

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.72 of 2014

Arising Out of PS.Case No. -50 Year- 1996 Thana -BAIRIYA District- WEST CHAMPARAN (BETTIAH)

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1. Ambika Sah, Son of Late Chaturi Sah
 2. Rama Shankar Sah, Son of Late Chaturi Sah
 3. Kanhaiya Sah, Son of Ambika Sah

All are residents of village - Balua Rampurwa, P.S.- Bairia, District -West
Champaran

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellants : Mr. Bashishtha Narayan Mishra, Advocate

Mr. B.K. Mishra, Advocate

For the State : Mr. Satya Narayan Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 19-01-2015

This Appeal is directed against the judgment dated
31st January, 2014 and the order dated 3rd February, 2014 passed
by the learned *Ad hoc* Additional Sessions Judge-IV, Bettiah, West
Champaran in Sessions Trial No. 8 of 2005 arising out of Bairiya
P.S. Case No. 50 of 1996 whereby and whereunder they have been
held guilty for the offences punishable under Sections 307 read
with 34, 323 read with 34 of the Indian Penal Code and 27 of the



Arms Act and sentenced to undergo R.I. for one year under Section 323 read with 34, R.I. for seven years and to pay a fine of Rs. 5,000/- each under Section 307 read with 34 of the Indian Penal Code and in default of payment of fine to further undergo simple imprisonment for six months each for the said charge and to undergo rigorous imprisonment for three years under Section 27 of the Arms Act and a fine of Rs. 3,000/- each and in default of payment of fine to further undergo simple imprisonment for three months each. All the sentences passed by the court below have been ordered to run concurrently.

2. On the basis of fardbeyan of Ramdeo Sharma recorded by Assistant Sub-Inspector of Police, S.D. Pal of Town Police Station, Bettiah on 27th April, 1996 at 11.30 a.m. at M.J. K. Hospital, Bettiah, Bairiya P.S. Case No. 50 of 1996 was registered for the offences punishable under Sections 341, 323, 307 read with 34 of the Indian Penal Code and 27 of the Arms Act against the appellants of the present case.

3. In short, the allegation is that while the informant along with one Feku Sah proceeded for his house at Gulabbagh, Bettiah on motorcycle from his house at Balua Rampurwa and when he reached near Hadehi bridge at about 9.00 a.m. he saw the appellants sitting along with arms. All of a sudden, the appellants



opened fire from the country-made revolver causing injuries on the head, waist and thigh of the informant as a result of which blood started oozing out profusely. The appellants are also alleged to have assaulted the pillion rider Feku Sah by iron rod and *lathi*. As a result of assault on them, they fell down from motorcycle. In the meantime, one of his villagers came there on a tractor. On seeing the informant and Feku Sah in an injured condition, an alarm was also raised whereafter, several persons gathered there. The two injured were then taken to M.J.K. Hospital, Bettiah for treatment on tractor.

4. An Assistant Sub-Inspector of Police of the Town Police Station, Bettiah who recorded the fardbeyan of the informant forwarded the fardbeyan to the Bairiya Police Station pursuant to which aforesaid FIR was registered on 3rd May, 1996 at 10.00 a.m. The FIR was forwarded to the Court on 4th May, 1996 and the same was received in the Court of the Chief Judicial Magistrate, Bettiah on 7th May, 1996. On conclusion of investigation a report under Section 173(2) of the Code of Criminal Procedure was submitted in the Court and the appellants were sent up for trial. After complying with the provision prescribed under Section 207 of the Code of Criminal Procedure, the case was committed to the Court of Sessions for trial. The Sessions Court

charged the appellants for having committed offences punishable under Sections 307 read with 34, 323 read with 34 of the Indian Penal Code and 27 of the Arms Act. The appellants denied the charges. Hence the trial commenced.

5. In course of trial altogether eight witnesses were examined on behalf of the prosecution. Out of them, P.W. 1 Surendra Sah, P.W. 2 Sheikh Samsullah, P.W. 3 Moti Lal Prasad and P.W. 5 Gulli Sharma turned hostile. P.W. 6 Jagarnath Sharma is brother of the informant. P.W. 7 Feku Sah is one of the injured. P.W. 8 Ramdeo Sharma is the informant of the case on whose fardbeyan the FIR was registered. P.W. 4 Srikant Upadhaya is the doctor who had examined the two injured initially at M.J.K. Hospital, Bettiah. Apart from the aforesaid eight prosecution witnesses, one Birendra Kumar a Sub-Inspector of Police was also examined as a court witness. He being the second investigating officer of the case had submitted charge sheet in the Court.

6. Learned counsel for the appellants has submitted that there was no cogent evidence on the basis of which the appellants could have been held guilty of the charges. There was inordinate delay in institution of the FIR and even after institution of the FIR there was considerable delay in sending the same to the Court. There is no plausible explanation for the delayed institution

and transmission of the FIR. He has submitted that the witnesses are not consistent with each other on the point of assault. In the FIR a general and omnibus allegation has been made but in course of trial, the informant and injured Feku Sah have tried to develop the story and assigned specific role to each of the accused. That apart they have introduced a fourth accused in the category of assailant.

7. Learned counsel for the appellants has further submitted that the prosecution has miserably failed to prove the time, place and manner of occurrence. The medical reports of the two injured are extremely doubtful and the doctors who are alleged to have treated the informant at Patna and/or other places were not examined in course of trial. Even the medical reports of those hospitals have not been brought on record. The independent witnesses have not corroborated the prosecution story and the investigating officer of the case had conducted a perfunctory investigation. The A.S.I. of Police who is said to have recorded the fardbeyan and the police officer who investigated the case initially were also not examined.

8. Lastly, it has been contended that the appellants have been implicated in the case due to the fact that the P.Ws. 6, 7 and 8 were made accused in a case of murder of son of appellant

no. 1 Ambika Sah which fact stands admitted by the prosecution witnesses in course of trial.

9. On the basis of the aforesaid submissions, learned counsel for the appellants has submitted that the court below has completely erred in holding the appellants guilty and sentencing them in the manner stated hereinabove.

10. Learned A.P.P., Mr. Satya Narain Prasad has contested the matter. He has submitted that the prosecution has proved its case beyond reasonable doubts. According to him, though there are some variations in the evidence of different witnesses but it may occur due to passage of time and the Court below has rightly ignored such variations in the context of the case as a whole. He has submitted that improvements and exaggerations *per se* do not render the evidence brittle. He has also submitted that enmity cuts both way and, hence, the appellants would get no benefit due to the fact that enmity between the parties is admitted by the prosecution witnesses.

11. In order to appreciate the rival submissions, I would like to discuss the evidence of the witnesses in some detail. P.W.-8 Ramdeo Sharma has stated in his deposition that on the relevant date and time of occurrence while he was driving the motorcycle and P.W. 7 Feku Sah was a pillion rider, the appellants



along with one Prabhu Sah being variously armed with country-made revolver encircled them and opened fire indiscriminately. However, initially, they did not fire shots targeting him and/or Feku Sah. First of all, the appellant no. 1, Ambika Sah assaulted him with iron rod on his hand as a result of which, he lost balance and fell down by the side of the road. When he tried to escape, appellant no. 3, Kanhaiya Sah fired at him which hit him on his back and the bullet got entangled in his lumbar spine. Thereafter, appellant no.2 Rama Shankar Sah fired but the missile which came out of the projectile fortunately caused only a scratch injury over his head. A non-FIR accused Prabhu Sah is alleged to have fired aiming Feku Sah but it did not hit him. Subsequently, appellant no.1 Ambika Sah assaulted him and P.W. 7 Feku Sah with iron rod and other accused persons assaulted them with fists and slaps. He has further stated in his examination-in-chief that on *hulla*, several persons gathered there and in the meantime, his brother Jagarnath Sharma (P.W. 6) also reached there. One Ram Anugrah Yadav of his village came on tractor and he took both the injured to M.J.K. Hospital, Bettiah where their initial treatment was made and his fardbeyan was recorded by the police. He has proved his signature on the fardbeyan which has been marked as Ext.-3. He has stated that the doctor who treated him at M.J.K. Hospital, Bettiah



referred him to Patna Medical College and Hospital, Patna. He was then taken to Patna Medical College and Hospital, Patna where he was admitted for about 10-15 days. He states that after sustaining the firearm injuries, his lower half of the body involving both legs were paralyzed. After treatment in Patna Medical College and Hospital, he got himself treated by Dr. Arun Kumar Agrawal in Lal Nursing Home at Patna. Dr. Agrawal extracted the bullet lodged in his spine but even, thereafter, paralysis of lower half of his body could not be cured. He states that he also went to Vellore, Delhi and Nepal for treatment but all in vain.

12. In cross-examination, he admits that the appellants are his co-villagers. He also admits that in case of murder of son of the appellant Ambika Sah, he along with his brothers Jawahar and Jagarnath Sharma (P.W.-6) was made accused. He states that his statement was not recorded by the police at Patna. He also admits that the appellants fired at him from behind while they were chasing him from a distance of 5-6 feet. He further admits that he had sustained injury over his hand by iron rod. He also admits that his statement was never recorded by the investigating officer of the case after he returned from Patna.

13. P.W. 7 Feku Sah has stated in his examination-in-chief that on the alleged date, time and place of occurrence, the

appellants along with one Prabhu Sah came out of a *Marai* (Hut) all of a sudden and the appellant Ambika Sah assaulted the informant Ramdeo Sharma with an iron rod. Thereafter he assaulted him also with an iron rod as a result of which they fell down from motorcycle. The appellant Kanhaiya Sah and Rama Shankar Sah as well as one Prabhu Sah who were variously armed fired from their respective country-made revolvers. The first firing made by the appellant Kanhaiya Sah hit on the back of the informant Ramdeo Sharma. Thereafter, the appellant Rama Shankar Sah fired causing scratch injury over head of the informant. The accused Prabhu Sah took a shot at him but the revolver misfired. He states that he had sustained injury by an iron rod on his face causing bleeding injury to him. He further states that thereafter, Jagarnath Sharma (P.W. 6) took him and the informant to M.J.K. hospital, Bettiah on a tractor. Their initial treatment was made there and the informant Ramdeo Sharma was referred to Patna Medical College & Hospital. He states that both of them went to the Government Hospital at Patna and they were treated there. Ramdeo Sharma was admitted in the Government hospital where bullet was extracted from his waist. According to him, the informant Ramdeo Sharma was admitted in the Government hospital for about 1-1/2 months. He states that he

had also stayed at Patna for about one month. He corroborates the fact that due to the gun shot injury caused to the informant Ramdeo Sharma, he has been paralyzed. He states that his statement was recorded under Section 164 of the Code of Criminal Procedure.

14. In cross-examination, he admits that he was made accused in the murder case of son of the appellant Ambika Sah. He also admits that his statement was never recorded by the police in course of investigation. He further admits that the informant Ramdeo Sharma had sustained only one firearm injury and there was no other firearm injury on his person. He has further stated that the informant had also sustained one injury caused by iron rod over his hand. He also states that a hole was caused on the shirt worn by the informant by the bullet. The shirt of informant was also stained with blood. He further clarifies in cross-examination that though all the three appellants had fired from the respective firearms from a very short distance but only one shot hit the informant.

15. As noted above, P.W. 6 Jagarnath Sharma is brother of the informant. According to him, he reached near the place of occurrence immediately after the occurrence. He is a chance witness. He states that at the time of occurrence, he saw it was the appellant Ambika Sah who first assaulted the informant

with an iron rod as a result of which he fell down and, thereafter, all the three appellants fired causing firearm injury to him on his back and head.

16. In cross-examination, he admits that he was made accused in case of murder of one Vijay Sah son of the appellant Ambika Sah. He also admits that in course of investigation, his statement was never recorded by the police. He states that he had voluntarily made his statement in the Court under Section 164 of the Code. He has stated that on the date of occurrence, blood had fallen on the ground at the place of occurrence. According to him, the informant was treated in Patna Medical College and Hospital for about three days and, thereafter, he was treated by Dr. Arun Kumar Agrawal in Lal Nursing Home.

17. P.W.4 Srikant Upadhaya who had treated both the injured at M.J.K. Hospital, Bettiah on 27th April, 1996 found two injuries on the person of the informant which are as follows:-

“(i) One lacerated wound on occipital area 1/8”
round inverted margin with charring of wound;
and

(ii) One lacerated wound on the back of trunk
with inverted margin with charring of the
wound.”

18. According to him, the patient was pulseless and very serious and thus he was referred to Patna Medical College and

Hospital for better treatment. In his opinion, both the injuries were caused within six hours by firearms. On receipt of the X-ray plate from Patna Medical College and Hospital, he had opined that injury no. 2 was grievous in nature whereas injury no. 1 was simple.

19. On the same day, i.e., 27.04.1996, he had also examined P.W. 7 Feku Sah and found two injuries on his person which are as follows:-

“(i) One diffused swelling on back of chest. X-ray showing no fracture; and

(ii) One lacerated wound on lower lip $\frac{1}{2}$ ” x $\frac{1}{4}$ ” x $\frac{1}{4}$ ” deep.”

20. According to him, all the injuries found on the person of Feku Sah were simple and caused by hard and blunt substance. He has proved the injury reports which were marked as Exhibits 1 and 1/1 respectively.

21. In cross-examination, he admits that the injury report of the informant Ramdeo Sharma was in two parts. The second part of the injury report was issued on the basis of the X-ray report of P.M.C.H. He also admits that the date of preparing the second part of the report has not been written in the report. He further admits that he had no personal knowledge about the treatment of the injured at P.M.C.H. and the X-ray at Patna was not



done in his presence. He states that he had examined the injury of injured persons at only one occasion on 27th April, 1996. He concedes that a lacerated wound can also be caused by hard and blunt substance and diffused swelling may also be caused by fall. He also admits that he did not collect bullet as X-ray was done at P.M.C.H. According to him, a bullet was lodged in body as per X-ray report of the informant Ramdeo Sharma. He also admits that the X-ray report is also not available before him.

22. The second investigating officer of the case Birendra Kumar, a Sub-Inspector of Police, was examined as a court witness. He has stated that on 1.8.1996, he was posted as Officer-in-charge of Bairiya Police Station and since that day, he took over investigation of the case from his predecessor G. Mishra. He inspected the place of occurrence on 1st August, 1996. He recorded the statement of Baban Choudhary, Gulli Sharma, Rajbanshi Sharma, Sitaram Choudhary, Nathuni Sharma, Babu Ram Thakur, Sheikh Samshul Haque, Motilal Prasad, Surendra Prasad, Shambhu Prasad and Khub Lal Prasad. He also recorded subsequent statement of the informant and Feku Sah. On conclusion of investigation, he submitted charge sheet in the case. He has proved endorsement made by the then Officer-in-charge on the fardbeyan of the informant Ramdeo Sharma which has been

marked as Ext. 4/1. He has also proved writing of Assistant Sub-Inspector of Police, S.D. Pal who had recorded the fardbeyan which has marked as Ext. 4/2.

23. In cross-examination, he has stated that he took over investigation of the case after four months of the occurrence and he had no knowledge regarding the occurrence from before. He further states that he did not seize any material from the place of occurrence. He states that the informant or P.W. 7 Feku Sah never produced before him the blood-stained shirt of the informant in question. He admits that no witness was ever sponsored by the investigating agency for examination under Section 164 of the Code of Criminal Procedure.

24. After the prosecution case was closed, the statements of the accused persons were recorded under Section 313 of the Code of Criminal Procedure. They have taken a defence that as the members of the prosecution party were made accused in case of murder of son of appellant Ambika Sah they have been falsely implicated in the present case.

25. Having heard the parties in detail and with their assistance after going through the record, I find serious infirmities in the prosecution case. In the FIR, the informant has made omnibus and general allegation of firing against the appellants as

a result of which he sustained injuries on the head, waist and thigh. He has also alleged that his friend Feku Sah was assaulted by iron rod and *lathi*. However, in course of trial, he has introduced one more accused, namely, Prabhu Sah and has alleged that while firing initially the accused persons did not target them. First of all, Ambika Sah assaulted him with iron rod on his right hand as a result of which he fell down by the side of the road and thereafter, when he tried to escape, the appellant Kanhaiya Sah fired at him which hit him on the back. The second shot fired by the appellant Rama Shankar Sah caused only a scratch injury over his head and, thereafter, one Prabhu Sah is alleged to have shot at Feku Sah but the revolver misfired. Subsequently, the appellant Ambika Sah is alleged to have assaulted both the injured with iron rods and others are alleged to have assaulted them with fists and slaps. In cross-examination, he has admitted that the firing was made from behind while he was being chased. Under such circumstance, the story narrated by the informant becomes highly unbelievable. If he was being chased, he could not have looked behind and seen the person who would have fired at him. Secondly, the story propounded in course of trial is quite different from the story narrated in the FIR. The allegation of indiscriminate firing caused by the appellants first has been given a complete go-bye in deposition.

26. The version of the informant is not being corroborated by Feku Sah (P.W. 7). He has clearly admitted in his evidence that the informant had sustained only one firearm injury on his person whereas the informant claims to have sustained two firearm injuries.

27. Under such circumstance, even the medical report issued by Dr. Srikant Upadhaya (P.W. 4) becomes highly suspect. The informant as well as P.W. 7 Feku Sah stated that the informant was assaulted with iron rod on his hand. However, no injury was found on the hand of the informant. The injury found over head of the informant was a lacerated wound. In cross-examination, the doctor admits that a lacerated wound could have been caused by iron rod. The informant claims to have been assaulted with iron rod, fists and slaps at hand of the accused persons but no such injury has been noticed by the doctor.

28. The second part of the injury report of the doctor is based on the X-ray report of P.M.C.H. The X-ray plate is not on record. The doctor who prepared the X-ray report has not been examined. The doctor who treated the informant and P.W. 7 Feku Sah at P.M.C.H. has also not been examined. The doctor who is said to have operated the informant at Lal Nursing Home in order to take out the bullet lodged in the spine of the informant has also



not been examined. Though the informant claims that he was treated at Vellore, Delhi, Nepal and other places but no prescription or any chit of paper of any hospital other than M.J.K. Hospital, Bettiah has been brought on record. Under such circumstances, the nature of injury given by the doctor in the injury report of P.W. 4 Srikant Upadhayaya becomes highly suspect.

29. I further find several other contradictions in the evidence of the prosecution witnesses. As noted above, the injured Feku Sah has stated in his deposition that the informant was admitted in Government hospital, Patna for about 1-1/2 months and his operation was also conducted in the Government hospital whereas the informant has stated that he had remained in P.M.C.H. for a period of 10-15 days only and, thereafter, he had been treated by Dr. Arun Kumar Agrawal in Lal Nursing Home at Patna. According to him, it was doctor Agrawal who had taken out the bullet from his body. Contradicting both of them, P.W.6 Jagarnath Sah states that the informant was treated at PMCH Patna only for 2-3 days.

30. I do find that P.W. 6 is not at all a reliable witness. In the FIR the informant has stated that on *hulla*, several persons had gathered at the place of occurrence. He had stated about one of his co-villagers who came on a tractor. However, he



has not uttered a word that P.W. 6 Jagarnath Sharma had also arrived there at that time. It is difficult to believe that if Jagarnath Sharma, who is brother of the informant would have arrived there at the time of occurrence, the informant would have missed to give his name in the fardbeyan. Be that as it may, P.W. 6 Jagarnath Sharma has admitted that his statement was never recorded by the investigating officer in course of investigation. Under such circumstance, it is hard to believe that he was a witness to the occurrence.

31. I am also of the view that the investigation of the case has been done in the most casual and perfunctory manner. The first investigating officer, Mr. G. Mishra has not been examined in course of trial. An Assistant Sub-Inspector of Police, Mr. G. D. Pal who recorded the fardbeyan of informant at M.J.K. Hospital, Bettiah has also not been examined by the prosecution. Admittedly, the second investigating officer who took over the investigation of the case after four months did not recover or seize any incriminating article from the place of occurrence. Though, the witnesses have stated that a hole was caused in the shirt worn by the informant due to the bullet injury but the said shirt was neither seized nor produced in the Court. Curiously enough, the second investigating officer of the case states that he had recorded the



subsequent statement of the informant and Feku Sah in course of investigation but these two witnesses clearly state in their deposition that their statement was never recorded by the investigating officer. Though, witnesses have stated that blood had fallen on the ground due to the profused bleeding but neither the blood stained earth was seized nor any empty cartridge was recovered from the place of occurrence.

32. I further find that the charge sheet contains list of 14 witnesses but in course of trial only 8 of them could be examined. The tractor driver who is said to be a co-villager of the informant and who is stated to have carried the two injured on his tractor to M.J.K. Hospital, Bettiah has not been examined for the reasons best known to the prosecution.

33. Admittedly, no witness was ever sponsored by the investigating agency for recording of statement of any witness under Section 164 of the Code of Criminal Procedure. Under such circumstance, the statements, if any, recorded by a Judicial Magistrate under Section 164 of the Code of Criminal Procedure is of no consequence. Moreover, the statement recorded under Section 164 of the Code of Criminal Procedure is not substantive evidence in a case and cannot be made use of except to contradict the witness. It cannot be used to corroborate the statement of

witness.

34. I find force in the arguments advanced on behalf of the appellants that there is undue delay not only in institution of the FIR but also in transmitting the same to the Court. As noted above, the alleged occurrence took place on 27th April, 1996, and the fardbeyan was recorded on the same day. It was forwarded to the concerned police station immediately but the FIR was registered on 3rd May, 1996. It was dispatched to the Court on 4th May, 1996 but the same was received in the Court of the learned Chief Judicial Magistrate, Bettiah on 7th May, 1996. There is no explanation for the undue delay caused in instituting the FIR and transmitting the same to the Court. I further find force in the arguments advanced on behalf of the appellants that the place of occurrence and manner of occurrence could not be established by the prosecution.

35. In these background of facts, if the credibility of witnesses examined on behalf of the prosecution is tested, the differences from the version disclosed in the FIR in course of deposition would become fatal. It is true that some variations in evidence of different witnesses may occur. However, material and vital contradictions and variations in evidence of different witnesses make the prosecution case doubtful.

36. It is equally true that exaggerations *per se* do not render the entire evidence brittle but they can be one of the factors to test credibility of the prosecution version. When the entire evidence is considered on the touchstone of the credibility based on these principles, I have no hesitation in my mind that the prosecution has miserably failed to prove its case beyond reasonable doubts.

37. In that view of the matter, the appeal is allowed. The judgment of conviction dated 31st January, 2014 and the order of sentence dated 3rd February, 2014 passed by the learned *Ad hoc* Additional Sessions Judge-IV, Bettiah, West Champaran in Sessions Trial No. 8 of 2005 arising out of Bairiya P.S. Case No. 50 of 1996 is set aside. The appellant nos. 1 and 2 namely, Ambika Sah and Rama Shankar Sah who are on bail are discharged from the liabilities of their respective bail bonds. Appellant no. 3 Kanhaiya Sah who is in jail is directed to be released forthwith, if not required in any other case.

(Ashwani Kumar Singh, J.)

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