
(2010) 12 PAT CK 0010
In the Patna High Court
Case No : Cr. Appeal (DB) No. 208 of 1988

Dinesh Sahni and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 13-12-2010

Acts Referred:

Citation : (2010) 12 PAT CK 0010

Final Decision : Allowed

Judgement

Shyam Kishore Sharma and Akhilesh Chandra, JJ.—All the above three appeals have been heard together and are being disposed of by this common judgment because they have arisen out of one judgment dated 6th April, 1988 passed by 4th Additional Sessions Judge, Begusarai in Sessions Case No. 140 of 1984. By the said judgment, these Appellants were held guilty u/s 396 of the Indian Penal Code and were sentenced to undergo rigorous imprisonment for life. Initially Cr. Appeal (DB) No. 208 of 1988 was filed by Ram Udit Sahni alias Hippias Sahni, Ram Prakash Sahni alias Karia and four others but during pendency of appeal, Ram Udit Sahni alias Hippias Sahni and Ram Prakash Sahni alias Karia died. So the appeal against them abated and their names have been expunged from the array of memo of appeal. The above Appellants were charged along with others namely, Anita Devi, Jiriya Devi, Chhathu Ram, Radhe Das, Binod Kumar, Kishore Kumar and Chhathu Paswan but they were acquitted by the trial court.

2. Charge u/s 412 of the Indian Penal Code was framed against accused Chhathu Ram, Binod Kumar Mishra, Hippias alias Ram Udit Sahni alias Khan Saheb, Giniya Devi (Jiriya Devi), Amita Devi (Anita Devi), Ram Prakash (Prasad) Sahni alias Karia, Dinesh Sahni, Pramod Singh alias Mahendra Singh alias Sitaram Singh alias Baldeo Singh whereas all the fifteen accused persons including these Appellants and some other accused persons were charged u/s 396 of the Indian Penal Code in connection with an occurrence of the night of 2/3.2.1984 at Ratanpur Bishanpur, Chatarbhuja, P.S. Muffasil Begusarai, District Begusarai in which the criminals not only committed dacoity in the house of the informant

Gopal Prasad Singh (P.W. 9), rather in course of commission of dacoity, they committed murder of the informant's brother Prushotam Singh.

3. The prosecution case has resulted on the basis of a fardbeyan registered against unknown on the basis of statement of Gopal Prasad Singh (P.W. 9) recorded at 3.00 A.M. on 3.2.1984 at Sadar Hospital, Begusarai in which he has stated that he is a resident of village Bishanpur (Chatarbhuj), P.S. Begusarai Mofassil, District Begusarai and in the previous night, while he was sleeping along with his other family members at about 1.00 A.M. they were disturbed when the criminals were knocking the door from outside and were telling to cut the door by means of gaita. On hearing the sound of criminals, the informant took up his gun and cartridges and opened his room. He found 4 to 5 persons standing in the Angan. At that time, electric bulb was available which was giving the light. Those 4 to 5 dacoits pointed out pistols upon the informant and one of the dacoits snatched the DBBL gun and 20 cartridges from the informant and they looted articles from the adjacent room and they pushed the informant in the said room and closed it from outside. The dacoits were wearing lungi and were also wrapped in shawls. They were of average built-up. Two of the criminals were long and others were of average height. All appeared to be illiterate. The criminals took away various articles. Altogether 12 to 13 dacoits were spotted there who were seen escaping after commission of dacoity. The dacoits fired four rounds in the house. The informant and others cried but within half of an hour the dacoits plundered the house articles. After the dacoits escaped, wife of informant's younger brother Balmiki Singh (not examined) came and opened the room of the informant. The informant came outside the room and noticed Hare Krishna Pathak (not examined), Ashok Singh (P.W. 2), Ramchandra Singh (not examined) and others present there. The informant also saw his brother Purushotam Singh (deceased) who was shot at on his chest and he was in pool of blood. The informant's wife was also having injury upon her left arm during commission of dacoity. The informant's brother Purushotam Singh and informant's wife were carried to hospital for treatment but the doctor pronounced Purushotam Singh dead. The first information report was registered against unknown but the informant claimed to identify the dacoits after seeing them. The fardbeyan of the informant resulted in Muffasil P.S. Case No. 0018 of 1984 dated 3.2.1984 u/s 396 of the Indian Penal Code. The matter was investigated into and after completion of the same, the police submitted charge-sheet. Thereafter cognizance was taken and the case was committed to the court of sessions where charges were framed and explained to the accused persons. The accused persons pleaded innocence and they claimed to be tried.

4. The defence of the Appellants was that they were known to the informant from before and they have been implicated because they are poor labourers and were working under Bhola Singh (relative of the informant). The defence of Appellant Pramod Singh was that his maternal uncle is neighbour and co-villager of the informant with whom he was having litigation and at the instance of his maternal uncle he has been implicated in this case. He was visiting the village

frequently from before and he was well known to the informant and his family members but non-mentioning of his name in the fardbeyan casts grave doubt in the prosecution case. All the accused persons including the Appellants further claimed that their identification after many months was of no use but the Investigating Officer deliberately arranged test identification parade after months and got Appellants implicated.

5. In order to prove its case the prosecution examined 17 witnesses. They are: P.W. 1 Prem Sagar Singh, P.W. 2 Ashok Kumar Singh, P.W. 3 Sukhsagar Singh, P.W. 4 Bhasho Singh, P.W. 5 Raj Niti Prasad Singh, P.W. 6 Balmiki Prasad Singh, P.W. 7 Raja Rameshwarendra Prasad (Doctor), P.W. 8 Gulam Sarful Haque, P.W.9 Gopal Prasad Singh (the Informant of the case), P.W. 10 Girish Nandan Singh (Executive Magistrate), P.W. 11 Surya Narayan Mandal (Judicial Magistrate), P.W. 12 Nagendra Nath Choudhary (Judicial Magistrate), P.W. 13 Rajendra Prasad Yadav (Judicial Magistrate), P.W. 14 Jay Nath Singh, (Assistant Sub-Inspector of Police), P.W. 15 Bishundeo Pathak, (Junior Sub-Inspector of Police), P.W. 16 Babhan Prasad Sharma (Junior Sub-Inspector of Police) and P.W. 17 Sukhdeo Prasad Yadav (constable).

6. The defence has also examined seven witnesses. They are: D.W. 1 Rajo Singh alias Rajeshwar Singh, D.W. 2 Chandi Sao, D.W. 3 Phuchaki Sao, D.W. 4 Gena Sah, D.W. 5 Bhola Sah, D.W. 6 Beda Nand Jha and D.W. 7 Devendra Prasad.

7. The post mortem report of the deceased has been marked as Ext.-1 whereas injury report of sole injured of the case has been marked as Ext.-2. T.I. Charts of the goods as well as the accused persons have been marked Exts.-5 and 6 series. The fardbeyan is Ext.-8 and its formal F.I.R. is Ext.-9. Inquest report has been marked as Ext.-10.

8. The defence has also exhibited some documents. They are beginning from Exts.-A to G.

9. The trial court after considering the entire evidences and other materials on record came to the conclusion that the prosecution has been able to prove the charge beyond the shadow of all reasonable doubts against the Appellants and hence they have been convicted and sentenced as stated above.

10. It has to be seen here that as to whether the prosecution was able to prove the charge against the Appellants beyond the shadow of all reasonable doubts or not.

11. The factum of dacoity has been challenged by the Appellants and it has been submitted that, in fact, there was no dacoity in the house of the informant which is apparent from the fact that the Investigating Officer has gone to the place of occurrence soon after the occurrence but has not found any blood there. This itself is enough to create doubt in the prosecution version. Once this fact is doubted, then the identification becomes meaningless. It has also been pointed out that the statements of the witnesses were taken after days and weeks of the

occurrence and as such, such statements cannot be relied upon and relying upon the statements of those witnesses, the prosecution has tried to prove its case which is violative of the mandate of the Code of Criminal Procedure and this fact has been decided by the Apex Court in Ganesh Bhavan Patel and Another Vs. State of Maharashtra, and 1971 S.C. 804 Balakrushna Swain v. The State of Orissa and the accused persons in those cases were acquitted mainly on the ground that the statements of the witnesses u/s 161 Code of Civil Procedure. was recorded after some gap. In the present case, the occurrence took place on 2.3.1984 whereas statements of P.Ws. 1 and 4 were recorded u/s 161 of the Code of Criminal Procedure on 7.2.1984 and statements of P.Ws. 2 and 3 were recorded on 24.4.1984. Other challenge on the judgment is that the inmates of the house were not examined. According to first information report, wife of the informant was also injured in connection with same occurrence but she has not been examined in this case. It is admitted fact that the room of the informant was opened by the wife of his brother Balmiki Singh (P.W.6) but she has also not been examined. Informant's father Laxman Singh was present in the house on the date of occurrence but he has also not been examined. It has come in evidence that the deceased's wife was sleeping at the time of occurrence alongwith her husband (P.W. 9 in paragraph 10). The witnesses examined are the residents of distant place and their presence on the date and time of occurrence cannot be even assumed.

12. The informant of the case is P.W. 9 Gopal Prasad Singh. His evidence is being discussed firstly. According to the informant, in the night of 2/3rd February, 1984 he was sleeping inside his room. In the house, his father and the deceased were also sleeping in their respective rooms. The informant's wife was not sleeping with him. At that very time, some persons started knocking the door. The informant woke up and guessed that dacoits might have arrived. The accused persons were telling to break the door. Thereafter the informant took out his gun and cartridges of his Fufera brother which were kept in his room but immediately after opening the door of the room, he found 4 to 5 armed dacoits there. They pointed out their pistols upon the informant and they snatched away the gun and 20 cartridges. The informant has clarified that his Fufera brother Pramod Singh was there. Some accused persons remained catching the informant whereas other dacoits looted household articles. In the meanwhile, many dacoits entered into the house after breaking main door. The informant claimed to have identified the dacoits because at that time electric bulb was giving the light. The offence of loot continued for half an hour and dacoits fired four rounds. The informant's room was opened from outside by the wife of Balmiki Singh who has not been examined. The informant came out from the room and saw his brother Purushotam Singh having firearm injury upon his chest. The informant's wife was also having firearm injury upon her left hand. In the meanwhile, the villagers assembled and carried injured Purushotam Singh and wife of the informant to the hospital for treatment but the doctor pronounced Purushottam Singh to be dead. The informant's wife was treated by the doctor. Fardbeyan of

the informant was recorded by the Police in the hospital. At that time, the informant was not in a position to give the list of detailed articles which were looted by the dacoits. Subsequently list of the looted articles was also given. According to the informant, he has attended test identification parade on 9 occasions and has identified 14 dacoits including Appellants Dinesh Sahni, Jugeshwar Ram, Pramod Singh, Nepali Sah and two dead Appellants namely, Ram Udit Sahni alias Hippia Sahni and Ram Prakash Sahni alias Karia. The informant has identified looted articles also.

13. In course of cross-examination, the ownership of the gun was doubted. The suggestion was given to the informant about the ownership of the looted gun. The informant in the fardbeyan has claimed that gun was to be of his Fufera brother Pramod Singh. In his evidence, he has stated that the gun belongs to his Fufera brother whereas in the initial version, he claimed to be his own but the police official P.W. 14 on court's question has replied that gun was of Gopal Singh, namely, the informant. The informant has refused in his statement about the ownership of the gun. He has given two quite contradictory version and both are not reconcilable. P.Ws. 1, 2, 3, 4 and 5 have been examined as eye witnesses of the occurrence. Though these witnesses have stated about the firing by the accused persons which has resulted in death of Purushottam Singh and injury to the wife of the informant but the Investigating Officer who had visited the place of occurrence has described it in paragraph 1 of his evidence. He has noticed the doors broken. Hooks were also broken. Various Kundalis of the house were uprooted but most vital thing which could have been noted at the place of occurrence was as to whether blood was available or not. The Investigating Officer has not mentioned about the availability of the blood at the place of occurrence though, according to fardbeyan of the informant, informant's brother Purushottam Singh was fired upon in the house itself and if a person is fired upon in the house, the presence of copious blood must have been firstly noticed there which was not noticed by the Investigating Officer. No doubt, some witnesses have stated about the presence of blood but non-finding even a drop of blood by the Investigating Officer at the place of occurrence creates doubt as to whether occurrence has occurred in the manner as alleged by the prosecution or not. Not only a person was fatally fired upon but the informant's wife had also received the injury. Therefore, normal circumstances would be that copious blood must be available at the place of occurrence. Non-mentioning of this fact by the Investigating Officer creates doubt as to whether the death or injury had occurred in the manner as alleged by the prosecution. If the prosecution alleges a definite allegation that a person was fired upon by the accused, then the onus is upon it to prove the occurrence as alleged in the manner as described by it. The prosecution has failed to discharge its onus there. So a grave doubt has remained to be explained which in course of entire evidence has not been explained.

14. The accused persons were apprehended and they were put on test identification parade on different dates. Appellant Dinesh Sahni was apprehended

on 12.2.1984 and was put on test identification parade on 24.2.1984. In the test identification parade, he was identified by P.Ws. 5, 6 and 9. Appellant Shyam Ram was apprehended on 6.7.1984 and was put on test identification parade on 30th July, 1984. In the test identification parade, he was identified by P.Ws. 3 and 5. Appellant Chhotan Ram was apprehended on 6.7.1984 and was put on 30th July, 1984. In the test identification parade, he was identified by P.Ws. 4 and 5. Appellant Jugeshwar Ram was apprehended on 12.2.1984 and was put on test identification parade on 24.2.1984. In the test identification parade, he was identified by P.Ws. 5, 6 and 9. Appellant Nepali Sah was apprehended on suspicion on 20.3.1985 and was put on test identification parade on 28th March, 1985. In the test identification parade, he was identified by P.Ws. 1, 2, 3, 5, 6 and 9. Appellant Pramod Singh was apprehended on 14.11.1984 and was put on test identification parade on 24. 11.1984. In the test identification parade he was identified by P.Ws. 1, 3, 4, 5, 6 and 9 but P.W. 4 has not identified Pramod Singh in the court. Other accused persons were also identified but they have been acquitted. The recovered articles were also put on test identification parade and these were identified in presence of P.W. 10 and the accused persons who were charged u/s 412 of the Indian Penal Code have been acquitted, so the evidence of P.W. 10 is not being considered.

15. All the witnesses, who are inmates of the house and villagers, have stated that the identification of the accused persons was in the source of electric light which was available at the time of occurrence. The -Investigating Officer (P.W. 14) was asked to explain about the source of light but he has not explained about the presence of the light at the time of occurrence. So specific question was put to him as to whether he has even noted about of source of light at the place of occurrence but he has stated that even in the case diary he has not mentioned about the availability of electric light, either of electric pole or any electric wire. The occurrence is admittedly of the night. There is evidence that the accused persons were identified in the electric bulb which was giving light. The onus was upon the Investigating Officer to go through the minute details of the source of light because that was very important evidence as the question of identification was involved. The identification part is a most vital part of the evidence when the first information report is against unknown. The offence is of the night, then the prosecution must come with clear and specific case regarding source of light. The Investigating Officer had gone to the place of occurrence but he has not even noted about the source of light. This fact is apparent from his evidence in paragraph 10. In view of this lacuna on the part of Investigating Officer regarding source of light it has become very difficult to assume that the accused persons were identified by the witnesses. So this important aspect has remained unexplained and it also creates doubt regarding source of identification at the time of occurrence.

16. The witnesses who have identified the Appellants at the test identification parade were examined after a long gap. Appellants Dinesh Sahni and Jugeshwar Ram were apprehended in the month of occurrence itself but both the Appellants

were put on test identification parade and were identified in the month of the occurrence but other Appellants have been put on test identification parade and were identified after months. Normal human memory is not so strong that it will keep in mind the details of the criminals who have participated in the commission of occurrence. In column No. 7 of the test identification parade the role of the accused persons have to be noted. The witnesses are required to explain as to what the accused persons were doing when he had identified him during commission of crime. This fact must be explained by the witnesses in course of their evidence. There is general statement of the witnesses that they have identified but they have not described the role of the accused persons when they have deposed in the court. This role must be commensurate with the substantive evidence when the witnesses depose in court. None of the witnesses who have identified the accused persons have given any role to any of the accused when they were examined in court.

17. The informant and his family members have supported the prosecution case but the most important witnesses of the case were wife of the informant who was injured and also wife of Balmiki Singh who had opened the door of the informant. According to prosecution case, these ladies as well as wife of the deceased and father of the informant were present in the house when the occurrence had occurred. According to informant, his room was opened only for a few second because immediately after opening of the room by the informant, his gun and cartridges were snatched and he was pushed into the room. Therefore, it is difficult to assume that he has seen the entire occurrence and in the circumstances, the most important witness who were present for a longer time near the dacoits were the wife of the informant, wife of the deceased and wife of Balmiki Singh. These were the most important witnesses of the occurrence. Their non-examination by the prosecution has not been explained. All the witnesses are not required to be examined. The number of witnesses do not matter rather their quality matters. When the specific case of the prosecution is that the occurrence has occurred in presence of such and such witnesses, then their withholding creates doubt as to whether the prosecution is coming with true version of the occurrence or not. Therefore, non-examination of the sole injured of the case and other inmates of the house creates another doubt as to whether the prosecution has tried to conceal something which could have been brought before the court. Evidence has come that Appellant Pramod Singh was having some litigation with his maternal uncle who is a resident of the village of the informant. The defence is that lie was frequently visiting the village of his maternal uncle so he was known to the informant and his men and he being not named in the first information report and his subsequent identification in test identification parade after more than nine months of the occurrence by the informant and his persons are indicative of the fact that he has been deliberately implicated at the behest of his maternal uncle.

18. Appellant Pramod Singh has been put on test identification parade on 24.11.1984. The delay in putting him on test identification parade from the date

of occurrence is longer delay and it is difficult to assumed that the identifying witnesses will keep in memory the role of the accused persons or their faces. The purpose of holding test identification parade is that it must be done as soon as possible after the occurrence, so that the human memory does not fail. In some cases the delay of even 15 days have been held to be fatal. When the test identification parade is conducted after months together then it will create grave doubt regarding identification. The identification of Appellant Pramod Singh and others at the belated stage during test identification parade are enough to indicate that they were framed later on at the behest of their enemies.

19. Learned Counsel for the Appellants has pointed out that at the time of occurrence, Appellants Dinesh Sahni and Chhotan Ram were hardly aged about years 16 years which is apparent from their statements made by the court u/s 313 Code of Civil Procedure. It has also been submitted that non-finding of blood at the place of occurrence, non-explanation about the source of identification and non-finding of any Kundalies of the doors etc. at the place of occurrence by the Investigating Officer would show the semblance of violence. The non-examination of sole injured and other inmates of the house and different versions of the informant are enough to create doubt in the prosecution version.

20. On the other hand, learned Counsel appearing on behalf of the State has submitted that the source of identification has been stated by the independent witnesses, but non-mentioning of this fact by the Investigating Officer, does not create any doubt in the prosecution case and the judgment of conviction and sentence of the Appellants requires no interference.

21. After analyzing the entire evidence on record and taking into consideration the facts that the prosecution has not been able to explain as to why Investigating Officer has not found any blood at the place of occurrence, the Investigating Officer has not explained about the source of identification, the accused persons have not been attributed specific role by the t witnesses in court, the delayed test identification parade, delayed statement recorded u/s 161 of the CPC and non-examination of the important witnesses including the inmates of the house, we are of the view that the prosecution has not been able to prove the charge beyond the shadow of all reasonable doubts. Once the doubt is created in the prosecution version of the occurrence, then according to criminal jurisprudence, the benefit of the same will go to the accused persons. As such the Appellants deserve to be acquitted.

22. In the result, all the above three appeals are allowed and the judgment of conviction and order of sentence is set aside. The Appellants of all the three appeals are acquitted of the charge and they are discharged from the liabilities of their respective bail bonds.