

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.266 of 2015**

Arising Out of PS.Case No. -68 Year- 1986 Thana -HISUA District- NAWADA

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1. Suraj Rajbansi s/o Late Baldeo Rajbanshi
 2. Punit Manjhi s/o Late Telar Manjhi
 3. Girani Manjhi s/o Late Baldeo Manjhi All of Village Eknor P.S. Hisua, District Nawada.

.... Appellant/s

Versus

1. The State of Bihar.

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Y.C. Verma, Sr. Adv.
 Mr. Anuj Kumar, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**ORAL JUDGMENT****Date: 19-03-2018**

Appellants, Suraj Rajbansi, Punit Manjhi, Girani Manjhi have been found guilty for an offence punishable under Section 307/34 IPC and each one has been sentenced to undergo RI for 10 years as well as to pay fine of Rs. 2000/- each in default thereof, to undergo SI for one month additionally, under Section 27 of the Arms Act, sentenced to undergo RI for 3 years with a further direction to run the sentences concurrently vide judgment of conviction dated 09.04.2015, order of sentence dated 13.04.2015 passed by Additional Sessions Judge-4th, Nawada in Sessions Trial No. 70/90/111/2014.

2. PW-6, Bundi Rajbansi gave his Fard-e-beyan at Sakra Mor in the midst of way to police station on account of meeting with the police officials on 07.09.1986 at 12.15 PM, alleging inter



alia, that on the same day at about 10.30 AM, while he was returning from Baliar Khandha and was about to reach his house, as the maize crop of Ragho Manjhi was damaged by the pig of Kuleshwar Manjhi whereupon they both were quarreling in front of house of Chamari Manjhi, he intervened and got the matter pacified. Then thereafter, while he was proceeding ahead toward his house, at that very time, accused, Suraj Rajbansi, Girani Manjhi, Kuleshwar Manjhi, and Punit Manjhi armed with country made gun, came. Suraj Rajbansi ordered to fire followed by first firing having at his end causing injury over his right hand, chest, face as a result of which, he fell down. Naresh came in rescue who was shot at by Girani Manjhi. Then thereafter, Kuleshwar and Punit also fired but, they have not sustained injury. It has further been disclosed that whole occurrence committed in a Gali in front of his house. On hearing sound of firing as well as alarm raised by them, Ragho Manjhi, Karu Manjhi, Girani Rajbanshi, Sitaram Rajbansi and others came who lifted them to hospital and during midst thereof at Sakra Chowk, they met with police officials whom, he has given Fard-e-beyan. The motive for occurrence has been suggested as accused persons have formed a group and were pressurizing them to join their group which, he declined as a result of which, he along with his brother has been assaulted.

3. On the basis of the aforesaid Fard-e-beyan, Hasua



PS Case No. 68/86 was registered followed with an investigation as well as submission of charge-sheet facilitating the trial meeting with the ultimate result, subject matter of instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. It has further been pleaded that both the parties are on strained relationship since before and under the garb of aforesaid strained relationship, Naresh Rajbansi had instituted a case at an earlier occasion wherein they got clean acquittal. Then thereafter, only to harass them, they have hatched a conspiracy whereunder the instant case has been filed. Though no ocular evidence has been adduced but Judgment of Sessions Trial No. 19/91/188/88 has been made exhibit as Exhibit-A.

5. It has been submitted at the end of appellants that before the learned lower court, it was pleaded that on account of inconsistency amongst the witnesses, neither there was an occasion for PWs-1, 2, 3, 4 to see the occurrence and on account thereof, there happens to be material development in their evidence whereupon and that being so, their evidences were fit to be discarded. In likewise manner, it has been urged that injury if any, having sustained by PWs-5 and 6, considering their evidence, is not at all found duly proved, more particularly, in the background of non examination of doctor



but, the learned lower court perused the injury report available in the case diary and inferred that whatever injuries were sustained by PWs 5 and 6 were that of fire arm whereupon convicted and sentenced the appellants which was not at all permissible in the eye of law. Consequent thereupon, the finding would not survive.

6. In order to substantiate the same, it has been submitted that doctor has not been examined. Non examination of doctor forbade the opportunity to the appellants to expose the falsity in the prosecution version with regard to manner of occurrence whether in the facts and circumstances injuries were possible in a way as narrated by the prosecution. Mere presence of fire arm injury would not be sufficient to identify the appellants to be authors of injuries. In likewise manner, It has also been submitted that non examination of the Investigating Officer happens to be another event jolting the prosecution version in the background of the inconsistency regarding the manner of occurrence, genesis of occurrence as well as place of occurrence. Furthermore, It has also been submitted that as prosecution witnesses are not at all consistent with regard to place of occurrence, that being so, the non examination of the Investigating Officer as well as doctor could be proved fatal to the prosecution.

7. Now coming to the ocular evidence, it has been submitted that PWs-5 and 6 have claimed themselves to injured.



When their evidences are independently scrutinized, even then, it is crystal clear that they have not corroborated the evidence of each other. So far evidence of PWs-1 to 4 are concerned, less said is better. Moreover, PW-1 is own brother while PW-3 is cousin brother (Phuphera). So, considering the totality of the event, prosecution case is found not at all substantiated beyond reasonable doubt whereupon the conviction and sentence is fit to be set aside.

8. On the other hand, learned APP counter meeting with the submission made on behalf learned counsel for the appellants, has submitted that prosecution has nothing to prove as while cross-examining PW-1 as well as PW-6, injured, defence had itself admitted that both the victims have sustained gun shot injury which happens to be self explanatory and in the aforesaid background non examination of doctor could not be proved fatal to the prosecution case. With regard to presence of development in the evidence of prosecution witnesses, it has been submitted that considering the occurrence of the year 1986, their evidences were recorded on considerable interval and that being so, whatsoever inconsistency is found, that happens to be but natural on account of efflux of time. However, so far gist of the prosecution case is concerned, evidence in its entirety, has substantiated the same whereupon conviction and sentence recorded by the learned lower court is fit to be confirmed.



Furthermore, it has been submitted that taking into account the evidence on record, non examination of Investigating Officer neither could be traced as deficiency persisting in the prosecution case, nor cause prejudice to the interest of the accused/appellants.

9. Examination of doctor is admitted under the banner of expert opinion as provided under Section 45 of the Evidence Act. That being so, without having presence of doctor, the opinion so formulated and the finding so recorded would not be entertainable in the eye of law. From para-8 of the judgment impugned, it is evident that learned lower court had peeped into the injury report and then extracted the relevant portion in order to fit in with the version of the prosecution that the victim had sustained fire arm injury. The aforesaid activity could not be patronized. Perusal of case diary in limited way is found permissible during course of judgment but it could not be referred. Moreover, the injury report though happens to be along with case diary is an event separate therefrom depleting independent identity, explicating opinion of an expert, and that being so, it could not be referred unless the expert is being examined.

10. Now coming to other aspect, Section 307 is not dependent upon the injury report or nature of injury or the weapon used. It could be a circumstance which could expose the activity of



the accused, manner of occurrence which could be further gathered from ocular evidence whether accused was carrying an intention or knowledge while committing the occurrence and that happens to be reason behind presence of hurt in the section itself where assault has been inserted which is not at all commanded by nature of injury. Hurt is defined under Section 319 IPC and that is mere assault over the person of the victim. That being so, in *Lachman Singh v. State of Haryana* as reported in *AIR 2006 SC 2763*, it has been held as follows:-

12. Section 307 of the Indian Penal Code reads: "Attempt to murder - Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned."

13. It is sufficient to justify a conviction u/s. 307 if there is present an intent coupled with some overact in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Sections makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an



intent coupled with some overt act in execution thereof.

14. In Sarju Prasad V/s. State of Bihar, it was observed that the mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim is not itself sufficient to take the act out of the purview of Sec. 307 of the Indian Penal Code.

15. The above position was highlighted in State of Maharashtra V/s. Balram Bama Patil and Ors., Girija Shankar V/s. State of U.P., Vasant Vithu Jadhav V/s. State of Maharashtra, and State of M.P. V/s. Saleem.

11. In the background of aforesaid settled principle of law, now ocular evidence is to be seen and for that first of all, evidence of PW-6, informant/injured is to be taken note of. He during his examination-in-chief had stated that the occurrence is about 14 years ago, it was 10.00 A.M.. He was returning from Baliar Khandha. When he reached in a 'Gali' in front of house of Chamari Manjhi had seen Ragho Manjhi, Girani Manjhi, Suraj Rajbansi, Kuleshwar Manjhi, Punit Manjhi having been indulged in a brawl. Four persons (Girani Manjhi, Suraj Rajbansi, Kuleshwar Manjhi, Punit Manjhi) all of them were armed with country made gun. He intervened and said that as to why you people are doing like so whereupon, Suraj Rajbansi directed him to shoot. Then thereafter, Suraj Rajbansi shot at causing injury over his chest, shoulder, face (right side) as a result of which, he sustained injury. His brother, Naresh came in rescue who was assaulted by Girani Manhi causing injury over left shoulder. Punit Manjhi and Kuleshwar Manjhi also fired but did not hit. Sita Ram,



Ganauri Rajbansi, Karu and Ragho Manjhi had seen the occurrence. While they were taken to Hasua, they met with Darogaji at Sakra Mor where his Fard-e-beyan was recorded. They were examined at Hasua Hospital. Identified the accused (Kuleshwar is dead).

12. During cross-examination at para-3, he had stated that he was standing south to his house. When he moved 7 ft east therefrom, then he sustained gun shot injury. At para-4, he had stated that brawl was going on in between accused as well as Rago Manjhi. At that very time, all the accused were armed with country made gun. At para-5, question was put, which side assailant was standing at the time when he sustained injury and the answer was that he was shot at by Suraj Rajbansi. Then at para-6 had denied the suggestion that during course of snatching of gun from the hand of Ganauri, his 'Phuphera Bhai' he had sustained pellets. Then his attention has been drawn at para-8 with regard to averments of the Fard-e-beyan. Then had disclosed at para-9 that just after sustaining fire arm injury, he began to raise alarm. Naresh came and lifted him. Copious blood was there.

13. PW-5 is another brother/injured, Naresh who had disclosed that at the time of occurrence, he was engaged in irrigating his field which lies east to his house. At that very time, he heard commotion coming towards his house whereupon he rushed there and



had seen Bundi Rajbansi (PW 6), Ganauri, Sitaram, Ragho, Karu, Suraj, Girani, Punit and Kuleshwar out of whom, Suraj, Girani, Punit, Kuleshwar were armed with country made gun. Suraj ordered to kill and then thereafter, Suraj shot at Bundi as a result of which, he sustained injury and fell down. He rushed to lift and at that very time, Girani shot at causing injury over his left shoulder. Kuleshwar and Punit also fired but did not hit. Then thereafter, all the accused fled away. Thereafter, Bundi was taken to Hasua hospital and during midst thereof, met with Darogaji at Sakra Mor where his Fard-e-beyan was recorded and then he was referred to Hasua PS. Identified the accused. At para-3, 4, there happens to be cross-examination relating to plot where he was irrigating. He had stated that this plot was taken by him on *Batai* which happens to be 10-15 bamboo away from the place of occurrence. He heard the uproar. He heard voice of Suraj- they were abusing. Then there happens to be contradiction on that very score. When he reached near his house, he had seen Suraj, Girani, Punit and Kuleshwar. His brother was also there. They were west to his Darwaza. They were 10 ft therefrom. All the persons were standing conjointly. Then said that his brother was at a distance of 10 ft. when he reached at the place of occurrence, then firing was made from 10 ft. that firing was made by Suraj. As soon as his brother received gun shot injury, he fell down. He began to lift him from northern side



having his mouth towards west and during course thereof, he was shot at by Girani Manjhi. Then thereafter, 2 firings were made by Punit and Kuleshwar but, did not hit. At para-6, he had stated that Ganauri, Sitaram, Ragho and others came after firing and then lifted his brother to Hasua. In para-7, he had stated that both the injured were conscious. In para-10, he had shown the boundary of the place of occurrence, North- he himself, South- he himself, West-Gali, East-Gali. Then had admitted that he had instituted a case against the accused persons wherein they were acquitted.

14. PW-1 is another brother who had deposed that on the alleged date and time of occurrence, he was at his house. House of Bundi Rajbansi lies east to his house. When he came out from his house hearing uproar, he had seen Suraj, Girani, Kuleshwar and Punit standing 10 ft west in 'Gali' from Bundi who were armed with country made gun. Suraj had ordered to kill and then Suraj Rajbansi fired over Bundi Rajbansi. Naresh came in his rescue who was shot at by Girani. Punit and Kuleshwar had also fired which did not strike and then thereafter, all of them fled away towards western direction. At that very time, he along with Ganauri, Karu, Radhe Manjhi were present there. They all lifted Bundi and Naresh to hospital, during midst thereof, they met with police official at Sakra Mor where police had recorded his Fard-e-beyan. During cross-examination, he had stated



that he happens to be three brothers, Sitaram, Naresh and Bundi. All are separate. The aforesaid theme has been controverted by the accused/appellant. There happens to be cross-examination relating to cases having been instituted by his father, his brother, PW-5 against accused persons wherein they were acquitted. In para-3, he had shown the boundary of the place of occurrence, North-House of Awadh Singh, South-Sitaram Rajbansi, East-Exit and West-house of Lagho Sao. In para-4, he had stated that only Bundi was presence since before at the place of occurrence. Then had clarified that Bundi was standing in a 'Gali' at a distance of one *Bans* (bamboo) from him having western front. He was standing 2-4 minutes since before. 5 minutes thereafter Bundi came and 5 minutes thereafter, accused persons came from southern side. Suraj was leading, then Girani, then Punit and then Kuleshwar. All of them came conjointly and they had seen from the distance of 10 ft. As a result of which, he became frightened but even then, he had not tried to flee. Just after coming, all of them fired. They fired aiming the victim. He was not assaulted. After 2-3 minutes, Naresh was shot at. The second firing was made 6-7 minutes after the first firing and then thereafter, firing was made by Punit and Kuleshwar which did not strike. Naresh also fell down after sustaining injury. Accused persons escaped towards western side. At para-8, he had stated that none of the persons having their houses at



northern, southern flank of the place of occurrence, came at the place of occurrence. Then had denied the suggestion that the injury happens to be self inflicted and then thereafter got the appellant involved in this case.

15. PW-2 is Radhe Manjhi who had deposed that on the alleged date and time of occurrence, he was in his maize field. After hearing sound of firing, he rushed to the house of Bundi where he saw Bundi, Naresh in an injured condition. Punit, Kuleshwar, Girani and Suraj were fleeing therefrom. During cross-examination at para-2, he was cross-examined over location of his field. At para-3, he had stated that he had not met with anybody during midst of way coming to the place of occurrence. At para-4, he had stated that Bundi and Naresh were unconscious. Sitaram was conscious. Bundi and Naresh regained their sense at hospital. In para-6, he had admitted that during course of statement under Section 161 of the CrPC, he had not said before the police that he had seen accused persons fleeing therefrom. Then had denied the suggestion.

16. PW-3 is Ganauri Rajbansi who had deposed that on the alleged date and time of occurrence, he was at his house. After hearing sound of firing, he came out from his house and rushed to the place of occurrence. When he came in front of house of Bundi, he had seen Bundi and Naresh lying in injured condition. He had also seen



Punit, Kuleshwar, Girani and Suraj fleeing therefrom having gun in their hands. During cross-examination at para-2, he had admitted inter se relationship with the informant. In para-3, he had further stated that his house lies two bamboos east from the place of occurrence. At that very time, he was taking meal. When he reached at the place of occurrence, he had not seen any body save and except the four accused persons who were fleeing towards western direction. He stayed for five minutes. In para-4, he had stated that he had seen Bundi and Naresh in an injured condition. Naresh was standing while Bundi was lying. Bundi was unconscious. He regained sense after two hours at Hasua hospital after having been treated by the doctor. In para-6 had shown the boundary of the place of occurrence, North-house of Awadh Singh, West-Bundi Rajbansi and then had disclosed that Darwaza of Bundi lies north to his house and Bundi was lying in a 'Gali' relating to that Darwaza. Bundi was lying adjacent to the wall of his house in a 'Gali' west to his Darwaza. At that very time, Naresh was lifting him. At para-7, there happens to be contradiction.

17. PW-4 is Karu Manjhi. He had deposed that on the alleged date and time of occurrence, he was at his house. At that very time, an altercation was going on at the house of Bundi whereupon, he had gone there. Out of whom, Punit, Kuleshwar, Girani and Suraj were armed with gun. Suraj directed to shoot and



then thereafter, he fired causing injury over chest, arm, head as a result of which, he fell down. Then thereafter, Girani shot at Naresh. Punit and Kuleshwar also fired but the firing missed. Then thereafter, they had gone therefrom. Both the injured were lifted to Hasua Hospital and during midst thereof, at Sakra Mor met with police who recorded Fard-e-beyan of Bundi. At para-5, he had stated that while he was at his house he heard an altercation in between Suraj and Bundi. They were abusing each other. He had not met with anybody during midst of way. Then had disclosed names of other persons whose house lies in the vicinity of Bundi. At para-7, he had stated that when he reached at place of occurrence, he had seen eight persons out of whom four were accused and four were, Ganauri, Sitaram, Radhey and Karu. All the four persons excluding accused were sitting over wall in a 'Gali'. He stayed for three minutes at the place of occurrence. All the persons remained there. Then thereafter, he had accompanied the victim to Hasua. Then at para-8, he had deposed that he had not given statement before the police and on account thereof, his attention has been drawn up regarding his previous statement whereunder he stood as hearsay witness.

18. Now coming to the motive shown by the informant, it is apparent that at an earlier occasion, there was an altercation going on in between Kuleshwar and Radhey and they were



altercating near the house of Chamari Manjhi where his presence was, got the matter pacified and when he proceeded towards his house. The appellants including one Kuleshwar (since deceased) came armed with gun, fired. The aforesaid event has been left out during course of deposition and with regard thereto PW-6, the informant was confronted. At an initial stage the aforesaid event was found to be immediate cause for causing assault which, in due course of time, has been left out and allowed direct confrontation which both the parties were continuing as is evident from witnesses including Ext-A.

19. Then coming to the evidence, it is apparent that appellants/accused, Suraj and Girani have been shown to have fired one round each causing injury over informant as well as Naresh while Punit and Kuleshwar fired which did not hit. To adjudge the same, first of all, it has to be traced out where the actual place of occurrence lies.

20. Ultimately, it is the prosecution which has to prove its case and so, there should have been positive evidence at the end of the prosecution in order to substantiate its case. As stated above, from the evidence of the witnesses, it is apparent that some of them have disclosed the occurrence to be house of Bundi (PW-6) while some had disclosed the occurrence to be a 'Gali' and furthermore, there also happens to be inconsistency in the boundary



of the place of occurrence. Though, the witnesses have stated that there was copious blood at the place of occurrence but the manner whereunder prosecution at least PW-1 had shown his presence appears to be suspicious as, had his presence at the place of occurrence, there was every chance of getting him injured also by means of fire arm as PWs-5 and 6 had. That being so, the inconsistency in the place of occurrence, coupled with non examination of Investigating Officer as had there been examination of the Investigating Officer not only actual place of occurrence would have been exposed but the material exaggeration visualizing in the evidence of the respective PWs would also found legally admitted as PWs-2, 3 and 4 had not claimed at an initial stage to have seen the accused persons fleeing therefrom. In likewise manner, the non examination of the doctor had also put finger of mark as the manner of occurrence, the distance in between which was expected at the end of the prosecution to be properly disclosed, found unfounded.

21. That means to say, merely putting allegation that appellants, Suraj Rajbansi and Girani Manjhi are responsible for commission of the fire arm injuries over persons of PWs-5 and 6 has to be properly substantiated in the background of the fact that they were carrying strained relationship since before (Ext-A) as well as having been admitted at the end of the respective witnesses coupled



with the fact that the motive whatever been assigned at an earlier occasion, though not a condition precedent but leaving the same subsequently, is a circumstance which, in the background of the cumulative effect of lapses prevailing in the prosecution case much less having complete on fixed over place of occurrence coupled with non examination of doctor and Investigating Officer causing serious prejudice to the appellant, did not justify the finding recorded by the learned lower court whereupon, the judgment of conviction and sentence is set aside. Appeal is allowed.

22. Since appellants are on bail, they are discharged from the liability of bail bonds.

(Aditya Kumar Trivedi, J)

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