

(2019) 07 PAT CK 0323

In the Patna High Court

Case No : Criminal Appeal (DB) No. 1108 Of 2013, 2, 16 Of 2014

Liladhar Choudhary And Ors

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

Date of Decision : 31-07-2019

Acts Referred:

Indian Penal Code, 1860 — Section 147, 148, 149, 302, 504

Arms Act, 1959 — Section 27, 27(ii)

Code Of Criminal Procedure, 1973 — Section 161, 313

Citation : (2019) 07 PAT CK 0323

Hon'ble Judges : Rakesh Kumar, J;Anjani Kumar Sharan, J

Bench : Division Bench

Advocate : Sanjeev Kumar, Nand Gopal Mishra, Amresh Kumar Sinha, Shashi Bhushan Singh, Rajesh Kumar Sinha, Vikramadit, Ajay Mishra

Final Decision : Allowed

Judgement

1. Five appellants in all the aforesaid three appeals were tried together and by common judgment, they were convicted and sentenced and as such, all the aforesaid three appeals were taken up together under the heading "For Hearing" and are being disposed of by this common judgment.

2. All the appellants by judgment dated 30-10-2013 were convicted for offence under Sections 147, 148, 302/149 of the Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.') and Sections 27 of the Arms Act, 1959 (hereinafter referred to as 'Arms Act'). By order dated 02-11-2013, under Sections 302/149 of the I.P.C., all the appellants have been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- (ten thousand) each. In default of payment of fine, they were directed to further undergo rigorous imprisonment for six months. Under Section 147 of the I.P.C., by the same order i.e. order dated 02-11-2013, all the appellants were sentenced to undergo rigorous imprisonment for two years, under Section 148 of the I.P.C., they were sentenced to undergo rigorous imprisonment for three years and under Section

27 of the Arms Act, all the appellants were sentenced to undergo rigorous imprisonment for three years. All the sentences were directed to run concurrently. The judgment of conviction and sentence was passed by Sri Vijay Kumar Sinha, learned Ist Additional District and Sessions Judge, Naugachia (hereinafter referred to as the 'Trial Judge') in Sessions Trial No. 194 of 2010 (arising out of Bihpur P.S. Case No. 210 of 2009).

3. The case has been initiated on the basis of fardbeyan of one Parmanand Choudhary (father of deceased Vikash Kumar). The fardbeyan of informant was recorded on 13-06-2009 at 5:00 PM by Sub-Inspector of Police-cum-S.H.O. Pramod Poddar (P.W.4) of Bihpur Police Station at Chotki Diyara mouja Lattipur beside the field of Shashi Jha near the dead body of his son. In the fardbeyan, it was disclosed by the informant/Parmanand Poddar (who died before commencement of trial) that on the same date i.e. on 13-06-2009 at 2:45 PM, he alongwith his sons Barun Chaudhary (P.W.7), Dhananjay Kumar (P.W.6) and Vikash Kumar (deceased) had proceeded for his orchard situated in Mauza Narkadia. It was disclosed that Vikash Kumar (deceased) proceeded on bicycle ahead of the informant. While the son of the informant reached near banana orchard of Gholti Kanu at about 3:00 PM, suddenly he saw that:

- (1) Liladhar Choudhary (A1 in Cr.App.DB No. 1108/13)
- (2) Santosh Choudhary (A2 in Cr.App.DB No. 1108/13)
- (3) Fantush Choudhary (died before charge)
- (4) Puran Sangahi (A1 in Cr.App.DB NO. 2/14)
- (5) Santosh Sangahi (A2 in Cr.App.DB No. 2/14)
- (6) Arbind Roy (sole app. in Cr.App.DB No. 16/14)
- (7) Son of Arvind Rai i.e. Gunjan Rai (abconder)
- (8) Gopal Kunwar (absconder), and
- (9) Saheb Kumar (his case separated)

carrying lethal weapons came out from the banana orchard and surrounded his son Vikash. Thereafter, Liladhar Choudhary (A1 in Cr.App.DB No. 1108/13) using filthy language ordered to gun down. Thereafter, Fantush Choudhary (died), Santosh Choudhary (A2 in Cr.App.DB No. 2/14), Gopal Kunwar (absconder) and Arvind Rai (sole app. in Cr.App.DB No.16/14) all fired on his son by their 3-not pistol, which they were carrying, whereupon, his son in injured condition fell down. The accused persons thereafter ran towards informant and others with a view to kill them, however; the informant and others fled away. The informant further stated that the accused persons, after committing the crime, fled towards southern side through banana orchard. After some time, when informant and others went to the place of occurrence, the informant saw that his son had already died. The reason for the occurrence was given by the informant that

Liladhar Choudhary (A1 in Cr.App.DB No. 1108/13) was pressurizing the informant to execute sale-deed in respect of the land, which was adjacent to the land of the appellant Liladhar Choudhary and in lieu of the said land, they were ready to transfer other land and due to said reason, the accused persons had killed his son Vikash Kumar. The said fardbeyan was read over to him and after finding it correct, the informant Parmanand Choudhary put his signature.

4. On the basis of said fardbeyan, on the same date i.e. on 13-06-2009 at 19.00 hrs. (7:00 PM), a formal F.I.R., vide Bihpur P.S. Case No. 210 of 2009, was registered for offence under Sections 147, 148, 149, 302, 504 of the I.P.C. and Section 27 of the Arms Act against following nine accused persons:

- (i) Liladhar Choudhary (A1 in Cr.App.DB No. 1108/13),
- (ii) Santosh Choudhary (A2 in Cr.App.DB No. 1108/13),
- (iii) Fantush Choudhary (died before charge),
- (iv) Puran Sangahi (A1 in Cr.App.DB NO. 2/14),
- (v) Santosh Sangahi (A2 in Cr.App.DB No. 2/14),
- (vi) Arbind Roy (sole app. in Cr.App.DB No. 16/14),
- (vii) Son of Arvind Rai i.e. Gunjan Rai (abconder),
- (viii) Gopal Kunwar (absconder), and
- (ix) Saheb Kumar (his case separated).

5. After investigation and finding the case true, the police on 26-09-2009 submitted chargesheet against all the nine accused persons, which includes five appellants. Out of 9 accused persons, two were shown as absconder and one was shown died during investigation. After submission of chargesheet, on 29-09-2009 the learned Addl. Chief Judicial Magistrate, Naugachia (Bhagalpur) took cognizance of the offence. Subsequently, the case was committed to the court of sessions on 04-02-2010 and it was numbered as Sessions Trial No. 194 of 2010. Thereafter, on 18-11-2011, charges under Section 147, 148, 302/149 of the I.P.C. and Section 27 (ii) of the Arms Act was framed against all the appellants.

6. During the trial, to establish its case on behalf of the prosecution, altogether nine witnesses were examined. Out of nine witnesses, P.W.3 Phuldai Devi @ Shyambara Devi (mother of the deceased), P.W.6 Dhananjay Kumar (own brother of the deceased) and P.W.7 Barun Choudhary (another own brother of the deceased) were shown as eye-witnesses to the occurrence, however; P.W.7 Barun Choudhary did not support the case and he was declared hostile. P.W.2 Nawesh Modi had identified his signature on the seizure list relating to seizure of 3 empty cartridges of .315 bore, which was marked as Ext.I and P.W.8 Sumit Kumar is another witness to the said seizure list, who identified his signature on the seizure list, which was marked as Ext.1/1. P.W.9 Mukesh Rai, brother-in-law (बहनोई) of the deceased is a hearsay witness, who identified the signature

of informant on the fardbeyan, who died during investigation and signature of the informant was marked as Ext.5. P.W.5 Dr. Arun Kumar Rai on 14-06-2009 was posted as Medical Officer, Sub-Divisional Hospital, Naugachia and he conducted post-mortem examination on the dead body of the deceased and also identified post-mortem report. P.W.4 Pramod Poddar on the date of occurrence i.e. 13-06-2009 was officer incharge of Bihpur Police Station, who recorded fardbeyan, investigated the case and submitted chargesheet, however; P.W.1 Bjay Kumar Choudhary and P.W.7 Barun Choudhary, since did not support the prosecution case, were declared hostile.

7. After completion of the prosecution evidence, on 12-08-2013, the statement of accused/appellants under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") was recorded, however; on examination of the same, it appears that only formality was done, otherwise, no specific incriminating circumstances or evidences were explained to them, however; in their statement recorded under Section 313 of the Cr.P.C., all the appellants had claimed that they were innocent and were falsely implicated. On examination of the evidences and trend of cross-examination, it is evident that the defence had suggested the witnesses that they were falsely implicated in the case due to land dispute.

8. Sri Nand Gopal Mishra, learned counsel appearing on behalf of two appellants namely Puran Sangahi @ Puro and Santosh Sangahi {in Cr.Appeal (DB) No. 2 of 2014}, after placing entire evidence on record, has argued that the prosecution has miserably failed to establish its case beyond all reasonable doubt. Despite the fact that prosecution has not brought on record any admissible evidence showing involvement of either of the appellants, the learned Trial Judge, in a mechanical manner, has passed the judgment of conviction and sentence, which requires interference. He highlights that in the case, only two witnesses have been examined as eye-witnesses to the occurrence, those are mother of the deceased, who was examined as P.W.3 Phuldai Devi and brother of the deceased namely Dhananjay Kumar (P.W.6). He submits that on examination of evidence of both the witnesses, who had claimed to be eye-witnesses, there are material inconsistency, which creates serious doubt on the prosecution case. It has been argued that mother of the deceased (P.W.3) in her evidence has stated, as if, she alone with the deceased was moving to orchard for plucking mango and in her presence, the accused persons suddenly surrounded her son and killed him by giving shot of firing, however; in the evidence of P.W.6 (Dhananjay Kumar), who is none else but son of P.W.3 and own brother of the deceased, has stated that at the time of occurrence, P.W.3 was at the house and she was not accompanying him.

9. Besides this, it has been argued by learned counsel for the appellants that in the fardbeyan, it was indicated, as if, deceased was proceeding on a bicycle ahead of his father Parmanand (died), P.W.6 and 7, however; P.W.7 Barun Choudhary, who is none else but own brother of the deceased, has categorically deposed that on the date of occurrence, he was not present in village and this was the reason that he was declared hostile. According to learned counsel for the

appellants, if in a case, in which, own brother of the deceased, who was cited as eye-witness, is coming out with a case that he was not present at the place of occurrence, certainly such stand creates serious doubt on the prosecution case.

10. Besides this, it has been argued that as per the fardbeyan or evidence of P.W.6/Dhananjay Kumar, the deceased had proceeded on bicycle and distance from the house and orchard, where occurrence had taken place, was far away i.e. about 10-15 km., which fact has been incorporated in the fardbeyan. Accordingly, it has been argued that once it was stand of the informant and prosecution that deceased had proceeded on bicycle, then while the deceased was intercepted, there was no possibility for witnessing the said occurrence by either of the so called eye-witnesses, who had disclosed that they had proceeded on foot.

11. Learned counsel for the appellants has also argued that it appears that deceased was done to death at some other place and his body was shown to be recovered near the banana orchard. To substantiate his submission, learned counsel for the appellants has argued that this is the reason that the investigating officer at the place, where dead body was found, had not noticed any blood mark. Learned counsel for the appellants has specifically drawn our attention to paragraph 5 (at page 20 of paper-book) of the statement made by the investigating officer/P.W.4 in his cross- examination wherein the investigating officer had stated that there was no blood on the earth. According to learned counsel for the appellants, had it been a case that the deceased at the place, where dead body was found, was given four shot of firing and he received all such injuries, there was every possibility of noticing huge blood at the place of occurrence. This circumstance, according to learned counsel for the appellants, substantiates that the manner of occurrence, as alleged by the prosecution, was different than stated by the witnesses. On aforesaid ground, it has been argued that the prosecution has not been able to establish its case beyond all reasonable doubt and as such, the judgment of conviction and sentence is required to be set aside.

12. Sri Sanjeev Kumar, learned counsel for the appellants namely Liladhar Choudhary and Santosh Choudhary {in Cr.Appeal (DB) No. 1108 of 2013} as well as Sri Amresh Kumar Sinha, learned counsel appearing on behalf of sole appellant namely Arbind Roy {in Cr.Appeal (DB) No. 16 of 2014}, adopting the argument advanced by Sri Nand Gopal Mishra, learned counsel for the appellants in Cr.Appeal (DB) No. 2 of 2014, has further argued that despite the fact that occurrence had allegedly been taken place at 3:00 PM, to the reasons best known to the investigating officer, the investigating officer has not recorded statement of any of the witnesses, who were residing nearby the place of occurrence. Both counsel have drawn our attention to statement made by the investigating officer in paragraph 7 of his cross-examination to show that investigating officer himself has admitted that he had not recorded statement of any of the witnesses, who were residing near the place of occurrence and they

(both counsel) submit that in such situation, in a case in which there is no independent eye-witness and witnesses, who are close relative, the evidence of those witnesses are required to be examined with caution and after examining the same, it is evident that there are serious contradictions in between the evidence of so-called two eye-witnesses.

13. Sri Ajay Mishra, learned Addl. Public Prosecutor, though has supported the impugned judgment of conviction and sentence, but he too was not in a position to satisfy the Court as to whether the evidence of P.W.3 and P.W.6 can be considered as reliable or not.

14. Besides hearing learned counsel for the parties, we have examined entire evidence, both oral and documentary, and after going through the same, prima facie, we are of the opinion that in a case, in which, the prosecution had failed to establish its case beyond all reasonable doubt, the learned Trial Judge has incorrectly passed the judgment of conviction and sentence. However, before proceeding, it would be necessary to examine the evidences, which have been brought on record.

15. Though, the case was initiated on the basis of fardbeyan of one Parmanand Choudhary (father of the deceased), it has come that even before submission of chargesheet, he died. In the fardbeyan, which has been marked as Ext.2, it has been indicated by the informant that informant with his three sons namely Dhananjay Kumar (P.W.6), Barun Choudhary (P.W.7) and Vikash Kumar (deceased) had left his house for his orchard. The deceased son had proceeded on bicycle, whereas, the informant and others had proceeded on foot. However, he claimed that at the place of occurrence, which was near the banana orchard and was about 15 km away from his house, the deceased was intercepted by altogether nine accused persons and on the order given by Liladhar Choudhary (A1 in Cr.App.DB No. 1108/13), other accused persons gave four shot of firing causing his death.

16. As per version of the fardbeyan, only four persons including the deceased had proceeded and thereafter, occurrence had taken place, however, during evidence, P.W.3 Phuldai Devi (mother of the deceased) has come out with a case, as if, she was the eye-witness to the occurrence. In her evidence, she stated that on the date and time of occurrence, she was moving alongwith Vikash (deceased). Vikash (deceased) was going for plucking mango. While they reached near the field of her gotiya, the accused persons including all the appellants killed her son (Vikash) by giving gun shot injury. She stated that her son Vikash on the same date had brought some mango and again on second occasion, he was going for the same thing, only then, he was killed. In paragraph 3 of her cross-examination, her attention was drawn to her previous statement recorded under Section 161 of the Cr.P.C. by the investigating officer and thereafter, at the time of examination of the investigating officer/P.W.4, contradictions were taken and in paragraph 9 of cross-examination of P.W.4, it has come that the fact, which she disclosed in her examination-in- chief, was not

disclosed by her during investigation. Even on court question on the point as to whether she was knowing the name of her gotiya, in whose field occurrence had taken place, she did not give reply, whereas, in her examination-in-chief, she had stated that while deceased arrived in the field of her gotiya, the deceased was gunned down. This suggests that she was not giving true picture. In paragraph 9 of her cross-examination, suggestion was given that her son was involved in theft of mango and banana and in course of theft, he was apprehended and he was killed, however; said suggestion was denied and she also denied the suggestion that she had not seen the occurrence.

17. Another so-called eye-witness in the case is P.W.6 Dhananjay Kumar (own brother of the deceased and son of P.W.3) and in examination-in-chief, he stated that occurrence had taken place on 13-06-2009 at 2:45 PM. He disclosed that he was present near banana orchard of Gholti Kanu. He further stated that the appellants and others killed his brother and four shot firing was made, thereafter, accused persons fled away. Police came and lifted the dead body. In paragraph 2 of his cross-examination, he deposed that from his house, banana orchard of Gholti Kanu was about 10-15 km. In paragraph 3, he further stated that four persons were moving on foot and his brother Vikash was moving on bicycle and was about 10 steps ahead of him and then occurrence had taken place. In paragraph 11 of his cross-examination, P.W.6 stated that about 20-25 minutes after the occurrence, his mother (P.W.3) arrived. In paragraph 20 of his cross-examination, he admitted that there was land dispute in between the informant side and appellants. Again, in paragraph 21 of his cross-examination, he stated that his statement was recorded at the place of occurrence and at the same place, statement of Barun (P.W.7) was recorded by the police, however; he stated that he was not aware as to when statement of his father was recorded by the police. Whereas, it was the case of the prosecution that after arrival of the police, the fardbeyan of father of the deceased was recorded. In paragraph 26, he stated that he had not stated before the police that accused persons had chased them also, whereas, in the fardbeyan, it was disclosed that firstly the deceased was fired and thereafter, accused persons had chased informant and other witnesses. His attention was drawn to his previous statement in paragraph 28 to the extent that before the police, he had stated that after some time of the occurrence, they arrived at the place of occurrence and saw that his brother was lying dead. He denied the suggestion in paragraph 31 that they had falsely implicated the accused persons with a view to pressurize the appellants for transferring the land and false case was instituted. Again he denied the suggestion in paragraph 38 that deceased (Vikash Kumar) was killed while he was indulged in theft of crop and hand-pump. At this juncture, it is necessary to notice that another brother of the deceased is P.W.7 Barun Choudhary, however; he stated that at the time of occurrence, he was not present at the place of occurrence. Ofcourse, he was declared hostile, but considering the fact that this witness was own brother of the deceased as well as so called eye-witness/P.W.6, his statement that he was not present at the place of occurrence creates serious

doubt on entire prosecution case. Moreover, there is serious inconsistency in between the evidence of two so called eye-witnesses i.e. P.W.3 and P.W.6 and as such, it would be difficult to place reliance on either of such witnesses.

18. The P.W.5 the doctor, who conducted post-mortem examination, has identified the post-mortem report and it was marked as Ext.5. In the evidence of P.W.5, it has come that deceased had received altogether four gun shot injuries, which were not made from close range. Since there is difficulty in accepting oral evidence, no purpose would be served in giving detail of the evidence of P.W.5 (Dr. Arun Kumar Rai) as well as dealing with the fact disclosed in the post-mortem report.

19. P.W.4 Pramod Poddar on 13-06-2009 was officer incharge of Bihpur Police Station. He stated that on getting information, he made station diary entry and thereafter, he reached the place of occurrence. The place of occurrence from the police station has been described as about 8 km. The occurrence had taken place at 3:00 PM and thereafter, police rushed to the place of occurrence and recorded fardbeyan of Parmanand Choudhary and identified the same, which was marked as Ext.2. He also prepared inquest report and identified the inquest report, which was marked as Ext.3. Ofcourse, during the trial, inquest report was not brought on record, rather paragraph 45 of the case diary, which contains reproduction of the inquest report, has been got exhibited and this was the reason that it was exhibited with objection. He has also identified the seizure list, which was in relation to recovery of three empty cartridge of .315 bore and on the back side it was mentioned as 8 MM and KF. The said seizure list was marked as Ext.4. The investigating officer thereafter deposed that he recorded restatement of the informant and statement of witnesses. He inspected the place of occurrence and place of occurrence has been mentioned in paragraph 3 of his evidence. As per investigating officer, the place of occurrence was Lattipur mauza near Chotki Diyara, which was lying in the middle of banana orchard of Gholti Kanu and maize field of Shashi Jha on passage (पगडंडी). In cross-examination in paragraph 4, he stated that he got information regarding the occurrence and on 13-06-2009 he recorded sanha entry and then he proceeded, however; in paragraph 8 of his cross-examination, he has stated that in case diary, he has not recorded any description of the place of occurrence in the case diary. In paragraph 5 of his cross-examination (at page 20 of the paper book), the investigating officer has stated that there was no blood on the earth.

20. It is necessary to be noted that in the fardbeyan, specific time of recording has been mentioned as 17 hrs. i.e. 5:00 PM and in the formal F.I.R., in column 4 (ग) i.e. प्राथमिकी दर्ज करने की तिथि/समय (date and time of lodging F.I.R.), it has been mentioned as "13-06-09" and on examination of recording of timing, it is evident that there is over-writing. It is difficult to come to a conclusion whether it is "17 hrs." or "19 hrs.". This certainly creates some doubt on the prosecution case.

21. On examination of the evidence of investigating officer, it appears that he has only done formality of the investigation. Moreover, in his evidence, it is clear that

at the place of occurrence, no blood was noticed by him nor any seizure list to this effect has been brought on record. However, a seizure list showing seizure of 3 empty cartridges of .315 bore was shown, but the seizure list witness i.e. P.W.2 Nawesh Modi, who identified his signature on seizure list, which was marked as Ext.1 in paragraph 2 of his cross-examination has stated that he could not see as to whether the paper on which his signature was obtained was written or blank.

22. P.W.8 Sumit Kumar is another witness to the seizure list, who identified his signature on the seizure list, which was marked as Ext.1/1. In paragraph 2 of his cross-examination, he admitted that his signature on the said seizure list was obtained by बड़ा बाबू (officer incharge of the police station) at the police station itself. Further, in paragraph 3, he stated that in his presence nothing was seized. The evidence of P.W.2 and P.W.8 reflects that there is serious doubt regarding finding of said three empty cartridge at the place of occurrence. Non-finding of any blood at the place of occurrence by the investigating officer and evidence of P.W.2 and P.W.8 regarding seizure list in respect of said cartridges are evident to show that the prosecution has not been able to establish as to whether the place, where the dead body was found, was actual place where the deceased was gunned down or not. This creates serious doubt on the prosecution case.

23. Only one witness i.e. Mukesh Rai, who is none else but brother-in-law of the deceased and has been examined as P.W.9, is only hearsay witness and he had come to identify the signature of the informant on the fardbeyan, which was marked as Ext.5.

24. On examination of entire aforesaid evidence, we fail to understand as to in such situation, how learned Trial Judge has passed the judgment of conviction and sentence and therefore, after discussing entire evidence, there is no difficulty to come to the conclusion that the prosecution has not been able to establish its case beyond all reasonable doubt and as such, by way of extending the benefit of doubt, it is necessary to interfere with the judgment of conviction and sentence.

25. Accordingly, the judgment of conviction dated 30-10-2013 and order of sentence dated 02-11-2013 passed by Sri Vijay Kumar Sinha, learned Ist Additional District & Sessions Judge, Naugachhia in Sessions Trial No. 194 of 2010 (arising out of Bihpur P.S. Case No. 210 of 2009) is, hereby, set aside and all the aforesaid three appeals are allowed.

26. Since the impugned judgment of conviction and sentence has been set aside and all the appellants are in custody, they are directed to be released forthwith, if not wanted in any other case.