

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (DB) No.699 of 2013**

Arising Out of PS. Case No.-94 Year-2010 Thana- BELHAR District- Banka

Surendra Yadav @ Surender Yadav, Son of Late Parmeshwar Yadav, resident of Village Ghiyahi P.S. Belhar District Banka. ... .. Appellant.

Versus

The State of Bihar. ... .. Respondent.

**WITH**

**Criminal Appeal (DB) No. 885 of 2013**

Arising Out of PS. Case No.-94 Year-2010 Thana- BELHAR District- Banka

Manohar Yadav @ Munna, Son of Sri Jagdish Yadav, resident of Village-Ghiyahi, P.S.-Belhar, District-Banka. ... .. Appellant.

Versus

The State of Bihar. ... .. Respondent.

**Appearance :**

[In Criminal Appeal (DB) No. 699 of 2013) & (In Criminal Appeal (DB) No. 885 of 2013]

For the Appellants : Mr. Ajay Mukherjee, Advocate.

Mr. Arjun Prasad, Advocate.

For the Respondent : Mr. Satyanarayan Prasad, APP

**CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR**

**AND**

**HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL)**

**Date : 11-01-2019**

As both the aforesaid criminal appeals have cropped up from the same judgment and order of conviction and sentence, hence they are taken up together for consideration and disposed of by this common judgment.

2. Heard learned counsels for the appellants and learned APP for the State on both these appeals.

3. The aforesaid two criminal appeals have been preferred against the judgment and order of conviction dated 17.04.2013 and order of sentence dated 23.04.2013 passed



against Surendra Yadav and order of sentence dated 29.07.2013 passed against Manohar Yadav @ Munna Yadav by the learned Additional Sessions Judge-I, Banka in Sessions Trial No.1203 of 2010, arising out of Belhar P.S. Case No. 94 of 2010, whereby the learned Trial Court convicted the accused Surendra Yadav and Manohar Yadav @ Munna under Section 302/34 of the Indian Penal Code (hereinafter in short referred to as the 'I.P.C.') and further convicted the accused Surendra Yadav under Section 27 of the Arms Act and sentenced both the accused to undergo R.I. for life and also slapped them with a fine of Rs.20,000/- each and in default of payment of fine to further undergo R.I. for six months each under Section 302/34 I.P.C. and further sentenced the accused Surendra Yadav to undergo R.I. for three years and also slapped him with a fine of Rs.1000/- each and in default of payment of fine to further undergo R.I. for one month. Both the sentences were directed to run concurrently.

4. The factual matrix of the case is that Belhar P.S. Case No. 94 of 2010 was instituted under Sections 302/34 I.P.C. and Section 27 of the Arms Act against Surendra Yadav, Jagdish Yadav and Manohar Yadav @ Munna Yadav on the basis of written report of Ashok Yadav, son of Sushil Yadav dated 18.06.2010 with the allegation in succinct that on 18.06.2010 at



around 6 PM when the father of the informant, namely, Sushil Yadav went to public hand pump to fetch water in the meantime Surendra Yadav stepped out of his house and forbade him from fetching water claiming the aforesaid hand pump installed on his land. On the protest made by his father there was altercation between them. On hulla, informant rushed there and raised protest against not allowing to fetch water then Surendra Yadav also indulged in altercation with him. In the meantime, Jagdish Yadav and Manohar Yadav @ Munna Yadav arrived there slating them and they also forbade them from fetching water. On the protest made by them, the aforesaid three persons got infuriated and gave order to eliminate both of them whereupon Surendra Yadav took out musket from his house and pointed at him. Then he made hulla for his rescue, whereupon his father rushed to him then Surendra Yadav resorted firing upon his father. Sustaining injury his father fell down on the ground and died on the spot. The mother and wife of the informant, namely, Pairiya Devi and China Devi respectively and other villagers witnessed the occurrence.

5. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against the accused Surendra Yadav and Manohar Yadav @ Munna, keeping the investigation pending against the



accused Jagdish Yadav.

6. On receiving the charge-sheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the Court of Sessions, and after commitment and on transfer finally the case came in seisin of the learned Additional Sessions Judge-I, Banka for trial.

7. Charge against the accused Surendra Yadav and Manohar Yadav @ Munna Yadav was framed under Sections 302/34 I.P.C. and Section 27 of the Arms Act. Charge was read over and explained to them by the Court to which they pleaded not guilty and claimed to be tried.

8. To substantiate its case, in ocular evidence, the prosecution has examined altogether nine prosecution witnesses namely, Parmila Devi as P.W.1, Manoj Kumar Yadav as P.W.2, Binod Paswan as P.W.3, China Devi as P.W.4, Pairiya Devi as P.W.5, Rekha Devi as P.W.6, informant Ashok Yadav as P.W.7, I.O. Deo Narain Ram as P.W.8 and Dr. Ashok Kumar, who has conducted the autopsy of the cadaver of the deceased, as P.W.9. The prosecution has also filed and proved some documents by way of documentary evidence in the case.

9. The statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure.



The case of the defence is complete denial of the occurrence claiming themselves to be innocent. The accused persons have also examined two witnesses, namely, Janardan Yadav as D.W.1 and Jai Prakash as D.W.2 in buttress of their case.

**10.** After hearing the parties and perusing the record, the learned trial court passed the impugned judgment and order of conviction and sentence as detailed in the earlier paragraph.

**11.** Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convict Surendra Yadav @ Surender Yadav has preferred Cr. Appeal (DB) No.699 of 2013 and Manohar Yadav @ Munna has preferred Cr. Appeal (DB) No. 885 of 2013.

**12.** The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellants beyond all reasonable doubts or not.

**13.** It is submitted by learned counsel for the appellants that the deceased Sushil Yadav has died not due to firing made by the appellants rather by the informants himself which hit the deceased. It is further submitted that there is no direct allegation of resorting firing against the accused Manohar Yadav @ Munna Yadav. The said accused is also not said to



have brought musket and taken any active participation in the offence, hence no offence under Section 302/34 I.P.C. is made out against him. It is also submitted that all the material witnesses barring P.W.2, P.W.3 are informant and his family and they are interested witnesses of the case and no independent witnesses have supported the prosecution case. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case against the appellants beyond all reasonable doubt by adducing trustworthy, convincing and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed against the appellants by the learned Trial Court is liable to be set aside and the appellants are entitled to be acquitted.

**14.** On the other hand, learned APP advocating the correctness and validity of the impugned judgment and order of conviction and sentence submitted that the informant has supported the prosecution case in toto and other material witnesses examined by the prosecution, who happens to be eye witnesses of the occurrence, have unanimously corroborated the occurrence. The consistent ocular evidence of the prosecution also stands corroborated by the medical evidence and the learned Trial Court correctly appreciating the facts and evidence on record has rightly passed the impugned judgment and order



of conviction and sentence which is liable to be upheld and these appeals are shorn of merit and are liable to be dismissed.

**15.** From perusal of the testimony of the informant Ashok Yadav (P.W.7), it appears that he has deposed before the Court in consonance to the prosecution case as adumbrated in the written report by stating in his examination-in-chief that at the time of occurrence his father Sushil Yadav had gone to the public hand pump to fetch the water but Surendra Yadav did not allow to fetch the water and started slating him which was protested by his father. The informant also rushed there and raised protest against the Surendra Yadav whereupon Manohar Yadav arrived there and slated them. Then Jagdish Yadav arrived there and gave order to Surendra Yadav to bring musket gun and eliminate both the father and son, whereupon Surendra Yadav took the musket from his house and pointed it on him. When he started making hulla his father rushed in his rescue. In the meantime he resorted firing on back of his father by the musket. Sustaining injury his father fell down and succumbed to injury on the spot. Thereafter, the accused persons left the scene. The informant was subjected to gruelling cross-examination but nothing convincing and cogent has been elicited by the defence in his cross-examination having potential to rule out his presence at the place of occurrence at the time of



occurrence and witnessing the occurrence by him. He appears to have stood the test of cross-examination tenaciously.

**16.** From perusal of the testimony of Parmila Devi (P.W.1), China Devi (P.W.4), Pairiya Devi (P.W.5) and Rekha Devi (P.W.6), it appears that they have also corroborated the prosecution case stating in consonance to the prosecution case in their respective examination-in-chief to the effect that at the time of occurrence when Sushil Yadav had rushed to the public hand pump to fetch the water Surendra Yadav did not allow him to fetch the water from the said hand pump and slated him. Informant also arrived there and made protest against not allowing by the accused to fetch the water. In the meantime, Jagdish Yadav and Manohar Yadav @ Munna arrived there and slated them and then on the order of the Jagdish Yadav, Surendra Yadav took musket from his house and pointed it on the informant Ashok Yadav (P.W.7). On alarm made by Ashok Yadav to save his life Sushil Yadav rushed in his rescue. Then Surendra Yadav resorted firing on the back of Sushil Yadav by means of musket. Sustaining injury he fell down on the ground and died on the spot. Thereafter, the accused persons left the scene. The aforesaid four witnesses were also subjected to gruelling cross-examination but nothing convincing and cogent has been elicited in their cross-examination by the defence



having potential to rule out their presence at the place of occurrence at the time of occurrence and witnessing the occurrence by them. They also appear to have stood the test of cross-examination tenaciously.

**17.** Parmila Devi (P.W.1) in para-2 of her examination-in-chief has corroborated the presence of P.Ws.4, 5, 6 & 7 at the place of occurrence at the time of occurrence. China Devi (P.W.4) has also corroborated the presence of P.Ws.1, 5 & 7 at the place of occurrence at the time of occurrence. Pairiya Devi (P.W.5) in para-3 of her examination-in-chief corroborated the presence of P.Ws.1, 4, 6 & 7 at the place of occurrence at the time of occurrence. Rekha Devi (P.W.6) in para-2 of her examination-in-chief has corroborated the presence of P.Ws.1, 4 & 7 at the place of occurrence at the time of occurrence and informant Ashok Yadav (P.W.7) in para-3 of his examination-in-chief has corroborated the presence of P.Ws.1, 4, 5 & 6 at the place of occurrence at the time of occurrence and witnessing of occurrence by them.

**18.** From perusal of testimony of Manoj Kumar Yadav (P.W.2) and Binod Paswan (P.W.3), it appears that they do not happen to be eye witnesses of the occurrence of resorting firing upon the Sushil Yadav by the accused Surendra Yadav but they have seen the accused escaping with musket from the place



of occurrence after the occurrence. Though P.W.3 has stated in para-2 of his examination-in-chief that on his arrival at the place of occurrence the family members of the deceased divulged him that Surendra Yadav has gunned down the deceased but none of the family members of the deceased has corroborated the factum of divulgence of the aforesaid facts to the P.W.3. Hence, the aforesaid statement of P.W.3 is not admissible in evidence for want of corroboration even as a hearsay witness.

**19.** China Devi (P.W.4) has stated in para-7 of her cross-examination that the accused was at ten hands i.e. 15' north of the deceased at the time of occurrence. Parmila Devi (P.W.1) has stated in para-10 of her cross-examination that the firing was made from a distance of ten hands i.e. 15' and the Dr. Ashok Kumar (P.W.9), who has conducted the autopsy of the cadaver of the deceased, has not found any charring and blackening mark on the wound of the deceased and P.W.9 has also stated in para-3 of his cross-examination that the firing was made from the distance of more than 4-5 meters. Thus, the aforesaid aspect of the case of resorting firing upon the deceased from the distance of 15' stands corroborated by medical evidence.

**20.** From perusal of the medical evidence i.e. postmortem report marked as Ext.7 and the evidence of P.W.9-



Dr. Ashok Kumar, who has conducted the autopsy of the cadaver of the deceased, it appears that the doctor has found the following anti mortem injuries on the person of the deceased:

(i) Entry wound on the right side back of chest wall of the size of 2" x 1" margin inverted, tattooing absent.

(ii) Fracture of 2<sup>nd</sup> and 3<sup>rd</sup> thoracic vertebra.

(iii) Exit wound measuring 1½" x 1" below left shoulder along left anterior axillary line.

(iv) Lacerated wound on the right side of scalp of the size of 3 cm x ½ cm.

**21.** The aforesaid injuries also happen to be in consonance to the testimony of the witnesses. Though the doctor has found one more injury i.e. lacerated wound on right side of the scalp of the deceased but the aforesaid injury might have been sustained by the deceased by falling on the ground sustaining bullet injury. Thus, the aforesaid consistent ocular evidence of the prosecution also stands corroborated by the medical evidence.

**22.** As per account of Parmila Devi (P.W.1) as given in para-6 of her cross-examination the bullet had made hole in the shirt of Sushil Yadav and as per the account of China Devi (P.W.4) given in para-13 of her cross-examination, hole by the bullet was made in the shirt of Sushil Yadav and I.O. Deo



Narain Ram (P.W.8) has also found the attire of the deceased torn by the bullet as stated by him in para-11 of his cross-examination. Thus, the aforesaid ocular testimony regarding sustaining bullet injury by the deceased at the place of occurrence at the time of occurrence stands corroborated by the I.O. as well.

**23.** To rebut the case of the prosecution, the defence has examined two witnesses, namely, Janardan Yadav (D.W.1) and Jai Prakash (D.W.2) but, from perusal of the testimony of the aforesaid witnesses, it appears that they happen to be cousin of the accused Surendra Yadav and moreover they also happen to be well wisher and adviser of Surendra Yadav (appellant) as D.W.1 has stated in para-12 of his cross-examination that on the divulgence of Surendra Yadav that he has been falsely implicated in the case he gave advice to him to also lodge a case against the prosecution party and following the aforesaid suggestion and deliberation with him, the Surendra Yadav lodged a case against the prosecution party. More so, the testimony of the aforesaid two defence witnesses also stands in quite contradiction to each other regarding the manner of the occurrence as claimed by the defence. As D.W.1 has stated in para-3 of his examination-in-chief that during course of brawl Ashok Yadav rushed to his house and taking gun resorted firing



the firing was resorted upon Manohar Yadav which hit Sushil Yadav and Manohar Yadav sustained injury on his shoulder, finger and other parts of his person by means of splinter of the said firing, while D.W.2 has stated in para-1 of his examination-in-chief that following the altercation between Sushil Yadav and Manohar Yadav, Ashok Yadav took out double barrel gun from his house and resorted two firing, first hit on the shoulder of the Manohar Yadav and second one hit Sushil Yadav. In view of the aforesaid contradiction between the testimonies of aforesaid witnesses regarding the manner of the occurrence as alleged by the defence and also in view of the aforesaid aspect of the case, the aforesaid defence witnesses examined by the defence, in our considered opinion, does not appear to be worth credence and reliable and their testimonies have no potential to create any doubt about the prosecution case.

**24.** Though there is some minor contradictions regarding the order giver and slating by the accused persons at the time of occurrence and name of firearm etc. between the testimony of the witnesses but the said contradiction, in our considered opinion, does not touch the core of the case and such contradictions are bound to happen in the case of natural witnesses as power of perceiving, retention and reproduction of the facts of the case differ from man to man.



25. The submission of learned counsel for the appellants that Manohar Yadav @ Munna has neither brought musket nor assaulted the deceased and the only allegation against the aforesaid appellant is that he was present at the place of occurrence, hence no offence under Section 302/34 I.P.C. appears to be made out against the aforesaid appellant does not appear convincing and appreciable to us. As as per the prosecution case and the account of the witnesses Manohar Yadav had also arrived at the place of occurrence and slated the informant and his father and forbade them from fetching water from the hand pump and as per prosecution case on the protest made by them all the accused persons gave order to Surendra Yadav to bring the musket and eliminate both the father and the son and responding the same Surendra Yadav took out the musket from his house and gunned down the deceased. Rekha Devi (P.W.6), who happens to be eye witness of the occurrence, apart from the aforesaid aspect of the case, has stated in her examination-in-chief that the aforesaid appellant arriving at the place of occurrence extended threatening of elimination of informant and his father (deceased). Thus, the aforesaid Manohar Yadav @ Munna was also present at the place of occurrence at the time of occurrence and shared the common intention and in furtherance of the common intention of all the



accused persons appellant Surendra Yadav gunned down the father of the informant. Hence, the offence under Section 302/34 I.P.C. appears to be made out against the aforesaid appellant as well.

**26.** The submission of learned counsel for the appellants that Parmila Devi (P.W.1), China Devi (P.W.4), Pairiya Devi (P.W.5), Rekha Devi (P.W.6) and informant (P.W.7) happens to be family members and interested witnesses of the case hence they are not worth credence and reliable also does not appear to be convincing and appreciable as though P.Ws.1, 4 & 6 happen to be daughter-in-law of the deceased, P.W.5 is the wife of the deceased and P.W.7-Ashok Yadav is the informant and son of the deceased but mere being relatives their testimony is not to be discarded outrightly rather it should be scanned and scrutinized carefully and cautiously and on careful and cautious scrutiny of the testimony of the aforesaid witnesses, we find that barring some minor contradictions, which is not going to touch the core of the case, nothing cogent and convincing has been elicited in their cross-examination having potential to shatter the prosecution case and the testimonies of the aforesaid witnesses are consistent, unblemished, worth credence and reliable.

**27.** In the facts and circumstances of the case, we find and hold that the prosecution has successfully substantiated



its case and succeeded to bring home the charges levelled against the appellants beyond reasonable doubt by adducing consistent, trustworthy and worth credence ocular and medical evidence. Hence, the aforesaid judgment and order of conviction and sentence passed by the learned Trial Court does not warrant any intervention of this Court and the same is hereby upheld. Accordingly, both these appeals are dismissed.

**(Rakesh Kumar, J.)**

**(Prakash Chandra Jaiswal, J.)**

Trivedi/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	17.01.2019
Transmission Date	17.01.2019

