

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.372 of 1993

(AGAINST THE JUDGMENT OF CONVICTION DATED 26TH JUNE 1993 AND ORDER OF SENTENCE, DATED 28TH JUNE, 1993, PASSED BY SHRI MADHUSUDAN SINGH, 6TH ADDITIONAL SESSIONS JUDGE, ROHTAS AT SASARAM, IN SESSIONS TRIAL NO. 615 OF 1990, ARISING OUT OF MOHANIA POLICE STATION CASE NO.41 OF 1990.)

=====

Mahendra Yadav @ Mahendra Singh Yadav S/o Chandrawa Yadav, resident of Village- Tilga, P.S. Mohania, District- Bhabhua.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

=====

Appearance :

For the Appellant/s : None

For the Respondent/s : Mr. Ajay Mishra, APP

Mr. Ravindra Kumar, Advocate, as Amicus Curiae.

=====

CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

And

HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 20-05-2015

Under the judgment, dated 26.06.1993, passed, in Sessions Trial No. 615 of 1990, by learned 6th Additional Sessions Judge, Rohtas, at Sasaram, the appellant, Mahendra Yadav @ Mahendra Singh Yadav, stands convicted under Section 302 of the Indian Penal Code and 27 of the Arms Act, 1956. Following his conviction under Section 302 of the Indian Penal Code, the accused-appellant has been sentenced, under the order, dated 28.06.1993, to suffer imprisonment for life. For his conviction under Section 27 of the Arms Act, 1959, the accused-appellant has been sentenced to suffer rigorous imprisonment for a period of two years, both the sentences

having been directed to run concurrently.

2. The case of the prosecution, as unfolded at the trial, may, in brief, be described thus:

(i) On 27.03.1990, at about 07:00 PM, Hanslal Yadav (since deceased) and his father, Ramcheej Yadav, were present at their *dera* (i.e., the residence). No sooner Hanslal Yadav, having milked their cows, tied the same, accused persons, namely, Mahendra Singh Yadav, Jagannath Ahir, Suraj Yadav and Baijnath Yadav came and started firing. Hanslal Yadav and his father, Ramcheej Yadav, suffered fire-arm injuries. Both the injured were shifted to Sub-Divisional Hospital, Bhabhua, where the statement of Hanslal Yadav was recorded, on the day of the occurrence itself, i.e., on 27.03.1990, at 11:30 PM, in the form of his *farbeyan* and, treating the same as First Information Report, Mohania Police Station Case No. 41 of 1990, under Section 307/34 of the Indian Penal Code and 27 of the Arms Act, 1956, was registered against four accused persons, namely, Mahendra Singh Yadav, Jagannath Ahir, Suraj Yadav and Baijnath Yadav.

(ii) Ramcheej Yadav's statement was recorded by the Investigation Officer (PW 7), when he was lying under treatment, as an injured, at hospital. While Hanslal Yadav succumbed to his injuries at Sub-Divisional Hospital, Bhabhua, his father, Ramcheej Yadav, who had been shifted to, and

treated at, Institute of Medical Science, Varanasi, died there after 18 days, i.e. on 14.04.1990.

(iii) Inquest were held over the dead bodies of the said two deceased. From the place of occurrence, blood-stained earth and empty cartridges were seized and, on completion of investigation, a *charge sheet* was laid, under Section 302 of the Indian Penal Code and 27 of the Arms Act, 1956, against accused Mahendra Singh Yadav and accused Jagannath Ahir. Because of absence of materials against the remaining two accused, namely, Suraj Yadav and Baijnath Yadav, these two accused were not sent up for trial.

3. At the trial, charges were framed, under Section 302 of the Indian Penal Code and Section 27 of the Arms Act, 1956, against accused Mahendra Singh Yadav and accused Jagannath. To the charges so framed, both the accused pleaded not guilty.

4. In support of their case, prosecution examined altogether 10 (ten) witnesses including Dr. Jai Shankar Mishra (PW 8), who had conducted the *post mortem* examination on the dead body of Hanslal Yadav, Dr. S. K. Tripathi, who had conducted *post mortem* examination on the dead body of Ramcheej Yadav, and Ganga Singh (PW 10), Investigating Officer.

5. During the trial, one of the accused,



namely, Jagannath Ahir, absconded and, thus, the trial proceeded only against accused Mahendra Yadav, who was, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure and, in his examination aforementioned, the accused denied that he had committed the offences, which were alleged to have been committed by him, his case being that of denial. No evidence was adduced by the defence.

6. Having, however, found the accused guilty of the offences charged with, learned trial Court convicted him accordingly and passed sentences against him as mentioned above.

7. Aggrieved by his conviction and the sentence passed against him, the accused, as a convicted person, has preferred this appeal.

8. We have heard Mr. Ravindra Kumar, learned *Amicus Curiae*, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State.

9. While considering the present appeal, let us, first, take note of the medical evidence on record.

10. Coming to the evidence of Dr. Jai Shankar Mishra (PW 8), who had, admittedly, performed, on 15.04.1990, at about 3.00 PM, at Sub-Divisional Hospital, Bhabhua, *post mortem* examination on the dead body of Hanslal Yadav, he found following *ante mortem* injuries:

"(i) one lacerated wound ½"x ½ "x

scalp cavity deep with margins inverted on the occipital region of scalp on the left side.(exit wound)

(ii) *One lacerated wound ¼ "x ¼ "x scalp cavity deep with margins inverted and tattooed i.e. ½ "in front of right pinna. (entry wound)*

Injury nos. I and II were communicating with each other.

(iii) *One lacerated wound ¼ "x ¼ " with margins inverted and tattooed on the posterior surface of left arm.*

(iv) *One lacerated wound ½"x ½" with margins inverted on the front surface of left arm with fracture of shaft of left humerus.*

Injury no. 3 is the wound of entrance and injury no. 4 wound of exit, and both the injuries were communicating to each other.

(v) *One lacerated wound ¼ "x ¼ " with margins inverted and tattooed in the right iliac fosse.*

(vi) *One lacerated wound 1"x 1" with margins inverted on low back region left, with fracture of (d) 10 to (d) 12 vertebra.*

Injury no. 5 is wound of entrance and injury no. 6 is the wound of exit. Both injury nos. 5 and 6 are communicating with each other."

11. In the opinion of the doctor (PW 8), all the injuries, suffered by Hanslal Yadav, were *ante mortem* in nature, same having been caused by fire-arms. The doctor (PW 8) has also opined that Hanslal Yadav's death was due to

combined effect of injury Nos. 1 to 6 coupled with *cardio respiratory failure*.

12. Let us, now, come to the evidence of Dr. S. K. Tripathi (PW 9), who had, admittedly, performed *post mortem* examination on the dead body of Ramcheej Yadav at the Institute of Medical Science, Varanasi. This witness (PW 9) has deposed that on 30.03.1990, at about 4:30 PM, he held *post mortem* examination on the dead body of Ramcheej Yadav and found *ante mortem* injuries, which were as follows:

"(i) *Multiple entrance wound of pellets on the back of right shoulder 4 C.M. outer to mid line over cervical vertebra.*

(ii) *Abrasion with contusion 5 C.M. x 1 C.M. on the inner aspect of left elbow.*

(iii) *Entrance wound of fire arms circular 3 ½ C.M. in diameter on left abdomen front 8 C.M. outer to mid line and 110 C.M. above left heel tip. Margins of wound and encircled with contused ring of 2 M.M. in thickness and the wound was abdominal cavity deep.*

(iv) *Exit wound of fire arms ¾ C.M. X 2 C.M. on the back of left hip upper part 108 C.M. above left heel and 3-1/2 C.M. outer to mid line.*

Injury No. 1 pellets impregnated in skin only. Few pellets recovered and sealed and sent to Senior Superintendent of Police, Varanasi. On dissection brain and membranes found pale. In the chest cavity, pleura, found pale. Larynx, trachea both lungs and

pericardium found pale. The abdomen cavity contained puss and clotted 1 ½ liters mostly in public pelvic area. Lower pancreas and kidney were found pale.

13. The doctor (PW 9) had opined that the cause of death of Ramcheej Yadav was shock and haemorrhage coupled with bacterial peritonitis, which contributed to the cause of death.

14. The findings of the doctors (PW 8 and PW 9) have not been disputed by the defence nor has the defence disputed the opinion of the doctors (PW 8 and PW 9) with regard to the cause of death, nature of injuries sustained by the two deceased and/or the nature of weapons, which might have been used.

15. Because of the fact that the findings of the doctors and/or their opinion, with regard to cause of death, nature of injuries and nature of weapons used, have not been in dispute and we, too, do not notice anything inherently incorrect or improbable in the evidence given by the doctors (PW 8 and PW 9), we have no difficulty in concluding, and we do conclude, that Hanslal Yadav and Ramcheej Yadav met with *homicidal* death.

16. In the light of the medical evidence on record, let us, now, examine the remaining evidence on record and determine if the prosecution could have been held to have brought home the charges, which had been framed against the

accused-appellant.

17. Before proceeding further, we may, however, pause here to point out that though the doctor (PW 8) has opined that a person, having received the kind of injuries, which Hanslal Yadav had received, can survive for sometime and can also speak, the question of immense importance, which needs to be answered, in this appeal, is whether injured Hanslal Yadav was in a position to speak or not at the time, when his statement is said to have been recorded by the Investigating Officer (PW 7) as the First Information Report.

18. Coming to the ocular evidence on record, we may point out that though the prosecution examined PWs 1, 3, 4, 5 and 6 as eye-witnesses, the fact remains that while PWs 1 and 5 have been declared hostile inasmuch as they have not supported the prosecution's case and have not admitted that they had witnessed the occurrence, PWs 3, 4 and 6, in the light of what they have deposed, cannot be regarded as eye-witnesses inasmuch as according to PW 3, when he was at his house, he heard sound of gun shot firing and, on hearing the sound of firing, he fled away and came back and saw Ramcheej Yadav lying at his *dera* and Hanslal Yadav lying in the field. The evidence, given by PW 3, clearly shows that he had not seen as to who had shot at Ramcheej Yadav and Hanslal. As far as PW 4 is concerned, his evidence is that he arrived at the place of



occurrence after hearing sound of firing and found Hanslal Yadav and Ramcheej Yadav lying on the ground with injuries on their persons and they were bleeding. To the same effect is the evidence of PW 6, widow of deceased Ramcheej Yadav and mother of Hanslal Yadav, inasmuch as she has deposed that when she came to the place of occurrence, she found her husband lying injured at the *dera* and her son was lying in the field. In clear words, PW 6 has deposed that she does not know as to who had killed her son and her husband.

19. Having pointed out that there is no witness, who has deposed to the effect that he or she had seen how Ramcheej Yadav and his son, Hanslal Yadav, had suffered fire-arm injuries, let us, now, point out that the prosecution's case rests entirely on the *dying declarations* said to have been made by Hanslal Yadav as well as his father, Ramcheej Yadav.

20. As far as Hanslal Yadav is concerned, he is claimed, in the light of the evidence of the Investigating Officer (PW 7), to have given the statement on the date of occurrence itself, i.e., on 27.03.1990 at 11:30 PM, while lying at the Referral Hospital, Mohania, to Sub-Inspector, Tripurari Singh (PW 7) and this statement was treated as the *first information report*.

21. While the *dying declaration*, which Ramcheej Yadav is said to have made to PW 7, has not been



brought and proved on record, injured Hanslal Yadav is claimed to have stated before PW 7, in the statement, which has been recorded as *First Information Report*, thus, "My name is Hanslal Yadav, S/o Ramcheej Yadav, Vill-Chotka Katra, P.S. Mohania, Dist-Rohtas. Today on 27.03.1990 at about 11:30 O'clock in the night, I give my statement at Referral Hospital Mohania, before you the Sub-Inspector of Mohania that at about 7:00 PM, I was present at the dera of my father. I was sitting there after controlling the cow and milking the cow. Just then four persons came there. All of a sudden, they opened fire at us. They fired shot towards left of my head, at my arm, shoulder and stomach. At the same time, they fired at my father from rifle which hit his stomach and crossed his back and the second shot hit at his shoulder. On seeing me being assaulted, my father rushed to me. They began to assault him also. I and my father recognized two among the assailants. Mahendra Singh Yadav S/o Chandrama Singh Yadav R/o Telanga, P.S. Mohania fired at me and Jagannath Ahir S/o Charan Deo Ahir, R/o Katsaria P.S. Mohania fired at my father with their gun and rifle respectively and caused injury to us by firing with intention to kill us. I recognized them in light. It is my claim that aforesaid both the accused persons in association with two other persons, caused injury to us by firing with intention to kill us. I can recognize the remaining two accused persons on seeing them."

22. The contents of the *First Information Report* show that injured Hanslal Yadav gave the said statement in conscious state of mind. This statement, which has been



treated as *dying declaration*, was signed by Babulal Yadav (PW 1) and Shanmuni Ram (PW 3). However, Babulal Yadav (PW 1) has turned hostile and has claimed that his signature was taken on a blank paper, whereas PW 3 (Shanmuni Ram) has, nowhere, deposed that injured Hanslal Yadav's statement was recorded by PW 7. Since the prosecution chose not to cross-examine PW 3, his evidence is binding on the prosecution, which does not support the prosecution's case that while injured Hanslal Yadav's statement was recorded by PW 7 as the First Information Report, PW 3 was present there.

23. Prosecution is, thus, left with the evidence of PW 7 alone to prove that the statement of Hanslal Yadav, recorded as *First Information Report*, was, indeed, made by injured Hanslal Yadav in conscious state of mind.

24. With regard to the above, it is noteworthy that PW 4 has deposed that both the injured were unconscious and PW 6 (who is widow of deceased Ramcheej Yadav and mother of deceased Hanslal Yadav), has also deposed that at the time, when the two injured left Mohania, they were unconscious.

25. There ought to have, therefore, been convincing evidence on record to show that injured Hanslal Yadav had regained his senses made the said statement in conscious state of mind. There is, thus, no evidence on record



to show that Hanslal Yadav regained senses after he had fallen unconscious at the place of occurrence. Despite the fact that Hanslal Yadav, in the light of medical evidence on record, had suffered fire-arm injuries on his head and was in perilous condition, PW 7 chose not to associate any doctor or Magistrate, while the statement of deceased person is claimed to have been recorded. This apart, and as already indicated above, two persons, namely, PW 1 and PW 3, who are said to be witnesses to the recording of the statement of injured Hanslal Yadav, have not supported the claim of PW 7 that the said statement was made by injured Hanslal Yadav.

26. Situated thus, one has no option, but to conclude, and we do conclude, that the prosecution failed, in the present case, to prove that Exhibit-1 was the statement made by injured Hanslal Yadav.

27. So far as injured Ramcheej Yadav is concerned, he was, in the light of the evidence on record, particularly, the evidence of his wife (PW 6), was found lying unconscious at the very place of occurrence and shifted to the hospital in unconscious state. Though Ramcheej Yadav remained under treatment for a long time inasmuch as he died after 18 days of the alleged occurrence, there is nothing to show that he had regained his senses. Combined with this is the omission of the prosecution, as already indicated above, to

produce and prove the statement of Ramcheej Yadav, which PW 7 claims to have recorded.

28. We find it, therefore, wholly unsafe to rely on the solitary testimony of PW 7 that Ramcheej Yadav had made any statement as claimed to have been made by him.

29. The contents of the first information report, which has been treated as dying declaration of Hanslal Yadav, is also contradicted by the findings of *post mortem* report inasmuch as injured Hanslal Yadav is claimed to have stated, in his statement, recorded as first information report, that he was shot on the left side of his head and scapular region, whereas the *post mortem* report shows that he was shot at right *pinna* inasmuch as the wound of entry is on the right *pinna* and on the left side of his head was found the wound of exit. This apart, the doctors, who had treated the said injured, have not been examined despite the fact that it was onus of the prosecution to prove that the said statements, attributed to have been made by the said two injured, were, as a matter of fact, made by them in their conscious states of mind.

30. Because of what have been discussed and pointed out above, we do not find that the evidence, adduced by the prosecution, was sufficient to hold that the accused-appellant was guilty of the offence, which he had been charged with. With the prosecution's failure to prove the charge

under Section 302 of the Indian Penal Code, the charge of use of a firearm, as envisaged by Section 27(1) of the Arms Act, 1959, must also fail. At any rate, the accused-appellant deserves to be accorded, at least, benefit of doubt.

31. In the result and for the forgoing reasons, we allow this appeal. The impugned conviction of the accused-appellant and the sentences passed against him by the judgment and order, under appeal, are hereby set aside. The accused-appellant is held not guilty of the offences, which he stands convicted of, and he is hereby acquitted of the same under benefit of doubt.

32. Since the accused-appellant is on bail, his bail bonds are hereby cancelled and his sureties shall accordingly stand discharged.

33. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Court Records.

(I. A. Ansari, J)

(Vikash Jain, J)

A.I./Md. Ibrarul
N.A.F.R.

U			
---	--	--	--