

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.165 of 2015**

Arising Out of PS.Case No. -25 Year- 2009 Thana -KUCHILA District- BHABHUA (KAIMUR)

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1. Birendra Singh  
2. Hamendra Singh @ Harendra Singh @ Habhendra Singh Both above sons of late Bajrangi Singh residents of village - Mukhraon, Police Station - Kuchhila, District - Kaimur at Bhabua. .... Appellant/s

Versus

1. The State of Bihar. .... Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Navin Kumar, Amicus Curiae

For the Respondent/s : Mr. Sujit Kumar Singh, APP

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

**ORAL JUDGMENT**

**Date: 04-01-2018**

None appears on behalf of appellants on repeated calls, on account thereof, Mr. Navin Kumar, Advocate has been requested to assist the court as an Amicus Curiae which he accepted and accordingly, heard learned Amicus Curiae, counsel for the appellants as well as learned APP.

2. Appellants, Birendra Singh, Hamendra Singh @ Harendra Singh @ Habhendra Singh have been found guilty for an offence punishable under Section 307 of the IPC and each one has been sentenced to undergo RI for three years as well as to pay fine of Rs. 5,000/- in default thereof, to undergo SI for one month additionally, under Section 27 of the Arms Act and each one has been sentenced to undergo SI for six months with a further direction to run the sentences concurrently with a further direction that period already undergone during course of trial would be set off in terms of 428 of the CrPC by the learned Additional Sessions Judge- IV, Kaimur at



Bhabhua in Sessions Trial No. 219/2010/3122/2014.

3. Manbodh Singh (PW-4) filed a written report on 18.10.2009 disclosing thereunder that on the same day at about 7:00-7:30 AM, they were engaged in irrigating the paddy crop by pumping set. At that very time, all of a sudden, Birendra Singh, Hamendra Singh, Munna Singh, Dinesh Singh, Umesh Singh and Subhash Singh armed variously, forming an unlawful assembly came and began to abuse. One of the members of the aforesaid unlawful assembly, namely, Hamendra Singh fired from his gun causing injury over back of his father Nagina Singh. Another member Birendra Singh fired from his pistol causing injury over left hand of his brother Govind while rest of them began to assault both of them with Lathi and danda on account of which, they became severely injured. At the time of occurrence, he was coming from nearby field carrying diesel. On his alarm, villagers began to assemble whereupon accused persons fled away. Motive for occurrence has been shown as the accused persons had ploughed the ridge which was protested at their end. If he would not have raised alarm, then in that event, certainly his father and brother would have been murdered.

4. The aforesaid written report led institution of Kuchila PS Case No. 25/2009 followed with an investigation as well as submission of charge-sheet after completing the same, facilitating the trial in a manner, subject matter of instant appeal.



5. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of the Cr.PC is that of complete denial. Furthermore, It has also been pleaded that on the alleged date and time of occurrence, the prosecution party were aggressors. They brutally assaulted and on account thereof, complaint petition no. 1239/2009 was filed on 20.10.2009 whereupon Kuchila PS Case No. 02/2010 was registered. Furthermore, documentary evidence has also been filed in order to support such plea.

6. In order to substantiate its case, prosecution had examined altogether 7 PWs out of whom PW-1, Ram Kishun Singh, PW-2, Nagina Singh, PW-3 Govind Singh, PW-4, Manbodh Singh, PW-5, Kamleshwar Mishra, PW-6, Buchchi Yadav, PW-7, Dr. Vijay Kumar Singh as well as had also exhibited written report as Ext-1, Injury report, Ext-2 series, Formal FIR, Ext-3, endorsement over written report, Ext-4, Injury report of Nagina Singh, Ext-5 series and injury report relating to Govind Singh, Ext-6. In likewise manner, the defence had also exhibited, Ext-A, FIR of Kuchila PS Case No. 2/2010, Ext-B, Charge-sheet.

7. The learned Amicus Curiae while assailing the judgment of conviction and sentence has submitted that considering the fact of the case, non examination of Investigating Officer has proved fatal to the prosecution case as, it has caused serious prejudice



to the interest of the appellants. Furthermore, It has also been submitted that not even a single independent witness has turned up to support the case of the prosecution. The occurrence as alleged had been committed in an open field whereupon, there would have been possibility of presence of so many independent witnesses, more particularly, the written report also contained specific detail that at their arrival, the accused persons escaped therefrom and that being so, it happens to be another circumstance, adverse to the interest of the prosecution. Apart from this, It has also been submitted that when the evidence of informant is gone through, it is crystal clear that he cannot be an eyewitness to the occurrence. Furthermore, the evidence of remaining witnesses, that means to say, PW-2, Nagina Singh, and PW-3, Govind Singh, both of them claimed to be an injured who rushed up to BHU for their treatment but, as per their evidence, there happens to be inconsistency with regard to proper identification of their assailants and in likewise manner, PW-7, the evidence of doctor could not be legally entertainable as the injury report issued by the BHU, the primary one has not been brought up on record as an exhibit. That being so, the genesis of occurrence as well as manner of occurrence as disclosed by the prosecution became doubtful whereupon, the learned lower court should not have recorded the finding of the guilt. Consequent thereupon, the same is fit to be set aside.



8. It has also been submitted that finding of PW-7, the doctor is based upon the report issued by the BHU hospital, but the same is not on record whereupon, the finding has got no recognition in the eye of law. Hence, the injury report issued by PW-7, could not be legally entertainable.

9. On the other hand, learned APP controverted the submissions made on behalf of learned Amicus Curiae and has submitted that from the evidence of PW-7, the doctor, it goes out of controversy with regard to status of PWs-2 and 3 to be injured. That being so, their evidences are to be accepted. When, the aforesaid exercise is properly done, it is apparent that they have substantiated the case of the prosecution and that being so, the judgment of conviction and sentence recorded by the learned lower court is fit to be confirmed. Furthermore, it has been submitted that plea of defence had been negatived at the nascent stage itself, on account of submission of final form by the police after investigation.

10. Manbodh Singh (PW 4) in his written report had not stated that he was present at the place of occurrence since before and from there he had gone to bring diesel. His assertion happens to be that while he was carrying diesel, during course thereof, he had seen the occurrence whereunder apart from showing presence of all the five persons had identified Hemendra to assailant of Nagina Singh by means of gun while Birendra Singh to be assailant of Govind Singh



by means of pistol. During course of evidence in examination-in-chief, he had reiterated showing presence of his father Nagina as well as brother Govind over plot where irrigation of paddy crop was going on and at that very time, after forming an unlawful assembly, being armed variously Munna Singh, Dinesh Singh, Umesh Singh and Subhash Singh, Birendra Singh, Hemendra Singh came at his field out of whom, Hemendra was armed with gun, Birendra was with Katta, Dinesh Singh with Rama and rest were armed with Lathi. They began to abuse as well as assaulted, during course thereof, Birendra shot at his brother Govind causing injury over his hand and Hemendra shot at his father causing injury over his back. Munna, Dinesh, Subhash assaulted with Lathi and Rama. On his alarm, the accused persons fled away. Then thereafter, they have taken the injured to the police station where he had submitted written report (Exhibited). Identified the accused. At para-5 of his cross-examination, he had stated that place of occurrence lies 1-2 KM east to the village but he is unable to say Khata, Khesra number. In para-6, he had stated that they were not on inimical terms since before. The occurrence took place all of a sudden. As accused persons came and forbade them from carrying water adjacent to their field though, there was not damage therefrom. In para-7, he has stated that both the parties did not enter into an altercation rather accused persons coming from village began to assault. They have seen the accused persons coming from village but,



at that very time, they have not understood that they are coming to assault them. He had further stated that Hemendra and Birendra fired single round. His brother had sustained injury over his left hand. He had sustained injury over his elbow. At that very time, his brother was standing having eastern front. He had further stated that he was assaulted. Over which, the accused persons escaped. Neither his father nor his brother raised alarm. He had further stated that the occurrence took place in “*Aaluwala field*”. He is unable to disclose Khata, Khesra number. Blood had fallen in the field. It was ploughed. Place of occurrence was visited by the O/C but he was not present at that very time. Doctor of Kochas had forwarded his brother and father to BHU for proper treatment. He has been denied the suggestion that they were aggressors.

11. PW-3 is Govind Singh, one of the injured. He had deposed that on the alleged date and time of occurrence he along with his uncle Nagina was engaged in irrigating paddy crop by diesel pumping set. At that very time, Hemendra armed with gun, Birendra with Katta, Dinesh Singh with Rama, Munna, Subhash armed with Lathi came and abused and scolded them as to why they are irrigating after constructing channel through their field. His uncle denied whereupon Birendra shot at him causing injury over his left hand. Hemendra fired from his gun causing injury over back of his uncle. They both fell down. Then thereafter, Munna, Dinesh, Umesh,



Subhash began to assault with lathi and Rama. Manbodh came with diesel and raised alarm whereupon villagers assembled as a result of which accused persons fled away. Then thereafter, they had gone to police station, to Hospital wherefrom they were referred to BHU where they got their injuries properly treated. During cross-examination at para-5, he had stated that his uncle had sustained three injuries caused by Lathi, gun. He had sustained fire arm injuries at his back, by iron part of Baisakhi, over forehead and by lathi over arm as well as back. His uncle was assaulted by all the accused persons. When he rushed in rescue , then he was assaulted. He along with his uncle became unconscious. They regained sense at Kochas Hospital. One cartridge was taken out from the body of his uncle. In para-6, he had stated that they were not on strained relationship since before. Dispute arose on account of construction of channel on the date of occurrence itself. Accused persons were saying that channel has been constructed in their field and they were saying that channel was in their field. Channel was constructed one day prior to the occurrence. Field of accused happens to be at his eastern as well as western boundary. Paddy was planted in his field. Occurrence took place in the paddy field. Disclosed the boundary of the place of occurrence, North-river, South-Field of Girija Rai, East and West-Accused. Paddy crop of an area of 2 Kattha got destroyed on account of dispute. In para-7, he had stated that while they were irrigating field accused



persons came. In para-8 he had stated that accused persons fired from the distance of 3-4 Ft. They were standing and before that, altercation took place for 2-4 minutes. He had further stated that accused persons have destroyed the channel before the occurrence. He had further stated that he sustained fire arm injury over his hand while lathi injury over his back.

12. PW-2 is Nagina Singh, another injured who had deposed that on the alleged date and time of occurrence, he along with Govind was engaged in irrigating paddy crop. At that very time, Hemendra armed with gun, Birendra with Katta, Dinesh Singh with Rama, Munna, Subhash armed with Lathi came and surrounded them and then, obstructed flow of water, they resisted as a result of which they began to assault and during course thereof, Birendra fired from Katta causing injury over his back while Hemendra fired from his gun causing injury over left hand of his nephew. He along with Govind fell down whereupon others also began to assault with Lathi, Rami. His son Manbodh came with diesel and began to raise alarm attracting villagers seeing whom the accused persons fled away. He had sustained Lathi blow over his chest as well as forehead. He had further stated that on account of irrigation dispute has arisen. During cross-examination at para-6, he had stated that they were not on inimical terms since before. He had further stated that the field of accused persons lies east to his field. In para-7, he had stated that



occurrence took place near the chamber lying in his field. No paddy crop was planted near about the same. Accused persons have fired from their field. One fire was made over him. There was an X-ray. Pellet was taken out from the wound. At that very time, he was unconscious. In para-8, he had stated that he sustained one Rama blow at his forehead. Then had disclosed that Rama happens to be Baisakhi. He had sustained injury from front side of the aforesaid Baisakhi. In para-9, he had stated that after sustaining injury, he fell down and then others began to assault. In para-10, he had stated that when his son came with diesel then raised alarm whereupon villagers came and then accused persons escaped. Neither he nor his nephew had disclosed with regard to the occurrence. He had further stated that his nephew had also sustained single gun shot injury. He was also treated at BHU. Then had stated that he sustained about 100 injuries, out of which one injury was of Khanti, another one was of fire arm and rests were of lathi. His nephew had sustained only one injury. In para-12, he had identified the place of occurrence as North- he himself, South-accused as well as Tijan Upadhyaya, East-accused, West- he himself. Copious blood had fallen. In para-15, he had stated that Govind happens to be separate from him.

13. PW-1 simply stated that there was dispute in between the parties as a result of which Nagina and Govind became injured. PW-6 had not supported the case of the prosecution, on



account thereof, he was declared hostile. PW-5 is Kamleshwar Mishra, Part Investigating Officer, who had simply submitted charge-sheet.

14. PW-7 is the doctor who had deposed that on 18.10.2009, he was a Medical Officer posted at PHC-Kochas. On the requisition of police, he had examined Nagina and found the following:-

1. Lacerated wound over occipital bone of skull 1"x1" with swelling about 2"x2".
2. 2 C.M. vertical wound on back over Rt. Scapula with bleeding. Age of injuries within 6<sup>th</sup> hours. Injury No.1 Caused by hard and blunt object. Injury No.2. Patient is referred to Higher Centre because it appears fire arm injuries.

Injury 2's opinion kept reserved. Injury No.1 is simple.

Final injury report of Nagina Singh:- Report received from department of Cardio Thoracic Surgery Institute of Medical Science, BHU-Varanasi. Show Fire-arm injury in right side back and right hemopneumo thorax with communicated trachea body of right scapula and fracture of 3<sup>rd</sup> and 4<sup>th</sup> ribs therefore injury no.2 is grievous in nature.



15. The doctor also examined Govind Singh on 18.10.2009 and found the following injuries:-

1. 2 C.M. vertical wound over anterior medial aspect of left arm at junction of mid and distal 1/3 with gapping and bleeding.
2. 2 C.M. longitudinal wound on posterior aspect of left arm at junction of mid and distal 1/3 with gapping and bleeding. Age of injuries- within 6<sup>th</sup> hours. Cause of injury:- appears to be caused by fire arm. Nature of injury;- fatal referred to BHU, Varanasi. Final injury report of Govind Singh:- Report received from BHU- Varanasi shows open spiral fracture. Lt. humerus at a junction of mid and distal 1/3 caused by fire arm. Therefore, nature of injury is grievous.

16. From Ext-A as well as B, it is evident that a complaint case no. 1239/2009 was filed by appellant/convict Birendra which was sent to the local police station for registration and investigation under Section 156(3) of the CrPC whereupon Kuchila PS Case No. 02/2010 was registered while from Ext-2, it is apparent



that final form was submitted.

17. From the evidence available on record, more particularly, that of PW-7, it is evident that Nagina as well as Govind both have sustained fire arm injuries. Furthermore, it is also evident from the evidence of PW-7 that both the injured were forward to BHU, Varanasi and on the basis of finding recorded by the BHU, he had finally recorded his finding. That means to say, the report issued from BHU was placed before him, who had placed, has not been established. In likewise manner, the report issued by BHU, not been brought upon record, even for identification. That being so, there happens to be absence of primary report. However, his own opinion remains and that shows presence of one injury caused by hard and blunt weapon and the injury caused by fire arm over the person of Nagina while two injuries over the person of Govind caused by fire-arm, and to that effect, his evidence is found intact, as defence failed to shatter.

18. Aforesaid finding of the doctor is to be compared with the ocular evidence. It is evident that PW-1 and PW-6 did not support the case of prosecution. Now remains the evidence of PWs-2, 3, and 4. Admittedly, from the evidence of PW-2 and 3 coupled with the evidence of PW-4 on its own did not inspire his presence as an eyewitness to occurrence. That being so, now remains the evidence of PW-2 and 3, both injured. After going through their evidence as



discussed hereinabove PW-2 had disclosed Birendra to be his assailant while Hemendra to be assailant of Govind while PW-3, Govind had stated Birendra to be his assailant while Hemendra to be the assailant of Nagina Singh. Furthermore, from the evidence of PW-2 (para-7), it is evident that the occurrence took place near his chamber while accused persons shot at from their field. He had shown boundary at para-12, North- his plot, South-plot of accused as well as Tijan Upadhyaya, East-plot of accused and West-he himself. While PW-3 had stated that occurrence took place in his paddy field. He had identified the boundary of the place of occurrence North-river, south-field of Girija Rai East and West-accused.

19. PW-2 had stated that near about chamber, paddy was not planted (para-7) while PW-3 (para-6) had stated that on account of dispute paddy crop of an area of two kattha got destroyed. When the evidence of PW-4 is taken together at this very score, he in para-7 of his cross-examination had stated that the occurrence took place at “Aaloowala Khet”. Blood had fallen.

20. Because of the fact that Investigating Officer had not been examined, on account thereof, actual place of occurrence is not at all found properly identified. In likewise manner, so far presence of injury is concerned, PW-2 in para-11 had deposed that he had sustained hundred injuries, on of Rama one fire arm and rest of Lathi while PW-3 at para-11 had said that he sustained fire-arm injury over



his hand while lathi injury at his back. Save and except, presence of fire arm injury the opinion of PW-7 is found in consonance with version of the injured. When the evidence in its entirety has been gone through as discussed hereinabove, it is apparent that prosecution has not been able to succeed in properly identifying the place of occurrence and in likewise manner, the manner of occurrence. The improbability of the case is further found from para-15 of the cross-examination of PW-2 who had stated that Govind happens to be separate from him. In the aforesaid facts and circumstances of the case, the non examination of Investigating Officer has serious caused dent in the prosecution case, simultaneously, also caused prejudice to the accused.

21. That being so, the conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed.

22. Since both the appellants are on bail, they are discharged from the liability of bail bond.

23. The first and last pages of the instant judgment be handed over to the learned Amicus Curiae for the needful.

(Aditya Kumar Trivedi, J)

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