

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.378 of 1992

Against the judgment of conviction dated 08.09.1992 and order of sentence dated 09.09.1992, passed by Shri Rameshwar Prasad Yadav, 5th Additional Sessions Judge, Bhagalpur, in Sessions Case No. 550 of 1988/Trial No. 89 of 1988.

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1. Tej Narain Yadav , son of late Hriday Narain Yadav
2. Uday Yadav, son of late Hriday Narain Yadav
Both residents of Ghogha Bazar, P.S. Kahalgaon, District Bhagalpur.
..... Appellants

Versus

State of Bihar
..... Respondent

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Appearance :

For the Appellants : M/s Ajay Kumar Thakur,
Rakesh Kumar Sinha and
Nilesh Kumar, Advocates

For the Respondent : Mr. Ajay Mishra, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH
and**

HONOURABLE JUSTICE SMT. ANJANA MISHRA

ORAL JUDGMENT

(Per: **HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH**)

Date: 23-01-2015

The two appellants, who are brothers, have been convicted under Section 302/34 of the Indian Penal Code and sentenced to undergo imprisonment for life by the 5th Additional Sessions Judge, Bhagalpur, in Sessions Case No. 550 of 1988/Trial No. 89 of 1988 by judgment of conviction and order of sentence dated 08.09.1992 and 09.09.1992, respectively. It is not in dispute that they are Gotias of the deceased Mahatma Prasad Yadav.

2. The prosecution case is based upon the fardbeyan of Mahatma Prasad Yadav as recorded in the Emergency Ward at Bed



No. 5 of Bhagalpur Medical College Hospital (for convenience 'BMCH') at about 8.10 pm on 11.01.1987. It is a very short statement. It states that the two appellants had come to the Tea Stall of the deceased and then assaulted him. Appellant Tej Narain Yadav shot at the deceased, whereas, appellant Uday Yadav cut his left hand. This fardbeyan was recorded by P.W.8 Shiv Prasad Gupta, A.S.I., attached to BMCH and was witnessed by P.W.7 Sebi Prasad Yadav, the nephew of the deceased. It was then sent to Kahalgaon Police Station for being registered as an F.I.R., where it was registered as such on 12.01.1987 at about 8.30 am. Thereafter, the prosecution case is that at about 9.40 pm on 11.01.1987, a Judicial Magistrate, namely, Md. Ashraf Hussain Ansari, who was then posted at Bhagalpur, recorded Dying Declaration of the deceased, which is Ext.3, while the deceased was there in the Emergency Ward at Bed No.5 of BMCH. Here he states that the two appellants along with five persons assaulted him. Occurrence took place at Ghogha Petrol Pump, where he was, allegedly, shot. The deceased is then said to have died at about 8.30 am in the morning on 12.01.1987. Inquest was prepared again by P.W.8 Shiv Prasad Gupta, A.S.I. and the dead body was sent for post-mortem examination. Post-mortem examination was performed by Dr. H. I. Ansari. Post-mortem report was submitted. Investigation was taken up and after investigation, charge-sheet was filed against three



persons i.e. the two appellants and one other accused- Kuldeep Mandal. The case was committed to the Court of Session, where charges were framed and the appellants and the said accused having pleaded not guilty, they were tried. The two appellants were convicted and sentenced as aforesaid, whereas, another accused Kuldeep Mandal was acquitted on the same sets of evidence.

3. The prosecution, in order to establish the guilt, has examined eight witnesses. Prosecution case is based on two sets of evidence. First set is the fardbeyan, read with Dying Declaration, which named the two appellants and second set is the evidence of P.W.2 Nirmala Devi, wife of the deceased and that of P.W.3 Bachchan Yadav, son of the deceased, both of whom professed to be eye witnesses.

4. P.W.1 is Dr. H. I. Ansari, who conducted the post-mortem examination. First he discloses the injuries. It would be important to note the same. The first thing, he found, was that there was no evidence of any medical treatment or surgical interference with the wounds on the hand. It is surprising. It raises more question and answers, specially when we see the nature of the wounds. The second thing was that left hand of the deceased was found completely severed at the wrist and the same was attached to the wrist only by skins. The right hand also had three deep cutting wounds. Then there



are two gun-shot injuries; one on the back near the eleventh vertebra piercing through the lungs and deflecting downward through the stomach, liver and kidney and the other from the front at very close range near the umbilicus. One bullet was also extracted from the body. It is because of these injuries, as we have observed above, that we were surprised of there being no medical treatment or surgical interference with the wounds. The Doctor was then questioned at length as to what would be the state of the patient with such an injury. He categorically stated that there would be profuse bleeding and the moment 1/3rd of the total blood volume was bled, the injured would go into state of shock and die thereafter. These are very important medical observations.

5. Mr. Ajay Kumar Thakur, learned counsel appearing in support of the appeal, submits that these injuries, as noted above and the evidence of the Doctor, would demolish the theory as regards recording of the fardbeyan and the Dying Declaration of the deceased because the incident took place at 6.30 pm at Ghogha Petrol Pump within Kahalgaon Police Station. The injured was allegedly brought to BMCH in Emergency Ward at about 8 pm i.e. after one and half hours. With such injuries going unchecked and untreated, the injured would have been long dead and not in a position to make any statement. He submits that it is because of this that the injured, having

been brought to BMCH, was dumped on the bed and no Doctor attended him because he was already dead. The question of recording of the fardbeyan or for that matter the Dying Declaration of the deceased does not arise. He would then submit that the fardbeyan and the Dying Declaration cannot be relied upon for any purpose.

6. We may note that so far as the Dying Declaration is concerned, it was recorded by a Magistrate, but the fact how the Magistrate came, who summoned him, who ordered him and that too at late hours of cold January morning, is not known. Similar is the case in regard to the fardbeyan. The fact as to who informed the A.S.I. and how the A.S.I. came, is not known. On A.S.I's own statement, he came twenty minutes after the patient was admitted. It cannot be believed that the patient was alive for that 20 minutes during which he was not attended. At least some one would have tried to treat his wounds, stitch them and bandage them. The Doctor, who performed the post-mortem examination, clearly said that there was no surgical or medical interference with the wounds at all. It can only mean that he was dead by the time he was brought to BMCH. Thus, the fardbeyan and the Dying Declaration cannot be taken note of.

7. Now we come to the evidence of P.W.2 Nirmala Devi, wife of the deceased and his own son P.W.3 Bachchan Yadav. Mr. Ajay Kumar Thakur, learned counsel, submits that if we see the



evidence of these two witnesses in totality, it would appear that they are not eye witnesses. Again we agree. The reason is that when we come to the evidence of P.W.2, the wife of the deceased, she admitted that her house was at about half a kilometer away from the Tea Stall, which was run by her husband. She stated that she saw her two Gotias (the appellants) having come, asked for tea. Her husband started preparing tea, but the appellants chased her husband to assault him, whereupon he ran across the road towards the Petrol Pump, where he was assaulted and shot. She also admitted that there were other persons, who had witnessed the incident, including the two attendants of the Petrol Pump, but none has been examined as a witness. She did not even know how her husband was taken to the Hospital. It is highly unusual because if she was an eye witness to the occurrence, she could have easily known how her husband was taken to the Hospital, rather she could have accompanied her husband.

8. To the contrary, we have the evidence of P.W.7 Sebi Prasad Yadav, nephew of the deceased, who is also an attesting witness to the fardbeyan. He clearly stated that he, along with four Police officials alone, brought the injured from Kahalgaon Police Station to the Hospital. This is again unusual. He, in his evidence, further stated that her aunt P.W.2 Nirmala Devi, did come to the Hospital. If she was in the Hospital, why did she not figure as an

attesting witness to the fardbeyan because she was an eye witness as well and why did she not give her statement to the Police for being recorded as fardbeyan. This only shows that, in fact, she was not present at the place of occurrence.

9. When we come to P.W. 3 Bachchan Yadav, he is a young boy, who was about 10 years old when the occurrence took place. He was 12 years old when the trial commenced. The trial court examined him and found that he could be a competent witness. Though not knowing the consequence of oath, he was not administered oath. He was exhaustively cross-examined. To material questions, his answers were that he did not remember, otherwise, he specifically stated the whole incident. He was questioned as to the presence of other persons at the time of occurrence. He agreed that several other persons were present but could not name even any one of them. The manner, in which he answered the questions, clearly shows that he was aware of some answers but not of all. We would not place reliance on his evidence.

10. We then have P.W.7 Sebi Prasad Yadav, the nephew of the deceased. He says that he carried injured to the Hospital but he is not a witness to the occurrence. He states that the fardbeyan was recorded in his presence, which, we have already said, could not have been possible and here we would also like to note one thing that



though the fardbeyan was recorded at 8.10 pm and the Dying Declaration was recorded at 9.40 pm on 11.01.1987, it is said that the person died at about eight in the following morning i.e. 12.01.1987. Thereafter, inquest was prepared. It is not possible in view of the nature of the injuries and if it was possible then who was treating and what treatment was given for those long twelve hours is not explained. The Doctor P.W. 1, as stated above, has found no medical treatment or surgical interference with the wounds. This belies the whole prosecution story. In such a situation, it would be highly dangerous to rely on fardbeyan, Dying Declaration and the evidence of P.Ws.2 and 3.

11. We may note that the Investigating Officer has been examined as P.W.6 Sarda Nand Pathak. He has admitted that he had interrogated the two petrol pump attendants and several other persons, who were present in and around the place of occurrence, but none of them had been brought in Court to depose in support of the prosecution. The only conclusion, we can derive, is that all the independent witnesses, who were more than six in number, having been withheld, would lead to an adverse inference against the prosecution. Thus, in our view, we cannot uphold the conviction and sentence against the appellants as aforesaid.

12. In the result, this appeal is allowed, the judgment of

conviction and order of sentence, passed against both the appellants by the trial court, are set aside. The appellants are acquitted of the charges levelled against them and they are discharged from the liability of their bail bonds.

(Navaniti Prasad Singh, J)

MPS/-

(Anjana Mishra, J)

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