

(2016) 01 PAT CK 0020

In the Patna High Court

Case No : Criminal Appeal (DB) Nos. 953 and 960 of 2011

Jivratan Yadav and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 19-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, Section 307, Section 324

Citation : (2016) 01 PAT CK 0020

Hon'ble Judges : Anjana Prakash and Rajendra Kumar Mishra, JJ.

Bench : Division Bench

Advocate : Baxi S.R.P. Sinha, Sr. Advocate, Rahul Nath, Sanjay Kumar, Bachan Jee Ojha, Ajay Kumar Tiwari and Hari Mohan Tripathi, Advocates, for the Appellant; S.C. Mishra and S.N. Prasad, APPs, for the Respondent

Final Decision : Dismissed

Judgement

Anjana Prakash, J.—1. The Appellants have been convicted under Section 302 I.P.C. and sentenced to R.I. for life and fine of Rs. 10,000/-, in default of which 2 years R.I. as also under Section 307 I.P.C. and sentenced to R.I. for 7 years and fine of Rs. 5,000/- in default of which six months R.I. and 27 of the Arms Act and sentenced to R.I. for 3 years as also under Section 324 I.P.C., for which no separate sentence has been recorded by the 3rd Additional Sessions Judge, Bhojpur, Ara by a judgment dated 9/18.8.2011 in Sessions Trial No. 26 of 2006.

2. The case of the prosecution, according to P.W.3 Suresh Yadav, who is the cousin brother of the deceased Deoraj Yadav, is that on 1.6.2002 when he was just moving out of his house, suddenly his nephew Dhananjay Yadav (P.W.4) came screaming saying that while you people are here, your cousin brother Deoraj has been shot at by his opponents. Hearing this he ran towards the School with lathi where he saw Deoraj had fallen on the ground whereas Appellant Jivratan Yadav and Saral Yadav and other accused persons had surrounded him. The two Appellants were armed with country made rifles and

were pointing their rifles towards the deceased. The deceased was fallen on the ground. Then they shot two fires. When P.W.1 Rambhuwan Yadav, P.W.5 Dashrath Yadav and other agnates wanted to intervene Appellants Jivratan Yadav and Saral Yadav along with the rest of the accused persons fired at his brother. They picked up the deceased and started to take him towards south. They followed them but both the accused, who were armed with rifles, fired which hit him on his head and also hit P.W.5 on his waist, due to which they became injured. His cousin, the deceased Deoraj Yadav, in an injured condition was taken towards south, even while the accused were firing having picked him up and then near the Baghar he was shot at on his head. The accused then left generally firing to create terror. He alleged that the deceased had been killed on account of old enmity and Dashrath Yadav (P.W.5) and Rambhuwan Yadav (P.W.1) and he himself have been injured while they were trying to save him. This information was recorded by the Officer Incharge Krishnagarh Police Station, Camp south of Bela Badhar on 1.6.2002 and forwarded to the Officer Incharge of Barhara Police Station for instituting a First Information Report, upon which on the next day the First Information Report was instituted and sent to the Chief Judicial Magistrate, Bhojpur, Ara, which was received on 3.6.2002.

3. During trial, the prosecution examined ten witnesses. Out of whom P.W.5 Dashrath Yadav has been declared hostile, whereas P.W.7 Dr. Naresh Prasad examined three injured and P.W.10 Dr. Om Prakash Arya conducted the postmortem examination report. P.W.9 Sujit Kumar Choudhary is a formal Police Officer, whereas P.W.8 Sujit Kumar is the Investigating Officer. P.W.1 Rambhuwan Yadav, P.W.2 Kesho Kumar Yadav, P.W.3 Suresh Yadav (Informant), P.W.4 Dhananjay Yadav and P.W.6 Sitaram Yadav have deposed as eye witnesses.

4. The Counsel for the Appellants submits that in fact none of the eye witnesses had seen the actual firing. The fact that P.W.4 while informing the rest of the witnesses did not disclose the name of the assailants points to the fact that the assailants were not known and it was only later on the Informant had developed the case which is not corroborated by the injuries sustained either by the injured or the deceased. Moreover, the witnesses have stated that they rushed to the Police Station and brought the Officer Incharge but their initial report at the Police Station has been suppressed by the prosecution which renders the First Information Report suspicious and the statements of the Informant hit under Section 161 Cr.P.C. He relies upon Paragraph 14 of a decision reported in , 2015(2) PLJR, page 79 for this proposition. He submits that the First Information Report has been instituted after one day and received in the Court yet another day later which raises a reasonable suspicion as to its veracity.

5. The further submission is that even though P.W.5 Dashrath Yadav has been declared hostile but when we examine the earlier statement we find that there was no reason for him to have been declared hostile. The Investigating Officer stated that he had merely recorded the statement of this witness saying that he has supported the fard beyan. In absence of a detailed statement having been

mentioned by the Investigating Officer, the Court will have to accept the evidence given by him in the Court. His statement that none of the assailants were known, directly contradicts the statement of the rest of the witnesses and their evidence should therefore be rejected.

6. Also there is no objective evidence with regard to the firing by others nor is there any dragging mark on the body of the deceased. Since the prosecution story is that after dragging the deceased the Appellant Jivratan Yadav had fired at the deceased i.e. after his death and therefore his conviction under Section 302 I.P.C. is unsustainable.

7. There is no explanation by the prosecution as to how blackening was found on the person of the deceased nor to the contradiction as to whether they got him treated by a private doctor or at the Sadar Hospital, which has been stated by the Investigating Officer. The witnesses have thus contradicted each other on every material point. There was no reason for the assailants to have committed this act when it is an admitted position that they did not have enmity and hence no reason to be called "Vipakshi in the fard beyan contradicts.

8. On the contrary, the Counsel for the State submits that there is consistent eye witness account in regard to the firing made by the Appellants which is further corroborated by the postmortem examination report and there is no scope for any interference.

9. To understand the above submissions and also the conclusion that we have reached, we would like to discuss the evidence of the witnesses in the seriatim as has been disclosed. As mentioned earlier, the fard beyan notes the fact that the Informant had been given information by P.W.4 Dhananjay Yadav with regard to assault having been made upon the deceased Deoraj Yadav, after which they ran and witnessed the occurrence. Hence we would think proper to discuss the evidence of P.W.4 Dhananjay Yadav first.

10. P.W.4 Dhananjay Yadav, who happens to be the cousin nephew of the deceased, stated that on 1.6.2002 at about 3.30 p.m. while he was near Bela Primary School he saw Deoraj Yadav being surrounded by five accused persons including present two Appellants. These two Appellants were armed with rifles whereas others were armed with lathi and one Ramnand had cartridge in his pocket which he was handing over to Appellant Jivratan Yadav and ordered him, at which Jivratan Yadav fired at the deceased. The deceased then fell down holding his stomach. He himself ran and informed Suresh Yadav (P.W.3), Informant Dashrath Yadav (P.W.5), Rambhuwan Yadav (P.W.1), Kesho Kumar Yadav (P.W.2) and Sitaram Yadav (P.W.6) in matter of 5-6 minutes at different locations. He then once again went to the place of occurrence, where he saw the deceased being carried by the accused persons towards south. Dashrath Yadav (P.W.5) and Suresh Yadav (P.W.3) requested the accused persons to leave him, at which the Appellants fired which hit Suresh Yadav (P.W.3) on his head and thereafter Dashrath Yadav on his thigh. They then saw that the two accused

persons fired twice and then Appellant Saral Yadav fired on the head of the deceased. He then went away and informed the Police, at which it came and recorded the statement of the Informant. He identified his signatures on the fard beyan and the inquest report as Exhibit 1 and 2 and signature of Sitaram Yadav on the inquest report as Exhibit 2/1. In the cross examination he explained that even though the Primary School was opened at that time but it was closed on that particular day and no one was present there. He also explains exact distance from the place of occurrence, from where he found the witnesses Suresh Yadav, Dashrath Yadav, Rambhuwan Yadav and his own house which was close by. He stated that in the transaction of informing everyone may have taken about 6 minutes and when he reached all the witnesses were already present there. He also stated that he ran towards the Thana which was about 3 kilometers away and behind him Awadhesh, his bother, had reached the Police Station and the Officer Incharge left on his motorcycle for the place of occurrence while the police force followed on a police jeep. When he reached the place of occurrence after having given information the police was already there. In cross examination he stated that there was no enmity between Jivratan Yadav and himself and that he had been examined on the very same day. He also explained that the occurrence may not have taken more than 30 minutes and within 2 minutes he had reached home from the place of occurrence. He confirms the injuries having been sustained by the injured and that the police had recorded their statements within 15-30 minutes that they were present there. His attention was drawn to the earlier statement that he had not stated that Appellant Jivratan Yadav had fired at Deoraj Yadav and Deoraj Yadav had fallen holding his stomach after which he had informed rest of the witnesses and that within 5-6 minutes he was back at the place of occurrence and had seen the same. When the attention of the Investigating Officer (P.W.8) was drawn to the statement of this witness, importantly in Paragraph 26 he stated that he had recorded the statement merely as that he had supported the fard beyan and nothing else. Evidently this is a major lapse having been committed by the Investigating Officer. He was duty bound to have recorded separately the full statements of this witness because he was the first person, who had witnessed the occurrence. However for this lapse on the part of Investigating agency we are not ready to reject the evidence of the witness.

11. As for rest of the witnesses, P.W. 1 Rambhuwan Yadav, who is the brother of the deceased, stated that on the date of occurrence at about 3.30 p.m. when he was sitting at the Kali Asthan all alone his nephew P.W.4 Dhanji Yadav came running saying that Deoraj Yadav (deceased) had been shot at. He then ran along with Dashrath Yadav (P.W.5), Suresh Yadav (P.W.3), Dhanji Yadav (P.W.4) towards Bahiyar where he saw deceased Deoraj Yadav dead on the ground with a bullet in his stomach. The Appellants with arms and other accused were standing there. He then saw the deceased being dragged and also Appellants Saral Yadav and Jivratan Yadav firing hitting Dashrath Yadav on his leg. Appellant Saral Yadav also fired at him whereas co-accused assaulted him with lathi. Just then the

police came and the accused ran away leaving the deceased brother. In cross examination he was asked to explain the topography of the place and stated that the accused persons had fired at him from a distance of 20 yards and himself he was taken in a car to Ara Hospital and on the way he regained his consciousness. He was got treated by the police at the Primary Health Centre. He further stated that all the injured had been treated at the Police Station and also examined by the Investigating Officer there itself. He stated in the cross examination that when he reached the place of occurrence the deceased had already died. His attention was drawn to the earlier statement that he had not stated that Deoraj Yadav had sustained fire arm injury on his stomach and that Jivratan Yadav had shot at him but he did not remember as to who had stated that the deceased was dragged by the accused persons.

12. P.W.2 Kesho Kumar Yadav stated that he was sleeping on the date of occurrence near Kali Asthan but suddenly his nephew Dhanji Yadav came saying that his brother Deoraj Yadav had been shot at and injured and detained by the Appellants and other accused persons. He along with the rest of the witnesses then ran towards the Primary School and saw both the Appellants firing at his brother. The accused then dragged his brother towards south. They followed but the two Appellants also fired at them, on account of which they were injured. In cross examination he stated that he met many persons on the way but he could not remember the names and that he had seen the accused persons from a distance of 100 yards. He also stated that he was not examined on the same day by the police and in fact his statement was recorded one month later. His attention was drawn to the earlier statement that he had not stated that deceased Deoraj Yadav had been shot at on the stomach by Appellant Jivratan Yadav and that there was no one else or that the Appellants had dragged the deceased.

13. P.W.3 Suresh Yadav stated that on the date of occurrence while he was going to the garden and reached near the Kali Asthan, he was informed by his nephew Dhanji Yadav that Deoraj Chacha was being assaulted. On hearing this he reached the Primary School and saw Deoraj Yadav being shot at by the Appellants and three other accused persons. Behind him the rest of the witnesses also arrived. They then tried to intervene at which Appellant Saral Yadav fired at him which hit him on his head and also hit Dashrath Yadav on his thigh. The accused persons then started to drag the deceased towards south. In cross examination he stated that when he reached the Kali temple he heard sounds of firings and immediately thereafter he had reached the place of occurrence and had seen Deoraj Yadav having sustained bullet injuries. There was bleeding from the three wounds he had sustained. He stated that when the police was informed at Saraiya by him, it came around 5 to 5.30 p.m. He himself did not come with the police and stayed at home whereas his nephew had come. He stated that all written reporting had taken place at the Sadar Hospital and not thana.

14. P.W.5 Dashrath Yadav, even though named in the First Information Report and is one of the injured witnesses, has not supported the case of the prosecution and has been declared hostile.

15. P.W.6 Sitaram Yadav stated that on 1.6.2002 at about 3.30 p.m. when he was coming home from the Bazar, he heard that the deceased had sustained gun shot injuries. He then ran towards the Government School and saw the police having arrived. He saw the dead body and signed on the inquest report, which was prepared. He proves the same as Exhibit 2/1. In cross examination there is nothing which would of any relevance.

16. P.W.7 Dr Naresh Prasad had examined Dashrath Yadav (P.W.5) and found lacerated wound over the right gluteal region with blackening inverted as also Rambhuwan Yadav (P.W.1) and found fire arm injury on the right knee and Suresh Yadav (P.W.3) and found lacerated wound over the right temporal region.

17. P.W.8 Sujeet Kumar is the Investigating Officer, who stated that on the report of Suresh Yadav he had recorded the fard beyan which is Exhibit 6 and the First Information Report which is Exhibit 7 as also the signature of the Officer Incharge as Exhibit 8. He stated that he started the investigation and prepared the inquest report as Exhibits 2 and 2/1. He also identified his forwarding report of the injuries of Suresh Yadav (P.W.3), Dashrath Yadav (P.W.5) and Rambhuwan Yadav (P.W.1), which he proves as Exhibits 11, 11/1 and 11/2. At the place of occurrence when he reached village Bela, he learnt from the villagers that Deoraj Yadav had been shot at and in an injured condition he was being taken away towards south, at which he proceeded toward place of occurrence. He saw that a large crowd had gathered. On enquiry Informant Suresh Yadav (P.W.3) gave his fard beyan. He sent the dead body for postmortem and the three injured for medical treatment. He stated that he sent the fard beyan for institution of the formal First Information Report to the Police chowki through Lalan whereas he himself went to the Sadar Hospital, Ara. On the next day he inspected the place of occurrence. The first place of occurrence was near the Primary School where he found blood stains and the next place of occurrence was the place where the dead body had been found where also blood stains were found. He also found marks of trampling there. It was at this place that the dead body had been found. No one appeared to give evidence. He examined the rest of the witnesses. The attention of the hostile witness (P.W.5) was drawn which he contradicted. In cross examination he conceded that he did not seize the blood stains earth found at the place of occurrence. He also stated that he had reached Bela village at about 4.10 p.m. and who had given him an information of the occurrence was not written. The entire police force was along with him. He further stated that he noted the injuries of the injured at the place of occurrence itself and thereafter sent them to the Hospital. He had not noted the distance between the first and the second place of occurrence and he stated that he had not mentioned about any dragging marks having been found between the two points. His attention was drawn to the earlier statement of P.W.4 and that he had merely noted that

this witness had supported the fard beyan. P.W.2 Kesho Kumar Yadav had not stated that the Appellant Jivratan Yadav had shot at the stomach of the deceased and Appellant Saral Yadav had fired on the head. P.W.1 Rambhuwan Yadav had also not stated that Appellant Jivratan Yadav had shot at the stomach and when the deceased fell down, Appellant Saral Yadav had fired. They had merely stated that both of them were firing with their rifles.

18. P.W.9 Sujit Kumar Choudhary is a formal witness, who stated about submission of charge sheet in the present case.

19. P.W.10 Dr. Om Prakash Arya held the postmortem of the deceased Deoraj Yadav and found the following injuries on his person:

"Rigor mortis present in upper and lower limbs. Both eye and mouth was closed.

External injuries:

1. One lacerated wound situated on the left side of head about 4" back to the left ear. Margin charred 2 1/4 cm. in diameter. It was wound of entry. One lacerated wound 4 cm. in diameter situated above and outer to the right eye, it was wound of exit.

2. One lacerated wound 1 1/4 cm. with charred margin situated on the front portion of abdomen just below the left last rib, it was wound of entry. One lacerated wound 12 cm. in diameter situated on the right side of abdomen posteriorly just above the right iliac crest it was wound of exit.

Internal Examination:

Brain Lacerated skull bone fractured.

Chest Lungs and heart were pale.

Abdomen Abdominal cavity full of blood.

Liver lacerated, stomach lacerated.

Bladder contains few ounce urine.

Time elapsed since death within 6 to 36 hours. Cause of death fire arm injury."

20. As we have seen the manner of occurrence is that it was suddenly that P.W.4 had seen his uncle being assaulted by the accused persons, at which he ran to inform rest of the witnesses. The fact that he did not disclose their names at that point in time to them seems perfectly normal since the natural conduct of a person would be to quickly inform and gain support instead of wasting time in giving details in situation when the anxiety would be to somehow preempt the occurrence. Hence non-disclosure of the names by him at the earlier instance has no value, especially when we find that the fard beyan was recorded within 45 minutes of the occurrence and the names of the Appellants find mention therein.

21. As for the next argument in regard to suppression of the earliest version, we

find the manner of occurrence is that the accused persons had shot at the deceased and thereafter had dragged the deceased to a distance in an attempt to remove the dead body which was sought to be prevented by the witnesses and the police who rushed there immediately. In such circumstances, it would be absurd to insist upon recording and production of the information given and hence we hold such argument not sustainable. In such circumstances, in the facts of the case, the decision relied upon by the Appellants is not applicable.

22. As for the next point we find the Investigating Officer has stated that he had merely stated that he had noted in the case diary that P.W.5 Dashrath Yadav had supported the case of the prosecution. Evidently it means that the version, which was given by the Informant, was supported by him. In such circumstances, when he did not support his earlier statement he was rightly declared hostile and this argument of the Appellants also does not appear reasonable. The further argument that the objective evidence did not support the case of the prosecution is also to be rejected since the Investigating Officer had found marks of trampling around the place where the dead body was found. Also some witnesses have stated that the deceased was being carried (tangkar), in which circumstances, there was no question of presence of dragging marks at the place of occurrence or dead body. As for not finding any fire arm (wads) etc at the place of occurrence has also to be ignored in the light of direct evidence that it was these two Appellants, who had fired in the stomach and the head of the deceased, which is fully corroborated by the doctor's evidence.

23. In the light of the above discussion when we find consistent eye-witness account fully corroborated by medical opinion, there does not appear any scope for interference only on the point of delayed institution of the case and receipt of First Information Report after one day.

24. For the reasons aforesaid, we find no merit in both the appeals and the same are dismissed.