

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.896 of 2012

Arising Out of PS. Case No.-229 Year-2009 Thana- MUNGER MUFFASIL District- Munger

Raj Kumar Yadav, S/O Late Ramdeo Yadav, Resident of Village- May, Police
Station- Muffasil, District- Munger.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

Criminal Appeal (DB) No. 866 of 2012

Arising Out of PS. Case No.-229 Year-2009 Thana- MUNGER MUFFASIL District- Munger

Foto Yadav, S/O Late Ramdev Yadav, Resident of Village May, Police Station
Muffasil, District Munger.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 896 of 2012)

For the Appellant/s : Mr. Anil Kumar Roy, Advocate

For the Respondent/s : Mr. A.K.SINHA (APP)

(In Criminal Appeal (DB) No. 866 of 2012)

For the Appellant/s : Mr. Anil Kumar Roy, Advocate

For the Respondent/s : Mr. A.K.SINHA(APP)

CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

and

HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date : 14-12-2017

We have heard parties and have perused the records of this
case.

The appellants have preferred these appeals assailing the
judgment of conviction dated 13.07.2012 and order of sentence



dated 16.07.2012 passed by Ad-hoc Additional District Judge-IV, Munger in Sessions Trial No. 520 of 2010 arising out of Muffasil P.S. Case No.229/2009 by which Raj Kumar Yadav and Photo Yadav have been convicted for the offences punishable under Sections 302/34, 114/34 of the Indian Penal Code and 27 of the Arms Act. They have been sentenced to undergo rigorous imprisonment for life with a fine of Rs.5000/-each for the offences under Section 302 IPC. The appellant Raj Kumar Yadav has also been sentenced to undergo rigorous imprisonment for five years under Section 27 of the Arms Act with a fine of Rs.2000/-. The appellant Photo Yadav has also been sentenced to undergo imprisonment for life under Section 114/34 of the Indian Penal Code with a fine of Rs. 5,000/- and in default of payment of fine, he has been directed to suffer one year simple imprisonment. However, the sentences have been directed to run concurrently.

The prosecution case, in brief, is that the informant Nandan Mandal on 14.09.2009 at about 11.50 in the night gave his fardbeyan before the Sub-Inspector of Police, Muffasil Police Station alleging therein that on the same day at about 7.00 P.M. a quarrel took place between the cousin Raj Kumar Yadav and his brother Pappu Yadav for the dispute of land of boundary. However, the quarrel ended after some time. Thereafter, the wife of Raj



Kumar went to her house. At about 10.30 P.M. Raj Kumar Yadav came from his house and called Pappu from his house to his Bungalow at that time the brothers of Raj Kumar Yadav, namely, Shyam Sunder Yadav and Foto Yadav were also present there. In the presence of his brothers, Raj Kumar Yadav told to Pappu that why you want to quarrel and, thereafter, Raj Kumar fired from his pistol on Pappu which hit below his left shoulder on chest. After receiving firearm injury, Pappu fell down, thereafter, all the three brothers/accused persons fled away. The informant further alleged that his nephew and brother-in-law of Pappu also saw the occurrence.

On the basis of aforesaid fardbeyan, the FIR was registered under Sections 302, 114 of the Indian Penal Code and Section 27 of the Arms Act vide Muffasil P.S. Case No.229 of 2009. The police took up the investigation of the case. After investigation, the police submitted charge sheet against the appellants. Thereafter, the Chief Judicial Magistrate took cognizance and committed the case to the court of sessions, where charges were framed, to which, the accused persons pleaded not guilty. Thereafter, trial started against the appellants.

During trial, the prosecution has examined altogether nine witnesses in support of its case. P.W. 1 is Sanjay Yadav, P.W. 2 is



Gopal Kumar, P.W. 3 is Rajiv Kumar, P.W. 4 is Gopal Yadav, P.W. 5 is Adhik Lal Yadav, P.W. 6 is Manju Devi, P.W. 7 is Nandan Yadav, P.W. 8 is Manvendra Kumar and P.W. 9 is Anil Kumar Singh.

The defence has not been examined any witness on its behalf.

The trial court after hearing learned counsel for the parties and considering the evidence on record came to the conclusion that the prosecution has been able to prove the charges against the appellants and, as such, the judgment of conviction and order of sentence has been passed.

Now this Court is required to reappraise the prosecution evidence to see as to whether the prosecution has been able to substantiate its case beyond the shadow of all reasonable doubts?

Upon the appellant Raj Kumar Yadav, there is allegation of firing killing the deceased Pappu, whereas, upon the appellant Foto Yadav, there is allegation that he was present, he gave order and some of witnesses have said that he has also participated in the crime by catching hold of the deceased while Raj Kumar Yadav had shot fire upon him.

The appellant Foto Yadav has been convicted under Sections 302/34 of the Indian Penal Code as he was present at the time of occurrence. In the above sections, he has been sentenced to



undergo rigorous imprisonment for life. He has also been convicted under Sections 114/34 of the Indian Penal Code and has been sentenced to undergo life imprisonment.

Now, we have to see as to whether there are sufficient evidence to convict the appellant Foto Yadav under the aforesaid sections.

Section 114 of the Indian Penal Code envisages that whenever any person, who even if is absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

This is admitted position that both the sides are agnates/cousins and there is land dispute also in the family. There was a quarrel between members of both the family, however, at about 10.30 in the night Raj Kumar Yadav came from his house and called Pappu. At that point of time accused Shyam Sundar Yadav (since dead) and appellant Photo Yadav were also present, then Raj Kumar Yadav asked Pappu would he quarrel then shot at him. Thus, in the FIR no role has been assigned on Foto Yadav even of quarreling earlier or playing role of abettor. Similarly, FIR also does not disclose that there was a pre-arrange plan and pre-



suppose prior to concert or there was any common intention prior to commission of the act so that to bring him within the ambit of either Section 34 IPC or Section 114 IPC. So far as the witnesses are concerned, P.W. 1 has stated that Raj Kumar Yadav, Shyam Sundar Yadav and Photo Yadav were arguing with Pappu and Photo Yadav and Shyam Sundar Yadav ordered Raj Kumar Yadav to kill Pappu. Now the question would be as to whether this witness is reliable or not. Of course this witness (P.W.1) is the FIR witness also but the informant has not taken his name to be an eye witness. In the FIR, he has taken the name of Vikash Kumar (his nephew) and Gopal Kumar (brother-in-law of Pappu) as eye witness. Of course, the informant has also stated about presence of other persons but in view of the fact that P.W. 1 Sanjay Yadav was well known to him and he has been shown as FIR witness also, had he been the eye witness, his name must have been disclosed by the informant. That apart, his evidence before the court also, to the aforesaid extent, vary from the FIR. Thus, in our view, evidence of this witness does not inspire confidence.

P.W. 2 Gopal Kumar, who happens to be the brother-in-law of the deceased and has been portrayed as an eye witness by the informant in the FIR, has taken the name of only Shyam Sundar Yadav as order giver. He has said that Photo Yadav was also



present but no overt act has been attributed to him. Thus, his testimony also does not disclose anything which can bring Photo Yadav within the ambit of Section 114/34 IPC.

So far as Shyam Sundar Yadav is concerned, he has already died and his appeal has already abated. As such, there is no reason for discussing his case.

P.W. 3 Rajiv Kumar has stated that Photo Yadav also caught hold of Pappu along with Shyam Sundar Yadav but he has not been named as eye witness either by the informant or by the P.Ws. 1 and 2.

Similarly, P.W. 4 Gopal Yadav has stated that Raj Kumar Yadav shot at the deceased and Shyam Sundar Yadav as well as Photo Yadav were merely present at the time of occurrence.

P.W. 5 Adhik Lal Yadav has supported the statement of P.W. 3 but he has also not been disclosed in the FIR as eye witness nor has he been disclosed as an eye witness either by P.W.1 or P.W. 2.

P.W. 6 Manju Devi, who is widow of the deceased, has also stated that Shyam Sundar Yadav and Photo Yadav were only present at the time of occurrence.

The informant has given entirely different story at the time of being examined as P.W. 7 as he has stated that at about 7.00 P.M. there was quarrel between Raj Kumar Yadav, Photo Yadav and



Shyam Sundar Yadav and Pappu was also present and Shyam Sundar Yadave threatened him that he would be killed. After that Raj Kumar Yadav had fired. But Photo Yadav could not assigned any specific role as an abettor or even as any act done by him in furtherance of any intention along with others.

The Investigating Officer (P.W.8) has stated that Sanjay Yadav (P.W. 1) had not stated before him that Photo Yadav and Shyam Sundar Yadav ordered Raj Kumar Yadav to kill Pappu. He has also stated that P.W. 2 Gopal Kumar has also not stated before him that he is the eye witness to the occurrence rather he had said that he heard sound of firearm and then came there and saw that Pappu had been killed.

Now, on scrutiny and analysis of the aforesaid evidence as well as FIR, it is clear that there is no material to hold appellant Photo Yadav guilty under Section 114 of the Indian Penal Code as none of the witnesses have portrayed him as abettor of the crime. So far as Section 34 of the Indian Penal Code is concerned, two witnesses have of course said that he caught hold of the deceased while Raj Kumar Yadav had fired but evidences of both have been discarded as discussed above. So far as other witnesses are concerned, they have merely said about the presence of Foto



Yadav at the time of occurrence but no overt act has been attributed to him.

To hold guilty under Section 34 of the Indian Penal Code, there has to be evidence to show that there was common intention to commit such crime. If the common intention is proved but no overt act is attributed to the individual accused, Section 34 IPC will be attracted as especially it involves vicarious liability. If participation of the accused in crime is proved and common intention is absent then in such case Section 34 IPC cannot be invoked.

Thus, in our considered view, there is no sufficient material to hold the appellant Foto Yadav guilty either under Section 34 or Section 114 IPC. That apart, since no overt act has been attributed to him, he also cannot be held guilty under Section 302 of the Indian Penal Code as at best he was merely present at the time of occurrence.

Accordingly, Cr. Appeal (DB) No.866 of 2012 filed by the appellant, namely, Foto Yadav is allowed. Judgment of conviction and order of sentence passed by the trial court against him are set aside. He is acquitted of the charges. Since he is on bail, he is discharged from the liability of the bail bonds.



So far as appellant Raj Kumar Yadav is concerned, the witnesses have seen him firing on the deceased and the deceased had died out of that firing. Therefore, his conviction has to be upheld. But the question is, as to whether his intention was to kill? Whether he had come in premeditated plan to kill or the action was in a fit of anger due to the quarrel between the family members and he had taken that step knowing fully well that his action may kill but he did not have intention to kill? In the FIR, it is stated that other persons were merely present and he merely asked question from the deceased then fired. The other witnesses say that co-convict gave order then he killed but that has been disbelieved by us at the time of discussing the case of appellant Foto Yadav and it is admitted position that both the sides are agnates and there was quarrel between the ladies and others members of the family. Thus, in our view, the conviction should have been, after holding that it was culpable homicide not amounting to murder, under Section 304 (II) of the Indian Penal Code.

Considering the facts and circumstances of the case, the Cr. Appeal (DB) No. 896 of 2012 preferred by the appellant, namely, Raj Kumar Yadav is dismissed with alteration in conviction from Section 302 of the Indian Penal Code to Section 304 Part II of the



Indian Penal Code and, his sentence is reduced to the period already undergone by him in custody as he has remained in jail custody since 7.04.2010.

Ordered accordingly.

Since, the appellant Raj Kumar Yadav is in custody, he is directed to be released forthwith, if not wanted in any other case.

(Dr. Ravi Ranjan, J)

(S. Kumar, J)

V.K.Pandey/-

AFR/NAFR	N.A.F.R.
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