

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction and order of sentence dated 06.08.1996 passed by Shri Diwakar Jha, learned 1st Additional Sessions Judge, Khagaria in Sessions Trial No. 97 of 1993, arising out of Khagaria P.S. Case No. 38 of 1993)

Criminal Appeal (DB) No.390 of 1996

1. Rambadan Yadav, son of Munshi Yadav
2. Nityanand Yadav, son of Ram Badan Yadav
3. Jagat Yadav, son of Rambadan Yadav
4. Ravish Yadav, son of Ram Badan Yadav
5. Bijay Yadav, son of Nirdhan Yadav
All residents of Village- Barkhani Tola, Police Station- Khagaria, District- Khagaria
6. Shambhu Yadav, son of Nathan Yadav,
7. Arun Yadav, son of Sahdeo Yadav
Both residents of Village- Chamantola, Police Station- Khagaria, District- Khagaria.
..... Appellant/s
Versus
The State of Bihar
..... Respondent/s
With

Criminal Appeal (DB) No. 426 of 1996

1. Brikshnandan Yadav, son of Laddu Yadav, resident of Village- Hiratola, Police Station- Sahebpur Kamal, District- Begusarai.
2. Nathan Yadav, son of Usho Yadav, resident of Village- Chamantola, Police Station- Khagaria, District- Khagaria.
..... Appellant/s
Versus
The State of Bihar
..... Respondent/s

Appearance :
(In CR. APP (DB) No.390 of 1996)
For the Appellant/s : Mr. Anil Singh, Amicus Curiae
For the Respondent/s : Mr. S. N. Prasad, A.P.P.
(In CR. APP (DB) No.426 of 1996)
For the Appellant/s : Mr. Anil Singh, Amicus Curiae
For the Respondent/s : Mr. S. N. Prasad, A.P.P.

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)
Date: 07-10-2017

Both the appeals arises out of the judgment of



conviction and order of sentence dated 06.08.1996 passed by learned 1st Additional Sessions Judge, Khagaria in Sessions Trial No. 97 of 1993, arising out of Khagaria P.S. Case No. 38 of 1993, whereby the appellants herein, namely, Nathhan Yadav and Brishnandan Yadav (Cr. Appeal (DB) No. 426 of 1996) have been convicted under Sections 302 and 148 of the Indian Penal Code and sentenced to undergo R.I. for life for the offence under Sections 302 of the Indian Penal Code and they have been further sentenced to undergo one year R.I. for the offence under Section 148 of the Indian Penal Code and a fine of Rs. 2,000/- and in default to undergo R.I. for six months. The appellants, namely, Rambadan Yadav, Nityanand Yadav, Jagat Yadav, Ravish Yadav, Bijay Yadav, Shambhu Yadav and Arun Yadav (Cr. Appeal (DB) No. 390 of 1996) have been convicted under Sections 302/149 and 148 of the Indian Penal Code and sentenced to undergo R.I. for life for the offence under Sections 302/149 of the Indian Penal Code. They have been further sentenced to undergo one year R.I. for the offence under Section 148 of the Indian Penal Code and a fine of Rs. 2,000/- and in default to undergo R.I. for six months. However, both the sentenced have been directed to run concurrently.

2. The prosecution case as appears from the fardbeyan of the informant is as follows:

On 01.02.1993 accused Jagat and Ravish Yadav were uprooting Kerao crop. Then the deceased Gorakh Yadav asked them



as to why they were uprooting Kerao crop from his land. It is further stated that the deceased asked the two accused to call their father and to get the land divided and then to uproot crop and thereupon the two accused, namely, Raveesh and Jagat went towards east and thereafter the appellants and others rushed to the place of occurrence. The informant further alleged that he saw them and asked the deceased to leave the place apprehending assault and in the meantime appellant Brishnandan Yadav fired and the informant and Gorakh Yadav fled away and thereafter the accused persons chased the deceased Gorakh Yadav and made indiscriminate firing upon him. It is further alleged that the appellants opened fire from their fire arm due to which the deceased Gorakh Yadav fell down.

3. On the basis of the aforesaid fardbeyan Khagaria P.S. case no. 38 of 1993 dated 01.02.1993 has been registered for the offence under Sections 147, 148, 149, 302, 326 of the Indian Penal Code and Section 27 of the Arms Act.

4. The police after investigation submitted charge-sheet against the appellants and thereafter the learned Magistrate took cognizance of the offence and committed the case to the Court of Sessions for trial. The appellants have pleaded not guilty and have claimed to be tried.

5. On behalf of the prosecution, 08 witnesses were examined. P.W. 1 is Raj Bali Yadav, P.W.2 is Ranbir Yadav, P.W. 3



is Rajendra Yadav, P.W. 4 Dr. Awadhesh Kumar Yadav. P.W.5 is Hakim Yadav, P.W.6 is Dashrath Yadav, P.W. 7 is Kapildeo Yadav and P.W.8 is Shobhakant Pathak. Out of which P.Ws. 2, 3, 5, 6 and 7 claims to be the eye witness of the occurrence, whereas P.W. 4 is doctor, who conducted post-mortem of the dead body of the deceased and P.W. 8 is Sub-inspector of Police, who proved his signature on the fardbeyan. P.W.1 is the investigating officer of the case.

6. The trial Court after scrutiny of the evidence convicted the appellants and sentenced them as mentioned in the earlier paragraphs of the judgment.

7. Mr. Anil Singh appearing on behalf of the appellant as Amicus Curiae has submitted that the entire case is based on perfunctory investigation of the case. He has highlighted the various infirmities in the matter of investigation in the instant case. He has drawn our attention to paragraph 16 and 17 of the trial court judgment. The trial Court in no ambiguous term passed comment on the perfunctory investigation. Para 16 and 17 of the trial Court judgment reads as follows:

“16. Learned A.P.P. appeared in the court and made a perfunctory argument and even on request of the court urged that the evidence adduced by the prosecution is already on record and the same may be perused by the court to arrive at the decision.



17. Perused the record prosecution evidence on record teems with the testimony of 8 P.Ws. Out of 8 P.Ws. examined by the prosecution P.W.4. is the doctor A.K. Yadav who conduct autopsy on the dead body of the deceased Gorakh Yadav on 2.2.93. at 11.15 hours and P.W. 8. S.K. Pathak, is the I.O of the case. P.W.8. of course appears to have conducted perfunctory investigation. It is obvious from the record that P.W. 8 did not make any seizure of blood stained earth from the so called place of occurrence. There does not appear any reason as to why P.W.8. departed from time honoured custom of seizing the blood or blood stained earth from the P.O. and of sending the same of chemical examiner for a report to help the prosecution to establish beyond the reasonable doubt situs of assault. If at all, there is any reason, it appears mere apathy or perfunctoriness on the part of P.W.8. in making such departure from time honoured custom.

8. Mr. Singh submitted that the deceased was a hardened criminal and in fact he was eliminated elsewhere and these innocent persons have been made accused in the instant case by the police. He submitted that F.I.R. was registered under Sections 147, 148, 149, 302, 326 of the Indian Penal Code and Section 27 of the Arms Act, but the appellants have not been charge-sheeted under Sections 27 of the Arms Act. He pointed out with reference to the post-mortem report that there are apparent contradiction in the prosecution case and medical/post-mortem report as per the



prosecution case firing was made from a distance of 2 Lagga, whereas the post-mortem suggest that firing was made from a close distance, otherwise the doctor could not have found blackening mark on the body of the deceased. He also referred to the nature of injury and the allegation of the eye witness as to the account of the firing by the accused persons and submitted that the nature of injury found in the post-mortem ruled out the possibility of the witnesses claiming as eye witness. The nature of injury i.e. entry and exit point as per the version of the so-called ocular evidence runs contrary to the medical evidence. The medical report totally falsifies the claim of the ocular evidence as to the manner in which firing was made and injury was sustained by the deceased. He highlighted that in the instant case not only perfunctory investigation was done, but the trial court perpetuated the illegality in conducting the trial contrary to the basic norms of fair trial. He pointed out with reference to the examination of the accused under Section 313 of the Cr.P.C. and submitted that the trial court once noted the age of the appellant Ravish Yadav as 16 years on the date of pronouncement of judgment i.e. on 06.08.1996, then by necessary implication on 01.02.1993, the appellant Ravish Yadav was juvenile as on the date of occurrence, he was juvenile and as such he could not have been tried by the regular court instead, his case ought to have been referred to the Juvenile Justice Board. Mr. Singh submitted that even Shambhu Yadav whose age was 17 years



on the date of occurrence is now entitled to protection of the Juvenile Justice (Care and Protection of Children) Act, 2000. He further submitted with reference to the examination under Section 313 of Cr.P.C. that the accused were not confronted with all the adverse circumstance during examination under Section 313 Cr.P.C. He placed reliance on the judgment of the Apex Court in the case of **Sukhjit Singh Vs. State of Punjab**, reported in (2014) 10 SCC 270 wherein the Apex Court reiterated that examination of accused under Section is not an empty formality and it may cause immense prejudice to the accused, if they are not confronted with the adverse material during course of their examination under Section 313 of the Cr.P.C. In para 13 of the aforesaid judgment has reiterated the principle laid down by the Apex Court in the case of Ajay Singh Vs. State of Maharashtra, reported in (2007) 12 SCC 341, which is quoted herein below for ready reference:

“13.The aforesaid principle has been reiterated in Ajay Singh Vs. State of Maharashtra, reported in (2007) 12 SCC 341 in the following terms:

14. The word 'generally' in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any



particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.”

9. Mr. Anil Singh submitted that during the course of cross-examination of the witnesses, a suggestion was made on behalf of the defence that in fact the deceased was killed in police encounter, as he was a hardened criminal, and was killed in police encounter and the appellants have been falsely implicated in this case. He submitted that the deposition of P.W.8 (investigating officer) is indicative of the fact that no attempt was made by him to properly investigate the case.



He highlighted that the statement of the investigating officer which does not tally with the Station Diary Entry as to the information he received about the occurrence. He submitted that the investigating officer has admitted that he did not see the land where the occurrence took place. None of the witness of the inquest report was produced in the Court. No independent witness was examined in this case. The witnesses were highly interested and close relative of the deceased.

10. Mr. Singh submitted that it is the prosecution case that the land of Sanskrit College was leased out to them and there was some dispute with regard to land under Bataidar and Ravish Yadav and Jagat Yadav were seen uprooting the Kerao crop from the land, which led to altercation. It is the prosecution case that Gorakh Yadav asked the accused to call their father to get their land divided and then to uproot the Kerao crop and thereafter appellant Ravish and Jagat went to east and thereafter Brishnandan Yadav, Bijay Yadav, Rambadan , Nityanand, Jagat, Raveesh, Rampravesh, Nathhan Yadav, Arun Yadav and Shambhu Yadav variously armed with pistol and other lethal weapons reached the place of occurrence and assaulted him and he was done to death by the appellants, but the police has not made any investigation on the point that whether any land was leased out by the Sanskrit College or not.

11. Mr. Singh thereafter referred to post-mortem report to highlight the contradiction of the medical evidence and the



evidence of the witnesses. He submitted the nature of injury on the person of deceased is impossible as per the ocular evidence. Injury found on the deceased was not only from close range but not possible from firing from behind, as those injuries can only be possible if firing is made by a person, who was parallel to the deceased and thus the so-called eye witnesses are not the eye witness and their version as to commission of crime cannot be relied upon.

12. Mr. S. N. Prasad, learned counsel appearing on behalf of the State submitted that the submission of the appellants' counsel as to applicability of the Juvenile Justice Act is misconceived, as the appellants have not raised the issue before the learned trial court that they are juvenile and as such they are required to be sent to the Juvenile Justice Board for appropriate decision. However, he has not disputed the fact that as per the assumption of the age by the Court itself, the appellant Ravish Yadav was undisputedly juvenile on the date of occurrence and as such he could not have been tried by the trial court in the teeth of the provisions of the Juvenile Justice Act.

13. Referring to the other submissions as to the perfunctory investigation, he submitted that the appellant cannot take advantage of perfunctory investigation and the trial court has committed no illegality in convicting the appellants.

14. We have heard the counsel for the parties and perused the evidence of the witnesses examined on behalf of the



prosecution as well as statement of the accused recorded under Section 313 of the Cr.P.C., we are of the considered view that the trial court committed gross error of jurisdiction in the matter of trial of Ravish Yadav (appellant no.4 of Cr. Appeal (DB) No. 390 of 1996). Admittedly, the Juvenile Justice Act was engrafted with a view to treat the juvenile different from other offenders. The Juveniles are required to be treated differently not as offender, but as person in conflict with law. The focus of the Juvenile Justice Act to treat such wrong doer with reformatory approach and not to adopt penal attitude towards juvenile in conflict but the trial court lost sight of the object of the Juvenile Justice Act and notwithstanding assessing the age of the appellant Ravish Yadav as 16 years on the date of passing of judgment, which correspond to 13 years on the date of occurrence and as such the appellant Ravish Yadav could not have been subjected to the trial by the regular court and in any event he cannot be inflicted punishment of more than three years in view of the Scheme of Juvenile Justice Act and the judgment of this Court in the case of **Krishna Bhagwan Vs. The State of Bihar**, reported in **1989 PLJR 507 (FB)**. We also find substance in the submission of Mr. Anil Singh that appellant Shambhu Yadav, who was 17 years old on the date of occurrence is also entitled to protection of the amended provision of Juvenile Justice (Care and Protection of Children) Act, 2000.

15. Adverting to the case of other appellants, we find



much substance in the submission of Mr. Anil Singh, learned Amicus Curiae that the scheme under Section 313 Cr.P.C. is not an empty formality. While examining the accused, the Court is required to confront the accused person with all adverse circumstance so that he may explain his position with regard to all the adverse material in the trial. In the instant case only empty formality in the nature of putting general question was completed by the trial court while examining the accused under Section 313 of the Cr.P.C. and in view of the judgment in the case of **Sukhjit Singh** (supra), the entire trial stands vitiated for non-adherence to the scheme of Section 313 of Cr.P.C. in its letter and spirit by confronting the appellants with adverse circumstance and material in the trial.

16. We are also of the considered view that there is apparent contradiction in the medical evidence and the manner of commission of occurrence as claimed by the eye witness. We also find substance in the submission of Mr. Anil Singh, Amicus Curiae, that witnesses claimed that they have seen the appellant firing from a distance of 2 Lagga, but in the post-mortem report the blackening mark noted by the doctor suggest that firing was made from very close range, which runs contrary to the statement of the ocular evidence.

17. We also find substance in the submission of Mr. Anil Singh that the F.I.R. was registered under Sections 302/34 and



27 of the Arms Act, but there is no explanation why after investigation the police has not submitted charge-sheet under Section 27 of the Arms Act. That a part on deeper scrutiny, we find that in the instant case that apart from appellants Brikshnandan Yadav and Nathan Yadav, appellant of Cr. Appeal DB No. 426 of 1996, others are only member of the mob. No specific role has been attributed to the other appellants.

18. In view of the fact that the entire investigation was conducted in a perfunctory manner. There is serious doubt about the place of occurrence. There is no investigation on the point whether the land was leased out by the Sanskrit College or not. There is no investigation on scientific line to establish the involvement of the appellants. There are materials on record that the deceased was a hardened criminal and was involved in various commission of serious crime. The cumulative effect of the lack of proper investigation, no application of mind by the trial court in conducting the trial of juvenile, doubts about the place of occurrence, the contradiction about the manner in which the appellants have fired and the medical evidence rendering such firing as impossible from such range and distance and the fact that the deceased was a hardened criminal, the appellants deserve the benefits of doubt due to lapse in proper investigation of the case by police and failure of the prosecution to establish the charge beyond all reasonable doubts. Accordingly, we



find that the judgment of conviction and order of sentence passed by the trial court is unsustainable and appellants deserve to be acquitted of the charges on account of reasonable doubt as to manner of commission of crime and failure of prosecution to prove the case against the appellants beyond doubt, as we find that in view of medical report other manner of commission is also possible.

19. In the result both the appeals are allowed. All the appellants are on bail, they are discharged from the liabilities of their bail bonds.

20. Let a copy of the judgment be handed over to Mr. Anil Singh, who appeared in these appeals, as Amicus Curiae for needful.

21. The Patna High Court Legal Services Authority is directed to pay the fixed remuneration to Mr. Anil Singh, who appeared in these appeals, as Amicus Curiae.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Uday/-

AFR/NAFR	NAFR
CAV DATE	NA
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