

(2011) 11 PAT CK 0045

In the Patna High Court

Case No : Criminal Appeal (SJ) No. 73 of 1998

Daya Sah and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 24-11-2011

Acts Referred:

Arms Act, 1959 — Section 27

Penal Code, 1860 (IPC) — Section 147, 148, 149, 307

Citation : (2011) 11 PAT CK 0045

Hon'ble Judges : Dharnidhar Jha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Dharnidhar Jha, J.—The three appellants along with three others, namely, Chhathu Raut, Daroga Das and Jagarnath Das were charged together under Sections 147, 307, 149 of the IPC by the learned Sessions Judge, Motihari for being tried in Sessions Trial No.248 of 1993. The three appellants were distinctly charged under Sections 148 and 307 IPC as also u/s 27 of the Arms Act and by judgment dated 20.02.1998, the appellants were held guilty of committing offences under Sections 148 and 307 IPC as also u/s 27 of the Arms Act and each of the appellants was directed to suffer rigorous imprisonment for one year u/s 148, for seven years u/s 307 IPC and for three years u/s 27 of the Arms Act. It was directed that the sentences were to run concurrently. The appellants have appealed against the above judgment of conviction.

2. The prosecution story is contained in the fardbeyan, Ext-2 of P.W.5 Dadan Baitha in which he stated that on 14.08.1992 he had gone for doing deweeding in the field of one Shyam Bihari Tiwari(not examined), at about 8 A.M. the three appellants along with accused Chhathu Raut, Daroga Das and Jagarnath Das came there armed with lathi and country made guns and started abusing the informant and others. It is stated that the appellant Daya Sah wanted to know as to why they had come into their field and is further said to have ordered to kill

the informant and others. It is specifically alleged that on the above orders appellants, Kashi Sah fired a shot which hit the informant (P.W.5) on his waist and right arm, whereas appellant Daya Sah fired another shot which caused injury to Rajdeo Tiwary. It was stated that other accused persons assaulted Deep Tiwary, Ajay Tiwary and Laxman Tiwary(all not examined) and thus caused injury to them. It is stated that on hullah villagers rushed to the place of occurrence, as a result of which the accused persons ran away from there. The injured persons were, thereafter, loaded on a tractor-trailer and brought to Raxaul for being admitted to Duncan hospital where they were treated for their injuries.

3. On the basis of Ext-2, the FIR of the case was registered and the investigation was undertaken by P.W.7, S.I Tarkeshwar Singh who on that day was posted as Assistant Sub-Inspector of Police in Ramgarhwa police station. He deposed that he recorded the fardbeyan and sent the same to the officer-in-charge of the police station, on the basis of which the FIR of the case was drawn up. Thereafter, he obtained the injury reports of injured and after inspecting the place of occurrence and recording the statements of witnesses sent up the appellants and other accused persons for their trial.

4. The defence of the appellants was very specific that there was a counter version and according to that the informant and others had trespassed into the field of the appellants and when they resisted, the informant and others assaulted the appellant Daya Sah and Kashi Sah. It was stated that for the above occurrence a counter case was also registered.

5. Seven witnesses were examined during the course of the trial, out of which P.W.6 Moses Jediya was a witness of formal character who tendered in evidence Ext-1 and 1/2 which were the injury reports in respect of the injuries found on Rajdeo Tiwary(not examined), Pannalal Sah and P.W.5 Dadan Baitha.

6. The learned trial Judge after considering the evidence passed the impugned judgment.

7. It was contended that under the facts of the case and in the light of the findings recorded by the learned trial Judge, the conviction of the appellants u/s 148 IPC was not sustainable in law. It was next contended that in absence of the evidence of the doctor the offence u/s 307 IPC could not be said to be constituted and as regards the conviction of the appellants u/s 27 of the Arms Act, for the same reason, i.e., in absence of evidence of the doctor that any gun was used for unlawful purposes of causing the injuries that particular conviction may also not be sustainable. Submissions were also that the witnesses were making contradictory statements in their evidence and further that they were admitting land dispute between the parties and pendency of litigations and the learned trial Judge did not even look to that part of the defence which was in most of its parts admitted and brushed aside the same without even referring to any of the documents. It was contended that it was a fit case in which the question of exercising the right to defend the properties could have been

examined.

8. While I was going through the judgment impugned, I found that the learned Sessions Judge was writing the judgment with a pre-determined mind that he had to convict the appellants on whatever the evidence and the affect thereof be. The evidence of witnesses was discussed in such a cryptic manner that the same could be sufficient not to sustain the judgment of conviction. The learned Sessions Judge was discussing the evidence of P.W.1 in paragraph-7 without discussing the cross-examination part of the evidence of P.W.1. This hardly requires to be pointed out to a Sessions Judge that evidence means and includes the statement of a witness recorded on oath in a judicial proceedings and that includes both the examination-in-chief and cross-examination part of such statement. The learned Sessions Judge was not even caring to note down that the witness had been cross-examined and any particular important question or answer was relevant for his consideration. Likewise, the cryptic approach of the learned Sessions Judge was apparently available in the same paragraph-7 when without even discussed the evidence of other witnesses, like P.Ws.2, 3 and 4 he was recording that their evidence was similar to P.W.1.

9. I went myself through the evidence of the witnesses and when I was going through the evidence of P.Ws.1, 2, 3 and 4, I was simply wondering as to how such a senior officer in the rank of Sessions Judge would take such a casual approach on appreciation of evidence. I have already noted that evidence of witness has to be adjudged only after the court considers the examination-in-chief and cross-examination of the statement of the witness. It was a unilateral consideration of the evidence of the witnesses and only their examination-in-chief were considered and not even a passing reference was made to their cross-examination. If the learned Sessions Judge had gone into the cross-examination part of the witness, he could have found from paragraphs-8 and 9 of P.W.1 that there was a land dispute and the dispute was on the same piece of land that is, the place of occurrence field, he could have further found that the dispute was since two years of the occurrence and further that there was a counter case which was also admitted by almost all witnesses and above all P.W.3 again in paragraph-11 was giving a very clear picture of the dispute when he was stating that appellants Kashi Sah, Daya Sah were also laying their claim over the land and further, that they had purchased the same land from the same owners from whom Shaym Bihari Tiwari, who did not turn up to depose on any aspect of the case though had claimed purchasing the same part of seven kathas of land. A huge number of documents were placed for perusal of the learned Sessions Judge. But by a particular part of the judgment he was indicating his cynicism towards the defence evidence. The learned Sessions Judge was recording that a huge number of documents had been placed on records by the defence for his consideration which were relatable to similar litigation between the parties. To reproduce the exact words of the learned Sessions Judge I could simply quote one line of the judgment:-

It appears that the learned defence counsel is under the impression that this court in the criminal side is to decide the title and possession of the parties over the place of occurrence. I am not inclined to waste my time in examining these documents one by one because it will be sheer wastage of energy because none of these documents cast any light on the occurrence of assault having taken place at the relevant time on the relevant date.

10. This Court wants to record that documents are never placed before a criminal court either by the prosecution or by the defence for seeking a decision on any pending litigation on the civil dispute or which might have cropped up on account of those documents. They are placed to decide some of the most important aspects which could be related to a criminal case. The first use of such documents could be to decide as to who was the aggressor because a title document could prima-facie lead to an assumption that the man who was holding the title was supposed to be in possession of the properties. Likewise, if there could be orders passed by competent court, say, the court of an Executive Magistrate on the disputed question of possession then that order which could be placed before a Criminal Court may lead to some inference by the court as to who might be in possession of the disputed properties on the date of occurrence. Similarly, the defence could be controverting by placing documents in its possession that the informant-side were aggressors as they could never have been in possession of the particular land and further that they had a prima-facie case of being continuously in possession till the date of occurrence and further that because the informant and witnesses had transgressed over their possession so as to unsettle their settled possession so they were acting in exercise of their right of private defence to repel the act of aggression. Unfortunately is the situation that this Court has to point out these things to an officer who was the Sessions Judge of the Sessions Division and was simply showing his conceit towards the defence and the papers placed before him by the defence which could set up a plea of self defence legally under general exception chapter of the IPC including that particular part of it which extends the rights under the right of private defence chapter of the Penal Code. However, lamenting the approach of the learned Sessions Judge is not going to result in any fruitful purpose because after all this Court has to judge the judgment and the order of conviction and the sentence.

11. Admission is of the witnesses that there was a counter case. Admission is also of the witnesses, may be, by way of allegation that the appellants and other accused persons had come armed there. The allegation is that they had assaulted the witnesses and had fired at them causing injuries. Injuries appear caused to Rajdeo Tiwary, Panalal Sah and P.W.5 Dadan Baitha out of whom Rajdeo Tiwary and Panalal Sah were not examined. Not only that the worst was that the Doctor was also not turning up to say as to what was his opinion on the injury. The injury reports were placed by examining the formal witness P.W.6 and, thus, the opportunity to cross-examine the doctor and thereby to bring on record some facts which could be probalizing the defence version of the

accused persons appears snatched from them. Not only that the defence evidence of doctor D.W.1 Dr. Anil Kumar was being dismissed with the same wholesome contempt as if he was committing a sin when he was deposing before a court of law. When the learned Sessions Judge was recording that the evidence of doctor was no way the relevant evidence and he was simply called upon to reject the evidence, the learned trial Judge was forgetting that in view of the admitted land dispute and further in view of the admitted filing of the counter version of the occurrence, the use of the evidence of a defence witness who was tendering in defence, the injury reports of two appellants, namely, Daya Sah and Kashi Sah, were simply not rubbish, those were useful evidence which could be leading the judge to render justice.

12. The above are, thus, the reasons including that the learned Sessions Judge was pre-determined to pass the order of conviction and the sentence upon the appellants.

13. The most important witness, like, Shyam Bihari Tiwari who was the kingpin and who was holding some interest in the property was not examined. Rajdeo Tiwari was one of the injured and was not examined. The most important witness, the doctor, was also not examined. The documents which were placed on record by the defence indicated that the appellants were claiming the land through a valid purchase made right in the year 1982. Subsequently, as may appear from the evidence of P.W.5 in paragraph-7 that the purchase by the informant and prosecution witnesses could be somewhere around the date of occurrence. So, there could be a probability that after having purchased the land, the informant and others forming a group at the behest of the said Shyam Bihari Tiwari went over the disputed plot so as to exercising their right of possession. This is the finding emanating from the evidence, then there could be accruing right to the accused persons who had valid documents and many orders from many courts indicating as if they were in possession to repel the aggression of trespassers. It was a case in which the learned Sessions Judge ought to have considered the aspect of exercising the right of private defence which appears to me the probable aspect of the defence version. The injuries were simple, gun shot injuries which have been found on three persons out of whom two were not examined. It could be said that those injuries could have been caused by the real owner of the properties to drive away the aggressors by the least use of force to repel the aggression.

14. Considering the above, the order of conviction and the order of sentence appear completely against the weight of evidence which was available on the record and in that view, the appeal appears meritorious which is hereby allowed. The three appellants are acquitted of the charges for which they had been convicted. All the three appellants are on bail. They shall stand discharged from the liabilities of their respective bail bonds.