

(2013) 06 PAT CK 0044

In the Patna High Court

Case No : Criminal Appeal (DB) No. 254 of 1990

Kulo Mandal

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 17-06-2013

Acts Referred:

Citation : (2013) 3 BLJud 193

Hon'ble Judges : Shyam Kishore Sharma and Amaresh Kumar Lal, JJ.

Bench : Division Bench

Advocate : Mr. Rakesh Kumar Sinha, Advocate, for the Appellants; Mr. Ajay Mishra, Addl. P.P, for the Respondent

Final Decision : Allowed

Judgement

Shyam Kishore Sharma, J. (Oral)—Appellants Kulo Mandal, Ilcha Mandal and Kailash Mandal have assailed the judgment dated 31.05.1990 passed by Sri Kanhaiya Prasad Verma, 6th Additional Sessions Judge, Bhagalpur in Sessions Trial No. 535 of 1988/Trial No. 13 of 1990 whereby all the above three appellants were convicted under Section 302/34 of the Indian Penal Code and 27 of the Arms Act and each of them were sentenced to undergo imprisonment for life and rigorous imprisonment for three years respectively. The sentences were ordered to run concurrently. Other four accused namely, Sikandar Mandal, Akhileshwar Mandal alias Akua, Bramhdeo Mandal and Soti Mandal were also tried along with these appellants but they were acquitted.

2. The midnight of 26/27th of May, 1986 became the fatal night in which Prasadi Mandal, lost his life. Harsadi Mandal went to Barbatta Police Station, District Bhagalpur on 27.05.1986 and gave a written report to the Officer-incharge stating therein that he was having animosity with the accused persons from before with regard to a piece of land which was being cultivated by the informant (P.W.7). Kulo Mandal (appellant no.1) wanted to harvest the crops forcibly which had resulted into altercation earlier also. Earlier two cases were lodged with regard to altercation regarding the said piece of land. The police submitted final

form in both cases but the land continued in possession of the informant. Soti Mandal (since acquitted) used to pressurise to execute the land in his favour. In the night of occurrence, the informant had gone to watch the crops of his field along with Ganesi Mandal (P.W.2), Puran Mandal (P.W.4) and Fate Mandal (P.W.5). It was the moonlit night. The informant was gossiping with his companions and his brother Prasadi Mandal was sleeping at his Basa. At about midnight the informant heard the sound of three shots from the side of his Basa. The informant and others went running and there they saw some persons escaping with guns. Prasadi Mandal who was in pool of blood told the informant that he was shot at by Kulo Mandal, Ilcha Mandal and Kailash Mandal with guns.....". Prasadi Mandal died. Chawkidar and Dafadar were informed. The written report was referred to Naugachhia police station for instituting a case and thereafter Naugachhia police registered Naugachhia (Parbatta) P.S. Case No. 0105 dated 28.05.1986 under Section 302/34 of the Indian Penal Code and 27 of the Arms Act. The matter was investigated into and after completion of investigation, the police submitted charge-sheet. Cognizance was taken and the case was committed to the court of sessions where charge under Section 302 of the Indian Penal Code was explained to accused Kulo Mandal, Ilcha Mandal and Kailash Mandal whereas charge under Section 302/149 of the Indian Penal Code was explained to all the seven accused namely, Kulo Mandal, Ilcha Mandal, Kailash Mandal, Sikandar Mandal, Akhileshwar Mandal alias Akus, Bramhdeo Mandal and Soti Mandal. Charge under Section 27 of the Arms Act was explained to accused Kulo Mandal, Ilcha Mandal, Kailash Mandal, Sikandar Mandal, Brahmddeo Mandal and Akhileshwar Mandal alias Akua. All the accused persons pleaded innocence and preferred to face the trial.

3. The prosecution thereafter in order to prove its case examined ten witnesses namely, P.W.1 Deep Narain Mandal, P.W.2 Ganesi Mandal, P.W.3 Sitaram Mandal, P.W.4 Puran Mandal, P.W.5 Fate Mandal, P.W.6 Mahendra Mandal, P.W.7 Harsadi Mandal, the informant of the case, P.W.8 Dr. H.I. Ansari, P.W.9 Kedar Mandal and P.W.10 Digambar Prasad Verma.

4. P.W.8 Dr. H.I. Ansari has conducted the post mortem examination over the dead body of the deceased. P.W.9 and P.W.10 are the police officials. The Investigating Officer of the case is P.W.10 Digambar Prasad Verma. P.W.4 Puran Mandal has been tendered by the prosecution though he was a named witness of the occurrence. P.W. 3 Sitaram Mandal and P.W.6 Mahendra Mandal are the witnesses of the seizure. There is no defence witness.

5. The written report has been marked as Ext.2. The post mortem report has been marked as Ext.3. The seizure list is Ext.5. The inquest report is Ext. 6. The formal F.I.R. has been marked as Ext.7.

6. The defence of the accused persons was of false implication due to previous enmity which has been given in the written report and the same was coming from before.

7. The trial court after considering the evidences on record and after hearing the arguments opined that the prosecution has been able to prove the charges only against the appellants beyond the shadow of all reasonable doubts and has passed the order of conviction and sentence, as stated above.

8. This Court is required to reappraise the evidences on record and to see as to whether there were materials on record to prove the charges against the appellants beyond the shadow of all reasonable doubts or not.

9. Before discussing the oral evidence, it would be appropriate to deal with the evidence of the doctor who held post mortem over the dead body of the deceased Prasadi Mandal. P.W.8 Dr.H.I.Ansari being posted as Associate Professor of Forensic Medicine Department in Jawahar Lal Nehru Medical College, Bhagalpur on 27.05.1986 held autopsy over the dead body at 2.15 P.M. and found following ante mortem injuries :-

(i) fire arm wound of entry on left side chest 1?" left from sternum near fifth rib with irregular inverted black margin oval in shape, chest cavity deep.

(ii) fire arm wound of entry on right side of chest about ?" x ?"x chest cavity deep which was 1?" above the right nipple. Triangular in shape with inverted black margin on 4th costal cartilage.

(iii) fire arm wound of exit on left side of back in sub-costal region size 1?" x ?" with everted lacerated margin.

(iv) fire arm wound of exit on left side of back on lumbar region size 1?" x ?" with everted lacerated margin.

(v) two stab wounds on both gluteal region with sharp cuts size 1?" x ?"x muscle deep each near both iliac crests. From the post mortem report and the evidence of the doctor it is apparent and conclusively proved that death of Prasadi Mandal was homicidal which was caused due to two fire arm injuries as well as two stab wounds.

10. Once it is established that it was a homicidal death, then the onus had come upon the prosecution to prove that the occurrence was the outcome of the act of the accused persons alone.

11. P.W.1 is son of the informant. P.W.2 has doubted the evidence of P.W.1 and was allowed to cross-examined by the prosecution. P.W.4 who claimed to be a witness in the written report was tendered. The material witnesses thus remained were the informant as well as P.W.5 Fatte Mandal.

12. The informant has deposed and described the occurrence wherein he has stated that in the night of 26/27th May, 1986 he was guarding his maize crops in the field and at that time he was gossiping with Ganeshi Mandal (P.W.2), Puran Mandal (P.W.4) who has been tendered by the prosecution and Fatte Mandal (P.W.5). At that time he heard 3-4 sound of firing. The informant rushed to the site from where sound of firing was coming and noticed that Kulo Mandal armed

with gun, Kailash Mandal armed with gun, Ilcha Mandal armed with thee-nut and Sikandar Mandal armed with gun were escaping. Others were not identified. He went near Prasadi Mandal who was in pool of blood who told that he has been shot at by Kulo Mandal, Kailash Mandal and Ilcha Mandal. The eye sight of this witness was weak for the last two years as such he was not in a position to identify the accused from the witness box which has been noted in paragraph 5 of his evidence. This witness sought permission of the Court to identify the accused persons in the dock. After getting permission of the court, this witness went near the accused persons standing in the dock and identified accused Sikandar Mandal, Kulo Mandal, Kailash Mandal and Ilcha Mandal. The evidence of this witness was recorded on 6th July, 1989 i.e. after three years of the occurrence. This witness has been supported by P.W.5 Fatte Mandal so far as his presence with the informant near Prasadi Mandal who named three persons before his death.

13. Now another evidence has to be discussed with the evidence of other witnesses. P.W.1 is nonetheless but the son of the informant. He has stated that he was guarding his maize field. He heard four sound of firing and then rushed towards the site and noticed the accused persons escaping. He has named Kulo Mandal, Sikandar Mandal and Ilcha Mandal who were armed with gun and he could not identify others. By the time he could arrive near the place of occurrence, Prasadi Mandal had departed to his ended soul. Father of this witness (informant P.W.7) was present there from before who told, on being asked by this witness, that Prasadi Mandal has named Ilcha Mandal, Kulo Mandal and Sikandar Mandal.

14. P.W.1 in paragraph 2 has named the assailants on the basis of information given to him by the informant and he has repeated in his deposition that his father had named Sikandar Mandal as third assailant but he has not named Kailash Mandal (appellant no.3) as assailant of the deceased. P.W.1 had arrived at the place of occurrence immediately after the occurrence but he was not told about participation of Kailash Mandal rather he was told about Sikandar Mandal. Sikandar Mandal has already been acquitted.

15. Learned counsel for the appellants has submitted that the dying declaration was never made and the prosecution has belatedly raised the plea of oral dying declaration which is apparent from some dates. The occurrence is of 26/27th May, 1986 and it was reported to police on 28th May, 1986. The F.I. R. has been received in the court on 31.05.1986/02.06.1986. There is no explanation as to what happened between 27th May, 1986 and 31.05.1986/02.06.1986. Section 157 of the Code of Criminal Procedure mandates that the information with regard to cognisable offences must be sent to the nearest Magistrate without delay. No doubt the delay in lodging the case cannot be fatal to the prosecution case but when the delay is not explained then it creates enough doubt regarding the truthfulness and reliability of the prosecution case-both with regard to occurrence and implication of the accused.

16. Further submission is that the written report does not say that the deceased prior to his death has described that he was fired upon by the accused rather only statement was that the accused persons were "with guns". It has also been submitted that the deceased had two stabbed wounds and there is no mention in the written report as to who are the author of those wounds. It has further been submitted that, in fact, no person had seen the occurrence and after Parasdi Mandal was shot at and succumbed to the injuries, the informant and others reached there and false implication was made.

17. Learned Addl.P.P. supporting the judgment of the trial court has submitted that the procedural delay was very much explained in circumstances of which distance of place of occurrence and the court was about 30 K.M. So it was usual that some delay must take place. It has also been submitted that the dying declaration was reliable and beyond doubt.

18. We have analysed the evidences on record and heard the submissions of the learned counsel for the parties. After going through the post mortem report it is apparent that the deceased has two ante mortem and two corresponding fire arm injuries. Besides that he has two stabbed injuries. Though there is doubt regarding dying declaration but even if it is accepted for the sake of argument, then also it can be said that there was three firings meaning thereby that there should have been three wounds of entry. Further there is no explanation as to how two stabbed wounds were inflicted upon the deceased. No step has been taken by the prosecution to fill up this vital gap. The dying declaration given by the deceased could not explain as to who fired and in what manner shots were done. On this score, it can be said that the prosecution has not proved the veracity of the narration and the dying declaration has become more doubtful with regard to participation of the accused persons. If the dying declaration is considered with the evidence of P.W.1 who is none else rather the son of the informant P.W.7, he had arrived immediately at the site after reaching of his father P.W.7 on hearing sound of firings and he was told by his father that the deceased named three persons. Kailash Mandal was not amongst them rather Sikandar Mandal was named as one of the killers. Though accused Sikandar Mandal had also faced the trial but he has been acquitted. If the evidence of P.W.3 is considered, then it is found that appellant Kulo Mandal was not at the spot and therefore, he was not the assailant of the deceased. If the prosecution relies upon a particular portion of the occurrence, then it has to prove it from all corners. The circumstances of the prosecution case are required to be proved and should be sufficient to convince us on its versions. The following circumstances have not been proved by the prosecution :-

(i) There is no explanation at all as to in what and in which manner the deceased received two stabbed injuries.

(ii) Dying declaration narrates about three firings (doubted) but there were only two ante mortem injuries.

(iii) P.W.7 has immediately told about the occurrence to his son P.W.1 about firing by accused Sikandar Mandal (since acquitted) and not by Kailash Mandal.

(iv) F.I.R. should have been received in the court on 28.05.1986 but has reached the court on 31.05.1986/02.06.1986 and this delay of 3 to 5 days in between recording the F.I.R. and reaching the court gives rise to false implication of the accused by the prosecution.

19. Thus, taking into consideration the discussions made above, we are of the view that there were no material on the record to prove the charges against the appellants beyond the shadow of all reasonable doubts.

20. In the result, the appeal is allowed and conviction and sentence passed against the appellants is set aside. The appellants are acquitted of the charges. The appellants are on bail, they are discharged from the liabilities of their respective bail bonds.