

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction, dated 11.11.2011, and order of sentence, dated 16.11.2011, passed by Dr. Ram Lakhan Yadav, learned Additional Sessions Judge-I, Madhepura in Sessions Trial No. 132 of 1997, arising out of Chausa P.S. Case No. 49 of 1992)

Criminal Appeal (DB) No.1129 of 2011

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1. Siya Ram Yadav, Son of Late Brahmi Yadav,
2. Pappu Yadav, Son of Sri Rudra Narayan Yadav
3. Ashok Yadav, Son of Sri Mahajan Yadav
All residents of Village- Bhatgama, P.S.- Chousa, District- Madhepura
..... Appellants

Versus

The State of Bihar
..... Respondent

With

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Criminal Appeal (DB) No. 1246 of 2011

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1. Chhanguri Yadav, Son of Brahm Deo Yadav.
2. Anil Yadav, Son of Ganesh Yadav
Both residents of Village- Bhatgama, P.S.- Chausa, District- Madhepura.
..... Appellants

Versus

The State of Bihar
..... Respondent

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Appearance :

(In CR. APP (DB) No.1129 of 2011)

For the Appellant/s : Mr. Kanhaiya Prasad Singh, Sr. Advocate
Mr. Pratik Mishra, Advocate
Mr. Krishna Ranjan, Advocate
Mr. Suman Kumar Jha, Advocate

For the Respondent/s : Mr. A. K. Sinha, APP

(In CR. APP (DB) No.1246 of 2011)

For the Appellant/s : Mr. Ashok Kumar, Advocate
Mr. Ajit Kumar Singh, Advocate

For the Respondent/s : Mr. S. C. Mishra, APP

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

And

HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 11-07-2017



Both the appeals have been preferred against the judgment of conviction, dated 11.11.2011, and order of sentence, dated 16.11.2011, passed by learned Additional Sessions Judge-I, Madhepura in Sessions Trial No. 132 of 1997, arising out of Chausa P.S. Case No. 49 of 1992, by which all the five appellants have been convicted under Sections 302/149 of the Indian Penal Code and 27 (i) of the Arms. For the offence under Sections 302/149 of the Indian Penal Code, the appellants have been sentenced to undergo life imprisonment and for the offence under Section 27 (i) of the Arms Act, the appellants have further been sentenced to undergo R.I. for three years. However, both the sentences have been directed to run concurrently.

2. The prosecution case, in short, as made out in the fardbeyan of one Umesh Singh (injured) son of Ramanand Singh (P.W.7) resident of village Bhargama, P.S. Chausa, District Madhepura, recorded by S.I. Ram Awadhesh Singh of Chausa Police Station, on 15.05.1992, at 19.30 hours, is as follows:

(i) The informant stated that in the evening of 15.05.1992 he was sitting at his house. In the meantime, at about 5.30 P.M., six accused persons, namely, Pappu Yadav, Anil Yadav Siyaram Yadav, Ramrup Yadav, Chhanguri Yadav and Ashok Yadav, all co-villagers, variously armed arrived and surrounded him. Ramrup



Yadav was carrying a bag of bomb, whereas the other accused persons were armed with pistol. As soon as they arrived, Pappu Yadav exhorted others to kill, whereupon Ramrup Yadav hurled bomb at him, which hit his chest. Thereafter, Pappu Yadav fired, which hit his left elbow. The fire opened by Anil Yadav injured finger of right hand of the informant. The firing opened by Siyaram Yadav also hit the right elbow. Chhanguri Yadav fired at the waist of the informant, whereas the firing opened by Ashok Yadav hit the head of the injured (informant). The informant shrieked in pain and thereafter Surendra Singh (P.W. 3), Kameshwar Singh (P.W. 2), Shiv Shankar Singh (P.W. 9), Parmanand Singh (P.W. 11) and others came. On seeing the people gathering near the place of occurrence, the accused persons fled away. The fardbeyan of the informant was read over to him and on finding the same to be true, put his L.T.I. The fardbeyan was attested by his father Ramanand Singh (P.W. 7) and Surendra Singh (P.W. 3).

(ii) On the basis of the Fardbeyan of the informant, formal F.I.R. was drawn, being Chausa P.S. Case No. 49 of 1992, dated 15.05.1992, under Sections 147, 148, 149, 341, 342, 307 of the Indian Penal Code, 27 of the Arms Act and 3/4 of the Explosive Substance Act. Later on, nearly about after 47 days, Section 302 of the Indian Penal Code was added.



3. After investigation of the case, the police prepared inquest report and took further statement of the informant and the other witnesses and also inspected the place of occurrence. The police also obtained the post-mortem report of the deceased and finding the case to be true, submitted charge-sheet under Sections 147, 148, 149, 341, 342, 307, 302, 447 of the Indian Penal Code, 27 of the Arms Act and 3/4 of the Explosive Substance Act.

4. On receipt of the charge-sheet, learned Magistrate took cognizance of offence and committed the case to the Court of Sessions for trial.

5. It is relevant to state that one of the accused, namely, Ramrup Yadav, who hurled bomb, died and, as such, the trial proceeded against the remaining five accused persons. Charges were framed against these five accused persons, to which they pleaded not guilty and claimed to be tried.

6. The defence of the accused as appearing from the mode of cross-examination and the explanation under Section 313 of the Cr.P.C. is one of complete denial of the occurrence and false implication on account of admitted enmities between the parties.

7. The prosecution in support of its case examined as many as 11 witnesses. P.W. 1 is Madan Kumar. P.W.2 is Kameshwar Prasad Singh. P.W. 3 is Surendra Prasad Singh. P.W.4 is Lalan Kumar



Singh. P.W.5 is Mahesh Prasad Singh. P.W. 6 is Nageshwar Singh. P.W. 7 is Ramanand Singh. P.W. 8 is Arun Singh, P.W. 9 is Shiv Shankar Singh, P.W.10 is Jhari Lal Rai and P.W. 11 is Parmanand Singh.

8. Out of these witnesses, P.W.1 Madan Kumar is a formal witness. P.W.10 Jhari Lal Rai, who is an advocate's clerk, has proved the post-mortem report. P.W.8 Arun Singh, P.W.9 Shiv Shankar Singh and P.W.11 Parmanand Singh, who are F.I.R. named witnesses, have turned hostile. P.W. 2 Kameshwar Prasad Singh, P.W.3 Surendra Prasad Singh, P.W.4 Lalan Kumar Singh, P.W.5 Mahesh Prasad Singh, P.W.6 Nageshwar Singh and P.W.7 Ramanand Singh (father of the deceased), are co-villagers and most of them related to the informant and have claimed to be the eye witness of the occurrence.

9. P.W.2 Kameshwar Prasad Singh stated in his evidence that while he was returning from Basa to his house and as soon as he reached near the house of Umesh Singh, he saw the accused persons hurling bomb and firing at the deceased.

10. P.W.3 Surendra Prasad Singh stated that he saw the occurrence, while he was returning to his Basa after answering the nature of call.

11. P.W. 4 in his evidence stated that he saw the



occurrence, while he was going to his Basa from his house at the relevant time.

12. P.W.5 Mahesh Prasad Singh stated that he saw the occurrence from his Basa, which was about 25 yards away from the Basa of Umesh Singh.

13. P.W. 6 Nageshwar Singh stated that he saw the occurrence as soon as he came near the house of Umesh Singh, while he was going to attend the call of nature.

14. P.W.7 Parmanand Singh, the father of the deceased, stated that he saw the occurrence, while he was going from his house to his Basa. All of them stated that Ramrup hurled bomb, which hit the chest of the informant (deceased), whereas the fire opened by the other accused also caused injuries to the informant (deceased).

15. P.W.10 Jhari Lal Yadav has produced and exhibited the post-mortem report. As per post-mortem report, the deceased sustained injuries on his abdomen, chest and left arm.

16. The trial court on consideration of materials on record, acquitted the accused persons for the charge under Sections 3/4 of the Explosive Substance Act and convicted the appellants under Sections 302/149 of the Indian Penal Code and 27 (i) of the Arms and sentenced them, as already mentioned in detail, in the earlier paragraphs.



17. Being aggrieved, the appellants challenged the judgment of conviction and order of sentence by filing these two appeals.

18. Learned counsel representing the different appellants raised some common issues apart from taking different grounds as well. For instance, Mr. Krishna Ranjan, learned counsel representing the appellant Siyaram Yadav, submits that the allegation made in the F.I.R. is not supported by medical evidence. For instance, it is alleged that the appellant fired injuring the right elbow of the informant, whereas there is no corresponding injury in the post-mortem report. Similarly, counsel representing the appellant Ashok Yadav submits that though he is alleged to have fired on the head, there is no corresponding injury on the head.

19. Similarly, counsel representing the appellant Anil Yadav submits that he is alleged to have injured the finger of right arm of the victim, which too is not corroborated by the post-mortem report. Counsel representing the appellant Chhanguri Yadav submits that he is alleged to have fired at the waist of the deceased, but there is no injury around the abdomen.

20. Mr. Kanhaiya Prasad Singh, learned senior counsel representing the appellant Pappu Yadav, submits that the injury alleged to have been caused by him is, near the left elbow, which is



non-vital part of the body, which in no circumstance could cause the death of the deceased. Besides this, the prosecution has failed to establish the manner of occurrence as to whether the deceased died on account of bomb injury or fire-arm injury, as the doctor, who conducted the post-mortem, has not been examined. Furthermore, the post-mortem report has been proved by an advocate's clerk, who has no knowledge about the intricacies of the medical report. As such, learned counsel submits that the post-mortem report cannot be considered for the purpose of corroboration. In support of his submission, learned counsel has relied upon the decision in case of Sallo Singh Vs. The State of Bihar, reported in 2007(1) BBCJ 368 and in case of Shiv Yadav @ Sheo Raut & Others Vs. The State of Bihar, reported in 2005(2) PLJR 62 (para 9).

21. He next submits that non-examination of the investigating officer has also prejudiced the defence case, as they were unable to draw the contradiction creeping in the statement of the witnesses from the investigating officer. In this regard, learned counsel has referred to the paragraphs no.13 of the evidence of P.W.3, where his attention was drawn to his previous statement before the police. Learned counsel also referred to paragraph nos. 7, 8 and 10 of the evidence of P.W.4, where his attention was drawn to his previous statement made before the police. Similarly, the attention of P.W. 7



was also drawn to his previous statement made before the police.

22. It has also been argued by Mr. Krishna Ranjan, learned counsel appearing for appellant, Siyaram Yadav, that as per his own case, the informant would not be in a position to make statement disclosing the injuries caused by specific accused. He further submits that the witnesses are relatives and interested witnesses and as such much credence be not be attached to this evidence.

23. On the other hand, Mr. Ashwani Kumar Sinha, learned Additional Public Prosecutor appearing for the State, has defended the impugned judgment of conviction and order of sentence. He submits that 5 - 6 witnesses have supported the prosecution case, which stands substantially corroborated by the post-mortem report. He next submits that the prosecution case cannot be set at naught only on the ground that the post-mortem report is not duly proved.

24. We have heard the learned counsel for the parties and perused the materials on record. The genesis of the case is the fardbeyan made by the informant Umesh Singh, who died after 47 days. According to the informant, while he was sitting in his Basa, at about 5.30 P.M., the accused persons, all co-villagers and six in number, came to his Basa, surrounded and attacked the deceased. He stated that Ramrup Yadav hurled bomb at his chest, whereas the rest



five accused fired at him by pistol on different parts of his body, with specific details in the F.I.R. The other witnesses i.e. P.W.2, P.W.3, P.W.4, P.W.5, P.W.6 and P.W.7 have also supported the prosecution case. However, these witnesses, like the informant, did not give any graphic description of the injuries caused by different accused persons. The prosecution has also relied upon the post-mortem report, which has been proved by an advocate's clerk, namely, Jhari Lal Rai (P.W.11).

25. The appellants have argued that there is no evidence to corroborate that the deceased sustained gun shot injuries or bomb injuries and died on account of it, as the post-mortem report has not been proved in accordance with law and in terms of Section 32 of the Evidence Act. It was the submission of the appellants that the post-mortem report could not be legally proved and used in evidence, in absence of the doctor, who conducted the post-mortem examination and prepared the post-mortem report. The post-mortem report could have been proved by any other competent witness, who has knowledge of medical science and also familiar with handwriting and signature of the doctor.

26. It is well settled that the post-mortem report should be generally exhibited by the doctor, who conducted the post-mortem examination. In case, the doctor, who conducted the post-mortem



report is not available in spite of all due process or is no more alive, then in such cases, the post-mortem report can be proved by a person, well versed in medical science and also familiar with the handwriting and signature of the author of the post-mortem report.

27. In case of Shiv Yadav @ Sheo Raut & Others Vs. The State of Bihar & Ors., reported in 2005 (2) PLJR 62, the post-mortem report was exhibited by an advocate's clerk. Deprecating the practice to prove the post-mortem report by an advocate's clerk, the Division Bench observed that the post-mortem report is an important document in a criminal trial for both the prosecution and the accused. A doctor, who conducts the post-mortem examination and prepares the post-mortem report, when in court, is subjected to cross-examination by the accused. In case, the author of the document is not made available then a competent person having technical knowledge connected with the medical jurisprudence can prove the document. The document cannot be proved by an advocate's clerk, who admits that he has no personal knowledge about the document and cannot explain intricacies of its content. In such circumstances, the learned Division Bench observed that the cause of death in absence of the doctor is not proved beyond all reasonable doubt. A similar view was reiterated in case of Sallo Singh Vs. The State of Bihar, reported in 2007(1) BBCJ 368.



28. We may agree with the submission of the learned counsel for the State that a criminal trial cannot be set at naught merely because the post-mortem report is not brought on record by a competent witness, if the ocular evidence is consistent and trust worthy. It is true that in case of conflict between ocular evidence and medical evidence, the former would prevail, if the evidence is trust worthy and credible.

29. In the instant case, the informant, who died after 47 days, has given graphical description of the injuries caused by different persons on his different parts, after he has received bomb injury on his chest and fire-arm injuries on his body. As generally, a person, who sustained 2-5 injuries on his person, may not be able to make such a graphic description of the injuries sustained by him and caused by different accused persons. Furthermore, in the case in hand, another witness P.W. 3, stated that the informant was not fully conscious. Furthermore, the Police officer, who recorded the fardbeyan of the informant, has not been examined, who could have corroborated the version of the informant in his evidence before the court and could have at least answered the question put by the defence on the issue. Thus, all these circumstances create a doubt on the authenticity of the informant's version.

30. Counsel for the State argued that other witnesses too



have supported the prosecution case, which ought to be seen in its totality. However, we find that P.W. 2 stated that he came to the place of occurrence after five minutes of the occurrence. P.W.6 stated that though he saw the incident, still he went to answer the nature of call without raising alarm, which too creates doubt on his statement. Furthermore, the attention of P.W. 3, P.W. 4 and P.W. 5 were drawn to the previous statement made before the police, which differed from the evidence in the court. The non-examination of the investigating officer, in such circumstances, cannot be said as to not have caused prejudice to the defence case.

31. Situated thus, and in view of the discussions made above, we are of the considered view that the prosecution has not been able to bring home the charge against the appellants beyond all reasonable doubt. As such, we set aside the judgment of conviction and order of sentence, passed by the trial court, and acquit the appellants of the charges. As appellant nos.1 and 2, namely, Siyaram Yadav and Pappu Yadav of Cr. Appeal (DB) No. 1129 of 2011 and appellant nos. 1 and 2, namely, Chhanguri Yadav and Anil Yadav of Cr. Appeal (DB) No. 1246 of 2011, are in custody, they are directed to be set at liberty forthwith, if not wanted in any other case. Since, appellant no.3 of Cr. Appeal (DB) No. 1129 of 2011, namely, Ashok Yadav is on bail, he is discharged from the liabilities of his bail bonds.



32. In the result, both the appeals are allowed.

(Samarendra Pratap Singh, J.)

(Prakash Chandra Jaiswal, J.)

Uday/-

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