

(2023) 07 PAT CK 0002

In the Patna High Court

Case No : Criminal Appeal (DB) No. 303 Of 1995

Jugal Yadav Alias Yugal Yadav

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 03-07-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302
Arms Act, 1959 — Section 27
Code Of Criminal Procedure, 1973 — Section 161

Citation : (2023) 07 PAT CK 0002

Hon'ble Judges : Sudhir Singh, J;Chandra Prakash Singh, J

Bench : Division Bench

Advocate : Prashant Kumar, Ajay Mishra

Final Decision : Allowed

Judgement

1. Heard Mr. Prashant Kumar, learned Amicus Curiae for the appellants and learned A.P.P. for the State.

2. By order dated 22.06.2023 passed by this Court, Mr. Prashant Kumar, learned advocate was appointed as Amicus Curiae to represent the appellants at the cost of the State.

3. The present criminal appeal has been preferred against the judgment of conviction dated 18.8.1995 and order of sentence dated 19.8.1995 passed by Sri Awadhesh Kumar Verma, 3rd Additional Sessions Judge, Aurangabad in Sessions Trial No. 370 of 90/37 of 91 (arising out of Obra P.S. case No. 70/90) whereby and whereunder the appellants have been convicted for the offence under Sections 302/34 of the Indian Penal Code and sentenced them to undergo imprisonment for life.

4. The prosecution case as per the fardbeyan of informant, namely, Smt. Surti Devi is that on 5.8.1990 at about 9.00 a.m. she was going with her husband, namely, Rajeshwar Yadav for sowing paddy crops in her field situated at south of

the village and when they reached on the road in front of dalan of Prasadi Yadav, said Prasadi Yadav instigated his nephews Keshav Yadav, Krishna Yadav and Yugal Yadav from the dalan to kill Rajeshwar Yadav (husband of the informant). On this, appellants Keshav Yadav and Yugal Yadav having garasa in their hands and accused Krishna Yadav having country made pistol in his hand came out of the dalan. Seeing this, Rajeshwar Yadav started running towards west on the road in the meantime appellant Keshav Yadav inflicted garasa blow on his left shoulder due to which he sustained injury and in the injured condition, Rajeshwar Yadav started running towards west for saving his life and blood started oozing from his body. On seeing this, the informant started crying. In the meantime, accused Krishna Yadav having gun in his hand shot fire on her husband (Rajeshwar Yadav). After reaching about 150 yards towards west, Rajeshwar Yadav fell down there and appellants Keshav Yadav and Yugal Yadav again inflicted garasa blows on Rajeshwar Yadav. On hulla, several people from the field and villagers came there and accused persons ran away towards south. The informant reached near her husband and found that he had injuries on his head, neck, arm and back and he had already died. The informant further stated in her fardbeyan that on hulla several persons from the village and the people who were working in nearby fields came there. The informant further stated that her son Ramjanam Yadav who was grazing the buffalow also came there and saw the occurrence. The informant further stated that the reason for the occurrence is that a dispute was going between the husband of the informant and the accused persons regarding land and a case was also pending in the Court at Aurangabad.

5. On the basis of fardbeyan of the informant (PW 3), Obra P.S. case No. 70/90 was registered under Sections 302/34 7 of I.P.C. and Section 27 of the Arms Act and investigation was taken up. After investigation, charge-sheet was submitted whereafter cognizance was taken by the Jurisdictional Magistrate and thereafter the case was committed to the Court of Sessions. Charges were framed against the appellants to which the appellants pleaded not guilty and claimed to be tried.

6. During trial, the prosecution examined altogether 13 witnesses, namely, PW 1 Ramjanam Singh, PW 2 Chanderdeo Singh, PW 3 Surti Devi (informant), PW 4 Dr. Ramashish Singh (doctor), PW 5 Ramji Mishra, PW 6 Doman Nonia, PW 7 Mungeshwar Yadav, PW 8 Chandardhan Singh, PW 9 Chalitar Yadav, PW 10 Ramchander Nonia, PW 11 Dukhi Yadav, PW 12 Rajdeo Singh and PW 13 Harinandan Pandey. Prosecution has also produced exhibits as Ext. 1 (Post-mortem report), Ext. 2 fardbeyan, Ext. 3 formal F.I.R., Ext. 4 inquest report, 4/1 signature of Chandradhan Singh on inquest report, Ext. 5 entire seizure list, Ext. 5/1 signature of Chandradhan Singh on seizure list and Ext. 6 is entire case diary. The defence has not produced any oral or documentary evidence in support of its case. After conclusion of the trial, the learned Trial Court convicted and sentenced the appellants in the manner indicated above.

7. Learned counsel for the appellants has submitted that the judgment of

conviction and order of sentence passed by the learned trial Court is bad in law and deserves to be set aside. The learned trial Court has failed to properly appreciate the entire material available on the record. It has further been argued that the prosecution has also utterly failed to prove the case beyond all reasonable doubts. In order to buttress this contention, the attention of this Court has been drawn towards the variation and contradiction in the testimony of the prosecution witnesses. It has also been pointed out that there is severe inconsistency between the ocular testimony of the witnesses and the findings of the post-mortem report. The learned counsel for the appellants has further argued that the prosecution has also failed to prove the place of occurrence to the judicial satisfaction of the Court. The learned counsel for the appellants has further drawn the attention of this Court towards the non-examination of material witnesses, including the Investigating Officer. Such lapses of the prosecution has caused immense prejudice to the appellants. Therefore, it is contended that the findings of the learned trial Court are bad in law, wrong on facts, bereft of legal reasoning, devoid of merit and the judgment of conviction is fit to be set aside.

8. Learned A.P.P. for the State, on the other hand, has submitted that the judgment of conviction and order of sentence under challenge require no interference as the prosecution has been able to prove the case beyond all reasonable doubts. It is observed that the testimony of the witnesses have been consistent throughout, thereby solidifying the case of the prosecution. It has been stated that minor inconsistencies in the testimony of the witnesses do not undermine the entirety of their evidence. As such, it has been contended that the guilt of the appellants has been satisfactorily proved by the evidence adduced during the course of trial and there is no infirmity in the judgment of conviction of the learned trial Court.

9. After perusing the record and hearing the arguments advanced by the parties, following issues arise for consideration in this appeal: -

(I) Whether the prosecution has been able to prove the manner of occurrence beyond all reasonable doubts?

(II) Whether the non-production of the FSL report of the blood stained earth collected from the alleged place of occurrence has caused prejudice to the appellants?

(III) Whether non-examination of the FIR named witnesses (Anil Singh and Dukhi Yadav), along with the failure to examine Dwarika Singh (the individual accompanying deceased from the village Manjhiyaon as stated by PW1 and PW3), has caused prejudice to the appellants?

(IV) Whether non-examination of the Investigating Officer will be fatal for the prosecution in the present case?

10. In order to address issue No. I, it is imperative to thoroughly examine the

deposition of the PW 1, PW 3, and PW 11 as their testimony holds significant relevance regarding the manner of occurrence. It has been stated by PW 1 in para No. 1 of his deposition that while grazing his buffaloes, he witnessed that Krishna Yadav discharged a firearm at the deceased, subsequently accused Jugal Yadav and Keshav Yadav assaulted the deceased with a garasa. However, it has been deposed by PW 1 in para No. 11 that upon hearing the sound of gunfire, he immediately fled and later turned back to the deceased found his lifeless body. It has furthermore been pointed out that there is major inconsistency and contradiction in the testimony of PW 3 (i.e. the informant). It has been stated by the informant in the fardbeyan that the accused persons initially attacked the deceased with a garasa, followed by firing of bullet. However, in sharp contradiction to such statement, it has been deposed by the PW 3 (informant) in paragraph 20, that the accused first killed her husband by giving a fatal gunshot and then attacked him with a garasa. It is furthermore found upon perusal of the deposition of the PW 11 that the PW 11 states about causing of gunshot injury upon the deceased by Krishna Yadav, as well as causing of injury upon the deceased by use of garasa and talwar by Jugal Yadav and Keshav Yadav, without explicitly specifying the wielders of these weapons. It is also found that the statement of the PW 11 was not recorded under section 161 of Cr.P.C. and the PW 11 has firstly appeared during the course of trial. We have also taken note of the fact that the presence of PW 1 and PW 3 further becomes doubtful in light of the fact that though the PW 11 contends to have remained near the dead body of the deceased for approximately 10-15 minutes, but he has not made any statement regarding the presence of any other eyewitness. Thus, there is evident inconsistency, substantial disparities and contradictions in the testimony of the above witnesses, who contend to be eyewitnesses to the alleged incident. At this point, it is imperative to consider the decision of the Hon'ble Supreme Court passed in the case of Sunil Kumar Shambhudayal Gupta and others versus State of Maharashtra, reported in (2010) 13 SCC 657, where in para No. 16 the following has been observed:

"The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature maybe a ground for disbelieving and discrediting that evidence. In such circumstances witnesses may not inspire confidence if the evidence is found to be in conflict and contradiction with the other evidences and the statement already recorded. In such a case, it cannot be held that the prosecution proved its case beyond reasonable doubt."

It is furthermore relevant to take note that the postmortem report marked as Ext. 1 is found to be in contradiction to the ocular testimony of the prosecution witnesses as regards the manner of occurrence. It is apparent from perusal of the post-mortem report that there was absence of any bullet wounds on the dead body of the deceased, thus negating the prosecution's version that the deceased sustained a gunshot injury. It has also been opined by the PW 4 (doctor) that the injury No. 8 cannot be caused by a garasa or farsa. Thus, the medical evidence is found to be in sharp contradiction to the testimony of the PW1, PW3 and PW11

who testified during the course of trial that the deceased was assaulted by garasa and farsa. At this juncture, we put reliance upon the case of Ram Narain Singh versus State of Punjab and Ama Singh & Ors. versus State of Punjab reported in (1975) 4 SCC 497 wherein the Hon'ble Supreme Court has held that inconsistency between the ocular and medical evidence is a fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case.

Accordingly, the issue no. I decided in negative.

11. In addressing the issue No. II at hand, it is relevant to take note that the PW 7 in paragraph 8 has deposed to the effect that he witnessed the collection of blood stained earth from the alleged place of occurrence. However, upon minute examination of the entire material available on the record, it is found that the prosecution has not brought on record any FSL report in relation to the blood stained earth so as to prove the missing causative link. The prosecution's case gets further hammered in light of the deposition of PW 8 (seizure witness) who deposes in paragraph 7 to the effect that no blood stained earth was seized in his presence. As such, it remains inconclusive whether the seized blood was of human origin and whether it was of the deceased or someone else. It is furthermore relevant to take note of the inconsistency between inquest report and the deposition of the seizure witnesses. Though it has been stated in the inquest report that the dead body of the deceased was found lying at the pucca road, but the PW 7 deposes that blood stained earth was seized. This raises doubt regarding the place wherefrom the blood was collected, thus raising further doubts as to the place of occurrence. In this regard, it is pertinent to take note of the decision of Hon'ble Supreme Court, passed in the case of Syed Ibrahim versus State of Andhra Pradesh, reported in (2008) 10 SCC 601, wherein it has been held that when the place of occurrence itself has not been established, it would not be proper to accept the version of the prosecution.

In light of the discussions made above, we are of the considered opinion that there exists reasonable doubts as to the place of occurrence.

Accordingly, the issue no. II is decided in the affirmative.

12. In order to address issue No. III, it is essential to examine the evidence pertaining to the witnesses mentioned in the fardbayan. It has been stated by the informant in the fardbayan that several individuals, including Dukhi Singh, Anil Singh, Chanderdeo Singh (PW2), Rajdeo Singh (PW 12), Charitar Yadav (PW 9), and Ramjanam Singh (PW 1), were working in the agricultural field near the alleged place of occurrence. However, it is noteworthy that the prosecution has not produced Anil Singh and Dukhi Yadav son of Shiv Sanakar Yadav, as witnesses during the course of the trial. It is significant to note that a witness identified as Dukhi Yadav, son of Hardeo Singh, was indeed examined and subjected to questioning by the Court, as elucidated in paragraph 90 of his deposition. During his examination, it came to light that although he was

commonly known as Dukhi Yadav or Dukhi Singh, but his father's name differed from that of the individual identified as Dukhi Yadav, son of Shiv Sankar Yadav, as mentioned in the fardbeyan. The difference in the parentage of the two individuals casts severe doubts as to their identity thereby leading to the inference that the FIR witness namely Dukhi Singh, son of Shiv Shankar Yadav was not produced as witness during the course of trial. It is furthermore imperative to underscore the fact that the other witnesses mentioned in the fardbeyan were not direct eyewitnesses to the case, but sources of hearsay information. For instance, the PW2 in paragraph 7 states that he received news of the deceased. Similarly, the PW 12 in paragraph 1, mentions that upon arriving in the village, he became aware of the murder. Likewise, the PW 9 in paragraph 1, states that he was neither present in the village nor saw the dead body. Lastly, the PW 1 in paragraph 11, asserts that upon hearing the sound of gunfire, he immediately fled but later returned to discover his deceased father lying lifeless. These accounts, while providing some information about the events, do not conclusively establish the guilt of the accused. It is furthermore noteworthy that the prosecution has not examined Dwarika Singh, the person who visited the house of the deceased. It has been stated by PW 1 in para 6 of his deposition that on the alleged date, one Dwarika Singh from the village of Manjhiyaon visited their home and after having meal, his father alongwith Dwarika Singh proceeded to drop the latter to his house. It is also noteworthy that PW 3 also corroborates the above testimony of PW 1 by specifically stating in paragraph 54 that the deceased alongwith Dwarika Singh was returning to his house. As such, the PW 1 and PW 3 are found to have been consistent in their testimony regarding the presence of Dwarika Singh. There is a consistent thread indicating the presence of a person named Dwarika Singh in the company of the deceased. Thus, the examination of the three individuals namely, Anil Singh, Dukhi Singh, and Dwarika Singh, would have been of utmost significance in the present case. Their non-examination not only has a critical impact on the prosecution's version but also gives rise to doubts regarding the veracity of the case. It is noteworthy that the prosecution has not provided any justifiable reason for their failure to examine these pivotal witnesses and hence, non-examination of such material witnesses also raises doubts regarding the suppression of material facts by the prosecution. In this context, it becomes imperative to refer the Hon'ble Supreme Court judgment delivered in the case of TakhajiHiraji v. Thakore Kubersing Chamansing, reported in (2001) 6 SCC 145, where in para 19 it has been observed that:

"... .. if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness

would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise... ..”

In light of the discussions made above, we are of the view that the prosecution has failed to present a complete case, as the crucial witnesses who could potentially provide much relevant information and would have illuminated essential aspects of the case were not examined. The withholding or non-examination of these witnesses assumes significant importance in the overall evaluation of the prosecution's case. Based on these considerations, the Court is compelled to critically evaluate the completeness and credibility of the evidence presented. The failure to examine these key witnesses significantly undermines the strength of the prosecution's case and raises doubts about the overall veracity and reliability of the evidence put forth.

Accordingly, the issue no. III is decided in the affirmative.

13. Turning to issue No. IV at hand, upon a thorough review of the case records, it becomes evident that the Investigating Officer has not been examined in this case. It is crucial to underscore the pivotal role of the Investigating Officer in establishing the place of occurrence and circumstances surrounding the incident through the presentation of evidence, including search and seizures, and statements of the key witnesses. It is pertinent to note that examination of the investigating officer enables to recognize the significant right of the accused to highlight contradictions in the statements made by witnesses during the investigation, as recorded by the Investigating Officer. This right holds considerable weight, as it allows the defense to effectively demonstrate that the witness has provided inconsistent testimony compared to their earlier statements before the Investigating Officer. In the present case, the circumstances indicate that the prosecution has attempted to suppress certain material witnesses, including the Investigating Officer, without providing any reasonable justification.

In the case of State Of Karnataka versus Bhaskar Kushali Kotharkar And Ors., (Cr. Appeal no. – 498 of 1998) the Hon'ble Supreme Court while highlighting the importance of examination of Investigating Officer, observed:

“It is true that as a part of fair trial the investigating officer should be examined in the trial cases especially when a serious sessions trial was being held against the accused. If any of the prosecution witnesses give any evidence contrary to their previous statement recorded under Section 161 Cr. P.C. or if mere is any

omission of certain material particulars, the previous statement of these witnesses could be proved only by examining the investigating officer who must have recorded the statement of these witnesses under Section 161 Cr. P.C.”

Hence, in the present case, the non-examination of the Investigating Officer has undeniably prejudiced the accused, as the actual place of occurrence remains unverified, and the accused have been deprived of the opportunity to challenge the credibility of the prosecution witnesses through questioning of the Investigating Officer. Therefore, in our considered opinion, the failure to examine the Investigating Officer in this case constitutes a significant flaw that has resulted in prejudice to the case.

Accordingly the issue no. IV is decided in affirmative.

14. In view of the findings arrived at on the issues formulated hereinabove, we are of the considered opinion that the prosecution has failed to prove the charges against the appellants and, therefore, the judgment of conviction is not tenable.

15. In the result, the appeal is allowed. The judgment of conviction dated 18.8.1995 and order of sentence dated 19.8.1995 passed by Sri Awadhesh Kumar Verma, 3rd Additional Sessions Judge, Aurangabad in Sessions Trial No. 370 of 90/37 of 91 (arising out of Obra P.S. case No. 70/90), are set aside. Since the appellants, namely, Jugal Yadav alias Yugal Yadav and Keshav Yadav are on bail, they are discharged from the liabilities of bail bonds.

16. Before parting with this appeal, we record our appreciation towards Mr. Prashant Kumar, learned advocate appointed as Amicus Curiae to represent the appellants, who has rendered his able assistance to this Court in this appeal. Therefore, we direct the Patna High Court Legal Services Committee to pay a sum of Rs. 10,000/- to Mr. Prashant Kumar, learned advocate, appointed as Amicus Curiae to represent the appellants at the cost of the State.