

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.813 of 2013

Arising Out of PS. Case No.-137 Year-2010 Thana- BAKHTIYARPUR District- Patna

Paras Nath Singh son of late Nasibi Singh resident of village Samatpur, P.S.
Bakhtiyarpur, District- Patna.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur & Mr. Kaushal Kishor,
Advocates
For the Respondent/s : Mr. S.N. Prasad APP

CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date : 21-11-2017

The sole appellant has been held guilty under Section 302 of the IPC and Section 27 of the Arms Act and sentenced to suffer R. I. for life under Section 302 of the IPC with fine having default clause vide judgment of conviction and order of sentence dated 16.4.2013/ 20.04.2013 respectively passed by Additional Sessions Judge-IV, Barh in Sessions Trial No. 1742 of 2010.



2. PW-2 Dina Nath Singh, full brother of the deceased, lodged the '*Fardbeyan*' (Ext.2) on 23.5.2010 at 06.30 hour at the place of occurrence duly attested by his another brother Om Prakash Singh (PW3) alleging in brief that at about 5 P.M. while he was at his house close to the house of the appellant his younger brother Chandra Shekhar Singh (deceased) was seen returning to the house and when he reached near the house of the appellant he was fired with pistol twice by the appellant. The informant rushed to the place of occurrence. Other witnesses also arrived there. His brother died on the spot. The reason of assault was enmity due to land dispute. It may be noted that the appellant is the step brother of the informant. After the death of the mother of the appellant, his father had married another lady from which the informant (PW2), Om Prakash Singh (PW3), the deceased and one more son was born.

3. At the trial, the prosecution came up with the case that the deceased had gone to the house of the appellant to take possession of the land adjoining to the house of the appellant where quarrel had ensued between the appellant and the deceased that continued for 5-6 minutes. The victim was caught hold of by two sons of the appellant whereafter he fired twice



at the deceased resulting in his death. PW-8 Bali Ram Singh was then posted as the Officer in charge Bakhtiyarpur Police Station. He reached the place of occurrence immediately and the '*Fadbeyan*' was recorded in his presence. By making an endorsement on the '*Fardbeyan*' (Ext. 2/1), he took over and conducted the investigation. The death inquest proceeding at the place of occurrence itself was drawn. The inquest report (Ext.4) was witnessed by the informant (PW2) and Om Prakash Singh (PW3). Under the '*Challan*' (Ext.5) the dead body was dispatched for holding postmortem examination. He recorded the statement of the witnesses and inspected the place of occurrence which is the front portion of the house of the appellant. He could notice the dead body of the deceased lying therein with pool of blood and the blood had fallen on the ground. After obtaining the postmortem report conducted by Dr. Wasimuddin (PW5) and finding the accusation(s) true against the appellant only laid the charge sheet which gave rise to the present trial on the file of the learned Trial judge.

4. The appellant pleaded not guilty to the charge and claimed a trial.

5. To prove the case beyond reasonable doubt, the prosecution examined altogether 08 prosecution witnesses. PW-



1 Kaushal Kumar is son of the informant. PW-2 is the informant himself. PW-3 is the full brother of the informant whereas PW-4 Rajnish Kumar is the minor son of the deceased who was then playing near the place of the occurrence. He too has narrated the prosecution case as an eye witness. PW-5 Dr. Wasimuddin held the autopsy and submitted the postmortem report (Ext. 1). PW6 Ajay Kumar was produced as the singular independent witness but was tendered. PW-7 Nirmala Devi is the sister of the deceased and the informant as well as PW-3. PW-8 is the Investigating Officer.

6. We have carefully perused the evidence of PWs 1,2, 3 and 4. In their respective examination(s)- in- chief, they have stated that the deceased when reached near the front yard of the house of the appellant he was fired twice by the appellant which caused injury in the chest and armpit. As a result whereof, he died. Although in the '*Fardbeyan*' there was no allegation against the two sons of the appellant of having facilitated commission of crime but in course of their respective evidence they have stated so. It has been pointed out to us that the police after conclusion of investigation did not forward the two sons of the appellant for taking trial as the accusation against them were not found true. Factually, the two



sons of the appellant have not stood the trial. On going through the cross-examination(s) of these witnesses, it appears that the partition in the family of the appellant and the present prosecution side had already taken place during the life time of their grandfather. The prosecution witnesses have admitted so. Subsequently, a *panchayati* in relation thereto was also held in 1989 and the dispute was resolved. Although the witnesses have stated so but have further stated that they had not put their signature(s) on the agreement reached in the *panchayati*. The defence has produced Ext. A which is the agreement after the *panchayati* reached between the parties. What transpires on deeper scrutiny of their evidence that the appellant after partition had also acquired some more land in the name of his wife. He had constructed a pucca dwelling structure on the land. Some vacant land contiguous to the house as well as part of the house constructed was, however, being claimed by the deceased. According to the prosecution case, the deceased was laying claim over 09 decimals of land as he was not satisfied with the allocation of some part of land to him which was not fertile. Under these backdrops, the incident had occurred wherein the prosecution witnesses, particularly, PWs 1 and 2 have stated that on the relevant date and time the deceased had



gone to the house of the appellant to take possession of the area/land claimed by him from the appellant. We have excluded from our consideration the evidence of PW-7 against whom a criticism has been made by the defence that she was not earlier produced before the I.O. for her C.D. statement. She directly appeared in Court to support the prosecution case. She is the full sister of the deceased and the informant.

7. The following facts have distinctly emerged from the evidence adduced by the prosecution:(i) the appellant is step-brother of the deceased and the informant/(ii) During the life time of the grandfather of both the parties, a partition was effected amongst them.(iii) Both parties had taken over possession as per their share.(iv) the appellant had purchased some more land subsequent thereto and had constructed a dwelling house. (v) the deceased was claiming some more land near the house of the appellant as he was not satisfied with the partition.

8. On the relevant date at about sunset time the victim had gone to the house of the appellant. Witnesses have further stated that several persons from the side of the deceased had also assembled there. A quarrel between them and the appellant ensued there and continued for sometime. Obviously, the



quarrel was in relation to the claim of the land by the deceased over the land possessed by the appellant. After the quarrel and hurling accusations the firing(s) were made by the appellant.

9. PW-5 held the autopsy on the cadaver and found the following ante-mortem injuries:-

1) External- Entry wound lacerated wound $\frac{1}{2}$ " x $\frac{1}{4}$ " x muscle deep just above the medial cubital fossa of right arm. Charring was not present. Margin was inverted.

Exit wound-Lacerated wound 1" x $\frac{1}{2}$ " x muscle deep just below the head of humerus of right arm. Margin was inverted. These entry wound and exit wound are communicating with each other.

2. Entry wound-lacerated wound 1" x $\frac{1}{2}$ " x chest cavity deep on the right axilla. Charring was not present. Margin was inverted.

Exit wound-Lacerated wound 1 $\frac{1}{2}$ " x $\frac{1}{2}$ " x chest cavity deep on the lateral side of left side of chest. Margin was inverted.

Both wounds were communicating with each other.

Internal Injuries_

Head-Skull intact, Brain-Pale. Neck Intact. Chest-ribs intact. Both lungs ruptured. Heart-ruptured and empty both side. Abdomen -Stomach contain digested food. All viscerae pale except spleen. Limbs intact.

Time since death within 24 hours.

Cause of death- Cardio respiratory failure, due to shock and haemorrhage caused by fire arm injury.

These injuries may be caused by pistol."

10. The deceased was done to death at the front yard of the house of the appellant is well established in view of the



objective finding of the doctor and the evidence on this aspect led by the PWs.

11. Learned counsel for the defence submits that postmortem report contradicts the prosecution case. The doctor did not find mark of charring. Two wounds of entry found on the deceased. In his cross-examination, he has stated that such injury must have been inflicted from a distance of more than 6 ft. Our attention is drawn to the evidence of PW-2 (informant) wherein he has stated that firing(s) were made from a distance of 2 to 3 hands. Thus, according to the informant, the fire was shot from a distance of 4 to 5 ft. Law is well-settled. The evidence of the doctor is advisory in nature. He is not a witness to the occurrence. Unless and until the objective finding of the doctor completely improbablize the prosecution case, the Courts have always leant in favour of the ocular evidence given by the witnesses. The contention of the appellant made on this point, in our view, has no substance.

12. Another contention is that no independent witness has been produced by the prosecution. The other witnesses save and except PW-6 are closely related. They are either the brothers or son of the brother. PW-6 was produced as an independent witness but the prosecution did not rely on him. He



was tendered without being examined in chief. He would argue that an adverse inference should be drawn against the prosecution. Reliance in this regard has been placed on the case of **Bir Singh & Ors. Vs State of Uttar Pradesh [AIR 1978 SC 59] = 1978 Cri LJ 177**

13. The prosecution, on the other hand, has submitted that there is no principle in law that a witness who is a family member should be disbelieved as an interested witness. Law on the point requires an indepth scanning of the evidence to find out whether their evidence contain grains of truth. We have analyzed the prosecution evidence. PW-4 who was then only 9-10 years old has taken the dock to narrate the prosecution case clearly demonstrating the complicity of the appellant in the crime. His evidence has been questioned on the ground that before recording the statement, the Court did not estimate his understanding to depose by subjecting him to questions and recording the same in the question/answer form. On going through his evidence we find that the Court has recorded before proceeding to record his statement that the witness had the understanding and ability to make statement in the Court. His evidence has not been shown to us by the defence as a completely tutored evidence, save and except that the witness



was not able to recall the month, date and time etc. PW4 son of the deceased has stated that his father had reached near the house of the appellant whereafter the appellant shot at him. He has been cross-examined at length running into few pages by the defence but his testimony on the point of place of occurrence, time of occurrence and the manner of assault has remained unshaken. In his cross-examination, he has admitted that there was hot tiff between the appellant and the deceased for 3-4 minutes wherein the abuses were hurled against each other before the appellant opened firing. He too has specifically stated in his cross examination that the dispute had arisen on that day for possession of the land as deposed by PW1 which admittedly was in possession of the appellant. We have also found from the evidence on record that after the partition the house and the land adjacent thereto was/were in possession of the appellant. The evidence of PW4 lends full support to the prosecution case as depicted by PWs 1,2 and 3.

14. Another contention of the appellant is that the prosecution cannot be allowed to rely on the evidence as the relevant incriminating material were not put to the appellant in his examination under Section 313 of the Cr. P.C. Learned APP, on the other hand, has contended that the evidence with regard



to the assault by the appellant with fire arm causing injury to the deceased on the relevant date and time of occurrence was specifically put to the appellant. We find from the record that the appellant was then serving in the B.M.P. The first question put to him was that he was present when the prosecution witnesses deposed which was replied in affirmative. Learned counsel for the appellant has submitted that the relevant part of the evidence that the sons had also participated and had caught hold of the arms of the deceased when the appellant fired was not put to him. We have already noticed that part of the prosecution case was found an embellishment during the investigation inasmuch as the sons of the appellant were not sent up for trial. The evidence on record is that the two sons were then reading outside the State of Bihar. We do not find much substance in the criticism of the prosecution case made by the defence on this point.

15. The final and important limb of the submission of the defence is that considering the evidence on record the conviction of the appellant under Section 302 of the IPC is not sustainable in law. In this connection, learned counsel for the defence, has submitted that indisputably the place of occurrence is the front yard of the house of the appellant. It is not the



prosecution case proved at the trial that two sons of the appellant were present along with the appellant. Our attention in this regard is drawn to the cross-examination of almost all the relevant evidence. Several PWs, in their respective cross-examinations, have stated about the partition in the family effected several decades before and they were in possession of their respective shares. The appellant had also constructed his house partly on the land given to him in his share and partly on the land later purchased by him while in service. The land adjacent to the house was also the land allotted to the appellant. The deceased was not satisfied with the partition of land. He was claiming some more land which was adjacent to the house of the appellant. The informant has gone to the extent of stating that the deceased was also claiming share in the land on which the appellant had already constructed his house. The evidence also reflects that several persons had also assembled from the side of the appellant as well as the deceased whereafter quarrel ensued. It lasted for sometime. Obviously, the quarrel was on the possession of the land by the deceased.

16. We are mindful of the evidence of PW-1 where he has stated that the deceased had gone to the house of the appellant for forcibly taking possession (Kabja). It has been



argued that the appellant who was then more than 60 years of age was alone in the house. Seeing the assembly of slew of persons in front of his house just at about the sunset he had a reasonable apprehension of danger to his life and the property. The quarrel between them continued for several minutes before assault was inflicted on the deceased by the appellant with fire arm. Referring to Section 97 of the Indian Penal Code (for short 'the Code') he would argue that a right of private defence of the appellant existed which pertains both to the body and of the property. The two categories in which such right of private defence of the body and of the property exist cited under Section 97 were placed. Section 102 was also relied in this connection which adumbrates the commencement and continuance of the right of private defence of the body. Assembly of persons at the sunset time for forcible possession had given reasonable apprehension of danger to the body as well as of the property to the appellant who was alone. Section 103 of the Code provides the extent of such right subject to restrictions contained in Section 99 of the Code, under which voluntary causing of death or of any other harm to the wrong doer would exists if the offence of any description enumerated therein is committed. Emphatically, it has been submitted that



the facts of the present case reveal a situation as enumerated in Section 103 of the Code when the appellant resorted to firing.

17. The counsel for the State, on the other hand, with reference to Section 105 of the Evidence Act (for short 'the Act') submits the burden lies only on the defence to prove it. It is a case where the appellant had fired twice at the deceased . The doctor also found two wounds of entries and two wounds of exits. The repeat firing(s) at the deceased by the appellant had no justification. On these facts and circumstances established at the trial, it is difficult to justify his acts as done in self defence of his body or the property in possession. It can reasonably, however, be inferred that a reasonable apprehension of being caused bodily injury or being forcibly dispossessed from the house or from the possession of the land did exist in the mind of the appellant. Under the law, the culpable homicide, in such situation, shall not amount to murder if the offender exceeds the right of private defence given to him and causes the death of the persons against whom he exercised such right of private defence without premeditation and acting on the spur of the moment. The facts of the case explicitly indicate that in the situation that emerged on the relevant time and date, the appellant may have a



reasonable apprehension of being subjected to bodily injury or being forcibly dispossessed from the house or the land in his possession since long but in resorting to firing twice the appellant definitely exceeded such right of his private defence to his body and to the property and is guilty of having committed offence of culpable homicide not amounting to murder.

18. Incidentally it may be noticed that the evidence adduced by the prosecution is that six or more persons had also assembled in support of the appellant to counter the apprehended attack on the appellant or to dispossess the appellant of his land/property. The two sons of the appellant were surely part of the congregation. As noticed, the prosecution case in so far as the complicity of the two sons of the appellant was not found true. They are not facing the trial. The police did not send them up for trial. In other words, the story put up by the prosecution that a slew of persons including the two sons of the appellant were present on the side of the appellant becomes doubtful. It is not the case that apart from the two sons some more persons had also assembled there from the side of the appellant.

19. In the light of the discussions made above, it is



concluded that the appellant, in the attending factual circumstances evidencing from the record had committed the crime under the reasonable apprehension of being subjected to grievous hurt at the hands of the deceased and his men who had assembled at the house of the appellant for forcibly dispossessing him from his property. In such circumstances, he resorted to firings. However, the facts proved at the trial shall not justify the repeat firing(s) at the deceased by the appellant. In other words, the appellant exceeded his right of private defence seemingly available to him. However, the assault on the deceased was not premeditated.

20. In our view, considering the entire facts and circumstances emanating from the record, the appellant can appropriately be convicted under Section 304 Part I of the IPC.

21. It has been submitted that at the time of recording statement under section 313 of the Code on 10.09.2012, he was assessed 70 years of age. The appellant has remained in custody since 01.07.2010. Taking into account the aforesaid facts the appellant is directed to suffer R.I. for 10 years under Section 304 Part I of the IPC and also to pay a fine of Rs. 20,000/- (Twenty thousand) .In default whereof, he shall further undergo R.I. for six months.



22. With the aforesaid modification(s) in conviction and sentence, the appeal is dismissed.

(Kishore Kumar Mandal, J)

(Madhuresh Prasad, J)

shyambihari/-

AFR/NAFR	NAFR
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