

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.347 of 2020

Arising Out of PS. Case No.-40 Year-1991 Thana- SIMRI District- Darbhanga

Kaleshwar Yadav @ Kaleshwar Rai, Son of late Chandeshwar Yadav @ Late Chandeshwar Rai, Resident of Village - Jagnia, Jaganiya, P.O.- Tharma, P.S.- Gaighat, District- Muzaffarpur.

... .. Appellant/s

Versus

1. The State of Bihar
2. Gorakh Rai, Son of Late Laxmi Rai, Resident of Village - Jaganiya, P.O.- Tharma, P.S.- Gaighat, District- Muzaffarpur
3. Lakshmeshwar Tiwari @ Lachu Tiwari, Son of Late Ram Nadan Tiwari, Resident of Village-Haripur, P.S.- Simri, District- Darbhanga
4. Navin Tiwari, Son of Baiju Tiwari, Resident of Village - Haripur, P.S.- Simri, District- Darbhanga

... .. Respondent/s

Appearance :

For the Appellant/s	:	Ms. Shama Sinha, Advocate
For the Respondent/s	:	Mr. Manish Kumar No. 2, APP
		Mr. Vikas Kumar Sharma, Advocate

CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 23-01-2023

This is an appeal by First informant PW 6 Kaleshwar Rai, who happens to be the son of deceased Chandeshwar Rai, challenging the acquittal of respondent no. 2 Gorakh Rai, respondent no. 3 Lakshmeshwar Tiwari @ Lachhu Tiwari and respondent no. 4 Navin Tiwari who were originally arrayed as accused nos. 1 to 3 respectively in Sessions Trial No.



252 of 1992 and who came to be acquitted of the offences alleged against them by the learned Fast Track Court No.-I, Darbhanga, Bihar on 23.12.2019.

2. Briefly stated it is case of the prosecution that in the night intervening 19/20.07.1991, at about 2 AM, when Chandeshwar Rai (since deceased) was at his bore-well in his field, accused persons including accused no. 1 Gorakh Rai, accused no. 2 Lakshmeshwar Tiwari and accused no. 3 Navin Tiwari along with convicted accused Baidya Nath Tiwari @ Baiju Tiwari and absconding accused Pramod Tiwari formed an unlawful assembly with common object to eliminate Chandeshwar Rai. Convicted accused Baidya Nath Tiwari and accused no. 1 Gorakh Rai was armed with Farsas whereas accused no. 2 Lakshmeshwar Tiwari @ Lachhu Tiwari was armed with Bhala and accused no. 3 Navin Tiwari was armed with lathi. The accused persons encircled Chandeshwar Rai and accused no. 2 Lakshmeshwar Tiwari @ Lacchu Tiwari exhorted and ordered other accused persons to kill Chandeshwar Rai. Acting on order of accused no. 2 Lakshmeshwar Tiwari, convicted accused Baidya Nath Tiwari gave a blow of Farsa, accused no. 1 Gorakh Rai also gave a blow of Farsa to Chardeshwar Rai when other accused persons were surrounding



him. Hearing shouts of Chandeshwar Rai, it is averred by the prosecution that P.W. 2 Yugheshwar Rai and P.W. 3 Rajendra Rai rushed to the scene of occurrence and saw the incident. According to the prosecution case, P.W. 4 Jitendra Rai and P.W. 6 Kaleshwar Rai who happens to be sons of deceased Chandeshwar Rai reached on the spot of the incident soon after the incident and heard dying declaration of their father Chandeshwar Rai who disclosed that he was assaulted by accused no. 1 Gorakh Rai and convicted accused no. 4 Baidya Nath Tiwari by means of Farsa. Chandeshwar Rai was then taken to the hospital where he succumbed to the injuries. Postmortem examination of dead body of Chandeshwar Rai came to be conducted by P.W. 8 Dr. V.C. Verma of Darbhanga Hospital on 20.07.1991.

3. After completion of investigation, the accused persons came to be charge sheeted. It is seen that initially they were charged for the offence punishable under section 302 with the aid of section 34 of the Indian Penal Code but subsequently at the time of the argument, the charge was altered to one under section 302 r/w 149 of the Indian Penal Code. It is not seen from the record that thereafter an opportunity was granted to the accused persons for further cross-examination of prosecution



witnesses in the wake of alteration of charge for imposing vicarious liability under section 149 of the Indian Penal Code.

4. The prosecution unfurled its case by examining ten witnesses and in rebuttal some witnesses were examined by the defence.

5. The prosecution relied on the ocular version of alleged eye witnesses P.W. 2 Yugheshwar Rai and P.W. 3 Rajendra Rai. It also relied on version of P.W. 4 Jitendra Rai and P.W. 6 Kaleshwar Rai who claimed to be witnesses to the oral dying declaration of their deceased father Chandeshwar Rai.

6. After hearing the parties, the learned trial court by the impugned judgment concluded that the prosecution has failed to prove the charge so far as respondents accused no. 1 Gorakh Rai, accused no. 2 Lakshmeshwar Tiwari and accused no. 3 Navin Tiwari are concerned. The learned trial court however concluded that the charge for the offence punishable under section 302 of the Indian Penal Code is proved qua accused no. 4 Baidya Nath Tiwari @ Baiju Tiwari. The learned trial court while appreciating evidence adduced by the prosecution has discarded evidence of P.W. 2 Yugheshwar Rai and P.W. 3 Rajendra Rai with a reason that their version is not in tune with the oral dying declaration of deceased Chandeshwar



Rai and they have not stated that the deceased had made an oral dying declaration to his sons P.W. 4 Jitendra Rai and P.W. 6 Kaleshwar Rai. The learned trial court by the impugned judgment has further observed that presence of accused nos. 1 to 3 is falsified by the oral dying declaration of the deceased.

7. The learned counsel appearing for the appellant-First informant – P.W. 6 Kaleshwar Rai has vehemently argued that version of P.W. 2 Yugheshwar Rai and P.W. 3 Rajendra Rai is clear and consistent to the prosecution case and finding of the learned trial court to the effect that these two eye witnesses have not stated that accused no. 1 Gorakh Rai and accused no. 4 Baidya Nath Tiwari @ Baiju Tiwari have assaulted the deceased with Farsa is totally perverse. She further argued that both these witnesses have ascribed role to the respondents-acquitted accused in the crime in question by stating that accused no. 2 Lakshmeshwar Tiwari had ordered to eliminate the deceased and respondent-accused no. 1 Gorakh Rai and accused no. 3 Navin Tiwari had surrounded the deceased in order to prevent him from fleeing. Hence, their liability in respect of the crime in question can be inferred. It is further averred by the learned counsel appearing for the appellant that P.W. 4 Jitendra Rai and P.W. 6 Kaleshwar Rai have spoken about dying declaration



made to them by their father at the time of the incident and therefore, the learned trial court ought not to have acquitted the respondents-accused nos. 1 to 3.

8. As against this, the learned counsel appearing for respondent-accused nos. 1 to 3 took us through evidence of P.W. 2 Yugheshwar Rai, P.W. 3 Rajendra Rai as well as evidence of P.W. 7 Om Prakash Verma, the Investigating Officer to demonstrate that the incident in question took place on the bund of the field where bore-well of the deceased was situated and that spot is at least 1 km away from village Jagania where all these witnesses were residing. It is argued that version of these witnesses goes to show that they took time to reach on the scene of occurrence and by that time the incident had already taken place and therefore, P.W. 2 Yugheshwar Rai and P.W. 3 Rajendra Rai can not be said to be an eye witnesses to the incident in question. It is further argued that with the injury sustained by the deceased, it was virtually impossible to infer that he was in a position to make statement as to the cause of his death to his sons who reach on the spot of the incident by traveling from their house which was situated at a distance of about 1 km from the spot of the incident.

9. We have considered the submissions so advanced.



We have also perused the record and proceedings including deposition of relevant prosecution witnesses.

10. This is an appeal challenging acquittal of respondent nos. 2 to 4. It is well settled that if the learned trial court has taken plausible view in consonance with evidence on record then even if other view is possible, the court of appeal is not justified in interfering with the judgment of acquittal recorded by the learned trial court. In such cases, presumption of innocence of the accused is in fact further cemented by the judgment of acquittal on the basis of view taken by the learned trial court by examining evidence on record.

11. Keeping in mind these principles of dealing with the appeal challenging acquittal, let us examine the case in hand in order to ascertain whether the view taken by the learned trial court is not plausible or it is an outcome of perverse appreciation of evidence by the learned trial court.

12. Undisputedly it is a case of the prosecution that the incident took place at or about 2 AM of the night intervening 19th and 20th July, 1991. It is not in dispute that the place of occurrence is in the field of deceased Chandeshwar Rai and near his bore-well. It is also not in dispute that P.W. 2 Yugheshwar Rai and P.W. 3 Rajendra Rai who are claiming to be an eye



witness to the incident, are resident of village Jagania. P.W. 2 Yugheshwar Rai had claimed that at the time of the incident he was at Thakurwari whereas P.W. 3 Rajendra Rai had claimed that at the time of the incident he was at his *Bathan* in village Jagania. On this backdrop, it is in evidence of P.W. 7 Om Prakash Verma, the Investigating Officer that from the scene of occurrence, village Jagania is at a distance of about 1 km. This witness has also spoken that Thakurwari is at a distance of about $\frac{1}{2}$ km from the spot of the incident. Let us now examine truthfulness what is spoken about the incident by P.W. 2 Yugheshwar Rai and P.W. 3 Rajendra Rai about the incident keeping in mind their distance from the scene of occurrence at the time of the incident.

13. P.W. 2 Yugheshwar Rai who claim to be at Thakurwari at the time of the incident which took place at mid-night has stated that he heard *Hulla* of deceased Chandeshwar Rai, took a torch and rushed to the spot of the occurrence. He then claims to have witnessed the incident according to the manner in which it is stated to have happened by the prosecution. However when he was subjected to cross-examination, this witness has spoken that when he rushed to the spot of the incident by coming on the road he saw deceased



Chandeshwar Rai lying on the road. This plausibly implies that this witness is not trustworthy and reliable. He, in all probability was not an eye witness to the incident because in cross-examination he has stated that he had seen the deceased lying on the road whereas the incident took place, according to the prosecution case on bund of the field and near bore-well. Moreover P.W. 6 Kaleshwar Rai is contradicting the version of this witness by claiming to be the first to reach on the spot of the occurrence.

14. P.W. 3 Rajendra Rai, who had claimed to be at his *Bathan* at the time of the incident, has spoken in tune with the prosecution case and claimed to have seen the incident after reaching the spot of the incident by traveling a distance of about 1 km from his *Bathan*. He has stated that he reached on the spot of the incident after hearing *Hulla* of the deceased and states that P.W. 4 Jitendra Rai and P.W. 6 Kaleshwar Rai had reached on the spot of the incident subsequent to reaching the spot of the incident. As quoted about, this witness was at a distance of about 1 km from the scene of occurrence and P.W. 6 Kaleshwar Rai has contradicted this witness by stating that he as well as his brother P.W. 4 Jitendra Rai were the first in point of time to reach the scene of occurrence.



15. That apart the mode and manner in which the incident took place makes presence of P.W. 3 Rajendra Rai on the scene of occurrence at the time of the incident improbable. It is the case of the prosecution that one blow was given by the accused on neck of the deceased while other accused persons surrounded the deceased. Thus the incident, in all probability did not last long as it is a case of single blow. In such situation, it is highly improbable that a person who travel a distance of about 1 km in the dark night hours to reach on the spot of the incident would witness the incident of slashing neck of the victim by a single blow. In this view of the matter, it can not be said that the learned trial court has not taken plausible view in the matter or had indulged in perverse appreciation of evidence on record.

16. The autopsy surgeon who is examined as P.W. 8 had stated that the deceased had sustained a wound measuring 3-1/2"x1/2"x1-3/4" on left side of neck of the deceased. The damage caused by this wound is stated by the autopsy surgeon by mentioning that muscles behind left sterno mastoid were found cut. Left side of 4th cervical vertebra were also found cut along with the blood vessels in the surrounding area. This implies the force with which the wound was inflicted by means



of Farsa. Considering the seat of injury and the force of blow, it is hardly possible that after reaching on the spot of the incident by traveling a distance of about 1 km, sons of the deceased had an opportunity to hear from the deceased his statement as to the circumstances of transaction leading to his death. The autopsy surgeon has accepted in his cross-examination that such a blow can cause severe bleeding rendering the victim unconscious within a span of 2 to 5 minutes after sustaining such type of wound. Hence, it is not possible to infer that the learned trial court has wrongly disbelieved the oral dying declaration of the deceased coming from the mouth of his own sons. For acting upon the oral dying declaration, the court is required to be satisfied that the contents of the dying declaration were truthful and the deceased was in a fit mental as well as physical condition to make such declaration. It can not be said that the dying declaration always contains truth and nothing but the truth. The court is expected to be more careful while acting upon such dying declaration because the accused had no opportunity to test the truthfulness of such statement of the deceased as the deceased is not available for cross-examination. Therefore, it is not possible for us to record a prima facie finding that the learned trial court has committed error in



disbelieving the evidence regarding the dying declaration.

17. The net result of foregoing discussion requires us to hold that the learned trial court has not committed any error of law or perversity in its finding while recording acquittal of respondent nos. 2 to 4 by the impugned judgment and order. The appeal as such is devoid of merit and the same is accordingly dismissed.

(A. M. Badar, J)

(Sandeep Kumar, J)

Aditi/Bharadwaj

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	13.02.2023
Transmission Date	13.02.2023

