

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.535 of 1994

Sessions Trial No.4 of 1983 arising Out of Bakhtiyarpur P.S. Case No.100 of 1981
District- SAHARSA

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Hira Prasad Yadav son of Late Lal Behari Yadav, resident of Village- Sakra
Paharpure, P.S. Bakhtiyarpur, Distt. Saharsa.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Ms Shaheen Begum, Amicus curiae.

For the Respondent/s : Mr. Shivesh Chandra Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

Date: 06-01-2018

No one appears on behalf of the appellant. Learned
Additional Public Prosecutor Sri Shiwesh Chandra Mishra is present.
Ms. Shaheen Begum, advocate is appointed as amicus curiae for the
appellant so that she could place the case of the appellant and give
assistance to this court.

2. The sole appellant has preferred this criminal appeal
against the judgment of conviction and sentence order dated
30.09.1994 passed by 1st Additional Sessions Judge, Saharsa in
Sessions Trial No.4 of 1983 by which and whereunder the sole
appellant was convicted for the offence punishable under Section 302
of I.P.C. and was sentenced to undergo rigorous imprisonment for
life.



3. P.W.11, namely, Parmeshwari Yadav gave his fardbeyan to P.W.10, Shyam Nandan Pandey, the A.S.I. of Saharsa police station, Shyam Narayan Pandey, on 16.12.1981 at about 5.30 A.M. at Sadar Hospital, Saharsa to this effect that on 15.12.1981 at about 7 P.M. while his younger brother Nageshwar Yadav @ Shailendra Yadav was studying in his room, the sole appellant made fire on him on which his younger brother became unconscious and, thereafter, he was taken to Chapram Kothi hospital for treatment but Dr.Arun asked to take him to Saharsa Hospital immediately and, thereafter, he was brought to Saharsa Hospital in morning but he succumbed to his injury during course of his treatment. The reason behind this occurrence is that in the morning of 15.12.1981, Anil Kumar Yadav, the son of Hira Prasad Yadav (appellant), came at the door of the deceased and started disturbing him. The deceased was a student of Matric and was studying in his room. However, after some time, the wife of the appellant came there and an altercation took place. However, the matter was pacified anyhow but aforesaid Anil Kumar Yadav returned giving threat of dire consequences and, thereafter, appellant, Hira Prasad Yadav having armed with gun came there and opened fire twice causing grievous injury to left cheek of deceased.

4. On the basis of the aforesaid fardbeyan of the



informant, Bakhtiyarpur P.S. Case No.100 of 1981 for the offence under Section 302 of the I.P.C. was registered against the appellant. After investigation police submitted charge sheet against the appellant as well as Ram Dulari Devi. The cognizance was taken and the case was committed to the court of Session, as usual. The appellant was charged for the offence punishable under Section 302 of the I.P.C. whereas Ram Dulari Devi was charged for the offence punishable under Section 109 of the I.P.C. The charges were read over to them but they denied and claimed to be tried. However, during pendency of the trial Ram Dulari Devi died and the proceeding against her was dropped.

5. In course of trial, the prosecution examined, altogether, 13 witnesses and also produced documentary evidences. The statement of the sole appellant was recorded under Section 313 of Cr.P.C. in which he reiterated his innocence and claimed his false implication.

6. The defence has examined one defence witness and adduced some documentary evidence.

7. The learned court below having analyzed the evidences available on record convicted and sentenced the appellant passing the impugned judgment of conviction and order of sentence in the manner as stated above.



8. The learned amicus curiae appearing for the appellant assailed the impugned judgment of conviction and sentence order arguing that except the family members of deceased, not a single independent prosecution witness came forward to support the prosecution case. She, further, submitted that in the present case, neither doctor nor the I.O. has been examined and non-examination of the doctor and the I.O. has caused serious prejudice to the defence but the learned court below has failed to take note of the aforesaid fact. She further, submitted that according to the prosecution case, the deceased was studying in his room and the firing was made through a window and the aforesaid story of the prosecution makes the case itself doubtful. She, further, submitted that in course of trial, the defence gave suggestion to the informant that he himself killed the deceased and got the appellant implicated due to previous enmity and dispute but the learned court below failed to take note of the aforesaid suspicious circumstances.

9. On the other hand, learned Additional Public Prosecutor supported the impugned judgment of conviction and sentence order arguing that the prosecution has proved its case beyond all shadow of reasonable doubts.

10. Having heard the above submissions of the parties, we went through the materials available on the record. We find that



P.W. 1, namely Rajbal Yadav @ Bauku Yadav claimed in his examination-in-chief that he had seen the appellant making firing upon the deceased but at paragraph 7 of his cross-examination, he admitted that he came to know about the name of the appellant from Sadanand Yadav (P.W. 4), Rajendra Yadav (P.W. 3), Kusho Yadav (P.W. 9) and Parmeshwari Yadav (P.W. 11), Lalan Kumar (P.W. 5) who had assembled there and, therefore, it is obvious that this witness is not an eye-witness of the alleged occurrence.

11. P.W. 2 Jahuri Yadav is father of the deceased and admittedly, he is not an eye-witness of the occurrence and he came to know about the alleged occurrence from one Gohal Yadav and having received the information of the alleged occurrence, came to his house where Sadanand Yadav, Lakshmi Yadav, Rajo Yadav and his wife disclosed that the appellant had opened fire on the deceased.

12. P.W. 3, namely, Rajendra Yadav, P.W. 4 Sadanand Yadav as well as P.W.7, Rajo Yadav have been declared hostile as they have not supported the prosecution case.

13. P.W.5, Lalan Yadav is a child witness who claimed that having heard the sound of firing, he reached at the door and when he went towards his house, he saw the appellant who was fleeing from the place of occurrence having gun in his hand. This witness also stated in respect of the occurrence which had taken place in the



morning of 15.12.1981. The attention of this witness was drawn towards his previous statement recorded by the I.O. and it was, specifically, asked by the defence that he had not made statement before the police to this effect that he had seen the appellant carrying gun in his hand. This witness happens to be nephew of the deceased. The attention of this witness has also been drawn towards this fact that he had not made statement before the police that prior to the murder of the deceased, a quarrel had taken place between deceased and Anil.

14. P.W.6, Laxmi Yadav, also claimed to have seen the alleged occurrence and stated that it was appellant who opened fire on the deceased, but at paragraph 6 of his cross examination, he admitted that the second round of fire was made within 3 second and at that time, he had not reached at the room in which the alleged occurrence had taken place. This witness happens to be a chance witness and in his cross examination, he has stated that at the time of alleged occurrence, he had gone to meet Satya Narayan Mukhiya and was waiting to meet him at his room and in the meantime, the occurrence took place.

15. P.W.8, Dudhwati Devi, claimed in her examination-in-Chief that at the time of alleged occurrence, deceased was studying in his room in the light of lantern. She further claimed that when she



came there to call him for dinner, she noticed that the appellant was standing there having gun in his hand and after that the appellant went towards western side and opened fire through window of the room as a result of which deceased sustained injury. After the occurrence, the appellant fled away from there. The deceased was taken away for treatment. She also narrated about the incident which is said to have taken place in the morning of 15.12.1981. The attention of this witness was drawn towards her previous statement recorded under Section 161 of Cr.P.C., and it was, specifically, asked from her that she had not made statement before the police to this effect that she had seen the appellant having gun in his hand and she had also not made statement before the police that it was the appellant who fired on the deceased. She was also asked that she had not made statement before the police regarding the incident which had taken place in the morning of the alleged date of occurrence.

16. P.W. 9 is Kusheshwar Prasad Yadav, who is elder brother of the deceased. He stated that at the time of alleged occurrence, he was sitting at his **sahan** along with others and was enjoying fire. He further stated that he went to his eastern side of his door to urinate and in course of urinating, he heard the sound of firing and, thereafter, he returned to his door and saw the appellant standing near eastern window of his house and thereafter, the appellant



immediately, again, made firing and fled away raising slogan of “**Jai Bajrang bali**”. He tried to catch the appellant but could not do out of fear. He went inside the room and found the deceased in unconscious state and he also noticed that blood was oozing out from the cheek of the deceased. He also stated that at that time Parmeshwari Yadav, Lalan Kumar Yadav, Dudhwati Devi, Sadanand Yadav, Bouku Yadav, Rajendra Yadav and several other persons including Mukhiya and Sarpanch had assembled there. This witness at paragraph 5 in his cross-examination admitted that he was enjoying fire at the distance of 2-2 ½ **Laggies** in the northern side from his **Veranda**. This witness also admitted that the house of the appellant was situated at the distance of 30-40 **Laggies** in north from the place where he was enjoying fire. He also admitted that between the house of the appellant and where he was enjoying fire, there was a drainage and at the time of alleged occurrence, there was water in the aforesaid drainage. He also described width of aforesaid **nala** as 3 – 4 **laggies**. He also admitted that he had not seen the appellant prior to making firing. However, attention of this witness was drawn to his previous statement recorded under Section 161 Cr.P.C and at para 6 of his cross examination, he stated that the place where he was enjoying the fire was shown by him to the Investigating officer. He also stated that he had disclosed the names of those persons who were enjoying fire



with him. He also admitted that he had stated before the I.O. that he had seen the appellant making firing. He denied this fact that he had only made statement that he had seen the appellant running from the place of occurrence.

17. P.W.10 , Shyam Narayan Pandey is a police officer who recorded the fardbeyan of the informant and prepared inquest report of the deceased.

18. P.W.11, Parmeshwari Yadav is the informant of the present case. He supported the story of quarrel in the morning of the alleged date of occurrence as well as claimed himself to be an eye witness of killing of the deceased. He admitted that a petition had been filed against him and in the said petition it was mentioned that he wanted to kill the deceased. He denied the suggestion that he implicated the appellant due to previous enmity.

19. P.W. 12 and 13 are formal witnesses who proved the formal F.I.R., seizure list as well as post mortem report respectively.

20. From careful perusal of the evidence of prosecution witnesses, it is obvious that the deceased was killed inside the room and the firing is said to have been made from outside through the window. The witnesses claimed that they had seen the appellant making firing through the window but admittedly, the alleged



occurrence took place at 7 P.M. Moreover, it is also obvious from the statements of prosecution witnesses that they developed their statements during course of trial and the defence drew their attention towards their previous statements recorded under Section 161 of Cr.P.C. and, therefore, in our view, non-examination of the I.O. is fatal to the prosecution case because the appellant did not get an opportunity to prove the contradictions and the developments made by the prosecution witnesses in course of trial. However, non-examination of the I.O. has caused serious prejudice to the defence because due to non-examination of the I.O., the real and exact topography of place of occurrence could not be brought on record and the defence could not get an opportunity to show that it was not possible to prosecution witnesses to see the occurrence. No doubt, in cross-examination of prosecution witnesses, the defence tried to bring the real and exact picture of place of occurrence as well as the places from where the so called eye witnesses claimed to have seen the occurrence, yet, in our view, the examination of I.O. was essential because the I.O. is most competent witness to prove the place of occurrence as well as the places from where the prosecution witnesses claimed to have seen the occurrence. Moreover, it is also obvious that except family members of the deceased, not a single independent witness came forward in support of the prosecution case. Therefore, in



our view, the appellant is entitled to get the benefit of doubt.

21. On the basis of the aforesaid discussions, this criminal appeal is allowed and the impugned judgment of conviction and sentence order dated 30.09.1994 passed by 1st Additional Sessions Judge, Saharsa in Sessions Trial No.4 of 1983 is set aside giving benefit of doubt to the appellant. The appellant is discharged from the charge as well as liability of bail bond.

22. Let first and last page of the copy of this judgment be handed over to Ms Shaheen Begum for needful.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

AnilKrSinha/-

AFR/NAFR	AFR
CAV DATE	NA
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