

(2003) 11 PAT CK 0004

In the Patna High Court

Case No : Criminal Appeal (DB) No. 465 of 1999

Bunni Lal Chaudhary and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 05-11-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 464
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2003) 2 RCR(Criminal) 718

Hon'ble Judges : S.N. Jha, J;B.N.P. Singh, J

Bench : Division Bench

Advocate : Y.V. Giri and Sanjay Kumar Giri, for the Appellant; Lala Kailash Bihari Prasad, for the Respondent

Final Decision : Allowed

Judgement

B.N.P. Singh, JJ.—Alleging a previous incident, of which the subsequent incident was a fall out, prosecution case, as set out in the fardbeyan of Yogendra Raut (P.W. 10), was that as a sum of Rs. 700/- had remained due on purchase of she-buffalo, by his relation, from Sattan Chaudhary, Maniraj Chaudhary took him to his house for payment of balance of consideration money Since he could pay only Rs. 400/- with balance of Rs. 300/- to be paid in future, Maniraj Chaudhary took out a countrymade pistol, pursuant to which he raised alarm. His family members came for rescue and took him to house. After about an hour, the father and also Shambhu Raut, the deceased brother, after taking meal, set out for the cattle shed. He too followed them and shortly thereafter, only after they had covered some distance, Bunnilal Chaudhary, Magister Chaudhary, Jagdish Chaudhary, Maniraj Chaudhary, Birendra Chaudhary, Dashrath Chaudhary, Naresh Chaudhary, Rajdhari Chaudhary and Amarjit Chaudhary came variously armed with weapons and encircled them. When Shambhu Raut ran for escape, he was chased by all of them who caught hold of him near house of Ambika Ram, pursuant to which Bunnilal Chaudhary pierced a dagger near upper left chest, and when father came for rescue, Magister Chaudhary too dealt blows with a

dagger on his head. A large number of persons on alarm had thronged to the place of occurrence. Shambhu Raut on sustaining injuries had dropped near the house of Ambika Ram with bleeding wounds and was carried to Dr. Mahesh Singh on a cot, who declared him dead. The dead body was brought to the Police Station where fardbeyan of Yogendra Raut was recorded at 21.45 hrs. on 13th December, 1994. A police case had been registered and investigation followed. Statement of witnesses were recorded, place of occurrence was inspected by the Police Officer, inquest report over the dead body was prepared and also post mortem over the dead body was held. The investigation had concluded, pursuant to which charge-sheet was submitted before the Court. During trial, 12 witnesses were examined by the State including father, brother and sister of the deceased. Though the Investigating Officer was not examined at trial, the State with the aid of examination of Ugendra Kumar Singh (P.W. 12) had brought fardbeyan, first information report, inquest report and also Police case diary on record. The State had also examined Dr. Vijay Kumar (P.W. 11) who stated to have held autopsy over the dead body of the deceased. A good number of witnesses examined by the State had, however, turned volte face to the State.

2. Bald defence of the appellants without adducing any evidence, was that of innocence and their false implication for animosity Trial Court, however, on having taken into consideration evidences available on record, while rejecting plea of innocence of the appellants, though acquitted them of the charges under sections 307 and 324 of the Indian Penal Code (IPC), recorded finding of guilt against them u/s 302 / 149 IPC and sentenced them to suffer imprisonment for life. While Jagdish Chaudhary, Bali Chaudhary, Maniraj Chaudhary, Dashrath Chaudhary, Rajdhari Chaudhary and Amarjit Chaudhary suffered conviction also u/s 147 IPC, for which they were sentenced to suffer rigorous imprisonment for a term of two years, Bunnilal Chaudhary, Magister Chaudhary, Birendra Chaudhary and Naresh Chaudhary suffered conviction also u/s 148 IPC for which they were sentenced to suffer rigorous imprisonment for a term of three years, with a rider that all the sentences would run concurrently.

3. Since manifold contentions were canvassed at Bar on behalf of the appellants to assail the findings recorded by the court below, lest we do not loose sight of them, firstly we wish to critically analyse testimony of witnesses on the anvil of reliability, credibility, and probability of their being competent witnesses. Those who claimed to be ocular witnesses to the incident at trial, are Brahmdeo Raut (P.W. 5), Ram Nath Bind (P.W. 7), Nirmala Devi (P.W. 9) and Yogendra Raut (P.W. 10). Reiterating his earliest version about subsequent event that took place at about 8.45 P.M., Yogendra Raut (P.W. 10) who was maker of fardbeyan, states that after he alongwith his father, sister, Ram Nath, Harishankar and the deceased brother set out for the cattle shed after taking meal, they were intended to be assaulted in the midway by the appellants, when they ran towards north. Shambhu Raut, however, ran towards west and hardly he could reach near the door of house of Ambika Ram, that he was apprehended by Bunnilal Chaudhary who stabbed him on left side of the chest. His father came for rescue.

It was Magister Chaudhary who dealt blows with dagger on his head. Though injured was rushed to Dr. Mahesh, he was declared dead. He took the dead body to the Police Station where his fardbeyan was recorded by the Police Officer. In the following morning, the dead body was sent to mortuary for post mortem examination.

4. The discordant note that has surfaced in the evidence of Yogendra Raut, to which our attention too had been drawn by the learned counsel for the appellants, is about the first part of the incident, and with much stress, submission made is that though in his earliest version, this witness stated to have gone to the house of Maniraj Chaudhary with a sum of Rs. 400/- where he was threatened to be assaulted on account of non-payment of rest amount, in the evidence at trial, he had made a significant departure stating, inter alia, that it was deceased Shambhu, who had gone to Sattan Chaudhary with a sum of Rs. 400/- when he had been threatened to be assaulted, and on these premises, contentions were raised that since there had been departure in the matter of genesis of incident, which was set out in the first information report, the entire prosecution case had to be discarded.

5. The variation highlighted at Bar was, however, not on material particulars of the case to affect credibility of the witness, and that apart, even rest witnesses, who claimed to be ocular, had stated about Shambhu Raut having gone to the house of Sattan Chaudhary with a sum of Rs. 400/- for its payment towards dues. In that view of the matter also, Yogendra Raut cannot be discredited. Brahmdeo Raut (P.W. 5), Ram Nath Bind (P.W. 7) and Nirmala Devi (P.W. 9) too had stated at trial that after they had set out for the cattle shed, taking meal in their house, they had met appellants in the midway when Bunnilal Chaudhary had stabbed Shambhu Raut and Magister Chaudhary too had dealt blows on Brahmdeo Raut

6. Dr. Vijay Kumar (P.W. 11) stated to have found following injuries on the dead body of Shambhu Raut during postmortem examination.

1" x 1/2" penetrating wound, second intercoastal space 4" above left nipple. On dissection left lung was found punctured. Central part of chest cavity was filled with blood and aorta was punctured. Rigor mortis was present in all four limbs.

Injuries in estimation of the doctor were ante mortem in nature caused within 24 hours of the examination.

7. We may also notice some ancillary evidences. Deonath Raut (P.W. 1) stated to have learnt about Shambhu sustaining stab injury, but he did not know about the assailant. Though Shiv Shankar Bind (P.W. 2) knew about the incident but no details, either about deceased or assailants, had surfaced in his evidence, and similar was the case with the evidence of Bikau Ram (P.W. 3) and Kanchan Raut (P.W. 4). There is no gainsaying that all the four witnesses had turned volte face to the State and their attentions were drawn by the State to impeach their credibility. Harishankar Bind (P.W. 6) stated to have taken the dead body of

Shambhu Raut to the Police Station and testified preparation of inquest report by the Police Officer. Gorakh Ram (P.W. 8) stated to have noticed Shambhu Raut dropped injured, and he had provided cot for taking him to the hospital who had stab injury in the stomach. He, however, did not claim to have witnessed the incident,

8. Criticising conduct of the prosecution witnesses, who claimed to be ocular, submission on behalf of the appellants was that though the occurrence took place near the house of Ambika Ram and Gorakh Ram, and Gorakh Ram had even provided cot for carriage of the injured to the hospital, the name of the assailants had not been disclosed to him by the family members of Shambhu Raut and hence nondisclosure of name of the assailants to Gorakh was quite eloquent which manifestly suggests that name of the assailant was not known even to the family members till that time, and reliance on this score was placed on a decision of the Apex Court reported in AIR 1979 SC 1042 (Baboo & Ors. vs. State of Madhya Pradesh). However, we have found that ratio of the decision stated at Bar was not applicable to the evidence of the case under consideration, as in that case, even on interrogation, eye witnesses had not disclosed complicity of the assailants to a person. This is not the case in hand. No where it is shown that even on interrogation by Gorakh, the family members of the house had not disclosed complicity of the assailants.

9. Non-examination of Dr. Mahesh to whom the deceased was taken on a cot and who had declared him dead was also highlighted at Bar and with all persuasiveness, argument was made that since Dr. Mahesh happens to be an important link in the chain, his non-examination has introduced serious infirmity in the prosecution version. We are, however, of the view that since Dr. Mahesh had not recorded any finding, his non-examination was not significant.

10. Since a good number of witnesses, who could be said to be independent, had turned volte face to the State, contentions were raised that in this backdrop, it was quite hazardous to place reliance on the testimony of only those who happened to be none else but the family members of the deceased, and for which our attention has been drawn to the evidence of P.Ws. 1 to 4 who turned hostile during trial. The trial court had drawn conclusion that these witnesses had been gained over by the defence and since they had not made parallel statement before the Court as that of statement, which they made during investigation, they were not credible, who had tried to suppress truth at trial.

11. Taking the criticism of the learned counsel for the appellants to its logical end, on this score alone, testimony of prosecution witnesses who happen to be family members of the deceased and who have been found otherwise credible, cannot be thrown over board, as the safeguard that has to be applied is that in case truth was found mingled with falsehood, the Court is to separate grains from chaff and for application of this safeguard, greater care and caution is to be taken by the Court. Though some variations have surfaced in statement of the ocular witnesses as to the person who accompanied the deceased when he set

out for the cattle shed after taking meal and also variation occurring in evidence of Yogendra Raut (P.W. 10) with that of his earliest version with regard to the first incident, it is nigh well settled that good testimony of the eye-witnesses cannot, however, be rejected on account of variations/discrepancies, if they do not materially affect the edifice of the prosecution case and only when discrepancies are so incompatible that they affect the credibility of a person, then court would be justified in jettisoning his evidence. These witnesses cannot be discredited for such omission on their part in making parallel statement before the Court. Those who had set out for the cattle shed after taking meal in the company of the deceased, were suggested to be Brahmdeo Raut (P.W. 5) and Yogendra Raut (P.W. 10). Name of Ram Nath Bind (P.W. 7) too, who had claimed to be ocular witness had surfaced in the fardbeyan of Yogendra Raut among those who had witnessed the incident. Though Nirmala Devi (P.W. 9) too stated to have accompanied the deceased to the cattle shed with a pot of water, true it is that her name had not surfaced in fardbeyan of Yogendra Raut. Though Brahmdeo Raut (P.W. 5) had not stated in so many words about family members, who accompanied him and also the deceased, when they set out for the cattle shed after the first incident, inference that can be drawn from his evidence was that these family members, who had pacified the quarrel during the first incident, had set out for the cattle shed and among them he stated name of his daughter also, who appears to be P.W. 9. The name of Nirmala Devi had also surfaced in the evidence of Yogendra Raut (P.W. 10) who had set out for the cattle shed in his company and also that of the deceased.

12. As appellants were acquitted for the charges under sections 307 and 324 IPC by the trial court, on this score too, submission was that since part of the prosecution case was found untrue by the court below, there was no assurance that rest part of the case was not untrue, and this argument, to us did not impress and has to be rejected, as when truth is mingled with falsehood, responsibility cast on the court is to separate grains from chaff and this is recognised that while weeding out falsehood, only the truth has to be regarded by the Court.

13. Other argument that was canvassed at Bar was that taking the prosecution version to be true on face value about Bunnilal Chaudhary alone to be the assailant of the deceased, neither any overt act was attributed to the rest appellants nor they were suggested to be participants in the incident. Arguments were made that even if Bunnilal Chaudhary was animated with mens rea of killing Shambhu Raut, how others could have known that Shambhu would be killed, and mere fact that all the appellants had come together was not sufficient to indicate that they had come having shared common object to commit murder, and that apart, even though appellants were shown to have possessed arms, they had not used them. There was neither anyone to prevent them nor there was any intervening circumstance to forbid them to translate their design into action, had they shared common object, and to fortify such thinking, reliance was sought to be placed on a decision of the Apex Court of the land reported in

Sukhan Raut and Others Vs. State of Bihar, . However, we have noticed that in that case when deceased ran away on receipt of injury, no member of unlawful assembly prevented him. Here when Shambhu ran for escape, not only that he was chased, but even father was assaulted when he came for his rescue. Reference was made on behalf of the appellants, also to a case of the Apex Court of the land reported in Rambilas Singh and Others Vs. State of Bihar, . However, we find that in that case, though at trial some overt act was attributed to the appellants, that had not surfaced in the first information report, and that apart, there was also inter se disparity in evidence of witnesses about persons who had caught hold of the deceased. To judge culpability of the appellants, other than the assailant of the deceased, we may refer to fardbeyan of Yogendra Raut where it was manifestly suggested that shortly after deceased and his family members had covered some distance while going to cattle shed, they were encircled by all the appellants, and when Shambhu Raut ran for escape, he was chased by them. Similar was the evidence of Brahmdeo Raut (P.W. 5) about all the appellants encircling them when he set out for the cattle shed. Inference about the appellants chasing and catching hold of the deceased can also be gathered from the evidence of these witnesses. Reference can also be made to the evidence of Ramnath Bind (P.W. 7) who had made similar narration about appellants encircling the deceased and his family members, and Bunnial Chaudhary, Magister Chaudhary, and Maniraj Chaudhary chasing Shambhu, when he ran for escape. Though body of unlawful assembly of the appellants would surface from the evidence of Nirmaia Devi (P.W. 9) also, about chase, she would name only Bunnial Chaudhary. The accusations about appellants having intended to assault had surfaced in the evidence of Yogendra Raut also.

14. However, we hasten to add that though Bunnial Chaudhary had been saddled with explicit accusation of dealing dagger blows on the deceased, who eventually succumbed to the injuries, he too alongwith other appellants had suffered conviction u/s 302 / 149 IPC instead of Section 302 IPC simpliciter. We are not oblivious that no specific charge u/s 302 IPC was framed against this appellant, and he too alongwith others had been charged u/s 302 / 149 IPC. Though said Bunnial Chaudhary was not charged formerly u/s 302 IPC, he was tried on evidence which brings his case well, within the mischief of Section 302 IPC, and that apart, during examination of the accused u/s 313 of the Code of Criminal Procedure, appellant Bunnial Chaudhary was explicitly apprised by the Court about he being the author of fatal injuries of the deceased. In this circumstance, we are of the view that non-framing of charge against Bunnial Chaudhary u/s 302 IPC would not vitiate his conviction, if he is convicted u/s 302 IPC simpliciter. We may reiterate that after Bunnial Chaudhary had fully understood the nature of charge of the offence for which he was tried, he was given full and fair chance to defend himself at trial, in one of the earlier decisions reported in Willie (William) Slaney Vs. The State of Madhya Pradesh, , constitution Bench of the Supreme Court declared and settled the law on this score, and it seems for all times to come, that mere omission to frame a charge

u/s 302 IPC, in case the accused had faced trial on such accusation, would not render the finding invalid. The Apex Court in a case reported in Kammari Brahmaiah and Others Vs. Public Prosecutor, High Court of A.P., , once again reiterated the law so settled by Willie Slaney (supra) in similar vein and same tune with following observation:-

"The aforesaid discussion leaves no doubt that non-framing of a charge would not vitiate a conviction, if no prejudice is caused thereby to the accused. The trial should be fair to the accused, fair to the State and fair to the vast mass of the people for whose protection Penal laws are made and administered. The Criminal Procedure Code is a procedural law and is designed to further the ends of justice and not to frustrate them by introduction of endless technicalities."

15. Similar is the observation of the Apex Court in the case reported in (2000)4 SCC 613 (Narinder Singh vs. State of Punjab) recording therein that if ingredients of section are present, conviction in regard thereto can be sustained. While interpreting Section 464 of the Code of Criminal Procedure, the Apex Court said in Kammari's case (supra) that if facts are such that charge should be framed and, yet it is not framed but no failure of justice has in fact been occasioned thereby, the finding, sentence, or order of the Court of competent jurisdiction is not to be set aside on that count.

16. We may once again reiterate the observation made by the constitution Bench of the Supreme Court in the case of Willie Slaney (supra) which are in the following terms:-

The appellant was charged with murder and nothing short of it, although it was stated in the charge that the offence was committed by him in furtherance of a common object. If the evidence failed to prove that the offence committed by him was in furtherance of a common object, it would be nonetheless his offence, namely, murder, if his act in law amounted to murder. The law does not require in such a case that a separate charge for murder should be framed, because charge of murder was already on the record.

17. Failure of the trial court to frame separate charge against Bunnilal Chaudhary u/s 302 IPC simpliciter, in our view, is only a curable irregularity which in absence of prejudice would not affect the legality of conviction, if it is recorded u/s 302 IPC simpliciter, as against Bunnilal Chaudhary, charge u/s 302 / 149 IPC was only a mere surplusage.

18. In the circumstances, we alter conviction of Bunnilal Chaudhary from Section 302 / 149 IPC to Section 302 IPC simpliciter which in the circumstances, would not prejudice the appellant. So far other appellants (except Bali Chaudhary and Jagdish Chaudhary) were concerned, their conviction u/s 302 / 149 IPC did not merit interference as offence u/s 149 IPC postulates criminal vicarious liability by virtue of legal fiction, even if one had not participated in the assault but had accompanied the assailant with conscious mind. The evidences available would show that the appellants had encircled the deceased and the family members,

variously armed, with weapons and while others were holding hard and blunt substance, Bunnilal Chaudhary, Magister Chaudhary, Birendra Chaudhary and Naresh Chaudhary held lethal weapons with them. They had not only encircled them but also gave a good chase when Shambhu wanted to escape, and that betrays the conscious mind of the appellants to make them answerable for killing of Shambhu, with the aid of Section 149 IPC.

19. Some disturbing features which have surfaced in the evidence of witnesses can also be noticed. Though name of Jagdish Chaudhary and Rajdhari Chaudhary had surfaced in the fardbeyan of Yogendra Raut, he had not named them in his evidence. Name of Maniraj Chaudhary and Naresh Chaudhary had not surfaced in the evidence of Brahmdeo Raut (P.W. 5). Name of Dashrath Chaudhary had not surfaced in the evidence of Ramnath Bind (P.W. 7). Name of Jagdish Chaudhary had not surfaced in the evidence of Nirmala Devi (P.W. 9). Worst was the case with Bali Chaudhary whose name though surfaced in evidence of witnesses, had not surfaced in fardbeyan of Yogendra Raut which was the earliest version of the prosecution, that being sheet anchor of the prosecution case. Though in all cases no jacket formula can be adopted that complicity of those persons, whose name had not surfaced in the first information report should be rejected, as much would depend on facts and circumstances of each case. Appellants are none else but residents of Buchia Inami Tola from where informant and other family members hail. It was quite unlikely that had he participated in the incident, his name would not have surfaced In the earliest version of Yogendra Raut, and that apart, it is not shown that he had any animus or hostility with Shambhu Raut, and hence, his complicity in the incident does not appear to be free from doubt. Similar was the case with Jagdish Chaudhary also. Though his name had surfaced in the fardbeyan of Yogendra Raut, neither he himself had named him in his evidence nor even Nirmala Devi (P.W. 9) had named him in her evidence. We are not oblivious that contra to this, complicity of Jagdish Chaudhary had surfaced in the evidence of Brahmdeo Raut (P.W. 5) and Ram Nath Bind (P.W. 7) and considering omission of his name in the evidence of P.W. 9 and also the informant, which we consider vital, complicity of this appellant too as participants in the incident had become suspect and hence they have to be given benefit of doubt. In the facts and circumstances of the case, while we uphold the findings recorded by Court below to the extent indicated above against rest appellants, set aside them against Bali Chaudhary and Jagdish Chaudhary who are acquitted of the charges and discharged from liability of their bail bonds. Since Birendra Chaudhary, Maniraj Chaudhary, Dashrath Chaudhary, Magister Chaudhary, Amarjit Chaudhary, Naresh Chaudhary and Rajdhari Chaudhary are on bail, their bail bonds are cancelled and it is directed that coercive steps be taken by the court below for their apprehension and to consign them to custody to serve out the remainder of sentences awarded to them. This appeal accordingly succeeds in part.

S.N. Jha, J.

20. I agree.