

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.347 of 2002

Arising out of P S. Case No. -159 Year- 1992 Thana -Bihta District- PATNA

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1. **Raj Kumar**, son of Bhagwan Rai, resident of village-Kanhauli, P. S. Bihta, District-Patna
 2. **Bijendra Rai**, son of late Laxmi Rai, resident of village-Subhao Tola, P.S. Bihta, District-Patna. Appellant/s

Versus

State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Ashok Kumar-Advocate
For the State : Mr. Sujit Kumar Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 13-02-2015

Appellants namely Bhagwan Rai, Deo Sharan Rai, Raj Kumar and Bijendra Rai, out of whom Bhagwan Rai and Deo Sharan Rai died, hence instant appeal abated against them, were found guilty vide judgment of conviction and sentence dated 25.06.2002 passed by the Presiding Officer, Additional Court No.II (Fast Track Court), Patna in Sessions Trial No.869 of 1993/ 557 of 2002 convicting all the appellants for an offence punishable under Section 304 (Part-I)/ 149 I.P.C. and directed each of them to undergo rigorous imprisonment for seven years.

2. Appellants Raj Kumar and Bijendra Rai have further been found guilty for an offence punishable under Section 148 I.P.C. and each one has been directed to undergo rigorous imprisonment for two years under Section 27 of the Arms Act and each one has been directed to undergo R.I. for three years. Appellant Bhagwan Rai,

Deosharan Rai (since deceased) have been found guilty for an offence punishable under Section 147 I.P.C. and each one has been directed to undergo rigorous imprisonment for one year with a further direction to run the sentences concurrently.

3. Bereft unnecessary details, the prosecution case as is evident from the fard-bayan of Mahanand Mahto (PW-13) recorded on 30.06.1992 at about 12.00 noon at Referral Hospital, Bihta alleging inter alia that on the same day at about 10.00 a.m. Ram Chander Rai was ploughing his field. At that very moment, his co-villager Bhuneshwar, Bhagwan, Deosharan armed variously came and unyoked, then took away to the field belonging to Karpuri @ Krishna Rai and began to plough. During course thereof, Deosharan was ploughing field while Bhagwan, Bhuneshwar were standing armed with lathi and garasa. Ram Chander Rai rushed to village and disclosed the event whereupon, he along with Ram Chander, Karpuri, Nandji, Lakhan, Lalji came and began to unyoke. Till then, Raj Kumar armed with pistol, Laxmi armed with countrymade rifle, Bijendra Rai armed with countrymade rifle, Chaubey armed with countrymade rifle along with 4-5 persons armed variously, came out from date palm herbs and began to fire on account thereof, Ram Chander, Nand Kumar Rai, Karpuri Rai sustained injury. It has also been disclosed that accused Raj Kumar Rai shot at Ram Chander while accused Bijendra Rai shot at Karpuri Rai.



Chaubey shot at Nandji Rai. Lalji also sustained firearm injury fired by Raj Kumar Rai, Bhuneshwar Rai assaulted Lakhan Rai with Garasa, Bhagwan Rai assaulted him (Mahanand Rai) with lathi. It has also been disclosed that accused Bhuneshwar Rai had land dispute with Bhagwan Rai since long. Then thereafter, all the injured were lifted to hospital and during course thereof, Ram Chander Rai died while, as per evidence, Karpuri and Nand Kumar also died during course of treatment. Accordingly, Bihta P. S. Case no.159 of 1992 was registered under Sections 147, 148, 149, 323, 324, 307, 302 of the I.P.C. and Section 27 of the Arms Act followed with investigation as well as submission of chargesheet and on the basis thereof, trial commenced and concluded in a manner, the subject manner of instant appeal.

4. Defence case, as is coming out from the mode of cross-examination as well as from the statement recorded under Section 313 of the Cr.P.C. is of complete denial of occurrence in a manner as suggested by the prosecution. There happens to be specific defence that land was originally possessed by one Mazid Mian with whom the accused persons fought, Bataidari Case in terms of Section 48 of the B. T. Act, which was decreed in their favour. The aforesaid Mazid Mian sold away the land in favour of Karpuri, who had purchased it in name of his brother in-law (Sala). On the alleged date and time of occurrence, the prosecution party having variously armed, raided the land while was



being ploughed by the accused persons and during course thereof, they brutally assaulted, as a result thereof, one Laxmi Rai succumbed to his injury at the spot itself while others were also injured. Then thereafter, the villagers came and in exercise of right of private defence, they confronted to prevent further loss of life and property and during course thereof, probability of loss to prosecution party cannot be ruled out. To support the same, the defence has exhibited series of documents including the F.I.R. of counter-case, post mortem report, order passed in Bataidari Case etc. as well as examined DW also.

5. In order to substantiate its case, prosecution had examined altogether sixteen PWs, out of whom, PW-1 Sri Bhagwan Rai, PW-2 Nandji Rai, PW-3 Binod Sharma, PW-4 Bindeshwari Rai, PW-5 Jamu Mahto, PW-6 Ram Ashish Brahmchari, PW-7 Deo Sharan Rai, PW-8 Hathi Mahto, PW-9 Sri Bhagwan, PW-10 Shobha Rai, PW-11 Umesh Prasad, PW-12 Baleshwar Rai, PW-13 Mahanand Mahto, PW-14 Ram Lakhan Rai, PW-15 Lal Chand Rai and PW-16 Rajesh Kumar as well as had also exhibited the documents as Exhibit-1 C.D. Page no.49, Exhibit-1/1 C.D. Page no.46, Exhibit-2 fard-bayan, Exhibit-3 formal F.I.R., Exhibit-4 to Exhibit-4/3 signatures on injury report, Exhibit-5 to 5/2 inquest reports, Exhibit-6 seizure list, Exhibit-7 to 7/3 injury reports of doctor, Exhibit-8 to 8/2 post mortem reports, Exhibit-9 to 9/3 four injury reports, Exhibit-10 C.C. of order sheet



dated 14.01.97 of L.P.A. No.935 of 1995. Defence had also examined one DW Narayan Sao and had exhibited series of documents as Exhibit-A fard-bayan, Exhibit-B inquest report, Exhibit-C seizure list, Exhibit-D carbon copy of post mortem report, Exhibit-E to E/3 injury reports, Exhibit-F charge sheet, Exhibit-G Certified copy of order dated 07.05.1990 of Bataidar Case no.01 of 1988-89, Exhibit-H to H/1 certified copy of judgment dated 25.07.95 in C.A. No.125C of 1984 and 10.05.1986 in C.A. No.335 of 1986, Exhibit-I certified copy of Deposition of PW-6 in S.T. No.253 of 1994.

6. while assailing the judgment of conviction and sentence, it has been submitted on behalf of appellants that on account of non-examination of doctor, even though the post mortem report has been exhibited at the instance of PW-16, a formal witness, the same cannot be read in terms of Section 32 of the Evidence Act on account of own lapses of the prosecution being failed to satisfy the ingredients thereof. As such, in absence of proper exhibit of post mortem report, though the document might be accepted as part of the record, but neither the cause of death, nor the finding recorded by the doctor could be looked into. On that very score, the cause of death of alleged deceased Ram Chander Rai, Karpuri Rai and Nand Rai had gone out of consideration. It has further been submitted that from the evidence of I.O. (PW-15), it is apparent that none had shown the land belonging to



deceased Ram Chander Rai, which was being ploughed by him nor the I.O. had inspected said field on his own. That means to say, the genesis of occurrence has not been properly placed by the prosecution party. At the other end, I.O. had found the land belonging to the appellants duly ploughed as well as prosecution party since its inception, have also admitted on that very score that, they have gone to the field belonging to Karpuri, being ploughed by the accused to teach a lesson to the appellants. In the aforesaid background, certainly it would be the prosecution party who, having variously armed, pounced upon appellants to dispossess them in the background of the fact that the land was purchased by Karpuri Rai in name of his brother-in-law from Mazid Mian, who contested Bataidari case launched by one of the appellants, and lost. The law speaks that the obligation which vendor was carrying shall be borrowed by the vendee, on account thereof, having identification of appellants as a Bataidar with regard to the aforesaid land which belonged to Mazid Mian purchased by Karpuri, subsequently, would not have wiped off status of appellants as a Bataidar. Therefore, appearance of prosecution party over the land being ploughed by the appellants, duly armed, clearly suggest that they were the aggressors.

7. It has also been submitted that it were the prosecution party, who were duly armed with unauthorized firearms as well as



deadly weapon to have a lesson and during course thereof, they used their weapon frequently causing injury to their own side as well as causing death of Laxmi and some of the appellants and even considering in worst case, though not admitted, appellants simply exercised their right of private defence to protect their life as well as property with utmost restraint.

8. It has further been submitted that learned lower Court, during course of appreciation of evidence had conceded on that very score while convicting the appellants under Section 304 (Part-I) of the I.P.C. as major offence along with other minor offences which, would not have, in the background of positive and concrete evidence suggesting the prosecution to be the aggressor as well as conduct of the appellants in exercise of their right of private defence.

9. Now, coming to authenticity, reliability of the prosecution witnesses, it has been submitted that apart from material contradictions available in their evidence which, they developed during course of trial intentionally as well as purposely, so that they could get their escape from counter-case instituted on that very score which the Investigating Officer (PW-15) had affirmed supported by defence exhibits.

10. Furthermore, it has also been submitted that from the nature of evidence, it is apparent that the case of the defence happens to

be more plausible, probable than the prosecution case and on that very score, whole prosecution case is bound to fail.

11. It has also been submitted that in the instant case, the status of the injured witness is found diluted in its entirety in the background of their illegal activity. Hence, acceptability of evidence of the injured witnesses is found duly frustrated in the facts and circumstances of the case.

12. Per contra, it has been submitted by the learned Additional Public Prosecutor that both the cases is to be adjudged independently as well as distinctly from each other. In the present case by cogent and reliable evidence, the prosecution established its case beyond reasonable doubt whereunder, apart from sustaining injury by some of the witnesses at the hands of appellants/accused, three persons were murdered.

13. It has further been argued that while causing injuries as well as murder of three persons, the learned lower Court had also considered the plea of the appellants as well as its impact over the prosecution case and on account thereof, the conclusion drawn by the learned trial Court is found well reasoned as well as in accordance with law. Consequent thereupon, the judgment of conviction and sentence recorded by the learned trial Court is fit to be affirmed.

14. Right from the fard-bayan, there happens to be





specific averment that while deceased Ram Chander Rai was engaged in ploughing his field, appellants Bhuneshwar Rai, Bhagwan Rai, Deo Sharan Rai came, unyoked and then shifted it to the field belonging to Karpuri Rai and began to plough. During course of evidence, it has come up at the end of prosecution itself that the land belonging to Karpuri Rai was purchased in name of his brother in-law (Sala) from Mazid Mian. However, failed to disclose Khata as well as Khesra number. No document has been produced by the prosecution on this score. From Exhibit-G, an order in terms of Section 48(E) of the B. T. Act filed by one of the appellants, bearing Bataidari Case No.01 of 1988-89, it is apparent that appellants were declared Bataidar. No order has been filed on behalf of prosecution to nullify the Exhibit-G and on account thereof, status of appellants is found duly recognized.

15. In the background of the aforesaid evidence, it has become crystal clear that an earlier occasion, the field belonging to Ram Chander Rai was being ploughed and subsequently thereof, the land claimed by Karpuri Rai over which status of appellants being the Bataidar. From the evidence of PW-15, the I.O. in Para-7, it is apparent that he had found place of occurrence barren land lying 500 yards west to Kanhauli village. The land happens to be North to South having an area approximately three Kattha and had found half portion of land from Western side ploughed. He had found blood spot hither and



thither mixed with soil. Further shown boundary East-Alakh Pandit, West-Jaipal Rai, South-Jaipal Rai, North-disputed land. In Para-8, he had further stated that he had found dead body of Laxmi Rai in the field of Dasam Rai. During cross-examination at Para-17, he had stated that place of occurrence was shown by Shiv Shankar Singh as well as Ramji Singh, who were present at the place of occurrence. He had further stated that these two were not an eye witness to the occurrence. In Para-18, he had stated that witnesses have disclosed that the land originally belonged to Mazid Mian, which was purchased by Karpuri Rai. However, he had not seen any document with regard thereto. During course of investigation, he has come to know that occurrence has taken place on account of ploughing of this land. He had mentioned in Para-14 of the case diary that Bhuneshwar had filed Bataidari Case against Mazid Mian with regard to disputed land along with others and won.

16. As such, from perusal of Para-7 inconsonance with Para-18 of PW-15, it has become crystal clear that only one plot was seen by him which was ploughed to some extent. Furthermore, he happens to be absent with regard to land possessed by Ram Chandra Rai. Moreover, failed to identify two different plots by its survey plot number, boundary belonging to Ram Chander Rai, one of the deceased as well as that of Karpuri Rai having been purchased from Mazid Mian over which the Bataidari claim was duly acknowledged under Exhibit-

G by a court of competent jurisdiction. On account thereof, although the prosecution had admitted its ploughing by the accused/ appellants, but really the field of Ram Chander Rai was being ploughed by him and subsequently, accused shifted to that plot is found attenuated.

17. Now, the status of the parties have to be considered. To adjudge the same, the inning is to commence from the fard-bayan itself. Informant himself had stated that having been disclosed by Ram Chander Rai with regard to activity of accused who, at that very moment, was not shown by Ram Chander Rai to be duly armed and inspite of knowing the fact that the land of Ram Chander Rai was not at all encroached upon by the accused persons, the prosecution party consisting of informant Mahanand Mahto, Ram Chander Rai, Karpuri Rai, Nandji Rai, Lakhan Rai, Lalji Rai have gone to the field and were engaged in unyoking. If the inference of aforesaid disclosure is to be taken note of, it should have been acknowledging their presence over the field belonging to Karpuri purchased from Mazid Mian over which appellants have legal right being declared as Bataidar by a court of competent jurisdiction.

18. First of all, on this score, evidence of PW-2 Nandji Rai in Para-2, Para-13, Para-15, Para-16, PW-13 in Para-1, Para-2, Para-8, Para-9, Para-10, PW-14 in Para-2, Para-3, Para-9, Para-10, it is apparent that prosecution party came over the land which was being



ploughed by the accused persons belonging to Karpuri Rai having purchased from Mazid Mian. Apart from Exhibit-G, PW-14 in Para-10 had admitted that Mazid Mian did not cultivate his field personally rather he engaged under Batai for the aforesaid purpose. Therefore, status of the prosecution party on being informed by Ram Chander Rai regarding ploughing of field by the accused persons over the land purchased by Karpuri Rai from Mazid Mian over which status of appellants have duly been acknowledged as Bataidar, in that circumstance the probability of prosecution being the aggressor appears to be more probable and on this very score, although the witnesses have tried their best to conceal their status as an aggressor, PW-14 in Para-9 had admitted that neither the land which was being ploughed was neither belonged to him nor to his son nay his nephew Ram Chander Rai. Because of the fact that they happen to be party of Karpuri Rai, as such, they have gone there. At the present moment, it would be relevant to mention evidence of PW-2 in Para-14, wherein he had admitted that some members of his side were duly armed. He had further admitted in the same paragraph that he happens to be an accused in counter-case. He had further admitted in the same paragraph that he is known to the facts that accused Laxmi Rai has been murdered in the same sequence while accused Bhuneshwar Rai, Bijendra Rai as well as Sri Bhagwan sustained severe injuries.



19. The prosecution in the aforesaid background was expected to play fair game as well as would have come forward with clean hands accepting their status either as an aggressor or being at defensive mood. Although, PW-2, PW-7, PW-13, PW-14 are the witnesses who claimed to have witnessed the whole occurrence, suggested part having been played by the appellants during course of occurrence, simultaneously tried to conceal how murder of one of the member of appellant Laxmi Rai had taken place as well as presence of injuries over person of some of the appellants.

20. The remaining witnesses are those witnesses, who arrived subsequently and their evidences also found relevant on this score. PW-1 had stated that on the alleged date and time of occurrence while he was at his house listening transistor, he heard one round of firing towards western side on account of which he proceeded towards destination. After covering some distance, he had heard 4-5 rounds of firing. Proceeding furthermore, he found Ram Chander Rai lying in a field. Lalji Rai and his two brothers Krishna Rai @ Karpuri Rai and Nandji Rai were also lying in an injured condition. He had also found Mahanand Mahto standing in an injured condition. He had also seen Bhuneshwar Rai armed with Garasa, Bhagwan Rai, Deo Sharan Rai armed with lathi, Raj Kumar @ Ram Babu Rai armed with pistol, Chauba and Birendra as well as Laxmi Rai lying in an injured



condition. He was also assaulted by Bhuneshwar Rai with Garasa over his head causing injury. Krishna Rai @ Karpuri Rai, Ram Chander Rai, Lalji Rai died subsequently. All the injured were taken to Bihta Hospital and from there to P.M.C.H. where strike was going on and on account thereof, they were taken to N.M.C.H. Ram Chander Rai died in the midst of way while Karpuri Rai at N.M.C.H. and Lalji Rai at P.M.C.H. He was treated at N.M.C.H. During cross-examination at Para-6, he had identified the P.O. North-Hit Narayan, South-Jaipal Rai, East-Alakh Pandit, West-Jaipal Rai. He had further submitted that he had no concern with the aforesaid land. However, his brother Karpuri's *Sala* had purchased this land and was being cultivated by his brother. Surendra Prasad and Birendra Prasad, Sala of his brother have purchased this land from Abdul Mazid in the year 1991. He had shown ignorance with regard to litigation amongst Abdul Mazid as well as Bhuneshwar Rai. In Para-7, he had stated that he had not seen Bhuneshwar Rai cultivating the land. In Para-8, he had stated that he had sustained injury ten Kattha behind from the P.O. land where Mahanand was present. He had further disclosed that Mahanand was not assaulted in his presence. He had not seen fracture at the hands of Bhuneshwar Rai (accused). In Para-9, he had admitted that Laxmi Rai had succumbed. He was murdered during course of instant occurrence. He had further admitted that he happens to be one of the accused in

counter-case. He had further stated that at that very time, accused persons were fleeing. He had further stated that he met with Bhuneshwar Rai in Jail and had found bandage over his hand. In Para-10, he had further averred that he had heard regarding institution of a criminal case against his Brother Karpuri Rai by Bhuneshwar Rai since before occurrence for committing theft of paddy.

21. PW-4 had stated that on the alleged date and time of occurrence, he was at his house. After hearing sound of firing, he rushed towards western direction and had seen Bhuneshwar Rai armed with Garasa, Bhagwan Rai armed with lathi, Raj Kumar armed with countrymade pistol, Birendra armed with rifle, Chaubey Rai armed with rifle, fleeing. He had also seen Ram Chander, Laldeo Rai, Karpuri Rai and Nandji Rai lying in an injured condition. At that very time, Ram Chander Rai was unconscious while others were conscious. Injured were taken to Bihta Hospital. During cross-examination at Para-6, he had stated that he had seen the accused persons fleeing towards western direction. As soon as he came out from the residential area of the village, he found accused persons fleeing. They have fled away from survey plot no.1034 as well as 1036. Injured were lying in the field of Das Narayan, he had gone near them. On the same day at about 11.00 a.m., police had recorded his statement. Police had also seen the injured then thereafter, injured were shifted to hospital. In Para-9, he has stated



that he had not seen Laxmi Rai in an injured condition. He had further admitted to be an accused in counter-case. In Para-10, he had admitted institution of case at an earlier occasion at the instance of Bhuneshwar Rai for committing theft of paddy wherein, he was convicted by the lower Court. However, was acquitted in the appeal. In Para-11, he had further admitted that in 1989, Bhuneshwar Rai had instituted another case for committing theft against him along with others including Mazid Mian, which is still pending. Then had denied the suggestion as well as Para-13 speaks regarding contradiction.

22. PW-6 had simply deposed that on the alleged date and time of occurrence, he was not present in the village. After coming back, he came to know about the occurrence.

23. PW-7 had stated that on the alleged date and time of occurrence, he had gone to the P.O. field after coming to know about the occurrence and found Bhagwan Rai, Munna armed with Garasa. Raj Kumar armed with countrymade pistol, Deo Sharan armed with lathi, Chaubey and Bijendra armed with rifle, fleeing therefrom. He had also found Ram Chander Rai, Lalji Rai, Karpuri Rai, Ram Lakhan Rai, Mahanand Rai in an injured condition. During cross-examination at Para-5, he had stated that he had seen all the injured lying in the field of Dasji. He had seen the accused persons fleeing away about one Biggha away from the field of Dasji. He had not seen Laxmi Rai in an injured



condition lying in the same field. He had not cared to see whether Bhuneshwar Rai was in an injured condition. At Para-6, apart from contradictions, he had admitted that Bhuneshwar Rai had instituted a case of theft of paddy against him and others before the occurrence, which is still pending. He had further admitted that Laxmi Rai was murdered in the same sequence. He had further admitted that he happens to be one of the accused in the aforesaid case.

24. PW-10 had stated that on the alleged date and time of occurrence while he was at his house, he rushed towards western direction after hearing sound of firing and found, accused persons duly armed with gun, pistol and lathi fleeing. He had identified Bhuneshwar Rai, Bhagwan Rai, Raj Kumar, Deo Sharan Rai, Bijendra Rai, Chaubey Rai, Laxmi Rai (since deceased). Chaubey and Bijendra Rai was armed with gun, Raj Kumar was armed with small gun. He had also seen Karpuri Rai, Nandji Rai, Ram Chander Rai, Laldeo Rai lying East to the field of Mazid Mian. He had also seen Ram Lakhan and Mahanand Rai in an injured condition. He had further stated that on the alleged date of occurrence, the land was under exclusive possession of Karpuri Rai which he had purchased in the name of his brother in-law (Sala). Injured were taken to hospital. During cross-examination at Para-6, he had admitted that dispute is going on amongst Mazid Mian and Bhuneshwar Rai for the last 4-5 years. He had further admitted that



Bhuneshwar Rai had instituted a case against him and others for theft of paddy. In Para-7, he had stated that Ram Chander Rai was ploughing the P.O. field on the alleged date and time of occurrence. Subsequently, he had stated that he saw oxen only. He had not seen who was over the field. He had further stated in Para-8 that 20-25 persons moving towards the place of occurrence while the accused persons were two Kattha away from the field of Mazid Mian. He had not identified the accused persons who was heading, however, Raj Kumar was behind. He had further stated that none was lying in the field of Mazid Mian. He had further admitted that he along with his son happens to be accused in a murder case lodged by Bhuneshwar Rai. He had further stated that Laxmi Rai had already been murdered. He has further stated that he has not seen accused Bhuneshwar Rai and Bhagwan Rai in an injured condition.

25. PW-12 had stated that on the alleged date and time of occurrence, he was at his house. After hearing sound of firing, he rushed towards western direction and found Bhuneshwar Rai, Bhagwan Rai, Raj Kumar, Deo Sharan Rai, Bijendra Rai, Chauba Rai fleeing. He had also seen Chauba, Bijendra armed with, Raj Kumar armed with pistol, Bhagwan Rai armed with farsa, Ram Chander, Lali, Karpuri, Nandji, Lakhan, Mahanand were in an injured condition. Ram Chander Rai, Laldeo Rai, Karpuri Rai died. In Para-6, he had stated that he had



seen the accused persons fleeing at a distance of one Biggha from the place where injured were lying. Blood was oozing out from the injury of the injured. He had seen the accused persons lying 2-3 field away from the field, which was being ploughed. He had seen blood oozing out from 5-6 places. He had further stated that Bhuneshwar Rai had instituted 5-6 cases against him and others. He had further stated that he happens to be an accused in the counter-case.

26. It is also apparent from the exhibits that the statement of Karpuri Rai @ Krishna Rai, Lalji Rai @ Lali Rai have been exhibited, out of which the statement of Nandji Rai lost its relevance on account of having been examined as PW-2. With regard to statement of Karpuri Rai @ Krishna Rai, Lalji @ Lali Rai, there happens to be no legal infirmity in getting the aforesaid statements and exhibits, in terms of Section 32 (1) of the Evidence Act, it is evident that it detailed the occurrence as well as part played by the each of the appellants. However, it lacks the fact regarding murder of Laxmi as well as injury sustained by some of the appellants. In likewise manner, the statement is completely silent with regard to appellants being Bataidar over the land, which originally belonged to Mazid Mian, subsequently purchased by Karpuri.

27. So, after crystallizing the evidence, it is apparent that though the prosecution witnesses tried their best to stroil the event.



However, during course of cross-examination, admitted that during course of said occurrence Laxmi Rai was murdered while some of the appellants had also sustained injury. PW-15, I.O. found the dead body at the same place, at the same time. They have also admitted presence of counter-case. But the reason best known to prosecution, none of them claimed to have assaulted the members of appellants in order to defend their life and property. Furthermore, presence of Exhibit-G rules out presence of appellants over the land under dispute, that of grappers.

28. After going through the statement of the appellants, it is apparent that none of them had claimed right of private defence. However, after scrutiny of the evidences adduced on behalf of prosecution as well as perceiving the mode of cross-examination, it is apparent that dispute arose on ground of ploughing of land by the appellants which earlier belonged to Mazid Mian and subsequently, though no document has been filed, but prosecution raised consistently having been purchased by Karpuri Rai in name of his both brother in-laws (Sala). At the other end, as stated above, there happens to be specific assertion coupled with exhibit of the document (Exhibit-G) identifying the appellants to be Bataidar with regard thereto.

29. Having absence of plea of right of private defence during course of statement under Section 313 of the Cr.P.C. has been taken into account by the Hon'ble Apex Court in Sumer Singh v.

Surajbhan Singh and others reported in 2014 Cr. L.J. 3246 wherein it has been held.....

16. It is well settled in law that exercise of right of private defence even if not specifically taken in Section 313 of the Code, it can always be gathered from surrounding facts and circumstances. The said position has been stated in Vidya Singh v. The State of Madhya Pradesh AIR 1971 (SC) 1857, Sikandar Singh and Others v. State of Bihar AIR 2010 (SC) 3580 and State of Rajasthan v. Manoj Kumar 2014 (4) SCALE 724.

30. The concept of right of private defence has been taken into consideration elaborately in State of Rajasthan v. Manoj Kumar with State of Rajasthan v. Raju @ Raj Kumar & another reported in 2014 Cr.L.J. 2420:-

11.....It is further put forth that even assuming the stand can be considered, in the case at hand the accused persons have miserably failed to discharge the burden in establishing their right of private defence. In this context, we may refer with profit to the pronouncement in Munshi Ram and others v. Delhi Administration reported in (1968) 2 SCR 455 wherein it has been laid that even if an accused does not take the plea of private defence, it is open to the court to consider such a plea if the same arises from the material on record and burden to establish such a plea is on the accused and that burden can be discharged by



showing preponderance of probabilities in favour of that plea on the basis of material on record. In Salim Zia v. State of Uttar Pradesh reported in (1979)2 SCC 645 the observation made by this Court to the effect that it is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence. Similarly, in Mohd. Ramzani v. State of Delhi reported in A.I.R. 1980 SC 1341, it has been held that it is trite that the onus which rests on an accused person under Section 105, Evidence Act, to establish his plea of private defence is not as onerous as the unshifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged, beyond reasonable doubt.

12. In the case at hand, the plea of right of private defence arises on the base of materials on record. As far as onus is concerned, we find that there is ocular and documentary evidence to sustain the concept of preponderance of probability. It can not be said that there is no material on record or scanty material to discard the plea. Thus, the

aforesaid submission being unacceptable, are hereby repelled.

13. Learned counsel for the State next contended that when the accused persons had exceeded their right of private defence and caused the death of the deceased, all of them should have been convicted under Section 302/34 IPC. In this regard, we may refer with profit to certain authorities before we advert to the facts unfurled in the case at hand. In Munshi Ram (A.I.R. 1968 SC 702) (supra), while dealing with right to private defence, this Court has observed that law does not require a person whose property is forcibly tried to be occupied by trespassers to run away and seek the protection of the authorities, for the right of private defence serves a social purpose and that right should be liberally construed. The Court further stated that such a right not only will be a restraining influence on bad characters but it will encourage the right spirit in a free citizen, because there is nothing more degrading to the human spirit than to run away in the face of peril. In Mohd. Ramzani (A.I.R. 1980 SC 1341) (supra) the Court has observed that it is further well-established that a person faced with imminent peril of life and limb of himself or another, is not expected to weigh in “golden scales” the precise force needed to repel the danger. Even if he in the heat of the moment carries his defence a little further than what would be necessary when





calculated with precision and exactitude by a calm and unruffled mind, the law makes due allowance for it. In Bhanwar Singh and others v. State of Madhya Pradesh reported in A.I.R. 2009 SC 765 it has been ruled to the effect that for a plea of right of private defence to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death and if the court were to reject the said plea, there are two possible ways in which this may be done, i.e., on one hand, it may be held that there existed a right to private defence of the body, however, more harm than necessary was caused or, alternatively, this right did not extend to causing death and in such a situation it would result in the application of Section 300 Exception 2.

31. In *Manjit Singh v. State of Himachal Pradesh* reported in 2014 Cr.L.J. 3970, it has been observed:-

19. *Under Section 96, IPC, “Nothing is an offence which is done in the exercise of the right of private defence”. Right of private defence of the body and of property has been enumerated under Section 97, IPC, subject to the restrictions contained in Section 99, IPC. As per the said section every person has a right to defend- “First. - His own body, and the body of any other person, against any offence affecting the human body; Secondly- The*



property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.”

Section 102, IPC, deals with commencement and continuance of the right of private defence of the body as follows:

“Section 102. Commencement and continuance of the right of private defence of the body.- The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

” The extent and limitations of the right of private defence is prescribed under Section 96 to 106, IPC. Such a right can be exercised only to defend the unlawful action and not to retaliate.

20. *This Court in George Dominic Varkey v. The State of Kerala, (1971) 3 SCC 275, has held:*

“6.....Broadly stated, the right of private defence rests on three ideas: first, that there must be no more harm inflicted than is necessary for the purpose of defence; secondly, that there must be reasonable apprehension of



danger to the body from the attempt or threat to commit some offence; and, thirdly, the right does not commence until there is a reasonable apprehension. It is entirely a question of fact in the circumstances of a case as to whether there has been excess of private defence within the meaning of the 4th clause of Section 99 of the Indian Penal Code, namely, that no more harm is inflicted than is necessary for the purpose of defence. No one can be expected to find any pattern of conduct to meet a particular case. Circumstances must show that the court can find that there was apprehension to life or property or of grievous hurt. If it is found that there was apprehension to life or property or of grievous hurt the right of private defence is in operation. The person exercising right of private defence is entitled to stay and overcome the threat.”

21. *In Moti Singh v. State of Maharashtra, (2002) 9 SCC 494, this Court held that dimension of the injuries may not be serious, it is the situs of the injuries that would indicate whether the accused could reasonably entertain the apprehension that at least grievous injuries/hurt would be caused to him by the assaulters unless aggression is thwarted.*

23. *In Rajender Singh and others v. State of Bihar, (2000) 4 SCC 298, dealing with the similar proposition this Court held as follows:*

“Non-explanation of the injuries on the person of the accused, ipso facto, cannot be held to be fatal to the prosecution case. Ordinarily, the prosecution is not obliged to explain each and every injury on the person of the deceased even though such injuries might have been caused during the course of the occurrence and they are minor in nature. But where the injuries are grievous, non-explanation of such injuries would attract the Court to look at the prosecution case with little suspicion on the ground that the prosecution has suppressed the true version of the incident.”

32. As, now found admitted at the end of prosecution regarding murder of Laxmi as well as sustenance of injuries by the other members, however found unexplained. Presence of injury over the person of accused has been subject to consideration by the Hon’ble Apex Court in *State of Rajasthan v. Shiv Charan & Others* reported in (2013) 12 SCC 76:-

24. Non-explanation of serious injuries on the person of the accused may be fatal to the prosecution case. But where the injuries sustained by the accused are minor in nature, even in absence of proper explanation of prosecution, story of the prosecution cannot be disbelieved. (Vide Laxman v. State of Maharashtra (2012) 11 SCC 158; (2013) 1 SCC (Cri) 404.

25. This Court considered the issue in Mano Dutt v. State of U.P. (2012) 4 SCC 79; (2012) 2 SCC (Cri) 226, and held as

under: (SCC p. 94, paras 38-40)

“38. The question, raised before this Court for its consideration, is with respect to the effect of non-explanation of injuries sustained by the accused persons. In this regard, this Court has taken a consistent view that the normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail.

39. Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the existence of two conditions:

(i) that the injuries on the person of the accused were also of a serious nature; and

(ii) that such injuries must have been caused at the time of the occurrence in question.

40. Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be the sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. Reference in this regard can be made to



Rajender Singh v. State of Bihar (2000) 4 SCC 298: 2000 SCC (Cri) 796, Ram Sunder Yadav v. State of Bihar (1998) 7 SCC 365: 1998 SCC (Cri) 1630 and Vijayee Singh v. State of U.P. (1990) 3 SCC 190: 1990 SCC (Cri) 378.”

In view of the above, we are of the opinion that the High Court has not considered the issue of non-explanation of injuries on the person of the accused in correct perspective.

33. Aforesaid aspect has again been considered in *Mohd. Khalil Chisti v. State of Rajasthan & Others with Yasir Chisti & another v. State of Rajasthan* reported in (2013) 2 SCC 541:-

30. *In Lakshmi Singh v. State of Bihar (1976) 4 SCC 394: 1976 SCC (Cri) 671, this Court held that: (SCC p. 400, para 12)*

“12. ... It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence.”.

It is clear that:

“12. ... where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the

prosecution witnesses is untrue; and (2) that the injuries probabalise the plea taken by the appellants. ... in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

‘(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.’” (Lakshmi Singh case Lakshmi Singh v. State of Bihar, (1976) 4 SCC 394: 1976 SCC (Cri) 671, SCC p. 401, para 12)

31. *It is further clear that: (Lakshmi Singh case Lakshmi Singh v. State of Bihar, (1976) 4 SCC 394: 1976 SCC (Cri) 671, SCC pp. 401-02, para 12)*

“12. ... The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. ... [However,] there may be cases where



the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, ... that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.”

32. *In Waman v. State of Maharashtra (2011) 7 SCC 295: (2011) 3 SCC (Cri) 83 wherein one of us (P. Sathasivam, J.) reiterated the very same principles and held that: (SCC p. 306, para 36)*

“36. Ordinarily, the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of occurrence, if the injuries are minor in nature, however, if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the course of the same occurrence then certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. However, if the evidence is clear, cogent and creditworthy then non-explanation of certain injuries sustained by the deceased or injury on the accused ipso facto cannot be the basis to discard the entire prosecution case.”

34. *In Krishnan vs. State of Tamil Nadu reported in*

(2006) 11 SCC 304, it has been held:-

15. It is now well settled that the onus is on the accused to establish that his action was in exercise of the right of private defence. The plea can be established either by letting in defence evidence or from the prosecution evidence itself, but cannot be based on speculation or mere surmises. The accused need not take the plea explicitly. He can succeed in his plea if he is able to bring out from the evidence of the prosecution witnesses or other evidence that the apparent criminal act was committed by him in exercise of his right of private defence. He should make out circumstances that would have reasonably caused an apprehension in his mind that he would suffer death or grievous hurt if he does not exercise his right of private defence. There is a clear distinction between the nature of burden that is cast on an accused under Section 105 of the Evidence Act (read with Sections 96 to 106 of the Penal Code) to establish a plea of private defence and the burden that is cast on the prosecution under Section 101 of the Evidence Act to prove its case. The burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a preponderance of probability (vide Partap v. State of U.P. (1976) 2 SCC



798: 1976 SCC (Cri) 303, *Salim Zia v. State of U.P.*(1979) 2 SCC 648: 1979 SCC (Cri) 568 and *Mohinder Pal Jolly v. State of Punjab*(1979) 3 SCC 30: 1979 SCC (Cri) 635.

16. *In Sekar v. State* (2002) 8 SCC 354 : 2003 SCC (Cri) 16 this Court observed: (SCC p. 355)

“A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence, is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence

was legitimately exercised, it is open to the court to consider such a plea. In a given case, the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record.”

(emphasis supplied)

17. The above legal position was reiterated in Rizan v. State of Chhattisgarh (2003) 2 SCC 661: 2003 SCC (Cri) 664. After an exhaustive reference to several decisions of this Court, this Court summarised the nature of plea of private defence required to be put forth and the degree of proof in support of it, thus: (SCC pp. 670-71, para 13)

“Under Section 105 of the Evidence Act, 1872, the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The



question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. When the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. ...

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.”

(emphasis supplied)

35. In *Babulal Bhagwan Khandare v. State of Maharashtra*, (2005) 10 SCC 404, at page 415, this Court held :

“27. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance”.

36. After giving anxious consideration, the following circumstances are called out:-



a) Prosecution had tried to bifurcate the P.O. as the first one field of Ram Chandra Rai being ploughed by Ram Chander Rai and the second one being ploughed by the appellants. However, prosecution is found deficient one, so far first part is concerned.

b) Prosecution tried to bury the dispute in between Mazid and Bhuneshwar over Bataidari, however, is found proved by Exhibit-G along with other exhibits. Prosecution also admitted litigation in between 4-5 years since before the occurrence.

c) From the evidence of prosecution witnesses, it is apparent that they have not shown Deo Sharan, Bhuneshwar Rai and Bhagwan Rai to be armed with deadly weapon when they arrived, unyoked from the field of Ram Chander Rai.

d) Prosecution witnesses admitted persons at their side were duly armed.

e) Going over land of Mazid Mian in the background of aforesaid disclosure by Ram Chander Rai probabilities the prosecution to be aggressor. Prosecution could be looked into as majority have tried to suppress the incidence.

f) Death of Laxmi, Bhagwan Rai and Bhuneshwar Rai being injured, though not conceded at their end, but admitted to be during cross-examination during course of said occurrence.

g) Statement of two injured, who subsequently died, found properly made an exhibit in accordance with law.

37. Thus, from the evidence, it is evident that apart from taking all sorts of precautionary efforts to cover up the defence version which, during course of cross-examination has been found duly

admitted and being so, certainly, from the conduct of the prosecution itself, it is apparent that they have not come with clean hand. Basically, the right of private defence is exercisable to protect, prevent life and property and not to retaliate. In likewise manner, during course of exercise of right of private defence, such exercise is not found to be measured under golden scale.

38. After having close as well as minute observation of the evidence, it is found so deep rooted infused with falsehood that it has become inseparable and on account thereof, even having presence of injured witnesses as well as so-called dying declaration, supported with presence of interested, enemical witnesses, the prosecution version found to be unauthentic. That being so, the judgment of conviction and sentence recorded by the learned trial Court is set aside. Appeal is allowed. Appellants are on bail, hence, they are discharged from its liabilities.

(Aditya Kumar Trivedi, J)

Patna High Court,
Dated-13.02.2015
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