

PETITIONER:
NARBDESHWAR TIWARY, DWARIKANATH TIWARY, MITHILESH UPADHYAY

Vs.

RESPONDENT:
STATE OF BIHAR

DATE OF JUDGMENT: 24/04/1997

BENCH:
M.K. MUKHERJEE, S. SAGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

WITH
CRIMINAL APPEAL NO. 39 OF 1996
WITH
CRIMINAL APPEAL NO. 38 OF 1996
J U D G M E N T

M.K. MUKHERJEE, J.

Mithilesh Upadhyay, Dwarikanath Tiwary and Narbdeswar Tiwary, the three appellants in these appeals and two others, namely, Gorakh Singh and Raghunath Singh were arraigned before the 4th Additional Sessions Judge, Rohtas at Sasaram to answer charges under sections 302/34 of the Indian penal code and 27 of the Arms Act. The trial ended in conviction of all of them under section 302/34 IPC and four of them (excluding Gorakh Singh) under section 27 of the Arms Act. In appeals preferred by them the High court set aside the conviction recorded against Gorakh Singh and Raghunath Singh but upheld the convictions of the three appellants. Hence these three appeals at their instance.

Briefly stated the prosecution case is that on January 1, 1989 at or about 12 noon Ajit Tiwary (the deceased) along with his minor daughter Kumari Sadhana was proceeding from his house in village Kumhau within the police station of sheosagar. On the way when they reached the house of Dwarikanath, he along with the other accused persons accosted them. Then on exhortation of Gorakh Nath (since acquitted) Narbdeswar fired at Ajit with a gun. When Ajit tried to run away to save his life Mithilesh fired at him with a rifle which hit him on the chest. Dwarikanath also fired from his rifle at the same time. Ajit then ran towards his baithak and fell down near the door. Chandradeep Tiwary (P.W.6), a cousin of Ajit, Sudama Singh (P.W.2), Paras Nath Tiwary (P.W.4), Rajeshwar Singh (P.W.5) and one Mangal Singh (not examined) , who were then on the roof of he house and had seen the firing, hurriedly came down. Carrying Ajit on a cot they then proceeded towards Sasaram for his treatment. However, by the time they reached the outskirts of their village Ajit succumbed to his injuries. Leaving the dead body of Ajit at the village gate under care of others Chandradeep went to Sheosagar police station and lodged a report. On that report (Ext.4) a case was registered and

Madhusudan Sharma (P.W.7), the officer in charge of the police station took up investigation. He first went to the place where the dead body of Ajit was laying; and after preparing the inquest report sent it for post-mortem examination. Sri Sharma then went to the place of occurrence and seized blood from the baithak of Ajit. On completion of investigation the police submitted charge sheet and in due course the case was committed to the court of sessions.

The motive that was ascribed by the prosecution for the above murder was that there was a long standing dispute over property between the appellant Narbadeshwar and the family of Ajit.

The appellants pleaded not guilty to the charges levelled against them and stated that they had been falsely implicated. Mithilesh Upadhyay took a specific plea of alibi and contended that on the date of occurrence he was undergoing treatment at the Banaras Hindu University hospital.

In support of their respective cases the prosecution examined nine witnesses while the defence examined ten. Of the witnesses examined by the prosecution Arvind Tiwari (P.W.1), Sudama Singh (P.W.2), Parasnath Tiwari (P.W.4), Rajeshwar Singh (P.W.5) and Chandradeep Tiwari (P.W.7), who lodged the FIR, figured as eye witnesses. After detailing and discussing the evidence adduced by the parties threadbare the trial court accepted the case of the prosecution in preference to that of the defence. In appeal the High court also reappraised the evidence in the light of the criticism levelled by the appellants for rejection of the prosecution case and upheld all the findings recorded by the trial court. On perusal of the High court we find that the High court discussed at length the witnesses examined on behalf of Mithilesh to prove his alibi and observed that he (Mithilesh) failed to produce any reliable document in support of his claim that he was staying in one of its hostel at the material time. The High court also took note of the fact that his further claim that on the day in question he was admitted as a patient in the hospital of the University was not borne out by the evidence adduced on his behalf.

Mr. Lalit, the learned counsel appearing for the appellants, urged that the prosecution's claim that each of the three appellants fired at Ajit and that each of the shots hit him was completely belied by the evidence of the doctor, who on post-mortem examination found only two wounds of entry. From the impugned judgment we find that this contention was raised before the High Court and negative with the following words:

"The witnesses have witnessed the occurrence from some distance from the roof of the baithak and the house. They are consistent in their testimonies that the accused Narbadeshwar Tiwary, Mithilesh Updhyaya and Dwarika Tiwary had fired from their respective weapons. The shots appear to have been fired in quick succession as such the witness could not have been in a position to state precisely which shot hit the deceased on a particular spot on his person. if a fire-arm is used and the shot does not hit the victim it may be on account of

misfiring or erratic aim. The testimonies of the eye witnesses cannot be discarded merely because only two wounds of entry were found."

As we are in complete agreement with the above comments of the High court we are unable to accept the contention of Mr. Lalit in this regard.

Mr. Lalit next submitted that in his testimony P.W.5 only stated that Mithilesh was present with a rifle but did not state that he fired from his rifle. Therefore, Mr. Lalit submitted, the testimony of p.w.5 completely negatives the prosecution case and, for eye that matter, falsifies the evidence of other four eye witnesses that Mithilesh had also fired at Ajit. we do not find any substance in this contention for it was elicited in cross examination of P.W.5 that Mithilish fired at Ajit. Read in the context of the evidence of the other four eye witnesses, of whom P.W.2 (Sudama Singh) was a completely disinterested witnesses it is evident that P.W.5 omitted to mention the role actually played by Mithilesh by mistake which he rectified in his cross examination. Mr. Lalit also submitted that the learned courts below was not at all justified in discarding the testimonies of the defence witnesses examined to prove the alibi of Mithilesh including Dr. Kundan Sinha (D.W.6) who testified that he had examined Mithilesh at sir Sunder Lal Hospital of Banaras University on January 1 and 32, 1989. This contention of Mr. Lalit is also without any merit. The High court discussed the evidence of D.W.7 at length and rejected the same principally on the ground that he could not identify mithilesh as the person who was admitted in the emergency out-patient department of the hospital. On perusal of the High court that no reliable documents were produced to show that Mithilesh was a research scholar on the date of the incident, that he was allotted a room in the university hostel and that he had a health card to entitle him to avail of the hospital facilities, is unexceptionable.

Having carefully gone through the entire evidence on record we find no justifiable reason to disturb the concurrent findings of fact recorded by the learned courts below. Hence the appeals are dismissed.