

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.1083 of 2007

Arising Out of PS.Case No. -244 Year- 1997 Thana -Muffasil District- MUNGER

1. Shyam Kumar @ Shyama Yadav

2. Ram Kumar @ Rama Yadav

Both sons of Sri Kaleshwar Yadav, resident of village- Nandlalpur, P.S.-Muffasil, District-Munger.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

With

Criminal Appeal (DB) No. 1134 of 2007

1. Hirday Yadav , son of Late Ramrup Yadav, resident of village-Lakrapatal, P.S.-Dharhara, District-Munger.

2. Dasrath Yadav, son of Late Tarai Yadav, resident of village-Nandlalpur, P.S.-Muffasil, District-Munger.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance:

(In CR. APP (DB) No. 1083 of 2007)

For the Appellant/s : Mr. Prem Chand Yadav, Adv.
Mr. Arbind Kumar Singh, Adv.

For the Respondent/s : Mrs. Shashi Bala Verma, APP

(In CR. APP (DB) No. 1134 of 2007)

For the Appellant/s : Mr. Sanjiv Kumar, Adv.

For the Respondent/s : Mrs. Shashi Bala Verma, APP

Amicus Curiae : Mr. Ashhar Mustafa, Adv.

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

CAV JUDGMENT

Date: 07 -07-2015

These two appeals arise out of two separate judgments of conviction and orders of sentence all dated 18.08.2007 passed by the learned Additional Sessions Judge FTC - II, Munger in Sessions Trial No.230 of 1999 and Sessions Case No. 230A of 1999, both arising out of Muffasil P.S.Case No. 244 of 1997, by which the two

appellants in each of the two appeals were held guilty of committing offence under Section 302 read with 34 of the Indian Penal Code (for short 'IPC') as also Section 27 of the Arms Act. Each of the four convicts was sentenced to undergo R.I. for life under Section 302 read with 34 IPC and R.I. for three years under Section 27 of the Arms Act. The sentences were ordered to run concurrently.

2. At the very outset, let it be mentioned that these appeals had been heard analogous by a Division Bench of this Court but the learned Judges were divided in their opinion expressed in the order dated 12.03.2015 on the scope and ambit of Section 319(4) of the Code of Criminal Procedure (for short 'the Code'), and the result of the appeal (Cr.Appeal (DB) No. 1134 of 2007). The matters have thus been referred to this Bench by Hon'ble the Chief Justice in terms of Section 392 of the Code, and that is how this Bench has been called upon to decide, determine and adjudicate the appeals as mandated by section 392 of the Code.

3. At this stage, I think it appropriate to record that both the learned Judges of the Division Bench have set aside the judgment of conviction by the court below so far as it relates to the appellants of Cr.Appeal (DB) No. 1083 of 2007, namely, Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav and directed for their retrial by taking evidence of all the witnesses afresh. To that

extent, there is no conflict in the opinion of the two learned Judges. However, the conflicting views as regards the retrial of the appellants of Cr.Appeal (DB) No. 1134 of 2007, namely, Hirday Yadav and Dasrath Yadav, expressed by the two learned Judges of this Court, as also their conflicting views on the scope and ambit of section 319(4) of the Code, has occasioned reference of the matter before this Single Bench under section 392 of the Code.

4. Both the learned Judges were of the view in Cr.Appeal (DB) No. 1083 of 2007 that in the light of the provisions prescribed under section 319(4) of the Code the proceedings in respect of the newly added accused has to commence afresh and the evidence (examination-in-chief), which was recorded in absence of the appellants Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav ought not have been used against them for recording their conviction.

5. However, in respect of the appellants of Cr.Appeal (DB) No. 1134 of 2007 Hirday Yadav and Dasrath Yadav, in the opinion of learned Brother Dharnidhar Jha,J., the trial ought to have been held afresh together with the newly added accused summoned under section 319 of the Code. He has set aside the judgment of conviction passed by the trial court and directed the retrial of all the four appellants together in one trial by taking evidence of all the witnesses

afresh. The operative part of the order recorded by him in paragraphs 10 to 12 are as under :-

“10. In that view of the matter I hereby set aside the judgment of conviction passed by the learned court below and direct the re-trial of all the four appellants together on one trial by taking evidence of all the witnesses afresh.

11. The judgment of conviction and order of sentence are accordingly set aside by allowing the appeal and by ordering re-trial of the accused persons.

12. While perusing the records, what I found was that the original accused, namely, Hirday Yadav and Dasrath Yadav had been tried in Sessions Trials No.230 of 1999, but the other two accused, namely, Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav were charged together in a separate case bearing Sessions Trial No.230A of 1999. I could not appreciate as to how the trial of the newly added accused, summoned under Section 319 Cr.P.C, could be initiated by numbering his trial separately from that which was numbered for the trial of Hirday Yadav and Dasrath Yadav. The summoning order under Section 319 Cr.P.C. was passed in Sessions Trial No.230 of 1999 and the newly summoned or newly added accused persons had appeared in that trial and as I have discussed with reference to the Supreme Court judgment, the trial of all the accused persons have to be held afresh by examining the witnesses which means that all the accused persons have to be tried together at one trial. The trial of newly added accused by summoning him under Section 319 Cr.P.C. separately was a gross violation of the provision of Section 319 and settled principles of law and indicate the ignorance of procedure in that behalf.”



6. Learned Brother Aditya Kumar Trivedi,J., however, differed with the opinion of Brother Jha,J. According to him, from perusal of Section 319(4) (a) and (b) of the Code, it would be apparent that the law does not mandate de novo trial of the newly added accused to be held along with the accused already present on record. He was of the view that a de novo trial has to be held only in respect of the accused, who has subsequently been summoned as an additional accused in terms of 319(1) of the Code. Brother Trivedi,J. was of the view that since the appellants Hirday Yadav and Dasrath Yadav had faced full fledged trial, simply because their trial was bifurcated at some stage, has caused no prejudice to them. Accordingly, he has directed Cr.Appeal (DB) No.1134 of 2007 to be listed for hearing on merit.

7. In view of the division of opinion expressed in the order dated 12.03.2015, the learned Judges observed as under in the concluding paragraph of the order :-

“In view of the conflicting orders as regards the re-trial of four appellants of the two appeals, as also due to conflicting views on the scope and ambit of Section 319(4) Cr.P.C. as discussed herein, let the matter be placed before Hon’ble the Chief Justice for the needful.”

8. The prosecution case is based on the fardbeyan of one Pinki Devi recorded by the Sub Inspector-cum-Officer-in-Charge of Muffasil Police Station, namely, Nand Bihari Singh on 22.09.1997 at



6.00 a.m. in village Nandlalpur, Munger. In the fardbeyan, the informant has stated that on that day at 5.30 a.m. while she was going along with her husband Sanjiva Yadav (deceased) to attend the call of nature in an open field situated on the eastern side of ITI building, and when they came on the road near the house of Akhilesh Gupta, the accused persons, namely, Hirday Yadav, Dasrath Yadav, Ramayadav, Shyama Yadav and Naresh Yadav all armed with pistols came there, surrounded her husband and one after the other fired shots at him, as a result of which he fell down and died. After assault, the accused persons ran away towards north. The informant has further stated that the accused Hirday Yadav used to pressurize her husband to vacate the house and leave the village and even on the fateful day he was the person who fired first shot at her husband. She has stated that on hulla, co-villagers, Anpi Devi, Neelam, Devi, Krishna Yadav, Mukesh Yadav and others arrived at the place of occurrence.

9. The fardbeyan has been witnessed by Sunil Yadav and Krishna Yadav. It would appear from the record that after recording the fardbeyan, the inquest report of the deceased was prepared at 6.30 a.m. and a seizure memo of blood-stained earth was also prepared at the place of occurrence itself and thereafter Muffasil P.S. Case No. 244 of 1997 was instituted at 1.00 p.m. on 22.09.1997 against five accused persons, namely, Hirday Yadav, Dasrath Yadav, Shyam



Kumar @ Shyama Yadav, Ram Kumar @ Rama Yadav, and Naresh Yadav, and the Officer-in-Charge Nand Bihari Singh took up investigation of the case himself. The FIR was transmitted to the court through special messenger and it was received in the court on 23rd September, 1997. From perusal of the record, I find that the inquest report of the deceased was witnessed by the aforesaid Sunil Yadav and Krishna Yadav and the seizure list bears the signature of Diwakar Yadav and Sunil Yadav.

10. On completion of investigation, the police found the case true against three of the five named accused and submitted charge sheet against the accused Naresh Yadav, Hirday Yadav and Dasrath Yadav vide charge sheet no.153 dated 30th June, 1998. However, the FIR named accused Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav were found innocent during investigation and hence they were not sent up for trial. The aforesaid police report was submitted by the Investigating Officer of the case in the court of the Chief Judicial Magistrate, Munger on 17th July, 1998 along with the case diary. Let it be mentioned that at the time of filing of the charge sheet accused Naresh Yadav was in custody, whereas the accused Hirday Yadav and Dasrath Yadav were absconding and hence they were shown as absconders in the police report.

11. The learned Chief Judicial Magistrate, Munger, after

looking into the materials collected in course of investigation and the police report submitted under section 173(2) of the Code, took cognizance of the offence as against accused Naresh Yadav, Hirday Yadav and Dasrath Yadav and discharged the other two accused persons, namely, Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav, who were found innocent in course of investigation. As noted above, since the accused Naresh Yadav was in custody and the other two accused Hirday Yadav and Dasrath Yadav were absconding, the learned Chief Judicial Magistrate, Munger committed the case to the court of Sessions on 11th March, 1999 after complying with the mandatory requirements prescribed under section 207 of the Code.

12. After the commitment proceeding, the case was numbered as Sessions Trial No. 230 of 1999.

13. At this stage, in my opinion, before appreciating the issues involved in these appeals, it would be apposite to record the manner in which Sessions Trial No.230 of 1999 got split up. In order to bring clarity, it would be appropriate to record the relevant proceedings of the trial court in Sessions Trial No.230 of 1999 in a tabular form, which is as under :-

Sessions Trial No. 230 of 1999

14.06.1999	An application was filed under section 193 of the
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	Code by the informant Pinki Devi for summoning Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama yadav as additional accused in the case.
24.08.1999	The trial Judge rejected the application of the informant filed under section 193 of the Code.
19.11.1999	An application was filed by the accused Naresh Yadav, who was in jail, for splitting the case of the absconder accused persons from the original case so that his trial may not be delayed.
19.11.1999	<i>The trial Judge allowed the prayer of accused Naresh Yadav and directed that the case of accused Hirday Yadav and Dasrath Yadav be split up from the original Sessions Trial No.230 of 1999.</i>

14. The proceedings of the trial court as recorded hereinabove would demonstrate as to how the case of absconding accused Hirday Yadav and Dasrath Yadav got separated from the original Sessions Trial No.230 of 1999. The split up case of accused Dasrath Yadav and Hirday Yadav was numbered as Sessions Case No.230A of 1999.

15. From here on, in order to bring clarity as to how the two separate Sessions cases proceeded before the court below, it would be appropriate to record the relevant proceedings of the court below of

the two trials in separate tabular form, respectively. Firstly, I would record the relevant proceedings of Sessions Trial No.230 of 1999, which is as under :-

Sessions Trial No. 230 of 1999

06.12.1999	Charges under sections 302 read with 34 IPC and section 27 of the Arms Act were framed against accused Naresh Yadav.
15.01.2000	P.W.1 Diwakar Kumar Yadav and P.W.2 Mukesh Kumar Yadav were examined, cross-examined and discharged.
04.02.2000	P.W.3 Krishna Yadav was examined, cross-examined and discharged.
16.06.2000	P.W.4 Anpi Devi was examined and cross-examined in part.
29.06.2000	P.W.4 Anpi Yadav was further cross-examined and discharged.
17.08.2000	P.W.5 Pinki Devi was examined, cross-examined and discharged.
21.11.2000	P.W.6 Dr. Krishna Mohan Purvey, who had conducted autopsy on the body of the deceased, was examined. As the defence declined to cross-examine him, he was discharged.

06.12.2000	On the prayer of the defence, P.W.6 Dr. Krishna Mohan Purvey was re called for cross-examination.
09.03.2001	The informant Pinki Devi filed an application under section 319 of the Code for summoning the FIR named accused Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav as additional accused.
16.03.2001	The trial Judge granted bail to accused Naresh Yadav.
09.04.2002	Finding a prima facie case to be made out against the accused Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav, the trial court summoned them as additional accused to face trial and allowed the application filed under section 319 of the Code.
22.05.2002	Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav appeared before the court and were granted bail by the trial Judge.
02.07.2002	Charges were framed against Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav under sections 302 read with 34 IPC and 27 of the Arms Act.
04.07.2002	Newly added accused filed an application with a prayer to recall all the six witnesses, who were examined on behalf of the prosecution, for cross-

	examination, which was allowed by the court.
31.07.2002	On recall, P.W. 5 Pinki Devi was cross-examined in part by newly added accused persons.
05.09.2002	P.W.5 Pinki Devi was further cross-examined and discharged.
09.09.2002	P.W.1 Diwakar Kumar Yadav and P.W.3 Krishna Yadav were cross-examined by the newly added accused and discharged.
11.10.2002	P.W.2 Mukesh Yadav was cross-examined and discharged.
21.01.2003	P.W.4 Anpi Devi was cross-examined and discharged.
06.03.2003	P.W.6 Dr. Krishna Mohan Purvey was cross-examined and discharged.

16. From the proceedings of the trial court narrated hereinabove, it would be apparent that though five persons were named in the FIR, only three of them were sent up for trial. Out of the three, two were absconding. The case of the absconding accused persons was separated from the original case. Hence, initially charges were framed in Sessions Trial No.230 of 1999 only against accused Naresh Yadav. In course of trial of Naresh Yadav, after examination



of six witnesses, an application was filed by the informant Pinki Devi under section 319 of the Code for summoning Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav, who despite being named in the FIR were not sent up for trial in the charge sheet, as additional accused. The application filed by the informant under section 319 of the Code was allowed by the trial court vide order dated 09.04.2002. The operative part of the order dated 09.04.2002 passed by the learned trial Judge in Sessions Trial No.230 of 1999 whereby Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav were summoned to face trial, reads as under :-

“In the instant case, P.W.4 and P.W.5 have categorically stated about the complicity and involvement of Rama Yadav and Shyama Yadav in the murder of Sanjeev Yadav. ***Therefore, there is prima-facie evidence against them in the record.*** Therefore, the petition u/s 319 Cr.P.C. of the informant is fit to be allowed.

In view of the discussions made above, the petition dt 01.02.2001 filed u/s 319 Cr.P.C. by the informant is allowed. The office is directed to issue summons against Rama Yadav and Shyama Yadav for appearance in the case.”

(Emphasis supplied)

17. Thus, it would appear that the trial court summoned Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav in Sessions Trial No.230 of 1999 for trial along with the accused Naresh Yadav. The facts narrated hereinabove further demonstrate that the trial court had summoned P.W.1 to P.W.6, who had already been

examined, cross-examined and discharged earlier during trial proceeding of accused Naresh Yadav, only for cross-examination at the request of the newly added accused Rama Yadav and Shyama Yadav. Those six witnesses were cross-examined by the aforesaid newly added accused from time to time between 31st July, 2002 and 6th March, 2003.

18. After cross-examination of P.W.1 to P.W.6, by the appellants Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav, Sessions Trial No.230 of 1999 proceeded in the following manner :-

24.02.2005	P.W.7 Nand Bihari Singh (Investigating Officer) was examined, cross-examined and discharged.
30.03.2005	P.W.8 Neelam Devi was examined, cross-examined and discharged.
21.09.2005	Bail bond of Naresh Yadav was cancelled for want of pairvi.
07.05.2007	Counsel appearing for the accused Naresh Yadav filed an application along with the death certificate of Naresh Yadav. It was contended that Naresh Yadav died on 02.10.2006
07.05.2007	The case against original accused Naresh Yadav abated due to his death.

17.05.2007	Statements of Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav were recorded under section 313 of the Code.
19.05.2007 to 18.08.2007	Final arguments were made from time to time by the respective counsel for the parties.
18.08.2007	Judgment of conviction and order of sentence against accused Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav were passed.

19. The facts narrated hereinabove would demonstrate that the appellants of Cr.Appeal (DB) No. 1083 of 2007 Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav could get opportunity to participate in the proceedings of Sessions Trial No.230 of 1999 before P.W.7 Nand Bihari Singh and P.W.8 Neelam Devi were examined and cross-examined during trial. It further stands demonstrated that during trial the original accused Naresh Yadav died on 02.10.2006 and the case against him abated vide order dated 07.05.2007 passed by the trial court. Apparently, summoning of the appellants Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav under section 319 of the Code was made in original Sessions Trial No.230 of 1999 in which accused Naresh Yadav alone was charged and was facing trial from before.

20. As noted above, vide order dated 19.11.1999 passed by the trial court, the case of absconding accused Dasrath Yadav and Hirday Yadav was ordered to be separated from the original Session Trial No.230 of 1999 by the trial Judge and hence in respect of them a separate case being Sessions Case No.230A of 1999 was opened. The relevant proceedings of Sessions Case No.230A of 1999 are being summarised hereinbelow in tabular form :-

Sessions Case No. 230A of 1999

14.02.2001	By filing an application the informant Pinki Devi brought to the notice of the trial court that the absconding accused Hirday Yadav was arrested in connection with G.R.Case No.1681 of 1997 pending before the learned Judicial Magistrate 1 st Class, Munger. Accordingly, the trial Judge issued production warrant for producing accused Hirday Yadav from jail before the court.
20.02.2001	The accused Hirday Yadav was produced from jail before the trial court and was remanded to judicial custody in Sessions Case No.230A of 1999.
17.05.2001	Another absconding accused Dasrath Yadav surrendered before the trial court and was remanded to judicial custody.

19.12.2001	Charges were framed against accused Hirday yadav and Dasrath Yadav.
31.07.2002	P.W.1 Pinki Devi was examined and cross-examined in part.
20.08.2002 to 05.09.2002	P.W.1 Pinki Devi was further cross-examined on different dates and was discharged on 05.09.2002.
09.09.2002	P.W.2 Krishna Yadav and P.W.3 Diwakar Kumar Yadav were examined, cross-examined and discharged.
10.10.2002	P.W.4 Mukesh Yadav was examined, cross-examined and discharged.
17.12.2002	P.W.5 Anpi Devi was examined and cross-examined in part.
21.01.2003	P.W.5 Anpi Devi was further cross-examined and discharged.
06.03.2003	P.W.6 Dr. Krishna Mohan Purvey was examined, cross-examined and discharged.
23.02.2005	P.W.7 Nand Bihari Singh (Investigating Officer) was examined and cross-examined in part.
24.02.2005	After further cross-examination, P.W.7 was discharged.
30.03.2005	P.W.8 Neelam Devi was examined, cross-examined

