

(2015) 08 PAT CK 0058

In the Patna High Court

Case No : Criminal Appeal (DB) Nos. 63, 111 and 175 of 2010

Jabed and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 24-08-2015

Acts Referred:

Arms Act, 1959 — Section 27

Penal Code, 1860 (IPC) — Section 120, 120(B), 120B, 147, 148

Citation : (2015) 08 PAT CK 0058

Hon'ble Judges : Gopal Prasad, J; Dharnidhar Jha, J

Bench : Division Bench

Advocate : Ajay Kumar Thakur, for the Appellant; Abhimanyu Sharma, APP, Advocates for the Respondent

Judgement

Gopal Prasad, J—Three appeals having been heard together are being disposed of by this common judgment as all three appeals arise out of the same judgment dated 9th December, 2009 passed by the Additional District & Sessions Judge, (Fast Track Court-1st) Madhubani, in Sessions Trial No. 743 of 2007, arising out of Lokaha(Khutauna) P.S. Case No. 138 of 2006, by which the appellant Jabed has been convicted for offence under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and fine of Rs. 5000/- and in default of paying the fine further sentenced to undergo rigorous imprisonment for five years. He has Further been convicted for offence under Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for five years and pay a fine of Rs. 5000/- and in default of payment of fine further sentenced to simple imprisonment for three years. The appellant, Multan Ahmad has been convicted for offence under Section 120(B) read with Section 302 of Indian Penal Code and sentenced to undergo rigorous imprisonment for life and remaining accused persons, Meraj Laheri, Thakai Mansuri, Mehdi Hassan, Lakhan Sah and Mohibul Hassan have been convicted for offence under Section 147 Indian Penal Code read with Section 302 of Indian Penal Code and sentenced to undergo rigorous imprisonment for life for conspiracy for committing murder and has been

sentenced to undergo rigorous imprisonment for life.

2. The prosecution case as alleged in the First Information Report by Aftab Alam, P.W.7 is that his father Md. Sadre Alam had gone to Ekhattha Hatia in the evening and he also went there to purchase vegetable at about 4 P.M. when his father returned back after purchasing vegetable and was at that time the north of the road, accused persons Meraj, Jabed, Thakai Mansuri, Mehdi Hassan, Lakhan Sah and Mohibul Hassan surrounded him and before the informant could know as to what was to befall, Jabed fired with a pistol at the neck of his father and all the accused persons fled away towards the south of the orchard. The father of the informant died at the spot. Further case is that Md. Anamullah, (P.W.2), Sahbaj Arfi (P.W.6), and Alam Hajam (P.W.3) and other co-villagers of P.W.7 had came there and they had seen the accused persons fleeing away. It is further stated that some days prior to the occurrence, accused Multan Ahmad, resident of Village-Ekhatha had threatened his father on telephone to withdraw the rape case and case in respect of theft of motorcycle else he would be killed and murder of father of the informant had been in connection with the above mentioned cases.

3. On receipt of the written report of the informant, Aftab Alam, the Officer-in-Charge, Ekhattha P.S. forwarded it to the Officer-in-Charge Lokaha (Khutauna) P.S. for institution of a case for offence under Sections 147, 148, 149, 302, 341 and 120(B) of the Indian Penal Code and took up the investigation of this case. Further statement of the informant was recorded, Inquest Report was prepared and the dead body of the deceased was sent for post mortem examination. Further, statements of Rajak Ahmad and Md. Amanullah were recorded. Thereafter, the I.O. inspected the place of occurrence and found blood fallen on the earth and seized blood stained earth and prepared seizure list in that behalf.

4. The police after investigation submitted charge sheet. Cognizance was taken and the case was committed to the Court of Sessions. Charges were framed under Section 302 of Indian Penal Code and Section 27 of the Arms Act against Md. Jabed and further charge was framed under Section 120B of Indian Penal Code against all the appellants. Further charge was framed under Section 302/341 of Indian Penal Code.

5. During trial fifteen witnesses were examined on behalf of the prosecution.

6. P.W. 7 is the informant, P.W. 2, 3 and 6 are named in the F.I.R. as witnesses. P.W.1 is not an eye witness. He is nephew of Md. Sadre Alam the deceased. P.W.2 claims to be eye witness who saw appellant Jabed firing at his brother, Sadre Alam. P.W. 3 Md. Alam Hajam claims to be eye witness of firing after the appellants had surrounded him. P.W.4 Sarif Ansari, is not an eye witness. P.W.5 Md. Mintullah, he is also not an eye witness, though, he heard hullah about killing of Sadre Alam by gun shot. P.W.6 Sahbaj Arfi claimed to be eye witness of firing the shot by Jabed causing death of Sadre Alam. P.W. 7 is the informant and he claimed to be an eye witness. P.W.8 Rajak Ahmad is an eye witness. P.W.9 Md.

Parwej is not an eye witness, though, claimed to have taken Sadre Alam to his house in injured state. P.W. 10 Aftabuddin has been declared hostile. P.W.11, Shamim Ahmad claims to be eye an witness of firing by Javed upon Sadre Alam. P.W.12 is Alia Khatoon wife of deceased Sadre Alam. However, she is not an eye witness, but learnt from the informant about the murder of her husband. P.W. 13 is Pashupati Nath Prasad conducted post mortem examined on the deceased. P.W.14 Alauddin Haidar, Officer-in-Charge of Khutauna police station investigated the case.

7. Defence has also adduced two witnesses as D.W.1 Md. Tahir and D.W.2 Firoj Ahmad.

8. After taking into consideration the evidences both of prosecution and defence and hearing the arguments of parties, the appellants have been convicted and sentenced as mentioned above.

9. The learned counsel for the appellants submits that F.I.R. was lodged on the written report of informant P.W.7, Aftab Alam, the son of the deceased Sadre Alam but P.W.7 has not mentioned the time of giving the written report to the I.O. P.W. 14 who endorsed on the written report forwarding it to the O/C Lokaha for instituting a case and proceeding with investigation whereas the evidence of I.O. P.W. 14 shows that he had received the written report at 9.30 P.M. on 09.11.2006. But the F.I.R. was drawn on the basis of the said written report mentioning that the written information was received in the Police Station at 20.00 hours, i.e., 8.00 P.M. on 09.11.2006. Hence, it is contended that F.I.R. is itself doubtful as it is not the one received by I.O. P.W.14 at 9.30 PM. on 09.11.2006, but was the one received in Police Station at 20.00 hours i.e. 8.00 as mentioned in the F.I.R. It is further submitted that the prosecution has failed as the earlier version of the F.I.R. has been suppressed and substituted by another version. It is further submitted that P.W. 14 has stated that on receipt of information he proceeded after recording Sanha bearing No. 143, dated 09.11.2006 in Station Diary and claimed to have remained busy for 3-4 hours in maintaining the law and order situation and only reached the village of the informant at 21.30 hours on 09.11.2006 whereas F.I.R. has been lodged on 10.11.2006 at 2.00 A.M. It is further submitted that statement of P.W.3 was recorded at the Darwaja of Sadre Alam on the date when Sahbaj Arfi and Rajak Ahmad were examined and their statements were recorded at 7.00 P.M. on 09.11.2006. Further blood seized has not been brought before the court and hence submission is that F.I.R. itself is doubtful as there is neither any time mentioned when it was handed over to the police and time when it was sent to police station and received at the police station and that time mentioned about receipt of Fardbeyan at the police station is inconsistent with the evidence of I.O. to believe the prosecution case. Further learned counsel for the appellants contends that so far as the conviction of appellant, Multan Ahmad in Cr. Appeal (DB) No. 111 of 2010 is concerned, there is no evidence against him either about his involvement or with regard to other appellants, like, Mohibul Hassan, Mehdi

Hassan, Meraj Laheri, Lakhan Sah and Thakai Mansuri have been convicted for offence under Sections 302/149 of Indian Penal Code. It is further submitted that the appellants other than Javed had not been charged under Section 149 I.P.C. rather they had been charged under Section 302 I.P.C. Hence it is contended that conviction under Section 302 I.P.C. with the help of Section 149 I.P.C. is not sustained when charge has not been framed even at a subsequent stage under Section 149 I.P.C. and hence conviction under Sections 302/149 I.P.C. is not sustainable. It is further stated that prosecution has not been able to prove charges.

10. Learned counsel for the informant Sri Ashok Jung Bahadur, however, contended that F.I.R. has been lodged on the written report of the informant, who is none else than the son of the deceased and the said written report was given to the I.O. P.W.14 at 9.30 P.M. on 09.11.2006 who endorsed on the written report and sent the same to the O/C Lokaha to lodge the F.I.R. with his endorsement on it and F.I.R. was lodged on the endorsement of O/C Lokaha to register case on 10.11.2006 and consequently F.I.R. lodged on 10.11.2006 filling of date of receipt of in written report on 09.11.2006 at 8.00 P.M. is only a mischief or an act of negligence is not to be relied upon. It is further submitted that the evidence of witnesses and informant is consistent, trustworthy and worthy of credence then merely because mischief of recording the receipt of information in Column of 3B of F.I.R. the entire prosecution case cannot be brushed aside and hence contends that there is sufficient evidence against the appellant, Javed to sustain his conviction. It has further been contended even if charge has not been framed under Section 149 I.P.C., conviction can still be sustained by taking help of Section 120B of Indian Penal Code as the charges had been framed against all the appellants under Section 201 and 120B of Indian Penal Code and this aspect also required to be considered.

11. The prosecution case is that occurrence took place at 4.00 P.M. in Ekhata Hatia where the deceased had gone to purchase vegetable and while purchasing and proceeding to his house, the accused persons surrounded and appellant Javed shot at the deceased Sadre Alam which hit on his neck and he succumbed to the injury. P.W.14, the I.O. in his evidence has stated that he received rumour about the murder of husband of Sarpanch in the Village-Ekhatha by gunshot injury. He recorded Sanha No. 143, dated 09.11.2006 in Station Diary and then proceeded to Village-Ekhatha and since then he remained there busy in maintaining law and order as there was tension amongst supporters of Sarpanch causing law and order problem. So he reached at the place of occurrence at 21.30 hours in the village. The deceased was taken to village after the occurrence at said Hatia where occurrence took place. However, the I.O., P.W.14 O/C of the Khutauna on receipt of the written report by informant made the endorsement on the written report forwarding the written report to O/C Lokaha for registering the F.I.R. and P.W.14 took up the investigation. The said endorsement has been proved and marked as Exhibit-4. The said endorsement is dated 09.11.2006. On the said written report, there is also endorsement of O/C

Lokaha to register a case bearing Lokaha P.S. Case No. 138 of 2006 dated 10.11.2006 for offence under Sections 147, 148, 149, 302, 341 and 120B of Indian Penal Code and Section 27 of the Arms Act. The said endorsement is apparently on written report itself by O/C Lokaha dated 10.12.2006. Hence, apparently after the endorsement on written report by O/C Lokaha, the F.I.R. was drawn on 10.12.2006 at 2.00 A.M. The evidence of P.W.14 the I.O. who received the written report on his arrival at the village at 21.30 hours (9.30 P.M. on 09.11.2006) and sent the same for lodging the F.I.R. with his endorsement at 9.30 on 09.11.2006 and endorsement of O/C Lokaha on the written report on 10.11.2006 itself shows that the entry in Column 3B of the F.I.R. showing the receipt of the written report in Police Station at 8.00 P.M. on 09.11.2006 stands falsified. However, finding the entry made in Column 3B of F.I.R. about receipt of written report at 8.00 P.M. on 09.11.2006 in the photo copy of F.I.R. attached in Paper Book, the receipt of written report in Police Station at 8.00 P.M. on 09.11.2006 contrary to evidence adduced by I.O. that written report was received at 9.30 P.M. at P.O. village and proved as Exhibit-4 compelled us to look into the original F.I.R. and it was curious to find that the said Column 3B had been filled in a different pen and ink and was not filled up in one stroke while filling other column of the F.I.R. in one stroke and it appears apparently that there is some manipulation done in favour of the accused by introducing receipt of written report at 20.00 hours or 8.00 P.M. Hence, I find that the said argument based on the apparent manipulation made in F.I.R. and the argument advance that F.I.R. based on the written report which was received at 8.00 P.M. is on the basis of false entry in the F.I.R. and hence is not accepted.

12. The argument was advanced that the occurrence took place at 4.00 P.M. and thereafter the police received rumour and then reached the P.O. later on. It has further come in the evidence of I.O. that since the murder was of husband of Sarpanch and it created a lot of law and order problem and it took about four hours in taking control of the law and order situation and then police proceed to record the written report.

13. The submissions are only based on supposition that police may have reached there at 8.00 P.M. and if it took 3 to 4 hours to control the law and order as per evidence of I.O. then written report could not have been recorded at 9.30 P.M. However, the argument made on supposition is only hypothetical devoid of factual matrix. The occurrence took place at 4.00 P.M. and it may have taken an hour to reach police at P.O. then after controlling the law and order situation in 3 to 4 hours, the police may have reached at 9.30 P.M. to receive the written report and hence there is no merit in the said submission. Moreover, there is no scope for supposition nor the time factor can be taken on mathematical precision to disbelieve the prosecution story on these grounds.

14. The case of the prosecution as alleged in the First Information Report, is that the deceased had gone to Hatia and the informant, the son of the deceased, also went to Hatia to take vegetable when he saw six accused persons coming into

the Hatia from the road side of Hatia, i.e., from South and identified six accused persons and Md. Javed fired from his pistol causing injury on the neck of the deceased. Exhibit-3 is the Inquest Report which shows blood had oozed out from the neck, and the injury was by fire arm. P.W. 13 is the Doctor who conducted the post-mortem examination on the person of the dead body and has stated that on 10.11.2006, he was posted at Sadar Hospital, Madhubani and conducted post mortem examination of dead body of a Muslim male aged about 45 years named Sadre Alam at 11.00 A.M. identified by Choukidar 5/1 Ram Prit Paswan of Khutauna P.S. and found the following anti mortem injuries:-

- (1) A lacerated wound on the left side of skull 2"x1/4" bone deep,
- (2) A perforating wound on the anterior surface of root of neck just to left to the mid line circular shape; 1/2" diameter with charging of skin around the wound,
- (3) A perforating wound on the right side of upper part of back of abdomen with ragged anal torn - to bear a nice; 1"x1" incise with averted margin wound of exit.

Time since death - within 24 hours and death in his opinion was due to hamaerroage and shock as a result of above mentioned perforating injuries.

15. Hence from the evidence of the Doctor, it is apparent that prosecution case is supported by the evidence of the Doctor as regards the time of occurrence and the manner of occurrence.

16. However, the informant, P.W.7 has specifically stated that he was purchasing vegetable and when he had already purchased it and was about to return, he saw Javed, Meraj, Mehadi, Thakai and Lakhan Sah had surrounded his father and Javed fired from his pistol which hit in his neck and his father fell down and died on the spot. He saw Meraj and Javed fleeing away towards west and they were chased and then he with the help of Alam Hajam and Sahbaj Arfi, (P.W.6) lifted his father, but he had died on the spot. He then brought his father from Hatia to his house. He has further stated that Multan threatened his father on telephone to withdraw the rape case else he would be killed. However, this witness in cross-examination stated that he cannot say that from which phone threatening was received and he cannot say whether his father was a witness in the rape case or who had lodged the rape case against whom and who was the victim of the offence.

17. P.W. 2 Md. Amanullah is an F.I.R. named witness who has claims to be an eye witness. He has deposed that he saw Mohibul Hassan, Md. Javed, Meraj and Mehdi Hassan had surrounded his brother and Javed fired on the neck of the deceased Sadre Alam by pistol due to which Sadre Alam fell down. Thereafter, the accused had decamped, who were chased. He then took the deceased along with other villagers to his darwaja. This witness claimed to be brother of the deceased Sadre Alam. After going through the entire evidence of P.W.2 there is nothing in his evidence to disbelieve the story.

18. P.W.3 Alam Hajam is also an eye witness and has supported the prosecution

case. He, in his deposition, stated that when he was purchasing the vegetable, he saw Javed, Mohibul Hassan, Meraj, Mehdi Hassan, Thakai Mansuri and Lakhan Sah were present there and Sadre Alam was also standing at the vegetable shop. Then all the accused persons came there and surrounded Sadre Alam. Javed fired at Sadre Alam causing injury to his head then the witness rushed there where Sadre Alam had fallen, though, he chased Javed, but Javed threatened him by his pistol. In his cross-examination he has described the place of occurrence.

19. P.W.6 Sahbaj Arfi is also an eye witness to the occurrence and stated that he met Sadre Alam in the Hatia while he was purchasing vegetable and Javed, Moibul and Meraj surrounded Sadre Alam. Thereafter, Javed fired at Sadre Alam and some persons chased Javed and Sadre Alam fell down and died. P.W. 8 Rajak Ahmad is also claims himself to be an eye witness to the occurrence.

20. However, P.Ws. 1, 4, 5, 9 and 10 are not eye witnesses to the firing of the actual shot which hit the deceased, but from their evidence it is apparent that they were present at the place and heard the sound of firing and on hullah they saw the victim having fallen and soaked in blood that there was hullah and people were saying that Javed had killed, though, they said they did not saw the firing which hit the deceased. But they had stated that they heard the sound of firing and deceased had fallen down and they arrived at the place of occurrence and took the victim to his darwaja. P.W.1 Nafis Alam had named Javed, Meraj, Thakhai and Lakhan and P.W. 4, Sarif Ansari support the presence of Javed and Meraj. P.W.5 Md. Mintullah has stated that at that time there was hullah that Sadre Alam was shot by Javed and saw Sadre Alam besmeared with blood.

21. Though, some of the witnesses are close relatives of the deceased, merely because witnesses are relatives, their evidences cannot be rejected. Their evidences required to be considered with care and caution. However, on strict scrutiny, I find that there is nothing in their evidence that their evidence should be disbelieve or rejected, though, submission has been made that witnesses have not disclosed the exact place of occurrence and it has been stated that witnesses stated that place of occurrence is Hatia which is surrounded on three sides by orchard of others and to the North a road passing there and beyond the road there was again an orchard.

22. However, criticism has been made on the exact point of place which has not been mentioned and witnesses have not stated the exact place in the Hatia where occurrence had taken place and witnesses had stated only boundary of the entire Hatia regarding place of occurrence and not exact place where occurrence took place. However, I.O. P.W. 14 in his evidence has specifically stated that the P.O. was the Hatia surrounded on three sides by orchards and to the north of the P.O. there was a village road and the area of Hat is about 10-15 Katha. The place of occurrence and that of the actual occurrence of firing where the shot was fired was on the South-West corner of the said Hat and witnesses have stated about the place of occurrence that it was the Hatia of specified boundary. Hence the

P.O. has been well established.

23. Learned counsel for the appellants, however, submits that, though, I.O. received rumour about death of husband of Sarpanch and then he recorded Sanha No. 143 on 09.11.2006 in Station Diary. The submission that Sanha has not been brought on record and proved and earlier version has been concealed has no merit as no attempt was made even by the defence to call for the Sanha. Moreover, having regard to the facts the I.O. has specifically stated about the information received is a rumour about murder of husband of Sarpanch of Village-Ekhatha and he recorded the statement in his Station Diary entry and has specifically mentioned in Sanha entry bearing No. 143, dated 09.11.2006 and has indicated the content for which Sanha was entered as mentioned and it was open to the defence to verify, but no question has been asked by the defence from I.O. regarding Sanha and hence it cannot be said any prejudice has been caused to the appellants.

24. However, further criticism was that there was rivalry between the parties for election dispute by which the appellants have been falsely implicated in this case. Further criticism about motive of the occurrence was that there was a case of theft of motorcycle and rape case against Javed and he was pressurizing the husband of Sarpanch Alia Khatoon to get him acquitted. However, this may be motive of occurrence but when there is direct evidence of murder and witnesses are eye witnesses and their evidence appears to be trustworthy and reliable the motive becomes irrelevant. It is further submitted that there was enmity and political rivalry. However, merely for the reason that there is political rivalry is no ground for outright rejecting the evidence of the witness but the relevant consideration is to strictly scrutinize the evidence of interested and inimical witness.

25. However, going by entire prosecution evidence, there is nothing in it to disbelieve their testimony nor any material was pointed out any defect in their evidence to disbelieve their testimony.

26. Taking into consideration entire evidence, the prosecution case as alleged that when the victim had gone to Hatia where accused persons surrounded then appellant Javed fired at the victim Sadre Alam by which Sadre Alam received injury on his neck and died at the spot. The police found blood at the place of occurrence and doctor found injuries in consonance with the allegation made to have been received by the deceased. Witnesses have supported the prosecution case regarding firing by Javed. Hence, prosecution has been able to prove the charge under Section 302 of Penal Code and Section 27 of the Arms Act against him.

27. So far evidence of witnesses regarding other accused persons is concerned, the evidence is that they came and surrounded the victim, but no specific overt act has been mentioned against any other accused persons. There is no specific averment in the entire evidence that what act of commission and omission had

been done by them except that they fled away after the shot was fired by Javed. However, there is evidence that after firing there was hulla and all the people started fleeing away and hence the act of fleeing away attributed to other appellants other than Javed cannot be attracted for their implication and there is no specific averment regarding any act of commission and omission except that they came at the time when Javed came and they flee away after firing by Javed and hence their implication of other co-accused except Javed has not been established beyond reasonable doubt. Hence all the appellants other than Javed are entitled for benefit of doubt and prosecution has not been able to prove the charges against other appellants for offence under Section 302 of Penal Code or Section 120B of Penal Code. However, the point raised at the outset regarding appellants other than Javed that they had been charged under Section 302 of Penal Code commuted to Section 302/149 of Penal Code when there is no charge under Section 302/149 of Penal Code has been framed and submission was that it can be looked into with the aid of Section 120 added regarding implication of other appellants except Javed.

28. So far evidence under Section 120B or 302/149 of Penal Code is concerned, there is no evidence regarding unity of mind nor there is any circumstance having been established to infer conspiracy. Only evidence is that accused persons came in the Hatia and they fled after firing by Javed and hence except evidence against Javed the evidence is so weak that it cannot be inferred on the basis of that evidence regarding implication of other appellants except Javed either for offence under Section 302/149 or Section 120B of Penal Code and hence prosecution has not been able to prove the charges under Sections 302/149 or 120B of Penal Code against other appellants.

29. Hence, prosecution has not been able to establish the charge against other appellants except Javed (appellant in Cr. Appeal (DB) 175 of 2010 and hence order of conviction recorded against other appellants (in Cr. Appeal (DB) 63 of 2010 and Cr. Appeal (DB) No. 111 of 2010) is set aside and their appeals are allowed. They shall stand discharges from the liabilities of their bail bonds.

30. So far, appellant, namely, Md. Javed in Cr. Appeal (DB) 175 of 2010 is concerned, prosecution has succeeded in proving the charges under Section 302 of Indian Penal Code levelled against him. Hence the Criminal Appeal filed by Javed is dismissed whereas Criminal Appeals filed by appellants other than Javed is allowed.

Dharnidhar Jha, J.

I agree.