

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.295 of 2009

With

Criminal Appeal (DB) No. 379 of 2009

With

Criminal Appeal (DB) No. 642 of 2009

AGAINST THE JUDGMENT AND ORDER OF SENTENCED DATED 20.3.2009 & 24.3.2009 RESPECTIVELY, PASSED BY THE ADDITIONAL SESSIONS CUM FTC- III, PATNA IN SESSIONS TRIAL CASE NO. 1011 OF 2006/251 OF 2006, ARISING OUT OF GRCASE MP/ 1605 OF 2004, FATWAH POLICE STATION CASE NO. 185 OF 2004).

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SANJAY YADAV, SON OF RAJ NANDAN YADAV, RESIDENT OF VILLAGE MALBIGHA, POLICE STATION FATUHA, DISTRICT PATNA

... Appellant in Criminal Appeal (DB) No.295 of 2009

With

BHUSHAN SINGH MUKHIYA, SON OF LATE RAMJI MAHTO, RESIDENT OF VILLAGE MACHHARIYAWA, POLICE STATION FATUHA, DISTRICT PATNA

.... Appellant Criminal Appeal (DB) No. 379 of 2009

With

VIJAY YADAV @ LANGWA SON OF LATE BALDEO YADAV, RESIDENT OF VILLAGE MALBIGHA, POLICE STATION FATUHA, DISTRICT PATNA

.... Appellant Criminal Appeal (DB) No. 642 of 2009

Versus

State of Bihar

..... Respondent in all the four appeals

Appearance :

(In CR. APP (DB) No. 295 of 2009)

For the Appellant : Mr. Sanjay Kr.Singh, Advocate

For the Respondent : Mr. Abnhimanyu Sharma, APP

(In CR. APP (DB) No. 379 of 2009)

For the Appellant : Mr.

(In CR. APP (DB) No. 642 of 2009)

For the Appellant : Mr. Naval Kishore, Advocate

For the Respondent : Mr. S.N.Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

and

HONOURABLE MR. JUSTICE AMARESH KUMAR LAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 20-05-2015

S.P.Singh &
A.K.Lal,J.J.

All the three appeals comprising of one appellant each

have been preferred against judgment dated 20.3.2009, passed in

sessions Trial No. 1011 of 2006/251 of 2006, by the Additional

Sessions Judge cum FTC-III, Patna, whereby all the three



appellants have been convicted under sections 302/34 and 307/34 of the Indian Penal Code (herein after referred to as 'the IPC') and 27 of the Arms Act. Further, for the offence u/s 302/34 IPC, all the appellants have been sentenced to rigorous imprisonment for life, for the offence u/s 307/34 IPC they have been sentenced to rigorous imprisonment for 7 years and for the offence under 27 Arms Act, they have been sentenced to rigorous imprisonment for 3 years and to pay a fine of Rs.3000/- and in default of the same to undergo simple imprisonment for 1 year. However, all the sentences have been directed to run concurrently.

2. The prosecution case as made out in the fardbeyan of Mithlesh Yadav s/o Baso Yadav (deceased) resident of village Siocha Police Station Fatuha district Patna recorded by Niyaz Ahmad, SI and officer-in-charge of Fatuha Police Station on 14.10.2004 at 10.15 PM at Machhariyawa village near the house of Ramsaran Mistri, in short, is as follows:-

3. The informant stated that on 14.10.2004 at about 10.15 AM, he along with his father Baso Yadav, aged about 70 years were going to the house of one Ramsaran Mistry for sharpening sickles, Khurpi and other instruments. But as soon as they reached near the house of Ramsaran Mistry, the accused persons, namely, Bhushan Singh Mukhia, Ramasis Mahto and Vijay Yadav @



Latawa and one unknown miscreant caught the father of the informant and started abusing them. All of them were armed with pistol and they instantly opened fire at informant's father with an intention to kill him. On account of fire arm injury, the informant's father fell down on the ground. As soon as the informant's father fell down, the unknown miscreant exhorted that when they have killed father, we would also kill the son (informant). The informant anyhow managed to flee towards Machhariyawa chowk in order to save his life. The accused persons chased him and even opened fire which fortunately did not hit. After sometime when he returned along with Raj Kishore yadav (not examined), Sanjay Yadav (PW 3) and others to the place of occurrence, he found his father dead on account of fire arm injuries. He stated that the land dispute was the cause of incident as father-in-law of Bhushan Singh Mukhia sold the land to the father of the informant. Bhushan Singh Mukhia used to pressurize the informant's father to release the land to which the latter did not relent, as such, out of vengeance, the offence has been committed.

4. On the basis of fardbeyan, police registered Fatuha Police station Case No. 185 of 2004 u/s 302/34 IPC and 27 Arms Act. The IO after completion of investigation submitted charge sheet against six accused persons u/s 302/34 IPC, 307/34 IPC and

27 Arms Act. Cognizance of the offence was taken against all the accused persons. On 21.7.2006, the case was committed to the court of sessions for trial. However, two of the accused persons, namely, Ramashish Mahto and Anup Ram did not turn up and so were declared absconders by the court vide order dated 3.10.2007. In the statement recorded under section 313 Cr.P.C., the accused pleaded innocence and denied the allegations leveled against them.

5. The prosecution in support of its case examined 8 witnesses. Out of these 8 witnesses, PW 4 Shailendra Kumar and PW 5 Raj Kishore Prasad Jadav have turned hostile. PW 1 Bahadur Prasad and PW 3 Sanjay Singh are hearsay witnesses. PW 2 Naresh Chaudhary is a chance witness and PW 6 Mithlesh Singh, the informant of the case, is said to be eye witness of the occurrence. PW 7 Dr Ashok Kumar Jadav conducted post mortem examination on the deceased Baso Yadav on 15.10.2004 at 9.30 AM at NMCH, Patna. PW 8 Mahadeo Murmu, is the IO of the case.

6. Defence did not choose to examine any witness nor adduced any documentary evidence in support of its case. The defence was total denial of the occurrence. The trial court on consideration of materials on record acquitted Raj Nandan Yadav one of the co-accused and convicted other accused persons as

indicated in earlier paragraphs.

7. Being aggrieved, each of the three convicted accused Sanjay Yadav, Bhushan Singh Mukhia and Vijay Yadav, filed the instant appeals.

8. The case of the defence is that they have been falsely implicated in this case on account of admitted land dispute. Furthermore, the informant did not produce the sickles, Khurpi and other instruments which they were carrying to the place of occurrence at the relevant time. The most important witness Ramsaran Mistry on whose house the murder was committed was not examined. No blood was seized. The place of occurrence is also not established by the prosecution as according to it the deceased was shot dead in front of the house of Ramsaran Mistry, but as per inquest report, the dead body was found lying in front of the house of Shyam Mahto. Though cartridges were seized, but no seizure list was prepared. On behalf of appellant Sanjay Yadav it was additionally submitted that his case is even better than that of the other two accused and similar to Raj Nandan Yadav who has been acquitted. We would advert to the points raised by the defence, once we examine the ocular evidence, as well as medical evidence.

9. Dr. Ashok Kumar Jadav (PW 7) at the relevant time was posted as Professor in Forensic Medicine Department, NMCH,

Patna. He held post mortem examination on the dead body of the deceased Baso Yadav on 15.10.2004 and found following ante mortem injuries on his person:-

“1. One wound of entry $\frac{1}{2}$ ” in diameter with grease and abraded colour was found on the upper and lateral aspect of right knee. The wound directed to the medial side of the right knee. On internal examination underlying right labial condyle pierced with laceration of soft tissues and blood vessels.

2. one wound of entry $\frac{3}{4}$ ” in diameter surrounded by 5” diameter tattoo mark was found on the front 7” below medial and of right clavicle and one inch right to the mid sternal line. The wound directed to left and backward with wound of exit $\frac{3}{4}$ ” diameter was found. 3” left to mid vertebral line and 1” below the left scapular angle. On external examination the liver and intestine and intestine were found lacerated and infiltrated with blood and blood clots.

3. One wound of entry $\frac{3}{4}$ ” surrounded by 5” diameter tattoo marks was found 5” below the left nipple and 3” left to the mid sternal line. The wound directed downward and right in the pelvic cavity. On internal examination left lung, spleen, stomach, intestine and omentum were found lacerated and infiltrated blood and blood clots.”

10. He retrieved a bullet from the fractured right rib bone of the deceased which was handed over to the constable in a sealed packet. In the opinion of the doctor, the injuries were caused by fire arm and the time elapsed since death was 10 to 24 hours. The findings of the doctor establish beyond doubt that the death was homicidal. The time elapsed since death tallies with the time mentioned in the prosecution case. The inquest report (exhibit 4)

also establishes that the deceased sustained fire arms injuries resulting in his death.

11. Once it is established that the deceased was killed, we would now examine whether the prosecution has been able to establish that it is the accused persons who have committed the crime. In order to appreciate the issue, it would be necessary to notice the evidence of the witnesses who have claimed to have seen the occurrence. We would first examine PW 6 who is the informant himself. In his evidence, he supported the prosecution case and stated that his father was killed on the fateful day at around 3 pm by the accused persons as alleged in the fardbeyan. We find that the defence was not able to elicit any material contradictions to discredit his evidence.

12. PW 2 Naresh Chaudhary, is the other eye witness produced by the prosecution side. He stated that at the relevant time he was taking toddy near the house of Ramsaran Mahto and in the meanwhile accused Bhushan, Anup, Ramashish and Vijay came and caught hold of the deceased Baso Yadav and on the order of Bhushan, accused persons fired on the deceased who fell on the ground. He stated that the accused persons started abusing the informant. The informant soon started fleeing out of fear towards Machariawan chowk for help. He claimed that Baso Yadav died

due to fire arm injuries. The defence has not been able to shake his evidence as well.

13. The prosecution has further examined PW 1 Bahadur Prasad, who is a hearsay witness. He is a co-villager and nephew of the informant. He stated that on the relevant date, he was preparing Khaini (tobacco) at Machariawan chowk. He stated that the informant came running and disclosed that accused Bhushan Singh Mukhia, Vijay, Ramashish, Anup and Sanjay have killed his father. The informant further told him that the accused persons were armed with pistol.

14. PW 3 Sanjay Singh, a co-villager of the deceased is another corroborative witness. He stated that he knows the deceased from before and on the relevant day he was taking tea at Machariawan station along with PW 5 Raj Kishore Prasad Yadav. In the meantime, the informant Mithilesh Yadav arrived crying seeking help. He stated that accused persons namely Bhushan Singh Mukhia, Vijay and Ramashis had killed his father. This witness too claims to have seen the accused Bhushan, Vijay, Ramashis, Anup, Sanjay and Rajnandan fleeing away towards south, whereupon he along with others chased them.

15. Mr. Abhimanyu Sharma, learned APP appearing for the State submits that the trial court has rightly convicted the

accused persons under section 302/34, 307/34 and under the Arms Act in view of overwhelming evidence against them.

16. At this juncture it is submitted on behalf of the learned counsel appearing in Cr.Appeal No. 642 of 2009 that sole appellant Bhushan Singh Mukhia has died. However, no affidavit or any petition is filed in support of his submission. We appointed Mr. Sanjay Kumar to appear as Amicus curiae for the appellant Bhushan Singh Mukhia.

17. As noticed earlier, apart from adopting common grounds, Mr. S.K.Singh, learned counsel appearing for appellant Sanjay Yadav submits that the case of this appellant is different than the case of other two appellants and similar to the case of Raj Nandan Yadav who has been acquitted by the trial court itself. He submits that the informant neither in the FIR nor in the evidence named him as an assailant. Other eye witnesses too do not name him as a an assailant. The prosecution is not in a position to controvert the submissions of learned counsel appearing for Sanjay Yadav. We find that the informant in the FIR specifically took the name of Bhushan, Ramashish, Anup and Vijay Yadav and one unknown person as assailant. PW 2 (the other eye witness) named Vijay, Ramashish and one Anup Ram as persons who fired upon the informant's father on order of Bhushan. Thus we find that



none of the two eye witnesses on which the prosecution has supported the case named this appellant directly or indirectly in the crime. The name of the appellant Sanjay Yadav figures in the statement of PW 1 who stated that the informant revealed the names of accused as Bhushan, Vijay, Ramashish, Anup and Sanjay. However, we find that the statement of PW 1 is a hearsay witness whose statement so far as Sanjay Yadav is concerned, is not corroborated by the statement of the informant himself. The evidence of PW 1, PW 3 at the best is to the extent that soon after the occurrence, they saw Bhushan, Vijay, Ramashis, Anup, Sanjay Yadav and Raj Nandan fleeing towards the south. In our view, materials brought on behalf of the prosecution is not sufficient to bring home the charge under sections 302/34, 307 IPC and under the Arms Act against Sanjay Yadav (Cr.Appeal No. 295 of 2009). As such, we find him not guilty of the charges. In the result, the judgment of conviction and sentence passed against Sanjay Yadav is set aside. He is discharged of his bail bonds and is set at liberty, if not wanted in any other case.

18. Now we will take up the appeal of accused Bhushan Singh Mukhia (Cr.Appeal No 379 of 2009) and Vijay Yadav (Cr.Appeal No. 642 of 2009).

19. The appellants submitted that as per the prosecution



case, occurrence took place near the house of Ramsaran Mistry. However, the prosecution has not chosen to examine the said Ramsaran Mistry whose evidence would have been vital on the issue. We find that the prosecution has examined PW 6, the informant and PW 2 Naresh Chaudhary and a few other witnesses, who were present at the occurrence site in the village and whose presence could not be doubted. It is relevant to point out here that for various reasons, different persons may not be so willing to appear in a case as a witness, as he or she may incur wrath of the offending side. Furthermore, it is not the case of the defence that Ramsaran Mistry was standing outside his house at the time of occurrence and had seen the crime. In this view of the matter, we find that non examination of Ramsaran Mistry would in no way undermine the prosecution case.

20. Learned counsel next submits that the accused persons have falsely been implicated in the case on account of land dispute. We find that father-in-law of the appellant Bhushan Singh Mukiha has sold some land in favour of father of the informant. It has come in the evidence that Bhushan Singh Mukhia used to pressurize the informant's father to give back the land to which he was not agreeable. According to the prosecution, refusal on the part of the informant's father to release the land was the motive for

Bhushan Singh Mukhia to commit the crime along with others. We find that the prosecution has been able to substantiate motive for the occurrence.

21. Learned counsel next submitted that the informant in his evidence stated that they were going to the house of Ramsaran Mistry in order to sharpen sickle, khurpi and other agricultural instruments. However, none of the instruments were produced before the police which creates a doubt as to whether they were at all going to the house of Ramsaran Mukhia for the said purpose. He next submits that the police did not even make seizure of blood, the clothes of the deceased and even bullets retrieved from the dead body of the deceased at the time of post mortem examination. We are pained to notice the manner in which the IO has conducted the investigation. He ought to have prepared seizure of the blood stains, clothes of the deceased and bullet taken out from the body of the deceased. However, faulty investigations, *ipso facto*, would not render a prosecution case futile. There is no dispute that Baso Yadav was murdered, not even by the defence. The primal ground of defence is that the prosecution has not been able to establish the place of occurrence. The defence submits that as per the inquest report (exhibit 4), the dead body has been recovered from a lane in front of the house of Shyam Mahto which was situated on the north

side which is at variance with the prosecution case that the deceased was shot dead in front of the house of Ramsaran Mistry.

22. We find that the IO in paragraph 8 of the deposition stated that the house of Shyam Mahto and Ramsaran Mahto are situated in the boundary of the place of occurrence. Both the PW 2, PW 6 and other witnesses have stated that the dead body was found in front of the house of Ramsaran Mistry. No suggestion has been given that the house of Ramsaran Mistry is far away from the place of occurrence. It is quite possible that one may describe a location in his own way and may refer to either of the nearby houses as a land mark for purpose of identification. As such, we hold that the defence has not been able to discredit the prosecution case that the place of occurrence is also in front of the house of Ramsaran Mistry.

23. Situated thus and discussed above, we are of the considered view that the prosecution has been able to bring home the charge under section 302/34 IPC and 27 Arms Act against both the appellants Bhushan Singh Mukhia (Cr.Appeal No. 379 of 2009) and Vijay Yadav @ Langwa (Cr.Appeal No.642 of 2009). However, they are acquitted of the charge under section 307/34 IPC. On the quantum of punishment, we find that the trial court has rightly awarded life sentence under section 302/34 IPC. However,

the sentence of 3 years awarded to the appellants under the Arms Act is reduced to two years. The sentences, as directed by the trial court, would run concurrently. Appellants would surrender forthwith to serve out the remaining period of custody. Learned counsel for the appellants submits that the appellant Vijay Yadav @ Langwa has remained in custody for more than 10 years. It goes without saying that period spent in custody would be set off against period of incarceration.

24. With the aforesaid modification in conviction and sentence, Criminal appeals No. 379 and 642 of 009 are dismissed.

(Samarendra Pratap Singh,J)

(Amaresh Kumar Lal, J)

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