
(2015) 01 PAT CK 0114

In the Patna High Court

Case No : Criminal Appeal (DB) No. 136 of 1993

Bauelal Jha

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 27-01-2015

Acts Referred:

Arms Act, 1959 — Section 27
Penal Code, 1860 (IPC) — Section 302

Citation : (2015) 3 PLJR 103

Hon'ble Judges : N.P. Singh, J;Anjana Mishra, J

Bench : Division Bench

Advocate : Abul Kalam and Raj Kumar No. 5, for the Appellant; Ajay Mishra, Advocates for the Respondent

Final Decision : Allowed

Judgement

N.P. Singh, J—The present appeal has been filed by the sole-appellant being aggrieved and dissatisfied with the judgment of conviction dated 27.1.1993 and order of sentence dated 9.2.1993 passed by the learned Sessions Judge, Begusarai in Sessions Trial No. 8 of 1991, by which the learned Sessions Judge has convicted the appellant under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life. It may be noticed here that the appellant was released on bail by this Court by order dated 14.5.1999, having already spent about 9 years in jail custody. The prosecution case is based upon the fardbeyan of one Ram Sumiran Singh (P.W. 6) as recorded at Balia Police Station in the districted Begusarai on 13.6.1990 at about 6:45 am. Ram Sumiran Singh (P.W. 6) informant is, the father of deceased Mithu Singh. In the, fardbeyan it is, inter alia, alleged that at about 4 pm on 12.6.1990, while the informant was cutting grass near the Gandak Bandh, his son, Mithu Singh was grazing the buffaloes. Biku Singh (P.W. 3), Lallu Singh (P.W. 7) and Ghuran Paswan (P.W. 2) were also grazing their buffaloes along with the informant's son, Mithu Singh. Being tired, they were resting under a Shisham tree. He saw that the appellant came with two of his buffaloes and asked the deceased, Mithu

Singh, age about 23 years, to take charge of grazing his two buffaloes as well. Mithu Singh (deceased) refused, on which, allegedly, the appellant started abusing him. Mithu Singh requested the appellant not to abuse him. Then, he took out his countrymade pistol and shot Mithu Singh hitting him on the palm and bullet then lodging in the neck Mithu Singh died on the spot. When the informant and others tried to defend the appellant, he is supposed to have reloaded his pistol and threatened the rest. He then escaped leaving the buffaloes. Thereafter, the villagers assembled. The village Chowkidar was then searched and he could not be found. Accordingly, on the next morning, this fardbeyan was being lodged at the police station at about 6:45 am. It is on 13.6.1990 at about 6:45 am this formal F.I.R. was registered against the appellant under Section 302 of the Indian Penal Code (in short "IPC") and Section 27 of the Arms Act. Then, the Sub-Inspector of Police, Pramod Kumar (P.W. 8), Investigating Officer comes to the village and the place of occurrence, prepares the inquest report (Ext.-4) and sends the body for post mortem. The post mortem is done on the same day i.e. on 13.6.1990 at about 2:30 pm by Dr. Prakash Nandan Singh (P.W. 1) and the post mortem report is Ext.-1. The post mortem report confirms shooting at close range, whereby the bullet penetrates the palm and then lodges in the neck. The bullet is also recovered but let it be noted, that it is not sent for forensic examination. The Investigating Officer, Pramod Kumar (P.W. 8) then picks up bloodstained mud, again it is not sent for forensic examination. What is more important is, he picks up the empty cartridge from the place of occurrence and it is witnessed by the two seizure list witnesses, Umesh Singh (P.W. 4) and Udit Singh (P.W. 5). The appellant is arrested and, ultimately, a charge-sheet is filed under Section 302 IPC read with Section 27 Arms Act. The learned Magistrate takes cognizance of the offences as charged and commits the case to the Court of Sessions. The appellant is then charged only under Section 302 IPC to which he pleads not guilty. We will advert to the charge at appropriate stage. He is tried and convicted. Hence, this appeal.

2. Learned counsel for the appellant submits that if one refers to the charge then serious prejudice has been caused to the appellant because of improper or erroneous charge. He draws attention of the Court to the fact that the charge is that the appellant is supposed to have murdered Mithu Singh on 12.6.1990. There is no charge or no factual circumstances in support thereof. In other words, he has not been charged of shooting and killing the deceased, Mithu Singh. Learned counsel for the appellant would submit that there being no charge of shooting and no charge under Section 27 of the Arms Act is made put in spite of the fact that empty cartridge was found. The death was because of bullet injury and the bullet was recovered from the body. No facts or nothing of this nature was mentioned in the charge. The prosecution could not even be permitted to lay evidence" in support thereof and the defence was not required to defend what was not in the charge. He then submits that as per the finding of the teamed Sessions Judge himself, the appellant was a very young boy verging between minority and majority. He belonged to a Brahmin family. There being

evidence that having passed his matriculation examination, he used to perform prayers and religious rituals in houses. How could he ask the deceased, Mithu Singh, who was about 23 years of age and of a dominant Rajput caste, to graze his buffaloes and on refusal shoot him? These are totally unnatural sequence of events. He then submits that the delay in lodging the F.I.R. and then the F.I.R. reaching the Court, after three days, is not satisfactorily and adequately explained raising grave suspicion about the correctness of the allegations. He points out that the occurrence took place at about 4 pm on 12.6.1990, the fardbeyan was lodged at 6:45 am on 13.6.1990 and the case was registered immediately at the police station itself. The F.I.R. is then allegedly sent by the Special Messenger which reaches the Court only on 15.6.1990. There is no explanation. Lastly, it is submitted that the prosecution not having proved that the appellant was at any point of time owning two buffaloes, rather defence having brought evidence to clearly state that the appellant or his family did not possess any buffalo and the defence having suggested false implication because of grudge, the appellant cannot be convicted.

3. Prosecution has examined in all eight witnesses to establish its case. P.W. 1 is Dr. Prakash Nandan Singh who performed the post mortem and submitted the post mortem report (Ext.-1). We have already indicated the injuries as found by him.

4. We then come to P.W. 2, Ghuran Paswan. He is one of the persons who is mentioned in the F.I.R. itself having seen the occurrence and shooting the appellant when he was sitting under a Shisham tree. He has fully supported the prosecution case in his examination-in-chief. When it comes to cross-examination, he admits that his uncle Uchit Paswan used to work for the father of the appellant and there had been disputes because of which he had filed cases under the Minimum Wages Act against the father of the appellant for paying less than what was due. In paragraph-7 of his cross-examination, he states that after the incident, the informant Ram Sumiran Singh (P.W. 6) and his brother Thethar Singh came to the place of occurrence. Thethar Singh, the brother of the informant, has not been examined in the Court. He admits in his cross-examination that number of villagers turned up at the place of occurrence but the Investigating Officer did not make any enquiries from them. He clearly suggested that the accused did not have any buffalo which obviously he denied.

5. We then have P.W. 3, Biku Singh who is again one of the persons mentioned in the F.I.R. as eye-witnesses. He again supports the prosecution case- So far as occurrence is concerned, he admits in his cross-examination that his father and one Rajpati Singh are brothers. Rajpati Singh has son Sato Singh and Sato is cousin. He admits that Sato Singh and Dina Nath Jha, the father of the appellant, are in inimical terms from before. In his cross-examination, he admits that the appellant after the shoot out abandoned his two buffaloes and ran away but, he admits that after the villagers came, even though the appellant was of the same village, no one went to his home looking for him.

6. We then have P.W. 4, Umesh Singh. He is witness to the seizure list including the inquest and the empty cartridge. In his cross-examination, he states that it was the village Chowkidar who had gone to call the police and he had come along with the police to the place of occurrence where the body was lying. Police had come on 13.6.1990 and had drawn up the inquest report, which is Bxt.-4, on which he had signed. The inquest report is drawn up at about 8 am on 13.6.1990.

7. We then have P.W. 5, Udit Singh who is also a witness to the seizure list including that of the empty cartridge. He states that when the report was being prepared there were lots of villagers there.

8. We then have P.W. 6, Ram Sumiran Singh, the informant himself. The first thing to be noticed is that he states that first they asked the village Chowkidar to go and inform the police in the evening. The village Chowkidar went but could not meet the S.I. He returned. In the next morning, the informant went and met the S.I., Pramod Singh, the Investigating Officer (P.W. 8) at the Balia Police Station where his statement was recorded on which he signed and on the basis of which the F.I.R. was instituted, which is Ext.-3. In the cross-examination, he was suggested that the informant's family had a criminal history. His cousin had been shot in the police encounter. His son was a hardened criminal. He denies criminal cases against his family members. He admits that he was a Rajput and that the accused had never before asked him or his son to graze his cattle. He admits that the accused is a neighbour. In his cross-examination, he changes and improves upon the story of Chowkidar. He states that he had sent his relation Yogendra Singh (not examined) to the Chowkidar but the Chowkidar was not located. The Dafadar was also not located in the village but the Mukhiya had come to the place of occurrence. Neither the Chowkidar nor the Dafadar nor the Mukhiya had been examined. This statement should be seen in his examination-in-chief that the village Chowkidar went but did not meet the S.I. The two statements are contradictory. He is then given two suggestions. One that as he had married a Bengali lady after abducting her. The father of the appellant refused to perform religious ceremony in his house, which was reason for the false implication. Then, it was, after his son was shot by the miscreants. The prosecution sat down over night to think how to implicate and whom to implicate and there was inordinate delay of 12 hours in lodging the F.I.R. Of course, he denies the two suggestions.

9. We then have P.W. 7, Lallu Singh who is also mentioned in the F.I.R. as eye witness and has been tendered. In his cross-examination, he states that he does not even know the deceased. The law with regard to tendered witnesses has been settled by the Supreme Court in the case of Sukhwant Singh Vs. State of Punjab, AIR 1995 SC 1601 : (1995) 2 Crimes 148 : (1995) 3 JT 495 : (1995) 2 SCALE 482 : (1995) 3 SCC 367 : (1995) 2 UJ 29 . It should be taken had the witness spoken, he would have spoken adverse to the prosecution.

10. We then have P.W. 8, Pramod Kumar, the Investigating Officer. He admits in his cross-examination that there were large number of persons who were present

there and who were interrogated but not all of them have been put as prosecution witness. He admits that he had seized empty cartridges but he had not sent them for forensic examination. He only confirms the place of occurrence and death by shooting. He does not seem to have helped any further the prosecution.

11. Having examined the evidence aforesaid, the prosecution case is that the appellant on refusal of deceased to graze his two cattle shot the deceased and escaped. But, what is the charge, there is no charge of shooting. There is no shooting by using firearms. There is no charge under Section 27 of the Arms Act. The charge is of murdering the deceased without any facts or manner in relation thereto. That being the charge, in our view, the essential part of the occurrence did not form part of the charge. The manner of occurrence was not stated at all. If that be so then the accused was required to defend himself to a non-existent charge. In our opinion, No. Serious prejudice had been caused in absence of a charge of use of firearms. However, we would not rest our judgment on this aspect alone.

12. So far as the manner of occurrence is concerned, though the prosecution evidence is consistent, it does not inspire confidence. The reason being that there is no plausible and/or reasonable explanation for the delay in lodging the F.I.R. One witness is said that the village Chowkidar was immediately sent to the police station but did not meet the S.I. He came back then waited the whole night - and the next morning the informant himself went and lodged the F.I.R. This is not acceptable. If the village Chowkidar had gone to the police station and even if the S.I. was not there he still could have lodged the F.I.R. there and returned. It would have been entered as a Sanha entry if not as a fardbeyan. Therefore, someone had gone to the police station in the evening is wrong. When we come to the evidence of the informant himself he states that the village Chowkidar was not to be found. The Dafadar was not to be found. but the Mukhiya had come then why did anyone not take steps to inform the police. It must be remembered that it was mid June and it is hot and the days are very long. The incident took place at about 4 pm. The Police Station was about 14 Kms. and the highway was only at very short distance from the village (about 150 yards) still no one took steps to inform the police. What is further of importance is that even though the F.I.R. was registered at 6:45 am on 13.6.1990, it reaches the Court on 15.6.1990, i.e., three days after the occurrence. That remains totally unexplained and raises serious doubts about the correctness of the case. That apart from the consistent suggestion of the defence that the deceased was of criminal antecedent suggesting thereby that he might have been killed and only in the morning his body, was found and police was informed or body having been found in the evening and not knowing who had done it and the whole night the plans were made to implicate the appellant. There was a grudge among the appellant, witnesses and the informant. We cannot thus rule out false implication.

13. Another important aspect is that appellant was said to have taken two of his buffaloes for grazing. It was thus essential for the prosecution to prove that appellant or his family had buffaloes. A suggestion was given to the prosecution witness that the appellant or his family does not have buffalo. Biku Singh (P.W. % has said that at least for last 10 years the appellant or his family does not have buffalo. That strike at the root of the genesis.

14. Another aspect as per the Court own assessment is that the appellant would be about 18 years of age at the time when the offence was committed. He being a Brahmin, it is not expected that he would order a Rajput boy of 23 years to graze his buffaloes and that too other persons including the father of the deceased was present there and on refusal he would be carrying the pistol to shoot the boy. We are unable to accept this as a natural conduct. For the reasons aforesaid, the appeal is allowed and the judgment of conviction dated 27.1.1993 and order of sentence dated 9.2.1993 passed by the learned Sessions Judge, Begusarai is set aside. The appellant is relieved from the liability of his bail bonds.