

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.48 of 2004

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

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1.Bilash Yadav son of Sri tulsi Yadav
2.Baleshwar Yadav son of Sri Naga Yadav
3. Ram Briksh Yadav son of Naga Yadav
4. Umesh Yadav son of sri Arjun Yadav
5. Bhuneshwar Yadav son of Sri Arjun Yadav
All are residents of village ordiyar P.S- Wazirganj. Dist- Gaya. Appellant/s
Versus
State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Bamdeo Pandey
Mr.Jitendra Pandey
For the Respondent/s : Mr. Syed Ashfaque Ahmad

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA
ORAL JUDGMENT
Date: 06-02-2018**

1. Learned counsel for the appellants as well as learned Additional Public Prosecutor Mr. Syed Ashfaque Ahmad appearing for the State and perused the record.

2. The present Appeal has been preferred against the judgment of conviction dated 10.01.2004 and sentence order dated 12.01.2004 passed by the learned 3rd Additional Sessions Judge, Gaya in Session trial no. 6/97/189/94 by which and whereunder the appellant nos. 1, 2 and 3 have been convicted for the offence punishable under section



307/149 of the Indian Penal Code whereas appellant nos. 4 and 5 have been convicted for the offence punishable under section 148 of the Indian Penal Code and, accordingly, the appellant nos. 1, 2 and 3 have been sentenced to undergo rigorous imprisonment for three years and fine of Rs.1000/- to each of them for the offence punishable under section 307/149 of the Indian Penal Code whereas appellant nos. 4 and 5 have been sentenced to undergo rigorous imprisonment for six months for the offence punishable under section 148 of the Indian Penal Code, and furthermore, in default of payment of fine, the appellants have to go two months rigorous imprisonment.

3. PW-5, Kishori Yadav, gave his fardbeyan to A.S.I Wajirganj Police Station on 13.11.93 at about 10 a.m at the M.M.C Hospital, Gaya to this effect that on the same day at about 8 a.m he gone to graze his she-Buffalo and while returning to his home, when he reached near the north hillock of the village, he saw the appellants armed with firearms standing near a pipal tree and seeing him, the



appellant no. 2 Baleshwar Yadav ordered others to kill him and, thereafter, appellant no.1 Bilash Yadav shot fire on him which hit on his left thigh near the testicle and having sustained firearm injury, he fell down there. Thereafter, the appellant no. 3 Briksh Yadav also opened fired on him but the aforesaid fire did not hit him. He raised alarm which attracted the family members and villagers, who came there and, thereafter, he was taken to hospital. The reason behind the alleged occurrence is said to be the land dispute and previous litigation.

4. On the basis of fardbeyan of PW-5, Kishori Yadav Wazirganj P.S.Case No. 184 of 1993 for the offences under section 302, 307/324 of the Indian Penal Code and 27 of the Arms Act was registered and subsequently, on the same day formal F.I.R for the aforesaid offences was drawn up against the appellants. After investigation, police submitted charge sheet. Cognizance of the offence was taken and the case was committed to the court of sessions.

5. The appellants stood charged for the offences



punishable under sections 307/149, 326/149,147 and 148 of the Indian Penal Code to which they denied and claimed to be tried.

6. In course of trial, prosecution examined altogether, five witnesses and also got exhibited the signature of PW-5 on his fardbeyan as Exhibit-1 and injury report as Exhibit-2. The statements of appellants were recorded under section 313 of the Cr. P.C in which they denied the prosecution story and claimed their false implication due to previous enmity and litigation. The defence also examined one witness and also got exhibited some documents. The learned trial court having relied upon the prosecution evidence passed the impugned judgment of conviction and sentence order in the manner as earlier stated above.

7. Learned counsel appearing for the appellants assailed the impugned judgment of conviction and sentence order arguing that all the prosecution witnesses are interested witnesses and had inimical terms with the appellants. He further submitted that the prosecution witnesses improved



their statements before the court in course of trial but even then, the learned court below relied upon the testimonies of aforesaid prosecution witnesses. He further submitted that the prosecution witnesses not only made contradictory statements in respect of place of occurrence but also in manner of occurrence and, moreover, due to non examination of investigating officer as well as doctor, a serious prejudice has been caused to the defence.

8. On the other hand, learned Additional Public Prosecutor appearing for the State supported the impugned judgment of conviction and sentence order arguing that the prosecution witnesses have well proved the prosecution case and non examination of I.O and Doctor is not fatal to the prosecution case because the injury report of the injured has been brought on the record and there is nothing on the record to show that any prejudice has been caused to the appellants.

9. As I have already stated that altogether, five prosecution witnesses were examined before the trial court. Out of them, PW-1 Mathura Yadav, PW- 2, Shiv Balak



Yadav, PW-3 Kapil Yadav and PW-4 Bilash Yadav claimed themselves to be eye witness of the alleged occurrence. PW-5 is informant and injured of this case.

10. PW-1 claimed that on the alleged date and time of occurrence, he had gone to ease himself and while he was returning to his village, he saw the appellants standing near pipal tree having firearm in their hands. He also noticed that PW-5 was going towards village along with his she-baffalo. He further stated that the appellant no. 2 Baleshwar Yadav ordered others to kill PW-5 and, thereafter, the appellant no. 1 Bilash Yadav opened fire causing firearm injury near the testicle of PW-5. He further stated that people came running there and, thereafter, the appellants fled away from there. This witness in his cross-examination admitted that he had inimical terms with the appellants as he was convicted in a case of 302 of the Indian Penal Code which had been fought between him and the appellants. He also admitted that the aforesaid case of 302 was lodged in respect of murder of father of appellant no. 1 and apart from this, some other case



had also been lodged. He further stated in his cross-examination that there was a **Baswari** near the pipal tree and the distance between papal tree and **Baswari** was about 10 meters. He also stated that PW-5 Kishori Yadav sustained injuries from his back side. PW-2 narrated almost similar story in his examination – in-chief but he added that when he as well as others reached over the place of occurrence, the appellant nos. 2 and 4 opened fire on him and appellant nos. 1 and 5 Bilash Yadav and Bhuneshwar Yadav ordered to cut the head of PW-5. This witness also admitted in his cross-examination that there was serious litigation and enmity between him and the appellants. This witness stated that at the time of alleged occurrence, he was making ridge in his favour along with his son. He further admitted that when he heard the noise, he came on the place of occurrence and found PW-5 lying in pool of blood.

11. PW-3 is son of PW-2, and this witness claimed that at the time of alleged occurrence, he was grazing his she-buffalo near the place of occurrence and also claimed that he



witnessed the alleged occurrence. This witness also admitted that there was inimical terms between him and the appellants. This witness stated in his cross-examination that he went to graze his cattle along with PW-5, Kishori Yadav and PW--4 Bilash Yadav.

12. Almost similar statement had been made by PW-4, who claimed that he along with PW-5, PW-3 and PW-1 were returning with she-buffalo and reached near the pipal tree, the appellants came out and made firing which hit on the right thigh of PW-5. This witness admitted in cross-examination that PW-5 informant/injured of this case was his cousin brother. He further stated that when he reached near the place of occurrence, he found PW-5 lying on injured condition. PW-5 Kishori Yadav is informant/ injured of this case. In his examination-in-chief, he stated that when he reached near the pipal tree, the appellant no. 2 Baleshwar Yadav ordered others to shoot him and, thereafter, the appellant no. 1 opened fire of his gun which hit on his thigh. The appellant no. 3 fired but his fire did not hit him. PW-5



further stated that having heard the sound of firing, villagers and his family members assembled there and he was taken to Wazirganj Hospital. In cross- examination, PW-5 tried to conceal the previous litigation and enmity between him and the appellants. However, in cross- examination, he admitted that when he reached near the **Baswari**, the appellants made indiscriminate firing as a result of which, he sustained injury and fell down.

13. It would appear from perusal of the lower court record that Exhibit -2 injury report was marked in trial court under section 294 of the Cr.P.C and admittedly, the aforesaid Exhibit-2 has not been proved by the doctor. PW-5, in his fardbeyan claimed that the alleged occurrence took place near Pipal tree but in his cross- examination he stated that he sustained firearm injury near **Baswari**. Although some prosecution witnesses claimed in their evidence that there was **Baswari** near the place of occurrence but, in my view, none examination of the I.O has caused serious prejudice to the appellants because due to non examination of the I.O.,



they could not get opportunity to make clarification regarding the aforesaid contradictory statements of PW-5. Apart from this non examination of doctor is also fatal to the prosecution case because the appellants also could not get opportunity to challenge the findings given in injury report.

14. In my view, keeping in mind, the inimical terms of appellants and prosecution party as well as above stated lacuna of the prosecution case, the appellants are entitled to get the benefit of doubt and, therefore this criminal appeal is allowed and the impugned judgment of conviction and sentence order, is hereby, set aside. The appellants are on bail. They are discharged from the liabilities of their bail bonds.

(Hemant Kumar Srivastava, J)

N.K/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	22.02.2018
Transmission Date	

