

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.753 of 2012

Arising Out of PS. Case No.-318 Year-2007 Thana- MADHEPURA District- Madhepura

Janardan Yadav, S/o late Phudan Yadav, R/o village Dighra, Dih Tola, P.S. and District Madhepura

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

Criminal Appeal (DB) No. 608 of 2012

Arising Out of PS. Case No.-318 Year-2007 Thana- MADHEPURA District- Madhepura

1. Upendra Yadav, S/o late Phudan Yadav
2. Chandeshwari Yadav, S/o late Phudan Yadav
Both S/o late Phudan Yadav, R/o village Dighra, Dih Tola, P.S. and District Madhepura
3. Birendra Yadav, S/o late Duni Yadav, R/o village Sirhi, P.S. Sonbarsa, District Madhepura

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In Both Criminal Appeals

For the Appellant/s	:	Mr. Uday Chand Prasad, Advocate
	:	Mr. Manoj Kumar, Advocate
For the State	:	Mr. Ashwini Kumar Sinha (APP)
	:	Mr. Dr. Mayanand Jha (APP)

CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

and

HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date : 02-08-2018

We have heard parties and have perused the records
of this case.



The appellants have preferred these appeals assailing the judgment of conviction and order of sentence dated 30.04.2012 passed by the Additional Sessions Judge-FTC-IV, Madhepura in Sessions Trial No. 34 of 2008 arising out of Madhepura P.S. Case No.318 of 2008 by which appellants have been convicted for the offences punishable under Sections 302, 323 read with 149 of the Indian Penal Code and 27 of the Arms Act and they have been sentenced to undergo rigorous imprisonment for life under Section 302 of the Indian Penal Code with a fine of Rs. 5,000/-each. They have further been sentenced to undergo rigorous imprisonment for six months under Section 323 read with Section 149 of the Indian Penal Code. They have also been sentenced to undergo rigorous imprisonment for two years with a fine of Rs. 1,000/- each under Section 27 of Arms Act. In default of payment of fine, to undergo further imprisonment for six months. However, all the sentences have been directed to run concurrently.

The prosecution case, in brief, is that on 26.10.2007 at about 5:00 PM, the informant after giving grass to his cattle was sitting on his 'Darwaza' where Kamleshwari Yadav was also there and when both were talking, he saw 20 persons coming from east and south and, out of them, five were armed with big



gun and the rest were armed with weapons, such as, lathi and Farsa and they were proceeding towards his 'Darwaza'. Thereafter, seeing that the enemy was coming, the informant ran away from there and hid himself by the side of 'Gahwar of Dharmaraja' and his uncle Kamleshwari Yadav ran away towards his house. The accused Upendra Yadav and Birendra Yadav ordered to fire on Kamleshwari Yadav upon which Janardan Yadav fired upon him by gun. As a result of which, Kamleshwari Yadav sustained injury and became restless and, thereafter, all the three ran towards east. When the informant saw towards east, he got that rest accused persons were assaulting his father Bindeshwari Yadav and his cousin Mithlesh Yadav by lathi. After assault, all the accused persons ran away towards east and, at the time of escaping, they dismantled the 'phoos shed' and also took three chairs. He alleged that the occurrence was witnessed by Basudeo Yadav, Bhujangi Yadav, Mahendra Yadav and Anil Yadav. The cause of occurrence has been disclosed to be land dispute.

On the basis of aforesaid fardbeyan, the FIR was registered under Sections 147, 148, 149, 323, 427, 379, 302 of the Indian Penal Code and 27 of the Arms vide Madhepura P.S. Case No.318 of 2008. The police took up the investigation of



the case. After investigation, the police submitted charge sheet against the appellants. Thereafter, the Chief Judicial Magistrate took cognizance and committed the case to the court of sessions, where charges were framed, to which, the accused persons pleaded not guilty. Thereafter, trial started against the appellants.

During trial, the prosecution has examined altogether twenty three witnesses in support of its case. P.W. 1 is Vasudev Yadav, P.W. 2 is Arun Prasad Yadav, P.W. 3 is Mohan Yadav, P.W. 4 is Dr. Ashok Kumar Verma, P.W. 5 is Ajay Kumar Yadav, P.W. 6 is Shambhu Prasad, P.W. 7 is Kama Devi, P.W. 8 is Anil Yadav, P.W. 9 is Amin Sada, P.W. 10 is Jitendra Yadav, P.W. 11 is Suresh Prasad. P.W. 12 is Mithilesh Yadav, P.W. 13 is Pradeep Kumar Singh, P.W. 14 is Prabhash Kumar Yadav, P.W. 15 is Bindeshwari Yadav, P.W. 16 is Mahendra Yadav, P.W. 17 is Manoj Yadav, P.W. 18 is Shatrughan Prasad Yadav, P.W. 19 is Bhushan Gupta, P.W. 20 is Bauku Yadav, P.W. 21 is Md. Inamullah, P.W. 22 is Dr. Raju and P.W. 23 is Sidheshwar Paswan.

The defence has not examined any witness in support of its case.

The trial court after hearing learned counsel for the parties and considering the evidence on record came to the



conclusion that the prosecution has been able to prove the charges against the appellants and, as such, the judgment of conviction and order of sentence have been passed.

Now this Court is required to reappraise the prosecution evidence to see as to whether the prosecution has been able to substantiate its case beyond the shadow of all reasonable doubts?

The informant, who has been examined himself as P.W. 18, has portrayed himself as an eye witness in the F.I.R. as well as in his testimony. As per him, he was sitting along with his uncle (deceased Kamleshwari Yadav). When, he was present on his “Darwaza” then he saw that about 20 persons holding gun, lathi and other weapons accosted them. Then he started running towards his house. His uncle also followed him. He has stated in the F.I.R. that he hid himself besides the “Gahwar” (house of deity of the family), then he saw that Janardan Yadav fired from his gun injuring his uncle Kamleshwari Yadav (deceased) and he fell down. Thereafter, some of them assaulted his father Bindeshwari Yadav and his cousin also and he had named several persons in the F.I.R. He has also stated that this occurrence was seen by Basudeo Yadav (examined as P.W. 1), Mahendra Yadav (examined as P.W. 16) and Anil Yadav



(examined as P.W. 8). He has further stated in his fardbeyan that his neighbour Manoj Kumar Yadav and Dinesh Yadav has signed as F.I.R. witnesses but none of the them has been portrayed as eye witness in the F.I.R. save and except the persons as stated above. In his testimony also, he has supported the F.I.R. but has stated that the deceased Kamleshwari Yadav, after receiving the gun shot injury fell down on the “Chaukhat” (frame of door) of his room. It has to be understood that the house of the informant and the deceased consisted of a ‘Darwaza’ i.e. the place outside the house where people usually sit and cattles are kept. Thereafter, there was entry to the house and in the midst of the courtyard, there was a pucca house devoted to the family deity. There were room of the family members. According to the informant, the deceased fell down at the ‘Chaukhat’ (frame of the door) of his room as the persons who were chasing him entered into the courtyard and fired. He has not stated in his evidence as to the gun shot injury hit which part of the body of the deceased. He has stated in his cross-examination in para 7 that the house of the deity is just adjacent north of the room besides the courtyard of the deceased Kamleshwari Yadav. He said that he hid himself besides that the room of deity. At one place, he has stated that while he was



trying to escape towards his house, he did not hear gun shot firing but when he hid himself then he heard the sound of the gun shot and also saw the occurrence. At the same time, he stated that deceased Kamleshwari Yadav was also running towards his house behind him at a distance of about 2-3 Lagga i.e. about 10-15 ft. The question arises here that when the deceased was behind him, about 10-15 ft away and also ran towards the 'Gahwar' (deity of the house) and he himself hid was he in a position to see the occurrence?

We have perused the case diary and have found that the Investigating Officer has not prepared the 'Nazri Naksa' (spot map).

Second question which arises is as to whether a person who is running towards house and was being chased by the miscreants and he received bullet injury, could he had received it on his chest or in the natural circumstances he would have received the injury on his back? The informant is silent about this but other witnesses, for example, P.W. 1 has stated that he received injury on the right side of the chest whereas the postmortem report discloses that injury was on the left side. However, the doctor has opined that there is entry wound half inch diameter oval inverted lacerated wound, two inches left to



external angle of chest and the second injury is two inches diameter irregular everted lacerated wound on posterior auxiliary line at the level of angle of right scapula and on dissection both the injuries were found communicating to each other. Thus, the doctor has opined that injury No.1 is entry wound of the bullet injury, whereas, injury No. 2 is exit wound.

The question remains unanswered as to how a person who was fleeing/trying to escape seeing the miscreants who were bent upon to kill him could have received injury from a longer distance as it is stated that there was no charring or gun powder present around the entry wound meaning thereby that the fire was shot from a long distance. Question would be how it would hit the chest when the fire was shot from behind the persons who were running and trying to escape? This has been tried to be explained by P.W. 1 Basudeo Yadav, who has stated that at the time of entering the house the deceased Kamleshwari Yadav stopped and turned to see whether the accused persons were still coming or not at that point of time he was hit.

Again, a question would be whether this testimony of the P.W. 1 inspires confidence? None of the other witnesses have stated regarding the occurrence as stated by him that the deceased turned to see the accused persons and at that point of



time he was hit. Not even the informant has stated the same in his fardbeyan or in his testimony while being examined as P.W. 18. At one place, P.W. 1 has stated that he has said all the things about the occurrence including the manner of the occurrence etc. before the police also when this question was put to him. However, though such suggestions was made before him but this question was not asked from the Investigating Officer who has been examined as P.W. 21 but, since the case diary was available, we looked into the diary so as to ascertain ourselves whether testimony of this witness is inspirable or not and we found that before the police, he has stated that he saw miscreants and heard gun fire sound then he came out of his house then he was informed that people were saying that Kamleshwari Yadav (deceased) has been hit by bullet and Bindeshwari Yadav was screaming why he was assaulting him. This means that he has not seen the firing. He has not stated before the police that he has seen the firing or that the deceased turned and received gun shot injury on his chest. Apart from the above, he has also stated in paragraph 19 that his house and 'Darwaza' is separated from the house and 'Darwaza' of the deceased. At one place, he has stated that he remained at 'Darwaza' when the occurrence was going on and, further that he had heard 2-3 gun shot sound



which is case of nobody. All these facts raises serious doubt about this person being an eye witness to the occurrence.

P.W. 8, who is stated to be the eye witness in the fardbeyan, is a tendered witness. P.W. 9, is also a tendered witness. P.Ws. 2, 3, 19 and 20 have been declared hostile by the prosecution.

That apart, son of the deceased, who has been examined as P.W. 6, has stated in his evidence that his father (deceased) are three brothers and all of them have constructed their respective houses separately and all of them were living separately. This further raises a question about the informant being eye witness to the occurrence. As, according to the son of the deceased, everybody were living separately by constructing there separate houses. This witness has further stated that at the north of his house, there is a house of accused Janardan Yadav, in the south is house of Basudeo Yadav P.W.1, in the east there is house of Dobhi Yadav meaning thereby that the accused persons were also closed door neighbours of the deceased and P.W. 1 has clearly stated that there was existing civil and criminal disputes between the persons since long.

In the fardbeyan, Mahendra Yadav has also been shown as eye witness and he has been examined as P.W. 16. So far he is



concerned, his testimony reveals that he has not seen the actual occurrence of firing as he has stated that when he heard gun fire sound then he came to the courtyard and saw that the deceased has been hit by the bullet and had died then he asked the informant Satrudhan Yadav that who had killed him then he answered that Janardan Yadav had killed. So far as this part is concerned, he is merely a hearsay witness.

One of the important witness would be Manoj Yadav, is witness of the fardbeyan and is close relative of the deceased as he has said that his sister is married with the son of the deceased but, surprisingly, in the F.I.R., the informant has shown him as neighbour and not as a relation. In fact, this witness has stated in his evidence that his house is about one kilometers away from the house of the deceased. To justify his presence at the time of occurrence, he has stated that he along with his sister came to the house of the deceased in the evening and had stayed there in the night. He has tried to establish that he has seen the occurrence which was in the courtyard of the house but, at the same time, he has stated that he was also present at the 'Darwaza' along with the deceased and the informant which is not supported by the informant either in the fardbeyan or in his testimony. He has stated in paragraph 7 in his cross-examination



that when the accused persons came, he saw them from about 7-8 'Lagga' but he did not try to escape, whereas, the deceased Kamleshwari Yadav, Bindeshwari Yadav and his son escaped to the courtyard. He said that when everybody escaped then he came to the outer door of the house then he saw the gun fire sound. Now, it is to be seen whether this can be a natural conduct of a person. When the accused persons were coming fully armed to harm whether he will remain present even when all other persons escaped and then behind the accused persons he would come to the courtyard and see the occurrence? He also saw accused persons running away but nobody harmed him. In our view, this story does not inspire confidence. There is another reason to come to the conclusion as to why his story inspires no confidence, i.e., the testimony of the Investigating Officer who has been examined as P.W. 23. His testimony gives a new turn to the story as the Investigating Officer in paragraph 5 of his cross-examination has stated that on the fateful day, i.e., on 26.06.2007, in the morning, at about 7:30 AM, Manoj Kumar Yadav, (P.W. 17) came to the police station and gave information regarding the occurrence but strangely his statement was not recorded by the police though he was actually the first informant in this matter. This has not been disclosed by Manoj Kumar



Yadav in his evidence which means that he was trying to hide and suppress the actual fact. The testimony of P.W. 21, who is also the Investigating Officer in this matter, in particular paragraph 10 of his cross-examination further demolishes the claim of P.W. 17 to be an eye witness in this matter. He has stated that Manoj Kumar Yadav has not stated before him in his statement recorded under Section 161 of the Cr.P.C. that Upendra Yadav, Birendra Yadav, Chandeshwari Yadav, Shivnandan Yadav, Birendra Yadav and Janardan Yadav were recognized and identified by him. He has also not stated before him that he saw them running away after the occurrence and he has also not stated before the police that he has come in the evening of 25.10.2007 along with her sister at her Sasural which he had stated first time in the court in his evidence. This raises a serious question regarding his presence at the time of occurrence and being an eye witness. That apart, if he was actually present at the time of occurrence and was an eye witness, there was no reason for the informant not to disclose his name as an eye witness in his fardbeyan especially when he was such a close relative of the deceased.

Apart from the above, the Investigating Officer has also stated that the witness Mahendra Yadav and Bindeshwari Yadav



had not stated before him regarding the manner of occurrence and presence of the accused persons and that Janardan Yadav fired at Kamleshwari Yadav (deceased) in their respective statements recorded under Section 161 of the Cr.P.C.

Above all, P.W. 1 in paragraph 19 of his evidence has stated that the time of occurrence is about 5:00 AM in the morning. The police came there at about 7:00 AM and recorded his statement under Section 161 of the Cr.P.C. at 7:00 AM, whereas, the fardbeyan appears to have been recorded on 26.10.2007 at about 8:35 AM and the F.I.R. was registered at about 5:45 PM in the evening i.e. after much delay which is not explained by anyone. This also raises serious doubt regarding the manner of occurrence, recording of fardbeyan, recording of the statements of the other witnesses etc.

In our view, the evidence of so called eye witnesses does not inspire confidence as they had not stated anything before the police on earlier occasion which would be evident from the testimony of the Investigating Officer and they have first time taken such stand before the Court. For many other reasons also, which has been discussed and considered above, in our considered view, the appellants are fit to be given benefit of doubt in this matter.



As a result, both these appeals succeed. The judgment of the conviction and order of sentence are set aside. The appellants are acquitted of the charges. Since, the appellants of Cr. Appeal (DB) No.608 of 2012 are on bail, they are discharged from the liabilities of their bail bonds. Since the appellant of Criminal Appeal (DB) No.753 of 2012, namely, Janardan Yadav, is in custody, he would be required to be released forthwith, if not wanted in any other case.

(Dr. Ravi Ranjan, J)

(S. Kumar, J)

V.K.Pandey/-

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