

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.870 of 2012

Against judgment & order of conviction and sentence dated 7.8.2012/9.8.2012, passed by the Ad hoc Additional Sessions Judge II, Gaya in Sessions Trial No. 138 of 2010/174 of 2010, arising out of GR No. 17/2001, Sherghati P.S. Case No. -22 Year- 2001, District- GAYA

Bindeshwar Yadav S/O Devan Yadav Resident Of Village- Nawadih, Police Station- Dobhi, District- Gaya Appellant

Versus

The State Of Bihar Respondent

Appearance :

For the Appellant : Mr. Surendra Singh, Senior Advocate and
Mr. Praveen Kumar, Advocate
For the other side : Mr. S.N. Prasad, APP
Mr. Narendra Kumar, Advocate and
Mr. Tej Narayan Singh, Advocate

**CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
and**

HONOURABLE MR. JUSTICE MADHURESH PRASAD

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 29-11-2017

The present appeal has been filed on behalf of the sole appellant assailing the judgment of conviction dated 7.8.2012, passed by the learned Additional Sessions Judge II, Gaya in Sessions Trial No.138 of 2010/174 of 2010, whereby the appellant has been held guilty under section 302 IPC and section 27 of the Arms Act and sentenced him to suffer rigorous imprisonment for life with fine having default clause.

2. PW 1 (Surendra Prasad Yadav) lodged the fard beyan (exhibit 1) on 8.2.2001 at about 01.00 hrs. recorded at the darwaja



of the informant by PW 6 SI Ram Sevak Prasad Yadav, Officer-in-charge of Dobhi Police Station. The informant and his son Kamlesh Yadav (deceased) had gone to Dobhi to attend a Grih Pravesh (house warming) function. They set out on return journey on motorcycle at about 10 PM. The informant was driving the motorcycle, whereas his son was pillion. As they left the main road and took the road leading to the village and reached near the house of the appellant, he could notice the assembly of few accused persons including the appellant. On shout of the appellant, the informant stopped his motorcycle in front of the house of one Deoraj Yadav and got down from the motorcycle. Meanwhile, the appellant reached near the informant and told him that a day before he had assaulted his brother, so he would not spare his son. Thereafter, he fired from his rifle causing injury on the chest of the informant's son Kamlesh Yadav causing his death. Accused persons again fired which, however, did not hit any one. On hearing the sound of the firings, nearby people as well as family members of the informant rushed to the place of occurrence. The aforesaid accused persons including some other miscreants started pelting stone on the prosecution party, in which PW 5 Anuj Kumar, nephew of the informant, got some injuries. It is further alleged that PW 4, elder brother of the informant, who had also witnessed the occurrence, was asked to go to the nearby village and inform the police about



the incident. The dead body was lifted and brought to the darwaja of the informant. On getting information given by PW 4 Ram Shuhawan Yadav, the police recorded a station diary entry and rushed to the place of occurrence where the fard beyan of PW 1 was recorded in the wee hours of 8.2.2001. I.O. inspected the place of occurrence and recovered three empty cartridges from the place of occurrence. He also noticed remains of brick pieces. After conducting the inquest proceeding the inquest report (Exhibit 3) was drawn. The dead body was dispatched for post mortem examination. Dr. Arvind Prasad, who was posted as the Associate Professor, Forensic Medicine, Magadh Medical College and Hospital, Gaya held post mortem examination on 8.2.2001 and furnished the post mortem report (Exhibit 5). Finding the accusations true against the appellant, charge sheet was laid showing the appellant absconder. The appellant was later apprehended and the charges were framed on 7.4.2010 and read over to the appellant which was denied. Defence of the appellant is complete denial of the prosecution case and his false implication merely on suspicion.

3. In order to prove the case, prosecution examined seven witnesses. PW 1 (the informant), PW 2 (Gaya Yadav), PW 4 (Ram Suuhawan Yadav) and PW 5 (Anuj Yadav) have testified as eye witness to the occurrence. PW 3 Manoj Kumar @ Bhunnu was declared hostile. PW 6 Ram Sevak Pd. Yadav is the I.O. of the case



who was then posted as Officer-in-charge of Dobhi Police Station. PW 7 Dr. Arvind Prasad is the doctor who has proved the post mortem report, (Exhibit 5). However, Dr. Vijay Kumar, posted as tutor, Forensic Medicine at A.N.M.C.H., Gaya had conducted the post mortem examination on the dead body. The trial court held the charges proved beyond reasonable doubt.

4. We heard Mr. Surendra Singh, learned Senior Advocate for the appellant, Mr. Satya Narayan Prasad, APP for the State and Mr. Tej Narayan Singh, learned advocate appearing for the informant.

5. Evidence of PWs. 1, 2, 4 and 5 directly implicate the appellant in the crime. Counsel for the appellant has criticized the prosecution evidence on several grounds. It has been submitted that the means of identification has not clearly been established in the case. Our attention was drawn to the evidence of DW 1 Shambhu Kumar who has taken the dock to state that during the relevant time there was no electric supply in the village. Informant has said about the identification of the appellant in the light of the electric bulb fixed in front of the house of Deoraj Yadav which is the place of occurrence. He submits that the place of occurrence has also not been established. The IO did not find blood or blood mark at the place of occurrence where the incident had taken place inasmuch as the same was not seized. PW 1 (the informant) has admitted in his



evidence that he sent PW 4 to the police station. PW 4 in his deposition has stated that he went to the police station and stated about the killing of Kamlesh Yadav by the appellant. Although the IO has stated to have entered the sanaha of the informant given by PW 4, but the same was not produced in the court at the trial. Post mortem report, he argued, also contradicts the prosecution case so as to the time of occurrence.

6. Counsel for the informant and the State, in contra, supported the findings of guilt recorded by the trial court. They submit that it is the consistent case of the prosecution, through the ocular account narrated by PWs 1, 2, 4 and 5 that it was the appellant alone who shot from his rifle on the chest of Kamlesh Yadav which resulted in his death. Post mortem report (exhibit 5) gives full credence to the prosecution case. Presence of the informant and other witnesses at the scene of occurrence was not unnatural. The incident occurred close to the house of the informant. PW 1, the informant has admitted that his house and the houses of the appellant and Deoraj Yadav stand along the village road and they are not far off. The identification of the appellant cannot be questioned as they are known to each other from before. Reason of the occurrence is that only a day before, there was a quarrel between one of the accused persons and the deceased. It has been urged that if the parties are known to each other from before, the claim of



identification of the appellant cannot be questioned, particularly, when the appellant first reminded about the earlier quarrel to the informant and then fired at the victim. Non production of station diary before the trial court also does not cut the root of the prosecution case. It is the case of the prosecution that the occurrence took place on 7.2.2001 at 10.30 PM, whereas police made station diary entry on the same day at 11.30 PM and at 01.00 hrs on 8.2.2001 the FIR was lodged at the darwaja of the informant where the dead body was lifted and kept. As about non presence of blood at the scene of occurrence it is stated that the victim was wearing woolen cloth and the blood was soaked.

7. Since contentions have been advanced referring to the injuries as found by the autopsy surgeon leading to the death of the victim, it is appropriate to first examine the findings of the doctor who conducted the post mortem and submitted the post mortem report. The deceased had sustained the following ante mortem injuries:-

“One lacerated punctured wound 1” x ½” x chest cavity was present on left side of the chest two inch below and one inch medial of the left nipple. Margins of the wound were found lacerated, bruised and inverted (entry wound). The wound was found leading to neck, passing through the left lung and heart. Entering in lower part of right lung, where one irregular, metallic bullet was lodged, which was taken out, sealed and forwarded to the I.O. The soft tissues in and around the neck were found lacerated, bruised and infiltrated with blood and clots. Blood and blood clots were found filled in the chest cavity.”



8. A bare perusal of the post mortem report and the evidence of the autopsy surgeon exhibits that the deceased had received a wound of entry on his left side chest but there was no wound of exit. Metallic remains of the bullet was found inside the chest. The doctor found soft tissues in and around the neck bruised and infiltrated with blood/blood clots. The chest cavity of the deceased was filled with clotted blood. Apparently, It was a case of profuse internal bleeding. Turning to the inquest report (Exhibit 3) it is found that the deceased had four layers of garments on his body. The top layer was woolen sweater. It was a winter night. The doctor did not find wound of exit. As per prosecution case the cloth on the body of the deceased was soaked with blood. Non presence of blood by the I.O. at the site of assault is well explained. Whatever quantity of blood oozed out from the wound was soaked in the layers of cloth/garment. It has been argued enthusiastically that the source of identification has not been established by the prosecution. DW 1 Shambhu Kumar, who was a Junior engineer of Bodh Gaya Industrial Area, was produced by the defence to state that on the relevant date between 5.30 PM to 12.30 AM there was no electric supply. However, he admitted that he brought incomplete/part of the register and had not brought with him the log books prior to 7.2.2001 and after 7.2.2001. Such evidence does not inspire confidence and cannot be relied upon to show about the stoppage of electricity in



Nawadih village and the proper maintenance of the record. Adverting to the evidence of the prosecution, it is found that both the parties are the co-villagers residing in the same neighbourhood. They are well known from before. The genesis of the occurrence is the quarrel that had taken place between the informant and one of the accused persons only a day before. As per the prosecution case, as soon as the informant reached the darwaja of Deoraj Yadav, the accused/appellant came out from his darwaja and shouted to stop. The appellant travelling on the motorcycle with the victim as a pillion stopped the motorcycle and got off. He saw the appellant and other accused had advanced towards him. The appellant first reminded him that the victim had quarreled a day before with his brother, and he shall not be spared. Thereafter, he fired from his rifle on the chest of the informant's son who, on receiving the fire arms injury, fell down and died. The claim of identification of the appellant in the crime is apparently both by voice as well as his physical presence. If both the parties are co-villagers and had some quarrel from before, it was not difficult for the informant to identify the appellant. Moreover, the I.O. who immediately reached the place of occurrence has deposed that the electric bulb was seen burning at the place of occurrence. The prosecution case, in our view, cannot be thrown out on this count. The contention of the defence that it was a case of complete non-identification of the appellant in absence of the



source/means of identification is not sustainable on the glaring facts established at the trial on this point.

9. One of the contentions of the defence is that the finding of the autopsy doctor creates doubt on the prosecution case. The objective findings on the estimated time of death does not fit in the prosecution case. The informant had gone with the victim to attend a party. They had taken food in the Grih Pravesh function before departing therefrom at 10 PM. The occurrence is said to have taken place at 10.30 PM. The doctor who conducted post mortem examination found semi digested food in the stomach of the deceased. Counsel for the appellant submits that it is quite improbable how the food particle turned semi digested within an hour, as the victim was shot dead at around 10.30 PM. We carefully examined the deposition. The informant and his son/the deceased had gone to the function at 7 PM and took the return journey at 10 PM. Whether the deceased had taken food at the Grih Pravesh and at what time between 7 PM to 10 PM is anybody's guess. The informant has stated that food arrangement at the function was not good/proper. They might not have even taken food at the party. The informant in his examination in chief has not said about taking dinner at the party. Even otherwise, considering the advisory nature of the findings of the doctor in face of the consistent ocular account of the prosecution case the court is disinclined to accept the submission of the defence.



One of the contentions of the defence is that the first version of the prosecution case has been suppressed by the prosecution which is fatal to the prosecution case. The I.O. (P.W.6) has deposed that on getting information about the incident, he drew up Station Diary Entry No. 165 dated 07.02.2001 and then marched to the place of occurrence and prepared the seizure-list as well as the inquest report at the place of occurrence. The information was given on telephone by P.W.4 regarding the incident around 11.30 at night. The F.I.R. was promptly drawn within few hours of the information. Obviously, there was not much time for the prosecution to fabricate a story leaving aside real culprits. Only on a spacious plea that the S.D. entry drawn up by the I.O. was not produced at the trial will not debase the prosecution case which otherwise stands conclusively proved by the ocular testimonies of several witnesses including one who had received injuries in course of the incident. It was the duty of the I.O. to produce the S.D. entry at the trial. If the Investigating Officer has failed in doing so, the prosecution case would not fail. No suggestion was given to the I.O. by the defence that the telephonic information to him narrated a different story.

10. In the light of discussions made above, the Court is of the opinion that the prosecution has successfully proved the charges under Section 302 of the IPC and Section 27 of the Arms Act



against the appellant beyond reasonable doubts. There is no scope for interfering with the judgment of the learned Trial Court.

11. The appeal is dismissed.

(Kishore Kumar Mandal, J)

I agree.

(Madhuresh Prasad, J)

Shashi.

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