

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.185 of 2012

Arising Out of PS. Case No.-38 Year-2007 Thana- NALANDA District- Nalanda

Naresh Gope @ Naresh Yadav, son of Munirak Yadav, Resident Of Village-
Saibat Tola Kharpar, Police Station- Nalanda, District- Nalanda

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

Criminal Appeal (DB) No. 18 of 2012

Arising Out of PS. Case No.-38 Year-2007 Thana- NALANDA District- Nalanda

1. Bijendra Gope, son of Suresh Gope
 2. Karu Gope @ Dharmendra Gope, son of Rajendra Gope
 3. Rama Gope, son of Brahamdeo Gope
 4. Suresh Gope, son of Kailu Gope
 5. Kapil Gope, son of Kisun Gope
 6. Karu Gope, son of Tulsi Gope
 7. Suresh Gope, son of Munarik Gope
 8. Boudhu Gope @ Arjun Gope, son of Madin Gope
- All are resident of Village- Sabait Tola, Kharpar, Police Station
Nalanda, District – Nalanda

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 185 of 2012)

For the Appellant/s : Sri Kanhaiya Prasad Singh, Senior Advocate

Sri Pratik Mishra, Advocate

Sri Raj Kishore Prasad, Advocate

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

(In Criminal Appeal (DB) No. 18 of 2012)

For the Appellant/s : Sri Kanhaiya Prasad Singh, Senior Advocate

Sri Pratik Mishra, Advocate

Sri Raj Kishore Prasad, Advocate



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

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 16-04-2018

1. In both the Appeals, since all the appellants were tried together and convicted by a common judgment, both the Appeals were taken -up together for hearing and are being disposed of by this common judgment.

2. Naresh Gope @ Naresh Yadav, appellant in CR. APP (DB) No. 185 of 2012 by judgment dated: 17.12.2011 was held guilty and convicted for commission of offence under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as the “I.P.C.”) and Section 27 of the Arms Act, 1959 (hereinafter referred to as the “Arms Act”). However, all the appellants in CR. APP (DB) No. 18 of 2012 by the same judgment were convicted for commission of offence under Section 302 / 149 of the I.P.C. By order dated 21.12.2011 Naresh Gope @ Naresh Yadav in CR. APP (DB) No. 185 of 2012 was directed to undergo rigorous imprisonment for life under Section 302 of the I.P.C. and to pay a fine of Rs. 2,000/-. He was further sentenced to undergo rigorous imprisonment for one year under Section 27 of the Arms Act, however, by the same order i.e. order dated 21.12.2011 all the



eight appellants in CR. APP (DB) No.18 of 2012 were sentenced to undergo rigorous imprisonment for life under Section 302/ 149 of the I.P.C. and to pay a fine of Rs. 2,000/- each. In default of payment of fine they were further directed to undergo rigorous imprisonment for one month. All the appellants were tried vide Sessions Trial No. 461 of 2008 and they have been convicted and sentenced by Sri Ajit Kumar Sinha, learned 5th Additional Sessions Judge, Nalanda at Biharsharif (hereinafter referred to as the “trial judge”).

3. The prosecution case in short is that on 27.11.2007 at 15.45 Hour (3.45 P.M.) Sub Inspector of Police Sri Mundrika Singh (P.W. 9) of Nalanda Police Station recorded *fardbyan* of one Raj Kumar Prasad, S/o Sri Fagu Mahto of village:- Ranibigha, District:- Nalanda. The *fardbyan* was recorded in Ranibigha village. In the *fardbyan* the informant (P.W. 8) disclosed that on the same day i.e. on 27.11.2007 at about 15.30 hours (3.30 P.M.) in सामुदायिक भवन (Community Hall) Circle Officer – cum- Block Development Officer, Silao had arrived in relation to election of Education Committee (शिक्षा समिति) where members of both the sides were present. Members of village of Ranibigha were saying that election has already been peacefully held, whereas villagers of Kharpar village raised dispute that no



election has taken place. Thereafter, altercation took place, however, due to intervention of Circle Officer dispute for the time being was settled and Circle Officer left the place. After Circle Office went from the सामुदायिक भवन husband of R.C. Jama (Mukhiya) namely Fakaru Jama instigated villagers of Kharpar to assault the villagers of Ranibigha. Thereafter: Naresh Gope [appellant in CR. APP (DB) No. 185 of 2012], Suresh Gope (A7), Bijendra Gope (A1), Rama Gope (A3), Suresh Gope (A4), Karu Gope (A6), Karu Gope @ Dharmendra Gope (A2), Kapil Gope (A5), Krishna Chaudhary (not charge-sheeted), Rameshwar Paswan (since dead), Arjun Gope @ Boudhu Gope (A8) [all appellants in CR. APP (DB) No. 18 of 2012] and other 20-25 unknown accused persons unlawfully assembled armed with rifle, pistol, *lathi*, *garasa*, sword etc. and they reached village: Ranibigha. Naresh Gope with a view to kill Sheonandan Mahto who was standing near the door of Bindeshwar Mahto (P.W. 7) fired from his rifle which hit Sheonandan Mahto and he fell down. Rama Gope and Kapil Gope also fired, however, villagers thereafter fled away and entered inside their houses. Sheonandan Mahto (injured) was immediately carried for his treatment by Bindeshwar Mahto (P.W. 7), Prakash Mahto (not examined), Madhu Mahto (P.W.1) and Suresh Jamadar. He was carried on a



cot. Videshi Mahto [father of deceased (not examined)], Ram Balak Mahto (brother of deceased, not examined), Pyari Devi (wife of elder brother of deceased, not examined), Birendra Prasad (not examined) all carried the injured to Bihar Sharif Sadar Hospital. The informant stated that in the occurrence from the accused side all were from village- Kharpar. He claimed that all the accused persons had formed unlawful assembly and with an object to kill on the instigation of Fakaru Jawa had fired from rifle, pistol etc. They fired indiscriminately however no other could receive any such injury.

4. The *fardbyan* was read over to the informant in presence of Surendra Prasad (P.W. 2), Sunil Kumar (not examined) and Madhave Mahto (P.W. 1). The informant thereafter put his signature and being witnesses, Surendra Prasad (P.W. 2) and Madhav Mahto also signed. On the basis of the said *fardbyan* on the same day i.e. on 27.11.2007 at 7 P.M. a formal F.I.R. vide Nalanda P.S. Case No. 38 of 2007 was registered for the offence under Section 147/ 148/ 149/307/337/120(B) of the I.P.C. and Section 27 of the Arms Act. Subsequently, vide order dated 29.11.2007 after death of the injured Section 302 of the I.P.C. was added in the F.I.R. F.I.R. was lodged against 12 named accused persons: (1) Naresh Gope (2) Bijendra Gope (3) Karu Gope (4)



Ramanand Gope (5) Suresh Gope (6) Kapil Gope (7) Karu Gope (8) Suresh Gope (9) Boudhu Gope @ Arjun Gope (10) Fakaru Jawa (11) Krishna Chaudhary and (12) Rameshwar Paswan (during pendency of the Appeal he died and his Appeal abated) and 20-25 unknown accused persons. After investigation accusation against some of the accused persons were initially found true, and as such, on 24.02.2008 charge-sheet was submitted against Bijendra Gope, Suresh Gope, S/o Kailu Gope [both appellants in CR. APP (DB) No. 18 of 2012] and one Rameshwar Paswan (who died during pendncy of the present Appeal) keeping investigation pending against others. Subsequently on 5.4.2008 supplementary charge- sheet was submitted against remaining F.I.R. named accused, however, two F.I.R. named accused namely: Fakaru Jawa and Krishna Chaudhary were exonerated by the investigating officer. After submission of charge -sheet, on 24.05.2008 learned Chief Judicial Magistrate took cognizance of offences, and thereafter, on 18.07.2008 the case was committed to the court of Sessions and it was numbered as Sessions Trial No. 461 of 2008. In the case, on 15.12.2008 charge under Section 302 & 120B of the I.P.C. and Section 27 of the Arms Act was framed against Naresh Gope [appellant in CR. APP (DB) No. 185 of 2012] and joint charge against remaining accused which includes



all the appellants in CR. APP (DB) No. 18 of 2012 for commission of offence under Sectiond 307, 148, 302/149 & 120B of the I.P.C. and Section 27 of the Arms Act was framed.

5. To prove its case from the prosecution side altogether eleven witnesses were examined and most of the witnesses claiming to be eye witness to the occurrence has supported the prosecution case.

6. P.W. 1 (Madhav Mahto, co-villager of the deceased), P.W. 2 (Surendra Prasad, co-villager of the deceased), P.W. 3 (Sakaldeep Prasad, cousin brother of the deceased), P.W. 4 (Bijay Prasad, distant relative of the deceased), P.W. 5 (Shiv Kumar Mahto, cousin brother of the deceased), P.W. 6 (Suresh Chauhan, Gotiya of the deceased), P.W. 7 (Bindeshwar Mahto, cousin brother of the deceased) and P.W. 8 (Raj Kumar Prasad, informant of the case) have claimed to be eye witnesses to the occurrence, whereas, P.W. 10 (Naresh Prasad, an Advocate Clerk) was examined as formal witness and this witness has proved the post-mortem examination report. P.W. 11 (Dr. Arbind Kumar Singh) had conducted post- mortem examination on the dead body of the deceased) and P.W. 9 (Mundrika Singh) who had recorded *fardbyan* of the informant was also the Investigating Officer of the case. After closure of prosecution evidence, on 17.10.2011



itself evidences and circumstances collected during trial were explained to all the accused persons and their statement under Section 313 of the Cr.P.C. was recorded in which they claimed to be innocent. From the defence side no witness was examined.

7. Sri Kanhaiya Prasad Singh, learned senior counsel, assisted by Sri Pratik Mishra, learned counsel for the appellants after placing entire evidence has argued that the prosecution has miserably failed to establish the case beyond all reasonable doubt, and as such, according to him, it was a fit case for passing judgment of acquittal, however, the learned trial judge has incorrectly passed judgment of conviction and sentence. He submits that in the entire evidence though witnesses have claimed to be eye witness to the occurrence, on examination of their evidences it is established that none has exactly seen the occurrence, rather some of the witnesses have said that in the occurrence firing was made and subsequently they came to know that Naresh Yadav had given shot from rifle which hit the deceased. So far participation of other appellants are concerned, it has been argued that save and except the fact that their presence was mentioned by the witnesses, none of the prosecution witnesses have specifically stated as to how and in which manner they participated in the occurrence. Sri Kanhaiya Prasad Singh, learned



senior counsel has emphasized that right from beginning of the investigation the prosecution has not come out with clean hand. He submits that if the *fardbyan* of the informant is treated as true, there was no reason for the investigating officer to give clean chit to a person who was the main accused and instigator in the occurrence. He submits that though a plea was taken that in relation to dispute of School Managing Committee Election altercation had taken place in between groups of two villages and after intervention of Circle Officer- cum- Block Development Officer the dispute had settled, after settlement of dispute it is evident from the F.I.R. that one Mukhiyapati (Husband of Mukhiya) namely- Fakaru Jama instigated the villagers of Kharpar village to assault the villagers of Ranibigha. Sri Kanhaiya Prasad Singh, learned senior counsel has argued that as per prosecution case main mover of the crime was Fakaru Jama and even during evidence witnesses have said that Fakaru Jama was the main instigator, but to the reasons best known to the Investigating Officer he was exonerated after investigation. He was not at all charge- sheeted by the Police nor the learned Magistrate who had taken cognizance of the offence had taken pain to examine the matter and take cognizance differing with the Police report so far Fakaru Jama is concerned. He further submits



that even for the time being if it is assumed that Police or the learned Magistrate who took cognizance had committed error in not proceeding against Fakaru Jama since at least once during evidence some of the witnesses had stated some fact, the learned trial judge was competent enough to proceed against Fakaru Jama while exercising power under Section 319 of the Cr.P.C., however, prosecution even during trial has not taken any pain to get Fakaru Jama summoned as accused. He submits that prosecution has not fairly approached the trial court, and as such, all the appellants were required to be acquitted instead of conviction.

8. Sri Ajay Mishra, learned Additional Public Prosecutor opposing the Appeal submits that it is specific case of prosecution that all the appellants had formed an unlawful assembly and thereafter indiscriminate firing was made in which at least one person from the prosecution side died due to fire arm injury. He submits that in such situation the learned trial judge has rightly passed judgment of conviction and sentence in relation to all the appellants. He submits that there is no need to interfere with the judgment of conviction and sentence.

9. Besides hearing, we have also minutely examined the entire evidences i.e. both oral and documentary evidences. After going through the same so far evidence in relation to appellant



-Naresh Gope is concerned, there is no reason to create doubt regarding his conviction and sentence. It is consistent case of the prosecution witnesses that this Naresh Gope had fired which hit the deceased who was standing near the door. This fact has been categorically stated by P.W. 1, P.W. 2, P.W. 3 , P.W. 5, P.W. 6 and P.W. 7 , however , P.W. 4 though in his examination -in- chief has stated the facts, which were stated by other witnesses, but in his cross -examination particularly in paragraph no. 14 of his cross-examination he had disclosed a fact which creates doubt as to whether he was actual eye witness to the occurrence or not. So far informant -Raj Kumar Prasad is concerned, this witness during his evidence has proved his signature on the *fardbyan*, which was marked as Exhibit -1/1. He further proved signature of other three witnesses, who had put signature on the *fardbyan*, however to the reasons best known to the prosecution except Madhav Mahto (P.W. 1) other witnesses had not come forward to support the prosecution case. This witness has also proved the signature on the seizure list relating to recovery of *khokha* of .315 bore cartridge and he proved the signature of Surendra (not examined) and Madhav Mahto (P.W. 1), which were marked as Exhibit -2 and 2/1. On the next date one another *khokha* was recovered for which a seizure list was prepared, which was signed by the witness



Kanhaiya Prasad (not examined), Manik Chandra Prasad (not examined) and those signatures were marked as Exhibit- 3 and -3/1. On examination of his evidence it is further evident that the own brother of the deceased namely Ram Balak Mahto who was already alive had not come forward to depose as prosecution witness. Similarly, nothing was indicated as to what was the reason that father of deceased (Sheonandan Mahto) was also not examined. From the evidence of informant (P.W. 8) it is evident that statement of Videshi Mahto (father of deceased) was recorded under Section 161 of Cr.P.C., however, no explanation was given by the prosecution for non-examination of either Videshi Mahto or Ram Balak Mahto regarding whom it has come that both along with others had carried the injured to hospital. The investigating officer (Mundrika Singh) has proved the *fardbyan*, which was marked as Exhibit- 4. He also proved his signature on the *fardbyan*, which was marked as Exhibit- 1/4. He proved the seizure list relating to *khokha* of .315 bore cartridge, which was marked as Exhibit -5 and 6. On examination of evidence of the Investigating Officer it appears that while he inspected the place of occurrence, he could not notice any blood mark at the place of occurrence. This witness has also proved the inquest report, which was incorporated in the case diary and same was marked as Exhibit- 7.



P.W. 10 (Naresh Prasad) who was an Advocate Clerk, to the reasons best known to the prosecution, had come forward to prove the post- mortem examination report, which was marked as Exhibit -9. However, the doctor who conducted post-mortem examination on the dead body of the deceased Dr. Arbind Kumar Singh was examined as P.W. 11. On 28th November, 2007 this P.W. 11 was posted as Assistant Professor in the Department of Forensic Medicine, P.M.C.H., Patna and he conducted post-mortem examination on the dead body of the deceased namely Sheonandan Mahto and noticed the following facts :-

“(1) wound of entry 1/2” in diameter 2 1/2” above umbilicus on midline, margin, blackened inverted and lacerated. Wound of exit - that of left lower chest 1/3” in diameter margin everted, lacerated, 3” away to left to midline at T 11 level

On dissection- abdominal cavity filled with blood & clots

The projectile of injury No. 1 pierced through liver, stomach, left kidney and came out through exit wound in a track.

All the viscera in general were pale, heart – empty, stomach contained watery fluid, perforated.

In my opinion 1. Time elapsed since death 6-18 hours approximately

2. Cause of death - internal haemorrhage and shock

3. Nature of weapon – firearm

This post mortem report is written by me which bears my signature which already marked as Ext. 8”

The doctor further deposed that the post-mortem examination report was in his pen and signature, which was marked as Exhibit -8, however, subsequently, it was corrected as Exhibit -9.



10. Besides this, we have also examined the statement of the remaining appellants in CR. APP (DB) No. 18 of 2012 which was recorded under Section 313 of the Cr.P.C. On examination of their statement recorded under Section 313 of the Cr.P.C. it appears that only formality was completed, otherwise, as per requirement entire circumstances and evidences were required to be explained to the appellants, which has not been done. Accordingly, it appears that such statement is in contravention of the provision contained in Section 313 of the Cr.P.C. Such irregularity and illegality has been deprecated by the Hon'ble Supreme Court long back in a case reported in AIR 1984 SUPREME COURT 1622 (Sharad Birdhichand Sarda v. State of Maharashtra). However, after examining entire evidence we are of the opinion that the learned trial judge has committed no error in passing judgment of conviction and sentence so far appellant-Naresh Gope @ Naresh Yadav is concerned since there is consistent evidence of most of the witnesses claiming to be eye witness that shot given by this appellant had hit the deceased which was the reason for his death. So far the case in respect of appellants in CR. APP (DB) No. 18 of 2012 is concerned, it appears that they were made accused since they were members of a village with which village there was dispute with the villagers



of Ranibigha. It is also the case of the prosecution that in the community hall (सामुदायिक भवन) villagers of both villages had assembled where altercation had taken place.

11. Considering the fact that there are several contradictions in the evidence of prosecution witnesses so far those appellants are concerned, it would not be safe to approve their conviction and sentence. Meaning thereby, that prosecution so far appellants of CR. APP (DB) No. 18 of 2012 are concerned has not proved its case beyond all reasonable doubt, and as such, by way of extending benefit of doubt all the eight appellants in CR. APP (DB) No. 18 of 2012 deserves to be acquitted. Accordingly the judgment of conviction and sentence dated: 17.12.2011 and 21.12.2011 respectively in respect of all the appellants in CR. APP (DB) No. 18 of 2012 is hereby set aside. Since all the appellants of CR. APP (DB) No. 18 of 2012 are on bail and their conviction and sentence has been set aside, they are discharged from liability of their bail bonds.

12. The Appeal i.e. CR. APP (DB) No. 185 of 2012 of Naresh Gope @ Naresh Yadav stands dismissed and judgment of conviction and sentence dated 17.12.2011 and 21.12.2011 respectively passed in S.Tr. No. 461 of 2008 (arising out of



Nalanda P.S. Case No. 38 of 2007) so far Naresh Gope is
concerned is hereby approved.

(Rakesh Kumar, J)

(Arvind Srivastava, J)

praful/-

AFR/NAFR	AFR
CAV DATE	NA
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