

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.107 of 2013

Arising Out of PS.Case No. -111 Year- 2009 Thana -BIHARIGANJ District- -

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Arun Yadav, son of Sri Jhimal Prasad Yadav, resident of Village and P.S.-
Gwalpara, District- Madhepura. Appellant.

Versus

The State of Bihar. Respondent.

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Appearance :

For the Appellant/s : Mr. Anant Kumar, Advocate
Mr. Ranbir Singh, Amicus Curiae
For the Respondent/s : Mr. Z. Hoda, APP

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT

Date: 31-10-2018

Heard learned counsel for the appellant,
learned amicus curiae and learned APP for the State on this
criminal appeal.

2. This criminal appeal has been preferred
against the judgment and order of conviction dated
12.12.2012 and order of sentence dated 19.12.2012 passed
by the *Ad hoc* Additional Sessions Judge-III, Madhepura in
Sessions Trial No. 35 of 2010/35A of 2010, arising out of
Bihariganj P.S. Case No. 111 of 2009, whereby the learned
trial Court acquitted the accused Mukesh Kumar from the
charges levelled against him while convicted the accused
Arun Yadav under Section 353 and 307/34 of the Indian
Penal Code and Section 27 of the Arms Act and sentenced
him to undergo R.I. for five years and also slapped him with



a fine of Rs.2000/- and in default of payment of fine to further undergo R.I. for three months under Section 307 Indian Penal Code and further sentenced him to undergo R.I. for two years under Section 353 IPC and also sentenced him to undergo R.I. for three years under Section 27 of the Arms Act. All the sentences were directed to run concurrently.

3. Factual matrix of the case is that Bihariganj P.S. Case No.111 of 2009 was instituted under Section 353, 307/34 of the IPC and Section 27 of the Arms Act against the accused Arun Yadav, Shyam Dev Yadav and Mukesh Kumar on the basis of self statement of S.I. Pankaj Kumar Singh, SHO of P.S. Bihariganj recorded by himself on 24.09.2009 at 9:00 AM at village Pararia with the allegation in succinct that on 24.09.2009 at 04:00 PM Incharge Task Force, namely, S.I. Vijay Singh along with police force arrived at his Police Station and divulged him about hiding of the hardcore criminal, namely, Arun Yadav in the village Pararia as per the secret information. On the said information, he along with the raiding party proceeded at 05:00 PM in verification of the matter and when they arrived near Fatehpur School at 07:15 PM three persons started proceeding towards the paddy field from the road near said



school. On asking to halt, they started resorting firing upon the police party. Finding themselves encircled by the accused his colleague Pankaj Kumar and Amit Kumar Pathak also resorted firing in retaliation. They also asked the accused persons to surrender giving their identification but in vain and the accused persons taking benefit of the paddy field intruded into the fence and dense orchard resorting firing. They, however, forced one of the accused persons to surrender. Responding the firing sound villagers also congregated there. Police party gave their search before the two independent witnesses, namely, Kameshwar Jha and Chandra Kishore Jha and searched the person of the surrendered accused and recovered a loaded country made pistol and one live cartridge from his possession. The apprehended accused disclosed his identity as Arun Yadav and also disclosed the names of his fleeing accomplices as Shyam Dev Yadav and Mukesh Kumar. The accused persons resorted 10-12 rounds of firing while the police party resorted nine rounds of firing in the said shootout, but empty cartridges could not be traced out due to mud and water in the paddy field.

4. Aforesaid case was investigated by the



police and on conclusion of the investigation, I.O. submitted charge-sheet against the accused Arun Yadav under Section 353 & 307/34 of the IPC and Section 27 of the Arms Act, keeping the investigation pending against the other accused persons. Subsequently, the police submitted supplementary charge-sheet against the accused Mukesh Kumar keeping the further investigation pending against the remaining accused.

5. On receiving the charge-sheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence against the aforesaid accused and committed the case to the Court of Sessions and after commitment and on transfer finally the case came in the seisin of *Ad hoc* Additional Sessions Judge-III, Madhepura, for trial.

6. Charge against the accused Arun Yadav and Mukesh Kumar was framed under Section 353/34, 307/34 of the Indian Penal Code and Section 27 of the Arms Act. Charge was read over and explained to them by the Court to which they pleaded not guilty and claimed to be tried.

7. During the course of trial, in ocular



evidence, the prosecution has examined altogether nine prosecution witnesses, namely, Constable Pankaj Kumar Yadav as P.W.1, S.H.O., Udakishunganj Vijay Kumar Singh as P.W.2, Constable Amit Kumar Pathak as P.W.3, Chandra Kishore Jha as P.W.4, Kameshwar Jha as P.W.5, informant S.I. Pankaj Kumar as P.W.6, S.I. Sanjay Kumar as P.W.7, Bodyguard of S.P. Rail, Muzaffarpur Bhaskar Kumar Jha as P.W.8, and S.H.O Supaul Brahmdeo Singh as P.W.9. Out of the aforesaid witnesses P.Ws. 4 and 5 happens to be seizure list witnesses and P.W.7 is formal witness who has proved the confessional statement of the accused Arun Yadav and seizure list. The prosecution has also filed and proved several documents by way of documentary evidence.

8. Statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming themselves to be innocent. The accused persons neither adduced any ocular nor documentary evidence in buttress of their case.

9. After hearing the parties and perusing the record, the learned trial court passed the aforesaid judgment



and order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convict Arun Yadav has preferred this Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellant beyond all reasonable doubts or not.

12. It is submitted by learned counsel for the appellant and learned amicus curiae that the seizure list witnesses, namely, P.W.4 Chandra Kishore Jha and P.W.5 Kameshwar Jha have turned hostile, hence the seizure of arms and ammunitions from the possession of the appellant does not stand established by the prosecution. As per the prosecution case, number of villagers had congregated at the place of occurrence responding firing sound but none of the aforesaid witnesses have been examined by the prosecution rather all the witnesses barring seizure list witnesses are official witnesses, and barring P.W. 7 all are members of raiding party and they are interested witnesses of the case



and they have falsely implicated the appellant in the case merely because the appellant is having a criminal antecedent. I.O. has also not been examined by the prosecution. It is further submitted that though as per the prosecution case and the witnesses' account 10-12 rounds of firing was resorted by the accused persons and 9 rounds of firing by the police party but the police has not seized any empty cartridge from the place of occurrence which goes to rule out the prosecution case. Thus the prosecution has utterly and miserably failed to substantiate the prosecution case by adducing trustworthy and reliable evidence. Hence, the aforesaid order of conviction and sentence passed by the learned trial court is liable to be set aside and the appellant is entitled to be acquitted.

13. On the other hand, learned APP advocating the correctness and validity of the impugned judgment and order of conviction and sentence submitted that the informant P.W.6 Pankaj Kumar has supported the prosecution case in toto and other witnesses, who happen to be members of the raiding party and were present at the place of occurrence at the time of occurrence have also corroborated the occurrence and recovery of arms and



ammunitions from the possession of the appellant. It is further submitted that though the seizure list witnesses turned hostile but the factum of the search and seizure has sufficiently been established by the official witnesses present at the place of occurrence at the time of occurrence and the appellant has not established any animosity with them, hence mere being the official witnesses their testimonies cannot be thrown out. It is also submitted that though several rounds of firing was made at the place of occurrence but no empty cartridge was recovered from there but mere non-recovery of empty cartridges from the place of occurrence does not rule out the prosecution case. As as per the prosecution case and the witnesses' account there was paddy crops of the height of two and half feet and there was mud and water at the place of occurrence and despite best efforts made by the police personnel they could not trace out the empty cartridge and the learned trial Court correctly appreciating the facts and evidence available on record has rightly passed the aforesaid judgment and order of conviction and sentence which is liable to be upheld and this appeal is shorn of merit and is liable to be dismissed.

14. From perusal of the record, it appears



that in substantiation of prosecution case prosecution has examined the informant P.W.6 Pankaj Kumar and other members of the raiding party namely P.W.1 Constable Pankaj Kumar, P.W.2 Vijay Kumar, P.W.3 Amit Kumar Pathak , P.W.8 Bhaskar Kumar Jha and P.W.9 Brahmdeo Singh who have unanimously stated in their respective examination-in-chief in consonance with the prosecution case that on getting secret information about hiding of the accused Arun Yadav in village Pararia the informant along with aforesaid witnesses proceeded to village Pararia in verification of the matter and on the way near Fatehpur school three persons started proceeding towards paddy field from the road seeing the police party. They asked them to halt but they started resorted firing upon police party and opened around 10-12 rounds of firing upon the police party and in retaliation Constable Amit Kumar Pathak (P.W.3) and Constable Pankaj Kumar (P.W.4) resorted nine rounds of firing. They anyhow apprehended one of the accused namely Arun Yadav while two others managed to escape. Responding the firing sound villagers congregated there and the police gave their search before the two independent witnesses namely, Chandra Kishore Jha (P.W.4) and



Kameshwar Jha (P.W.5) and then searched the person of apprehended accused Arun Yadav and recovered a loaded country made pistol and a live cartridge from his person and prepared the seizure list before the aforesaid witnesses. A copy of the aforesaid seizure list was also furnished to the apprehended accused Arun Yadav. Apprehended accused disclosed the name of his fleeing accomplices as Mukesh Kumar and Shyam Dev Yadav. Aforesaid witnesses were subjected to lengthy cross-examination but from perusal of their cross-examination I find that nothing convincing and cogent has been elicited in their cross-examination having potential to rule out their aforesaid testimony and the aforesaid witnesses stood the test of cross-examination. Though the said witnesses happens to be police personnel and official witnesses but mere being official witnesses there testimonies cannot be discarded out rightly unless and until the accused establishes having any animosity with the aforesaid witnesses. But the appellant has utterly and miserably failed to substantiate any animosity with the aforesaid official witnesses. So the question arises as to why the aforesaid official witnesses will falsely implicate the appellant in this case which



remains unanswered.

15. From perusal of the seizure list marked as Ext.-1/2 it appears that the aforesaid seizure list was prepared before two independent witnesses, namely, P.W.4 Chandra Kishore Jha and P.W.5 Kameshwar Jha and it bears the signature of the aforesaid witnesses. A copy of the said seizure list was furnished to the accused Arun Yadav. Though the aforesaid seizure list witnesses examined as P.W.4 and P.W.5 in this case have turned hostile and have not supported the factum of seizure and recovery of arms and ammunition from the possession of the appellant but P.W.4 Chandra Kishore Jha has identified his signature on the seizure list and has also stated that he has put his signature on the said seizure list out of his sweet will. Likewise P.W.5 Kameshwar Jha has also identified his signature and that of P.W.4 on the seizure list and other official witnesses have unanimously stated about recovery of the loaded country made pistol and live cartridge from the possession of the accused at the place of occurrence and the seizure of the aforesaid arms and ammunitions and preparation of seizure list before them hence turning of the aforesaid independent seizure list witnesses hostile, in my



considered opinion, is not going to shatter the prosecution case. As per the prosecution case, the police party made search of the person of the appellant after giving their search before the aforesaid two independent witnesses namely P.W.4 and 5 and P.Ws. 1, 2, 3, 6 and 8 have unanimously stated that before making search of the person of the appellant they gave search of their person before the independent witnesses present at the place of occurrence at the time of occurrence. Thus, search and seizure of the arms and ammunition from the possession of the appellant stands sufficiently established by the prosecution.

16. Though as per the prosecution case and witnesses' account 10-12 rounds of firing was made by the accused persons while 9 rounds of firing was made by the police party in the shootout but no empty cartridge was recovered from the place of occurrence. But mere non-recovery of empty cartridges from the place of occurrence, in my considered opinion, is not going to affect the merit of the case by any stretch of imagination. As as per the prosecution case itself as adumbrated in the self statement of the informant the empty cartridges could not be recovered due to presence of mud and water in the paddy



field. In consonance to the aforesaid prosecution case P.W.1 has stated in para-17 of his cross-examination that there was paddy crops up to the height of waist and water in the said field where the shootout took place. P.W.2 has stated in para-5 of his cross-examination that at the place of occurrence there was paddy crops some up to the height of waist and some above that height and crop of managera up to the height of person. In Para-14 of his cross-examination, he has further stated that as there was paddy crop and the field was filled with water, no empty cartridge could be traced out. In Para-44 of his cross-examination, he has also stated that the field was filled with water and was having ditches. P.W.3 Constable Amit Kumar Pathak in Para-8 of his cross-examination has stated that there was paddy field and forest and bush at the place of occurrence and they could not trace out the empty cartridge despite making effort. Informant P.W.6 Pankaj Kumar in Para-19 and 20 of his cross-examination has stated that there was paddy crops up to the height of one and half feet to two feet and dense manager crops up to the height of 8 to 10 feet in the fields at the time of occurrence. P.W.8 Bhaskar Kumar Jha has stated in Para-49 of his cross examination that there was



crops of manegara up to the height of 8 to 10 feet besides paddy crops at the place of occurrence. The aforesaid statement of the said witnesses indicates that at the place of occurrence there was paddy crop of one and half feet to two feet and manegara crops of 8 to 10 feet in the fields and the fields were filled with water and mud and were having ditches and despite the efforts made by the police party they could not trace out the empty cartridges. Thus, the prosecution appears to have succeeded to establish its case that due to presence of the paddy and manegara crops of the height of 8 to 10 feet and mud water and ditches in the fields which is the place of occurrence the empty cartridges could not be traced out.

17. Though the I.O. of the case has not been examined by the prosecution but the defence has utterly and miserably failed to substantiate as to what prejudice has been caused to it due to non examination of the I.O., and in my considered opinion, non-examination of I.O. in the case is not going to affect the merit of the case.

18. In the facts and circumstances of the case, I find and hold that the prosecution has successfully



substantiated its case that accused Arun Yadav resorted firing upon the police party when they arrived at the place of occurrence in course of verification of the information of presence of the said accused in the village and any how he was apprehended by them and arm and ammunition was recovered from his possession and has thus succeeded to bring home the charges levelled against the appellant beyond all reasonable doubt. Hence, the aforesaid judgment and order of conviction passed by the learned trial Court against the appellant does not warrant any interference of this Court and is, accordingly, upheld.

19. So far as sentence is concerned, from perusal of the record, it appears that the appellant was aged about 22 years at the time of occurrence and has faced the rigors of trial for a considerable period of nine years and has already undergone custody of three years eight months and twelve days, hence, considering the facts and circumstances of the case, the sentence awarded by the learned trial Court is reduced to the period of custody undergone by the appellant, which, in my considered opinion, would subserve the ends of justice. Accordingly, this appeal is dismissed with the aforesaid reduction in the



sentence awarded by the learned trial court.

20. Let a copy of the first and the last page of this judgment be handed over to the learned amicus curiae. Learned amicus curiae be paid prescribed fee by the Patna High Court Legal Services Committee.

(Prakash Chandra Jaiswal, J)

Trivedi/-

AFR/NAFR	AFR
CAV DATE	NA
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