

(1998) 09 PAT CK 0074

In the Patna High Court

Case No : Criminal Appeal No. 141 of 1986 (D.B.)

Karoo Singh, Manoj Singh, Prasidh Singh and Nago Singh,
Adv.

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 04-09-1998

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 302, 323

Citation : (1998) 3 PLJR 559

Hon'ble Judges : R.N. Sahay, J;P.K. Sarkar, J

Bench : Division Bench

Advocate : Suraj Nr. Prasad, Shivanand Prasad Sinha and Jayanand, for the Appellant; Ganesh Prasad Jaiswal, for the Respondent

Final Decision : Allowed

Judgement

R.N. Sahay and P.K. Sarkar, JJ.—An appeal against conviction or acquittal involves review of evidence by the appellate court but this is an exceptional, case where the appeal can be disposed of on mere reading of judgment under appeal in as much as the learned Additional Sessions Judge having disbelieved sub stratum of the prosecution case still found the Appellants guilty by giving benefit of doubt to the prosecutio.

2. These four Appellants along with three other lady accused were tried in Sessions Trial No. 343 of 1979 before the 1st Additional Sessions Judge, Gaya, in respect of an offence punishable under Sections 147, 148, 323 and 302 I.P.C. These Appellants were convicted u/s 302 I.P.C. and sentenced to life Imprisonment but three female accused where acquitted for lack of convincing evidence.

3. The charge against the Appellants was that on 22.6.1976 at village Naknupa they caused the death of Birabal Dusadh of that village, who was a rickshaw puller. The story is that on 22.6.1976 at about 7.30 A.M. deceased Birbal

Dusadh, who was also known as Biroo Dusadh and his son Suresh Dusadh also known as Suresh Paswan were at their house situated at village Naknupa within Sherghati police station. They saw Appellant Manoj Singh and Prasad Singh moving in the lane armed with bhala and lathi respectively. There was some litigation between them and one Kapildeo Singh. They suspected that accused persons were intending to assault them. They decided to leave the village at once. When they were fleeing west of the village, Kapildeo Singh, Karoo Singh, Manoj Singh, Nago Singh and Prasad Singh chased them and surrounded in a field situated in the badh of village Bharati known as Bharatitari. Appellant Manoj Singh was carrying a bhala and the remaining carrying lathis. Manoj Singh is the son of Kapildeo Singh. Prasad Kumar is the son of the sister of Kapildeo Singh and Karoo Singh lived in Hunterganj, district-Hazaribagh. Karoo Singh is the brother of Kapildeo Singh. Nago Singh is the brother of the wife of Appellant Karoo Singh. In the field at Bharatitari badh accused persons started showering their weapons on Birbal Dusadh who fell down in the field. When his son Suresh Dusadh tried to rescue him, Kapildeo Singh and Prasad Kumar Singh struck him with lathis on his both hands and near left eyebrow. Suresh Dusadh fled to Sherghati Police stations and lodged an F.I.R. on the same day. The accused persons including Kapildeo Singh dragged Birbal Dusadh to their house in the village while beating him on the way. At their house they mercilessly thrashed Birbal Dusadh who became unconscious. Suresh Dusadh went to Sherghati police station. He found that his uncle Faguni Dusadh (P.W. 6) at the ponce station. Suresh Dusadh gave his fardbeyan of the occurrence to the Officer Incharge of Sherghati police station. At the relevant time Shri D.N. Gautam, a trainee I.P.S. officer was the Incharge of Sherghati police station. Indradeo Singh was the regular Officer Incharge of Sherghati police station. It is relevant to mention that Faguni Dusadh went to give the version of the occurrence but the officer incharge: did not record the statement for some reason. Faguni Dusadh gave entirely different version of the occurrence. Piari Devi, daughter of Kapurwa Devi and Faguni Devi are also witness to the occurrence.

4. Now the defence of the Appellants was denial of the occurrence in the manner alleged by the prosecution. Kapildeo had earlier purchased some piece of land situated east and west of the house of the deceased from his co-sharers. In 1976 he had grown maize crop over those lands. The defence case is that on 22.6.1976 a she goat belonging to the deceased had trespassed into the maize field of Kapildeo Singh and was damaging the crop as well as the fencing erected for its protection." That led to altercation between the deceased and Kapildeo Singh. The defence alleges that the informant Suresh Dusadh, Faguni Dusadh (P.W. 6.) and others also reached there with lathis. Deceased Biroo Dusadh struck Kapildeo Singh by means of Fasuli. The informant Suresh Dusadh had also struck Karoo Singh with lathi. On hulla 400 to 500 persons assembled there and they started brick batting. The defence case was that deceased Birbal Dusadh @ Biroo Dusadh had sustained injuries on his person in course of brick batting resorted to by the angry villagers and succumbed thereto later on. Taking

advantage of that incident and the death of the deceased the accused persons including female of the house have been implicated by concocting the story as alleged by the prosecution.

5. Birbal Dusadh died of multiple injuries on his person on 22.6.76 at Sherghati State Dispensary. Indradeo Singh, S.I. stated that when he reached at village Naknupa on 22.6.76 after getting information from Suresh Dusadh he found the deceased lying on the Varandah of Kapil Singh and Karoo Singh contiguous north of their residential house.

6. Dr. Sri Narain Choudhary on 23.6.76 was posted at Pilgrim Hospital Gaya as Civil Assistant Surgeon conducted autopsy on the dead body of Birbal Dusadh. He found multiple ante mortem injuries. According to the doctor the death was due to shock and haemorrhage as a result of the injuries found on his person, especially those on the head.

7. During the trial Suresh Paswan affirmed what he had stated in his fardbeyan. The evidence of Faguni Dusadh (P.W. 6), who is most important witness, has been considered in para 8 of the judgment as extracted below:

P.W. 6 Faguni Dusadh is the full brother of the deceased and uncle of P.W. 9. He has said that on the date of the occurrence which was a Saturday at about 7 in the morning he was weeding grass in a paddy field of one Ram Singh of his village situated north of the village. He saw that Karoo Singh and Kapil Singh had been chasing Birbal from south and Manoj Singh, Prasad Singh and Nago Singh from north. In the field of one Rohan Mahto at Bhararitari badh those five persons surrounded Birbal and Suresh and started assaulting them. He rushed to that place. When he reached there, he found that Birbal had fallen and Kapil Singh, Karoo Singh, Nago Singh and Prasad Singh were showering lathi blows on him and Manoj Singh was inflicting bhala blows. The witness does not say that he had seen P.W. 9 also being assaulted by any of the assailants. He has told that he rushed to village Bharari and informed the choudidar. Thereafter, he rushed to police station. At the police station he asked the Sub Inspector that his brother Birbal had been murdered by Kapil Singh, Karoo Singh, Nago Singh, Prasad Singh and Manoj Singh. In the meantime, P.W. 9 Suresh Paswan also arrived there and informed the police of the assault. Then the Sub Inspector took Suresh on his jeep and went to the village. He was detained at the police station. He has said that he was-allowed to go from the police station after the dead body of the deceased was sent to hospital.

8. The learned trial judge from the evidence of the informant in para 7 of the judgment has substantially disbelieved the evidence of Suresh Paswan, the son of the deceased. The learned Judge says- "if P.W. 9. was actually going with his father to see him off for his safety, he could not have been 2 to 3 bamboos behind him. This shows that the witness had not told the whole truth in the court. At least, he appears to be concealing something material as will be evident when I discuss the defence evidence".

9. Chandar Dusadh, P.W. 7. also deposed as an eye witness of the occurrence. The learned trial Judge has commented that this witness has made self contradictory statement that he has not stated that Faguni Dusadh was weeding in the field of Ram Singh. The learned Judge commented that this witness was concealing the fact that Kapil Singh and Karoo Singh had injuries on their persons when they were apprehended in the village by the police. This fact was admitted by P.W. 9 and P.W. 11 and corroborated by the medical evidence of D.W.1.

10. The learned Judge has not placed reliance on the evidence of Kapurwa Devi, P.W. 5 wife of P.W. 6 and Piyari Devi, daughter of P.Ws. 5 and 6. The learned Judge has held that according to the evidence of the prosecution witnesses that the deceased had been dragged from the field of Rohan Mahto to the house of the accused like a log but the injuries found on the person did not indicate that the deceased had been dragged to a considerable distance.

11. The learned Judge accepted the defence case that Kapildeo Singh (since dead) and Appellant Karoo Singh had injuries on their person had been sent to Sherghati State Dispensary for examination. Injuries found on these two persons were noticed in para 16 of the judgment. The learned Judge observed that the injuries on the persons of Kapil Singh and Karoo Singh indicate that the occurrence had not taken place entirely in the manner as stated by the prosecution witnesses.

12. In para 19 of the judgment the learned trial Judge has stated that in the cross examination P.W.6 has stated that, after purchasing the homestead lands of Keshwar Dusadh and Bichh Dusadh, Kapil Singh erected fencing around those lands very close to their house and the trouble between the parties started since then and litigation started. He has also stated that the incident of erecting fencing close to his house had also led to fight between the parties. The witness has also stated that In course of the same fight deceased Birbal Dusadh died. He has also stated that the fight between the parties had taken place on the day the fencing was being erected by Kapil Singh and the deceased succumbed to his injuries and this case relates to that incident. So according to the learned Judge, the evidence of P.W. this much is clear that on the day the deceased was assaulted and died, there had occurred some sort of occurrence near his house over the question of either erecting fencing around the land purchased by Kapil Singh from Keshwar Dusadh and Bichh Dusadh, or of damage to his maize crop and fencing by the she goat of the deceased. Otherwise, there was no occasion for Kapil Singh and accused Karoo Singh to receive the injuries on their persons.

13. In para 20 of the judgment the learned Judge disbelieved of the very genesis of the occurrence. After rejecting the core of the prosecution case the learned judge re-constructed the whole case in the light of the evidence of the witnesses. In other words "he made out a third case of the prosecution". The learned Judge observed that-

If both the prosecution as also the defence version of the occurrence are considered together, the injuries on accused Karoo Singh and Kapil Singh as also on the deceased leading to his death and his son Suresh Dusadh are fully explained. From the facts and circumstances stated above, it appears that in the morning on 22.2.76 some trouble arose between Kapil Singh and deceased Birbal Dusadh over the question of the damage to the maize crop and fencing of the former by the she goat of the latter, or over the question of erecting fencing very close to the house of the deceased, and Kapil Singh was assaulted by the deceased and his supporters including his son. Karoo Singh arrived there and he was also assaulted by the deceased and his supporters, might be only his son or even some others. Finding that two of the affluent villagers had sustained injuries, the deceased and his son tried to escape. While Suresh Dusadh escaped, the deceased was either caught then and there by the supporters of Karoo Singh and Kapil Singh, or after chasing him upto some distance, and he was brought to the house of the accused. Thereafter, he was mercilessly beaten at the house of Karoo Singh. Had any such incident of assault on Karoo Singh and Kapil Singh not taken place, there was absolutely no occasion for chasing the deceased and his son while they were leaving the house for Gaya, and assault the deceased in the manner as alleged. The prosecution witnesses appear to have deliberately concealed the first part of the occurrence which can be said to be the genesis thereof in the same way as the defence has tried to conceal the latter part of the occurrence relating to the apprehension of the deceased and assault on him at the house of the accused.

14. The question for consideration before us is whether it is permissible for the trial Judge to make out a new case for the prosecution.

15. In *Ugar Ahir v. State of Bihar* 1964 B.L.J.R. 615 the case of the prosecution was that deceased Sheonandan was surrounded by the accused persons and assaulted by bhala leading to his death. The trial Judge however, gave finding inconsistent with the prosecution case. It was found that there were two factions in the village, (1) the accused belonging to one faction, and (ii) the deceased and the witness belonging to the other, some members of each group were wrestlers and there was previous history of criminal proceeding between these two factions. The Supreme Court commented that having disbelieved a major part of the prosecution case and the evidence, the learned Additional Sessions Judge evolved a new theory which he expressed in the following terms:

From the entire evidence it is clear that there was a clash between Shivnan-dan and Sheodutta, Jagarnath and Dharamnath on one side and the four accused Ugar, Chandrika, Mahadeb and Chandan on the other side. The conviction affirmed by this Court was set aside by the Supreme Court. It was observed by the Supreme Court-

It is therefore the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But its cannot obviously disbelieve the substratum of the prosecution case or the material parts

of the evidence and; reconstruct a story of its own out of the rest. That is what the courts have done: in this case. In effect, the courts disbelieved practically the whole version given by the witnesses in regard to the I persuit, the assault on the deceased with lathis, the accused going on a; bicycle and the deceased wresting the: bhala from one of the Appellants and attacking with the same two of the Appellants, the case that the accused at; tacked the witnesses, and the assertion of the witnesses of their being disinter-, ested spectators. If all this was disbelieved, what else remained ? To reverse the metaphor, the courts removed the grain and accepted the chaff and convicted the Appellants. We, therefore, set aside the conviction of the Appellants and the sentence passed. on them.

16. This is actually what has happened in the case, the learned Judge having disbelieved the prosecution case went on to evolve a new theory. The Supreme Court in Ugar Ahir"s case (supra) said-it was not permissible for the trial court to adopt such course.

17. The appeal is allowed and the conviction and sentence against the Appellants recorded by the learned Additional Sessions Judge is set aside by giving benefit of doubt. All the Appellants are on bail. They are discharged from the liability of their bail bonds.