

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.248 of 1992

Arising Out of P.S.Case No. -101 Year- 1986 Thana –Udakishunganj

District- MADHEPURA

- =====
1. Bishun Mukhiya, son of late Sundar Mukhiya
 2. Nageshwar Mukhiya, son of Binchu Mukhiya
- Both resident of village-Shayam, P.S. Kishunganj (Uda-Kishunganj), District-Madhepura.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

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Criminal Appeal (DB) No. 262 of 1992

Arising Out of P.S.Case No. -101 Year- 1986 Thana -Udakishunganj

District- MADHEPURA

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Nanda Yadav @ Nande Yadav, son of Bisho Yadav, resident of village-Shayam, P.S. Uda-Kishunganj, District-Madhepura.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (DB) No. 248 of 1992)

For the Appellant/s : Shri Ras Bihari Thakur, Advocate
Shri Ravi Kumar, Advocate

For the Respondent/s : Dr. Mayanand Jha, APP

(In CR. APP (DB) No. 262 of 1992)

For the Appellant/s : Shri Ras Bihari Thakur, Advocate
Shri Ravi Kumar, Advocate

For the Respondent/s : Dr. Mayanand Jha, APP

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL

C.A.V. JUDGMENT

(Per: HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL)

Date: 26.03.2015

Both these appeals arise out of the judgment and order

dated 30.6.1992 passed by the learned 3rd Additional Sessions Judge,

Madhepura, in Sessions Case no. 1 of 1988 by which the appellants of Cr. Appeal no. 248 of 1992 have been convicted to undergo rigorous imprisonment for life under Section 302/34 of the Indian Penal Code and the appellant of Cr. Appeal no. 262 of 1992 has been convicted and sentenced to undergo rigorous imprisonment for life under Section 302 of the Indian Penal Code and rigorous imprisonment for three years under Section 27 of the Arms Act.

2. The prosecution case, in brief, is that the informant Shivnarayan Mehta (P.W.3) with his brother Jainarayan Mehta (deceased) on one bi-cycle and two co-villagers, namely, Bishundhar Rishideo (P.W.1) and Upendra Mehta (P.W.2) on another bi-cycle were returning to their house on 19.5.1986 at about 7 P.M. from Gwalpara Bazar. When they reached near the orchard of Shyam-village, about 7 to 8 persons came on the road and uttered that they be caught and killed. In the meantime, the appellants, namely, Bishun Mukhiya and Nageshwar Mukhiya dragged Jainarayan Mehta from his bi-cycle and took him to the western side of the road. In the meantime, Chandradeep Paswan fired a shot at Jainarayan, due to which he became injured and fell down. Thereafter, Nanda Yadav (appellant of Cr. Appeal no. 262 of 1992) fired the other shot at the rib-cage of Jainarayan. Upendra Mukhiya fired upon Bishundhar Rishideo (P.W.1) in his left rib-cage. Jainarayan Mehta succumbed to



his injuries. Thereafter, all these aforesaid five accused escaped through the maize field. Upendra Mehta (P.W.2) rushed towards the village. After sometime Bishundhar Rishideo (P.W.1) also came to the village. Co-villagers assembled there came, to the place of occurrence and saw the dead body and some of them remained there to watch the dead body. The informant and some other co-villagers took Bishundhar Rishideo (P.W.1) to the police station.

3. The reason for the occurrence is that there had been an old enmity between the informant and Chandradeep Paswan for which Chandradeep Paswan had set fire to the house of the informant. In that case, Bishundhar Rishideo had deposed in favour of the informant. Chandradeep Paswan was conspiring with the members of his group to teach a lesson to the informant.

4. The fardbeyan (Ext. 5) was recorded by the officer-in-charge of Kishunganj police station on 20.5.1986 at about 1 A.M. Accordingly, Kishunganj P.S. Case no. 101 of 1986 was instituted for the offence punishable under Sections 302 and 120B of the Indian Penal Code. After investigation chargesheet was submitted, cognizance was taken and the case was committed to the court of sessions. Initially, charges were framed against five accused, out of whom Chandradeep Paswan died after charge and Upendra Mukhiya absconded in course of trial and his case was separated. The

appellants faced the trial and they were convicted and sentenced as aforesaid.

5. It is submitted on behalf of the appellants that the defence of the appellants is that they are innocent and have been falsely implicated in this case. Chandradeep Paswan had filed a case against Upendra Mehta (P.W.2), Jai Narayan Mehta (deceased), Bishundhar Rishideo (P.W.1) and his father under Section 307 of the Indian Penal Code which was pending. In that case, appellant no. 2, Nageshwar Mukhiya, Ram Krishna Mukhiya and Satya Narayan Mukhiya had deposed for Chandradeep Paswan. Ram Krishna Mukhiya and Bishun Mukhiya (appellant) are cousins. Deceased, Jai Narayan Mehta is the step-brother of the informant. The investigating officer and the Block Development Officer have not been examined and their non-examination has caused prejudice to the appellants. The trial court should have rejected the evidence of P.W.3 in view of the fact that he did not make himself available for cross-examination on recall. It is further submitted that no conviction of the appellants Bishun Mukhiya and Nageshwar Mukhiya has been made under Section 27 of the Arms Act. The doctor has found three injuries caused by firearms. The prosecution story appears to be doubtful. Witnesses named in the F.I.R. have not been examined. No motive has been alleged. Materials shown were not exhibited.

6. Learned counsel for the State has submitted that the appellants have taken active part in the commission of the offence. The discrepancy between the ocular and medical evidence is minor. P.W.1 and P.W.3 have supported the prosecution case. The appellants have rightly been sentenced and no interference by this Court is required.

7. In view of the divergent submissions of the learned counsels for both the parties, this Court is required to reappraise the prosecution evidence to consider as to whether the prosecution has been able to substantiate its case beyond all reasonable doubts.

8. The prosecution has examined the following six witnesses. They are P.W.1 Bishundhar Rishideo, P.W.2 Upendra Mehta, P.W.3 Shivnarayan Mehta, P.W.4 Dr. J.B. Singh, P.W.5 Amarendra Kumar and P.W.6 Chakradhar Prasad Yadav.

9. P.W.1 Bishundhar Rishideo, is the victim of the occurrence. He has stated that he was returning from Gwalpara Bazar in the evening by bi-cycle. Upendra Mehta (P.W.2) was also on the same bi-cycle. Shivnarayan Mehta (P.W.3) and Jainarayan Mehta were travelling on another bi-cycle. When they reached near the grove of Sisam trees in the southern side of Shyam Dargah, 7 to 8 persons intercepted them, out of them one uttered 'catch and kill'. He identified Chandradeep Paswan, Nanda Yadav (appellant), Upendra



Mukhiya (absconding), Nageshwar Mukhiya (appellant) and Bishun Mukhiya (appellant) who were all armed with firearms. Bishun Mukhiya and Nageshwar Mukhiya dragged Jainarayan Mehta from the bi-cycle and took him to the western side of the road in the field of Bindeshwari Yadav. Chandradeep Paswan shot point blank in the jaw of Jainarayan Mehta, who fell down. Thereafter, Nanda Yadav fired a shot in the rib-cage of Jainarayan Mehta. When he (P.W.1) tried to escape, Upendra Mukhiya fired in his rib-cage. (The court has recorded a big scar of healed up wound in the left side of his abdomen below the ribs.) Thereafter, all the accused escaped in the western side through the maize crops. He, any how, went to his house and narrated about the occurrence to his father and others. He was taken to the Kishunganj police station where the officer-in-charge took his statement. Thereafter, his statement was recorded by the Block Development Officer and he put his signature (Ext.1). He was taken to Madhepura hospital for treatment. He has further stated that one year prior to the occurrence Chandradeep Paswan set fire to the house of Jai Narayan Mehta and a case was lodged. He gave statement to the police against Chandradeep Paswan, due to which Chandradeep Paswan was annoyed with him. In his cross-examination he has stated that Shivnarayan Mehta and Jainarayan Mehta are step-brothers and Upendra Mehta is not cousin of Shivnarayan Mehta. He also



stated that Chandradeep Paswan had also lodged a case against him, Jainarayan Mehta, Shivnarayan Mehta, Ayodhi Mehta and Upendra Mehta for the offence punishable under Section 307 of the Indian Penal Code. In that case Nageshwar Mukhiya had deposed against them. All the 7 to 8 accused had surrounded them. First shot was fired at Jainarayan Mehta and thereafter at Upendra Mehta when the other persons tried to escape from the place of occurrence. In paragraph-23 he has stated that at the time of taking statement by the Block Development Officer, officer-in-charge and doctor were present. It appears that he has been cross-examined at length. The defence has not been able to demolish the evidence of P.W.1. His evidence appears to be trustworthy and reliable.

10. P.W.2, Upendra Mehta, has stated that he had gone to Gwalpara Bazar with Bishundhar Rishideo (P.W.1) on a single bi-cycle. While returning, he and Bishundhar (P.W.1) were on one bi-cycle and Jainarayan and Shivnarayan were on another bi-cycle. All of them started from Gwalpara Bazar in the evening at about 7 P.M. When they reached near the southern side of Shyam Dargah, 7 to 8 persons from the sisam-grove came there and stopped the bi-cycle and one of them uttered to assault. Thereafter, Nageshwar Mukhiya and Bishun Mukhiya dragged Jainarayan Mehta from the bi-cycle and took him in the barren land towards western side at a distance of 2/3



laggi. Chandradeep Paswan shot blank fire in the chin of Jainarayan Mehta, who fell down. Thereafter, Nanda Yadav shot fire in his rib-cage. Jainarayan Mehta succumbed to his injuries there. Bishundhar Rishideo tried to escape and since he went towards the southern side of Upendra Mukhiya who fired in his left rib-cage. Any how, he escaped towards the southern direction. Shivnarayan Mehta (P.W.3) also rushed towards the village raising alarm. Bishundhar Rishideo was taken to the police station by the co-villagers on a cot. He (P.W.2) also followed them.

In his cross-examination he has stated that he did not identify 2/3 other accused. All of them had firearms. Jainarayan Mehta was dragged by two persons from the bi-cycle and was taken towards the western side of the road. Jainarayan Mehta was caught by Nageshwar Mukhiya and Bishun Mukhiya and thereafter, Chandradeep Paswan had fired. The fardbeyan of Shivnarayan Mehta was recorded at about 1 A.M. in the police station. The statement of Bishundhar (P.W.1) was made about 1-30 A.M. His (P.W.2) statement was also taken after the statement of Shivnarayan Mehta. He also admitted that Chandradeep Paswan had lodged a case for the offence punishable under Section 307 of the Indian Penal Code against him and Jainarayan Mehta, Shivnarayan Mehta, Ayodhi Mehta and others which is pending for trial. In paragraph-16 he has



stated that he and others reached at the place of occurrence at about 7-30 P.M. The distance between Gwalpara and his village is about six kilometer. The occurrence took place within 2 to 3 minutes prior to the death of Jainarayan. No one from the prosecution side dared catching the accused. Prior to the murder of Jainarayan, Bishundhar also did not try to escape. There is some deviation in the prosecution evidence which is minor and natural. His evidence also appears to be convincing.

11. P.W.3, Shivnarayan Mehta, is the informant of this case. He has also supported the prosecution case. His evidence also appears to be convincing. He has identified his fardbeyan (Ext.2). It appears from his evidence that there has been enmity between Chandradeep Paswan on the one hand and the informant and his brother and father (P.Ws. 1 and 2) on the other hand. In paragraph-8 he has stated that where the dead body of Jainarayan was lying, copious blood was there. The blood stained clothes were given by chowkidar Nabbu Paswan to the doctor. Police did not take the cloth of Bishundhar. His cloth was also stained with blood. He has denied the suggestion that due to enmity the accused have been falsely implicated in this case. After careful examination of his evidence it does not appear that his evidence can be discarded due to enmity. His evidence appears to be convincing. He was examined on 23.8.1989

and his cross-examination was resumed on 4.9. 1989 and he was discharged. On recall, he has been further cross-examined on 1.4.1992. In his further cross-examination on recall, he has stated that it takes half an hour to 45 minutes from Gwalpara Bazar to the place of occurrence. This occurrence was witnessed in the moon lit night. He and Bishundhar were surrounded by 8 to 10 persons. All were armed with firearms or other weapons. He cannot say that he had ever seen a country made gun. He has denied the suggestion of the accused that as the deceased was his step-brother and there was dispute between the accused and the deceased, as such, the accused have been falsely implicated in this case.

12. P.W.4 Dr. J. B. Singh has held the post mortem examination on the dead body of the deceased Jainarayan Mehta aged about 28 years on 20.5.1986 at 5 P.M. and found the following anti mortem injuries.

(1) One circular wound of entrance $\frac{3}{4}$ " in diameter with margin lacerated and blackening present on the lower border of chin going upward causing fracture of lower jaw into pieces upper jaw with teeth of incisors and heart pellet broken leaving the wound of exit $1\frac{1}{2}$ " below the nose.

(2) Lacerated wound 1" x ½" into skin deep on chin.

(3) Haematoma of 3" to 2" present on left side of temporal region under the skull.

(4) Circular wound with black margin with 1" in diameter present on the right side of the chest in mid axillary line in VIIIth space rising upward.

In his opinion, the cause of death was shock and haemorrhage due to injury nos. 1 and 4. Those injuries were sufficient to cause death in ordinary course of event individually or taken together. Injury nos. 1 and 4 were caused by firearms and injury nos. 2 and 3 were caused by hard and blunt substance. The post mortem report has been marked as Ext.3.

13. In his cross-examination he has stated that he had forgotten to mention the time elapsed between the death and his post mortem examination. He did not mention the weapons with which the injuries found were caused. He has not mentioned the burnt injury regarding the wound of entry but he has mentioned the

blackened margin by which he meant charred margin. Injury no. 1 could not be caused by hard and blunt substance. He did not find any injury on the left side of the chest of the deceased.

14. P.W.5 is a formal witness, who proved the case diary from page-1 to 17 which has been marked as Ext.4 and the fardbeyan is Ext.5.

15. P.W.6 is also a formal witness, who has proved the injury report written by Dr. J. B. Singh (P.W.4).

16. It appears from the order dated 20.2.1991 passed by the learned Sessions Judge that at the instance of the accused Nanda Yadav, his prayer to recall P.W.3 Shivnarayan Mehta for further cross-examination was allowed on the ground that the prosecution case was not closed as the investigating officer had not been examined and secondly, the accused was in custody. As such, in the interest of justice, the petition of the accused for further cross-examination of the informant was allowed.

17. The recall of prosecution witness for re-examination or recross-examination is not at the sweet-will of a party or the court. The witness can be recalled or re-summoned and examined or cross-examined in case there is alteration or addition to charge under Section 217 and under Section 311 of the Code of Criminal Procedure, when the evidence of such witness appeared to the court



to be essential to the just decision of the case, meaning thereby, a witness cannot be recalled or recross-examined without any rightful purpose. It appears that the court has not been given the unfettered power to recall or re-examine any witness. The court has to justify that the recall of the witness is essential for the just decision of the case or such recall was necessary as the re-examination/cross-examination of such a witness was material to the facts of the case as appears from Section 217(b) Cr. P.C. In the present case, it appears that P.W.3 Shivnarayan Mehta was examined on 23.8.1989. He was cross-examined in part on 23rd of August 1989 itself and his cross-examination was completed on 4.9.1989 after giving sufficient time to the accused for preparation of cross-examination or consultation with his learned counsel. But a petition was filed on behalf of the accused on 5.2.1991, on the ground that the accused could not instruct his lawyer on certain important aspects of his defence, but no such ground has been mentioned in the petition to justify the recall of P.W.3. This prayer was opposed by the prosecution vide its objection petition dated 20.2.1991 in which it has been mentioned that the defence was allowed ample and sufficient time for taking instructions from the accused persons on any important aspect of defence and the cross-examination of the witnesses has been made in detail on two different dates. As such, the petition was fit to be



rejected. But the learned Sessions Judge allowed the petition without appreciating the provisions of Section 217 and Section 311 of the Code of Criminal Procedure. As such, the cross-examination of P.W.3 on recall is non est in the eye of law and no benefit can be given to the defence on the deposition made in the cross-examination on recall of P.W.3. Thus, the submission of the appellants that P.W.3 did not appear for cross-examination on recall order is not correct.

18. It appears that there has been enmity between the accused party on the one side and prosecution party on the other. There was enmity prior to the occurrence. There was also litigation between both the parties. The prosecution witnesses are certainly interested and inimical to the defence. But only on these grounds, the evidence adduced on behalf of the prosecution cannot be discarded. The occurrence had taken place on a barren field. The evidence is that it was moon lit night. Both the parties were acquainted with each other. The prosecution failed to identify 2 to 3 accused as they were not acquainted with them. The evidence of P.Ws. 1, 2 and 3 appears to be natural and convincing. There are minor contradictions in their evidence which do not go to the root of the case. As such, those contradictions do not affect the prosecution case. The ocular evidence stands corroborated by the medical



evidence. There is ample evidence on the record to show that the appellants had formed an unlawful assembly and committed the offence with their common intention. The appellants Bishun Mukhiya and Nageshwar Mukhiya have acted in furtherance of common intention and have dragged the deceased Jainarayan Mehta from the bi-cycle and took him to the barren field and have facilitated the other accused to commit the offence. Thereafter, the other accused Chandradeep Paswan, the leader of the gang, shot fire in the chin of the deceased and Jainarayan fell down. Thereafter, Nanda Yadav shot fire in his panjra and Jainarayn succumbed to his injuries on the spot. Thereafter, Upendra Mukhiya shot fire in the rib-cage of Bishundhar Rishideo (P.W.1).

19. The non-examination of the Block Development Officer and investigating officer has not caused any prejudice to the case of the appellants as the Block Development Officer had recorded the statement of Bishundhar Rishideo as at that time his injury was grievous and it was thought that Bishundhar might succumb to his injury. As such, his statement was recorded by the Block Development Officer in utter expectation of his death in presence of the officer-in-charge and the doctor and fortunately Bishundhar survived and recovered from his injury. Therefore, in our opinion, non-examination of the Block Development Officer and

investigating officer does not prejudice the appellants or affect the prosecution case.

20. Considering the facts and circumstances stated above, we do not find any ground to interfere with the impugned judgment. These appeals have got no merit, as such they are dismissed.

21. The bail bonds of the appellants are cancelled and they are directed to serve out the sentence as imposed by the learned trial court. The learned trial court is directed to ensure that the appellants are serving their sentences as imposed on them.

(Amaresh Kumar Lal, J)

Dharnidhar Jha, J. I agree.

(Dharnidhar Jha, J)

sudip/-
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