

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.421 of 2011

(Against the Judgment of conviction dated 30.03.2011 and Order of sentence dated 01.04.2011 passed by the 4th Additional District and Sessions Judge (FTC), Madhepura, in Sessions Trial No.81 of 2007).

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Amar Nath Yadav, son of Late Ramjee Yadav, resident of village-Madhaili, P.S.-Singheshwar (Shankarpur), District.-Madhapura.

.... Appellant.

Versus

The State of Bihar

.... Respondent.

with

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Criminal Appeal (DB) No. 377 of 2011

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Pawan Yadav, son of Late Ramjee Yadav, resident of village - Madhaili, P.S. Singheshwar (Shankarpur), District – Madhepura.

.... Appellant.

Versus

The State of Bihar

.... Respondent.

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Appearance :

(In CR. APP (DB) No. 421 of 2011):

For the Appellant : M/s. Kanhaiya Prasad Singh and Durgesh Kumar, Advocates.

For the State : M/s A.K. Sinha and A. Sharma, APPs..

For the Informant : Mr. Amarnath Jha, Advocate.

(In CR. APP (DB) No. 377 of 2011):

For the Appellant : M/s. Kanhaiya Prasad Singh and Durgesh Kumar, Advocates.

For the State : M/s A.K. Sinha and A. Sharma, APPs..

For the Informant : Mr. Amarnath Jha, Advocate.

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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: 15-03-2016

Appellants have been convicted under Sections 302/34 of



the Indian Penal Code and sentence to rigorous imprisonment for life and fine of Rs.5000/-, in default of which, further 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.1000/-, in default of which, further imprisonment for six months vide Judgment of conviction dated 30.03.2011 and Order of sentenced dated 01.04.2011 passed by the 4th Additional District and Sessions Judge (FTC), Madhepura, in Sessions Trial No.81 of 2007.

2. The case of the prosecution, according to the Fardbeyan of the Informant Shiv Kumar Yadav (P.W.1) is that on 07.11.1999 at about 07.00 P.M. when he alongwith his brothers deceased Krishna Kumar Yadav alias Kishun Yadav and Sushil Kumar Yadav (P.W.3) had gone to the house of Satya Narayan Rai (not examined) and were sitting on the Varandah on the occasion of Deepawali, suddently, at about 07.15 P.M., the present Appellants and three other names persons and about 5-6 unknown persons variously armed came and surrounded all of them. They then threatened them of dire consequences, if they moved. All of them kept sitting because of fear and then Anil Yadav exclaimed that “this is Kishunwa” and he should be shot at and then he himself fired from his pistol on the chest. Thereafter, Appellant Amar Nath Yadav fired with a pistol on the back and Vidyanand Yadav alias Musharhu Yadav fired on his neck. At that point of time, Appellant

Pawan Yadav and one sanjay Yadav were holding the rest of them at gun point. After having injured the deceased, Anil Yadav stated that the work was over and all left firing in the air. The deceased was on way to the hospital died and was brought back and kept at his door. He stated that he and his brother Sushil had identified all the accused persons in the light of the lamps and could identify them once again if shown.

3. During trial, the prosecution examined 11 witnesses whereas defence examined one witness on the point of alibi of Appellant Amar Nath Yadav.

4. Out of the 11 prosecution witnesses, P.W.1 Shiv Kumar Yadav and P.W.3 Sushil Kumar Yadav have deposed as eye witnesses. P.W.2, Ashok Kumar Yadav, P.W.4 Sanjay Kumar Yadav, P.W.5 Suresh Kumar Yadav as also P.W.7 Tarni Prasad Mandal are hearsay witnesses. P.W.10 Manish Kumar is the main Investigating Officer whereas P.W.8 Deepak Kumar is a formal Investigating Officer. P.W.9 is Dr. Mehilal Singh, who held the post-mortem examination of the dead body of the deceased. P.W.11 Bodhan Ram is a formal witness who brought the material exhibits to the court.

5. After having gone through the evidence of the witnesses, we find certain disturbing elements in the case which has influenced us to acquit the present Appellants. One of the factors is that right from



the beginning, i.e., at the stage of Fardbeyan there is an averment by the Informant that the accused Anil exclaimed as to the identification of the deceased. Since deceased was co-villagers well known to the accused, who were on litigating terms with the father of the deceased Tarni Prasad Mandal (P.W.7), it appears highly improbable that the deceased would have been pointedly identified or any exclamation in this regard would be made.

The second point which appears disturbing is that even though the said occurrence is said to have taken place in the house of Satya Narayan Yadav has not been examined by the prosecution. Witnesses who have been examined including P.W.6 Brahmdeo Prasad Yadav either belong to the same family or in agnatic relationship, which raises a suspicion in our minds as to whether the accused persons had been implicated for the reasons of previous pending land dispute.

Further influencing factor is that the prosecution witnesses stated that the only unknown persons had concealed their faces whereas it should have been the other way round. In these lines, we would like to discuss the evidence of the witnesses.

6. P.W.1 Shiv Kumar Yadav, who was sitting alongwith the deceased and P.W.3 Sushil Kumar Yadav, has stated that on 07.11.1999 at about 07.15 P.M. while there was ample light on account of other lamps on the occasion of Diwali and were sitting chatting, five

named accused persons including the present Appellants and 5-6 unknown accused persons came variously armed and surrounded them on the Varandah. Anil Yadav threatened them and then pointing to the deceased exclaiming "this was Kishunwa" fired at him on his chest on account of which he fell down, Appellant Amar Nath Yadav fired on the back, Vidyanand Yadav alias Musharhu fired on the neck of the deceased and Anil Yadav stated that the work was over and they should leave the place. The rest of the accused persons including Appellant Pawan Yadav and one Sanjay Yadav were holding them on gun point and departed firing. On their screams, number of persons gathered there and with their help the deceased was attempted to taken for treatment to the hospital but he died on the way so was brought him back and kept at the door. He proves the Fardbeyan and the signatures of the two witnesses Nunu Lal Yadav and Vijay Kumar Yadav on the same as Exts.1, 1/1 and 1/2. Incidentally, neither Nunu Lal Yadav nor Vijay Kumar Yadav has been examined in the case. He stated that he was one of the seven brothers and his father Tarni Prasad Mandal (P.W.7) was Ex-Mukhiya and they had sufficient landed property. He also stated that number of litigations were going on in between the accused and himself including a proceeding under Section 145 of the Code of Criminal Procedure. He also stated that his house was situated 1/2 kilometer away from the place of occurrence and P.W.3 Sushil



Kumar Yadav, P.W.2 Ashok Kumar Yadav and P.W.7 Tarni Prasad Mandal belonged to the same family and they were witnesses in the case. Even though he stated that Satya Narayan Rai, who happened to be the father-in-law of his brother was a witness in the present case but he has not been examined. He described the place of occurrence being a closed room adjacent to the Varandah which was open. It was suggested to him that, in fact, the deceased had been killed by unknown persons and the Appellants were falsely implicated.

7. P.W.2 Ashok Kumar another brother of the deceased is on the factum of occurrence and stated that while the deceased and P.W.1 had gone to the house of Satya Narayan Rai, this occurrence took place. When he went to the place of occurrence, he heard about it and saw his brother in an injured condition and when he asked P.W.3 and Satya Narayan as to what have happened, he disclosed that accused Anil, Appellant Amar Nath and Musharhu had shot at the deceased and Appellant Pawan, Sanjay and some 5-6 other persons were also alongwith the miscreants.

In cross examination, he stated that he was the past-Mukhiya and there was a case including a proceeding under Section 145 of the Code of Criminal Procedure going on between the parties.

His evidence as hearsay witness is inadmissible in law since P.W.1 has not supported the factum of disclosure of the names of the

Appellants.

8. P.W.3 Sushil Kumar Yadav is the next eye witness who was present at the place of occurrence on 07.11.1999 alongwith the deceased and P.W.1 Shiv Kumar Yadav in the house of Satya Narayan Rai on the occasion of Deepawali. While they were sitting, accused Anil Yadav, Vidyanand Yadav alias Musharhu Yadav, Sanjay Yadav and the present Appellants alongwith 5-6 unknown accused persons variously armed came and then Anil Yadav threatened them not to move. Then Anil Yadav pointing to deceased exclaimed that “this was Kishunwa” and he should be shot and then himself shot at the deceased on account of which he fell down injured. Thereafter, Appellant Amar Nath Yadav also fired with a pistol on the deceased at the back whereas Vidyanand Yadav alias Musharhu Yadav fired on the neck due to which he was seriously injured. The accused persons then ran away towards west. Thereafter a number of villagers came and lifted the injured brother but on the way he died so they brought him back to his house.

In cross examination, he explained that all the witnesses were his close relatives and accused Anil Yadav, Vidyanand Yadav alias Musharhu Yadav, Appellants Amar Nath Yadav and Pawan Yadav were own brothers whereas accused Sanjay Yadav was the son of accused Vidyanand Yadav alias Musharhu Yadav. He also admitted

the factum of a proceeding under Section 145 of the Code of Criminal Procedure going on between the families and it was his father with whom they were litigating terms. He also explained that the lands and the house of the accused was adjacent to the house of Satya Narayan Yadav in whose house they were sitting and they had cattle etc. at the time of occurrence but all of them was removed later on.

It was suggested to him in order to uproot the Appellants from their lands, the present case had been instituted against them to which he denied. He also denied the fact that his brother Surya Kumar and nephew Abhishek Kumar were accused in a case of murder. He stated that his family was rich and powerful in the area.

In cross examination, he once again asserted that the accused declared that "this was Kishunwa" and then fired at him. He stated that the unknown accused persons had concealed their faces with cloths. He also stated that 50-60 persons had gathered at the house of Satya Narayan Rai when he started raising cry on the occurrence.

9. P.W.4 Sanjay Kumar Yadav, who is an agnate of the informant, stated that on the Deepawali night on 07.11.1994, he heard some sounds as of crackers and then learnt that the deceased had been shot at so he went to the door of Satya Narayan Rai and found Krishna Kumar Yadav injured. He also saw Shiv Kumar Yadav (P.W.1) and Sushil Kumar Yadav (P.W.3) there. P.W.1 Shiv Kumar Yadav told

him about the factum of the Appellants and the other accused persons having shot at the deceased in his presence. The police collected the marks of blood stained earth as also a Chappal of which the seizure list was prepared in which he and Brahmdeo Prasad Yadav (P.W.6) signed.

However, in cross examination, he stated that the seizure list was not before him. He further stated that about 50-60 persons were going towards the house of Satya Narayan Rai where the police later came and seized the articles in his presence.

The statement of this witness as hearsay is not admissible since P.W.1 has not supported the factum of disclosure to him and, hence, he has to be considered merely as a formal irrelevant witness.

10. P.W.5 Suresh Kumar Yadav another agnate of the deceased stated that on the night of occurrence he had met the accused persons variously armed and coming from the village side. When he came home, he learnt that at the house of Satya Narayan Rai, Krishna Kumar Yadav had been shot at. He then went to the house of Tarni Prasad Mandal (P.W.7), the father of the deceased, and saw him laid out on a Chowki. He stated that the place where he had seen the Appellants with arms was about one kilometer from the place of occurrence.

Surprisingly, in cross examination, he also stated that while he was at Saifan, which was about one kilometer away, he had heard



shots and screams from the house of Tarni Prasad Mandal (P.W.7), the father of the deceased and that Krishna Kumar Yadav had been shot dead. He also stated that the accused persons had their faces uncovered when he crossed them and also that the Appellants used to live adjacent to his house. He stated that the time of occurrence the Appellants were more or less self sufficient but after this incident they had left the village. He conceded that he had not been examined by the police.

From the evidence of main Investigating Officer Manish Kumar (P.W.10) we also find no corroboration that he had examined this witness during investigation and, hence, his evidence has to be rejected on this count.

11. P.W.6 Brahmdeo Prasad Yadav is a formal witness on the seizure of some articles but he does not prove any document and, hence, even his evidence is of no value. In cross examination, he stated that he was agnate of the family of the deceased and about 50-100 people had gathered at the time of occurrence.

12. P.W.7 Tarni Prasad Mandal, the father of the Informant, has supported the factum of P.Ws.1 and 3 and the deceased having gone to the house of Satya Narayan Rai where the deceased was shot at by the Appellants and others. Thereafter, the deceased while being removed to the hospital died on the way.

He stated that when he went to the place of occurrence,

P.W.1 disclosed about the factum of occurrence to him but this fact was not corroborated by P.W.1. His evidence as hearsay witness is of no value and it is only to the point of factum of the occurrence.

In cross examination, he stated that his son had gone to jail for having kept firearms and his grand son Vijay Kumar had gone to jail in a case of murder as also there was some proceeding under Section 145 of the Code of Criminal Procedure with Fanni Lal Mehta. He also stated that the accused persons were his own agnates.

13. P.W.8 Deepak Kumar is a formal witness who conducted the part investigation but it is of no relevance..

14. P.W.9 is Dr. Mehilal Singh who conducted the Post-Mortem examination of the dead body of the deceased and found the following injuries on his person:

(I) Wound of entry- Lacerated wound (1/2" x 1/2"). Left lateral and posterior aspect of the neck with dark and inserted margins on probing and dissection, it led to an opening (1/2" x 1/2") on the right side of neck with exerted margins (wound of exit). On the track it pierced the right common carotid artery and muscles of the neck.

(II) Wound of entry- Lacerated circular wound (1/2" x 1/2") on upper part of the left side of the abdomens near backside dark and inverted margins on probing and dissection, it led to an opening (1/2" x 1/4") on the front and lateral aspect of the right side of

the abdomen with protrusion of mentem and intestine with exerted margins (wound of exit). On the track it pierced large intestine and the lines.

(III) Wound of entry- Lacerated circular wound (1/2" x 1/2") on the upper part of the left side of the abdomen on the anterior axillary line with dark and invertal margins. On prolong and dissection it led to an opening on the right side of the abdomen (1/2" x 1/2") with exerted margins (wound of exit). On the track it pierced the small intestine at two places blood and clot was present in the abdominal cavity.

Death was due to shock and hemorrhage as a result of the five arms injuries.

From the aforesaid, we find that he proved the Post-Mortem Report as Ext.2 and that there was no injury on the back of the deceased which he also clarified in his cross examination.

15. P.W.10 Manish Kumar is the main Investigating Officer. He stated that on 07.11.1999 at about 07.30 P.M. he heard a remour about a person having been shot at, at which he alongwith rest armed forced after recording the Sanaha Entry No.114 reached the house of Ex-Mukhiya Tarni Prasad Mandal (P.W.7) and recorded the statement of Shiv Kumar Yadav (P.W.1) in the presence of Nunulal Prasad Yadav and Vijay Kumar Yadav (none of them examined). He proves the Fardbeyan and the signature on the forwarding report as Exts.3 and 3/1 respectively and the First Information Report as Ext.4 as



also the Inquest Report as Ext.5. He stated that he inspected the place of occurrence and found it to be the house of Satya Narayan Rai, which was the east facing. The Baithka was one room and adjacent to it was a Varandah which was about 15 feet wide. He also seized some incriminating articles from there and, thereafter, submitted charge-sheet which is Ext.6. In cross examination, he stated that no details had been mentioned in the Sanaha Entry Diary as to who had given the information or who had been killed. In course of investigation, he examined some persons but he does not mention about P.W.5 Suresh Kumar Yadav. There is nothing else worth in his evidence.

16. P.W.11 is a formal witness who brought the material exhibits to the court.

17. On going through the evidence of the witnesses, we find that, admittedly, all the witnesses belong to the same family under which circumstance we will have to receive their evidence with great caution.

18. As mentioned earlier even though P.W.2 Ashok Kumar Yadav, P.W.4 Sanjay Kumar Yadav and P.W.7 Tarni Prasad Mandal have given hearsay account but when P.W.1 has not corroborated the fact of disclosure to them, their evidence on this point has to be rejected.

As for, the evidence of P.Ws.1 and 3, we find that no doubt

they have given consistent evidence but the Post-Mortem Report does not support their versions that the deceased had been fired at the back.

We also find that it is their case that before having been shot dead the accused had exclaimed that “this is Kishunwa” and he should be shot at which is not probable if the accused persons were in agnatic relationship with the deceased and the Informant and also resided in the same village.

The further notable point which influences our judgment is the fact that one of the witnesses has stated that the unknown persons had covered their faces meaning thereby that the known accused persons had left their faces uncovered, which is not believable. Admittedly, there is previous land dispute between the parties. The most important witness Satya Narayan Rai, in whose house the alleged occurrence is said to have taken place, has not been examined, which is a major laps committed by the prosecution making the evidence of interested witnesses highly unsafe to rely upon.

We also find that the prosecution has taken great pains in ensuring complicity of the accused and to the extent of setting up P.W.5 Suresh Kumar Yadav on the point he had seen accused out side the village. It reveals the intent of the prosecution to ensure the complicity of the Appellants and other accused persons and they are well-pinned. Since the accused lived in the same village there was no

occasion for them to have go out of the village in a manner that they would be identified.

19. In the facts and circumstances of the case, these Appeals are allowed. The Judgment of conviction and Order of sentence passed against the Appellants, above named, are set aside. They are acquitted of the charges. The Appellant Amar Nath Yadav {in Criminal Appeal (DB) No.421 of 2011} is in jail custody, therefore, he directed to be released forthwith, if not wanted in any other case. So far as Appellant Pawan Yadav {in Criminal Appeal (DB) No.377 of 2011} is concerned, he is on bail, therefore, he is discharged from the liabilities of his bail bonds.

(Anjana Prakash, J)

(Rajendra Kumar Mishra, J)

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

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