

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.220 of 2009

1. **Kamlesh Rai**, son of Hiranman Rai
2. **Hiranman Rai**, son of Suresh Rai, both resident of village-Bhadari Dahari
Ke Tola, Police Station-Began Gola, District-Buxar.

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

with

Criminal Appeal (SJ) No. 792 of 2009

Baldeo Ray, S/O Hiranman Ray, R/O Vill.- Bhadsari, P.S.- Began Gola, Distt.-
Buxar

... .. Appellant/s

Versus

THE STATE OF BIHAR

... .. Respondent/s

Appearance :

(In Criminal Appeal (SJ) No. 220 of 2009)

For the Appellant/s : Mr. Baban Roy-Amicus Curiae

For the Respondent/s : Mr. S.N. Prasad-A.P.P.

(In Criminal Appeal (SJ) No. 792 of 2009)

For the Appellant/s : Mr. Ranbir Singh-Amicus Curiae

For the Respondent/s : Dr. Mayanand Jha-A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

11-12-2018

In Cr. Appeal (S.J.) No.220 of 2009, wherein

Kamlesh Rai and Hiranman Rai are the appellants and Cr. Appeal
(S.J.) No.792 of 2009, wherein Baldeo Ray is the appellant arise
out from common judgment of conviction dated 29.01.2009 and
order of sentence dated 03.02.2009 passed by the Additional
Sessions Judge, Fast Track Court No.3rd, Buxar in Sessions
Trial No.146 of 2007/ 28 of 2008, whereby and whereunder all
the appellants have been found guilty for an offence punishable



under Section 307/34 of the I.P.C. and sentenced to undergo R.I. for seven years, under Section 448 of the I.P.C. and sentenced to undergo R.I. for one year. Appellant Baldeo Ray has separately been found guilty for an offence punishable under Section 27 of the Arms Act and sentenced to undergo R.I. for three years with a further direction to run the sentences concurrently, on account thereof, have been heard together and are being disposed of by a common judgment.

2. In spite of repeated calls, none turned up on behalf of appellants in both the appeals on account thereof, Sri Baban Roy and Sri Ranbir Singh, learned counsels have been requested to assist the Court as an Amicus Curiae.

3. Bhikham Ram (PW-4) filed written report on 15.03.2006, disclosing therein that on the same day at about 6.00 P.M. while his son was sitting along with other family members in his courtyard, during midst thereof, his co-villager Baldeo Ray armed with pistol, Ram Deo Rai, Kamlesh Rai, Hiranman Rai intruded inside and then, all of them, besieged his son. On an order of Hiranman Rai, Baldeo Ray shot at, his son Nepali Rai causing injury over his person. Copious blood bled from the injury. During course of fleeing, Kamlesh Rai took away an attache containing cloths, ornaments, cash appertaining



to Rs.20,000/-. On hue and cry raised at their behest, villagers came and at whose assistance, he took the injured Nepali Rai to the police station. Furthermore, it has also been disclosed that both the parties are on inimical term since before and that happens to be reason behind commission of the instant occurrence.

4. After registration of Bagen Gola P. S. Case No.07 of 2006, investigation commenced and after concluding the same, chargesheet was submitted, facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

5. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has further been pleaded that the injured Nepali Rai might have sustained injuries in different manner at different place by different person and getting a golden opportunity, got the accused persons/ appellants implicated in this case putting false and frivolous allegation in the background of continuing strained relationship.

6. Prosecution in order to substantiate its case has examined altogether seven PWs, who are PW-1, Nepali Rai, PW-2, Shiv Muni Rai, PW-3, Bachano Devi, PW-4, Bhikham



Rai, PW-5, Ram Dayal Dubey, PW-6, Dr. Ram Naresh Prasad and PW-7, Ramashraya Singh, I.O. Side by side, also exhibited as Exhibit-1, signature of the informant over written report, Exhibit-1/1, endorsement over written report, Exhibit-2, formal F.I.R., Exhibit-3, injury report, Exhibit-3/1, police requisition issued against injured Nepali Rai. Nothing has been adduced on behalf of defence.

7. From perusal of the L.C. Record, it is evident that prosecution has identified the place of occurrence inside the house, whereupon only the family members have been examined. That means to say, PW-1 is the injured, PW-2 is his brother, PW-3 is his mother and PW-4 is his father, informant. PW-5 is a formal witness while PW-6 is the doctor, who has examined the victim Nepali Rai (PW-1) and PW-7 is the Investigating Officer.

8. On account of presence of inconsistency amongst PWs with regard to manner of occurrence, place of occurrence, on account thereof, even having been disclosed at the end of PW-6 with regard to pellet injury having over the person of PW-1, the prosecution could not be said to be succeeded in substantiating its case. As per version of PW-1, PW-2 and PW-3, the P.O. happens to be the roof of house of the



informant while PW-4, informant had not stated likeso. PW-7 had not gone over roof of the house. There happens to be specific disclosure at the end of PW-1, PW-2 that the height of the roof is 12 feet having no fencing, firing was made from his courtyard. So, the direction of the injuries would have been towards upward.

9. PW-6, who had examined the PW-1 on 16.03.2006 (wrongly mentioned as 16.06.2003) at 7.50 A.M. and found the following:-

1) Firearm injury showing pellet on upper forehead in X-ray plate.

2) Firearm injury on forehead between both eyebrow showing pellet in X-ray plate.

3) Firearm injury on right side cheek showing pellet in X-ray plate.

4) Firearm injury on front of neck showing small pellet in X-ray plate.

5) Firearm injury on right side mid and lower chest in axillary line showing pellet in X-ray plate.

Opinion-All the above injuries caused by firearm and showing pellet (foreign body) in X-ray plate, within 12 to 18 hours. None of the injuries have been identified by the PW-6 having upward direction, that means to say, belies the story of the prosecution that firing was made from the courtyard over PW-1, who was on roof. That means to say, from lower level to upper level, nor the prosecution cared to suggest like so.



10. It is further evident from the evidence of PW-1, Para-2 that he was not shot at while the accused persons have encircled him inside the house. Accused persons have not fired while he was going over roof of his house through bamboo stair. Accused persons not fired, when he was over the roof, accused persons fired only after when he raised slogan of Chor-Chor. Furthermore, there happens to be no disclosure at the end of the prosecution that PW-1 was the target in the background of long standing enmity. The aforesaid eventuality should also be seen in the background of the disclosure having at the end of PW-1 that all the family members were there, but none was assaulted and same set of evidence happens to be at the end of PW-2.

11. PW-3, mother, also spoke in same manner. Furthermore, she had not gone over roof to see her son. She had also reiterated that they were not at all assaulted at the end of the accused persons while they were in courtyard.

12. PW-4 is the informant, who had stated that on 15.03.2006 at about 6.00 P.M., he was sitting at his courtyard wherein Baldeo Ray, Ramdeo Rai, Kamlesh Rai, Hiranman Rai came and encircled them. On an order of Hiranman Rai, Ramdeo Rai and Baldeo Ray shot at his son Nepali Rai causing injury, took away attache containing ornaments, cloths, cash



appertaining to Rs.20,000/-. He came to police station along with the injured wherefrom his son was referred to State Dispensary. During cross-examination at Para-2, he has stated that he along with his son were sitting in courtyard and were taking food. They heard sound of firing. At that very moment, four rounds of firing was made, whereupon he stood up leaving food and then, had seen his son in an injured condition. Thereafter, they have gone to police station. He has further stated that neither he nor family members were assaulted. Only Nepali Rai was assaulted.

13. PW-7, the I.O. during course of his inspection has stated that after being entrusted with the inspection, recorded further statement of informant, inspected the place of occurrence and detailed the topography of the house, without having his presence over the roof, recorded statement of the witnesses and after completing investigation, submitted chargesheet. During cross-examination at Para-6, he has admitted that he had examined neighbours. Further, there happens to be contradiction relating to witness injured Nepali Rai.

14. From the evidence as discussed hereinabove, it is apparent that prosecution has not been able to substantiate



the actual place of occurrence, because of the fact that PW-4, informant has not disclosed either in the written report nor during course of his evidence that Nepali Rai (PW-1) had gone over roof. He was shot at during course of staying at roof as a result of which, he became injured. On the other hand, PW-1, PW-2 and PW-3 have stated that when PW-1 went over the roof, he was shot at. No specific plea has been taken at the end of the prosecution identifying PW-1 to be the only soft target, whereupon other family members, who were present, were not shot at. Furthermore, presence of PW-1 was also along with other family members. At that very time, he was not shot at. None of the family members slipped to save their life, but PW-1 had gone over roof through bamboo stair in order to save himself, is a circumstance, which speaks otherwise, more particularly in the background of the fact that I.O. (PW-7) had not cared to go over roof in order to trace out any sign, which could have a supportive link identifying the place of occurrence. Furthermore, as stated hereinabove, the PW-6, doctor had not found any pellet injury having upward direction corroborating the prosecution version to the effect that PW-1, Nepali Rai was shot at while he was standing over roof having height of 12 feet.

15. It is settled principle of law that whenever



there happens to be conflict in between ocular as well as medical evidence, ocular evidence will prevail unless the medical evidence completely rules out the prosecution version. Here, the medical evidence completely rules out the manner whereunder commission of occurrence is alleged, as has been explained hereinabove.

16. Thus, having critical analysis of the evidences available on the record, the circumstances visualizing from the record, the conduct of the witnesses, the finding recorded by the learned lower Court did not find fit for its concurrence. Consequent thereupon, same is set aside. Appeal is allowed. Appellants are on bail, hence are discharged from its liability. The first and last page of the judgment be handed over to the learned Amicus Curiae for needful.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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