

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.372 of 2015**

Arising Out of PS. Case No.-58 Year-2009 Thana- UDAKISHUNGANJ District- Madhepura

Arun Yadav, S/o Jhimal Yadav, resident of village Gwalpara, P.S.-
Udakishunganj (Gwalpara) , District - Madhepura

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Sri Bakshi S.R.P. Sinha (Senior Advocate)

Sri Mrigendra Pratap Singh (Advocate)

Shri Sanjay Kumar (Advocate)

For the Respondent/s : Sri Ajay Mishra (A.P.P.)

**CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ANIL KUMAR SINHA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)**

Date : 25-04-2019

1. The sole appellant after being convicted and sentenced in Sessions Trial No. 49(A) of 2010 has approached this court by filing the present appeal under Section 374(2) of the Code Of Criminal Procedure, 1973 [hereinafter referred to as the “Cr.P.C.”].

2. The sole appellant by judgment dated- 18.12.2014 was held guilty and convicted for the offence under Section 302 of the Indian Penal Code, 1860 [hereinafter referred to as the “I.P.C.”] and 27(1) of the Arms Act, 1959 [hereinafter



referred to as the “Arms Act”]. By order dated: 20.12.2014 under Section 302 of the I.P.C. the appellant was sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/- In case of default in payment of fine he has been directed to further undergo imprisonment for one year. Under Section 27(1) of the Arms Act the appellant has been sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 5,000/-. In case of default in payment of fine he has been directed to further undergo imprisonment for six months. Both the sentences were directed to run concurrently.

3. Short fact of the case is that on 18.05.2009 at 22.15 Hours (10.15 P.M.) Sub Inspector of Police -cum- S.H.O., Gwalpara O.P. namely: Sri Sanjay Kumar (P.W. 7) recorded *farbayan* of Murari Lal Das (P.W. 6). The *farbayan* was recorded at Primary Health Center, Gwalpara. In the *farbayan* informant (P.W. 6) disclosed that on the same day i.e. on 18.05.2009 in the night as usual he along with his son Chandan Kumar, aged about 25 years (deceased) after closing digital photo shop namely *Chhaya* Studio, Gwalpara was returning back to his home along with his staff- Arvind Kumar



Rai (P.W. 4) and one another nearby shopkeeper namely Pramod Yadav (P.W. 3). At about 9.00 in the night while he reached on metalled road opposite Kala Bhawan, Gwalpara he from the back heard sound of one firing which hit his son Chandan Kumar and his son fell down in the middle of the road. His chest was bleeding. He in the light of torch saw the appellant who after killing his son carrying pistol was fleeing away along with his other associates, however the informant could not identify others. He raised alarm and thereafter number of persons arrived there and carried the injured to Primary Health Center, Gwalpara where on arrival doctor declared his son as dead. The reason for the occurrence was explained by the informant that on earlier occasion with Arun Yadav (appellant) some dispute was going on in relation to Udakishunganj (Gwalpara) P.S. Case No. 46 of 2006 in which the appellant was accused. He stated that due to said animosity the appellant conspiring with his other associates had shot at and killed his son. The said *fardbyan* was read over to him and after finding it correct, in presence of his nephew- Nutan Kumar Das (P.W. 1) the informant put his signature. The said *fardbyan* was forwarded by A.S.I. to



Gwalpara Police Station and thereafter on the same day i.e. on 18.05.2009 a formal F.I.R. vide Udakishanganj (Gwalpara) P.S. Case No. 58 of 2009 was registered for the offence under Section 302/34/120(B) of the I.P.C. and Section 27 of the Arms Act against the appellant and two other unknown accused persons. The said F.I.R. was received in the court of Chief Judicial Magistrate, Madhepura on 20.5.2009. After recording *fardbyan* the Sub Inspector of Police Sanjay Kumar (P.W. 7) took up investigation of the case. He conducted raid to apprehend the accused persons. He prepared inquest report and dead body was sent for post mortem examination. The Police initially tried to apprehend the accused persons but all the accused persons were found absconding. Finally on 20.08.2009 charge sheet was submitted against one of the accused- Naresh Yadav, who was not named in the F.I.R., keeping investigation pending against others. Thereafter on 22.08.2009 learned Chief Judicial Magistrate, Madhepura took cognizance of the offence. Subsequently on 06.10.2009 the appellant was arrested. Thereafter on 30.11.2009 supplementary charge sheet against appellant, Pankaj Yadav and Dharmendra Yadav was submitted, but after submission



of supplementary charge sheet the case of appellant and other two accused person was committed to the court of Sessions on 27.04.2010. The case of Naresh Yadav, who was earlier arrested in which charge sheet was submitted, proceeded separately. In the present case after commitment, on 30.09.2010 charge was jointly framed against appellant and other two accused persons under Section 120B, 302/34 of the I.P.C. and Section 27 of the Arms Act which was denied and the accused persons claimed to be tried.

4. During the trial to establish its case the prosecution examined altogether eight witnesses. Out of eight witnesses the informant (P.W. 6) was examined as only eye witness to the occurrence. P.W. 1 (Nautan Kumar Das @ Hira Das) has stated that he heard about the occurrence. P.W. 3 (Pramod Yadav) was examined as formal witness and he proved his signature on the inquest report, which was marked as Ext. 1. P.W. 8 (Dr. Shekhar Prasad Bishwas) who was posted as Medical Officer on 19.05.2009 had conducted post mortem examination on the dead body of the deceased and Sanjay Kumar is the then Sub Inspector -cum- Officer in charge of Gwalpara O.P. and has been examined as P.W. 7,



however P.W. 2 (Pankaj Das), P.W. 4 (Arvind Kumar Rai) and P.W. 5 (Pampum Kumar Singh) since did not support the case they were declared hostile.

5. After conclusion of prosecution evidence on 14.10.2014 the appellant was questioned on the incriminating circumstances and evidences brought against him and his statement was recorded under Section 313 of the Cr.P.C. in which he claimed to be innocent however no defence evidence has been brought on record. The learned Trial Judge on the basis of evidence on record, while acquitting other two accused persons, convicted the appellant by the impugned judgment which is under challenge before this court.

6. Sri Bakshi S.R.P. Sinha, learned senior counsel, assisted by Sri Mrigendra Pratap Singh, learned counsel for the appellant, after placing entire evidence on record has argued that the case is based on no evidence. He submits that though informant -P.W. 6 (father of the deceased) has come forward and claimed to be eye witness to the occurrence, he was neither present at the place of occurrence nor he had seen any occurrence. He further submits that during entire prosecution evidence only P.W. 6 has come forward claiming



to be eye witness to the occurrence, however though he was not present at the place of occurrence, in his evidence he developed the case from original case i.e. from what he had stated in his *fardbyan*. Accordingly he submits that evidence of P.W. 6 is not credible. He further submits that the developed version of prosecution is contrary to medical evidence. According to Sri Bakshi S.R.P. Sinha, learned senior counsel for the appellant, the informant (P.W. 6) in his evidence has stated that his son was shot from back side but medical evidence i.e. evidence of P.W. 8 and post mortem examination report is specific that the deceased was shot from his front side and entry wound is on chest. Accordingly he submits that only oral evidence i.e. evidence of P.W. 6 is in conflict with the medical evidence and as such the learned trial judge, instead of passing judgment of acquittal has incorrectly passed judgment of conviction and sentence which is liable to be set aside.

7. Sri Ajay Mishra, learned Additional Public Prosecutor has vehemently opposed the appeal. He submits that the informant while exaggerating the case has damaged the case, otherwise initial version of prosecution case was true



and those evidence were sufficient for approving the judgment of conviction and sentence.

8. Besides hearing learned counsel for the parties, we have examined entire evidence on record and after going through the same *prima facie* we are of opinion that prosecution has not been able to establish its case beyond all reasonable doubt. However before proceeding, it is necessary to examine the evidence, which has been brought on record. Admittedly the prosecution case is based on only evidence i.e. evidence of P.W. 6, who is the unfortunate father of the deceased. P.W. 6 (Murari Lal Das) in his evidence has identified his signature on the *fardbyan*, which was marked as Ext. 2. He also identified the signature of Nutan Kumar Das (P.W. 1) on the *fardbyan* , which was marked as Ext. 2/1. He also identified his signature on the inquest report, which has been marked as Ext. 1/1. In his evidence P.W. 6 deposed that occurrence had taken place on 18.05.2009 at 9.00 P.M. His son- Chandan Kumar (deceased) was doing business in the name and style of “*Chhaya Digital Studio*” in Gwalpura market. At the said time, after closing his shop his son, Arvind Kumar Rai (P.W. 4) and Pramod Yadav (P.W. 3) along with



him were returning to his house. While they reached on N.H. 106 metalled road opposite Kala Bhawan, he heard some sound. Thereafter he turned back and flashed the torch light and saw that Arun Yadav (appellant) gave shot of firing on his son- Chandan Kumar (deceased). He stated that the gun shot injury was given on the back of the deceased. He claimed that he saw the occurrence of firing. He reiterated that shot of firing hit the back side of Chandan Kumar and rupturing his chest the bullet exited. Chandan Kumar on the road itself fell down. The appellant after firing, along with his two associates, fled away. On *hulla* number of persons ran towards the place of occurrence. With the help of others this witness carried his injured son to Gwalpara Primary Health Center where doctor declared his son -Chandan Kumar as dead. The reason for the occurrence was explained by P.W. 6 that prior to the occurrence in the year 2004 Arun Yadav (appellant) with other accused persons had committed *dacoity* in his house and he was pressurizing the informant to withdraw the case. In the said connection in his field earlier this appellant had assaulted him and demanded Rs. 10,000/- as *rangdari*. Regarding the said occurrence this witness had lodged a case vide



Udakishanganj P.S. Case No. 48 of 2006. Subsequently the informant was kidnapped in the year 2008 and for his release Rs. 1,00000/- ransom amount was demanded. For the said occurrence this witness had lodged an F.I.R. vide Udakishanganj (Gwalpara) P.S. Case No. 08 of 2008. This witness further stated that due to aforesaid animosity one another accused namely- Pankaj Yadav, who at the time of occurrence was confined in Madhepura Jail, conspiring with the appellant had got the son of the informant killed. They further restrained the informant from doing any agriculture work in his field. This witness stated that on getting information Officer -in- charge, Gwalpara Police, namely Sanjay Kumar with armed forces arrived at the Primary Health Center, where his *fardbyan* was got recorded. On the said *fardbyan* he put his signature. He further stated that his re-statement was also recorded. He further stated that the inquest report in respect of dead body of his son was prepared on which also he had put his signature, which was marked as Ext. 1/1. This witness identified the appellant in dock. In paragraph 6 of his cross examination he reiterated that he identified Arun Yadav (appellant) in the light of torch. In his



cross examination he admitted that he was having two shops. One was the Studio and another was cloth shop. In paragraph 14 of his cross examination he deposed that he used to remain in the cloth shop where there were no staffs which fact has come in paragraph 15 of his cross examination. In paragraph 17 of his cross examination he stated that at the time of closure of the Studio shop along with this son, Arvind Kumar (P.W. 4) and Pramod Yadav (P.W. 3) were there. He further stated that before the occurrence he had already proceeded ahead and behind back of him Chandan Kumar (deceased), Arvind Kumar Rai and Pramod Yadav (i.e. P.W. 4 and P.W. 3) were coming. Then he heard the sound of firing from the gun and he turned back and saw his son. At that very time his son was standing and he had not received gun shot injury. Thereafter getting injury he fell down. His attention was drawn to his statement made in his *fardbyan* as well as his previous statement. In paragraph 18 and 19 of the cross examination his attention was drawn regarding the fact as to whether in the statement before Police he had stated that while he turned back and flashed the torch he saw the appellant firing on his son. Correctness of this statement was got



corroborated in paragraph 10 and 11 of the evidence of P.W. 7 (Sanjay Kumar), the Investigating Officer of the case. On examination of the *fardbyan* as well as paragraph 10 and 11 of the cross examination of the Investigating Officer it is evident that this witness (P.W. 6) neither in the *fardbyan* nor before the Police had stated that he had actually seen the appellant firing on his son. On the contrary in the *fardbyan* he had only stated that while he was moving ahead he heard the sound of firing and turned back then he saw his son in injured condition and appellant along with his other two associates fleeing away. It was seen while appellant flashed his torch.

9. P.W. 1 (Nutan Kumar Das) in his evidence has stated that he came to know about the fact that appellant was involved in the murder however he has not disclosed the name of the source from whom he got such information and as such there is difficulty in placing reliance on his evidence.

10. P.W. 3 (Pramod Yadav) save and except identifying his signature on the inquest report has said nothing.

11. P.W. 2 (Pankaj Das) and P.W. 4 (Arvind Kumar Rai) regarding whom it was stated by the informant in his



fardbyan as well as in his evidence that they were accompanying the deceased along with informant, had turned hostile.

12. P.W. 8 (Dr. Shekhar Prasad Bishwas) on 19.05.2009 was posted as Medical Officer, Sadar Hospital, Madhepura and on the same day at 8.30 A.M. he conducted post mortem examination on the dead body of the deceased. In his evidence he noticed the following facts:-

“External examination – Average built, black hairs, rigor mortis present in both upper and lower limbs.

Injury no. 1 an oval wound of 3/4” x 1/2” deep underline structure on the right lateral side of sternum with fracture of ribs adjoining to the wound with blackish depigmentation around the wound (wound of entry).

(ii) On the inter scapular area (posterior part) – a wound of 1 1/2” x 3/4” with inverted margin and in communication with injury no. 1.

on dissection of the chest – heart walls found ruptured. Lungs on section found pale. Other viscera also found pale on dissection.

Cause of death – haemorrhage (hypovolumic shock) leading to cardio respiratory failure.

Time elapsed since death – within 36 hours

weapon used – fire arms”

This witness further stated that the post mortem report was in his own pen and signature and as such post mortem report was marked as Ext. 7.



13. On examination of the evidence of P.W. 8 as well as on examination of the post mortem examination report it is evident that entry wound on the dead body of the deceased was on the front side i.e. chest. The entry wound also indicates as if fire arm injury was given from a very close range since the entry wound surrounding was blackish.

14. P.W. 7 (Sanjay Kumar) on 18.05.2009 was posted as Officer -in-charge of Gwalpara O.P. and he had recorded *fardbyan* and also investigated the case. In his evidence he proved *fardbyan* which was marked as Ext. 3. He also proved his forwarding report on the *fardbyan*, which was marked as Ext. 4 and he had prepared inquest report and same was marked as Ext. 5. In his evidence he stated that after recording *fardbyan* he prepared inquest report and dead body was sent for post mortem examination. Thereafter on the next day he visited the place of occurrence and place of occurrence was found as the same place which was indicated by the informant in his *fardbyan*. Though in his evidence he has stated that at the place of occurrence he noticed blood clot but no seizure list has been brought on record during the trial.



15. On examination of the evidence particularly evidence of P.W. 6 it transpires that the informant (P.W. 6) during his evidence has exaggerated the case. The fact which he did not state either in his *fardbyan* or before the Police was disclosed by him in his evidence. Evidence of P.W. 6 which has come during the trial creates doubt on the prosecution case since there is inconsistency in his evidence and facts disclosed in the *fardbyan*. In the *fardbyan* he categorically stated that he had not seen the actual occurrence rather he disclosed that while he was moving ahead of his son he heard sound of firing from back side then he flashed torch and in torch light he identified the appellant fleeing away however in the evidence he has come out with a case as if before hearing of sound of firing he heard some other sound and he turned back then he saw that the appellant in his presence fired on the back side of his son. Besides the fact that this statement was contrary to his previous statement the deposition is also not reliable in view of medical evidence. The medical evidence i.e. post mortem examination report (Ext. 7) and evidence of P.W. 8 is specific on the point that gun shot injury was given from the front side whereas in the evidence this witness has stated that his son



was shot from back side. It is true that during the trial only one witness i.e. P.W. 6 -Murari Lal Das (father of the deceased) has come forward to depose as eye witness to the occurrence and in a criminal trial on the basis of solitary evidence conviction and sentence can be approved, but in that case evidence of such witness is required to be examined cautiously. Meaning thereby that if the sole witness is credible and his evidence is away from any doubt only then the court can proceed for approving the judgment of conviction and sentence. In the present case save and except the evidence of P.W. 6 there is nothing on record which suggests the involvement of the appellant. Accordingly, on minute examination of evidence of P.W. 6 it is difficult to come to conclusion that his evidence is credible. Without any reason in his *fardbyan* he had given a different story, however in his evidence he developed the case as if he had seen the actual occurrence. During the evidence it has come that P.W. 6 has admitted that at the time of occurrence the transformer of the area was out of order. Meaning thereby that he admits that there was no street light there. This witness (i.e. P.W. 6) has categorically stated that he identified the appellant in torch



light. In the case prosecution has not brought on record the source of identification i.e. torch. Time without number it has been reiterated that in a case of such identification onus lies on the prosecution to bring on record source of identification and failure to bring such material on record certainly goes against the prosecution case. The medical evidence which has been brought on record also does not support or corroborates the oral evidence of P.W. 6. In such situation it would be difficult for this court to approve the judgment of conviction and sentence.

16. On examination of entire evidence on record we are of considered opinion that prosecution has not been able to prove its case beyond all reasonable doubts and as such by way of extending benefit of doubt it is desirable to interfere with the judgment of conviction and sentence. Accordingly the judgment of conviction and order of sentence dated: 18.12.2014 & 20.12.2014 respectively passed by Sri Housila Prasad Tripathi, learned Additional Sessions Judge Adhoc – II, Madhepura in Sessions Trial No. 49(A) of 2010 [arising out of Udakishunganj (Gwalpara) P.S. Case No. 58 of 2009, G.R. No. 687 of 2009] is hereby set aside and the appeal is allowed.



The appellant is in custody and since judgment of conviction and sentence has been set aside, it is hereby directed to release the appellant Arun Yadav forthwith, if not wanted in any other case.

(Rakesh Kumar, J)

(Anil Kumar Sinha, J)

praful/-

AFR/NAFR	AFR
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