

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**CRIMINAL APPEAL (DB) No.760 of 2015**

Arising Out of PS. Case No.-183 Year-2014 Thana- BHAGALPUR KOTWALI District-  
Bhagalpur

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1. Raja Yadav @ Rajesh Bharti, son of Sikandar Yadav;
  2. Guddu Yadav, son of Kailash Yadav @ Kailu Yadav;
- Both residents of Village-Sahebganj, P.S.-University, District-Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Surendra Singh, Sr. Advocate  
Mr. Rajive Ranjan Singh, Advocate  
For the State : Mr. Dilip Kumar Sinha, APP

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**CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR**

**and**

**HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)**

**Date : 26-09-2023**

The appellant Nos. 1 and 2, viz., Raja Yadav @ Rajesh Bharti and Guddu Yadav respectively have been convicted for the offences punishable under Section 302 of the Indian Penal Code and Section 27 of the Arms Act *vide* judgment dated 24.06.2015 passed by the learned



3<sup>rd</sup> Additional District and Sessions Judge, Bhagalpur in Sessions Trial No. 635 of 2014, arising out of Kotwali (Vishwidayalay) P.S. Case No. 183 of 2014, and by order dated 30.06.2015, they have been sentenced to undergo imprisonment for life and a fine of Rs. 10,000/- (ten thousand) each and in default of payment of fine, to further suffer simple imprisonment for two years for the offence under Section 302 IPC. For the offence under Section 27 of the Arms Act, the appellants have been sentenced to suffer rigorous imprisonment for five years, to pay a fine of Rs. 2,000/- (two thousand) each and in the event of non-payment of fine, to further suffer for simple imprisonment for two months. The sentences have been ordered to run concurrently.

2. Both the appellants are said to have killed one Gandhi Yadav in his lodge by firing at him. According to the First Information Report, which has been lodged by Birju Yadav (P.W. 5), who is the brother of the deceased, the deceased was shot at by the two



appellants and one Ranjit Yadav (who has not yet been put on Trial) on the exhortation of approximately six others, all of whom had been put on Trial but acquitted. The firing made by the appellants is said to have hit the deceased in his chest, shoulder and elbow.

3. According to P.W. 5, most of his family members who had gone to the lodge in search of the deceased had seen the occurrence. While the deceased was still alive, he was taken on a three-wheeler to Mayaganj Hospital by the family members, but there he was declared dead. The reason for the occurrence, according to the FIR, is that the deceased had only recently deposed against the accused persons including the appellants in the University P.S. Case No. 148 of 2012, which had irked the appellants and others and as a retaliation, they killed the deceased.

4. On the afore-noted *fardbeyan* statement of P.W. 5, Kotwali (Vishwidayalay) P.S. Case No. 183 of 2014 dated 19.03.2014 was registered for investigation



against the appellants and seven others under Sections 147, 148, 149, 448, 452 and 302 of the IPC and Section 27 of the Arms Act.

5. One of the assailants of the deceased, namely, Ranjit Yadav never surrendered to the process of law.

6. The police submitted charge-sheet against all the named accused persons including the appellants, whereupon cognizance was taken and all of them were put on trial.

7. The learned Trial Court, after examining seven witnesses on behalf of the prosecution, convicted the appellants as aforesaid, but acquitted the other accused persons.

8. We have heard Sri Surendra Singh, the learned Senior Advocate assisted by Mr. Rajive Ranjan Singh, the learned Advocate on behalf of the appellants and Mr. Dilip Kumar Sinha, the learned APP for the State.



9. It was argued on behalf of the appellants that none of the witnesses had seen the occurrence or had heard the deceased saying that the appellants and one Ranjit Yadav had fired at him leading to his death. In fact, it was argued, all the witnesses improved upon their statements which they had made during the investigation in order to falsely implicate the appellants. Apart from this, it has been urged on behalf of the appellants that the nature of injury suffered by the deceased would have lead to his instantaneous death, giving him no time to narrate about the occurrence or tell the names of the assailants.

10. It was, thus, argued that in the event of the factum of deceased having made disclosure against the appellants being not possible, the Trial Court judgment, which has relied solely on the oral dying declaration, requires to be interfered with.

11. Lastly, it has been submitted that despite the occurrence having taken place inside a lodge, which



may have been inhabited by many and which is located in the city, no independent person has been examined to prove the case except the direct and close relatives of the deceased.

12. As opposed to the afore-noted contentions, Mr. Dilip Kumar Sinha, the learned APP has submitted that merely because the oral dying declaration was not recorded in writing, it ought not to be disbelieved when almost all the witnesses have testified to the fact that when they had met the deceased for the first time after his being injured, he was still gasping for breath and, thus, was alive. It is not always necessary that with gunshot wounds, a person would die immediately, leaving no time for him to state about his assailants before his own persons. Apart from this, Mr. Sinha has also shown from the evidence on record that immediately after the gunshot was heard by the witnesses, they entered the lodge and found that the deceased was writhing in pain and was gasping. Had he



been dead by the time the witnesses visited the lodge, there would have been no occasion for them to have taken the deceased to hospital. He had been taken to the hospital only in the hope of his resuscitation after medical help.

13. A strong motive, according to Mr. Sinha, existed for the appellants to have eliminated the deceased. That the other accused persons who too were seen by the prosecution witnesses, exhorting the appellants to kill the deceased, were acquitted, does not necessarily mean that the allegation against the appellants is false and that should also fail. After all, the proposition of law remains inviolate even today that truth is to be winnowed from a sea of falsehood.

14. So far as the appellants are concerned, Mr. Sinha has argued, not only their names were taken by the deceased before his death, but they were also seen by the witnesses entering the lodge prior to the occurrence and exiting the lodge, doling out threats that



if this murder also is reported, the witnesses would meet the same fate. Thus, even if for a moment, it is disbelieved that the deceased had made any statement before his death, the circumstances of the appellants entering the lodge; the witnesses hearing the sound of gun firing and their exiting the lodge threatening the witnesses are definite evidence which would complete the chain of events so as to prove that the appellants had killed the deceased.

15. It would be profitable to first refer to the medical evidence as the conviction of the appellants primarily rests on the oral dying declaration of the deceased before P.W. 5 and other witnesses including the wife of the deceased.

16. The post-mortem examination of the deceased was conducted by Dr. A.K. Mallik (P.W. 6). He found three gunshot wounds; one of which was a wound of entry with inverted margin and tattooing around  $\frac{1}{2}$ " X  $\frac{1}{4}$ ", which lead to the right chest cavity and entered the



left side of the lower part of the neck below the clavicle. P.W. 6 has also discussed the trajectory of the bullet, namely, the same entering in the right chest cavity after piercing the pericardium, heart and the right lung. The bullet was found lodged in the posterior wall of the right chest wall. That bullet was recovered and handed over to the investigator under sealed cover for the needful. Both the chest cavities contained blood and blood clots, whereas the chambers of both sides of the heart were found to be completely empty. The other wound on the deceased was also a wound of entry with inverted margin and tattooing of the same dimension which was abdominal cavity deep. Here also, the bullet had pierced the peritoneum and had entered the left chest cavity. The second bullet also was found lodged in the posterior wall of the left chest which also was taken out and handed over under sealed cover for the needful. The last of the wound found by P.W. 6 was again a wound of entry of  $\frac{1}{2}$ " X  $\frac{1}{2}$ " dimension, which was communicating



with the wound of exit in the upper portion of the left forearm. This bullet had come out through the wound of exit with everted margin on the lower part of the left arm. The doctor had found all the injuries to be ante-mortem and caused by firearm. Injury Nos. 1 and 2 were found to be grievous and dangerous to life in ordinary course of nature. Injury No. 3, *i.e.*, the wound on the forearm was found to be simple in nature. The death was because of haemorrhagic shock because of the injuries suffered by the deceased.

17. The injuries found on the deceased, without doubt, is grievous and dangerous as well. The medical evidence tells us that wounds on lungs could be immediately fatal because of profuse haemorrhage or because of suffocation due to respiratory embarrassment on account of presence of blood in the pleural cavity or in the air passages. Some times, the death may ensue because of subsequent septic pneumonia. The wounds of heart are also usually fatal, except in few circumstances



and cases. Danger to life, it is known, would depend upon the nature of the wound. If the wound is not plugged, there are every chances of neurogenic/haemorrhagic shock where the patient would immediately fall in coma and would pass out. The medical evidence is also replete with instances where any penetrative wound in the lungs or the heart bleeds more rapidly causing septic pericarditis or mediastinites.

18. According to the evidence of P.W. 7, the Investigating Officer, who had visited the place of occurrence, there was copious blood on the floor. This pre-supposes that the deceased had bleed profusely on having received three gunshot wounds. With such injuries on the person of the deceased, it would only be a wonder that he would survive or be in his fit mental and physical faculties to recite the names of the assailants and other persons also who are said to be present at the time when the deceased was shot at.

19. In this context, we find that the deposition



of witnesses to be highly exaggerated. In the FIR, P.W. 5 has categorically stated that after receiving the gunshot by three persons, the deceased fell down unconscious. During the trial, he has made statement which clearly reflects that he had not seen the act of firing. He had gone inside the lodge along with others after hearing the sound of gunshot. According to the deposition of P.W. 6, the deceased was still surviving and he gave out the names of the appellants.

20. This is what has been challenged by the appellants to be an improvement upon the earlier version, only for the purposes of lending credence to the accusation made against the appellants.

21. Had the deceased been alive to take the names of the appellants, P.W. 5 would have been careful enough to state in the FIR that he heard the deceased while he was still surviving, speak out the names of the assailants. Surprisingly, in the *fardbeyan*, he has narrated the sequence of events as if he had seen the



occurrence himself. He also claims that other persons who accompanied him had also seen the occurrence.

22. The Investigating Officer of this case, namely, Samrendra Kumar (P.W. 7) has completely denied that anyone of the witnesses including P.W. 5 spoke to him about the deceased, while struggling for life, gave the names of the assailants.

23. We have also noted from the deposition of P.W. 5 that the deceased was carried to Mayaganj Hospital where he was declared dead. It is not the case of the prosecution that on the way, the deceased resumed consciousness for a while and spoke about the appellants. The specific prosecution case right from the beginning is that the deceased had fallen unconscious on being shot at.

24. In this background, it is difficult for us to accept the statement of the other witnesses, namely, Rukma Devi, who is the widow of the deceased (P.W. 2), Sabita Devi, who is the sister-in-law of the deceased



(P.W. 3) and Dinesh Yadav, who is one of the brothers of the deceased (P.W. 4), that they had heard the deceased speak out the names of the appellants.

25. There is yet another aspect to it, which renders their deposition unbelievable. The Trial Court has rejected the accusation against the other accused persons who had exhorted the appellants and had surrounded the deceased while he was being attacked. All the afore-noted witnesses, namely, P.Ws. 2, 3 and 4, referred to above, improved upon their respective version and stated before the Trial Court that when they reached near the lodge of the deceased, they found the appellants and others loitering around and entering the lodge after a while. Then they heard a gunshot and also saw the appellants coming out of the lodge and running away. It was only then that the three of them (P.Ws. 2, 3 and 4) entered the lodge and found that the deceased had fallen on the ground and was struggling for his life. The entire story of the other accused persons including



the appellants having been seen by the witnesses loitering around the place of occurrence, going inside the lodge and after executing the murder, fleeing away from the lodge, has been disbelieved by the Trial Court. The reason is that their attention was drawn and it was proved that they had not made such statements before the police during the course of investigation. Thus, all of this accusation was an after thought and, perhaps, motivated.

26. Dinesh Yadav (P.W. 4) has signed the *fardbeyan* statement. He has also stated during trial that whatever was stated by Birju Yadav (P.W. 5) was recorded in verbatim by the Officer-in-Charge of the police station. The contents of the *fardbeyan* of P.W. 5 clearly reflects that the deceased had fallen unconscious. Where was the occasion of the deceased having resumed consciousness and having spoken about the appellants as his assailants?

27. The omission of P.W. 5 regarding his



having heard from the deceased about the names of the assailants, while he gave his *fardbeyan* statement, assumes relevance.

28. The fact that the deceased talked about the appellants as his assailants was a fact which was relevant, especially, when that was the source of information to P.W. 5. In hindsight, when it was found that P.W. 5 had not seen the actual part of the assault but had given the specific details of the persons firing at the deceased, it would have obviously been sourced through the deceased or it would have been his imagination. Not stating the fact of the deceased having taken the names of the appellants as assailants, thus, was an omission of such an importance which has affected the probabilities of the case and this fact assumes relevance under Section 11 of the Indian Evidence Act.

29. The fact of the deceased remaining alive to take the names of the assailants is in itself as also in



connection with other facts, makes the existence of the fact of the deceased having been murdered at the hands of the appellants highly relevant, making the case probable and in its absence, the case to be improbable.

30. There is no denying the fact that FIR being a previous statement would, strictly speaking, be only used for corroborating or contradicting the maker of it but in the present case when the brother of the deceased gave a *fardbeyan* giving specific details about the appellants having fired, missing out upon the factum of the oral dying declaration assumes relevance and makes such statement susceptible of being called a lie.

31. Even otherwise, the law with respect to dying declaration has been very well settled by now to brook of any confusion in the matter.

32. A dying declaration is a relevant evidence as declared under Section 32 of the Indian Evidence Act, 1872.

33. If a declaration is made, either oral or in



writing, by a person whose death is imminent, the principle propounded by *Matthew Arnold* that "truth sits upon the lips of a dying man" and "no man will go to meet his maker with falsehood in his mouth", will come into play but there are certain checks provided as such statement is not capable of being verified.

34. There may not be any rule of law or of prudence that corroboration always would be required for relying upon dying declaration but only if the Court is satisfied that the dying declaration is true and voluntary that it could be used for conviction. A dying declaration has to be examined and scrutinized very carefully so as to ensure that it is not the result of any tutoring, prompting or imagination of either the dying man or of the person claiming to have heard such dying declaration. Whenever there is any suspicion regarding the correctness of such declaration, the law enjoins that it ought not to be acted upon without any corroborative evidence. There can be no denial of the rule of prudence



that if the deceased is found to be unconscious, he cannot be believed to have made a statement which would be admissible under Section 32 of the Indian Evidence Act. This would be the biggest infirmity in a dying declaration, namely, the person remaining unconscious all the while.

35. There is no reason for us to disbelieve or doubt the *fardbeyan* of P.W. 5 that the deceased had fallen unconscious. There is nothing on record except for the first statement, at the trial, of the witnesses that the deceased had spoken about the assailants for us to believe that P.W. 5 and the other witnesses had seen the deceased when he had not lost his consciousness.

36. The appellants, in the present case, have been convicted primarily because of the Court relying on the oral dying declaration, which we have found to be very shaky. The nature of injuries suffered by the deceased; the copious bleeding; the witnesses not being present at the time of occurrence; the deceased being



taken to hospital in an unconscious state with no medico legal evidence of his condition of health prior to his being declared dead; no disclosure in the *fardbeyan* about the dying declaration and total turn around of the witnesses during trial that the deceased had made a declaration; coupled with the fact that all the other part of the accusation in the prosecution version have been disbelieved by the Trial Court, we find it difficult to give our approval to the opinion rendered by the Trial Court.

37. The deceased, for all we know, was dead or unconscious. That is what appears from the first version of P.W. 5. As noted above, the injuries, especially, when two of the bullets got embedded inside the body of the deceased makes it very doubtful that the deceased would have been in a position to even whisper. The pericardium was pierced through and the lungs were also torn. The heart chambers were completely flushed out of blood. A person would be completely gagged with such injuries.



38. We have tested the case from another angle as well.

39. The motive introduced in the *fardbeyan* also could not be proved. There is nothing on record except for the statement of P.W. 5 that the deceased had deposed against the appellants shortly before this occurrence. We have no idea what the case was about and in what capacity the deceased had deposed against them. Simultaneously, we have also found one of the witnesses says that appellant/Raja Yadav had actually lodged a complaint against the deceased and others, which case was sought to be compounded.

40. Motive in such circumstances, especially when specifically introduced in the prosecution version, is required to be proved, failing which the prosecution case might falter, though not in all circumstances. There could be enmity between the parties but there would be some force in the submission of the appellants that because of such enmity, accusation has levelled by the witnesses,



completely forgetting that they had made different statements before the Investigating Officer.

41. With the Investigating Officer denying that anyone of the witnesses had spoken about the deceased remaining conscious when they had met him, completely discredits the witnesses for us to accept their statements as true.

42. We are thus left with no option but to give benefit of doubt to the appellants and acquit them.

43. For the reasons afore-noted, the impugned judgment of conviction dated 24.06.2015 and the consequent order of sentence dated 30.06.2015 passed by the learned 3<sup>rd</sup> Addl. Sessions Judge, Bhagalpur in Sessions Trial No. 635 of 2014, arising out Kotwali (Vishwidayalay) P.S. Case No. 183 of 2014, are set aside and the appellant Nos. 1 and 2, viz., Raja Yadav @ Rajesh Bharti and Guddu Yadav respectively are acquitted of the charges levelled against them.

44. The appellant Nos. 1 and 2, viz., Raja



Yadav @ Rajesh Bharti and Guddu Yadav are in custody.  
They are directed to be set at liberty forthwith unless  
their detention is required in any other case.

45. The appeal stands allowed.

46. Let a copy of this judgment be dispatched  
to the Superintendent of the concerned Jail forthwith for  
compliance and record.

47. The records of this case be returned to the  
Trial Court forthwith.

48. Interlocutory application/s, if any, also  
stand disposed off accordingly.

**(Ashutosh Kumar, J)**

**(Alok Kumar Pandey, J)**

Saurabhkrsinha/  
Praveen-II

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