

(2007) 01 JH CK 0034

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No"s. 45 and 69 of 2001

Hariom Prasad

APPELLANT

Vs

State of Jharkhand and Shiv Kumar Sharma
 Ajay
Barua Vs State of Jharkhand

RESPONDENT

Date of Decision : 17-01-2007

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Penal Code, 1860 (IPC) — Section 120B, 302, 34

Citation : (2007) 3 JCR 16

Hon'ble Judges : Dhananjay Prasad Singh, J; Amareshwar Sahay, J

Bench : Division Bench

Advocate : P.P.N. Roy, V. Shivnath, P. Kumar and R. Lala, for the Appellant; V.S. Sahay, APP, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Singh, J.—Both the appeals, arising out of same judgment, were heard together and are being disposed of by this common judgment.

2. Both the appeals are directed against the judgment of conviction and order of sentence dated 11.12.2000 and 23.12.2000 passed by the learned First Additional Sessions Judge, Jamshedpur in Sessions Trial No. 115/98, whereby and whereunder the learned Sessions Judge held all the appellants guilty under Sections 302/34 IPC and 27 of the Arms Act and sentenced them to serve RI for life under Sections 302/34 IPC and appellants Ajay Barua and Hariom Prasad are further sentenced to serve RI for three years u/s 27 of the Arms Act. However sentences were directed to run concurrently.

3. The factual matrix leading to these appeals are that the deceased Dr. Capitan Shankar Lal Sharma has got some dispute with Jairam Yadav @ Yuadunandan Singh regarding some properties situated in Jamshedpur town. The prosecution case further is that the deceased has purchased a house on which accused

Jairam had also an eye resulting to criminal cases between them. The informant Shiv Kumar Sharma stated that in the evening of 30.6.97 the deceased Dr. Sharma was examining patients as usual in the clinic situated at holding No. D/235, Khuntadih. Further stated the informant along with nurse, PW 2 Sushila Das has gone to the PO with some medicines at about 8 PM where the deceased was examining patients. It is further stated that when he was taking instruction from the deceased for the medicine; all of a sudden accused Jairam Yadav, Dudhai Yadav, appellants Ajay and Hariom entered into the clinic. He further asserted that Jairam Yadav, since deceased shouted "kill the doctor, as he is trying to send all of us to jail". As alleged, on this appellants Ajay, Hariom and Dudhai fired upon the deceased from the pistols in their hands. The bullets hit the deceased, blood started coming out of his body. Thereafter, all the accused persons ran out of the clinic flashing the guns in their hands.

4. Immediately the informant along with others carried the deceased to TMH hospital for medical aid where he was declared dead. The police got information, arrived at the PO and proceeded to TMH to record the statement of the informant. Accordingly, registered Sonari P.S. Case No. 66/97 under Sections 302/34/120B IPC against 8 persons including the appellants. The police investigated the case and finally submitted charge sheet against 8 persons, who were committed to the court of sessions for trial. The learned trial court framed charges against sever, persons including the appellants under Sections 302/34/120B IPC. The appellants were further charged u/s 27 of the Arms Act separately. All the accused person pleaded not guilty and claimed false prosecution. The learned trial court, after examining the witnesses, found and held only three persons guilty under Sections 302/34 IPC and appellants Ajay Barua and Hariom Prasad were also found guilty u/s 27 of the Arms Act. All other accused persons were acquitted of the charges. Accused Dudhai Yadav died during pendency of the appeal. Both the appellants were sentenced as aforesaid.

5. These two appeals have been preferred on the ground that the learned trial court has committed apparent mistakes by believing the prosecution case. It is also asserted that the entire prosecution version stands contradicted by the circumstances and facts on record. Learned Counsel for the appellants asserted that these two appellants have got no concern with the affairs of accused Jairam Yadav or Dudhai Yadav with whom the deceased has got any litigation. It is further submitted that in absence of any motive available on record, the appellants have been convicted, wrongly. It is also submitted that from the fact on record, it is apparent that the fard beyan, proved as Ext.3, is not the first version of the occurrence as it is admitted by the informant that his statements were recorded by the police in the police station and not in TMH. The learned Counsel further pointed out that so called fard bayan was recorded by the police after much delay with concoction to implicate the accused Jairam and Dudhai Yadav because of previous enmity at the instance of brother of the deceased, who was a police inspector. The learned Counsel stressed before us that informant Shiv Kumar Sharma had he occasion to be present at the PO at the

alleged time of occurrence. Therefore, he should have been held, a tutored witness and prosecution case should have been discarded. It has also been asserted that the identity of the appellants as well as their participation in the alleged crime has not been properly established by the prosecution witnesses. Learned Counsel for the appellants further stressed that the prosecution has failed to prove beyond doubt that the bullets recovered from the body of the deceased were fired upon by the appellants. Therefore, conviction of the appellants is fit to be set aside.

6. We have anxiously considered the submissions of the learned Counsel for the appellants along with materials available on record. The prosecution has examined altogether ten witnesses in support of its case. Out of which PW 2 Sushila Das and PW 3 Dinesh Pandey have been declared hostile. PW 1 Dr. Renu Bala has conducted the post mortem upon the dead body of Dr. Capitan Shankar Lal Sharma and found three fire arm injuries on his person. This witness has opined that fire arms were used from the close range, causing injuries all over the face and other parts of the deceased. The doctor has further extracted two bullets from the dead body and handed it over to the police. Therefore, it is established beyond doubt that the deceased met with homicidal death caused by fire arms.

7. PW 4, Shiv Kumar Sharma, the informant and PW 5 Sanjay Kumar Sharma, relative of the deceased, have supported the prosecution case in details. We would like to discuss their evidence later on. PW 6 Rama Raman Prasad is the IO and PW 7 Keshav Prasad is another IO., who has submitted the charge sheet only. PW 9. Mukesh Kumar is a seizure list witness while PW 8 Arun Kumar Dubey is another eye witness of the occurrence, though he has not seen the actual firing upon the deceased. PW 10 is Sri S.B. Singh, the Judicial Magistrate, who recorded the statements of PW 2 and DW 1 u/s 164 Cr.P.C. PW 8 stands criticized by the learned Counsel for the appellants that he was a police informer and on their pay role, who was generally examined as a witness by the police to implicate falsely the innocent persons. During argument the learned Counsel for the appellants admitted that PW 8 during his cross examination in the dock was not confronted with any such document. In such view of the fact the credibility of the witness has not been challenged properly before the trial court. However, his statement is require to be considered on merit along with other evidences.

8. PW 9 Mukesh Kumar has signed over the seizure list of the articles seized by the police from the clinic of the deceased, vide Ext.5 series. PW 10 Sri S.B.P. Singh proved the statements recorded by him on 7th July, 97 of Sushila Das, Chhotu Lal Mahto and Deepak Parikh, vide Exts. 6, 6/1 and 6/2. PW 7 Kesho Prasad took the investigation from PW 6 to submit the chargesheet on 31.8.97. He has visited the PO on 3rd August, 97. Nothing material has come during cross examination in favour of the appellants. PW 6 Ram Raman Prasad received the information while he was on patrolling duty that some incident has taken place in the clinic of Dr. S.L. Sharma (deceased) and he proceeded there to know that Dr

Sharma has been taken to TMH for his treatment. He reached TMH to learn that Dr. Sharma has already been declared dead. He recorded the fard beyan of PW 4 marked as Ext.3. He has asserted that during the visit at the PO he found a room of 10 x 30" size fenced by grills. He has got the PO photographed and described it in para 4 of his examination in chief. He has prepared the seizure list already marked as Ext.1 and photograph is marked as material Ext.2. He has further proved the negatives of the photographs, two bullets recovered from the body of the deceased, marked as material Exts.3 and 4. He has described the PO vide para 9 of the examination in chief in details. He has been cross examined at length regarding the presence of the patients in the clinic of the deceased at the time of occurrence. He has admitted that PW 5 Sanjay Sharma has not named appellant Ajay Barua before him. The learned Counsel for the appellants has criticized this witness on the ground that this witness has not mentioned the presence of any emergency light at the PO. It is also submitted that this witness has contradicted PWs 4, 5 and 8 regarding the presence of patients and their Identity as well as means of identification in absence of the emergency light. According to the learned Counsel, it is admitted case of the prosecution that during occurrence the regular electricity was not available and the deceased was working in emergency light but no such emergency light was found by him.

9. The informant, PW 4, Shiv Kumar Sharma has supported his statement made in the fard beyan in details. He has been cross examined at length, in which he admitted that when he reached at the PO the deceased was examining a child. He further admitted that when the deceased was instructing PW 2 how to induce the medicine, this occurrence took place. He admitted vide para 14 that he knew appellant Hariom Prasad 7-8 years before. He has further admitted that he has signed over the papers in the police station, where he reached after his brother was declared dead. He has been further supported by PW 5 Sanjay Kumar Sharma. According to this witness, he was sitting in the pathology room when incident took place. He named Jairam Yadav shouting to kill the deceased and thereafter he heard the sound of three firing. He saw the appellants running out of the room. He used to run a repairing shop in the same campus. He is said to be an afterthought witness by the defence. It has come during cross examination that he did not see any of the appellants firing upon the deceased but immediately thereafter he saw them fleeing away.

10. The learned Counsel for the appellants attacked the evidence of PWs 4 and 5 on the ground that they were afterthought and tutored witnesses because of the following probabilities:

- (1) PW 4 Shiv Kumar Sharma had no occasion to visit the clinic of the deceased at 8 PM on 30.6.97.
- (2) The FIR was lodged by the police after consultation and may result in concoction.
- (3) PW 5 was admittedly related with the informant and a tutored witness.

11. In this context our attention was drawn towards the admission of PW 4 that he signed over the fard beyan in the police station, whereas the fard beyan Ext.3 mentions the recording of the statements in TMH at 21.45 hours. According to the learned Counsel, it shows that the fard beyan was obtained in the police station and wrongly shown to be recorded in TMH. Learned APP submitted that when the police has arrived at TMH and the statement was recorded as per Ext.3, there was no occasion to get the signature of the informant in the police station. However, the informant has admittedly reached the police station after recording of the fard beyan where during course of investigation police recorded his further statement, vide para 3 and 6 of PW 6, the I.O., Rama Raman Prasad. Learned APP further pointed out that vide para 15 of PW 4, this confusion has been cleared where he asserted that he signed over twice on the papers in the police station during investigation. We have gone through the evidence of PWs 4, 5 and 6 minutely and find that this point raised by the defence counsel cannot be accepted particularly when the informant having seen his brother being killed in his presence and the police investigated the case immediately after recording his statement in TMH. Further more, it cannot be accepted to hold the fard beyan and its contents as afterthought and concocted.

12. Our view in the above context stand corroborated from the facts on record. It is admitted case that accused Jairam Yadav and his brother Dudhai Yadav have got serious litigations with the deceased and informant prior to this occurrence. It has come on record that accused Jairam Yadav has got his business premises just outside D/235, the clinic of the deceased. The statements of PWs 4, 5 and 8 in this context are specific that Jairam Yadav along with three others entered into the clinic of the deceased after 8 PM and on his direction the deceased was shot upon by three accused including these two appellants at point blank range. The post mortem has confirmed that there were three bullets injuries resulting in his death and further that two bullets were recovered from the dead body. So far as the question of identity of the appellants is concerned, PW 4 has asserted that he knew appellant Hariom since before. The presence of these two appellants at the time of occurrence outside the clinic has been admitted by witnesses examined by the appellants in their defence. DW 1 Deepak Parikh, who has also been examined u/s 164 Cr.P.C. by PW 10 on 7th July, 97 specifically mentioned that he saw the appellants Hariom and Ajay sitting with accused Jairam and Dudhai (since dead) in the shop of Jairam in evening of 30.6.97 at about 5 PM and again on 6 PM as well as 18 PM. According to this witness all of them had gone to the clinic of the deceased on hearing the sound of fire shot and found that Dr. Capitan Sharma has been shot dead. This witness has tried to assert that the informant Shiv Kumar Sharma has reached after half an hour of the said firing. During cross examination this witness has denied his earlier statement made before the Judicial Magistrate, vide Ext.6/2. Therefore, the appellants were admittedly present near the PO immediately when the deceased was fired upon. DW 2, Santosh Kumar similarly mentioned that he along with appellants Hariom and Ajay went to the clinic of the deceased. According to him, two boys were

coming out of the clinic and he could identify them. He was also examined by PW 10 and this fact has not been stated earlier. As such the defence witnesses have also admitted that appellants were present at the PO. The appellants during their statements u/s 313 Cr.P.C. have not explained their presence nor asserted that they reached there after hearing the shot, rather tooth of them, appellants Hariom and Ajay flatly denied their presence and any knowledge about the death of the deceased. Therefore, there is material contradiction between the statements of the appellants and DWs 1 and 2. Accused Jairam Yadav, in his statement u/s 313 Cr.P.C. asserted that they were not present there. He has again denied that he has any enmity with the deceased.

13. PWs 4 and 5 though related, their testimony cannot be thrown away just because they happened to be related with the deceased. The presence of PW 4 has been explained by the prosecution and his presence has further been supported by PW 2, Sushila Das, who did not identify the appellants before the trial court. However, she has asserted the identity of these two appellants in her statement u/s 164 Cr.P.C. before PW 10. Even without her support, PW 4 has known the appellants since before. PW 5 is admittedly having a gas repairing shop by the side of the clinic and his presence at about 8 PM on 30.6.97 cannot be ruled out.

14. The learned Counsel has tried to discredit this witness on the ground that he was sitting in the lab situated outside the room where the deceased was shot upon. This has come in the evidence of PW 6, the IO that clinic consisted of a room of 8 x 10" in which the deceased used to examine the patients. He further asserted that this room has got two doors, one from front side and other door opening inside the verandah. The said pathological clinic is situated inside the verandah, which is apparent from para 7 of PW 8. The defence has tried to discredit these two witnesses PWs 4 and 5 by bringing some minor contradictions in the manner in which so-called fire was opened and the deceased was hit, whether any emergency light was available or not. The suggestion appears to be farfetched. There is no dispute that deceased was examining patients and there was load shedding at about 8 PM. The doctor will not examine any patient without any light. The photo graphs of PO brought on record show that a large torch was available on the table. It is also of no consequence regarding identity of accused Jairam and Dudhai and these two appellants because they had got their shops just beside the clinic and there were litigations continuing between them and the deceased. The witnesses have further asserted the identity of appellants Hariom and Ajay. The defence could not bring on record any valid reason why these two appellants, if not involved, were named immediately after the occurrence. The IO has examined these witnesses immediately after the occurrence.

15. Considering the above facts and circumstances, the suggestion of the learned Counsel for the appellants that in absence of third bullet as well as earlier version of the occurrence, the whole prosecution story should be disbelieved, is not

acceptable. The prosecution witnesses PWs 4, 5 and 8 are apparently probable and reliable witnesses. All these three witnesses have identified the appellants. PW 8 has not claimed that he saw the appellants firing upon the deceased. However PWs 4 and 5 have specifically named them to have fired upon the deceased. Co-accused Jairam and Dudhai are already dead. In such circumstances, the non-examination of patients and the nightguard does not prejudice the defence of the appellants.

16. Learned Sr. counsel Sri Roy has tried to impress upon us that charges against other co-accused persons have not been found true and in absence of emergency light the whole prosecution story becomes doubtful. Similarly Sr. counsel Sri V. Shivnath submitted that appellant Hariom Prasad has got no motive to commit the offence. After going through the materials on record, we are of the view that such minor discrepancies are natural to occur without creating doubt on the prosecution case established above.

17. In view of specific and clear evidence on record, there was motive to commit the offence by accused Jairam and Dudhai and these two appellants have participated in the offence at their behest. Their presence at the PO and taking part in firing upon the deceased has been proved beyond doubt. The death of the deceased with fire arm injuries has also been established by the prosecution. We do not find any reason on record to accept the suggestion that the prosecution witnesses would falsely implicate these two appellants.

18. In view of the aforesaid findings, we find and hold that both the appeals are devoid of merit. Accordingly, the judgment of conviction of the trial court and further the sentence passed against the appellants are upheld and confirmed. In this manner the present appeals stand dismissed.

Amareshwar Sahay, J.

19. I agree.