

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.748 of 2012

Arising Out of PS. Case No.-188 Year-1995 Thana- MANSI District- Khagaria

Upadhyay Yadav S/O Late Kumi Yadav Resident of Village- Rajajan, Police
Station- Mansi, District- Khagaria

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
Criminal Appeal (DB) No. 761 of 2012

Arising Out of PS. Case No.-188 Year-1995 Thana- MANSI District- Khagaria

Panchu Yadav son of Late Asharfi Yadav resident of village- Rajajan P.S.-
Mansi, District- Khagaria

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
Criminal Appeal (DB) No. 783 of 2012

Arising Out of PS. Case No.-188 Year-1995 Thana- MANSI District- Khagaria

Shambhu Yadav S/O Late Kamleshwari Yadav R/O Village - Rajajan, Police
Station - Mansi, District - Khagaria

... .. Appellant/s

Versus

The state of Bihar

... .. Respondent/s

Appearance :
(In Criminal Appeal (DB) No. 748 of 2012)
For the Appellant/s : Mr. Viveka Nand Singh
Mr. Md. Najmul Hodda
Mr. A. Kumar
For the State Mr. S.N.Prasad, APP
(In Criminal Appeal (DB) No. 761 of 2012)
For the Appellant/s : Mr. Bishweshwar Ram
For the State Mr. S.N.Prasad, APP
In Criminal Appeal (DB) No. 783 of 2012)
For the Appellant/s : Mr. Binay Kumar
For the State : Mr. Sujit Kumar Singh, APP



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**CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR
MANDAL**

And
HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date : 05-01-2018

Appellant Upadhyay Yadav (A-1) has been convicted under sections 302/149 and 148 IPC as well as section 27/35 of the Arms Act. Appellants Panchu Yadav (A-2) and Shambhu Yadav (A-3) have been held guilty only under sections 148/149 IPC. The learned trial court by a judgment of conviction and order of sentence dated 20.06.2012 and 28.06.2012 respectively recorded in Sessions Case No. 94 of 1999/Trial No. 38 of 2012 directed A-1 to suffer R.I. for life under sections 302/149, R.I. for 02 years under section 148 IPC and R.I. for 05 years under sections 27/35 of the Arms Act. A-2 and A-3 were, however, held guilty under sections 148 and 149 IPC and both of them were sentenced to suffer R.I. for 02 years.

2. In the morning of 31.12.1995, the informant (P.W.4) and his father Yogendra Yadav (deceased) had set out from the village to go to Mansi Bazar. As they reached near the house of the Pappu Singh (P.W.6) at 9:45am, it is alleged, the appellants herein and 11 other accused persons variously armed with fire-arms, Dabia, Lathi etc. appeared from the nearby ditch and at the orders of one



of the co-accused(s), the appellant no.1 fired at the deceased causing injury in his **Panjra**. The deceased ran for shelter inside the house of Pappu Singh when, it is alleged, co-accused Haribol Yadav chased him up to the room and fired at him inside the room causing his instantaneous death. All the accused persons thereafter opened fire in the air to scare/frighten the people assembled there and made good their escape. Promptly, the Fardbayan of P.W. 4 was recorded by the police officer posted at Mansi on 31.12.1995 at 11.00am at the site of the incident. The informant cited P.Ws 1,2 and 3 amongst others as the witnesses who had witnessed the incident. Old land disputes was assigned as the motive for the occurrence. Lodging of the case gave rise to a formal FIR (Ext.3) which, in turn, ignited the investigation. The police prepared the inquest report (Ext.1) which was witnessed by P.W. 10 Shankar Yadav. Signature of Shankar Yadav on the inquest report has been proved as Ext. 1. The deadbody was dispatched for autopsy. P.W. 11 was then posted as the Medical Officer Sadar Hospital Khagaria. He performed the autopsy on 31.12.1995 and provided the post mortem report (Ext.2).

3. On conclusion of investigation and finding the accusations true against the present appellant the charge-sheet was filed whereon cognizance was taken and the case, on being committed,



came on the file of the learned trial court for disposal. Charges were accordingly framed and explained/read over to the appellants to which they pleaded not guilty.

4. To prove the prosecution case beyond the pale of doubt, the prosecution examined 12 witnesses. A summary of the witnesses is as follows:-

5. P.W.1 Ravin Yadav, P.W.2 Deep Narayan Yadav, P.W.3 Chhatri Yadav are the eye witnesses to the occurrence. All of them have been cited as the witnesses in the Fardbayan itself. P.W. 4 Pappu Yadav is the son of the deceased and the informant of the case. P.W.5 Deo Nandan Sah, P.W.6 Pappu Singh, P.W.7 Maheshwar Prasad Sah, P.W.8 Arun Singh, P.W. 9 Jai Prakash Pandit were produced only to be declared hostile. P.W. 10 Shankar Yadav is a formal witness who has proved the signature on the inquest report. P.W. 11, as noted above, is the Autopsy Surgeon, who authored the post mortem report (Ext.2). P.W. 12 Sunil Kumar is a formal witness who has proved the signature and endorsement on the formal FIR (Ext.3).

6. In consideration of the evidence adduced by the prosecution, the learned trial court found the evidence of P.Ws 1, 2 and 3 lending full support to the prosecution case as enumerated in the FIR and deposed by the informant (P.W.4) during the trial. Having



found the post mortem report (Ext.3) also in tune with their evidence, the learned trial court held the appellants guilty.

7. We have heard both sides and perused the materials on record.

8. The judgment of conviction challenged in this appeal has been questioned by the learned counsel for the appellants on diverse counts. It has been submitted that only P.Ws 1,2,3 and 4 have supported the prosecution case. There are several inner contradiction(s) in their evidence. The final assault was made on the deceased in the house of P.W. 6. P.W. 6 has shown his absence from the place of occurrence and was thus declared hostile. Similarly, P.Ws 5,7,8 and 9 produced by the prosecution have not supported the prosecution case. Resultantly, the prosecution got them declared hostile.

9. The counsel for the appellants would further argue that P.Ws 1,2,3 and 4 are close relatives of the deceased. P.Ws 1,2 and 3 are also criticized as the chance witness. They have given some excuse in their respective examinations in chief to show their presence near the place of occurrence. Though the evidence is replete that several villagers had assembled/gathered at the place of occurrence but the prosecution has not produced any independent witness. It is a case where the medical evidence also



does not fully support the prosecution case. The counsel representing the appellants of the present appeals have also argued that the assailant of the deceased namely Haribol Yadav against whom P.Ws 1,2,3 and 4 have consistently spoken, has since been acquitted by the learned trial court in a separate trial. Two of the accused persons of the present case stood trial in S.T. No.71 of 2006 wherein the learned trial court, in consideration of the evidence produced thereat, acquitted them of the charge. Ext-G has been produced in support of the same. The deposition(s) made by the present set of witnesses in another trial have also been produced as Exhibits on behalf of the defence to show that they have either not supported the prosecution case or stated differently at the trial resulting in acquittal of the co-accuseds Haribol Yadav, Bhaggal Yadav, Hansraj Yadav, Kishore Yadav and Najir Yadav in S.T No. 71 of 2006 whereas co accused Ranjeet Yadav has been acquitted in S.T.No. 135 of 2001. Lastly, it has been argued that the non- examination of the I.O. of the case has seriously prejudiced the case of the defence as in absence of his evidence and considering the inconsistency in the ocular account given by the prosecution witness the place of occurrence has not firmly been established. The appellants also suffered prejudice in not



demonstrating the inconsistency in the evidence of P.Ws 1,2,3 and 4.

10. In contra, learned counsel for the State supported the finding of guilt recorded by the trial court. He would argue that the evidence of P.Ws 1,2,3 and 4 fully prove the prosecution case. The deceased was fired at twice; one by A-1 and another by co-accused Haribol Yadav when he fled into the house of Pappu Singh (P.W.6). The doctor found two wounds of entry and two wound of exit on the person of the deceased.

11. In the light of the rival contentions made at the Bar, the Court has to evaluate the evidence to find out as to whether the prosecution has been able to prove the case beyond reasonable doubt. Firstly, the medical evidence shall be examined. P.W. 11 Dr. Awadhesh Kr. Yadav held the autopsy and found the following ante mortem injury:-

“External Examination:-

1. Lacerated wound 1/4” diameter on the left side of chest. 2” below the left shoulder joint on middle left shoulder joint with bleeding wound of entry.

2. Lacerated wound. 1” diameter on the mid auxiliary line on lower left side of the chest, wound of exit.

3. Lacerated wound 1”x diameter on the mid clavicular line on sixth inter coastal space of the right side of the chest, wound of entry.



4. one lacerated wound 1/ ½ diameter with bleeding lateral aspect of right side of body, wound of exit”.

12. As noted above, two injuries are wounds of entry and two injuries are wound of exit. They were communicating to each other. The death was homicidal in nature caused by the fire-arm. Since submissions have been advanced with reference to the finding of the doctor, it may be noted here and now that the doctor did not find the wounds of entry having charred or tattooing marks.

13. P.Ws 1,2,3 and 4 are closely related. They appear to be cousin amongst themselves. The deceased had four more brothers. Ravin Yadav (P.W.1) is the son of one of the brothers of the deceased namely Ramawatar Yadav. P.W.2 Deep Narayan Yadav is the son of another brother of the deceased namely Tejo Yadav. P.W. 3 Chhatri Yadav is the son of Rattan Yadav. He has admitted in his evidence that the deceased was his uncle and that he lives in a house having common Aangan. What the Court further gathers from the record is that the two brothers of the deceased namely Tejo Yadav and Jagat Yadav had been murdered. Suggestions are given to P.Ws 1 and 2 that in the murder of Bijo Yadav, being the brother of A-2 Panchu Yadav, the deceased himself was an accused. Both of them have, however, denied. It has been argued



that P.W.1 is not a witness to the actual assault. We have closely examined his evidence. In his evidence, P.W.1 has admitted that when he reached near the place of occurrence the accuseds were seen on the run. P.W. 2 Deep Narayan Yadav was then present at one of the shops at Chauk Market. According to him, on hearing the sound of firing he reached the place of occurrence where several people had also assembled. However, he has claimed to have seen A-1 firing first at the deceased at the orders of another co-accused whereafter the deceased ran to shelter in the house of P.W. 6 Pappu Singh where one of the co accuseds namely Haribol Yadav chased and fired resulting in his death. P.W.2 has, however, not named A-2 Panchu Yadav and A-3 Shambhu Yadav as the participants in the crime. Chhatri Yadav (P.W.3) was also chanced to be present near the place of occurrence. He has also narrated the ocular account of the occurrence. He did not, however, name appellant no.3 in the commission of crime. What is surprising in his evidence that he negates the presence of P.Ws 1 and 2 at the scene of occurrence. In course of cross examination both P.Ws 2 and 3 have admitted to have been sent to jail in few criminal cases prior to the present incident. The defence has given suggestion to almost all the witnesses that Jagat Yadav being the full brother of the deceased



was the Sarpanch and the present set of the appellants were opposing him. The prosecution has, however, only stated the old land dispute as the reason of the occurrence.

14. P.W. 4 is the son of the deceased. He was following the deceased from the village. In his examination-in-chief he has supported the prosecution case, although accepting bad blood between both the parties and cases of murder prior to the present occurrence. According to P.W.4, the first assault with fire arm was made on the deceased from a very close distance. The FIR was lodged at the site of the occurrence. P.W.4 has further deposed that after having seen the incident he went to the police station where itself the Fardbayan was made/recorded and signed by him. In para 9, the witness is categorical in alleging that the first shot was fired at the victim/deceased when the accuseds were standing close to him. Relying on the aforesaid statements of P.W. 4, it has been argued, with much vehemence, that the post mortem report (Ext.3) belies the prosecution case or at least creates a serious doubt on the veracity of the evidence of the witness. The doctor did not find charring or blackening marks around the two wounds of entry.

15. The defence has submitted referring to the Exhibits produced by him that the evidence of the present set of witnesses



deposing as eye-witnesses namely P.Ws 1 to 4 should not be believed as they have either not deposed or deposed quite differently in three other session trials arising out of the present case wherein orders of acquittal have been recorded by the learned trial court.

16. Mr. S.N. Prasad, learned APP for the State, on the other hand, submitted that what was adduced in other trial(s) would be alien to the present trial. The Court is not required to look to or refer to those evidence.

17. In the case of **Rajan Rai vs. State of Bihar, 2006 (1) PLJR 418 (SC)**, similar question came up for consideration before the Hon'ble Supreme Court wherein the Apex in para 10 clarified the legal position as under:-

“A three Judges' Bench of this Court had occasion to consider the same very question in the case of **Karan Singh vs. The State of Madhya Pradesh, AIR 1965 SC 1037**, in which there were in all 8 accused persons out of whom accused Ram Hans absconded, as such trial of seven accused persons, including accused Karan Singh, who was appellant before this Court, proceeded and the trial court although acquitted other six accused persons, convicted the seventh accused, i.e., Karan Singh under Section 302 read with



Section 149 IPC. Against his conviction, Karan Singh preferred an appeal before the High Court. During the pendency of his appeal, accused Ram Hans was apprehended and put on trial and upon its conclusion, the trial court recorded order of his acquittal, which attained finality, no appeal having been preferred against the same. Thereafter, when the appeal of accused Karan Singh was taken up for hearing, it was submitted that in view of the judgment of acquittal rendered in the trial of accused Ram Hans, the conviction of accused Karan Singh under Section 302 read with Section 149 IPC could not be sustained, more so when other six accused persons, who were tried with Karan Singh, were acquitted by the trial court and the judgment of acquittal attained finality. Repelling the contention, the High Court after considering the evidence adduced came to the conclusion that murder was committed by Ram Hans in furtherance of the common intention of both himself and accused Karan Singh and, accordingly, altered the conviction of Karan Singh from Section 302/149 to one under Section 302/34 IPC. Against the said judgment, when an appeal by special leave was preferred before this Court, it was contended that in view of the verdict of acquittal of accused Ram Hans, it was not



permissible in law for the High Court to uphold conviction of accused Karan Singh. This Court, repelling the contention, held that decision in each case had to turn on the evidence led in it. Case of accused Ram Hans depended upon evidence led there while the case of accused Karan Singh, who had appealed before this Court, had to be decided only on the basis of evidence led during the course of his trial and the evidence led in the case of Ram Hans and the decision there arrived at would be wholly irrelevant in considering merits of the case of **Karan Singh**, who was appellant before this Court.....”

18. Considering the position in law spelt out and noticed herein-above, the Court does not find much substance in the said contention of the defence.

19. Coming to the case in hand, the Court finds that the medical evidence runs directly counter to the evidence of P.W. 4 (informant) as well as the other witnesses. P.W. 4 has stated that the first firing by A-1 was made from a close range whereafter the deceased ran to the nearby house of P.W.6 when another co accused followed him into the room and then assaulted at the deceased with fire arm. In both the cases, the injuries ought to



have caused blackening around the wound of entry. The evidence of the doctor (P.W.11) ruled out the presence of charring marks. A doubt is thus created over the prosecution case. Further, if the informant (P.W.4) is to be believed then the first version of the prosecution case was recorded at the police station when the informant, after the incident, visited there. The present FIR however, shows the same having been recorded at the site of the occurrence at 11.00am. What was the case of the informant lodged at the police station is not known. The I.O. has not been examined in the case to explain it. Harping on these facts elaborated by P.W. 4 himself, it has been argued by the defence that the prosecution has suppressed the initial version of the case which makes the cloud of doubt over the prosecution case more hazy. In the given circumstances at least presence of the informant at the place of occurrence was natural. He had set out from the house with his father (deceased). Other witnesses just chanced to be there. They are also close relatives of P.W. 1. That apart, P.W. 2 had narrated the background of the case where two of the four brothers of the deceased of the present case were killed. The cousin brother of A-2 was also murdered in which the present deceased was an accused. The background of the case elaborated at the trial is adequate enough to hold that there was a deep-rooted



rivalry between the appellant and the deceased as well as the witnesses of the present case. In a case like this, chance of false implication of the appellants cannot be completely ruled out. Animosity and hatred tend a witness to depose falsely. In that context, presence of P.Ws 2 and 3 who chanced to be present near the place of occurrence has to be viewed with circumspection. Moreover, P.W.3 has not claimed to have seen P.W. 1 and 2 at the site of the occurrence. P.W. 2 has not alleged participation of A-2 and A-3 in the crime.

20. Suggestion given to the witnesses by the defence has been shown to us in order to contend that in the particular facts of the case where the manner and place of occurrence having not been firmly proved, the non-examination of the I.O. has caused prejudice to the defence. There is also marked variance in the evidence of P.W.4 as to when and where the Fardbayan was first recorded. The Court, in consideration of the evidence on record and the submission made on behalf of the defence, does not find the said contention without any basis/base.

21. In the light of the discussions made above, it is difficult for the court to hold the appellants conclusively guilty of the charges. They are entitled to the benefit of doubt.



22. Accordingly, the appeals are allowed. The judgment of conviction recorded against the appellants in Sessions Case No. 94 of 1999/Trial No. 38 of 2012 is set aside. A-1 Upadhyay Yadav is said to be in jail custody. He is directed to be set at liberty forthwith, if not required in any other case. A-2 and A-3 are absolved of the liabilities of their bail bonds.

(Kishore Kumar Mandal, J)

(Vinod Kumar Sinha, J)

HR/-

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