

(2004) 03 PAT CK 0035

In the Patna High Court

Case No : Criminal Appeal No. 602 of 2000 (DB)

Amar Nath Mallah

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 26-03-2004

Acts Referred:

Penal Code, 1860 (IPC) — Section 396

Citation : (2004) 2 BLJR 858

Hon'ble Judges : Bal Krishna Jha, J;Aftab Alam, J

Bench : Division Bench

Advocate : Nawal Kishore Singh, for the Appellant; Ganesh Prasad Jaiswal, APP, for the Respondent

Final Decision : Allowed

Judgement

B.K. Jha, J.—This appeal has been preferred against the Judgment and Order passed by the then learned Additional Sessions Judge-I, Saran at Chapra on 27.11.2000 in Sessions Trial No. 427/94.

2. The sole appellant, Amar Nath Mallah, has been convicted u/s 396 of the Indian Penal Code and sentenced to life imprisonment.

3. Briefly, the facts of the case are that on 19th October, 1993, the informant, Kamaldeo Sah, PW 4 along with his father, Shiv Nath San, was returning to his village after selling grains in Janta Bazar Hat. At about 7 P.M. when they reached in a Chour, all of a sudden, the accused, Amarnath Mallah, with Chhura, Anil Rai with gun and Ghogi Rai with Chhura besides three unknowns with small dandas encircled them. At the point of the gun the accused, Anil Rai, asked Shiv Nath Sah, to hand over the money to him failing which he threatened to shoot him down. In the mean time the accused, Ghogi Rai, pushed Shiv Nath Sah, all the accused pinned him down on the ground and started assaulting him with the weapons in their hands. The accused, Ghogi Rai and Amar Nath Mallah assaulted Shiv Nath Sah with Chhura and the accused, Anil Rai, shot him dead. Thereafter

they took away cash Rs. 3/4 thousands from the possession of Shiv Nath Sah and also 20 kgs. rice in a gunny bag and made good escape in the north. On the hulla raised by the informant the villagers rushed and chased the dacoits. One of the dacoits was apprehended by them and was beaten to death. The dacoits were calling their names as Jata Shankar Nut and Sushma Nut.

4. On the same day, i.e., 19th October, 1993 at 8.30 P.M. the S.I., Rajeshwar Prasad, OC, Amnaur PS Camp, Parmanand Chapra, recorded the fardbeyan (Ext. No. 3) of the informant, Kamaldeo Sah, Son of Shiv Nath Sah of Village-Madhubani, P.S. Amnaur, District-Saran at Chapra in the Chour. He forwarded the fardbeyan to the Incharge O.C. of Amnaur Police Station for the institution of a case u/s 396 of the Indian Penal Code. On the basis of the fardbeyan of the informant a formal FIR (Ext No. 4) was drawn up and Amnaour P.S. Case No. 156/93 dated 19.10.2003 was instituted u/s 396 of the Indian Penal Code against the five accused persons, namely, Amar Nath Mallah, Jata Shankar Nut, Sushma Nut (dead), Ghogi Rai and Anil Rai.

After investigation police submitted chargesheet against all the five accused persons u/s 396 of the Indian Penal Code showing Nut (dead) and Ghogi Rai as absconder. Accordingly cognizance of the offence was taken and their case was committed to the Court of sessions for trial. There Sessions Trial No. 323/94 proceeded against the accused, Jata Shankar Nut and Anil Rai. During the trial Anil Rai escaped from custody, so his trial was split up on 11.6.1998 and the trial of the accused, Jata Shankar Nut, succeeded in his acquittal on 2nd May, 2000.

The present Sessions Trial proceeded against the sole accused, Amar Nath Maliah, which ultimately fetched the result as indicated above.

5. The defence of the appellant is that he had not at all committed the offence and was falsely implicated in this case.

6. The prosecution examined altogether six witnesses but the Investigating Officer was not examined. Out of them PW 6, Ashok Sharma, is a formal witness. He has proved the fardbeyan which is in the pen and signature of Sri Rajeshwar Prasad, the then Officer Incharge of Amnour Police Station (Ext. No. 3). He has also proved the formal FIR which is in the pen and signature of Sri Randhir Kumar Rai, the then Officer Incharge of Amnour Police Station (Ext. No. 4).

7. The evidence of PW 4, Kamaldeo Sah, is that at the alleged time he along with his father was returning to his village separately on bicycle after selling grains in Janta Bazar. His cousin brothers, Biju Sah, PW 2 and Nawal Sah, PW 1, were also returning from Janta Bazar and were 10/15 yards ahead of them. He has further stated that when he along with his father reached in Chour, the accused, Amar Nath Mallah, Ghogi Rai, Anil Rai, Jata Shankar Rai and Shushma Nut, all of a sudden surrounded his father and demanded money from him. On refusal the accused, Amar Nath Hallah and Ghogi Rai, assaulted his father with Chhura in his abdomen and the accused, Anil Rai, fired at him causing injury in his abdomen and he died at the spot. Thereafter, the accused, Amar Nath Mallah, took away

20 kgs. rice, kept on a bicycle and the accused, Shushma Nut, took away cash Rs. 4000/- from the possession of his father and all of them escaped in the north. His further evidence is that about 8/8.30 P.M. the Officer Incharge arrived at the place of occurrence, recorded his fardbeyan and he put his signature. He has proved his signature on the fardbeyan (Ext. No. 1), In cross examination he has stated that the Janta Bazar is situated at a distance of one and half kilometers from his village, and when they covered the distance of one kilometer the occurrence took place in the Chour. The occurrence had taken place at about 7 P.M. and there was a dark night. His further evidence is that he was not assaulted by any of the dacoits and as soon as they surrounded his father he waited for 4/5 minutes and then rushed to the village. He narrated to the villagers about the incidence and when he came back to the place of occurrence alongwith the villagers he spotted his father lying dead there. The villagers chased the dacoits and succeeded in apprehending an unknown dacoit who was beaten to death by them.

PW 1, Nawal Sah, is the cousin brother of the informant, Kamaldeo Sah, PW 4. He has stated that at the relevant hour of occurrence he was also returning to his village after selling grains in the Janta Bazar. His uncle, Shiv Nath Sah and his son, Kamaldeo Sah, PW 4 were also returning after selling grains in the Janta Bazar and they were about 20 steps behind him. He has further stated that his uncle had 3/4 thousands cash in his possession. When his uncle and cousin brother arrived in a lonely place Chour situated near the village-Parmanand Chapra, all of a sudden 5/6 miscreants encircled them and demanded money from his uncle. He identified the accused, Amar Nath Mallah and Ghogi Rai, armed with Chhura, Anil Rai with Bandook, Jata Shankar Nut and Shushma Nut with dandas. At that time light was sufficient to identify them. When his uncle refused to hand over the money to them the accused, Amar Nath Mallah and Ghogi Rai, assaulted him with Chhura and the accused, Anil Rai, shot him dead. Thereafter the accused, Jata Shankar Nat, took away cash from the possession of his uncle and the accused, Ghogi Rai, took away rice and all made good escape from there. His further evidence is that after 1/1.30 hours of the occurrence police came and dispatched the dead body of his uncle for post-mortem examination. Police recorded the statement of his cousin brother, Kamaldeo Sah, at the spot and his statement was recorded on the following day. In cross examination, he has stated that he along with his brother, Biju Sah, was returning from the Bazar after selling grains in the market. There had already been sunset but he identified the accused persons in the moon light. He has further stated that when he arrived at the place of occurrence he found his uncle lying dead there.

PW 2, Biju Sah, is also cousin brother of the informant, Kamaldeo Sah, PW 4 as well as of Nawal Sah, PW 1. At the alleged time he was also returning to his village from Janta Bazar after, selling grains and he was 20 steps ahead of his uncle, Shiv Nath Sah and cousin brother, Kamaldeo Sah, PW 4. He identified all the five accused persons with weapons as alleged in their hands by the

prosecution. He has supported the factum of the prosecution case and corroborated the evidence of both the witnesses. In cross examination he has stated that soon after the occurrence villagers arrived there. Jagarnath Singh, Satya Narain Singh, Krishna Singh and many others had come there. When he went to the place of occurrence he found his uncle lying dead- His cousin brother, Kamaldeo Sah, was also not there because he had gone to village to inform about the incidence. PW 3, Krishna Singh, has stated that on the day of occurrence at about 7 P.M. while he was at his Darawaja he heard hulla of "dacoits-dacoits" raised by the informant, Kamaldeo San. He along with the other villagers rushed towards the PO and found Shiv Nath Sah, lying dead there. He learnt about the occurrence from his son, Kamaldeo Sah, the informant. Thereafter, villagers chased the dacoits and succeeded in apprehending one of the dacoits and rest managed to escape from there. The apprehended dacoit was brought at the spot and learnt the names of other dacoits, Amar Nath Mallah, Jata Shankar Nut, Ghogi Rai, and Anil Rai. In cross examination, he has stated that the night of the occurrence was dark one and the Officer Incharge, had arrived at the PO at about 8 P.M. and recorded his statement.

8. PW 5, Sanat Kumar Singh, is a Doctor who held post mortem examination. His evidence is that on 22.10.93 while he was posted as Medical Officer at Sadar Hospital on the same day at about 2.20 P.M. he held post mortem examination on the dead body of Shiv Nath Sah and found the following ante-mortem injuries on his body :--

(i) One penetrating wound on back below right scapula size about 1" x 1/2" X chest cavity deep.

(ii) One incised wound on the left thigh at the junction of lower two third and upper one third anteriorly.

(iii) One lacerated wound below left eye with black charred inverted margin, size about 1" x 1/2" x 1/2".

(iv) One lacerated wound in front of right pinna with black charred inverted margin, 1/2" x 1/4" x 1/4".

(v) One lacerated wound on the right pinna with black charred margin 1" x 1/4" x 1/4".

(vi) Fracture of nasal bone.

In his opinion, the death was caused due to haemorrhage and shock due to the injuries to the vital organ, like lung caused by sharp penetrating weapon. Injury No. (1) was caused by sharp penetrating weapon. Injury No. (ii) was caused by sharp cutting weapon. Injury Nos. (iii), (iv) and (v) were caused by firm arm and Injury No. (vi) was caused by hard and blunt substance.

The time elapsed between death and post-mortem examination held was within 24 hours. He proved the post-mortem report (Ext. No. 2). Nothing material could

be elicited in his cross examination by the defence.

9. Thus, the medical evidence is in consonance with the prosecution case that Shiv Nath Sah died of the injuries found on his person. The defence has also not challenged the murder of Shiv Nath Sah in course of dacoity but has challenged the involvement of the appellant.

10. The learned counsel for the appellant contended that the trial Court committed an error on law in convicting him on the basis of the same set of evidence on which he acquitted the co-accused, Jai Shankar Nut. He further contended that PW 1, Nawal Sah and PW 2, Biju Sah, projected as eye witnesses by the prosecution have not been named in the FIR and the evidence of all the three alleged eye witnesses, PW 1, Nawal Sah, PW 2, Biju Sah and PW 4, Kamaldeo Sah, are not consistent with each other, so the appellant cannot be convicted on the basis of their evidence particularly in absence of any other independent and corroborating evidence. The trial Court wrongly accepted their evidence for the conviction of the appellant. He again contended that the IO has not been examined in this case and because of his non examination the place of occurrence could not be established and the testimony of PWs 1 and 2 could not be tested with respect to their statements made u/s 161 Cr PC.

11. On going through the evidence of the alleged eye witnesses carefully and hearing the learned counsel for the parties on the point of truthfulness of their evidence I find that the trial Court has not given good and convincing reasons for convicting the appellant. All the three eye witnesses have categorically stated that the occurrence had taken place at about 7 P.M. in the lonely place "in Chour". The informant in his evidence at para 7 has clearly stated that the night of occurrence was dark and this also finds support from the evidence of PW 3, Krishna Singh (vide Para-6). PW 1, Nawal Sah, put forth a different story that he identified the accused persons in the moon light and PW 2, Biju Sah, has not stated even a single word about source of identification. Again no source of identification was disclosed by the informant in the FIR, Thus, examined in the context of above facts the doubt about the source of identification assumes importance. Further, PW 4, the informant, Kamaldeo Sah, has specifically stated at para 7 in his cross examination that as soon as dacoits encircled his father, he rushed towards the village to inform about the incidence to the villagers and on coming back he found his father lying dead. Further, according to PW 1, Nawal Sah and PW 2, Biju Sah, the accused, Jai Shankar Nut, took away cash from the possession of Shiv Nath Sah whereas according to PW 4, Kamaldeo Sah, the informant, the accused, Shushma Nut, took away cash from his possession. Thus, there is no consistency in the evidence of all the alleged three eye witnesses and their evidence does not inspire confidence to prove the guilt against this appellant.

12. It may be added here that in case of the acquitted accused, Jai Shankar Nut in Sessions Trial No. 323/94 only these three material witnesses, PW 1, Nawal Sah, PW 2, Biju Sah and PW 4, Kamaldeo Sah, were examined as eye witnesses

and on the analysis of their testimony the learned Additional Sessions Judge found the involvement of the accused in the case not proved by the prosecution. The testimony of all the three alleged eye witnesses in respect of the acquitted accused was rightly held to be not convincing and trust-worthy but on the basis of same set of evidence available in the Sessions Trial No. 427/94 the accused-appellant was convicted.

13. On the facts and evidence of the case, in my view it is not safe to base the conviction of the appellant on the basis of the testimony of PW 1, Nawal Sah, PW 2, Biju Sah and PW 4, Kamaldeo Sah. Their evidence regarding the involvement of the appellant in the commission of the alleged offence appears to be doubtful and there is no evidence to sustain his conviction, so the appellant deserves benefit of doubt.

14. In the result, there is merit in this appeal and it is allowed. The order of conviction and sentence- passed against the appellant is set aside and he is acquitted of the charge. The appellant, Amar Nath Hallah, is in custody, so he is ordered to be set at liberty forthwith in this case, if not wanted in any other case.

Aftab Alam, J.

I agree.