

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 94 of 1994

Arising Out of PS.Case No. -100 Year- 1990 Thana -Dalsingsarai District- SAMASTIPUR

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Mahendra Singh, Son of Ram Chandra Singh, resident of village-Basadhiya, P.S.
Dalsingsarai, District-Samastipur.

.... Accused/Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Uma Kant Shukla, Adv.
Mr. Pramod Kumar, Adv.

For the Respondent : Mr. Dilip Kumar Sinha, A.P.P.

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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: 05-01-2018

Heard learned counsel appearing for the appellant and
the State.

2. The sole appellant has preferred this appeal against
the judgment of conviction and sentence order dated 18.01.1994
passed by 5th Additional Sessions Judge, Samastipur in Sessions Trial
No. 223/105 of 1991/1991 by which and whereunder the sole
appellant was convicted under Section 302 of the I.P.C. and ordered
to undergo life imprisonment for the above stated offences and also
convicted under Section 27 of the Arms Act for which he was ordered
to undergo rigorous imprisonment for three years. Both the sentences



were ordered to run concurrently.

3. PW-9, namely, Yadunandan Singh, who happens to be father of deceased Deo Narayan Singh, gave his ferdbeyan on 27.07.1990 at 05:00 A.M. before the S.I. of Dalsingsarai police station, namely, Daya Shankar Rai (PW-11) at Sub-divisional Hospital, Dalsingsarai to this effect that in the night of 26.07.1990, he was sleeping in his house and his deceased son, namely, Deo Narayan Singh was sleeping at his flour mill. In the meantime, he heard sound of firing and crying of his deceased son upon which he woke up and having taken his licensee gun came running to village-Bajitpur Gado and reached near the house of Lakhan Das and Dhanik Das where he found his son, Deo Narayan Singh lying on the ground wriggling in pain. He also noticed four to five persons fleeing towards east side and out of the aforesaid persons, he identified the appellant. He went near his son, who disclosed that it was appellant, who shot fire on him. In the meantime, several persons including Chanchal Das, Mahendra Das, Lakshmi Das, Ram Pravesh Baitha (PW-6) of village-Gado Bazitpur and Ashok Singh, Ram Udgar Singh, Permashwar Singh and Bathu Singh of village-Basadhiya also reached there. The aforesaid persons chased the appellant and his companions but they managed to escape from there taking the advantage of darkness. The informant noticed that blood was oozing out from the chest of his son



who had sustained two fire arm injuries on his chest. The informant tied the injury of his son with Gamcha and with the help of his villagers brought his deceased son to Sub-divisional hospital, Dalsingsarai where he was declared brought dead by the doctor. The reason behind the alleged occurrence is said to be previous land dispute and pendency of civil suit.

4. On the basis of ferdbeyan (Exhibit-1) of the informant, Dalsing Sarai P.S. Case No. 100 of 1990 for the offences punishable under Section 302/34 of the Indian Penal Code was registered against the appellant and four unknown persons. The formal F.I.R. has been marked as Exhibit-5. PW-11 Daya Shankar Rai took charge of investigation and in course of investigation, he inspected the place of occurrence, recorded the statements of witnesses, collected the post mortem report but before completion of the investigation, he was transferred and thereafter, charge sheet was submitted by PW-12, namely, Mustaque Ahmad. The cognizance of the offences was taken and the case was committed to the court of sessions in usual course.

5. The appellant stood trial before the court below and accordingly, he was charged for the offences punishable under Section 302 of the Indian Penal Code and 27 of the Arms Act. The appellant denied the charges and claimed to be tried.



6. To substantiate the charges, prosecution examined altogether 13 witnesses and also got exhibited ferdbeyan as Exhibit-1, post mortem report as Exhibit-2, signature of informant PW-9 as Exhibit-3, signature of Nirash Singh (PW-10) as Exhibit-3/1, forwarding note as Exhibit-4, formal F.I.R. as Exhibit-5, death inquest report as Exhibit-6, order sheets as Exhibit-7, seizure list as Exhibit-8, certified copy of judgment passed in Title Suit No. 28 of 1971 as Exhibit-9. Apart from this, one pair of sleeper was marked for identification as X and one piece of bullet marked for identification as Y. The prosecution also proved two torches as material exhibits 1 and 2.

7. The statement of sole appellant was recorded under Section 313 of the Cr.P.C. in which he denied the prosecution story and reiterated his innocence. From perusal of statement recorded under Section 313 of the Cr.P.C. as well as from the trends of cross examination of the prosecution witnesses, it would appear that defence of the appellant was total denial of prosecution story and his false implication due to previous enmity and dispute.

8. The defence also examined, altogether, three witnesses and proved sale deed as Exhibit-A, F.I.R. of Dalsingsarai P.S. Case No. 08 of 1979 as Exhibit-C, certified copy of order dated 06.06.1990 passed in Title Appeal No. 23 of 1987 as Exhibit-B and



certified copy of deposition of Dhannu Singh in Title Suit No. 100 of 1964 as Exhibit-D.

9. The learned court below having analyzed the evidences available on the record convicted and sentenced the appellant in the manner as stated above on two grounds. Firstly, the deceased had made oral dying declaration before the PW-1, PW-9 and some other witnesses and secondly, the appellant was identified by the PW-8 & 9 in the light of torch while he along with his companions fleeing from the place of occurrence just after the alleged occurrence.

10. Learned counsel appearing for the appellant assailed the aforesaid findings submitting that learned court below failed to take note of this fact that deceased was not in a position to make statement before the above stated witnesses after having sustained such a grievous injury and the aforesaid fact has been stated by the PW-7 who has stated at para-3 of his cross examination that deceased might be unconscious immediately after receiving such grievous injuries. He further submits that learned court below only on the basis of surmises and conjectures held that deceased even having sustained such injury might be in conscious state for certain periods. Continuing his submission, he submits that prosecution failed to bring evidence on record to show that even having received serious and grievous injury the deceased was in conscious state and was able to



make statement before the witnesses.

11. Learned counsel for the appellant further submits that prosecution could not succeed to establish the place of occurrence because according to ferdbeyan of PW-9, at the time of alleged occurrence deceased was sleeping in his flour mill but he was found in injured condition on a village road which is about 200 yards far from the flour mill of the informant. He further submits that moreover, the investigating officer did not collect blood, soil or grass from the place of occurrence and to cover up the aforesaid fault, the investigating officer stated that there was heavy rain in midnight but he admitted in his cross examination that he had not mentioned the factum of rain in the case diary. He submitted that all the above stated fact creates doubt about the place of occurrence.

12. Learned counsel for the appellant further submits that identification of the appellant is also doubtful because the informant did not mention in his ferdbeyan that he had identified the appellant in the light of torch nor the informant produced the torch before the investigating officer as admitted by the investigating officer in his deposition. Similarly, the other witness also did not produce the torch before the investigating officer in course of investigation and the investigating officer accepted that in course of investigation, no one had produced any torch before him. He submits that admittedly, the



alleged occurrence is said to have taken place at 10:30 P.M. and there was complete dark at the time of alleged occurrence and, therefore, it was not possible either for the informant or for the other witnesses to identify the appellant while the appellant was fleeing from there, particularly, when the appellant was at the distance of more than 10-15 lagga from the aforesaid witnesses.

13. Learned counsel for the appellant further submits that informant has, specifically, stated in his ferdbeyan as well as deposition that deceased was killed because a civil suit was pending between the informant and family members of the accused but as a matter of fact, civil suit was decided against the father of the appellant who had preferred an appeal but the aforesaid appeal had already been disposed of prior to the alleged occurrence and, therefore, genesis of the occurrence as disclosed by the informant appears to be incorrect. He further submits that moreover, the land for which the civil suit was filed had already been transferred to the own brother of informant and the family members of appellant had already lost their interest in the aforesaid land and, therefore, there was no occasion before the appellant to commit murder of the deceased. He further submits that as a matter of fact, there was a piece of land of the appellant adjacent to house of the informant and informant wanted to purchase the aforesaid land but father of the appellant sold the aforesaid land to



own brother of the informant and that is the reason the informant was carrying grudge against the family members of the appellant and when his son was murdered by some other persons, the informant implicated the appellant in this case. He further submits that witnesses examined on behalf of the prosecution are either family members of informant or inimical to the appellant but learned court below failed to appreciate the above stated facts in right perspective and came to wrong conclusion.

14. On the other hand, learned A.P.P. appearing for the State supported the impugned judgment of conviction and sentence order arguing that all the prosecution witnesses have consistently stated about the involvement of the appellant in the alleged crime. He further submitted that the witnesses, specifically, stated that deceased made his dying declaration before the PW-1, 8 & 9 and moreover, the PW-8 claimed to have seen the actual killing of the deceased. He further submits that defence failed to illicit anything contradictory to the prosecution case from the depositions of prosecution witnesses and, therefore, it is a well proved case and, therefore, this court should not interfere into the judgment of conviction and sentence order.

15. Having heard the contentions of both the parties, we went through the record. We find that PW-1, Usha Singh is the wife of deceased and admittedly, she had not seen the actual killing of



the deceased. This witness only stated that on the alleged date of occurrence at about 10:00 P.M. her husband came to house but in the meantime, the electricity went off and thereafter her husband left home saying that he was going to remove the defect of fuse. She further stated that in the meantime, she heard sound of firing as well as crying of her husband, who was crying that appellant had shot fire on him. She further stated that having heard the aforesaid sound of firing and crying of her husband, her father in law (PW-9) having taken his licensee gun went there and she also followed her father in law. She further stated that when she reached near the national highway, she noticed that her husband was lying there. She further stated that her husband disclosed before the PW-9 that it was appellant, who had shot fire on him. In her cross examination, she admitted that national highway is at the distance of 25 lagga from her house. She further admitted at para 4 of her cross examination that having heard the sound of firing she got woke up her family members. She further stated that when she reached on the place of occurrence, 10-15 persons had already assembled there but she had no talk with those persons. She further stated that she remained on the place of occurrence for only ten minutes and after that her husband was taken away from there for treatment.

16. PW-2, Ram Nandan Singh and PW-3 Parmeshwar



Singh are full brothers. Both the aforesaid witnesses stated that having heard the sound of firing, they came out of their house and saw five persons fleeing towards east side and out of them they identified appellant and Ram Chandra Singh as well as Rajendra Singh. They further stated that the appellant was carrying gun in his hand at that time. Further both witnesses stated that they returned to their home and in the next morning, they came to know that deceased was killed by appellant Mahendra Singh. Although, both the aforesaid witnesses denied this fact that they had inimical term with the family member of the appellant but Exhibit-C goes to show that there was previous enmity between PW-2 & 3 and family members of the appellant.

17. PW-4 Akaloo Singh has been tendered whereas PW-5 Prem Kumar Mishra is a formal witness who has proved ferdbeyan as Exhibit-1.

18. PW-6 Ram Pravesh Baitha is said to be a witness of alleged occurrence and his name is mentioned in Exhibit-1 but this witness did not turn up for cross examination and accordingly, his deposition became redundant and the trial court did not take in account the deposition of this witness.

19. PW-7 is Dr. Hari Sharan Prasad Singh, who conducted post mortem examination on the corpus of the deceased, Deo Narayan Singh. This witness stated that in the noon of



27.07.1990, the dead body of deceased was brought before him and he did post mortem examination on the dead body of the deceased. This witness further stated that he found following injuries on the person of the deceased:-

- (i) **Lacerated wound, back of the chest 1" x 3/4" x chest cavity deep- left side with blackening of skin and inverted margin. This is wound of entry.**
- (ii) **Lacerated wound left side in the front of the chest 1 1/2"x 1/2 x chest cavity deep with inverted margin. This is wound of exit.**
- (iii) **Lacerated wound right side posterior aspect of the chest 1"x 1/2" x chest cavity deep with blackening of skin and inverted margin. This is wound of entry.**
- (iv) **Lacerated wound right side front of the chest 1 1/2 "x 1/2"x chest cavity deep with inverted margin. This is wound of exit.**

20. In para-3 of cross examination, this witness stated that all the parts damaged were very vital parts of the body and if such vital organs are damaged and if proper treatment is not available, the injured may die within 2-3 hours. This witness further stated that patient may be unconscious immediately after receiving such injuries. One thing is clear from the deposition of PW-7 as well as from perusal of Exhibit-2, the post mortem report that deceased sustained four injuries but injury no. 1 and 2 are communicating to each other.



Similarly, injury no. 3 and 4 are communicating to each other and the aforesaid injuries were caused by fire arm and therefore, it is obvious that deceased sustained two fire arm injuries. It is also obvious from the deposition of this witness that injuries sustained by deceased were such a serious that deceased might have lost his conscious just after receiving the aforesaid injuries.

21. PW-8, Ram Udar Singh claimed himself to be eye witness of the alleged occurrence and this witness stated that on the alleged date of occurrence at about 10:30 P.M. he was returning to his home after closing his shop and when reached near Wazitpur school, he heard sound of firing. He further stated that again he heard another sound of firing and when he proceeded 20 lagga ahead and flashed his torch, he saw 4-5 persons fleeing from there and out of the aforesaid persons he identified the appellant, who was carrying gun in his hand. He further stated that he again proceeded and saw the deceased, Deo Narayan Singh lying on the ground wriggling in pain. The deceased Deo Narayan Singh disclosed that appellant had shot fire on him. He further stated that when the deceased disclosed the aforesaid fact, father of the deceased (PW-9), PW-1 as well as one Chanchal Das were also present. The cross examination of this witness goes to show that this witness has inimical term with the appellant. He admitted at para 6 of his cross examination that even after hearing the sound of



second firing he did not flash his torch. Moreover, he also admitted in his cross examination that he had not claimed before the police that he had seen four to five persons fleeing from there.

22. PW-9 Yadunandan Singh is the informant of the present case and he supported the prosecution case. He claimed that on the alleged date of occurrence he was sleeping at his door and heard the crying of his son, who was calling him and having heard the sound of crying of his son, he having armed with his licensee gun and torch ran towards east side and reached near the house of Lakhan Das and Dhanik Das where he saw his son lying on the ground and telling that appellant had shot fire on him. He identified the appellant in the light of torch. This witness further stated that there was a civil suit between him and father of the appellant and the aforesaid civil suit was decreed in his favour against which the father of the appellant filed title appeal which is pending. At para 6 of his cross examination, this witness admitted that there is a piece of land of father of the appellant adjacent to his house and the aforesaid land was sold by father of the appellant to his own brother, namely, Sundar Mahto. He also admitted at para-8 of his cross examination that there are several houses near the place of occurrence. He denied this fact that his deceased son was a criminal. He also claimed that he had seen the appellant and other miscreants from the distance of 10 lagga. This



witness further admitted at para-12 of his cross examination that while appellant and his companions were fleeing from the place of occurrence, except this witness, no one had come there. Further at para 13 of the cross examination, this witness stated that when the mohalla people came there, he did not talk with them. He further admitted that he had no talk with his family members. He also admitted that he did not give any information to Mukhiya, Chowkidar and Dafadaar nor sent any person to police station for giving information in respect of the alleged occurrence.

23. PW-10, Nirash Singh is a witness on seizure and proved the signature on seizure list as Exhibit-3/1.

24. PW-11, Daya Shankar Rai is investigating officer who stated that he recorded the ferdbeyan of PW-9 on 27.07.1990 at Sub-divisional Hospital, Dalsingsarai and prepared inquest report of deceased. He further stated that he recorded further statement of PW-9 and proceeded to inspect the place of occurrence. He stated that he reached on the place of occurrence at 09:30 A.M. He described the place of occurrence at para-4 of his examination in chief. He stated that the place of occurrence of the present case was situated at village Gado Bazitpur which is at the distance of 150 yard west from the N.H.

28. This witness described the boundaries of place of occurrence and also noticed that there was some grass on the field of place of



occurrence as well as plants of maize crop. He also noticed blood on the place of occurrence but he did not take pain to seize the blood found on the place of occurrence though he seized a pair of sleeper from the place of occurrence and prepared the seizure list which is Exhibit-8. He admitted that he did not visit the flour mill of the deceased nor verified this fact as to where the deceased was sleeping prior to the alleged occurrence. He also admitted that several villagers had assembled at the time of inspection of place of occurrence as well as seizure of sleepers but none of the villagers could identify the aforesaid sleepers. He further stated that witness PW-2 Ram Nandan Singh had never made statement before him that at the time of alleged occurrence he was carrying torch and had identified the culprits in the light of torch. Similarly, he admitted that PW-8 had not made statement before him that he went near the deceased and saw him wriggling in pain. He also admitted that neither PW-9 nor any other witness had produced any torch before him.

25. PW-12 is second investigating officer who had only submitted charge sheet. Similarly, PW-13 is a formal witness who produced empty cartridges and plastic sleepers which had been marked as X & Y for identification. This witness admitted that case number has not been mentioned on the aforesaid material exhibits.

26. The defence examined DW-1, namely, Raghunath



Singh to prove the sale deed executed by father of appellant in favour of Shankar Singh and Devendra Singh and similarly, DW-2, Tirpit Rai to prove the previous conduct and antecedent of the deceased. DW-3 Prem Kumar Mishra is a formal witness who has proved the F.I.R. of Dalsingsarai P.S. Case No. 08 of 1979 which has been brought on the record by the defence to show inimical term of the witnesses with the appellant.

27. On perusal of above stated evidences, it is obvious that prosecution has relied upon two sets of evidence. Firstly, the so-called oral dying declaration of the deceased and secondly, the identification of the appellant at the place of occurrence just after the alleged occurrence.

28. No doubt, the PW-1, 8 and 9 have stated that deceased had disclosed the name of the appellant as assailant but it is an admitted position that when the deceased sustained firearm injury, PW-1 and 9 were at their home and they went on the place of occurrence having heard the sound of firing. At this juncture, we would like to say that PW-7, specifically, stated in his deposition that deceased might be in unconscious position immediately after receiving the injuries. There is nothing on the record to show that except the above stated statements of prosecution witnesses, deceased was in condition to make statement before them after the alleged



occurrence. Moreover, the aforesaid statement of an expert creates doubt on this fact as to whether the deceased had made statement before the PW-1, 8 and 9 or not and, therefore, in our view, the learned court below ought to have not placed reliance upon oral dying declaration. Although, it is true that a judgment of conviction can be based on oral dying declaration, if the oral dying declaration inspires confidence to the court but in the present case, in view of statement of PW-7, the so-called oral dying declaration of the deceased does not inspire confidence to the court.

29. The prosecution has relied upon the identification of the appellant but we find that the aforesaid so-called identification of the appellant is also doubtful because PW-9 has, nowhere, mentioned in his ferdbeyan that he went on the place of occurrence having torch in his hand rather he stated that he went on the place of occurrence having his licensee gun. Similarly, PW-2 also claimed that he had identified the appellant and two others in the light of torch but he had not made such statement before the investigating officer in course of investigation as it is evident from perusal of para 7 of his cross examination and, therefore, it appears that he developed his statement in course of trial. Almost similar case is PW-3 who, too, claimed to identify the appellant and two others and claimed to have identified them in the light of Batti (torch) but admittedly, at para 5 of



his cross examination, he had not made statement before the police regarding identification of the appellant and others in light. Moreover, it would appear from perusal of Exhibit-C that PW-2 and 3 have inimical term with the family of the appellant. Therefore, in our opinion, no reliance can safely be placed upon statements of PW-2 and 3. PW-6, namely, Ram Pravesh Baitha has claimed to have seen the alleged occurrence but he did not turn up for cross examination and, therefore, his deposition can not be read into evidence.

30. PW-8, Ram Udar Singh claimed to have seen the alleged occurrence but in cross examination when defence put specific suggestion to him regarding his false deposition on account of previous enmity, he tried to suppress the aforesaid fact. However, he admitted in his cross examination that he had not made statement before the police to this effect that he had seen four to five persons running from the place of occurrence. It is pertinent to note here that he claimed to have seen the appellant fleeing from the place of occurrence but it is not possible to identify a person from his back side, particularly, in dark night and, therefore, the statement of this witness, too, appears to be doubtful.

31. PW-9 is informant of this case. He, too, claimed to have identified the appellant in the light of torch but as we have already discussed that he had not disclosed the aforesaid fact in



ferdbeyan and moreover, there are several contradictions in the statement of this witness and, therefore, it is very difficult for us to place reliance upon the deposition of this witness.

32. On the basis of aforesaid discussions, we are of the opinion that prosecution could not succeed to prove its case beyond shadow of reasonable doubts and the appellant is entitled to get privilege of benefit of doubt. Accordingly, this criminal appeal is allowed and the impugned judgment of conviction and sentence order dated 18.01.1994 is, hereby, set aside. The appellant is set free and he is discharged from the liabilities of bail bonds.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

SHAHZAD/-

AFR/NAFR	A.F.R.
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