
(2010) 09 PAT CK 0179
In the Patna High Court
Case No : Cr. Appeal No. 117 of 1988 (DB)

Gama Choudhary and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 06-09-2010

Acts Referred:

Citation : (2010) 09 PAT CK 0179

Final Decision : Allowed

Judgement

Shyam Kishore Sharma and Dinesh Kumar Singh, JJ.—In the present appeal, the abovenamed four Appellants have challenged the judgment of conviction and order of sentence dated 16th January, 1988 passed in Sessions Case No. 195 of 1980 by the learned 1st Additional Sessions Judge, Siwan whereby the Appellants were held guilty for the offences punishable u/s 302 of the Indian Penal Code and accordingly sentenced to undergo rigorous imprisonment for life. Though in the last part of the judgment, it has been mentioned that no separate sentence under Sections 302/149 Indian Penal Code is being passed which appears to be a mistake since the order of conviction was passed only u/s 302 of the Indian Penal Code, as the Appellants were not convicted separately under Sections 302/149 Indian Penal Code.

2. The prosecution case, as canvassed through the fardbeyan of Sipahi Bhagat (PW-6) recorded by S.I.N. Jha on 3.4.1979 at 4.15 P.M. at Sadar Hospital, Siwan is to the effect that on 3.4.1979 at 11 A.M. the informant's son, namely, Sambhu Prasad (deceased), who was Sarpanch of the village, was going to Siwan from his village home Chapia, when the bus reached near Daroga Hata (P.O.) then co-villagers, namely, Basudev Koiree, Babu Lai Ahir (Appellant No. 2), Gama Ahir (Appellant No. 1), Saheb Ahir (Appellant No. 4) and Manika Ahir (Appellant No. 3) armed with lathi and dagger obstructed the traffic by putting a Bullock cart on the main road. When the bus stopped then all the accused persons dragged out the informant's son from the bus and took him to a nearby wheat crop field and started assaulting with lathi and dagger. The informant was

also going to Siwan, hence on alarm of his son, the informant went to save him the informant was followed by the co-villagers Banarsi Koiree (PW-4), Devraj Koiree (PW-5) as well as Ganga Bhagat (not examined) who also saw "The occurrence but they could not go forward to save the deceased. Subsequently when the villagers reached to the place of occurrence, the accused persons fled away. Thereafter, the informant brought his injured son to Sadar Hospital, Siwan on a truck where his son was treated but ultimately the informant's son died. The fard-beyan (Ext.-3) culminated into the institution of Siwan Muffasil P.S. Case No. 4 of 1979 under Sections, 147, 148, 149, 302 of the Indian Penal Code. The FIR (Ext.-5) bears the signature of two attesting witnesses, namely, Birendra Yadav and Devraj Prasad (not examined).

3. The police after investigation submitted charge-sheet and after cognizance, the case was committed to the Court of Sessions where the charges were framed under Sections 302, 302/149 Indian Penal Code and explained to the Appellants to which they pleaded not guilty and claimed to be tried.

4. The prosecution, in order to substantiate its case, examined nine witnesses, out of which PW-1 Jamuna Choudhary, is Dafadar of the local area and came to know about the occurrence from Bajrangi Chamar (PW-2), a hearsay witness. PW-2, Bajrangi Chamar deposed to have not seen the actual occurrence and has been declared hostile. PW-3 Sona Singh is the bus driver. This witness has also deposed to have not seen the actual occurrence, hence has been declared hostile. PW-4 Banarsi Prasad, PW-5 Deoraj Bhagat and PW-6 Sipahi Bhagat, the informant, all these three witnesses claim to be the eye-witnesses. PW-7 Dr. S.K. Srivastava is the Civil Assistant Surgeon who conducted post mortem on the dead body of the deceased. PW-8 Narayan Jha being I.O. has investigated the case. PW-9 Lalan Prasad is an Advocate's Clerk and has proved the hand-writing and signature of Narendra Prasad, S.I. on the formal FIR and hand writing of Uma Shankar on the Sanha.

5. The defence has also examined three witnesses, namely, Gorakhnath Srivastava, Nagendra Singh and Ramanand Choudhary as DWs-1 to 3 respectively. DWs-1 and 2 have deposed to prove the alibi of Basudeo Koiree who has been acquitted whereas DW-3 has proved the station diary entry 55 dated 3.4.1979 (Ext.-F).

6. On the basis of evidences of PWs 4 to 8 and the defence witnesses, the learned Trial Court came to the conclusion that the prosecution has failed to prove the charge against Basudeo Koiree against whom there was allegation of playing the role of order giver as well as assaulting the deceased, whereas convicted four Appellants above named on the same set of evidences.

7. Now, this Court has to see whether the evidence of prosecution witnesses, particularly PWs-4 to 6, are reliable to the extent on which the judgment of conviction needs no interference.

8. The First Information Report suggests that the informant (PW-6) saw the

entire occurrence from very inception of dragging of the informant's son by accused and then making assault. The informant has further claimed that the occurrence was seen by PW-4 Banarsi Koiree and PW-5 Devraj Koiree. The conduct of the informant (PW-6) creates reasonable doubt since no effort was being taken either at the time of dragging out the deceased from the bus or taking him to the field or during the assault as no effort was made to save the victim either by the informant or by PWs-4 and 5.

9. It is true that the First Information Report is not the substantive piece of evidence but the FIR is a document which gives basic sketch of the prosecution case. The occurrence is alleged to have taken place at 11 A.M. in the morning whereas the fardbeyan was recorded at 4.15 P.M. when the victim died. The FIR suggests that the victim was first taken to Sadar Hospital, Siwan where he was being treated but no medical document has been brought on the record by the prosecution to suggest the initial version of the informant as recorded in the fardbeyan. The FIR was ultimately registered on 3.4.1979 at 6.30-P.M., but it was transmitted to the learned C.J.M., Siwan on 7.4.1979 which further clouds the prosecution version as it is in complete violation of the provisions of the Code of Criminal Procedure particularly in view of the fact that the prosecution has not come with any explanation for such a delayed transmission of the First Information Report.

10. In the fardbeyan the informant has claimed to witness the entire occurrence and same is the claim of PWs-4 and 5, but surprisingly PWs-4 and 5 have neither accompanied the victim to the hospital nor they have been made witnesses of the FIR rather the witnesses of the FIR are Birendra Yadav and Devraj Prasad who have not been examined for the reasons best known to the prosecution.

11. The First Information Report further conceals this fact that immediately after the occurrence or during the occurrence, the Sanha (Ext.-F), Station Diary Entry was made on the information supplied by PW-4 to the Police Station. It is surprising that there is no mention of Sanha in the F.I.R. and the prosecution has deliberately not brought this Sanha entry on record as it has ultimately been proved by the defence through DW-3. Though PW-4 as well as PW-8, the Investigating Officer, have admitted the existence of the Station Diary Entry No. 55 dated 3.4.1979 (Ext.-F), Station Diary Entry No. 55 suggests that PW-4 only informed about the informant's son being assaulted by few persons. PW-4 in paragraph 6 of his evidence has admitted that he was acquainted with the accused persons since last 10-15 years. In that circumstances, it appears absolutely unreasonable that PW-4 while getting the Sanha entry recorded did not disclose the name of any accused persons particularly in view of the fact that all the accused persons, the informant and PWs-4 and 5 are resident of same village and PW-4 has admitted this fact in his evidence that it was at the instance of PW-6 that PW-4 went to the Police Station.

12. In the background of the aforesaid facts, we find that the prosecution has not disclosed the true version in the FIR. Now, since on the basis of the FIR, the

police after investigation submitted charge-sheet and on the basis of evidences of prosecution witnesses, order of conviction has been passed, this Court has to examine whether the prosecution witnesses have proved the prosecution case beyond the shadow of all reasonable doubts or not?

13. There are three witnesses to the occurrence, of which PWs-4 and 5 claimed to have seen the occurrence. It is admitted by PW-6 in paragraph 34 of his evidence that PWs-4 and 5, not only belong to informant's caste but they are also neighbours of the informant. Hence, the evidence of PWs-4 and 5 has to be cautiously scrutinized in view of the aforesaid factors.

14. PWs-4 and 5 claimed to have started their journey from their village home Chapia, one by foot and another by bicycle and reached the place of occurrence when the bus was stopped near Daroga Hata.

15. Learned Counsel for the Appellants submits that their reaching to the place of occurrence is itself doubtful. Controverting the aforesaid stand of the Appellants, learned Counsel for the State Miss. Shashi Bala Verma submits that it is not mentioned as to when PWs-4 and 5 started their journey. Non-disclosure by PWs-4 and 5 as to when they started their journey itself creates doubt about their reaching to the place of occurrence and hence their presence at place of occurrence becomes doubtful.

16. The evidences of PWs-4 and 5 are not trustworthy on the ground of their unreasonable conduct as they never tried to save the informant's son when the assault took place. Neither they accompanied the victim to hospital nor did they become the attesting witness to the FIR.

17. PW-6 who is the informant, his conduct of not taking any effort to save his son from being assaulted, not disclosing about the lodging of the Station Diary Entry No. 55 in the Fardbeyan and lodging the case only after the death of the victim impeach the credibility of this witness.

18. So far as the manner of occurrence is concerned PW-4 in paragraphs 2 and 16, PW-5 in paragraphs 2 and 11 and PW-6 in paragraphs 2 and 22 have stated in their depositions that only Manika Choudhary has given knife blow to the victim whereas other four accused have indiscriminately assaulted by lathi.

19. PW-7 is the doctor. This witness has conducted post mortem of the deceased and has found altogether ten injuries out of which injury Nos. 2 and 9 were found to be caused by sharp cutting weapon, such as dagger, whereas injury Nos. 6 and 7 were caused by sharp penetrating weapon and rest were bruises on the head, nose, chest, left arm, hand, leg, right arm and back. Hence in view of the post mortem report it appears that the evidences of so-called eye witnesses (PWs-4 to 6) do not corroborate the actual injuries as found by the doctor. Hence it appears that the injuries have been caused in some other manner than alleged by the eye witnesses. As PW-4 in paragraphs 2 and 15, PW-5 in paragraphs 1 and 10. PW-6 in paragraph 8 have specifically stated that the victim was dragged

from the bus to the wheat crop field for 400 yards but no such dragging injuries have been found on the dead body of the deceased.

20. It is submitted by the learned Counsel for the State that the bruises might have been caused due to dragging but no such dragging injuries are reflecting through the post mortem report as the bruises do not contain soil or other earthly material. Moreover there is allegation of assault by lathi by several accused but no such injury has been found by the doctor.

21. The manner of occurrence also gets clouded in view of the fact that PW-8 in paragraph 14 has stated that he has not seized any bullock-cart from the road and further in his evidence has stated that he did not find the wheat crop at the place of occurrence being destroyed due to the occurrence in substantial manner, nor dragging sign or trampling was found at the place of occurrence.

22. So far as the actual place of occurrence is concerned, it is the consistent case of the prosecution as deposed by PW-4 in paragraphs 4 and 15, PW-5 in paragraphs 2 and 13, PW-6 in paragraph 2 that it was the field of Shivjee Koiree where the actual assault has taken place. The Investigating Officer PW-8 in paragraph 5 has also stated that he found the place of occurrence to be the field of Shivjee Koiree from where he collected the blood stained soil, hence it appears that the prosecution has been able to prove the place of occurrence.

23. From the evidences of the prosecution witnesses, it appear that there was election dispute between the deceased and the Appellants and evidences to that effect have come on record in paragraph 3 of PW-4 and in paragraph 5 of PW-6 of their depositions. It is settled principle of law that the enmity cuts both ways. Hence it cannot be conclusively said that due to the enmity the accused persons committed the offence or due to the said enmity the informant has falsely roped the accused persons in the present case. Hence on this score also, the benefit of doubt should go to the Appellants.

24. It has been argued by Mr. Y.V. Giri the learned Sr. Counsel that since the victim was a veteran criminal hence, he might had received the injuries while committing some offence and due to the enmity the Appellants have been roped in the present case. For proving this contention, the defence has got some documents exhibited as Exts.-H and H/1 which suggest that the victim was accused in cases under Sections 399, 402, 307 of the Indian Penal Code, and Section 27 of the Arms Act. Though the suggestion to that effect was given to the informant during his cross-examination before the learned Trial Court but the informant has specifically denied to have any knowledge of the involvement of the victim in several criminal cases.

25. Though Exhibits-H and H/1, in no way suggest that the informant was aware of the cases because those FIRs in no way reflect that the informant was a bailor or a surety in those cases as suggested by the defence during cross-examination of the informant.

26. The non-examination of eye witnesses, namely, Ganga Bhagat and the truck driver on which the injured was taken to hospital, the two FIR attesting witnesses namely, Birendra Yadav and Devraj Prasad and the doctor who initially examined the injured and treated the deceased has definitely clouded the prosecution case. It is further submitted by the learned Counsel for the Appellants that in their statement u/s 313 Code of Criminal Procedure, the Appellants are not confronted with the circumstances which have come against them and in this connection reliance has been placed on a judgment reported in Ranvir Yadav Vs. State of Bihar, After going through the statements of the Appellants u/s 313 of the Code of Criminal Procedure, we find that broadly the circumstance of dragging the victim from the bus and subsequently assaulting him in the field of Shivjee Koiree have been put to the accused persons, hence, we do not find any substance in this contention of the learned Senior Counsel for the Appellants.

27. It is true that Basudev Koiree was alleged to be the order giver and also assaulted the victim alongwith other accused persons with lathi and the same set of evidence is available on the record against Basudev Koiree as it is available against other accused persons particularly the present four Appellants, but Basudev Koiree has been acquitted on the ground that DWs-1 and 2 have proved the alibi taken by Basudev Koiree. If the defence has been able to prove the alibi of Basudev Koiree and it was accepted by the learned trial Court, then in that view of the matter the part of the prosecution case was doubted by the learned trial Court and that alone creates doubt over the entire prosecution case hence, the benefits flowing from the aforesaid doubt have to be conferred to the present Appellants also. Hence, on this score also we hold that the prosecution has failed to prove its charge beyond the shadow of all reasonable doubts against the present four Appellants.

28. Hence, in view of the aforesaid discussions, we hold that the inconsistency and unreasonableness of the evidences of eye witnesses, namely, PWs-4, 5 and 6 impeach their credibility as they have failed to prove the manner of occurrence. The impugned judgment of conviction and order of sentence are set aside.

The Appellants named above are hereby acquitted from the charges levelled against them. They are discharged from the liabilities of their respective bail bonds.

29. Accordingly, this appeal is allowed.