

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.62 of 2004

1. Rajendra Mishra

2. Jitendra Mishra

Both sons of Digambar Mishra, resident of village Chandi Asthan
Basudeopur, P.S. Kotwali, district Munger

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Sri Dharendra Kumar Jha, Advocate

Sri Jibendra Mishra, Advocate

For the Respondent/s : Sri Ajay Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 26-03-2019

1. The present appeal was preferred by the appellant alongwith his another brother namely – Jitendra Mishra under Section 374(2) of the Code Of Criminal Procedure, 1973 (hereinafter referred to as the “Cr.P.C.”) against judgment of conviction and sentence passed in Sessions Trial No. 730 of 2002. The appeal of appellant no. 2 – Jitendra Mishra stood dismissed since after being released on bail and his bail bond being canceled by the Honb’le Supreme Court he did not surrender. For securing his appearance all processes were exhausted still he neither appeared nor anyone appeared on his behalf. Appellant – Rajendra Mishra along with other three accused persons by judgment dated



05.12.2003 was convicted under Section 148, 302/34, 307/34 of the Indian Penal Code, 1860 (hereinafter referred to as the “I.P.C.”) and Section 27 of the Arms Act, 1959 (hereinafter referred to as the “Arms Act”) in Sessions Trial No. 730 of 2002 arising out of Kotwali P.S. Case No. 176 of 2002 and by order dated- 08.12.2003 all the accused persons who were put on trial including the appellant were sentenced to undergo rigorous imprisonment for life under Section 302/34 of the I.P.C. Under Section 307/34 of the I.P.C they were sentenced to undergo rigorous imprisonment for ten years. Under Section 148 of the I.P.C. rigorous imprisonment for one year was imposed and under Section 27 of the Arms Act rigorous imprisonment for three years was imposed however all the sentences were directed to run concurrently. In addition to above sentence, Rs. 10,000/- each as fine was imposed which amount was to be distributed amongst the wives of both the deceased. The judgment of conviction and sentence was passed by Sri Ramesh Kumar Rateria, learned 3rd Additional Sessions Judge , Munger (hereinafter referred to as the “trial judge”) in Sessions Trial No. 730 of 2002 (arising out of Kotwali P.S. Case No. 176 of 2002).

2. Short fact of the case is that on 03.05.2002 a written report was submitted to the Officer-in-charge of Kotwali, Munger



by Panchanan Mishra (P.W. 4). In the written report of the informant it was disclosed that on 03.05.2002 in his house there was *Satyanarayan Katha*. Informant's two sons namely- Sunil Kumar Mishra and Chandra Shekhar Mishra (both deceased) were proceeding to distribute '*prasad*' in the village and informant carrying torch in his hand was following his two sons. As soon as his both sons at about 9.30 P.M. reached near the house of Digambar Mishra, Digambar Mishra ordered his three sons that it was a good opportunity and kill both of them. In the meanwhile Nagendra Mishra, Jitendra Mishra, Rajendra Mishra-appellant carrying guns in their hands came out and intercepted both the sons of the informant. Digambar Mishra told his brother -Mahendra Mishra for finishing both sons of Panchanan Mishra (informant). Thereafter Digambar Mishra exhorted as to what they were watching for. Thereafter, Nagendra Mishra through his licensee gun fired on Sunil Kumar Mishra, son of the informant. After receiving gun shot injury he fell down and started squirming. Then Mahendra Mishra with intent to kill another son of the informant namely Chandra Shekhar Mishra fired on him. Chandra Shekhar Mishra after receiving fire arm injury fell down. Thereafter, Gopal Mishra, son of Mahendra Mishra with intent to kill the informant gave three shots of firing from his country made



pistol, however anyhow the informant saved him and raising arm he ran towards his house. In the meanwhile his other sons namely- Anil Kumar Mishra (P.W. 2) and Manoj Kumar Mishra (P.W. 1) also arrived there and started raising alarm. On the said alarm number of persons assembled there and then accused persons by way of firing fled away in two different areas. The informant with the help of villagers carried both injured sons on *thela* to Sadar hospital, Munger where doctor noticing the seriousness of the injuries admitted them and immediately declared both sons of informant as dead. The reason for the occurrence was explained by the informant that he earlier had sold his *khatiyani* land to Ramchandra Yadav and this led to raising grudge in the mind of the accused persons since they were pressurizing to transfer the said land on lesser price and they wanted *rangdari*. In this context one criminal case was also going against them and this was the reason for the present occurrence. The informant besides requesting for taking legal action against the accused persons also requested for providing proper security to his family. In last it was indicated by the informant in his written report that his son -Anil Mishra had also received pellet injury. The said written report was signed by the informant and as a witness Anil Kumar Mishra (P.W. 2) also put his signature. On the basis of the said written report on



the same day i.e. on 03.05.2002 at 11.45 P.M. a formal F.I.R. vide Kotwali P.S. Case No. 176 of 2002 was registered under Section 302 /34 of the I.P.C. and Section 27 of the Arms Act against:

1- Digambar Mishra [died during pendency of his appeal i.e. Cr. Appeal (D.B.) No.50 of 2004]

2- Mahendra Mishra [died during pendency of his appeal vide Cr. Appeal (D.B.) No. 87 of 2004]

3- Nagendra Mishra [in charge sheet shown as absconder]

4- Gopal Mishra [he too was shown as absconder in the charge sheet]

5-Jitendra Mishra [who was appellant no. 2 in the present appeal and whose appeal stood dismissed] ; and

6- Rajendra Mishra [appellant in the present appeal].

After registering F.I.R. Police investigated the case and during investigation accusation against all the F.I.R. named accused persons was found true and as such, on 30.06.2002 charge sheet was submitted against all the six F.I.R. named accused persons. However two accused persons namely- Nagendra Mishra and Gopal Mishra in the charge sheet were shown to be absconder. On 15.07.2002 learned Chief Judicial Magistrate, Munger on the basis of charge sheet took cognizance of offence and thereafter the case was committed to the court of Sessions on 29.11.2002 and it was numbered as Sessions Trial No. 730 of 2002. On 11.02.2003 charge was jointly framed under Section 148, 302/34, 307/34 of the I.P.C. and 27 of the Arms Act against Mahendra Mishra, Rajendra Mishra (appellant) and Jitendra Mishra whereas charge



under Section 109, 302 and 307 of the I.P.C. was separately framed against Digambar Mishra. It may be clarified that Digambar Mishra was the father of the appellant who was convicted along with the appellant and died during pendency of his appeal before this court.

3. During the trial to prove its case on behalf of the prosecution altogether eight witnesses were examined. Out of eight witnesses, P.W. 1 (Manoj Kumar Mishra) brother of both the deceased and son of the informant, P.W. 2 (Anil Kumar Mishra) another brother of both the deceased and son of the informant, P.W. 4 (Panchanan Mishra) informant and father of the deceased and P.W. 5 (Pramod Kumar Mishra) nephew of informant and cousin brother of the deceased were examined as eye witnesses to the occurrence. P.W. 6 (Dr. Arun Kumar Sinha) had conducted post- mortem examination on the dead body of two deceased, P.W. 7 (Mumtaz Ali) was the 1st Investigating Officer against whom the informant during investigation had filed complaint and in evidence it has come that on his complaint investigation of the case was entrusted to P.W. 8 (Binod Prasad Yadav), 2nd Investigating Officer of the case. P.W. 3 (Bhawesh Prasad Singh) who was only independent hearsay witness and whose statement under Section



164 of the Cr.P.C. was recorded during investigation since he did not support the case was declared hostile.

4. After completion of prosecution evidence on 12.09.2003 entire incriminating circumstances and evidences were explained to the appellant and only thereafter his statement under Section 313 of the Cr.P.C. was recorded however, he claimed to be innocent and denied the charge. In support of defence one witness i.e. D.W. 1 (Braham Deo Ram) was examined. On conclusion of the argument the learned trial judge by the impugned judgment has convicted and sentenced the appellant.

5. Sri Dharendra Kumar Jha, learned counsel appearing on behalf of the appellant after referring to entire evidence has argued that prosecution has not been able to prove its case beyond all reasonable doubts. He submits that even during the trial save and except the evidence that appellant was present at the time of occurrence along with other accused persons and also of resorting to firing, it has not come that shot given by the appellant hit anyone. Besides this, he submits that appellant has already remained in custody for more than fourteen years. He submits that during the trial the appellant was in custody however in the present appeal initially he was extended privilege of bail by a Co-ordinate



Bench of this Court. Subsequently informant preferred an appeal before the Hon'ble Supreme Court and Hon'ble Supreme Court canceled the order granting bail by this Court. Thereafter the appellant himself surrendered and is languishing in custody from 16.07.2006. Sri Jha, learned counsel for the appellant submits that during the trial prosecution has not examined even a single independent witness. Only one independent witness was cited who was Bhawesh Prasad Singh however since the accusation was not true and appellant was falsely implicated, the only independent witness i.e. Bhawesh Prasad Singh (P.W. 3) turned hostile otherwise all the witnesses who had claimed to be eye witness are either own brothers, father or cousin brother of the deceased. Sri Jha, learned counsel for the appellant has also tried to persuade the Court that the accusation was not true nor prosecution has established the place of occurrence. By way of referring to the evidence of only defence witness (D.W. 1) he has argued that the occurrence had taken place in an another manner than the manner shown by the prosecution. Alternatively, it has been argued that this Court may take lenient view in the matter and pass some favourable order.

6. Sri Ajay Mishra, learned Additional Public Prosecutor opposing the appeal has argued that prosecution in the present case



has established its case beyond all reasonable doubts. He submits that it is true that most of the material witnesses are close relatives of the deceased but fact remains that now -a- days it is difficult to get any evidence from independent source. He further submits that only on the ground that witnesses are close relative of the deceased their evidence may not be ignored if the evidence is otherwise credible.

7. Besides hearing learned counsel for the parties we have minutely examined entire evidence on record and after going through the same prima facie we are of considered opinion that the learned trial Judge has rightly passed judgment of conviction and sentence which requires no interference. However before recording finding it would be necessary to cursorily refer to the evidence which has been brought on record to establish the prosecution case.

8. P.W. 4 (Panchanan Mishra) is an unfortunate father whose two sons were done to death in his presence. In his evidence he has deposed that on the date of occurrence i.e. on 03.05.2002 there was *Satyanarayan Katha* in his house which concluded at 8.30 P.M. Thereafter all the visitors had dispersed. Since after distribution of '*prasad*' sufficient quantity of '*prasad*' was available and many of the villagers had not come his two sons



namely: Sunil Kumar Mishra, a practicing Advocate and Chandra Shekhar Mishra proceeded for distributing '*prasad*' in the village who were followed by the informant. The informant was carrying a torch in his hand and he was following both his sons. While both the sons were passing from the house of Digambar Mishra (father of the appellant), Digambar Mishra came out and exhorted to kill both sons of the informant. Both the sons of the informant were intercepted by three sons of Digambar Mishra namely- Nagendra Mishra, Jitendra Mishra and Rajendra Mishra who all were carrying fire arms in their hands. Thereafter on the order given by Digambar Mishra, Nagendra Mishra from his licensee gun fired on Sunil Kumar Mishra which hit him and he fell down and started squirming. Thereafter, Mahendra Mishra, brother of Digambar Mishra gave one shot of firing on Chandra Shekhar Mishra which hit on his forehead and he fell down. Thereafter, another shot of firing was made on the eye of Chandra Shekhar Mishra. The informant was also fired by the accused persons but anyhow he could save himself. In the meanwhile, his other sons namely – Manoj Mishra, Anil Mishra and others arrived there and all of them had witnessed the occurrence. On alarm being raised all the accused persons after firing fled away. Thereafter two injured sons of the informant with the help of villagers were carried to hospital



on a *thela*. In hospital both were admitted and immediately thereafter both sons of the informant were declared dead. Thereafter written report was handed over to Officer- in-charge of Kotwali Police Station. This witness was cross examined at length and steps were taken to extract something to create doubt on his evidence. However on going through entire evidence we have not noticed any plausible material to suggest that the evidence of P.W. 4 is doubtful.

9. P.W. 1 (Manoj Kumar Mishra) too in his evidence has stated like P.W. 4. Of course he had come after arrival of P.W. 4. During investigation since the informant was having an impression that Police may not do justice, on complaint the Investigating Officer was got changed and during investigation statement of P.W. 1 under Section 164 of the Cr.P.C. was got recorded by the learned Magistrate and in his evidence he had proved his signature. His statement recorded under Section 164 of the Cr.P.C. was marked as Ext. 1. Almost in similar manner P.W. 2 (Anil Kumar Mishra) has deposed. His statement was also recorded under Section 164 of the Cr.P.C. Similarly, P.W. 5 (Pramod Kumar Mishra) nephew of the informant and cousin brother of the deceased had deposed claiming to be witness to the occurrence. In the evidence of P.Ws. 1, 2 and 5 there is similarity with the



evidence of P.W. 4. Of course there are some inconsistencies but those inconsistencies are negligible and normal otherwise it would have been a case as if witnesses had given parrot type evidence.

10. P.W. 6 (Dr. Arun Kumar Sinha) on 04.05.2002 was posted as Civil Assistant Surgeon in Sadar Hospital, Munger and on the same day he conducted post mortm examination on the dead body of both the deceased. In the said morning at 7.25 A.M. he conducted post mortem examination on the dead body of Chandra Shekhar Mishra and noticed the following facts:

“(I) Wound of entry – One lacerated irregular wound in size 3 cm x 2 ½ x bone deep at left eye. Left eye was lacerated and lost.

(II) Multiple circular blackening spot on forehead below brain.

On dissection – extra vasion of blood and blood clots were present in cranial cavity. Brain matter was lacerated and multiple small pillets were lodged in cranial cavity.

Lungs were congested. Heart was empty. Liver, spleen and kidney were pale.

Death in my opinion was due to shock and haemorrhage as a result of above mentioned injuries caused by fire arm.

Time elapsed since death within 24 hours.”

He also proved the post mortem examination report which was marked as Ext. 6. On the same day at 7.15 A.M. he had conducted post mortem examination on the dead body of deceased- Sunil Kumar Mishra and noticed the following facts:

“(I) wound of entry: - One large irregular lacerated wound with inverted margin at right side of chest wall and shoulder joint size 5 cm x 4 cm x 4 cm (bone deep).



(II) Multiple blackening spot on right side of chest.

On dissection:- Extra vasation of blood and blood clots were present in chest cavity. Fracture of 3rd and 4th ribs of right side. Right lungs was lacerated and multiple small pillets were lodged inside the lungs.

Pillets were preserved, labelled signed and sent to the Police.

Both the chambers of heart was empty. Liver, spleen and kidney were pale.

Death in my opinion was due to shock and haemorrhage as a result of above mentioned injury caused by fire arm.

Time elapsed since death within 12 hours.”

The post mortem examination report in respect of dead body of Sunil Kumar Mishra was marked as Ext. 7. On going through the evidence of P.W. 6 as well as Exts. 6 and 7 it is evident that dead body of both the deceased were having fire arm injuries and fire arm injury was given from close range. It was case of the prosecution that both sons of the informant were intercepted and thereafter firing was made. Accordingly, medical report corroborates the oral evidence.

11. P.W. 7 (Mumtaz Ali) on 03.05.2002 was posted as Officer-in-charge in Town (O.P.). On the same day he got rumour information. Thereafter, he went to the place of occurrence. At the place of occurrence he noticed huge quantity of blood. On being asked one person who was present there informed him that injured were sons of Panchanan Mishra and were shot at and they were taken to Sadar hospital, Munger. On the said information P.W. 7 reached Sadar hospital, Munger and saw that both had already



died. He also got an information that O.D. slip by the doctor had already been sent to Kotwali and also noticed that Panchanan Mishra had gone to Kotwali. On the basis of written report a Case vide No. 176 of 2002 was registered and investigation was entrusted to him. He recorded re-statement of the informant. Thereafter, he visited Sadar hospital. Inquest report was prepared and dead bodies were sent for post mortem examination. He inspected the place of occurrence which was near Chandi Asthan on the road nearer to the house of Panchanan Mishra. At two places at the place of occurrence he noticed huge quantity of blood. The place where he noticed blood was on Northern side of the house of accused- Mahendra Mishra. He has given description of the place of occurrence in paragraph 10 of his evidence. In paragraph 12 of his evidence he stated that about fifty three steps away from the place where blood was noticed in the Eastern bush he noticed two fired 12 bore cartridges. He also prepared seizure list in respect of seized blood which had come out from the body of Sunil Kumar Mishra and Chandra Shekhar Mishra as well as two fired 12 bore cartridges. The said seizure list was got exhibited as Ext. 4. The seizure list was prepared in presence of two witnesses. Again he went to Sadar hospital, Munger where he prepared inquest report. Inquest reports were marked as Exts. 9



and 9/1 in respect of Sunil Kumar Mishra and Chandra Shekhar Mishra respectively. He proved endorsement on the written report of Panchanan Mishra which was in the writing and signature of Sri Binod Prasad Yadav, Police Inspector cum Officer-in-charge, Kotwali Police Station, marked as Ext. 10, formal F.I.R. marked as Ext. 11. He further stated that during investigation he recorded statement of Anil Mishra, Manoj Kumar Mishra, Shankar Jha and Rakesh Mishra, etc. He also noticed that in between the parties land dispute was going on. Subsequently he handed over investigation to Sri Binod Prasad Yadav (P.W. 8).

12. P.W. 8 (Binod Prasad Yadav) on 25.05.2002 was posted as Police Inspector- cum- Officer-in-charge in Munger, Kotwali Police Station and on the same day he took charge of investigation from Mumtaz Ali (P.W.7). During further investigation he recorded statement of number of witnesses and on completion of investigation finally he submitted charge sheet.

13. P.W. 3 (Bhawesh Prasad Singh) is only independent witness but he is a hearsay witness, however he did not support the prosecution case and as such he was declared hostile.

14. On examination of aforesaid entire evidence it is evident that prosecution has brought on record materials showing involvement of the appellant in the occurrence and as such, the



learned trial judge has rightly passed the judgment of conviction and sentence. Evidence of P.W. 4 (Panchanan Mishra), father of his two deceased sons is very much specific. His evidence has been supported by the medical evidence as well as evidence of P.W. 7 who had inspected the place of occurrence. Injuries which were found on the person of the deceased also corroborates the oral evidence. It is true that only independent witness i.e. P.W. 3 (Bhawesh Prasad Singh) who was examined had turned hostile and in the case there is no other independent material witness but on going through the entire evidence on record we are of opinion that evidence of those witnesses particularly P.Ws. 1, 2, 4 and 5 are credible and there is no question to consider their evidence as suspicious. It is not to be reiterated that prosecution case if otherwise is credible may not be ignored only on the ground of non examination of independent witnesses. Now- a- days it is difficult to get support from any independent witness but if a case is based only on interested and relative witnesses those evidences are required to be examined with caution. On cautious examination of entire evidence we do not find any material to consider their evidences as doubtful. Of course from the defence side one witness was examined namely Braham Deo Ram (D.W. 1) but on examination of his evidence we do not find any worth in his



evidence particularly in view of nature of evidence which has been brought on record by the prosecution.

15. After going through entire evidence we are of considered opinion that judgment of conviction and sentence requires no interference. Accordingly, judgment of conviction dated 5th December, 2003 and sentence dated 08.12.2003 passed by Sri Ramesh Kumar Rateria, 3rd Addl. Sessions Judge, Munger in Sessions Trial No. 730 of 2002 is approved and the appeal stands dismissed.

(Rakesh Kumar, J)

(Prakash Chandra Jaiswal, J)

praful/-

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