
(2003) 08 PAT CK 0075

In the Patna High Court

Case No : Criminal Appeal (DB) No's. 368 of 1999

Prabhat Yadav, Birendra Yadav and Baikunth Yadav

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 13-08-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302

Citation : (2003) 4 PLJR 209

Hon'ble Judges : P.K. Sinha, J;C.M. Prasad, J

Bench : Division Bench

Advocate : P.N. Pandey, Arun, Sanjay Kr. @ S.K in Criminal Appeal DB Nos. 368, 386, 431 and 439 of 1999 and Mukul Prasad, in Criminal Appeal DB No. 434 of 1999, for the Appellant; G.P. Jaiswal, for the Respondent

Final Decision : Allowed

Judgement

P.K. Sinha, J.—In all twenty accused had faced trial in the lower Court out of whom ten were acquitted of the charges against them but the ten Appellants of the aforesaid five appeals were found guilty in the manner that Appellants Parshuram Yadav, Ram Karan Yadav and Ballam @ Raj Ballam Yadav were convicted u/s under Section 302 of the Indian Penal Code ("the Code," in short) as well u/s 148 of the Code and sentenced to undergo imprisonment for life and for rigorous imprisonment for two years, respectively, each. Rest of the Appellants were convicted u/s 302 read with Section 149 of the Code as well u/s 148 of the Code and sentenced to imprisonment for life and rigorous imprisonment for two years, respectively.

2. The fact matrix of the case as coming out of the first information report (Exhibit 4) containing fardbayan of P.W. 1, Bhuneshwar Yadav son of the deceased Bal Chand Yadav is that when on 17.2.1993 at about 7 P.M. he was going to irrigate his field, he saw some persons in police dress coming with many others but soon he realised that they were extremists and were going to attack his house because of previous enmity, being armed with firearms and fasuli.

They asked the name of his father at which he named his uncle, Nathun Yadav (P.W. 6) still they tied his hands and legs with his Lungi and pushed him down. Ram Ratan Yadav threatened him that he would deal with him while returning. Somehow he untied, and concealed, himself, and saw the occurrence in the light of torch held by the accused. The informant named the accused persons and their weapons whereafter he said that some of them dragged out his father from house and at northern entrance cut his neck with fasuli and again dragged him towards the western wall, cutting the abdomen with fasuli. Parshuram Yadav, Ram Karan and Ballam Yadav had so assaulted with fasuli. Appellants Birendra Yadav and Prabhat Yadav also had assaulted his mother with lathi. While leaving the place they threatened them to withdraw the case otherwise rest also would be done away with. The informant claimed that the reason for occurrence was animosity with regard to the lands. Nathun Yadav (P.W. 6) and Nageshwar Yadav (P.W. 4) have specifically been named as witnesses to the occurrence.

3. The prosecution relied upon the testimonies of 10 witnesses in all, Dr. Raj Kumar Prasad (P.W. 7) being the doctor who had conducted autopsy upon the dead body and P.W. 7, Tej Narayan Singh being the Investigating Officer. P.W. 8 is a formal witness who has produced certain documents whereas P.W. 10, Munni Ram, a retired Police Officer, had also conducted part of the investigation and said that he had filed supplementary Charge-sheet.

4. Out of the rest P.W. 1 is the informant, and his brother Madheshwar Yadav and Ranvijay Kumar (P.Ws. 2 and 3) have also come as eye witnesses. In this case some of witnesses have been examined more than once to which will come presently.

5. Nageshwar Yadav was numbered as witness No. 4 when he was examined first on 22.12.1995 denying that he had identified anyone and allowed to go on his evidence but when second time on 6.4.1998 he was examined again as P.W. 5, though again he claimed not to have identified anyone, he was declared hostile and cross-examined by the prosecution but the prosecution did not draw his attentions towards any of his previous statement to claim that he had resiled from that. P.W. 5 was Ganesh Yadav when examined on 2.1.1996 but on 3.1.1998 he was examined as P.W. 4.

6. Before proceeding it may be noticed that on 22.8.1995, fifteen accused persons were charged and the case went on trial. Then by order dated 15/5/1996 split up record of accused Rajesh and Balendra Yadav was amalgamated with the main file and again charges were framed on 17.5.1996 against them and trial started afresh. Lastly, split up record of rest of the accused including of Appellant Brajlal @ Birju Yadav and Ram Lakhan Chamar was also amalgamated, charges framed against them on 4.7.1997 and again trial took place afresh. All these depositions are evidences on record and every evidence can be considered against the accused in whose presence that was recorded, but not against others. However, the last evidence of the witnesses who were examined again could be considered against all. So when in this

judgment the number of a witness is noted that is the number of their last evidence. For example P.W. 1 was examined three times and his number was 1, 2, 1. The number of P.Ws. 2 and 3 have remained unchanged. The change of number of Nageshwar Yadav and of Ganesh Yadav has been noticed earlier. P.W. 6, Nathun Yadav was examined on 4.1.1996, i.e., before last amalgamation of the record of five accused out of whom only Brajlal and Ram Lakhan Chamar are the Appellants. However, Nathun Yadav, own uncle of the informant and full brother of the deceased claimed that though he had seen the occurrence, he did not identify anyone. Since this has been argued in favour of all the accused, in my opinion, his evidence can be considered as whole because sound principle of law is that evidence recorded in absence of an accused may not be considered as against him, but the evidence on record if that goes in favour of that very accused, and sought to be used in his favour, there is hardly any reason why such evidence cannot be considered in favour of such an accused, while considering the same in favour of other accused.

7. The defence of the Appellants was that the deceased was doing "pairvi" in a case relating to the murder of his "Samadhi" by the extremists and he was killed by those extremists for that reason but be-I cause of admitted enmity between the in-| formant and the Appellants relating to land, they were falsely implicated.

8. Learned Counsel for the Appellants pointed out that the accused side and the informant side belonged to different families so much so that Parsuran Yadav, Baikunth Yadav and Ramkaran Yadav were sons of Ram Ratan Yadav whereas Prabhat Yadav and Birendra Yadav were sons of Parsuram Yadav, all the five being Appellants. Appellants Suresh Yadav, Birju Yadav HSre sons of Budhan Yadav the rest three Appellants being Ballam Yadav, Ram Keshwar Yadav and Ram Lakhan Chamar. Beamed counsel submitted that as per Byidence on the record the main three witnesses, namely, P. Ws. 1, 2 and 3 were full brothers, sons of the deceased Balchand Yadav, and P.W. Ganesh Yadav admitted in cross-examination that the deceased was his Gotia. Similarly, Nathun Yadav admittedly was full brother of the deceased. P.W. Nageshwar Yadav had admitted in cross-examination that Nathun Yadav was his brother. It was also pointed out that the informant, P.W. 1 in his evidence had admitted that sixteen of the accused facing trial were his co villagers and excepting them he had no enmity with any one else in the village. He admitted that Nageshwar Yadav and Nathun Yadav were his uncles with whom he had no differences.

9. Shri P.N. Pandey, learned Counsel for the Appellants, submitted that three witnesses, Nageshwar Yadav, Ganesh Yadav and Nathun Yadav out of whom two were brothers of the deceased and who lived nearby as per the evidence on record, did not support the case as made out by the informant in the F.I.R. and supported by his two brothers. Nageshwar Yadav when examined two times as P.W. 5 said that at about 7 P.M. he heard much hulls and coming out of the house he saw many persons armed with guns, when he entered in his house and bolted the door from inside. Subsequently when the door was opened he saw that

Balchand Yadav was murdered, his neck cut. He categorically said that he did not identify any one out of the miscreants nor did he know as to why his brother was murdered. This second time, as noted earlier, he was declared hostile. This witness when cross-examined by the State asserted that before police also he had said that he had not seen anyone actually committing the murder. The Investigating Officer, P.W. 9 admitted that neither Nageshwar Yadav in his statement nor Ganesh Yadav had told about identifying any of the murderers. About Nathun Yadav this Investigating Officer said that though he had claimed to have seen the incident from his darwaja he did not tell any name but claimed that he could identify them by face.

10. Nageshwar Yadav also has admitted that the Samadhi of the deceased was killed by the extremists. Likewise Ganesh Yadav has narrated the incident saying that he had seen 20-25 persons assembled at the house of Bal Chand Yadav with firearms and one of them had aimed the gun at him also. He said that Bal Chand Yadav was dragged out from his house and his neck was cut by fasuli by those who all were unknown persons. After murder the miscreants fled away. He also claimed that he had given statement before the police. He admitted in cross-examination that extremists had murdered the deceased. In para 54 he categorically said that he knew all his co-villagers but none of them was amongst the miscreants. He also said that after the miscreants had fled away, the family members of the deceased had come.

11. In para, 6 he admitted that Raj Ballabh Yadav of village Mayapur was the "Samadhi" of Bal Chand Yadav who was murdered by the extremists. He also admitted that the extremists had asked the deceased not to do "pairvi" in that case and also had threatened him.

12. Now coming to the evidence of Nathun Yadav, he said that he had seen 20-25 persons to have come in police dress who went to the house of his brother. He had also seen the dead body of Bal Chand Yadav with injury on neck, chest and abdomen. This witness admitted that he had good relationship with the deceased, his full brother and admitted that "Samadhi" of the deceased, Raj Ballabh Yadav, belonged to Mayapur, who was murdered by extremists in which case Bal Chand Yadav was doing "pairvi" which had made the extremists his enemies. He also said that the properties of Raj Ballabh Yadav were being looked after by the deceased. He also admitted that the persons who had come were all unknown.

13. Learned Counsel argued that besides the fact that no independent witness of the village supported the prosecution case, even the relatives of the deceased with whom the informant had good relation, have not supported the case as made out by the informant, rather they admitted that the murder had been committed by unknown extremists. The motive for murder by the extremists as claimed by the defence has also been admitted by these witnesses.

14. It was thereafter argued that even the evidence of P.Ws. 1, 2 and 3 are not

worth reliance, being full of improbabilities and inherent contradictions.

15. In the arguments the specific evidence about enmity was also pointed out. P.W. 2 in para 38 admitted that relating to 22 bighas of lands differences with the family members of Parasuram Yadav were continued since before. P.W. 1 was more specific and he said in para 38 of his evidence that with Ram Ratan Yadav (father of Parasuram Yadav) they were fighting since about 28 years for 22 bighas of land. Further clarifying he said that they had got a favourable order from the Collector against which the other side had filed appeal in the High Court. As seen, besides Parasuram Yadav, the Appellants, Baikunth Yadav, Ram Karan Yadav, Prabhat Yadav and Birendra Yadav belonged to the family of Ram Ratan Yadav. This witness (P.W. 1) in his earlier statement in para 19 had admitted that his father had filed a case against Budhan Yadav and accused Ballam Yadav relating to assault in which he was a witness though in his last statement (Para 35) he denied that, Appellant Suresh Yadav and Birju Yadav are sons of Budhan Yadav.

16. Now coming to P.W. 1, in the F.I.R. itself this witness had claimed that while in the way he had met the miscreants who asked the name of his father and he named Nathun Yadav as his father at which they opened his lungi and in nude condition, tearing the lungi, tied his legs and hands behind his back and fell him down. But after they departed he somehow untied the knots and hid himself and saw the entire occurrence, identifying the accused also. In this evidence this witness said (para 47) that where he had met the accused person, there was 5 feet tall sugarcane crop. There was also field of Ram Chandra Yadav on which the wheat was grown. Further he said that accused caught hold of his hand and took him with them. He denied that in the F.I.R. he had said that he was made nude by taking away of his lungi but asserted that he had told that he was tied with his lungi and he was brought near his house which, however, is a new claim. In para 49 he again denied having stated in the F.I.R. that his hands were tied behind, and claimed that rather he had said that hands were tied in front.

17. In para 51 again he changed the story and said that his hands were tied with lungi and the legs were tied with Gamchha.

18. In his examination-in-chief this witness on this point had said that he had concealed himself in the bush of "Sem" from where he saw the occurrence. In para 12 he asserted that his legs and hands were tied after he was brought near his house, not where he was first caught. He r said that he was so tied near the "Sem" bush and after releasing himself he hid himself behind the bush. This witness said pin para 26) that aforesaid bush was about 15 yards to the north of the entrance of his House which bush was seen by the police. This witness also admitted that in his previous evidence he had said that he had concealed himself behind the palm leaves.

19. P.W. 9, Investigating Police Officer, when cross-examined on this point said (Para 17) that to the north of the house of the informant, after the Gall, there

was cattle shed of Parasuram Yadav, to the west of which the cattle shed of the deceased was situated, as also his Baithaka. This witness said that around that place no "Sem" bush or palm leaves were found.

20. Therefore, it is doubtful as to from which place the informant had seen the occurrence, if he had seen that. He has given different versions at different times in that regard.

21. Learned Counsel for the Appellants also pointed out that when more than a dozen miscreants belonged to the same village, there was no occasion for any of them to ask the parentage of the informant, nor the informant could have told them the name of his uncle as of his father. However, he could have told them that if the miscreants were unknown. According to the learned Counsel for the Appellants, there is serious doubt as to whether in the group of the criminals any was a co-villager.

22. P.W. 2 has said that at the time of occurrence the informant was not present. He also said that when after occurrence he met the informant, he told him about the occurrence. There was hardly any occasion for the P.W. 2 to narrate the incident to P.W. 1, when he himself, as claimed, had seen the occurrence.

23. P.W. 1 has said that he had gone 50 yards from his house when he saw the extremists in the police dress. He said (para 19) that all of them had tied Galmochha (concealing of face by clothes). However, despite the admission here, that miscreants, 20-25 in number, had tied Galmochha, the three brother witnesses have claimed to have identified the Appellants and others out of them. P.W. 2 has deposed that at the relevant time he was in his Angan along with P.W. 3 when the accused persons, out of whom he identified 17, entered into the house and dragged out his father. He supported as to how his father was killed. In cross-examination this witness said that when the accused came inside the house both he and his brother had rushed inside the southern room in which room no accused had entered. He also said that he came out of the house when his father already had been taken away, the incident having completed within 3-4 minutes. This witness also admitted that his father, at that time, was in the northern room. He further said that in the southern room he alone had concealed himself and categorically stated that besides him nobody else had gone to that room. As seen, earlier in evidence he had claimed that his brother also had gone inside that room. This witness further said (Para 21) that when he came out of his concealment, he had seen his mother injured and he was shown her injuries near the dead body of his father. It may be noticed that earlier in his examination-in-chief, this witness had narrated the entire incident as to who, and how, had assaulted his father, as an eye witness. But from his evidence it becomes very much doubtful as to whether he had seen the occurrence.

24. In para 33 this witness gave a different story and said that he had fled upon the southern tiled roof, also claiming that some tiles were broken because of that, which had been shown to the police. He also claimed that till the accused

had gone away, he had stayed on the tiles. Therefore, this witness gave out two places where he claimed to have fled when miscreants came, and had stayed there till they went away.

25. Now coming to the evidence of P.W. 3 he also gave evidence as an eye witness as to how his father was dragged and as to how he was assaulted and killed. He also said, in his first evidence, that at the relevant time he was in his Angan and his father was sleeping on a cot in the Angan itself though P.W. 2 has claimed that his father was in northern room. But in second evidence he said that his father was in a room with two entrances. In cross-examination this witness said that when the miscreants came inside the Angan he went and concealed himself in the cow shed. In para 7 of first evidence he had said that he had concealed himself in the cow shed for 10 minutes. It has come in the evidence that the entire occurrence had taken place within 3-4 minutes. However, in his second evidence (Para 13) he categorically said that after occurrence many co-villagers had assembled in the Angan and he came out of the cow-shed only after the co-villagers had so come.

26. Therefore, it is doubtful as to whether or not this witness had seen the occurrence of assault. There are other aspects also which create doubts about prosecution case.

27. According to the evidence of witnesses, soon after the occurrence, when the culprits fled away the police from Bandhya picket had come who stayed for the whole night but it has also come in the evidence of three important witnesses that despite that, and despite the fact that as many as 16 of the accused were from the village, they did not reveal the name of any accused to the police.

28. P.W. 1 said that from the place of occurrence he had gone to Bandhya picket where the constables were there and gave the information to Jamadar at which that police officer came with force to the village. He said that the police officer did not make any enquiry from any one and on their coming he had gone to his house and slept.

29. However, none from the police party from Bandhya picket has been examined to say that P.W. 1 had told them any name.

30. P.W. 2 has admitted that Bandhya was a village contiguous to his village where there was a police camp. He further said (Para 25) that when initially police came to the village, his statement was not taken nor on that day he told them the name of any accused, rather he gave his statement to the police two days after the occurrence. As claimed by this witness, the police from the picket had come in the night itself and had stayed at his Darwaza but they made no enquiry from him. He also said (P. 24-26) that co-villagers had come near the dead body including P.Ws. 4 and 6, his relatives, but even to them he did not reveal the names of the miscreants till 19.2.1993. P.W. 3 said that the police had come just after 20 minutes of the occurrence and had stayed for the whole night at his house. He admitted that there was no reason for them not to give any

statement to the police during the night itself. He also said (Para-8) that in the night itself the co-villagers had come to his house but even to them he did not tell anything rather he admitted that while he was entering into the cow-shed to conceal himself, the accused had already taken away his father. This witness also said (P-14) that when the police came (next morning) for investigation even then he did not tell them as to how his father had died or who had killed him. As already seen (Para 4), this witness said that this statement was taken after two days, i.e. on 19.2.1993. Therefore, from the evidence it appears that no names were revealed by either of the three brothers to anyone, to the police or to the co-villagers during the night. P.W. 3 also said (para 13) that after occurrence he did not meet P.W. 2.

31. It will appear that in the morning also they had failed to reveal the names before fardbeyan was recorded, even to the Choukidar who had come there before going to the police station.

32. It is obvious that though such an occurrence had taken place in the family, none of the family members including the three brothers had gone to the police station for the purpose of lodging a case either in the night or in the morning. P.W. 2 said that Chowkidar had come next morning at about 6 to 6.30 A.M. and having seen everything he went to the police station to submit information. He said that Chowkidar had made enquiries from his brother but claimed that they had not told him the names of the accused persons. He also said that Chowkidar had gone to the police station to lodge information all alone.

33. Chowkidar was the first person who had given the information to the Office-in-charge at Goh police station. The Investigating Officer in his evidence has said that Chowkidar Ramashish Yadav had informed him that in the village Balchand Yadav was murdered, on basis of which Sanaha entry No. 368 was recorded (Ext. 4). This exhibit would reveal that Chowkidar had told the police that Balchand Yadav was murdered by unknown criminals by dragging him from his house and by cutting his neck with fasuli. The Investigating Officer admitted that the place of occurrence fell within the jurisdiction of the aforesaid Chowkidar and he also said that Chowkidar had come to the police station after visiting the place of occurrence. It was on the basis of this evidence on the record that the learned Counsel for the Appellants has forcefully argued that the murder so committed was the handiwork of extremists for the reasons suggested by the defence, who were unknown, and taking advantage of more than 12 hours which had lapsed in between the occurrence and recording of the fardbayan, a story was hatched up by the three brothers to falsely implicate Parasuram Singh, his family members, their supporters and others with whom they had enmity which story they finally consolidated after the Chowkidar had departed for the police station.

34. The prosecution ought to have clarified the matter by examining the police personnel of the picket who had stayed at the house of the deceased for the whole night, as also by examination of the Chowkidar which have not been done.

35. That the alleged extremists were involved in the murder is also indicated in the F.I.R. where the informant has claimed that while going away, they asked the victim side to withdraw the case failing which they all would also meet the same fate. Reference in evidence-about any case which could be withdrawn has come in connection with the only case which related to the murder of the "Samadhi" of the deceased, which was, as admitted by relative witness, being looked after by the deceased.

36. The main eye witnesses have claimed that Parasuram Yadav had cut the neck of the deceased with fasuli whereafter Ram Karan Yadav (as per P.W. 1) had given two fasuli blows upon the abdomen, tearing that and Ballam Yadav had torn the chest with similar sharp cutting weapon. In the evidence of P.W. 1 it also has come that the miscreants had also assaulted his sister and mother. However, these witnesses were not produced who were very important witnesses particularly when the main culprits were co-villagers.

37. Coming to the evidence of P.W. 7, the doctor, he has found following ante mortem injuries upon the deceased:

(1) Mouth and eyes partially opened, abdomen and viscera are protruding out from the abdominal wounds, cut-throat, semi-lunar in shape, extending from third cervical vertebra, all major vessels, soft tissues skin, along with C/3 (3rd cervical vertebra) were cut, head was attached with neck, only posteriorly by skin.

(2) Incised wound on anterior abdominal wall measuring 6" x 1/2" x leading to abdominal cavity.

(3) Incised wound on anterior abdominal wall measuring 8" x 1/2" leading to abdominal cavity.

(4) Incised wound on anterior abdominal wall measuring about 6" x 1/2" x leading to abdominal cavity.

(5) Incised wound on anterior abdominal wall measuring about 2" x 1/2" x leading to abdominal cavity.

All the found incised wounds are longitudinal in direction having viscera protruding.

38. From these injuries it will appear that there was sharp cut injury upon the neck and several sharp cut injuries upon the abdomen, but none on the chest. The four injuries upon the abdomen were longitudinal in direction. Therefore, it will appear that on the abdomen four injuries were inflicted but the chest was spared. However, as per evidence on record Ballam Yadav by fasuli had cut open the chest and at abdomen, the best evidence is about infliction of two injuries.

39. All these factors altogether do not inspire confidence in the evidence of these highly interested witnesses. There are enough grounds to suspect the veracity of their testimonies. The evidence of interested or inimical witnesses, which in any

case has to be considered with extra care and caution, has to be such so as to inspire confidence in its truthfulness but should such evidence fail to pass this test, hazardous it would be to convict the accused on basis of that. In this case the evidence of the three brothers even when considered on its own, and more particularly when considered with evidence of other witnesses including their kin, exhibits more contradictions and loopholes than cohesiveness, rendering the same exposed to doubts.

40. Therefore, it must be held that the prosecution has failed to prove its charge beyond reasonable doubts. That being so, the Appellants in all the appeals aforesaid deserve acquittal.

41. In the result, Cr. Appeal Nos. 368 of 1999 with 386, 431, 434 and 439, all of 1999, are allowed and the Appellants of the aforesaid appeals, are acquitted of the charges framed against them and the judgment of the lower Court is set-aside.

42. Appellants Ballam Yadav @ Raj Ballam Yadav and Ram Keshwar Yadav are in custody. They are ordered to be detained in connection with any other case.

43. Appellants Prabhat Yadav, Birendra Yadav, Baikunth Yadav, Suresh Yadav, Birju Yadav @ Brijlal Yadav @ Braj Lal, Parsuram Yadav, Ram Kran Yadav and Ram Lakhan @ Ram Lakhan Chamar @ Lakhan Chamar are on bail. They are discharged from the liability of their bail bonds.

Chandra Mohan Prasad, J.

44. agree.