
(2010) 03 PAT CK 0101
In the Patna High Court

Kailash Mandal @ Kaila Mandal

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 08-03-2010

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 294
Penal Code, 1860 (IPC) — Section 302, 307, 326

Citation : (2010) 03 PAT CK 0101

Hon'ble Judges : Shyam Kishore Sharma, J;Dinesh Kumar Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Shyam Kishore Sharma, J.—The sole appellant Kailash Mandal alias Kaila Mandal has been convicted on 14.02.2007 u/s 302 of the Indian Penal Code and 27 of the Arms Act by 7th Additional Sessions Judge, Bhagalpur in Sessions Case No. 266 of 2002/T.R. Case No. 550 of 2006 arising out of Sultanganj P.S. Case No. 112 of 2001, G.R. Case No. 1394 of 2001 and whereby he has been sentenced to undergo life imprisonment for offence u/s 302 of the Indian Penal Code and has been further sentenced to undergo rigorous imprisonment for three years for offence u/s 27 of the Arms Act. Both the sentences have been ordered to run concurrently.

2. Fardbeyan of Etwari Mandal son of late Ram Rachi Mandal was recorded by Sub-Inspector of Police Sewa Bhagat of Barari police station in Jawahar Lal Nehru Medical College and Hospital, Bhagalpur at 10.00 A.M. on 28.6.2001. He in his fardbeyan has stated that on the preceding day at 6.30 A.M. his brother Yogo Mandal (deceased) went to the field of Sahwaj Diara and he was returning after watching his maize crops at 3.30 P.M. and when he reached near Murarka College which is just south of the Railway crossing, appellant fired from his country made pistol upon Yogo Mandal who received injury and fell down. The informant (P.W. 4) was following him and on hearing the sound of firing, he

rushed to his brother and found him bleeding profusely. He tied the injury of his cousin (deceased of the case) and brought him to Sultanganj Referral Hospital for treatment but he was referred to Jawahar Lal Nehru Medical College and Hospital, Bhagalpur because his condition was serious. Before proceeding from Sultanganj Referral Hospital, injured Yogo Mandal had given his statement on 27.06.2001 at 4.15 P.M. stating that he has cultivated maize crops upon his field situated in Sahwaj Diara. He had been to see the maize crops in the morning and while he was returning and reached near Murarka College at 3.30 P.M. appellant Kailash Mandal alias Kailu Mandal fired upon him which caused injury on his body. He fell down. Meanwhile, many persons assembled there. He was brought to hospital on a hand-cart and he had given his statement. The motive given by the deceased prior to the death was that he was having land dispute. On the statement of the injured Yogo Mandal, a case was registered for offence under Sections 326 and 307 of the Indian Penal Code and 27 of the Arms Act. As the condition of the injured was serious, he was referred to Jawahar Lal Nehru Medical College and Hospital, Bhagalpur where he died. After death of the injured, Section 302 of the Indian Penal Code was added on 30th June, 2001. The matter was investigated into and after completion of investigation, chargesheet was submitted against the sole appellant under Sections, 326, 307 and 302 of the Indian Penal Code and 27 of the Arms Act. Cognizance was taken and case was committed to the court of sessions. Charges u/s 302 of the Indian Penal Code and 27 of the Arms Act were framed against the sole appellant and the same was explained to him who pleaded innocence and preferred to face trial.

3. In order to prove its case, the prosecution has examined altogether six witnesses. They are : P.W. 1 Bhagwan Das, P.W. 2 Ram Bilas Mandal, P.W. 3 Etwari Mandal son of Late Mahadev Mandal, P.W. 4 Etwari Mandal son of late Ram Rachi Mandal, cousin of the deceased, P.W. 5 Yugeshwar Prasad Singh, retired Investigating Officer and P.W. 6 Dr. Anjani Kumar. The doctor who conducted post mortem examination over the dead body of the deceased has not been examined. No witness has been examined on behalf of the defence.

4. Besides oral evidences of the prosecution witnesses, the prosecution has exhibited some signatures. Signatures of Ishwar Chand Bidya Sagar on the fardbeyan and on the formal F.I.R. have been marked as Exts. 1/D and 1/E respectively. Signatures of witnesses on the fardbeyan have been marked as Exts. 1 to 1/B. Signature of Dr. Anjani Kumar on the fardbeyan has been marked as Ext. 1/C. The injury report of Yogo Mandal has been marked as Ext.2. The post mortem report has been marked as Ext.3 u/s 294 of the Code of Criminal procedure.

5. The defence of the appellant was of malicious prosecution as the witnesses of the fardbeyan have expressed their ignorance about any statement regarding occurrence. They are P.W. 1 (Bhagwan Das), P.W. 2 (Ram Bilash Mandal) and P.W. 3 (Etwari Mandal). P.W. 1 Bhagwan Das in his evidence has expressed ignorance about the occurrence. He has denied that he has made any statement

before the police. Similar is the evidence of P.W. 2 Ram Bilash Mandal and P.W. 3 Etwari Mandal. All the aforesaid three witnesses were declared hostile and they have not supported any part of the prosecution version. The fardbeyan was given by the deceased at the Referral Hospital, Sultanganj before Sub- Inspector of Police Ishwar Chand Vidya Sagar, officer-in-charge of Sultanganj police station and that Officer-in-charge has also not been examined on behalf of the prosecution.

6. P.W. 4 is the another Etawari Mandal who is cousin of the deceased and has come to support the prosecution case. P.W. 5 is the Investigating Officer of the case. P.W. 6 is the doctor who had treated the injured when he was brought to Referral Hospital, Sultanganj. He in his evidence has stated that on 27.6.2001 at 4.15 P.M. he examined Yogo Mandal and found the following injuries:

(i) piercing wound on thorax (gun shot injury in the right side back just below scapula about 2" x ? x depth could ascertain as vital part involve.

(ii) Piercing wound in front of right side of chest valve just at nipple about 1" x ? x depth could ascertain as vital part involve.

The witness has not been cross- examined by the defence. According to doctor, the patient was semi conscious.

7. Only eye witness of the occurrence is P.W. 4 who is cousin of the deceased. The statement of the deceased which was given before the police at Referral Hospital, Sultanganj has not been brought in evidence but it has been pointed out by the learned Counsel for the appellant that even if that statement is looked into incidentally, then it is clear that P.W. 4 was not present either at the time of occurrence or at the time of giving statement before the police at Referral Hospital, Sultanganj. Only eye witness Etwari Mandal has stated that on 27.6.2001 his cousin had gone to see his field at Shahabad Bahiyar and while he was returning and in that way when he reached near the railway crossing, Sultanganj Murarka College gate, then this witness heard the sound of firing. At that time, he was also following Yogo Mandal. This witness further stated that appellant had fired upon Yogo Mandal who fell down. After occurrence, many persons arrived. The injury portion of injured Yogo Mandal was tied by the assistance of cloth and thereafter injured was brought to Referral Hospital, Sultanganj where the police came and recorded the statement of the injured. The police after recording the statement, it was narrated to the injured who after found it correct, put his thumb impression upon the fardbeyan which was signed by P.Ws. 1 to 3. The doctor P.W. 6 has also signed upon that statement. Thereafter, the injured was referred to Jawahar Lal Nehru Medical College and Hospital, Bhagalpur where he was declared dead. The fardbeyan of this witness (P.W. 4) was recorded by the police. In cross-examination, this witness has stated that injured Yogo Manal was not unconscious after he received injury, rather he became unconscious after leaving Referral Hospital, Sultanganj. The doctor P.W. 6 who examined the injured Yogo Mandal on 27.6.2001 at 4.15 A.M.

has not found him to be conscious, rather, according to him, the patient at the time of his examination was found to be semi conscious. Therefore, there is contradiction between the statement of the doctor and P.W. 4.

8. P.W. 4 has further stated that Yogo Mandal had fallen down on the western part of the road after receiving fire arm injury and at that place, the blood was scattered.

9. P.W. 5, Investigating Officer, has not seized anything from the place of occurrence, though according to P.W. 4 Etwari Mandal, blood was found in plenty at the place of occurrence. It appears that P.W. 5 is ignorant about the place of occurrence as, according to him, nobody has shown him the place of occurrence and he has not prepared any map of the place of occurrence. In paragraph 17 in his cross-examination, he has clearly stated that he has not found any blood at the place of occurrence. Here the prosecution has not been able to explain the inconsistency between the evidence of P.W. 4 regarding availability of the plenty of blood and the Investigating Officer regarding non-presence of any blood at the place of occurrence.

10. Another fact which is apparent from the depositions is that Yogo Mandal has given his statement before the police but the doctor has stated that at the time of giving statement, he was semi conscious. According to P.W. 4, Yogo Mandal lost his consciousness after leaving Referral Hospital, Sultanganj. P.W. 4 in paragraph 12 has stated that Yogo Mandal has given his statement before the police only once, meaning thereby his re-statement was not recorded but P.W. 5 has stated that he has recorded re- statement of Yogi Mandal (P.W. 5 in paragraph 2). Only two witnesses available on this point have contradicted themselves.

11. Though the doctor who performed post mortem examination has not been examined but the post mortem report has been brought on record u/s 294 of the Code of Criminal Procedure. The doctor has found following ante mortem injuries:

- (i) Entry wound of the 1/2" x 3/4" x cavity deep was found on the right nipple.
- (ii) Exit wound of the 1" x ?" x cavity deep was found on the right scapular region of the back.
- (iii) Abrasion of the size 3" x 2" was found on the left temple and left palm of the head.
- (iv) Abrasion of the 1" x ?" was put on the left thigh.

12. According to doctor who conducted post mortem examination on the body of the deceased, the deceased was having some injuries caused by hard and blunt substance also. Post mortem was performed at 11.00 A.M. on 28.6.2001. According to post mortem report, the doctor has opined the time elapsed since death within 6 to 36 hours. As per evidence of P.W. 4, the death was on 28.6.2001 in the morning when the injured was brought to Jawahar Lal Nehru

Medical College and Hospital, Bhagalpur. He has given his fardbeyan at 10.00 A.M. and post mortem was performed at 11.00 on that very date. As per statement of P.W. 4 the deceased died within two hours of the post mortem examination but the doctor has opined the death within 6 to 36 hours and here also there appears some contradictions. If the post mortem report is considered, then it appears that the death occurred earlier than stated by P.W. 4.

13. Even if the fardbeyan of deceased Yogo Mandal is accepted to be true, then it appears that P.W. 4 was not there as the deceased has not mentioned in the fardbeyan that he was brought to hospital by P.W. 4.

14. The case of the prosecution is clear that due to only one fire arm injury, Yogo Mandal has died but the prosecution has not been able to explain as to how Yogo Mandal was having some injury by hard and blunt substance.

15. No doubt, an accused can be convicted only on the basis of dying declaration but in the present case, the statement made by the deceased prior to his death has not been brought on record and only some signatures have been proved. If the evidence of the doctor who has treated the deceased prior to his death is considered, then it appears that the injured was not in a position to make his statement because the doctor has found him semi unconscious at 4.15 P.M. on the date of occurrence. The injury was of such nature that it was difficult for him to give any statement. Non-mentioning the name of P.W. 4 in the statement of injured Yogo Mandal creates doubts with regard to his presence at the time of occurrence. P.W. 4 in paragraph 23 has stated that the injured was taken inside the hospital and when Officer-in-charges came, he also went there and after preparing some papers, the officer-in-charge returned and took the signatures of the witnesses who were sitting outside the hospital. Therefore, it appears that P.W. 4 has signed upon the paper brought by the Officer-in-charge. About conduct of the deceased, the informant has stated that his cousin was an accused in a murder case. His brother had to loose his one eye in famous Bhagalpur blinding case. Non-examination of Officer-in-charge, Sultanganj Police station who recorded the fardbeyan of the deceased and the doctor who conducted post mortem examination of the deceased, have certainly caused prejudice to the defence because the defence could take out the benefit of contradictions between the statements of the witnesses. Non-mentioning the name of P.W. 4 in the statement of the deceased prior to his death strongly goes against the prosecution version as the time of death has varied in the statement of P.W. 4 and in the post mortem examination report. The injured was not in fit state of mind to make any statement and this statement has not been certified by the doctor. There is no explanation as to why the deceased was having injury by hard and blunt substance. No witness of the place of occurrence which was densely populated area has not been examined. The hand cart puller who had brought the injured to hospital was an important witness and he could have given some more details has not been examined. These are the vital lacuna in the prosecution version. The case rests on the testimony of sole eye witness. No

doubt, an accused can be convicted on the testimony of sole witness but such testimony must remain intact. Here the presence of P.W. 4 itself at the time of occurrence becomes doubtful. So considering every aspects of the matter, I am of the view that the prosecution was not able to prove the charges beyond the shadow of all reasonable doubts. Once a doubt is created, then the prosecution version becomes liable to be suspected and on such shaky evidence, no conviction can be passed. Accordingly, the appellant is held to be entitled to the benefits of doubt in view of the facts discussed above.

16. In the result, this appeal is allowed and the judgment of conviction and sentence is set aside. Appellant is acquitted of the charges leveled against him. The appellant, who is reported to be in custody, is directed to be released forthwith if not required in any other case.

17. I agree.