

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (DB) No.510 of 1994**

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1. Lal Babu Paswan, son of Ramjee Paswan
2. Balmiki Paswan, son of Bhola Paswan
3. Vijay Paswan, Son of Bhola Paswan
4. Bineshwar Paswan, son of Iseshwar Paswan
5. Awadhesh Paswan @ Nepali Paswan, son of Kailu Paswan
6. Ganesh Paswan, son of Babu Lal Paswan.

All residents of village-Bibipur, P.S. Gauri Chak, District Patna

... .. Appellants

Versus

The State of Bihar

... .. Respondent

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Appearance :

|                    |   |                                                                                                 |
|--------------------|---|-------------------------------------------------------------------------------------------------|
| For the Appellants | : | Mr. Ramakant Sharma, Sr. Adv.<br>Mr. L.K. Sharma, Adv.<br>Ms. Swati Sinha, Adv. (Amicus Curiae) |
| 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 PRABHAT KUMAR SINGH**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)**

**Date : 22-08-2019**

1. We heard learned Senior Counsel Shri Ramakant Sharma, learned Amicus Curiae Ms. Swati Sinha, Advocate appearing for the appellants as well as Shri Dilip Kumar Sinha learned Additional Public Prosecutor for the State.

2. This criminal appeal has been preferred against the impugned judgment of conviction dated 23.09.1994 and sentence order dated 24.09.1994 passed by learned 6<sup>th</sup> Additional Sessions Judge, Patna in Sessions Trial No. 503 of 1993 by which and whereunder, the learned 6<sup>th</sup> Additional Sessions Judge, Patna



(hereinafter referred to as “trial court”) convicted appellant no. 2, namely, Balmiki Paswan, appellant no. 4, namely, Bineshwar Paswan and appellant no. 5, namely, Awadhesh Paswan @ Nepali Paswan for the offences punishable under Sections 302/34 and 302 of the IPC and accordingly, sentenced them to undergo imprisonment for life for the above stated offences and furthermore, convicted the appellant no. 1, namely, Lal Babu Paswan, appellant no. 3, namely, Vijay Paswan and appellant no. 6, namely, Ganesh Paswan for the offences punishable under Sections 307/34 and 307 of the IPC and sentenced them to undergo rigorous imprisonment for seven years for the above stated offences independently. However, the learned trial court ordered that the sentences shall run concurrently.

3. PW-11 Haricharan Paswan gave his ferdbeyan to PW-16 Balmiki Pd. Singh, the then S.I. of Gaurichak police station, on 21.09.1992 at 1:30 A.M. at Gaurichak police station in presence of PW-5 Raghunandan Paswan, PW-3 Yogendra Paswan, PW-9, Binod Paswan, PW-4 Ram Pramod Paswan, PW-8 Ram Prit Paswan, Vijendra Paswan (not examined), Vinay Paswan (not examined) and Chowkidar Ram Padarath Paswan (not examined) to this effect that on 20.09.1992 at about 6:00 P.M., he heard sound of firing which was coming out towards south-west corner of his



village and he also heard noise and having heard sound of firing and noise, he along with his co-villagers went running and reached Manjha Roja Khanda where he saw Kailash Paswan (PW-2) and Dhuri Paswan (PW-1) in injured condition and also noticed that both the aforesaid persons were in unconscious state. He, further, claimed that he with the help of his co-villagers brought PW-1 and PW-2 to his home. He claimed that PW-1, PW-2 as well as his son, namely, Ram Dahin Paswan (deceased) had gone to Jaitiya Bazar at 1:30 P.M. on 20.09.1992 but he found PW-1 and PW-2 in injured condition whereas he did not find his son. He, further, claimed that again he as well as others went in search of his son near the aforesaid KHANDA and then he found his son lying in a field in injured condition and his son was also in unconscious state. He, further, claimed that he noticed several firearm injuries on the person of his son as well as PW-1 and PW-2. However, he claimed that his son died after sometime on account of aforesaid injuries and thereafter, he along with above stated persons went to Gaurichak police station and gave his ferdbeyan. PW-11, further, claimed in his ferdbeyan that prior to alleged occurrence, a dispute was going on between him as well as appellants on account of drainage and the appellants had given threatening of dire consequences. He expressed his belief that it were appellants who



committed the murder of his son Ram Dahin Paswan and injured PW-1 and PW-2.

4. On the basis of ferdbeyan of PW-11, Fatuha P.S. Case No. 234 of 1992 under Section 302 and other minor sections of the IPC as well as 27 of the Arms Act was registered on 21.09.1992 and the formal FIR was drawn up at 2:30 A.M. on the same day. However, the formal FIR and fard-e-bayan were put up before the concerned Magistrate on 23.09.1992.

5. PW-16 took charge of investigation and in course of investigation, he inspected the place of occurrence, recorded the statements of prosecution witnesses and also got recorded the statements of PW-1 and PW-2 under Section 164 of the Cr.P.C. However, after completion of investigation, PW-16 submitted charge sheet against the appellants for the offences punishable under Section 302 and other minor sections of the IPC. The cognizance of the offence was taken and the case was committed to the court of sessions, in usual way.

6. All the six appellants stood charged for the offences punishable under Sections 302, 307/34 of the IPC and 27 of the Arms Act whereas appellants Balmiki Paswan, Awadhesh Paswan and Bineshwar Paswan stood, separately, charged for the offence punishable under Section 302 of the IPC and appellants Ganesh



Paswan, Lal Babu Paswan and Vijay Paswan stood charged, separately, for the offence punishable under Section 307 of the IPC. The appellants denied the charges and claimed to be tried.

7. In course of trial, prosecution examined, altogether, 17 prosecution witnesses and also got exhibited inquest report, postmortem report, statements of PW-1 and PW-2 recorded under Section 164 of the Cr.P.C. as well as some other relevant documents. The statements of appellants were recorded under Section 313 of the Cr.P.C. in which they denied the claim of prosecution witnesses and also claimed their false implication due to previous enmity.

8. No evidence was adduced by the appellants in support of their defence but from perusal of statements of the appellants recorded under Section 313 of the Cr.P.C. as well as trends of cross examination of prosecution witnesses, it is obvious that defence of the appellants was their false implication due to enmity.

9. The learned trial court after evaluating the evidence available on the record passed the judgment of conviction mainly basing reliance on the testimony of PW-1 and PW-2, who happen to be injured witness.



10. Learned Senior Counsel Mr. Sharma assailed the impugned judgment of conviction and sentence order arguing that according to prosecution case itself, except PW-1 and PW-2, none had seen the occurrence because the remaining material witnesses admitted in their depositions that they reached over the place of occurrence after the alleged occurrence. He, further, submitted that so far as PW-1 and PW-2 are concerned, no doubt, they claim themselves to be injured witness and PW-12 Dr. Krishna Chandra Pandey found injuries on the person of PW-1 and PW-2 but admittedly, PW-1 and PW-2 are family members of PW-11. He, further, submitted that enmity between PW-11 and appellants is an admitted fact and, therefore, even if PW-1 and PW-2 sustained injury in the alleged occurrence, their testimony should be looked into very cautiously. He submitted that PW-1 and PW-2 not only improved their statements in course of trial but also contradicted to each others on material points and, therefore, in the aforesaid circumstance, it is very difficult to place reliance upon the testimonies of PW-1 and PW-2. He, further, submitted that except PW-1 and PW-2, there is no other eye witness. He, further, submitted that according to PW-11 itself, the occurrence took place at the time of sunset and neither PW-1 nor PW-2 disclosed the means of identification as it is obvious that at the time of



occurrence there was complete dark. He, further, submitted that PW-6 Sanjay Paswan claims that he had seen the appellants having firearms while they were fleeing after committing the alleged occurrence but admittedly, PW-6 is nephew of PW-11(informant) and, therefore, no reliance can safely be placed upon the statement of PW-6. He, further, submitted that evidence available on the record goes to show that deceased as well as PW-1 and PW-2 sustained injuries at the hands of some unknown persons but subsequently, due to previous dispute and enmity, the appellants were implicated in the present case and, therefore, in the aforesaid circumstance, the appellants are entitled to get benefit of doubt.

11. Learned Amicus Curiae Miss Swati Sinha, advocate seconded the submission of Mr. Sharma.

12. On the other hand, Mr. Sinha learned Additional Public Prosecutor refuted the above stated submissions arguing that PW-1 and PW-2 sustained injury in the alleged occurrence and PW-12 proved the injuries of PW-1 and PW-2. He, further, submitted that PW-12 found firearm injuries on the person of PW-1 and PW-2 and, therefore, the presence of PW-1 and PW-2 over the place of occurrence cannot be doubted. Learned Additional Public Prosecutor, further, submitted that status of an injured witness is on better footing to that of an ordinary witness and,



therefore, the testimony of PW-1 and PW-2 cannot be discarded on flimsy grounds. He, further, submitted that both the aforesaid witnesses very clearly stated about the involvement of the appellants in the alleged crime and even if some minor contradictions appear hither and thither in their testimonies, then also, the aforesaid minor contradictions cannot be taken into consideration because the said minor contradictions do not go to the root of prosecution case.

13. Having heard the rival contentions of both the parties, we went through the record along with lower court record.

14. As we have already stated that prosecution examined, altogether, 17 witnesses but out of the aforesaid 17 witnesses, PW-1 Dhuri Paswan, PW-2 Kailash Paswan, PW-6 Sanjay Paswan and PW-11 Haricharan Paswan are material witnesses. So far as PW-3, PW-7, PW-8, PW-9, PW-10, PW-14 and PW-15 are concerned, they were tendered by the prosecution and similarly, PW-4 Ram Pramod Paswan and PW-5 Raghunandan Paswan are witnesses of seizure as well as inquest report respectively and they have stated nothing in respect of the alleged occurrence. PW-12 claimed to have examined PW-1 and PW-2 after the alleged occurrence whereas PW-13 did postmortem examination on the dead body of the deceased Ram Dahin Paswan



and PW-16 is investigating officer whereas PW-17 claimed to have recorded the ferdbeyan of PW-1 Dhuri Paswan at N.M.C.H., Patna after the alleged occurrence.

15. PW-1 and PW-2 are witnesses on the point of actual assault and killing whereas PW-6 claims to have seen the appellants running from the place of occurrence having firearms after the alleged occurrence.

16. First of all we would like to discuss the statement of PW-6 Sanjay Paswan. PW-6 Sanjay Paswan claims that it was time of sunset while he was at his home and heard sound of five to six round of firing and having heard sound of aforesaid firing, he came out of his house and saw the appellants having firearms in their hands running to their respective houses. This witness, further, claimed that he went to place of occurrence and found PW-1, PW-2 as well as deceased Ram Dahin in injured condition and in the meantime, several co-villagers came there. This witness on being cross examined by the defence admitted that deceased Ram Dahin was his cousin brother. This witness, further, admitted that after his arrival at the place of occurrence, the villagers came there. This witness, further, admitted that he had not disclosed this fact before PW-11 that he had seen the appellants running from the place of occurrence. Furthermore, this witness admitted that he had



gone to police station along with PW-11 but at the police station also he had not disclosed the above stated fact. Admittedly, this witness is nephew of PW-11(informant) but it is surprising enough that he did not disclose such a material fact before PW-11, especially, when the fard-e-bayan of PW-11 was recorded. Moreover, this witness claims that he was the first person who reached at the place of occurrence and saw PW-1, PW-2 and deceased in injured condition and thereafter, PW-11 and others reached at the place of occurrence but PW-11 claims that he as well as villagers went to the place of occurrence and firstly, they found PW-1 and PW-2 in injured condition and thereafter, later on, when they went in search of deceased Ram Dahin, they found him in injured condition. Therefore, the aforesaid contradiction also creates doubt about the claim of PW-6 and in our view, it is not safe to place reliance upon the statement of PW-6.

17. PW-1 Dhuri Paswan claims himself to be injured and states that on the alleged date of occurrence he along with PW-2 and deceased Ram Dahin had gone to Jaitiya Bazar and while they were returning and reached near Khanda, he saw six persons sitting there and he identified all the aforesaid persons who were appellants. This witness, further, states that at the time of aforesaid occurrence, sun was setting down. This witness, further, states that



appellant Awadhesh, Balmiki and Bineshwar opened fire of their respective guns on deceased Ram Dahin who sustained injury and fell down there. This witness, further, claims that he as well as PW-2 started running from there but appellant Ganesh shot fire on him whereas appellant Lal Babu shot fire on Kailash as a result of which he as well as Kailash Paswan (PW-2) sustained injury and he fell down and became unconscious. This witness, further, claims that he regained his consciousness next day of the occurrence at hospital and gave his statement to police. This witness admits that there was dispute between him and appellants on the point of drainage and a proceeding under Section 107 of the Cr.P.C. was also going on between his family members as well as appellants.

18. PW-12 Dr. Krishna Chandra Pandey claims that on 21.09.1992 he examined PW-1 and found multiple firearm injuries on his person and he proved injury report of injured Dhuri Paswan as Ext. 2. Therefore, the aforesaid fact clearly establishes this fact that PW-1 sustained injury and according to PW-1, he sustained injury in the alleged occurrence.

19. PW-1, on being cross examined by the defence, admitted at para 7 of his cross examination that when he as well as PW-2 and deceased left Jaitiya Bazar, sun had already set down



and when he as well as others reached near the KHANDA, he saw the appellants who were sitting in a field. This witness, further, admits that when he saw the appellants first time, they were sitting at the distance of 5 to 7 GAJ. This witness further claims that he sustained injury on his front side. This witness also admits that his statement under Section 164 of the Cr.P.C. was recorded before the Magistrate. This witness also admits that while he was in hospital he got news of death of deceased Ram Dahin but he did not enquire about the name of appellants. This witness, further, claims that when his statement was recorded by the police at hospital, he disclosed the name of Bineshwar, Balmiki and Awadhesh as assailants and had also disclosed that fire of Lal Babu and Vijay hit PW-2. This witness denied this fact that before police he had stated that he had not seen who had fired on PW-2. This witness also denied this fact that before Magistrate he had disclosed that he as well as PW-2 had sustained injury while they were fleeing from the place of occurrence. This witness also denied to have made statement before the police and Magistrate to this effect that at the time of alleged occurrence, there was sun set. This witness, further, admits that before making firing there was no talk between him as well as appellants. Here, we would like to refer para 9 of deposition of PW-16 who admitted that PW-1 had not disclosed



before him as to who had fired on PW-2. Furthermore, PW-16 admitted at para 8 of his cross examination that fard-e-bayan of PW-1 was recorded by DAROGA of Alamganj police station and he incorporated the fard-e-bayan of PW-1 at para 55 of the case diary. PW-17 claims that on 21.09.1992 at about 9:00 P.M. he had recorded the fard-e-bayan of PW-1 but in his fard-e-bayan PW-1 had not disclosed the name of appellants Bisheshwar and Awadhesh as assailants and he had also not disclosed this fact who had fired on PW-2. Although, fard-e-bayan of PW-1 recorded by PW-17 has not been brought on record either by the prosecution or by the defence but the admission of PW-17 suggests that PW-1 had not disclosed the name of appellants Bineshwar and Awadhesh as assailants when his fard-e-bayan was recorded by PW-17. From perusal of entire evidence of PW-1, PW-16 and PW-17, it is obvious that PW-17 had recorded fard-e-bayan of PW-1 and in the said fard-e-bayan, PW-1 had not disclosed the name of appellants Bineshwar and Awadhesh nor had disclosed the name of the person who had fired on PW-2. Furthermore, it is also established that when the occurrence took place, there was sunset and it was complete dark. The statement of PW-1 recorded under Section 164 of the Cr.P.C. has been exhibited as Ext. 8. Although, the above stated statement of PW-1 was exhibited on oral request of public



prosecutor and the same was not proved by the concerned Judicial Magistrate but it is obvious that at the time of exhibit of the aforesaid statement, no objection was raised. However, admittedly, the statement of PW-1 recorded under Section 164 of the Cr.P.C. has been brought in evidence by the prosecution. The aforesaid Ext. 8 goes to show that PW-1 claimed in the aforesaid statement that when appellants Balmiki, Awadhesh and Bineshwar fired upon the deceased, he as well as PW-2 started fleeing from there but in the meantime, appellant Ganesh fired which hit on his entire body. This witness, further, admitted in his statement recorded under Section 164 of the Cr.P.C. that after two days of the alleged occurrence he regained his consciousness in the hospital. The injuries found on the person of PW-1 goes to show that no injury was found on his back whereas it is specific assertion in the statement recorded under Section 164 of the Cr.P.C. that he sustained injury while he was fleeing from the place of occurrence. Although, PW-1 tried to cover the aforesaid lacuna of the prosecution case saying before the court that he sustained injury on his front but he had not made such claim before PW-16 as PW-16 admitted that PW-1 had disclosed before him that he had sustained injury while he was fleeing from the place of occurrence. Therefore, all the aforesaid contradictions create doubt about the



claim of PW-1, especially, keeping in mind that there was previous enmity between PW-1 and the appellants.

20. PW-2 Kailash Paswan also claims himself to be injured witness and PW-12 claims to have examined PW-2 and found firearm injuries on his person and the injuries of PW-2 were simple in nature. This witness narrates the same thing which has been narrated by PW-1 but states that appellants Lal Babu and Vijay opened fire on him as a result whereof he sustained injury and became unconscious. This witness, further, claims that on the next day of the alleged occurrence, he regained his consciousness at the hospital and made his statement before the police. This witness also claims that his statement was also recorded before the Magistrate. On being cross examined by the defence, this witness admits that the appellants were hidden in a ditch and he as well as his associates saw the appellants from the distance of 4 to 6 steps. This witness claims that he had disclosed before the police and Magistrate that fire of appellants hit PW-1. This witness, further, admits that when he gave his statement before the police, he could not disclose the entire incident before the police and subsequently, he narrated the entire incident to his parents. This witness denies this fact that his statement was recorded by the police after three days of the alleged occurrence. However, PW-16 admitted this fact



that PW-2 had not claimed before him that it was appellant Ganesh who shot fire on PW-1.

21. PW-2 has admitted that his statement under Section 164 of the Cr.P.C. was recorded by the Magistrate and the aforesaid statement was brought by the prosecution on record as Ext. 8/1. Although, the aforesaid statement was exhibited on the oral request of concerned public prosecutor but perusal of Ext. 8/1 goes to show that PW-2 admitted in the aforesaid statement that when he started running from the place of occurrence, he sustained firearm injury said to be fired by appellants Lal Babu and Vijay Paswan and remained silent about the assailants of PW-1. Admittedly, the aforesaid statement of PW-2 was recorded on 13.10.1992 i.e. after much later of the alleged occurrence.

22. PW-16, the then Officer in Charge of Gaurichak police station, claims that on 22.09.1992 at about 1:30 A.M., PW-1 and PW-2 along with dead body of deceased Ram Dahin Paswan were brought to police station by villagers and at that time PW-1 and PW-2 were in unconscious state. PW-16, further, claimed that he recorded the fard-e-bayan of PW-11. This witness, further, admitted that he went to the place of occurrence and seized blood from a field but there is nothing in the statement of PW-16 to show as to whether he sent the seized blood for chemical examination or



not and no FSL report of seized blood has been brought on record. Furthermore, it is obvious that PW-1 and PW-2 claimed that they had purchased some lungies and at the time of alleged occurrence, they were carrying the said lungies but PW-16 did not find any lungi on the place of occurrence.

23. It is obvious from the statement of PW-1 and PW-2 that at the time of alleged occurrence, there was complete dark and the appellants were hidden in a ditch. So, in the aforesaid circumstance, the claim of PW-1 and PW-2 that they had identified the appellants appears to be doubtful, especially, keeping in mind that at the time of alleged occurrence there was complete dark and the aforesaid witnesses have not disclosed the source of identification and, therefore, in our view, it is very difficult to place reliance upon the testimonies of PW-1 and PW-2.

24. It has also come in prosecution evidence that after the alleged occurrence, several villagers went near the place of occurrence and after that PW-1 and PW-2 along with dead body of deceased were brought to the police station but not a single independent witness including local Chowkidar came forward to support the prosecution case and not only this, the family members of the informant were also tendered by the prosecution in course of



trial and the aforesaid family members of informant did not say anything in respect of the alleged occurrence.

25. Therefore, on the basis of aforesaid discussions, we are of the view that the appellants are entitled to get benefit of doubt and accordingly, the appellants are acquitted of the charges framed against them giving benefit of doubt to them. The appellants are on bail. They are discharged from the liabilities of their bail bonds. In the aforesaid manner, impugned judgment of conviction and sentence order are, hereby, set aside and this appeal is allowed accordingly.

26. Let copy of first and last page of this judgment be handed over to learned Amicus Curiae Ms. Swati Sinha so that she could make claim for her remuneration before the competent authority.

**(Hemant Kumar Srivastava, J)**

**( Prabhat Kumar Singh, J)**

shahzad/-

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