

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.2 of 2015

[Against the judgment of conviction dated 04.12.2014 and order of sentence dated 09.12.2014 passed by the *Ad hoc* Additional Sessions Judge, 1st, Sitamarhi, in Sessions Trial No.08 of 2008/ 07 of 2013]

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1. Ram Swarath Rai, son of Indrasan Rai, resident of village - Masaha Alam, P.S. Bairgania, District - Sitamarhi.

.... Appellant/s

Versus

1. The State of Bihar.

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. Aaruni Singh, Advocate

For the Respondent/s : Mr. S. C. Mishra, APP

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CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH

&

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)

Date: 20-06-2016

By the judgment of conviction dated 04.12.2014 and order of sentence dated 09.12.2014 passed by the *Ad hoc* Additional Sessions Judge, 1st, Sitamarhi, in Sessions Trial No.08 of 2008/ 07 of 2013, the sole Appellant has been convicted under Sections 302, 307 Indian Penal Code and Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for life under Section 302 Indian Penal Code with fine of ₹50,000/- and in default of payment of which further rigorous imprisonment for one year, seven years rigorous imprisonment under Section 307 Indian Penal Code with fine of ₹15,000/- and in default of payment of fine further

rigorous imprisonment for six months, three years rigorous imprisonment under Section 27 of the Arms Act with fine of ₹5,000/- and in default of payment of fine further rigorous imprisonment for two months. All the major sentences were ordered to run concurrently.

2. The case of the prosecution according to PW 5 (Jai Narain Rai), son of the deceased, given before S. I. Amit Nandan (PW 7), SHO, Bairgania P.S., Sitamarhi, on 25.08.2007 is that at about 1.00 AM he suddenly heard screaming of his uncle Kailash Rai (PW 4) and came down and saw the accused Indrasan Rai, Madhurendra Rai, Sarju Rai and the Appellant assaulting him. They were all assaulting with guns and lathis. On hearing of shout of Kailash Rai, his father, the deceased, Raghubir Rai @ Veera Rai also came and accosted the accused as to why they were assaulting his brother. On this, the Appellant is said to have fired at the deceased on account of which he was injured. The two injured were removed to the hospital where his father died but his uncle was still unconscious.

3. Before we proceed any further, it would be pertinent to say that on hearing the counsels and on going through the records of the case, we find that there is reasonable doubt in regard to veracity of the prosecution case and we proceed to discuss

the evidence accordingly.

4. During trial, the prosecution examined eight witnesses.

5. PW 1 (Ram Bahadur Rai) is the *Patiidar* of the family of the Informant, who stated that on the night of occurrence while he was sleeping in his house. He suddenly heard screaming of Kailash Rai (PW 4) and came to the place of occurrence and found the accused persons assaulting him. When deceased Veera Rai protested, the Appellant fired at him due to which he died later on. The reason for the occurrence was an earlier dispute on account of a goat.

In cross-examination, it transpired that the accused persons had instituted a case against this witness and other prosecution witnesses under Section 436 Indian Penal Code including the Informant. He conceded in cross-examination that the Appellant had instituted a case against him as also Kailash Rai (PW 4), the deceased, and rest of the witnesses including the Informant under Section 436 Indian Penal Code and the deceased happened to be his agnate. He also stated that he had met the Investigating Officer at Bairgania Hospital on the same night but his statement was recorded twenty days later by the Dy. Superintendent of Police. In this intervening period, he had met the Investigating Officer

various times.

Under such circumstances, we are not inclined to place any reliance on this witness.

6. PW 2 (Bhola Rai) is the brother of Kailash Rai (PW 4), who stated that he used to live in a separate house and woke up in the night of occurrence on the cries of his brother and saw the accused persons including the Appellant assaulting Kailash Rai (PW 4). When the deceased protested, the Appellant fired at him. He stated that after the accused persons left, the two injured were removed to the hospital where the deceased died.

In cross-examination, he stated that they had met the Daroga Jee on the way and he had given his statement at Bairgania Hospital and also signed on the same. His attention was drawn to the earlier statement that he had not disclosed about the manner of occurrence earlier to the Police Officer. It was suggested to him that, in fact, the case which had been instituted on his statement was purposely suppressed in order to falsely implicate the present accused persons by way of giving a subsequent ante-dated statement.

At this juncture, it would be important to point out the evidence of the Investigating Officer, Amit Nandan, (PW 7), who stated that this witness had not disclosed the names of any of the

accused persons at the earlier instance which leads us to the conclusion that, in fact, the prosecution had not named any accused persons at the initial stage and it was only subsequently that the present *fard-e-bayan* with specific names was set up which reached the Court two days later.

7. PW 3 (Hira Rai) is another eye witness, who stated that on the night of occurrence he got up on the cries of PW 4 and came to the place of occurrence where he saw the accused persons variously assaulting Kailash Rai and the Appellant firing at the deceased.

In cross-examination, he stated that about 50 villagers had gathered at the place of occurrence and they were all screaming “*Dacoits- Dacoits*”. In further cross-examination, he stated that the deceased had reached about two minutes after he had reached the place of occurrence as also the distance between the deceased and the Appellant was about 1½ Laggi i.e. 7-10 feet. At this juncture, we would like to point out that the objective evidence of PW 8 (Dr. Jagdev Mandal) is that the injuries had been caused from a close distance.

He further stated that the Appellant had instituted a case against him, his brother and several of his family members which was still going on as also that right thumb of the Appellant

was completely chopped off.

8. PW 4 (Kailash Rai), the injured, initially stated in his examination-in-chief that after he was assaulted by the co-accused and the Appellant he had seen the Appellant firing at the deceased, but in cross-examination, he conceded that after the initial assault upon himself he fell unconscious and, therefore, did not see anything and it was only later he learnt that the Appellant had fired at the deceased. He further conceded that the accused had instituted a case under Section 436 Indian Penal Code against them. He also conceded that thumb of right hand of the Appellant was completely chopped off since last ten years which fact even the Court has taken note of in paragraph 14.

9. PW 5 (Jai Narayan) is the son of the deceased and the nephew of the injured, who stated that on the night of occurrence he was sleeping on the terrace and suddenly on the cries of his uncle (PW 4) he came down and saw the occurrence.

In cross-examination, he stated that when he came down his father was already injured and bleeding. He also stated that there were some cases pending between the prosecution and the accused and the Appellant had instituted a case against his family numbered as Bairgania P.S. Case No.99 of 2005 and also one under Section 436 Indian Penal Code. It was suggested to him that, in fact,

unknown *dacoits* had killed the deceased and the accused had been falsely implicated which suggestion he denied.

10. PW 6 (Ramesh Kumar Yadav) is also another son of the deceased, who stated that on the night of occurrence he heard the cries of his uncle and father and saw the occurrence. The Inquest Report was prepared in his presence upon which he had signed. He proved his signature as well as signature of his uncle as Ext.1 and 1/2.

In cross-examination, he conceded that the accused persons had instituted a case against his father, uncle and other family members under Section 436 Indian Penal Code and that right thumb of the Appellant was completely chopped off.

11. PW 7 (Amit Nandan) is the Investigating Officer, who was posted at Bairgania P.S. He recorded the *fard-e-bayan* of the Informant (PW 5) at 2.50 AM at the hospital. He proved the same as Ext.2 as also the Inquest Report as Ext.3. He proved the First Information Report as Ext.4. He also collected the wads of fired cartridges and prepared the seizure list which he proved as Ext.5 and 5/1.

On inspection of the place of occurrence, he found that the house of the deceased and the Informant to be temporary hutments as also that on the same night house of the Appellant was

raided but no one was found therein.

Importantly, he states that PW 3 (Hira Rai) had not disclosed any names in his earlier statement as also PW 4 (Kailash Rai) had not disclosed the name of the person, who had fired at the deceased. He conceded that PW 6 (Ramesh Kumar Yadav), son of the deceased had not appeared before him during investigation and, therefore, his statement was not recorded.

12. PW 8 (Dr. Jagdev Mandal) has proved the Post Mortem Examination Report as Ext.6 and found following injuries on the person of the deceased:

“External Injury: Eye closed, Mouth closed, Multiple blackish wounds charring of about 1 centimeter diameter in L I Fossa, Left side of abdomen about 50 in numbers.

On Dissection: Cranium- intact, Brain matter- Pale, Thorax- Both lungs- intact and pale. Heart Chambers filled with dark blood and clots.

On opening of abdominal cavity: Descending colon, small intestine and omentum filled with dark blood and clots. Stomach contains semi digested food material. Urinary bladder- partially filled, some pellets recovered from descending colon, small intestine and omentum are handed over to accompanying police constable.

Cause of death was due to haemorrhage and shock leading to C.R. failure as a result of the above mentioned injury caused by fire arm. Time elapsed since death and PM held is within 24 hours.”

13. As indicated above, we found considerable

loopholes in the prosecution story upon which we conclude that the Appellant deserves to be acquitted by giving benefit of doubt. The reasons are enumerated hereunder:

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- (a) All the witnesses either belonged to the same family or are in agnatic relationship and there was previous litigation initiated by the Appellant against them.
 - (b) PW 1 was examined 20 days later, PW 2 did not name anyone in his earlier statement, the manner of occurrence given out by PW 3 is directly contradicted by the Doctor, PW 4 also did not see the actual firing, PW 5 was not an eye witness and statement of PW 6, son of the deceased, was not recorded by the Investigating Officer at all, and yet he appeared as an eye witness.
 - (c) PW 2 (Bhola Rai) specifically stated that he had given a *fard-e-bayan* at the hospital but the said statement has been suppressed. This is especially crucial in view of the fact that even though the present *fard-e-bayan* was recorded on 25.08.2007 at 2.50 AM and the First Information



Report was instituted at about 4.30 PM on the same day, yet the First Information Report reached the Court only on 27.08.2007 i.e. two days later. The prosecution is not forthcoming with any explanation in regard to either of the two circumstances which are viewed seriously against it.

- (d) Further the fact of non disclosure of any name by PW 2, brother of PW 4, at the earlier instance is also noteworthy in the context that Hira Rai (PW 3) stated in Court that the villagers, who had gathered at the place of occurrence, were all screaming "*Dacoits Dacoits*" which suggests that probably the occurrence had been committed by unknown dacoits which was the suggestion of the defence and the present Appellant has been falsely implicated for the reason of earlier case lodged by him against the prosecution party.
- (e) The fact that the Appellant's right thumb was completely chopped off which was noted even by the Trial Court also raises a reasonable doubt as to how he would have been able to use a rifle.

14. For the reasons aforesaid, we give the benefit of doubt to the Appellant and acquit him of the charges levelled against him. The impugned judgment of conviction and order of sentence passed against the Appellant is hereby set aside.

15. The Appellant Ram Swarath Rai, who is in custody, is directed to be released forthwith if not required in any other case.

16. In the result, the appeal is allowed.

(Anjana Prakash, J)

J.Alam/-

(Rajendra Kumar Mishra, J)

AFR/NAFR	
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