

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.248 of 1994**

SIYA PANDIT, Son of Madhu Pandit,
Resident of village Meyar, P.S. Noor Sarai, District Nalanda

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

Appearance :

For the Appellant/s : Dr. Rajsh Kumar Singh, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA**

and

HONOURABLE MR. JUSTICE PARTHA SARTHY

ORAL JUDGMENT

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

Date : 01-05-2019

This criminal appeal has been preferred against the Judgment of conviction and sentence order dated 11.4.1994 passed by learned Sessions Judge, Nalanda at Bihar Sharif, in Sessions Trial No. 618/92, by which and whereunder learned Sessions Judge (hereinafter referred to as “the trial court”) convicted the appellant No. 1, Siya Pandit, and appellant No. 2, Jagdish Pandit (since dead) for the offence punishable under Section 302/34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life and, furthermore, appellant No. 2, namely, Jagdish Pandit (since dead), was convicted for the offence punishable under Section 27 of the Arms Act and, accordingly, he was sentenced to undergo rigorous imprisonment for seven years thereunder. However, the



learned trial court did not impose fine under Section 302 of the Indian Penal Code upon the appellants but ordered that both the sentences would run concurrently.

2. It is pertinent to note here that during the pendency of this appeal, appellant No. 2, namely, Jagdish Pandit, died and *vide* order dated 12.8.2010 his appeal stood abated.

3. Briefly stated prosecution case is that P.W. 3 (Keshav Pandit) gave his *fard-e-beyan* to P.W. 5 (Rajeshwar Sharma), the then S.I. of Noorsarai Police Station, on 15.5.1992 at 01.00 A.M. at village Meyar, to this effect, that on 14.5.1992 at about 10.15 P.M., someone threw a brick on his house and, thereafter, his brother Chhote Pandit (deceased) along with his wife (PW -2) came out of their house. The informant claimed that he, too, came out of his house and saw that the appellant Siya Pandit armed with country-made rifle and deceased appellant, namely, Jagdish Pandit, armed with country-made pistol were standing in front of his house. The informant claimed to have identified the aforesaid persons in the moonlight as well as in the light of torch. The aforesaid persons were abusing the deceased and were threatening to close the lane situated in front of house of informant as well as deceased,



upon which, some altercation took place between the deceased and the aforesaid persons and, thereafter, appellant No. 1, namely, Siya Pandit ordered deceased appellant Jagdish Pandit to shoot the deceased and after that deceased appellant Jagdish Pandit opened fire of his pistol which hit at the chest of the deceased Chhote Pandit, as a result whereof, he fell down at his door and died then and there. The informant claimed that he raised alarm, which attracted the neighbours but appellant No. 1 and deceased appellant No. 2 fled away towards north side. However, appellant No. 2 left his slipper on the place of occurrence, while fleeing from there. The informant, further, claimed that PW -1 had also seen the occurrence as before the aforesaid occurrence, he had made attempt to pacify the altercation. PW-3 (informant) claimed that Ganauri Pandit, who happens to be the father of the deceased appellant Jagdish Pandit, wanted to close the lane situated in front of house of the informant and the deceased.

4. On the basis of aforesaid *fard-e-beyan*, Noor Sarai P. S. Case No. 83 of 1992 under Section 302/34 of the Indian Penal Code and Section 27 of the Arms Act was registered on the same day and after that formal first information report was drawn up against appellant no. 1 and



deceased appellant no. 2 for the offences punishable under Section 302/34 of the Indian Penal Code and Section 27 of the Arms Act.

5. PW-5, namely, Rajeshwar Sharma took charge of investigation. He inspected the place of occurrence, recorded the statement of prosecution witnesses and after completion of other formalities of investigation, submitted charge-sheet against appellant no. 1 as well as deceased appellant no. 2. The cognizance of the offence was taken and the case was committed to the court of sessions, in usual way.

6. Appellant no. 1 and deceased appellant no. 2 were put on trial before learned trial court and, accordingly, they stood charged for the offences punishable under Section 302/34 of the Indian Penal Code and Section 27 of the Arms Act. The appellant no. 1 as well as deceased appellant no. 2 denied the charges and claimed to be tried.

7. In course of trial, prosecution examined, altogether, six prosecution witnesses and also got exhibited some documents including inquest report as well as postmortem report. The appellant no. 1 as well as deceased appellant no. 2 did not adduce any evidence in support of their defence but when the statement of appellant no. 1 as well as deceased



appellant no. 2 were recorded, they, again, denied the prosecution story and claimed their false implication. However, from perusal of the statements recorded under Section 313 of the Cr. P. C as well as trends of cross-examination of prosecution witnesses, it is clear that the defence of appellant no. 1 as well as deceased appellant no. 2 was complete denial of their participation in the alleged crime.

8. Learned trial court after analyzing the prosecution evidence and having relied upon testimonies of PW-1, PW-2, PW-3, PW-5 and PW-6 convicted and sentenced the appellant no. 1 as well as deceased appellant no. 2 as stated above.

9. Learned counsel appearing for appellant no. 1 assailed the impugned Judgment of conviction and sentence order arguing that the learned trial court committed error in appreciating the prosecution evidence. He submitted that PW-5, admittedly, investigated the place of occurrence and when PW-5 was examined before the trial court, he stated that he found the dead body of deceased Chhote Pandit lying in his house whereas it is specific case of the prosecution that the alleged occurrence took place in a lane situated in front of house of the deceased. He submitted that PW-5 further stated that he found copious



blood in the house of the deceased and no blood was found either in lane or the stairs of house of the deceased and, therefore, the aforesaid fact clearly goes to show that prosecution could not succeed to prove the place of occurrence beyond all shadow of reasonable doubts.

10. He, next, submitted that according to PW-1, PW-2 and PW-3, the alleged occurrence took place at about 10.15 P.M. in a lane and the PW-3 in his *fard-e-beyan* claimed to have identified the assailants in the light of torch as well as in moon-light but before trial court, he claimed to have identified the assailants in moon-light and when specific question regarding the identification of assailants in the light of torch was asked from PW-3, the aforesaid witness admitted that he never identified the assailants in the light of torch. Therefore, it is admission of PW-3 that at the time of alleged occurrence, there was no source of light except moon-light. He, further, submitted that the alleged occurrence took place in a lane which was only four feet in width and there were houses on both the flanks of aforesaid lane and, therefore, it is very difficult to believe that PW-1, PW-2 and PW-3 identified the assailants in moon-light and, therefore, it is obvious that the prosecution failed to prove the source of light in which the prosecution witnesses claimed to



have identified the assailants.

11. He, next, submitted that according to the claim of PW-1, PW-2 and PW-3, it was deceased appellant Jagdish Pandit who shot fire on the deceased and so far as appellant no. 1 is concerned, the aforesaid prosecution witnesses claimed that he was also present in the lane along with deceased appellant no. 2 and it was appellant no. 1 who instigated the deceased appellant no. 2, who opened fire on the deceased. He, further, submitted that according to the prosecution case itself, at the time of alleged occurrence, appellant no. 1 was armed with rifle but it is surprising enough that he did not use his rifle and instead of using his rifle, he instigated the deceased appellant no. 2 to shoot the deceased and, therefore, the aforesaid circumstances creates doubt about the claim of the prosecution witnesses. He, further, submitted that there is nothing on the record to show that there was meeting of minds of appellant no. 1 and appellant no. 2 prior to alleged occurrence or at the time of alleged occurrence for committing the murder of deceased and, therefore, in the aforesaid circumstance, it cannot be said that the appellant no. 1 shared common intention with appellant no. 2 for committing the murder of deceased. He submitted that in the aforesaid circumstance, learned trial court committed



error in convicting the appellant no. 1.

12. On the other hand, learned Additional Public Prosecutor appearing for the State supported the impugned Judgment of conviction and sentence order arguing that the PW-1, PW-2 and PW-3 are eye witnesses of the alleged occurrence and all the aforesaid prosecution witnesses claimed to have seen the appellant no. 1 instigating the deceased appellant no. 2 to shoot the deceased and, therefore, the aforesaid fact clearly goes to show that appellant no. 1 had shared common intention with deceased appellant no. 2 for committing the murder of the deceased.

13. Learned Additional Public Prosecutor, next, submitted that appellant no. 1 and deceased appellant no. 2 are co-villagers of PW-1, PW-2 and PW-3 and it is specific case of the prosecution that prior to opening fire, an altercation was going on between the appellants and deceased and in that altercation, PW-1 intervened and tried to pacify the matter but, in the meantime, deceased appellant no. 2 on the instigation of appellant no. 1 opened fire on the deceased and therefore, in the aforesaid circumstance, it cannot be said that the prosecution witnesses no. 1, 2 and 3 were not able to identify the culprits involved in the alleged occurrence due to dark night.



14. He, next, submitted that PW-6 proved the postmortem report. He, further, submitted that although the doctor, who did postmortem examination on the dead body of the deceased could not be examined but, admittedly, the postmortem report was exhibited under Section 294 of the Cr. P. C. and, therefore, the appellants have no right to challenge the genuineness of postmortem report of the deceased.

15. He, further, submitted that the learned trial court has passed a well discussed judgment and there is no need to interfere into the findings recorded by the learned trial court while passing impugned Judgment of conviction and sentence order as the prosecution successfully proved its case beyond all shadow of reasonable doubts.

16. Having heard the rival contentions of the parties, we went through the records as well as lower court record. The only question arises for determination, as to whether the impugned Judgment of conviction and sentence Order is liable to be confirmed or not.

17. We have already stated that PW-1, PW-2 and PW-3 are only material witnesses, who claimed to have seen the alleged occurrence. Admittedly, PW-5 is Investigation Officer and he just after recording the *fard-e-beyan* of PW-3 went to the



place of occurrence and not only inspected the place of occurrence but also recorded the statements of prosecution witnesses. So far as PW-6 is concerned, this witness has proved the postmortem report and at the time of his examination, he was posted as Medical Officer, Bihar Sharif. This witness proved the signature and handwriting of doctor, S. N. Anwar who had held postmortem examination of the deceased. This witness, further, stated that Dr. S. N. Anwar was not available as he went to Saudi Arabia. However, on being cross-examined by the defence, this witness admitted that the postmortem report of deceased was not prepared in his presence.

18. PW-1 Shiv Nandan Yadav claimed that on the alleged date of occurrence, he was going to attend the call of nature and as soon as reached in front of house of deceased Chhote Pandit, he saw that altercation was going on between deceased Chhote Pandit and deceased appellant. This witness stated that the appellant no. 1 Siya Pandit was armed with gun whereas deceased appellant no. 2, namely, Jagdish Pandit was armed with pistol. This witness claimed that he intervened into the aforesaid altercation and tried to pacify the dispute but while he was returning from there, appellant no. 1 Siya Pandit ordered the deceased appellant Jagdish Pandit and, thereafter, deceased



Jagdish Pandit shot fire which hit on the chest of the deceased.

19. PW-2, namely, Sharda Devi is wife of deceased Chhote Pandit and she claimed that in the night of alleged occurrence, she along with deceased were sleeping on their *Kotha* but, in the meantime, someone threw brick and she along with her husband came out of her house to see who had thrown brick on her house. She, further, claimed that she saw the appellants standing near the door of her house. She, further, claimed that hot exchange of words took place between her husband and the appellants but, in the meantime, PW-1 intervened into the aforesaid dispute and started taking away the appellants to their houses but in the meantime, appellant no. 1 ordered the deceased appellant no. 2 to shoot the deceased and thereafter deceased appellant no. 2 opened fire of his pistol which hit on the chest of the deceased Chhote Pandit, as a result whereof, he having sustained firearm injury fell down there and died then and there.

20. PW-3 Keshav Pandit, who happens to be the brother of the deceased, is informant of the present case. He, too, supported the prosecution case and stated that, at the time of alleged occurrence, appellant no. 1 was armed with country made rifle whereas deceased appellant no. 2 was armed with



country made pistol. This witness also claimed that at the direction of appellant no. 1, appellant no. 2 shot fire on the deceased.

21. On perusal of testimonies of PW-1, PW-2 and PW-3, it is obvious that according to aforesaid prosecution witnesses, the occurrence took place in a lane but PW-5 stated that when he went at the place of occurrence, he found the dead body of deceased lying in his house and he also found copious blood in the house of deceased. However, in his cross-examination, he tried to cover up the aforesaid admission saying that the dead body of the deceased was lying on the stairs of the house though he did not find any blood on the stairs of the house of the deceased. Therefore, there appears some suspicion regarding place of occurrence. Moreover, PW-1, PW-2 and PW-3, all the witnesses stated that occurrence took place in a lane situated in front of house of the deceased and therefore, it might be possible that the deceased having sustained firearm injury, fell on the stairs of his house.

22. On perusal of testimonies of PW-1, PW-2 and PW-3, it is also obvious that the appellant no. 1 was also carrying rifle in his hand and due to intervention of PW-1, appellant no. 1 and appellant no. 2 started returning to their



doors but deceased appellant no. 2 opened fire on the instigation of appellant no. 1. Had the appellant no. 1 any intention to commit the death of deceased, he would have certainly opened fire of his rifle instead of giving order to deceased appellant no. 2 to shoot the deceased. Therefor, it appears that the appellant no. 1 had not shared common intention with deceased appellant no. 2 to commit the murder of the deceased. It is also an admitted position that appellant no. 1 is not family member of deceased appellant no. 2 and there was dispute between family of deceased appellant no. 2 and deceased on the point of a lane and there was no dispute between appellant no. 1 and deceased. In course of examination of prosecution witnesses, specific suggestion was given to them that the appellant no. 1 was implicated by the prosecution party as he was friend of deceased appellant no. 2. Therefore, it is obvious from the aforesaid evidence that appellant no. 1 had no grudge or annoyance against the deceased and, therefore, even if it presumed that he was present in the lane along with deceased appellant no. 2 at the time of alleged occurrence, then also, it cannot be said that he shared common intention with deceased appellant no. 2 to commit the murder of deceased. Moreover, it is also important to note here that the appellant no. 1 has not been convicted for



the offence of Arms Act and, therefore, in the aforesaid circumstance, we are of the view that the prosecution could not succeed to prove this fact that appellant no. 1 shared common intention with deceased appellant no. 2 to commit the murder of deceased and, accordingly, we are of the view that the learned trial court committed error in convicting the appellant no. 1 for the offence punishable under Section 302/34 of the Indian penal Code and the impugned Judgment of conviction and sentence Order in respect of appellant no.1 can not sustain in the eye of law.

23. On the basis of aforesaid discussion, this criminal appeal is allowed and the impugned Judgment of conviction and sentence order, so far as it relates to appellant no. 1, is, hereby, set aside. Appellant no. 1 is acquitted of the charge framed against him. He is on bail and accordingly, he is discharged from the liabilities of bail bonds.

(Hemant Kumar Srivastava, J)

(Partha Sarthy, J)

Spd/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	06.05.2019
Transmission Date	06.05.2019

