

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No. 1076 of 2010

1. Bhajan Yadav son of Late Bindeshwari Yadav (since dead)
2. Beni Yadav son of Late Satyanarayan Yadav, resident of village – Shishwa,
P.S.- Murliganj, District – Madhepura.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 1053 of 2010

1. Rami Yadav son of Late Satyanarayan Yadav
2. Kalanand Yadav son of Late Bindeshwari Yadav
3. Bijendra Yadav son of Late Bindeshwari Yadav
4. Jitendra Yadav @ Jitan Yadav son of Late Laxmi Yadav
All are resident of village – Shishwa, P.S.- Murliganj, District – Madhepura.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 1076 of 2010)

For the Appellant/s : Mr. K.P. Singh, Sr. Adv.
Mr. Kumar Dharendra Pratap Singh, Adv.
Mr. Pratik Mishra, Adv.

For the State : Mr. Ajay Mishra, A.P.P.

(In CRIMINAL APPEAL (DB) No. 1053 of 2010)

For the Appellant/s : Mrs. Mayuri, *Amicus Curiae*

For the State : Mr. Ajay Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 07-03-2019

Heard Sri Kanhaiya Prasad Singh, learned senior
counsel, assisted by Sri Kumar Dharendra Pratap Singh, learned



counsel for the appellant {in Cr. Appeal (DB) No. 1076 of 2010} and Sri Ajay Mishra, learned Addl. Public Prosecutor. Yesterday, when the matter was taken up, there was non-appearance on behalf of appellants in Cr. Appeal (DB) No. 1053 of 2010 and today again, there was non-appearance and as such, for just decision in the matter, the Court requested Mrs. Mayuri, learned counsel to assist the Court as *Amicus Curiae* and she agreed for the same. Accordingly, we heard her on behalf of appellants in Cr. Appeal (DB) No. 1053 of 2010, as *Amicus Curiae*.

2. Appellants in aforesaid two appeals were tried together and convicted & sentenced by the common judgment of the trial court and as such, both the appeals were taken up together under the heading “For Hearing” and are being disposed of by this common judgment.

3. The appellant no. 1 Bhajan Yadav (since dead, his appeal stood abated) and appellant no. 2 Beni Yadav {in Cr. Appeal (DB) No. 1076 of 2010} by judgment dated 25-08-2010 were convicted for commission of offence under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as ‘I.P.C.’) and Section 27 of the Arms Act, 1959 (hereinafter referred to as ‘Arms Act’), however remaining appellants by the same judgment were convicted for commission of offence under



Section 302/149 of the I.P.C. By order dated 27-08-2010, the appellant no. 2 Beni Yadav {in Cr. Appeal (DB) No. 1076 of 2010} under Section 302 of the I.P.C. was sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 25,000/- (twenty five thousand). In case of default in payment of fine, he was directed to further undergo simple imprisonment for six months. Under Section 27 of the Arms Act, the appellant Beni Yadav was further sentenced to undergo rigorous imprisonment for four years. Other appellants, under Section 302/149 of the I.P.C. by order dated 27-08-2010, were sentenced to undergo rigorous imprisonment for life. The sentence, in respect of appellant Beni Yadav, was directed to run concurrently. The judgment of conviction and sentence was passed by the learned Sessions Judge, Madhepura (hereinafter referred to as the 'Trial Judge') in Sessions Trial No. 61 of 1996 (arising out of Murliganj P.S. Case No. 141 of 1991).

4. Short fact of the case is that on 18-08-1991 at 10:00 PM in the night, *fardbeyan* of Hariballav Yadav (P.W.6) was recorded in the Murliganj Police Station. In the *fardbeyan*, the informant disclosed that on the same date i.e. on 18-08-1991 at 3:30 PM, he alongwith his brother Surendra Yadav (deceased) on occasion of *Ghari* festival, had gone to the house of Hari Mehta



(P.W.2), resident of village Shishwa, P.S. Murliganj, Distt. - Madhepura on a feast. After taking meal, from the courtyard, he came out and near the door of Hari Nandan Mehta (P.W.2) and while standing he started discussing with Khokha Yadav (not examined), Shyamal Yadav (P.W.3), Ajit Yadav (P.W.4) and Nitya Nand Yadav (P.W.1). Informant's brother Surendra Yadav (deceased) proceeded for his house and while he had moved ahead to some distance, suddenly from the courtyard of Bachi Mehta, 1. Beni Yadav {appellant no. 2 in Cr. Appeal (DB) No. 1076 of 2010}, 2. Bhajan Yadav (died) {appellant no. 1 in Cr. Appeal (DB) No. 1076 of 2010} both carrying gun in their hand, 3. Laxmi Yadav (not appellant), 4. Rami Yadav, 5. Kalanand Yadav, 6. Bijendra Yadav, 7. Jitan Yadav {Sl. 4 to 7 are appellant no. 1 to 4 in Cr. Appeal (DB) No. 1053 of 2010}, 8. Dukhi Rishideo (not appellant), carrying Bow and Arrow in their hands came there. Thereafter, Chandeshwari Yadav {sole appellant in Cr. Appeal (DB) No. 1034 of 2010 and since he died, his appeal stood abated}, who was having no weapon in his hand and was Mukhiya of panchayat, immediately after coming out from the house, exhorted to kill him (Surendra Yadav). While Surendra Yadav (deceased) turned to see, Bhajan Yadav and Beni Yadav pointing their gun towards Surendra Yadav simultaneously fired



and both the bullets hit the chest of the brother of the informant and after receiving injury, his brother fell down. Thereafter, Mukhiya directed the accused persons to kill informant also, however the informant anyhow fled away and concealed himself in the courtyard of Ajit Yadav (P.W.4). On hearing sound of firing, number of persons ran towards the place of occurrence and thereafter, accused persons after firing in air fled away. The informant then went near to his injured brother and found that he (Surendra Yadav) had already died. The informant claimed that the occurrence was witnessed by number of witnesses. The informant anyhow by concealing himself and crossing river went to the Murliganj Police Station. The informant further stated that all the accused persons with their family members were removing their articles & cattle and were moving towards unknown place. The informant specifically stated that there was no dispute with accused persons. He stated that he and his deceased brother were not cooperating in the misdeeds of Mukhiya and it appears that the Mukhiya was having some ill-will and he (Mukhiya) was of the view that he may not be supported by the informant and his brother and this was the reason for the said occurrence. He further clarified that earlier, there was a criminal case against Mukhiya for offence under



Section 420 of the I.P.C. The said *fardbeyan* was read over to him and thereafter, he put his signature in presence of witnesses. Ajit Yadav (P.W.4) also put his signature on the *fardbayan*.

5. On the basis of said *fardbeyan*, on the same date i.e. 18-08-1991 at 10:30 PM, a formal F.I.R., vide Murliganj P.S. Case No. 141 of 1991, was registered for offence under Section 302/34 of the I.P.C. and Section 27 of the Arms Act against:

- (1) Chandeshwari Yadav {who was convicted and after conviction, he had filed Cr. Appeal (DB) No. 1034 of 2010, however; since he died, his appeal stood abated by order dated 04-02-2019}.
- (2) Laxmi Yadav (died before framing of charge and his case was dropped on 28-01-2002).
- (3) Rami Yadav {appellant no. 1 in Cr. Appeal (DB) No. 1053 of 2010}.
- (4) Beni Yadav {appellant no. 2 in Cr. Appeal (DB) No. 1076 of 2010}.
- (5) Bhajan Yadav {appellant no. 1 in Cr. Appeal (DB) No. 1076 of 2010, who died and thereafter, on 04-02-2019 his appeal stood abated}.
- (6) Kalanand Yadav {appellant no. 2 in Cr. Appeal (DB) No. 1053 of 2010}.
- (7) Bijendra Yadav {appellant no. 3 in Cr. Appeal (DB) No. 1053 of 2010}.
- (8) Jitendra Yadav @ Jitan Yadav {appellant no. 4 in Cr. Appeal (DB) No. 1053 of 2010}.
- (9) Dukhi Rishideo (since he died, his proceeding was dropped on 01-10-2005).

6. After registering F.I.R., police investigated the case and thereafter, on 10-05-1992, chargesheet was submitted against nine accused persons and one more namely Bachi Mehta, who subsequently died and his proceeding was dropped on



01-10-2005. However, in the chargesheet, F.I.R. named accused Chandeshwari Yadav was shown to be absconder. After submission of chargesheet, on 24-08-1992, the learned Chief Judicial Magistrate, Madhepura took cognizance of the offence and the case was committed to the court of sessions on 26-04-1996 and it was numbered as Sessions Trial No. 61 of 1996. After commitment, on 30-07-2002, charge against appellant/Beni Yadav and Bhajan Yadav (since dead) was framed for offence under Section 302 of the I.P.C. and Section 27 of the Arms Act, whereas joint charges were framed against remaining accused persons under Sections 302/149, 120(B) of the I.P.C.

7. The accused persons denied their charges and claimed to be tried and as such, to establish its case on behalf of the prosecution, altogether six witnesses were examined. Out of six witnesses, P.W.3 Shyamal Yadav (another brother of the deceased), P.W.4 Ajit Kumar Yadav (a distant relative of the deceased) and P.W.6 Hariballav Yadav (informant and brother of the deceased) were examined as eye-witnesses to the occurrence. P.W.5 Dr. Mithilesh Kumar had conducted *post-mortem* on the dead body of the deceased, whereas P.W.1 Nitya Nand Yadav (brother-in-law of cousin brother of the informant) and P.W.2 Hari Nandan Mehta, in whose house the informant and deceased



had gone on the occasion of *Ghari* festival, since did not support the case, they were declared hostile. After completion of the prosecution case, on 04-11-2009, accused persons were questioned on incriminating circumstances and evidences and their statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') was recorded, in which, they claimed to be innocent. During the trial, the investigating officer was not examined. From the defence side, neither oral nor documentary evidence was brought on record, however; from the trend of cross-examination, it appears that defence was taken that the occurrence was not seen by the witnesses and deceased was not having good antecedent. The learned Trial Judge, on the basis of evidence on record, has passed the judgment of conviction and sentence, which has been assailed in aforesaid appeals.

8. Sri Kanhaiya Prasad Singh, learned senior counsel assisted by Sri Kumar Dhirendra Pratap Singh, learned counsel for the appellant {in Cr. Appeal (DB) No. 1076 of 2010}, after referring to entire evidence, has argued that the prosecution has miserably failed to establish its case beyond all reasonable doubt. He submits that the prosecution in the case has not established even place of occurrence, due to non-examination of the



investigating officer. Attention to previous statement of some of the witnesses were drawn, but in absence of investigating officer, no such corroboration could be extracted. Besides this, in absence of investigating officer, the defence case was seriously prejudiced and nothing could be extracted to demolish the case of prosecution, so far as place of occurrence is concerned.

9. According to Sri Singh, learned senior counsel, the entire prosecution case is demolished on the basis of evidence of P.W.4/Ajit Kumar Yadav. He submits that on examination of evidence of P.W.4, it appears that this witness was introduced with a view to corroborate the version of the informant that all the accused persons before committing crime had assembled in the house of Bachi Mehta, whereas informant (P.W.6) in his evidence, has stated that P.W.4 had also accompanied informant to the house of Hari Nandan Mehta (P.W.2), where they were invited on the occasion of *Ghari* festival on a feast. Besides this, P.W.3 Shyamal Yadav and P.W.6 Hari Ballav Yadav (informant), who were full brother of the deceased, in the evidence have stated that in the occurrence, Bhajan Yadav and Beni Yadav both had fired one shot from their gun, however P.W.4/Ajit Yadav in his evidence had stated that firing was made by Bhajan Yadav and Laxmi Yadav (died during the trial itself).



10. According to Sri Singh, learned senior counsel, the prosecution case appears to be doubtful due to the reason that neither *fardbeyan* nor inquest report was got formally proved during the trial. Even witnesses, who were shown to be witness to the inquest report, were withheld by the prosecution. According to Sri Singh, the prosecution has purposely not produced number of witnesses without any plausible explanation. The witnesses Chandeshwari (full brother of deceased & informant), Krishna Ballav (another brother of the informant) and Khokha Yadav (co-villager), whose presence was mentioned by the witnesses, without any explanation were not examined by the prosecution. He further submits that it was case of the informant that after the occurrence, he was asked by concerned chowkidar as well as Sarpunch to go and inform the police, but Sarpunch was not examined. Ofcourse during evidence, it has come that the concerned chowkidar died during the trial itself. It has also been argued that neither objective material evidence has been brought on record by the prosecution nor the manner of occurrence has been proved. On aforesaid grounds, it has been argued that the prosecution has not proved its case beyond all reasonable doubt and as such, the judgment of conviction and sentence is liable to be set aside.



11. Mrs. Mayuri, learned *Amicus Curiae* {in Cr. Appeal (DB) No. 1053 of 2010}, by way of referring to the *fardbeyan* as well as evidence, has argued that it was case of the informant that in between accused persons and informant & deceased, there was no dispute and since there was no dispute, there was no reason for committing the crime, as alleged by the informant and other witnesses. It has also been argued by learned *Amicus Curiae* that during the trial, no independent witness was examined. The witnesses, who were independent, have not supported the case of the prosecution and as such, they were declared hostile, otherwise P.W.3 and P.W.6 were full brothers of the deceased and P.W.4 was a distant relative of the informant and deceased. According to Mrs. Mayuri, learned *Amicus Curiae*, the prosecution has miserably failed to establish the motive behind the crime and in absence of such motive, it was not appropriate for the learned Trial Judge to pass judgment of conviction and sentence.

12. Sri Ajay Mishra, learned Addl. Public Prosecutor submits that evidence of P.W.4 and P.W.6 is specific on the point that they were eye-witnesses to the occurrence and in their presence, the deceased was gunned down and as such, the learned



Trial Judge passed the judgment of conviction and sentence, which requires no interference.

13. Besides hearing learned counsel for the parties, we have minutely examined entire evidence on record and after going through the same, *prima facie*, we are of the opinion that prosecution has not been able to establish its case beyond all reasonable doubt. However, before proceeding, it would be necessary to cursorily refer to certain evidences.

14. The case has been initiated on the basis of *fardbeyan* of P.W.6 Hari Ballav Yadav, who was none else, but own brother of the deceased. In his evidence, he reiterated what he had stated in *fardbeyan*. In paragraph-1 of his evidence, he deposed that occurrence had taken place at 3:30 PM on the date when the informant had gone in the feast in the house of Hari Mehta (P.W.2). Alongwith this witness, Surendra Yadav (deceased), Shyamal Yadav (P.W.3), Khokha Yadav (not examined), Ajit Yadav (P.W.4) and Nitya Nand Yadav (P.W.1) also had gone. In the courtyard of Hari Mehta (P.W.2), they had taken meal and thereafter, they came out and near the door, they were having some discussion, in the meanwhile, his brother Surendra Yadav (deceased) left for his house. When he (Surendra Yadav) moved to some distance, the informant saw that from the



courtyard of Bachi Mehta, Beni Yadav {A2 in Cr. Appeal (DB) No. 1076 of 2010}, Bhajan Yadav {A1 in Cr. Appeal (DB) No. 1076 of 2010 already died} both carrying gun in their hand, Rami Yadav {A1 in Cr. Appeal (DB) No. 1053 of 2010}, Laxmi Yadav (died during trial), Kalanand Yadav {A2 in Cr. Appeal (DB) No. 1053 of 2010}, Bijendra Yadav {A3 in Cr. Appeal (DB) No. 1053 of 2010}, Jitan Yadav {A4 in Cr. Appeal (DB) No. 1053 of 2010} and Dukhi Rishideo (died during the trial) carrying Bow and Arrow in their hands came out. Chandeshwari, the then Mukhiya, who had also come out, was empty hand. Mukhiya/Chandeshwari thereafter uttered that Surendra Yadav was going and by using filthy language, he ordered to kill him, whereupon Surendra Yadav tried to see turning back, in the meanwhile, Bhajan Yadav and Beni Yadav each fired on Surendra Yadav, which hit on his chest. Thereafter, Chandeshwari (Mukhiya) exhorted to kill his brother (P.W.6), but anyhow the informant fled away and he concealed himself in the house of Ajit Yadav (P.W.4). Number of persons assembled there and accused persons after firing in the air fled away. After some time, this witness came out from the house of Ajit Yadav (P.W.4) alongwith P.W.4 and saw his brother, who was lying dead. He also proved his signature on the *fardbeyan*, which was marked as Ext.3.



15. Sri Kanhaiya Prasad Singh, learned senior counsel for the appellant in his argument, has drawn our attention to the statement made in paragraph-13 and 14 of cross-examination of P.W.6 to show that this witness had not seen the actual occurrence.

16. In paragraph-13 of his cross-examination, P.W.6 deposed that while he alongwith others were standing, he firstly heard the sound of firing, while his brother Surendra Yadav (deceased) was moving towards his village. In paragraph-14 of his cross-examination, he further stated that for the first time, he saw his brother while he had fallen and bleeding. On examination of paragraph-13 and 14 of cross-examination of P.W.6, it would be difficult to place reliance on his evidence that he had actually seen that while his brother was moving, on the exhortion of the Mukhiya Chandeshwari to kill him, firing was made. This certainly creates some doubt regarding credibility of this witness.

17. P.W.3 Shyamal Yadav is another own brother of informant & deceased and he too has deposed like P.W.6.

18. However, on examination of evidence of P.W.4, certainly it would not be appropriate to place reliance on the evidence of P.W.3 and P.W.6. In the evidence, P.W.6 has stated that in the house of Hari Nandan Mehta (P.W.2), P.W.4 was also



present and enjoying the feast, however in the evidence of P.W.4/ Ajit Kumar Yadav, it has come, as if, he was invited on the feast in the house of Bachi Mehta. It appears that presence of this witness was purposely shifted from the house of Hari Nandan Mehta to the house of Bachi Mehta to show arrival of accused persons, which includes all the appellants, in the house of Bachi Mehta, from where, it was alleged that when Surendra Yadav (deceased) was moving towards his house, all the accused persons came out and thereafter, on exhortion, given by Chandeshwari (Mukhiya), firing was made.

19. P.W.5 Dr. Mithilesh Kumar on 19-08-1991 was posted as Civil Assistant Surgeon in Sadar Hospital, Madhepura and on the same date at 11:30 AM, he conducted *post-mortem* on the dead body of the deceased and noticed following facts:-

“1. Multiple lacerated wound ranging from 1/6” x 1/8” in diameter over front of right chest over the pectoral region.

2. Blood was coming out from nostril.

On dissection:- On opening the skin of chest there was diffuse haematoma over the right pectoral region in subcutaneous and inter-muscular plaques. There was fracture of 3rd and 4th rib interiorly. On opening the chest cavity about 2 liters of blood was present in right plural cavity. Right lungs was lacerated. Heart - pale and empty. On opening the abdomen - liver pale, spleen pale, kidney pale, urinary bladder empty and stomach containing



semi digested rice. Nothing abnormal was detected in the skull or scalp.

Opinion - the cause of death was shock and haemorrhage due to fire-arm injury.

Time elapsed since death- about 24 hours.”

He also proved the *post-mortem* report, which was marked as Ext.2.

20. On examination of evidence of P.W.5 as well as *post-mortem* report, it appears that the deceased had received one gun shot injury, whereas informant and other witnesses were consistent that two firings were made and both firing hit the deceased. Accordingly, finding one fire-arm injury on the chest creates some doubt on the credibility of the evidence of P.W.3 and P.W.6.

21. On examination of entire evidence, it appears that prosecution has not been able to establish the place, where actual occurrence had taken place and dead body was lying. Due to non-examination of the investigating officer, the place of occurrence has not been established nor inquest report, which was best evidence for establishing the place of occurrence, was got proved. Ofcourse, *fardbeyan* was also not formally proved, but merely on the ground of non-proving of *fardbeyan*, entire prosecution case may not be disbelieved. But at the same time, onus was on the prosecution to establish the place of occurrence,



which in the present case has not at all been established. The prosecution case further appears to be doubtful due to the reason that without any plausible reason, number of witnesses were suppressed. Neither witness to the inquest report, who were Dayananad Yadav and Chandeshwari Yadav, have come forward to prove at least their signature on the inquest report nor another own brother of the deceased and informant namely, Chandeshwari was examined. Similarly, brother of the deceased Krishan Ballav and Sarpanch of the village, whose reference has come in the evidence of informant, have neither been examined by the prosecution nor any plausible explanation has been given for their non-examination. It is also evident that no objective material evidence has been brought on record by the prosecution. Ofcourse merely on the ground of non-examination of the investigating officer, entire prosecution case may not be disbelieved, but in the present case, the witnesses are silent, particularly on the place of occurrence, and as such, non-examination of the investigating officer has seriously prejudiced the defence case.

22. The Court is also in agreement with the submission of Mrs. Mayuri, learned *Amicus Curiae* that prosecution has not been able to prove any motive for the occurrence. This fact is



evident from the evidence of P.W.6 as well as *fardbeyan*, in which, it was categorically stated that in between informant & deceased and accused persons, there was no dispute. There is serious contradiction in the ocular evidence also. On the one hand, P.W.3 and P.W.6 have come out with a case that deceased was given shot of firing by Bhajan Yadav and Beni Yadav, whereas P.W.4 Ajit Yadav has come out with a case that firing was made by Bhajan Yadav and Laxmi Yadav.

23. In view of such serious inconsistencies as well as lapses, we are of the considered opinion that the prosecution has not been able to establish its case beyond all reasonable doubt and as such, by way of extending benefit of doubt, the judgment of conviction and sentence can be interfered with.

24. Accordingly, the judgment of conviction and sentence dated 25-08-2010 and 27-08-2010 respectively passed in Sessions Trial No. 61 of 1996 (arising out of Murliganj P.S. Case No. 141 of 1991) by the learned Sessions Judge, Madhepura is, hereby, set aside and appellants are acquitted from all the charges levelled against them. Both the appeals are allowed.

25. The appellant-Beni Yadav {in Cr.Appeal (DB) No. 1076 of 2010} is in custody and since the judgment of conviction



and sentence has been set aside, he is directed to be released forthwith, if not wanted in any other case. Other appellants, who are on bail, are discharged from the liability of their bail-bonds.

26. Let a copy of the first and last page of this judgment be handed over to Mrs. Mayuri, learned *Amicus Curiae* and the learned *Amicus Curiae* be paid the prescribed fee by the Patna High Court Legal Services Committee.

(Rakesh Kumar, J.)

(Prakash Chandra Jaiswal, J.)

Anay

AFR/NAFR	AFR
CAV DATE	NA
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