

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 305 of 1993

Arising Out of PS.Case No. -20 Year- 1990 Thana -HILSA District- NALANDA (BIHARSHARIFF)

- =====
1. Devan Garain @ Deonandan Prasad son of late Ganga Garain, resident of village Gosainpur, P.S. – Hilsa, in the District of Nalanda.
 2. Baleshwar Paswan son of Rajendra Paswan, resident of village Balwapur, P.S. Hilsa in the District of Nalanda.

.... Appellants

Versus

The State of Bihar

.... Respondent

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With

Criminal Appeal (DB) No. 317 of 1993

Arising Out of PS.Case No. -20 Year- 1990 Thana -HILSA District- NALANDA (BIHARSHARIFF)

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Shishupal Garain S/o Late Ganga Garain, resident of village Gosainpur P.S. Hilsa, Distt. Nalanda.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

(In CR. APP (DB) No. 305 of 1993)

For the Appellant/s : Mr. Anjani Kumar, Adv.

Mr. Sanjay Kumar, Adv.

For the Respondent/s : Mr. Ajay Mishra, A.P.P.

Mr. Mahesh Prasad, Adv.

(In CR. APP (DB) No. 317 of 1993)

For the Appellant/s : Mr. Anjani Kumar, Adv.

Mr. Sanjay Kumar, Adv.

For the Respondent/s : Mr. Ajay Mishra, A.P.P.

Mr. Mahesh Prasad, Adv.

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date: 18-08-2017

Since in both the appeals, common judgment and conviction is under-challenge, both the appeals were heard together and are being disposed of by this judgment.

2. In the present case, judgment of conviction and



sentence dated 15th June, 1993 in Sessions Trial No. 54 of 1991/3 of 1991 passed by Sri Rakeshwar Dayal, learned 7th Additional Sessions Judge, Nalanda at Biharsharif (hereinafter referred to as 'trial court') is under challenge. The appellant no. 1 Devan Garain @ Deonandan Prasad in Cr. Appeal (DB) No. 305 of 1993 has been convicted under Section 302 r/w section 34 and 114 of the Indian Penal Code and he was sentenced to undergo rigorous imprisonment for life for offence under Sections 302 r/w section 34 of the Indian Penal Code, however; no separate sentence under Section 114 of the Indian Penal Code was passed. Baleshwar Paswan, appellant no. 2 in Cr. Appeal (DB) No. 305 of 1993 has been convicted under Sections 302 r/w section 34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life. He has further been convicted under Section 307 of the Indian Penal Code, but no separate sentence has been passed, however; under Section 27 of the Arms Act, 1959, he has been convicted and sentenced to undergo rigorous imprisonment for three years. Shishupal Garain, appellant in Cr Appeal (DB) No. 317 of 1993 has been convicted under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life. He has further been held guilty and convicted under Section 27 of the Arms Act, 1959 and he has been sentenced to undergo rigorous imprisonment for three



years. All the sentences have been directed to run concurrently.

3. Short fact of the case is that at about 1:00 AM (night) on 23rd January, 1990, the Sub-Inspector of Police Narayan Dutt Tiwari (P.W.10) recorded *fardbeyan* of Dinesh Prasad Singh (P.W.9). The *fardbeyan* was recorded near a mill of Chittranjan Garai, village – Gosaipur, PS – Hilsa,, Distt.. – Nalanda. In the *fardbeyan*, Dinesh Prasad Singh (informant) disclosed that on 22-01-1990, in the evening, he alongwith his brother Om Prakash Singh (deceased), Raj Kumar Prasad (P.W.-3), Sarvesh Kumar (P.W.-4), Bidya Bhushan Prasad (P.W.-2), Sheo Kumar Prasad (P.W.-1), Ram Chandra Prasad (P.W.-5) with one Chittranjan Prasad (P.W.-6) were sitting in the *Khalihan* of one Rangish Garain and having some discussion. On the same date at about 5:30 PM (evening), suddenly Shishupal Garain, appellant in Cr. Appeal (DB) No. 317/1993 carrying a country-made pistol, Baleshwar Paswan (appellant no. 2 in Cr.Appeal DB No. 305/93) also carrying a country-made pistol in his hand and Deven Garai @ Deonandan Prasad (appellant no. 2 in Cr.Appeal DB No. 305/93) arrived there and immediately Shishupal Garain asked his brother Om Prakash Singh (deceased) as to why he had got the land of his brother Sujju @ Rajendra Garain transferred, which was replied by his brother that he had purchased the land after payment. Immediately thereafter, Deonandan Prasad



exhorted and by using abusive word ordered to kill him. In the meanwhile, Shishupal Garain fired from his pistol on his brother Om Prakash Singh, which hit the left side ribs of his brother. Baleshwar Paswan also fired on the informant, which did not hit him. After hearing the sound of firing, several villagers arrived there and thereafter, his brother in their presence said that Shishupal had shot him. The informant stated that the declaration of the deceased was heard by other villagers and witnesses and thereafter, his brother died. The informant stated that the accused persons were anti-social elements. The informant further stated that accused persons had not allowed them to remove the dead-body. This was the reason that they failed to carry the dead-body outside the village and after arrival of the police officer, he gave his statement. It was also stated by the informant that accused persons, in pre-planned manner, had come to kill his brother Om Prakash Singh and killed him. The reason for the murder was that about one year ago in the month of *Maagh*, his brother Om Prakash Singh had purchased some land from Sujju Garain, brother of Shishupal (appellant), since he was not having any male child.

4. After recording *fardbeyan* on 23-01-1990 at about 7:30 AM (morning), a formal F.I.R., vide Hilsa P.S. Case No. 20 of 1990, was registered against all the three appellants for offence



under Sections 302, 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959. The case was thereafter investigated and finally, on 26-04-1990, chargesheet was submitted against all the three appellants. Thereafter, the learned Magistrate took cognizance of offence on 22-05-1990. Subsequently, after compliance of provision under Section 207 of the Cr.P.C., on 28-01-1991, the case was committed to the court of sessions and thereafter, it was numbered as Sessions Trial No. 3 of 1991. On 4th July, 1991, Deven Garain @ Deonandan Prasad (appellant no. 1 in Cr.Appeal DB No. 305/93) was charged for offence under Sections 302, 114 of the Indian Penal Code. The appellant Shishupal Garain (appellant in Cr.Appeal DB No. 317/93) was charged for offence under Section 302 of the Indian Penal Code and Section 27 of the Arms Act, 1959, whereas, appellant no. 2 in Cr.Appeal DB No. 305/93 Baleshwar Paswan and Deonandan Prasad @ Deven Garain were charged for offence under Section 302 r/w Section 34 of the Indian Penal Code. Baleshwar Paswan was further charged for offence under Section 307 of the Indian Penal Code. Since the accused persons denied the charges, the prosecution, to prove the case, examined altogether 10 witnesses, out of whom, P.W.-1 (Sheo Kumar Prasad), P.W.-2 (Bidya Bhushan Prasad), P.W.-3 (Raj Kumar Prasad), P.W.-4 (Sarvesh Kumar), P.W.-5 (Ram Chandra Prasad), P.W.-6



(Chittranjan Prasad) and P.W.-9 (Dinesh Prasad Singh, informant as well as brother of the deceased) have been examined as eye-witnesses to the occurrence, whereas, P.W.-7 (Dr. R.P. Singh) had conducted *post-mortem* examination on the dead-body of Om Prakash Singh and P.W.-10 (Narayan Dutt Tiwari) was the investigating officer of the case. After conclusion of the prosecution evidence, statement of accused under Section 313 of the Cr.P.C. was got recorded and thereafter, the defence produced about five witnesses to disapprove the charges, namely; D.W.-1 (Jagdeo Prasad), D.W.-2 (Dr. Prahlad Kumar), both aforesaid defence witnesses were examined to establish the plea of *alibi* in respect of Deven Garain @ Deonandan Prasad (appellant no. 1 in Cr.Appeal DB No. 305/93), whereas Rangish Garain (D.W.-3) and Ram Krishna Das (D.W.-4) were examined to prove that the occurrence was not seen by any of the eye-witnesses, rather a plea was taken that all the eye-witnesses were with D.W.-3 & D.W.4 at the time of occurrence and they were having some discussion in the *Khalihan* of Rangish Garain (D.W.-3). Dr. Rajendra Kumar Sinha, who is Civil Surgeon, was got examined as D.W.-5 to substantiate the stand of the defence.

5. Learned counsel for all the appellants had tried to develop a case that the occurrence was not seen by any of the eye-witnesses and witnesses, who had claimed to be eye-witness



to the occurrence, had stated like parrot type evidence, which is not believable. He has further argued that there is serious lacuna on the prosecution case, since the investigating officer, though had visited the place of occurrence, had not prepared any seizure list either about recovery of the fired cartridges or blood stained soil or any other articles from the place of occurrence. Learned counsel for the appellants tried to develop a case that the place of occurrence was not same as was alleged by the prosecution. He has further argued that the entire prosecution case comes into the cloud of serious doubt due to the reason that appellant no. 1 at the relevant time was already on duty away from the district and he was posted in Garu within the district of Palamu. He has argued that D.W.-1 (Jagdeo Prasad) had produced the Attendance Register of the office, where the appellant Devendra Prasad Sinha (Deonandan Prasad) was posted. The Attendance Register, which was got exhibited as **Ext. C**, suggests that on the date of occurrence i.e. 22-01-1990, the appellant Deonandan Prasad was on duty. This fact has been corroborated by the Medical Officer, who was posted in the Palamu Referral Hospital i.e. D.W.-2 (Dr. Prahlad Kumar). By way of referring to evidence of D.W.-2, he has argued that this witness has categorically stated that while Dr. Prahlad Kumar had visited for inspection of Family Welfare Sub-centre, he had seen that Devnandan was in attendance. This



witness has also produced a certificate, which was prepared in his writing and signature to show that on the date of occurrence, he was already on duty in the district of Palamu. The said certificate has been got proved, as **Ext. D.**

6. Learned counsel for appellants has further drawn our attention to the evidence of D.W.-3 (Rangish Garai) in whose *Khalihan* alleged occurrence had taken place. He submits that this defence witness has categorically stated that at that time, at the place of occurrence, all the witnesses, who have been shown as eye-witness, as well as informant and his deceased brother were sitting in the field and having some discussion. In the meanwhile, deceased Om Prakash Singh felt natural call and he went for attending the same and out of 10-5 minutes, they heard the sound of firing and thereafter, all the witnesses had seen that in the south-eastern *Khalihan* near *Ari* of the field, Om Prakash Singh had fallen in injured condition. Almost, similar deposition was given by D.W.-4 Ram Krishna Das. According to learned counsel for appellants, those witnesses are natural witness and on examination of evidence, it is evident that none had seen the actual occurrence, only they had seen some accused persons fleeing away after committing the occurrence. Accordingly, as per learned counsel for appellants, the impugned judgment is liable to be set aside and appellants may be acquitted.



7. Sri Ajay Mishra, learned Addl. Public Prosecutor as well as Sri Mahesh Prasad, learned counsel for the informant have opposed the appeals. It was argued by them that in the case, there is consistent evidence of P.W.-1 to P.W.-6, which is exactly consistent to the evidence of P.W.-9, who is the informant of the present case. Sri Mishra has further argued that besides the fact that entire occurrence was noticed by all the witnesses, the deceased, after receiving gun shot injury before his death, in presence of witnesses, had categorically said that **“ge ugha cpsaxs] gessa f”k”kqiky us xksyh ekj fn;k”** i.e. “he will not survive since he was shot by Shishupal”. This fact amounts to an oral ‘dying declaration’ of the deceased and as such, the evidence may not be ignored. Sri Mishra admits that some defect has been committed by the investigating officer. He submits that though investigating officer (P.W.-10) in his evidence has stated that he had seen blood stained soil as well as blood stain on straw and seized them, but neither seizure list nor those materials were produced during the trial. He submits that only on such technicality entire evidence may not be ignored and as such, on the basis of direct oral evidence, which has been corroborated by the medical evidence, there is no reason to interfere with the judgment impugned.

8. Besides hearing learned counsel for the parties, we



have minutely examined entire record and evidence. The informant has been examined as P.W.-9 and in his examination-in-chief, he stated that on 22-01-1990 at 5:30 PM, occurrence had taken place. He was present in the *Khalihan* of Rangish Garain. There Raj Kumar Prasad (PW-3), Sheo Kumar Prasad (PW-1), Ram Chandra Prasad (PW-5), Chittranjan Prasad (PW-6), his brother Om Prakash Singh (deceased), Bidya Bhushan Prasad (PW-2) and Sarvesh Kumar (PW-4) were present. They were having some discussion while sitting, in the meanwhile, appellant Shishupal (in Cr.Appeal DB No. 317/93), Baleshwar and Deven (both appellant in Cr.Appeal DB No. 305/93) arrived. Shishupal and Baleshwar were carrying pistol in their hands. Immediately after their arrival, Shishupal asked his brother (deceased) as to why he had purchased land of his brother, on which, his brother (Om Prakash Singh) answered that he had got the land transferred after payment. Thereafter, Deven exhorted using filthy language to shoot him then Shishupal fired on his brother, which hit the left ribs of his brother. Immediately thereafter, Baleshwar Paswan also fired on him, fortunately he could be saved. Thereafter, the accused persons fled away towards southern area. While fleeing away, they had threatened not to inform police otherwise he would also be killed. After hearing the sound of firing, several villagers assembled there and arrived



near Om Prakash Singh. At that very time, his brother said that Shishupal has shot him and now he may not survive and thereafter, he died. The reason for not going to police station was explained by him that accused persons had threatened him. Police arrived in night and thereafter, *fardbeyan* was recorded, on which, he put his signature and his signature was got marked as **Ext. A/5**. He further proved the signature of Ramesh Chandra Bhashkar (PW-8) and Chittranjan Garai (PW-6) on the *fardbeyan*, which were marked as **Ext. A/3** and **A/4**. This witness was cross-examined at length, but on perusal of entire cross-examination, it appears that nothing could be extracted to create doubt on his evidence.

9. P.W.-1 Sheo Kumar Prasad is also one of the eye-witness and his name was mentioned in the *fardbeyan* of the informant. This witness was also present at the time of occurrence and in his presence, entire occurrence was given effect to. This witness has stated like the informant (P.W.-9).

10. Similarly, P.W.-2 to P.W.-6 have stated like P.W.-9 (informant) and as such, there is no need to reiterate their examination in chief.

11. We have closely observed their cross-examination and after going through the same, we are of the opinion that nothing could be extracted to create doubt on their evidence.



12. P.W.-7 Dr. R.P. Singh, who conducted *post-mortem* examination on the dead-body of Om Prakash Singh, was posted on 23-01-1990 as Civil Assistant Surgeon, Sadar Hospital, Biharsharif and on the same date at about 12:30 PM, he conducted autopsy and found following ante-mortem injuries:-

“(i) One lacerated gun shot wound on the left side of chest along the anterior auxiliary line of size 1” X ½”X Cavity deep with blackened and charred margin. 9th rib fractured. This was wound of entry. On dissection left lung lacerated, chest cavity filled with blood, both sides of heart empty right lungs pale and intact abdominal cavity filled with blood and blood clot, left lobe of liver fractured, stomach ruptured. The bullet was lodged between 7th and 8th thoracic vertebra which was taken out. Stomach and bladder were empty large intestine filled with foeces and gas. All the other internal organs of the abdomen were pale and intact. Death was due to shock and haemorrhage as a result of the above-noted injury caused by fire-arm, may be pistol. Time elapsed since death between 12 to 24 hours. One bullet sealed and sent with constables.”

He stated that post-mortem examination report bears his writing and signature and same was got exhibited as **Ext. 1**.

13. P.W.-8 Ram Chandra Bhashkar, whose name was also incorporated in the F.I.R., was examined as formal witness, who has proved his signature on the inquest report as well as signature of Binay Kishore Sinha on the inquest report, which



were marked as **Ext. A/1** and **A/2** respectively. He has also proved his signature on the *fardbeyan* of informant (Dinesh Prasad Singh) as well as signature of Chitranjan Garai, which were marked as **Ext. A/3, A/4** and **A/5**.

14. P.W.-10 Narayan Dutt Tiwari was the investigating officer and he stated that on 23-01-1990, he was officer incharge of the Hilsa Police Station and on the said date, while investigating another case and conducting search, while he was in the village Jogipur Bazar, he got an information regarding murder in the village Gosaipur and thereafter, he proceeded and about 12:30 AM (night) arrived village Gosaipur and thereafter, he seen the dead-body lying at the place of occurrence and recorded *fardbeyan* of informant, which was marked as **Ext. A/6**. Thereafter, he prepared formal F.I.R., which was exhibited as **Ext. 2**. Subsequently, he prepared inquest report in presence of witness Ramesh Chandra Bhashkar and Binay Kishore Sinha and this inquest report was marked as **Ext. A/7**. He prepared dead-body challan and through two constables, after preparing dead body challan, which was marked as **Ext. A**, the dead body was sent for *post-mortem* examination. Subsequently, he took up the charge of investigation and after investigation, finding the case true, submitted chargesheet. This witness has also made categorical statement that he inspected the place of occurrence



and at the place of occurrence, he noticed blood stained mark on the soil as well as straw. He had seized the same, but no such report was produced.

15. On minute examination of entire evidence, there is no reason to create doubt on the prosecution case. It is true that there is some fault in the investigation, but merely due to fault on the part of the investigating officer, in a case in which there is consistent evidence, benefit of doubt may not be extended to the accused/appellants. In the present case, if for the time being any doubt is created on the prosecution evidence regarding place of occurrence or manner of occurrence, same has been demolished by the defence evidence itself. D.W.-3 Rangis Garai and D.W.-4 Ram Krishna Das had made specific deposition that at the time of occurrence, all the eye-witness of the present case including informant and deceased were present at the place of occurrence and place of occurrence has also been supported by the defence witness. Only plea was taken by aforesaid two defence witnesses that none had seen the occurrence, they heard the sound of firing and thereafter, they went at the place of occurrence and seen the brother of the informant in injured condition. Once the case of the prosecution, which was initially based on the *fardbeyan*, was corroborated by at least six eye-witnesses, other than the informant, there is no reason to create any doubt.



16. So far as submission of learned counsel for appellants that as per evidence of D.W.-5 Rajendra Kumar Sinha, injury does not substantiate the prosecution case regarding manner of occurrence is concerned, the Court is of the opinion that on such hyper-technical ground, no benefit can be extended. Moreover, it is case of the prosecution that the deceased alongwith witness and informant while sitting in the *Khalihan* were having discussion, in the meanwhile, appellants arrived and before firing appellant Shishupal had asked the deceased as to why he had purchased land of his brother, in that situation, it is difficult to accept the submission of learned counsel for the appellants that firing was shot while the informant was sitting on the field. Even deceased had seen the appellant carrying pistol in his hand and had asked the deceased regarding the purchase of land and as such, there is every possibility that immediately after noticing the appellants side, he was not sitting at the *Khalihan* and while he was standing gun shot was fired. Even this suggestion was given to the P.W.7 (Dr. R.P. Singh), who had opined that conclusively it cannot be said that the injured had received injury while he was sitting or standing. In paragraph – 7 of his cross-examination, he has stated that if the shooter is standing and the victim is sitting then the injury sustained by him will go on downwards. Moreover, on such trivial issue, in a case,



in which there is consistent evidence, no doubt can be created.

17. Considering the fact that occurrence was seen by the informant as well as other eye-witnesses and injury was substantiated in the *post-mortem* examination report, we are of the opinion that learned trial judge has committed no error in convicting and sentencing the appellants by the impugned judgment.

18. Accordingly, the judgment impugned requires no interference and both the appeals stand dismissed.

19. Since the appellants were directed to be released on bail, in view of dismissal of both appeals, their bail-bonds are cancelled and they are directed to surrender before the court below forthwith.

(Rakesh Kumar, J.)

(Mohit Kumar Shah, J.)

Anay

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