

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.1151 of 2012

Arising Out of PS.Case No. -106 Year- 2009 Thana -null District- SIWAN

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1. Jawahar Yadav S/O Late Shital Yadav R/O Village - Khedai Hata, P.S. Andar,
District - Siwan .

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Vindhya Keshri Kumar, Sr. Advocate
Mr. Satyendra Narayan Singh,
Mr. Raghav Pd, Advocates

For the Respondent/s : Mr. Ashwini Kumar Sinha, APP

For Informant : Mr. A. K. Pandey, Advocate

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**CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP
SINGH**

and

HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)

Date: 16-11-2016

Sole appellant, Jawahar Yadav who has been found guilty for an offence punishable under Section 302 IPC and directed to undergo RI for life as well as also to pay fine of Rs. 5,000/- in default thereof, to undergo RI for six months, under Section 27 of the Arms Act, directed to undergo RI for three years with a further direction to run the sentences concurrently vide judgment of conviction dated 28.09.2012 and order of sentence 03.10.2012 passed by Sessions Judge, Siwan in Sessions Trial No. 198/2010, has challenged the same by way of preferring the instant appeal.

2. The prosecution case as being unfurled by the Fard-e-beyan (Ext-5) of Dinesh Yadav (PW 5) having been recorded on 19.02.2009 at about 6:00 a m. at his Darwaja before O/C Andar PS alleging inter alia that in the preceding night while all the family



members were sleeping at their house, at about 2:30 a m., they heard sound of firing whereupon they came out and saw Jawahar Yadav, his co-villager running towards southern direction from his Darwaja. Seeing this, he went to awake his father where he found fire arm injury over his chest. His father was wriggling. On hue and cry having been raised, his younger brother Awadhesh Yadav (PW 1), Prahlad Yadav (not examined), mother, (not examined), sister (not examined) came out from their house, till then, his father succumbed. The motive for the aforesaid occurrence has been alleged as his father had borrowed Rs. 10,000/- from Jawahar Yadav and for that, Jawahar was threatening that in case, the aforesaid money is not returned to him, he would realize the same after causing murder. A panchayati was convened at an earlier occasion on that very score whereunder it was resolved that after subtracting the amount being charge of ploughing the field by his tractor, the remaining amount Rs. 6,000/- be paid to the Jawahar which Jawahar declined to receive.

3. After registering Andar PS Case No. 106/2009 under Section 302 of the IPC, 27 of the Arms Act, investigation commenced and after concluding the same charge-sheet was submitted against the appellant under the aforesaid sections whereunder cognizance was also taken. Subsequently thereof, being the offences exclusively triable by the court of sessions led trial before the court of sessions by way of commitment which ultimately concluded in a manner, the subject matter of instant appeal.



4. The defence case as is evident from mode of cross-examination as well as statement having been recorded under Section 313 Cr.P.C. is that of complete denial of the occurrence. Furthermore, false implication has been pleaded on account of previous animosity. However, in support thereof, neither any DW nor any kind of document has been exhibited on behalf of appellant/convict.

5. In order to challenge the finding rendered by the learned lower court, it has been submitted on behalf of appellant that judgment impugned suffers from conjecture and surmises on account of fact that learned lower court failed to appreciate the evidence in its right perspective. To substantiate the same, it has been submitted that the story so propounded on behalf of prosecution over manner of identification happens to be unreliable which the learned lower court failed to appreciate. In this connection, it has been submitted that right from Fard-e-beyan, it is evident that no source of light has been disclosed. The so-called occurrence happens to be of mid December. Fog, on account thereof, more particularly, the place of occurrence lies in the countryside, would have visualized and its density would not have enabled the prosecution to perceive presence of appellant fleeing from his Darwaja toward southern direction. Furthermore, it has also been submitted that, that happens to be reason behind the presence of development in the evidence of the witnesses from their initial stage in terms of Section 161 of the Cr.P.C. They introduced new story whereunder PW 11 as well as PW 3 have stated that when



they came inside Palani, the appellant was present who dashed against PW 1 and managed to escape. Furthermore, there also happens to be introduction of lantern during course of evidence at the end of PWs 1 and 3 which, during course of inspection of place of occurrence, neither been found by the Investigating Officer nor produced by any of the prosecution witness. Not only this, the aforesaid theme, being development is found duly substantiated from the evidence of PW-6, the Investigating Officer. It has also been submitted that these evidences are not mere omissions rather happen to be a contradiction which has got an impact upon prospect of the case as, being inadmissible, is fit to be rejected, whereupon the source of identification is found completely melted down.

6. It has also been submitted that the learned lower court should have considered that the prosecution could not succeed to substantiate the place of occurrence. To justify such submissions, it has been submitted that in the Fard-e-beyan, there happens to be specific disclosure that his father (deceased) was sleeping at his Darwaja while during course of evidence, place of occurrence has been shifted from Darwaja to Palani. At the present moment, it has also been submitted that from the objective finding of the Investigating Officer, (PW-6), it is apparent that Palani is also not an actual place of occurrence as no sign has been perceived by the PW 6 substantiating the same and so, as the prosecution failed to substantiate the same. Apart from this, it has also been pleaded that



the manner of occurrence, identification of the appellant is all found to be full of improbability and on account thereof, arraying the appellant as an accused responsible for causing murder of deceased is found commercial one.

7. In its continuity, it has also been submitted that though the Investigating Officer had spoken during course of evidence beyond the case diary which he was not at all expected and that being so, the aforesaid part happens to be inadmissible in the eye of law. The objective finding relating to place of occurrence what he narrated during course of examination-in-chief clearly speaks absence of blood at the place of occurrence, absence of cot, absence of quilt or blanket makes the presence of deceased at Palani doubtful in the background of being winter season no one could be expected to sleep without the same. The inquest report (Ext 7) also did not speak regarding presence of aforesaid items save and except sweater, which suggests that deceased might have gone somewhere else where he met with unfortunate incident.

8. It has also been submitted that after perusal of the aforesaid inquest report, it is evident that gun shot injury was found over chest below neck but none of the apparels that means to say, vest, sweater show presence of sign of gun-shot and in likewise manner, having absence of blood spot thereupon is indicative of the fact that those apparels were subsequently provided by the prosecution and in the aforesaid background, it has also been



submitted that deceased might have murdered in different way as suggested by the prosecution.

9. It has further been submitted that there happens to be material inconsistency amongst the evidences of the witnesses on each and every point which goes to the root of the prosecution case and on account thereof, their evidences suggest that they have not seen anything rather in the morning when they saw the deceased, lifted him somewhere else from actual place of occurrence and then hatching a plan got this case filed identifying the appellant in the background of dispute. So submitted that the judgment of conviction and sentence recorded by the learned lower court is not at all found supported with the materials available on the record and is, accordingly, fit to be set aside.

10. Controverting the submission made on behalf of appellant, it has been submitted at the end of learned APP assisted by learned counsel for the informant that source of identification apart from having been introduced by the witnesses disclosing that lantern was burning, they have also stated that it was moonlit night. Appellant being co-villager was vulnerable on that very score and so his identification by the prosecution witness is found reliable, trustworthy whereupon the conviction and sentence having been inflicted by the learned lower court appears to be fit to be confirmed.

11. It has further been submitted that there happens to be some sort of exaggeration in the evidence of the PWs, which happens



to be natural one having been examined after a lapse of time but is not a material one to discredit their status. Whatsoever deposed at their end conclusively prove complicity of the appellant during commission of the crime and that being so, the appeal is fit to be dismissed.

12. In order to substantiate its case, prosecution has examined altogether 7 PWs out of whom PW 1, Awadhesh Yadav, one of the sons of deceased, PW 2, Gorakh Yadav, brother of deceased, PW 3, Urmila Devi, wife of informant, Dinesh Yadav, PW 4, Meera Devi, wife of Awadhesh Yadav (PW 1), PW 5, Dinesh Yadav, (informant), PW 6, Nijamul Haque, Investigating Officer and PW 7, Dr. Ramesh Kumar. Side by side, has also exhibited the following documents:-

Ext-1, Signature of witness, Awadhesh Yadav on Fard-e-beyan, Ext-2, Signature of witness, Awadhesh Yadav on seizure list, Ext-3, Signature of witness, Awadhesh Yadav on carbon copy of P.M. report, Ext-4, Signature of witness, Dinesh Yadav on Fard-e-beyan, Ext-5, Fard-e-beyan, Ext-5/1, pagination of Fard-e-beyan, Ext-6, Formal First Information Report, Ext-7, Postmortem examination report, Ext-8, Seizure List, Ext-9, Postmortem report.

13. As per evidence of PW-7, he found following antemortem injuries during course of postmortem having been held on 19.12.2009 at about 10:30 a m.:-

On external examination:-

Entry wound of 4 CM diameter with lacerated margin present over duprasternal area. No exit wound found. No other external injury.



On dissection:-

Fracture of upper pole of sternum present. Left side lung ruptured. Rupture of ascending. Aorta present. Left plural cavity full of blood. Multiple pellet present in superior mediusteam. Number of one cork present also present. Pellet and cork handed over police. Both chamber of heart, empty. Stomach contains digested food material. Urinary bladder-empty.

14. From the evidence of PW-7 coupled with Ext-9, postmortem report, there happens to be consistency suggesting deceased, Ramdeo Yadav died on account of ante-mortem fire arm injury. Furthermore, it is also apparent that the aforesaid theme is found out of controversy at the end of the appellant also.

15. From the evidence of the material witnesses, that means to say, PWs 1, 2, 3, 4 and 5, it is apparent that none had claimed to be an eyewitness to the occurrence. On account thereof, this case rests upon the theme of circumstantial evidence and for that, the basic rule happens to be that ultimate finding should be in conclusiveness regarding guilt of the accused excluding all possibilities of innocence of an accused. The circumstances should be at a definite tendency unerringly pointing towards guilt of the accused. Furthermore, the circumstances, taken cumulatively, should form a complete chain so that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non else. Furthermore, such evidence should not only be consistent with the guilt of the accused but should be in consistent with his innocence. Now coming to the evidence, it is apparent that



none had claimed to have seen the appellant being armed with fire-arm coming towards Darwaja or Palani whichever may be, of the deceased. None had seen the accused running having fire-arm in his hand. None had spoken the distance from where they had seen the appellant fleeing. None had deposed that they have seen the appellant fleeing from front side or back side. None had deposed that at that very moment, there was any source of light which could have enabled them to identify the appellant.

16. Identification of a co-villager even in absence of light is possible by way of his gesture, posture, gait, voice etc and that happens to be consistently held by the Hon'ble Supreme Court. But, the prosecution should insist thereupon that even in absence of source of light they had identified the accused and the mode of identification should be addressed and disclosed. The time of occurrence, being dead of the night, during midst of winter season, and further, disclosure in Fard-e-beyan by PW 5 that other family members came subsequently, and further, PW 5 come out from his house awakening from deep sleep, would really require proper identification.

17. The prosecution perceived the aforesaid deficiency and that happens to be the reason behind that while examining PW-1, the prosecution had introduced a story that when they came inside Palani accused was present there who, after pushing him, escaped therefrom. First of all, presence of other witnesses as has been disclosed would not allow the appellant to escape therefrom. Furthermore, is not at all



substantiated from the evidence of PW-5, informant as well as PW-4, Mira Devi. Not only this, as per evidence of PW-1, it is evident that he had deposed that he along with PWs 5, 3 and 4 jointly came at the Palani, then in that event, the inconsistency amongst the evidence of PWs-1, 3, 4 and 5 on that very score will play vital role, in the background that had there been such event, neither the Fard-e-beyan nor the evidence of PW 5 would have disclosed that accused was identified while fleeing, contrary to it, would have disclosed that after pushing PW 1, managed to escape.

18. It is also evident from the evidence of PW-1 that during cross-examination, he had stated that lantern was burning at the verandah inside house, where they were sleeping as well as at the Palani, where the deceased was sleeping (para-13 as well as 14) which has been substantiated by PW-3 (para-10) but again the same has been not been supported at the end of PW 4 as well as PW 5. Though no cross-examination has been made at the end of the defence, but those PWs have kept mum on their own for the reasons best known to them. Apart from this, from the evidence of PW 6, 9, 10, it is evident that no lantern was ever shown to him nor any of the PWs had said that it was shown to the Investigating Officer, PW 6.

19. Being the prosecution deficient on that very score, and further having development in the evidence of the PW 1 as well as PW 3 for the purpose of claiming identification which has been found duly substantiated from the evidence of PW 6 (para-16, 17, 18 and 19)



the story having developed at the end of the prosecution that in a Palani appellant had given a push to PW 1, Awadhesh Yadav and managed to escape therefrom, appears to be development. If the aforesaid development is taken together with the evidence of PW 4 as well as PW 5, the said prosecution version becomes doubtful and suspicious one.

20. Now coming to the place of occurrence, it is evident that though place of occurrence has been shown as Palani, but neither blood has been found over earth, nor bed has been found inside Palani. Contrary to it, one Sofa has been found regarding which, the Investigating Officer failed to record where it could be converted as bed. Apart from this, the Investigating Officer has not found blood stain over the same. No bed has been found inside the Palani, nor quilt or blanket. In absence thereof, it looks improbable to accept that deceased had slept in the Palani. It is also evident from the inquest report that the apparels having worn by the deceased had no mark of gun shot. In likewise manner wound does not depict charring or blackening, on account thereof, firing from close range is ruled out. Therefore, the occurrence being at 2.30 AM having no source of light, would enable the accused to aim and shoot at from a distance happens to be unrealistic.

21. Thus giving anxious consideration over the materials available on record, it looks unsafe to rely upon the same while inferring guilt of the appellant by holding him responsible for causing



death of the deceased.

22. Consequent thereupon, the judgment of conviction and sentence rendered by the learned trial court is set aside. Appeal is allowed.

23. The appellant is under custody, he is directed to be released forthwith if not wanted in any other case.

(Samarendra Pratap Singh, J)

(Aditya Kumar Trivedi, J)

Patna High Court
16th day of November 2016.
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