

(2007) 09 PAT CK 0066
In the Patna High Court
Case No : Criminal Appeal No. 491 of 2002

Hiralal Yadav and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 28-09-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2008) 56 BLJR 471 : (2007) PLJR 925 Supp

Hon'ble Judges : Syed Md. Mahfooz Alam, J; Shiva Kirti Singh, J

Bench : Division Bench

Advocate : Rajesh Kumar Singh, Rana Pratap Singh, Vivekanand Singh No. 1 and Ravi Prakash, for the Appellant; Ashwini Kumar Sinha, APP, for the Respondent

Final Decision : Dismissed

Judgement

Shiva Kirti Singh, J.—This appeal is directed against judgment and order dated 12.6.2002 passed by Sessions Judge, 1st Fast Track Court, Ara in Sessions Trial No. 290/92 whereby appellant No. 1, Hiralal Yadav, has been convicted for the offence u/s 302 of the Indian Penal Code (hereinafter referred to as "the IPC") and appellants No. 2 to 5, namely, Kamta Yadav, Kashinath Yadav, Bhim Yadav and Ajodheya Yadav have been convicted for the offence u/s 302 read with Section 149 of the IPC. The all have been awarded imprisonment for life for the aforesaid offence. They have also been convicted u/s 148 of the IPC but no separate sentence has been awarded for that offence.

2. The prosecution is based upon Fardbeyan of Ramji Yadav (PW 6), a nephew of Ramayan Yadav (deceased), recorded on 16.11.1991 at 10.30 am. In brief, the prosecution case is that on 16.11.1991 at about 9.00 am, appellant Ajodheya Yadav armed with a Lathi and the other 4 appellants armed with Bhala were ploughing a field belonging to the informant in which he had already planted crop of potatoes. Informant went to forbid on which appellant Kashinath Yadav

exhorted others to kill the informant. Hiralal Yadav caused a bleeding injury on the head of the informant with a Bhala. The informant in order to save his life shouted on which from his house came his uncle, Ramayan Yadav (deceased), his father Dharichhan Yadav (PW 1) and his brother Bir Bahadur Yadav (PW 3), who attempted to save him. Hiralal Yadav caused a Bhala injury on the chest and abdomen of Ramayan Yadav who fell down and became unconscious. Father of the informant, Dharichhan Yadav (PW 1) was assaulted with Bhala by Kashinath Yadav and Kamta Yadav causing injuries on abdomen, back of the body and hand. PW 1 also fell down. Bir Bahadur Yadav (PW 3) was also assaulted by Ajodheya Yadav with Lathi and also by Bhim Yadav with Bhala on head causing bleeding injury. On the hulla raised by the informant and his party, Dudhnath Yadav (PW 2) and Jagdish Yadav came and saved them. Others from the village also came and thereafter the accused persons stopped assaulting and fled away. The reason for the occurrence was said to be dispute over land and litigation in the past which had resulted in court case also.

3. It appears that after recording the Fardbeyan (Exhibit 4), Assistant Sub Inspector Surajdeo Ram (PW 9) registered Tier PS Case No. 30/91 dated 16.11.1991 under Sections 147, 148, 149, 323, 324, 307 IPC and himself took up investigation. The formal FIR (Ext.5) shows that the police station was situated very close to the place of occurrence only at about 300 yards on the west. Exhibit 5 further shows that formally Section 302 was not added by the Investigating Officer by way of correction in the FIR although he had sought a permission for the same from the court of learned Magistrate on 16.11.1991 itself by informing the court that Ramayan Yadav, uncle of the informant Ramji Yadav died in the way while being taken to Bihia Hospital for treatment. The Investigating Officer (PW 9) inspected the place of occurrence, seized blood stained earth from the place of occurrence, prepared inquest report (Ext.3) sent the dead body for postmortem examination and obtained postmortem report, recorded the statement of witnesses including further statement of the informant and submitted charge sheet for the offence u/s 302 and other Sections of the IPC. After taking cognizance, the learned Magistrate committed the case to the Court of Session where charges were framed for various offences including the offence for which the appellants have been convicted. The accused appellants pleaded not guilty to the charges. After trial, they were found guilty leading to their conviction and sentence as noticed earlier.

4. The defense of the accused appellants is that they have been falsely implicated in this case on account of enmity and that the occurrence did not take place at the time and in the manner alleged by the prosecution. The defense has not examined any witness and has not filed any document.

5. The prosecution in order to prove its case has examined 9 witnesses in total. PW 1, Dharichhan Yadav is father of the informant. He is an injured who has claimed to be an eye witness of the occurrence as mentioned in the FIR itself. He has fully supported the prosecution case. PW 2, Dudhnath Yadav, is a brother of

PW 1 who came on hulla and has claimed to have seen the occurrence. PW 3, Bir Bahadur Yadav, is son of the deceased Ramayan Yadav. Like PW 1 he is also an injured and an eye witness. He has fully supported the prosecution case. PW 4, Sonia Devi and PW 5, Munesari Devi are mother and wife respectively of the informant. PW 4 has claimed to have gone to the place of occurrence on hearing hulla and to have seen the occurrence whereas PW 5 has claimed that she was on the roof of her house and from there she saw the entire occurrence because the place of occurrence is close to the house. PW 6, Ramji Yadav is the informant who is also an injured and as claimed by him in the Fardbeyan as well as in his deposition in court he saw the entire occurrence from beginning till end. PW 7, Dr Rajesh Kumar Singh, held autopsy on the dead body of the deceased. He has proved the postmortem examination report as Exhibit 1. According to him, the postmortem examination was held on 17.11.1991 at 8.00 am. He found the following 8 injuries on the dead body of the deceased:

(I) Incised wound with clean cut edges 1"x 2/10"x whole thickness on the pina of right ear.

(II) Incised wound 1 1/2 "x 1/2 "x 2/10" on the upper portion of right arm.

(III) Incised wound 1"x2/10"x2/10" on the back of scalp left side.

(IV) Incised wound 1/10"x 1/10"x1/10" on the front of right shoulder.

(V) Incised wound 1"x 1/2"x abdominal cavity deep on the right side of abdomen upper portion.

(VI) Swelling 2"x2" on the left side of back of scalp.

(VII) Penetrating wound with cut edges 1"x 1/2"x chest cavity deep on the right side of chest. 2 1/2" away from midline almost in the middle.

(VIII) Incised wound 3/4"x 1/10"x skin deep on the middle finger of right hand.

In his opinion, all the injuries were anti mortem caused by sharp cutting pointed instruments and the time elapsed since death was within 36 hours of postmortem examination. He found the cause of death to be injury No. (VII), a penetrating wound 1"x 1/2 x chest cavity deep on the right side of chest. He has further opined that the injuries could be caused by Bhala. However, Injury No. (VI) could be caused by Lathi also. The stomach of the deceased contained undigested food material and the bladder was empty.

6. PW 8, Dr R.P. Singh examined the injuries of PW 1, PW 3 and PW 6 on 16.11.1991 at Bihia Block Hospital between 12.30 and 1.15 pm. He found six injuries on the person of PW 1. He found all the injuries simple in nature but injury No. 2 and 3 were penetrating wounds on chest, right side of back and lower part of right arm above elbow joint. On PW 3 he found two injuries, one was incised wound over front portion of head 3"x 1/2" skin deep and the other was penetrating wound on the right side of abdomen 1/2"x1/4"x 3/4". The injuries were found to be simple. On PW 6, the informant, he found three

injuries. One was lacerated wound on the left side of head 1/4x 1/4 "x scalp deep up to bone, the second injury was also a lacerated wound on left side near middle of head 1"x 1/4"x 1/6". The third injury was a swelling 3"x 2" on left buttock. The injuries were simple. Some of the injuries on PW 1 and PW 3 were by sharp weapon like Bhala but in case of PW 6 the doctor opined that the injuries were by hard and blunt substance like Lathi. The age of injuries in respect of all the three injureds was found to be within six hours. The injury reports of the three injureds were proved by PW 8 as Exhibits 2, 2/1 and 2/2.

7. PW 9, Surajdeo Ram, is the Investigating Officer. Some part of investigation as done by him has already been noticed earlier. In course of inspection of the place of occurrence, he found it to be field belonging to the informant in which potatoes crop had already been planted. He found that over the potatoes crop marks of three rounds of ploughing were visible. He also seized blood stained earth from the place of occurrence. He has stated in cross-examination that report of the occurrence was first received from Choukidar and on that basis a station diary entry was made but he did not record the statement of the Choukidar. He has admitted that he has written the case diary in a systematic manner as per happening of events and the Fardbeyan is mentioned in paragraph 1 of the case diary. He has also stated that after the Fardbeyan further statement of the informant was recorded and the place of occurrence was inspected and thereafter formal FIR was instituted. According to his statement in cross-examination in respect of earlier statements made by PWs 1, 2 and 3 u/s 161 CrPC there was virtually no difference in what they had stated regarding the occurrence in court. Regarding PW 4, he has deposed that she had not told him in clear terms in her earlier statement as to which of the accused persons were having Bhala and who was ploughing and that Hiralal had assaulted on head with Bhala and Ramayan Yadav (deceased) had received injury on head with Bhala and she had also not stated on what part her husband Dharichhan Yadav (PW 1) had received injuries by Bhala and that the accused persons fled away on arrival of Jagdish and Dudhnath. No contradiction was sought in respect of Munesawari Devi (PW 5).

8. On behalf of the appellants it was argued that the time of occurrence has not been proved by the prosecution beyond reasonable doubts because the doctor has opined while conducting the postmortem examination on 17.11.1991 at 8.00 am that death appeared to be within 36 hours whereas according to the prosecution case, death had taken place within 23 hours. To this submission, learned Counsel for the State has replied that the doctor has not given any basis for arriving at the opinion regarding time of death. He has further placed reliance upon a recent judgment of the Supreme Court in the case of Ramjee Rai v. State of Bihar (2007) 2 SCC (Cri) 626 to submit that medical science has not achieved such perfection so as to enable a medical practitioner to categorically state the exact time of death. The discussions made in paragraphs 37, 38 and 39 clearly support the stand of learned Counsel for the State that the time given by the doctor regarding death can only be taken as approximate and not exact. On facts

also, I am conscious that as per general practice the doctors in course of autopsy indicate time of death since postmortem examination only in general terms using the expressions- within 12 hours, within 24 hours, within 36 hours etc. Such phraseology itself indicates that the time indicated by the doctor is only approximate. If the postmortem examination had been done at 9.30 am then the same opinion of the doctor that the death was within 36 hours would have appeared to be in full consonance with the prosecution case. Such small difference of time cannot be of any significance when the time of occurrence given by the eye witnesses is consistent that the occurrence took place on 16.11.1991 at 9.00 am. Hence, the aforesaid submission on behalf of the appellants is found to be without any substance.

9. The other submission advanced on behalf of the appellants is that the nature of injuries found on the deceased and the injureds do not support the prosecution case. On careful perusal of the injuries found on the deceased and the injureds it appears that most of the injuries are by sharp and penetrating weapon like Bhala and the two most prominent injuries on the deceased as mentioned in the Fardbeyan were by Bhala caused by appellant Hiralal Yadav on the chest and abdomen. Those injuries appear to be injuries Nos. (V) and (VII). Although injury No. (V) has been described by the doctor as incised wound but its dimension- 1"x1/2"x abdominal cavity deep, leaves no manner of doubt that this was also a penetrating wound capable of being caused by a Bhala. This is confirmed by the opinion of PW 7, Dr Rajesh Kumar Singh that all the injuries were caused by sharp cutting pointed instruments. The eye witnesses, particularly the injured witnesses have given consistent and natural version of the occurrence. Since some of the witnesses including the informant had sustained injuries in the occurrence, their attention could not have been equally focused in respect of further assault on others including the deceased but PW 2 as well as PW 3 have clearly stated that after Ramayan Yadav received Bhala injuries at the hands of Hiralal Yadav and fell down, he was subjected to further assault by Hiralal. The opinion of the doctor in respect of three injuries on the informant (PW 6) that all were caused by hard and blunt substance like Lathi cannot be given such value so as to disbelieve the prosecution case that Ramji Yadav was assaulted on the head by Bhala which caused bleeding injury. The two injuries on the head which is a bony part may also appear to be lacerated unless edges of the cut skin are carefully subjected to examination under microscope to find out whether the edges were sharply cut or not. Further, the edges of a Bhala may not always be as sharp as the edge of knife or sword and may cause wound on a bony portion like scalp resembling a lacerated wound generally attributed to a hard and blunt substance. Further, it is well established in law that in case of availability of consistent and reliable ocular evidence, some discrepancies on account of medical evidence may justifiably be ignored. On a careful consideration of the injuries on the deceased and the injureds no discrepancy is found which may discredit the prosecution case.

10. The last and most serious submission on behalf of the appellants was that

the Investigating Officer (PW 9) has admitted in his cross-examination that information of the occurrence was first given by a Choukidar which was incorporated in a station diary entry. It has been submitted that such information has been suppressed and purposely the statement of the Choukidar was not recorded by the IO whereas such information should have been treated as the first information report in respect of the alleged occurrence. It is worth pointing out that in cross examining the IO the defense has not elicited either the number and time of the station diary entry nor the time when the Choukidar allegedly gave some information whose substance was entered in some station diary entry. The name of the Choukidar has also not been elicited. This was an extraction or revelation of a fact which had never been put before the material witnesses like the informant and the injured witnesses who had been examined before the IO. Even the limited information given by the IO in cross-examination is insufficient and it was not possible for the prosecution to produce the alleged station diary entry whose number, date and time was not elicited from the IO. It was also not possible to examine the Choukidar who had allegedly given the information because his name was also not elicited. The prosecution is thus being blamed for suppressing the contents of a station diary entry whose details are absolutely vague and missing and the defense, never requisitioned any station diary entry to be produced during trial. Further, the IO has stated in the same paragraph that Fardbeyan of the informant is mentioned in paragraph 1 of the case diary and that he has recorded the events in the case diary systematically as they took place. This piece of evidence from the IO is sufficient to take away all the force from the submission of the defense that information by a Choukidar was the earliest version of the occurrence. In such circumstances, no adverse inference can be drawn against the prosecution on the unacceptable plea of the defense that there was an earlier version of the occurrence which has been suppressed.

11. There is some discrepancy regarding the place where the Fardbeyan was actually recorded. On the top of the Fardbeyan the heading given in English, apparently by the IO, shows that Fardbeyan was recorded at the place of occurrence but in the actual Fardbeyan which is in Hindi the place of recording of the Fardbeyan is not clear. The informant in his evidence has clearly stated that his Fardbeyan was recorded by the Assistant Sub Inspector at the police station. It is general practice that if a Fardbeyan is recorded at a place other than the police station then a note is appended at the end of the Fardbeyan as a forwarding note by PW 9 to show that it has been forwarded to the police station for recording of a formal case. Such note is followed by another note in the nature of a receiving note that the Fardbeyan has been received by the officer incharge and he has authorized some police officer to investigate the case. A perusal of Exhibit 4, the Fardbeyan and also the formal FIR shows that there is neither any forwarding note nor any receiving note by the officer incharge of the police station. In fact, the informant (PW 6) has given further details in paragraph 13 of his deposition that even the injureds were brought to the police station first and there they stayed for about 20 minutes during which the officer

incharge did not come then the ASI took the Fardbeyan and then the informant proceeded to Bihia Hospital which is at a distance of about 13 kms. Since the place of occurrence and the police station are admittedly in close proximity of 300 yards hence it is clear that the actual recording of the Fardbeyan was at the police station where it was convenient for the ASI to sit down and write the Fardbeyan but for some technical reasons he has insisted on showing the Fardbeyan to have been recorded at the place of occurrence. On going through this inconsistency which has been highlighted by the defense, it is clear that on account of lapse by the ASI incorrectly showing the place where the Fardbeyan was recorded, the prosecution case cannot be thrown out of court. The actual place where the Fardbeyan was recorded as disclosed by the informant deserves to be accepted and this alone cannot be used against the prosecution to submit that it has failed to prove its case that the occurrence took place in the manner and at the time alleged by the prosecution.

12. On a careful appreciation of the entire evidence, particularly of the injured witnesses, it is clear that the prosecution has proved the manner of the alleged occurrence as well as the time and place of such occurrence. The objective findings of the IO also go to support the place of occurrence. PW 4, the mother of the informant may not have seen the actual occurrence as appears from the contradictions between her statement in court and statement before the police but the other witnesses are found to trustworthy and the presence of the injured witnesses as well as of PW 2, Dudhnath Yadav, is supported by the earliest version of the occurrence contained in Fardbeyan of PW 6. The witnesses are no doubt related to the deceased and it is clear from the evidence that there was land dispute between the parties from before but on careful appreciation, the ocular evidence is found to be reliable as well as consistent. The prosecution has succeeded in proving the alleged occurrence as well as time and place of the occurrence beyond any reasonable doubts. The finding of the doctor that the stomach of the deceased contained some undigested food and his bowel was empty also supports the time of the alleged occurrence because by 9.00 in the morning people in villages generally have some food after attending the call of nature and washing their mouth etc. There is no substance in the submission that medical evidence does not support the prosecution case.

13. For all the aforesaid reasons, the appeal is found to be without any merit and is, therefore, dismissed. It appears from the records that appellant No. 1, Hiralal Yadav is in jail custody whereas appellants No. 2 to 5, namely, Kamta Yadav, Kashinath Yadav, Bhim Yadav and Ajodheya Yadav are on bail. The bail bonds of appellants No. 2 to 5 shall stand cancelled and they should be taken into custody forthwith to serve their remaining sentence in accordance with law.

Syed Md. Mahfooz Alam, J.

14. I agree.