

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.499 of 2009

Arising Out of P.S.Case No. -222 Year- 2004 Thana –Sheikhpura District- SHEIKHPURA

Kirath Yadav son of Late Peyary Yadav, resident of village- Matokhar, P.S.-
Sheikhpura, District- Sheikhpura.

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant/s :

For the Respondent/s : Shri Dilip Kumar Sinha, APP

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 10-04-2015

The Court had initially called Shri Krishna Prasad Singh, learned senior counsel as it appears to it that it was from his office that the appeal had been filed. Sri Singh appeared and had shown his inability by pointing out that the initial counsel who had filed the appeal had relieved him of the brief and he has no longer any instructions to appear in this case. The counsel who had filed the appeal appears and we find him not in a position to argue the appeal. We refer to the Supreme Court decision in *K.S. Panduranga v. State of Karnataka* reported in (2013) 3 SCC 721 and the provisions of Section 386 Cr.P.C. which grants the right to hear a counsel only when he appears. In our opinion, if a counsel appears and is not ready to argue the case and then his appearance could not be noted as

regards the hearing of the matter. We have perused the papers ourselves and are proceeding to pass the judgment.

2. The solitary appellant is accused of killing his brother Bireshan Yadav on the 18th of August 2004 at village-Matokhar P.S. and District-Sheikhpura. He was tried by the learned Presiding Officer, Fast Track Court No.V, Sheikhpura in Sessions Trial No.1035 of 2008/Trial No.67 of 2009 and was held guilty of committing the offence under Section 302 Indian Penal Code by judgment dated 13.04.2009. The learned trial Judge heard the appellant on the quantum of sentence to be imposed upon him on 15.04.2009 and directed the appellant to suffer rigorous imprisonment for life. The appellant appealed to this Court.

3. The wife of Bireshan Yadav had lodged the report by giving her fardbeyan before S.I. A.K.Keshari who was the Officer-in-Charge of Sheikhpura police station on 18.08.2004 at 3.30 P.M. It was stated by P.W.2 Sabita Devi that the deceased was going to throw organic manure in his field and the lady informant was also going with him. The appellant appeared there with a *tangi* (small axe) and dealt blows to the deceased Bireshan Yadav on his head as a result of which the deceased was seriously injured. While the assault was being given by this appellant to the deceased Bireshan Yadav, the lady raised *hulla* which attracted the persons who had seen the appellant

running away with his *tangi* in his hand.

4. It appears from the evidence of P.W.5 S.I. Brahmdeo Tiwari, who was posted on 18.08.2004 in Sheikhpura police station that after the case was instituted on the basis of the fardbeyan (Ext-1), the investigation was handed over to P.W.5. He came to the place of occurrence. He inspected the place where the occurrence had taken place and recorded the statements of witnesses. The inquest had been held by the Officer-in-Charge of the police station and the dead body had also been forwarded for post mortem examination. The inquest report was marked Ext-3 and as appears from the evidence of P.W.5 after receipt of the postmortem examination as also after close of the investigation, he sent up the appellant for trial.

5. The defence of the appellant was of innocence and non-participation. It was pleaded by the appellant as may appear from the cross-examination part of P.Ws.2 and 3 that there was some dispute between the deceased Bireshan Yadav and the present appellant for certain land and, as such, the appellant had falsely been implicated.

6. During the course of the trial, six witnesses were examined by the prosecution. P.W.1 Dulari Devi was the mother of the deceased Bireshan Yadav and this appellant and she did not support the charges. She was declared hostile. P.W.2 Sabita Devi was the wife of the deceased Bireshan Yadav and the informant of this

case. P.W.3 Ram Balak Yadav was another full brother of the deceased and the appellant and he also supported the prosecution charges. P.W.4 Satya Nandan Singh had only arrested the appellant and had submitted chargesheet against him. P.W.5 S.I. Brahmdeo Tiwari, we have already noted had fully investigated the case. P.W.6 Dr. Yogendra Kumar had held postmortem examination and had prepared the report in that behalf.

7. We have perused the judgment in question as also the evidence of all the witnesses. We have also heard Shri Dilip Kumar Sinha, learned Additional Public Prosecutor in this case. What we find from the evidence of witnesses is that there was no challenge to the fact that deceased Bireshan Yadav was murdered and his death was caused by injuries which were found by P.W.6. The evidence of P.W.6 indicates that the two ante-mortem injuries of the following description were found by him after holding postmortem examination of the dead body of deceased Bireshan Yadav:-

(i) Incised wound on the left frontal head measuring 3"x1/4" into bone deep.

(ii) Incised wound on occipital region of the head of size 4"x1/2"x bone deep with fracture of occipital bone.

8. P.W.6 had found blood and blood clots in the cranial cavity and the brain matter lacerated. In the opinion of P.W.6 death



was due to shock and haemorrhage as a result of above noted injuries caused by sharp cutting weapon. This witness was cross-examined by putting a few questions but we do not find anything meaningful brought on record by cross-examining P.W.6 except that some of the visiological changes or anatomical appearance elicited from this witness during certain period of time or after the passage of particular period. Thus, what appears to us is that deceased Bireshan Yadav was killed by being assaulted.

9. We have already noted that P.W.1 Dulari Devi was not supporting the prosecution charges. We see the reason behind her neutrality because while the deceased was one of her four sons, the appellant was also belonging to the four sons, she had blessed with. P.W.2 Sabita Devi, the informant and wife of the deceased appears to us a competent witness. She had stated about the initial incident which had taken place in the morning of the day, when the appellant was found cutting the dried up leaves from the palm trees which was fallen in the share of the deceased at that particular time the deceased Bireshan Yadav was grazing his buffalo. The deceased had forbid the appellant to cut the dried up palm trees and this fact appears told by P.W. 3 Ram Balak Yadav as well who was ploughing his field at that time. The incident did not occur at that particular moment of time or in the same transaction rather the incident occurred at around 12



O'clock in the day when the deceased was going to deposit the manure in his field and he was accompanied by P.W. 2. The dung manure was to be noted appears stated also by the Investigating Officer. P.W. 5 S.I. Brahmadeo Tiwari has stated in his evidence in paragraph 3 that during the course of inspection of the place of occurrence, he had found some dung manure in the field situated just by the side of path way. Thus, the reason as to why the deceased was assaulted while going towards the field appears probalised. P.W. 2, the wife of the deceased had claimed that she had accompanied her husband and we find that it was not contradicted by any evidence nor it was challenged by the defence. On perusal of her evidence what we find is that she was inspiring confidence, inasmuch as, she was telling the incident in all aspects which included her own behaviour when she stated in one of the paragraphs, i.e., paragraph-10 that she had attempted to save her husband by clinging to his body but the accused persons had threatened and had run to beat her, as a result of which she stood apart from the deceased. The other part of the evidence of P.W. 2 may not be wholly correct as regards the number of blows which were wielded by the appellant to the deceased Biresan Yadav. The witness P.W. 2 stated that four blows with *tangi* were given by the appellant to the deceased Biresan Yadav on his head. The first blow was given by the appellant on his temporal



region. On testing this line of evidence by considering the evidence of the doctor, we find that there were no four injuries found by him on the dead body and in fact only two injuries which we have just extracted were found and those injuries were on the frontal part of the head as also on its occipital region but then when blows are given they are individual given with such timing as to allow persons who are viewing the occurrence to count down. The blows correctly as also to note down the side where the blows had fallen. The witness might have stated the number of blows but it does not appear humanly possible to correlate to the medical evidence as there has to be some mistake in counting and observing the blows, if there were many in number. This appears a case of that class where a bonafide in correct statement on the part of P.W.2 appears to have been made in paragraph-10.

10. P.W.3 Ram Balak Yadav was one of the four brothers and as appears from his evidence as also from that of P.W.2 Sabita Devi, the properties which were belonging to the joint family had been partitioned between the brothers and those partition was in respect of the palm trees. P.W.3 Ram Balak Yadav has been more specific on the story of partition when he stated that the partition was made by his father during his life time and the same was got registered subsequently and some times three or four years prior to the



occurrence. However, the partition having been effected during the life time of his father, the four brothers were in occupation of the properties which had fallen in their share. P.W.3 stated that a plot over which the palm tree, in question, was standing had fallen into the share of the deceased and palm tree out of two was belonging to him. The palm tree was in share of P.W.3. The investigating officer has not noted that he had seen any dried up leaves of palm tree cut but he had stated that he had gone to the field and he had found palm tree standing there. This is nobody's case that any dried up leaves of palm tree had been cut or had partially been cut, so the question which was put to the investigating officer in paragraph-4 as to whether he had found any palm tree cut does not appear relevant for the purpose. If there had been a case of the prosecution that indeed leave of palm tree had been cut, then we could have considered that part of this evidence in its own context. The story was there so as to pointing out as to what was the reason which generated the commission of the offence and we are satisfied from an over all view and consideration of the evidence to the extent that the prosecution had succeeded in establishing the charges.

11. The two witnesses P.Ws.2 and 3 appear inspiring confidence. There was some questions put to P.W.3 as regards the place, i.e., the plot which was plaughed by him and the place where

the deceased had been assaulted, there does not appear some reason to conclude that the different version of the witness to have seen the occurrence of giving blows to the deceased, might not have been clearly perceived by them but then again he came to the place of occurrence rushing and he himself admitted that when he came he found the deceased in a pool of blood and injured. Thus, his evidence also appears supporting the prosecution story in most of its part.

12. Regard being had to the evidence available to us on the record of the case, we find that the judgment of conviction and the order of sentence passed by learned trial Judge in respect of the appellant Kirath Yadav does not require any interference.

13. In the result, the appeal lacks merit and the same is dismissed.

(Dharnidhar Jha, J.)

(Amaresh Kumar Lal, J.)

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