

(2012) 02 PAT CK 0043

In the Patna High Court

Case No : Criminal Appeal (DB) No's. 778, 824, 853, 895, 933, 937, 953, 956, 962 of 2006; 89 of 2007

Jai Prakash Yadav and Another and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 22-02-2012

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 120B, 148, 302
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(i)(iv), 3(i)(v), 3(i)(x)

Citation : (2012) 2 PLJR 429

Hon'ble Judges : Sheema Ali Khan, J;Aditya Kr. Trivedi, J

Bench : Division Bench

Advocate : Kanhaiya Prasad Singh, Binod Kumar Sinha, Uday Chand Prasad, Akhilesh Kumar and Shailendra Kumar Singh, for the Appellant; Ashwani Kumar Singh for the State, for the Respondent

Judgement

Hon"ble Justice Smt Sheema Ali Khan

1. These ten appeals are being heard together as they arise out of the common judgment passed in Sessions Trial No. 14 of 2005 on 10.8.2006 by the 1st Additional Sessions Judge, Madhepura. The Trial Court has convicted all the accused persons twelve in number under Sections 148, 302, 120B of the Indian Penal Code, 27 of the Arms Act and Sections 3(i)(iv), 3(i)(v) and 3(i)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. All of them independently been awarded life imprisonment under Sections 302 and 120B of the Indian Penal Code alongwith a fine of Rs. 30,000/- each, in default of which they have to undergo two years imprisonment. Ail the appellants have been further sentenced to undergo rigorous imprisonment for seven years and a fine of Rs. 10,000/- each u/s 27 of the Arms Act and in default of which further sentence of one year. The appellants have also been sentenced u/s 148 of the

Indian Penal Code to undergo rigorous imprisonment of three years. They have further been sentenced for five years and a fine of Rs. 10,000/-under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and in default of which further sentence of one year. Five persons, namely, Mittan Rishideo, Domni Devi, Khusboo Kumari, Lila Devi and Urmila Devi were murdered on 8.8.2004 at about 3:30 a.m. in the paddy field of Yogendra Rishideo.

2. The informant Nirmala Devi, P.W. 9, gave her fardbayan on 8.8.2004 at about 5:30 a.m. stating therein that at about 8 p.m. on the preceding evening one Foko Yadav was murdered. It has been alleged by the family members of Foko Yadav, that the persons of Rishideo Tola alongwith their supporters were responsible for the death of Foko Yadav. It is alleged that in order to take revenge, Sulo Mian, Natta Mian, Buchchi Mian, Lalit Yadav, elder son-in-law of Foko Yadav, Dinesh Yadav, Mustaq Mian, Shamshad Mian, Shaligram Singh, Bishwamohan Purve, Arvind Purve alongwith 15 other persons variously armed with weapons came to the village and began to search for the male members of the Tola, it is said that the men of the Tola began to run away, the informant Nirmala Devi, Lila Devi, Urmila Devi, Domni Devi, Khusboo Kumari and Mittan Rishideo were dragged to the field of Yogendra Rishideo. All of them were made to sit on the ground. Shaligram Singh is said to have ordered upon which all of them began to fire. The informant claims that she managed to escape from the field, whereas others were killed. The reason for the said occurrence is that the landlord Indu Bhushan Choudhary had sold the lands situated at Madhepura which were occupied by the informant and others since a very long time. This land was apparently under the Ceiling Act. The informant claims that she alongwith others had got the lands settled in their favour. It is alleged that Indu Bhushan Choudhary had planned the entire occurrence and sold the land to the strong persons of the village. On the basis of the fardbayan the First Information Report was instituted at 7:30 a.m. and the investigation commenced in this case.

3. During the trial, the appellants denied from participation in the occurrence and opted to be tried in this case.

4. The question before this Court is whether the informant's case that she saw the occurrence is correct, and whether the witnesses can be believed with respect to their claim of being eye witnesses to the occurrence?

5. In this case, altogether eleven witnesses have been examined on behalf of the prosecution. As stated earlier, P.W. 9 is the informant of this case and claims to be the eye witness. Apart from which, P.Ws. 2, 4, 5 and 6 also claim that they are eye witnesses in this case. P.W. 1 Prithvi Prasad Yadav and P.W. 8 Kari Choudhary have been declared hostile. P.W. 3 is a formal witness whereas P.W. 7 is the hearsay witness. P.W. 10 is the Investigating Officer of this case whereas, P.W. 11 is the doctor. Side by side also exhibited Ext.-1 series signature over inquest report, Ext.-2 fard-e-bayan, Ext.-3 series inquest report of respective doctors, Ext.-4 formal FIR, Ext.-5 series post mortem reports of respective deceased.

6. This Court will examine the statement of the witnesses in Court in order to reach a finding as to whether the prosecution has been able to prove the case beyond reasonable doubt? We shall start by discussing the evidence of P.W. 9 who is the informant of this case. In her chief, she has tried to support the case as made out in the First Information Report. Her statement is that the occurrence took place in the manner described in the First Information Report. In her chief, she has improved her case by stating that apart from the victims mentioned earlier, one Geeta Devi was also dragged by the accused persons. She claims that when the accused asked the victims concerned to sit down in the field, Geeta Devi and P.W. 9 did not sit down alongwith the rest. She claims that she and Geeta Devi escaped from the field. In her chief, she does not mention the names of Akhilesh, Jai Prakash and Arbind. In Court, she stated the names Lalit Yadav, Shamshad Mian, Sulo Mian, Dinesh Yadav, Mushtaq Mian, Arbind Purve, Bishwamohan Purve, Natta Mian, son-in-law of Foko Yadav and Buchchi Mian. In cross-examination, at paragraph-13, she has stated that her house is adjacent to the house of Yogendra Rishideo. She claims that she was sleeping in the house of Yogendra Rishideo. She has tried to make out a case that all the deceased persons were sleeping in the aangan of Yogendra Rishideo, from where they were dragged to the place of occurrence. It would appear from the description given by P.W. 9, who the wife of Balo Rishideo is, that her house and the house of Yogendra Rishideo is intervened by Bilash Rishideo's house. At the same time, this witness has stated that she has a common aangan with the house of Yogendra, she claims that she has built a room, after the occurrence had taken place, opposite to the house of Yogendra Rishideo and both of them thus share a common aangan. In the cross-examination, it has been admitted that Foko Yadav was murdered prior to the occurrence and that Yogendra Rishideo, Binda & others were arrested by the police. This witness also states that the Muslim Tola is at some distance from the Rishideo Tola. She admits that she never visited the Muslim Tola or spoken with the Muslims of that Tola. Regarding the motive for the occurrence, this witness admits that some persons have occupied the lands belonging to Shaligram Singh. P.W. 9 claims that apart from the lands which have come under the Ceiling Act, the people of Rishideo Tola had occupied the lands on the basis of a settlement made by the ex-landlord. A suggestion has been put to this witness that the case has been instituted at the instance of Kartik Mukhiya. This witness has categorically admitted that the persons of Rishideo Tola work for Kartik Mukhiya. She also denies the suggestion that initially the statement of Urmila Devi, her "Saut", was recorded by the police in which Urmila Devi has not named the miscreants.

7. On the basis of the evidence of P.W. 9, the facts which may be highlighted are that this witness has not named Akhilesh Yadav and Jai Prakash Yadav in the First Information Report or in her statement before the Court. It also becomes apparent that this witness has tried to improve the case by including the name of Geeta Devi alongwith the persons who were dragged alongwith this witness to the field of Yogendra Rishideo. It is also clear that in order to explain that P.W. 9

was present at the place of occurrence when the five deceased were dragged by the accused, she has made an attempt to show that they were all sleeping in one aangan. While describing the place of occurrence, she has specifically stated that Mittan has his hut just near the hut of Yogendra Rishideo. It would appear that all five of these persons have been placed together in order to substantiate the prosecution case that P.W. 9 and subsequently Geeta Devi P.W. 5 could be assigned the role of eye witness.

8. This Court finds it difficult to believe that all five persons should be sleeping in the aangan of Yogendra Rishideo. Apparently Geeta Devi was not sleeping alongwith these persons which is obvious, both from the First Information Report and the evidence that has come on record. It would also appear from paragraph 5 of the cross-examination that this witness could have not identify Natta Mian, Sulo Mian, Shamshad Mian and Mushtaq Mian, as according to her she had never visited the Muslim Tola and, therefore, she had no means of knowing or identifying these four persons by name. It has been submitted that this witness could not be an eye witness to the occurrence, as the story weaved by her that she managed to escape from the field of Yogendra Rishideo alongwith Geeta Devi is unbelievable. There are eleven named accused persons who were present armed with rifle, guns and various other weapons alongwith 15 others, it cannot be expected that two women could have escaped from the clutches of the miscreants without there being any reaction on their part to apprehend these two ladies.

9. Having pointed out the glaring discrepancies that have been elicited after cross-examination of PW-9, the Court will examine the evidence of the three eyewitnesses i.e. P.Ws. 2, 4 and 7. The occurrence has taken place in two parts; the first with respect to allegedly witnessing the dragging of seven persons to the field of Yogendra Rishideo and the second part of the occurrence is the actual shooting of the five deceased persons. This Court may make it clear that as far as the first part of the occurrence is concerned, PW-9 and Geeta Devi (PW-5) would be the eye-witnesses to the occurrence. On the other hand, P.Ws. 9, 2, 4 and 7 are the eye-witnesses to the second part of the occurrence. It would, thus, become important to describe the place of occurrence as disclosed by the prosecution witnesses to determine whether they would be eye-witnesses to the occurrence in this case.

10. PW-9 describes the first place of occurrence in the following manner at paragraph-4 of her deposition. She claims that Jagdeo has an aangan; just west to the aangan is the village road whereas on the east side, there is a bamboo clump (Bans Kothi). On the south is the house of Binda Rishideo (victim). On the north side, there is the house of Binda Rishideo. She further corrects herself and states that in the north, there is the house of Balo Rishideo and the house of Binda Rishideo is on the south. PW-9 is the wife of Baio Rishideo. She has also accepts that she has two minor children. She claims that there is an aangan in her house, which is north to south. On the north side of the house of Balo

Rishideo, there is the house of Bilash Rishideo, which faces west and opens on the east side. There is an open field in front of the house of Balo, on the west of which, there is a bamboo clump and banana trees belonging to Balo Rishideo. Bilash Rishideo has also an aangan in his house which is 17-18 feet east-west and 28-30 feet north-south. Bilash also has a bamboo clump near his aangan. North to the house of Bilash, there is the house of Yogendra Rishideo, which is the place from where the accused persons had dragged Mittan and others to the field of Yogendra Rishideo. South to the house of Yogendra is the house of Mahendra and south to the house of Mahendra is the house of Bima. All the huts/houses have an aangan attached. Thereafter, the houses of other villagers after which there is a water channel, again followed by the houses. After the water channel, is the field of Yogendra Rishideo where the second part of occurrence had taken place. Near the house of Mittan (deceased), there is a road which goes towards the east and the house of Lalit which again has a bamboo clump. This witness goes on to say that there are 60-75 houses near the road which goes towards Murliganj. PW-9 has her hut/ house south of the house of Bilash Rishideo.

11. From the above description of the place of occurrence, it is clear that the aangan of Yogendra Rishideo and Bilash Rishideo are next to each other whereas, the house of P.W. 9 is one house away from the house and Aangan of Yogendra Rishideo. The question that remains unanswered, is that the prosecution has not been able to explain why this witness (PW-9) was sleeping in the aangan of Yogendra Rishideo, especially as she has two minor children who were admittedly not with her at the time of occurrence, from where Mittan, Domni Devi, Leela Devi, Urmila Devi and Khusboo Kumari were dragged by the miscreants. She admits that she has built her hut with an aangan adjacent to the house of Yogendra Rishideo during the pendency of the trial. Therefore, this Court finds it difficult to believe that PW-9 could have been an eye-witness to the dragging of the deceased persons from the aangan of Yogendra Rishideo. This aspect of the matter will further be supported by the fact that the deceased Mittan Rishideo, his wife Domni Devi and daughter Khusboo Kumari had a hut and aangan which is adjacent to the hut of Yogendra Rishideo. Leela Devi, the deceased, is the wife of Yogendra Rishideo. It is thus understandable that these four persons could have been dragged from the aangan of Yogendra Rishideo and Mittan Rishideo because their aangans are situated just adjacent to each other at a distance of 20-30 feet. The presence of Nirmila Devi in the house of Yogendra Rishideo has not been explained. It may be pointed out that the Investigating Officer who has been examined as PW-10 has not described the first place of occurrence and, therefore, this Court has only the evidence of PW-9 to determine the topography of the place of occurrence aforesaid.

12. The second place of occurrence is where the actual murder took place, which is the field of Yogendra Rishideo. In the evidence of the Investigating Officer, it has specifically been mentioned that north to the field of Yogendra Rishideo, is the village road which is east to west. In the south side, is the uncultivated land

of Sita Ram Rishideo. On the east is the uncultivated field of Bilash Rishideo and on the west side, is the half constructed house of Mittan Rishideo.

13. As the judgment progresses, this Court will compare the evidence of the Investigating Officer with respect to the second place of occurrence and the evidence of the witnesses regarding this aspect of the matter.

14. PW-2 Mahendra Rishideo claims to be an eye-witness of the second part of the occurrence. In his examination-in-chief, he identified all except Arbind Purve. At paragraph-2, this witness has stated that he was examined by the Police 4-5 days after the occurrence had taken place. He claimed that he has specifically stated before the Police that Sulo Mian, Natta Mian, Mushtaq Mian had fired on the deceased persons. He had not stated the names of others before the Investigating Officer. According to this witness, he has his house near the road. He has about 24 bighas of land and his house is built on 1.25 bighas of land. He claimed that he heard the sound of firing and hid himself alongwith his mother and wife in the bamboo clump from where he had seen the occurrence. He has specifically stated at paragraph 7 of his deposition that his land has been purchased by Shaligram, Mustaq Mian, Buchchi Mian, Shamshad Mian and the son-in-law of Foko Yadav. On reading the evidence of this witness, it is quite clear that his house and field is situated quite far from the place of occurrence and it is not acceptable that he could have identified, and specifically assigned roles to the persons who were present at the time of occurrence. There is a discrepancy even in the identification and statement made before the Investigating Officer. In his examination-in-chief, he claimed to have identified all persons by naming them and also claimed to have identified Shaligram Babu (not put up trial as investigation is still pending against him) by his voice as the order giver. His examination after 4-5 days before the Police has been questioned by the Counsel for the appellants. The contradiction made by him and the fact that he has admitted that his land have been purchased by the persons named above indicates that he could not have seen the occurrence from the distance where his house is situated more so as there was no means of identification. As such, the claim of PW-2 as an eye-witness cannot be substantiated and creates doubt regarding the veracity of the statements made by PW-2.

15. The next eye-witness to the occurrence is Jasia Devi, PW-4. She claimed that she was sleeping in her house when 10-25 persons (i.e. the appellants) came and began to pull away people from their houses. They took away the deceased persons and killed them in the field of Yogendra Rishideo. She also disclosed the motive of the said occurrence. This witness has misidentified Arbind Purve- by calling him Shamshad, later she identified Arbind, but not Shamshad. She had misidentified Manoj Yadav, son-in-law of Foko Yadav by calling him Lalit. Thus, this witness has misidentified Lalit Yadav, son-in-law of Foko Yadav i.e. Manoj Yadav and Shamshad Mian. The later identification of Arbind is also doubtful. At paragraph-9 of the deposition, she has specifically stated that she got up when she heard the sound of firing and hid herself, with her family behind the bamboo

clump. Thus, the evidence of this witness becomes unreliable in view of her statement at paragraph-9 of the deposition. It is also difficult to believe her statement that she could see the occurrence from where her house was situated, which appears to be at some distance from the field of Yogendra Rishideo. Her house has not been shown in the vicinity of the house of PW-9, the informant. PW-9 has not mentioned that Jasia Devi, wife of late Saryug Rishideo has her hut/house near the house of Yogendra Rishideo. Special attention has also been drawn to the fact that the statement of Jasia Devi was recorded by the Investigating Officer alongwith the statements of Janaki Devi and Girja Devi at one place. In other words, the Investigating Officer has not recorded their statements separately. It has also been stated by the Investigating Officer that they had not named the accused persons separately; in fact the Investigating Officer merely states that they said the same thing as was stated by Geeta Devi in her statement u/s 161 of the Code of Criminal Procedure. This Court on the basis of the aforesaid discussions finds that in fact this witness had neither seen the first part of the occurrence nor the second part of the occurrence and as such, she cannot be said to be reliable on the point of identification of the persons who are responsible for the said occurrence.

16. PW-5 Geeta Devi Claims that she is also an eye-witness to the occurrence. According to this witness, she has also been dragged to the field of Yogendra Rishideo. She claimed that she escapes from the field and hid herself alongwith Nirmala Devi. She misidentified Natta Mian by calling him Dinesh, she identified Nattu Mian by calling him Sulo. Sulo Mian was identified as Mushtaq Mian. She identified Bishwamohan Purve as Arbind Purve. She called Arbind Purve as son-in-law of Foko and Shamshad Mian was identified as Bishwamohan Purve.

17. The fact that PW 9, the informant, has not said that Geeta Devi was also dragged by the miscreants in the field of Yogendra Rishideo in the First Information Report, raises doubt with respect to the evidence of this witness. This witness claims that she hid herself alongwith Nirmala Devi (PW-9). She claims that she hid herself in the house of Mittan Rishideo, whereas the claim of PW-9 is that they were hiding in the bamboo clump. This witness is also not reliable because she has not been able to identify as many as nine accused persons. The story of escaping from the field of Yogendra Rishideo is impossible to believe for the same reasons as it is difficult to believe that PW-9 could have escaped from the clutches of the accused persons, especially as there were open space in the three sides of the place of occurrence and it was the accused persons who were carrying torches, and were variously armed with weapons.

18. The last witness who claimed to be the eye-witness of the occurrence is PW-6 Mallick Rishideo. He claims to have seen the accused persons dragging the three ladies and Mittan Rishideo to the field of Yogendra Rishideo. PW-6 claims to have seen the occurrence by hiding behind the lemon tree, which is allegedly situated near the field of Yogendra Rishideo. His evidence at paragraph 7 of the deposition is sufficient to lead this Court to conclude, that in fact, he could not have seen

any part of the occurrence, where he states that between the lemon tree and the place of occurrence, there are two houses which intervene between the field of Yogendra Rishideo (place of occurrence) and the place where this witness was hiding to see the occurrence.

19. Having analyzed the evidence of all the eye-witnesses in this case, this Court come to the conclusion that the testimonies of PW-9 and PW-5 who are said to be the eye-witnesses to both parts of the occurrence, in fact cannot be believed for the reasons as follows:--(a) PW-9 has her own house and two minor children and, therefore, it cannot be believed that she would leave her children alone and go to the house of Yogendra Rishideo to spend the night, (b) It is also not acceptable that she could have escaped from the field of Yogendra Rishideo alongwith Geeta Devi (PW-5). The later part is an addition and the development made in the prosecution case, as Nirmala Devi (PW-9) has not been mentioned this fact in the First Information Report, (c) Similarly, it is difficult for this Court to believe that these ladies could have identified the accused persons by names, which is also apparent from the misidentification made by PW-5. (d) Regarding the muslim accused persons, it has been admitted by PW-9 that she had no occasion to meet them or talk to them or even visit their Tola or see them in the market place. Under such circumstances, this Court finds It difficult to believe that she could have identified these persons by names: The prosecution case developed by PWs-9 and 5 regarding identification is unreliable. The identification and version of P.W. 9 and P.W. 5 may be examined from another angle. Since, this Court finds the prosecution version that P.W. 9 and P.W. 5 escaped from the clutches of the accused persons, they could not have been eye witness to the first part of the occurrence. If, in fact they were dragged to the open field of Yogendra Rishideo, then there was no way that they could have escaped and saved themselves, especially as the witnesses have stated that the appellants were carrying torches.

20. It is not denied that an occurrence had taken place in which five persons were killed, what has been argued is that these persons who are not known to the prosecution witnesses 4 & 5, or for that matter PW-9, could have identified them in the late night without any means of identification unless they had any special knowledge and occasion to know the accused persons. This Court takes into consideration that prosecution witnesses 2, 4 and 5 have altogether misidentified 9 accused persons i.e. Lalit Yadav, Sulo Mian, Shamshad Mian, Nakta Mian, Dinesh Yadav, Bishwamohan Purve, Arbind Purve and Manoj Yadav and, therefore, finds that they cannot be convicted on the basis of their evidence whereas this Court has already discussed the other reasons for not relying on these eye-witnesses, while discussing their evidence earlier In this judgment.

21. Another good reason for not believing the evidence of P.Ws. 2, 4, 5 and 9 is that none of the witnesses have disclosed the source of identification. They have not stated that it was a moonlit night or that it was a dark night. This is another factor which would lead this Court to disbelieve their evidence.

22. The defence raised on behalf of the appellants which has been disclosed by way of suggestions put to the witnesses, is that, the witnesses have named the accused persons out of enmity. They deny that there was a ceiling proceeding. They have been made accused on the basis of the fact that they are bona fide purchasers and are in possession of the land. It has been suggested that the appellants have been named at the instance of Kartik Yadav. The persons of Rishideo Tola work for Kartik Yadav who bears enmity with these appellants. The defence has led evidence by examining D.Ws. 1, 2 and 3. The defence witnesses have been examined to show that in fact accused Lalit Yadav was present on the night of occurrence. The witnesses have also stated that Kartik Yadav had ensured through his Bataidars to rope in the accused persons. Some of whom had purchased land of Indu Bhushan. Apparently Kartik Yadav wanted to purchase the land of Indu Bhushan but for some reason he was unsuccessful and as such he got the case instituted.

23. Learned counsel for the State has argued that these cases would be covered by the judgment of the Supreme Court in the case *Masalti Vs. State of U.P.*, , according to which the court ought to believe the identification if two reliable witnesses claim to have identified the persons participating in a case of rioting or for that matter in case, such as, the present one. The main issue is that the court must find that the evidence of the witnesses is reliable. Once this court has held for various reasons that the witnesses cannot be relied upon to substantiate the case made out by them in the First Information Report and through their evidence, the question of believing the identification of such witnesses does not arise. Besides which in a case of rioting/carnage, the mob is divided into groups, which indulge in acts of arson and murder at different places, and is not possible that every witness can see, all parts of the occurrence.

24. It may be clarified that the examination of witnesses lead this court to the conclusion that the evidence of the eye witnesses in this case, is not reliable and in fact, could not have identified the accused persons. In the circumstances this court cannot conclude that the accused persons named in the First Information Report were the persons responsible for committing the crime. In the result, the appeals are allowed. Appellant Dinesh Yadav of Criminal Appeal No. 824 of 2006, appellant Arvind Purve of Cr. Appeal No. 853 of 2006, appellant Buchchi Mian of Cr. Appeal No. 895 of 2006, appellants Natta Mian and Sulo Mian of Cr. Appeal No. 933 of 2006, appellant Shamshad Mian of Cr. Appeal No. 937 of 2006, appellant Manoj Yadav @ Sushil Yadav of Cr. Appeal No. 953 of 2006, appellant Mushtaq Mian of Cr. Appeal No. 956 of 2006, appellant Lalit Yadav of Cr. Appeal No. 962 of 2006 and appellant Bishwamohan Purve of Cr. Appeal No. 89 of 2007, who are in custody, are directed to be released forthwith if not wanted in any other case. The appellants of Criminal Appeal (DB) No. 778 of 2006, namely, Jai Prakash Yadav and Akhilesh Yadav, who are on bail, are discharged from the liabilities of the bail bonds furnished earlier in this case.

Aditya Kumar Trivedi, J.

I agree.