

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.291 of 2013

Arising out of PS. Case No. -89 Year- 2008 Thana -ALOULI District- KHAGARIA

Gaurav Yadav S/O Ram Sundar Yadav Resident Of Village Gadhbanni, P.S. Alauli, District Khagaria.

.... Appellant

Versus

The State Of Bihar

.... Respondent

With

Criminal Appeal (DB) No. 154 of 2013

Arising out of PS.Case No. -89 Year- 2008 Thana -ALOULI District- -

- 1. Mangan Yadav S/O Late Sukhdeo Yadav Resident of Village- Gadhbanni, P.S.- Alauli, District- Khagaria
- 2. Rajeshwar Yadav S/O Late Baldeo Yadav Resident of Village- Gadhbanni, P.S.- Alauli, District- Khagaria
- 3. Yogi Yadav S/O Late Baldeo Yadav Resident of Village- Gadhbanni, P.S.- Alauli, District- Khagaria
- 4. Murari Yadav S/O Rajeshwar Yadav Resident of Village- Gadhbanni, P.S.- Alauli, District- Khagaria
- 5. Narain Yadav S/O Late Baldeo Yadav Resident of Village- Gadhbanni, P.S.- Alauli, District- Khagaria
- 6. Ramdeo Yadav S/O Late Gango Yadav Resident of Village- Gadhbanni, P.S.- Alauli, District- Khagaria

.... Appellants

Versus

The State Of Bihar

.... Respondent

Appearance:

(In Cr. Appeal (DB) No.291 of 2013)

For the Appellant/s : Mr. D.K.Sinha

Mr. Satish Chandra

For the State

Mr. S.N. Prasad, APP

(In Cr. Appeal (DB) No.154 of 2013)

For the Appellant/s : Mr. D. K. Sinha

Mr. Satish Chandra

For the State

Mr. S.N. Prasad, APP



CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
And
HONOURABLE MR. JUSTICE SANJAY KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)
Date: 21-06-2017

The sole appellant of Cr. Appeal No. 291 of 2013 has been held guilty under section 302 IPC and section 27 of the Arms Act and sentenced to undergo R.I. for life with fine having default clause and R. I. for 03 years with fine having default clause, respectively whereas the appellants of Cr. Appeal No. 154 of 2013 have been convicted under section 302/34 IPC and sentenced to suffer R.I. for life with fine having default clause. The judgment of conviction was rendered by the learned trial Judge in Sessions Case No. 96 of 2010 (arising out of Alauli P.S. Case No. 89 of 2008).

2. The factual profile which led to the trial, in brief, is that on 31.05.2008, the wife of the victim (P.W.6) made a Fardbayan (Ext.4) before the Station House Officer of Alauli police station (P.W.11) at 9.45 P.M. alleging that she had accompanied her husband Balmiki Yadav on 31.05.2008 in the evening to the house after closing the shop (flour mill) located at village Raun when her husband sat on a cot in front of his house. P.W.1 was also sitting on a Chouki in front of his house on the road when the accused persons arrived. P.W.1 reminded the accused persons about payment of certain amount several years ago for conveying the land in his favour on which his house was standing/constructed, when a hot argument/discussion between him and co-accused Umesh Yadav ensued whereafter co-accused Umesh Yadav and the appellant Gaurav Yadav started firing at him. P.W.1 escaped from the place of occurrence. The deceased present there forbade them from firings at night whereafter the appellant Mangan Yadav exhorted other co-accuseds to assault the deceased as he was also one of the close agnates of P.W. 1 Satyanarain



Yadav @ Satto Yadav. The further allegation is that the appellant Gaurav Yadav and co-accused Umesh Yadav fired at the deceased as a result whereof he received injury in his chest. The accused persons thereafter left the place of occurrence. The informant with the help of co-villagers carried her husband to the Primary Health Centre, Alauli (PHC) where the police also arrived on getting telephonic information about the incident. At the hospital her husband died of the firearm injuries sustained by him. Accordingly, her statement was recorded at the PHC by P.W. 11 which was attested by P.W. 2 Rambilas Yadav. The Panchnama (Ext.7) over the dead body was prepared at the Primary Health Centre, Alauli itself in presence of P.Ws 4 & 5. The dead body was sent for post mortem examination. The I.O. on the same night visited the place of occurrence and recorded the statements of some of the witnesses. Four shells of fired cartridges were seized near the place of occurrence under the seizure list (Ext.6) in presence of P.W. 2 Rambilash Yadav and P.W. 3 Birendra Yadav. After recording the statements and obtaining the post mortem report (Ext.3) furnished by P.W. 10, the I.O. found the accusations true and laid two charge-sheets. Later, the case of the co-accused Umesh Yadav was separated as he had absconded. The case of the rest of the accuseds/appellants was committed on 05.04.2010 which, on transfer, came on the file of the learned trial Judge where charges were framed and read over/explained to the accuseds/appellants to which they pleaded not guilty. After recording the evidence of the prosecution, their statements u/s 313 Cr. P.C. were recorded on 13.07.2012 wherein they all denied the charges levelled against them. The defence is total denial and their false implication in the case. The defence did not adduce any oral evidence but exhibited Ext. A which is a petition filed by the informant before the Sarpanch of the Gram Panchayat and



the order was passed by the Sarpanch on the said petition in order to demonstrate their false implication.

3. Learned trial court, on appraisal of the prosecution evidence, placing full reliance on the evidence of P.Ws 1,2,3,4 and 5 as well as the evidence of the doctor (P.W.10), held the appellants guilty of the charges and sentenced them in the manner stated above.

4. In order to bring home the guilt of the appellants, the prosecution examined 12 witnesses. They are as follows:-

5. P.W. 1 Satyanarain Yadav @ Satoo Yadav is the Gotia of the deceased who was present at the place of occurrence when the accused first attempted to kill him. P.W. 2 Rambilash Yadav has also claimed himself as an eye-witness and also an attesting witness to the FIR. P.W. 3 Birendra Yadav has proved the seizure memo. P.W. 4 Shailendra Yadav is an eye-witness and also a witness to the Panchnama along with P.W. 5 Rajendra Yadav, who has also proclaimed himself as an eye-witness. P.W. 6 is the widow of the deceased and the informant of the case. P.W. 7 Thakkan Yadav is a hearsay witness. P.W. 8 Umesh Yadav and P.W. 9 Biran Yadav had taken the dock to narrate the hearsay version of the prosecution case. The prosecution got them declared hostile and did not rely on them. P.W. 10, Dr. Purushottam Kr. Sinha is the autopsy surgeon who conducted the post mortem examination on the dead body of the deceased on 01.06.2008 at 8.55 A.M. at the Sadar Hospital, Khagaria. P.W. 11 Abhay Prasad Yadav is the I.O. of the case. He recorded the Fardbayn, made the investigation and laid the charge-sheet. P.W.12 Ramanand Mandal is the officer-in-charge of Alauli police station who has produced four shells of empty cartridges recovered from the place of occurrence which have been marked as Exts. I to IV.



6. We have heard Mr. Dharendra Kumar Sinha, assisted by Mr. Satish Chandra appearing on behalf of the appellants in both the appeals and Mr. S. N. Prasad, APP for the State.

7. Mr. Sinha has criticized the judgment of the learned trial court, inter alia, on the ground that the trial court completely failed to appreciate that the evidence of the witnesses were sharply at variance to each other. The evidence of P.Ws suffers from inner contradictions inasmuch as they are not supported by the objective finding(s) of the autopsy surgeon. The occurrence occurred late in the evening when the darkness had set in. P.W.6, the informant has stated so in para 11 of her deposition. P.W. 5 has spoken about the identification of the accused in the torchlight held by him, but the same was not produced either before the I.O. or in the court. The means of identification is, thus, doubtful. He next submitted that the enmity between the parties is explicit from the evidence of the prosecution witnesses. Owing to the land dispute between them, the prosecution has falsely implicated them in the case. The I.O. in his deposition has stated about an information of the incident given to him on telephone about the commission of murder in the village which was reduced by him as the station diary entry which prompted him to rush to the primary health centre where the victim had already arrived. The prosecution did not place on record the station diary entry (Sanha) which throws a serious doubt on the veracity of the FIR and thus on the entire prosecution case. He has, in particular, drawn our attention to the evidence of the eye-witnesses in order to highlight that at least two of them have stated that the deceased was shot at and hit by co accused Umesh Yadav (not facing the trial) and that the fire shot by the appellant Gaurav Yadav had not caused injury to the deceased.



8. Mr. S.N. Prasad, APP for the State, however, supported the impugned judgment. He would urge the evidence of the eye-witnesses fully prove the time of occurrence, the place of occurrence, the manner of occurrence as well as the complicity of the appellant in the crime.

9. Keeping in mind the rival contention of the parties, we would scan the relevant evidence. Before doing so, it may be noted that through the evidence of P.W.4 it is evident that the appellants and the deceased are close agnates. The genesis of the occurrence has been spoken by P.W. 4 when in para 7 he has stated that his father had sold 15 dhurs of Basgit land in favour of father of P.W. 1. The accused persons were claiming 6 dhurs of land in the said plot. P.W. 1 had allegedly paid certain amount to co-accused Umesh Yadav for conveying 06 dhurs of land on which the house of P.W. 1 was already constructed which was not being heeded to by the accused persons. Precisely, this was the bone of contention which also gets reflected from the prosecution evidence, as according to the prosecution, initially a heated arguments had ensued between the the co-accused Umesh Yadav which P.W.1 on conveyance of land. P.W. 1 had also come along with the deceased and was sitting on a chauki in front of his house . It is also seen from the evidence of the prosecution that many of the witnesses and many of the accuseds reside close to each other. The deceased was occupying a cot on the road in front of the house of P.W. 2 whereas P.W.1 was sitting on a chauki in front of his house. The two houses are very close to each other. This is the time when at about 8:30 P.M. the accused persons are said to have emerged/appeared at the place of occurrence and a hot exchange ensued between P.W. 1 and the accused(s) whereafter firing(s) was resorted to. As noted, the accused persons are related to each other. They are agnates. The witnesses of the



prosecution are related amongst themselves distantly. The bone of contention between the parties was that P.W. 1 was claiming title over 21 dhurs of Basgit land conveyed to his father by the father of P.Ws.3 and 4. The accused persons were claiming 06 dhurs of the 21 dhurs of land. A measurement was also carried out in which 06 dhurs of land came to the share of the appellant Ramdeo Yadav. P.W. 1 had paid certain amount for conveying 06 dhurs of land which although received by co-accused Umesh Yadav but was not being conveyed to him. The entire land was in possession of P.W. 1 on which his house was standing.

10. According to P.W.1, he was standing on the soling road whereas the deceased was sitting on a cot on the road. His wife (informant) and P.W.4 were present there. Co-accused Umesh Yadav arrived there when hot discussion ensued between P.W. 1 and the aforesaid co-accused. Umesh Yadav started abusing. In the meantime, his agnates appellants 1 to 6 (Cr. Appeal No. 134 of 2013) arrived there. The appellant Mangan Yadav exhorted to kill P.W. 1 whereafter the appellant Gaurav Yadav of Cr. Appeal No. 291 of 2013 and co-accused Umesh Yadav brought pistol from their house and fired at P.W.1. He, however, escaped from the place of occurrence and hid himself in the nearby hut. The appellant Mangan Yadav then ordered to kill the deceased on which both the accuseds namely Umesh Yadav and Gaurav Yadav fired at the deceased which hit him in his chest. He claims to have carried the victim with others to the hospital where he was declared dead. He stayed overnight at the hospital when in the following morning the dead body was sent for post mortem examination. In his cross-examination, he has stated that in the first round of firing, injury was caused to none. In the second round of firing the deceased received gunshot injury. He further stated that the firing was made on



the victim from a distance of 25 feet. He also stated that actually co-accused Umesh Yadav had fired twice at the deceased which hit the victim in his chest.

11. P.W.2 similarly claims in his evidence that he too was standing outside the house on the road when he saw the victim sitting on a cot in front of his house when all the appellants and co-accused Umesh Yadav arrived there and involved themselves in a hot tiff with P.W.1 when at the orders of the appellant Mangan Yadav, co accused Umesh Yadav and appellant Gaurav Yadav brought pistol and started firing. P.W. 1 escaped from there. The victim forbade them from doing so when all the appellants exhorted the co-accused Umesh Yadav and appellant Gaurav Yadav to assault him. Both the aforesaid accuseds fired at the deceased which hit him. He too joined hands in carrying the victim to the hospital where he was declared dead. In his cross-examination this witness states that firing was made by co-accused from a distance of 15 meters which had hit the deceased in his chest.

12. P.W.3 in his examination-in-chief states about his presence at the house of P.W.2 when hot discussion between P.W.1 and co-accused Umesh Yadav ensued. At the orders of appellant Mangan Yadav, co-accused Umesh Yadav and appellant Gaurav Yadava started firing at P.W.1, who, however, escaped. When the deceased forbade them, then all the appellants exhorted whereupon co-accused Umesh Yadav and appellant Gaurav Yadav fired and hit the deceased. He described the place of occurrence which is in the heart of the village. According to him, Umesh Yadav fired at a distance of 30-35 feet which hit the deceased. The second fire hit where and whom this witness could not say thereabout.

13. P.W.4 also claimed his presence at the place of occurrence with the deceased and the informant when the assault was made on the victim. He too



accompanied the injured to the hospital. According to him, firing at the deceased was made from a distance of 3-4 **laggas**.

14. P.W.5 similarly claims himself as an eye-witness who was present on the road in front of the house of P.W.2 when in the light of torch held by him he could see the hot discussion between co-accused Umesh Yadav and P.W.1. On hearing the **Bakjhak** (hot tiff), his Gotia (appellants herein) arrived who too started hot discussion when co-accused Umesh Yadav and appellant Gaurav Yadav who were armed from before fired at P.W.1, but he managed to escape. The deceased forbade them from doing so when at the orders of one of the appellants, co-accused Umesh Yadav and appellant Gaurav Yadav fired and hit the deceased. From his cross-examination, it appears that he claimed to have seen the occurrence in the torchlight. He also admitted that the firing made by co-accused Umesh Yadav from a distance of 20 yards had first hit the deceased in his chest. The second shot fired by appellant Gaurav Yadav also hit the victim.

15. We have purposefully noticed the evidence of the relevant witnesses giving out the ocular account of the case before examining the evidence of the informant/P.W.6 (wife of the deceased). In her examination-in-chief she has stated that the accused appellants came and started quarreling with P.W. 1 when her husband intervened whereafter the appellants fired at him. Her husband died as she reached the Primary Health Centre, Alauli with the injured where her statement was recorded. This witness, however, in her examination-in-chief has stated that at about 8:30 P.M she was cooking food inside the house. She heard the sound of gunfire and came outside the house and saw her husband lying in an injured condition on the cot. When she reached him there was none present. On Hulla, co-villagers Chandeshwari



Yadav, Dhiraj Yadav, Ram Sundar Yadav and Thakkan Yadav arrived at the place of occurrence. She carried the injured with the help of aforesaid witnesses to the Primary Health Centre, Alauli. Furthermore, she has clearly stated that when she reached with the victim near the primary health centre, P.Ws.1,2,3,4 and 5, the Gotias of her husband, met them whereafter all of them went to the police station where her statement was recorded which was actually the statement of P.W.2 on which she put her LTI. Be it noted, P.W.2 is an attesting witness to the Fardbayan. Both the parties were locked in a land dispute from before in which P.W. 1 was making Pairvai. What emerges from scanning of the evidence of P.W.6 is that P.Ws 1 to 5 were not seen present at the place of occurrence immediately after the occurrence and had not joined the informant in carrying the victim to the PHC. P.W.6 (informant) herself was actually not an eye-witness to the actual assault. It further emerges that P.Ws 1 to 5, who are Gotias of the deceased, had joined the victim and the informant at the primary health centre. The evidence of P.W. 6 cuts at the root of the credibility of the evidence of P.Ws. 1 to 5. Although the evidence of the informant can only be discredited referring to her statement/Fardbayan, but if the evidence of the informant clearly negates the presence of the P.Ws 1 to 5 at the place of occurrence at the time of occurrence then the court can legitimately doubt the credibility of those witnesses particularly when the enmity between the parties is almost admitted. Presence of the wife (informant) of the deceased near the place of occurrence, in the facts of the case, was natural and cannot be doubted.

16. We have another reason to doubt the truthfulness of the evidence of P.Ws 1 to 5. All of them except P.W. 1 have stated about the firing made by co-accused Umesh Yadav and appellant Gaurav Yadav which hit the deceased.



They have also consistently stated that such firing was made from a fairly long distance. Adverting to the evidence of the doctor (P.W.10) it is seen that he found the following ante mortem injuries:-

“External:- (1) Lacerated wound $\frac{1}{2}$ ”x1” chest cavity deep oval with blackening of margin, inverted margin over lower part of chest. Right side 3” above xiphoid process. 2. Lacerated wound 1”x1 $\frac{1}{4}$ ” over left side of chest interolateral aspect 2 $\frac{1}{2}$ ” below left nipple margin everted.

Internal on dissection:- Lower lobe of right lung and lower lobe of left lung was lacerated forming communicating track with injury no.1 and 2. Blood and blood clot was present in both chest cavity. There was extravasation of blood and blood clot in surrounding tissue associated with all the above mentioned injury. All other viscera were pale. All above mentioned injuries caused by firearm and ante mortem in nature. The first wound was wound of entry and second wound was wound of exit. The cause of death was haemorrhage and shock due to above mentioned lung injuries caused by firearm.”

17. The doctor found the victim having received one firearm injury which entered from the front part of the chest and exited on left side of chest interolateral aspect 2 $\frac{1}{2}$ ” below left nipple. The important finding of the doctor is the wound of entry on the chest cavity had blackening of the margin. On the basis of his clinical findings the doctor clearly opined that blackening of margin established that the firing was made from a distance of 3 to 4 feet. We have no reason to doubt the opinion of the doctor which he found on close examination of the wounds suffered by the victim.

18. It has been argued by the defence that it was late in the evening when the occurrence had taken place. P.W. 6 in paragraph 11 has clearly stated so.



The prosecution has not been able to establish that there was any source of identification. None of the witnesses except P.W. 5 has stated about the means of identification. P.W.5 has only claimed to have seen the occurrence in the torchlight held by him. We are unable to uphold the said contention. According to the prosecution, all the appellants had involved in a hot discussion with P.W. 1 before they resorted to assault. Both the parties are co-villagers residing in the same neighbourhood. They were locked from before in a land dispute. It further reveals from the evidence that they are distant agnates as well. On these facts appearing from the records, identification of the appellants by P.Ws even during the late evening was possible. It is not a case that some unknown persons had participated in the crime with whom the witnesses were not fully acquainted with.

19. Coming to the merits of the case what disturbs us most is the porous statement of the P.W. 6(wife of the deceased). Her presence at the place of occurrence is natural. According to P.W. 6 she reached first at the place of occurrence soon after the assault made on her husband and saw him lying in an injured condition. In paragraph 6 of her cross examination she named five persons namely Chandeshwari Yadav, Dheeraj Yadav, Tula Nand Yadav, Ram Sundar Yadav and Thak Khan Yadav who arrived at the place of occurrence on hearing her alarm and helped her in carrying the victim to the primary health centre. Four of them have been withheld by the prosecution. Thak Khan Yadav, however, has been produced as P.W. 7. His evidence does not support the prosecution case. He has only narrated the hearsay account of the occurrence. The court can legitimately presume that rest of the persons of whom P.W. 6 has spoken if produced would also not have supported the prosecution case as developed at the trial.



20. We have another reason to doubt the evidence of P.Ws 1,2,3, 4 and 5. As noticed above, it has been stated by P.W. 6 that when she was carrying the victim to the primary health centre and was about to reach the centre when these P.Ws met her. P.W. 6 in her examination-in-chief has not stated about the presence of these PWs except P.W.1. She has further stated that P.W.1 was first targeted who managed to flee away from the place of occurrence. P.W. 2 Ram Bilash Yadav is the attesting witness of the Fardbayan. P.W. 6 in para 8 has in unequivocal terms stated that she signed at the bottom of the statement made before the police by P.W. 2. These P.Ws are close agnates of the deceased which P.W. 6 also testified in para 7. In the aforesaid background, it is difficult for the court to fully rely on the ocular version of the case narrated by P.Ws. 2 to 5.

21. As noted above, there is a sharp contradiction in the evidence with regard to the firing resorted by the appellant Gaurav Yadav and co accused Umesh Yadav. At least some of the witnesses have clearly stated that firing made by the appellant Gaurav Yadav had not hit the deceased. We have already noted that the deceased had received only one gunshot injury which exited causing wounds of entry and exit. The doctor found the wound of entry having charred margin. On the basis of such finding it has been opined and, rightly so, that the shot was fired from a close range. In para 5 he has given the distance as 3 to 4 feet. P.W. 1 to 5 have given out the distance from which the victim was fired at by the appellant Gaurav Yadav and co-accused Umesh Yadav. The distance so stated by these witnesses even taken on an average basis sharply contradicts the objective finding of the doctor. In the above circumstances, we do not find it safe to rely on their evidence to connect the appellants.

22. For the reasons noted above, we are unable to uphold the conviction



recorded by the learned trial court. Both the appeals succeed. The judgment of conviction and sentence dated 31.01.2013 and 05.02.2013 respectively, passed against the appellants by the learned trial court, are set aside. The appellants of Cr. Appeal No. 154 of 2013 are on bail. They are discharged from the liabilities of their bail bonds The appellant Gaurav Yadav of Cr. Appeal No. 291 of 2013 shall be set at liberty, if not required in any other case.

(Kishore Kumar Mandal, J)

I agree (Sanjay Kumar, J)

HR/-

AFR/NAFR	NAFR
CAV DATE	15.05.17
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