

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.691 of 2013

(Against the Judgment of conviction dated 04.06.2013 and Order of sentence dated 11.06.2013 passed by the District and Sessions Judge, Jehanabad, in Sessions Trial No.288 of 2009).

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1. Pramod Tiwary, son of Late Deep Narayan Tiwary.
 2. Binod Tiwary, son of Late Deep Narayan Tiwary.
- Both resident of village- Saristabad, P.S.- Ghoshi, District- Jehanabad.

.... Appellants.

Versus

The State of Bihar

.... Respondent.

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Appearance :

For the Appellants : M/s. Krishna Prasad Singh, Senior Advocate, Jharkhandi
Upadhyay, Rakesh Singh and Bhaskar Shankar, Advocates.
For the State : Mr. Abhimanyu Sharma, A.P.p.

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CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)

Date: 22-06-2016

The Appellants have been convicted under Section 302 of the Indian Penal Code and 27 of the Arms Act and sentenced to undergo rigorous imprisonment for life under Section 302 of the Indian Penal Code, while no separate sentence was awarded under Section 27 of the Arms Act, vide Judgment of conviction dated 04.06.2013 and Order of sentence dated 11.06.2013 passed by the District and Sessions Judge, Jehanabad, in Sessions Trial No.288 of 2009.

2. The case of the prosecution, according to the Fardbeyan



of the Informant Punam Devi(P.W.3) is that on 31.10.2008 at about 05.30 A.M. while she was sleeping, the deceased Sitaram Pandit called out her husband, the deceased Hemant, saying that the transformer was burning. Hearing this, her husband got up and started to go with him. Just then, the Appellant Pramod Tiwary fired at her husband on account of which he fell down injured and then the two Appellants picked up her husband and put him in front of her house. When the deceased Sitaram Pandit accosted the Accused as to what they had done, the Appellant Binod Tiwary fired at him on the stomach and which injured Khalasi Sao alias Sunil Kumar (P.W.6) also. All the three were removed to the Sadar Hospital, Jehanabad. The reason for the occurrence was that few days earlier, a dispute had arisen between the Accused-Appellants and the deceased Hemant Tiwary on the point of raising level of the road and they had threatened him of dire consequences.

3. During trial, the prosecution examined altogether 12 witnesses.

4. P.W.1 Sunil Sharma stated that at about 05.30 A.M., when he had gone to relieve himself, he heard some sounds of firing at which he ran to the place of occurrence and found the deceased Sitaram Pandit fallen injured. He stated that he should attend to Hemant Babu, who was lying about 20-25 feet away from him. The

deceased Hemant disclosed that Pramod Bhaiya had fired at him. Then both the injured were put in a cart where the deceased Sitaram Pandit disclosed that the Appellant Binod Tiwary had shot at him. From Jehanabad Hospital, the two were referred to Patna. The deceased Sitaram Pandit died on the way whereas the deceased Hemant Tiwary died 25 days later in Rajeshwari Nursing Home.

In cross examination, he stated that there as a minor dispute between the Accused and the deceased Hemant and he confirms the presence of the mother Shanti Devi (P.W.7) and wife Punam Devi (P.W.3) of the deceased Hemant Tiwary at the place of occurrence.

5. P.W.2 Brahmdeo Tiwary is the father of the deceased Hemant Tiwary, who stated that at about 05.30 A.M., while he was at home, the deceased Sitaram Pandit called his son, the deceased Hemant Kumar. He then instructed his wife to wake up Hemant. When he went out, he heard the sounds of firing, he immediately went out and saw his son injured. He stated that the Appellant Pramod Tiwary had fired at him and when the deceased Sitaram Pandit accosted the Accused Pramod as to why he had unnecessarily killed Hemant, the Appellant Binod Tiwary fired at the stomach of the deceased Sitaram Pandit which also injured Khalasi Sao (P.W.6). He also stated about the dispute between the deceased and the Appellants

over raising of the level of the road as also that the deceased Sitaram Pandit lost his life on way to Patna whereas his son was removed to a private hospital where he died later.

In cross examination, he stated that he could see clearly and that his wife and his daughter-in-law reached immediately after him. He also stated that while the deceased were put in a car, the police arrived.

6. P.W.3 Punam Devi is the wife of the deceased Hemant Tiwary, who reiterated what she had stated in the Fardbeyan and that her husband went out of the house on the calling of the deceased Sitaram Pandit and while he was sitting to urinate, he screamed that Mummy-Mummy Pramod Bhaiya had fired. She was standing at the door. Just then, the Appellant Binod fired at Sitaram because he had protested at the act, which also injured Khalasi (P.W.6). The accused, thereafter, ran away whereas the injured were put in a car and were taken to the hospital. She also stated about recording of the Fardbeyan and she identified his signature on the same as Ext.1.

In cross examination, she stated that both the Appellants were her agnates and that the police had come within half an hour of the occurrence. She confirms that her husband died about 15-16 days after the occurrence. There is nothing else which is of note in her cross examination.



7. P.W.4 Agnideo Tripathi is the cousin uncle of the deceased Hemant Tiwary, who stated that on the date of occurrence, when he got up at about 05.15 A.M. to urinate, he saw the Appellant Pramod Tiwary standing at the door. Ten minutes later, he heard the voice of Sitaram asking the deceased Hemant to get up because of some problem in the grid. He was woken up by the family and proceeded with him. Just then, Hemant screamed calling out to his mother that Appellant Pramod Bhaiya had shot him. He also got up on hearing the sound and went to the place of occurrence where he saw the two deceased lying injured. Whereas the deceased Hemant disclosed that the Appellant Pramod had shot at him, the deceased Sitaram said that Hemant should be attended to. They were taken to the hospital alongwith Khalasi Sao (P.W.6) and in course of being them taken to the hospital, the deceased Sitaram died whereas the deceased Hemant died 25 days later during treatment.

In cross examination, he stated that there was no enmity between the deceased Sitaram Pandit and the Appellant Pramod and they used to work as Priests. There is nothing else which is of note in his cross examination.

8. P.W.5 Bachchu Tripathi is also cousin uncle of the deceased Hemant Tiwary, who stated that he came out of his house on hearing the sounds of firing and saw the two deceased injured. He

stated that, allegedly, the deceased Sitaram disclosed that he and Hemant were injured but did not disclose any name. Further, he saw the two Appellants standing there.

In cross examination, he stated that he had not seen any arms in the hands of the two Appellants and they were empty handed. Also that Sitaram had no enmity with the Appellants and there was a minor dispute between the Appellants and the deceased Hemant.

9. P.W.6 Sunil Kumar alais Khalasi, an injured witness, stated that he heard screaming of the deceased Hemant saying that Pramod Bahiya had shot him. When he started to lift him up, another firing took place in which Sitaram and he himself were injured. However, he did not know as to who had shot at him. The deceased Sitaram asked the Appellant Binod Tiwary as to what he had done. He then left from the place of occurrence.

In cross examination, he stated that the deceased Hemant had fallen on the south of his house and he had gone for the treatment on a motorcycle and also there is no enmity between the parties from before. He confirms that he is not an eye witness to the actual occurrence and neither the deceased Hemant nor the deceased Sitaram had disclosed anything to him.

10. P.W.7 Shanti Devi, the mother of the deceased Hemant Tiwary, stated that in the morning the deceased Sitaram

called up to wake up her son on which he went out and started talking with him. A little while later, when he sat down to urinate, the Appellant Pramod shot at him. The deceased Sitaram accosted the Accused-Appellant Pramod as to why he had done such an act then the Appellant Binod snatched a gun from the Appellant Pramod and shot at Sitaram on account of which he and Khalasi (P.W.6) were injured, they then were removed to the hospital.

In cross examination, he confirms that he was an eye witness to the occurrence and described the exact manner of occurrence as also that there was no enmity between the parties from before.

11. P.W.8 Nidhi Kumari is the daughter of the deceased Hemant Tiwary, who also stated about the deceased Hemant going out of the house on calling of the deceased Sitaram and as soon as Hemant sat to urinate, the Appellant Pramod fired at him and when Sitaram protested, the Appellant Binod took the gun from Pramod and shot at which also injured Sitaram as well as Khalasi. However, in cross examination, she stated that she had not been examined by the I.O.

12. P.W.9 Sanjay Gupta is the Doctor, who held Post-Mortem Examination on the person of the deceased Sitaram Pandit and proved the Post-Mortem Examination Report of the deceased

Sitaram Pandit as Ext.3. He found the following injuries on the person of the deceased Sitaram Pandit.

I. Externally- wound on the right side at the back at the level of the lumbar region 1/4" in dimension and another wound of exit 1" X 1" on the left side at the lumbar level from the abdomen.

II. On dissection- skull shows no abnormality internally all skull bones were intact.

III. Chest, heart and lungs do not show any injury.

Lungs pale and heart chambers on dissection shows the right chambers to be empty, the left chambers are full.

IV. Abdomen and back, on dissection, from the back region at the level of entry wound internally there is laceration of the viscera, intestine, muscles towards the abdomen puncturing the liver and exiting at the left lumbar region. Blood clots are seen in the abdomen with damage to adjoining structure of the path taken by the bullet. Burnt skin at the site of entry wound is observed causing blackening around the entry wound.

V. Stomach on dissection was found to be empty. Kidneys intact and Urinary bladder empty.

VI. Time since death-within six hours.

VII. Cause of death-shock and haemorrhage consequent to firearm injury and massive tissue/organ damage as a result of the path

taken by the trajectory.

13. P.W.10 Madhusudan Singh is the Investigating Officer, who stated that while he was posted at Okari O.P., he recorded the Fardbeyan of Punam Devi (P.W.3) at 06.30 A.M. on 31.10.2008. He identified his signature on the Fardbeyan as Ext.4 and that of on the First Information Report as Ext.5. He inspected the place of occurrence, which was a lane in front of the house of the Informant, almost adjacent to which was the house of the present Appellants. He collected the blood stained earth from the place of occurrence and recorded the statement of the injured Hemant Tiwary on 12.11.2008. He produced Nidhi Kumari (P.W.8), Agnideo Tripathi (P.W.4), Sunil Kumar(P.W.1) and Shanti Devi (P.W.7) before the court for recording their statements under Section 164 of the Indian Penal Code. After receiving of the Post-Mortem Examination Reports of the deceased, he submitted the chargesheet.

In cross examination, he stated that he had reached the place of occurrence on information about the same at 06.00 A.M. He had recorded a Sanha in the Sanha Register. It was elicited from him that he had not verified as to who was the owner of the field from where the two Appellants were apprehended. He further stated that he had never recorded the statement of P.W.6 Sunil Kumar alias Khalasi and P.W.8 Nidhi Kumari. P.W.6 Sunil Kumar alias Khalasi had also

not produced any injury report before him.

14. P.W.11 is Dr. Anil Kumar Singh, who had examined the injured Hemant Kumar Tiwary on 31.10.2008. He proved the injury report of the injured Hemant Kumar Tiwary as Ext.1. He found the following injuries on his person.

(I). Entry wound over right side back on spine near T-12, charring-present, gun powder marking present and on X-Ray of the chest, bullet shaped opacity between 11th and 10th ribs near spine opacity, right lung.

O.T. Note: 31.10.2008-under K.A. right side chest tube inserted 1250 ml. of blood drain. Entry wound clean and repaired done.

O.T. Note:-09.11.2008-under G.A. through R.P.M. incision peritoneum opened.

Bullet was lodged in superior posteriorly in liver and taken out.

15. P.W.12 Dr. Pankaj Kumar conducted the Post-Mortem Examination of the deceased Hemant Kumar Tiwary @ Hemant Tiwary. He proves the Post-Mortem Examination Report of the deceased Hemant Tiwary as Ext.3/a. He found the following injuries on the person of the deceased Hemant Tiwary.

(i). One surgical stitched wound 8½" long on anterior

abdominal wall, 1/2" right from midline, 1½" below xiphysternon, 5½" above pubic symphysis .

(ii). One stitched wound 3/4" long, 3/4" right from injury no.(i).

(iii). One entry wound 3/4" X 3/4" right side back of lower chest. 1/2" right from mid line, 11" below right shoulder tip level with tattooing 15" X 9" back of chest the underlying 10th thoracic vertebra was found pierced, clot of blood was found on greater omentum. Pus was found in the chest and abdominal cavity.

On dissection- Heart right side little back viscera congested, bladder empty, stomach chock-let pasty, material 10-20 grams.

In his opinion, the time since death 6 to 24 hours approx and cause of death was septicemia with chest injury. Nature of violence was firearms.

16. Counsel for the Appellants submits that there is, in fact, no eye witness to the occurrence and the entire story has been built up by the prosecution so as to falsely implicate both the Appellants on account of a minor issue. He further stated that P.W.6 Sunil Kumar alias Khalasi, an injured witness, had not disclosed about the complicity of the present Appellants which further fortifies the submission that, in fact, the two Appellants had been implicated

without any reason. Further submission is that the Appellants had no criminal antecedents.

17. On going through the evidence of the aforesaid witnesses, we find that there are two kinds of evidence against the present Appellants; (i) direct evidence by way of eye witness account and (ii) oral dying declaration of the two deceased.

18. So far as the direct evidence is concerned, we find that P.W.2 Brahmdeo Tiwari, who is the father of the deceased Hemant Tiwary, is an eye witness on the second part of the occurrence, i.e., on the complicity of the Appellant Binod Tiwary having fired at the deceased Sitaram Pandit in the stomach. P.W.3 Punam Devi, the Informant, stated that she heard her husband screaming that the Appellant Pramod Tiwary had fired at him and she had seen the Appellant Binod Tiwary firing at Sitaram Pandit when he protested at their act. P.W.4 AgnideoTripathi is also on the point of having heard the deceased Hemant Tiwary screaming that the Appellant Pramod had shot at him. P.W.6 Sunil Kumar alias Khalasi is also on the point of having heard the deceased Hemant Tiwary screaming that Appellant Pramod had fired shot at him. P.W.7 Shanti Devi, the mother of the deceased Hemant Tiwary, is directly on the point of seeing the Appellant Pramod Tiwary having shot at her son on his back and when Sitaram Pandit protested, the Appellant Binod

fired on his stomach. P.W.8 Nidhi Kumari is also on the point of the Appellant Pramod Tiwary having fired at her father and the Appellant Binod Tiwary having fired at the deceased Sitaram Pandit.

There is no doubt that P.W.6 Sunil Kumar alias Khalasi and P.W.8 Nidhi Kumar have not been examined during investigation but that is a lapse committed by the Investigating Officer for which the prosecution cannot suffer. Moreover, even if we decide to ignore their evidence, we are left with the direct evidence of the rest of the witnesses, which stands fully been corroborated by the evidence and objective finding of the Doctors, i.e., P.W.9 Dr. Sanjay Gupta, P.W.11 Dr. Anil Kumar Singh and P.W.12 Dr. Pankaj Kumar, who found corroborative injuries on the person of the two deceased.

19. Another reason for relying upon the prosecution case, is that the matter had been reported soon after the occurrence, i.e., almost within an hour, and, therefore, there appears no scope for any interpolation or embellishment and points to its truthfulness.

20. So far as the dying declaration is concerned, we find that P.W.1 Sunil Sharma, P.W.2 Brahmdeo Tiwari, P.W.4 Agnideo Tripathi and P.W.6 Sunil Kumar alias Khalasi have stated about the oral dying declaration but P.W.5 Bachchu Tripathi has not stated anything about any disclosure by the two deceased. Evidently, there is some inconsistency in the statements of the witnesses on the

point of oral exact nature of dying declaration but the same is fit to be ignored in view of the witnesses supporting that the deceased Hemant Tiwary had screamed that the Appellant Pramod Tiwary had shot at him and, later on, the deceased Sitaram Tiwary disclosed that he had been shot at by the Appellant Binod Tiwary. Hence on both these aspects, the prosecution case is well founded which leaves no scope for interference.

21. In view of the aforesaid discussions, finding no merit in this appeal, the same is dismissed.

(Anjana Prakash, J)

(Rajendra Kumar Mishra, J)

Pradeep Srivastava/A.B. Bhardwaj.

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