

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.58 of 1989

Arising Out of P.S.Case No.4 Year- 1976 Thana -Govindganj District- East Champaran.

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Bhuwali Tiwari, son of Late Ram Baran Tiwary, resident of village-Mamarkha
Bhaiya Tola, P.S.-Gobindganj, District- East Champaran.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Smt. Fauzia Shakil, Amicus Curiae
For the Respondent : Sri Dilip Kumar Sinha, A.P.P.

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 16-01-2015

The present appeal arises out of the judgment of conviction and order of sentence dated 13.01.1989 passed by the learned 4th Additional Sessions Judge, East Champaran at Motihari in Sessions Trial No.16 of 1985/84 of 1987 by which the solitary appellant Bhuwali Tiwary was convicted of an offence under Section 302 IPC and was directed to suffer rigorous imprisonment for life.

2. Originally, there were four accused persons named in the FIR including this appellant. It was stated by the informant Yogendra Dubey (P.W.4) that he had come to the house of the deceased Badan Nath Tiwary for fixing a date for *Vidagari* of his daughter-in-law, who happened to be the daughter of said deceased Badan Nath Tiwari. As soon as had arrived at the *Darwaja* of



deceased at about 6 P.M. after attending to the call of nature, he found accused Laxman Tiwary, Ramjee Tiwary and appellant Bhuwali Tiwari, all sons of Ram Baran Tiwary standing in front of the Darwaja of the deceased Badan Nath Tiwary in its sahan. Laxman Tiwary and this appellant Bhuwali Tiwari were carrying farsas in their hands and an altercation between the wife of the deceased Badan Nath Tiwary and mother of Laxman Tiwary, namely, Champa Devi was going on. Accused Laxman Tiwary was daring the deceased Badan Nath Tiwary to come out of his house and get killed. The wife and daughter of deceased Badan Nath Tiwary were forbidding him to go out of his house, but the deceased Badan Nath Tiwary did come out of his house when he was clashed in his arms by accused Ramjee Tiwary. It was alleged that accused Laxman Tiwary dealt a farsa blow which hit the deceased Badan Nath Tiwary on his head and this appellant Bhuwali Tiwari dealt the other blow with the same weapon which hit the deceased Badan Nath Tiwary on his scapula. Deceased Badan Nath Tiwary fell down when the accused persons ran away from there leaving behind out of their farsas.

3. P.W.4, the informant, went to the police station on 11.10.1976 and lodged a report in respect of the occurrence which had taken place on 10.10.1976 at 6 P.M. The FIR was drawn up and as appears from the record, the investigation was taken up which

ultimately ended in submission of the chargesheet only against the present appellant Bhuwali Tiwari who was put on trial by being charged with committing offence under Section 302 IPC.

4. It appears that seven witnesses were examined during course of the trial, out of whom, P.W.2 Surendra Tiwari was declared hostile in spite of having supported the prosecution case, only because he had not implicated the present appellant as one of the assailants of the deceased Badan Nath Tiwary. P.W.3 Sudama Tiwari, who was named in the FIR as an eye witness, was tendered for cross-examination. P.W.5 Shambhu Nath Tiwari gave evidence on seizure of different articles and preparation of different documents and during that course, he also stated that the deceased Badan Nath Tiwary had been assaulted and killed by accused Laxman Tiwari and this appellant Bhuwali Tiwari, but in cross-examination in paragraph-5 the P.W.5 stated that he had not seen the occurrence himself. So far as P.W.1 Yagyanand Tiwari is concerned, his evidence was also hearsay from P.W.2 Surendra Tiwari and we have already noted that Surendra Tiwary was declared hostile and his evidence does not indicate that he had met P.W.1 Surendra Tiwari who stated to him about the story and the manner in which deceased Badan Nath Tiwary was killed. P.W.6 Dr. Kapildeo Singh had held postmortem examination on the dead body of the deceased and had prepared the

postmortem report (Ext-3).

5. Smt. Fauzia Shakil, learned Amicus Curiae took us through the evidence of witnesses and submitted that there was the solitary evidence of P.W.4 Yogendra Dubey, the informant of the case and it appears that the evidence of other witnesses, like, P.W.1 Yagyanand Tiwari and P.W.2 Surendra Tiwari did not implicated the present appellant Bhuwali Tiwari. The evidence of P.W.4 was also not wholly reliable as there were many infirmities in his evidence.

6. Sri Dilip Kumar Sinha, learned Additional Public Prosecutor, initially attempted to support the judgment by submitting that the evidence of P.W.4 was acceptable and the same was supported by the evidence of P.W.6 Dr. Kapildeo Singh but subsequently being confronted with some infirmities which appeared from the evidence of P.W.4, was lukewarm in his resistance to the submissions of the learned counsel for the appellant.

7. There should not be any doubt that deceased Badan Nath Tiwary was murdered as appears from the evidence of P.W.6 Dr. Kpildeo Singh who had found the following two ante-mortem injuries on his person:-

- (i) Incised fractured wound over back of left arm with regular margin measuring 2 1/2"x2"x2 1/2" deep.
 - (ii) Incised wound 2 1/2"x 1 1/2"x bone deep over forehead on left side
- On dissection, injury no.(i) was found cutting the auxiliary vessels and nerves. Injury no.(ii) had cut the right scapula

through and through and had gone up to the meninges of the same and the two injuries were caused by sharp cutting weapon.

8. Thus, what appears from the evidence of P.W.6 is that two blows were given to the deceased causing one injury on his arm and other on his left forehead. P.W.4 the informant of the case while deposing during trial stated that the first blow was given by accused Laxman Tiwary with *farsa* which hit the deceased on his head and at the orders of Champa Devi, this appellant Bhuwali Tiwari had given two blows, one on the scapula of the deceased Badan Nath Tiwary and the other on his abdomen (P.W.4 paragraph-1). Thus, as per the evidence of P.W.4, there should have been three injuries one on the head, the other on either of the scapula and the third on the abdomen of the deceased. However, the doctor's evidence, which we have just extracted a little earlier, indicates as if it were a case only of two blows. No injury was found either on the scapula or on the abdomen of the deceased Badan Nath Tiwary rather in addition to the one injury on the forehead of the deceased, there was another injury on the back of left arm. Thus, the evidence of P.W.4, does not go hand in hand with that of the Dr. P.W.6. If the informant had really been present at the scene of the occurrence and had seen the blows being given to the deceased Badan Nath Tiwary, then there was no reason for him to give evidence which was contrary to the evidence of the



doctor. What we find is that there might be an injury which was in consonance with his evidence as regards the blow which was given by accused Laxman Tiwary on the head of the deceased Badan Nath Tiwary but the non-finding of the injuries either on the scapula or on the abdomen of the deceased Badan Nath Tiwary tells another story as if he had given evidence on one of the most material aspects of the case, which was not consisting with the medical evidence. The other inference which could be drawn after considering the oral testimony of P.W.4 Yogendra Dubey and that of the doctor was that the blow which was assigned to the present petitioner, i.e., of giving two *farsa* blows, on his scapula or on his abdomen, was not being borne out from the doctor's evidence and this anomaly was leading to the inference that the allegations against the appellant of his direct or otherwise participation in commission of murder was doubtful.

9. What we further find from the evidence of P.W.4 Yogendra Dubey is that the occurrence had taken place at about 6 P.M. in the evening of 10.10.1976 and the deceased Badan Nath Tiwary had almost immediately been picked up and carried to Malahi Hospital. While his wounds were being bandaged, he breath his last and his dead body was carried back to his house. This exercise of carrying the injured deceased Badan Nath Tiwary to the hospital and bringing him back after his death to his house, as may appear from the



evidence of P.W.4, had probably consumed almost about two hours as appears from paragraph-5 of the evidence of P.W.4. Thereafter, the informant and others of the family of the deceased or those who had accompanied the injured up to Malahi Hospital were not moving anywhere to lodge a report about the incident. The informant had stated in paragraph-8 that the report was lodged at the police station in the next evening and the FIR also bears testimony to the above fact that the FIR was lodged at about 6 A.M. on 11.10.1976. The explanation which was given by P.W.4 for the delayed lodging of the report was that the accused persons might have assaulted and killed the informant in the way itself, if he had ventured out of his house to go to lodge the report. We do not find the explanation acceptable. The reason which we have found is that there was no evidence that the accused persons after the incident, had been found hanging around, holding out threats to the informant or any of the family members of the deceased. No witness had stated that they had seen any of the accused roaming around and giving out threats either to the informant directly or was conveying it through any one. The very evidence of the informant that he and others took the deceased Badan Nath Tiwary to Malahi Hospital is also a testimony to the fact that there was no threat or any resistance from the accused or any one connected with them so as to obstructing the informant or any one from going out of



the village for any purpose. The informant had stated that he had remained at the house of the deceased Badan Nath Tiwary for the whole night. We do not see any reason as to why he should have remained at the house of the deceased Badan Nath Tiwary for the whole night and should not have lodged a report. There was a suggestion given to him by the defence that, in fact, he was not present at the scene of occurrence and that after the deceased Badan Nath Tiwary had been assaulted by some known persons, he was called by his family members to tell the police a half baked story about the incident. We do not say that the suggestion given to the informant in paragraph-9 of his deposition was the gospel truth, but the circumstances which emerge from the testimony of P.W.4 do raise some strong suspicion on his claim that he was present at the scene of occurrence and had seen it with his eyes.

10. Some of the anomalies which appear in the evidence of P.W.4, we have already highlighted and those anomalies or inconsistencies in his testimony are suggestive of the above inference which we have just drawn on the probability as regards his presence or absence at the scene of occurrence. As regards the evidence of P.W.1, he was not an eye witness to the occurrence and he stated that while he was going to the market place, he met P.W.2 who stated to him that deceased Badan Nath Tiwary had been killed by accused



Laxman Tiwary. The evidence of P.W.1 is though hearsay, but it indicates that the name of this appellant Bhuwali Tiwari had not appeared in the initial story which was making round in the village or in the area. P.W.2 Surendra Singh was supporting the story that deceased Badan Nath Tiwary was given a blow by a farsa by accused Laxman Tiwari on his head and he fell down and accused Laxman Tiwari gave another blow to him with the same weapon. P.W.2 Surendra Tiwari was very clearly stating that no other person than accused Laxman Tiwari dealt blows to deceased Badan Nath Tiwary. P.W.2 was declared hostile only for the reason he was not implicating any one, except accused Laxman Tiwari in his evidence. P.W.3 Sudama Tiwari, a witness named in the FIR as an eye witness, was tendered for cross-examination and the evidence of these witnesses also indicate that the name of the present appellant Bhulwali Tiwari had also not appeared in some of the initial stories which were making round and which were being circulated by one person to the others and, as such, it remains in doubt that indeed this appellant had participated in any manner in commission of the offence.

11. On consideration of the evidence which is available to us on record, we are clearly of the opinion that the charge against the appellant had not been established by evidence which appears quite shaky and infirm, as a result of which, we find merit in the present

appeal. It is hereby allowed by setting aside the judgment of conviction and order of sentence passed upon the appellant Bhuwali Tiwari. The solitary appellant is acquitted of the charge he had been held guilty of. He is on bail. He is discharged from the liabilities of his bonds.

12. Smt. Fauzia Shakil, Advocate has assisted the Court as Amicus Curiae and the Court desires that she be paid one fee of hearing by the Patna High Court Legal Services Committee and for that purpose let a copy of the first and last pages of this judgment be made over to Smt. Shakil, an Advocate of this Court appearing in this matter as Amicus Curiae.

(Dharnidhar Jha, J)

(Amaresh Kumar Lal, J)

B.Kr./-V.K.Pandey.

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