

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.45 of 2013

Arising Out of PS.Case No. -45 Year- 2004 Thana -null District- MADHUBANI

Dilip Yadav, Son of Late Vilash Yadav, Resident of Village- Gwalpara Bazar,
P.S. Gwalpara, District- Madhepura

.... Appellant

Versus

The State Of Bihar

.... Respondent

WITH

Criminal Appeal (SJ) No. 435 of 2013

Arising Out of PS.Case No. -45 Year- 2004 Thana -BIHARIGANJ District- MADHEPURA

1. Ramnath Yadav, Son of Late Jageshwar Yadav Resident of Village+ P.S-
Gwalpara, District- Madhepura.
2. Mani Sharma @ Muni Kumar Sharma, Son of Bhagwan Sharma Resident of
Village- Pararia, P.S- Bihariganj, District- Madhepura.

.... Appellants

Versus

The State Of Bihar

.... Respondent

Appearance :

(In CR. APP (SJ) No. 45 of 2013)

For the Appellant : Mr. Vikram Deo Singh, Advocate.
Mr. Shailendra Kumar Singh, Advocate.
For the State : Mr. Bipin Kumar, A.P.P.

(In CR. APP (SJ) No. 435 of 2013)

For the Appellants : Mr. Vikram Deo Singh, Advocate.
Mr. Shailendra Kumar Singh, Advocate.
For the State : Mrs. Abha Singh, A.P.P.

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 30-09-2015

Heard learned counsel for the appellants and learned counsel
for the State.

2. Two appeals have been heard together and disposed of by
common judgment as two appeals arise in Sessions Trial No. 35/35(A) of



2009 (arising out of Bihariganj P.S. Case No 45 of 2004) passed by Shri Anil Kumar Jha, learned Adhoc 2nd Additional Sessions Judge, Madhepura, by which the appellant Dilip Yadav had been convicted for offence under Sections 353/34 of Indian Penal Code and sentenced to undergo simple imprisonment for two years. Further he had been convicted for offence under Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for three years and payment of fine of Rs. 5,000/- and in default of payment of fine the convict had further undergo simple imprisonment for six months. Both the sentences were ordered to run concurrently. The appellants Mani Sharma @ Mani Kumar Sharma and Ramnath Yadav had been convicted for offence under Sections 353/34 of Indian Penal Code and sentenced to undergo simple imprisonment for two years. They have been further convicted for offence under Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for five years and payment of fine of Rs. 5,000/- each and in default of payment for fine further undergo simple imprisonment for one year respectively. All the sentences were ordered to run concurrently. Though, two trial of the cases have been proceeded separately as the evidence of two cases had gone separately.

3. The prosecution case as alleged by the informant Bhagirath Prasad, Officer-in-Charge, Bihariganj Police Station that on 18.08.2004 at 8.30 P.M. while he was on patrolling duty along with

S.I. Intekhab Ahmed, S.I. Biresh Kumar, S.I. Anand Bihari, S.I. Rakesh Kumar Bhaskar, S.I. Ranjeet Singh along with other Constables were going to Laksmipur to raid, in the meantime on got secret information that veteran criminal Dilip Yadav was sitting in Village- Sarauni Bhatta Tola along with his accomplices Ramnath Yadav, Manoj @ Mani Sharma, Yogendra @ Yogan Rishideo were taking meal and drinking at the Basa of Dilip Yadav. On the said information, he proceeded along with associates reached near the Basa of Dilip Yadav then Dilip Yadav and his associates started indiscriminating firing upon the police party on which informant asked his party to take possession and to save themselves and stated on top voice that they were police personnel and ordered to stop firing and to surrender before the police, but accused persons not to stop firing then informant ordered to his associates to fire in counter to save and this led to firing from both sides. However, night was dark and taking advantage of dark night, accused persons managed to escape. It is further alleged that while resisting Dilip Yadav thrown his rifle and fled away. Thereafter, on hullah local villagers were collected and then in presence of two independent witnesses Kamleshwari Mandal and Narayan Mandal, the seizure list was prepared regarding one semi-automatic rifle and empty cartridges. When the rifle was opened then smell of burn sulphar from one barrel of rifle and two live cartridges loaded from the said rifle was found

and from the place of occurrence two motorcycles one in red colour bearing no. BR 43-2325 Engine/Chesis No. 425307221 and another purple coloured Escort Yamaha motorcycle was recovered and seizure list was prepared of the two motorcycles. It is alleged that said rifle appears to have been looted article by the accused. Accordingly, a case was instituted for offence under Sections 307, 353 and 414/34 of the Indian Penal Code and Sections 25(1-B)A, 26, 27 and 35 of the Arms Act.

4. However, police after investigation submitted charge sheet against accused Mani Sharma @ Mani Kumar Sharma showing accused Dilip Yadav and Ramnath Yadav were absconder. Subsequently, Ramnath Yadav was arrested but Dilip Yadav remained absconder and hence case instituted against Ramnath Yadav and Mani Sharma and after commitment, trial proceeded against them in Sessions Trial No. 35 of 2009 and charge was framed against them for offence under Sections 353/34, 307/34 and 414/34 of Indian Penal Code and Sections 25(1-B), 26, 27 and 35 of the Arms Act.

5. During trial after framing of the charge, nine witnesses were examined on behalf of the prosecution. P.W. 1 Shibdayal Sah, is formal witness and had proved the formal F.I.R., P.W. 2 Rabindra Kumar who is also formal witness has proved charge sheet, P.W. 3 Rakesh Kumar Bhaskar, S.I. who is member of raiding party and stated that he did not identify the accused persons as accused persons

fleeing away taking advantage of dark night, P.W.4 Satyanand Gupta, he had produced material exhibit on the command of the court, P.W. 5, Kamleshwari Mandal is agriculturist and seizure list witness of Basa, though, stated that whatever seized he cannot see and seizure list was not read over and police got his signature on plain paper, P.W. 6 Narayan Mandal is also seizure list witness, though, he has proved seizure list but stated that nothing has been recovered, P.W. 7 Bhagirath Prasad, the informant has come to support the prosecution case, P.W. 8 is Anand Bihari, S.I., though, have supported the prosecution case, but has not expressly stated in his evidence about identification of two appellants, though, he has stated on the date of occurrence, night was dark, though, lantern was burning but said lantern was not seized. However, he has specifically stated in his evidence in paragraph 2 that he had not identified the accused persons who were fleeing away. Taking into consideration of evidence of witnesses in Sessions Trial No. 35 of 2009 two appellants, Mani Sharma and Ramnath Yadav have been convicted for offence under Sections 353/34 of Indian Penal Code and sentenced to undergo simple imprisonment for two years each and further convicted for offence under Sections 27 of the Arms Act and sentenced to rigorous imprisonment for five years each and payment of fine of Rs. 5,000/- each and in default of payment of fine further sentenced to simple imprisonment for one year but they were acquitted for offence under

Section 307 of Penal Code. However, no specific finding recorded with regard to offence under Sections 307 and 414 of Penal Code as well as 25 (1)(b) and 26 of the Arms Act. However, no Government appeal has been preferred and neither notice has been issued to the accused even by this Court while admitting the appeal.

6. However, from perusal of the record, it appears that subsequently after commitment of the case of the two appellants, Mani Sharma and Ramnath Yadav in the year 2009, a petition was filed on 20.12.2010/15.05.2011 that accused Dilip Yadav is in custody in connection with other cases, hence, may be remanded in this case. Thereafter, by the order of this Court, Dilip Yadav was produced on production warrant and non-bailable warrant of arrest had already been issued against Dilip Yadav. Hence Dilip Yadav remanded in this case along with custody warrant on 19.05.2011 with direction to produce on 20.05.2011. Thereafter, case was committed to the Court of Sessions on 20.05.2011 and a separate trial was proceeded bearing Sessions Trial No. 35(A) of 2009 on which charge was framed for offence under Sections 353/34, 307 and 414/34 of the Indian Penal Code as well as Sections 25(1-B), 26, 27 and 35 of the Arms Act. Charge was framed on 09.06.2011 and then trial proceeded and ten witnesses were examined by the prosecution. P.W. 1 Satyanand Gupta, S.I. he has produced material exhibit seized and kept at Bihariganj police station which has been marked as material Exhibits,

A, B, B/1, B/2 and B/3. P.W. 2 Shibdayal Sah, Advocate Clerk who is formal witness and proved formal F.I.R. marked Exhibit-1. P.W.3 Rabindra Kumar another Advocate Clerk and formal witness and had proved the charge sheet which has been marked as Exhibit-2, P.W. 4 Narayan Mandal is seizure list witness, though, he has proved his signature on the seizure list, though, stated that seizure list was not read over to him and only his signature was taken, P.W. 5 Kamleshwari Mandal is also seizure list witness, P.W. 6 Rakesh Kumar Bhaskar, S.I. and also member of the raiding party and had supported the prosecution case even identified Dilip Yadav. P.W.7 Sanjeev Ranjan Lal, Constable bearing no. 61 in the Dy.S.P. office. He has also supported the prosecution case. He stated that on secret information he along with others proceeded to Basa on raid and supported the prosecution case regarding fire by the accused persons and had identified Dilip Yadav in Court. P.W. 8 Bhagirath Prasad is informant has also supported the prosecution case and had also identified accused Dilip Yadav. P.W.9 Anand Bihari, S.I. who has also supported the prosecution case as a member of the raiding party and had also identified Dilip Yadav. P.W. 10 Biresh Kumar Officer-in-Charge of Bihariganj, he was also member of the raiding party and had supported the prosecution case and stated that they raided the Basa of Dilip Yadav and then there was firing by the accused and accused Dilip Yadav succeeded in fleeing away. However, stated that

he did not identify Dilip Yadav.

7. The Trial court taking into consideration the evidence of the witnesses convicted the appellant Dilip Yadav for offence under Sections 353/34 of Indian Penal Code and sentenced to simple imprisonment for two years. Further convicted for offence under Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for three years and payment of fine of Rs.5,000/- and in default of payment of fine further sentenced to undergo simple imprisonment for six months.

8. Learned counsel for the appellants has been challenged both the order of conviction and sentenced in two appeals. It is contended that appellants Ramnath Yadav and Mani Sharma @ Muni Kumar Sharma in Cr.Appl.(SJ) 435 of 2013, there is no reliable evidence with regard to their identification as the persons who identified have participated in the raiding party. It is submitted that none of witnesses except informant claimed to have identified the appellants of Cr.Appeal (SJ) 435 of 2013 and evidence of informant regarding identification has also there is no reliable evidence regarding participation of these appellants. Further submitted that with regard to appellant Dilip Yadav in Cr.Appl.(SJ) 45 of 2013 that Basa belongs to Dilip Yadav, but said Basa had not been proved belong to Dilip Yadav and some of the witnesses stated that said Basa was not belong to Dilip Yadav. Further relied upon decision reported

in **1999(3) PLJR page 76 (Abhai Rai & others Vrs. State of Bihar)** and **2003(3) page 262 Eastern India Criminal cases (Chanda Pal Singh Vrs. State of Bihar)**. It is submitted that it has not been established that fire was made from the Gun seized by the police. Hence submitted that conviction under Section 27 of Arms Act had not been sustainable against Dilip Yadav.

9. Learned counsel for the State however contends that there is specific allegation that police on information raided the Basa of Dilip Yadav and there is specific allegation regarding firing resorted by the accused persons and police also to have resorted firing and there is evidence that accused persons had fled away throwing rifle and cartridges has also been recovered. Hence, there is specific allegation against the accused persons regarding firing and obstructed the police party and prosecution has been able to prove the charges.

10. Hence, I proceed to consider the evidence of witnesses and submissions made by the parties. Having regard to the fact, both the appeals arise out of Bihariganj P.S. Case No. 45 of 2004 dated 19.08.2004 registered under Sections 307, 353 and 414/34 of the Indian Penal Code as well as Sections 25(1-B)A, 26, 27 and 35 of the Arms Act. However, since Dilip Yadav remained absconded even after submission of the charge sheet and hence case was proceeded against Ramnath Yadav and Mani Sharma and hence they are appellants in Cr.Appl.(SJ) 435 of 2013 vide Sessions Trial No. 35 of

2009 and Dilip Yadav is appellant in Cr. Appeal (SJ) 45 of 2013 had been convicted in Sessions Trial No. 35(A) of 2009 and trial proceeded with two separate set of appeals and separate judgments were also pronounced.

11. So far Cr.Appl(SJ) 435 of 2013 arising out Sessions Trial No. 35 of 2009 is concerned, nine witnesses were examined in this case. P.Ws. 1 and 2 are formal witnesses who have proved formal F.I.R. P.W. 3 Rakesh Kumar Bhaskar, Officer-in-Charge of Bihariganj, he stated in his evidence that he identified Ramnath Yadav, but he did not identify accused Mani Sharma and Yogendra Rishideo. P.W. 4.Satyanand Gupta is not eye witness to the occurrence but he has only brought material exhibits A, B, B/1, B/2 and B/3 respectively. But during cross-examination he has stated that this material exhibits were brought from Thana Malkhana. P.Ws. 5 and 6 are seizure list witnesses and they also not supported the prosecution case about seizure, though, they have signed on the seizure list. P.W. 8 and 9 though, witnesses of the raiding party, but they have stated that they did not identify the accused persons who were fleeing away. However, the evidence witness P.W.7 is on identification. However, P.W. 8 in his evidence stated that there was firing from the side of the accused persons when they raided the Basa of Accused Dilip Yadav, though, he has also stated that accused persons were chased from some distance and rifle, arms and

ammunitions were recovered there and were seized, but there is no evidence to the effect that he identified the accused persons, though, he has specifically mentioned that he saw the appellant- accused persons were firing, though, he has stated that Mani Kumar is present. He has further stated in his cross-examination that night on the occurrence night was dark and there a lantern was burning, but the said lantern was not seized, He has further stated that he has not identified the accused persons before him nor they were known to him before the occurrence. However, from the evidence, it is apparent that no T.I. Parade was conducted hence evidence of this witness regarding identification of the accused persons does not inspire confidence nor he has specifically stated that he identified the accused persons while firing was made or fleeing away.

12. So far evidence of P.W. 7 the informant is concerned, this witness in his evidence had identified the accused person Ramnath Yadav and Mani sharma @ Muni Kumar Sharma, but not identified in court. However, no step has been taken for identification of the accused persons and there was no T.I. Parade was conducted, though, he can identify, but in fact there is no specific evidence that witness has identified the accused persons soon before the occurrence. Further in his cross examination he had stated that at the place of occurrence accused persons were not arrested and no police personnel got injured by firing. He has only stated that he was spy who was

deposed that accused persons were Dilip, Ramnath Yadav. However, there is no specific evidence of P.W.7 that he identified the accused persons while firing. Moreover, evidence regarding identification of the accused persons while firing is not specifically mentioned in the evidence of this witness.

13. Hence taking into consideration the entire evidence, I find that prosecution has not specifically prove by cogent and reliable evidence that any act of commission and omission committed by the appellants or the appellants were identified by the witnesses. Moreover means of identification has also not been established nor it has been established that appellants were known since before the occurrence nor there is specific evidence that accused persons has specifically identified by this witness and hence evidence against two appellants Ramnath Yadav and Mani Sharma @ Muni Kumar Sharma regarding their identification and participation does not inspire confidence. Hence I find that prosecution has not been able to prove the charges against Ramnath Yadav and Mani Sharma @ Muni Kumar Sharma Hence, order of conviction and sentence recorded by the trial court in **Cr. Appeal No. 435 of 2015 is hereby set aside and appeal is allowed.**

14. So far as appellant, namely, Dilip Yadav in Cr. Appeal No. 45 of 2013 is concerned, there is specific evidence that police on secret information reached the Basa of Dilip Yadav and there was

firing from the Basa of Dilip Yadav and there is specific evidence that appellant DilipYadav throw his rifle and flee away. Hence there is specific evidence regarding his identification and there is specific evidence that this appellant was firing from his rifle and police resorted to the counter then appellant fled away after throwing the said rifle and said rifle was seized and brought in evidence. It has also brought in evidence that said rifle was effective as per evidence of P.Ws. 6, 7, 8 and 9 and they have also identified the appellant in Court.

15. However, learned counsel for the appellant has submitted that, though, rifle has been recovered and has been seized and report has been received that said rifle was in effective, but, though, requisition was sent to expert opinion, calling report, but there is no specific report that fire was made from the aforesaid rifle. Learned counsel for the appellant has place reliance reported in **1999 (3)PLJR 276 (Abhai Kumar & others V. State of Bihar.** However, fact stated in the aforesaid decision is not in consonance with the fact and circumstance of the present case. The fact and circumstance reported in 1993 (3) PLJR remained that there was no overt act has been attributed to the appellant except that he was holding (a counter made pistol) and he was a person who arrived at the place of occurrence as a result of which mob dispersed and in that particular fact and circumstance of the case it was held conviction under Section 27 of

the Arms Act as bad in the eye of law.

16. However, fact at hand in present case is quite different, there is specific allegation that firing was made by the accused persons and there is specific allegation that police had also made counter attack and there is specific evidence that accused persons had fled away after throwing the said rifle and said rifle was found loaded with cartridge and the appellant was identified.

17. Hence, having regard to the fact, there is specific evidence that accused persons was firing and hence decision reported in **1999 (3) PLJR** is not applicable. Further ratio decided in the fact and reliance has been placed in decision reported in **2003(3) Eastern India Criminal Cases Chanda Pal Singh V. State of Bihar**. Here fact and circumstance of the case that pistol was recovered from the possession of the appellant, but neither the appellant nor the prosecution witnesses stated that said fire arm was used by the accused. However, in the present case there is specific allegation and evidence that appellant resorted firing and he was firing at the police party even obstructed the police while performing his duty and hence decision reported in **2003 (3) Eastern India Criminal Cases Chanda Pal Singh V. State of Bihar** is not applicable in this case.

18. Having regard to the facts and circumstances of the case and going into entire evidence, I find that there is specific evidence against this appellant, Dilip Yadav who identified by four witnesses

P.Ws. 6, 7, 8 and 9. Hence prosecution has been able to prove the charges against the appellant in Cr.Appeal (SJ) 45 of 2013 and hence order of conviction and sentence recorded by the trial court against the appellant, Dilip Yadav is sustained and Cr. Appeal (SJ) 45 of 2013 is hereby **dismissed**.

m.p.
N.A.F.R.

(Gopal Prasad, J)

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