

(2004) 10 PAT CK 0042

In the Patna High Court

Case No : Criminal Appeal (DB) No. 574 of 2001

Ajay Kumar Pandey @ Jhajhu Pandey

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 14-10-2004

Acts Referred:

Arms Act, 1959 — Section 27

Criminal Procedure Code, 1973 (CrPC) — Section 161

Penal Code, 1860 (IPC) — Section 149, 302, 307, 34, 395

Citation : (2006) 1 PLJR 545

Hon'ble Judges : Shiva Kirti Singh, J; Mridula Mishra, J

Bench : Division Bench

Advocate : B.P. Pandey, Jagannath Singh and Yogendra Mishra, Vikramdeo Singh, for the Appellant; Lala Kailash Bihari Prasad, for the Respondent

Final Decision : Allowed

Judgement

Shiva Kirti Singh, J.—Both the appellants were tried together for the same offence. Appellant, Ajay Kumar Pandey @ Jhajhu Pandey has been convicted u/s 302/149 IPC whereas appellant, Santosh Kumar Pandey @ Munna Pandey has been convicted for offence u/s 302 IPC and both of them have been sentenced to undergo rigorous imprisonment for life. Both the appellants have further been convicted for offence u/s 27 of the Arms Act and sentenced to undergo 3 years rigorous imprisonment. Both the sentences have been ordered to run concurrently. The prosecution case, in brief, is that the informant Raj Bansh Rai gave his fardbeyan before Sub-Inspector of Police, Murlidhar Prasad of Sidi outpost on 24.10.1996 at 21.30 hours near the place of occurrence, Panchayat Bhawan of village Tenduni and disclosed that at about 3.00 p.m. he alongwith his elder brother Ram Ashish Rai (the deceased), one Havildar Kherwar (PW 1) and Saroj Kumar (son of the informant, wrongly described in fardbeyan as son of late Ram Aasish Rai) was getting cauliflower planted in his field adjacent to the Panchayat Bhawan; he suddenly saw 8-10 unknown persons coming from the house of accused Shyamrati Pandey. They were armed with gun, Santosh Kumar

Pandey son of Shyamrati Pandey was having a country-made pistol (Katta) in his hand, accused Ajay Kumar Pandey son of Shyamrati Pandey was also with them and he pointed out as to who was Ram Ashish Mukhiya. On this all the miscreants surrounded Ram Ashish Rai; Santosh Kumar Pandey fired causing injury near the ear as a result whereof Ram Ashish Rai fell down writhing in pain and died at the spot. Other miscreants fired twice with their gun causing several other injuries to him. The informant and others ran to save themselves and near his Darwaza informant saw accused Shyamrati Pandey standing armed with a single barrel gun alongwith 4-5 others miscreants. The informant then fled towards other side in a lane. The miscreants entered into his house and abused and threatened the womenfolk to hand over arms available in the house. When the womenfolk expressed ignorance about arms then they were assaulted with fists and slaps. The motive of the occurrence was said to be a dispute because Shyamrati Pandey had taken Rs. 6000/- by way of loan and when that money was demanded two months ago then all the three named accused had threatened to teach a lesson for asking for money.

2. After completing investigation of consequent Karghar (Sidi) PS Case No. 128/96 lodged by informant Ram Bansh Rai (PW 6) the investigating officer SI Murlidhar Prasad (PW 9) submitted charge-sheet against the three named accused. These two appellants were tried and convicted as noticed earlier whereas the third accused Shyamrati Pandey was charge-sheeted for offence u/s 302/149, 307/450/395 IPC and section 27 of the Arms Act and acquitted of all the charges.

3. On behalf of both the appellants it has been submitted that acquittal of Shyamrati Pandey which is no longer under challenge, shows that to a large extent the prosecution case has been found unreliable. The claim of the informant (PW 6) and 3 lady inmates of his house who were examined as PW 3, Anita Devi, PW 4, Lalita Devi and PW 5 Aagmati Devi that at about the same time when deceased Ram Ashish Rai was killed, the father of these two appellants alongwith 4-5 unknown persons committed dacoity and assault in the house of the informant has been found to be unreliable. It has further been submitted that besides the informant Raj Bansh Rai (PW 6) only PW 1, Havildar Kharwar and PW 2, Saroj Kumar Singh who is son of the informant, have claimed to be eye witnesses but their allegations regarding murder of Ram Ashish Rai has not been supported by any independent witness or any co-villager; a careful appraisal of their evidence would show serious infirmities such as subsequent developments, exaggerations and material contradictions. Hence, according to learned counsel for the appellants, there is no reliable evidence on record to warrant conviction of appellants. On the other hand, learned counsel for the State supported by learned counsel for the informant has submitted that fardbeyan was lodged within 6 and 1/2 hours of the alleged occurrence and hence, there was no occasion to concoct or improve the prosecution case and although PW 1 is appearing to be an employee of the informant and PW 2 is informant's son, they should be relied on material particulars wherein they have alleged presence and

participation of appellant, Ajay Kumar Pandey and firing at the deceased by appellant, Santosh Kumar Pandey. It has been submitted that discrepancies are natural and not over material aspects of the prosecution case. It was further highlighted that the post mortem report proved by Dr. Shankar Kumar Jha (PW 8) shows that death was caused due to three firearm injuries, as alleged by the prosecution.

4. In order to appreciate the rival contentions and come to a finding whether the appellants are guilty or not of the charges, it would be relevant to discuss in some detail the evidence of alleged eye witnesses, PWs 1, 2 and 6. As noticed earlier, PWs 3, 4 and 5 are ladies who do not claim to be eye-witnesses of killing of Ram Ashish Rai. They have only claimed to have heard 2-3 sounds of firing at the relevant time. PW 7, Umesh Kumar Singh, is a formal witness who has proved the inquest report. PW 10, Ram Bansh Rai is also a formal witness who has proved station diary entry, Ext. 8. The defence has not examined any witness. But the trend of cross-examination and suggestion discloses that according to defence the real occurrence took place late in the evening hours in a different manner by unknown assailants but the appellants and their father were implicated on account of differences or enmity from before.

5. From the defence noticed above it is apparent that place of occurrence has not been seriously disputed. The evidence of Sub-Inspector of Police (PW 9) and of independent witness Umesh Kumar Singh (PW 7) who is formal in nature and has proved the inquest report, leave no doubt that the dead body of Ram Ashish Ram was found lying near Gram Panchayat Bhawan of village Tenduni. The IO (PW 9) has claimed that the dead body was lying at about 25 yards south and west of the Panchayat Bhawan upon a heap of sand where he found blood. He also claimed that in front of Panchayat Bhawan at a distance of about 10 feet on the village road he found two firearm empties. He has claimed to have prepared seizure list showing seizure of blood stained sand and two empties. Thus, it is found that the claim of the prosecution regarding alleged place of occurrence cannot be doubted. But there is serious dispute regarding time of the alleged occurrence as well as its manner.

6. Coming to the manner of occurrence, the fact that all the 3 eye-witnesses are interested requires a careful scrutiny of their evidence. PW 1, Havildar Kharwar, has contradicted his earlier statement u/s 161 Cr.PC and has attempted to conceal and deny the fact that he is an employee of the deceased Ram Ashish Rai. PW 9 (the I.O.) has stated in paragraph 5 of his deposition that Havildar Kharwar had stated before him that since childhood he is living in the house of Ram Ashish and doing his work. PW 1 claimed in his deposition that at the time of occurrence the informant, Raj Bansh Rai (PW 6) was present in the field where the occurrence took place. He claimed that he had stated this fact before the I.O. but the I.O. (PW 9) has denied such claim and has stated that presence of Raj Bansh at the place of occurrence when the occurrence allegedly took place was not stated by PW 1. This witness had not stated before the police that Ajay

Pandey was having a gun in his hand but he has claimed so in his deposition contrary to evidence of PW 2 and the informant (PW 6). Paragraph 6 of deposition of the I.O. further discloses that this witness had not disclosed u/s 161 CrPC that Santosh Pandey fired near the ear of the deceased from very close range and the deceased fell down near heap of sand or that after he had fallen Santosh further fired two shots.

7. In paragraph 17 of his deposition PW 1 first stated that when he reached the P.O. field, holes at regular intervals for planting cauliflower plants had already been dug but in the next breath he claimed that he had dug the holes which took about two hours. Regarding the manner of occurrence PW 1 has given a version different from that of informant in the fardbeyan or in court. According to this witness the miscreants came to the P.O. field in two groups; first group came from the east and second group from south; the eastern group consisting of 8-9 persons arrived earlier and immediately on arrival surrounded all the four persons present in the field from before and after five minutes the second group came from south and this group included both the appellants. This version does not fit in with the prosecution case in the fardbeyan that all the accused persons came in one group and on identification of the deceased Mukhiya by Ajay Kumar Pandey the other miscreants surrounded him and thereafter one firing was made by Santosh. According to this witness, all the three shots were fired by Santosh. This witness has further stated that at the time of receiving first firearm shot the deceased was sitting in the field under a Neem tree but again in the next breath he said that the deceased ran for about 10 steps but none fired from behind rather Santosh brought his Katta in close contact with Kanpatti of the deceased and fired the first shot. According to this witness, both the appellants were wearing Pants and Shirt at the time of occurrence. But according to PW 6, the informant, Ajay Pandey was wearing Shirt and Pant and Santosh was wearing Kurta and Pajama.

8. PW 2 is son of the informant aged about 14 years and he has admitted that on the date of occurrence he could not meet the I.O. His statement was recorded by the I.O. after three months and after filing of charge-sheet on the directive of the Deputy Superintendent of Police. This witness has deposed about occurrence in the field in which Ram Ashish was allegedly killed as well as about the occurrence of loot and assault in the house. He has alleged that miscreants arrived in the field in two groups from east and as soon as the deceased saw the miscreants he started running and on identification made by appellant, Ajay and on his order, appellant, Santosh Pandey fired thrice with his Katta where upon the deceased fell down on a heap of sand and died. According to him, other miscreants thereafter made 8-10 firing in the air and escaped towards north and east. He has further claimed that when he fled towards his house then he saw Shyamrati Pandey and 4-5 others standing with guns near Darwaza of his house and when they saw father of this witness then Shyamrati Pandey fired his gun but it missed the target. According to him, his father ran away and entered into the house of one Sadhu Singh, the miscreants could not enter that house because Darwaza

was closed; the miscreants attempted to break the door. PW 6 on the other hand has claimed in paragraph 19 of his deposition that he had fled and entered the house of one Badri Rai.

9. In cross-examination this witness has given no explanation why he could not meet the I.O. on the date of occurrence. He has feigned ignorance in early part of paragraph 6 of his deposition as to whether the I.O. went to his house or not but in the same paragraph he later admitted that the I.O. came to his house and met his father but again he disclosed his ignorance as to whether the I.O. recorded the statement of his father or not. In paragraph 7 of his deposition he again exhibited his ignorance as to whether the I.O. had recorded the statement of any person of his family till late evening of next day (when DSP allegedly came) or not. He denied to have made any disclosure about the occurrence to any villagers who came to his house soon after the occurrence. The defence has boldly suggested to this witness that his claim that the Deputy Superintendent of Police recorded his statement on the next day of the occurrence is false but still neither the Dy. S.P. was examined nor his supervision note was exhibited.

10. There is admission in paragraph 11 of deposition of PW 2 that at the time of occurrence this witness was a student of class VII in a school in village Bisodehri situated at a distance of two miles from his village. The timing of the school was admitted to be 10.30 a.m. to 4.30. p.m. The defence suggested that on the date of occurrence this witness had gone to attend the school and his presence is marked in the attendance register of the school. Of course, this suggestion was denied.

11. PW 2 has also denied the suggestion that PW 1 is an employee of his family. According to PW 9, (the I.O.), he looked for this witness to record his statement but he did not come to him till charge-sheet was filed and thereafter on the direction of DSP he recorded the statement of this witness. He further stated that DSP never recorded statement of this witness in his presence. The IO has clarified that this witness did not disclose to him that at the time of occurrence in the field the father of this witness was also present. The IO further clarified that contrary to his deposition in court that only one firearm injury was caused on the Kanpatti (near the ear) in his earlier statement this witness had claimed that two firearm injuries were caused on the Kanpatti of the deceased. The IO has clarified that this witness had said before him that his father was coming from the side of his house when he saw 10-12 persons coming from east.

12. On a close and careful scrutiny of evidence of PWs 1 and 2, this Court finds that they cannot be relied upon as truthful witnesses. The contradictions become more glaring and material because these witnesses are clearly interested witnesses. There is no witness from the village to corroborate their presence at the place of occurrence. It appears unnatural that both these witnesses, as appears from paragraph 25 of deposition of PW 1 and paragraph 7 of deposition of PW 2, did not disclose about the occurrence to anyone in the village after the alleged occurrence when the villagers arrived. For all these reasons, it does not

appear safe to rely upon either PW 1, Havildar Kherwar or PW 2, Saroj Kumar Singh.

13. The only remaining material witness is the informant Ram Bansh Rai (PW 6). In his deposition in Court he has developed the allegations made in the fardbeyan by adding that accused Santosh fired at the deceased more than once and that accused Shyamrati Pandey alongwith 4-5 unknown persons not only assaulted the female inmates of his house but also forced them to part with all the jewellery they were wearing. He has admitted that there is a Choukidar in his village but has feigned ignorance as to whether the Chaukidar arrived after the occurrence and prior to coming of the IO or not. About the occurrence in field this witness has claimed in paragraph 15 of his deposition that Havildar Kherwar (PW 1) and this witness went to the P.O. field together at about 12-1 in the noon and the deceased Ram Ashish Rai came to the field 1 & 1/2-2 hours thereafter. PW 1 on the other hand has claimed in paragraph 16 of his deposition that he went to the field at about 12.00 noon all alone; the deceased Ram Ashish Rai came there after about 3 hours and in between nobody from the village came there. It is noticeable that PW 1 in his examination-in-chief also has not mentioned the presence of either the informant (PW 6) or informant's son (PW 2) at the place of occurrence when the alleged occurrence took place.

14. In paragraph 16 of his deposition the informant first claimed that while he was in the field he saw the members of the unlawful assembly coming out from the house of accused Shyamrati Pandey but in the last part of the said paragraph he has said that the miscreants came into the field from east and when they were coming from the east he could not see them and he saw the miscreants only when they had surrounded. As noticed earlier, he has not supported the manner of occurrence given by PWs 1 and 2 that the miscreants came in two groups; one from the east and other from the south. According to PW 1, accused Santosh was wearing Shirt-Pant but according to PW 6 Santosh was wearing Kurta-Pajama.

15. PW 6 in paragraph 8 of his deposition has disclosed that in the P.O. field sand was kept in a heap in the eastern-northern corner of the field. The dead body was found by the I.O. on this heap of sand. There is a village road at a distance of 5 yards north of this field and 32-35 yards west south of Panchayat Bhawan. The two firearm empties were found by the I.O. on this village road. According to the informant (PW 6) when the miscreants came into the field and surrounded the deceased, the deceased was sitting under a Neem tree situated in the middle of the P.O. field (Paragraph 6 of deposition of PW 6). In the fardbeyan there is no mention of deceased having run for 2-4 steps before he was shot by Santosh, as claimed by this witness in paragraph 17 of his deposition. Contrary to the fardbeyan, this witness has further claimed that second shot was also fired by accused Santosh from a distance of two feet which hit the deceased on back portion of the chest. It appears that deliberate attempt has been made to develop the prosecution case that the deceased proceeded for few steps from

under the Neem tree situated in the middle of the field only with a view to explain the fact that the dead body was found by the I.O. on a heap of sand kept in a corner of the P.O. field.

16. The part of prosecution case regarding the occurrence of assault and loot in the house of the deceased has been found to be false by the trial court and that finding is no longer under challenge. The allegation made by the informant that Santosh caused death of the deceased by firing the second shot from a close range of two feet is a clear development. The informant has failed to substantiate the motive as alleged in the fardbeyan. No document or paper showing loan of Rs. 6000/- was produced and no witness has supported the alleged motive.

17. On a careful consideration of evidence of the informant (PW 6) as discussed above it is found that his evidence suffers from certain material contradictions and developments in respect of how the occurrence took place. Since objective findings such as dead body being found on sand kept in corner of the field and not under the Neem tree in the centre of the P.O. field, empties not found in the P.O. field but on the village road do not support the manner of occurrence described by the informant, it is not found safe to rely upon his testimony to convict the appellants. In this context it is relevant to note that according to the Doctor, all the three wounds of entry were found with black margin. Accordingly, allegation has been made by the prosecution witnesses. All the three injuries are not likely to be from a close range if the version of the informant as given in his deposition in court is accepted that the deceased received first injury while he was running away.

18. It is surprising that although admittedly there was a Choukidar in the village but he has not been examined at least to indicate at what time the occurrence took place. The non-examination of any independent witness from the village also creates doubt regarding the prosecution case. The alleged assailants were co-villagers and yet admittedly no names were disclosed to the co-villagers who arrived immediately after the occurrence. The Sidi outpost situated only at a distance of two miles, received information only by way of rumor at 6.30. p.m. The I.O. (PW 9) claimed to have left immediately for the place of occurrence obviously because the occurrence related to killing of a prominent person of the village who was Mukhiya. In the peculiar facts of this case a suspicion arises that the occurrence could have taken place not at about 3.00 p.m. but later as suggested by the defence. A further suspicion arises regarding the version given in the fardbeyan because it was recorded in the village at 9.30 p.m. Police could not have taken three hours to cover a distance of two miles. The I.O. (PW 9) has admitted that he did not find any left over plants of cauliflower or agricultural tools or equipments in the P.O. field. No firearm empties were found in the P.O. field rather they were found on the village road situated nearby. The presence of semi-digested food in the stomach of the deceased coupled with statement of the informant that he and the deceased had taken food at about 9.00 in the morning and thereafter they take snacks in the evening at about 3-4 p.m. also tends to

support the suggestion of the defence that the occurrence took place late in the evening and the assailants could not be seen. Hence, the circumstances also do not support the prosecution case.

19. Some judgments were cited by the learned APP to support his submission that evidence of PW 2 should not be rejected because of his late examination by the I.O. The counsel for the appellants did not contest the submission and hence, the evidence of PW 2 has been considered on its own merit. Since the evidence adduced on behalf of the prosecution has not been found reliable in material particulars and acquittal is proposed on that ground, some other judgments cited by the learned APP relating to principles as to when a person may be convicted with the aid of Section 34 IPC and that delay in lodging the FIR by itself is not fatal and the effect of material discrepancies as against normal discrepancies are not found relevant for elaborate consideration. However, in fairness to the learned counsel it is recorded that in support of his aforesaid submissions he placed reliance upon judgments of the Apex Court reported in Zahoor and others Vs. State of U.P., (Zahoor vs. The State of UP) and 2004 SCC (Cri.) 135 (State of Punjab vs. Karnail Singh). On careful consideration of all the facts and circumstances, it is found that in this case the prosecution has failed to prove its case against the appellants beyond reasonable doubt. Hence, both the appellants are acquitted of all the charges. Appellant, Santosh Kumar Pandey @ Munna Pandey, is directed to be released from custody forthwith unless required in connection with some other case. Appellant, Ajay Kumar Pandey @ Jhajhu Pandey is on bail. The liability of his bailors shall stand discharged. Both the appeals are allowed accordingly.

Mridula Mishra, J.

20. I agree.