(2010) 12 PAT CK 0048

Patna High Court

Case No: Criminal Appeal No. 132 of 1988

Dwarika Yadav and Others		APPELLANT
	Vs	
The State of Bihar		RESPONDENT

Date of Decision: Dec. 22, 2010

Final Decision: Allowed

Judgement

D.K. Singh, J.

This appeal has been filed against the judgment and order of conviction dated 19th of March, 1988 passed by Sri. Harishankar Prasad, 14th Additional District & Sessions Judge, Munger in Sessions Trial No. 137 of 1980, whereby Dwarika Yadav has been held guilty under Sections 148, 302 and 307/149 I.P.C. and sentenced to undergo R.I. for two years u/s 148 I.P.C., R.I. for five years u/s 307/149 I.P.C. and further R.I. for life u/s 302 I.P.C. So far as accused Chano Yadav, Banwari Gope and Chhotu Yadav are concerned, they have been held guilty under Sections 148, 307, 302/149 I.P.C. and sentenced to undergo R.I. for two years u/s 148 I.P.C., R.I. for five years u/s 307 I.P.C. and further R.I. for life u/s 302/149 I.P.C., whereas Pano Yadav has been held guilty under Sections 307/149 and 302/149 I.P.C. and sentenced to undergo R.I. for five years u/s 307/149 and further sentenced to R.I. for life u/s 302/149. All the sentences were directed to run concurrently.

2. Out of the five Appellants, Dwarika Yadav and Banwari Yadav@ Banwari Gope died during pendency of the present appeal, hence their appeals abated in pursuance to affidavit filed on their behalf vide order dated 25.03.2010 passed by Division Bench of this Court.

3. The prosecution case as per the fardbeyan of Singheswar Mahto recorded on 23.11.1979 at Lakhisarai Hospital by M.H. Khan, the Police Officer of Lakhisarai P.S. is to the effect that on 23.11.1979 at 7:30 A.M. accused Dwarika Yadav, Chhotu Yadav, Chano Yadav, Borhan Yadav, Banwari Yadav and Pano Yadav armed with sharp cutting weapons were cutting his paddy crops over an area of about two bighas. When the

informant somehow came to know about this, he went to his land with his brother Sobhi Mahto, nephew Nepali Mahto to forbid the accused persons upon which Chhotu Yadav ordered to assault and then Dwarika Yadav assaulted with Farsa to Sovi Mahto, Banwari Yadav assaulted with farsa to Nepali Mahto and Chhotu Yadav assaulted with farsa to the informant and Banarsi Mahto. The informant then raised alarm on which the villagers assembled and then the accused persons fled away. It is also alleged by the informant that he received farsa injuries on neck, right hand, left hand and as a result of which one finger was chopped off. It is also alleged that the informant''s brother Sobhi Mahto got injuries between the eye and nose and in both legs whereas Banarsi Mahto also received injury on left hand and the back whereas the Nepali Mahto received injuries on the neck, head and left leg and thereafter the villagers carried them to the hospital. It is also claimed by the informant that the occurrence has been seen by Triloki Mahto, Nikhedi Mahto, Ramcharitar Mahto and Parmeshwar Mahto.

4. On the basis of the aforesaid fardbeyan Halsi P.S. Case No. 6 of 1979 was registered under Sections 147, 148, 149, 302, 307 of the Indian Penal Code against six accused persons. The police after investigation submitted charge sheet against Dwarika Yadav u/s 148, 302, 307/149 I.P.C, against Chano Yadav, Banwari Gope and Chhotu Yadav u/s 148, 307, 302/149 I.P.C and against Pano Yadav u/s 307/149 and 302/149 I.P.C and consequently cognizance was taken.

5. Charges were framed against all six chargesheeted accused under Sections 302 and 307 I.P.C., against Dwarika Yadav, Chano Yadav, Chhotan Yadav, Banwari Yadav u/s 148 I.P.C., against Pano Yadav u/s 147 I.P.C., against Chano Yadav, Chhotan Yadav and Banwari Yadav u/s 307 I.P.C. and against Dwarika Yadav u/s 302 I.P.C. also.

6. The prosecution in order to substantiate its case has examined altogether 11 witnesses of which P.W.1, Ramashish Paswan being A.S.I. has proved the F.I.R. (Exhibit-A). P.W. 2 is Triloki Mahto, P.W. 3 is Nepali Mahto, nephew of the informant, P.W. 4 is Saudi Yadav, P.W. 5 is Banarsi Mahto and P.W. 7 Singheshwar Mahto is the informant of the case. P.W. 6 Dhano Mahto is witness to the inquest report. P.W. 8, Dr. Suchit Prasad who conducted the postmortem examination on the dead body of Sobhi Mahto, P.W. 9, Md. Hasnain, is the I.O. of the case. P.W. 10 is Dr. Syed Sarfuddin Abdullah, Deputy Superintendent of Medical College who examined the injuries of Banarsi Mahto and Nepali Mahto and P.W. 11 Laxmi Prasad Mahto, an Advocate''s Clerk who is a formal witness who proved sale deed and two rent receipts. P.W.s 2 to P.W. 5 and P.W. 7 claim themselves to be eye witnesses.

7. The defence examined 10 witnesses of which D.W. 1 Kamaldeo Narain Azad being posted as Officer-in-charge of Nawadah P.S. arrested Chhotu Yadav moving in a suspicious condition on 23.11.1979 at 2:30 A.M. and he has stated in his evidence that he released Chhotu Yadav at 8:40 A.M. D.W. 2 Madan Mohan Gupta, a formal witness has proved the sale deed (Ext-C) executed by Syed Hakeem Mohammad Nezamuddin in favour of Budhan Yadav. D.W. 3 Banwari Yadav is also a formal witness who proved the

sale deed (Ext-C/2) which was executed by Safi Ahmad and Wasi Ahmad in favour of Budhan Yadav. D.W. 4 Gauri Shankar Keshri is the bailor of Chhotu Yadav when he was arrested within Nawada P.S. D.W. 5 Padam Singh Thapa is the Hawaldar who has stated that Banwari Gope (Appellant) was posted as security guard under him at Barmadih Colliery. D.W. 6 Dr. Sri Narayan Prasad Singh examined the injuries of Dwarika Yadav, Brahmdeo Yadav, Raj Kumar Yadav. D.W. 7 Baijnath Prasad, an Advocate''s Clerk, is a formal witness who has proved the sale deeds (Exhibits-C/3 and C/4). D.W. 8 Karu Sao is also a formal witness who has proved the true copy of sale deed (Exhibit-5). D.W. 9 Yadunandan Prasad is also an Advocate''s Clerk who has proved the rent receipts (Exhibit-H & H/1). D.W. 10 Md. Suleman, a clerk of the Registry Office is a formal witness and has proved the entry in the register book No 1 of the register at page 593 to 596 (Exhibit-I). Apart from ocular evidence, several documentary evidences have also been filed by both the sides.

8. Learned trial Court, relying on the prosecution evidences, convicted the Appellants. Now this Court on reappraisal of the evidences on record has to see whether impugned judgment needs any interference.

9. Mr. Chitranjan Sinha, learned Senior Counsel for the Appellants has submitted that the remaining three Appellants were not sharing the common object with Dwarika Yadav and that the informant side were the aggressors and the actual occurrence took place on the land of the Appellants, since the blood has also been found on the land of the Appellants and the P. Ws have also supported that the victim fell down on the land of Dwarika Yadav.

10. The other contention of the learned Counsel for the Appellants is that P.W.s 3, 5, 7 were examined by the I.O. u/s 161 of the Code of Criminal Procedure after 26 days of the occurrence and the excuse given was that they were admitted in P.M.C.H., but no document to that effect has been brought on record. The other contention of the Appellants is that there is a sharp contradiction between the ocular evidence and the medical evidence as the so called eye witnesses have stated that only one blow was given by Dwarika Yadav between the nose and eye of the deceased Sobhi Mahto whereas the other assaults to the deceased were made on both the legs, but the Doctor has found three different injuries on face and temporal area whereas no injury has been found on the leg of the deceased. Furthermore, it is submitted that there is no injury report of the informant on record who claims to have received several injuries.

11. Apart from the aforesaid contentions the F.I.R. named witness Ram Charitar Mahto and Nikhedi Mahto have not been examined and they have deliberately been withheld. Moreover the other eye witnesses like P. Ws 2, 3, 5 and 7 are related to each other, hence reliance has wrongly been placed on interested witnesses.

12. It is contended that the Appellants side also received injuries hence they acted in right to private defence to their property as the land belonged to them. The alibi with regard to

Banwari Gope and Chhotu Yadav has been proved by the D. Ws.

13. Miss Shasi Bala Verma, learned A.P.P. while supporting the judgment of conviction submitted that there is specific allegation of assault by Dwarika Yadav between eye and the neck of the deceased Sobhi Mahto whereas other accused persons assaulted informant, Banarsi Mahto and Nepali Mahto. The charges have been conclusively proved through the evidences of the eye witnesses, hence the judgment of conviction needs no interference.

14. Considering the prosecution case, the evidence on record and the finding of the learned Trial Court, it is necessary to reappraise the evidence of P. Ws 2 to 5 and P.W. 7, who claimed themselves to be the eye witnesses.

15. P.W. 7, Singheshwar Mahto is the informant of the case and as per his evidence, the land over which the occurrence took place is 1 acre 37 decimal of Khata No. 61, Plot No. 1069 which was purchased from Sami Ahmad and Wasi Ahmad and the said purchase was made in the name of five brothers of the informant. It is claimed by the informant that the paddy crop was grown by them on the said land and the accused persons were never in the possession over that. The allegation is that on the date of occurrence the accused persons cut paddy crop on the north western extremity of an area of two bighas. It is also admitted by P.W. 7 that adjacent to his land, 1.37 decimals of the land was being ploughed by the accused side. P.W. 7 in his evidence has clearly stated that Chhotu Yadav ordered then Dwarika Yadav assaulted with farsa to Sobhi Mahto and when Sobhi Mahto fell down in the land of Dwarika Yadav, then Dwarika Yadav assaulted him with farsa on both the legs. Thereafter Nepali Mahto was assaulted by Banwari Yadav with Farsa and Banarsi Yadav was assaulted by Chhotu Yadav by farsa where as Chano Yadav assaulted the informant. It is relevant to state here that in the fardbeyan the informant has stated that Dwarika gave farsa blow which hit Sobhi between the eye and ear which caused cut injury and the assault was made on the legs also by Dwarika. In this connection, it is relevant to go through the evidences of P.W. 8 who conducted postmortem examination on the deceased Sobhi Mahto and found altogether three injuries on the dead body of the deceased which are as follows:

(i)Incised wound 2" x 1/2 " skull bone deep over upper part of head longitudinally placed.

(ii) Incised wound 5" x 3/4" x 2" across the face cutting the bridge of the nose and left cheek, left maxillary bone cut through and through, palate was cut, cheek bone was cut through, extending deep up to pharyngeal wall.

(iii) Incised wound 4" x 1/2 "x 1/2 on right temple from eye brow to ear cutting right orbital ridge of bone and part of frontal bone was cut.

16. As per the evidence only injury No. (ii) corresponds with the evidence of P.W. 7 whereas the incised wound on right temple of deceased has not been alleged by the prosecution witnesses which suggests that either the informant did not see the actual

occurrence or had not deposed correctly as there is specific allegation in the fardbeyan as well as in the evidence of P.W. 7 that Dwarika Yadav gave farsa blow on both the legs of the deceased Sobhi Mahto but the doctor has not found any injury even a scratch on the legs of the deceased which is a very vital contradiction.

17. That so far as the assault part is concerned, P.W. 2 in para 1 of his evidence has deposed exactly in the same terms as has been stated by informant P.W. 7, hence so far as the assault to the deceased is concerned, it appears that P.W. 2 has also not come up with the true version of the actual assault because his evidence is also completely being negated in view of ante-mortem injuries found by the Doctor.

18. P.W. 3 in para 2 of his evidence has also stated that Dwarika Yadav assaulted Sobhi Mahto between eye and the nose causing cut injury and when Sobhi fell down in the land of Dwarika Yadav then the assault was made on his both legs. Hence the evidence of P.W. 3 also can not be relied.

19. So far as P.W. 4 is concerned, it is admitted that he was ploughing his field which was at a considerable distance from the P.O. land and on alarm being raised by Triloki Mahto he went at the place of occurrence and found that Sobhi Mahto, Banarsi Mahto, Singheshwar Mahto and Nepali Mahto were being assaulted. But in his evidence, he has not stated any specific manner of assault being made by any of the accused, hence from perusal of his evidence, it appears that he has not seen the actual occurrence.

20. P.W. 5 is Banarsi Mahto and he has also stated that Dwarika Yadav assaulted with farsa to the deceased Sobhi Mahto and when the deceased fell down in the field of Dwarika, then Dwarika again assaulted with farsa but this witness has not specified the part of the body upon which the assault was made. But, he has admitted in para 6 of his evidence that his statement u/s 161 Code of Criminal Procedure was recorded after 15 days of the occurrence. Though in para 1 of his evidence this witness has stated that at the time of occurrence he was at his door and the informant side were also there and when he heard about cutting of the paddy crop by the accused persons then he went along with the informant and others to the place of occurrence but P.W. 7, the informant has not stated as such, as P.W. 7 in para 4 of his evidence has stated that he went to P.O. alone after hearing about cutting of the paddy crop but has not stated that he was at the door of P.W. 5. All these contradictions cloud the evidence of P.W. 5.

21. It appears from oral and documentary evidences of the parties that the lands of the Appellants and the informant side are adjacent to each other and they both are bonafide purchasers. Now the dispute is whether the occurrence took place on the land of the Appellants or, to be precise, on the land of Dwarika Yadav or on the land of the informant. In this regard the evidence of the informant is important as he said in paragraph No. 4 of his evidence that the deceased Sobhi after receiving the injury ran and fell in the land of Dwarika Yadav and it is consistent case of P. Ws including P.W. 7 that the assault on the leg was made by Dwarika Yadav when he fell down, hence as per prosecution version

also the part of the occurrence took place admittedly on the land of Dwarika Yadav.

21. P.W. 9 is the Investigating Officer and in para 4 of his deposition he has described P.O. as paddy field which is north western end of the plot, measuring around two dhoors which was found cut and the I.O. found blood at a place two feet away from the southern end of the field, though in the further statement he has stated that he found blood stains at several places. Here it is relevant to see the evidences of P.W. 7 who in his deposition at para 20 has stated that the paddy crops were cut on two dhoors of the land on the northern side of two bighas of land. Hence from this also, it does not appear that as to whether the accused persons were cutting the paddy from their own field or in the field of the informant.

22. Hence from the above discussion, it is apparent that so far as exact P.O. is concerned, it has not been proved from the evidence of the P. Ws but this much is admitted even by the P. Ws that part of occurrence took place on the land of Dwarika Yadav and from the evidences of P. Ws. 2, 3, 5, 7 and 9, it is not proved that actually the accused persons were cutting the crop of the informant side and more so in the light of the defence case that they acted in defence of their personal safety and property while reaping their own crop as a result of which defence side also received injuries. Injury of the defence has not been relied by the learned trial Court since the accused side did not lodge any case.

23. The evidence of DW 6 reflects that he found 6 injuries on the person of accused Dwarika Yadav(Ext-G). Four injuries (Ext-G/1) on accused Brahmdeo Yadav, one of them scaldeep, three injuries(Ext-G/2) on Raj Kumar Yadav, one of them bone deep on left side of forehead and three injuries to Brahmdeo Yadav, one of which was on the left parietal region. The injuries of accused have been proved by the doctor (DW-6) and that has not been challenged. It can not be negated thoroughly on the basis of the proposition that no counter case was lodged. Moreover the prosecution has failed to explain the injuries on head and parietal region of accused which also creates doubt about the prosecution version.

24. Hence the injury suggests that the defence side apprehended the danger to their life and property and if the assault was made then it might have been made in right to private defence of life and property. Hence this Court comes to the conclusion that the manner of occurrence is also not proved in view of the major contradiction between the ocular evidence and the medical evidence, as the medical evidence substantially negates the prosecution version.

25. It is well settled proposition that where there is a contradiction between the medical evidence and ocular evidence then the ocular evidence gets primacy. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony then only the Court has to try to discard the testimony of the eye witnesses. The aforesaid principle has been elaborated in the case of Shyam v. The

State of Madhya Pradesh through P.S. Bercha reported in 2007(3) SCC 318 . The same principle has been discussed in the case of Chembur Cooperative Industrial Estate Ltd. Vs. M.K. Chhatre and Another, wherein the Hon''ble Supreme Court has held that where the evidences of the witnesses of the prosecution are totally contrary to the medical evidences, then it is the most fundamental defect of the prosecution case and it is sufficient to discard the prosecution evidence. In case of Lakshmi Singh and Others Vs. State of Bihar, it has been held that in respect of assault made to the victim, if the evidence appears to be false in view of the medical evidence then there is no guarantee that the other part of the evidence of such P. Ws may not be false. Hence in view of the contradictions between the postmortem report and the oral evidence, the whole testimony of the P. Ws becomes suspicious.

26. It is true that medical evidence is opinionative in nature hence it can not override the ocular evidence except when the medical evidence either completely negates the ocular evidence or creates serious doubt about the prosecution case and in the present case medical evidence creates serious doubt about the prosecution case. Hence the benefit flowing from the said doubt has to be conferred to the accused.

27. In the present case the medical evidence and the postmortem report suggests three injuries on the face, temporal region and on the head whereas P. Ws consistently claimed one injury between the neck and the eye and other on both the legs but the postmortem does not reflect any injury on either of the leg. Moreover prosecution has no explanation about the other two injuries on the deceased. Hence, in some or the other manner the medical opinion negates the prosecution version substantially and hence it is a fit case in which the adverse inference can be drawn because the doubt is created with regard to the version of the P. Ws

28. It is admitted by the I.O. that out of 2 acre 47 decimal of the land, the paddy crop was found cut on only two dhoors in the north western corner and the sign of blood was there. This admission of the I.O. suggests that actually the occurrence took place on the land of the accused persons. The P.O. further gets not fixed exactly in view of the deposition of P.W. 9 at para 18 that he could not take the Amin and get the P.O. land measured. P.W. 9 in para 34 admits that he did prepare the sketch map of P.O.

29. Hence in view of the aforesaid discussions, it is apparent that the exact P.O. has not been proved and there are substantial admissions on behalf of P. Ws that the part of the occurrence took place on the land of Dwarika Yadav, where the blood was found and from the measurement given by the prosecution and the I.O., it appears that out of total area of 2 acres 47 decimal, the occurrence took place on only 2 dhoors on the north western part of the land. Hence it creates substantial doubt that the occurrence had actually taken place on the land of the accused persons and this doubt is enough to lead credence to the defence version that the assault took place in exercise of the right to private defence and right to defend the property. The deposition of the P. Ws also not remains very reliable on the ground that P.W. 9 in para 33 of his deposition has admitted

that he took the statement of Nepali Mahto (P.W. 3) on 19.12.1969 for the first time and did not ask for the document of P.M.C.H. with regard to the treatment whereas the occurrence took place on 23.11.1969 which suggests that statement of injured was taken after 26 days of the occurrence.

30. The injury of Nepali Mahto(P.W. 3) has been proved by P.W. 10 who is the In-charge of Sub-Divisional Hospital, Lakhisarai but in no way this injury suggest that Nepali Mahto, P.W. 3 was ever admitted in P.M.C.H. nor any document has been brought on record to suggest that P.W. 3 was ever admitted in P.M.C.H. The injury report does not suggest that P.W.3 was not in a position to give statement for more than three weeks.

31. The other injured Banarasi Mahto''s (P.W. 5) statement was recorded by P.W. 9 at Lakhisarai on 18/19-12-1969 but from P.W. 5 also neither medical documents of PMCH was asked nor shown as has been admitted by P.W. 9 in para 32 of the evidence. Hence delayed recording of statement clouds not only the injury of P.W. 5 but the entire prosecution case.

32. The two Doctors have been examined in the case. They are P.W. 8 and P.W. 10. P.W. 8 has conducted the postmortem on the body of the deceased Sobhi Mahto whereas P.W. 10 has examined the injuries of P.W. 3 and P.W. 5 but no injury report of the informant is on record whereas he has claimed in his fardbeyan as well as in his deposition that he received injuries with farsa on neck, right hand, left hand and as a result of which one of the fingers of the informant was chopped off. Hence in absence of any medical injury on record, of the informant, the case of the informant can not be relied upon. Hence the evidence of informant(P.W. 7) becomes doubtful and it creates doubt about the whole manner of occurrence.

33. Though P.W. 10 found five injuries on the person of P.W. 3, two injuries on the body of P.W. 5 but as per paras 2 and 4 of the doctor''s evidence it is apparent that injury No. V. of P.W. 3 and injury No. II of P.W. 5 are caused by hard and blunt substance whereas there is no allegation about any assault on P.W. 3 and 5 by hard and blunt substance. Moreover the doctor''s evidence reflects that, opinion about injury No. i to iv of P.W. 3 and injury No. ii of P.W. 5 was kept reserved but final opinion with regard to above injuries never came. Hence in these circumstances the charge u/s 307 of the I.P.C. can not be said to be substantiated.

34. So far as the charge of common object is concerned, from the evidence on record it does not suggest that all the accused persons were sharing common object because the allegation of assault of the deceased is only against Dwarika Mahto but other persons did not even touch deceased Sobhi though the other accused persons who caused injury to P.W.s 3, 5 and 7 had no intention to take their lives which is apparent from the injury of P. Ws 3 and 5, hence it can not be said that they were sharing the common object.

35. Mere presence in an assembly does not make a person, who is present, a member of unlawful assembly unless it is shown that he had done something which would make him a member of an unlawful assembly or unless the case falls u/s 142 I.P.C. It can not be read as laying down a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it can not be said that he is member of such an unlawful assembly.

36. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with other members of the assembly, the common object as defined by Section 141 I.P.C.

37. Admittedly against Pano Yadav no overt act is alleged and moreover Chano Yadav is alleged to have assaulted the informant, whose injury has not been proved and if the charge of 149 I.P.C. is not made out against the aforesaid two Appellants, then in no manner other accused persons can be charged u/s 149 I.P.C.

38. The plea of alibi has been taken on behalf of Banwari Yadav and Chhotu Yadav. So far as Banwari Yadav is concerned, since Banwari is dead, I am not discussing the plea of alibi taken by Banwari. But so far as Chhotu Yadav is concerned, it is contended on behalf of the defence that on the date of occurrence, Chhotu Yadav was in police lock up under Nawada P.S. where he had been arrested by Officer-in-Charge of Nawada P.S. as he was found moving in suspicious condition at 2:30 P.M. in night and he was released on the next morning and this fact has been proved by D.W. 1 and D.W. 4 vide Exhibits-A and A/1 which are Sanha Diary entry No. 405 and 401, respectively, of Nawada P.S. as D.W. 1, Kamaldeo Narain Azad being the Officer-in-Charge Nawada P.S. has admitted to have arrested the accused Chhotu Yadav whereas D.W. 4 Gauri Shankar Keshri being the bailor of Chhotu Yadav in connection with Nawada P.S. has stated in his evidence that he executed the Jamanatnama. Yet the learned Trial Court has disbelieved Exhibit A(Sanha entries) as it did not bear the serial number of sanha moreover just before and after Exhibit "A" and A/1 no serial number has been maintained, hence it was held by the Trial Court to be cooked up and false document. Moreover Chhotu Yadav remained in custody only for about six hours from 2:30 in the night to 8:40 A.M. in the morning for an allegation of moving in a suspicious condition, hence this alibi of Chhotu Yadav does not inspire confidence.

39. So far as non examination of F.I.R. witness Ram Charittar Yadav and Nakchhedi Yadav is concerned, it is well settled principle that it is not necessary to examine the F.I.R. named witnesses but since these two witnesses have claimed to have seen the occurrence and they were independent witnesses, their withheldment by the prosecution creates doubt about the prosecution case.

40. In view of the discussions made above, it is held that the prosecution has not been able to prove the manner of the occurrence, the place of the occurrence nor it has been

able to prove as to which of the side was the actual aggressors. Hence all these doubts go in favour of the accused persons. Since the prosecution has failed to prove its case beyond shadow of reasonable doubt, hence this appeal is allowed and the impugned judgment of conviction and order of sentence dated 19th March, 1988 are hereby set aside and the Appellants are directed to be discharged from their respective bail bonds.