

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.992 of 2009

Arising Out of PS.Case No. -0 Year- null Thana -null District- SAHARSA

Nandkishore Yadav son of late Raghunath Yadav, resident of village –Barsam, PS-Saur Bazar, District-Saharsa.

.... Appellant/s

Versus

The State of Bihar.

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Ashok Kumar Mishra, Adv.
Mr. Rishit Deo Kumar Singh, Adv.
Mr. Amit Kr. Mishra, Adv.

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

CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH
and
HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)

Date: 28-07-2015

1. Heard learned counsel for the appellant and the State.

2. The sole appellant has been convicted for the offence under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and punished with fine of Rs. 5,000/- and he has further been convicted under Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for three years and also punished with fine of Rs. 1,000/- by the Additional Sessions Judge, Fast Track Court-III, Saharsa in Sessions Trial No. 169 of 2007 (T.R. No. 10 of 2007) by judgment and order dated 16th September 2009 and 17th September 2009 respectively.

However, both the sentences have been ordered to run concurrently.

3. The case of the prosecution, according to Shoshan Sharma, informant (P.W.6) is that on 07.05.2007 at about 12 Noon, his brother, Pampam Sharma (deceased) had gone for fishing in a ditch towards east of the village. When he returned home, the appellant and his brother came at the house of the informant and questioned him as to why he had caught fish and abused him. The deceased, Pampam Sharma protested saying that he had caught fish from the field of Ram Kishun Yadav and not from his *Jalkars*. Then the next date on 08.05.2007 at about 01.00-01.30 P.M. once again the appellant and his brother came to his door and started demanding fish from the deceased who said that the fish had been eaten. At this, both the accused persons went to their house and brought arms and Appellant Nand Kishore Yadav is said to have fired on the informant's brother, deceased which hit him on his left chest due to which he fell down dead. This statement was recorded at 2.30 P.M. on the same day at the place of occurrence.

4. During trial, prosecution examined altogether eleven witnesses, out of whom, PW 1 Bauku Sharma, PW 3 Rani Yadav, PW 5 Faguni Devi and PW 6 Shoshan Sharma have deposed as eye witnesses to the occurrence. They happen to be close family members of the deceased.

5. Independent witnesses such as PW 2 Udit Yadav, PW 4 Mohammad Kasim Khan, PW 7 Jitendra Kumar, PW 9 Sanjay Yadav and PW 10 Vivekanand Yadav have been declared hostile, PW 8 Anil Kumar Yadav is the Investigating Officer and PW 11, Ashok Kumar is the Doctor who conducted the *post mortem* examination.

6. On going through the evidence it appears that PW 1 Bauku Sharma, father of the deceased and PW 5 Fauni Devi mother of the deceased deposed as eye witnesses to the occurrence giving description of the manner in which the occurrence had not taken place and the cause for it. However, their attention was drawn to the earlier statement to the effect that they had not stated before the Police that they had gone for treatment of PW 5 and only heard about the occurrence and in fact was not eye witness. PW 5 also admitted that in her earlier statement she was merely a hearsay witness. The Investigating Officer, PW 8 corroborated this fact, hence, it has to be accepted that these two were not eye witnesses.

7. PW 3 Rani Devi, wife of the deceased and PW 6 Shoshan Sharma, brother of the deceased have, no doubt, supported the prosecution case to its hilt. From the evidence of PWs. 3 and 5 it appears that the occurrence had taken place after an altercation with the deceased. Even if the story that the appellant had gone into his own house, is believed, since his



house was only next door, there is no gainsaying that the occurrence had taken place at the spur of moment in the midst of an altercation over fish which the appellants claimed a minor matter like to be of their share. There is no allegation of a second round of firing. This fact is corroborated by the Doctor Ashok Kumar, PW 11 who found a single injury on the person of the deceased.

8. In the facts enumerated above, the submission of the counsel for the appellant is that even if the prosecution case is believed, it does not appear to be a case punishable under Section 302 Indian Penal Code and, at best, it would be a case under Section 304(II) of the Indian Penal Code whereby the appellant merely had knowledge that such injury would have caused death.

9. On the other hand, the counsel for the State submits that since the appellant had made point blank fire on the chest of the deceased, it is a clear case under section 302 of the Indian Penal Code.

10. While discussing the evidence of PW 3 Rani Yadav, we find that on the day of occurrence when the accused persons came to ask the deceased for fish, he started arguing that he had not caught the fish from their field, but had caught it from the field of another person. She further stated that on the day of occurrence, there was an altercation between the two on



which she herself came running and accused came with the fire arms and shot at the deceased. In Para 15, she has stated that there was no dispute between the deceased and the appellant from before. The fact that there was no dispute between the deceased and the appellant, is also conceded by PW 1 Bauku Sharma, father of the deceased. In his evidence, PW 6 Shoshan Sharma stated that on the previous day of occurrence, the accused persons came to his door and started challenging the deceased as to why he has caught fish from their field on which the deceased had replied that he had caught the fish from the field of Ram Kishun. On the next day also the accused persons are said to have demanded explanation from the deceased as to why he has caught fish and then the accused had gone into their house and brought fire arms and shot at him.

11. PW 8 Anil Kumar Yadav, Investigating Officer stated that the house of the appellant was adjacent to that of the deceased and on search of their house on the very same day, he did not find any incriminating material.

12. In such circumstances, We are of the view that it evidently appears that the act of assault had taken place in the midst of an altercation, the degree of which is not known and for a petty matter. Hence we find ourselves in agreement with the counsel for the appellant that in the facts of the case, no offence under Section 302 Indian Penal Code is made out and

his conviction under the same is not warranted. Hence, the conviction is converted into one under Section 304(II) Indian Penal Code and the sentence is reduced to the period already undergone by him. He is also directed to pay a fine of Rs.15,000/-within a period of four weeks from the date of receipt/production of a copy of this judgment which shall be disbursed to the wife/son of the deceased on proper verification by the learned trial court.

13. In the result, the appeal is dismissed with the modification as above, failing which the appellant shall undergo R.I. for 1 year.

(Anjana Prakash, J)

(Shivaji Pandey, J)

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