

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.501 of 2013

Arising Out of PS. Case No.-49 Year-2010 Thana- MATIHANI District- Begusarai

Sumit Mishra S/O Lakho Mishra @ Ram Lakhan Mishra resident of Village Ramdiri Tola Ram Nagar Nicha, Police Station Matihani in the district Of Begusarai.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

Criminal Appeal (DB) No. 626 of 2013

Arising Out of PS. Case No.-49 Year-2010 Thana- MATIHANI District- Begusarai

Manna Singh Son of Nabab Singh Resident of Village- Ramdiri Tola, Bhavanandpur, P.S.- Matihani, District- Begusarai

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

Criminal Appeal (DB) No. 680 of 2013

Arising Out of PS. Case No.-49 Year-2010 Thana- MATIHANI District- Begusarai

Pankaj Singh s/o Fucho Singh resident of village- Bhawanand Tola Ramdiri, P.S.- Matihani, Distt.- Begusarai

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 501 of 2013)

For the Appellant/s : Mr. Sunil Kumar

Mr. Ranjeet Kumar

For the State Mr. Ajay Mishra, APP

(In Criminal Appeal (DB) No. 626 of 2013)

For the Appellant/s : Mr. Vikram Deo Singh

Mr. Sada Nand Roy

For the State Mr. S.N.Prasad, APP



(In Criminal Appeal (DB) No. 680 of 2013)

For the Appellant/s : Mr. Uma Shankar

For the State Mr. Abhimanyu Sharma, APP

**CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR
MANDAL**

And

HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date :10-01-2018

A-1 (Sumit Mishra), A-2 (Manna Singh) and A-3 (Pankaj Singh) have been convicted under section 302/34 IPC and section 27 of the Arms Act. By the impugned judgment dated 02.05.2013 and order of sentence dated 15.05.2013 passed by the learned Ad hoc Additional District and Sessions Judge-IV, Begusarai in S.T. No. 473 of 2011, they have been sentenced to suffer R.I. for life under section 302/34 IPC with fine having default clause. Additionally, they have also been sentenced to suffer R.I. for five years with fine, having default clause under section 27 of the Arms Act. Both the sentences, however, are directed to run concurrently.

2. The trial emerged out of Matihani P.S. Case No. 49 of 2010 registered on the basis of the written report submitted by Ramchandra Singh @ Naga Singh (P.W. 5) alleging that on 07.05.2010, at about 2:00pm in the noon, when the informant had gone to his land in Diyara to see his field and was returning



with the harvested crops (Ajmain) he saw his son Devendra Singh (deceased) tending the she-buffalo in the field at Bhatta Pari Barki Nakti Bandh. Soon he noticed Devendra Singh fleeing away followed by the appellants and three other named accused persons besides two others unknown. While the deceased was on the run, the accused persons fired at him. He received gunshot injury and fell down whereafter A-2 fired at the chest of the deceased. A-3 Pankaj Singh also fired at him(deceased). Two other co-accuseds had also fired at the deceased. The assault was made at the order of the co-accused Lakho Mishra. After having assaulted the victim the accused persons escaped. The deceased died at the spot instantaneously. The incident was witnessed, amongst others, by his son (P.W.7) and his brother (P.W.8). An information was given on telephone to P.W. 9 who is the SHO of Matihani police station. He was then at Begusarai. Within few hours of the occurrence, P.W.9, along with a police party, reached the site of the incident, carried out the death inquest proceeding, collected the empty shell of the cartridges found scattered near the place of occurrence under a seizure memo and inspected the place of occurrence whereafter the deadbody was dispatched for post mortem examination. A written report bearing the LTI of the



informant (P.W.5) and the signature/LTI of P.Ws.7 and 8 as attesting witnesses was made to P.W.9. He himself later became the I.O. of the case. The statements of the witnesses were recorded. P.W.6 was then posted as the Medical Officer of Begusarai Sadar Hospital. He performed the autopsy on 08.05.2010 at 8.30am and furnished the post mortem report (Ext.2). On conclusion of investigation and finding the accusations true against the appellants filed the charge-sheet which gave rise to the present trial on the file of the learned trial Judge.

3. The appellants abjured the guilt and claimed the trial. On behalf of the defence, a plea of innocence and false implication due to village politics was taken. The defence also put up a case that the deceased was a criminal as several cases were pending against him. He was killed at a different place and in a different manner of occurrence.

4. To prove the guilt of the appellants beyond reasonable doubts, the prosecution adduced oral as well as the documentary evidence. As many as 9 prosecution witnesses were examined. The prosecution also placed on record Ext.1 (the signature of the witnesses on the seizure memo), Ext.2 (post mortem report),



Ext. 3 (signature of the I.O. on the seizure memo) and Ext.

4(Signature and endorsement of the I.O. on the formal FIR).

5. In appreciation of the evidence on record, the learned trial court held the appellants guilty of the charges and sentenced them in the manner stated above.

6. We have heard the counsel(s) appearing in the respective appeals as well as Mr. S.N.Prasad, APP for the State. Perused the materials on record.

7. The judgment of conviction has been challenged on several counts. Firstly, it has been submitted that the place of occurrence and the time of occurrence have not firmly been established by the prosecution. The evidence on the manner of occurrence as projected through the evidence at the trial also suffer from serious inner contradictions. The description of the ocular account of the incident does not get full support from the medical evidence. According to the prosecution, the deceased was fired at more than eight times, whereas the doctor found only 07 injuries out of whom injury nos 1 to 4 were found wounds of entry whereas injury nos. 5,6 and 7 were the wounds of exit. It has also been submitted that the finding of the autopsy surgeon that these injuries were caused by firing from a long range also completely negates the prosecution case. They



have also urged that on close scrutiny of the evidence of P.W. 7 (son of the informant) and P.W.8 (brother of the informant), it shall distinctly appear that they are not the eye-witnesses to the occurrence. Lastly, it has been argued that the presence of the informant at the place of occurrence is also not free from doubt. According to the informant, on reaching of the I.O. he made a statement which formed the basis of the investigation. However, this witness has subsequently stated about the filing of the written report. The written report has not been formally proved by the prosecution. Our attention, in this regard, is drawn to the first page of the FIR wherein there is overwriting(s) on the time of receiving of the information, drawing up of the FIR and institution of the FIR. All the above informations lead to one conclusion that immediately after the incident the names of the appellants as accuseds were not disclosed by the informant. Subsequently, it appears, a written report was furnished to the I.O. wherein the appellants and other co-accused persons were named as the assaulters of the deceased.

8. Counsel for the State, conversely, supported the finding(s) of guilt recorded by the learned trial court. He submits that the ocular account of the occurrence given by P.Ws 5 (informant) 7 and 8 conclusively prove the place of occurrence, the time of



occurrence as well as the manner of occurrence. Let it be noted, the prosecution adduced evidence of P.W.1 Rajesh Singh @ Pappu, P.W. 3 Kundan Kumar and P.W. 4 Jitendra Singh, but they were declared hostile at the instance of the prosecution. Both the parties have not referred to their evidence. P.W.2 Bam Kumar Singh is a formal witness. He has proved his signature as (Ext.1) on the seizure memo in respect of recovery and seizure of 03 empty cartridges and 02 pieces of front part of the bullet seized from the place of occurrence by the I.O. (P.W.9).

9. As the place and time of occurrence have seriously been questioned by the defence the Court would first examine the relevant evidence on these two aspects. Although, in the written report, specific time of the occurrence has not been stated but at the trial almost all the relevant witnesses i.e. P.Ws 5, 7 and 8 have stated that the incident had occurred at and around 2.00pm in the noon when the informant had gone to the field and the deceased was also tending the she-buffalo in the Bahiyar. We do not find anything questionable in their evidence to doubt the time of occurrence. In the opinion of the doctor (P.W.6), the time since the death of the deceased elapsed was between 12-18 hours. He held the post mortem on 08.05.2010 at 8.30am



which takes the time of occurrence as stated by the witnesses. The Court is unable to uphold the contention of the defence that the prosecution has not been able to prove the time of occurrence. Coming to the place of occurrence it may be noted that the criticism has been made on the ground that P.Ws 5,6 and 7 have differently described the place where the incident had actually occurred. They have named the place of occurrence being the land on the bank of the river by different names. However, it has not been argued before us considering the consistent evidence on record that the place of occurrence was the Diara land. Almost all the relevant witnesses have spoken that it was a lonely place at a long distance from the nearby dwelling house(s).

10. Counsel for the defence has argued that the distance of the place of occurrence from the house of the informant has been differently described by P.W.5, 7 and 8. According to P.W.7, the place of occurrence was at a distance of 05 kms from his house whereas P.W. 8 has estimated the distance of the place of occurrence from the house as 02 kms. P.W. 5 has stated that the distance of the place of occurrence was less than 01 km.

11. The I.O. (P.W.9) after reaching the place of occurrence inspected the same and found it to be the Diara land which



is generally known as Bhatta Pari Barki Nakti Bandh. True it is, the evidence on record indicates three names of the Diara land but they may be parts of the Diara land. The evidence of the I.O. puts a seal on the aforesaid contention of the appellants and it is established that the place of occurrence is the Diara land which is generally called as Bhatta Pari Barki Nakti Bandh. It is the agriculture field of Bhallu Singh and Ram Kishore wherefrom the bank of river is close by. In the Fardbayan, the aforesaid description finds mentioned. The another contention to doubt the place of occurrence is that the I.O., on inspection soon after his arrival at the place of occurrence, did not find the blood at the place of occurrence. The evidence is replete to demonstrate that it was a Diara land filled up with sand where vegetable (Parwal) was being grown. The I.O. did find and collect the empty shells of the cartridges and the front part of the bullets at the place of occurrence. P.Ws 7 and 8 have unambiguously deposed about the presence of the blood at the place where the deceased after receiving the assault had fallen whereafter shots were also fired at him by two of the present appellants i.e. A-2 and A-3. The prosecution has been able to establish the place of occurrence by reliable evidence both oral and documentary.



12. Coming to the finding of the doctor in the post mortem report (Ext.2), the Court considers it apposite to extract hereinbelow what the autopsy surgeon found in the post mortem report(Ext.2). The following ante mortem injuries were found on the deceased:-

“External examination:-

- (i)“on left side of parietal part entrance wound $\frac{1}{2}$ ”x $\frac{1}{2}$ ” blackening margin wound on right side of parietal part of scalp. Ne wound impacted with one rounded flat pellet like wound is $1\frac{1}{2}$ ”x 1”.
- (ii) on right thigh back portion one entrance wound 1”x $\frac{1}{2}$ ” just below the proton muscle one bullet found.
- (iii) on left side of chest just below the clavicle bone one entrance wound with blackening spot $\frac{1}{2}$ ”x $\frac{1}{2}$ ”
- (iv) on right side just lateral to sternum one entrance wound $\frac{1}{2}$ “x $\frac{1}{2}$ ” with blackening spot.
- (v) on back one exit wound $1\frac{1}{2}$ ”x1” on mid part.
- (vi) on just medial to right scapula of back exit wound 3”x1”.
- (vii) on lateral part of scapula of back exit wound 3”x1”

After dissection external examination-

cranial cavity- (i) lacerated wound from left to right or vice-versa in parietal lobe, clotted blood, fracture of both sides of bone.



- (ii) Thoracic cavity- lungs are pale, heart is punctured, just below the heart one bullet found.
- (iii) abdominal cavity- stomach and bladder- empty, liver, spleen and kidney are pale.”

13. The Autopsy surgeon found injury at item nos .i, ii, iii and iv entry wounds caused by fire-arms. Two of them were having blackening spots/margin. Three exit wounds at item nos. v, vi and vii were found. According to the prosecution, at least the appellant nos. 2 and 3 from close range when the victim on receiving some injuries while on run had fallen in the field. Two wounds of entry at item nos. iii and iv were caused to the victim from a close range whereas injury at item no. (ii) was, in all probability, received by the victim when fired from behind while he was trying to run and save himself. In course of evidence, the doctor P.W.6 has, however, stated that those injuries (ante mortem) were the result of firing from a long range. As per the prosecution case propounded at the trial, seeing the accuseds, the deceased was on the run. He was chased and fired several times. On receiving few injuries, he fell down whereafter it is specifically alleged that A-2 and A-3 fired at him (deceased). The firing made by A-2 hit the chest. However, the situs of the injury caused by A-3 could not be seen and given by the witness. It has been argued by the defence that such finding



of the doctor about firing from a long distance runs counter to the prosecution case adumbrated at the trial. The submission may be attractive but on deeper scrutiny appears to be hollow. The courts give primacy to the evidence of the eye-witness. The character of the medical evidence is advisory in nature which the court considers in the light of the entire evidence on record. Such observation by the doctor in his evidence was given in casual way. Moreover, his findings to this effect, in our view, do not completely improbabilize the prosecution case.

14. On a careful evaluation of the evidence of P.Ws 5,7 and 8, it is explicit that they found the presence of blood near the deadbody. The I.O. (P.W.9) has, however, stated about non presence of the blood at the place of occurrence. In the face of the ocular account, it is difficult to accept the contention of the appellants that non finding of the blood at the place of occurrence is a serious jolt to the prosecution evidence insofar as establishing the place of occurrence is concerned.

15. It was argued by the defence that P.W. 7 has stated about going on to the place of occurrence on a bicycle whereas there is nothing on record from the deposition of the I.O. that a bicycle was found near the place of occurrence. This may be due to faulty investigation by the I.O. That apart, non seizure of the



bicycle near the place of occurrence can not be considered as a serious blow to the prosecution case. The law is settled beyond cavil. The prosecution cannot suffer for any faulty investigation unless it is shown to the court that the missing part of the investigation completely uproots the prosecution case or creates a serious doubt on the veracity of the prosecution case. It is not one of such cases.

16. One of the contentions of the defence is that the seizure list (Ext.1) has not properly been proved as P.W. 2 Bam Bam Kumar Singh in course of his deposition has stated that the same was not prepared in his presence. The Court finds that P.W. 2 had proved his signature (Ext.1) on the seizure list. Of late, it is experienced that the witness to seizure list becomes the soft target of the defence and is brought under the influence of the accused and such seizure witness while accepting and identifying his signature thereon denies preparation of the seizure memo in his presence. The courts have consistently accepted the contention of the prosecution that the seizure has properly been proved. In the attending facts also we do not entertain a doubt that the seizure of the shells of used cartridges and pieces of front part of bullet were found and seized by the I.O. from the place of occurrence. The ocular



account of the three relevant witnesses and the evidence of the I.O. (P.W.9) on this point is clear and specific.

17. Although the parties have not made submissions with reference to the evidence of P.Ws 1,3 and 4 who have declared hostile. The Apex Court in **Paramjeet Singh @ Pamma vs. State of Uttarakhand, (2010) 10 SCC 439 in para 16 & 17** held as under:-

“16. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony. (vide State of Rajasthan vs. Bhawani, (2003)7 SCC 291).

17. This Court while deciding the issue in Radha Mohan Singh vs. State of U.P. (2006)2 SCC 450 observed as under: (SCC p.457, para 7)



7.It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examine him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof.”

18. Having regard to the legal principle discussed above, the Court has perused the evidence of P.W. 3. He was examined-in-chief and thereafter declared hostile. It is not difficult to find from his evidence that this witness had in course of investigation supported the prosecution case. His cross-examination further admits the presence of the informant (P.W.5), Sikandar (P.W.7) and Mahendra Singh P.W.8 at the place of occurrence when the police soon after the occurrence arrived at the spot.

19. The Autopsy Surgeon found left side of parietal part entrance wound having received as wound of entry caused by fire-arm whereas posterior part of the right side had also received a wound of entry caused by fire-arm. These two injuries had no blackening of the surrounding area. Injury no.3 was found on the left side of the chest with blackening



surrounding whereas injury no.4 on right side just lateral to sternum was found the wound of entry having blackening spot. These were the two injuries caused to the deceased after he fell down. Injury nos. 6 and 7 are the wound of exit. These were the injuries caused to the deceased from a close range. Noticeably, the doctor found only one injury i.e. injury no.2 from where the bullet was recovered. The defence has argued that the presence of only 07 injuries on the person of the deceased. Two of them being wound of exit, belies the prosecution case as it has been stated by the informant as well as the other witnesses that the deceased was fired at by 08 accused persons. We do not find on close perusal of their evidence that it was alleged that although the firing was made by 08 accused persons while chasing the deceased, but all the firings made at the deceased had actually caused injury. It appears from the finding of the doctor that only two bullet injuries were sustained by the deceased from behind as a result whereof he had fallen in the field whereafter A-2 and A-3 reached near the deceased and fired at him from a close range. While questioning the manner of occurrence, it has been submitted that although in the written report the informant has alleged that after the deceased having fallen on the field 04 accused persons, including A-2 and A-3 also fired at him, but in



course of trial P.W.5 has not stated so. In his examination-in-chief, he has stated about chase and firing by 08 accused persons including two unknown at the deceased. The second part of the allegation was not deposed by him. Similar is the statement of P.W. 8. However, we find that P.W. 7, being the brother of the deceased, had deposed completely in line with the allegation levelled against the accuseds in the written report. Not describing the second part of the allegation specifically by P.W. 5 and P.W.8 would be considered mere omission(s). The Court is not oblivious/unmindful of the fact that the incident had occurred just few hours before lodging of the case. In a very gruesome manner, the deceased was chased and done to death. The discrepancy in describing the manner of occurrence, which has been highlighted by the defence, in our view, is minor discrepancy. It is also to be kept in focus that the witnesses were deposing at least two years after the incident. These discrepancies may be due to human error and bound to creep in with the passage of time.

20. Referring to the overwriting(s) with respect to the first information to the police, recording of the Fardbayan and drawing up of the formal FIR, it has been argued with much vehemence that such overwriting(s) create a serious doubt on



the first version of the prosecution case. The informant, it is submitted, subsequently presented a written report after much confabulation at the police station several hours after the incident. If that be so, then the entire prosecution case stands smeared with doubt. While examining the said contention, the court found that the I.O. (P.W.9) when received the message about commission of murder in Bahiyar was not at the police station. He rushed to the place of occurrence immediately along with a police party where the written report containing LTIs of the informant and the attesting witness (P.W.8) as well as P.W.7 was presented. He immediately took up the investigation, made seizure of the incriminating articles (shells of empty cartridges etc.) and the death inquest proceeding was carried out. The deadbody was then carried out on the spot. The doctor (P.W.6) in his deposition has stated that the deadbody of the deceased was brought at the hospital on -7.05.2010 at 8:30pm. Obviously, by that time, the formal FIR was not registered as the post mortem report does not indicate the case number. Only thereafter it appears that the I.O. reached the police station and drew up the FIR and in an honest manner recorded the actual time and information at the police station and drew up the formal FIR. That apart, the defence has not cross-examined the



I.O. on this point. Not even a suggestion was given to the witness. In the facts and circumstances evidencing from the record, it is difficult to accept the contention of the defence made on the said point.

21. Having evaluated the evidence on record in the light of the criticism of the defence, the Court is unable to find any legal defect/flaw in consideration of the case by the learned trial court in holding the appellants guilty of the charges.

22. Consequently, the appeals fail and are dismissed.

(Kishore Kumar Mandal, J)

(Vinod Kumar Sinha, J)

HR/-

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