
(1999) 08 PAT CK 0020

In the Patna High Court

Case No : Criminal Appeal (DB) 366 of 1991

Awadhesh Kumar Singh @ Awadhesh Singh

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 04-08-1999

Acts Referred:

Arms Act, 1959 — Section 27

Penal Code, 1860 (IPC) — Section 302, 304(2)

Citation : (1999) 3 PLJR 837

Hon'ble Judges : P.K. Deb, J;D.P.S. Choudhary, J

Bench : Division Bench

Advocate : Ram Bilas Mahto, for the Appellant; Assistant Public Prosecutor, for the Respondent

Judgement

P.K. Deb and D.P.S. Choudhary, JJ.—The 2nd Additional District and Sessions Judge, Saran by his judgment and order dated 9th July, 1991 convicted the sole appellant Awadhesh Kumar Singh alias Awadhesh Singh in Sessions Trial No. 4/1 of 1990 u/s 302 of the Indian Penal Code and sentenced to R.I. for life. He has been further convicted u/s 27 of the Arms Act and sentenced to R.I. for three years. Sentences are to run concurrently. The prosecution case arises out of the Fardbeyan of the informant Girja Shankar Awasthi (P.W. 7), the full brother of deceased Uma Shankar Awasthi alias Nunu Awasthi recorded by the A.S.I. Chhawili Chand Ram (P.W. 10) of Rivilganj Police Station, District Saran at the place of occurrence at 18 hours on 9.8.1988 for the occurrence said to have taken place on the same day at 16.30 hours.

The prosecution case in brief is that the informant was at his tobacco shop on 9.8.1988. At about 4.45 P.M. one Amir Kurmi resident of his village came to him and told that his younger brother Umashankar Awasthi alias Nunu Awasthi has been murdered by accused appellant Awadhesh Singh by firing from a country made pistol in the orchard of Narmadeshwar Awasthi near the railway line. He further told the informant that accused appellant Awadhesh Singh along with

Bhulli Dhobi, Madalim Mian, Hasnain Khan and Heera Pasi were drinking toddy in the said orchard while deceased Umashankar Awasthi along with Narmadeshwar Awasthi (P.W. 6) went to the said orchard and said to them that they are drinking toddy in the orchard and their bamboos are regularly cut from the orchard. It is further case of the prosecution that thereupon accused Awadhesh Singh started abusing them and his associates instigated him and altercation took place between them. Thereafter, the accused appellant Awadhesh Singh took out country made pistol from his waist and fired at Umashankar Awasthi from close range resulting into his death on the spot. Thereafter appellant accused fled away. Anil Kumar further told the informant that he had come to inform him at the instance of Narmadeshwar Awasthi who also accompanied the deceased and still standing near the dead body. The informant rushed to the place of occurrence and found his brother dead. After the institution of the case the police submitted charge sheet and after cognizance the trial concluded in the court below.

2. The case of the accused appellant as appears from the trend of cross-examination, is that he is not guilty to the charges levelled against him and claimed to be innocent and has been falsely implicated in this case out of enmity at the instance of Narmadeshwar Awasthi. It has been further stated that said Narmadeshwar Awasthi had purchased the orchard in question from the brother of appellant Awadhesh Singh for which the appellant has made protest. There was also a dispute between the deceased on the one hand and Narmadeshwar Awasthi on the other regarding construction of the tube well and it was Narmadeshwar Awasthi who has committed the murder of deceased Uma Shankar Awasthi but because of enmity implicated the appellant.

3. The prosecution has examined ten witnesses out of which P.W. 7 Girja Shankar Awasthi is the informant. He is a hear say witness regarding the occurrence which he learnt from one Anil Kumar not examined on behalf of the prosecution. P.W. 5 Harihar Ram and P.W. 6 Narendra Kumar Awasthi are also hear say witnesses of the alleged occurrence. P.W. 6 is also a witness on the seizure list and the inquest report. P.W. 3 Parmeshwar Prasad P.W. 4 Tarkeshwar Prasad and P.W. 8 Narmadeshwar are the eye witness of the occurrence. P.W. 8 also signed on the seizure list of the blood taken from the place of occurrence by the I.O. and on inquest report. P.W. 1 Dr. Rajbali Singh and P.W. 2 Dr. C.M. Gupta have jointly conducted postmortem of deceased Umashankar Awasthi and the postmortem report is Ext.2. P.W. 9 Rajbanshi Singh and P.W. 10 Chhiwili Ram are the Investigating officers.

On behalf of prosecution Fardbeyan has been marked as Ext. 3, formal F.I.R. Ext. 4, seizure list Ext. 5 and inquest report Ext.6.

4. The above mentioned Anil Kumar who is said to have informed about the occurrence to informant P.W. 6 Narmadeshwar Awasthi has been examined as defence witness (D.W.1)

5. P.W. 1 and 2 who are doctors, had jointly held postmortem on the dead body of Umashankar Awasthi alias Nunu Awasthi on 10.8.1981 at 8.05 A.M. and found the following ante-mortem injuries :

One wound 3/4" diameter inverted charred margin with blackening on an adjacent area on left side of chest, 5th in costal space in mid axillary line in oblique direction with blood oozing out of the wound. On dissecting open the chest it was found full of dark, red fluid blood mixed with some food materials. On cleaning the blood of the cavity the ventricle of heart was found completely lacerated and masserated. Adjacent part of the diaphragm of left side of chest was also found lacerated 3/4" x 3/4" thickening of diaphragm with laceration of lung tissue. On dissecting open the abdomen it also contained some dark red fluid blood. Stomach was lacerated in its anterior and middle part with blood and fluid blood coming out. Even after the thorough search of thoracic and abdominal cavity the foreign body (bullets or pelletes) could not be found out.

In the opinion of the doctors the death was caused due to fire arm injury such as pistol. The injury was on vital organ and it was sufficient to cause death in ordinary course of nature. Time elapsed since death was within 24 hours of the postmortem examination. The finding of the doctor that wound on the deceased had charred margin with blackening of adjacent area suggests that deceased was fired upon from close range. P.W. 2 had stated that he found only wound of entry and not wound of exit on the person of the deceased. He did not find pillet or bullet inside the body. It appears that bullet was lodged in the body and no thorough search was made by the doctor at the time of dissection as in many cases bullet could take very erratic and unusual course while passing through the body. It is possible that bullet might have oozed from the dead body with transfuentation of the blood from the wound of entries caused by fire arm. Therefore, non-finding of the bullet or pillet is not an infirmity in the evidence of the doctors. At best it may be some sort of negligence on the part of the doctor in not tracing out the bullet while conducting the postmortem. However, this has got no bearing on the prosecution case. From the evidence of the doctors and the postmortem report it is proved beyond doubt that deceased died due to fire arm injury.

6. P.W. 8 is the main eye witness. His evidence required careful scrutiny. He had deposed that at the time of occurrence at about 5 P.M. he along with deceased Uma Shankar Awasthi went to his orchard and found the deceased and others taking toddy. He protested and asked that in their presence the bamboo from his orchard are being stolen away. An altercation took place with the deceased and the appellant, thereupon, took out country made pistol and fired at Nunu Awasthi who died on the spot. As stated above the postmortem report shows that the fire was made from the close range on the deceased. Whether bullet hit at abdomen as stated by this witness or it hit at the chest is not material point in this case nor the learned appellant lawyer has hammered on this minor contradiction.

7. From the evidence of P.W. 8 it is clear that one sale deed in respect of the land

has been executed by the accused himself in his favour and the second sale deed in its respect was executed by the agnates of the accused and the third sale deed was executed by the eldest brother of the accused. The occurrence took place on the portion of the orchard executed by the eldest brother of the accused. The witness has denied that this orchard was looked after by the accused who had protested to the deceased about the sale deed regarding the orchard in favour of P.W. 8. It is thus clear that this accused had himself sold the portion of the orchard to P.W. 8. Therefore, there is no substance in this contention of the defence that the said orchard was still in possession of the accused and the deceased and P.W. 8 went there to claim their possession over the same. There is nothing on record to show that on the date of occurrence any serious enmity existed in between the deceased, P.W. 8 Narmadeshwar Awasthi and the accused appellant. It is thus, clear that P.W. 8 had no personal animosity with the appellant. He had accompanied the deceased to the orchard only to check the regular cut of bamboos stealthily. The I.O. stated in his evidence that he found the mark of five bamboos freshly cut from the bamboo clumps in the said orchard. This objective finding of the I.O. lends support to the genesis of the occurrence and the evidence of P.W. 8 Narmadeshwar Awasthi.

8. P.W. 4 Tarkeshwar Prasad has deposed as an eye witness. He stated that near railway line he had gone to case himself from where he saw accused Awadhesh Singh eating some thing in the orchard while Umashankar Awasthi (deceased) and Narmadeshwar Awasthi came near the accused. Umashankar Awasthi asked the accused that he was sitting here and still the bamboos are being cut. Thereupon accused asked him to go away otherwise from his hand a Brahman shall be killed. He further stated that thereupon Nunu Awasthi told him as to whether anybody of his family has ever committed the murder of a Brahman? Thereupon, appellant Awadhesh Singh took out country made pistol and fired at him causing his death instantaneously. Thereafter appellant Awadhesh Singh fled away. This witness went to the place of occurrence and found the deceased lying on the ground in pool of blood. In cross-examination he stated that he had seen the appellant firing by his country made pistol on the deceased. In paragraph 7 of his cross examination, he stated that he went to the place of occurrence after hearing the sound of firing. He also deposed that he was first to arrive at the place of occurrence and saw Narmadeshwar Awasthi standing near the deceased Nunu Awasthi. In the cross-examination there is nothing to suggest that he has animosity with the appellant. The learned lawyer has pointed out some contradiction in his evidence and stated that in view of his admission that he reached at the place of occurrence after hearing the sound of fire suggests that he is not an eye witness of the actual shooting at the deceased. In our opinion, this contention of the learned appellant lawyer has got no force because from a careful scrutiny of his evidence it shows that he stated that near the railway line where he was standing, heard the conversation in between accused and the deceased and just after the firing he rushed to that place and found the deceased lying in pool of blood. Therefore, there is no reason to disbelieve him

as an eye witness.

9. The evidence of P.W. 3 Parmeshwar Prasad is also to the same effect. He also stated that while he went to case himself, he heard the sound of firing and he came to the orchard and found Umashankar Awasthi in pool of blood. Nunu Awasthi was standing there and he also saw accused Awadhesh Singh fleeing away with pistol in his hand. He further stated that Narmadeshwar Awasthi told him that appellant had fired at the deceased. From his evidence it appears that he has not seen the appellant firing at the deceased but seen him fleeing from the place of occurrence with pistol in his hand. There is nothing in cross examination to suggest that he has enmity against the appellant.

10. From the evidence of the Investigating Officer P.W. 10, it appears that said orchard is under 150 yards of the railway line and he found the dead body in the orchard under mango tree where there was profuse bleeding on the earth near the dead body of Nunu Awasthi. He has seized the blood stained earth and prepared the inquest report. Therefore, the objective finding of the I.O. corroborates the ocular evidence of P.W. 3, 4 and 8.

11. From the trend of cross examination of P.W. 8 it appears that defence has tried to make out a case that P.W. 8 has enmity with both, the accused appellant Awadhesh Singh and deceased Umashankar Awasthi and that is why he himself killed the deceased and falsely implicated the accused, thereby he tried to kill two birds with one stone. This suggestion of the defence has been vehemently denied by P.W. 8. P.W. 3 and 4 have stated that P.W. 8 has no enmity with the deceased. Therefore, we do not find much force in the above submission of the appellant lawyer nor there is any cogent evidence in support of his contention.

12. The learned appellant lawyer submitted that the Fardbeyan (Ext.3) was recorded on the statement of the informant and informant learnt the facts of the occurrence from one Anil Kurmi, but surprisingly this witness has been examined as Defence witness who stated that on the date of occurrence he was at Chapra and he came to the village at 7. P.M. He has not met Narmadeshwar Awasthi P.W. 8 on that day. Thus the Fardbeyan, which is based on hear say statement, has not been supported by Anil Kurmi. Therefore, there is no relevancy of contents mentioned in the Fardbeyan. The learned A.P.P. submitted that from the trend of evidence of Anil Kurmi it is clear that he has been gained over. The learned A.P.P. further submitted that the trial court in his judgment (paragraph-10) has discussed this fact in detail from which it appears that Anil Kurmi had come to depose for the prosecution in the Court on 14.9.90 and his Hajiri with signature was filed by the A.P.P. His signature on Hajiri has been marked Ext. 7; but for some reason he did not depose in the court and thereafter he deposed as a defence witness. Therefore, no credibility should be attached to the evidence of such witness and on this ground there is no reason to discredit the Fardbeyan. Besides, the Fardbeyan is not a substantive piece of evidence but only the corroborative evidence. As discussed above, there are consistent ocular evidence in the case against the appellant which support the prosecution case

beyond doubt.

13. The learned appellant lawyer submitted that from the facts, circumstance and evidence on record it is apparent that accused appellant had no intention to kill the deceased from before. He had no personal animosity with him. There is evidence to this effect that while appellant was taking toddy in the orchard the deceased and P.W. 8 objected, and asked him that in his presence his bamboo trees are cut. This utterance caused annoyance to the appellant, thereafter altercation took place. During that altercation suddenly appellant took out pistol and fired at the deceased. Therefore his act was due to sudden provocation and it was not pre-planned murder with any intention. As such, this case shall come under the purview of section 304(2) of the I.P.C. The appellant had no intention to cause death at the time of occurrence but his act was under sudden provocation which resulted into the death of deceased Nunu Awasthi. The learned appellant lawyer further submitted that accused is in custody from the date of his arrest and he has not been let out on bail till now This occurrence is dated 9.5.88 and as such he is in custody for about 11 years.

14. The learned A.P.P. also conceded to this submission of the appellants lawyer that murder committed by the accused is not premeditated or planned one, rather it took place in course of the altercation in which the accused fired at the deceased killing him on the spot. From careful analysis of the evidence, as discussed above, and considering the facts and circumstances of the case, we are of the view that there are mitigating circumstances in favour of the accused to come to the conclusion that his act of killing was not premeditated or planned one, rather it was his sudden act, therefore, his case will come under the purview of section 304(2) of the I.P.C. He is accordingly found guilty for the offence u/s 304(2) of the I.P.C. and not u/s 302 of the I.P.C. as found by the learned trial court. Accordingly, his sentence is altered from section 302 I.P.C. to section 304(2) of the I.P.C. and he is sentenced to the period already undergone. The learned trial court has rightly found him guilty u/s 27 of the Arms Act and sentenced him for three years R.I. His conviction and sentence u/s 27 of the Arms Act is hereby confirmed. With this modification in the judgment and order of the trial court the appeal fails. The appellant has been in jail custody for more than 11 years, hence he is directed to be released forthwith.