

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.38 of 2009

Arising out of PS.Case No.-173 Year-2007 Thana-Nath Nagar (Madhusudanpur) District-
BHAGALPUR

=====

Pawan Kumar Yadav, Son of Kapildeo Yadav, Resident of Village Manoharpur
Navtolia, P.S. Madhusudanpur (Nathnagar), District Bhagalpur.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Shri Krishna Mohan, Advocate
Shri Praveen Kumar, Advocate
For the State : Susri Shashi Bala Verma, APP

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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: 03-04-2015

The present appeal is directed against the judgment of conviction dated the 20th of December, 2008 passed by the learned Presiding Officer of Fast Track Court No. III, Bhagalpur in Sessions Trial No. 7 of 2008 by which the solitary appellant who was put on trial in the above noted sessions trial was held guilty of committing offence punishable under Section 302 of the Indian Penal Code and also those punishable under Sections 25(1-B)a, 26 and 27 of the Arms Act. After hearing the appellant on sentence on the 22nd of December, 2008, the learned judge directed him to suffer rigorous imprisonment for life as also to pay a fine of Rs. 5,000/- each else to suffer rigorous imprisonment for six months. The appellant was further directed to suffer rigorous imprisonment



for three years each under Sections 25 and 27 of the Arms Act as also to pay fine of Rs. 1,000/- on each of the two counts else to suffer rigorous imprisonment for six months. As regards the conviction of the appellant under Section 26(1) of the Arms Act, he was directed to suffer rigorous imprisonment for two years as also to pay fine of Rs. 1,000/- else to suffer rigorous imprisonment for six months. The sentences passed upon the appellant were directed to run concurrently.

2. Dharmendra Chaurasia was running a miscellaneous article shop into a *Gumti* which was *Pucca* built. It was just at the entrance of his residential house. It is stated that on 06.07.2007 at 10 P.M. when the deceased Dharmendra Chaurasia was about to close his business, this appellant Pawan Kumar Yadav, son of Kapildeo Yadav who has been described as resident of Navtolia along with another Pawan Kumar Yadav of Manesar and one Umesh Yadav arrived there and this appellant is said to have asked for biscuits from the deceased. The deceased gave biscuits to the present appellant and demanded the price thereof. When it is stated that this appellant pulled out a pistol and fired a shot which hit the deceased in his neck and he slumped into his *Gumti* dead.

3. Nilu Devi (P.W.8), the wife of the deceased Dharmendra Chaurasia stated that on her alarms, her son Sintu

Kumar (P.W.5) and other persons, like, Mahendra Chaurasia, Anirudh Modi @ Anirudh Chaurasia (P.W.2) and others came and they with the help of Sintu Kumar (P.W.5) brought out the dead body from inside the shop.

4. It was stated by the informant that the present appellant had asked one Uday Modi to pay up extortion money of Rs. 50,000/- and there had been a *Panchayati* in the village also and in the early hours of the very day on which the murder of Dharmendra Chaurasia was committed when this appellant along with the other two accused persons, named above, had come at the shop of the deceased, he had advised him not to realize extortion money from a co-villager as it will be against him and in that case the villagers may not be coming to his rescue.

5. As may appear from the evidence of P.W.10, S.I. Awadhesh Kumar Singh, he had received a telephonic message from Nathnagar police station intimating that a murder had been committed at village Manoharpur-Sahzadpur, that information was reduced by P.W.10 into Station Diary Entry No. 94 dated 06.07.2007 and he started for the said village to reach there at 22.55 hours, i.e., 10.55 P.M. He recorded the *fardbeyan* (Ext.6) of Nilu Devi (P.W.8), sent the same to Nathnagar for registering the first information report. He thereafter took up the investigation himself and prepared the seizure memo after seizing the illegal



country made pistol as per the description in paragraph-3 of his evidence. It was loaded with two cartridges. The seizure memo has been marked Ext.8. He recovered a single cartridge case from the place of occurrence and prepared the seizure memo in that respect also. A red colour diary containing the photograph of co-accused Pawan Kumar Yadav, son of Lakhan Yadav (resident of village Manesar) along with a purse bearing a photo over which the name Pawan was scribed along with a Hero Honda CBZ motorcycle bearing registration no. WB-58A-5943 was also recovered from the place of occurrence by preparing the seizure memo (Ext.9) in presence of the witnesses. The Investigating Officer (P.W.10) recorded the statements of witnesses, like, Anguri Yadav and held inquest on the dead body at 5.30 A.M. on 07.07.2007 and sent a copy of the same along with the dead body Chalan to the doctor while dispatching the dead body for holding autopsy over it. He had inspected the place of occurrence and after concluding the investigation, he sent up the appellant for trial while other accused persons were shown absconders.

6. The defence of the appellant was that it was a case of mistaken identity as the place of occurrence enveloped by darkness making the identification impossible. It also appears from the trend of cross-examination that there was no *Panchayati* held in the village in respect of an attempt to realize the ransom

amount from Uday Modi who was not examined.

7. Shri Krishna Mohan, the learned counsel appearing on behalf of the appellant took us through the evidence of witnesses and submitted that except Nilu Devi (P.W.8) the informant of the case, no one appears an eye witness to the occurrence. It appears from the very evidence of those witnesses that they could have arrived after the occurrence was over. It was contended that the evidence of the Investigating Officer indicates that no drop of blood was found at the place of occurrence and there is no evidence of the ballistic expert that the cartridge case which was found at the place of occurrence had indeed been fired country made pistol which was seized by P.W.10 from the place of occurrence. Submission also was that the genesis of the occurrence was not established and that Nilu Devi (P.W.8) may not be reliable as she was adding up quite some spice to the story by specifically alleging that Pawan Kumar Yadav, son of Lakhan Yadav, resident of Manesar had fired the first shot which hit left temple of the deceased and thereafter this appellant had fired the shot which hit him in the neck. Submission was that if the witness was found not truthful in part of her evidence then her entire evidence should be discarded.

8. Susri Shashi Bala Verma, the learned Additional Public Prosecutor was refuting the submissions noted above which



was advanced by the learned counsel for the appellant. It was contended that indeed the initial genesis of the occurrence might be the attempt for paying up an amount of Rs. 50,000/- as ransom by Uday Modi but that genesis appears not the real motives for the propelling force as regards killing of the deceased by the appellant as there had been some altercation between the appellant and the deceased in the early hours of the day itself when the appellant is said to have held out a thrust to liquidate the deceased and thereafter to take care of the said Uday Modi. Submission was that there is no controversy that witnesses other than Nilu Devi (P.W.8) are not the eye witnesses to the occurrence but merely because she had improved upon by stating a specific fact as regards Pawan Kumar Yadav, son of Lakhan Yadav, resident of Manesar having fired the shot is not going to wipe out the effect of the remaining evidence of Nilu Devi (P.W.8) and the Court must attempt to separate the grain from the chaff. Submission was that if the Court had made attempt to separate the grain from the chaff then it could find that there was sufficiency of light at the place of occurrence which could have facilitated the identification of the real culprits and the evidence of the doctor as also that of the Investigating Officer was lending quite some credence to the evidence of P.W.8 who appeared a witness wholly reliable. Susri Verma was submitting that the trial court had scanned the evidence with utter

care and caution and had reached the conclusion after due marshalling of facts and the findings recorded by the learned trial judge do not require to be disturbed.

9. Out of twelve witnesses examined by the prosecution, we may point out that Tanwa Modi (P.W.6) and Janardhan Modi (P.W.7) were declared hostile. Except Nilu Devi (P.W.8) who happened to be the wife of the deceased as also the informant of the case. We do not have any hesitation in noting that others could be eye witnesses to the occurrence but their value of evidence may not be minimized. Witnesses, like, Mahendra Chaurasia (P.W.1), Anirudh Modi @ Anirudh Chaurasia (P.W.2), Urmila Devi (P.W.3) the mother of the deceased with Sangita Devi (P.W.4) his *Bhabhi* as also Sintu Kumar (P.W.5) the son of the deceased were all telling almost the same fact that on being attracted or after having exited from their respective houses, they found that three accused persons were identified by them, i.e., this appellant Pawan Kumar Yadav, son of Kapildeo Yadav, resident of Navtolia with his name shake who was the son of Lakhan Yadav and the resident of Manesar with third accused Umesh Yadav were running away from the scene of occurrence. Anirudh Modi @ Anirudh Chaurasia (P.W.2) had in paragraph-3 in its last line stated that it was dark and, as such, he could not identify the remaining three. This could be the statement which could go against the



prosecution as regards the identification of the accused persons inasmuch as if the darkness which had enveloped the place of occurrence so much so as not making identification of a person possible then the defence can very well argue that the identification of the appellant and his companions may also be not possible but while we were taken through the evidence of the same Anirudh Modi @ Anirudh Chaurasia (P.W.2), we could find out at paragraph-18 cross-examination of the witness that the defence was bringing a fact to the witnesses that it was a moonlit night and that identification was not possible. Thus, the evidence on identification which could have been coming from P.W.2 appears contradicted by his own evidence. It is not safe, in our opinion, to reject the entire prosecution case merely by reading the single line in paragraph-3 of P.W.2 when we find P.W.8, the informant of the case and other witnesses stating that the electric light was available there. The electric pole had a electric bulb lighted and that had drawn sufficient light on or around the place of occurrence. The evidence of witnesses on availability of sufficient light facilitating the identification of the accused persons appears probalilized by the evidence of P.W.10, the Investigating Officer also who stated in paragraph-24 that it was night and the light was not sufficient for holding inspection of the place of occurrence as also holding inquest upon the dead body. The defence had attempted to



constitute the evidence as indicative of non-availability of sufficient light so as to holding the inspection of the place of occurrence or the inquest upon the dead body and was further drawing the attention of the court towards the document inquest report (Ext.3) by pointing out that the inquest was held by P.W.10 at 5.30 a.m. on 07.07.2007 though the *fardbeyan* had been drawn at 10 p.m. at 06.07.2007. We want to point out that inspecting the place of occurrence or holding inquest upon the dead body are jobs which require careful looking at the place where the occurrence had taken place as also the dead body so as to finding out that what were the important elements which could be noted down in the inquest report. The light as per P.W.10 was not sufficient so as to facilitating the appropriate inspection of the place of occurrence as also the holding of the inquest in a more competent manner so as to noting down all the relevant aspects which could be found on the dead body. Moreover while considering the evidence of witnesses, we could find out that it was not that the appellant was completely unknown to them. The witnesses appear fully acquainted with the appellant and which fact appears accepted by the defence also as a result of which not even a single suggestion has given that the present appellant was known to any of them. It is normal behaviour of a human being that a person who is quite known to him could be identified even in shadow of light merely

by his gait or the posture of his body. Here as per the evidence of the witnesses the light was there and the identification was complete.

10. As regards the genesis part of the occurrence it is true that the initial prosecution story was that the appellant had asked Uday Modi to pay up an amount of Rs. 50,000/- as extortion money. Probably there was a *Panchayati* also though we are not sure about it as to who were the *Panches* and where it had been held but as appears from the evidence of witnesses, the appellant or his companions had not attended the *Panchayati* which had been convened in the village and probably the *Panches* had not taken an ex-parte decision which was adverse to the present appellant rather they had decided to talk to the appellant. When the appellant on the very date of the occurrence sometimes in the day had appeared at his shop, the deceased had talked to him and advised him not to realize extortion money from a co-villager and had cautioned him that when a co-villager was being targeted by the appellant by asking to pay up some ransom amount then the situation may worsen for him. Nilu Devi (P.W.8), the informant of the case had stated that while the talks were going on between the deceased and the present appellant, she was very much there and had heard and seen the exchange of words between the deceased and the present appellant. We do not have any reason not to believe the words of



P.W.8 because her evidence appears to us naturally coming from her. It was true that exchange of words between the deceased and the present appellant that the appellant is said to have stated to the informant that now it was the deceased who was to be taken care of whereafter Uday Modi will be tackled. It was by way of a repercussion to the discussion between the deceased and the present appellant in the early hours of the day on 06.07.2007 that the appellant along with his two companions had arrived at the shop of the deceased and after having asked for biscuits, it was this appellant who had fired the shot after the price of the biscuits was demanded by the deceased. Thus, what appears is that the genesis of the occurrence which was initially the demand of a ransom amount of Rs. 50,000/- to be paid by the Uday Modi to the appellant was not the central theme or the motivating factor behind the commission of the murder of Dharmendra Chaurasia @ Jhoti rather the very words which were spoken by the deceased to the appellant in the very day of the occurrence had impelled the appellant to commit the murder. The facts have very clearly come on record and we do not have any reason not to act upon them as while cross-examining P.W.8 or other witnesses who spoke on that, the defence had not even suggested to them that that part of the prosecution story was not true or that the witnesses who had testified that part of the prosecution story were making false

statements. Thus, what appears to us that the genesis of the occurrence was fully established by pointing out the reason which was behind the murder of Dharmendra Chaurasia @ Jhoti. As such, the defence suggestion that the genesis was not improved appears not fit to be accepted. Nilu Devi (P.W.8) did not have any axe to grind. She was the wife of the deceased and, as such, could be related to her. But her claim of being present at the very entrance to his house by the side of which the shop of Dharmendra Chaurasia was situated appears not challenged. Her claim also appears acceptable to us while going through the evidence of P.W.8. We could find her inspiring out confidence. It is true that she had attributed a direct allegation against Pawan Kumar Yadav, son of Lakhan Yadav, resident of village Manesar of firing the first shot which hit the deceased as per his evidence into the temple of the deceased and which injury was not found by Dr. Yogesh Prasad Sah (P.W.9) but merely for that reason the acceptable part of the evidence of P.W.8 could never be discarded. She appears to be a trustworthy witness because she did not have any motive as we have just noted for falsely implicating the present appellant. There was no enmity or ill will between the deceased Dharmendra Chaurasia @ Jhoti or his wife Nilu Devi or P.W.5 the son of the appellant and the present appellant. The present appellant appeared quite known to the family and it appears that he was a



regular visitor to the shop of the deceased as well. Merely because P.W.8 was related to Dharmendra Chaurasia on account of being his wife, her evidence could not be thrown over board. We have cautiously considered her evidence and we find that not a single word except that part of the story which attributed a shot being fired by Pawan Kumar Yadav, son of Lakhan Yadav, there was no flaw in the evidence of P.W.8. There might be some reason for implicating Pawan Kumar Yadav, son of Lakhan Yadav, resident of Manesar but here we are not concerned that part of the evidence because we are not disturbing the acquittal or conviction of the said Pawan Kumar Yadav, son of Lakhan Yadav. We are considering the judgment as regards the present appellant in the context of the evidence which was appearing against him. After taking out that particular line of evidence from that of P.W.8, we do not find any reason not to act upon it. It was consistent with the evidence of P.W.9 Dr. Yogesh Prakash Sah who had found a single entry wound with blackening and tattooing around it measuring 1" x 1/2" x neck cavity deep on right side of neck, 3/4" away from middle of neck. The projectile had entered the neck cavity and pierced it and was found lodged in the right chest cavity below the 3rd rib in the inter costal muscle. The projectile had pierced the great vessel of neck and right lung. The chest cavity was full of blood clots. The projectile was recovered and handed to police



under seal cover. This evidence of P.W.9 indicated that as if the trajectory of the projectile was from neck towards the lungs and if the man could be erected from upwards to downwards. However, the evidence of P.W.8 in paragraph-19 in its last line indicates that at the time when the deceased was hit by the bullet, he was crouching forward and if this situation was there at the time when the deceased was hit by the shot then indeed the trajectory could be possible. This is one particular reason upon which we have found P.W.8 more trustworthy.

11. The submission of the learned counsel was that the Investigating Officer had not found a single drop of blood during the course of investigation and that the deceased had killed somewhere else and the dead body was brought to the place of occurrence where the other proceedings were held, this submission appears quite unreasonable and fit to be rejected on many counts. Witnesses have stated as appears from Mahendra Chaurasia (P.W.1) that while running away, this appellant had thrown his pistol at the witness so as to scaring him and other witnesses away who were attempting to chase the appellant. That pistol was recovered from the place of occurrence by P.W.10. Not only that, he had also recovered a cartridge case from the place of occurrence. P.W.10 had stated that he had found the dead body lying on ground near his house. This appears stated by the witness

in his evidence and this appears recorded in the inquest report. The witness P.W.10 had not stated clearly that he had found any blood and had seized it. The defence also did not brought a very categorical question in cross-examination that no blood was found at the place of occurrence. We had indeed taken care of the evidence of P.W.10 regarding the opinion finding of blood at the place of occurrence and we find that there was no question put to him. It appears that the officer who had investigated the case was as incompetent as to handle such serious case but for that incompetence we cannot reject the whole prosecution story. Similar is the reason for us to discard the submission that in spite of having seized the weapon as also the cartridge case, no attempt was made by P.W.10 to dispatch it to the ballistic expert so as to eliciting an opinion from him regarding the shot having been fired by the same weapon. When the witnesses have been found trustworthy and their evidence appears reliable then the incompetence of the investigation could not allow making dent in the prosecution case merely because it was showing the incompetence of the officer who had investigated the case. On an appraisal of evidence of witnesses, we are sure that the occurrence had indeed taken inside the *Gumti* where Dharmendra Chaurasia @ Jhoti had been shot by this appellant and was killed. Thus, what we find is that the conviction of the appellant for a charge under



Section 302 of the Indian Penal Code appears quite sustainable in the face of the evidence available on record. However, when we were examining the conviction of the appellant under Sections 25(1-B)a, and 26 of the Arms Act, we find that there was no recovery directly from the possession of the appellant. The appellant had surrendered on the 30th of August, 2007 and in between there had not been any search of his house. It was the evidence that the appellant had thrown the weapon on the place of occurrence but we are not giving much importance to that part of the evidence when the law requires proof of conscious possession of effective arms from a person. This is the reason that we find the conviction of the appellant under Sections 25(1-B)a, and 26 of the Arms Act not sustainable. However, the conviction of the appellant under Section 27 of the Arms Act appears sustainable inasmuch as the death of Dharmendra Chaurasia @ Jhoti was caused by use of an unlawful arm and we, as such, uphold his conviction under Section 27 of the Arms Act.

12. In view of the discussion of evidence and in the light of the criticism of it made by the learned counsel for the appellant, we acquit the appellant under Sections 25(1-B)a, and 26 of the Arms Act while uphold his conviction under Section 302 of the Indian Penal Code and Section 27 of the Arms Act and also uphold the sentences which were passed upon him. As directed by

the learned trial court, the sentences on the two counts shall run concurrently.

13. With the above modification in the judgment of conviction, we dismiss the appeal in its entirety.

(Dharnidhar Jha, J.)

(Amaresh Kumar Lal, J.)

Sanjay/N.A.F.R.

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