

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction, dated 09.04.2010, and order of sentence, dated 13.04.2010, passed by Sri Balram Singh, learned Additional Sessions Judge, F.T.C.-II, Nalanda at Bihar Sharif in Sessions Trial No. 201 of 1992, arising out of Noorsarai P.S. Case No. 174 of 1991)

Criminal Appeal (DB) No.503 of 2010

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1. Tilak Gope, S/O Late Dwarika Gope.
2. Mela Gope, S/O Late Dwarika Gope.
3. Karu Gope, S/O Late Dwarika Gope,
All resident of Village- Jagdishpur Tiary, Tola Milkpur, P.S.-Noor Sarai,
District- Nalanda at Bihar Sharif.

..... Appellants

Versus

The State of Bihar

..... Respondent

with

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Criminal Appeal (DB) No. 995 of 2010

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Biresh Gope, son of late Dwarika Gope, resident of Village- Jagdishpur Tiary, Tola Milkpur, P.S.-Noorsarai, District- Nalanda at Bihar Sharif.

..... Appellant/s

Versus

The State of Bihar

..... Respondent/s

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Appearance :
(In CR. APP (DB) No.503 of 2010)
For the Appellant/s : Mr. Animesh Kumar Mishra, Amicus Curiae
For the Respondent/s : Mr. A. K. Sinha, APP

(In CR. APP (DB) No.995 of 2010)
For the Appellant/s : Mr. Animesh Kumar Mishra, Amicus Curiae
For the Respondent/s : Mr. S. C. Mishra, APP

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH
and
HONOURABLE MR. JUSTICE ARUN KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)
Date: 13-04-2017



Both the appeals have been preferred against the judgment of conviction, dated 09.04.2010, and order of sentence, dated 13.04.2010, passed by Shri Balram Singh, learned Additional Sessions Judge, F.T.C.-II, Nalanda at Bihar Sharif in Sessions Trial No. 201 of 1992, arising out of Noorsarai P.S. Case No. 174 of 1991, by which all the three appellants, namely, Mela Gope, Karu Gope and Tilak Gope, of Cr. Appeal (DB) No. 503 of 2010 have been convicted under Sections 302 read with Section 149 of the Indian Penal Code. The sole appellant, namely, Biresh Gope, of Cr. Appeal (DB) No. 995 of 2010 has been convicted under Sections 302 of the Indian Penal Code and 27 of the Arms Act. All the appellants have further been convicted under Section 323 of the Indian Penal Code.

For the offence under Section 302 read with Section 149 of the Indian Penal Code all the three appellants, namely, Mela Gope, Karu Gope and Tilak Gope, of Cr. Appeal (DB) No. 503 of 2010 have been sentenced to undergo R.I. for life and a fine of Rs.5,000/- each and in default to undergo one year additional rigorous imprisonment. For the offence under Section 302 of the Indian Penal Code, the sole appellant, namely, Biresh Gope, of Cr. Appeal (DB) No. 995 of 2010 has been sentenced to undergo R.I. for life and a fine of Rs.5,000/- and in default to undergo one year additional rigorous imprisonment.



For the offence under Section 323 of the Indian Penal Code, all the four appellants, namely, Mela Gope, Karu Gope and Tilak Gope, of Cr. Appeal (DB) No. 503 of 2010, and Biresh Gope, of Cr. Appeal (DB) No. 995 of 2010, have been sentenced to undergo simple imprisonment for one year. However, all the sentenced have been directed to run concurrently

2. The prosecution case, in short, as made out in the fardbeyan of Kusum Devi, wife of Shankar Yadav of village Paltu Bigha, P.S. Tharthari, District- Nalanda, presently residing in village Jagdishpur Tiyyari, Tola Milkipar, P.S.- Noorsarai, District- Nalanda, recorded by S.I. M.M. Pathak of Noorsarai police station on 21.09.1991, at 12 noon, at Dukhia Khandha Pain of village Jagdishpur Tiyyari, Tola Milkipar, P.S.- Noorsarai, District- Nalanda, is as follows:

(i) The informant stated that on 21.09.1991, she was at her Naihar in Jagdishpur Tiyyari, Tola Milkipar. On the same day i.e. 21.09.1991 at about 6.00 A.M., her younger brother Arbind Kumar had gone to Jagir Khandha to irrigate his field. At around 7.00 A.M. she heard halla that Arbind has been killed. On hearing the news, she proceeded for Jagir Khandha along with her two younger sisters, namely, Savitri and Dhanwanti. She saw co-villagers Bindeshwari



Gope, Mela Gope, Biresh Gope, Tilak Gope, Sumirak Gope, Karu Gope all sons of Dwarika Gope and Dwarika Gope, all armed with Lathi, Gadasa, Rifle, Pistol and knife assaulting her brother mainly with Lathi and Gadasa. On account of injuries, her brother fell on the ground. As soon as the informant and her sisters reached, the accused persons fled towards the village. The informant saw her brother in pool of blood and asked her younger sister Dhanwanti to bring cot from the house. In the meantime, she along with her younger sister Savitri tried to carry her brother towards the house and as soon as they reached Dukhia Khandha Pain, all the accused persons came running towards them. On seeing them, her brother pleaded with folded hand to spare him and assured that he would do as they would want. However, the accused persons did not pay heed to the request of her brother and began to assault him. It is stated that Bindeshwari shot above the eye brows of her brother with rifle from a close range, whereas Biresh Gope also fired from his rifle from point blank range at the ear of her brother, on account of which her brother died. The informant stated that the accused have killed her brother, as her father has settled in his Sasural and the father-in-law of her father had gifted the land in favour of his daughter (mother of the informant).

(ii) On the basis of the Fardbeyan of the informant,



Noorsarai P.S. Case No. 174 of 1991, dated 21.09.1991, was registered for the offences under Sections 147, 148, 149, 323, 324, 307, 302 of the Indian Penal Code and 27 of the Arms Act.

3. The police in course of investigation prepared inquest report of the deceased and sent the dead body for post-mortem. He also took restatement of the informant as well as statement of the other witnesses under Section 161 of the Cr.P.C. The police also inspected both the place of occurrence. After finding the case true against the accused persons, the police submitted charge-sheet against all the seven accused persons under Sections 147, 148, 149, 323, 324, 307, 302/201 of the Indian Penal Code and 27 of the Arms Act.

4. Thereafter learned Magistrate took cognizance of the offence and committed the case to the Court of Sessions for trial. Charges were framed against Biresh Gope and Bindeshwari Gope under Section 302 of the Indian Penal Code for committing murder of Arbind Kumar. They were also charged under Section 27 of the Arms Act for illegal use of fire-arm. The other five accused namely, Mela Gope, Tilak Gope, Sumirak Gope, Karu Gope and Dwarika Gope were charged under Sections 302/149 of the Indian Penal Code for forming unlawful assembly with deadly weapons with common object to commit murder of Arbind Kumar. All the seven accused persons



were further charged under Section 323 of the Indian Penal Code for causing injury to Kusum Devi and Savitri Devi, to which all the accused pleaded not guilty and claimed to be tried.

5. The case of the accused as appearing from the mode of cross-examination and their statement under Section 313 of Cr.P.C., is that no one saw the occurrence and they have been implicated on account of land dispute.

6. The learned trial court relying upon the evidence of informant Kusum Devi and her sister Savitri Devi as well as statement of Sagar Prasad under Section 164 of Cr.P.C. and the post-mortem report convicted the appellants, as noticed in the earlier paragraphs.

7. Before we examine the grounds, on which the defence has assailed the impugned judgment of conviction, it would be relevant to notice the evidence of witnesses.

8. The prosecution, in order to substantiate its case, examined as many as 7 witnesses. P.W. 1 Badri Paswan is a Chaukidar, P.W.2 Savitri Devi is the sister of the informant and the deceased, P.W. 3 Kusum Devi is the informant. P.W.4 is Sagar Yadav. P.W.5 is Rita Kumari. P.W. 6 is Dr. Mathura Prasad, who has conducted the post-mortem on the dead body of the deceased Arbind Yadav. P.W. 7 Raj Kishore Prasad is a formal witness.



9. Out of these seven witnesses, only P.W.3 Kusum Devi is the eye witness of the occurrence, which took place in two phases. P.W.2 Savitri Devi is eye witness to the first part of the occurrence. P.W.7 (Dr. Mathura Prasad) conducted the post-mortem of the dead body of Arbind Kumar on 21.09.1991 at 4.35 P.M. P.W.4 Sagar Yadav and P.W.5 Rita Kumari did not support the prosecution case in the evidence and were declared hostile. P.W.7 Raj Kishore Prasad is a formal witness, as such the evidence of the informant Kusum Devi (P.W.3), Savitri Devi, the sister of the informant and deceased (P.W.2) and Badrai Paswan (P.W.1) is relevant.

10. P.W.1 Badri Paswan is not an eye witness of the occurrence. He stated that on the relevant day, at about 6.00 A.M., he was in his field. He heard halla. On hearing halla, he came near the dead body of Arbind Kumar. He stated that the two sisters of Arbind Kumar were also near the dead body of their brother. Both the sisters were crying. On query, they stated that Dwarika and his six sons variously armed have killed their brother by fire shot. He saw fire-arm injuries on the person of the deceased. The dead body was covered with Lungi of the deceased. He stated that Wajir Gope had gifted land in favour of his daughter, who is the mother of the deceased Arbind Kumar, which was the motive for the occurrence. It thus appears that



the evidence of this witness is relevant only to the extent that soon after the murder of Arbind Kumar, this witness learnt from the sister of the deceased that the accused persons had committed murder of her brother by fire arms, because of greed and jealousy that Nana of the deceased had gifted land in favour of his mother.

11. P.W.2 Savitri Devi has supported the prosecution case. She stated that on the relevant day her brother had gone to irrigate his field in Jagir Khandha. Soon, there was a halla that her brother has been killed. On hearing halla, she along with her sister Dhanwanti Devi and Kusum Devi rushed towards Jagir Khandha and the accused variously armed assaulting her brother. On seeing them, the accused fled away. When she came near her brother, she saw him badly wounded. Thereafter the informant asked one of her sisters Dhanwanti Devi to bring cot, whereas she along with the other sister Kusum Devi carried her brother to village. In the meantime, some villagers arrived and two of them, namely, Sagar and Kailu, helped them in carrying the deceased. As soon as they reached Jogia Khanda, the accused persons again advanced towards them. On seeing them, Sagar and Kailu retreated. The accused persons again began to assault her brother. Bindeshwari fired at her brother with rifle over his right eyebrow, whereas Biresh fired on right temple (Kanpati), leading to



his death. She stated that the accused persons were cousin Maternal uncle (Mama) and they were aggrieved, as her Nana has gifted the land in favour of his daughter.

12. P.W.3 Kusum Devi is the informant of the case. In her evidence, she has supported the prosecution case, as stated in the F.I.R. She too stated that her brother had gone to Jagir Khandha to irrigate his land at 6.00 A.M., which is half a mile from her house. Within an hour, she heard halla that her brother has been killed. Thereafter she along with her two sisters, namely Savitri (P.W.2) and Dhanwanti (not examined) rushed to the place of occurrence. She reiterated the prosecution case that Bindeshwari Gope and his six sons variously armed assaulted her brother. On seeing them, the accused persons fled away. Thereafter she sent one of her sisters Dhanwanti to bring cot and with the help of two villagers, namely Sagar and Kailu and her sister Savitri, she began to take her brother towards her house. The accused persons again intercepted them. On seeing them, her brother pleaded with folded hand to spare him and also assured that he would do whatever they would ask him to do. The plea of mercy went unheeded. Bindeshwari Gope (now dead) fired at her brother with rifle, over his right eyebrow, whereas Biresh fired on right temple (Kanpati), on account of which he died.



13. P.W. 6 Dr. Mathura Prasad conducted post-mortem on the dead body of Arbind Kumar on the same day i.e. 21.09.1991. He found rigor-mortis present in all four limbs. He also found blackening margin around the wound, where the deceased had sustained two fire arm injuries. He further opined that time elapsed since death was 3 to 36 hours.

14. Learned Amicus Curiae appearing on behalf of the appellants has assailed the impugned judgment on a number of grounds. He submits that none of the witnesses have seen the occurrence and has named the appellants as accused only on suspicion and village politics. He next submits that as per the informant and P.W.2, their brother had gone to the field, which was ½ a mile away from the house. On hearing halla, they are said to have rushed to the place of occurrence. Learned counsel argues that it is very difficult to hear halla, which is made from a distance of ½ a mile. He next submits that though all the seven accused persons are alleged to be variously armed with Lathi, Gadasa, knife, rifle and pistol, but there are only two other injuries, other than the fire-arms, which falsifies the statement of the prosecution witnesses that all the accused persons assaulted the deceased.

15. On the other hand, Mr. Ashwani Kumar Sinha,



learned counsel appearing for the State has defended the impugned judgment of conviction and sentence passed against the accused persons. He submits that the Ayodhya (father of the deceased) had settled in his Sasural, as his wife was gifted land by her father. Furthermore, only brother of wife of Ayodhya Gope had died. The accused Dwarika Gope is the cousin of the wife of the mother of the deceased, whereas the rest accused are sons of Dwarika Gope. Learned APP submits that it is obvious that if the wife of the Ayodhya Gope had not gifted the land, the same would devolve on Dwarika Gope and his sons, which did not happen. The accused persons, as such had killed Arbind Kumar, the son of Ayodhya Gope, to put pressure on prosecution to leave the village. He further submits that earlier the accused persons drowned Arjun Kumar, the other brother of the deceased Arbind Kumar, though he admits that no case was lodged for the same.

16. We have heard the learned counsel for the parties. It appears from the evidence on record that father of the deceased Arbind Kumar has settled in his Sasural. The accused Dwarika gope is the own cousin of the wife of Ayodhya Gope, the latter being father of the informant and the deceased. The rest of the accused are sons of Dwarika Gope. It is also not in dispute that father-in-law of Ayodhya



Gope had gifted his land in favour of his daughter, which according to the prosecution, was the motive of the occurrence.

17. On careful examination of the prosecution case, we find that there are only two eye witnesses to the occurrence. One is the informant (P.W.3) and the other is her sister P.W.2. P.W.1, the local chaukidar is a hearsay witness and his evidence is relevant only to the extent that he learnt from the informant that the accused-appellants have killed her brother. Both P.W.2 and P.W.3 stated that their brother had gone to Jagir Khandha for irrigating his field. At 7.00 A.M., they heard halla that their brother has been killed, thereupon they rushed and saw the accused persons assaulting the deceased. It is difficult to comprehend that the informant could hear halla made from a distance of ½ mile. The informant further stated in her statement that halla was not raised by any villagers, but raised by her brother. Besides this, the informant and her sister (P.W.2) stated that when they reached the place of occurrence, the accused persons were assaulting the deceased variously armed with Lathi, Garasa, knife, pistol and rifle. Apart from the gun shot injuries, there are only two injuries on the person of the deceased including one abrasion and the other a laceration. These too create doubt on the authenticity of the prosecution case that the deceased would sustain only two injuries, if



he is assaulted by five to six persons with Lathi, Garasa etc. The informant then stated that while she covered the body of her brother, he was fired upon by Bindeshwari Gope and Biresh Gope. However, no blood stains were found on her person or clothes. She stated that she also sustained some injuries, but there is no injury report on the record. Apart from this witness, no other witness has supported the prosecution case, though a number of villagers are said to have arrived at the P.O., soon after the occurrence.

18. The trial court while convicting the appellants has relied upon the statement of Sagar Kumar recorded under Section 164 of Cr.P.C., as substantive piece of evidence, though the witness has retracted from his submission in the evidence. No attention to the statement under Section 161 of Cr.P.C. was also drawn, while recording the statement under Section 164 of Cr.P.C. Besides this, the investigating officer has not been examined in this case, which has prejudiced the defence case, as they have been deprived of the opportunity to seek contradiction with respect to the place of occurrence as well as with respect to presence of blood mark at the alleged two place of occurrence. In such situation, we are of the considered view that the trial court ought to have given the benefit of doubt to the accused persons.



19. We thus find that there are no cogent materials on record to uphold the conviction of the appellants.

20. In the result, both the appeals are allowed and the judgment of conviction, dated 09.04.2010, and order of sentence, dated 13.04.2010, passed by the learned trial court is set aside and the appellants are acquitted of the charges levelled against them. The appellant Biresh Gope, of Cr. Appeal (DB) No. 995 of 2010, who is in custody, is directed to set at liberty forthwith, if not wanted in any other case. So far as the appellants, namely, Mela Gope, Karu Gope and Tilak Gope, of Cr. Appeal (DB) No. 503 of 2010, they are already on bail and are discharged from the liabilities of their bail bonds.

21. The Patna High Court Legal Services Committee is directed to pay the fixed remuneration to Mr. Animesh Kumar Mishra, who is appearing in this appeal, as Amicus Curiae.

22. Let the 1st page and last page of the judgment be handed over to Mr. Animesh Kumar Mishra, Amicus Curiae.

(Samarendra Pratap Singh, J.)

(Arun Kumar, J.)

Uday/-

AFR/NAFR	NAFR
CAV DATE	NA
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