

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.200 of 2011

(Against the Judgment of conviction dated 05.02.2011 and Order of sentence dated 10.02.2011 passed by the Additional District and Sessions Judge-IV, Barh, Patna, in Sessions Trial No.650 of 2008).

Shivjee Yadav @ Shiv Kumar Yadav, son of Yugeshwar Yadav, resident of Village - Dargahi Tola, P.S. Pandarak, District – Patna.

..... Appellant.
Versus
The State of Bihar
..... Respondent.
with

Criminal Appeal (DB) No. 163 of 2011

Surendra Yadav, son of Late Brahmdeo Yadav, resident of village : Lemuabad, P.S. Pandarak, District Patna.

..... Appellant.
Versus
The State of Bihar
..... Respondent.
with

Criminal Appeal (DB) No. 160 of 2011

Ganga Prasad Yadav @ Ganga Yadav, son of Bhagwat Prasad Yadav, resident of village-Lemuabad, P.S. Pandarak, District-Patna.

..... Appellant.
Versus
The State of Bihar
..... Respondent.

Appearance :

(In CR. APP (DB) No. 200 of 2011):

For the Appellant : M/s. S.N.P. Sinha, Senior Advocate, J.N. Sinha, Ajit Kumar and Rohit Kumar, Advocates.

For the State : Mr. A.K. Sinha, A.P.P.

(In CR. APP (DB) No. 163 of 2011):

For the Appellant : M/s. Rajendra Narain, Senior Advocate, Prem Ranjan Kumar and Dharmendra Kumar, Advocates.

For the State : Mr. A. Sharma, A.P.P.

(In CR. APP (DB) No. 160 of 2011):

For the Appellant : M/s. S.N.P. Sinha, Senior Advocate, J.N. Sinha, Ajit Kumar

and Rohit Kumar, Advocates
For the State : Mr. S.N. Prasad, A.P.P.

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CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)

Date: 12-02-2016

Appellant Shivjee Yadav alias Shiv Kumar Yadav has been convicted under Section 302 of the Indian Penal Code and sentenced to rigorous imprisonment for life and fine of Rs.10,000/-, in default of which, further 9 months rigorous imprisonment, under Section 148 of the Indian Penal Code and sentenced to rigorous imprisonment for two years and under Section 323 of the Indian Penal Code and sentenced to rigorous imprisonment for six months as also under Section 27 of the Arms Act and sentenced to rigorous imprisonment for three years and fine of RS.5000/-, in default of which, nine months further rigorous imprisonment. As for, Appellants, Ganga Prasad Yadav alias Ganga Yadav and Surendra Yadav, they have been convicted under Sections 302/149 of the Indian Penal Code and sentenced to rigorous imprisonment for life and fine of Rs.10,000/-, in default of which, six months rigorous imprisonment, as also under Section 323 of the Indian Penal Code and sentenced to rigorous imprisonment for six months vide Judgment of conviction dated 05.02.2011 and Order of sentence dated 10.02.2011 passed by the Additional District and Sessions Judge-IV, Barh, Patna, in Sessions Trial No.650 of 2008.

2. The case of the prosecution, according to the Informant Asharfi Rai alias Ram Padarath Rai (P.W.8) is that he was one of the persons, who was executing some work in the village on behalf of K.E.C. International Limited for setting up power grid. About a month back, some villagers had got stopped the work and Shivjee Rai, Surendra Yadav and Ganga Prasad Yadav and some others whose name he did not know had come to the place of occurrence and threatened and abused them. They had said that the work was not to be executed at any costs. However, on the date of occurrence, they had restarted the work on the direction of higher officials Sumanji and Gopalji of the power grid which was being executed by himself, deceased Yaswant and four staff of J.C.B. as also Arjun Manjhi (P.W.12). On the same day, at about 05.00 P.M., four persons variously armed came and started to assault them with 'Danda'. While they were running away, Appellant Shivjee Yadav fired at Yaswant Kumar Singh which hit him on his chest and he fell down. Appellants Surendra Yadav and Ganga Prasad Yadav as also his elder son which he could identify then ran away. He himself sustained injury on his hand and leg. Deceased Yaswant Kumar Singh was taken to the hospital but he was declared dead. This Fardbeyan was signed by Satish Kumar (P.W.7) and Surendra Rai (P.W.3).

3. During trial, the prosecution examined 14 witnesses, out of whom, P.W.1 Bachhu Prasad Yadav, P.W.2 Surendra Prasad, P.W.4

Rajendra Choudhary, P.W.5 Daya Prasad Nirala and P.W.6 Tileshwar Rai are the formal witnesses. P.W.10 Sanjay Rai and P.W.12 Arjun Manjhi have been declared hostile whose evidence nevertheless discussed at the proper stage. P.W.9 Ashok Kumar is a hearsay witness whereas P.W.3 Surendra Rai, P.W.7 Satish Kumar and the Informant P.W.8 Asharfi Rai alias Ram Padarath Rai are the eye witnesses. P.W.13 Keshnath Ram and P.W.14 Ram Prasad Paswan are the Investigating Officers. P.W.9 is Dr. Kumar Kartikeya, who examined the Informant and conducted the post-mortem examination of the deceased.

4. It has been submitted on behalf of the Appellants that the First Information Report reached the Court on 3rd day which suggests that the same was manipulated. He further points out that there are some overwritings and cuttings in the Fardbeyan which gives rise to suspicion as to the veracity of the prosecution case. The witnesses are highly doubtful inasmuch as P.W.3 in paragraphs-12 and 29 has stated that the accused came after the occurrence whereas P.W.8 in paragraph-26 could not really narrate as to when the firing had taken place. P.W.9, a hearsay witness who, stated that no names were disclosed to Sumanji and Gopalji when they arrived. The doctor also did not find any blackening, charring or gun powder around the firearm injuries on the dead body of the deceased which is totally contradictory to the prosecution case. The Investigating Officer did not find any blood at

the place of occurrence or on the clothes of the deceased. P.W.8 the Informant has stated he was examined by the Investigating Officer after eight days and P.W.7 stated that he was not examined during investigation at all. The prosecution has not examined a number of witnesses. P.W.3 and P.W.8 having come after the occurrence have not corroborated the occurrence. Motive of the occurrence was, in fact, that the villagers had not been granted adequate compensation and they resisted work on account of the same, it was not a case of demand of 'Rangdari'. As for Appellants Surendra Yadav and Ganga Prasad Yadav alias Ganga Yadav, it has been submitted that since there is no allegation against them of firing, they deserve to be acquitted. The Informant has stated that he and Arjun Manjhi were assaulted by the accused with stick and were injured but there is no injury report of Arjun and his own injuries are superficial.

5. In order to appreciate the aforesaid contentions, we would briefly discuss the evidence of the eye witnesses.

6. P.W.3 Surendra Rai stated that on the date of occurrence while he, the deceased, Informant (P.W.8), P.W.7 and P.W.12 were working at their sites, four persons came there and started to abuse them whom he recognized as Ganga Yadav, Surendra Yadav, Shivjee Yadav and Prasant Kumar. Shivjee Rai fired at Yaswant from the back which hit him on the chest. When he fell down, the accused persons ran away. He stated that Shivjee used to demand 'Rangdari' from the Informant

since 15-20 days back which he had refused. He proved the signature on the Fardbeyan as Ext.3/1. He consistently stated in the cross examination that there were four accused persons who had come and he alongwith the Informnant, Arjun Manjhi (P.W.12), Satish Kumar (P.W.7) and others had been examined. Surendra Rai (P.W.3) had been examined on the same day. There is nothing else which is of note further in his cross- examination.

7. P.W.7 Satish Kumar was also a person, who was attending to the site. He stated that on the date of occurrence while they were working, 5 persons, out of whom, he identified, Ganga Yadav, Surendra Yadv, Shivjee Yadv and Prashant Kumar, came and told them to stop the work and also asked for 'Rangdari'. He then assured that demand should be made from the "Thekedar" at which Shivjee Yadav fired at Yashwant which hit him on the chest and he fell down. Informant and Arjun were also assaulted with "Lathi" by Ganga Yadav and Surendra on account of which they were injured. When they were taken to the hospital, Yashwant was declared dead and the Fardbeyan was recorded on which he also signed as a witness which he proved as Ext.3/3. In cross examination, he stated that he had learnt the names of the accused persons about 2-4 days before the occurrence. He stated that he had seen the occurrence from 50 yards and the firing was made after the assault with 'Lathi' which caused the death of Yashwant. He stated that he and Asharfi were examined as soon as the documents

were prepared.

8. P.W.8 Asharfi Rai alias Ram Padarath Rai the Informant stated that on the date of occurrence, they were executing the work for power grid and at about 03.00 O'clock, one Prashant Kumar came and told them to stop the work which had earlier been stopped. When the work was started, Surendra Yadav, Shivjee Yadav and Ganga Yadav came there and told them not to start the work and also stated that if the work was started without asking them, they would be killed. This information was given to Sumanji and Gopalji of power grid. 15 days later when the work re-started, at about 05.00 P.M. five persons including the present Appellants came holding 'Danda' in their hands. Shivjee had a pistol. They assaulted them with 'Danda' due to which he, Arjun (P.W.12) and Satish (P.W.7) were injured. Yashwant was caught by Surendra after which Shivjee Yadav fired at him which caused his death. On their 'Hulla' several persons came there. In cross examination, he stated that after days of the arrest of the accused, his further statement was recorded. He also stated that he had given information to Sumanji and Gopalji about the occurrence on telephone. He stated that number of persons came after the occurrence which he named. He also explained as to how he had named the accused persons and in explanation he stated that the accused were 26-35 years of age. There is nothing else which is of importance in his evidence.

9. P.W.9 Ashok Kumar is a Contractor who deposed on

factum of occurrence and having heard from the Informant that Shivjee had fired whereas the Informant, Arjun and Satish had told them that Surendra and Ganga had assaulted them with bricks.

10. P.W.10 Sanjay Rai was also working on the site on the same day and he stated that on the date of occurrence, Informant, Yashwant Kumar, Arjun Manjhi, Shailendra Rai and Satish Kumar were working. When he heard gun firing at about 05.00 P.M., then he reached there and saw Yashwant having sustained a bullet injuries, whereafter, he was taken to the hospital and Asharfi having sustained some injuries. He was declared hostile on the point that, in fact, earlier he was an eye witness. However, since the attention of the Investigating Officer towards his statement was not drawn, his evidence is of no consequence.

11. P.W.12 Arjun Manjhi, who is also a hostile witness, appears to be hearsay at the initial stage but even the attention on the statement of this witness was not drawn to the Investigating Officer. therefore, his evidence is also of no value.

12. P.W.13 Keshnath Ram is the Police Officer who had recorded the Fardbeyan (Ext.1). He proves the First Information Report (Ext.8) and the Inquest Report (Ext.9). He could not explain as to how the First Information Report was instituted on 05.01.2008 and the same reached the Court on 07.01.2008. He also stated he did not find any blood stains on the person of the deceased.



13. P.W.14 Ram Prasad Paswan is the Investigating Officer who stated that on the date of occurrence he was entrusted the Investigation whereafter he took the further statement of the Informant as also recorded the statement of Satish Kumar (P.W.7), Surendra Rai (P.W.3) and arrested the Appellants, Shivjee Yadav,, Ganga Prasad Yadav and Surendra Yadav on the same day. He found the place of occurrence to be village Lamuabad where the pit had been dugged to construct a pillar and the first pit was in the field of Ganga Yadav. He further stated in his cross-examination that all the accused persons were arrested in the night of the occurrence itself and that he had not found any material in regard to 'Rangdari'.

14. P.W.11 Dr. Kumar Kartikeya examined the Informant and found the following injuries on his person:

1. Pain and tenderness over knee joint of left lower limb.
2. Pain and tenderness over elbow joint of left forearm.

Type of injuries:- Both injures are simple in nature.

He also conducted the post-mortem examination of the deceased Yashwant Kumar and found a single firearm injury on his person. He recovered the bullet from inside the body. In cross examination, he explained the injuries caused from the close range since there was no blackening or charring or gunpowder around the

injury.

15. There are two witnesses, who have been examined on behalf of the defence, i.e., Dr. P.C. Gupta and Girijesh Prasad in regard to ophthalmic problem that the Appellant Shivjee was suffering even on the date of occurrence.

16. On going through the evidence of the witnesses, we find that the consistent evidence of the three eye witness is that the accused persons had come together armed with "Lathi" and, thereafter, some of them started assaulting the witnesses whereas Appellant Shivjee fired at Yashwant Kumar Singh who fell down and was injured. We note that the conviction of the Appellants Surendra Yadav and Ganga Prasad Yadav alias Ganga Yadav is under Sections 302, 149 and 323 of the I.P.C. but from the evidence of the witnesses which we have reproduced, it does not appear that they had common intention or object of causing death of Yashwant Singh and it was the isolated act of Appellant Shivjee Yadav alias Shiv Kumar Yadav. It appears that the intention of these Appellants was to stall work in course of which, Appellant Shivjee Yadav alias Shiv Kumar Yadav fired at the deceased which appears as individual act. Further, we find that there is general allegation of assault upon the Informant, Asharfi Rai alias Ram Padarath Rai against the Appellants, Surendra Yadav and Ganga Prasad Yadav alias Ganga Yadav of Criminal Appeal (DB) Nos.163 of 2011 and 160 of 2011 respectively and such injury was found on his person.

In view of such, the conviction of the Appellants, Surendra Yadav and Ganga Prasad Yadav alias Ganga Yadav of Criminal Appeal (DB) Nos.163 of 2011 and 160 of 2011 respectively is maintained only under Section 323 of the Indian Penal Code and the sentence is reduced to period already undergone.

17. As for Appellant Shivjee Yadav alias Shiv Kumar Yadav, there is no doubt that there is also overwriting in the Fardbeyan but they are of no consequence since they are minor in nature having no bearing on the material particular, hence, we are inclined to ignore the same. We also find that Fardbeyan was recorded soon after the occurrence at the hospital and the witnesses have also consistently deposed that they had given the statement either in the hospital or as soon as police officials reached there. In such circumstances, the fact that the First Information Report reached the Court on 07.01.2008, in our opinion, has to be ignored.

18. As for the minor contradiction in the evidence of P.Ws.3 and 8 as also that of P.W.9 that the witnesses did not disclose the name of the accused to Sumanji and Gopalji, who came to the hospital does not in any manner affect the structure of the prosecution case since the names of the accused were immediately disclosed in the Fardbeyan.

19. Since prosecution has never alleged that the deceased was shot at from a close distance hence the doctor not finding any

blackening or charring around the margin is also noteworthy of attention. We notice that angle of the firearm injury on the person of the deceased further corroborates the prosecution case that while the deceased was attempting to run away he had been shot at.

20. As for the Investigating Officer not mentioning that he had found blood stains at by the place of occurrence or of the deceased is also no significance in the light of consistent evidence that the occurrence had taken place at the construction site.

21. To satisfy ourselves on the arguments advanced, we looked into the case diary and found that the further statement of P.W.8 was recorded right after the Fardbeyan as also P.W.7 had been examined by the Investigating Officer. The Investigating Officer confirmed the same in court so the statement of P.W. 7 appears to be misdirected on account of a confused query.

22. Non examination of the several witnesses who had come to the place of occurrence is also not a major lapse since as many as three eye witnesses who have given consistent account have been examined.

23. Thus relying on the evidence of the three eye witnesses which is further corroborated by the doctor for as the allegation against the Appellant Shivjee Yadav alias Shiv Kumar Yadav of Criminal Appeal (DB) No.200 of 2011 is concerned, we are inclined to maintain conviction.

24. In the result, Criminal Appeal (DB) No.200 of 2011 filed on behalf of the Appellant Shivjee Yadav alias Shiv Kumar Yadav is dismissed. So far as the Criminal Appeal (DB) No.163 of 2011 filed on behalf of the Appellant Surendra Yadav and Criminal Appeal (DB) No.160 of 2011 filed on behalf of the Appellant Ganga Prasad Yadav alias Ganga Yadav are concerned, with the modification of their conviction and sentence, as indicated above, the same are partly allowed.

(Anjana Prakash, J)

(Rajendra Kumar Mishra, J)

**Bhardwaj/Pradeep Srivastava/
A.F.R.**

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