

(2013) 09 PAT CK 0038

In the Patna High Court

Case No : Criminal Appeal (DB) No. 219 of 1989

Ganouri Baitha and Nawal Kishore Baitha

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 04-09-2013

Acts Referred:

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

Citation : (2013) 09 PAT CK 0038

Hon'ble Judges : Shyam Kishore Sharma, J; Amaresh Kumar Lal, J

Bench : Division Bench

Advocate : Rakesh Kumar Sinha in CR. app DB No. 219 of 1989, Mr. Kamal Nayan Choubey, Mr. Gopal Swaroop Dubey and Mr. Siddharth Harsh, in CR. app DB No. 236 of 1989, for the Appellant; Ajay Mishra, APP in Both the Appeals, for the Respondent

Final Decision : Allowed

Judgement

Shyam Kishore Sharma, J.—Criminal Appeal (DB) No. 219 of 1989 filed on behalf of Nawal Kishore Baitha (A1) and Criminal Appeal (DB) 236 of 1989 filed on behalf of Maheshwar Bind (A2), Manikchand Bind (A3) and Bishun Bind @ Bishundeo Bind (A4) have been taken up together because all the aforesaid appellants have been convicted and sentenced by a common judgment delivered on 12.04.1989, by the learned IInd Additional Sessions Judge, Bhagalpur holding the appellants guilty u/s 302/34 of the IPC and sentenced each of them to undergo R.I. for life. During pendency of the appeal one of the appellant Ganouri Baitha of Criminal Appeal (DB) No. 219 of 1989 and two appellants namely Ramji Bind and Mahendra Bind of Criminal Appeal (DB) No. 236 of 1989 have died and hence the appeal on their behalf were ordered to be abated. The appeal now continues on behalf of Nawal Kishore Baitha (A1), Maheshwar Bind (A2), Manikchand Bind (A3) and Bishun Bind @ Bishundeo Bind (A4). In the night of 22/23.09.1985, Sitaram Bind (D1) and Ramdas Bind (D2) were butchered to death. The fardbeyan with regard to the occurrence was given at 08:30 a.m. on 23.09.1985 at police station which resulted into formal FIR (Ext. 3) of Sanhaua

P.S. Case No. 68 dated 23.09.1985 u/s 302/34 of the IPC in which all the eight persons have been figured as accused. The appellants were named as accused. In the fardbeyan Boku Bind P.W. 6 stated that at about preceding 02:30 a.m. in the night was trying to slip after urinating. At that very time, he noticed that his cousins Sitaram Bind (D1) and Ramdas Bind (D2) sleeping on cot. House of the informant and his cousins were situated side by side, at that very time i.e. after 15-20 minutes some persons encircled the informant and forced him to keep mum. They were identified as Manikchand Bind (A3), Ramji Bind (now dead), Bishun Bind @ Bishundeo Bind (A4), Maheshwar Bind (A2), Ganauri Baitha (now dead), Nawal Kishore Baitha (A1) and Mahendra Bind (now dead). After half an hour Mahendra Bind (now dead) informed about completion of the work and so all the named persons escaped towards south east. The informant came out shout and found his cousins were slit to neck. There was enmity from before with regard to measurement of the land from Manikchand Bind and Ramdas Bind. Ramdas Bind was working as Amin. Five days prior to the occurrence Manikchand Bind had poisoned the bitch of Ramdas Bind and Sitaram Bind that was another reason of enmity. On cry of the informant villagers Sheonandan Mahto P.W. 5, Shrawan Mahto P.W. 4 and Banarsi Bind (not examined) came and heard about the occurrence through the informant.

2. The fardbeyan was witnessed by Ram Bilash Bind. In course of investigation inquest of the dead body of Sitaram Bind (Ext. 4) and Ramdas Bind (Ext. 4/1) was prepared. The postmortem report of Sitaram Bind (Ext. 5) and Ramdas Bind (Ext. 5/1) was obtained. The place of occurrence was investigated into, statement of witnesses was recorded and charge sheet was submitted. The case being triable by the court of Sessions was committed where charges u/s 302/34 of the IPC were explained to the accused persons and they pleaded innocence and claimed that they have been falsely implicated. Before the trial court, the prosecution examined Dhananjay Bind P.W. 1, Ram Bilash Mahto P.W. 2, Bidyakar Thakur P.W. 3, Shrawan Mahto P.W. 4, Sheonandan Mahto P.W. 5, Boukoo Bind P.W. 6, the second investigating officer Sheopujan Yadav as P.W. 7 and Dr. Haidar Imam Ansari as P.W. 8. The defence examined D.W. 1 Anirudh Goswami a Sarpanch of the Panchayat, D.W. 2 Kuldeep Mandal-Mukhiya of Gram Panchayat and Prakash Paswan-the Chowkidar.

3. The learned Additional Sessions Judge after considering the facts and circumstances of the case came to the conclusion that the prosecution has been able to prove the charge against the accused persons beyond shadow of all reasonable doubts. This Court is to reappraise the evidence, as to whether the prosecution has been able to prove the case against all the accused or any of the accused beyond shadow of all reasonable doubts or not.

4. Learned Counsel for the appellants has submitted that the case is based upon the sole testimony of Boukoo Bind who was also not a witness of the occurrence but Boukoo Bind was aged 70 years at the time of occurrence, therefore, he was not in a position to identify all the accused during night. It has also been

submitted that the occurrence has been described to be of at about 02:30 a.m. to 03:00 a.m., and at that time it was dark night and it is not explained as to how the informant identified the accused. The factum of night being a moonlit night has not been found to be correct according to the prosecution own version. Another aggressive argument has been made, that in fact the informant has killed his cousins and for that he was taken to police station and was kept detained there for long and only for those reasons the fardbeyan recorded on 23.09.1985 was changed in the court and it was gross violation of all the mandates laid down in the Cr.P.C.

5. Before taking up the eye witnesses' account it would be appropriate to go through the doctor's evidence. Dr. Haider Imam Ansari was posted as Assistant Professor of Bhagalpur medical college and on 23.09.1985 at 03:45 p.m., he performed post-mortem upon the dead body of Sitaram Bind which was identified by constable Bidyakar Thakur P.W. 3 and Ram Bilash Mahto P.W. 2. The body was having following anti-mortem injuries:

(I). Incised wound in front of the neck 9"x2 1/2"x cut of sixth survival vertebra. The skin, muscles and blood vessels, nerves, trachea and esophagus and six surgical vertebra were found cut.

(II). Incised wound in front and left side of neck in the upper part size 6 1/2"x 2 1/2" x cut on six surgical vertebra.

(III). Incised wound on left side of the lower jaw 1 1/2"x 1/2" x cut of mandible.

Injuries were caused by heavy sharp cutting weapon and it was caused within 12-18 hours of examination by sharp cutting weapon.

On the same day at 04:00 p.m. the doctor had performed another autopsy on the dead body of Ramdas Bind and found the following anti-mortem injuries:

(I). Four incised wounds on left side of neck of different shape and size varying from 6" in length and 4" in width up to cut of vertebra at different levels on survival vertebra.

(II). Skin, muscles, large vessels, nerves, trachea and esophagus, and third, fourth & sixth survival vertebra were found cut. Spinal chord was also found cut at the level of IVth survival vertebra. Regurgitated food found in the wound.

The cause of death was hemorrhage, shock and asphyxia and the weapon used was heavy sharp cutting weapon. The death was 12-18 hours before from the examination.

6. From cross-examination and some argument it was apparent that the death of Sitaram Bind and Ramdas Bind due to use of heavy sharp cutting weapon was not disputed. The postmortem read with the inquest has proved beyond shadow of all reasonable doubts that Sitaram Bind and Ramdas Bind were killed in the night of 22/23.09.1985 by use of sharp cutting weapon.

7. Once it has been established that two persons were killed by the use of sharp cutting weapon and it was a case of culpable homicide amounting to murder then the prosecution was required to prove that it was the conduct of the appellants and appellants alone which was resulted into death of two persons for this the ocular evidence has to be scanned through.

8. P.W. 1 is son of the informant P.W. 6. P.W. 5 is an inquest witness as well as a hearsay witness. P.W. 3 is the constable who had carried the dead body of both the deceased for postmortem. P.Ws. 4 and 5 were other hearsay witnesses. P.Ws. 2, 4 and 5 are named as witnesses in the fardbeyan of the informant P.W. 6. Firstly, the evidence of the informant is being considered.

9. The informant at the time of his deposition was found to be of 75 years. The deposition was recorded on 9th May, 1988 and the occurrence was of the night of 23.09.1985. He has stated that he got up to urinate but has not seen anybody sleeping. The informant took to his bed. Half an hour thereafter, meaning thereby at about 03:00 a.m., in the night he was encircled by the criminals who were Manikchand Bind, Ramji Bind, Bishun Bind @ Bishundeo Bind, Maheshwar Bind, Ganauri Baitha, Nawal Kishore Baitha and Mahendra Bind. They were identified, as it was a moonlit night. Sometimes thereafter, other criminals gave report about completion of work and decamped towards south west of the village. The informant came out and found his cousins' neck cut. On his cry Shrawan Mahto P.W. 4, Sheonandan Mahto P.W. 5 and Banarsi Bind (not examined) came. He has further deposed that Banarsi Bind has already been murdered. His fardbeyan resulted into the formal FIR. He has stated that before he had gone to the police station the officer-in-charge had already visited the place of occurrence and the informant was taken to police station by the officer-in-charge. The informant gave his fardbeyan at the police station. His statement was also recorded at his house in presence of a number of villagers. Subsequently, the informant was sent to police station along with the constable and the officer-in-charge remained himself near the dead bodies. He has described the place of occurrence in para-4 of his deposition wherein he has stated that his house was facing north and it was encircled of three sides by wall. The informant was sleeping on his cot along with his wife (not examined). Small children were also sleeping there. At that very time the criminals came near him but the informant and none of his family member was assaulted. The informant claimed the identification in the night which was moonlit night. Only the deceased were present in their houses. The exit of the deceased was towards east. He has denied that he has claimed the identification through voice. Now, we have to see as to whether the informant's evidence was corroborated by other witnesses or not. P.W. 1 is not named as a witness in the fardbeyan but he is son of the informant, therefore, his presence at the relevant time can be possible. He has stated that his wife and mother were quarreling till 01:30 in the night at that very time his uncle Ramdas Bind (the deceased) came and pacified the matter. P.W. 1, thereafter, returned to his bed and his uncle went to his house. After 1 1/2 hour at 03:00 a.m., he came at his door where his father was

present. P.W. 1 went to his uncle Ramdas Bind (the deceased) but found that he was killed. He was told by his father that the occurrence was committed by the accused persons but P.W. 1 has not named the appellants so this witness is a hearsay witness and came through the informant who was his father. He has stated that the occurrence was informed to Chowkidar, Sarpanch and Mukhiya (P.Ws. 1 and 3) they came and the occurrence was reported to police by Chowkidar, P.W. 1 has also gone to the police station. P.W. 2 is named as a witness in the occurrence, but has said that he knew about the occurrence from the informant. P.W. 4 has stated that he knew about the occurrence through the informant. P.W. 5 has also stated that he knew the occurrence from the informant.

10. Learned counsel for the appellants has submitted that in fact it was a case of no evidence and the trial court had wrongly placed the testimony of sole eye witness. P.W. 6 Boukoo Bind who was also not a witness of the occurrence. Even the entire evidence of the informant is to be believed correct, then also it can be safely said that he was not a witness of the occurrence but has presumed that the occurrence might have been committed by the appellants and others who were found in the night. Further argument is that it was not possible that in the dark night a person of advanced age can identify the culprits. It has also been submitted that the informant tutored his version at different stages. Though fardbeyan was recorded after many hours of the occurrence and it was not mentioned that any source of light was present which enable the informant to identify the accused. It has also been submitted that in fact it was not a work of the informant who had enmity with his cousins and initially for that reason he was taken to police station by the officer-in-charge but was withholding the FIR in reaching the court for more than a week and a false, malicious case was manufactured.

11. On the other hand, learned APP has submitted that the case rests at the single witness but the informant has remained intact in his version. His evidence has established that it was a conduct of the appellants which led to death of Sitaram Bind and Ramdas Bind in the night. It has also been submitted that the informant has told about the occurrence to P.Ws. 1 to 4 and 5 who came after the occurrence and he had no time to fabricate the case.

12. We have heard the submissions and analyzed the circumstances. The occurrence was of the night and it was at about 03:00 a.m. in the night. Before the trial court the correct stress was given on the source of identification in the moonlit night. It was also asserted that it was a month of Bhadra Shukla Paksha, so it was possible that the moon light shall be available at 02:20 a.m. in the night.

13. The discussion of the trial court is that on 22.09.1985, the moon light was available at 02:00 a.m. It is not the case of the prosecution that the occurrence was at 02:00 a.m., rather consistent version is that the occurrence was of half an hour meaning thereby it can be of before a.m. and the prosecution version

regarding availability of the moon light that the light at best was available at 02:00 a.m. and not to 03:00 a.m. which can be said to be the time of occurrence according to the prosecution. Once the light was not there then the onus was not upon the prosecution which was not done.

14. P.Ws. 1, 2 and 3 are the witnesses who have come to the place of occurrence and the matter has been informed and the Chowkidar had gone to the police station and has given information about the occurrence. That version was altogether different version and not the version as has been given by the informant. It has come in the deposition of those different witnesses that name of the assailants were not disclosed that they arrived near the informant. The first I.O. has not been examined in the case.

15. The circumstances available on the record analyzed and it can be said that source of identification has not been explained beyond shadow of all reasonable doubts and sketchy evidence cannot be relied. In the result, the judgment of conviction and order of sentence is set aside. The appeals are allowed. The appellants are already on bail. They are acquitted of the charges and discharged from the liabilities of their respective bail bonds.