

(2012) 11 PAT CK 0019

In the Patna High Court

Case No : Criminal Appeal (DB) No. 127 of 1988

Jai Narain Mahto and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 22-11-2012

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 148, 149, 302

Citation : (2013) CriLJ 522 : (2013) 1 PLJR 783

Hon'ble Judges : Mihir Kumar Jha, J;Aditya Kumar Trivedi, J

Bench : Division Bench

Advocate : Baxi S.R.P. Sinha, Mr. Imran, Mr. Nagma Shamim, Mr. Rahul Nath and Mr. Sunil Kumar, for the Appellant; Shasi Bala Verma, Assistant Public Prosecutor for the State, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice Aditya Kumar Trivedi

1. Both these two appeals arise out against judgment of conviction and sentence dated 8th March, 1988 passed by 4th Additional Sessions Judge, Bhojpur at Arrah in connection with Sessions Trial No. 146 of 1980 whereby and whereunder appellant Amirhand Mahto has been found guilty for an offence punishable under Sections 302, 148 of the Indian Penal Code as well as 27 of the Arms Act while the remaining appellants, namely, Jainarain Mahto, Shyamlal Mahto and Sudarshan Mahto have been found guilty for an offence punishable under Sections 302/149, 148 of the Indian Penal Code and 27 of the Arms Act and all of them have been sentenced to undergo R.I. for life u/s 302/149 of the Indian Penal Code as also one year R.I. each for offences punishable u/s 148 as well as 27 of the Arms Act respectively, which have been directed to run concurrently. Kalika Singh, PW-5 had given his fardbeyan (Exhibit-2) on 02.10.1979 at about 10 AM at village-Bajen before the Officer-in-charge, Charpokhari Police Station

stating inter alia that on the same day at about 07:00 A.M. his father Baleshwar Singh since deceased Lakshuman Singh, Tapeswar Singh, Raj Kumar Singh, including himself were engaged in conversation relating to agricultural work while sitting at the Darwaja of Lakshuman Singh. He has alleged that all of a sudden Amirchand Mahto armed with rifle, Dularchand Mahto armed with gun, Jainarain Mahto armed with gun, Sudarshan Mahto armed with gun, Chandeshwar Mahto armed with rifle, Uma Thakur armed with gun, Shyamlal Mahto armed with gun, all having his co-villagers came and stood in the southern side to Shiv Mandir situated West to Dalan of Lakshuman Singh. According to him they had come towards southern side and no sooner of their arrival. Amirchand Mahto opened fire which was followed by indiscriminate firing by others. The informant had claimed that the firing made by Amirchand Mahto had hit over the neck of his father who fell down and also died instantaneously at the spot. The informant had also stated that he along with others had hidden themselves inside Dalan for their safety and in fact none of the villagers could even dare to come forward on account of indiscriminate firing resorted by the appellants and others. The informant has also stated that what the accused persons heard sound of jeep belonging to police official they had a hasty retreat and had fled away. The motive for such occurrence according to the informant was that since his father happened to be a wrestler and the accused persons were all having a bad reputation they were aggrieved on account their having scolded/chided by his father from time-to-time.

2. On the basis of the aforesaid fardbeyan of the informant, Piro (Charpokhari) P.S. Case No. 2 of 1979 was registered leading to investigation of the case by the police which after completing had submitted a charge sheet where the appellants along with others were put on trial and convicted and sentenced by the impugned judgment giving rise to these two appeals.

3. The defence case as is evident from mode of cross-examination as well as from the statement of accused persons recorded u/s 313 of the Cr.P.C. is that of complete denial of occurrence. It has further been suggested that deceased was done to death at a different place in altogether different manner by unknown criminals but on account of village politics/animosity the appellants and others had been falsely implicated. The defence however has led no evidence in support of its case.

4. While assailing the judgment of conviction and sentence, the learned counsel for the appellants submitted that the finding recorded by the learned lower court is based entirely upon conjecture and surmises. The learned counsel further submitted that the learned lower court had proceeded and concluded in a wholly mechanical manner without appreciating the evidence on record in judicious manner which could have, if properly scrutinized, reveal that none of the material witnesses stood the test of cross-examination to the extent of supporting their status to be an eye witness to occurrence. On this score, further elaborating and by referring to different paras of the evidence of PWs, it has

been argued that all the witnesses had given a wholly inconsistent and unreliable version with regard to manner of occurrence which in turn did defy their status as an eye witness.

5. The learned counsel for the appellant had further submitted that from the evidence of doctor, PW-8 it could be safely inferred that the manner of occurrence as suggested by ocular evidence was totally demolished. According to him the informant, PW-5, who was also examined subsequently on recall to make successful attempt to explain the prosecution case had utterly failed to do so which is bound to be adverse to the interest of the prosecution version. In likewise manner, it has also been argued by the learned counsel for the appellants that on account of non-examination of I.O., the appellants have been gravely prejudiced inasmuch as in absence of the I.O., they could not get the opportunity of placing material contradiction in the subsequent improved version of the witnesses in the court apart from relying on the objective finding of the I.O. at the so alleged place of occurrence. He has also highlighted on the other aspects relating to the conduct of the prosecution which it properly scrutinized would expose the infirmities with a cumulative effect of making the prosecution case doubtful and thus also is fit to be rejected as a whole.

6. Per contra, the learned Additional P.P. has submitted that the evidence of the PWs has to be viewed in its totality inasmuch as the law requires proper consideration of the evidence as a whole and not in piecemeal and in isolation to the purpose of discrediting testimony of PWs. In likewise manner, it has further been submitted that the evidence of doctor is conclusive on the point of that deceased was done to death by means of firearm which fully fits in with the ocular evidence. It has further been submitted that the assertion of defence that they have found prejudiced on account of non-examination of I.O. is not tenable because of the fact that there happens to be consistent version of the other witnesses fully supporting the case of the prosecution with regard to place of occurrence as well as manner of occurrence. On all these pleas learned A.P.P. has canvassed for affirming the impugned judgment without any modification and/or interference.

7. In order to prove its case the prosecution had examined altogether 8 PWs out of whom PW-1 Lakshman Singh, PW-2 Ishwar Dayal Singh, PW-3 is Ramadhar Singh, PW-4 is Ram Kumar Singh, PW-5 is Kalika Singh (informant), PW-6 is Dr. Birendra Prasad Singh, the doctor who had held postmortem over the dead body of deceased Baleshwar Singh while PW-7 Shivmuni Singh and PW-8 Murat Ram are the formal witness who have had exhibited certain documents in absence of the Investigating Authority. Side by side the prosecution has also exhibited Exhibit-1 Series being Signature of witnesses over respective documents, Exhibit-2 is fardbeyan, Exhibit-3 Series happens to be the postmortem report in original as well as its carbon copy. Exhibit-4 is formal FIR, Exhibit-5 is the Inquest report and Exhibit-6 is the Case diary.

8. P.W. 6 the doctor who had conducted postmortem over the dead body of

deceased Baleshwar Singh had found following ante mortem injuries:-

Externally (1) Punctured & lacerated wound of the right forearm through and through in front back. Wound of interence 1/6" diameter & wound of exit 1/8" diameter the margin of the wound of the exit was overt. There was also tattooing of the skin.

(2) Similar wound was present on the left upper arm with same size of wound of entrance and exit.

(3) Punctured wound with lacerated margin present on the right side of neck. The wound of entry and exit of the size of above and tearing the vessels of the right side of the neck.

(4) Punctured wound present in the left side of upper chest with fracture of the third rib and entering the left side heart and passing through the back side of the spine. Wound of entry 1/4" and wound of exit 1/6" diameter.

(5) Punctured wound left fore arm 1/6" diameter in which a foreign body was found, locked under neath the skin. There was fracturing of the left ulna bone. There was blackening of the skin on the side of wound. There was blood and blood clots about 1 pint in the left plural cavity.

Injury ante mortem in nature caused by firearm, time elapsed since death 24 hours. Death in my opinion due to shock and haemorrhage as a result of on the injury described above.

One F.B. recovered from the wound is being forwarded under sealed cover.

9. The doctor also found presence of two ounce of semi digested food in the stomach of deceased. He had also found presence of rigor mortis at the lower lip and had accordingly opined that time elapsed since death was within 24 hours. In the further opinion of the doctor the cause of death happened to be shock and haemorrhage on account of above ante mortem injuries which was found in ordinary course of nature to sufficient to cause death of the deceased.

10. It has to be kept in mind that at the initial stage of inception of the instant case, that means to say in the fardbeyan of the informant, appellant Amirchand Mahto was shown to be armed with rifle apart from Chandeshwar Mahto who was also shown to be armed with rifle while remaining were identified having armed with gun, but during course of trial all the witnesses had changed that part of allegation and claimed that all the accused were armed with guns. The aforesaid change in their version has to be viewed with suspicion inasmuch as the same has been purposely introduced by the prosecution to meet and explain the objective finding of PW-6, the doctor, who had not found even a single injury caused by a rifle. Not only this from the fardbeyan itself, it is evident that there is specific disclosure made against appellant Amirchand Mahto who had allegedly fired at deceased Baleshwar Singh by his rifle causing injury over neck of Baleshwar Singh which was said to be fatal. PW-1 Lakshman Singh at whose

Darwaja the deceased along with others witnesses were sitting since before the occurrence had also disclosed that by firing made by appellant Amirchand from his firearm deceased Baleshwar had sustained injury and on account thereof deceased died and only thereafter indiscriminate firing was made by others. PW-2 had disclosed that first firing was made by Amirchand on account of which Baleshwar Singh had sustained injury and died. PW-3 had disclosed that first firing was made by Amirchand causing injury to Baleshwar Singh and then thereafter other also fired and on account thereof Baleshwar Singh died. PW-4 had narrated that first firing was made by Amirchand causing injury over neck of Baleshwar Singh and thereafter other co-accused stepping forward had also fired on account of which deceased died. PW-5 had disclosed that first firing was made by Amirchand which caused injury over neck of his father and thereafter all the accused persons proceeded forward and fired on account of which his father died after falling over chowki.

11. The aforesaid theme which has been brought up by the material witnesses during examination-in-chief alone is again found to be discredited because of the fact that there happens to be inconsistency amongst them over sustaining of injury by the deceased as the doctor had found five gun shot injury over the person of deceased. None of the prosecution witness even during course of their examination-in-chief have narrated that deceased got any injury from the firing made by other co-accused at the relevant time.

12. Sustaining of fire clear gun shot injuries as has been perceived by the PW-6, did not match with Exhibit-5, the inquest report which divulges presence of only two injuries on the persons of the deceased, one on upper portion of right side of neck and the other on the right arm. Further the aforesaid exhibit-5 discloses that deceased was wearing lungi and vests at the time of inquest but none of the apparel contained mark of gun shot injury or even bloodstain.

13. The improbability of the case is further evident from the conduct of the witnesses as none of them had disclosed that they had ever tried to disperse from the place of occurrence at the time of commission of occurrence. Although in the fardbeyan there happens to be the disclosure of the informant that he along with others had rescued themselves by hiding inside Dalan. Not only this PW-1 during the course of his examination in para-13 had narrated that all the six persons being witnesses had sat in a row in the northern front but surprisingly none of them except the deceased had sustained injury despite continuous firing being made by a large number of persons including the four appellants from the southern side.

14. That apart the doctor PW-6 had found fickle matter in the large intestine and on that very basis had opined that deceased had not gone to ease himself before the occurrence whereas there happens to be contrary evidence of PW-1 at para-11 that deceased had already met with call of nature and only his routine exercise was left to be done. Such contradictory version in the ocular evidence cannot be ignored keeping in view of the other material discrepancies in ocular

evidence being contrary to the medical evidence PW-5, the informant at para-5 had infact also disclosed that his father used to come out from his house only after taking food but again the aforesaid disclosure is not found supported with the finding of the doctor who had found semi digested food and for that he had categorically stated that semi digested food denotes the deceased might have taken food two hours before the occurrence.

15. From the postmortem report, it is further found that the gun shot injuries were found containing blackening and tattooing mark. None of the prosecution witnesses save and except PW-1 had disclosed the distance in between the place of occurrence to the temple. However, PW-1 in para-7 during his cross-examination had disclosed that the temple was 15-16 yards away from west to his house. PW-1 in para-14 had disclosed that the accused persons had fired from the distance of 15-16 yards. PW-2 at para-7 had disclosed that he had seen Amirchand making firing at a distance of 10-12 yards. PW-3 in para-8 had disclosed that accused persons have fired from the place 5 to 7 yards east to temple. He had also claimed to have seen the accused persons at that very place for the first time. PW-5 in para-17 had stated that he had scribed in the fardbeyan that Amirchand had fired from there (South to temple) while other accused persons had fired proceeding ahead 2 to 4 steps. So at least the distance as disclosed above certainly did not give impression of presence of tattooing as well as blackening of the firearm injuries allegedly caused on the person of the deceased.

16. The witnesses are also not consistent with regard to presence of injury over person of deceased. Although the informant in his fardbeyan is specific to the extent with regard to firing made by Amirchand hitting upon the neck of his father on account of which he had fell down and died. In para-14 PW-1 had disclosed that he had found two injuries over the person of deceased one at his neck and the other in his right hand and that indiscriminate firing was made upon them after falling of the deceased but none of them had sustained any injury. PW-4 in para-10 had disclosed that he had seen only one firing hitting the deceased. Causing injury over his right arm and how did he sustain other injuries could not be explained by him because he had not seen. The aforesaid inconsistency in the manner of occurrence amongst the evidence of PWs not only makes their status as eyewitness unstable but infact the aforesaid exaggeration also fails to explain the presence of other gun shot injuries over the person of deceased.

17. Although I.O. has not been examined on behalf of prosecution and on account thereof the objective finding relating to place of occurrence has not properly been brought up on record but from the evidence of PW-1, para-15, it is evident that he had categorically stated that the I.O. had not found any wade or pellet at place of occurrence. In para-17 he had said that no blood was found by the I.O. save and except over earth adjacent to chowki.

18. Not only this according to initial prosecution version, the accused persons

took to their heels immediately after hearing sound of police jeep but surprisingly when the police jeep came, that fact had not been disclosed. The prosecution case in fact remained unchanged that the occurrence took place at about 07:00 A.M. while the fardbeyan was given at 10:00 A.M. According to PW-2 in para-6, he had seen the duration of the occurrence to continuing for about 10 to 15 minute. Whereas PW-4 in para-12 had disclosed that he had seen the accused persons near at the school after 15 to 20 minute and in at para-14 he had disclosed that he had continued to see the accused up to 10:00 A.M. when the police came near the place of occurrence at about 10:00 A.M. the accused persons escaped there only on the eve of arrival of police jeep. PW-5 in para-19 had disclosed that accused persons remained there 10 to 15 minute after occurrence. Therefore, there happens to be also inconsistency is the evidence of PWs on this score.

19. The evidence on record if segmentized individually may scrim the visibility as well as probability of the occurrence as alleged but when such evidence is taken together in its entirety and totality along with the findings recorded in the inquest as well as postmortem reports, the same completely demolish the case of the prosecution. Consequent thereupon we find it difficult to concur with the finding arrived at by the learned trial court in the impugned judgment which is accordingly set aside.

20. In the result both the appeals are allowed. Appellants are on bail and accordingly they are now discharged from its liability.

I Agree.