

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 1024 of 2012

Arising Out of PS. Case No.-137 Year-1998 Thana- Ballia District- Begusarai

=====

Balmiki Mahto, son of late Ramdeo Mahto, resident of village - Bahuwara,
P.S. - Ballia, District Begusarai.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

=====

Appearance :

For the Appellant/s	:	Mr. Amaresh Kumar Sinha, Adv. Mr. Abhimanyu Deo, Adv.
For the Respondent/s	:	Mr. Ajay Mishra (APP)

=====

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 05-12-2017

The present appeal under Section 374(2) read with Section 389(i) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') was preferred against judgment of conviction and sentence of the sole appellant in Sessions Trial No. 01 of 2000 (arising out of Ballia P.S. Case No. 137 of 1998). By judgment of conviction dated 17th of July, 2012 passed by learned Adhoc Additional Sessions Judge – V, Begusarai (hereinafter referred to as the 'Trial Judge'), the appellant was convicted under Sections 302/34, 449/34 of the Indian Penal Code and Section 27 of the Arms



Act, 1959 and by order of sentence dated 28-07-2012, he has been directed to undergo imprisonment for life under Section 302/34 of the Indian Penal Code and fine of Rs. 10,000/-. He has further been sentenced to undergo imprisonment for five years with fine of Rs. 5,000/- under Section 449/34 of the Indian Penal Code. This appellant has further been sentenced to undergo imprisonment for five years and fine of Rs. 5,000/- for offence under Section 27 of the Arms Act, 1959. All the sentences were directed to run concurrently.

2. Short fact of the case is that on 10-09-1998 at about 5:00 AM (morning) Sub-Inspector of Police Sri Nand Kumar Singh (P.W.11) recorded *fardbeyan* of Sita Saran Mahto (P.W.10). The *fardbeyan* was recorded at Parihara Police out-post, village Bahuwara, police station – Ballia, Distt. Begusarai. The informant, in presence of co-villager Rajendra Yadav (P.W.1), stated that in preceding night after taking meal at 9:00 PM, he went for sleeping near his door, where is uncle Nand Kishore Mahto @ Khudo Mahto (deceased), Lakhan Sah (P.W.2) and Janardan Yadav (P.W.5) were sleeping on their respective beds. His uncle (deceased) Nand Kishore Mahto was sleeping on cot. At about 10:45 PM, after hearing



the sound of firing, he awoke and saw that on right temporal region of his uncle, there was one fire-arm injury and blood was coming out. Near him, he seen that his co-villager Balmiki Yadav (appellant) was standing carrying country-made pistol in his hand and showing the same towards the informant, he started blowing the barrel of the pistol. In the meanwhile, second shot of firing was made by Naresh Mahto, younger brother of the Balmiki (appellant), which hit on the chest of his uncle Nand Kishore Mahto. The informant and others wanted to raise alarm, but both accused threatened them not to speak, otherwise all will be killed and accused persons left the place of occurrence from the eastern gate and thereafter, they went towards south side. The informant said that due to fear, they did not raise any alarm and after the two accused fled away, then he noticed that other villagers had already arrived and seen the occurrence. The reason for the occurrence was stated by the informant that there was old animosity regarding Diara land and son of Ramdeo namely Balmiki Mahto (appellant) was regularly threatening them for killing. The informant further stated that when occurrence had taken place near the door, electric bulb was *ON* and in the



light of electric bulb, two accused persons were identified. He stated that immediately after receiving fire-arm injury his uncle died and he claimed that he had seen the occurrence and identified the accused persons.

3. After recording *fardbeyan*, on the same date, a formal F.I.R. was drawn at 8:15 PM, vide Ballia P. S. Case No.137 of 1998 under Sections 448, 302, 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959 against the appellant and his brother Naresh Mahto. During investigation, it appears that involvement of other accused persons was also noticed and it was noticed that in the occurrence, besides two accused, other two persons were also involved, who were none else but father of the appellant namely Ramdeo Mahto and his brother Yugal Mahto. During investigation itself, two accused, which includes appellant, were apprehended and after collecting material showing accusation as true against two accused persons, on 10-12-1998, charge-sheet was submitted and investigation against other accused persons was kept pending. After submission of charge-sheet, on 21-12-1998, the learned Magistrate took cognizance of offence and thereafter on 16-12-1999, the case was



committed to the court of sessions. After commitment on 30-06-2000, charge under section 302/34, 449 of the Indian Penal Code and Section 27 of the Arms Act, 1959 was framed against the appellant and his brother. Since the accused persons denied charges and claimed to be tried, the prosecution, to prove its case, examined altogether 11 witnesses. Out of 11 witnesses, P.W.1 Rajendra Yadav, P.W.2 Lakhan Sah, P.W.5 Janardan Yadav and P.W.10 Sita Saran Mahto (informant) were shown to be eye-witnesses to the occurrence, however; during trial, P.W.5 Janardan Yadav, since had not supported the case, was declared hostile. P.W.4 Biso Yadav was a witness to the seizure list relating to blood stain bed-sheet and other materials. P.W.9 Mithilesh Prasad Mahto is a witness to the inquest report. P.W.6 Jagarnath Paswan, P.W.7 Bhola Mahto and P.W.8 Jagdish Mahto are co-villagers and they have stated that after hearing the sound of the firing, they proceeded towards the place of occurrence and they had seen four accused persons coming out from the gate of the informant and fleeing away carrying weapon. P.W.3 Dr. Akhilesh Kumar, who was posted as Civil Assistant Surgeon, Sadar Hospital, Begusarai at relevant time, had conducted the



post-mortem examination on the dead body of the deceased and P.W.11 Nand Kumar Singh, Sub-Inspector of Police was posted at the time of occurrence in Pahuara Police out-post and he is the investigating officer of the case.

4. Sri Amaresh Kumar Sinha, learned counsel assisted by Sri Abhimanyu Deo, learned counsel for the appellant, after placing evidences, has argued that though prosecution has not proved its case beyond all reasonable doubt, the learned Trial Judge has incorrectly held him guilty and passed order of conviction and sentence. He submits that prosecution case appears to be doubtful due to the reason that though the informant in his deposition has stated that with his uncle Nand Kishore Mahto @ Khudo Mahto (deceased), father of the informant was also sleeping, but to the reasons best known to the prosecution, he has not been examined as prosecution witness, rather co-villagers have come forward as if they were sleeping with the deceased. According to Sri Amaresh Kumar Sinha, learned counsel for the appellant, P.W.1 Rajendra Yadav, P.W.2 Lakhan Sah and P.W.5 Janardan Yadav were introduced to be eye-witnesses to the occurrence and this is the reason that P.W.5 Janardan Yadav had not



supported the prosecution case and he was declared hostile. He has also argued that though it is a case that deceased was shot at temporal region and also he had received fire-arm injury on the chest, the investigating officer had not stated as to whether he had found blood mark near the place of occurrence, save and except statement that bed-sheet was soaked with the blood. He submits that in a case of injury on temporal region as well as injury on chest and both injuries were fire-arm injuries, there was possibility of finding huge quantity of blood at the place of occurrence, but nothing has been indicated by the investigating officer. He has also argued that during investigation, the police had not bothered to trace weapon, which was used in the occurrence nor the said weapon was produced during the trial. By way of placing evidence of P.Ws. 6, 7 and 8, he has argued that those witnesses are consistent on the point that occurrence was committed by the four accused and amongst four accused persons, three accused persons were carrying country-made pistol and one was carrying *garasa* in his hand, but the informant (P.W.10), Rajendra Yadav (P.W.1) and Lakhan Sah (P.W.2), who have been examined as eye-witnesses to the



occurrence, are consistent on the point that in the occurrence, only two persons were involved i.e. appellant Balmiki and his brother Naresh. He submits that the contradictory evidence of P.Ws. 6, 7 and 8 with the evidence of P.Ws. 1, 2 and 10 creates serious doubt on the prosecution case and as such, the appellant deserves to be acquitted by way of extending benefit of doubt.

5. Sri Ajay Mishra, learned Addl. Public Prosecutor submits that in the present case, even only evidence of P.W.10 was sufficient to held the appellant guilty and as such, the learned Trial Judge has committed no error. Besides this, it has been argued by Sri Mishra that P.W.1 Rajendra Yadav and P.W.2 Lakhan Sah have stated consistently that after hearing the sound of the firing, they awoke and noticed that this appellant was standing nearing the uncle of the informant and on his temporal region, there was fire-arm injury and at that very time, this appellant was holding a country-made pistol in his hand and immediately thereafter, second accused namely Naresh, who was none else but the brother of the appellant, gave shot of firing on chest of his uncle. They have categorically stated that the appellant and Naresh were



identified in electric bulb light, which was *ON* at the time of occurrence. He further submits that even in cross-examination, though suggestion was given that there was no electricity, the witnesses have categorically stated that on the date of occurrence after 8:00 PM, there was continuous electric supply till the next morning and occurrence in the case had taken place at about 10:45 PM. He further submits that involvement of the appellant has also been corroborated by the evidence of P.Ws. 6, 7 and 8, who are very much categorical that after hearing the sound of firing, they came out from their houses and thereafter, they had seen this appellant with his brother Naresh and his father Ramdeo with one other person fleeing away carrying the weapon. He submits that evidence of the eye-witnesses, who had seen the occurrence, had also been corroborated by the evidence of P.Ws. 6, 7 and 8, who had seen the accused persons immediately after the occurrence while fleeing away. Besides this, Sri Mishra has argued that prosecution story has been substantiated by the medical evidence. By way of referring to evidence of P.W.3 Dr. Akhilesh Kumar as well as *post-mortem* examination report i.e. Ext. 2, he submits that the



witnesses have made categorical statement that deceased had received one fire arm injury on right temporal region and one fire-arm injury on his chest and both the injuries were found on the person of the deceased. Ofcourse, there was only entry wound, no exit wound, but during *post-mortem* examination, two pilates were found in the body of the deceased. According to Sri Mishra, since there was consistent evidence showing involvement of the appellant, the learned Trial Judge has rightly passed the order of conviction and sentence, which requires no interference.

6. Besides hearing learned counsel for the parties, we have minutely examined entire evidence i.e. oral and documentary evidence. Before proceeding, it would be necessary to firstly notice the evidence of the informant i.e. P.W.10 Sita Saran Mahto. This witness has proved his signature on the *fardbeyan*, which was marked as Ext. 3/C. He also proved the signature of Janardan Yadav (P.W.5) on the *fardbeyan*, which was marked as Ext. 3/D and he further proved the signature of Rajendra Yadav (P.W.1) on the *fardbeyan*, which was marked as Ext. 3/E. He has also identified his signature on inquest report, which was marked



as Ext. 3/B and he proved the signature of P.W.9 Mithilesh Mahto on the inquest report, which was marked as Ext. 3/A. In examination-in-chief, he stated that on the date and time of occurrence, he was sleeping near his door, where besides him, deceased Nand Kishore Mahto, Janardan Yadav (P.W.5), Lakhan Sah (P.W.2) and Rajendra Yadav (P.W.1) were also sleeping. After hearing the sound of firing, he awoke and he noticed that his uncle Nand Kishore Mahto @ Khudo Mahto had received gun shot injury on the head and blood was oozing out and he clarified that gun shot injury was on his temporal region and he had seen Balmiki Mahto (appellant) blowing barrel of pistol and thereafter, Naresh Mahto gave second shot of firing through his weapon, which hit the chest of his uncle and he died immediately. He stated that they tried to raise *hulla*, but accused persons stretched weapon towards them and restricted them not to raise any alarm and thereafter, both the accused persons fled away. After the accused persons had gone from the place of occurrence on hearing *hulla*, Bhola Mahto (P.W.7) Jagarnath Paswan (P.W.6), Jagdish Mahto (P.W.8) Nawal Mahto, Upendar Mahto, Devendra Mahto and others arrived there and they disclosed that they



had seen four accused persons namely Ramdeo Mahto, Yugal Kishore Mahto, Naresh Mahto and Balmiki Mahto (appellant) fleeing away. The chowkidar was asked to call the police and thereafter, police arrived and his *fardbeyan* was got recorded. In his presence, the seizure list as well as inquest report on the dead body of his uncle was prepared. In paragraph – 8 of his evidence, he stated that land dispute was the reason for the occurrence. The said disputed land was situated in *diara*. He further stated that Balmiki Mahto (appellant) had threatened his uncle Khudo Mahto for killing him. In paragraph – 10, he stated that accused Yugal Kishore Mahto carrying weapon in the village had threatened to kill. In paragraph – 17 of his evidence, this witness has given the number of plot i.e. Kheshra No. 759, which was the land in dispute. He stated that accused had threatened for vacating the said land, otherwise they will be murdered. He further stated in the same paragraph that there was proceeding under Section 107 of the Cr.P.C. with the appellant side, however; due to lack of evidence, the case was dismissed and thereafter, about one month prior to the occurrence, this appellant (Balmiki Mahto) had come to his door and threatened his uncle to vacate the



land of Keshra No. 759, otherwise, he will be done to death. He has further reiterated in paragraph – 21 of his cross-examination that with the appellant, there was dispute in respect of same land and proceeding under Section 107 of the Cr.P.C. was also initiated. In paragraph – 24 in his cross-examination, he has clarified that at the time of occurrence, there was electric bulb light. Even in cross-examination, in paragraph 26, this witness has reiterated that after hearing the sound of firing, he had seen the accused person i.e. the appellant and second firing was made on the chest of his uncle. He stated that accused persons were about 2-3 hands near to his uncle. On going through his evidence, there is no reason to doubt on his evidence. Even though, this witness was cross-examined at length, but nothing could be extracted to draw any adverse inference against his evidence.

7. Almost, in similar manner, P.W.-1 (Rajendra Yadav) and P.W.2 (Lakhan Sah) have stated. In paragraph – 21 of his cross-examination, P.W.1 has clarified that he has seen the appellant (Balmiki) and Naresh fleeing away and they had fled away from the small gate of the campus. In his further cross-examination, he has clarified that he was having one



room house and that was not sufficient for their accommodation and this was the reason that he was regularly sleeping in the *verandah* of the deceased. In paragraph – 22 of his cross-examination, he has clarified that alongwith him P.W.5 (Rajendra Yadav) was also sleeping, but he has stated that after the occurrence due to fear Janardan (P.W.5) has stopped sleeping there.

8. P.W.4 Biso Yadav has stated that seizure list was prepared in his presence and he put his L.T.I. on the seizure list.

9. P.W.9 Mithilesh Prasad Mahto is the witness to the inquest report and he has proved his signature on the inquest report, which was marked as Ext. 3/A. He also proved signature of Sita Saran Mahto (P.W.10) on the inquest report and his signature was marked as Ext. 3/B. This witness in his evidence has stated that even one day prior to the date of his deposition, he was threatened by one of the accused, against whom, investigation was pending regarding his evidence. This suggests that the accused persons were trying to influence the witnesses also.



10. Ofcourse, P.Ws. 6, 7 and 8 though have stated that they had seen the accused persons while fleeing away after the occurrence and they claimed to identify them in the torch light, however; during the trial, source of identification was not established nor torch was seized during the investigation or during the trial, it was produced by either of the witnesses.

11. Dr. Akhilesh Kumar, P.W.3 on 10th of September, 1998 was posted as Civil Assistant Surgeon, Sadar Hospital, Begusarai and he had conducted *post-mortem* examination on the dead body of the deceased and found following *ante-mortem* injuries:-

“Wound of entry - Two in numbers – (a) Rt. Temporal region (1” x $\frac{3}{4}$ ” x cavity deep), inverted, clavied, lacerated margin with wide area of burnt (soots of carbon particles) 3” diameter around the wound of entry. The wound of entry was found 2 $\frac{1}{2}$ ” in front of Rt. ear with no wound of exit. The bullet was found at the vertex in the fax cerebrai damaging the meninges and Rt. parietal lobe of brain.

(b) The second wound of entry was found over the front of chest on Rt. side two inch above the right nipple with dimension of $\frac{3}{4}$ ” x $\frac{1}{2}$ ”. Inverted lacerated and charved margin with soots



of carbon particle found all around it. (1½ ” diameter with no wound of exit).

On exploration, the bullet had damaged the upper lobe of right lung, superior mediastinum, lower lobe of left lung, with blood inside both thoracic cavity and mediastinum. The bullet pierced left diaphragm posteriorly and finally lodged in paravertebral gutter found left side of the spine at the level of L₂ vertebra.

Both bullets sealed in a glass vial and handed over to the accompanying police man.

Opinion – Death was due to shock and haemorrhage as a result of fire-arm.”

He also proved *post-mortem* examination report, which was marked as Ext.2. In cross-examination, this witness stated that there were two injuries, one was on head and other was on chest. He clarified that the gun shot injury on the head was sufficient to cause death. Meaning thereby that the allegation, which was made against the appellant that he shot on the temporal region, was proved that the said injury was sufficient to cause death. The injuries, which were found on the person of the deceased, corroborate the oral evidence and there is no inconsistency in between the oral evidence as well as medical evidence.



12. The investigating officer i.e. Nand Kumar Singh was examined as P.W.11 and on the date of occurrence i.e. on 10-09-1998, he was posted in Bahuwara police out-post and he got information from the chowkidar and thereafter, he reached to the place of occurrence and recorded *fardbeyan* of the informant and he proved the *fardbeyan*, which was marked as Ext. 4. He also proved inquest report, which was marked as Ext. 5. Seizure list relating to the bed-sheet soaked with the blood was marked as Ext. 6. He categorically stated in paragraph – 6 of his evidence regarding inspection of place of occurrence. The place of occurrence was the *verandah* of the deceased, which was having campus and surrounded by a wall and height of same was about six feet. He had clarified that there was a big gate and in the same gate, there was a small gate. Though, in examination-in-chief, no such fact was disclosed, but in cross-examination, the witnesses have given the description of the gate. So, the investigating officer has visited the place of occurrence and examined the same and thereafter, prepared the seizure list. In paragraph – 8 of his evidence, he has further stated that the place, where dead body was found, on the western wall, there was an electric



bulb, which was *ON* and throwing light. Attention of this witness was drawn to the previous statement of P.W.5 (Janardan Yadav), who was declared hostile and he stated that in his statement under Section 161 of the Cr.P.C., he actually stated as to how he had seen entire occurrence, however; that has got no relevance for adjudication of the present case. In paragraph – 11 of his evidence, he has clarified that during investigation, involvement of four accused namely Ramdeo Mahto, Yugal Mahto, Naresh Mahto and Balimiki Mahto (appellant) was found, however; since the appellant (Balmiki) and Naresh were in jail, against them chargesheet was submitted and investigation against Ramdeo and Yugal Mahto was continuing. Though, this investigating officer was cross-examined at length, but on going through the cross-examination, we find nothing to doubt on his evidence.

13. Besides examining the oral evidences, we have also perused the documentary evidences, such as; inquest report, *post-mortem* examination report, F.I.R. etc. After closer of prosecution evidence, the circumstances and evidences, which were collected during trial against the appellant was placed to him and thereafter, statement of the



appellant under Section 313 of the Cr.P.C. was got recorded. In recording statement of the accused under Section 313 of the Cr.P.C., we do not find any error.

14. On examination of the aforesaid evidences, the Court is of the opinion that the learned Trial Judge has rightly passed the judgment of conviction of the appellant. On going through the material on record, it is evident that two persons were put on trial namely the appellant Balmiki Mahto and his brother Naresh, however; at the time of argument, the accused Naresh Mahto fled away and he remained absconder and as such, the case was finally concluded against the sole appellant showing Naresh as absconder.

15. On examination of the evidence of the informant, we are satisfied that the learned Trial Judge has rightly not doubted his evidence. The evidence of P.Ws.1 and 2, who were also sleeping with the deceased, consistently speaks about the prosecution case. They are also consistent with the evidence of the informant. So far as evidence of other three witnesses is concerned, the Court is of the opinion that since the involvement of the appellant was proved by the ocular evidence of P.Ws. 1, 2 and 10 and the oral evidence was also



corroborated by the medical evidence, there is no doubt on the prosecution case. We find no error in the judgment of conviction.

16. Accordingly, the appeal stands dismissed.

(Rakesh Kumar, J.)

(Mohit Kumar Shah, J.)

Anay

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	07.12.2017
Transmission Date	07.12.2017

