

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.713 of 2013

Arising Out of PS. Case No.-219 Year-2007 Thana- MUNGER MUFFASIL District- Munger

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Varun Yadav Son of Narayan Yadav Resident of Village-Tofir, P.S.-Muffasil,
District-Munger

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with

Criminal Appeal (DB) No. 347 of 2013

Arising Out of PS. Case No.-219 Year-2007 Thana- MUNGER MUFFASIL District- Munger

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1. Pappu Yadav S/o Late Panna Lal Yadav Resident of Village- Tophir, P.S-
Muffasil, Distt- Munger.
 2. Kishto Yadav S/o Sakaldeo Yadav Resident of Village- Tophir, P.S- Muffasil,
Distt- Munger.
 3. Rupesh Yadav S/o Late Panna Lal Yadav Resident of Village- Tophir, P.S-
Muffasil, Distt- Munger.
 4. Sunil Kumar @ Sunny S/o Sakaldeo Yadav Resident of Village- Tophir, P.S-
Muffasil, Distt- Munger.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

(In Criminal Appeal (DB) No. 713 of 2013)

For the Appellant/s : Mr. Gouranga Chattarjee, Advocate
Mr. Shekhar Kumar Singh, Advocate

(In Criminal Appeal (DB) No. 347 of 2013)

For the Appellant/s : Mr. Krishna Murti Singh, Amicus Curiae
For the Informant : Mr. Pankaj Kumar Sinha, Advocate
in both the appeals Mr. Kamal Kishore Jha, Advocate
For the State in both ; Mr. Ajay Mishra, A.P.P.
appeals

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

And

HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL)

Date : 24-01-2019



As both the aforesaid criminal appeals have cropped up from the same judgment and order of conviction and sentence, hence, they are taken up together for consideration and disposed of by this common judgment.

2. Heard Mr. Gouranga Chatterjee, learned counsel assisted by Mr. Shekhar Kumar Singh, learned counsel for the appellant (in Cr. Appeal (DB) No. 713 of 2013), Mr. Krishna Murti Singh, learned amicus curiae for the appellants (in Cr. Appeal (DB) No. 347 of 2013), Mr. Pankaj Kumar Sinha, learned counsel assisted by Mr. Kamal Kishore Jha learned counsel for the informant in both the appeals as well as Mr. Ajay Mishra learned Addl. Public Prosecutor in both the appeals.

3. The aforesaid two criminal appeals have been preferred against the judgment and order of conviction dated 23.02.2013 and of order of sentence dated 26.02.2013 passed by learned Adhoc Additional Sessions Judge-II, Munger in Sessions Trial No. 49 of 2011 arising out of Mufassil P.S. Case No. 219 of 2007 whereby the learned trial court convicted the accused Varun Yadav, Rupesh Yadav @ Rupesh Kumar, Kishto Yadav, Sunil Kumar @ Sunny Yadav and Pappu Yadav for the offence punishable under Sections 302/149, 307/149, 201 of the Indian Penal Code and Section 27 of the Arms Act and



sentenced them to undergo life imprisonment under Section 302/149 of the Indian Penal Code and further sentenced to all the accused persons barring Kishto Yadav to undergo R.I. for ten years each under Section 307/149 of the Indian Penal Code. Further sentenced to all the accused persons to undergo R.I. for three years each under Section 201 of the Indian Penal Code and R.I. for three years each under Section 27 of the Arms Act and also slapped them with a fine of Rs. 10000/- each and in default of payment of fine to further undergo S.I. for three months each under the aforesaid Sections. All the sentence were directed to run concurrently.

4. The factual matrix of the case is that Mufassil P.S. Case No. 219 of 2007 was instituted under Sections 147, 148, 149, 302, 201, 120(B) and 324 of the Indian Penal Code against accused Rajesh Yadav, Varun Yadav, Ranvir Yadav, Mamal Yadav, Pappu Yadav, Saurav Yadav, Yogendra Yadav, Kistho Yadav, Sakal Deo Yadav, Pannalal Yadav, Santosh Yadav, Sunil Yadav @ Sunny Yadav, Rupesh Yadav and 8-10 unknown miscreants on the basis of fardbeyan of Gajendra Kumar Yadav @ Guddu Kumar S/o Indradeo Indra recorded by S.I. Shiv Prasad Singh O/c P.S. Muffasil on 28.10.2007 at 05:00 PM at Basa of the informant located at Rahimpur Dahiya Tofir with



the allegation, in succinct that on 28.10.2007 at around 12:00 O'clock, informant along with his middle brother, namely, Swadesh Kumar, younger brother, namely, Gautam Kumar had gone to see his field and after seeing the field, they along with co-villager, namely, Sarus Yadav were regressing to his Basa at around 1:30 PM. As soon as they arrived near the Basa of Rajesh Yadav, all the thirteen FIR named accused persons along with 8-10 unknown miscreants, who were way laying there gave them chase resorting indiscriminate firing. Then they started escaping to save their lives, but in the course of escaping, his younger brother, namely, Gautam Kumar sustained firearm injury. Sustaining injury he fell down on the ground while rest three persons managed to escape to nearby bush and made them hidden there. From the aforesaid bush, they witnessed that Rajesh Yadav and Varun Yadav resorted 5-6 rounds of firing upon Gautam Kumar resultantly, he died on the spot. Thereafter, the aforesaid accused persons took away the dead body of Gautam Kumar on the tractor of Rajesh Yadav to conceal his dead body. They also resorted firing in the course of retreat. The informant and his two companions anyhow rushed to his Basa and informed the occurrence to his father and his family members through mobile and on arrival of nearby



villagers, he made hectic search of the dead body of his brother in the bush etc., but in vain. On getting information of the occurrence, his father and family members arrived at the place of occurrence along with the police personnel. Several persons have witnessed the occurrence. Bone of contention is said to be that the informant had taken Argara (cattle pound) in auction from the Zila Parishad District Board but Rajesh Yadav was also running Argara (cattle pound) illegally in his vicinity and used to realize the exorbitant amount for releasing of the cattle. He also used to extend threatening to the informant to remove his Argara (cattle pound) else to face dire consequences.

5. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against accused Santosh Yadav, Sakal Deo Yadav, Saurav Yadav, Ranvir Yadav and Pannalal Yadav keeping the investigation pending against other accused persons. Subsequently, he submitted supplementary charge-sheet against seven other accused persons including the appellants.

6. On receiving the charge-sheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions, and after commitment and on transfer finally the case came in



seisin of the learned Adhoc Additional Sessions Judge-II, Munger for trial.

7. Charge against the accused Roopesh Yadav, Sanni Yadav @ Sunil Yadav, Pappu Yadav and Barun Yadav was framed under Sections 307/149, 201 of the Indian Penal Code and Section 27 of the Arms Act. Further charge against the accused Barun Yadav was framed under Section 302/34 of the Indian Penal Code on 19.08.2011 and on 5.06.2012 further charge was framed under Section 302/149 of the Indian Penal Code against accused Barun Yadav, Rupesh Yadav, Sanni Yadav @ Sunil Yadav, Pappu Yadav and Kishto Yadav. Charge was read over and explained to them by the court to which they pleaded not guilty and claimed to be tried.

8. To substantiate its case, in ocular evidence, the prosecution has examined altogether nine prosecution witnesses namely, Indradeo Indra @ Indradeo Yadav, who happens to be father of the deceased as PW-1, Swadesh Kumar, who happens to be brother of the deceased as PW-2, Saudagar Yadav as PW-3, Drup Kumar as PW-4, Saras Yadav as PW-5, Anil Yadav, who happens to be seizure list witness as PW-6, I.O. Shiv Prasad Singh as PW-7, Police Yadav, who happens to be another seizure list witness as PW-8 and informant Guddu Yadav @ Gajendra



Kumar as PW-9. Out of the aforesaid witnesses, PW-4 turned hostile. The prosecution has also filed and proved some documents by way of documentary evidence in the case.

9. The 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 have neither adduced any ocular nor documentary evidence in buttress of their case.

10. After hearing the parties and perusing the record, the learned trial court passed the impugned judgment and order of conviction and sentence as detailed in the earlier paragraph.

11. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convict Varun Yadav has preferred Cr. Appeal (DB) No. 713 of 2013 and convicts Pappu Yadav, Kishto Yadav, Rupesh Yadav and Sunil Kumar @ Sunny have preferred Cr. Appeal (DB) No. 347 of 2013.

12. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellants beyond all reasonable doubts or



not.

13. It is submitted by Mr. Gouranga Chatterjee, learned counsel for the appellant (in Cr. Appeal (DB) No. 713 of 2013) and Mr. Krishna Murti Singh, learned amicus curiae for the appellants (in Cr. Appeal (DB) No. 347 of 2013) that the prosecution has utterly and miserably failed to establish the death of Gautam Kumar as dead body was not found. Neither the I.O. has taken any step to search out the dead body nor even prosecution witnesses have made any effort to search it out. Moreover, the informant has stated that he went to search the dead body along with I.O. while the I.O. has stated that he has not mentioned in the case diary regarding search out the dead body. Thus, no sincere effort was made either by the witnesses or by the I.O. to search out the dead body of Gautam Kumar. It is further submitted that though PW-1 has stated that he was informed by two villagers about cutting into pieces of the dead body of Gautam Kumar and dumping it into river, but no sincere effort was made by the I.O., informant and their relatives to fish out the remains of the dead body from the river. It is further submitted that only three material witnesses, namely, PWs-2, 5 and informant (PW-9) are claiming themselves to be eye witnesses of the occurrence, but PW-2 and PW-5 have not stated



to the I.O. recorded under Section 161 Cr.P.C. regarding escaping of PW-2, PW-5 and PW-9 and Gautam Kumar during the course of resorting firing by the accused persons and witnessing of Gautam Kumar falling down sustaining injury. Hence, the aforesaid aspect of the case creates serious doubt about credibility of the aforesaid witnesses as eye witnesses of the occurrence. It is further submitted that as per the account of I.O., bush from where the informant and other witnesses claimed to have witnessed Rajesh Yadav and Varun Yadav resorting firing upon Gautam Kumar resulting into his death and taking his dead body on the tractor, is located around $\frac{1}{2}$ Km. from the place of occurrence. Hence, it is not practicable and possible to witness the aforesaid occurrence from such a long distance. It is also submitted that admittedly there is animosity between the parties and the appellants have been falsely implicated in this case by the prosecution party due to aforesaid animosity. It is further submitted that no trail of blood was found from the place of occurrence to the place of parking tractor on which the dead body of the deceased is said to have taken away which creates serious doubt about the prosecution case. It is also submitted that as per the prosecution case, accused persons giving chase to the informant and his



companions resorted indiscriminate firing, but none of them barring Gautam Kumar sustained firearm injury which creates serious doubt about the prosecution case. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case against the appellants beyond all reasonable doubt by adducing trustworthy, worth credence and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed against the appellants by the learned trial court is liable to be set aside and the appellants are entitled to be acquitted.

14. On the other hand, Mr. Ajay Mishra learned APP and Mr. Pankaj Kumar Singh assisted by Mr. Kamal Kishore Jha, learned counsel for the informant advocating the correctness and validity of the impugned judgment and order of conviction and sentence submitted that PW-2, PW-5 and PW-9, who happen to be eye witnesses of the occurrence have unanimously and consistently supported the prosecution case. There is no material contradiction in the testimony of the aforesaid witnesses. The prosecution has also established running of Argara (cattle pound) at the place of occurrence by the informant by filing rent receipt in this regard and learned trial court correctly appreciating the facts and evidence on



record has rightly passed the impugned judgment and order of conviction and sentence which is liable to be upheld and these appeals are shorn of merit and are liable to be dismissed.

15. From perusal of record, it appears that to substantiate its case, the prosecution has examined six material witnesses in the case. Out of them, PW-4 (Drup Kumar) has turned hostile while PW-3 (Saudagar Yadav) though has not been declared hostile by the prosecution, but he has also not supported the occurrence and has denied to have witnessed the occurrence. PW-1 (Indradeo Indra @ Indradeo Yadav), who happens to be father of the deceased also does not happen to be eye witness of the occurrence rather is a hearsay witness. As per the prosecution case itself, his father and his family members arrived at the place of occurrence along with the police personnel on giving information of occurrence to him telephonically by the informant and PW-1 (Indradeo Indra @ Indradeo Yadav) has also stated in his examination-in-chief that he had arrived at the place of occurrence on receiving information of the occurrence from his son Guddu Yadav @ Gajendra Kumar (informant). Though PW-1 (Indradeo Indra @ Indradeo Yadav) has stated in paragraph 2 of his examination-in-chief that during the course of search of dead body of



Gautam Kumar, when he went to Rahimpur Bahiyar, Anuj Thakur and Mohan Thakur divulged him about bringing of a dead body on the horse by 20-25 persons on 28.10.2007 at 03:00 PM and cutting it into pieces and dumping it in the confluence of Ganga and Gandak river but the aforesaid Anuj Thakur and Mohan Thakur have not come forward to corroborate the divulgence of the aforesaid facts to PW-1. Hence, for want of corroboration, the aforesaid statement of PW-1 is not admissible in evidence even as hearsay witness of the case.

16. From perusal of testimony of PW-2 (Swadesh Kumar), who happens to be brother of the deceased and PW-5 (Saras Yadav), who happens to be co-villager of the informant, it appears that though the aforesaid witnesses happen to be companions of the informant and were present with informant and deceased Gautam Kumar at the time of occurrence and have made an abortive bid to support the prosecution case by giving statement in their respective examination-in-chief in consonance to the prosecution case as adumbrated in the fardbeyan by stating that at the time of occurrence, the informant and the aforesaid persons along with Gautam Kumar were regressing to their Basa and when they arrived near the Basa of Rajesh Yadav,



all the FIR named accused persons along with 8-10 unknown miscreants, who were way laying there abruptly started resorting firing upon them. The informant, Gautam Kumar and they started escaping, but in the course of escaping, Gautam Kumar sustained bullet injury and he died on the spot. But, they and the informant anyhow managed to escape and kept themselves hidden in the bush and from the bush, they witnessed resorting of 5-6 rounds of firing upon the dead body of Gautam Kumar by Rajesh Yadav and Varun Yadav and taking away dead body on the tractor for some distance and then on horse to conceal the evidence. But, attention of the said witnesses regarding their statement given before the court and that given before the I.O under Section 161 Cr.P.C. in respect of escaping of all the aforesaid four persons including the informant and Gautam Kumar during the course of resorting firing by the accused persons and sustaining injury by Gautam Kumar in the course of escaping, resultantly, he died on the spot was drawn by the defence in paragraphs 11 and paragraph 5 respectively of their cross-examination. I.O. Shiv Prasad Singh PW-7 in paragraph 9 of his cross-examination has also corroborated the contradiction between their statement given before the court and that given before him under Section 161



Cr.P.C regarding aforesaid material aspect of the case. Thus, the aforesaid two witnesses appear to have taken altogether different stands before the court regarding the aforesaid material aspect of the case which creates serious doubt about the credibility of the said witnesses and their testimony do not inspire our confidence to hold the conviction of the appellants relying upon the same.

17. From perusal of testimony of the informant PW-9 (Guddu Yadav @ Gajendra Kumar), it appears that he has also made an abortive bid to support the prosecution case by stating in his examination-in-chief in consonance to the prosecution case as adumbrated in his fardbeyan and as adverted hereinabove. But, in view of the aforesaid testimony of PW-2 and PW-5, the testimony of the informant also appears to be doubtful. As as per the prosecution case and the statement of the informant (PW-9) PW-2, PW-5, informant PW-9 and Gautam Kumar were heading to Basa of the informant at the time of occurrence. In the meantime, they were attacked by the accused persons, who started indiscriminate firing and then all the aforesaid four persons started escaping the firing, but Gautam Kumar fell down in the course of escaping sustaining bullet injuries and died on the spot. But, in view of the aforesaid



contradiction between the statement of PW-2 and PW-5 as given before the court and that given before the I.O. under Section 161 Cr.P.C. regarding the aforesaid material aspect of the case, the testimony of the informant regarding the aforesaid aspect of the case also does not appear to be worth credence and reliable as per account of informant, PW-2 and PW-5 are said to have been escaping along with the informant, but PW-2 and PW-5 do not appear to have been escaping during the course of firing along with the informant and Gautam Kumar and witnessed sustaining injury and succumbing on the spot by Gautam Kumar.

18. PW-2 (Swadesh Kumar) in his statement has not stated about place of search of the dead body of Gautam Kumar. PW-5 (Saras Yadav) has stated in paragraph 6 of his cross-examination that he did not make effort to trace out the dead body of Gautam Kumar. Though, informant PW-9 has stated in paragraph 14 of his cross-examination that he searched the dead body of Gautam Kumar along with the I.O., but I.O. PW-7 though has stated in paragraph 9 of his cross-examination that after recording the fardbeyan of the informant at the place of occurrence, he searched the dead body, but in vain, but in paragraph 10 of his cross-examination, he has stated that he has not mentioned the factum of searching of the dead body in the



case diary. He has also not stated about searching of dead body along with the informant. The aforesaid statement of the witnesses goes to indicate that no effort was made either by the I.O. or by the informant or his relatives to search out the dead body of Gautam Kumar which happens to be against natural course of conduct as in the natural course of conduct in case of missing of dead body in the incident his relative would made hectic and best effort to trace it out. Thus, the prosecution has utterly failed to substantiate the death of the deceased Gautam Kumar in the occurrence.

19. As per the prosecution case, the dead body of Gautam Kumar was taken to Ganga river on the tractor to some distance and thereafter on the horse and as per the prosecution case, the wound of Gautam Kumar was bleeding, so there must be trail of blood from the place of occurrence to the place where tractor was parked and on the tractor itself, but I.O. PW-7 in paragraph 7 of his cross-examination has stated that he did not found blood at any place barring the place of occurrence. He has also not found any blood on the seized tractor. Hence, the aforesaid aspect of the case also creates serious doubt about the place of occurrence and manner of occurrence.

20. From perusal of paragraph 9 of cross-



examination of I.O. PW-7, it appears that bush from where the informant and his companions have allegedly witnessed the occurrence of gunning down Gautam Kumar by Rajesh Yadav and Varun Yadav and taking his dead body on the tractor is located at ½ Km. from the place of occurrence. The aforesaid aspect of the case also creates serious doubt about witnessing of the occurrence by the informant and his companions from such a long distance and that too specifically attributing the assault to Rajesh Yadav and Varun Yadav amongst 20-25 persons indulged in resorting firing from such a long distance.

21. As per the prosecution case itself, the informant had taken Argara (cattle pound) in auction from Zila Parishad District Board and was running the said pound. But, Rajesh Yadav was illegally running another Argara (cattle pound) in the vicinity of his pound and was realizing exorbitant amount for releasing of cattle and he had also extended threatening to the informant to remove his cattle pound else to face dire consequences. PW-1 has also stated in paragraph 3 of his cross-examination that bone of contention is said to be that his son Gajendra Kumar @ Guddu Yadav had taken Argara (cattle pound) in auction from the District Board while Rajesh Yadav was running Argara (cattle pound) illegally. The prosecution has



also filed and proved the receipt of Argara (cattle pound) issued in favour of the informant in the case marked as Ext-3. The aforesaid prosecution case and the statement of PW-1 indicates that there is animosity between the parties over running of Argara (cattle pound). Animosity cuts both the edges. But, in view of the material and vital contradiction between the testimony of the witnesses, non-reliability of testimony of the witnesses examined by the prosecution, not establishing the death of Gautam Kumar in the occurrence, not bringing on record any objective evidence by the prosecution, false implication of the appellants at the hand of the prosecution party due to aforesaid animosity cannot be ruled out.

22. In the aforesaid facts and circumstances of the case, we find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charges levelled against the appellants beyond all reasonable doubt by adducing convincing, cogent, consistent and worth credence evidence. Hence, the impugned judgment and order of conviction and sentence passed by learned trial court against the appellants is set aside and the appellants are acquitted of all the charges levelled against them giving them benefit of doubt. As the appellant Varun Yadav of Criminal



Appeal (DB) No. 713 of 2013 is in custody, he is directed to be released forthwith from the custody, if not wanted in any other case whereas the appellants Pappu Yadav, Kishto Yadav, Rupesh Yadav and Sunil Kumar @ Sunny are on bail, they are discharged from the liability of the bail bonds. Accordingly, the aforesaid two Criminal Appeals are allowed.

23. Let a copy of the first and last page of this judgment be handed over to the learned *amicus curiae*, Mr. Krishna Murti Singh and learned *amicus curiae* be paid prescribed fee by the Patna High Court Legal Services Committee.

(Rakesh Kumar, J)

(Prakash Chandra Jaiswal, J)

rohit/-

AFR/NAFR	AFR
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