
(2000) 04 PAT CK 0022
In the Patna High Court
Case No : Criminal Appeal No. 55 of 1992 (R)

Awani Sao @ Awani Kumar Sao and Others
Vs

APPELLANT

State of Bihar

RESPONDENT

Date of Decision : 27-04-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 360
Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 323

Citation : (2000) 2 BLJR 1520

Hon'ble Judges : A.K. Sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.K. Sinha, J.—This appeal has been directed against the judgment/order of conviction and sentence passed by 2nd Addl. Sessions Judge. Jamshedpur, in S.T. No. 671/1 of 1986-89, whereby and whereunder the learned Court below convicted all the appellants u/s 147 of the Indian Penal Code and the appellant Nos. 1 and 2 were convicted under Sections 325/34 as also u/s 436 of the Indian Penal Code. The appellant Nos. 3 to 28 were, however, released after due admonition u/s 360(3) of the Code of Criminal Procedure for their conviction u/s 147 of the Indian Penal Code, but appellant Nos. 1 and 2 were sentenced to undergo R.I. for period of one year u/s 147 of the Indian Penal Code. The appellant Nos. 1 and 2 were further sentenced to undergo R.I. for a period of 3 years under Sections 325/34, I.P.C. and R.I. for ten years u/s 436 of the Indian Penal Code. However, all the sentences were to run concurrently.

2. The relevant facts, concerning this appeal are as under:

The F.I.R. of this case was lodged on 16.11.1985 at 7.30 p.m. by the informant, namely, Surendra, Nath Bera of village Kesarda at Bahragora police station, who alleged that on the same day at about 6.30 a.m., while he was standing in front of his house, all of a sudden accitised Ram Chandra Sah being armed with sword along with his sons Bhawani Sah and Awani Sah who were armed with Lathi

came followed by about 30-34 persons, who were armed with arrow and bow and they were announcing to do away the life of the informant and by making such announcement accused Ramchandra Sao is alleged to have assaulted the informant with sword on his head causing bleeding injury to him. Thereafter, Bhawani Sah and Awani Sah assaulted the informant indiscriminately with lathi, on account of which, the informant sustained injuries. The mob was making hulla and announcing to set fire to the house of the informant. Thereupon, Bhawani Sah and Awani Sah set fire to the house of the informant, which was witnessed by Durga Bera. The informant has given the names of the persons, who had formed unlawful assembly and were the members of mob and it is alleged that some of the accused-persons were pelting stones on the house of the informant. It is further alleged that as a result of setting fire, the house of the informant along with all the assets and several articles valued Rs. 30,000/- were burnt. The informant has named Durga Pado Bera, Awani Bank, Nirmal Kximar Bera, Bhuteshwar Bera, Amulyo Bera and others as the witnesses to the alleged occurrence and motive assigned in the F.I.R. is that there are two groups in the village and two cases u/s 107 of the Code of Criminal Procedure are going on between the two groups and the accused-persons committed the occurrence on account of party politics and groupies in the village. The Police investigated the case and submitted charge-sheet against the appellants tinder Sections 147, 148, 149 and 307/436 of the Indian Penal Code on the basis of which cognizance was taken, the case was committed to the Court of Sessions and the Session Court also framed charges under the aforesaid counts, to which the appellants pleaded not guilty and it was the specific defence of the appellants that the accused-persons have been falsely implicated in this case and as a matter of fact, the accxised Ramchandra Sao was murdered and his dead body was made trace-less and in order to save themselves the informant and his party men lit fire in the thatched house in a planned manner to implicate the accused-persons in a case of arson.

3. The learned trial Court, however, convicted the appellants and passed order of sentence in the manner as stated above.

4. Being aggrieved with and dissatisfied by the impugned judgment/order of conviction and sentence the present appeal has been preferred on the ground that the learned Court below was not justified in convicting and sentencing the appellants, inasmuch, as the prosecution has failed to prove the charges levelled against them, in view of the numerous contradictory statements made by the witnesses in their evidence and most important witnesses in this case was the I.O., who was not examined by the prosecution nor any satisfactory explanation was given for non-examination of the I.O. As such, non-examination of I.O. renders the whole prosecution version doubtful, but still the learned trial Court convicted the appellants by ignoring the material facts.

5. In this case, altogether 8 witnesses were examined by the prosecution and the defence also examined one witness. Out of the prosecution witnesses, P.W. 1

Shyamal Sarkaf is a formal witness to prove the F.I.R. (Ext. 1) and P.W. 8 is another formal witness who has proved the writing of the case diary (Ext. 3) and there is nothing worth to comment in the testimony of P.W. 1 and P.W. 8.

6. Before I proceed to discuss the evidence, facts and circumstances of the case, I must say at the very outset that it is a well-settled principle of law that the prosecution must prove its case beyond all reasonable doubts before an accused can be convicted of the charges. In the instant case, from the very beginning, the specific case of the defence is that accused Ram Chandra Sao, who is said to have assaulted the informant with sword on his head, was murdered by the informant and his men and in order to save themselves, the informant has falsely implicated the appellants. It is an admitted position that the murder case was instituted against the informant and others for the commission of murder of Ram Chandra Sao and the defence has proved fardbeyan Ext. A, which relates to Bahragora P.S. Case No. 120 dated 16.11.1985 under Sections 364/323/341 of the Indian Penal Code, lodged by the-wife of Ram Chandra Sao against Bisheshwar Bera, Durga Bera, and others, in which it was alleged that on 16.11.1985 at the time of sunset the accused-persons assaulted Ram Chandra Sah with fists and blows in spite of the protest made by him and when son of the informant, namely, Bhawani Sah came out of the house the accused-persons assaulted him also and thereafter, they took away Ramchandra Sah with an intention to commit his murder. It has been admitted by the witnesses that Ramchandra Sail was never seen in the village after the aforesaid occurrence, inasmuch, as P.W. 2 and P.W. 3 their evidence have admitted this fact. The witnesses have also admitted that the bone of the dead body of Ramchandra Sao was found in a pond, later on which was seized by the police. Therefore, in the background of the defence version and the admitted facts as aforesaid, the case of the prosecution has to be examined to find out as to whether the prosecution case is above board.

7. The prosecution witness No. 2, namely, Nirmal Kumar Bera and P.W. 3, namely, Amulya Kumar Bera are the own brothers of the informant, whereas P.W. 4 Awani Barik is an accused in the counter-case. P.W. 5, namely, Nalini Basuri claims himself to be an eye-witness, P.W. 6, Dr. A.K. Singh is the doctor who had examined the injuries of the informant and P.W. 7 is the informant himself. The I.O. of the case has not been examined by the prosecution without giving any satisfactory explanation whatsoever. Admittedly, I.O. had visited the place of occurrence on that very date. The witnesses have admitted this fact that the I.O. had not seized any material from the place of occurrence, although, it is alleged that the entire household articles including the house were burnt in the alleged fire, which means that the I.O., if actually, visited the place of occurrence, must have found some burnt household articles, which should have been seized by him, but the fact remains that nothing was seized by the I.O., inasmuch, as no seizure-list was prepared by the I.O. in that regard. The witnesses have also admitted this fact that the I.O. had not seized any material from the place of occurrence, which creates reasonable doubt and the I.O. was the best person to

explain as to under what circumstances he did not seize any article from the place of occurrence. That apart, the I.O. was the best person to explain about Ramchandra Sao, who was subsequently murdered, but the prosecution withheld the I.O. purposely and the defence was certainly prejudiced on account of his non-examination. In such view of the matter, non-examination of the I.O. is not only prejudicial to the defence case, rather, it renders the prosecution story highly doubtful. The non-examination of the I.O. further prejudiced the defence because several contradictions elicited by the defence in the statements of the P.Ws. examined by the prosecution, could not be verified from him. Therefore, this is another aspect of the matter, on account of which, the defence was highly prejudiced. There are varying versions in the statements of the witnesses as regards the place of occurrence where assault took place, inasmuch, as according to the F.I.R. The informant was standing in front of his house, where the assault took place, but the witnesses stated otherwise and the I.O. was the best person to prove the exact place of occurrence and due to his non-examination, I must say, that the exact place of occurrence has not been established by the prosecution beyond all reasonable doubt.

8. So far, injuries sustained by the informant are concerned, according to the F.I.R., it was Ramchandra Sao who had assaulted the informant with sword on his head causing incised injury to him and accused-appellant Nos. 1 and 2 are alleged to have assaulted him indiscriminately with lathi, which must have caused several injuries to him. but the injury report (Ext. 2) goes to show that the informant sustained only 3 injuries, out of which one was incised injury and only two injuries caused by hard and blunt object were found on his person, which are lacerated wound on the ulnar border of right forearm in lower 1/3 size 1/2" x 1/2" with fracture of ulnar shaft caused by some hard and blunt substance, an other lacerated wound on the ulnar border of left forearm 1/2" x 1/2" Caused by hard and blunt substance. Although, the allegation in the F.I.R. is that appellant Nos. 1 and 2 assaulted the informant indiscriminately with lathi, but only two injuries alleged to have been caused by lathi i.e. hard and blunt substance were found on the person of the informant which rules out the possibility of indiscriminate assault with lathi on the informant.

9. P.W. 6 Dr. A.K. Singh has been examined by the prosecution and he deposed that injury No. 2 was a fracture of bone and he has proved his injury report Ext. 2. It does not appear from his evidence that he had taken any X-ray with regard to the injury No. 2 in order to find out as to whether it was fracture or crack or there was no fracture. P.W. 6 ought to have given his opinion regarding the injury No. 2 after X-ray, examination which he did not do and in absence of any X-ray, it is difficult to accept that injury No. 2 was really fracture, which was grievous in nature and, as such, the prosecution failed to establish the charge under Sections 325/34 of the Indian Penal Code against appellant Nos. 1 & 2 beyond reasonable doubt. P.W. 6, however, admitted in his cross-examination that so far as injury No. 2 and 3 are concerned, they may be possible, by fall on rocky surface. Therefore, if the possibility of fracture is ruled out then the possibility of

sustaining simple injuries by the informant on account of fall cannot be ruled out.

10. Now coming to the allegation regarding the setting fire by appellant Nos. 1 and 2 in the house of the informant, I may point out that it has been alleged in the F.I.R. that Bhawani Sah and Awani Sail set fire to the house of the informant but there is no whisper in the F.I.R. that by what means the fire was actually ignited, although, subsequently, the witnesses have developed the story that both of the them ignited fire by using "Mashal". Therefore, I must say that that part of the evidence of the witnesses is not worth belief. From the F.I.R. (Ext. 1) itself, it would be seen that according to the informant, it was only Durga Bera, who had seen the appellant Nos. 1 and 2 setting fire in the house. So, the informant has excluded the possibility of seeing the alleged occurrence of setting fire by the other P.Ws., who claimed to have seen the appellant Nos. 1 and 2 setting fire in the house of the informant. Had it been the fact that P.Ws. 2 to 5 had also seen the appellant Nos. 1 and 2 setting fire to the house of the informant, this important fact must have been stated in the F.I.R. (Ext. 1), which was the earliest version, but I find that only the name of Durga Bera has been mentioned as the witness, who had seen the appellant Nos. 1 and 2 setting fire to the house of the informant. Amazingly, the said Durga Bera though closely related with the informant and is an accused in the counter-case instituted by the mother of the appellant Nos. 1 and 2 has been withheld by the prosecution and he was not examined to support the narration of the informant in the F.I.R. This circumstance goes against the prosecution that Durga Vera who was the best competent witness to depose on the point of setting fire to the house of the informant, by the appellant Nos. 1 and 2 was not examined by the prosecution purposely because if he would have been examined then the truth might have come from his mouth and due to that fear the prosecution had not examined him.

11. Regarding setting fire to the house of the informant, I find that there are contradictory versions in the evidence of the witnesses. P.W. 2 Nirmal Kumar Bera, who is the own brother of the informant and, as such, a highly-interested witness stated in paragraph 49 of his evidence that the accused-persons had lit fire with "Mashal" but P.W. 4 has contradicted his statement by saying that the accused-persons had set fire with match-stick. He has not specifically stated that who amongst the two had lit the match-stick. Therefore, it will be found that the prosecution witnesses have contradicted themselves on the material point regarding means by which fire was lit and I have already stated above that there is nothing in the F.I.P. to show that by what means fire was lit. In this connection, I may point out an important circumstance that P.W. 4 has admitted in his cross-examination that the house of the accused Ramchadra Sao, who was the father of appellant Nos. 1 and 2, is situated at a distance of 8 to 10 cubits from the house of the informant. In such circumstances, the story propounded by the prosecution that appellant Nos. 1 and 2 set fire to the house of the informant becomes doubtful because if the appellant Nos. 1 and 2 would have set fire in the house of the informant, there was every chance that fire must, have spread and the house of the appellant Nos. 1 and 2 could also have been

burnt, which was situated in such a close distance. Therefore, no prudent man will take such risk to set fire to the house of neighbour situated close to his house. Therefore, this circumstance also throws doubt on the prosecution story that the appellants Nos. 1 and 2 had set fire to the house of the informant, which is not worth belief and probable. Apart from that, it would be found that P.Ws. 2 and 3 have admitted in their evidence that there were 25 to 30 persons, who had assembled there when the house of the informant was burning but no attempt, whatsoever, was made by any of them to extinguish the fire. P.W. 2 and P.W. 3 have also admitted that they used to live with their family in the same house, which means that there must have been female members, children living in the house but surprisingly no body tried to extinguish the fire and they allowed the house to be burnt along with all the articles and put the lives of female members at risk. This goes to show that the case of the prosecution is against the natural human conduct, inasmuch, as the natural human conduct of the informant and his family members and other villagers who were present when the house was burning would be that they must have tried to extinguish the fire. Even the strangers participate in such matters, but it is really surprising that no body moved an inch to save the house from being gutted. Therefore, this circumstance lends support to the defence version that probably such an attempt was not made by the informant or members of his family or the persons, who were present at the scene, because it was planned to burn the house and implicate the appellants after concocting a false case.

12. There is contradiction in the statements of witnesses, regarding the manner of setting fire, inasmuch, as the F.I.R. is conspicuously silent as to whether appellants No. 1 and 2 set fire in the straw or in the door plank or any other part of the house but the witnesses have developed the story. At the cost of repetition, I may say that one witness said that fire was lit in the straw of the thatched roof of the house, whereas, other witnesses have stated that it was lit in the plank of the main door of the house. The alleged occurrence took place in the month of November and the witnesses have stated that fire was lit by match-stick which is highly improbable because, it is not possible that by lighting match stick the fire can catch in the door of the house and the door was burnt. This circumstance also goes to show that the prosecution version regarding setting fire in the house of the informant by the appellants Nos. 1 and 2 is nothing but a cock and bull story.

13. On the point of assault also as indicated above, it looks highly improbable that the informant, who was attacked by the appellants, as I also by a mob of 30-35 persons, will sustain only two injuries caused by I hard and blunt substance which were found on the person of the informant. On the point manner of assault also, the witnesses have contradicted their statements. P.W. 2 has stated that after the assault the informant was carried to bus stand on a cot but P.W. 7 informant has himself stated that he went to the bus stand by sitting on the back seat of the bicycle which means that he was conscious but the witnesses have stated that soon after the occurrence the informant because

unconscious. P.W. 2 in paragraph 25 of his cross-examination has stated that he saw the occurrence from 10-15 metres and he could not have identified the accused-persons by face from that distance because it was the month of November and the alleged occurrence took place at 6.30 p.m. so, naturally it was not possible for P.W. 2 to witness the assault or to identify the assailants. Therefore, the evidence of P.W. 2 on the point of manner of assault does not inspire confidence to believe. In paragraph 34, P.W. 2 has stated that his brother (informant) was assaulted at a distance of 10-15 metres from his house which contradicts the prosecution case as the informant stated that he was assaulted informant of his house. In paragraph 40 P.W. 2 has stated that he took the informant from the bus stand by Metadoor to T.M.H. where his brother remained admitted for about 15/16 days but neither any body from T.M.H. has been examined nor a chit of paper has been filed to show that the informant was actually admitted in T.M.H. and received any treatment. This witness has stated that his brother had become unconscious (paragraph 44) and he could not say as to whether his brother learnt about the alleged fire in his house. If the informant became unconscious and nobody informant him about setting fire in his house, it was not possible for the informant to say in the F.I.R. that appellant Nos. 1 and 2 set fire in his house. To my utter surprise I find that P.W. 2 said in paragraph 56 of his cross-examination that he proceeded to bus stand as soon as the fire was ignited, this witness stated that 10-12 persons were present in the house when fire was ignited and nobody could remove any article from the house which looks highly improbable. In paragraph 60 this witness has stated that the accused-persons had not set fire to the door of the house, but his own brother (P.W. 3) has stated that the accused-persons had set fire in the door of the house. Therefore, it would be found that there are numerous contradictions in the statements of two witnesses regarding the manner and means, by which the alleged fire was set to the house.

14. P.W. 4 Awani Karim, who claims to arrive at the place of occurrence, has admitted that he is also an accused in the counter-case and very fairly admitted that he did not see Ram Chandra Sao again after the alleged date of occurrence. This witness, however, stated that after the assault the informant was not taken to his house, rather he was taken to the house of Presh in unconscious condition, from where he was taken to the bus stand on Bicycle but the informant (P.W. 7) himself has stated that he did not become unconscious after the assault and he was made to sit in front of the house on a cot and he also stated that the accused-persons did not repeat the assault. Therefore, it appears that the witnesses who are highly interested-witnesses have contradicted their statements on the manner of occurrence and the subsequent events connected with the occurrence and as such, their evidence does not inspire confidence to believe.

15. After considering all the facts and circumstances of the case and in view of the discussion made above, I have no doubt to hold that the prosecution had not proved the charges levelled against the appellants beyond all reasonable doubts

and in view of the circumstances pointed out above, it appears that the prosecution version is quite doubtful in view of the specific case of the defence which has been referred to above. I, therefore, hold the appellants not guilty of the charges levelled against them and acquit them of the same. Consequently, the judgment/order of conviction and sentence recorded by the learned Court below against the appellants are hereby set aside.

16. In the result, therefore, this appeal is allowed. The appellant Nos. 1 and 2 are discharged from the liability of their respective bail-bonds. The remaining appellants have already been released earlier by the trial Court after admonition u/s 360(3), Cr.P.C.