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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
Sanjay Kishan Kaul; M.M. Sundresh; JJ.
January 31, 2022

CRIMINAL APPEAL NO.1492 OF 2021
PAPPU TIWARY *v.* **STATE OF JHARKHAND**

CRIMINAL APPEAL NO.1202-1203 OF 2014
LAW TIWARI @ UPENDRA KUMAR TIWARI *v.* **THE STATE OF JHARKHAND**

Criminal Trial - The test which is applied of proving the case beyond reasonable doubt does not mean that the endeavour should be to nick pick and somehow find some excuse to obtain acquittal. *(Para 36)*

Criminal Trial - Alibi - The burden on the accused is rather heavy and he is required to establish the plea of alibi with certitude- The plea of alibi in fact is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the place of occurrence. *(Para 16, 17)*

Criminal Trial - Inquest report is not substantive evidence. The objective is to find out whether a person who has died under suspicious circumstances, what may be the apparent cause of his death. *(Para 32)*

Criminal Trial - Major difference in recording the number of injuries suffered by the deceased in the inquest report and the post-mortem report, not fatal to prosecution case. *(Para 32)*

For Appellant(s) Mr. Shree Prakash Sinha, Adv. Mr. Rakesh Mishra, Adv. Ms. Mohua Sinha, Adv. Mr. Nawalendra Kumar, Adv. Mr. Sidharth Singh, Adv. Mr. Shekhar Kumar, AOR

For Respondent(s) Mr. Tapesh Kumar Singh, AOR/ AAG Mr. Aditya Pratap Singh, Adv. Mr. Aditya Narayan Das, Adv.

JUDGMENT

SANJAY KISHAN KAUL, J.

Background:

1. On 07.03.2000 at about 1:00 p.m. Vikas Kumar Singh, aged about 22 years was going from his house towards *Bhandar* for performing physical exercise. It is the case of the prosecution that based on the fardbeyan of his younger brother, Pankaj Kumar Singh which was recorded at Sadar Hospital, Garhwa at 2:00 p.m., when Vikas Kumar Singh reached in front of the house of Ramadhar Ram, all of a sudden six person who were sitting on the road surrounded him; namely Pappu Tiwari (appellant in Crl. A.

No.1492/2021), Sanjay Ram, Uday Pal, Ajay Pal, Pintu Tiwari and Law Tiwari (appellant in Crl. A. No.1202- 1203/2014). Pappu Tiwari fired from his pistol at Vikas Kumar Singh as a result of which he got injured and fell down by the side of the road. The other accused are alleged to have been carrying knives and they pounced upon him and inflicted knife blows on his entire body. Hearing the commotion, Pankaj Kumar Singh rushed in the direction. Seeing the said informant and other villagers coming, the accused persons fled towards the path made over the Ahar. They are stated to have also threatened persons present against giving any evidence in the matter. Later on, as per the informant, he claims to have derived knowledge that they fled in a Maruti Van bearing registration No.DL-2C-5177, which belonged to Pintu Tiwari. On the basis of the fardbeyan, FIR Garhwa P.S. Case No.33 of 2000 was registered under Sections 302 and 34 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and Section 27 of the Arms Act, 1959 (hereinafter referred to as the 'Arms Act') against the six named accused persons.

2. Assistance Sub-Inspector (for short 'A.S.I') Rajnikant Jha prepared an inquest report but failed to identify the fire arm injury. The post-mortem was conducted by Dr. Mahesh Prasad Singh, Medical Officer, Sub-Divisional Hospital, Garhwa and the cause of death was opined due to shock and haemorrhage caused by vital and multiple injuries. Injuries one and two were identified as firm arm injuries. The Maruti van was subsequently recovered on 09.03.2000. All the accused were arrested albeit, Law @ Upendra Tiwari was arrested on 16.03.2000. On investigation being completed, the chargesheet was submitted on 02.06.2000 against all the six persons under Sections 302 and 34 of the IPC and Section 27 of the Arms Act and cognizance of the offence was taken on the same date. The case was committed to the court of Sessions Judge on 26.07.2000 where all six accused persons were charged under Section 302 read with Section 34 of the IPC and Pappu Tiwari was additionally charged under Section 27 of the Arms Act.

3. In the course of Sessions Trial No.159/2001, the prosecution examined 22 witnesses and the defence examined two witnesses. In terms of the judgment dated 27.05.2002, all the accused persons were convicted as charged and in terms of order dated 28.05.2002, they were sentenced to undergo imprisonment for life. Pappu Tiwari was additionally sentenced to undergo rigorous imprisonment for three years under Section 27 of the Arms Act.

4. The challenge to the judgment of the trial court was laid by two separate appeals. Law Tiwari and Pintu Tiwari jointly filed Criminal Appeal No.242/2002 while the remaining four convicts filed Criminal Appeal No.398/2002. The High Court of Jharkhand vide a common judgment dated 07.05.2012 affirmed the judgment of conviction of the trial court against all the six convicts. However, in pursuance of an inquiry conducted by the learned Chief Judicial Magistrate on the aspect of juvenility, the High Court opined that since Pintu Tiwari was a minor on the date of the incident and had already remained in jail for more than three years, no further order of detention could be passed in view of the provisions of Sections 15 & 16 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

Insofar as Sanjay Ram and Uday Pal are concerned, both of them accepted the High Court judgment. That left three appellants, who took up the matter further to this Court.

5. Pappu Tiwari filed a Special Leave Petition (for short 'SLP') with an application seeking exemption from surrendering. That application was dismissed by this Court on 09.11.2012 granting four weeks time to Pappu Tiwari to surrender. On a prayer being made, a further extension of four weeks was granted to Pappu Tiwari on 18.02.2013 to surrender failing which the SLP would be dismissed without reference to the Court. Pappu Tiwari did not surrender and, thus, the SLP came to be dismissed in terms of the order dated 18.02.2013.

6. Law @ Upendra Tiwari and Ajay Pal chose to jointly prefer an SLP along with an application for condonation of delay. The appeals came up for consideration on 19.11.2013 before this Court when the appeal qua Ajay Pal (petitioner No.2) was dismissed while issuing notice qua the appeal filed by Law Tiwari. On 07.05.2014, leave was granted qua the said appeal which came to be registered as Criminal Appeal Nos.1202-1203/2014.

7. Pappu Tiwari was finally apprehended on 25.06.2015. Thereafter, he filed an application seeking restoration of his SLP and condonation of delay in filing the restoration application but after issuing notice, the same was dismissed on 07.03.2017 on the ground of failure to explain the delay of 862 days appropriately. Pappu Tiwari filed a review petition along with an application seeking bail on 22.01.2021. The review petition was considered and allowed on 27.01.2021. The appeals were thereafter directed to be listed.

8. In the mean time, Law Tiwari was released on 28.09.2016 after having served out his sentence and, thus, on 01.09.2021 it was inquired whether he was still interested in prosecuting the appeal to which the answer was in the affirmative as Law Tiwari wanted to argue the aspect of his conviction.

9. As far as Pappu Tiwari is concerned, his bail application was dismissed on 04.10.2021 but with a direction for the appeal itself to be taken up for hearing. Leave was also granted in the said SLP on 23.11.2021.

10. The aforesaid is the background on which these two appeals were listed before us for hearing.

Crl.A. Nos.1202-1203/2014 (Appeal by Law @ Upendra Tiwari):

11. Insofar as Law Tiwari is concerned, a query was posed to the learned counsel that on the appeal being jointly preferred by him (Law Tiwari) and Ajay Pal and appeal of Ajay Pal having been dismissed, the evidence being common, the role being common, i.e., five people collectively inflicting knife injuries on the deceased after he was shot, what could be the defence, which would be available to Law Tiwari.

12. Learned counsel fairly stated that his appeal is within a limited scope and this Court also admitted the appeal on his plea of alibi.

13. Learned counsel drew our attention to the judgment of the trial court as according to him there was hardly any discussion in the appellate court judgment on the particular aspect. The trial court referred to the depositions of the two defence witnesses, Rajendra Yadav (DW-1) and Samsuddin Ansari (DW-2). DW-1 deposed in his examination-in-chief that on 24.01.2000 he had x-rayed the right knee of Law @ Upendra Tiwari. He proved the cash memo (Ex. A) and stated that he had x-rayed the knee on the advise of Dr. M.P. Singh. DW-2 stated that he knew Law @ Upendra Tiwari and on 24.01.2000, he had come to Garhwa from Silliya Donger by bus. He saw Law Tiwari after falling from motorcycle who was reeling in pain. He saw another man holding him. A rickshaw was called and Law Tiwari was put on rickshaw and brought to Garhwa Hospital to Dr. M.P. Singh, who advised an x-ray. The x-ray was done in Janta Clinic and the doctor had opined that his leg had broken near the knee. The man who is stated to have helped Law Tiwari was identified as Kanchan Yadav. After handing over Law Tiwari to him, DW-2 went away.

14. Two witnesses were also examined as court witnesses on the prayer of the defence – Almuddin Khan (CW-1), who proved the certificate of Dr. M.P. Singh (Ex. A) and receipt of medicine (Ex. A/1) as well as Akshay Kumar Mahto (CW-2) who stated that he knew Law Tiwari, that Law Tiwari had come to Garhwa for marketing, and had gone to see the ailing son of his cousin, Mohan Prasad Mahto in hospital. He claimed to be a witness to the treatment and that Law @ Upendra Tiwari was on bed with his leg plastered though he did not talk to him. In view of the said testimony, the argument which was advanced before the trial court as recorded as also before us was that since on the date of the occurrence his leg was fractured, it was not possible for Law Tiwari to have taken part in the crime and he was falsely implicated in the case. The trial court noted that neither the x-ray plate nor the advise of Dr. M.P. Singh had been produced in court. The doctor had also not been produced by the defence. No papers of admission or treatment at the Garhwa Hospital have been produced in support of the case of admission or treatment of his fractured leg in hospital and the certificate did not support such a case.

15. On the other hand, the case of the prosecution was and is that *inter alia* as per the fardbeyan, a formal FIR was registered in PS case No.6/2000 under Section 364, 365 and 120B of the IPC. The date of occurrence was 26.01.2000 and the allegation was of kidnapping for purposes of murder in that case. Law Tiwari was named as an accused in that case too. The occurrence was of 26.01.2000 and the defence is that the leg of Law Tiwari was fractured on 24.01.2000. Law Tiwari was convicted under Section 365 of the IPC vide judgment dated 28.02.2000. We may, however, note that as per learned counsel for the appellant in the appeal filed against that conviction, Law Tiwari was acquitted on 17.12.2005.

16. Learned counsel for the State also submitted that there are three eye witnesses, Pankaj Kumar Singh (PW-6), Subodh Kumar Singh (PW- 13) and Chandraman Singh (PW-18) and their testimonies have broadly been consistent, which assign the role to Law Tiwari. The endeavour to apprehend him on 07.03.2000 was not successful as he was found absconding by the IO on six different occasions when his premises were visited. He was only subsequently arrested and taken on remand on 04.04.2000. The contention of learned counsel for the State was that neither the advise of Dr. M.P. Singh nor the x-ray having been produced, and Dr. M.P. Singh not having been produced as a defence witness or summoned, there was not a piece of paper evidencing the admission and treatment of Law Tiwari in the hospital which could be produced in support of his plea of alibi. He also drew our attention to the fardbeyan to indicate that Law Tiwari and other accused had demanded a motorcycle of the deceased to go to Meral in connection with a case, which was declined. Learned counsel for the State also submitted that the conduct of Law Tiwari even during custody was not proper as he had extended a threat to the informant and the informant had suffered fire arm injury on 13.06.2001. Consequently, case No.107/2001 was registered at the Garhwa Police Station. In the end it was contended that there was no attempt made to distinguish the appellant's role from that of Ajay Pal and the appeal of Ajay Pal being dismissed, the only aspect which had to be examined was whether the concurrent findings of the two courts below rejecting the plea of alibi was required to be interfered with by this Court when the burden lay heavy on the appellant as when such a plea is raised the accused must discharge that burden. We may refer to the judicial view in this behalf in ***Vijay Pal v. State (Government of NCT of Delhi),*** (2015) 4 SCC 749 wherein this Court held that:

"27. In our considered opinion, when the trial court as well as the High Court have disbelieved the plea of alibi which is a concurrent finding of fact, there is no warrant to dislodge the same. The evidence that has been adduced by the accused to prove the plea of alibi is sketchy and in fact foes not stand to reason. It is not a case where the accused has proven with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. The evidence adduced by the accused is not of such quality that the Court would entertain a reasonable doubt. The burden on the accused is rather heavy and he is required to establish the plea of alibi with certitude."

In ***Jitender Kumar v. State of Haryana,*** (2012) 6 SCC 204 this Court stated that:

"71. …. The burden of establishing the plea of alibi lay upon the appellants and the appellants have failed to bring on record any such evidence which would, even by reasonable probability, establish their plea of alibi. The plea of alibi in fact is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the place of occurrence and in the house which was the home of their relatives."

17. We have given our thought to the limited scope of appeal of Law Tiwari and we do not find any merit whatsoever in the same. It has been rightly pointed out by the learned counsel for the State that the burden was on Law Tiwari to establish the plea of alibi (***Vijay Pal*** (supra) and ***Jitender Kumar*** (supra), which he failed to discharge. It was not a case where opportunity was not granted to him. In fact, two witnesses were produced

in defence by Law Tiwari and two court witnesses were also summoned. However, the relevant evidence was not led.

18. It has been rightly pointed out that the most material witness would have been Dr. M.P. Singh, who was not produced as a defence witness nor summoned.

19. We may note that there is some identity confusion in the judgment of the trial court as a reference has been made to one Dr. M.P. Singh (PW-1), who is not the same doctor. The advise stated to be given by Dr. M.P. Singh was also not proved nor was the x-ray plate produced. DW-2 stated that he took Law Tiwari to Garhwa Hospital but no papers of admission or treatment at the hospital were produced in support of the treatment of a fractured leg in the hospital. Thus, on all these aspects Law Tiwari failed to discharge the burden to establish the plea of alibi and, thus, the trial court and the High Court cannot be said to have fallen into any error in rejecting the plea of alibi. This was the only aspect to be examined by us.

20. We may note that there is discussion in the trial court judgment on the aspect of another case registered against Law Tiwari and his conviction in the said case. The incident was contemporaneous to his alleged fracture and, thus, the plea based on the fracture was found to be unsustainable as Law Tiwari was convicted in the said case. He has, however, filed the order of acquittal in appeal. This is the reason we have not delved on this aspect but in view of our finding aforesaid this aspect does not remain crucial.

21. The result of the aforesaid is that we find no merit in the criminal appeal of Law @ Upendra Tiwari.

Crl.A. No.1492/2021 (Appeal by Pappu Tiwari):

22. Learned counsel for the appellant sought to raise multifarious pleas that the prosecution has to prove its case beyond reasonable doubt. This is not something which is really required to be stated and is the basic principle of criminal jurisprudence. Suffice to say that learned counsel sought to build on that principle by contending that if a reasonable doubt could be created in the story of the prosecution, the appellant must succeed.

23. In respect of the aforesaid, learned counsel sought to refer to the testimonies of the eye witnesses. Pankaj Kumar Singh, the informant is the brother of the deceased who was examined as PW-6. In the fardbeyan he had not taken the name of any witnesses though he referred to them as “many witnesses”. It was stated that there was contradiction in the testimonies of the eye witnesses. He further submitted that PW-13 was a chance witness and that his presence at the place was doubtful as he came to the area only ten days prior to the incident for appearing in the matriculation examination and could not have known anybody.

24. We may, however, note that on perusal of the evidence it cannot be said that there are any major discrepancies in the testimony of the eye witnesses as to throw doubt on

the story of the prosecution. There are three eye witnesses. The testimony of the informant, PW-6, cannot be waived away merely because it is the testimony of a close relative. Similarly, PW-13 albeit a chance witness, explained his presence and stated that he could identify the accused, who were well-known in the area, even though in a negative sense. We may note, however, insofar as the third eye witness, PW-18, is concerned, the High Court has not relied upon his testimony on account of delay of more than two months in examination of this witness who claimed to be an eye witness and was the maternal uncle of the deceased.

25. Learned counsel vehemently sought to contend that the FIR was ante timed and that itself would throw a doubt on the story. The FIR was recorded on 07.03.2000 in the early afternoon but reached the court on the next date on 08.03.2000 even when the distance between the court and the police station was hardly a kilometre.

26. On the other hand learned counsel for the State pointed out that the incident occurred at 1300 hours on 07.03.2000, at 1343 hours the telephone call from the hospital reported that the injured had come to the hospital and the time of the recording of the fardbeyan is 1400 hours. The inquest report was prepared at 1410 hours and the FIR was registered at 1425 hours. The body was received for post-mortem at 1445 hours and simultaneously the IO reached the place of occurrence. The post-mortem commenced at 1550 hours. The IO returned home at midnight and had gone to the house of the accused several times. The FIR, thus, reached the court on 08.03.2000. These sequences of timings and dates were pointed out to show that there could be no scope of ante dating the FIR.

27. We may examine this aspect in the context of the judgment cited by learned counsel for the appellant in ***Sudarshan & Anr. v. State of Maharashtra,*** (2014) 12 SCC 312. The relevant paragraph pointed out by learned counsel for the appellant shows that Column 15 of the FIR in the said case pertained to date and time of dispatch to the Court which was left blank. The IO could not prove as to when and how the FIR was sent to the court. The necessity of doing so was emphasised in the judgment as as the primary purpose is to ensure that truthful version is recorded in the FIR and there is no manipulation or interpolation therein. That is the reason this statutory requirement is provided under Section 157 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.P.C.'). There was grave suspicion qua the FIR.

28. On the touchstone of the principles laid down aforesaid it can hardly be said that the mandate of law under Section 157 Cr.P.C. has not been met. On the intimation of the incident, the fardbeyan was recorded expeditiously, inquest report prepared and the FIR was registered within 25 minutes of the same. The body was sent for post-mortem immediately and the FIR was sent to the court the next morning. We cannot say that there is any loophole which could have been utilised or that the FIR was ante timed and, thus, the objective of the requirement for sending the FIR to the Magistrate has been complied with. Thus, there is no merit in this plea.

29. Now turning to the next plea on which a lot of emphasis was placed by learned counsel for the appellant, it was urged that there was a major discrepancy between the inquest report (Ex.3) and the post-mortem report (Ex.1). This aspect was actually sought to be linked to the plea of the FIR being ante timed. There are stated to be differences in the version which would indicate that the fardbeyan was lodged only after the post-mortem report. The factual basis for the same is stated to be that in the inquest report six injuries are mentioned with no mention of gunshot injury while the post-mortem report shows that there are 26 injuries including the gunshot injury. The pistol was not recovered from him nor any cartridge found and A.S.I. Rajnikant Jha who recorded both the fardbeyan as well as the inquest report was not examined by the prosecution. On this aspect learned counsel relied upon the observations in ***Maula Bux & Ors. v. State of Rajasthan,*** (1983) 1 SCC 379.

30. On the other hand learned counsel for the State sought to submit that inquest report cannot be treated as substantive evidence but may be utilised for contradicting the witness of inquest (***Suresh Roy v. State of Bihar,*** (2000) 4 SCC 84). He submitted that the inquest report is not really an evidence by itself and cannot be pitted against the evidence of the medical witness in court (***Surjan & Ors. v. State of Rajasthan,*** AIR 1956 SC 425). Learned counsel drew our attention to the observations in ***Pedda Narayana & Ors v. State of Andhra Pradesh,*** (1975) 4 SCC 153 opining that the object of proceedings under Section 174 Cr.P.C. is merely to ascertain that whether the person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of death. The details, however, as to how the deceased was assaulted or who assaulted him would be foreign to the scope of proceedings under Section 174 of the Cr.P.C., nor are such details required to be mentioned in the inquest report (***Yogesh Singh v. Mahabeer Singh & Ors.,*** (2017) 11 SCC 195).

31. Learned counsel next turned to the more recent judgment of this Court in ***Tehseen Poonawalla v. Union of India,*** (2018) 6 SCC 72 opining that the purpose of holding an inquest is limited and the inquest report does not constitute substantive evidence. As compared to an inquest report, the doctor who conducts the post-mortem examination, examines the body from a medico-legal perspective. It is, thus, the post-mortem report that is expected to contain the details of injuries through a scientific examination. In that context he submitted that ***Maula Bux & Ors.,*** (supra) case did not help the appellant as a police officer who prepared the inquest *panchnama* is not an expert in medical jurisprudence.

32. On examination of the aforesaid pleas, insofar as the factual context is concerned, there is little doubt that there is not a minor but a major difference in recording the number of injuries suffered by the deceased in the inquest report and the post-mortem report. However, this will not be fatal in our view. We say so keeping in mind the purpose of an inquest report, which is not a substantive evidence. The objective is to find out whether a person who has died under suspicious circumstances, what may be the apparent cause

of his death. In the present case the death was unnatural. There were wounds. There is no doubt that it is a homicide case. The expert is the doctor who carries out the post-mortem and has been medico legal expert. The two fire arm injuries have been clearly identified with the wounds at the entry and at the exit being identified. We have already discussed the proximity of the time period between the intimation and the police proceeding with it right up to the stage when the post-mortem commenced. We do not find any substance in this plea.

33. The third aspect emphasised by learned counsel for the appellant was the alleged discrepancy between the medical evidence and ocular evidence. PW-1 found 26 injuries on carrying out the post-mortem on the deceased. Learned counsel pointed out that on being asked about the distance from which the fire arm was used, he did not express any opinion. Learned counsel also points out that the case of prosecution is that after the fire arm injury by Pappu Tiwari, the deceased fell down and the other accused persons assaulted him with knives. No explanation is forthcoming on the backside of the deceased. As per the story of the prosecution, the witness was going towards the gym at around 1:00 p.m. but the post-mortem report reveals that the stomach was empty and the rectum and the bladder full which would show that the person had not eased himself and had also not taken his breakfast. This should be a position in the morning hours and not in day time.

34. On the other hand, learned counsel for the State referred to the testimony of the eye witnesses as also of the medical officer PW-1. On the issues such as what fire arm was used, whether the injuries were caused by bullet or pellet and the distance from which the fire arm was used, it was submitted that where the weapon and ammunition is of uncertain make and quality, the normal pellet pattern based on standard weapon and ammunition cannot be applied with accuracy (***Prahlad Singh & Ors. v. State of M.P.,*** (2011) 15 SCC 136 – Para 9).

35. On consideration of this plea, we find that really there is no discrepancy between the medical and ocular evidence but too much is sought to be made out by learned counsel for the appellant on the doctor not opining about the distance from which the fire arm injury was caused. Further, the eye witnesses are categorical that the other accused attacked the deceased with knives. In such a process of five persons attacking the deceased it cannot be said that the deceased would be lying in the same position and, thus, there is every possibility of injuries both at the back and front. In the nature of the incident and the testimony of the eye witnesses, a doubt must be cast on the story and not merely some aspect of the food consumption pointed out. We cannot really see any such infirmity which would cause us to reverse the concurrent findings of the courts below.

36. The remaining arguments of learned counsel for the appellant are based on plea of defective investigation, absence of independent witnesses but then there is no reason why the eye witnesses story, which is believable should not be given full credence. The

test which is applied of proving the case beyond reasonable doubt does not mean that the endeavour should be to nick pick and somehow find some excuse to obtain acquittal.

37. The last aspect urged by learned counsel for the appellant was that the IO has referred to the antecedents of the appellant and other accused, which has been erroneously taken into account by the High Court contrary to the statutory provisions of Section 53 of the Indian Evidence Act, 1872. The said provision stipulates that the previous bad character is not relevant except in reply, i.e., unless evidence has been given of a good character in which case it becomes relevant. However, what has happened in the present case is that the part of the testimony of the IO that the accused persons were dangerous was not supported by any evidence being led nor has it weighed with the courts below. PW-13 was able to identify the appellants because they used to pass through the road and are stated to have been known to be "boss of the area". We are, thus, of the view that despite best endeavour learned counsel for the appellant has not been able to cast any doubt on the impugned judgment of the trial court and the High Court.

Conclusion:

38. In the conspectus of the discussion aforesaid, we are of the view that the story put forth by the prosecution has been established and has not been dented by the appellant accused so as to cast a doubt and entitle them to benefit of doubt. The result is that both the appeals are dismissed leaving the parties to bear their own costs.

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