

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.243 of 1994

(Against the Judgment of conviction and sentenced order dated 02.05.1994 passed by the 3rd Additional Sessions Judge, Arrah, in Sessions Trial No.245 of 1991, arising out of Udawant Nagar P.S. Case No.1 of 1990).

- =====
1. Kameshwar Dubey, son of Shree Niwas Dubey.
 2. Sadhu Sharan Pandey alias Sadhu Pandey, son of Bishwanath Pandey.
 3. Hare Ram Pandey, son of Kedar Pandey.
- All residents of village-Rampur Milki, P.S. Udwant Nagar, District-Bhojpur.

..... Appellants.

Versus

The State of Bihar

..... Respondent.

with

=====

Criminal Appeal (DB) No. 291 of 1994

=====

Sunil Dubey, son of Shri Surendra Dubey, resident of village-Rampur Milki, P.S. Udwant Nagar (Arrah Mufasil), District-Bhojpur.

..... Appellant.

Versus

The State of Bihar

..... Respondent.

=====

Appearance :

{In CR. APP (DB) No.243 of 1994 & CR. APP (DB) No.291 of 1994}:

For the Appellants : M/s. Uma Kant Shukla and Panditjee Pandey, Advocates.

For State : Dr. Mayanand Jha, A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

Date: 09-01-2018

These criminal appeals are directed against the Judgment of conviction and sentenced order dated 02.05.1994 passed by the 3rd Additional Sessions Judge, Arrah, in Sessions Trial No.245 of 1991,



arising out of Udawant Nagar P.S. Case No.1 of 1990, by which and whereunder he convicted all the four appellants for the offences punishable under Sections 302/34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life for the above stated offence. The appellants Sunil Dubey and Sadhu Sharan Pandey alias Sadhu Pandey were separately convicted under Section 27 of the Arms Act and they were sentenced to undergo rigorous imprisonment for one year for the aforesaid offence. Both the sentences were ordered to run concurrently.

2. P.W.6, namely, Harendra Dubey, gave his fardbeyan to A.S.I. S.N. Tiwari of Arrah Town P.S. on 01.01.1990 at 09.45 A.M. at Sadar Hospital, Arrah, to this effect that on the same day at 05.45 A.M., the appellants Sunil Dubey armed with country made gun, Kameshwar Dubey, Sadhu Pandey armed with country made gun and Hare Ram Pandey entered in his house and appellants Sunil Dubey and Sadhu Pandey started searching him with an intention to kill him. He managed to escape through other door but, in the meantime, the appellant Sunil Dubey opened fire on his mother causing firearm injury near her eyes and, after that, all the four appellants fled away from there. He further stated that he reached near his mother and found her in an injured condition. He also stated that his mother disclosed that the appellant Sunil Dubey had shot fire on her. The



neighbours, namely, Jagyaram Chowkidar, Bhagedan Choudhary, Dudhnath Dubey, Shivpujan Dubey, Shivyash Dubey etc. rushed there and saw the occurrence. His mother disclosed the name of the appellants before the aforesaid persons. The injured was taken to Sadar Hospital, Arrah, for treatment but she succumbed to her injuries at 07.30 P.M. on the same day. The genesis of the occurrence is said to be the pendency of lis between Sunil Dubey and the informant.

3. On the basis of the aforesaid fardbeyan, Udawant Nagar P.S. Case No.1 of 1990 was registered under Sections 307 and 302/34 of the Indian Penal Code and Section 27 of the Arms Act and, on the same day, formal F.I.R. was prepared against all the appellants for the above stated offences, which was sent from the police station to the concerned court where receipt was made.

4. The Investigating Officer took the charge of investigation and, after completing the investigation, he submitted the chargesheet against the appellants. The cognizance of the offence was taken and, accordingly, the case was committed to the court of sessions.

5. All the four appellants were put on trial and stood charged for the offences punishable under Sections 302/34 of the Indian Penal Code. However, the appellants Sunil Dubey and Sadhu Sharan Pandey alias Sadhu Pandey were charged separately for the



offence punishable under Section 27 of the Arms Act.

6. In course of trial, the prosecution examined altogether 8 witnesses and also got exhibited the Post-Mortem Report as Ext.1, signature on fardbeyan as Ext.2, fardbeyan as Ext.3 and formal F.I.R. as Ext.4. The statements of the appellants were recorded under Section 313 of the Code of Criminal Procedure in which they reiterated their innocence and claimed their false implication. The defence also examined altogether 3 witnesses and got exhibited some documents.

7. From perusal of the trend of cross examination of the prosecution witnesses as well as the evidence adduced on behalf of the defence, it appears that the defence of the appellants was that the firing was accidentally made when one Munna Dubey the son of deceased was playing with firearm in the room of the deceased and due to the aforesaid firing, the deceased sustained firearm injuries but the informant and his other family members being inimical with the appellants implicated them in the present case.

8. The learned court below on relying and scrutinizing the evidences available on the record, convicted and sentenced the appellants in the manner, as stated above.

9. Learned counsel for the appellants assailed the impugned Judgment of conviction and sentence order and argued that



out of 8 prosecution witnesses, not a single prosecution witness claimed to have seen the actual killing of the deceased and only P.W.3 Dudhnath Dubey as well as P.W.6 Harendra Dubey supported the prosecution story to some extent but they, too, did not claim themselves to be the eye witnesses of the occurrence. He further submitted that there are several contradictions as well as improbabilities in the testimonies of P.W.3 and P.W.6 but the learned court below ignored the aforesaid contradictions as well as improbabilities. He submitted that non-examination of the Investigating Officer was fatal to the prosecution case as the prosecution failed to establish the exact topography of the place of the occurrence and, therefore, the prosecution failed to prove that P.W.6 was in position to see the occurrence.

10. On the other hand, learned Additional Public Prosecutor supported the impugned Judgment of conviction and sentence order arguing that P.W.6 (the informant) very clearly stated that when the appellants entered the room of the deceased in his search, he fled to Angan and from there, he witnessed the entire occurrence. He also submitted that P.W.3 and P.W.5 also reached at the place of the occurrence, just after the occurrence and, moreover, the witnesses examined on behalf of the defence also stated that when they reached at the place of the occurrence, they found P.Ws.3, 5 and



6 present in their Angan and, therefore, this fact clearly goes to show that the prosecution succeeded to prove the place of the occurrence, manner of occurrence as well as time of occurrence and there is nothing on the record on the basis of which the prosecution evidence could be doubted.

11. Having heard the contentions of the parties, we went through the record. It is admitted case of prosecution that the alleged occurrence took place on 01.01.1990 at 05.45 A.M. in a room and at the time of the alleged occurrence, the deceased was in the said room. P.W.6 claimed that when the appellants entered the room, he left the room and fled away from there but he has not stated in his fardbeyan that after leaving the room, he remained stayed at his courtyard. In course of trial, P.W.6 tried to improve his case by saying that at the time of the alleged offence, a lantern was burning in the room but he had not made such statement either in his fardbeyan or before the Investigating Officer. Furthermore, P.W.6 claimed in his fardbeyan that the appellants committed the alleged crime to take the avenger as the lis was pending between him as well as the appellants but when he was testified in cross examination before the trial court, he, specifically, denied about the pendency of any lis between him as well as the appellants. P.W.6 further tried to suppress this fact that the appellant Sunil Dubey had lodged criminal case against his brother



Ashok Kumar Dubey but Ext.A goes to show that prior to the institution of the present case, the appellant Sunil Dubey had lodged criminal case for the offence under Section 307 and other minor Sections of the Indian Penal Code against one Ashok Kumar Dubey, who happens to be full brother of P.W.6. Therefore, it is established by the aforesaid fact that there was enmity between P.W.6 and the appellant Sunil Dubey. Although P.W.6 disclosed the above stated fact in his fardbeyan but he tried to suppress the aforesaid factum when he was examined before the trial court and himself damaged the genesis of the occurrence by saying that there was no litigation between him and the appellants.

12. P.W.3 Dudhnath Dubey is the uncle of P.W.6 Harendra Dubey. This witness stated that at the time of the alleged occurrence, he was at his roof and heard the sound of firing and went towards the southern side of his roof from where he saw the appellants fleeing and, at that time, the appellants Sunil Dubey and Sadhu Sharan Pandey alia Sadhu Pandey were carrying guns in their hands. This witness further stated that he got down from the roof and came to Angan where he found Harendra Dubey (P.W.6) and the deceased in injured condition. This witness stated that P.W.6 narrated to him about the alleged occurrence.

13. From perusal of the depositions of P.Ws.3 and 6, it is



obvious that neither P.W.3 nor P.W.6 claimed that the deceased had disclosed the name of the assailants to them. Therefore, the story of the so called dying declaration of the deceased, as mentioned in the fardbeyan, is completely belied. Furthermore, we find that P.W.3 stated at paragraph-5 of his cross examination that he had seen the appellants running towards southern side whereas P.W.6 stated in paragraph-2 of his examination-in-chief that the appellants were fleeing towards eastern side. Therefore, the aforesaid contradiction creates doubt about the claim of P.W.3 and P.W.6.

14. Admittedly, the deceased was killed inside her room and the claim of the prosecution is that at the time of her killing except the deceased and the appellants, no one was present there and P.W.6 claims that at the time of actual killing of her mother, he was standing in his courtyard but, admittedly, the Investigating Officer has not been examined in this case and, therefore, there is nothing on the record to show the distance between the courtyard and the room of the deceased and it is also not clear as to whether it was possible to visualize the occurrence, which was being taken in the room, from the place where P.W.6 was standing. No doubt, the non-examination of the Investigating Officer is not always fatal to the prosecution case but, in the present case, non-examination of the Investigating Officer is fatal because the topography of the place of the occurrence in the



present case plays an important role to judge the statements of the prosecution witnesses and, therefore, we are of the opinion that the non-examination of the Investigating Officer is fatal to the prosecution case.

15. It is admitted case of the prosecution that all the appellants had entered the house of P.W.6 in his search with an intention to kill him but he managed to escape from there and, thereafter, his mother was killed. So, in our view, all the appellants, could not have been convicted under Sections 302/34 of the Indian Penal Code because there is nothing in the prosecution evidence to show that all the appellants had common intention to kill the mother of P.W.6. P.W.4, the doctor, who did the post-mortem examination over the corpus of the deceased, found only one injury on her person and it is not proved who was the author of the aforesaid injury. Furthermore, it is admitted case of the prosecution that only appellants Sunil Dubey and Sadhu Sharan Pandey alias Sadhu Pandey were carrying guns in their hands at the relevant time and it is not established as to which of the aforesaid appellants, had fired on the deceased. Therefore, we are of the opinion that the appellants are entitled to get the benefit of doubt.

16. On the basis of the aforesaid discussions, these criminal appeals are allowed. The impugned Judgment of conviction



and sentence order dated 02.05.1994 passed by the 3rd Additional Sessions Judge, Arrah, in Sessions Trial No.245 of 1991, arising out of Udawant Nagar P.S. Case No.1 of 1990, are hereby set aside. The appellants are acquitted of the charges. The appellants are on bail, therefore, they are discharged from the liabilities of their bail bonds.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

Pradeep Srivastava

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	18.01.2018.
Transmission Date	18.01.2018.

