

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction and order of sentence dated 31.03.1994 passed by Shri R. P. Chaudhary, learned 2nd Additional Sessions Judge, Khagaria in Sessions Trial No. 81 of 1992, arising out of Khagaria P.S. case no. 247 of 1991)

Criminal Appeal (DB) No.205 of 1994

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1. Kedar Yadav, son of Sudho Yadav
 2. Jito Yadav @ Jitan Yadav, son of Kailu Yadav
 3. Sadanand Yadav, son of Jagdish Yadav
 4. Tapeswar Yadav, son of Yugal Yadav
 5. Degan Yadav, son of Uchit Yadav.

All are resident of Village- Markanhi Tola, Police Station- Khagaria, District- Khagaria. Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Abhay Kumar Singh No.1, Advocate
Mr. Bharat Bhushan, Advocate
Mr. Siddhartha Kumar Singh, Advocate
For the Respondent/s : Mr. Abhimanyu Sharma, APP

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)

Date: 30-01-2018

The present appeal has been filed on behalf of five appellants against the judgment of conviction and order of sentence dated 31.03.1994 passed by learned 2nd Additional Sessions Judge, Khagaria in Sessions Trial No. 81 of 1992, arising out of Khagaria P.S. Case No. 247 of 1991, whereby the appellants have been convicted under Section 302/34 of the Indian Penal Code and they have been sentenced to undergo R.I. for life.



2. Out of five appellants, appellant no.2, namely, Jito Yadav, died during the pendency of the appeal and, as such, the appeal on behalf of appellant Jito Yadav stands abated.

3. (i) The prosecution case in brief is that on 15.07.1991, at 2.30 P.M. while the informant, namely, Jitendra Kumar Yadav was at his house, Kedar Yadav and Tapeswar Yadav came to his house and asked his father Nand Kishore Yadav (deceased) to accompany them to witness dance at village Nankutola, whereupon his father denied to go to Nankutola, but the aforesaid two accused persons persuaded him and he became ready to go with them and he started for village Nankutola along with accused Kedar Yadav and Tapeswar Yadav. The informant and witness Rajesh Kuamr Yadav and Dhiraj Yadav also started for village Nankutola for seeing the dance and they were going behind the aforesaid accused persons and his father. When they reached in front of the school accused Sadanand Yadav, Degan Yadav and Jitan Yadav also accompanied them. It is said that accused Degan Yadav and Jito Yadav were holding lathis in their hands. They all reached Nankutola, but no dance was being performed there and as such the deceased and the accused returned from the village. The informant and witness Rajesh Kumar Yadav and Dhiraj Yadav also started coming back. However, they were two laggas behind the accused appellants and Nand Kishore Yadav. When



they reached on the Tinmohani near the field of Khalto Yadav accused Kedar Yadav over powered Nand Kishore Yadav and told that the enemy had to be killed. Accused Tapeswar Yadav took out a country made pistol from his waist and fired at the Kanpatti of Nand Kishore Yadav. Accused Kedar Yadav also took out a country made pistol and fired on the head of Nand Kishore Yadav. Thereafter, the informant and his associates retreated a little distance. Then accused Sadanand Yadav fired his country made pistol, but the informant could not see whether it hit the deceased or not. It is further alleged that accused Degan Yadav and Jito Yadav assaulted the deceased with lathi. Hearing the alarm of the informant and the sound of firings, witnesses from the Bahiar and vilalge, namely, Suresh Yadav, Pramod Yadav, Naresh Yadav, Sanjay Yadav, Ashok Yadav etc. came and on seeing them accused persons fled away in the western direction.

(ii) It has been alleged in the fardbeyan that due to previous enmity the accused persons committed murder of the deceased Nand Kishore Yadav. The informant Jitendra Kumar Yadav gave his fardbeyan before the police at the place of occurrence alleging therein the aforesaid facts.

4. On the basis of the fardbeyan Khagaria P.S. case no. 247 of 1991 dated 15.07.1991 was registered for the offence under



Sections 302/34 of the Indian Penal Code.

5. The police after investigation submitted charge-sheet against the accused persons. Thereafter the learned Magistrate took cognizance of the offence and committed the case to the Court of Sessions. On framing of the charges the accused persons pleaded not guilty and claimed that they have been falsely implicated in the case on account of enmity. They pleaded that the deceased was man of criminal antecedent and he was killed somewhere else and on account of previous enmity they have been implicated in this case. They disputed the manner of occurrence.

6. On behalf of the prosecution, 7 witnesses were examined. Out of 7 witnesses, P.W.1 Jitendra Kumar Yadav is the son of the deceased and informant of the case, aged about 11 years, P.W.2 Rajesh Kumar is the nephew of the deceased, who was aged about 10 years, at the time of occurrence. P.W.3 Pramod Yadav is the brother of the informant and son of the deceased. P.W.4 Ashok Kumar is the seizure witness. PW.5 Naresh Yadav has been tendered for examination, P.W.6 is Dr. Ramanand Kumar, who conducted post-mortem of the deceased and P.W.7 Dilip Kumar Singh is the investigating officer of the case.

7. The trial court on scrutiny of the evidence convicted



the appellants for the offence under Section 302/34 of the Indian Penal Code and sentenced them to undergo R.I. for life.

8. On behalf of appellants Mr. Abhay Kumar Singh argued that P.W.1 and P.W.2 were child witness and not competent to depose in the present case, as eye witness on account of their tender age of 11 years and 10 years. Mr. Singh referring to the deposition of P.W.2 submitted that P.W.2 was a regular student, who used to attend the class regularly and during the school time the circumstances indicate that he was not present at the place of occurrence and as such he could not be accepted as eye witness to the occurrence. Mr. Singh referring to the entire facts and circumstances of the case submitted that the prosecution case is highly improbable and suspicious. He submits that it is impossible for P.W.1 and P.W.2 to see the occurrence from a distance to two Laghas, about the incident committed in the ditch. He also mentioned the manner of firing, as indicated by the P.W. 1 and P.W.2, is not supported by the doctor P.W.6. As per the prosecution case, the deceased was fired from close range, but the medical report ruled out the prosecution case, as in case of fire injury from the close range charring mark and blackening is the result, but in the present case the doctor in the post-mortem and the examination before the court has clearly opined and stated that no such blackening or charring mark or smoke and tattooed mark was



found even the gun power was not found from the dead body, which ruled out the prosecution case of firing from a close range. Similarly, the story of firing by the appellants Kedar Yadav and Tapeswar Yadav while sitting over the chest of the deceased is impossible and as such the prosecution case is under serious doubt.

9. Mr. Singh has next submitted that the conduct of the witnesses in the present case is most unnatural, as the witnesses have stated that after seeing the occurrence they remained at the place of occurrence where several people assembled, but neither the P.W.1 nor P.W.2 has disclosed name of any person, who assembled after hearing the sound of firing and on raising alarm by P.W.1 and P.W.2. This conduct of the witness is not natural and as such he submits that after the occurrence it appears that due to enmity they have been tutored and as such the informant has named the accused persons.

10. Mr. Singh next submitted that in the present case there was enmity between the parties and, as such, they have been falsely implicated. He next submitted that in the present case, the investigating officer has not sent the blood stained soil for chemical examination, which was allegedly collected from the place of occurrence and as such he submits that in the present case only highly interested family members have been examined and their statements have not been corroborated by scientific evidence. He next submitted



that in the present case, the prosecution has made a definite statement about lathi blow on the deceased, but in fact no such injury was found by the doctor, who conducted the post-mortem of the deceased. Mr. Singh next submitted that the prosecution has not examined the independent witnesses, although the investigating officer has stated in the court that 20 - 25 persons assembled at the place of occurrence but none was examined in support of the prosecution case and only family members were examined in the case and, as such, their version cannot be relied upon for conviction of the appellants. He next submitted that in the facts and circumstances in this case, there is absolutely no material to establish the common object for commission of crime.

11. Mr. Singh in support of case of contradiction in the ocular evidence and the expert evidence placed reliance upon the judgment in the case of **Ram Narain Vs. The State of Punjab**, reported in, **AIR 1975 SC 1725**. Referring to para 14 he submitted that in the present case, the evidence of P.W.1 and P.W.2 is not supported by the doctor (P.W.6) and, as such, conviction of the appellants is unsustainable. Para 14 of the judgment reads as follows:

“14. Where the evidence of the witnesses for the prosecution is totally inconsistent. It with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained it



is sufficient to discredit entire case. In *Mohinder Singh v. The State* (AIR 1953 SC 415) this Court observed in similar circumstances as follows:

"In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle."

It is obvious that where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. While appreciating the evidence of the witnesses, the High Court does not appear to have considered this important aspect, but readily accepted the prosecution case without noticing that the evidence of the eye witnesses in the Court was a belated attempt to improve their testimony and bring the same in line with the Doctor's evidence with a view to support an incorrect case."

12. Mr. Singh placed reliance on the judgment in the case of **Santa Singh Vs. The State of Punjab**, reported in, **AIR 1956 SC**



526 to contend that in the present case, the story of firing from close range is not supported by the medical evidence. Para 5 of the said judgment reads as follows:

“5. The circular wound of entry at the back of the deceased, 1/4" in diameter, had burnt inverted margins according to the doctor who conducted the postmortem examination.

The ballistic expert, Dr. Goyle, examined as P. W. 11, said that if there were burnt edges of the wound, the distance between the muzzle and the victim would only be a few inches and not more than nine inches. This opinion is in substantial accord with what is found in some of the text books on medical jurisprudence.

For instance, it is stated in Taylor's Principles and Practice of Medical Jurisprudence, Vol. I, 10th Edition, at page 441, under the heading "Burning of the Wound".

"It is impossible to state rules as to the precise distance from which it is possible to produce marks of burning, for this depends on the quantity & nature of the powder, the method of charging, and the nature of the weapon. It is unusual, however, to get marks of burning beyond a yard or a yard and a half with a shot gun, or at more than half a yard with a revolver ".

13. Mr. Singh placing reliance on the Division Bench judgment reported in the case of **Kaushlendra Kumar Chowdhary**



& Anr. Vs.The State of Bihar, reported in, **2017 (4) BBCJ 282** submitted that in the present case the allegation against the appellants is that they have fired from pistol and the deceased died due to fire injury and the appellants in that case were acquitted by the Division Bench on the ground that the appellants were not charged for offence under Section 27 of the Arms Act, although there was allegation of firing, which was the cause of death of the deceased. He submitted that in the present case also the accused persons have been charged under Section 302/34 of the Indian Penal Code and not under Section 27 of the Arms Act and as such the appellants' conviction is bad on account of non-framing of charge under Section 27 of the Arms Act.

14. Mr. Abhimanyu Sharma, learned APP appearing on behalf of the State submits that the trial court has meticulously considered the understanding and capability of P.W.1 and P.W.2 and after due consideration the trial court held out that P.W.1 and P.W.2 are quite competent and after testing their outstanding capacity of perceiving and understanding the things held out that P.W.1 and P.W.2 are quite competent and natural witness and their deposition cannot be brushed aside. Referring to the entire deposition of the witnesses he submitted that the informant has recorded his fardbeyan at the place of occurrence. The occurrence took place at 3.30 and at 4.30 he gave fardbeyan at the place of occurrence i.e. after one hour



and the informant has specifically named five accused persons. He also mentioned in his fardbeyan that Kedar and Tapeswar have given gun shot on the head and temple (Kanpatti) of the deceased. The statement of P.W.1 is supported by P.W.2. The injury was found on head and temple by the doctor, who conducted the post-mortem. The only variation which the counsel for the appellants has highlighted is the distance of firing. He submitted that the court has to consider the fact that the prosecution witnesses were of rural background and in their communication the distance which they have assessed disclosed and as such their evidence cannot be disbelieved. He submitted that the trial court on scrutiny of the entire facts and circumstances held out that the witnesses examined on behalf of the prosecution are competent, consistent and natural. Referring to the deposition of P.Ws. 1, 2, 3 and 7 he submitted that all the aforesaid witnesses are consistent on the point of place of occurrence. The ocular evidence and the medical evidence is on the same line that the death was caused by gun shot injury and the specific case of the prosecution as to the injury caused on head and temple was found by the doctor. The inquest report and post-mortem report also suggest the injury as alleged by the informant and supported by the witnesses in the trial. The investigating officer of the case has found cartridges at the place of occurrence. He also found injury on head and temple and thus he



submitted that the trial court has committed no error in convicting the appellants. Referring to the medical jurisprudence and the deposition of the doctor he submitted that the injury of lathi was not found may be on the deceased on account of the fact that the injury was at the flassy part of the body of the deceased and on account of the fact that such injury were inflicted after the death.

15. We have gone through the materials available on record and given our anxious consideration to the submission advanced by the counsel appearing on behalf of the appellants and the State. In fact all the submissions, advanced in this appeal, were advanced by the appellants at the trial. The trial court on meticulous examination of the entire facts and circumstances held out that the child witnesses were competent witness and they were most reliable, as they have seen the occurrence. The trial court on the basis of scrutiny of entire material held out that the appellants have committed the crime and they have been seen by P.W.1 and P.W.2 while committed crime from a distance of 2 Laghas i.e. approximately 18 feet, and as such the trial court accepted the version of the eye witnesses.

16. We have examined the present case in the light of the judgment reported in **AIR 1975 SC 1727**. The judgment reported in **AIR 1975 SC 1727** is not applicable in the instant case. In the said



case, the direct evidence was not supported by the expert evidence and most material part of the prosecution case was not supported by any evidence. The evidence of the witnesses were inconsistent with the medical evidence, whereas in the present case the witnesses examined on behalf of the prosecution are consistent on the point of place of occurrence, manner of occurrence, cause of death. The prosecution has explained all the material circumstances by ocular evidence as well as the medical report. P.W.1 and P.W.2, who were present at the place of occurrence, have narrated the entire incident. The fardbeyan was recorded within one hour of the occurrence at the place of occurrence. The inquest report and the deposition of the investigating officer also establish the place of occurrence. The story of firing as per the evidence of P.W.1 and P.W.2 has been corroborated by P.W.6 the doctor, who conducted post-mortem and as such the medical evidence and ocular evidence as well as the investigating officer of the case are consistent on the point of death due to firing at the place of occurrence.

17. We do not find any substance in the submission of Mr. Singh that P.W.1 and P.W.2 on account of their tender age of 11 years and 10 years were incompetent to depose as eye witness. The submission of Mr. Singh has no legs to stand that P.W.2, who used to regularly attend the class has made a false statement in this case, as he



was not expected at the place of occurrence during the school time. From the deposition and cross-examination of witness, there was no suggestion that on the date and time of occurrence he was not present at the place of occurrence, but he was inside the school and as such the appellants in the absence of any suggestion during cross-examination that P.W.2 was not present at the place of occurrence and to establish that he was present at the school, instead of place of occurrence at the time of occurrence cannot impeach the evidence of P.W.2. The submission of Mr. Singh that only interested family members have deposed in this case cannot be a ground to disbelieve the prosecution case and cannot be a ground to disbelieve the evidence of the prosecution witnesses. In the present scenario, the witnesses, who in fact have seen the occurrence are reluctant in giving evidence and under such circumstances only family members or those who dare to run the risk of taking wrath of the accused persons depose in the court and under the aforesaid circumstances, we cannot discard the prosecution case for only examining the family members, as witnesses.

18. Mr. Singh has relied upon the judgment reported in **AIR 1956 SC 526**, the submission of the appellants in the instant case runs contrary to the reasoning in the judgment on which the appellants have placed reliance. In the said judgment the Apex Court referred to



the Taylor's Principle's and Practice of Medical Jurisprudence, the Court held out that it is unusual to get marks of burning beyond a yard or a yard and a half with a shot gun, or at more than half a yard with a revolver, if the injuries are caused from a distance of inches not more than 9 inches, then burn injury of the wound is not found. In the instant case, the doctor opined that if the distance is more than 4 feet then in that situation the suggestion of the appellants that burn, blackening or tattooing on the deceased was not possible. The submission of the appellants referring to the assessment of distance of the prosecution witness from a distance of approximately 18 feet is no ground to disbelieve the prosecution case.

19. In view of the consistent case of the prosecution witness and corresponding fire-arm injury on the deceased found in the post-mortem report we are of the considered view that the injury found on the person of the deceased was supported by the prosecution witnesses i.e. ocular evidence as well as the medical report.

20. The last submission of Mr. Singh with reference to the Division Bench judgment that in the present case, although the murder was committed by the fire-arm, but no charge was framed under Section 27 of the Arms Act and as such the appellants deserve to be acquitted for failure of the trial court to frame charge under



Section 27 of the Arms Act.

21. In the present case, the ocular evidence is consistent on the point that the deceased died due to gun shot injury. There is no speculation that the appellants Kedar Yadav and Tapeswar Yadav were not carrying fire arm. There is no dispute that the deceased has not sustained fire-arm injury. The case of death of the deceased as per the post-mortem report is gun-shot injury and as such the appellants cannot be acquitted on the ground that the trial court has not framed charge under Section 27 of the Arms Act. In fact, in the judgment on which the appellants have placed reliance, the Division Bench has noted that the appellants were seen by the witnesses fleeing away. There was no material to indicate that the appellants were fleeing away were carrying any weapon. In that case, the entire prosecution case was based on rumour and as such the appellants were acquitted in the peculiar facts of that case when there was no evidence that the appellants were fleeing away carrying any weapon. The entire case was based on rumour to the contrary in the present case and there is definite case of eye witness of commission of crime by the appellants Kedar and Tapeswar Yadav by the gun shot injury and as such we find the case reported in **2017 (4) BBCJ 282** distinguishable on facts.

22. Considering the totality of the facts situation, we have no manner of doubt that the prosecution has been able to bring



home the charges beyond reasonable doubt, so far as appellants Kedar and Tapeswar Yadav are concerned and as such the appeal of Kedar Yadav and Tapeswar Yadav does not merit any consideration and is, accordingly, dismissed.

23. However, in the totality of the facts situation, we find that the other two appellants, namely, Sadanand Yadav and Degan Yadav have not joined appellants Kedar Yadav and Tapeswar Yadav from very beginning. They accompanied the deceased and the appellants in the mid way. There is no allegation against the two appellants that they were armed with lethal weapon. The allegation that they have given lathi blow is not supported by the medical evidence. The submission of learned APP referring to the deposition of P.W.6 that if the injury caused after the death of the deceased, then no such injury is found on the person of the deceased. In the facts and circumstances of the case, when the allegation of lathi blow was simultaneous and immediate after the fire arm injury. The suggestion that lathi blow was inflicted after the death is not convincing, as after gun shot injury, if lathi blow was inflicted then so long the tissues are not dead, the injury on the deceased may carry injury mark.

24. Thus, in the totality of the facts of this case, we find that the conviction of the other two appellants when there was no definite material to indicate that there was pre-meeting of mind for



commission of crime and no definite material to suggest that they inflicted lathi blow on the deceased, we find it difficult to accept the prosecution case, so far as the appellant Sadan Yadav and Degan Yadav are concerned. Accordingly, extending the benefit of doubt, they are acquitted of the charges. Their appeal stands allowed and the judgment of conviction so far as the appellant Sadanand Yadav and Degan Yadav is concerned, is set aside. Since the appellants Sadanand Yadav and Degan Yadav are on bail, they are discharged from the liabilities of their bail bonds.

25. The appeal filed on behalf of Kedar Yadav and Tapeswar Yadav is dismissed and they are directed to surrender forthwith to serve the remaining part of the sentence.

26. With the aforesaid modification in the judgment of conviction, the appeal stands disposed of.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Uday/-

AFR/NAFR	NAFR
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