

(2013) 11 PAT CK 0042

In the Patna High Court

Case No : Criminal Revision No. 542 of 2000

Kanhaiya Kumar Jha

APPELLANT

Vs

The State of Bihar and Madan Mohan Jha

RESPONDENT

Date of Decision : 01-11-2013

Acts Referred:

Constitution of India, 1950 — Article 136
Criminal Procedure Code, 1973 (CrPC) — Section 313, 360, 361
Penal Code, 1860 (IPC) — Section 109, 307, 323, 326, 342
Probation of Offenders Act, 1958 — Section 3, 4

Citation : (2014) 1 PLJR 745

Hon'ble Judges : Aditya Kumar Trivedi, J

Bench : Single Bench

Advocate : Ashok Kumar Mishra, for the Appellant; Arif, APP, for the Respondent

Final Decision : Dismissed

Judgement

Aditya Kumar Trivedi, J.—Sole petitioner Kanhaiya Kumar Jha who has been convicted for an offence punishable u/s 326 of the IPC and sentenced to undergo R.I. for three years as well as also slapped with a fine appertaining to Rs. 3,000/- in default thereof to undergo R.I. for one year vide judgment dated 30.08.1997 by Ist Assistant Sessions Judge, Saharsa in Sessions Trial No. 44 of 1988 arising out of G.R. No. 1155 of 1986 as well as the judgment dated 27.07.2000 passed by Ist Additional Sessions Judge, Saharsa in Cr. Appeal No. 23 of 1997 confirming the conviction for the said offence however, reducing the sentence as R.I. for a year as well as fine appertaining to Rs. 3,000/- in default thereof to undergo R.I. for one year additionally has challenged the verdict under present revision petition. While assailing the judgment of conviction and sentence passed by the learned successive Courts below, it has been submitted on behalf of the petitioner that the learned Lower Court failed to appreciate the evidences adduced on behalf of the prosecution in its right perspective. It has also been submitted that there happens to be non-compliance of Section 360 Cr.P.C. as well as Section 3 or 4 of the Probation of Offenders Act and further the learned Lower

Court have not recorded any reason for non-application of the same which happens to be mandatory in the eye of law as per Section 361 of the Cr.P.C. It has further been submitted that there happens to be inordinate delay in dispatching/receiving if FIR at the office of learned Chief Judicial Magistrate and for that no explanation has been adduced on behalf of the prosecution. It has also been submitted that the evidence on the record did not justify application of Section 326 of the IPC because of the fact that there happens to be complete absence of criminal intention or knowledge at the part of petitioner in the background of the fact that co-accused Surya Narayan Jha, the father of petitioner against whom there was an allegation of abetting the offence stood acquitted by the learned Trial Court itself.

2. Elaborating arguments on above referred points, it has been submitted that save and except the informant Madan Mohan Jha, none of the witnesses who have been examined on behalf of the prosecution tested their identity as an eye witness to the occurrence. Therefore, the case rest upon the evidence of sole witness/victim Madan Mohan Jha. After going through the evidence of Madan Mohan Jha, it is apparent that the occurrence was committed without having mens rea in the spur of moment in the background of family feud wherein the informant intervened, hence no offence u/s 326 of the IPC could be there. It has further been submitted that it is apparent from the evidence itself that victim happens to be own uncle of petitioner and was residing commonly in a house. It is also apparent from the evidence that petitioner was not armed since before and in the aforesaid background when the evidence of P.Ws. have been disbelieved with regard to co-accused Surya Narayan Jha(since acquitted) then in that event, similar treatment would have been given to the petitioner also.

3. It has also been submitted that the date of alleged occurrence has been shown on 07.11.1986 at about 6 A.M. while the FIR was recorded on the same day at about 11.45 A.M. however, the FIR was seen by the learned Chief Judicial Magistrate, Saharsa on 13.11.1986. On account of non-examination of I.O. the aforesaid infirmity could not be brought up on record and thus had caused prejudice to the petitioner. Had there been examination of I.O., the petitioner could have brought the theme of FIR being ante-time whereunder petitioner and his father got involved at the behest of their jealous pattidars.

4. It has also been submitted that when the prosecution had itself brought up on record the occurrence and its outcome at the spur of moment, in the aforesaid background petitioner would have been given benefit u/s 360 of the Cr.P.C. or either u/s 3 or 4 which ever may be, of the Probation of Offenders Act. It has also been submitted that petitioner has got no criminal antecedent and at the time of occurrence, he was aged about approximately 18-19 years. Therefore, he was to be dealt with accordingly. As per Section 361 of the Cr.P.C. it was mandatory for the Court to see whether there happens to be any prospect with regard to application of Section 360 or 3 or 4 of the Probation of Offenders Act and having denied by the court concerned should follow with the reasonable

explanation. Therefore, the mandate of law as scribed u/s 361 of the Cr.P.C. has been violated.

5. It has further been submitted that there happens to be utter violation of provision of Section 313 of the Cr.P.C. because of the fact that during course thereof, the court failed to exercise proper precaution by way of confronting every inculpable incriminating materials before the petitioner which ever been produced by the prosecution during course of trial. So, the submission is that the successive judgments are fit to be set aside.

6. At the other hand, the learned Additional P.P. while supporting the concurrent finding of courts below has submitted that after going through the successive judgments, it is evident that the successive courts have taken pain to go through the evidence minutely and then had convicted and sentenced the petitioner. It has also been submitted that initially petitioner was charged for an offence punishable under Sections 307, 379, 323 of the IPC along with co-accused Surya Narayan Jha(since acquitted) who was charged for an offence punishable u/s 307, 109, 323 and 342 of the IPC but after scrutinizing the evidence available on the record, the learned Trial Court convicted the petitioner for an offence punishable u/s 326 of the IPC and sentenced him to undergo R.I. for three years along with fine with default clause and while disposing of the criminal appeal filed on behalf of the petitioner, the learned Appellate Court while confirming the conviction reduced the sentence to the extent of R.I. for one year. That means to say the Appellate Court had already taken sympathetic attitude towards the petitioner which now needs no consideration on that very score taking into account the nature of allegation.

7. P.W. 7 Madan Mohan Jha gave his fardbeyan on 07.11.1986 at about 11.45 A.M. at Sadar Hospital, Saharsa in an injured condition disclosing therein that on the same day at about 6 A.M. while he was gossiping along with his brother Pratap Narayan Jha, at the Darwaja of his brother he rushed to his house hearing sound of brawl. After coming there, he had seen the brawl going on amongst the female folk and children, which he forbidden. However, none of them listened to. During midst thereof, Surya Narayan Jha and his son Kanhaiya Kumar Jha also arrived and began to abuse which was protested by him and on account thereof Surya Narayan Jha caught hold him and on his instigation to assault Kanhaiya Jha took out chura and gave a blow causing injury below his left armpit. He was taken to Saharsa hospital where he regain sense and then saw his wrist was missing which was taken away by Kanhaiya Kumar Jha as was disclosed by his son Sanjay Kumar Jha. He also found injury over his back regarding which his son had disclosed that Surya Narayan Jha had assaulted him as well as he himself by means of Lathi. Pratap Narayan Jha, Nandbhushan Jha, Avind Jha along with others were named as a witness.

8. After registration of Bangaon P.S. Case No. 489 of 1986, chargesheet was submitted after completing investigation against the two accused whereunder cognizance was also taken and accordingly, the case was committed to the court

of Sessions. After conduction of trial, co-accused Surya Narayan Jha was acquitted while the petitioner was convicted in a manner as indicated above.

9. Altogether eight P.Ws. have been examined on behalf of the prosecution to support its case along with exhibits of the relevant documents. From the record, it is evident that I.O. has not been examined. Petitioner did not examine any D.W. in his defence. During course of statement he had simply denied the occurrence.

10. From the evidence of witnesses, P.W. 1 Arbind Jha para-2 (examination-in-chief itself), P.W. 3 Pratapnarayan Jha para-2,(Examination-in-chief) it is evident that they are hearsay witness and when they arrived at the place of occurrence, they found Madan Mohan Jha in injured condition. So they only corroborated the prosecution case. P.W. 6 and P.W. 8 are formal witnesses who have exhibited relevant document in absence of I.O.

11. P.W. 4 Nandbhushan Jha, P.W. 5 Sanjay Kumar Jha, son of the informant are eye witnesses to the occurrence. P.W. 4 in his examination-in-chief had supported the case of the prosecution was cross-examined at length and his presence at the place of occurrence since before is found proved from para-5. With regard to occurrence, para-8 as well as para-9 is there.

12. P.W. 5 is the son of informant who had shown his presence inside the Angan while Surya Narayan Jha, his wife, his son Kanhaiya Kumar Jha were abusing in his presence on the pretext that they have stolen sugar He had also shown presence of P.W. 4 at the Angan when his father arrived and forbidden them from abusing. During course thereof, Surya Narayan Jha caught hold his father and on his instigation, Kanhaiya Jha gave chura blow at the left side of stomach of his father on account of which he fell down. Kanhaiya Jha snatch away wrist watch. When he tried to intervene he along with his father was assaulted by lathi by Surya Narayan Jha. However, on arrival of so many persons, his father was lifted for medical treatment. During cross-examination at para-4, it is evident that there happens to be material contradiction and for want of examination of I.O. the aforesaid embellishment could not be legally brought up on record. However, he was cross-examined on the point of occurrence under para-10 and found fully supported.

13. P.W. 7 is the victim/informant who had reiterated the version regarding commission of an occurrence in a manner as stated by him at an earlier occasion. From para-2 of his cross-examination, inter-se relationship is there. He had further stated that he had sustained single chura blow at the hands of Kanhaiya Jha and is found consistent thereupon.

14. P.W. 2 is the doctor who on 07.11.1986 at 7.15 A.M. had examined P.W. 7 Madan Mohan Jha and found following injuries on his person:--

Sharp cut penetrating wound 1 1/2" x 1" x 1/1/2" at the left side of the chest back in the mid of axillary line and the aforesaid injury has been found grievous

in nature. During cross-examination, the defence would not be able to sack his testimony.

15. Therefore, from the evidence available on the record, more particularly by the victim P.W. 7 himself that Kanhaiya Kumar Jha happens to be the sole assailant who had given single chura blow and that aspect is found fully corroborated by the medical evidence through P.W. 2, Dr. Sushil Kumar(Ext-2) and on this very factual aspect the prosecution case is found duly proved.

16. So far delay in receiving FIR at Chief Judicial Magistrate office is concerned, although there happens to be absence of I.O., even then the P.W. 7, informant was not at all cross-examined on that score. Apart from this, during course of argument, the petitioner has failed to show that there was any possibility of FIR being ante-dated, as well as any kind of prejudice has been caused to him. At the other hand, from the fardbeyan itself, it is evident that the same was recorded at Sadar Hospital, Saharsa while case was registered at Bangaon P.S., and then thereafter the FIR was sent to the court concerned. Hence there happens to be proper explanation available on the record itself.

17. From the successive judgment, it is apparent that Appellate Court had already taken a lenient view by reducing the sentence. With regard to non-applicability of Section 360 as well as 3 or 4 of the Probation of Offenders Act by the learned successive Courts and further it was incumbent upon the learned Lower Court to take notice thereof in terms of Section 361 of the Cr.P.C. has been taken into account in the case of Manjappa Vs. State of Karnataka, which are as follows:--

11. The counsel referred to a decision of this Court in Om Prakash and Ors. v. State of Haryana, : (2001) 10 SCC 477 and submitted that all the orders deserve to be quashed and set aside by granting benefit of probation to the appellant who, though more than 21 years of age, the offence in question was his first offence.

12. The learned counsel for the State, on the other hand, supported the order of the courts below. He submitted that all the three courts have concurrently found that the appellant had caused serious injury to the complainant and had ordered conviction and imposed sentence, which calls for no interference. He also submitted that the complainant had suffered seven injuries and had lost two teeth. It was submitted that when the High Court reduced sentence from six months to 1 1/2 months, no further reduction in the sentence may be made by this Court in exercise of discretionary power under Article 136 of the Constitution.

13. Having heard learned counsel for the parties, in our opinion, the submission of the learned counsel for the appellant that the case is covered by Om Prakash is not well-founded. In Om Prakash, the case of the prosecution was that the entire incident was an outcome of an accident wherein the wife of the complainant was hit by a tractor driven by one of the accused. It was, therefore, clear that in Om Prakash, one of the important elements of a crime "mens rea"

was absent. In the case on hand, the appellant-accused caused grievous injury to the complainant intentionally and hence Om Prakash has no application.

14. At the same time, however, the fact remains that the High Court has reduced substantive sentence to a month and a half. It is also not in dispute that the appellant has undergone and has remained in custody for about fifteen days. Moreover, as on today, he is on bail. Hence, even though we are of the view that in the facts and circumstances of the case, provisions of Section 360 read with Section 361 of the Code are not attracted and Om Prakash does not help the appellant, it would not be appropriate now to direct the appellant to surrender and to suffer the remaining sentence for about a month. The incident is of 1997 and about 10 years have passed.

18. From the evidence available on the record, it is evident that prosecution has been able to bring mens rea whereunder occurrence of stabbing was committed by the petitioner resulting grievous hurt to the P.W. 7. Thus, the instant revision petition is found devoid of merit and is accordingly dismissed. Petitioner is on bail, hence bail bond is cancelled and is directed to surrender before the learned Lower Court to serve out the sentence so inflicted. Office is directed to return back the Lower Court Record immediately to the court concerned.