
(2008) 12 JH CK 0068

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 117 of 2001

Bipin Kumar Singh

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision : 23-12-2008

Acts Referred:

Arms Act, 1959 — Section 27, 35

Penal Code, 1860 (IPC) — Section 120B, 302, 34

Citation : (2008) 12 JH CK 0068

Hon'ble Judges : R.R. Prasad, J; Amareshwar Sahay, J

Bench : Division Bench

Advocate : B.M. Tripathy, in Cr. Appeal No. 117 of 2001 and A.K. Kashyap, in Cr. Appeal No. 110 of 2001, for the Appellant; Binod Singh, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

R.R. Prasad, J.—Both the appellants were put on trial to face charges under Sections 302/34 read with Section 120B of the Indian Penal Code and also under Sections 27 and 35 of the Arms Act along with other accused persons, namely, Krishna Kumar Pandey, Shambhu Kumar Das, Bhup Narayan Singh, Kanhaiya Pandey, Shankar Kumar Das Sunil Kumar Singh and Krishnadeo Jha who were charged under Sections 302/120B of the Indian Penal Code on the allegation of committing murder of one Mahima Pandey in furtherance of common intention and also by hatching conspiracy.

2. Learned trial court while acquitting the aforesaid accused persons found both the appellants guilty for the charges under Sections 302/34 of the Indian Penal Code and also under Sections 27/35 of the Arms Act and both of them were sentenced to undergo rigorous imprisonment for life for the offence under Sections 302/34 of the Indian Penal Code and were further sentenced for five years for the offence u/s 27 of the Arms Act. Both the sentences were ordered to be run concurrently. However, no separate sentence was awarded for the offence

u/s 35 of the Arms Act.

3. The case of the prosecution is that on 26.7.1993 the informant, Anil Kumar Pandey, P.W. 3, had come to the Civil Court, Jamshedpur along with his father, Mahima Pandey, (deceased) for giving evidence in a case. There the informant found both the appellants and also one Krishnadeo Jha present over there who had also come to the court for giving evidence. There some verbal altercation took place in between the appellant, Bipin Kumar Singh, and the deceased, Mahima Pandey, and then the appellant, Bipin Kumar Singh, held out threat of dire consequence. When the case was fixed for other day, the informant as well as his father and also one Dhrub Nath Pandey (P.W. 4) proceeded to their home to Sidgora on a motorcycle, which was being driven by the deceased, whereas the informant was a pillion rider and Dhrub Nath Pandey was in between the deceased and the informant. They stopped at Jail Chowk at 1:00 p.m. and took cold drinks. As soon as they started for Sidgora and reached near the house of one J.N. Jha, Sub Inspector (Rail), one motorcycle of red colour being driven by an unknown person came by the side of the motorcycle of the deceased all on a sudden upon which the appellant, Bipin Kumar Singh, was in the middle and the appellant, Hare Ram Singh, was a pillion rider and suddenly, the appellant, Bipin Kumar Singh, took out a revolver and fired shot at Mahima Pandey causing injury near the right waist as a result of which, all the persons fell down but fortunately other two persons did not receive serious injuries and then they brought Mahima Pandey to T.M.H. but there he was declared dead.

4. When Ram Nandan Sharma, the then Officer Incharge, Sakchi Police Station was informed about the occurrence telephonically, he rushed to T.M.H. where he (P.W. 9) recorded the fard-beyan (Ext. 3) of Anil Kumar Pandey, the informant, wherein he stated about the occurrence, as stated above, and also disclosed that due to land dispute, the accused persons including these appellants were inimical to the deceased and they had also held out threat of dire consequence for which 107 proceeding was going on and, therefore, all the accused persons including these appellants by hatching conspiracy committed murder of the deceased.

5. On the basis of the fard-beyan (Ext. 3), an FIR was lodged. P.W. 9 himself took up investigation of the case and thereupon held inquest on the dead-body and prepared an inquest report (Ext. 5). Thereafter, the dead-body was sent to M.G.M. Hospital for post mortem examination, which was conducted by Dr. Y. Math, P.W. 7, who found the following injuries:

(A) Abrasions -- Arrow head shaped measuring 14 C.M. x 3.5 C.M. over back of right abdomen and adjoining loin.

(B) Fire-arm injury:- 2.5 C.M. x 4.1 C.M. situated over back of right chest, 12.3 C.M. above sole, 10.5, C.M. lateral to midline of the body on right chest back and 25 C.M. below shoulder line. Total height of the deceased from head to sole was 152 C.M. There was mark of powder grains and tattooing over an area of 15 x 15 C.M. round the wound of entrance. The outer clothing torn, 13 C.M. long and 14

C.M. wide, inner clothing torn 5 x 6 C.M. The bullet entered into chest cavity through 5th inter costal space, fractured with 5th and 6th ribs near vertebral end, it then passed slightly upwards and towards left lacerating prosperior surface of right lung. It then passed into the right ventricle and got lodged into the pericardial cavity, also lacerated the anterior surface of pericardium and lower border of left lung. Pericardium was full of blood. Blood and blood clot in the chest cavity. The bullet recovered from pericardial sack, was sent along with the post mortem report in a sealed cover, size of the bullet 3.2 C.M. long and 2.9 C.M. circumstance with nose deformed.

(C) Post mortem -- peeling of skin over right buttock right breast measuring 6 x 4, 5 x 4 and 4/2 C.M.

6. Accordingly the doctor issued post mortem report (Ext. 2) with an opinion that the death of the deceased was caused due to shock and hemorrhage due to aforesaid injuries caused by firearm, which was shot from a close range.

7. Meanwhile, the Investigating Officer, in course of investigation recorded the statements of the witnesses and when he came to the place of occurrence, he found the motorcycle lying on the ground. There he also found earth smeared with blood, which was seized.

8. After completion of the investigation, the police submitted charge-sheet. On committal of the case, charges were framed to which the appellants pleaded not guilty and claimed to be tried.

9. In course of trial, the prosecution examined as many as 10 witnesses. Of them, P.W. 1, Sunil Kumar Pandey, P.W. 2, Prakash Pandey, P.W. 6, Hari Shankar Singh and P.W. 8, Ram Bachan Singh, are the hearsay witnesses, whereas P.W. 5 Basir Ahmad, and P.W. 10, Arun Kumar Singh, have been declared hostile and the rest two witnesses, P.W. 3, Anil Kumar Pandey, the informant, and P.W. 4, Dhrub Nath, Pandey, are the eye witnesses.

10. Learned trial court having placed his implicit reliance on the testimonies of P.Ws. 3 and 4 getting corroboration from the medical evidence and also by the objective finding of the Investigating Officer found the appellants guilty for the charges levelled against them while rest of the accused persons were acquitted.

11. Being aggrieved with the said order of conviction and sentence, both these appellants have preferred these appeals separately.

12. B.M. Tripathy, learned senior counsel appearing for the appellant- Bipin Kumar Singh submits that learned trial court while holding the appellant- Bipin Kumar Singh guilty has placed his reliance on the testimonies of P.Ws. 3 and 4, but P.W. 4 when was recalled for cross-examination, has failed to identify the appellant- Bipin Kumar Singh and in that circumstances, only one witness P.W. 3 remains who has testified that it was the appellant. Bipin Kumar Singh, who fired shot at the deceased, but the testimony of P.W. 3, who is an interested witness, is not worth reliable, as he being a Canteen Manager at TELCO is not expected to

accompany him further at the time of occurrence, as it was the duty time of P.W. 3 and further on account of the fact that when three persons were riding a motorcycle, which was being driven by the deceased, they must be sitting close to each other and in that event, if one would fire from the right side, the injury would never be caused at the place below the back and as such, site of the injury belies the entire testimony of P.W. 3 and, therefore, the impugned order is fit to be set aside.

13. On behalf of the appellant -Hare Ram Singh, it was submitted by Mr. A.K Kashyap, learned senior counsel that admittedly neither the appellant Hare Ram Singh has been alleged to have fired shot at the deceased nor has been alleged to have committed any overt act. Furthermore, there has not been any material to show that the appellant-Hare Ram Singh was sharing common intention except the fact that the appellant-Hare Ram Singh was accompanying the other appellant-Bipin Kumar Singh on the motorcycle but that is not sufficient to hold a person guilty in absence of any material showing that the appellant- Hare Ram Singh was sharing common intention but the trial court convicted the appellant-Hare Ram Singh simply for the reason that the appellant-Hare Ram Singh was accompanying the other appellant-Bipin Kumar Singh, who fired shot at the deceased, and also for the reason that the appellant- Hare Ram Singh was inimical to the deceased but admittedly, no case was pending in between the appellant and the deceased and as such the appellant- Hare Ram Singh deserves to be acquitted in this case.

14. As against this, learned Counsel for the State submit that earlier to the occurrence, both the appellants had extended threat to the deceased on account of land dispute, which the deceased was having with one Krishnadeo Jha to whom the appellants were supporting and subsequently both the appellants in furtherance of their common intention committed murder of the deceased which the prosecution by leading evidence of P.W. 3 and P.W. 4 has established beyond all reasonable doubts.

15. Having heard learned Counsel appearing for the parties and on going through the records, it does appear that P.W. 3, Anil Kumar Pandey, son of the deceased, and P.W. 4, Dhrub Nath Pandey, are the eye witnesses. According to them, they had come to the Civil Court, Jamshedpur along with the deceased for giving evidence in the case, where they found these appellants and others present over there and according to P.W. 3, the appellant-Bipin Kumar Singh, held out threat to the deceased, whereas according to P.W. 4, both the appellants-Bipin Kumar Singh & Hare Ram Singh extended threat to the deceased. Further, they have testified that as the case got adjourned, they left the premises of the court and proceeded home on a motorcycle which was being driven by the deceased, whereas P.W. 3, Anil Kumar Pandey, the informant; was a pillion rider and P.W. 4, Dhrub Nath Pandey, sat in between the deceased and the informant and in the way, they stopped at Jail Chowk at 1:00 p.m. and took cold drinks. Thereafter, they left out that place on the motorcycle and as soon as they reached near the

house of one J.N. Jha, Sub Inspector (Rail), three persons riding on a motorcycle suddenly came by the side of the motorcycle of the deceased and then appellant-Bipin Kumar Singh took but revolver and shot at causing injuries at the right side of the waist of the deceased as a result of which, they fell down on the ground and then all the accused persons fled away. Both of them further testified that it was appellant-Bipin Kumar Singh, who fired shot at the deceased.

16. However, P.W. 4 when was recalled for cross-examination on behalf of appellant-Bipin Kumar Singh, after three years, he did not identify Bipin Kumar Singh as assailant, but from the testimony of P.W. 4 who testified earlier in the year 1997, it appears that he was quite categorical that he had identified the person who fired shot at the deceased and when the court put question that who was the person who fired shot, he had named appellant-Bipin Kumar Singh, still when he was recalled after three years, he testified that he does not know appellant-Bipin Kumar Singh, which statement certainly appears to have been made under the influence of the accused persons and, therefore, the defence can not take any advantage of the subsequent development, as indicated above. So far as P.W. 3 is concerned, a doubt has been raised over his testimony on the plea that he, being a Manager of canteen of TISCO, is not expected to be there with the deceased at the time when the occurrence took place, but nothing seems to have been brought on record to discredit the testimony of P.W. 3, rather his testimony gets corroboration from his earlier version, as has been narrated in his fard beyan (Ext. 3). Further, testimonies of P.Ws. 3 & 4 get corroboration from the post mortem report (Ext. 2), which does indicate that the deceased had received gun shot injuries over the back of right chest, lateral to midline of the body, below the shoulder line where there was mark of powder grains and that apart, tattooing was also found around the wound of entrance, which according to Dr. Y. Nath, P.W. 7, was caused from very close range and that apart, the testimonies of P.Ws. 3 and 4 get corroboration from the objective finding of the Investigating Officer, as he when came to the place of occurrence, found the motorcycle lying on the ground and there he also found earth smeared with blood which, according to the Investigating Officer, was seized but that never seems to have been sent for serological examination, but that, in the facts and circumstances, would never effect the prosecution case adversely in absence of any suggestion that no such occurrence took place at the place of occurrence. Thus, the testimonies of P.Ws. 3 and 4 are worthy of credence and, therefore, learned trial court has rightly believed the version of both the witnesses in recording the order of conviction so far as the appellant-Bipin Kumar Singh is concerned.

17. So far as appellant-Hare Ram Singh, is concerned, he admittedly did not fire shot at the deceased nor any overt act seems to have been done in furtherance of common intention to commit murder of the deceased except the fact that he was accompanying the appellant-Bipin Kumar Singh and simply for that reason, he seems to have been convicted for an offence of murder with the aid of Section 34 of the Indian Penal Code.

18. No doubt, it is true that the common intention or the intention of the individual concern in furtherance of the common intention could be proved either from the direct evidence or by the inference from the acts or attending circumstances of the case and conduct of the parties. It is a matter of common experience that there used to be rarely direct evidence and, therefore, the ultimate decision at any rate would invariably depends upon inference deductible from the circumstance of each case.

19. Coming to this case, so far as appellant-Hare Ram Singh, is concerned, it appears from the evidence adduced on behalf of the prosecution that the appellant-Hare Ram Singh did not have any land dispute with the deceased still he was convicted on the premise that earlier to the occurrence and on the date of occurrence, appellant-Hare Ram Singh had also held out threat to the deceased and was accompanying appellant-Bipin Kumar Singh, who fired shot at the deceased, but the prosecution seems to have failed in establishing the fact that this appellant had held out threat to the deceased on 23.7.1997 and also on the date of the occurrence.

20. In this respect, it be noted that P.W. 1, Sunil Kumar Pandey, a hearsay witness, has testified in his examination-in-chief that in the court premises when there had been verbal altercation in between the deceased and appellant-Bipin Kumar Singh and others including appellant-Hare Ram Singh, they had held out threat to the deceased of dire consequence, but the testimony of this witness never gets corroboration from the testimonies of P.Ws. 3 and 4, as they have not testified that appellant-Hare Ram-Singh also held out threat, rather according to P.W. 3, it was appellant-Bipin Kumar Singh, who had extended threat to the deceased at the court premises. Further, P.Ws. 1, 6 and 8 have also testified that earlier to the occurrence on 23.7.1993, the appellants-Bipin Kumar Singh, Hare Ram Singh and others came to the house of the deceased and there had been verbal altercation but according to P.Ws. 1 and 8, no such statements had been made by them before the police. On the other hand, according to P.W. 3, it was appellant-Bipin Kumar Singh and some unknown persons who came at the house of the deceased on 23.7.1993 and held out threat to him and thus any statement made by the witnesses that appellant-Hare Ram Singh had also extended threat on 23.7.1993 never inspire confidence to be believed.

21. Further, nothing seems to be there on the record to draw inference even from the conduct of appellant-Hare Ram Singh that he was sharing common intention except the fact which has come that he also accompanied the appellant-Bipin Kumar Singh on the motorcycle, but it would be significant to note that it is the case of the prosecution that appellant-Bipin Kumar Singh who on riding the motorcycle along with appellant-Hare Ram Singh and others came by the side of the motorcycle of the deceased and appellant-Bipin Kumar Singh suddenly took out revolver from his waist and fired shot at the deceased and under these circumstances, it is quite possible that appellant-Hare Ram Singh may not have been knowing that appellant-Bipin Kumar Singh was even carrying firearms and

under these circumstances, it never gets proved beyond all reasonable doubts that appellant-Hare Ram Singh was sharing common intention. That apart, the appellant has also been convicted u/s 35 of the Arms Act in absence of any material having reasons to believe that appellant-Hare Ram Singh was aware with the fact of existence of the firearm with the other accused and unless that is being proved, one cannot be said to be in joint possession of the arms in question used by the other accused.

22. Under the circumstances, as stated above. I do find that the prosecution has failed to establish the charges against appellant-Hare Ram Singh either under Sections 302/34 of Indian Penal Code or u/s 35 of the Arms Act. Accordingly, the order of conviction and sentence is hereby set aside so far as appellant-Hare Ram Singh is concerned.

23. However, the prosecution has been able to establish beyond any reasonable doubt that the appellant-Bipin Kumar Singh fired shot at the deceased causing gun shot injury which according to the doctor, P.W. 7, was sufficient in the ordinary course of nature to cause death of the deceased.

24. Under these circumstances, appellant-Bipin Kumar Singh, in spite of the fact that no charge was framed u/s 302 of the Indian Penal Code simplicitor, can still be held liable for the offence u/s 302 of the Indian Penal Code simplicitor in view of the ratio laid down by the Hon'ble Supreme Court in a case of Nallabothu Venkaiah Vs. State of Andhra Pradesh, .

25. Accordingly, the conviction recorded u/s 302/34 of the Indian Penal Code against appellant-Bipin Kumar Singh is converted into Section 302 simplicitor of the Indian Penal Code. However, in the fact of the case of the prosecution, the offence u/s 35 of the Arms Act does not get attracted, as the firearm was never in the joint control of other persons, rather it was in exclusive possession of the appellant which was used and as such, he has been convicted u/s 27 of the Arms Act and, therefore, conviction u/s 35 of the Arms Act seems to be unwarranted. Accordingly, the order of conviction u/s 35 of the Arms Act is hereby set aside.

26. In the result, this appeal stands dismissed with the modification in the order of conviction as indicated above so far as, appellant-Bipin Kumar Singh is concerned.

27. However, appellant-Hare Ram Singh is acquitted of all the charges levelled against him and is directed to be released forthwith, if not wanted in any other case.

Amareshwar Sahay, J.

I agree.