

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.456 of 1994

Arising out of Judgment and order dated 15.09.1994 passed by learned 1st Additional Sessions Judge, Purnea in S. Tr. No. 120/1983 (arising out of Dhamdaha (Mirganj) P.S. Case No. 185/1981)

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1. Bindeshwar Yadav
 2. Chittan Yadav
Both sons of Darogi Yadav
 3. Badri Yadav
 4. Bhuthu Yadav
Both sons of Natho Yadav
- All resident of village Lobjar, P.S. – Mirganj, Dhamdaha, District – Purnea.

.... Appellants

Versus

The State of Bihar

.... Respondent

With

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Criminal Appeal (DB) No. 473 of 1994

Arising out of Judgment and order dated 15.09.1994 passed by learned 1st Additional Sessions Judge, Purnea in S. Tr. No. 120/1983 (arising out of Dhamdaha (Mirganj) P.S. Case No. 185/1981)

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Manoj Yadav, son of Baidnath Yadav, resident of village – Lohjar, P.S. – Mirganj, District – Purnea.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Yogesh Chandra Verma, Sr. Advocate
Mr. Pramod Kumar Mallick, Advocate

For the Respondent : Ms. S.B. Verma, A.P.P.

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CORAM: HONOURABLE THE CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 12-04-2018



Heard learned counsel for the appellants and learned Additional Public Prosecutor representing the State.

2. Challenge in these two criminal appeals is to the judgment dated 15th September 1994 passed by learned 1st Additional Sessions Judge, Purnea (hereinafter referred to as the “learned Trial Court”) in Session Trial No. 120/1983 by which the learned Trial Court has been pleased to hold that all the accused-appellants were members of unlawful assembly with common object to commit murder of one Md. Nasiruddin. According to the learned Trial Court all the accused persons assaulted the deceased in furtherance of their common object of the assembly to cause his death and Manoj Yadav strangled the deceased of this case to death. The accused Darogi Yadav (since deceased) was found to have abated the offence. In result all the accused, who are appellants in these two appeals, have been convicted for the offences under Sections 147 and 302/149 of the Indian Penal Code. Accused Manoj Yadav who is appellant in Criminal Appeal (DB) No. 473/1994 has been convicted under Section 302 of the I.P.C. also. All the appellants have been sentenced to undergo life imprisonment. No sentence has however been



passed against Manoj Yadav under Section 302/149 of the Indian Penal Code and no sentence has been passed against other accused persons under Section 147 I.P.C. in view of the fact that they have been convicted and sentenced to undergo life imprisonment under Section 302/149 of the Indian Penal Code.

3. The prosecution case is based on the fardbeyan of one Md. Shamsuddin, son of Md. Dilawar, resident of village Lohjar, P.S.- Mirganj, District – Purnia. According to the informant (P.W.6), on 13.10.1981 at about 7.00 a.m. Darogi Yadav, Chittan Yadav, Bindi Yadav, Manoj Yadav, Badri Yadav and Bhuthu Yadav along with 20/25 persons of village Lohjar were fishing in the paddy field of deceased Md. Nasiruddin. Seeing the damage being done to his field, the deceased reached there and asked them to stop saying that because of the fishing his paddy crops will be destroyed and due to the flow of water the paddy crops will be badly affected. It is alleged that the persons who were fishing in the field of deceased did not stop, on this the deceased caught hold of the equipment by which they were fishing and told them that he would not allow them to do the fishing in his field. It is alleged



that on this the accused Darogi Yadav (since deceased) ordered to kill the deceased, on this, Manoj Yadav jumped with his lathi and gave a blow on the head of Nasiruddin (deceased of this case). Md. Nasiruddin is said to have fallen down and raised hulla, on this, his Bhagina, Nasir, who was engaged in irrigation of field in the nearby, co-villager Samshul and from the village Kadiruddin came running to the place of occurrence and tried to stop the assault but on their attempt to stop, the accused persons also assaulted them and because of that they also became injured, however being strong persons they started fleeing away towards village. It is alleged that the persons who were engaged in fishing were giving repeated lathi blow on the body of Nasiruddin who was lying in the field. It is alleged that thereafter the co-villagers came there and on seeing them the accused persons fled away. The motive behind the occurrence as alleged is that about 3-4 years ago Nasiruddin had got a mortgage of 5 Kathas of land from one Baidnath Yadav for a sum of Rs. 500/-, the said land is in possession of Nasiruddin and Nasiruddin was regularly asking Baidnath Yadav to execute the registry of the land, but Darogi Yadav was not allowing the transfer of land and was



asking the deceased to leave the land.

4. On the basis of the fardbeyan of P.W.6, a formal First Information Report giving rise to Dhamdaha (Mirganj) P.S. Case No. 185 dated 13.10.1981 was registered. After investigation police submitted a charge-sheet against the accused persons and after commitment of the case the records were transferred to the court of sessions where all the accused were charged and tried under Section 147 and Section 302 read with Section 149 of the Indian Penal Code. Accused Manoj Yadav was further charged and tried under Section 302 of the Indian Penal Code.

5. In course of trial, the prosecution examined as many as 11 witnesses, whereas on behalf of the defence one Pradip Pandey, who was the Assistant Sub-Inspector of Police posted at Mirganj Police Station in the year 1981, deposed to prove the statements recorded in para 10, 12, 14, 17, 19 and 42 in the case diary recorded by Janardhan Mishra who was the Sub-Inspector of Police at Mirganj Police Station.

6. On behalf of the prosecution the formal First Information Report and the fardbeyan have been proved and exhibited as Exhibits-4 & 5 respectively. Exhibit-2 is the



signature of the informant on the fardbeyan, Exhibit-3 is post mortem report of the deceased, Exhibit-2/1 & 2/2 respectively are signature of Haseluddin @ Helaluddin and Nihaluddin who are the seizure list witnesses. Exhibit-1 and 1/1 are the injury reports.

7. In course of trial, the learned Trial Court even before entering into the evidence of prosecution took note of the vital discrepancy appearing in the prosecution case. According to the F.I.R., deceased died due to head injury but no head injury was found by the doctor (P.W.7). P.W.7 has recorded in his opinion "the cause of death due to pressure over the neck". The informant claimed himself to be an eye witness of the case whereas Insul (P.W.1) has stated in paragraph 4 of his cross examination that brothers of the deceased and villagers arrived at the place of occurrence after the accused persons had left the place of occurrence. He has also stated that Md. Samsuddin (informant) who is the brother of the deceased was not present there at the time P.W.1 was there. The learned Trial Court proceeded to examine the evidence of P.W.1 who in his deposition said that he and Naseer were splitting Patwa at the Bhinda in the Pokhar.



According to him, the accused persons were fishing in the paddy field of the deceased, they were having a Tin (container) with rope with which they were splitting water, Nasiruddin came there and asked them not to throw water because that will damage his paddy crop. The accused persons did not stop, Nasiruddin caught hold of the Tin and quarrel broke out. According to P.W.1 Manoj Yadav caught hold of Nasiruddin by Neck and put him down and thereafter he gained over his chest and started pressing his neck. P.W.1 has further stated in his deposition that other accused persons assaulted Nasiruddin with Lathi and fists causing his death at the spot. P.W.1 has further deposed that he and Naseer were also assaulted by Chittan, Bindi, Badri, Bhattu and Bhola. Bhola however was not an accused in this case. P.W.5, the doctor who examined this witness had found one lacerated wound on his head and some other injuries on his person. P.W.1 said that he was assaulted with Lathi on his head and the corresponding injury has been found by the doctor. He further stated that Naseer was also assaulted with Lathi on his head and both shoulders and back.

8. The learned Trial Court believed the story as per



deposition of P.W.1. According to the learned Trial Court there was nothing in the cross examination of the witnesses to disbelieve him.

9. It was the argument of the defence that P.W.1 should be disbelieved because his statement was inconsistent with the story contained in the fardbeyan (Exhibit-5). The learned Trial Court rejected the contention of the defence saying that the fardbeyan and the F.I.R. did not contain the version of P.W.1 and is not a substantive piece of evidence. It can be used, according to learned Trial Court, to some extent, to discredit the informant but not the other witnesses. It may be used to contradict the evidence of the informant. In the present case, according to the learned Trial Court, the F.I.R. is the product of the brain of inexperience, uneducated villagers incapable of distinguishing between material and immaterial fact, and as such, the same cannot be used to contradict other witnesses. The learned Trial Court held that it is not a case of complete variance between the F.I.R. and the case for which the accused has been committed.

10. The learned Trial Court held that the evidence of Insul (P.W.1) cannot be discredited. Regarding the other



witnesses namely, P.W.2 Sk. Idrish, P.W.3 Sk. Nasir, P.W.4 Sk. Nurai, P.W.8 Helaluddin, P.W.9 Sk. Nihaluddin and P.W.10 Md. Noor Islam, the learned trial court held that even though they have tried to pose as eye witness but it is apparent from their examination in chief itself that they came to know about the occurrence from Insul (P.W.1) and Naseer(P.W.3). The learned Trial Court still held that only because of the claim of the witnesses, i.e., P.Ws. 2, 4, 8 and 9 is suspicious on the point of they are being eye witness of the occurrence, their evidences cannot be brushed aside as immaterial and not trustworthy. There is no doubt about the fact that they reached at the place of occurrence just after the occurrence and came to know about the occurrence from P.W.1 and P.W.3, according to the learned Trial Court, their evidence lend strength and support to the evidence of P.W.1 and P.W.3 who according to all of them were present at the place of occurrence from before their arrival.

11. On the basis of these evidences, learned Trial Court held the accused-appellants guilty of the offences as aforesaid.

12. Learned senior counsel representing the



appellants would submit that the learned Trial Court has committed grave error in giving credence to the evidence of P.W.1 and P.W.3 which were completely different from the fardbeyan of P.W.6 who is own brother of the deceased. It is submitted at the bar that ocular evidence of the informant (P.W.6) is not corroborated from the post mortem report of the deceased. The prosecution case of giving Lathi blow is totally demolished from the evidence of Dr. Srikant Jha (P.W.7). He has in his post mortem report stated that the injury no. 1 to 6 as mentioned in the inquest report were not found over the dead body and in his opinion the cause of death was due to pressure over the neck. He has proved the post mortem report (Exhibit-3). In his cross examination, he has clearly stated that he did not find any nail mark on the dead body of the deceased.

13. Learned senior counsel submits that the Investigating Officer (in short the 'I.O.') of this case was not examined in course of trial which will prove fatal to the prosecution because non examination of the I.O. has caused prejudice to the defence of the accused.

14. Pointing out to the statements of P.W.3 Sk.



Nasir, learned senior counsel would further submit that if the statement of P.W.1 and P.W.3 are read together, it will appear that P.W.3 has come out with a third story, and according to him, while Manoj Yadav was pressing neck of Nasiruddin, rest of the accused persons were assaulting Nasiruddin with Lathi and fists. He has further deposed that Chittan Yadav had assaulted the deceased with a spade but in course of post mortem no spade injury could be found on the dead body of the deceased. According to P.W.3 he along with Insul (P.W.1) were splitting Patwa at the hill of the Pokhar which is situated at a distance of 2-3 bighas of land. According to P.W.1 he was at the hill of Pokhra (Bhind) along with Nasir(P.W.3), but according to him, informant and others came there only later on when the accused persons had already left the place of occurrence.

15. In the above view of the matter, learned senior counsel submits that the prosecution case has not been proved beyond all reasonable doubt and hence conviction of the accused-appellant is not proper.

16. On the other hand, learned Additional Public Prosecutor representing the State has supported the judgment



of the learned Trial Court submitting that there is no discrepancy in the evidence of P.W.1 and the learned Trial Court has rightly believed the statements of P.W.1 and P.W.3.

17. Having heard learned senior counsel for the appellants and learned Additional Public Prosecution representing the State as also on perusal of the records, we find that there are vital inconsistencies and material contradictions in the first version of the prosecution story as disclosed in the fardbeyan (Exhibit-5), on the one hand and the evidences of P.W.1 and P.W.3 which came in course of trial for the first time. According to the informant Samsuddin (P.W.6) he was in his house when he heard a hulla from the side of Kabristhan. According to him Kabristhan is situated at a distance of 3-4 ropes. P.W.6 in his deposition has markably changed his version as disclosed in his fardbeyan (Exhibit-5). According to this when he reached at the place of occurrence, he found that the deceased was being assaulted by the accused persons. In his fardbeyan he had stated that Manoj Yadav jumped with his lathi and assaulted on the head of the deceased because of which the deceased Nasiruddin fell down. It was not his case in the fardbeyan that Manoj Yadav



gained over the chest of the deceased and was pressing his neck but when he came to depose in course of trial, he not only changed his version but also introduced Naseer (P.W.3) and Insul (P.W.1) saying that P.W.3 and P.W.1 came there running and thereafter other people also came. In his deposition, he further alleged that the accused persons had assaulted Riyajuddin and Insul causing them injury, however in his fardbeyan he had not stated that Insul (P.W.1) had also come running there.

18. The learned Trial Court has taken note of the fact that P.W.3 has also stated in paragraph 2 of his examination in chief that he had enquired from Insul and Sk. Nasir about the occurrence and they had narrated him the story. The prosecution has not examined the I.O. in this case, and therefore, the veracity of the statements of P.Ws. 1 & 3 that they had made statement before the I.O. could not be tested in course of trial. Non examination of the I.O., in the opinion of this court, would prove fatal to the prosecution case, because in this case, where the informant as well as P.Ws. 1 & 3 have changed their version and had introduced a new case about the entire manner of occurrence, evidence of



I.O. was all the more necessary. P.W.1, whose evidence has been believed by the learned Trial Court, has stated in his cross examination that when he along with P.W.3 was splitting Patwa in the field, there were other labourers, but the prosecution has not brought anyone of the labourers in support of its case. Further in para 6 of his cross examination P.W.1 has stated that he and Naseer had not rushed on the hulla raised by Nasiruddin. He has also stated that Daroga had come but he had not made a statement that he had gone at the place of occurrence on the hulla raised by Nasiruddin. P.W.1 has categorically stated that when he reached at the place of occurrence at that time the informant Samsuddin was not there. He has stated that when the brothers of Nasiruddin and other witnesses reached at the place of occurrence the accused persons had already fled away. He has stated that he had informed the manner of occurrence to brothers of Nasiruddin (deceased). P.W.1 has further stated in his cross examination that he had not stated to Samsuddin (informant) that Manoj Yadav had gained over the chest of Nasiruddin and was pressing his neck. This witness has further stated that he told about the manner of occurrence at 12.00 noon when



Daroga Jee reached there but prior to that he did not tell this to Samsuddin (informant) as to who killed Nasiruddin.

19. On complete reading of the evidence of P.W.1, we find that while the occurrence is said to have taken place at 7.00 a.m., the P.W.1 has himself stated that he did not tell the manner of occurrence to the informant before 12.00 noon. This clearly shows that neither the informant had seen the alleged occurrence nor P.W.1 had told him about the manner of occurrence as is being claimed by P.W.1 and P.W.3 in course of evidence at trial. He has made statement that he told the manner of occurrence to Daroga at 12.00 noon for the first time but neither Daroga had been examined nor the case diary containing the statement of P.W.1 and P.W.3 had been proved in course of trial. The medical evidence i.e. the post mortem report (Exhibit-3) does not support the ocular version of the prosecution case.

20. In view of the material contradiction in the prosecution evidence, we are of the considered opinion that the conviction of the appellants in the present case is not based on the materials beyond all reasonable doubts. The witnesses such as P.W.1 and P.W.3 who have come out with a



different story from the fardbeyan of P.W.1 cannot be believed for the purpose of conviction of the appellants under Section 302 I.P.C. or under Section 147 and Section 302/149 of the I.P.C.

21. In result, the impugned judgment of the learned Trial Court is hereby set aside. Both the appeals are allowed. The appellants who are on bail are discharged from the liabilities of their bail bonds.

(Rajendra Menon, CJ.)

(Rajeev Ranjan Prasad, J.)

Rajeev/-

AFR/NAFR	NAFR
CAV DATE	NA
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