acquitted them of the charges levelled against them. However, has given reason that the benefit of such acquittal cannot be extended to the present appellant because he had forcibly took away the licensed gun. So far as the contention of the appellant counsel that other accused have been acquitted, the Apex Court has carved out the distinction in the case of ***Amrita vs. State of M.P., (2004) 12 SCC 224***; ***Gangadhar Behera vs. State of Orissa, (2002) 8 SCC 381*** and ***Raja vs. State, (2013) 12 SCC 674,*** it has been held that, mere acquittal of some of the accused on the same evidence by itself does not lead to a conclusion that all deserve to be acquitted in case appropriate reasons have been given on appreciation of evidence both in regard to acquittal and conviction of the accused. As such, the contention of the appellant that parity should be extended in his favour on the ground that other co-accused, against whom similar allegations were levelled, have been acquitted by the impugned judgment, don't sustain in view of the principles laid down by the Apex Court, as referred to hereinabove.

Whether the prosecution have been able to establish guilt beyond reasonable doubt?

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27. Upon a comprehensive appraisal of the entire evidence on record, this Court finds that the oral testimony of the P.W.1 and P.W.2, who are the material witnesses being close relatives of the informant and alleged eye-witnesses to the occurrence, though have supported the factum of dacoity in general terms, but they have categorically failed to identify any of the accused persons and have, in anunequivocal terms, stated that the accused persons facing trial were not involved in the occurrence. Their evidence, therefore, does not support the prosecution case on the crucial aspect of identification and rather demolishes the substratum of the prosecution story. In such circumstances, the conviction cannot be sustained on their testimony. The entire case, thus, rests upon the sole testimony of P.W.3, the informant. Though it is a settled principle that conviction can be based on the testimony of a solitary witness, if it is wholly reliable. In the present case, the evidence of P.W.3 suffers from inherent inconsistencies and material infirmities, particularly with regard to identification of the accused persons, absence of Test Identification Parade, and failure to attribute specific overt acts to the appellants. His claim of identification in court, especially when the accused were not properly identified during investigation, loses its evidentiary value.

28. In the facts and circumstances, the sole testimony of

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P.W.3, in absence of any corroborative and cogent evidence, cannot form a safe basis for conviction. The prosecution has also failed to examine the Investigating Officer and any independent witness, which further casts a serious doubt on the fairness and completeness of the investigation. In view of the settled legal position, as reiterated in decisions as refereed hereinabove, that the evidence against each accused must be independently assessed and conviction must rest on reliable and trustworthy evidence, this Court is of the considered opinion that the prosecution has not been able to prove its case against the appellant to the required standard of proof.

29. Accordingly, the present appeal is allowed.

30. The impugned judgment of conviction 15.02.2012 and order of sentence dated 18.02.2012 passed by the learned 3rd Addl. Sessions Judge, Muzaffarpur in Sessions Trial No.139/2000 arising out of Motipur P.S. Case No. 25/94 is hereby set aside. Consequently, the above-named appellant is acquitted from all the charges levelled against him. Since the appellant is on bail, he is discharged from the liability of his bail bond. The fine deposited by the appellant, if any, shall be refunded to him.

31. Office is directed to send back the lower court records along with a copy of the judgment to the learned District

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Court forthwith.

(Purnendu Singh, J)

Sanjay/-

AFR/NAFR	NAFR
CAV DATE	27.04.2026
Uploading Date	05.05.2026
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