

(2024) 04 PAT CK 0029

In the Patna High Court

Case No : Criminal Appeal (DB) No. 785, 825 Of 2017

Kapil Deo Yadav

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 04-04-2024

Acts Referred:

Indian Penal Code, 1860 — Section 302

Code Of Criminal Procedure, 1973 — Section 313, 372, 374(2)

Arms Act, 1959 — Section 27

Citation : (2024) 04 PAT CK 0029

Hon'ble Judges : Vipul M. Pancholi, J;Sunil Dutta Mishra, J

Bench : Division Bench

Advocate : Shashidhar Jha, Shiv Shankar Sharma, Sujit Kumar Singh, Arun Kumar Sinha, Prabhakar Tekriwal

Final Decision : Dismissed

Judgement

1. Criminal Appeal (DB) No. 785 of 2017 (Kapil Deo Yadav Vs. The State of Bihar) has been filed under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred as the 'Code') challenging the judgment of conviction dated 25.05.2017 and the order of sentence dated 29.05.2017 passed by learned Adhoc Additional District and Sessions Judge (Fast Track Court II), Khagaria in Sessions Case No. 187 of 2000, arising out of Chautham P.S. Case No. 22 of 1999, whereby the concerned Trial Court has convicted the present appellant and sentenced him to undergo rigorous imprisonment for life under Section 302 of the Indian Penal Code and also fine of Rs. 10,000/- (Rupees Ten Thousand Only). The appellant is also awarded sentence to undergo R.I. for the period of five years with a fine of Rs. 5,000/-(Five Thousand Only) for the offence under Section 27 of the Arms Act. In default of payment of fine, he will have to undergo further imprisonment for a period of one month. All the sentences have been directed to run concurrently, whereas Criminal Appeal (DB) No. 825 of 2017 (Uma Kant Yadav Vs. The State of Bihar & Ors.) has been filed by the informant/appellant under Section 372 of the Code against the judgment of acquittal dated

25.05.2017 rendered by Additional District & Sessions Judge (Fast Track Court-II), Khagaria, whereby the present private respondents herein have been acquitted of the charges levelled against them for the offence punishable under Section 302 of the IPC and Section 27 of the Arms Act giving them benefit of doubt.

2. As both these appeals arise out of the common judgment and order, both these appeals are being heard together.

3. The brief facts leading to filing of the present appeals are as under:-

3.1. On 16.04.1999, at about 10:00 a.m., the brother of the informant named Bathu Yadav saw Tarni Yadav, Abhyas Yadav, Sanjay Yadav, Bimal Yadav, Kapil Deo Yadav and Pawan Yadav along with three to four unknown persons carrying the wheat crop from the field of the informant and rebuked them for the said misdeed. At this, all of them armed with deadly weapons surrounded him and started assaulting him. In the meantime, Awadhesh Yadav shot at him from his rifle, as a result of which, the brother of the informant Bathu Yadav sustained injury on his left shoulder. The informant and the other persons, who were present nearby, rushed to the place of occurrence. The injured Bathu Yadav was brought to Hospital for the treatment. The further case is that due to the land dispute, the instant occurrence occurred.

3.2. After registration of the F.I.R., the Investigating Officer started the investigation and during the course of the investigation, he had recorded the statement of the witnesses and thereafter filed the charge-sheet against the appellant/accused before the concerned Magistrate Court. As the case was exclusively triable by the Court of Sessions, the learned Magistrate committed the same to the Sessions Court where the same was registered as Sessions Case No. 187 of 2000.

4. During the course of the trial, the prosecution had examined seven witnesses and produced the documentary evidence. Thereafter, statement of the accused under Section 313 of the Code came to be recorded and, after conclusion of the trial, the Trial Court passed the impugned order whereby the accused Kapil Deo Yadav has been convicted whereas rest of the accused came to be acquitted. Hence, convicted accused Kapil Deo Yadav has preferred Criminal Appeal (DB) No. 785 of 2017 whereas the informant has filed Criminal Appeal (DB) No. 825 of 2017 against order of acquittal against other accused.

5. Heard Mr. Shashidhar Jha, learned counsel for the convict-appellant, Mr. Shiv Shankar Sharma, learned counsel for the informant and Mr. Sujit Kumar Singh, learned A.P.P for the Respondent-State in Criminal Appeal (DB) No. 785 of 2017.

5.1. We have also heard Mr. Shashidhar Jha assisted by Mr. Arun Kumar Sinha for the appellant, Mr. Prabhakar Tekriwal assisted by Mr Shashidhar Jha for the Respondents and Mr. Sujit Kumar Singh, learned A.P.P. for the State in Criminal Appeal (DB) No. 825 of 2017.

6. Learned counsel for the convict/appellant submits that PW-1 and PW-2 have not supported the case of the prosecution and they have turned hostile whereas PW-6 Ashok Kumar is a formal witness. Therefore, the case of the prosecution rests on the deposition given by PW-3 (Bechan Yadav) and PW-4 (Uma Kant Yadav) who are claiming to be the eye-witnesses to the occurrence in question. However, there are major contradictions and discrepancies in the deposition of the said witnesses. It is further submitted that the present is a case of cross-F.I.R. and on the side of the present accused also one person died. At this stage, it is pointed out that, in the fardbeyan, PW-4 (informant) has specifically alleged against one Awadhesh Yadav that he opened fire from the rifle which he was carrying and in the said firing, the cousin brother of the informant sustained injury. However, the informant did not disclose in the fardbeyan that in the firing made by the informant side, the said Awadhesh Yadav also sustained injury and thereafter, he died on the spot.

7. Learned counsel for the appellant/convict would thereafter submit that, in the fardbeyan, no allegation was levelled against the appellant/convict. However, while giving deposition before the Court, PW-4 (informant) has levelled allegation against the appellant/convict that he opened fire in which the deceased Bathu Yadav sustained injury and thereafter he succumbed to the injury before he reached the Hospital.

8. Learned counsel for the appellant/convict further submits that, surprisingly, the case diary has been exhibited and the Trial Court has placed reliance upon the said case diary in which reference is made with regard to the statement given by the injured (deceased) which was recorded by the Police at the place of occurrence. It is contended that, if the injured himself has narrated the occurrence and if he was in a position to give statement, what was the necessity for the Police to record the fardbeyan of the informant who is the cousin brother of the deceased. It is also contended that the Inquest Report has not been produced before the Court and the post mortem examination of the deceased was conducted on the next date of occurrence. Thus, the prosecution story is doubtful, despite which the Trial Court has believed the said story and convicted the appellant herein. It is also pointed out that except the appellant/convict, all the other co-accused have been acquitted by the Trial Court. Similarly, in the cross case filed by the appellant/convict side against the members of the informant side and the deceased, all the accused of the said case have been acquitted. Learned counsel, therefore, urged that the conviction appeal filed by the appellant be allowed and the appeal filed by the informant against the order of acquittal be dismissed.

9. On the other hand, learned counsel appearing for the informant has opposed the appeal filed by the appellant/convict. Learned counsel would submit that there are two eye-witnesses to the occurrence in question and their presence at the place of occurrence was natural. It is further submitted that there are minor contradictions in the deposition of the prosecution witnesses. However, benefit of

the same may not be given to the accused. It is further submitted that the Investigating Officer has specifically referred in his deposition that the statement of the injured was recorded by him and there is reference in the case diary with regard to the same. In the said statement, specific role has been attributed to the appellant/convict and, therefore, the Trial Court has not committed any error while passing the order of conviction against the appellant/convict. It is also contended that the medical evidence also supports the case of the prosecution that the appellant/convict opened fire and in the said occurrence, Bathu Yadav sustained injury and thereafter, he died. Thus, the prosecution has proved the case against the appellant/convict beyond reasonable doubt and, therefore, no error is committed by the Trial Court while passing this aforesaid portion of the judgment and order concerned. However, it is contended that the Trial Court has wrongly acquitted the other accused. It is contended that the other accused were also present with deadly weapons along with the appellant/convict. There was an unlawful assembly and common intention of the accused to kill the deceased. The motive has also been established by the prosecution and, therefore, the Trial Court ought to have convicted the other accused also. Learned counsel, therefore, urged that the appeal filed by the appellant-informant be allowed.

10. Learned A.P.P. has also supported the submissions canvassed by the learned counsel for the informant.

11. We have considered the submissions canvassed by the learned counsels appearing for the parties. We have also gone through the L.C.R. and the paper-book. From the evidence led by the prosecution before the Trial Court, it would emerge that PW-1 and PW-2 have not supported the case of the prosecution and they have turned hostile. PW-3 and PW-4 are projected as eye-witnesses whereas PW-5 is the Doctor who had conducted the post mortem of the dead body of the deceased. PW-6 is a formal witness, whereas PW-7 is the Investigating Officer who has carried out the investigation.

12. PW-3 Bechan Yadav has stated in his examination-in-chief that Kapil Deo Yadav, Bimal Yadav, Awadhesh Yadav, Abhyas Yadav, Subhash Yadav, Tarini Yadav, Sanjay Yadav, Pawan Yadav, Sudhir Yadav and Umakant Yadav were carrying the load of wheat from the field. All the above mentioned persons were firing. Only Awadhesh Yadav was shot and no one else. Bathu Yadav was shot on his left arm. He again said that it hit the shoulder and yet again said, in the left pakhura. Awadhesh Yadav died on the spot and Bathu Yadav was taken for treatment. Later on, he also succumbed to his injuries.

12.1. In his cross-examination, he has stated that in the murder case of Awadhesh Yadav, the informant Umakant Yadav had gone to jail but it is not known as to how many days he had remained in jail. Further, he has stated that the first incident site is less than one kilometre away from his village and the second incident site is less than a half kilometre. Later, he has stated that he went to his farm at 07:00-07:30 in the morning. He went along with 5-7 persons who are named as Kaushalya Devi, Bajiya Devi and other persons who were from

outside and their names are not known to him. He cannot tell as to who had shot at Awadhesh. Further, he had stated that he had not told the Police that, due to the firing, he had gone to a little distance away so he did not see whose bullet hit whom.

13. PW-4 Uma Kant Yadav has stated in his examination-in-chief that the incident is of 16.04.1999 at 10:00 a.m. in the morning. He saw that Bathu Yadav (his cousin) was with his buffalo which was grazing in his field and harvested wheat from his field by hiring labourers Awadhesh Yadav, Abhyas Yadav, Subhash Yadav, Tarni Yadav, Kapil Deo Yadav, Vimal Yadav, Sanjay Yadav, Pawan Yadav, Sudhir Yadav. Bathu Yadav obstructed them from carrying wheat after cutting it from Umakant's field. When stopped, everyone went away and came back there armed with weapons. When they refused to allow the labourers from transporting the crop, at that very moment, they came variously armed with weapons. Those people had guns in their hands and they started firing. When Bathu Yadav fell down, the accused person fled away firing. They picked up Bathu in injured condition and brought him to the Police Station. In the meantime, he met Darogaji in Chautham Bazar where he gave his statement. Darogaji also recorded the statement of Bathu Yadav. As they were on their way to Begusarai for treatment, he died.

13.1. In his cross-examination, he has stated that he had ongoing land dispute with the accused. Further, he has stated that Bathu was around 250 yards east of him. At the time of altercation with Bathu, apart from the accused, there were no other people at a distance of 5-7 laggas. He saw that Kapil Deo Yadav fired at and ran away firing from a distance of 50 yards. When he saw at a distance of 50 yards, all the accused were firing. The firing was made at Bathu Yadav. The firing continued for about 5-7 minutes. When the firing was going on, he was at a distance of 250 yards. Later, he had stated that the Police had registered the case on the day of the incident and he had given an application in writing. F.I.R. was lodged against him. Darogaji took his fardbeyan. The fardbeyan bears his signature and is marked as Exhibit-1. Fardbeyan was incomplete. He cannot tell upto what extent the fardbeyan was written. When he signed, the fardbeyan was not read out to him. He had made Awadhesh as an accused.

14. PW-5 Dr. Sajjan Kumar Pansari was posted at Sadar Hospital, Khagaria as C.A.S. on 17.04.1999. On that day, he had conducted the post mortem of the dead body of Bathu Yadav and found following injuries:-

- "1. Rigor Mortis present in all the limbs and neck.
2. Fair complexion partly bald scalp, black green mixed scalp hair, shaved beard, black moustache, eyes black and closed, mouth partly closed.
3. Bandage in left upper arm. Bandage was removed.
4. One lacerated wound over interior surface of middle of left upper arm, blackening around the wound margin inverted size 1/2" x 1/2" x bone deep,

blood and clot present around the wound (wound of entry).

5. One lacerated wound over posterior surface of middle third of left upper arm, margin inverted size 1" x 1" bone deep (wound of exit) Blood and clot present around the wound.

On dissection:-

1. Superficial and deep tissue in connection with the injuries mentioned above were lacerated and contained blood and clot. Injury No. 4 and 5 were communicating with each other.

2. There was fracture of shaft of left humerus. muscles, vessels and nerves near the fracture site were lacerated. Left arm was full of blood and clot.

3. All other viscerae i.e. liver, spleen, kidney, heart and lungs were pale. Both side of heart was empty. Stomach contained about 3 to 4 ounce of partly digested food material.

All the above injuries were ante mortem in nature. Opinion- Death was due to hemorrhage and shock due to above mentioned injuries caused by the firearm.

Time elapsed since death- within twenty four hours of P.M. Examination."

15. PW-7 Raj Kishore Baitha is the Investigating Officer who was posted as Sub Inspector in Chautham Police Station. He took the fardbeyan of Umakant Yadav. He prepared the injury report of Bathu Yadav, sent him for treatment and conducted the medical examination of the injured. He also took the statement of other witnesses. He also inspected the incident site. He has further stated that bullets were fired from both sides in Hardiya West Dam. He also recorded the names of the independent witnesses. He received the inquest report of Bathu Yadav.

16. We have re-appreciated the entire evidence as discussed hereinabove. It would emerge from the evidence that PW-4 is the informant and it is the case of the prosecution that he had immediately lodged the F.I.R. in the bazar (market) when the Police came at the said place. If the fardbeyan of the informant is carefully seen, it is revealed that informant is claiming that he is an eye-witness to the occurrence and, in the said F.I.R., he has specifically levelled allegations against Awadhesh Yadav. It is alleged that Awadhesh Yadav came at the place of occurrence with the other co-accused. He was carrying rifle from which he opened fire and the cousin brother of the informant, namely Bathu Yadav, sustained gun-shot injury in the said firing. It is pertinent to note that it is the case of the Investigating Officer that injured was lying at the place of occurrence and the Investigating Officer had recorded the statement at the said place. However, at this stage, it is required to be observed that if the injured was present at the place of occurrence and if he was in a position to give statement and, in fact, as stated by the Investigating Officer, his statement was recorded, then what was the necessity for the Investigating Agency to record the fardbeyan

of the cousin brother of the injured. In the fardbeyan of the informant, he has only stated that, after the occurrence of firing, he had brought the injured to the hospital. It is also revealed that the informant had not disclosed that, in the occurrence of cross-firing, Awadhesh Yadav and one Subhash Yadav also sustained injury and, in fact, Awadhesh Yadav died on the spot. It would further emerge from the record that, for the first time, while giving deposition before the Court, the informant has levelled allegation against the appellant/convict Kapil Deo Yadav by alleging that he had opened fire and, in the said firing, Bathu Yadav sustained injury.

17. It further appears from the record that the Inquest Report of the dead body of the deceased was not produced before the Court. There is no material available in the evidence of the prosecution as to at what time the injured died. It would emerge that on 17.04.1999 PW-5 (Doctor) had conducted the post mortem of the dead body of the deceased. In his deposition, he has stated that the dead body was received early in the morning after 06:00 a.m. At this stage, it is important to note that, as per the case of the prosecution, the occurrence took place at about 10:00 a.m. in the morning on 16.04.1999 for which the F.I.R. was lodged at 11:00 a.m. As per the case of the prosecution, the injured was taken to Begusarai. However, before they reached the Hospital at Begusarai, the injured succumbed to the injuries. Thus, it appears that the injured died within approximately one hour after the fardbeyan of the informant was recorded i.e. at about 12:00 noon on 16.04.1999. Thereafter, as observed hereinabove, surprisingly the post mortem was conducted on 17.04.1999 in the morning at about 07:00 am. There is nothing on record to suggest as to where the dead body of the deceased was kept and why the post mortem was not immediately conducted.

18. From the evidence led before the Trial Court, it would further emerge that so called statement/oral dying declaration given by the deceased before the Police was not produced before the Court. However, the entire case diary has been exhibited. In the said case diary, there is a reference of recording the statement of the injured. There is nothing on the record to suggest that the injured was in a position to give statement before the Police.

19. It appears from the record that, in the fardbeyan, the informant has levelled allegation against Awadhesh Yadav that he opened fire from his rifle in which Bathu Yadav sustained injury and thereafter, he died. However, thereafter it appears that Awadhesh Yadav also died in the said incident in cross-firing and, therefore, it appears that the prosecution has changed the story and it is alleged that the appellant/convict Kapil Deo Yadav made firing from his rifle in which Bathu Yadav sustained injury.

20. It is pertinent to observe, at this stage, that in the cross F.I.R., the trial was conducted against the persons on the side of the informant and, in the said trial, all the accused have been acquitted. Similarly, in the present matter also, except the appellant/convict, all the other persons have been acquitted. The Trial Court,

in the present case, has simply relied upon the changed/improved version of the prosecution in the form of the chance witness PW-3 and PW-4 (informant). The Trial Court has also placed reliance on the case diary in which there is a reference of the statement of the injured (deceased).

21. We are of the view that the prosecution had, in fact, failed to prove the case against the appellant/convict beyond reasonable doubt, in view of the aforesaid discussion, despite which, the Trial Court has convicted the appellant Kapil Deo Yadav and, therefore, the judgment and order of conviction against the appellant Kapil Deo Yadav is required to be quashed and set aside.

22. However, we are of the view that the Trial Court has not committed any error while acquitting the other accused.

23. At this stage, we would like to place reliance upon Chandrappa & Ors. Vs. State of Karnataka, reported in (2007) 4 SCC 415, wherein it has been held in Para-42 as under:-

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

24. Keeping in view the aforesaid guidelines, if the facts of the present case, as

discussed hereinabove, are examined, we are of the view that no interference is required in the impugned order whereby the Trial Court has acquitted the rest of the accused. 25. Criminal Appeal (DB) No. 785 of 2017 stands allowed.

26. The impugned judgment of conviction dated 25.05.2017 and order of sentence dated 29.05.2017 passed by learned Adhoc Additional District and Sessions Judge (Fast Track Court II), Khagaria in Sessions Case No. 187 of 2000, arising out of Chautham P.S. Case No. 22 of 1999 are quashed and set aside.

26.1. The appellant, namely Kapil Deo Yadav, is acquitted of the charges levelled against him by the learned Trial Court. He is in custody. He is directed to be released forthwith, if not required in any other case.

27. Criminal Appeal (DB) No. 825 of 2017 stands dismissed.