

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.465 of 2013**

Arising Out of PS. Case No.-36 Year-2007 Thana- ITARHI District- Buxar

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Musafir Yadav @ Veer Singh @ Mosafir Yadav and Anr. S/O Late Shiv Prasad Yadav Resident Of Village- Basaon Khurd, P.S.- Itarhi, District- Buxar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance:

For the Appellant/s	:	Mr. Digvijay Kumar Ojha, Advocate
	:	Mr. Kumar Rajiv, Advocate
For the Respondent/s	:	Mr. Mukeshwar Dayal, APP

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**CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND
MALVIYA**

ORAL JUDGMENT

Date: 27-11-2024

The present appeal has been filed under Section 374(2) of Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C') challenging the Judgment of conviction dated 06.06.2013 and order of sentence dated 12.06.2013 passed in Sessions Trial No. 149 of 2009 in connection with Itarhi P.S. Case No. 36 of 2007 dated 05.04.2007 passed by learned Additional District and Sessions Judge- IVth, Buxar, whereby and where under the appellants have been convicted for the offence under Sections 436/34 of Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and Rs. 5000/- fine has been imposed and on failure of payment of fine, the appellants will further have to undergo simple



imprisonment for 1 year with the direction that all sentences shall run concurrently.

2. Heard Mr. Digvijay Kumar Ojha, learned counsel for the appellant assisted by Mr. Kumar Rajiv and Mr. Mukeshwar Dayal, learned APP for the State.

3. The brief fact leading to the filing of the present appeal on the basis of written statement given by Guddu Yadav (informant) on 05.04.07, at about 2 PM in the day, a fire broke out in the house. At that time, he was sleeping, when suddenly he woke up and he saw the fire and shouted. The people of the village gathered and tried to extinguish the fire, but it could not be extinguished and all the household goods were burnt. He further stated that he was fully confident that Musafir Yadav alias Veer Singh and Shivji Yadav have set fire to their house since they had seen him coming and going from that road 3-4 times and they had a quarrel with him from before.

4. Further on the basis of written statement of informant Guddu Gadav, on 05.04.2007 a formal FIR was registered in Hatadi Police Station Case No. 36 of 2007 dated 05.04.2007 against Musafir Yadav @ Veer Singh and Shivji Yadav under Section 436 of Indian Penal Code which was presented in the court of the Chief Judicial Magistrate, Buxar on



06.04.2007 and after investigation, charge sheet no. 105 of 2007 dated 31.07.2008 was submitted to the court of Chief Judicial Magistrate, Buxar on 18.09.2007. The case was committed to the court of the Districts and Sessions Judge for trial. On 30.06.2009, charges was framed against the appellants Musafir Yadav @ Veer Singh and Shivji Singh under Sections 436/34 of the Indian Penal Code.

5. The prosecution examined altogether 10 witnesses to substantiate the charges levelled against the appellants, who are namely, PW-1 Haridwar Singh, PW-2 Surendra Bhar, PW-3 Gorakh Ram, PW-4 Kedar Ram, PW-5 Dinesh Yadav, PW-6 Shashibhushan Mishra, PW-7 Guddu Yadav (informant), PW-8 Seeta Devi (wife of informant), PW-9 Vasukinath Kunwar and PW-10 Mohammed Shamiullah (Investigating Officer). Prosecution has also brought on record documentary evidence, Exhibit-2 is the writing and signature on the charge sheet, Exhibit-3 is the writing and signature of the written application, Exhibit-4 is the endorsement on the written application and Exhibit-5 is the case diary. The defence has neither produced any oral witness in its support nor presented any documentary evidence before the court.

6. PW-2 Surendra Bhar, PW-3 Gorakh Ram, PW-



4 Kedar Ram have been declared hostile by the prosecution and they have stated in their evidence that they do not know anything about the incident.

7. PW-1 Haridwar Singh is a formal witness, he has marked the handwriting and signature of the official applicants as Exhibit I.

8. PW-5 Dinesh Yadav stated in paragraph no. 1 of his examination-in-chief that the incident took place three years ago, at around 2:30 P.M. in the afternoon, when a fire broke out while he was sleeping in the hut in his courtyard. All his clothes etc. were burnt and money was also burnt. He stated that Musafir and Shivji set the fire. He further stated that there was a dispute going on between them regarding the land. In his Cross-examination he stated that since one year there was a dispute going on regarding the sugarcane crops. He further stated that he had planted sugarcane in Harishankar's field, at that time he kept 1/2 of the land for himself and gave 1/2 of the field to Harishankar Ojha. He further stated that sugarcane crop gives fruits thrice if it is sown once. Musafir took the crops of the second year. He further stated that he had forbidden them from ploughing the field. He further stated that whatever happened in his house while he was sleeping, he was in the



courtyard, daughter-in-law was in the *palani*. He further stated that at the time of the occurrence the entire village had come and Musafir had fled away. He further stated that he did not say that when he got up on hearing the noise he saw the *Palani* was on fire and he also started raising an alarm along with the family members and tried to extinguish the fire along with other people, but the fire did not extinguish. He further stated that I have not given statement to Police that Musafir and Shivji Yadav set fire at my house because dispute was going on between us.

9. PW-6 Shashibhushan Mishra is a formal witness; he has got his handwriting and signature on the charge sheet marked as Exhibit-2.

10. PW-7 Guddu Yadav (informant) has stated in examination-in-chief that the occurrence is of 04.05.2007, at that time he was resting in his Palani. PW-7's house which was in *Palani* of Jhalasi caught fire and the fire was set by Musafir Yadav and Shivji Yadav. When he raised an alarm, the witnesses came but by then the rice, pulses and gold jewelry had been burnt. He further stated that the reason for the fire was old enmity. In his cross-examination, he stated that before this case, there was already a dispute going on between both the parties.



The dispute was over the sugarcane crop. He further stated that he had planted the sugarcane crop on lease in Harishankar's field and the crop had been harvested twice. He further stated that the third time, the accused Musafir cut the crop and on asking, Musafir also abused us, due to which we were also saddened. He further stated that before this case, a case under Section 107 Indian Penal Code was filed between both the parties. He further stated that the boundary of my *Palani* is stated below. He further stated that south is Hiran Palwan's house, North is Ibbas' house, East is Harishankar's house, West is Shyamnarayan Paswan's house. My house is in between *Palani* and Harishankar's house. *Palani's* exit is to the north and Janani Kitta is to the west from the outside. He states that the fire was coming from East's side and I was on the north side of *Palani* and my *Palani's* house was also burnt to some extent. He further stated that when case was registered, he was in his senses. He further stated that he had given such a statement that he had seen the accused fleeing away after setting fire. He further stated that he had given a statement that his wife used to say that she used to see these people in the past.

11. PW-8 Sita Devi, wife of Informant, stated in her examination-in-chief that this incident took place on



05.04.2007 at 2 o'clock in the day, at that time she was resting in her hut when the hut caught fire. Musafir Yadav and Shivji Yadav had set the hut on fire. Further she stated that they tried to extinguish the fire and also made noise but could not douse the fire. She further stated that her watch, pulses, flour etc. and iron utensils also got burnt in it and Gold coins etc. in the jewellery box got burnt, Sewing machine, watch, bedding and Rs. 16,000 were burnt in the fire. In her cross examination, she stated that Namti Devi is her mother-in-law, she was sleeping in the courtyard. She further stated that she had not slept till then and she was alone in the *madai*. In her cross examination, she stated that north of her hut is Surendra Kumar's *madai*. Sahabuddin has an outer wall to the north and to the south is her old house. Behind her house to the south is the house on the west side and there is a road to the east in the *Palani* and adjacent to the road is Sonu's house and a house was being built on the west side. To the east of my *Palani*, and south side, there was a mud wall, there was a *Palani* and she was lying in the same *Palani*. She further stated that due to the burning of her *Palani*. In Para-6 she stated that there is no dispute between the two sides from the past till now. She further stated that they are of the same social group, there was a dispute about sugarcane a year ago and



case was instituted for the same. In Para-7 of the cross-examination she stated that there is a wall of her *Palani* and there is no hole. In Para-8 she stated that at the time of the uproar, a *Palani* was burnt 1-2 feet from the east, *chana* was not roasted there. In Para-10 she stated that she brought money by selling potatoes, she did not remember the name of the person who bought the potatoes. She further stated that she did not take rice from the appellants and not taken water from them.

12. PW-9 Vasukinath Kuwar is a formal witness, he has got the pages of the application marked as exhibit 4.

13. PW-10 Md. Shamiullah investigating officer stated in his examination-in-chief that after taking over the charge of the investigation, he took the statement of the informant again and recorded the statements of the witnesses and inspected the place of occurrence and he has told the place of occurrence to be the eastern part of the old house of informant which is about ten feet wide and twenty-five feet long and has a mud wall of *fuss*, in which the wife of the informant slept in the hut during occurrence. In the said, mud walls were found in the east, north and south. He further stated that the roof of the house was found completely burnt and burnt bamboo and remains of frozen items were found inside. A big tin box which



was kept adjacent to this part next to the under-construction house of the informant and it was told that the box was inside the house due to which it was burnt due to fire. The material kept inside the box was found burnt by Investigating Officer and according to him adjacent to road is the house of Shahabuddin, to the south is the old collapsed house of informant, to the east is the village road, to the west is the under-construction house of the informant and after investigation the investigating officer has submitted a charge-sheet against Musafir Yadav alias Veer Singh and Shivji Yadav after finding the occurrence true. In para-4 of his cross-examination, he had stated that the seizure list of the goods has not been made which were found at the place of occurrence. The burnt goods were at the place of occurrence, the signature of any villager was not found during the recovery of the goods. It is not written that there was a hole in the wall of the *Chauhadi*. He further stated that there is a road on the north side, the house which was burnt and the hole in the wall is not written. That in para 6 of his cross-examination, he stated that Dinesh Yadav had given a statement before him that he had full faith that Musafir Yadav alias Veer Singh, son of Shivpratap Yadav and Shivji Yadav, son of Devraj Yadav, had set the house on fire. That in para-10, Dinesh stated that Musafir



and Shivji had set the fire. That in para-7, he stated that, Guddu Yadav has not given such a statement that he saw Musafir and Shivji Yadav running away after setting the fire. He has given such a statement that he has full faith that these people set the fire.

14. After closure of the prosecution evidence, the appellants were examined under Section 313 of the Cr.P.C confronting them with incriminating circumstances which came in the prosecution evidence, so as to afford them opportunity to explain those circumstances. During this examination, they admitted that they had heard the evidence of prosecution witnesses against them. But they did not explain any circumstance, though they claimed that the prosecution evidence is false and they are innocent and have been falsely implicated.

15. The learned counsel appearing on behalf of the appellants submitted that the prosecution is not able to prove its case beyond all reasonable doubts. He further submits that the accused persons are innocent and they have not committed no offence and the trial Court erred in convicting the appellants for the charges, despite having no material available on record, except for the oral evidence of prosecution witnesses. He next argued that he has falsely been implicated by the informant in a



criminal case. There is vital contradictions in manner of occurrence and the said party has been in a feud with each other since long and due to this enmity. He further submitted that whole case stands merely based on suspicion as there is no proof that how fire took place at the place of occurrence. He further submitted that no equipment was seized and neither was it deposed in the statement of the PW's that how fire took place and from the perusal of the written statement, it is clear that informant did not see anyone setting fire, but on the other hand, he only believed that Musafir Yadav @ Veer Singh and Shivji Yadav had set the house on fire. In this way, the informant had also expressed the possibility of these people setting fire while writing the report to the police station. The learned counsel for the appellant further submitted that there is a difference between the written statement of the informant and the deposition of the informant, where the informant has expressed the possibility in the written statement, the name of Musafir Yadav and Shivji Yadav has been mentioned, which is contradictory in the deposition. PW-8 Seeta Devi also stated in her evidence that Jaanki Devi who is her mother-in-law was also sleeping in the courtyard. Jaanki Devi has not been examined and PW-5, was sleeping in his courtyard at the time of the occurrence. Thus, the



learned counsel for the appellant submitted that when he was sleeping in the courtyard, how did he saw them setting the fire.

16. Further learned counsel for the appellant submitted that PW-1 Haridwar Singh is a formal witness and PW-2 Surendra Bhar, PW-3 Gorakh Ram, PW-4 Kedar Ram have been declared hostile and PW-6 Shashibhushan Mishra is also a formal witness and PW-9 Vasukinath Kunwar is also a formal witness. He further submitted that there are no independent witness in the case to support the occurrence all are interested witness. Thus, there is contradiction in the evidence of the remaining witnesses and no one has supported the incident, and hence the accused should be acquitted.

17. On the other hand, learned Additional Public Prosecutor has vehemently opposed these appeals and submits that there is direct allegation against the present appellants, for setting up the fire in the house of informant Guddu Yadav which resulted into huge loss of goods. He further submitted that the informant PW-1 Guddu Yadav, PW-5 Dinesh Yadav, PW-8 Sita Devi have fully supported the occurrence and PW-10 Mohammad Shamiullah Khan, investigation officer also inspected the incident and found the house on fire and burnt goods at the place of occurrence. The occurrence cannot be



considered false merely on the basis that some witnesses have been declared hostile. In view of the aforesaid statements and the evidence on record, learned trial Court has rightly convicted the appellant and the present appeals should not be entertained.

18. At this stage, I would like to appreciate the relevant extract of entire evidence led by the prosecution and appellant before the Trial Court.

19. On deeply studied and scrutinized all the facts and materials available on record,, it is evident that during the course of trial, the learned trial Court convicted the appellant from criminal liability under Sections 436/34 of the Indian Penal Code, but the learned trial Court failed to scrutinize the evidence brought on record regarding deficiencies, drawbacks and infirmities crept during course of trial and passed the impugned judgment in complete ignorance of criminal jurisprudence. Moreover, there are discrepancies regarding the occurrence and the presence of individuals at the place of occurrence as there are no eye witness. **PW-8** being wife of the informant has also not seen the occurrence rather her statement is based on mere suspicion. Another important witness (PW-7) who is the informant of the case has also not seen the occurrence and he was resting in the *palani* and on mere



suspicion he blamed the Musafir Yadav @ Veer Singh and Shivji Yadav and there are no independent witnesses of the occurrence, and this occurrence has taken place in the month of April and the time of occurrence as stated is 1:00 – 1:30 PM so how can it be possible that people living in the house did not feel the heat of the fire when their place of dwelling and goods were burning, they get to know about the fire from the noise of the villagers, which further proves that all the deposition are on the basis of mere suspicion.

20. Further, it appears that there is vital contradiction in manner of occurrence and genesis of the case which has not been proved by the prosecution as nothing has been recovered or seized ash or burned articles by investigating officer from place of occurrence, and not being marked as an exhibit by the prosecution and the prosecution not presenting any such evidence which proves that how the fire was set up by the appellants at the house of informant on the date of occurrence and prosecution has failed to establish this case beyond all reasonable doubt, therefore, in such circumstances, it may not be proper to convict the appellants/accused on the materials available on record, the judgment of conviction and order of sentence in this present matter is fit to be set aside.



21. The **Hon'ble Apex Court**, in the case of **Raj Kumar Singh Vs State of Rajasthan (2013) 5 SCC 722** also held that-

“suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved and "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied.”

22. Hence, it does not appear from the records that the incriminating circumstance under Section 313 of Cr.P.C. was put to the accused persons / appellants. Taking into consideration the entire material on record it can be constrained that there is no sufficient corroborating evidence i.e. either oral



or documentary to convict the appellants. Therefore, conviction held by the trial Court is not sustainable and is liable to be set aside. Further, the prosecution has miserably failed to prove the guilt of the accused persons/appellants for the charges levelled against them.

23. On perusal of the impugned judgment of conviction dated 06.06.2013 and order of sentence dated 12.06.2013 passed by the learned Additional District and Sessions Judge- IVth, Buxar in Sessions Trial No. 149 of 2009 arising out of Itarhi P.S. Case No. 36 of 2007 against the appellants is set aside and the appellants are acquitted from the charges leveled against them. As the appellants are on bail, they are discharged from their liability of bail bonds.

24. Accordingly, this appeal is allowed.

(Ramesh Chand Malviya, J)

Mayank/-

AFR/NAFR	NAFR
CAV DATE	NA
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