

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.728 of 2014

Arising Out of PS.Case No. -159 Year- 1993 Thana -BHOJPUR COMPLAINT CASE District-
BHOJPUR

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1. Akshay Kumar Yadav Son of Late Harbansh Yadav
2. Kapil Yadav, Son of Late Haribansh Yadav
3. Durga Yadav Son of Late Haribansh Yadav
4. Chandrama Yadav Son of Late Haribansh Yadav
5. Virendra Yadav , Son of Late Darichhan Yadav.
6. Sribhagwan Yadav , Son of Sri Akshay Kumar Yadav

All are resident of Village - Rasauli , Police Station -- Piro in the district of Bhojpur.

.... Appellants

Versus

The State of Bihar.

.... Respondent

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Appearance :

For the Appellant/s : Mr. Sunil Kumar, Adv.
For the State : Mr. S.C. Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

Date: 31-10-2018

1. This criminal appeal has been preferred against the judgment of conviction and sentence order dated 02.08.2014 and 05.08.2014 respectively passed by learned 3rd Ad hoc Additional Sessions Judge, Bhojpur at Ara in Sessions Trial No. 241 of 1995/Supplementary Trial Serial No. 226 of 2013 by which and whereunder he convicted the appellants for the offences punishable under Sections 148 and 302 read with Section 149 of the Indian Penal Code and accordingly, sentenced them to undergo rigorous



imprisonment for life for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code and to pay a fine of Rs. 50,000/- each and in default of payment of fine, to undergo simple imprisonment for two years and furthermore, to undergo rigorous imprisonment for three years for the offence punishable under Section 148 of the Indian Penal Code. It is pertinent to note here that by the same impugned judgment of conviction and sentence order, the learned Additional Sessions Judge convicted one accused Daroga Roy for the offence punishable under Section 302 and 148 of the Indian Penal Code and accordingly, sentenced him to undergo rigorous imprisonment for life and to pay a fine of Rs. 2,00,000/- for the offence punishable under Section 302 of the I.P.C. and in case of default in payment of fine to further undergo rigorous imprisonment for three years only and to undergo rigorous imprisonment for three years for the offence punishable under Section 148 of the Indian Penal Code. However, the sentences were ordered to run concurrently. The amount of fine was to be paid to the wife of deceased as well as his dependents and if no dependent is found alive, the amount of fine was ordered to be credited in the account of Victim Compensation Fund created under Section 3 of Bihar Victim Compensation Scheme, 2011 and if it is found that fund has not been created as yet, the amount of fine was ordered to be credited in the account of Prime Minister's Relief Fund, Government of India.



2. Originally, PW-4 Binder @ Rabindra Singh Yadav filed complaint case bearing Complaint Case No. 347 C of 1991 before the court of Chief Judicial Magistrate, Bhojpur, Ara on 03.08.1991 which was converted into Piro P.S. Case No. 83 of 1992 but the police submitted final form in the aforesaid case. However, a protest petition was filed by the PW-4 Binder @ Rabindra Singh Yadav which was converted into complaint case bearing Protest-cum-Complaint Case No. 159 C of 1992 and the enquiring court having found prima facie case against the appellants and accused Daroga Roy as well as Dharikchan Yadav summoned the appellants and accused Daroga Roy and Dharikchan Yadav and subsequently, committed the case to the court of sessions. However, during pendency of sessions trial, accused Dharikshan Yadav died and proceeding against him was dropped by the learned trial court vide order dated 07.03.2003. Subsequently, the appellants stood charged for the offence punishable under Sections 302 read with Section 149 of the Indian Penal Code. Furthermore, the appellants along with accused Daroga Rai stood charged for the offence punishable under Section 148 of the Indian Penal Code. The accused Daroga Rai was, separately, charged for the offence punishable under Section 302 of the Indian Penal Code. The appellants and accused Daroga Rai denied the charges and claimed to be tried.

3. In course of trial, prosecution examined, altogether, six



witnesses and got exhibited post mortem reports of deceased Shamhut Yadav and Bihari Yadav as Ext. 1 and 1/1, deposition of Dr. Ashok Kumar Choudhary recorded in Sessions Trial No. 45 of 1992 as Ext. 2, original complaint petition dated 03.08.1991 of Complaint Case No. 347 C of 1991 as Ext. 3 and photostat copy of injury reports of injured Bhuti Singh, Devendra Yadav, Sipahi Singh and Umesh Singh as Ext. 4. The statements of appellants and co-accused Daroga Rai was recorded under Section 313 of the Cr.P.C. in which they denied the prosecution story. The appellants and co-accused Daroga Rai also got exhibited charge sheet of Piro P.S. Case No. 120 of 1991 as Ext. A and certified copy of judgment passed in Sessions Trial No. 45 of 1992 as Ext. B in their defence. The learned trial court after perusing the evidences available on the record convicted and sentenced the appellants and accused Daroga Rai in the manner as stated above.

4. PW-4 Binder @ Rabindra Singh Yadav claimed in his protest cum complaint petition that on 28.07.1991 at about 5:00 P.M., while he along with Sipahi Singh @ Sipahi Singh Yadav (PW-1), Bhuti Yadav (PW-5), Ram Kishun Yadav (PW-2), Devendra Singh (PW-3) and Samhut Yadav (deceased) was making ridge in his field as per the measurement done by the concerned Amin of Consolidation, appellants along with accused Dharikchan Yadav and Daroga Rai being armed with double barrel gun, farsa, lathi etc. encircled them and on the order of appellant Akshay Kumar Yadav,



the appellants and other accused started assaulting them by means of lathi and in that course appellant Virendra Yadav and Kapil Yadav assaulted Devendra Singh (PW-3) by means of lathi. Appellant Chandrama Yadav and Bihari Singh Yadav (deceased) assaulted Bhuti Yadav (PW-5) by means of lathi and accused Dharikchan (since deceased) assaulted Sipahi Singh Yadav (PW-1) by means of lathi. The appellant Sribhagwan Yadav hurled farsa on him but, anyhow, he saved himself and appellant Akshay Kumar fired of his gun which hit Bihari Singh Yadav and, thereafter, he as well as his men ran towards south-east but again on the instigation of Akshay Kumar Yadav, Daroga Rai shot fire which hit Samhut Yadav as a result of which Samhut Yadav died. The aforesaid occurrence was witnessed by several villagers. PW-4 further claimed in his complaint petition that Sipahi Singh Yadav (PW-1) , Bhuti Yadav (PW-5), Chandrama Yadav, Purnamasi Yadav and Ramlal Yadav along with dead body of deceased Samhut Yadav went to Hasan Bazar police outpost on the same day at about 6:00 P.M. where Sipahi Singh Yadav got recorded his ferdbeyan and put his signature on the ferdbeyan. Chandrama Yadav and Purnamasi Yadav also put their respective signatures on the ferdbeyan of Sipahi Singh Yadav but subsequently, they came to know that a counter case had been lodged in Piro police station in respect of the occurrence and in the aforesaid counter case, Sipahi Singh Yadav was arrested and was sent to Ara Court. However, the



local police in collusion with the appellants did not institute any case nor got examined the injured persons.

5. Learned counsel appearing for the appellants challenged the impugned judgment of conviction and sentence order arguing that admittedly, the appellants had lodged Piro P.S. Case No. 120 of 1991 against the prosecution party in respect of the alleged occurrence and in the aforesaid Piro P.S. Case No. 120 of 1991, the complainant Binder Singh Yadav @ Rabindra Singh Yadav as well as others were convicted vide judgment of conviction and sentence order dated 01.07.1995 and 03.07.1995 respectively passed by the then 9th Additional Sessions Judge, Ara in Sessions Trial No. 45 of 1992 and the aforesaid fact was brought to the notice of learned trial court in course of argument but the learned trial court did not pay any heed and erroneously convicted and sentenced the appellants for the murder of Samhut Yadav. Learned counsel for the appellants, further, submitted that in course of trial, prosecution witnesses made contradictory statements and moreover, the prosecution party filed complaint petition after 3 to 4 days of the alleged occurrence when they got knowledge about institution of Piro P.S. Case No. 120 of 1991. Learned counsel for the appellants, further, submitted that the learned trial court based his judgment on the documents which were not admissible in evidence and moreover, the doctor, who is said to have examined the injured persons of this case, was not examined in



course of trial and, therefore, the appellants could not get an opportunity to cross examine the above stated doctor. He, further, submitted that prosecution also failed to prove the place of occurrence and as a matter of fact, there were several infirmities in the prosecution case but even then, the learned trial court convicted and sentenced the appellants passing impugned judgment of conviction and sentence order which is not in accordance with law.

6. On the other hand, learned Additional Public Prosecutor appearing for the State supported the impugned judgment of conviction and sentence order arguing that learned trial court has passed a well thought judgment and there is no need to interfere into the impugned judgment of conviction and sentence order. He, further, submitted that prosecution witnesses have well proved the place of occurrence, manner of occurrence as well as participation of the appellants in the alleged crime and there was nothing before the court below to disbelieve the prosecution story.

7. Having heard the contentions of both the parties, I went through the record. I find that to prove its case, prosecution examined PW-1 Sipahi Singh @ Sipahi Singh Yadav, PW-2 Ram Kishun Yadav, PW-3 Devendra Singh, PW-4 Binder @ Rabindra Singh Yadav and PW-5 Bhuti Yadav and all the aforesaid prosecution witnesses claimed themselves to be eye witness of the alleged occurrence. PW-6 Tarkeshwar Prasad is a formal witness who has



proved the complaint petition as Ext. 3.

8. PW-1 Sipahi Singh @ Sipahi Singh Yadav claimed that on 28.07.1991 at about 5:00 P.M. he along with PW-5, PW-2, PW-3, PW-4 and deceased Samhut Yadav was making ridge in his field. In the meantime, appellants and other accused came there and appellant Akchay Kumar Singh opened fire of his gun which hit Bihari Singh. This witness, further, stated that appellant Bhagwan Singh hurled farsa on Devendra Singh but he retreated as a result whereof farsa blow did not hit him. He, further, claimed that Dharikchan Singh assaulted him by lathi causing injury on his hand and Chandrama Singh and Bihari Singh assaulted Bhuti Singh by lathi causing injury on his head. He, further, claimed that Birendra Singh and Kapil Singh assaulted Devendra Singh by lathi. This witness, further, claimed that when he as well as others started fleeing from there, again on the instigation of Akshay Kumar Singh, Daroga Singh opened fire which hit to Samhut Singh as a result whereof he having sustained firearm injury died on the spot. This witness supported the contents of complaint petition stating that after the occurrence, the deceased was taken to Hasan Bazar police station where he made his ferdbeyan before the police but subsequently, he came to know that no case was instituted against the appellants and other accused. On being cross examined by the defence, this witness admitted that he was convicted and sentenced to life imprisonment for the murder of Bihari Singh



Yadav but he was never prosecuted nor convicted for the murder of Samhut Singh. He, further, admitted that in counter case, all the witnesses of this case were convicted. This witness also admitted that in Sessions Trial No. 45 of 1992, appellant Akchay Kumar was informant. This witness, further, admitted that at the time of alleged occurrence, he was carrying spade in his hand. This witness stated at para 6 of his cross examination that there is no land of appellants towards east of his land. This witness stated that he had given ferdbeyan to police and his ferdbeyan was recorded upon which he put his signature. Again, this witness stated that on the next day of the alleged occurrence he had lodged case before the Chief Judicial Magistrate also but he had orally lodged his case before Chief Judicial Magistrate. This witness, further, admitted that after three days of the alleged occurrence, he was examined by the jail doctor. This witness, further, admitted at para 12 of his cross examination that there was ridge in his field prior to the alleged occurrence. This witness, further, admitted at para 13 of his cross examination that he could not see as to whether the assailant had made firing in standing or sitting position. This witness also expressed his inability to say the khata and plot number of the field over which the alleged occurrence is said to have taken place.

9. PW-2 Ram Kishun Yadav also stated that on the alleged date of occurrence while they were making ridge in their field, the



appellants encircled them and all the appellants started assaulting Devendra by lathi. He, specifically, stated that Chandrama Yadav assaulted the deceased Bihari Singh Yadav whereas Daroga Yadav fired which hit Samhut Yadav. This witness, further, claimed that appellant Akchaya Kumar also fired on Sipahi Singh (PW-1) but, fortunately, Sipahi Singh escaped unhurt and the aforesaid firing hit Bihari Singh Yadav. This witness admitted that he as well as others have been convicted in murder case of Bihari Singh Yadav and Samhut Yadav. This witness also admitted the counter case filed by appellant Akchaya Kumar Singh Yadav. This witness also admitted that he surrendered before the court in counter case after 15 days of the alleged occurrence but between the aforesaid period, he did not give any petition to any competent authority in connection with the alleged occurrence. This witness admitted at para 13 of his cross examination that field of appellants is adjacent east to his field. This witness has been cross examined at length by the defence.

10. Almost, similar statement has been made by PW-3 Devendra Singh and this witness stated that Kapil Singh and Birendra Singh had assaulted him by means of lathi. This witness admitted the counter case and also admitted that in counter case he has been convicted and sentenced to life imprisonment. This witness also stated that he had not seen any firearm injury on the person of the deceased Bihari Singh Yadav. This witness also stated that after 2-3 days of the



alleged occurrence, his younger brother lodged complaint case.

11. PW-4 Binder @ Rabindra Singh Yadav also supported the prosecution case and stated the manner in which the alleged occurrence is said to have taken place. This witness, specifically, stated that Daroga Yadav shot fire of his double barrel gun which hit on the chest of deceased Samhut Yadav. This witness also stated that PW-1 Sipahi Singh Yadav gave his statement before the police but he was taken into custody by the police and no case was instituted by the police on his statement and thereafter, complaint case was filed in court. This witness also admitted that he as well as others were convicted in Sessions Trial No. 45 of 1992. This witness admitted that there was field of appellant Akshaya Kumar towards adjacent east to his field.

12. PW-5 Bhuti Yadav also supported the prosecution case and made almost similar statements as made by the PW-1, PW-2 and PW-4.

13. PW-6 Tarkeshwar Prasad is a formal witness who has proved the complaint cum protest petition, which has been marked as Ext. 3.

14. As I have already stated that the appellants brought certified copy of charge sheet of Piro P.S. Case No. 120 of 1991 (Ext. A) as well as certified copy of judgment passed in Sessions Trial No. 45 of 1992 (Ext. B) on record and they took stand in course of trial



that it was prosecution party of the present case who committed the murder of the deceased Bihari Singh Yadav as well as Samhut Yadav. Furthermore, the appellants claimed in their defence that while the prosecution party was making ridge encroaching their lands, they went there and forbade them to do so but the prosecution party assaulted them and made firing causing death of Bihari Singh Yadav and Samhut Yadav, who was grazing his buffalo near the place of occurrence. Therefore, the presence of the appellants as well as PW-1 to PW-5 on the place of occurrence is admitted and it is also an admitted position that deceased Bihari Singh Yadav and deceased Samhut Yadav having sustained firearm injury died in the aforesaid occurrence.

15. It is pertinent to note here that complainant Binder Singh @ Rabindra Singh Yadav (PW-4) claimed in his complaint petition that two persons died in the alleged occurrence due to firing made by the appellants but learned trial court framed charges against the appellants only for the murder of deceased Samhut Yadav and no charge was framed against the appellants for causing the murder of deceased Bihari Singh Yadav. Similarly, no question regarding the murder of deceased Bihari Singh Yadav was asked by the learned trial court from the appellants at the time of recording their statements under Section 313 of the Cr.P.C. The impugned judgment goes to show that learned trial court pronounced the impugned judgment only



taking notice of the death of deceased Samhut Yadav. Moreover, as I have already stated that presence of both the parties over the place of occurrence is not in dispute and there is only controversy between the parties as to which of the parties was aggressor. The PW-4 and other witnesses claimed that it was appellants who having armed with firearms and other weapons came there and assaulted them and made firing while they were carving out ridge in their field and in that course, they sustained injury and similarly, deceased Bihari Singh Yadav and deceased Samhut Yadav also sustained firearm injury and died later on. The impugned judgment goes to show that deposition of Dr. Ashok Kumar Chowdhary recorded in counter case bearing Sessions Trial No. 45 of 1992 was brought on record and got exhibited as Ext. 2 but admittedly, the aforesaid Dr. Ashok Kumar Chowdhary was not examined in the present case. Neither the original injury reports of injured persons of the present case were exhibited in the present case nor the concerned Doctor, who had examined the injured persons of this case, was examined by the prosecution. The lower court's record goes to show that photostat copy of injury report of injureds of this case has been exhibited as Ext. 4 without following the procedure of law. The learned trial court used the deposition of Dr. Ashok Kumar Chowdhary which has been recorded in Sessions Trial No. 45 of 1992 in the present case. The aforesaid fact clearly goes to show that the appellants did not get any opportunity to cross examine



the aforesaid Dr. Ashok Kumar Chowdhary. Moreover, the deposition of a witness recorded in a case cannot be used in another case as substantive piece of evidence. The non examination of Dr. Ashok Kumar Chowdhary and non production of injury reports of injured persons of the present case in accordance with law as well as non examination of the concerned Doctor who had examined the injureds of this case was fatal to the prosecution case because the injury reports of so-called injureds of this case is a very valuable document and the absence of injury report of so-called injureds of this case creates doubt regarding the manner of occurrence as claimed by the prosecution. Therefore, in my view, the learned trial court committed error in relying upon Ext. 2, the deposition of Dr. Ashok Kumar Chowdhary recorded in Sessions Trial No. 45 of 1992 as well as Ext. 4, the photostat copy of injury report.

16. The claim of prosecution is that the prosecution party was making ridge in their field in accordance to measurement done by the Amin of consolidation but appellants attacked on them. Admittedly, no measurement report has been brought on record nor the concerned Amin was examined on behalf of the prosecution. In absence of any measurement report as well as statement of concerned Amin, it is difficult to believe upon the above stated story of prosecution, especially, in the circumstance, when it is specific stand of the appellants that the prosecution party was making ridge



encroaching their field and when they forbade them, the prosecution party assaulted them and killed two persons. Therefore, in the aforesaid circumstance, I am of the view that prosecution failed to establish beyond all shadow of reasonable doubt that it were appellants who were aggressor.

17. It is an admitted position that just after the alleged occurrence, the appellant Akshay Kumar Yadav lodged Piro P.S. Case No. 120 of 1991 against the prosecution party for murder of deceased Bihari Singh Yadav and Samhut Yadav and in the aforesaid case, after due investigation police submitted charge sheet and the prosecution party were put on trial in Sessions Trial No. 45 of 1992 and subsequently, they were convicted for commission of murder of deceased Bihari Singh Yadav and Samhut Yadav. It is also an admitted position that after three days of the alleged occurrence, the PW-4 filed complaint petition which was sent to police station where Piro P.S. Case No. 83 of 1992 was registered. However, it is also an admitted position that after due investigation police submitted final form finding the aforesaid case untrue and after that PW-4 filed protest petition against the investigation of police and on the basis of aforesaid protest petition, the court proceeded to enquire the matter under Section 202 of the Cr.P.C. and appellants were summoned to face trial. Furthermore, PW-1 claimed that he had made statement before the Officer in charge of Hasan Bazar police station but no case



was registered on the basis of his statement and he was detained and arrested by the police on the same day. However, it is an admitted position that remaining so-called eye witnesses and injured persons were not in custody of the police and there is nothing on the record to show that the aforesaid injured persons as well as eye witnesses made any attempt to make complain before the higher officials of the police and after three days of the alleged occurrence, they filed complaint petition when they came to know about the institution of Piro P.S. Case No. 120 of 1991. Therefore, the aforesaid circumstance also creates doubt about the genuineness of the prosecution case.

18. Moreover, there are several contradictions in the depositions of prosecution witnesses in respect of manner of occurrence and place of occurrence and the aforesaid contradictions cannot be treated as minor contradictions, particularly, in the circumstance when the police case had already been lodged by the appellants against the prosecution party for the alleged occurrence. Therefore, in the aforesaid circumstance, I am of the view that learned trial court committed error in convicting and sentencing the appellants and the impugned judgment of conviction and sentence order cannot sustain in the eye of law.

19. On the basis of aforesaid discussions, this criminal appeal is allowed and the impugned judgment of conviction and sentence order are, hereby, set aside. The appellants are acquitted of



the charges. The appellants are on bail. They are discharged from the liabilities of their bail bonds.

(Hemant Kumar Srivastava, J)

Rajendra Kumar Mishra, J I agree

(Rajendra Kumar Mishra, J)

SHAHZAD/-

AFR/NAFR	A.F.R.
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