
(2015) 09 PAT CK 0092

In the Patna High Court

Case No : Criminal Appeal (DB) Nos. 595, 414, 480, 603 of 2010, 594 and 640 of 2012

Dua Lal Yadav and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 15-09-2015

Acts Referred:

Arms Act, 1959 — Section 27

Penal Code, 1860 (IPC) — Section 149, 302, 307, 34

Citation : (2015) 09 PAT CK 0092

Hon'ble Judges : V.N. Sinha, J;Jitendra Mohan Sharma, J

Bench : Division Bench

Advocate : Kanhaiya Pd. Singh, Senior Advocate, Shabbir Ahmad and Shailendra Kumar Singh, for the Appellant; A.K. Sinha, D.K. Sinha, S.C. Mishra, S.B. Verma, A. Sharma and Ajay Mishra, APPs, Advocates for the Respondent

Final Decision : Allowed

Judgement

V.N. Sinha, J—Cr. Appeals (DB) Nos. 414, 480, 595, 603, all of 2010 have been filed by 8 convicts assailing judgment of conviction, order of sentence dated 23/31.03.2010 passed by 2nd Additional Sessions Judge, Madhepura in Sessions Trial No. 128 of 1992 appertaining to Trial No. 257 of 1990 whereunder accused Nos. 1, 2, 4 appellants in Cr. Appeal (DB) Nos. 595, 603, both of 2010 have been convicted for the offence under Section 302 of the Penal Code, Section 27 of the Arms Act, sentenced to suffer rigorous imprisonment for life, 5 years respectively. The sentences have been directed to run concurrently. Accused No. 3, 5, 6, 7 and 8 in Cr. Appeal (DB) Nos. 414, 480, both of 2010 have been convicted for the offence under Sections 302/149 of the Penal Code, sentenced to suffer rigorous imprisonment of life. Cr. Appeal (DB) No. 594, 640 both of 2012 have been filed against judgment of conviction, order of sentence dated 29/30.05.2012 passed by Additional Sessions Judge, F.T.C. V, Madhepura in Sessions Trial No. 128 of 1992(S) whereunder appellant in Cr. Appeal (DB) No. 594 of 2012 has been convicted for the offence under Sections 302/149 of the

Penal Code, appellant in Cr. Appeal (DB) No. 640 of 2012 has been convicted for the offence under Section 302 of the Penal Code simplicitor, Section 27 of the Arms Act, sentenced to suffer rigorous imprisonment for life, 5 years respectively. Both the sentences have been directed to run concurrently.

2. Both the aforesaid trials arise out of Udakishunganj P.S. Case No. 42 of 1991 registered for the offence under Sections 302, 307/34 of the Penal Code, Section 27 of the Arms Act, as such, these appeals have been heard together, are being disposed of by this common judgment.

3. Prosecution case as set out in the fardbeyan of informant Priyabrat Yadav, resident of village Guwalpara within Udakishunganj Police Station, District-Madhepura, recorded by Sub-Inspector B.N. Murmu of Udakishunganj Police Station on 11.04.1991 at 11:00 pm in Guwalpara Market Chauk is that in the same evening around 8:00 am like any other evening he was near the tea shop of his brother Fahim Yadav, his brother Kanahi Yadav, nephew Sunil Yadav were sitting in the tea shop, Subodh Prasad Yadav son of Fahim Yadav was selling tea in the shop, meanwhile informant saw 17-18 men coming out from the nearby shops, armed with three naught, pistol and pipe gun approaching the tea shop resorting to firing on the tea shop. Informant, however, concealed himself in the nearby Mahavir Asthan beneath the Banyan tree, identified amongst the miscreants co-villager, agnate accused No. 1 Dualal Yadav, accused No. 3 Triful Yadav, accused No. 2 Hare Ram Yadav, accused No. 6 Ram Kumar Yadav, accused No. 5 Chandra Kumar Yadav all sons of Sahdev Yadav, accused No. 4 Shambhu Yadav, accused No. 1 Dilip Yadav in connected trial both sons of Bilash Yadav resident of village Gwalpara, Maheshwar Yadav, Jaleshwar Yadav son of Billo Yadav resident of Sheikhpura within Udakishunganj Police Station, District-Madhepura and 7-8 unknown. Shambhu Yadav, Dua Lal Yadav while firing shot asked the nephew of the informant Subodh Prasad Yadav about whereabouts of the informant, Mahadev Yadav and Fahim Yadav. Informant having heard the miscreants asking his whereabouts could understand that the miscreants are the men of his agnates and has come with others to kill him and his family member also saw Dua Lal Yadav, Hare Ram Yadav firing at his father Kanahi Yadav twice/thrice who breathed his last just in front of the tea shop. Shambhu Yadav, Dilip Yadav shot at the nephew of the informant who was killed inside the shop. Meanwhile, elder brother of the informant Mahadev Yadav hearing the firing sound was about to approach the tea shop from the northern side but the informant somehow restrained him from going into the shop. Mahadev succeeded to identify the miscreants. Dualal Yadav held out that Mahadev Yadav, Priyabrat Yadav may be at their house and having stated so, Maheshwar Yadav, Chandradeo Yadav shot at Subodh Prasad Yadav who become injured and fell down. The miscreants thereafter, proceeded towards the house of the informant, meanwhile the informant, his brother raised alarm in the northern side of the market and along with the market people, raising alarm ran towards his house the miscreants thereafter, fled towards eastern outer area of the village. Informant also stated in the fardbeyan that Balkrishna Yadav son of Late Jai

Narayan Yadav resident of village Sarahpur, Tola Tikkar, Kapileshwar Yadav resident of Azad Tola,, Md. Islam son of Md. Habib, Prakash Kumar Sah son of Sukhdev Sah, Manoj Yadav son of Dev Narayan Yadav all residents of village Gwalpara and regular visitor of Gwalpara market and other shopkeepers of the market are the witness of the occurrence. In the fardbeyan informant also stated about the motive behind the occurrence i.e. family dispute and dispute concerning grant of agency of Bus-stand. Informant claimed in the fardbeyan that accused Dua Lal Yadav, Triful Yadav, Hare Ram Yadav, Ram Kumar Yadav, Chandra Kumar Yadav, Shambhu Yadav and Dilip Yadav all are resident of village Gwalpara, Maheshwar Yadav, Jaleshwar Yadav both sons of Bilo Yadav resident of Sheikhpura within Udakishunganj Police Station came to his shop armed with three naught, pistol and pipe gun killed his father Kanahi Yadav, nephew Sunil Yadav and injured another nephew Subodh Prasad Yadav with intention to kill him also. Having read the fardbeyan, the informant put his signature over the same.

4. After recording the fardbeyan scribe of the fardbeyan forwarded the same to the Officer-in-Charge of Udakishunganj Police Station to institute a case under Sections 302, 307/34 of the Penal Code, Section 27 of the Arms Act, took up its investigation, as would appear from the endorsement made on the fardbeyan. After forwarding the fardbeyan, on the basis of which the formal First Information Report has been registered on 12.04.1991 and dispatched to the court of Chief Judicial Magistrate, Madhepura which was received in the court on 13.04.1991, scribe of the fardbeyan recorded further statement of the informant, inspected the place of occurrence and found two dead bodies of Sunil Yadav in the tea shop and that of Kanahi Yadav away from the dead body of Sunil Yadav outside the tea shop. Having seen the dead bodies, inquest proceedings of the dead bodies was conducted on 12.04.1991 at 5:30, 5:45 am in presence of Md. Muslim and Bishundev Sah. From perusal of inquest reports (Exts. 8 and 9) it is evident that the two deceased were inflicted firearm injuries causing their death. After inquest proceedings, the dead bodies were sent for post mortem to Sadar Hospital, Madhepura. The two post mortem reports also confirm that the two deceased were inflicted firearm injuries which were sufficient to cause their death. Investigating Officer having conducted preliminary investigation at the place of occurrence, recorded the statement of other witnesses and in the light of the statement of the witnesses as also the contents of the inquest reports, post mortem reports and the seizure list indicating recovery of three empties of three naught, front portion of the fired bullet and empty of 12 bore cartridge as also the blood soaked soil, submitted chargesheet, supplementary chargesheet on different dates against all the 9 accused persons named in the fardbeyan and also 3 others namely, Indal Yadav, Jaggarnath Yadav and Ram Nath Yadav not named in the fardbeyan. In the light of the chargesheet, cognizance was taken, after supply of police papers to the accused persons case was committed to the court of Sessions. Sessions Court framed charge under different orders dated 09.09.1997, 16.03.2002, 11.04.2002 and on 18.06.2008 and 15.09.2010 in the

connected trial to which the accused persons facing the two separate trial pleaded not guilty, claimed to be tried.

5. In support of charge prosecution in the main trial has examined as many as 13 witnesses. PW 1 Fahim Yadav is the owner of the tea shop where the occurrence has taken place, named in the fardbeyan and brother of the informant, who just before the occurrence left the shop for his sitting place across the road to bring tea leaves, is said to have seen the occurrence from his sitting place. PW 2 Priyabrat Yadav is the informant of the case. PW 3 Mahadev Yadav is also named in the fardbeyan, the brother of the informant, son of deceased Kanahi Yadav and uncle of the deceased Sunil Yadav. PW 4 Md. Muslim, PW 5 Bishundeo Sah are two inquest witnesses. PW 6 Dr. Mithilesh Kumar conducted post mortem on the dead body of Kanahi Yadav. PW 7 Dr. J.B. Singh conducted autopsy on the dead body of Sunil Yadav. PW 8 Bal Krishna Yadav is the son-in-law of PWs 1, 2 and 3, is named in the fardbeyan as witness of the occurrence. PW 9 Subodh Prasad Yadav is named in the fardbeyan, was selling tea at the time of occurrence and also claims to be the injured witness of the occurrence. PW 10 Baidyanath Murmu is the Sub-Inspector of Police posted in Udakishunganj Police Station, scribe of the fardbeyan, Investigating Officer of the case. PWs 11, 12 and 13 Umesh Yadav, Amrendra Kumar Verma and Jagdish Ram are the Advocate Clerk, formal witnesses.

6. Besides the prosecution witnesses in the main trial, defence has also examined one Prabhash Kumar Sah who has sweetmeat shop by the side of the tea shop of PW 1, claimed to be present in his shop at the time of occurrence. He supported the incident but stated that the assailants could not be identified. D.W. 1 is the chargesheet witness, has been examined as PW 1 in the connected trial but declared hostile.

7. Besides PW 1 in the connected trial prosecution examined 8 witnesses who were also examined in the main trial. PW 2 Bal Krishna Yadav of the supplementary trial has been examined as PW 8 in the main trial but in the supplementary trial PW 2 has been declared hostile. PW 3 Fahim Yadav in the supplementary trial was examined as PW 1 in the main trial, his evidence in both the trial is almost the same. PW 4 of supplementary trial Mahadeo Yadav was examined as PW 3 in the main trial, his evidence is also almost the same as that of main trial. PW 5 informant Priyabrat Yadav in the supplementary trial was examined as PW 2 in the main trial, his evidence is also same in both the trials. PWs 6 and 7 of the supplementary trial are the two doctors who were examined as PWs 6 and 7 in the main trial also, their evidence is also the same as that of main trial. PW 8 Baidyanath Murmu in the supplementary trial is the Investigating Officer, was examined as PW 10 in the main trial, his evidence is also similar to that of main trial. PW 9 Subodh Yadav the injured of supplementary trial was examined as PW 9 in the main trial, his evidence is also almost the same as that of earlier trial.

8. Learned counsel for the appellants in all the appeals submitted that perusal of

the fardbeyan of the informant Priyabrat Yadav would indicate that besides him, his two brothers, brother-in-law, nephew, other shopkeepers of adjoining shops in the Gwalpara Market witnessed the occurrence and are named in the fardbeyan as witnesses of the occurrence but have not been examined to support the prosecution story as they were not inclined to implicate the appellants and other locals. In this connection, learned counsel referred to the evidence of Prabhash Kumar Sah who is a chargesheet witness but was examined as D.W. 1 in the main trial. They further pointed out to the evidence of PW 1 in the supplementary trial that he became hostile. Prosecution apprehending that the other shopkeepers named in the fardbeyan as witnesses of the occurrence may also not support the participation of the appellants in the incident thought it prudent not to examine them, thereby did not allow the independent witnesses to unfold the true version of the occurrence. It is submitted that the identity of the assailants was not known and that is why the informant, his men even after departure of the accused persons did not take any steps to inform to Udakishunganj Police Station about the occurrence, though the Police Station is hardly 1-2 kilometer away from the place of occurrence and the Sub-Inspector of Police, scribe of the fardbeyan, hearing the rumor about the occurrence, came to the place of occurrence at 10:45 pm, saw one Chaukidar, Dafadar guarding the two dead bodies at the place of occurrence, proceeded to the house of the informant which was at a distance of 1/4th kilometer away from the place of occurrence, again came back with the informant to the place of occurrence and recorded his fardbeyan in the same night at 11:00 pm. Had the informant identified the assailants during the occurrence he may not have been sitting idle at his residence after the occurrence and departure of the miscreants soon after the occurrence and arrival of Dafadar, Chaukidar and distance of Udakishunganj Police Station being hardly 1-2 kilometer from place of occurrence.

9. It is next submitted by learned counsel for the appellants that close perusal of the evidence of 5 eye witnesses of the occurrence examined in both the trials would indicate that they are also not the eye witness of the occurrence. It is submitted that Fahim Yadav on his own showing has left the tea shop few minutes prior to the occurrence for his sitting place which was across the road to bring tea leaves, while he was there at his sitting place, the occurrence is said to have taken place inside the shop, he had hardly any opportunity to identify the assailants as the Investigating Officer in his evidence has categorically stated that there was no means of identification available at the place of occurrence as there was neither electricity nor petrol nor any other means of light available at the place of occurrence in which the assailants could have been identified by the witnesses at the place of occurrence.

10. According to learned counsel for the appellants, informant PW 2 was also not in the tea shop of his brother PW 1 and his claim that he identified the assailants does not appear to be reliable, in view of his own evidence that he was away from the tea shop, was at the sitting place of his brother Fahim Yadav. From the evidence of the informant, paragraph 8 (bottom), it is evident that the sitting

place of Fahim Yadav is at some distance on the opposite side of the road, may not have been possible for him to have identified the assailants at the tea shop from the sitting place when there was hardly any electricity or petromax available in the tea shop. In this connection, learned counsel also referred to that part of the evidence of the informant that while the firing was on, he concealed himself in the Mahavir Asthan and also restrained his brother Mahadev Yadav from going to the place of occurrence, thereby, according to learned counsel, neither the informant nor his brother Mahadev Yadav has any opportunity to identify the assailants.

11. Learned counsel for the appellants assailed the evidence of Bal Krishna Yadav, son-in-law of deceased Kanahi Yadav and submitted that from his evidence it will appear that at the time of occurrence he was at the betel shop of Haider Ali in Guwalpara market, heard gunshots, saw from the betel shop that 15-20 miscreants came to the tea shop of Fahim Yadav variously armed and submitted that the claim of Bal Krishna Yadav that he identified the assailants from the betel shop of Haider Ali does not appear to be reliable. Learned counsel next assailed the evidence of injured PW 9 and submitted that his claim that he was shot at in the tea shop at the time of occurrence by the miscreants, identified them in the electric light does not appear to be reliable as neither his injury report has been brought on record nor the Investigating Officer has found any trace of electricity or other means of identification in the tea shop. In this connection, learned counsel also pointed out that the trial court itself did not accept the claim of Subodh Prasad Yadav that he was also injured in the occurrence and submitted that the trial court itself found that the charge under Section 307 of the Penal Code for inflicting firearm injury on Subodh Prasad Yadav has failed, his claim that he suffered injury in the occurrence and identified the miscreants does not appear to be reliable.

12. Learned counsel for the State has supported the judgment but could not explain as to why the three independent fardbeyan named witnesses were not examined especially in the background that one shopkeeper Prabhash Kumar Sah a chargesheet witness was given up by the prosecution and examined as D.W. 1, who supported the occurrence but claimed that the miscreants could not be identified. He also could not explain as to why members of the prosecution party did not inform the Police Station about the occurrence although Dafadar, Chaukidar came to the place of occurrence soon after the occurrence, the Police Station was hardly 1-2 kilometer away from the place of occurrence situate in Gwalpara market itself.

13. The informant, his two brothers, namely, Fahim Yadav, Mahadev Yadav nephew Subodh Yadav as also his brother-in-law Bal Krishna Yadav have claimed that they identified the miscreants, assailants but close examination of their deposition, both examination-in-chief, cross-examination would indicate that their such claim does not inspire confidence as from the evidence, as discussed above, it would appear that informant, Fahim Yadav, Mahadev Yadav were either

at the sitting place of Fahim Yadav across the road or at the Mahavir Asthan there being no electricity or any other means of identification available in the tea shop, it would have been impossible for them to have identified the miscreants in the tea shop. Their claim that the miscreants resorted to firing while Kanahi Yadav, Sunil Yadav were sitting on the bench inside the tea shop and Subodh Prasad Yadav was selling tea also does not appear to be true as the two dead bodies have not been found near the bench rather the dead body of Kanahi Yadav has been found outside the tea shop contrary to the claim made by the informant, his other witnesses. From the evidence of the Investigating Officer it also appears that he heard the rumor about the occurrence and then came to the place of occurrence tea shop, saw the Dafadar, Chaukidar guarding the two dead bodies, none of the family members of the informant was present at the tea shop, then the Investigating Officer proceeds to the house of the informant where he found Subodh lying injured, prepared the injury report, referred him to the hospital for treatment. There is, however, nothing on the record to suggest any injury found on his person or treatment being administered to Subodh Prasad Yadav. Investigating Officer claimed that having after referring Subodh Prasad Yadav to hospital, he came to the place of occurrence tea shop along with the informant, recorded fardbeyan, conducted preliminary investigation including seizure but the seizure list is also not on the record. The inquest proceedings have been conducted at 5:30 am which is further indicative of the fact that investigation of the case has not proceeded in the manner as has been deposed by the Investigating Officer in court. The evidence of the eye witnesses being such, it is difficult for us to rely upon them. The conduct of the Investigating Officer being also not rendering any confidence, in such circumstances, it may not be possible for us to maintain the conviction. The appellants are allowed benefit of doubt, the impugned judgment of conviction, order of sentence is set aside, the appeals are allowed. Appellants Dua Lal Yadav, Hare Ram Yadav in Cr. Appeal (DB) No. 595 of 2010 and Dilip Yadav in Cr. Appeal (DB) No. 640 of 2012 are in custody, are directed to be released forthwith if not required to be detained in any other case. Other appellants are on bail, they are discharged from the liability of their respective bail bonds.