

**Arbind Kumar and ors. Vs. the State of Bihar**

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**Court :** Patna

**Decided On :** Jan-08-2008

**Judge :** Shiva Kirti Singh and Shailesh Kumar Sinha, JJ.

**Acts :** Arms Act - Sections 27; Indian Penal Code (IPC) - Sections 149 and 302; Code of Criminal Procedure (CrPC) - Sections 161 and 164

**Appeal No. :** Criminal Appeal No. 113 of 2003

**Appellant :** Arbind Kumar and ors.

**Respondent :** The State of Bihar

**Advocate for Def. :** Ashwini Kr. Sinha, Adv.

**Advocate for Pet/Ap. :** Kanhaiya Pd. Singh, Sr. Adv., Raj Nandan Prasad and Atal Bihari Prasad, Advs.

**Disposition :** Appeal allowed

**Judgement :**

**Shiva Kirti Singh and Shailesh Kumar Sinha, JJ.**

1. This appeal is against the Judgment and Order dated 22/28-2-2003 passed by 3rd Additional Sessions Judge, Nalanda at Biharsharif in Sessions Trial No. 456 of 1998 whereby appellant No. 5, Shambhu Prasad has been convicted for offence

under Section 302 of the Indian Penal Code (hereinafter referred to as the I.P.C.) and awarded life imprisonment and the remaining four appellants have been convicted for the offence under Section 302 read with Section 149 of the I.P.C. and also awarded life imprisonment. Appellant No. 2, Dhananjay Kumar and appellant No. 5, Shambhu Prasad have been further convicted under Section 27 of the Arms Act and awarded R.I. for five years but the sentences are to run concurrently. Two co-accused namely Sitaram Mahto and Ram Awatar Prasad have been acquitted of the charge under Section 302/149 of the I.P.C. and Section 27 of the Arms Act by giving them benefit of doubt.

2. The prosecution case as contained in fardbeyan of Gayanand Prasad (P.W.9) is to the effect that on 15-10-1997 at about 5.45 A.M. while he was milching his cattle in front of his house near the road on the north and his nepehew Sunil Kumar (the deceased) was washing his mouth while sitting on his Tube-well situated north of Khanta, in his orchard, at that time appellant No. 1, Arbind Kumar, appellant No. 2, Dhananjay Kumar and appellant No. 5, Shambhu Prasad, all armed with pistol and appellant No. 3, Vir Mani Kumar with lathi and appellant No. 4, Devendra Prasad came there and surrounded Sunil Kumar. Appellants Arbind Kumar and Vir Mani Kumar caught hold of Sunil Kumar and then Devendra Prasad started assaulting him with leg and fists. On hulla the informant (P.W.9), his son Sanjay Sinha (P.W.7), co-villager Naresh Prasad (P.W.8) and others wanted to go to the place of occurrence but they were prevented due to firing by co-accused Sita Ram Mahto and Ram Awatar Prasad (both acquitted) made towards them. Appellant No. 5, Shambhu Prasad and appellant No. 2, Dhananjay Kumar fired at Sunil Kumar. Shot fired by appellant No. 2 hit Arbind Kumar, appellant No. 1 and shot fired by appellant No. 5, Shambhu Prasad hit Sunil Kumar the deceased on the back of his chest. On receiving the injury Sunil cried, fell down and became unconscious. On seeing Sunil Kumar fallen down the accused persons fled away. Thereafter Sunil Kumar was taken to police station and from there to Biharsharif Hospital with the aid of police. From there he was referred to P.M.C.H. on account of his serious condition. At about 10/12 hours he was brought to P.M.C.H. Patna where the doctor declared him dead. The reason of the occurrence was given out as old enmity. The aforesaid fardbeyan of P.W.9 was recorded by S.I. of police R.P. Singh of Pirbahore police station, Patna on 15-10-1997 at 1.30 P.M. It was

transmitted to the concerned police station Rahui and on receipt of the fardbeyan and inquest report formal F.I.R. was drawn at Rahui police station on 19-10-1997 leading to Rahui P.S. Case No. 205 of 1997 and thereafter investigation began which was conducted by P.W.10, Safaur Rahman, Sub-Inspector of Police who at the relevant time was posted as Officer Incharge of Rahui police station.

3. After recording F.I.R. the I.O. inspected the place of occurrence, recorded statement of some of the witnesses and submitted charge sheet against all the seven accused persons. He also received postmortem report from P.M.C.H. but could not record further statement of the informant or the statement of Sanjay Sinha (P.W.7) and Naresh Prasad (P.W.8), the two witnesses whose names are mentioned in the fardbeyan given by the informant, Gayanand Prasad (P.W.9). After cognizance all the named seven accused were committed to the court of sessions. They pleaded not guilty to the charges framed against them and were put on trial. The defence of the accused persons is general denial of their involvement in the occurrence. From the suggestions and arguments it appears that the defence has also challenged the place and manner of occurrence. It has examined two defence witnesses who are formal in nature and have proved the F. I. R. of counter case lodged by appellant Shambhu Prasad as Exhibit-A and the injury report of appellant No. 1, Arbind Kumar as Ext. B. The Ext. A shows that the counter case i.e. Rahui P.S. Case No. 202/97 was recorded on written report of Shambhu Prasad on 15-10-97 at 8 P.M. against 9 persons including the informant of this case P.W.9, his son P.W.7, his nephew, P.W.8, father of the deceased, P.W. 5 and also the deceased Sunil Kumar. The injury report shows that Arbind Kumar was examined by the doctor at Biharsharif on 15-10-97 at 8.05 A.M, and the doctor found two fire arm injuries on his body which appear to be wound of entry and wound of exit.

4. The prosecution in order to prove its case has examined altogether 11 witnesses. P.W.1, Binda Prasad is a co-villager who in court has claimed to have arrived at the place of occurrence on hearing sound of firing and to have seen four accused persons near the place of occurrence. He has not named appellant No. 4, Devendra Prasad. His attention was drawn to his statement before the I.O. and from the evidence of P.W.10, the I.O. it appears that during investigation this

witness had claimed only to have heard that Sunil was injured.

5. P.W.2, Renu Devi and P.W.4, Prem Lata Devi @ Munni Devi are family members of the deceased being his Bhabhi and sister respectively. In court they have claimed to have seen entire occurrence from their roof top where they were taking walk but from their earlier statement, as deposed by the I.O., and towards which their attention was drawn during cross-examination, it appears that they had not clearly claimed to be eye witnesses of the occurrence and had not stated that they had seen the occurrence with their eyes from roof top.

6. P.W.3, Bachchu Ravidas has claimed to be an eye witness of the occurrence. Whereas according to P.W.2 the entire occurrence was over within two minutes, according to P.W.3, the deceased was assaulted by the accused persons with fists and slaps for about 10 minutes. His attention has been drawn to his earlier statement before the I.O. and from the evidence of the I.O., P.W.10, it appears that before the I.O. he had not stated material facts such as he was washing his mouth at a distance of 20-25 feet and he had seen the accused persons with various arms. He had also not mentioned that Arbind Kumar and Vir Mani and Devendra had caught Sunil and assaulted him with fists and slaps and when Sunil was in a position to escape then Dhananjay fired and the shot hit accused Arbind and the shot fired by Shambhu hit Sunil in the back and he fell down and became unconscious. The I.O. has further stated that this witness had told him that whose shot hit Arbind was not seen by him.

7. P.W.5, Jagdish Mahto is father of the deceased and admittedly he is only a hearsay witness who had gone to some other part of the village at the time of the alleged occurrence. P.W.6, Girja Nandan Prasad is a teacher. He has claimed that on the date of occurrence he had gone to attend call of nature and while he was returning back along with his friend one Naresh Prasad of village Gularia Bigha (not examined) then he saw the occurrence from the road. At that time the deceased Sunil had been surrounded by all the seven accused persons who were variously armed. According to his statement in paragraph-26, the deceased had been caught by accused Arbind Kumar and Dhananjay and Devendra was assaulting him with fists and slaps and when Sunil attempted to escape,

Dhananjay fired a shot which instead of hitting Sunil hit Arbind and then Shambhu Prasad fired a shot which hit in the back of chest of deceased Sunil. Later after three days of making such statement, in cross-examination in paragraph-42 he stated that he had named Dhananjay by mistake in place of Vir Mani as one of the persons who had caught Sunil. He has admitted that he is the resident of another village and works in the school at Balia Bigha and has claimed that in Balia Bigha he stays in the office of the school which is situated in the Dalan of informant, Gayanand. The attention of this witness has been drawn to his earlier statement and his statement in court. From the evidence of the I.O., P.W.10 in paragraphs 23 to 25 it appears that in his first statement to the I.O. he had claimed that after hearing the sound of firing and noise he went near the place of occurrence and had not disclosed the name of the assailants. In his another statement made later to the I.O. he claimed that he came to know that shot fired by Dhananjay had caused injury to Arbind but did not name the assailant of Sunil (deceased). He had claimed that he was returning with his friend Naresh but had not disclosed that the said Naresh was of village Gularia Bigha.

8. P.W.7, Sanjay Sinha and P.W.8, Naresh Prasad are son and nephew respectively of informant Gayanand Prasad and have claimed to be eye witnesses of the alleged occurrence. They have supported the claim of the informant, Gayanand Prasad (P.W.9) that they were present with the informant when he was milching a she-buffalo. They appear to support the informant in respect of the time, place and manner of occurrence as given in the fardbeyan. Both these witnesses have claimed that they had given their statement to the I.O. who had recorded the same on a plain paper. Both P.W7 and P.W.8 have admitted that there was a counter case filed against them. They have also claimed that they had given a statement before the Magistrate under Section 164 of the Cr.P.C. In cross-examination of P.W.7 it has come that the alleged old enmity between the parties was of the year 1954 relating to an occurrence of dacoity and that had ended in compromise between the parties. This witness has further deposed that one day prior to the occurrence he had heard that there had been verbal altercation and abuses between Sunil (deceased) and appellant No. 1, Arbind Kumar but he was not aware as to why such altercation had taken place. According to P.W.7 Sunil was assaulted by the accused persons by fists and slaps with considerable force

for one or two minutes and then firing was done when he was making efforts to escape. According to paragraph-12 of the deposition of P.W.8 also the deceased had been surrounded by the accused persons. Accused Vir Mani and Arbind had caught the deceased from the front, accused Shambhu Prasad and Dhananjay had also surrounded the accused and they were towards east of him. Firing was done on the deceased when he attempted to flee away and it was done in the course of such attempt. When Sunil fell down after receiving fire arm injury then the accused persons left him and fled away. Neither P.W.7 nor P.W.8 have admitted that they raised any hulla (hue and cry) in course of the occurrence or later on when they reached at the place of occurrence.

9. P.W.9, the informant is uncle of the deceased. He has supported the prosecution case. According to him the police did not investigate the case properly and therefore he had filed in court a protest petition (Ext.2). He has claimed that he got opportunity to see the case diary in court and then came to know that police had not recorded his further statement and the statements of P. Ws. 7 and 8 in the case diary. He has claimed that statement of other witnesses also has not been noted correctly. He has deposed that the learned Chief Judicial Magistrate rejected the prayer for recording of statement of P.Ws.7 and 8 under Section 164 Cr.P.C. but after revisional order of the session court such statement was recorded. He has admitted counter case relating to injury caused to Arbind Kumar, appellant No. 1. The defence has suggested that his further statement was not recorded because he was absconding due to the counter case in which he surrendered on 17-2-98. In cross-examination he has admitted that he along with others had reached hospital at Patna at about 12-12.30 in the after-noon where the deceased was examined by the doctor and declared dead. The postmortem was held on the same date and the body was received by him at about 4 P.M. He has admitted that from the place of occurrence he had gone along with the injured to Rahui police station but he did not disclose the occurrence to anybody there on account of advice that injured was serious and he should be taken to hospital. He proceeded from police station to hospital without any injury report or paper from the police station. The vehicle for going to hospital was provided by the police and at the time of departure for the hospital a police constable of the police station was present. They reached Bihar Sadar Hospital at about 7.30 or 8 in the morning

where the injured was given some treatment which took about half an hour in that hospital at Biharsharif. He had seen Arbind Kumar, appellant No. 1 in injured condition. According to him Arbind reached hospital after 10-20 minutes of their arrival in the hospital. He has admitted that the Officer Incharge of Rahui had come to the hospital at Biharsharif but he did not disclose anything about the occurrence to him. He has given an explanation that he wanted to give information to the police officer but he advised him to go to patna and take care of the injured. He has also admitted that through-out the occurrence he did not raise any hulla. He has denied the suggestion that the place of occurrence is not visible from his Bathan where he claims to be present and milching a she-buffalo. He has also denied the suggestion that no occurrence took place as alleged and nothing happened at the time and place alleged by him.

10. P.W.10, Safaur Rahman is the investigating officer of this case. He has proved the formal F.I.R. as Ext. 3 and the fardbeyan as Ext. 4. Although he lodged the F.I.R. after receipt of fardbeyan and a photo-copy of inquest report, on 19-10-97, he has admitted that on 15-10-97 at 8 A.M. he received information on telephone that injured from village Balia Bigha had arrived at Biharsharif Sadar Hospital in serious condition for treatment. He went to the hospital and saw injured Sunil (deceased) and also injured Arbind Kumar. Both were unconscious and therefore he could not record their statements but he saw their injuries and issued a requisition in respect of their injuries and requested the doctor to inform him when the injured became conscious or when their family members became available. He has claimed to have inspected the place of occurrence as shown by maternal uncle of deceased Sunil namely Jai Narain Singh (not examined). He has described the place of occurrence as the tube-well of deceased Sunil Kumar situated in his orchard. He did not find any mark of blood at the place of occurrence. According to him some people had explained that the blood was washed out due to rains. This statement of the I.O. was objected by the defence and in course of arguments also it was highlighted that no witness has claimed that there was any rain after the occurrence. He claims to have recorded the statement of Prem Lata Kumari (P.W.4) on 20-10-1997 and statement of Jagdish Mahto (P.W.5) on 29-10-1997. He further claimed that on 4-11-97 when he went to the concerned village along with Subdivisional Police Officer then he recorded the

statement of several witnesses including P.Ws.1, 2, 3, 4 and 6. He also received postmortem report from P.M.C.H. A photo-copy of the inquest report was produced by him and was marked 'X' for identification. He has claimed that on 3-1-98 he was transferred from Rahui police station and hence further investigation was handed over to another Sub-Inspector, Rama Nand Singh of Rahui police station. He has admitted that counter case being Rahui P.S. Case No. 202/97 was lodged on 15-10-1997 and on the same date he had inspected the place of occurrence of that case which was in village Balia Bigha. In cross-examination also he has claimed that family members of the two injured were not present in the hospital at Biharsharif. He has further claimed that on 24-10-1997 he had gone to village Balia Bigha and on that date the informant and other members of his family were absconding and the house was closed. He instructed the Chaukidar and Dafadar to inform them to make themselves available for recording their statements. Thereafter on 29-10-97 he recorded the statement of P.W.5 and on 4-11-1997 statement of some other witnesses. He has claimed that so long as he was the I.O. the informant did not appear before him for recording of his further statement and P.W.7 and P.W.8 also did not appear before him to give their statements. The chargesheet was submitted in this case on 26-1-98. According to the I.O. the place of occurrence of both the cases i.e. this case and the counter case are situated within the vicinity of 30 yards.

11. P.W.11 is doctor Arun Kumar Singh who conducted the autopsy on the dead body of Sunil Kumar on 15-10-97 at 2.45 P.M. He found one stitched wound of 1' size on the right side of the back of chest 1/2' right from mid line and 9 1/2' above from sacrum. Upon dissection he found internal injuries and recovered the metallic bullet from abdominal cavity from near the left kidney. In the opinion of P.W.11 the death had taken place within 6 to 24 hours of postmortem examination and the cause of death was due to shock and haemorrhage and the weapon used was fire arm. The postmortem report was proved by him as Ext. 5. Nothing useful has been elicited from the doctor in cross-examination.

12. On behalf of appellants it has been submitted that P.Ws. 1 and 5 have not claimed to be eye witnesses of the actual occurrence and so far as P.Ws. 2,3,4 and 6 are concerned, their presence at the place of occurrence is not mentioned in

the fardbeyan of P.W.9 and from their earlier statements made under Section 161 of the Cr.P.C. before the I.O., as deposed by P.W.10, they had not claimed to be eye witnesses of the actual occurrence and hence they should not be relied upon as eye witnesses. It was further submitted that P.W.2 and P.W.4 are family members of the informant and P.W.6 has also admitted that he lives in the house of the informant where the school office is located. Hence they are interested witnesses also on account of their closeness to the informant.

13. So far as P.W.7, San jay Sinha and P.W.8, Naresh Prasad and the informant Gayanand Prasad (informant) are concerned, it has been submitted that although they claimed to be eye witnesses and have given more or less consistent account of the alleged occurrence but they are not independent witnesses as they are closely related to each other and the deceased. It has further been submitted that their depositions require to be scrutinized carefully particularly in respect of manner of occurrence, keeping in view the broad circumstances available on record. Learned senior counsel for the appellants submitted that no doubt the fardbeyan itself contains an explanation for serious fire arm injury on the person of appellant No. 1, Arbind Kumar but such explanation requires minute and close scrutiny in the light of admitted fact that at the earliest opportunity and soon after the occurrence although P.Ws.7, 8 and 9 had gone to Rahui Police Station where a constable was present and had met with officer incharge of that police station at Biharsharif hospital, but no effort was made to disclose the prosecution case at that stage. The other circumstance or fact highlighted by learned senior counsel was on the basis of injury report of Arbind Kumar which has been proved as Ext. B. It was shown from Ext. B that appellant No. 1 was examined by the doctor on 15-10-97 at 8.05 A.M. and he found the following injuries on his person (1) Lacerated wound 1/4' x 1/4' x muscle deep, inverted blackened margins on left lateral portion of upper part of left thigh. (2) Lacerated wound 1/2' x 1/4' x muscle deep on left gluteal region with everted margins with one metallic piece semulating bullet embedded in it.

14. Elaborating the aforesaid submission, it was pointed out that injury No. 1 which is clearly the wound of entry was found to have blackened margins which indicates that firing was done from a very close range of about 3 feet which is not possible in

case of firing from a friendly hand but on account of mistaken aim. It was further submitted that according to the prosecution case the deceased had been surrounded from all sides and had been caught by appellant No. 1, Arbind Kumar and another accused. Appellant Dhananjay Kumar and Shambhu Prasad were also present very close to the deceased and other accused persons. In such circumstances there can be no scope of aiming the weapon at the deceased but hitting the appellant No. 1 on account of mistaken aim. It was also highlighted that the initial injury report of the deceased has been suppressed by the prosecution and so far as the postmortem report is concerned it does not show that injury on the deceased had charred or blackened margin. On that basis also, it has been submitted that even the injury on the deceased does not fit in with the prosecution case that he had been over powered by the accused persons and when he attempted to flee he was shot by Shambhu Prasad and when he fell down he was left by the accused persons who fled away. Thus, it has been submitted that the objective findings and the broad circumstances in this case do not support the manner of occurrence alleged by the prosecution.

15. Further submission on behalf of accused persons is that the fardbeyan was lodged by the prosecution in this case after considerable delay only after the deceased died and there is every possibility that the initial version of the occurrence has been suppressed and another one given after premeditation and consultation and therefore explanation has been given with regard to injury to Arbind Kumar, appellant No. 1, although the said explanation is not free from doubt in view of injury No. 1 found on Arbind Kumar which shows firing from a very close range. It was further submitted that due to own fault of the prosecution in not giving information to the police at the earliest, the inspection of the place of occurrence was delayed but even then there is no explanation as to why no mark of blood was found at the place of occurrence. It was pointed out that although the I.O. has tried to introduce an explanation by saying that someone had told him that blood had been washed out due to rain but in court no witness has given such explanation. It was further submitted on behalf of defence that initially the informant as well as P.Ws. 7 and 8 were reluctant to give their statement before the I.O. and only an hearsay witness P.W.7 was produced from the family besides the lady witness P.Ws. 2 and 4 and later on they proceeded to get themselves

examined under Section 164 of the Code of Criminal Procedure. On this account also, according to learned Counsel for the appellants the evidence of P.Ws. 7, 8 and 9 who are all interested witnesses should not be relied upon. It was highlighted that the admission made by this witness that they did not raise any hulla during the occurrence or even later is also an unnatural conduct of a close relation of a deceased and it indicates that they were not present at the time of actual occurrence and have wrongly claimed to be eye witnesses.

16. On behalf of State it was submitted that the conduct of the I.O. has been questioned by the informant by filing a protest petition and therefore the statement of witnesses in the case diary as recorded by the I.O. cannot be given much value. For this proposition of law, reliance has been placed upon judgment of the Supreme Court in the case of Baladin v. State of U.P. : 1956 CriLJ345 .

17. No doubt the informant has expressed dis-satisfaction with the investigation done by the I.O. and there appears substance in the submission advanced on behalf of the State that in such situation much reliance should not be placed upon the statements recorded by him under Section 161 Cr.P.C. However, the main point in this appeal is whether the manner of occurrence alleged by the prosecution and the explanation given by it regarding injury sustained by appellant No. 1, Arbind Kumar is fit to be relied upon or reasonable doubts arise in accepting the version of the prosecution on account of various factors and circumstances as per submissions advanced on behalf of defence and noted earlier. The broad features of the case show that although five out of seven accused were allegedly armed with fire arms and one had lathi, the deceased has sustained only one fire arm injury and the medical evidence does not show that it was from close range which should have been the case according to the manner of occurrence given by the prosecution. The explanation given for the injury to Arbind Kumar that he was accidentally hit on account of firing by Dhananjay Kumar does not appear free from doubt because the deceased as well as Arbind Kumar and Dhananjay all were close to each other at the place where the deceased was allegedly held by two of the accused persons.

18. In such circumstances there is hardly any occasion of missing aim at the deceased from point blank range. An accidental shot due to mistaken aim is probable and possible only if the target as well as the person who received injury are at some distance from the person who is taking the aim. According to the prosecution case the situation was quite otherwise. Hence on broad probabilities and from the circumstances the prosecution case in respect of manner of the alleged occurrence and particularly in respect of injury to appellant No. 1 does not appear free from doubt. Once the explanation given by prosecution in respect of a serious fire arm injury upon appellant No. 1 by fire arm in course of the same occurrence, as per prosecution case, is found to be doubtful, it has to be held that the prosecution has not come forward with clean hands and true version of the occurrence. This is probalised further on account of failure on the part of the alleged eye witnesses P.Ws.7, 8 and 9 to report the occurrence at the earliest to the police either at Rahui police station or at Biharsharif Sadar Hospital.

19. We are conscious of the fact that P.Ws 7, 8 and 9 have given somewhat consistent account of the occurrence but it is a fact that they are not independent witnesses and no one from the village has come forward to depose who can be safely relied upon as an eye witness nor any such independent villager has been named as a witness in the fardbeyan. The presence of independent witnesses was expected when in a village 7 persons variously armed proceeded through the road to surround and commit the occurrence, as alleged by the prosecution. It is also well established in law that witnesses may lie but the circumstances do not. In view of the facts and circumstances discussed above we find that the manner of occurrence given out by the prosecution in this case cannot be safely relied upon and therefore all the appellants deserve to be given benefit of doubt. Hence, the appeal of all the five appellants is allowed. They are acquitted of all the charges. Appellant No. 5, Shambhu Prasad is in custody. He should be released forthwith if not required in connection with any other case. The other four appellants shall stand discharged from the liabilities of their respective bail bonds.