

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.227 of 1995

Arising Out of PS.Case No. -140 Year- 1986 Thana -Ekangarsarai District- NALANDA
(BIHARSHARIFF)

- =====
1. Nasib Gope, son of Nanhak Gope
 2. Umesh Gope
 3. Awdhesh Gope
 4. Mahendra Gope
- All sons of Najib Gope
5. Krishna Gope
 6. Arjun Gope
 7. Mina Gope

All sons of Baso Gope

8. Baso Gope, son of Kasi Gope

All resident of village-Bare Bigha, P.S.-ParwalPur, District-Nalanda.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

=====

Criminal Appeal (DB) No. 305 of 1995

Arising Out of PS.Case No. -140Year- 1986 Thana -Ekangarsarai District- NALANDA
(BIHARSHARIFF)

=====

Umesh Gope, son of Baso Gope, resident of village-Bara Bigha, P.S.-Parwalpur,
District-Nalanda.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Pratik Mishra, Adv.
Miss Sweta Raj, Adv.

For the Informant : Mr.Sunil Kumar, Adv.
Mr. R. Griyaghay, Adv.
Mr. Ravi Shankar, Adv.

For the State : Miss Shashi Bala Sinha, APP

=====

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 19-06-2018



These two criminal appeals are arising out of a judgment dated 22nd July, 1995 passed by the learned 5th Additional Sessions Judge, Nalanda at Biharsharif (hereinafter referred to as the 'learned trial court') in Sessions Trial No.367 of 1988 arising out of Ekangarsarai P.S. Case No.140 of 1986 under Sections 147, 148, 149, 323, 324, 307 of the Indian Penal Code read with Section 27 of the Arms Act, later on, in view of the informant's death due to the injury sustained in the alleged occurrence, the case was converted in a case under Section 302 of the Indian Penal Code.

2. By the impugned judgment, the learned trial court has held that the prosecution is able to prove its case beyond all reasonable doubts and the charges under Sections 148 and 302 of the Indian Penal Code as also under Section 27 of the Arms Act has been proved against accused Umesh Gope, son of Baso Gope. It has been further held that the prosecution has proved the charges under Sections 148, 302/149 of the Indian Penal Code and Section 27 of the Arms Act against the accused Mahendra Gope, Krishna Gope and Arjun Gope. The charges under Sections 148, 302/149 have also been proved against accused Nasib Gope, Umesh Gope, son of Nasib Gope, Awadhesh Gope, Meena Gope and Baso Gope beyond all reasonable doubts. After holding the accused persons guilty having committed the offences as stated above, the learned trial court has awarded



imprisonment for life to the main assailant Umesh Gope, son of Basdeo Gope, the other accused persons who were all members of unlawful assembly have been awarded the same punishment holding them constructively liable for the offences. Umesh Gope, son of Baso Gope has been further sentenced to undergo rigorous imprisonment for two years under Section 148 of the Indian Penal Code and rigorous imprisonment for five years under Section 27 of the Arms Act. The convicts Mahendra Gope, Krishna Gope and Arjun Gope have been further sentenced to rigorous imprisonment for two years under Section 148 of the Indian Penal Code and rigorous imprisonment of five years under Section 27 of the Arms Act. The convicts Nasib Gope, Umesh Gope, son of Nasib Gope, Awadhesh Gope, Meena Gope and Basdeo Gope @ Baso Gope have been sentenced to rigorous imprisonment for life under Section 302/149 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment of two years under Section 148 of the Indian Penal Code.

3. Cr. Appeal (DB) No.227 of 1995 has been preferred by altogether eight convicts, namely, Nasib Gope, son of Nanhak Gope, Umesh Gope, Awdhesh Gope, Mahendra Gope, all sons of Najib Gope, Krishna Gope, Arjun Gope and Mina Gope, all sons of Baso Gope and Baso Gope, son of Kasi Gope, whereas Cr. Appeal



(DB) No.305 of 1995 has been preferred on behalf of Umesh Gope, son of Baso Gope. It appears that during the pendency of the appeals Nasib Gope, son of Nanhak Gope (appellant no.1), Umesh Gope, son of Nasib Gope (appellant no.2), Baso Gope, son of Kasi Gope (appellant no.8) and Krishna Gope, son of Baso Gope (appellant no.5) in Cr. Appeal (DB) No.227 of 1995 died. Taking note of this fact, vide order dated 01.05.2018, this Court called for a report from the State with regard to the status of the four appellants. The report has been received vide letter no.137 dated 09.05.2018 issued under the signature of S.P., Nalanda, a copy of which is kept on the record which certifies the information regarding death of the four appellants. We, therefore, accept the report submitted by the Superintendent of Police, Nalanda. Cr. Appeal (DB) No.227 of 1995 as regards the appellant nos.1, 2, 5 and 8 stands abated.

4. According to prosecution story based on the fardbeyan of the deceased Ram Chandra Gope, there was a dispute over a Gali in between the house of the informant and Basudeo Gope for which the Panchayat had taken some decision whereunder Basudeo Gope was directed to go towards east and will not go towards north. It is alleged that on 15.08.1986 at about 5.00 PM Basudeo Gope left his cattle in the disputed Gali which damaged the under-constructed wall on which the informant protested which led to



the alleged occurrence. In the alleged occurrence Nasib Gope armed with Bhala, his son Umesh Gope armed with Saif, Awadhesh Gope armed with Garasa, Mahendra Gope armed with country made gun, Krishna Gope, Umesh Gope, son of Basudeo Gope and Arjun Gope (all the three) armed with rifles, Basudeo Gope armed with Bhala and Mahendra Gope armed with Garasa assembled there. Accused Krishna Gope ordered for assault, upon which Umesh fired a shot from his rifle which hit the informant on his back near his waist. After sustaining injury the informant fell down. One Brahama Gope who had come to sell his grains to Basudeo Gope also came there, he sustained injury on his left thigh from the shot fired by the accused Mahendra Gope from his rifle. Allegedly other accused persons were raising Hulla of 'Maro-Maros' and were also firing shots from their rifles due to which some of the accused persons might have sustained injuries but the informant was not aware of the same.

5. The occurrence had taken place due to dispute over a Gali. On Hulla, Ram Nandan (PW-1), Jamuna (PW-6) and Deo Narain Gope (PW-5) reached at the place of occurrence and they had seen the occurrence. The fardbeyan was recorded by the Assistant Sub-Inspector S.N. Singh (PW-8). Since the informant died, case was converted under Section 302 of the Indian Penal Code, investigation was taken up and upon completion thereof the charge-sheet was



submitted leading to taking of cognizance of the offences. Subsequently, case was committed to the court of Session. The appellants were charged under various provisions of the Indian Penal Code and under the Arms Act as stated above but they denied the charges and claimed to be tried.

6. The prosecution has examined altogether eight witnesses in support of its case, whereas the defence of the accused persons was the total denial of the prosecution story in the manner as alleged by them. According to the defence the case was a counter blast of the case filed by Basudeo @ Baso Gope against the deceased Ramchandra Gope and several others. According to defence version on 15.08.1986 in the morning when Basudeo Gope was taking his cattle through the Gali in question, Ram Chandra Gope protested and was not allowing the cattle to pass through the said Gali and in the evening around sunset when Basudeo Gope was coming back with his cattle through said Gali he found Ramchandra Gope (deceased), Brahama Gope (injured, not examined), Jagdish Gope, Ramnandan Gope and several others armed with different weapons standing at the Darwaza of Jagdish Gope. As soon as Basudeo Gope reached the Gali, Brahama Gope fired a shot from his gun inflicting injury on the chest of Basudeo Gope. Ramchandra Gope (deceased) fired a shot which inflicted injury on the right hand of Basudeo Gope. All the



named accused came over the Bathan of Basudeo Gope and were talking to loot away the properties of Basudeo Gope. On behalf of the defence formal witnesses DW-1 Mahendra Prasad was examined who has proved Ext.-A (fardbeyan) and Ext.-B (FIR of counter case), Ext.-C is the certified copy of the judgment in G.R. Case No.195A/82.

7. PW-1 Ramandan Gope, PW-5 Deo Narain Gope, PW-6 Jamuna Prasad and PW-7 Jagdish Gope are said to be the eye witnesses to the occurrence. PW-3 Indu Prasad has been declared hostile. PW-2 is Dr. B.B. Singh, who had conducted the postmortem examination over the dead body of the deceased (informant), PW-4 Gariban Prasad is a witness on the inquest report and PW-8 is the investigating officer of the case. Ext.-1 is the postmortem report, Ext.-2 is the signature of PW-4 on the inquest report, Ext.-2/1 is the signature of Shyam Nandan Prasad on the inquest report, Ext.-3 is the fardbeyan, Ext.-4 is the FIR, Ext.-5 is the inquest report and Ext.-6 is the case diary.

8. Learned trial court has recorded that presence of the accused Basudeo @ Baso Gope and the deceased (the informant) Ramchandra Gope and his witnesses Ramnandan Gope (PW-1), Jagdish Gope (PW-7) and Brahama Gope is admitted. The evidence of I.O. (PW-8) shows that the injuries were sustained by both the parties during the occurrence. Accused Baso @ Basudeo Gope was also



admitted to have sustained injuries during the occurrence. Ramchandra Gope (deceased) is the informant and his fardbeyan has been taken admissible in evidence under Section 313 of the Indian Evidence Act. In the said fardbeyan, the deceased had given an explanation about the injuries on the accused persons. The learned trial court believed the prosecution evidence and held that the medical officer Dr. B.B. Singh (PW-2) has fully corroborated the assertions made by the eye witnesses P.Ws. 1, 5, 6 and 7 on the point of injuries inflicted on the person of the deceased. Before the trial court, the defence argued that since the informant has specifically asserted in his fardbeyan that he sustained injury over his waist on his back, all the eye witnesses P.Ws. 1, 5, 6 and 7 should be disbelieved as all have contradicted by saying that the shot fired by accused Umesh Gope, son of Baso Gope caused injury on the person of the informant in his abdomen beneath his naval.

9. It was also argued that the medical evidence should also be disbelieved on this score, but the learned trial court rejected the plea of the defence saying that all the eye witnesses including the informant in his fardbeyan had specifically alleged that it was accused Umesh Gope/Baso Gope who fired one shot from his rifle which hit the informant and caused injury on his person. No shot was fired at the informant. The learned trial court thereafter took a view that when



a shot is fired from a fire arm the bullet passes in a high speed and the skin of the abdomen is very tender, therefore, it was quite probable that when the bullet entered into the abdomen the informant may not have felt pinch of it but when the bullet passed through and ruptured large intestine, fractured pelvis bone, damaged muscle, blood vessels and made its exit from the back, the informant must have felt intolerable pain at the time of the exit of the bullet from his body through his back. Thus, the trial court was of the view that the informant may have presumed that the bullet has hit him on his back near his waist and it is simply for the reason that the informant had not said that the bullet entered in his body through abdomen. The doctor opined that the wound of entrance and wound of exit was caused by a single bullet as both the wounds were communicating to each other.

10. Another plea of the defence that the fardbeyan of the case (Ext.-3) was manufactured or fabricated by the I.O. because the injuries as inflicted on the person of the informant was such that he could not have survived to give his fardbeyan, has also been rejected by the learned trial court. The learned trial court held that the defence had not suggested the I.O. (PW-8) that he had manufactured the fardbeyan of the informant and PW-8 had testified on oath that in normal course of his public duty he had recorded the fardbeyan of the



informant which he had proved as Ext.-3.

11. Learned counsel representing the appellants has assailed the impugned judgment on the ground inter-alia that the learned trial court has failed to appreciate that in his fardbeyan the informant is said to have specifically stated that Umesh Gope, son of Baso Gope had fired from his rifle which hit his waist from the back side and he fell down after getting said injury. The informant further stated that one Brahama Gope who had come there to purchase foodgrains had also suffered injuries when Mahendra Gope fired from his country made rifle. He had received injury on his left thigh.

12. This Brahama Gope who is said to be an eye witness and an injured witness was not investigated by PW-8 and he was not examined in course of trial. Learned counsel submits that the medical evidence of PW-2 does not support the version of the informant. PW-2 has stated that the dead body was brought in the hospital by the Chowkidar. Doctor had found one circular punctured wound $\frac{1}{4}$ " DD diameter with inverted and blackened margin on the abdomen 2" below the umbilicus. This was wound of entrance. Learned counsel submits that the learned trial court has in order to convict the accused-appellants presumed a fact which was not proved. Learned counsel also submits that when the informant has categorically stated that he received injury in his waist on the back



side, the learned trial court is not correct in presuming that the deceased did not feel pinch of the injury when he was shot in his abdomen. It is further submitted that non-examination of the injured eye witness raises a doubt on the conduct of the prosecution and in view of the prior enmity false implication of the accused persons cannot be ruled out.

13. On the other hand, learned APP for the State has supported the impugned judgment. It is submitted that the learned trial court has rightly appreciated the evidence adduced on behalf of the prosecution as well as defence and the view taken by the learned trial court is based on the cogent evidence which need not be interfered with.

14. Having heard learned counsel for the appellants and learned A.P.P. for the State and after going through the materials available on record, we find that in the fardbeyan the informant (deceased) has specifically alleged that he received fire-arm injury in his waist from the back side and fell down due to the said injury. The medical evidence i.e. the postmortem report (Ext.-1) however shows the wound of entry on the abdomen. PW-2 in his evidence also stated that firing from a distance of even ten to twenty feet will cause blackening and that the injury on the body of the deceased was possible only if fired from the front. PW-1 who is said to be an eye



witness has stated that shot fired by Umesh Gope hit the deceased below naval in his left side. He has stated that Brahama Gope had also suffered injury on his left thigh and had fallen down. He claims that the deceased Ramchandra Gope died in Biharsharif Hospital.

15. On going through the evidence of Sheonath Singh (PW-8) who had conducted the investigation has stated that on 15.08.1986 at about 8.30 PM the informant Ramchandra Gope and Brahama Gope had come at the police station in injured condition where he had recorded the statement of Ramchandra Gope. He has proved the fardbeyan as Ext.-3. He has stated that he had sent Ramchandra Gope and Brahama Gope for treatment to Sadar Hospital, Biharsharif. PW-8 claims that he had also went to the hospital with them and then came back to the police station. In course of his cross-examination in paragraph 12, PW-8 has stated that Dev Narain Gope (PW-5) had not told him that he was present in his village at the time of sunset. He had also not said that Ramchandra (deceased) had received firearm injury below the naval of the deceased and Mahendra had fired which hit Brahama. PW-8 has further stated that he had not taken the statement of Jagdish (PW-7). He has further stated in paragraph 17 of his evidence that Ext. 5 (inquest report) was recorded by Sub-Inspector Shyam Sundar Mishra on 17.08.1986 in his presence but his signature was not appearing on



Ext.-5. A perusal of Ext.-5 shows that the same was prepared on 17.08.1986 at 11.00 AM in the Sadar Hospital, Biharsharif. The alleged occurrence took place on 15.08.1986 at about 5.00 PM and according to the eye witnesses particularly PW-1 the deceased was hit below his naval, but this was not stated before the investigating officer.

16. In the given set of evidence available on the record, we are of the opinion that the learned trial court has failed to appreciate the evidences adduced on behalf of the prosecution. In this case the fardbeyan of the informant which has been treated as dying declaration does not get support from the medical evidence i.e. the postmortem report. The most important eye witness namely Brahama Gope who is said to have suffered injury on his left thigh has been withheld by the prosecution. He has not been investigated by the I.O. The I.O. has stated in his evidence that in course of investigation he had not recorded the statement of Jagdish Gope (PW-7) and has further stated that Deo Narain Gope (PW-5) had not told him that Ramchandra Gope (deceased) had received injury by fire arm below his naval. The prior enmities between the parties are admitted, therefore considering the vital lacuna in the evidence of prosecution we are of the opinion that the defence has been able to create a reasonable doubt as to the prosecution version and manner of



occurrence in this case. In view of withholdment of Brahama Gope and the fact that the prosecution witnesses who later on deposed as eye witnesses did not make a statement corroborating the medical evidence before the investigating officer at the first instance, we give benefit of doubt to the appellants.

17. The impugned judgment is set aside. Both the appeals are allowed and the appellants are acquitted and discharged from the liability of their respective bail bonds.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

Arvind/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	26 .06.2018
Transmission Date	26 .06.2018

