
(2010) 03 PAT CK 0050
In the Patna High Court

Bhagwan Sahni

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 30-03-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 34, 396

Citation : (2010) 03 PAT CK 0050

Hon'ble Judges : Shyam Kishore Sharma, J;Dinesh Kumar Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Shyam Kishore Sharma and Dinesh Kumar Singh, JJ.—This appeal has been filed by the sole appellant Bhagwan Sahni who has been convicted u/s 396/34 of the Indian Penal Code by judgment dated 26.12.2005 passed in Sessions Trial No. 78 of 2002/160 of 2004 arising out of Chak Mehshi P.S. Case No. 17 of 2001 and has been sentenced by order dated 28.12.2005 to undergo rigorous imprisonment for life.

2. In short, the prosecution case relates to an occurrence dated 7th March, 2001 at about 7.00 P.M. On that date, Bipin Kumar Singh (P.W.7) gave his fardbeyan before the Officer-in-charge of Chak Mehshi Police station, district Samastipur that he was having a brick kiln since last five years. The criminals were making extortion calls. One of the criminals Maheshwar Rai, resident of village Shivrinar Tepari, P.S. Piar, District Muzaffarpur had demanded the ransom amount and when amount was not paid, then occurrence occurred on 7.3.2001 at 7.00 P.M. when 15-20 persons variously armed with fire arms came and attacked upon the house of the informant (P.W.7) and due to indiscriminate firing by the criminals informant's younger brother Binay Kumar Singh (P.W.6) sustained injuries. He tried to save himself by hiding inside the room but the door was opened by the criminals and they attempted to fire upon him. Manjesh Rai son of Maheshwar Rai was identified amongst the criminals by the informant. Informant's father

identified another criminal who was Maheshwar Rai and he asked as to why he was doing like that. This invited the firing by Maheshwar Rai upon the informant's father who received fire arm injury and succumbed. The criminals looted Rs. 68,000/- in cash and gold ornaments. At the time of occurrence, three persons were concealing their identities by covering their faces whereas others were unmasked. The motive of the occurrence is non-payment of illegal extortion demands. The information of the informant resulted in a case u/s 396 of the Indian Penal Code against two named accused Maheshwar Rai, his son Manjesh Rai and 18 unknown. The matter was investigated into. During investigation, the appellant was caught by the informant and villagers. He was handed over to the police where he confessed that he was one of the participants of the occurrence which has led to the killing of informant's father. After investigation chargesheet was submitted only against the accused-appellant keeping the investigation against the rest accused pending. Cognizance against the accused-appellant was taken and the case was committed to the court of Sessions where charge u/s 396 of the Indian Penal Code was framed against him who pleaded innocence and preferred to be tried.

3. The defence of the appellant was of false implication and also that he has been implicated because he had tried to raise the voice of labourers who were working under the informant.

4. In order to prove its case, the prosecution has examined altogether 8 witnesses. They are: P.W.1 Gopal Jha, P.W.2 Harish Chandra Jha, P.W.3 Kamal Kishore Singh, P.W.4 Kuldeep Sahani, P.W.5 Bhola Pratap Singh, P.W.6 Binay Kumar Singh, P.W.7 Bipin Kumar Singh (informant of this case) and P.W.8 Dr. Baikunth Prasad Sinha, a retired doctor. Braj Lal Prasad Sinha has been examined as a Court witness. Prosecution has exhibited the post mortem report of the deceased as Ext.4, Fardbeyan as Ext.1, Formal F.I.R. as Ext.2, Signatures of Kuldeep Sahni and Bhyola Pd. Singh on the seizure list as Ext.3 and 3/1 respectively, signature of the informant on the fardbeyan as Ext.1/1 and original case diary as Ext.5.

5. The trial court after taking into consideration the evidences on record found the accused-appellant guilty. So he has been convicted and sentenced, as stated above.

6. This Court has to see whether the prosecution has been able to prove the charge against the appellant beyond the shadow of all reasonable doubts or not.

7. P.Ws. 1 and 2 are formal witnesses. P.W.3 is a seizure list witness and he is not a witness of the occurrence but he has stated that on 23.4.2001 while he was at chimini, a boy came and asked the Manager Narendra Kumar that extortion money was to be sent to Maheshwar Rai. That boy was over-powered and was handed over to the police. The said boy confessed that he was also one of the participants of the occurrence. In corss-examination, he has stated that he was working at the Chimini of the informant for the last one year and at the said

Chimini 50 to 60 labourers were working. Suggestion was given to this witness that the person handed over to the police was minor as his age was about 15 years and it was also suggested that he has been implicated falsely in this case. P.W.4 is also a seizure list witness and he had not gone to the Chimini. He is not a witness of the occurrence. P.W.5 is a person who had come at the place of occurrence after the offence of dacoity and murder was committed. He has supported the factum of seizure.

8. P.W.6 Binay Kumar Singh, who is brother of the informant, is an injured witness of the occurrence and he has stated that at about 7.00 P.M. while he was in the Aangan, 5-6 persons came and fired. He tried to escape and for hiding himself entered into a room but it was broken due to pressure of the criminals. This witness was caught by Maheshwar Rai. At that very time, father of this witness asked as to why they were catching his son. The criminals fired upon the father of this witness which proved fatal. After the occurrence the villagers assembled. The police also came and took fardbeyan and prepared seizure list.

9. P.W.7 Bipin Kumar Singh is the informant of the case and he has supported the factum of occurrence. It has been stated by this witness in his evidence that the date of occurrence was evening of 7th March, 2001. The dacoity was committed in his house in which his father was killed, Rs. 68,000/- and gold ornaments were taken away by the criminals. This witness has put his signature on the fardbeyan which has been marked as Ext.1/1 and has supported the factum of dacoity and murder. About role of the appellant, this witness has stated that he came to know that a person was caught and thereafter he was handed over to the police. This witness had participated in the test identification parade and has identified the appellant.

10. P.W.8 is Dr. Baikunth Prasad Sinha who has conducted the post mortem examination over the dead body of Hari Keshav Prasad Singh and has found the following ante-mortem injuries:

- (i) Incised wound 3"x1/2"x muscle deep over left arm laterally in middle.
- (ii) Incised wound 1" x 1/3"x skin deep oblique only lateral aspect of left forearm in middle, red in colour. Communicating wound round in shape inverted marking J over front of chest medial to the left nipple.
- (iii) chest cavity deep 3/4" in diameter blackening and charring of skin surrounding the injury present, blood clots present in the wound (wound of entry).
- (iv) Incised wound 3"x1/2" muscle deep over left shoulder red in colour, blood clots present in the wound.

The death, according to opinion of the doctor, was due to shock and haemorrhage caused by the above mentioned ante mortem injuries. The injuries may be caused by gun. The time elapse since death is about 24 hours.

11. There is consistent evidence that on the date of occurrence i.e. on 7.3.2001 at about 7.00 P.M. a dacoit was committed in the house of the informant in which his father was shot dead by the dacoits. There is also consistent evidence with regard to the death on account of use of fire arm and time given by the doctor is almost the same as has been alleged by the informant and other witnesses.

12. Argument advanced on behalf of the appellant is that the identification of the appellant has not been established by the prosecution at all. The T.I.P chart has not been brought on record. The Judicial Magistrate, who conducted the test identification parade, has not been examined. In absence of those materials it was not proper to found the appellant guilty. So his conviction has been wrongly recorded by the trial court. It has further been argued that according to prosecution case P.W.6 Binay Kumar Singh had sustained injury in the occurrence but the doctor who treated him has not been examined in trial. The Investigating Officer who was most important witness of the case and his role has been found later on, has also not been examined.

13. The entire lower court record is here and after going through the entire records it is clear that T.I.P. chart has not been brought on record by the prosecution and in absence of the T.I.P. chart or in absence of evidence of the Judicial Officer who has conducted the test identification parade, the identification of the appellant becomes meaningless and only on the basis of conjecture and his statement u/s 313 of the Code of Criminal Procedure it cannot be taken into consideration though two witnesses namely, P.Ws.6 and 7 have been examined on this point and have not stated that on which date test identification parade was conducted. There are certain norms for conducting the test identification parade. It is well settled that the test identification parade shall be conducted within a reasonable time and the delay should not exceeded too much. In the present appeal, we see no evidence at all as to on which date test identification parade was held. It means that there is no evidence at all to presume that the appellant was identified by any witness in test identification parade. Learned Counsel for the appellant has relied upon a judgment of this Court in the case of Ramadhar Chamar and Ors. v. The State of Bihar reported in 1986 PLJR 327. In that case, carbon copy of the TIP chart was made an exhibit without original being produced and in that case, the Magistrate who prepared the TIP chart was not examined. After relying upon the various judgments, the court came to the opinion that TIP chart cannot be relied upon. Although in that case carbon copy of the TIP chart was available but in the present case not even carbon copy of the TIP chart has been brought on record.

14. There is no explanation at all as to why the doctor who treated P.W.6 was not brought before the trial court for evidence. Hence, this part of the prosecution case that P.W.6 has also sustained injury in course of commission of dacoity has not been proved.

15. Another vital point is that from the order dated 9.7.2001 of the Chief Judicial Magistrate, it appears that accused-appellant was directed to be examined

medically regarding his age and for that purpose a Medical Board was constituted. After examination, the Board has submitted a report and on perusal of that report it is clear that the appellant was 16-17 years of age on the date of occurrence. The Juvenile Justice (Care and Protection of Children) Act, 2000 fixes the juvenile to a person who has not completed 18 year of age. In the present case, the record and the report of the Medical Board are indicative of facts that the appellant was not major on the date of occurrence.

16. Considering every aspect of the matters, it appears that the prosecution has failed to establish the identity of the appellant in course of trial, the appellant has been found to be 17 years of aged on the date of occurrence, the doctor who has treated P. W.6 has not been examined and the Investigation Officer has also not been examined. So, we are of the view that the prosecution has not been able to prove the charge beyond the shadow of all reasonable doubts. Accordingly, the appellant deserves to be acquitted.

17. In the result, this appeal is allowed and the judgment of conviction and sentence of the appellant is set aside. He is acquitted of the charge. The appellant, who is reported to be in custody, is directed to be released forthwith if not wanted in any other case.

18. As none was appearing on behalf of the appellant, Mr. Abhimanyu Sharma, Advocate, was appointed as Amicus Curiae to assist the court on behalf of the appellant and he has argued the appeal after taking much pains. We appreciate his assistance as Amicus Curiae. The Secretary, High Court Legal Services Committee, Patna shall ensure payment of fee to Mr. Abhimanyu Sharma, Advocate for assisting this Court as Amicus Curiae.

19. Let a copy of this judgment be given to Mr. Abhimanyu Sharma, Advocate for needful.