

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 19 of 1995

Arising Out of PS.Case No. -null Year- null Thana -null District- BHOJPUR

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Bhikhari Pandey @ Ganpati Pandey, son of Radha Pandey, resident of village-
Jagdeopur, P.S. Agiaon, District Bhojpur.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Yogesh Chandra Verma, Sr. Adv.

Mr. Sunil Kumar-II, Adv.

Mr. Abhoy Kumar Kashyap, Adv.

For the State : 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: 26-06-2018

1. Heard learned counsel for the appellant as well as
learned Additional Public Prosecutor for the State.

2. The appellant, namely, Bhikhari Pandey @ Ganpati
Pandey faced trial along with co-convict Radha Pandey, in Sessions
Trial No. 128 of 1993 and the appellant and co-convict Radha Pandey
were convicted for the offence punishable under Section 302/34 of the
Indian Penal Code whereas co-convict Radha Pandey was separately



convicted for the offence punishable under Section 27 of the Arms Act. The appellant and co-convict Radha Kishun Pandey were sentenced to undergo imprisonment for life for the offence punishable under Section 302/34 of the Indian Penal Code, whereas co-convict Radha Kishun Pandey was separately sentenced to undergo rigorous imprisonment for two years for the offence punishable under section 27 of the Arms Act.

3. The appellant filed the present appeal whereas co-convict Radha Pandey filed Criminal Appeal (DB) No. 20 of 1995 against the same judgment of conviction and sentence order dated 22.12.1994 and 23.12.1994 respectively passed by learned Sessions Judge, Bhojpur at Ara in the above stated Sessions Trial No. 128 of 1993.

4. During the pendency of Criminal Appeal (DB) No. 20 of 1995, sole appellant, namely, Radha Pandey of the aforesaid criminal appeal died as a result whereof the aforesaid criminal appeal stood abated.

5. PW-2, namely, Nandji Pandey on 19.11.1992 at about 11.40 P.M. gave his fardbeyan to S.I., Ramashish Kamati of Piro police station at State Hospital, Piro to this effect that on the same day, at about 9:00 PM, he was sitting at the door of his nephew, namely, Sumeshwar Pandey, and in the meantime, his co-villagers



Radha Pandey and Bhikhari Pandey @ Ganpati Pandey (appellant) came there and started abusing his nephew. His nephew Sumeshwar Pandey came out of his house and forbade them to do so as a result whereof, a scuffle started between the appellant and his nephew. The informant intervened into the aforesaid scuffle but appellant uttered to shoot his nephew and thereafter, Radha Pandey (Co-convict) took out pistol from his waist and shot fire on his nephew as a result whereof, his nephew sustained firearm injury on his abdomen and fell down there. The informant raised alarm which attracted his co-villagers Ram Nath Pandey, Lal Babu Pandey and Indrajeet Pandey who came there and thereafter, the appellant and other co-accused fled away from there. The deceased was taken to State Piro Hospital where he died in course of his treatment. The reason behind the above stated occurrence is said to be long standing land dispute and enmity between the deceased as well as the appellant and co-convict.

6. On the basis of aforesaid fardbeyan, Agiaon Bazar P.S. Case No. 61 of 1992 was registered for the offences punishable under Sections 302/34 of the Indian Penal Code and 27 of Arms Act and formal FIR was drawn up against the appellant and co-convict Radha Pandey for the aforesaid offences.

7. PW-6 took charge of investigation and after completion of investigation, he submitted charge-sheet against the appellant and



co-convict Radha Pandey. The cognizance of the offence was taken and the case was committed to the court of sessions in usual way and, accordingly, appellant and co-convict were put on trial before learned Sessions Judge, Bhojpur in Sessions Trial No. 128 of 1993.

8. The appellant and co-convict Radha Pandey stood charged for the offences punishable under Section 302/34 of the Indian Penal Code whereas co-convict Radha Pandey was separately charged for the offence punishable under section 27 of the Arms Act. The charges were denied and appellant as well as co-convict claimed to be tried.

9. In course of trial, the prosecution examined, altogether, 7 witnesses and also got exhibited the post mortem report (Ext. 1), fardbeyan (Ext. 2), injury report (Ext. 3), formal F.I.R. (Ext. 4), Parcha (Ext. 5) and certified copy of order sheet (Ext. 6). The statements of appellant and co-convict were recorded under Section 313 of the Cr. P. C. in which they denied the prosecution story.

10. No oral evidence was adduced by the appellant and other co-convict but appellant and co-convict got exhibited certified copy of order sheet of proceedings under section 107 of the Cr. P. C as Ext. A series, certified copy of judgment as Ext. B, Charge-sheet as Ext. C, certified copy of deposition in case no. 897 as Ext. D. The defence brought the aforesaid documents in evidence to show the long



standing land dispute as well as enmity between the parties as well as prosecution witnesses.

11. The learned trial court after scrutinizing the evidences available on record convicted the appellant for the offence punishable under Section 302/34 of the Indian Penal Code as stated above on the ground that the appellant and co-convict had common intention to kill the deceased and as a matter of fact, co-convict opened fire on the deceased in furtherance of common intention.

12. Learned counsel appearing for the appellant challenged the impugned judgment of conviction and sentence order, arguing that the learned court below failed to appreciate the evidences available on the record in its right perspective and as a matter of fact, the learned court below completely ignored this fact that the appellant as well as co-convict had no common intention to commit the murder of deceased as the prosecution witnesses very clearly admitted in course of trial that the scuffle took place between the appellant and deceased and that scuffle lasted for near about 10 minutes and, therefore, the aforesaid fact clearly goes to show that appellant and co-convict had no common intention to commit the murder of deceased. He further submitted that the evidences available on the record reflect that all of a sudden co-convict took out pistol and shot fire on the deceased and, as a matter of fact, PW-2 (informant)



developed the story of instigation by the appellant just with an object to falsely implicate the appellant. He further submitted that no charge under Section 109 of the Indian Penal Code was framed against the appellant and, therefore, the learned court below committed error in convicting the appellant for the offence of instigation.

13. On the other hand, learned Additional Public Prosecutor supported the impugned judgment of conviction and sentence order arguing that almost all the eye-witnesses are consistent on this point that it was appellant, who instigated the co-convict to shoot the deceased and co-convict in furtherance of instigation of the appellant shot fire on the deceased and, therefore, the aforesaid fact clearly goes to show that appellant and co-convict had common intention to commit murder of the deceased.

14. Having heard the rival contentions of the parties, we went through the record. It is obvious from perusal of the record that altogether seven prosecution witnesses have been examined, out of them PW-2, PW-3 and PW-4 claimed themselves to be eye witness of the alleged occurrence. So far as PW-1 is concerned, he happens to be doctor, who did autopsy of deceased. Similarly, PW-6 is investigating officer whereas PW-5 has been declared hostile and PW-7 has been tendered by the prosecution. Therefore, it is apparent that PW-2, PW-3 and PW-4 are material witnesses.



15. PW-2 is the informant and this witness stated that appellant and co-convict, Radha Pandey came at the door of deceased Sumeshwar Pandey and started abusing the above stated deceased Sumeshwar Pandey and when deceased forbade them to do so, scuffle started between deceased and appellant as well as co-convict and, thereafter, appellant ordered the co-convict to assault the deceased upon which co-convict Radha Pandey took out pistol and opened fire on the deceased. This witness claimed that PW-3 Jaganath Pandey, PW-4 Indrajeet Pandey, PW-5 Shambhu Mishra, PW-7 Lal Babu Pandey and one Ramnath Pandey arrived there and, thereafter, the deceased was taken to hospital where he died in course of his treatment. The attention of this witness was drawn towards his written report vide para 12 of the cross examination and this witness stated that he had not made statement before the police that Ramnath Pandey, Lal Babu Pandey, Jaganath Pandey and Indrajit Padney came there when he raised alarm.

16. PW-3 stated that appellant gave order to shoot and thereafter, co-convict Radha Pandey opened fire on the deceased. Similarly, PW-4 stated that on the instigation of appellant, Radha Pandey took out pistol from his waist and opened fire on the deceased.

17. From conjoint reading of written report as well as depositions of PW-2, PW-3 and PW-4, it is apparent that in written



report, PW-2 claimed that Ramnath Pandey, Lal Babu Pandey and Indrajit Pandey came on the place of occurrence when he raised alarm and prior to his raising alarm, the deceased had already sustained firearm injury. Therefore, the aforesaid fact goes to show that PW-3 and PW-4 were not present on the place of occurrence when allegedly, appellant ordered the co-convict to shoot the deceased.

18. PW-2, PW-3 and PW-4 have admitted in there evidence that there was long standing land dispute and enmity between the deceased and appellant as well as co-convict. Furthermore, PW-3 and PW-4 admitted that they had inimical terms with the appellant as well as his father, who is co-convict.

19. Admittedly, no charge under Section 302 read with Section 109 of the Indian Penal Code has been framed against the appellant nor while recording the statement of appellant under Section 313 of the Cr.P.C. any specific question regarding the above stated fact of instigation was put to the appellant. Therefore, it is obvious that the learned trial court failed to place evidence which came against the appellant in course of trial before him at the time of recording statement under Section 313 of the Cr.P.C.

20. As we have already discussed that except PW-2, the presence of PW-3 and PW-4 on the place of occurrence at the time of alleged occurrence was doubtful and admittedly, PW-2 had inimical



term with the appellant and the statement of PW-2 has not been corroborated by any other material witness and therefore, in our view, no reliance can safely be placed upon the deposition of PW-2.

21. The evidence of PW-2 can be looked from another angle. The PW-2 has stated:- भिखारी पांडये मारने का आदेश दिया। The word “मारो” has two meaning in English. First assault and second kill. Admittedly, the appellant was unarmed at the time of alleged occurrence and there is nothing in the evidence of PW-2 as well as other witnesses to show that appellant was aware of this fact that co-convict was carrying pistol with him and, therefore, even if it assumed that appellant uttered the word “मारो”, then also, it cannot be presumed that he had intention to order the co-convict to shoot the deceased and, therefore, in our view, the learned court below has committed error in coming to the conclusion that the appellant and co-convict had common intention to commit the murder of the deceased and we are of the considered opinion that the impugned judgment of conviction and sentence order cannot sustain against the appellant in the eye of law.

22. On the basis of aforesaid discussions, this criminal appeal stands allowed and the impugned judgment of conviction and sentence order in respect of appellant only is, hereby, set aside and accordingly, appellant is acquitted of the charge framed against him.



The appellant is on bail. He is discharged from the liabilities of his bail bonds.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

SHAHZAD/-

AFR/NAFR	AFR
CAV DATE	N.A.
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