

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

**Criminal Appeal (DB) No.293 of 1994**

Sessions trial no. 584/1992 Arising Out of Hilsa P. S. Case No. 299/1991  
District- NALANDA (BIHARSHARIFF)

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Munna Kumar son of Danveer Singh resident of village Juniar P.S. Hilsa District  
Nalanda

... .... Appellant/s

Versus

State of Bihar

.... .... Respondent/s

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**Appearance :**

For the Appellant/s : Miss. Monica, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA**

**and**

**HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)**

**Date: 25-01-2018**

1. We heard Miss. Monica, Advocate appearing as  
amicus curiae as well as Sri Dilip Kumar Sinha for the State  
and perused the record.

2. This criminal appeal has been preferred against  
the judgment of conviction and sentence order dated  
28.4.1994 passed by the learned Sessions Judge, Nalanda at  
Biharsharif in Sessions trial no. 584/1992 by which and  
whereunder learned Sessions Judge, Nalanda convicted the  
sole appellant for the offence punishable under section  
302/34 of the Indian Penal Code and 27 of the Arms Act  
whereas two other co-accused were acquitted of the charges.



3. In brief the fact, which lies to file this criminal appeal, is that PW 8, Satyendra Kumar gave his statement to officer incharge of Hilsa police station on 18.11.1991 at 10 p.m. at Hilsa police station along with Bal Govind Paswan and others to this effect that on the same day at about 4 p.m. he along with his deceased brother Anil Kumar, sister and co-villagers Bharat Prasad (PW 5) and Awadhesh Prasad (PW 4) were irrigating his field. In the meantime, his uncle's son, namely, Munna Kumar (appellant), Prem Kumar and their maternal uncle namely, Kaushal Kishore Prasad being armed with lethal weapons came there. The appellant Munna Kumar was carrying country made rifle whereas remaining accused were carrying different weapons. Appellant and his associates started abusing him and his brother and thereafter, Kaushal Kishore Prasad ordered others to shoot Anil and thereafter, appellant Munna Kumar opened fire of country made rifle as a result of which his brother sustained fire arm injury and fell down on the ground. Co-accused Prem Kumar and Kaushal Kishore Prasad, too, opened fire of their respective rifles as a result of which his brother sustained injuries on his back, right Kanpati and forehead. After the aforesaid occurrence, appellant and his associates fled away from there. He raised



alarm which attracted several villagers who saw the appellant and his associates running from the place of the occurrence. Injured was being brought to sub divisional hospital but he succumbed to his injuries on the way. The reason behind the occurrence is said to be previous land dispute and litigation due to dispute of partition.

4. On the basis of the statement of PW8, Hilsa P.S. case no. 299/1991 was registered and accordingly, formal FIR was drawn up against the appellant and others for the offence punishable under section 302/34 of the Indian Penal Code and 27 of the Arms Act on the same day. The case was investigated by PW11, namely, Deepak Lal who submitted charge sheet against the appellant and others. The cognizance of the offence was taken and the case was committed to the court of sessions, in usual course. The appellant along with others stood charges for the offence punishable under section 302/34 of the Indian Penal Code and 27 of the Arms Act.

5. It is pertinent to note here that after framing of the charge, a plea was taken on behalf of the accused Prem Kumar that at the time of alleged occurrence he was juvenile. Accordingly, his case was separated and sent to Juvenile Justice Board in accordance with law.



6. In course of trial, prosecution examined, altogether, twelve prosecution witnesses and also got exhibited documentary evidences such as inquest report and post mortem report etc.

7. The statements of the appellant and other accused were recorded under section 313 of the Code of Criminal Procedure in which they claimed their false implication. No evidence was adduced by the appellant as well as other accused in support of their defence but it would appear from perusal of the trends of cross-examination as well as statements made under section 313 of the Code of Criminal Procedure, that the defence of the appellant and his associates was of their false implication. The learned court below, having analyzed the evidences available on record, convicted the appellant in the manner as stated above whereas acquitted other accused giving benefit of doubt to them. The learned trial court based his judgment of conviction, basically, having relied upon testimonies of eye-witnesses as well as documentary evidences.

8. Miss Monica, Advocate appearing as amicus curiae assailed the impugned judgment of conviction and sentence order arguing that the learned trial court failed to



appreciate the evidence in its right perspective and came to wrong conclusion. She, further, submitted that the learned trial court doubted the credibility of so-called eye witnesses in respect of other accused on the ground of their contradictory statements but accepted the statements of the prosecution witnesses in respect of appellant. She, further, submitted that the prosecution failed to prove manner of occurrence and, as a matter of fact, none had seen the killing of the deceased but subsequently, PW 8 lodged the present case implicating the appellant and others because of previous partition dispute.

9. On the other hand, learned Additional Public Prosecutor appearing for the State supported the impugned judgment of conviction and sentence order arguing that PW 8 as well as other eye-witnesses proved that it was the appellant who shot fire on the deceased causing his death and, therefore, there is no scope to interfere into the impugned judgment of conviction and sentence order.

10. From perusal of the record, we find that PW1 Radhika Devi, PW2 Swarswati Kumari, PW 3 Mathura Yadav, PW 4 Awadhesh Prasad, PW 5 Bharat Prasad and PW 8 Satyendra Kumar claimed themselves to be eye witnesses



of the alleged occurrence. PW 6 Gopal Prasad claimed that he had seen the deceased lying on the ground having sustained fire arm injury and also claimed to have seen the appellant and accused Prem Kumar as well as two unknown persons having rifle in their hands fleeing from the place of the occurrence. PW 7 is an eye witness on the inquest report but he, too, claimed to have seen the deceased lying on the ground having sustained fire arm injury. This witness happens to be maternal uncle of the deceased. PW 9 and PW 10 have been tendered by the prosecution and they have stated nothing in respect of alleged occurrence. PW 11 is the Investigating officer who stated that having recorded the statement of PW 8, he investigated the case and submitted charge sheet against the appellant and others. PW 12, Dr. Ram Pratap Singh, has proved post mortem report of the deceased.

11. First of all, we would like to refer statement of PW12. This witness stated that on 19.11.1991 at about 3.30 p.m he did post mortem on the corpus of the deceased Anil Kumar. This witness stated that dead body of Anil Kumar son of Bhulan Singh of village Juniar P.S. Hilsa was brought by constable no. 484. He, further, stated that he found following



ante mortem injuries on the dead body of the deceased Anil Kumar – (i) one punctured wound of  $\frac{1}{3}$ ” in diameter with blackened and charred margins was found on right temporal region of the skull (wound of entry) (ii) one lacerated wound of  $\frac{1}{2}$  x  $\frac{1}{3}$ ” x brain deep on the middle of scalp (wound of exit), (iii) one gun shot wound with inverted margin on the eleventh thoracic vertebra of size  $\frac{1}{2}$ ” in diameter (wound of entry) but no blackened or charred margin. This witness also stated that bullet was found lodged in the interior wall of the left side which was taken out and was given to the concerned constable. This witness also stated that cause of death was of due to haemorrhage and shock due to the above stated injuries caused by fire arm. He also found that time elapsed since 24 hours. This witness proved post mortem report of the deceased Anil Kumar as exhibit 5.

12. It would appear from perusal of deposition of PW 12 as well as exhibit 5 that there were three fire arm injuries on the person of the deceased but according to exhibit 5 as well deposition of this witness, there was one wound of entry and one wound of exit. Therefore, it is obvious that the injuries to the deceased were caused by two shots.

13. Now, we would discuss the depositions of eye



witnesses. PW 1, Radhika Devi is sister of the deceased and the informant. She stated that on the day of the alleged occurrence, her brother was irrigating his field and her elder brother Satyendra Kumar (PW 8) and Bharat Prasad (PW5) and Awadhesh Prasad were also there. Deceased was irrigating his field through a well which was situated towards south western side of his field. This witness stated that she along with PW2 Swarwati Kumari went there to serve breakfast to deceased and others and having kept the breakfast near the well while she was returning, she saw the appellant and other accused coming towards her and at that time accused Bijendra Prasad was carrying lathi in his hand whereas appellant and others were carrying country made rifle in their hands. This witness stated that on the command of accused Bijendra, appellant opened fire on the deceased Anil which hit on back of the deceased Anil and having sustained the aforesaid fire arm injury deceased Anil fell on the ground and thereafter Prem Kumar and Kaushal Kumar, too, opened fire and after that, appellant and others took to their heels. It is obvious from the above stated statement of PW 1 that the appellant and two others namely, Prem Kumar and Kaushal Kumar opened fire on the deceased causing



injury to him. Therefore, according to this witness, deceased had sustained three gun shot injuries. The attention of this witness was drawn towards her previous statement and she, specifically, stated that she had made statement before the police to this effect that appellant had opened fire on the deceased Anil Kumar which hit on the back of the deceased Anil Kumar and thereafter, accused Prem Kumar and Kaushal Kumar had opened fire on the deceased.

14. PW 11 Investigating officer at para 11 of his cross-examination stated that PW 1 had not stated before him that firing of the appellant hit on the back of the deceased Anil Kumar and similarly, co-accused Prem Kumar had, too, fired on the deceased Anil Kumar. PW 11 stated that PW 1 had said before him that all the four persons had opened fire on the deceased.

15. PW 2 Swarswati Kumai is maternal niece of the deceased. This witness claimed that she along with PW 1 had gone to the place of the occurrence with an object to deliver breakfast to the deceased. She, too, stated that the appellant Munna Kumar opened fire on the deceased causing injury on the back of the deceased and thereafter accused Prem Kumar and Kaushal Kumar, too, opened fire which hit to the



deceased Anil Kumar. At para 5 of her cross-examination, she stated that she had made statement before the police that appellant Munna had opened fire on the deceased causing fire arm injury on his back and thereafter, accused Prem and Kaushal opened fire causing fire arm injury to the deceased Anil at his Kanpati and forehead. PW 11 at para 12 of his cross-examination stated that PW2 had made statement before him that at the time of alleged occurrence appellant Munna and accused Prem were carrying guns in their hands but she had not stated that accused Kaushal was carrying gun in his hand. This witness further stated that PW 2 had not stated before him that appellant Munna had fired on the deceased which hit on the back of the deceased and similarly, she had not stated that accused Prem and Kaushal had also fired on the deceased which hit on the Kanpati and forehead of the deceased.

16. PW 3 claims that on the alleged date of occurrence, he was grazing his buffalo in an orchard situated towards east side of his village and saw that accused, Prem and appellant, Munna and two unknown persons were coming from western side. This witness further stated that accused, Prem and appellant, Munna and one person were carrying



gun whereas fourth person was carrying lathi in his hand. He further stated that the appellant and his associates went to the field of the deceased where deceased was irrigating his field and an altercation took place between the deceased and appellant and, thereafter, on the command of one unknown person, appellant opened fire of his gun which hit on the back of the deceased and, thereafter accused Prem fired of his gun which hit on the kanpatti of the deceased. Thereafter, appellant and his associates fled away from there. He denied this fact that he had not made statement before the police that on the alleged date of occurrence, he was grazing his buffalo in a field situated towards east of his village. He also denied this fact that he had made statement before the police that on the alleged date of occurrence he was at his house and heard three round of firing in the evening of the alleged occurrence and also heard the sound of **chor-chor**. He also denied this fact that he had not made statement before the police that he had seen the appellant Munna, accused Prem and one unknown person carrying gun and after altercation, appellant Munna opened fire on the deceased Anil which hit on his back and thereafter accused Prem opened fire which hit on the kanpatti of the deceased.



17. PW 11 at para 13 of his cross examination admitted this fact that PW-3 had not made statement before him that on the alleged date of occurrence he was grazing his buffalo towards east side of his village. This witness further stated that PW-3 had made statement before him that at the time of alleged occurrence, he was at his home and heard sound of firing and cry of chor-chor at about 07:00 P.M. This witness further admitted that PW-3 had not made statement before him that he had seen accused Prem, appellant Munna and two unknown persons coming from east side and at that time accused Prem, appellant Munna and one unknown person were carrying gun whereas fourth person was carrying lathi. This witness further stated that PW-3 had also not made statement before him that appellant Munna opened fire as a result of which deceased sustained firearm injury on his back and thereafter accused Prem opened fire which hit on the kanpatti of the deceased, Anil Kumar. PW-11 also stated that PW-3 had made statement before him that after the occurrence, he went on the place of occurrence where he came to know that someone had shot dead the deceased Anil Kumar. This witness also stated that PW-3 had not made statement before him that at the time of alleged occurrence,



Witness Awdhesh, Bharat, sister and maternal niece of deceased Anil were present.

18. PW-4 Awdhesh Prasad stated that at the time of alleged occurrence, he had gone to ease himself and saw the deceased Anil and PW-8 who were irrigating their field and in the meantime, PW-1 and PW-2 came there with breakfast of deceased Anil and PW-8. This witness stated that he noticed that appellant Munna and three others, namely, Bijendra, Kaushal and Prem came there and at that time Bijendra was carrying lathi whereas remaining accused including appellant were carrying gun in their hands. This witness stated that appellant Munna, on the command of Bijendra, opened fire on the deceased Anil which hit on his back and after that Kaushal and Prem also fired which hit on the right kanpatti of the deceased. This witness denied the suggestion of the defence that he had not made statement before the police to this effect that appellant Munna fired on the deceased which hit on his back and thereafter Kaushal opened fire which hit on the right kanpatti of the deceased. This witness also denied this fact that he had not made statement before the police that at that time Bharat was easing himself near a field and PW-3 Mathura was grazing his



buffalo. PW-11 stated that this witness had not made statement before him that appellant Munna fired which hit on the back of the deceased Anil rather this witness stated that appellant Munna and accused Prem having armed with gun and rifle came there and opened fire causing injury on the forehead and back of the deceased Anil. PW-11 further stated that this witness had also not stated before him that Kaushal fired which hit on the kanapatti of the deceased Anil.

19. PW-5, Bharat Prasad has also made almost similar statement as made by the PW-4 but he added that appellant Munna fired on the deceased which hit on his back and thereafter Kaushal and Prem both made firing which caused injury on the kanpatti of the deceased. The attention of this witness has also been drawn towards his previous statement and he claimed that he had made statement before the police that appellant Munna opened fire which hit on the back of the deceased and firing of Prem and Kaushal hit on the kanpatti of deceased but PW-11 completely demolished above stated claim of PW-5 saying that PW-5 had not made the above stated statement before him.

20. PW-6 has claimed that having heard the sound of firing, he went near the place of occurrence and saw the



deceased Anil lying on the ground having sustained firearm injury. He also claimed to have seen the appellant Munna and accused Prem and two other persons running from the place of occurrence having rifles in their hands. However, when the attention of this witness was drawn towards his previous statement, he claimed that he had not met police during entire course of investigation nor he had made any statement before the police. However, PW-11 stated that PW-6 had made statement before him but had not stated in his statement that having heard the sound of firing when he went near the place of occurrence he found deceased Anil lying on the ground having firearm injury on his Kanpatti and body and PW-8, PW-1 and PW-2 were also present there. PW-11 stated that PW-6 had stated before him that PW-8 came to his house and gave information that Anil was murdered and thereafter he along with PW-8 went to the place of occurrence.

21. PW-8, informant claimed that appellant Munna Kumar fired of his rifle which hit on the back of the deceased and after that Prem and Kaushal opened fire and the fire of Prem hit on the kanpatti of the deceased whereas gun shot fired by Kaushal did not hit the deceased Anil. This witness stated that he along with others went to police station



and lodged the case. This witness stated that alleged occurrence took place due to dispute of partition and property. On being cross examined, this witness admitted that at the time of alleged occurrence he was at the distance of 3-4 **Gaj** from the deceased but he did not take any attempt to flee from the place of occurrence. At para 12 of his cross examination, this witness admitted that witnesses whose names disclosed by him, arrived on the place of occurrence after the alleged occurrence. This witness denied this fact that he had not made statement before the police that fire shot by appellant Munna caused injury on the back of the deceased. At para 14 of his cross examination, this witness stated that when deceased fell on the ground, accused Prem opened fire on him and till the second firing, none had come there and when he as well as some other witnesses raised alarm the villagers came there. This witness admitted that after second firing the alarm was raised. This witness also admitted that accused Prem and Kaushal fired simultaneously but he could not see whose fire hit the deceased. This witness denied this fact that he had made statement before the police that shot fired by accused Prem did not hit the deceased. The defence gave a suggestion to this witness at para 16 of cross



examination to this effect that he had not seen the alleged occurrence and lodged the present case after perusing the injuries of the deceased. PW-11 at para 18 of his cross examination stated that PW8 had not made statement before him that fire of appellant hit on the back of the deceased, however, again this witness stated that the appellant had made firing which hit on the back of the deceased Anil.

22. After perusing and analyzing the depositions of above stated prosecution witnesses, it is obvious that almost all the witnesses stated that appellant Munna Kumar and two others fired on the deceased. It is also obvious from the above stated discussions that some witnesses stated that fire of all the three persons hit to deceased whereas some witnesses stated that fire of two persons hit the deceased. It is also obvious from the above stated discussions that the witnesses improved their statements in course of trial because they contradicted their previous statements recorded under Section 161 of the Cr.P.C. We have already discussed the deposition of PW-12 and according to the said witness, the deceased sustained firearm injuries due to two gun shots fire because only two wound of entries were found on the person of the deceased. Here, we would like to refer that so-called



eye witnesses contradicted the manner of occurrence because according to them, three shots were fired causing firearm injury to deceased but according to PW-12, only two wounds of entry caused by firearms were found on the person of deceased. Therefore, the aforesaid contradiction creates doubt about the credibility of the so-called eye witnesses.

23. The defence has, specifically, given suggestion to PW-8 that he lodged the present case after perusing the injuries of the deceased and as, a matter of fact, he had not seen the actual killing of the deceased. The above stated contradictions between depositions of prosecution witnesses as well as in post mortem report support the above stated suggestion of the defence.

24. Admittedly, there was land and partition dispute between the appellant and informant as the appellant happens to be cousin brother of PW-8 and, therefore, possibility of false implication of appellant due to partition and land dispute can not be ruled out.

25. Here, we would also like to refer that altogether four persons including appellant were made accused and the case of one accused was separated and sent to Juvenile Justice Board whereas rest two accused were



acquitted of the charges on the ground that prosecution failed to prove factum of the common intention of the co-accused and, therefore, it is obvious that learned trial court came to a definite conclusion that there was no common intention of the accused persons including the appellant but even then the learned trial court convicted the appellant for the offence punishable under Section 302/34 of the Indian Penal Code.

26. It is pertinent to note here that no specific charge under Section 302 of the Indian Penal Code was framed against the appellant. No doubt, even in the absence of specific charge of Section 302 IPC, the appellant could have been convicted under Section 302 of the Indian Penal Code but in view of the aforesaid discussions as well as specific finding of the trial court regarding non-establishment of common intention, the learned trial court ought to have acquitted the appellant too and accordingly, we are of the opinion that the impugned judgment of conviction and sentence order can not sustain in the eye of law.

27. On the basis of aforesaid discussions, this criminal appeal is allowed and impugned judgment of conviction and sentence order dated 28.4.1994 passed by the learned Sessions Judge, Nalanda at Biharsharif in Sessions



trial no. 584/1992 is hereby set aside and accordingly, the appellant is acquitted of the charges. He is on bail. He is discharged from the sureties of his bail bonds.

28. Let copy of first and last page of this judgment be handed over to Miss Monika, learned amicus curiae for needful.

**(Hemant Kumar Srivastava, J)**  
**(Rajendra Kumar Mishra, J)**

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