

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.59 of 1995

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Pundeo Yadav @ Pundeo Yadava, Son of late Karmani Yadav, resident of
Village Bandaul, P.S. Guraru, District Gaya.

... .. Appellant/s

Versus

State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr.Aurangzeb Khan
For the Respondent/s : Mr.Pp

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA**

and

HONOURABLE MR. JUSTICE PARTHA SARTHY

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA)**

Date : 10-05-2019

The sole appellant faced trial in Sessions Trial No. 48 of 1994 (A.S.J.II)/ 503/1989 (S.J.) before the Court of 2nd Additional Sessions Judge, Gaya, and he was convicted for the offences punishable under Section 396 of the Indian Penal Code and was sentenced to undergo life imprisonment for the above stated offence by the impugned Judgment of conviction and sentence order dated 31.03.1995.

2. It is pertinent to note here that two other accused also faced trial along with the appellant in the aforesaid Sessions Trial No. 48 of 1994 and by the same impugned judgment, they were acquitted from the charges framed against



them for the offences punishable under Sections 396 and 412 of the I.P.C. and, similarly, the appellant was also acquitted from the charge framed against him for the offence punishable under Section 412 of the I.P.C.

The appellant being aggrieved by the above stated impugned judgment of conviction and sentence order dated 31.03.1995 preferred the instant appeal.

3. Briefly stated the prosecution case is that P.W.-6, namely, Ravindra Yadav, gave his fardbeyan to PW-10, Awadhesh Kumar, on 01.09.1988 at about 3.30 A.M. at his village-Mannaur to this effect that on the same day, at about 1.30 A.M. while, he was along with his other family members was sleeping in his house in between six hundred to seven hundred people raising slogans of “MCC Jindabad”, “Inclab Jindabad” and “Dara Singh Jindabad” came in his village and, out of them, some persons started pushing his main door whereas some persons went on Chappar of his house and tried to jump into his courtyard but he as well as his other family members started pelting bricks on the aforesaid persons, as a result whereof, they could not come into the courtyard of his house. The above stated persons were making fire. He further claims that the aforesaid persons were uttered that they would



take revenge of killing of their associate, Dara Singh. The above stated persons set his house on fire. The aforesaid persons succeeded to enter into his house. PW-6 further claimed that his brother, namely, Karu Yadav ran from his house but he was caught by the aforesaid persons and shot dead. The other inmates of the house were also assaulted by the miscreants by means of lathi and other weapons. The aforesaid persons committed loot of belongings of the house and they also committed loot in the house of other co-villagers and miscreants were flashing torches and, in the light of torches, P.W.-6 claimed that he as well as his other family members saw the aforesaid miscreants. P.W.-6 further claimed that some miscreants had covered their faces. He also claimed that miscreants had encircled the entire village and after committing the aforesaid occurrence, they left the village, raising slogans of “MCC Jindabad”.

4. On the basis of fardbeyan of P.W.-6, Guraru P.S. Case No. 36 of 1988 under Sections 147, 148, 149, 323, 324, 302, 380, 436, 341, 427 of the Indian Penal Code and 27 of the Arms Act was registered against six hundred to seven hundred unknown extremists.

5. P.W.-10 took the charge of investigation. He



submitted charge-sheet against the appellant and others.

6. The cognizance of offence was taken and the case was committed to the court of sessions, in usual way.

7. Accordingly, appellant and two others were put on trial. The appellant and two others stood charged for the offences punishable under Sections 396 and 412 of the Indian Penal Code. The appellant and others denied the charge and claimed to be tried.

8. In order to prove the charges, prosecution examined, altogether, 14 prosecution witnesses and also got exhibited some documents as documentary evidence. The statement of the appellant and others were recorded under Section 313 of the Cr.P.C., in which, they claimed their false implication but no evidence was adduced on behalf of defence.

9. Learned trial court after analyzing the prosecution evidence and having relied upon the testimonies of prosecution witnesses convicted the appellant whereas acquitted remaining accused in the manner as we have already stated.

10. Learned Amicus Curiae, Shri Prince Kumar Mishra, Advocate, assails the impugned judgment of conviction and sentence order arguing that the learned trial court failed to



appreciate the prosecution evidence in right perspective. He submits that according to prosecution case itself, the alleged occurrence took place in the mid night and the prosecution witnesses claimed to have identified the dacoits in the light of torches flashed by the dacoits. He submits that the aforesaid claim of prosecution witnesses does not appear to be probable as it was very difficult for prosecution witnesses to identify the dacoits/miscreants in the light of torches flashed by dacoits. In support of his above state of contention, he cited a decision **reported in 2019 (3) BLJR pg.-44**. By referring the aforesaid decision, learned Amicus Curiae submits that the aforesaid decision is based upon the decision of Hon'ble Apex Court rendered in the case of **Tamilselvam Vs. State** represented by **Inspector General of Police, Tamilnadu, reported in 2008(7) SC Cases 755**. He further submits that it is admitted case of the parties that the appellant as well as informant and other prosecution witnesses are co-villagers but it is surprising enough that PW-6 did not disclose the name of appellant when he got recorded his fardbeyan before P.W.-10. He, further, submits that similarly, the other witnesses also did not disclose the name of appellant in course of investigation. To fortify the above stated contention, he drew out attention towards the relevant



paragraphs of depositions of prosecution witnesses, in which, the attention of respective witnesses were drawn towards their previous statements recorded under section 161 of Cr.P.C. He submits that the aforesaid fact clearly goes to show that the prosecution witnesses improved the prosecution story in course of trial and for the first time, they disclosed the name of the appellant before the Court. He, further, submits that no-doubt, PW-6 as well as other prosecution witnesses claimed to have identified the appellant before the trial court but identification of appellant by P.W.-6 and other witnesses is meaningless because admittedly, appellant is co-villager of P.W.-6 as well as other prosecution witnesses. He, further, submits that P.W.-6 as well as other prosecution witnesses admitted in their respective statements that the brother of appellant was killed for which a criminal case was lodged and in the aforesaid criminal case, P.W.-6 as well as family members of some of the prosecution witnesses were made accused. He, further, submits that almost all the prosecution witnesses are related with each others and, therefore, the above stated fact goes to show that the prosecution witnesses are not only related with each others but they are also interested in the outcome of the present case. He, further, submits that admittedly, nothing was recovered from



the possession of the appellant and the above stated fact clearly suggests that the possibility of false implication of the appellant due to previous enmity cannot be ruled out and, therefore, in the aforesaid circumstance, the appellant is entitled for acquittal.

11. On the other hand, learned Additional Public Prosecutor supports the impugned Judgment of conviction and sentence order arguing that, in course of trial, not only P.W.-6 but other prosecution witnesses also claimed to have seen the appellant committing the alleged crime and, therefore, there is no need to interference into the impugned judgment of conviction and sentenced order.

12. Having heard the rival contentions of the parties, we went through the record along with Lower Court Records.

13. On perusal of evidences available on the record, we find that the factum of dacoity and murder is not in dispute and almost all the prosecution witnesses have supported the factum of dacoity and murder and, therefore, the questions which have to be determined as to whether the appellant had participated in the alleged dacoity and murder or not and as to whether the impugned judgment of conviction and sentence order is liable to be sustained or not.



14. As we have already stated that in course of trial, prosecution examined, altogether, 14 witnesses, out of them, only P.W-9, P.W.-10, P.W.-13 and PW-14 are not the witnesses on the point of occurrence as PW-9 is a formal witness, who has proved certain documents. PW-10 is Investigating Officer. P.W. 13, did postmortem examination on the dead body of the deceased and P.W.-14, had examined the injured.

15. P.W.-1, P.W.-2, P.W.-3, P.W.-4, P.W.-5, P.W.-6, P.W.-7, P.W.-8, P.W.-11 and P.W.12 claimed to have seen the alleged dacoity and murder.

16. P.W.-1, Ram Brat Yadav, supported the story of dacoity and murder and claimed that he had identified the appellant amongst the dacoits. P.W.-1 claimed that when appellant came on his Chappar and jumped from the aforesaid Chappar, he identified the appellant. P.W.-1, further, claimed that prior to alleged occurrence, appellant had given threatening to take revenge of murder of Dara Singh. This witness, further, claimed that prior to alleged occurrence, appellant and some unknown persons were listening songs near Devi Asthan. P.W. 1 admitted in his cross-examination that after two hours of the alleged occurrence, police came at the place of occurrence and



he gave his statements to police. This witness further claimed at paragraph 12 of his cross-examination that he had stated before the police that he had identified the appellant at the time of occurrence but P.W. 10 at para 20 of his cross-examination, admitted that P.W. 1 had not claimed before him to have identified the appellant at the time of alleged occurrence. P.W. 1, further, admitted to have made statement before the police that he had hidden himself in a room, out of fear but had not made statement that he could not see the face of miscreants. This witness, further, admitted at para 15 of his cross-examination that he had claimed before the police that he was of firm belief that the appellant was behind the alleged occurrence. This witness, further, admitted that he came out from the room after half an hour of departure of miscreants from the place of occurrence. This witness, further, admitted at para 29 of his cross-examination that Badri Yadav (P.W. 8), Ravindra Yadav (P.W. 6) and Surendra Yadav were accused in murder case of one, Devanand Yadav, P.W. 10, admitted in his cross-examination that P.W. 1 had not made the above stated statements before him and he had, nowhere, disclosed as to what was the source of identification because in his examination-in-chief P.W. 1 has admitted that the alleged occurrence had taken



place at about 1.30 A.M.

17. P.W. 2, Mathura Yadav, also claimed that at the time of alleged occurrence, he got hide himself in the house of Bifan Mahto. He claimed that it was appellant, Pundeo Yadav, who was behind the alleged occurrence as prior to alleged occurrence, Pundeo Yadav, had given threatening to him. This witness also claimed that he had identified the appellant at the time of alleged occurrence. This witness also admitted at para 8 of his cross-examination that after two and half hours of the alleged occurrence, he had given his statement before the police. This witness also admitted at paragraph-11 of his cross-examination that after two hours of departure of dacoits, he came out of the house of Bifan Mahto. This witness, further, claimed that he had seen the appellant at the time of alleged occurrence while, the appellant was at his door. This witness further stated that he had made statement before the police to this effect that he had identified the appellant while, he was at his door but P.W.-10 stated that P.W.-2 had not made statement before him to this effect that he had identified the appellant while, appellant was at his door. This witness further admitted at paragraph- 25 of his cross-examination that he is next door neighbour of the appellant, Pundeo Yadav. This



witness denied this fact that an altercation had taken place between appellant as well his family members in respect of a hand-pipe and in the aforesaid altercation, it was accusation against the appellant that he had opened fire causing firearm injury to his brother Harihar Yadav and Mohan Yadav.

18. P.W.-3 Upendra Yadav, also supports the factum of dacoity and assaults and states that the dacoity committed in his house as well as in the house of RambratYadav and Bachhu Yadav. This witness also claims that during course of dacoity, he had identified the appellant. This witness admitted that P.W. 2 is his uncle. He, further, claims that when appellant came at his Dalan, he identified the appellant. He further claimed that it was appellant, who tied his hands. This witness admits that he had not seen the killing of son of the informant. The perusal of the statements of this witness, goes to show that this witness has also not stated the means of identification. This witness admitted that at the time of dacoity, he was sleeping at his Dalan and he claimed to have identified the appellant when appellant came at his Dalan but this witness has, nowhere, claimed that there was light at his Dalan at the time of alleged occurrence. Moreover, this witness is nephew of P.W.-2, who has enemical terms with appellant.



19. P.W.-4, Rajdeo Yadav, also supported the factum of dacoity but stated that he could not identify any dacoits. This witness has been declared hostile but this witness admitted that he is full brother of P.W.-1.

20. P.W.-5, Umesh Yadav, is brother of P.W.-3. This witness claims that dacoity was committed in his house as well as in the houses of Rambrat Yadav (P.W. 1) and Mathura Yadav (P.W. 2) and, in course of dacoity, Karu Yadav was killed. He also claims to have identified the appellant at the time of alleged occurrence but frankly admitted that he had not identified the remaining dacoits. This witness, further, admitted that his statement was recorded by the police. This witness, specifically, stated at paragraph-10 to his cross examination that there was no light in his Dalan at the time of alleged occurrence and there was complete dark. This witness again admitted at paragraph-14 of the cross-examination that when miscreants came to his Dalan, there was complete dark. This witness admitted at paragraph-23 of his cross examination that he had not claimed before the police that he had identified the appellant at the time of alleged occurrence. However, again at paragraph-24, he claimed that he had stated before the police regarding the identification of appellant at the time of alleged



occurrence. Moreover, P.W. 10 admitted in his cross examination that P.W.-4 had not claimed before him regarding the identification of appellant at the time of alleged occurrence.

21. P.W.-6 is the informant of the present case. He also supports the factum of dacoity as well as killing of his brother by dacoits. This witness claims that when the dacoits succeeded to break his main door, his brother namely, Karu Yadav, fled away from the house through back door but he was caught by the appellant and after that the other dacoits started assaulting him by means of Lathi and, thereafter, his brother was taken by the miscreants near the door of one, Rajdeo Yadav, where appellant shot fire on his brother near a tree, as a result whereof, his brother died. P.W. 6 further claimed that P.W. 8 and P.W. 12 were also assaulted by the dacoits. The dacoits committed loot in his house as well as other houses. He claimed that he identified the appellant as well as other dacoits in the light of torches as well as in moon light. This witness, further, claimed that at the time of committing alleged occurrence, the dacoits were raising alarm of "MCC Jindabad". He claims that he made statement before the police and having found his statement correct, he signed his statement. In his cross-examination, this witness stated that on 1.9.1988 at about 3.30



A.M., he had given his statement before the police. He, further, admitted that at the time of alleged occurrence, he was sleeping alone in his room and his other family members were sleeping in other rooms. He further claimed that his Chappar was set on fire by the appellant. He further claimed that when his main door was broken by the dacoits, he fled towards north side of his house and got hide himself at the distance of 50 yards from his house whereas his father remained at his home as his father could not succeed to flee from his house. He admitted at paragraph 16 of his cross-examination that his brother fled towards east side but his brother was visible to him. He claimed at paragraph 18 of his cross-examination that from the distance of 50-55 fts., he had seen the appellant, Pundeo Yadav, catching his brother. This witness, further, admitted at paragraph 19 of his cross-examination that the house of Rajdeo Yadav was at the distance of 40 fts. east from his house. He, further, admitted at paragraph 20 of his cross-examination that he got himself hide at the distance of 60 fts. from the house of Rajdeo Yadav. He, further, stated that when dacoits decamped, he left the place of occurrence and went to police station where, he met the Officer-in-Charge of concerned police station and narrated about the occurrence to Officer-in-Charge of concerned police station. He,



further, admitted at the same paragraph that his statement was recorded by the Officer-in-Charge of concerned police station and again at paragraph 22 of his cross-examination stated that he along with Officer-in-Charge of concerned police station proceeded towards place of occurrence. He claimed that he had made statement before police to this effect that his brother was caught and killed by appellant, Pundeo Yadav. He further admitted that when police came at his village, his family members were present over the place of occurrence. He also accepted that he was accused in murder case of brother of appellant, Pundeo Yadav.

22. P.W. 10 at paragraph 22 of his cross-examination admitted that P.W. 6 had not stated before him that he had seen the appellant, Pundeo Yadav, catching his brother Karu Yadav. P.W. 10, further, admitted that P.W. 6 had not claimed to have identified the appellant at the time of alleged occurrence and, furthermore, P.W. 6 had not claimed before him that his brother was killed by appellant, Pundeo Yadav.

23. P.W. 7, Lalan Yadav, claims that on the alleged date of occurrence dacoity was committed in his house and, in course of dacoity, dacoits tied his hands and legs. This witness admits that he had not identified any dacoits.



24. P.W. 8, Badri Yadav, is brother of P.W. 6. This witness also claims that dacoity was committed in his house and in that course, he identified the appellant, Pundeo Yadav. This witness admitted in his cross-examination that in course of investigation, police had not made enquiry from him. The aforesaid admission of P.W. 8 goes to show that his statement was not recorded by the police, in course of investigation and for the first time before the Court, he claimed that he had identified the appellant in course of dacoity.

25. P.W. 10, Awadhesh Kumar, is Investigating Officer. This witness states that on the alleged date of occurrence at about 2.30 P.M., he got an information that the firing was going on towards village Bandaul and, thereafter, he along with others went to village Bandaul, where, he marked that one person was killed, in course of dacoity. He claims that he recorded the fardbeyan of P.W. 6. He also claims that he recorded the further statement, prepared inquest report, recorded the statements of witnesses, prepared requisition of injury reports of injured P.W. 13 and others and inspected the place of occurrence. This witness at paragraph 6 of his examination-in-chief states that the dead-body of Karu Yadav was found near the house of Rajdeo Yadav. This witness denied that he got



information about the occurrence at police station from P.W. 6. This witness admitted that he did not record the distance of houses of P.W. 1 and Rambrat Yadav from the house of Rajdeo Yadav. This witness also admitted that formal F.I.R. was registered against unknown extremists.

26. P.W. 11, happens to be wife of P.W. 1 and she also supports the factum of dacoity as well as killing of Karu Yadav. However, she claims that appellant had assaulted her as well as P.W. 13 and P.W. 8 in course of dacoity.

27. Almost similar statement has been made by P.W. 12 and this witness claims that he was assaulted by the extremists, as a result whereof, he sustained injury on his left hand and on his back. He, further, claims that his brother, namely, Karu Yadav, was assaulted by the extremists. He claimed to have identified the appellant, Pundeo Yadav, and also claimed that appellant had assaulted him by means of Lathi. He further stated that appellant assaulted him outside his house. He further admitted that his brothers were accused in the murder case of brother of appellant.

28. P.W. 13 and P.W. 14 are doctors but the death of deceased, Karu Yadav, as well as injuries found on the person of injureds of this case are not in dispute and, therefore,



there is no need to discuss the statements of P.W. 13 and P.W. 14.

29. On perusal of the above stated evidences of the prosecution, it is emerged that some of the prosecution witnesses claimed to have identified the appellant, Pundeo Yadav in moon light as well as in the light of torches flashed by the dacoits whereas, some of the prosecution witnesses did not disclose the means in which they succeeded to identify the dacoits. However, according to prosecution case itself, there were six hundred to seven hundred extremists and according to some witnesses, the dacoits were flashing torches and, in the light of aforesaid torches, they could identify the appellant but as held by the Hon'ble Apex Court in the decision of *Tamilselvam (supra)*, it was not possible for the prosecution witnesses to identify the dacoits in the light of torches flashed by the dacoits and, therefore, the aforesaid claim of the prosecution witnesses does not appear to be reliable. However, it is admitted case of the prosecution that appellant, Pundeo Yadav, is co-villager of the P.W. 6 and other prosecution witnesses but it is surprisingly enough that the name of appellant, Pundeo Yadav, does not find place in the fardbeyan of P.W. 6, especially, in the circumstance, when the fardbeyan of



P.W. 6 was recorded within two hours of the alleged occurrence as well as in the presence of his family members. Had P.W. 6 as well as other prosecution witnesses identified the appellant, Pundeo Yadav, in course of dacoity, his name would have certainly been mentioned by P.W. 6 in his fardbeyan or the remaining witnesses would have disclosed his name before the police in course of investigation. In the present case, P.W. 10 has admitted that not a single prosecution witnesses had disclosed the name of appellant, Pundeo Yadav, before him, in course of investigation. Therefore, it is obvious that prosecution witnesses developed and changed their statements in course of trial. **In Ahmad Bin Salam Vs. State of Andhra Pradesh (1999) 4 SC Cases 111**, the Hon'ble Apex Court in almost in similar fact refused to believe upon the testimonies of prosecution witnesses.

30. P.W. 6 and P.W. 12 claimed before the Court to have seen the appellant carrying the deceased Karu Yadav and, furthermore, the aforesaid witnesses also claimed that deceased Karu Yadav was killed by the appellant near the house of Rajdeo Yadav. Admittedly, the aforesaid occurrence took place in mid night and there was nothing on the record to show that there was any light except so-called flashing of



torches by the miscreants. P.W. 6 admitted that he had seen the aforesaid occurrence from the distance of 50-55 fts., The aforesaid claim of P.W. 6 as well as P.W. 12 is improbable because in dark night, it is not possible to see any occurrence from such a long distance. Therefore, the aforesaid circumstance also creates doubt about the claim of prosecution witnesses.

31. Almost, all the prosecution witnesses have admitted that brother of appellant was killed prior to the alleged occurrence and P.W 6 as well as his other family members and some of the prosecution witnesses were accused in the murder case of brother of appellant, Pundeo Yadav. Therefore, the aforesaid fact clearly establishes that there was previous enmity between appellant and family members of P.W. 6.

32. In the aforesaid situation, the possibility of false implication of appellant in present case could not have been ruled out. It is settled principle of law that before seeking conviction, the prosecution has to prove its case beyond all shadow of reasonable doubts and even slightest doubt in the prosecution case shall be proved fatal to the prosecution. In the present case, we have noticed several infirmities and lacuna in the prosecution case and, therefore, in our view, the appellant is entitled for acquittal.



33. On the basis of aforesaid discussion, we are of the view that the impugned judgment of conviction and sentence order cannot be sustained. Accordingly, this criminal appeal is allowed and the impugned judgment of conviction and sentence order are, hereby, set aside. The appellant is acquitted of the charge. The appellant is on bail. He is discharged from liabilities of his bail bonds.

34. Learned Amicus Curiae, Sri Prince Kumar Mishra, Advocate, has given his valuable assistance to this Court and, therefore, copy of first and last page of this judgement be handed over to him, so that he could make his claim for remuneration before appropriate authority.

(Hemant Kumar Srivastava, J)

(Partha Sarthy, J)

sudha/-

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