

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.253 of 2015

Arising Out of PS.Case No. -88 Year- 2006 Thana -JAHANABAD District- JEHANABAD

- =====
1. Wakil Yadav Son of Indradeo Yadav
 2. Pramod Yadav Son of Wakil Yadav Both Resident of Village- Shiwabigha, P.s and Dist- Jehanabad.
 3. Uday Yadav Son of late Munshi Yadav Resident of Village- Bhawarbigha , P.s - Prabigha, Dist- Jehanabad.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 258 of 2015

Arising Out of PS.Case No. -88 Year- 2006 Thana -JAHANABAD District- JEHANABAD

- =====
1. Jay Lal Yadav son of Indradeo Yadav Resident of village- Shiwabigha, P.S. & Dist. - Jehanabad.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No.253 + 258 of 2015)

For the Appellant/s : Mr. Alok Kumar Choudhary, Adv
Mr. Nagendra Kumar, Adv.
Mr. Kulanand Jha, Adv.
For the Respondent/s : Mr. Sujeet Kumar Singh,
Mr. Z. Hoda, APPs.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 16-02-2018

Cr. Appeal (SJ) No. 253/2015 wherein Wakil Yadav, Pramod Yadav, and Uday Yadav are the appellants, Cr. Appeal (SJ) No. 258/2015 wherein Jay Lal Yadav is the appellant commonly originate against the judgment of conviction dated 06.04.2015 and order of sentence dated 07.04.2015 passed by Sessions Judge, Jehanabad in Sessions Trial No. 678/2006 whereby and whereunder



all the appellants have been found guilty for an offence punishable under Sections 307/34 of the IPC and for that appellant, Jay Lal Yadav has been sentenced to undergo RI for 10 years as well as to pay fine of Rs. 50,000/- in default thereof, to undergo RI for 2 years additionally while, rest of the appellants, namely, Wakil Yadav, Pramod Yadav, and Uday Yadav have been sentenced to undergo RI for 5 years as well as to pay fine of Rs. 5,000/- in default thereof, to undergo SI for six months additionally, under Section 342/34 IPC and all the appellants have been sentenced to undergo RI for six months, Jay Lal Yadav exclusively, under Section 452 of the IPC and has been sentenced to undergo RI for 2 years, 27 of the Arms Act, and sentenced to undergo RI for 3 years with a further direction to run the sentences concurrently, with a further direction that the period having undergone during trial be set off as provided under Section 428 CrPC and on account thereof, have been heard together and are being disposed of by a common judgment.

2. Vijay Yadav (PW 5) gave his Fard-e-beyan while he was admitted at Sadar Hospital, Jehanabad on 27.04.2006 at about 9.20 AM disclosing therein that on the preceding day i.e. on 26.04.2006 at about 4:00 PM while he was at his house, at that very time, his co-villagers, Jai Yadav @ Jay Lal Yadav, Wakil Yadav, Pramod Yadav, and Uday Yadav who were armed with country made



pistols and gun, came and cordoned his house, and out of them Jay Lal Yadav armed with gun made house trespass. He, in order to, save himself ran through door of his house, as soon as arrived to the door, at that very time, Jay Lal fired from his gun causing injury over his chest, left side, both sides of neck, near the umbilicus, at the right shoulder (upper part), on account thereof, he became injured, fell down and began to shout. At that very moment, his family members as well as his neighbours Shiv Yadav (not examined), Dhaneshwar Yadav (not examined), Ram Prakash Yadav (not examined), who were present, seen the occurrence. After becoming injured, his uncle, Bangali Yadav (not examined) and Jugeshwar Yadav (PW 2), Ram Prakash Yadav (not examined) and his father Rameshwar Yadav (PW 1) came and lifted him to Jehanabad Sadar Hospital where treatment was going on. The aforesaid Fard-e-beyan was recorded in presence of Rameshwar Yadav (PW 1).

3. On the basis of the aforesaid Fard-e-beyan, Jehanabad (Kalpa) PS Case No. 88/2006 was registered whereupon investigation commenced and after concluding the same, charge-sheet was submitted followed with trial which concluded in a manner, subject matter of instant appeals.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is



that of complete denial of the occurrence. It has also been pleaded that on the alleged date and time of occurrence, the prosecution party were aggressors and in the aforesaid background, they have assaulted the members of accused and for that a counter case has been instituted. Furthermore, also exhibited certain documents in their defence.

5. In order to substantiate its case, prosecution had examined altogether 7 witnesses who are PW-1, Rameshwar Yadav, PW-2, Jugeshwar Yadav, PW-3, Sanyoga Devi, PW-4, Subhagiya Devi, PW-5, Vijay Yadav, PW-6, Kauleshwar Prasad and PW-7, Dr. Mukesh Kumar. Side by side had also exhibited Ext-1, signature of informant as well as his father, Ext-2, Formal FIR, Ext-3, Fard-e-beyan and Ext-4, Injury Report. Though no ocular evidence has been adduced on behalf of defence but certain documents have been exhibited as Ext-A, Fard-e-beyan Jehanabad PS Case No. 58/2009, Ext-B, Formal FIR of Jehanabad (Kalpa) PS Case No. 58/2009, Ext-C, Charge-sheet of Jehanabad (Kalpa) PS Case No. 58/2009, Ext-D, FIR of Dulhin Bazar PS Case No. 135/2011, Ext-E, Fard-e-beyan of Dulhin Bazar PS Case No. 135/2011, Ext-F, Chargesheet of Dulhin Bazar PS Case No. 135/2011.

6. Learned counsel for the appellants while challenging the finding recorded by the learned lower court has submitted that the finding recorded by the learned lower court is



wrong, illegal, perverse and that being so, is fit to be set aside. In order to substantiate such plea, it has been submitted that obligation lies upon the prosecution to substantiate its case beyond all reasonable doubts. Slight variance or from the evidence available on record a reasonable doubt cropped up with regard to veracity of the prosecution case, then in that event, the whole case is to be brushed aside even to the extent of benefit of doubt in favour of accused. In order to justify the aforesaid legal principal it has been submitted that the witnesses whose presence have been properly identified during course of Fard-e-beyan, namely, Shiv Yadav, Dhaneshwar Yadav Ram Prakash Yadav have not been examined. There happens to be no explanation at the end of the prosecution with regard to their non examination. Further it has also been submitted that as per Fard-e-beyan, after sustaining injury presence of Shiv Yadav, Dhaneshwar Yadav Ram Prakash Yadav have been shown out of whom only Rameshwar Yadav has been examined. In the background of the aforesaid deficiency when the evidence of witnesses so examined is properly scrutinized then in that event, it is apparent that PW-1 to PW-4 did not claim themselves to be eyewitness to the occurrence. That means to say, the prosecution case rests upon the evidence of PW-5, injured/informant, PW-6, Investigating Officer, and PW-7, the doctor who had examined the injured.



7. It has also been submitted that from perusal of the evidence of doctor it is apparent that neither he had shown wound of entry nor exit though, he had found injuries over the person of PW-5 caused by fire arm. Had there been, then in that event, it would have a positive evidence with regard to assault over the victim whether he was shot at from front side or back side. That has got a relevance in the background of the evidence of PW-5, injured who had deposed that after seeing the accused persons he rushed inside the house and while he was staying in the inner verandah, appellant/accused Jay Lal Yadav armed with gun made house trespass seeing whom PW-5 ran, came out from the door and at that very moment, he was shot at by the appellant, Jay Lal Yadav who was inside the house. That means to say, the injuries as per prosecution version would have been from behind and not from front side. No injury has been categorized or found over the person of injured PW-5 having been caused from backside. Accordingly manner of assault is found inconsistent with narration of the prosecution version. Furthermore, it has been submitted that place of occurrence has also not been properly identified and to substantiate the same, it has been argued that as per evidence of PW-5, it is apparent that as soon as he came out from his house, he was shot at near main door of the house and the assailant at that very time, was inside his house. Furthermore, it is evident from



the evidence of other witnesses that means to say PWs-1, 2, 3 and 4 that they are not consistent with regard to actual place of occurrence where PW-5 had sustained gun-shot injury. When the aforesaid event is found with objective finding of the Investigating Officer regarding place of occurrence, PW-6, in para-2 had stated the place of occurrence to be 'Gali'. None had stated that injured PW-5 had fallen in a 'Gali'. Though during cross-examination, all the witnesses have admitted that counter case happens to be at the end of the appellants, simultaneously, they have also admitted that the victim happens to be an accused of murder case and so, he might have sustained injury elsewhere but as the parties are on strained relationship due to flow of water (drainage) on account thereof, this false case has been instituted against them getting an opportunity in revengeful action. So, the cumulative effect did not support the finding recorded by the learned lower court hence, is fit to be set aside.

8. Learned APP while refuting the submissions made on behalf of appellants, has submitted that the occurrence is of the year 2006. Murder case is of the year 2009 bearing Ext, A, B, C, Jehanabad PS Case No.58/2009. Witnesses began to be examined since 2010 and so, at that very time, murder case was pending whereunder informant had gone to judicial custody, so aforesaid event has nothing to do with the instant prosecution. Furthermore, it has also



been submitted that another case bearing Dulhin Bazar PS Case No. 135/2011 happens to be much after the occurrence and so, it has got no relevance. Then has submitted that there happens to be admission at the end of the prosecution witnesses that counter case was instituted but, neither the same has been exhibited nor injury report, if any, has also been exhibited. Mere presence of counter case is not going to serve the purpose.

9. In the aforesaid background, when the evidence of PWs are properly scrutinized, then in that circumstance, it is evident that PW-1 to 4 have consistently identified the appellant Jaya Lal Yadav to be assailant of the victim/PW-5 whose presence, in order to kill the PW-5 happens to be inside his house armed with a gun which he fired while informant in a way to save himself, ran away from inside his house to outside. So far presence of other appellants are concerned, certainly there happens to be some sort of sketchy evidence to that extent. It has also been submitted that gun-shot injury is found properly substantiated by the doctor (PW 7) and place of occurrence is also found duly corroborated by all the witnesses including the Investigating Officer, PW-6, so prosecution has substantiated its case. Consequent thereupon, judgment impugned is fit to be confirmed.

10. In order to appreciated rival submissions, it



looks better to deal with the medical evidence at the first instance. PW-7 had examined the victim on 27.04.2006 at 09.45 PM and found the following:-

Lacerated wound with inverted margin of 1/6"x1/8" x muscles deep on left side of mid neck, right side of upper neck, lower part of abdomen below umbilicus. Left upper chest and right lower chest in front. All caused by fire arm.

Nature— All are simple in nature. X-ray of neck, abdomen and chest shows radio opaque foreign particles.

11. Furthermore, doctor had clarified the situation as by stating that he had examined the patient on 26.04.2006 at 9.45 PM but report was written after obtaining X-ray report, so it has been scribed as 27.04.2006. During cross-examination, he had stated that nature of the injury suggests that firing was made from a distance. He had further stated that he had shown the age of the injury within six hours. Though the doctor in plain and simple way had not mentioned the wound of entry but, the wound having inverted margin is indicative of the fact that it happens to be wound of entry. That means to say, whatever injuries have been sustained by the victim PW-5, it was caused by firing having from his front side. In the aforesaid background, now evidence of PW-5 is to be seen whether he had substantiated the finding recorded by the doctor.



12. PW-5 had stated that on the alleged date and time of occurrence he was at his house. There was quarrel relating to drain. At the time of occurrence, Jay Lal Yadav, Wakil Yadav, Pramod Yadav, and Uday Yadav came. Jay Lal Yadav was armed with gun while remaining three were armed with pistol. Seeing them, he had gone inside his house. At that very time, Jay Lal Yadav made house trespass, whereupon, he in order to save his life, ran outside the house. As soon as he came out from the door of the house, Jay Lal made firing causing injury over his left shoulder, neck, right side, below umbilicus, right hand. After sustaining fire arm injury, he fell down and began to cry. Accused persons, after staying 10-20 minutes left the place. Then thereafter, the Bangali Yadav, Jugeshwar Yadav, Shiv Yadav lifted him to Sadar Hospital, Jehanabad where police came and recorded his statement, read over whereupon he put his signature. He put his signature in presence of his father (exhibited the same). He was again interrogated by the police. He was treated for 15 days. Identified the accused. During cross-examination at para-6, he had stated that for the first time he had quarreled relating to drainage on the date of occurrence, itself. It was at about 12 noon and for that, no case was instituted. In para-7, he had stated that Indradeo Yadav who happens to be father of Wakil Yadav has also instituted counter case for the same occurrence. In para-8, he had further stated that there



happens to be only one door in the house having eastern front. At para-9, he had stated that at the time when accused persons came he had returned from Badhar carrying his cattle. He had gone inside his house. In para-10, he had stated that Jay Lal Yadav intruded inside his house armed with gun. At that very time, he was near verandah. From that verandah entrance is not visible. In para-11, he had stated that when Jay Lal came inside his house then he had seen him. At that very time, he was 10 steps west to him. He, after seeing him, moved towards eastern direction, rushed whereupon, he fired from behind after chasing. After causing injury, accused persons remained there for 10-20 minutes. During midst thereof, he continued to raise alarm in order to save himself. In para-12, he had stated that after fleeing of accused 5 to 8 persons came including Jugeshwar Yadav, Ram Prakash Yadav , Dhaneshwar Yadav, Shiv Yadav, Bangali Yadav and others. In para-14, he had further disclosed that one has to cross Kalpa in a way to Jehanabad. He had further stated that he had gone to Kalpa and had narrated regarding occurrence whereupon the same was recorded, signature was obtained and then, he was sent to hospital. Then at para-16, admitted that he happens to be an accused in counter case. He had denied the suggestion that no occurrence as alleged had taken place and he has falsely implicated the accused persons.

13. PW-6 is the Investigating Officer. He had stated



that he was posted at Kalpa on 27.04.2006. After registration of Jehanabad (Kalpa) PS Case No. 88/2006, he took up investigation. Recorded further statement of the informant, statement of other witnesses and then proceeded to inspect the place of occurrence. In para-2, he had identified the place of occurrence to be drain going towards the house of accused, Jay Lal Yadav lying north to barren land of Jay Lal Yadav as well as southern wall of house of informant, Vijay Yadav. On account thereof, there happens to be dampness over the wall of informant. On account of dispute regarding flow of aforesaid drainage, informant was shot at and further identified the actual place of occurrence as East-land of Jay Lal Yadav, West-residential house of Jay Lal Yadav, North-house of informant and South-barren land of accused. He had also found sign of pellet embedded over the wall at the place of occurrence. He had recorded statement of other witnesses and after obtaining injury report submitted charge-sheet. Exhibited relevant documents. During cross-examination at para-12, he had stated that who shown the place of occurrence, he had not mentioned. He had further admitted that he had not seized any article from the place of occurrence. He had not mentioned whether pellets were found embedded in the wall because of the fact that the wall had pores, on account thereof, he had incorporated so. In para-13, he had admitted that case and counter



case was registered for the same occurrence. Then at para-17, he had denied the suggestion that at an earlier occasion informant had registered FIR against unknown but, later on that very score in collusion with informant got the earlier FIR removed by the present one.

14. PW-1 is father of the informant who on the alleged date and time of occurrence was at cow-shed. At that very time, he had seen Jay Lal Yadav, Wakil Yadav, Pramod Yadav, and Uday Yadav cordoning the house of Vijay Yadav. Jay Lal Yadav was armed with gun while others were armed with pistol. When Vijay tried to come out from his house, he was shot at by Jay Lal Yadav, as a result of which, he sustained injury and fell down. After arrival of villagers, the accused persons fled away. Then thereafter they have lifted Vijay to Jehanabad Sadar Hospital. During cross-examination at para-6 had admitted that both the parties are Gotias and they are on strained relationship over drain though, no case has been instituted thereto. In para-7 he had shown ignorance with regard to counter case. In para-11, he had stated that there happens to be 'Gali' adjacent to his house and adjacent to that 'Gali' at eastern side, his cow-shed lies. While he was tying cattle, he heard sound of firing whereupon, he rushed and found Vijay, informant lying over the ground outside the door. He had further stated that Vijay was lying adjacent to Darwaza



which was eastern side of 'Gali'. There was copious blood. In para-12, he had stated that he was first to arrive at the place of occurrence.

15. PW-2 is cousin brother who had stated that on the alleged date and time of occurrence he was at his school. While he was there, he heard commotion as well as sound of firing coming from village whereupon he rushed towards his house and during midst thereof, he had seen Jay Lal Yadav armed with gun, Wakil, Pramod, Uday armed with pistol. Out of whom Jay Lal Yadav was saying that he has been shot. When he came at the house, saw Vijay in an injured condition having gun-shot injuries over his person. During cross-examination at para-3, he had admitted his relationship. In para-7, he had stated that when he reached at the house, he had seen all the four accused armed with weapon standing there. Vijay Yadav was lying having gun-shot injuries. At that very time, 5-6 persons were also there and named the same.

16. PW-3 is the wife of PW-2 who had deposed that on the alleged date and time of occurrence she was at her Darwaza. She had seen Jay Lal Yadav armed with gun and Wakil, Pramod, Uday armed with pistol who came at Darwaza and then cordoned her Devar, Vijay whereupon he ran from his house out of fear. At that very time, Jay Lal Yadav who was armed with gun, fired causing injury over neck, chest, right eye, umbilicus. Vijay fell down.



Accused persons fled away. He was shot at in the background of dispute relating to drain. During cross-examination at para-5 she had admitted that her house as well as house of Vijay happens to be separate intervened by a 'Gali'. At para-6, she had further stated that none other was present along with her. In para-7, she had stated that after hearing sound of firing she became afraid of and so, she hid herself. Then thereafter, she had gone to Darwaza of Vijay where he was lying after sustaining gun-shot injuries. Then had clarified that Vijay was lying in a 'Gali'. In para-8, she had stated that she has first to rush to the place of occurrence.

17. PW-4 is the wife of PW-5, informant. She had stated that on the alleged date and time of occurrence, she was at her house. At that very time, Jay Lal Yadav, Wakil Yadav, Pramod Yadav and son-in-law of Mahendra Yadav came out of whom, Jay Lal shot at her husband causing injury over her right hand, chest, umbilicus and thigh. Other accused persons were also armed with pistol. After sustaining injury, her husband fell down at the door and then thereafter all the accused persons fled away. During cross-examination at para-4, she had stated that she heard sound of only one firing whereupon, she rushed towards outside and during course thereof, had seen her husband lying over door. First of all, Sanyoga arrived at the place of occurrence and then followed by she. Again



controverted that when she came out from her house, she had seen 10-20 persons.

18. From the perusal of the record, it is evident that not even a single FIR named witness has been examined in this case nor there happens to be any kind of explanation relating to non examination. Now coming to the evidence of PW-1, 2, 3 and 4 none of them claimed herself/himself to an eyewitness, though shown his/her presence soon after the occurrence. When the evidence of PWs 1, 3 and 4 is taken together with the evidence of PW-2, then in that event, evidence of these three witnesses would not be subject to proper consideration. The most surprising feature is the evidence of PW-4, the wife of informant/injured. She had stated that at the time of occurrence she was inside her house. There happens to be consistent evidence of the injured that seeing the accused persons he rushed inside the house followed by Jay Lal Yadav. Had there been such event, PW-4, wife of victim would have disclosed that her husband came inside her house followed by Jay Lal Yadav seeing whom, Vijay escaped and during course thereof, he was shot at. That means to say, had there been presence of Jay Lal Yadav inside the house, he would have certainly been seen by the PW-4 shooting her husband from inside the house . Non discloser at the end of PW-4, is a circumstance, which would play pivotal role during course of appreciation of



genuineness of the persecution version.

19. Now coming to the other aspect, as per evidence of Investigating Officer, he had identified the place of occurrence with a specific boundary East-Barren land of accused, West-residential house of accused, North- House of informant and South- barren land of the accused but failed to locate actual place, whether it was conjoint with main entrance of house of the informant. As per evidence of informant, the door happens to be at the eastern front of the house. It is the case of the prosecution that as soon as he came out from the door he was shot at by Jay Lal Yadav who was inside the house whereupon, informant fell down. So he fell down east to his own house just crossing the door, then in that circumstance, in the western boundary there should have been presence of house of informant. Though, during course of examination-in-chief, the Investigating Officer had not said anything which, he was confronted during cross-examination at para-12, even then, there happens to be no seizure and further, had stated that he had not seen pellet embedded inside the wall rather as being pores, he had opined like so. So, from the evidence as is visualizing from the prosecution witnesses, place of occurrence is also found non-substantiated.

20. Now coming to the manner of occurrence, none of the witnesses has stated that victim PW-5 was shot at from front



side. Although from the evidence of PWs-1, 2, 3 and 4, their conduct has been found doubtful, more particularly, that of PW-4, wife of the informant, however, from the evidence of PW-5, injured, it is evident that he had shown presence of Jay Lal Yadav inside his house, ten steps away from him seeing whom he slipped and as soon as crossed the door, shot at. So certainly, he was shot at from behind. Doctor had found inverted injuries over the person of PW-5, over front side of the body, that means to say, injury was caused from front side and not from the backside and in the aforesaid background, if the ocular evidence is accepted, then it nullifies the finding recorded by the doctor and if medical evidence is accepted, then in that event, it contradicts the evidence of the injured as well as other PWs.

21. There happens to be settled principle of law that whenever there happens to be inconsistency in between medical evidence as well as ocular evidence, then in that event, unless and until, the medical evidence completely rules out the manner of occurrence, the ocular evidence will prevail upon the medical evidence. So far facts of present case is concerned, both the events is found suspicious one in the background of infirmities persisting on record as pointed out hereinabove, that means to say, if ocular evidence is accepted, there happens to be inconsistency at least amongst the evidences of PW-4 as well as PW-5 (husband & wife),



the objective finding relating to place of occurrence, is found inconsistent with the version of the informant as well as PW-4, and if the medical evidence is accepted then in that event, the victim PW-5 should have sustained injury on account of firing made from front side and not from backside as he had deposed apart from the fact that controversy regarding actual place of occurrence even then, persists.

22. In the background of aforesaid infirmities persisting on the record, it looks unsafe to rely upon the prosecution case as has been flashed. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court is, hereby, set aside.

23. Both the appeals are allowed. Since appellants are on bail, they are discharged from the liability of bail bonds.

(Aditya Kumar Trivedi, J)

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