

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.102 of 2009

Arising Out of PS.Case No. -0 Year- null Thana -null District- AURANGABAD

=====

Vijay Yadav, son of Late Pararath Yadv, resident of Village Bhallu Khaira, P.S. Rafiganj, Distt. Aurangabad.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Shankar Kumar/A.C.

For the Respondent/s : Mr. Parmeshwar Mehta, APP

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 09-10-2018

None turned up on behalf of the appellant. On account thereof, Sri.

Shankar Kumar has been requested to assist the Court as an Amicus Curiae.

Appellant Vijay Yadav has been found guilty for an offence punishable under Section 307 of the Indian Penal Code and sentenced to undergo R.I. for five years as well as to pay fine appertaining to Rs. 2,000/- in default thereof, to undergo S.I for two months additionally, under Section 27 of the Arms Act and sentenced to undergo R.I. for three years as well as to pay fine appertaining to Rs. 1,000/- and in default thereof, to undergo S.I. for one month, additionally, with a further direction to run the sentences concurrently, vide judgment of conviction and order of sentence dated 28.01.2009 passed by Additional Sessions Judge F.T.C. IInd, Aurangabad in Sessions Trial No. 123 of 1996 / 01 of 2003.

Haridwar Yadav, P.W.-5 lodged First Information Report on 10.08.1995 at about 10 a.m. alleging inter alia that on the same day at about 7



a.m. he came to know that his co-villagers, Vijay Yadav, Indradeo Yadav, Brijendra Yadav and Satyendra Yadav sons of Padarath Yadav are opening door in his land whereupon, he rushed. When he reached at the spot, he found Vijay Yadav and Indradeo Yadav armed with country made pistol, Satyendra Yadav possessing cartridges. He said that first of all land be measured, whereupon, Brijendra Yadav provoked to assault, Vijay Yadav shot at him with an aim to commit murder but, he managed to escape. During midof, his father arrived, who was also aimed at by Vijay Yadav, but again the aim missed. Then he ran there from raising alarm whereupon Vijay Yadav again fired without any harm. During course of running, he fell down as a result of which he sustained injury over his knee. Dev Prasad, Kamta Yadav, Jagdish Yadav, Brajesh Kumar Yadav, Sanjay Yadav, Nagdev Yadav and others have been cited as eye witnesses. It has been stated that the aforesaid land happens to be his ancestral property for that, in the year 1960 there was litigation with the grand-father of the accused and the case was decided in the year 1964. Since thereafter they were trying to open darwaja in his land. After registration of Rafiganj P.S. Case No. 61 of 1995 followed with an investigation as well as submission of charge-sheet, facilitated the trial whereunder by the judgment impugned, others have been acquitted while appellant has been convicted in the manner indicated above, subject matter at instant appeal.

Defence, as is evident from mode of cross examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has further been pleaded that no land of prosecution party lies in the northern boundry of the appellant/accused rather the land belongs to one Mukhiya Devi and with ulterior motive and jealousy filed false and fabricated case. In support thereof, apart from oral evidence, documentary evidences have also been



adduced.

In order to substantiate its case, prosecution has examined altogether six witnesses who are P.W.-1 Kamta Yadav, P.W.-2 Jagdish yadav, P.W.-3 Nagdeo Yadav, P.W.-4 Brajesh Kumar Yadav, P.W.-5 Haridwar Yadav and P.W.-6 Md. Mazhar Alam. Side by side, Ext.-1 is the F.I.R., Ext.-2 is the signature of the informant Haridwar yadav, Ext.-3 is the injury report. In likewise manner defence has also examined three D.Ws and those are D.W.-1 Ramdas Yadav, D.W.-2 Md. Nurul Hoda and D.W.3 Babulal, side by side, had also exhibited Kewala dated 29.04.2008 as Ext.-‘A’, the Register of the Registry Office marked as ‘X’ for identification.

Heard learned Amicus Curiae as well as learned Additional Public Prosecutor.

Gone through the evidences available on the record, it happens to be obligatory on the part of the prosecution to support its case beyond reasonable doubt. After hearing the rival submissions in consonance with the materials available on the record, two important points are falling in between while adjudging the matter. The first one is with regard to actual physical status, and the second happens to be probability of the occurrence as alleged. So far as first point is concerned, none of the prosecution witnesses have stated that accused persons were constructing a new house nor there happens to be disclosure therein that after cutting certain portion of the wall of the existing house the door was being opened. When the evidence of the informant P.W.-5 is being minutely gone through, from examination-in-chief alone, it is evident that there happens to be disclosure that on the alleged date and time of the occurrence while he was at the house, he came to know that Vijay Yadav, Indradeo Yadav, Bijendra Yadav, Sateyendra Yadav, after filling earth over his land is opening the darwaja. He



rushed and found those persons engaged in opening darwaja. So it is to be ascertained whether there was filling of earth and then, door was being opened. Neither the prosecution had disclosed that new house was being constructed as stated above or the wall of the existing house was being cut in order to open the door. However, when the evidence of remaining witnesses that means to say P.W.-1, P.W.-2, P.W.-3 and P.W.-4 including the informant P.W.-5 have further been gone through, it is evident that none of them have disclosed presence of mason or labourer engaged in constructing or cutting the wall or affixing the door and in likewise manner, P.W.-1 to P.W.-4 have failed to disclose that earth was filled up in the land of the informant. On account of non-examination of the I.O., the aforesaid theme could not be properly found exposed and that being so, suffers from ambiguity.

The second aspect is with regard to firing made at the end of the appellant over the informant-P.W.-5 and his father Surajdeo Yadav. There happens to be non explanation at the end of the prosecution witnesses with regard to non-examination of Surajdeo Yadav. All the witnesses have stated that Vijay yadav had fired thrice. From the evidence of P.W.-5 informant paragraph-4. it is evident that he had shown the distance in between him as well as Vijay yadav to be 5-6 Feet, at the time of first incident of firing having no injury.

In the same breath, he had not disclosed that repeated firing was aimed at him rather in casual way, he had stated that firing was also made over his father causing no harm. In the same line, P.W.-1 to P.W.-4 have substantiated the case of the prosecution.

Now coming to proper identification of the place of occurrence, that means to say, the land possessed by the informant, P.W.-5 informant in his cross-examination in para-3 had identified the land bearing Khata no. 79 Khesra No.



345 having boundary North- Road, South- Akal Yadav and Padarath Yadav, East- Harihar Paswan and west- Nankuri Paswan, while P.W.-1 at Para-5 had disclosed Khesra No. 343, P.W.3 at para-4 had disclosed the boundary of the P.O. and again clarified the boundary of the house of the Indradeo Yadav north- Haridwar Yadav, south-Haridwar Yadav, east-Akal Yadav and west- Nankuni Yadav. P.W.-4 at para-3 had shown the boundary of the P.O. land north- road, south- Vijay Yadav, East- Harihar paswan and west- Nankuri Paswan. In the background of infirmity in the evidence of the prosecution witnesses over proper identification of the P.O. land, it happens to be severe dent in the prosecution case. Moreover, due to the non-examination of the I.O. is found fatal to the prosecution.

In **Lahu Kamlakar Patil and Another Vs. State of Maharashtra** reported in (2013) 6 SCC 417, it has been held:-

“It is an accepted principle that non-examination of the Investigation Officer is not fatal to the prosecution case. In **Behari Prasad Vs. State of Bihar [1996] 2 SCC 317**, this Court has stated that non-examination of the Investigating Officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In **Bahadur Naik Vs. State of Bihar [(2000) 9 SCC 153]**, it has been opined that when no material contradictions have been brought out, then non-examination of the Investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused.”

In the background of the inconsistency persisting on the record, it looks difficult to concur with the findings arrived at by the learned lower court. Consequent thereupon same is set aside.

Appeal is allowed. Appellant is on bail. He is being



discharged from the liability of the bail bonds.

First and last page of the judgment is handed over to the Amicus Curiae.

(Aditya Kumar Trivedi, J)

sushma/-

AFR/NAFR	NAFR
CAV DATE	-----
Uploading Date	27/10/2018
Transmission Date	27/10/2018

