

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.263 of 2002

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SHIV SHANKAR TIWARI @ SHANKAR TIWARY, SON OF GORAKH
TIWARY, RESIDENT OF VILLAGE-TEGHARA, POLICE STATION-BIHEA,
DISTRICT-BHOJPUR.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

..... RESPONDENT/S

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Appearance:

For the Appellant/s : Mr. Baxi S.R.P. Sinha, Sr. Adv.
Mr. Rahue Nath, Adv.
Mr. Sanjay Kumar, Adv.
For the State : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 13-01-2015

Heard learned counsel for the appellant as well as
learned Additional Public Prosecutor.

2. At an initial stage, Shiv Shankar Tiwary @ Shankar
Tiwary, Hari Shankar Tiwari @ Tuntun Tiwari were appellants
out of whom, Hari Shankar Tiwari @ Tuntun Tiwari died and on
account thereof, vide order dated 11.09.2014 instant appeal
has been allowed to abate against him. As such, now the
instant appeal found alive only relating to appellant no.1, Shiv
Shankar Tiwary @ Shankar Tiwary who along with Hari Shankar
Tiwari @ Tuntun Tiwari (since deceased) has been found guilty
for an offence punishable under Section 307 of the IPC, 27 of
the Arms Act vide judgment of conviction dated 17.05.2002 and
sentence to undergo R.I. for seven years under Section 307 IPC,
R.I. for three years under Section 27 of the Arms Act with a
further direction to run the sentences concurrently vide order of

sentence dated 20.05.2002 by the Second Additional Sessions Judge, Bhojpur at Arrah in Sessions Trial No.394 of 1993, hence this appeal.

3. Devanand Tiwary (PW-4), gave his fardbeyan (Ext.4) on 09.02.1991 at about 05:30 PM at his *Darwaja* before Officer-in-charge, Bihea P.S. disclosing therein that while he was engaged in constructing his house, at about 04:00 P.M. his *Pattidar*, Shankar Tiwary, Hari Shankar Tiwari @ Tuntun Tiwari, son-in-law of Gorakh Tiwary (husband of Mamta) came at the place where construction work was going on and forbidden him. As they did not pay heed, then thereafter, aforesaid persons gone to their roof and Shankar Tiwary fired from his licensee gun causing injury over his chest, neck. Hari Shankar Tiwari fired from countrymade gun causing injury over his hand, temple, cheek. Shankar Tiwary repeatedly fired 3-4 rounds causing injury to his brother, Radhe Krishna Tiwary, one maison Shivjee Yadav, his mother Sampato Devi and at that very time, brother-in-law of Shankar Tiwary was armed with *Bhala*. It has also been averred that Malti Devi, Manju Devi, Mamta Devi pelted stone from roof of their house on account of which Bimla Devi, wife of younger brother of informant has sustained injury. He has further disclosed that his *Pattidar*, Hari Shankar Tiwari as well as Shankar Tiwary have fired with an intention to kill however, they have narrow escape. The motive for the occurrence has been shown as a suit is going on relating to the

land under dispute. He has been decreed from the court of Illrd Munsif, however appeal is pending at the end of accused.

4. On the basis of the aforesaid fardbeyan, Bihea P.S. Case No.19 of 1991 was registered followed with investigation as well as submission of charge sheet whereupon the case was committed and after conduction of trial, the appellants, as indicated above were convicted and sentenced while remaining accused were acquitted.

5. Defence as has been gathered from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial of occurrence as well of false implication. Though, only injury report has been exhibited without having FIR or the manner of occurrence suggested to the witnesses specifically, there also happens to be fragrance of counter activity.

6. In order to substantiate its case, prosecution had examined altogether six PWs out of whom, PW.1 is Bimla Devi, injured, PW.2 is Sonapati Kunwar, injured, PW.3, Radha Krishna Tiwary, injured, PW.4, Devanand Tiwary, informant as well as injured, PW.5 Shivji Yadav, though injured as shown in the fardbeyan however, declined to, and on account thereof, has been declared hostile. PW.6, Dr. Keshav Prasad Singh who has examined all the injured. Side by side the prosecution had also exhibited Ext.1, signature of PW.4 over fardbeyan, Ext.2 Series respective injury reports, Ext.3 Formal FIR, Ext.4 Fardbeyan.

Defence, though did not examine any witness had exhibited Ext.-'A', C.C. of Misc. Appeal No.38 of 1987, Ext.-'B', C.C. of Title Suit No.48 of 1987, Ext.-'C' order of Title Appeal No.507 of 1991, Ext.'D', order dated 27.01.1996, Ext.-'E', judgment of Title Appeal no.82 of 1990.

7. Manifold argument has been raised on behalf of appellant while assailing the judgment impugned. The first and foremost argument happens to be that from the fardbeyan itself it is evident that appeal was pending at the behest of appellant before the learned appellate court on account thereof, was it permissible for the prosecution party to go over the land and began to erect house in the background of the fact that first appeal happens to be in continuity with the suit and the judgment passed by the learned lower court was under challenge. In the aforesaid background, it has been submitted that prosecution parties were themselves aggressors whereunder they pounced upon appellate and their family members, brutally assaulted and in retaliation, they acted to save their life and property with due restrain, which the injury itself suggest. Unfortunately, neither the injury nor the FIR have been exhibited and probably the same has not been brought up on record by the appellants in the background of non-examination of the Investigating Officer who, in case so examined, would have disclosed the real event.

8. It has also been submitted that after going through



the relevant judgments passed by the Civil court, it is apparent that construction of the house had already been completed much before the date of occurrence which, the defendant (prosecution) had already admitted during course of their evidence as has been traced out by the learned lower court as well as appellate court and only *Chajja* to the extent of one and half hand projected towards the land of appellant which, though perceived but no coercive order was passed by the learned trial court under issue no.3 was scrapped by the First Appellate Court as well as affirmed by the Hon'ble High Court in second appeal directing for its removal then in that event there was no occasion for the appellant to go over the land, to forbidden the prosecution party and as they failed to oblige the appellants, was given a lesson having shot at by the appellants from their roof was nothing but an intentional act to cover their sin.

9. It has further been submitted that there happens to be specific disclosure in the fardbeyan as well as categorical statement of the witnesses that appellants, after going to their roof fired and on account thereof, prosecution party, being at the ground might have sustained gun shot injuries projecting down ward, which, the doctor PW-6 failed to specify. That means to say, presence of gun shot injuries, even considering the evidence of PW-6, was caused having the victim as well as assailant at common horizon therefore, it rules out the manner of occurrence, as projected by the prosecution.



10. It has also been submitted that though, as per own version, the witnesses, who ever been examined, apart from being family members, are injured one. However, going through their evidence, it is evident that there happens to be material contradiction on account of material development having brought up by them during course of evidence however could not be brought up on record on account of non-examination of Investigating Officer.

11. In the aforesaid background, it has been submitted that non-examination of Investigating Officer has caused prejudice to the appellant on following score.

- a) On account of non-examination of Investigating Officer ,the objective finding of the Investigating Officer relating to place of occurrence, at least having an exposure at his end regarding construction of a building over the disputed land which, as per concurrent finding of a competent Civil court as well as examination of DW-6, the prosecution themselves had admitted it having constructed since before.
- b) The material contradictions which the appellant had drew attention however could not legally been brought up on record.
- c) Appellant failed to bring counter version which the case diary does contain. Therefore, having

the cumulative effect of the aforesaid deficiency did not justify prevalence of the judgment impugned, hence the same is fit to be set aside.

12. At the other end, the learned Additional Public Prosecutor while sticking with the finding recorded by the learned lower court has submitted that the evidence of injured witnesses should not be brushed aside in casual manner. Evidence of injured witnesses lies on upper pedestal and on account thereof, due to importance is to be given.

13. It has also been submitted that all the witnesses, who ever examined, in this case are injured witness. Appellants have not denied presence of gun shot injury over their person however having not pleaded or suggested to have caused those injuries in exercise of right of private defence. That means to say, it happens to be a new exercise taken up by the appellant at the present stage. At least during course of statement under Section 313 Cr.P.C. they would have exposed the same. Apart from exhibiting series of document at their behest during course of defence, the reason best known to them having not chosen to exhibit the injury report or counter version.

14. In likewise manner it has also been submitted that no suggestion was given at the end of appellant nor the witnesses were cross-examined over non-construction of house. That means to say the prosecution party were constructing other houses apart from what they have already constructed



during course of pendency of Title Suit No.48 of 1987. As such, the argument advanced on behalf of appellant that construction of house was already made during pendency of title suit and on account thereof there was no occasion for the prosecution to construct a house, is nothing but own illusion of appellants.

15. In likewise manner, the learned Additional Public Prosecutor as repelled the argument made on behalf of appellant relating to prejudice having been caused on account of non-examination of Investigating Officer. It has been submitted on behalf of learned Additional Public Prosecutor that the witnesses are yet to be traced out in whose evidence, which he deposed years after the occurrence, development would not be noticed. However, there happens to be no development in the evidence of PW-4, the informant, the injured. Furthermore, in terms of Section 134 of the Evidence Act it is the quality not the quantity which matters. Furthermore, it has also been submitted that non-disclosure by the doctor that he had perceived or not down ward injury is not going to harm the prosecution in the background of the fact that the aforesaid injuries have not been challenged at the end of appellants during course of trial. Consequent thereupon, the appeal is fit to be dismissed.

16. In order to appreciate the rival contention, it looks better to go into the materials having been adduced on behalf



of respective parties. From the fardbeyan itself, it is evident that PW-4 had admitted that case was pending since before amongst the parties relating to the land under dispute. It is also apparent therefrom that from the learned lower court, the suit was decreed in his favour, however appeal is pending at the instance of appellants. In the aforesaid background, was he legally entitled to go over the land and indulge in constructing a house is a moot question and the answer should be “not at all” till the matter is finally concluded. That means to say from own disclosure made by the informant PW-4, it is apparent that the construction of building, even accepted was going on during course of pendency of title appeal. At the present, moment the defendant (prosecution) himself as DW-6 had admitted in para-14 of his evidence that construction was done during pendency of the suit and his wall lies on the eastern flank of his plot and further, he erected *Chajja* about half hand towards east, (page-6 of the C.C. of the judgment, page-10 of the original judgment) Then in such circumstance whether it was a new construction than that of old one as admitted by defendant was to be properly brought up on record and for that, it was the prosecution is carries the obligation. The subsequent judgment speaks about identifying the aforesaid projection to be removed by the defendant himself otherwise at his cost by the exercise of the court. It is also evident from Ext.-D that Execution Case No.6 of 1992 was going on. Therefore,

certainly on account of non-examination of Investigating Officer, the physical feature of the P.O. could not properly come up on the record. Furthermore, the evidence lacks whether the construction, if any, was taken up over the land outside suit property.

17. Now coming to the evidence, it is apparent that none of the PWs had disclosed on that aspect on their own and on account thereof, it appears that defence ignored to cross-examined them on that very score. However, from the evidence of PW-3 at para-3, it is evident that he had shown the plot whereupon the construction work was going on to be Khata No.113, Plot No.428, Area 5 decimal which has purposely been introduced in the background of the fact that in Khatian it happens to be like so, however the map happens to be of less area that means to say nine decimal. As the survey Plot No.428 belonging to the defendant (prosecution) contains an area of five decimal, and the survey Plot No.429 which happens to be that of plaintiff (appellant) has been recorded as four decimal and on account thereof, the suit has been brought up for declaring the recording of revisional entry wrong and illegal and not binding upon the plaintiff and is found decreed. The disclosure of aforesaid five decimal as total area itself suggest the cunningness of the prosecution. Not only this, the prosecution (defendant) had not claimed that they are in possession of 5 decimal of survey plot no.428.



18. It is further evident from the evidences of the PWs that all the accused have gone to roof and then appellant Shiv Shankar Tiwary used his licensee gun. On account of non-examination of Investigating Officer, again it has not been brought up on record whether appellant have got licensee gun, if so, was seized, sent for ballistic examination and whether the test gone in favour / adverse to the prosecution.

19. From the evidence of PW-4, para-6, he had clearly stated that the roof where the appellants along with other were present happens to be eleven feet in height, about 20 hands away from his land at northern-western corner. He had not stated at which level PW-2, PW-3 and PW-4 were. In para-6 itself PW-4 had stated that at the time of firing, the work was going on at eastern-northern corner. He had further stated that at the time of firing they all were there. He was over the wall. Radha Krishna was ten hand away from him. Shivjee was over the wall along with him while PW-3, another injured had stated in paragraph 4 of his cross-examination that all the three were standing conjointly while his mother was standing 4-5 meter away. That means to say there happens to be inconsistency amongst the evidence of PW-3 and PW-4 regarding their location and that has got pivotal role while considering the case of the prosecution because of the fact that admittedly the firing as alleged, was made from roof of the house by the appellants and the roof measures eleven feet from the ground. Then in

that event, certainly the injury will go towards down ward.

20. PW-4, who had found gun shot injuries over the person of Shivjee Yadav, Radha Krishna Tiwary, Devanand Tiwary failed to explain the same by stating under para-17 of his cross-examination "I cannot say the direction and distance of the firing."

21. Now coming to the quality of the evidence as is evident from PW-11, para-6, while she was a hearsay witness during course of investigation, became eyewitness to occurrence. PW-3 para-6, PW-4 para-5, it is apparent that there happens to be some vital omission at one end while major development at the other end.

22. Apart from this, on account of non-examination of Investigating Officer certain mysterious event remained unfurled. PW-3 at para-5 had stated that just after occurrence he rushed to the P.S. which lies 1 KM away from his house. He had orally informed the Officer-in-Charge. At that very time, the Officer-in-Charge had not recorded his statement, registered a case rather proceeded towards place of occurrence. After coming to place of occurrence, had taken away all the injured to hospital where he took statement. His statement was also recorded at that very place. He had further stated that while he had gone to P.S., he had seen Shankar Tiwary following him to P.S. He further shown ignorance with regard to institution of any case at the behest of Shankar Tiwary. PW-4 in para-2 of



examination-in-chief had stated that Radha Krishna Tiwary had informed the police regarding the occurrence. *Daroga* came and recorded his statement over which he had put his signature. Accordingly, the conduct of the police official has come up under consideration which could have divulged only after his examination in the background of the fact that whenever there happens to be information regarding commission of cognizable offence, more particularly by the injured, then in that event, the police would have taken recourse to record statement of injured as well as to transmit him to hospital for treatment. As per evidence of PW-3, PW-4 para-7, it is evident that PW-3, in injured condition had gone to the P.S. then in that circumstance, how the police officer left him from the obligation of being the informant of the case and in stead thereof, accompanied with him at the place of occurrence and then recorded fardbeyan of PW-4, is a circumstance which also creates doubt over authenticity of the prosecution case.

23. Though, from the evidence of all the injured witnesses coupled with the evidence of PW-6, doctor presence of firearm injury is found over the person of injured but the manner, whereunder it has been suggested, has become doubtful and furthermore, having perceived the interest of accused / appellant having jeopardized on account of non-examination of I.O., the cumulative effect did not justify

sustainability of the judgment impugned. Consequent thereupon, the judgment of conviction and sentence recorded by the learned trial court is set aside. Appeal is allowed. Appellant is on bail hence is discharged from its liability.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated, the 13th day of Jan, 2015
Prakash Narayan

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