

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.526 of 1993

Arising Out of P.S.Case No. -167 Year- 1986 Thana –Sadar District- PURNIA

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Dukhan Rai son of Domi Rai, resident of village-Sanbhanga, P.S. Sadar, District-
Purnia.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Smt. Archana Sinha @ Shahi, Amicus Curiae.

For the Respondent : Sushri Shashi Bala Verma, APP.

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 21-08-2015

Eight accused persons charged variously, were put on trial by the learned 5th Additional Sessions Judge, Purnea in Sessions Trial No.357 of 1988. The present appellant Dukhan Rai had been distinctly charged under Sections 148 and 302 of the Indian Penal Code. While seven accused persons were acquitted of all the charges including that under Sections 147 and 307/149 of the Indian Penal Code, the present appellant was held guilty of committing the offence under Sections 148 and 302 of the Indian Penal Code by judgment dated 30.09.1993 passed by the learned trial Judge. The learned trial Judge heard the appellant on sentence on 01.10.1993 and directed the appellant to suffer rigorous imprisonment for one year under Section 148 of the Indian Penal Code and rigorous imprisonment for life

under section 302 Indian Penal Code. The present appeal has been filed by the appellant to challenge the correctness of the findings as regards his guilt and the appropriateness of the sentence.

2. The prosecution case is contained in the fardbeyan of Hari Lal Rai (PW 8) (Ext-3) in which he stated that on 25.06.1986 at 8 A.M., he along with his father Sant Lal Rai (the deceased of the case), Sukni (PW 5), his mother, brother-in-law Kuchali Rai (PW 1) and his step-father Chhotai Rai (not examined) besides his villagers Butan Rai (PW 7), Kartik Rai (not examined), Holi Lal Rai (PW 6), Bokai Rai (not examined) and Mahabir Rai (PW 4) was constructing a house on 15 decimals on land pertaining to *Khata* No.92, *Khesara* No.210 which had been allotted to him by the Government of Bihar five years ago. Some part of it had been constructed and at that time, Kanak Lal Biswas (PW 2) had come there while on way to another place and sat down there when all the accused persons including the present appellant Dukhan Rai came there armed with *lathi*, *farsa*, sword, *tangi*, bow and arrows and *dabiya* and attacked the informant and witnesses. It was stated that this appellant Dukhan Rai shot an arrow at deceased Sant Lal Rai which hit him just above the chest in his neck. The accused Bhadai Santhal gave a blow with *Kulhari* on the neck of the deceased as a result of which the deceased Sant Lal Rai fell down. The said accused Bhadai Santhal ran away with the trident which the deceased used to carry with him. P.W.5 Sukni, the



mother of the informant, was also injured by an arrow shot by accused Domai Santhal in her hand and Barki Majhian, the accused, also gave a *Hasua* blow to PW 5. Barki Majhian dealt another blow with *Kulhari* on the informant who was hit just by the side of his left ear and he became injured. Manju Santhal also shot an arrow which hit the informant in his back and caused a superficial injury to him. Other accused persons, men and women, assaulted the informant, his mother and Kuchali Rai (PW 1) with *lathi* causing injuries to them. On the *Hulla* raised by the injured persons people assembled there and seeing them, the accused persons ran away towards their respective houses. The villagers, however, arrested Manju Santhal, Barki Majhian and Talamai Majhian while others succeeded in running away from there and the arrested accused confessed their guilt before the police. The three arrested accused persons were handed over to the police.

3. On the basis of Ext-3, the FIR of the case was drawn up and the investigation was taken up by S.I. Dilip Kumar Ojha, but what we find is that the investigating officer had not been examined. However, what appears from the record of the case is that the injured witnesses were sent to the doctor, like, PW 10 Dr. Gaya Prasad Diwakar, who examined them and issued the injury certificates. The investigating officer also held inquest upon the dead body of deceased Sant Lal Rai and prepared the inquest report in presence of the witnesses. A copy of the inquest report finds placed on

the paper book at page-69. On close of the investigation, the accused persons were sent up for trial which ended the judgment impugned herein.

4. Smt. Archana Sinha, the learned Amicus Curiae appearing on behalf of the solitary appellant referred to us the evidence of different witnesses and mainly argued that the oral testimony of witnesses was not in consonance with the medical evidence of PW 9 Dr. Kamal Krishan Das who had held postmortem examination on the dead body of deceased Sant Lal Rai. Thus, what we find is that the decision of this appeal lies in a very narrow compass.

5. At any rate, we must mention that out of eleven witnesses examined in the case, PW 11 Surendra Nath Mishra was a witness of formal character who had brought on record the formal FIR of the case which was marked Ext-7. PW 9 Dr. Kamal Krishan Das was the doctor who had held postmortem examination on the dead body while PW 10 Dr Gaya Prasad Diwakar had examined the injured, like, Sukni (PW 5), Holi Lal Rai (PW 6) and Kuchali Rai (PW 1) for the injuries which were found on their persons and had issued the injury certificates Exts-6 to 6/2. PW 3 Sheo Narayan Mandal was a witness to inquest and was also a witness to the seizure of the blood stained earth as also the wooden part of the arrow from the place of occurrence. The seizure list in respect of the seizure of

blood stained earth and wood-part of the arrow was marked Ext-2. PW 1 Kuchali Rai, PW 2 Kanak Lal, PW 4 Mahabir Rai, PW 5 Sukni and PW 6 Holi Lal Rai were eye witnesses to the occurrence while PW 7 Butan Rai was tendered for cross-examination. We have already noted that PW 8 Hari Lal Rai was the informant of the case.

6. The defence had also examined Doman Hembrum (DW 1) and Dr. Mahadeo Prasad Saha as DW 2. DW 1 had stated that the informant and others had trespassed over his land to construct a house which was objected to by him and others and that an arrow was shot by Hari Lal Rai (PW 6), the informant of the case and he was injured in that course. DW 2 had stated that he had found a couple of injuries on the person of DW 1.

7. The argument being confined to the solitary point of there being a conflict between the ocular and medical evidence, we find it very convenient for us to find out the facts on the submission which was addressed to us by Smt. Sinha. We must note that it is the consistent evidence of all eye witnesses, like, PW 1 Kuchali Rai, PW 2 Kanak Lal, PW 4 Mahabir Rai, PW 5 Sukni who herself was an injured witness, PW 6 Holi Lal Rai and the informant PW 8 Hari Lal Rai that the accused persons armed variously with *lathi*, *farsa* bows and arrow and also carrying *dabiya* came to the place where the informant was constructing his house to attack him and others during which course, this appellant Dukhan Rai had shot an arrow which had



hit the deceased Sant Lal Rai somewhere about his chest in his neck. Smt. Sinha was taking us to the evidence of different witnesses and was pointing out that some witnesses had stated that the deceased Sant Lal Rai was hit directly in his neck while the others, like, PW 4 Mahabir Rai in paragraph-1 that the arrow shot by this appellant Dukhan Rai had hit the deceased Sant Lal Rai just below his neck and above his collar bone. Likewise, PW 5 Sukni had stated that her husband was hit just below his neck by the arrow which was shot by this appellant Dukhan Rai. So far the evidence of PW 6 Holi Lal Rai was concerned, Smt. Sinha was pointing out that that witness did not state as to what part of the body of the deceased was hit by the arrow which was shot by this appellant Dukhan Rai. On the basis of this evidence, it was contended that the finding of PW 10 Dr. Gaya Prasad Diwakar that there was an arrow intact in the wound on the lower portion of the neck in its middle was contrary and in conflict with the above oral evidence of witnesses.

We want to recall that the use of medical evidence can be made both by the prosecution and the defence. The prosecution can use the medical opinion of the doctor to buttress its case that the manner of occurrence which was alleged by it was completely in consonance with the oral testimony of the witnesses. As regards the use of the same evidence by the defence, it could be pointed out to the court that by such use of the evidence of the doctor that the manner of

occurrence which was stated by the prosecution was contrary to the medical opinion and thus, the prosecution had failed to prove and establish the story which was presented before the court in proof of the charges.

8. Before considering the evidence of the above noted witnesses, we want to point out that the occurrence had taken place on 25.06.1986 and the witnesses had been examined in Court sometimes in the later part of the year 1989, i.e., after three years. Moreover, when the attack was set up suddenly upon the informant and his companions who were engaged in constructing the house, then it could not be possible for each and every person who had seen the occurrence to exactly point out the organ of Sant Lal Rai which had been hit by the arrow which was shot by the present appellant Dukhan Rai. Even if they had seen, we may note, that the process of production of evidence being through human beings, there is bound to be some difference between the statements of witnesses. Every person has his own power of retaining a fact and then he has also his own manner of reproducing the fact before the trial Court. As such, there could not be word by word consistency in the evidence of the witnesses and that appears natural considering the capabilities of human beings on retention and reproduction of the facts. Moreover, what we could find was that if a witness had stated that the arrow had hit the deceased somewhere above his collar bone but in his neck and



the other has not stated as to which part of the body was hit, still the common allegation which appeared against this appellant from the evidence was that it was this appellant Dukhan Rai who had shot the arrow which had definitely hit the deceased Sant Lal Rai. Clarity as regards the organ of the body of the deceased of being hit appears still available from the evidence of witness, like, PW 1 Kuchali Rai who stated that his father-in-law was hit just above his collar bone in the middle of his neck. Kanak Lal Bishwas, who was an independent witness, had stated that the arrow had hit him on the collar bone. The wife of the deceased Sukni PW 5 or the informant Hari Lal Rai also stated that the deceased was hit by the arrow in his throat. When we considered the above evidence in the light of the evidence of PW 9 Dr. Kamal Krishna Das, we found him stating that there was an arrow intact and lodged in the lower portion of the neck in the middle. On dissection of the neck, the arrow was seen directed to the lower and right side 4" deep upto upper lobe of the right lung. No other important blood vessel or trachea was punctured in the neck, chest cavity was full of blood and clots on the right side. The heart was empty. The fifth, sixth and seventh right ribs were fractured. The stomach was empty and the arrow had caused injury to the right lung and that was the cause of deceased Sant Lal Rai. Thus, the site of the injury which was found by PW 9 Dr. Kamal Krishan Das also corroborates the manner of occurrence which was stated by the

witnesses that the arrow shot by the present appellant Dukhan Rai had hit the deceased somewhere in his neck and had killed him.

9. On considering the evidence both of the witnesses and that of PW 9 Dr. Kamal Krishan Das, we find that the prosecution had succeeded in establishing the manner of occurrence and thus, the participation of this appellant Dukhan Rai in causing the death of deceased Sant Lal Rai by shooting an arrow which had caused his death.

10. While considering the judgment passed by the learned trial Court, we were distressed to find that in spite of holding that there was an unlawful assembly which was prosecuting a common object and, as such, was holding appellant Dukhan Rai guilty of committing offences under Sections 148 and 302 of the Indian Penal Code. The learned trial Judge was acquitting all the accused persons for charges under Sections 147 and 302/149 of the Indian Penal Code. The reason which was assigned by the learned trial Judge for acquitting the other accused persons appears at page-10 of the impugned judgment when he was stating that in absence of any specific overt-act allegedly having been committed by the other accused, they were entitled to acquittal as the charge under Sections 302/149 Indian Penal Code did not appear established by evidence.

11. We want to refer to the decision of the Supreme Court in *Ranbir Singh and others v. State of Bihar*, which is reported



in, *AIR 1995 SC 1219*, before whom a similar argument was raised so as to seeking acquittal of *Ranbir Yadav*, the appellant in that case. It was also urged before the Supreme Court that the appellant *Ranbir Yadav* had not committed any overt-act and he was only alleged to be moving on a horse carrying a gun and there was a specific allegation of committing overt-acts of firing shots, killing the deceased persons by other weapons and throwing the dead bodies into the river *Ganges*. The Supreme Court had noticed their earlier decisions in order to considering the merit of the submission and held that in some cases, it may be necessary to find out as to what overt-act had been alleged and proved by the prosecution against a particular accused, but when the facts are so clear as to indicating that there was definitely an unlawful assembly which had moved to prosecute a particular common object and if was shown circumstances that the accused who was not bearing any particular overt-act was definitely a member of that unlawful assembly and was moving with as such a member in order to prosecuting that common object, then even in absence of any evidence on direct participation of such an accused, he could be convicted by virtue of Sections 302/149 Indian Penal Code. In *Ranbir Yadav* (supra), the said appellant was moving on a horse with a gun and he was found leading the mob of rioters who had indulged in multiple murders as also causing the disappearance of a huge number of dead bodies. Except that there was no evidence against appellant



Ranbir Yadav and the Supreme Court had upheld the conviction of the said appellant. The learned trial Judge in the present case had definitely found that there was an unlawful assembly and that he held the present appellant Dukhan Rai guilty under Sections 148 and 302 of the Indian Penal Code, but was acquitting the other accused persons in absence of any overt-act. The evidence of witnesses does indicate that there was some overt-act also alleged against some of the accused persons. As such, what we find is that the learned trial Judge had passed outrightly an illegal order of acquittal as regards those accused persons who had been acquitted by him by the same judgment. It is true that no appeal against acquittal of those accused persons lies before us but it is by now a well settled principle of law that even in absence of an appeal against the acquittal, the Appellate Court could held the acquittal of some of the accused persons illegal. We express our opinion on that line that the acquittal of the other accused persons does not appear lawful in view of the evidence.

12. So far as the merit of the present appeal is concerned, after having considered the evidence of the witnesses in the light of the medical evidence, we find no merit in the appeal and the same is dismissed. The appellant Dukhan Rai is on bail. His bail bond is cancelled. He shall surrender himself to the custody of the court below to serve out the sentence passed against him. If he does not surrender in a period of one month from the date of receipt of the

copy of the present judgment, the court below shall take steps to ensure his arrest and his remand to judicial custody.

13. Smt. Archana Sinha, the learned Amicus Curiae has assisted the Court to the best of her abilities and we record our appreciation of her effort and in token thereof, we direct that a fee of hearing may be paid to her by the Patna High Court Legal Services Committee.

(Dharnidhar Jha, J)

(Gopal Prasad, J)

mr./- Brajesh kr.

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