

(1999) 11 PAT CK 0020

In the Patna High Court

Case No : Criminal Appeal (D.B.) No's. 100 and 119 of 1996

Mohd. Yunus and Others Etc.

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 04-11-1999

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 302, 34

Citation : (2000) 1 BLJR 324 : (2000) 2 PLJR 41

Hon'ble Judges : S.K. Katriar, J; M.L. Visa, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.L. Visa, J.—These two appeals have been heard together and are being disposed of by this common judgment because both these appeals arise out of the common judgment passed by Sessions Judge, Madhepura in Sessions Cases No. 3 of 1994 and 164 of 1994 convicting and sentencing Md. Ismail, the sole appellant in Cr. Appeal No. 119/96 to undergo life imprisonment u/s 302/34, I.P.C., Md. Yunus and Md. Manzoor, who are appellants in Cr. Appeal No. 100/96 to undergo life imprisonment u/s 302/34 each and Kapileshwar Das, who is also an appellant in Cr. Appeal No. 100/96 to undergo life imprisonment u/s 302/34/114, I.P.C.

2. The case of prosecution in short is that in the night of 27-11-1992 informant Arjun Das (P.W. 7) and his father after taking meal went to bed. The father of informant slept in a "gohal" (cow-shed) whereas the informant slept in his house situate adjacent to "gohal". At about 11.30 p.m. the informant woke up and after urinating he again went back to his bed. Half an hour thereafter, he heard sound of presence of some persons in "gohal". He came in courtyard and hiding there he saw that all the four appellants had entered his "gohal" and they were whispering with each other and all were armed with weapons. He identified all the appellants in the light of lantern which was burning in the "gohal". Appellant Kapileshwar Das asked to go fast on which appellant Md. Ismail shot at the

father of informant and thereafter, the appellants fled away towards west. The informant could not raise alarm when the appellants were in "gohal" because the passage for going outside from his house is situated adjacent to "gohal". When the appellants fled away, the informant went near his father and found that he had received injuries near his ear and the blood was dropping from that injury. At that time, his father was breathing his last. Informant raised hulla on which Suresh Das (P.W. 5), Sideshwar Das (D.W. 2), Prasadi Das (D.W. 1) and others came and saw his father, who by that time had already died. On the next day i.e., 28-11-1992 the informant along with Raj Kishore Das (not examined), Bindeshwari Das (P.W. 2), Jhawar Das (not examined) went to Murliganj P.S. where his fardbeyan (Ext. 2) was recorded by the Police at 8.30 a.m. About the motive of occurrence the informant in the fardbeyan stated that there was a land dispute between the deceased and the appellants and 10 days prior to the occurrence, an altercation had taken place between the deceased and appellants and the appellants had given threatenings to kill the deceased and an application giving the details of incident was also filed before the Sub-Divisional Magistrate, Madhepura. A case against the appellants under Sections 302/34, I.P.C. was instituted and after investigation the police submitted charge-sheet against them under Sections 302/34, I.P.C. in parts. It appears that first charge-sheet against Md. Ismail, Md. Manzoor and Md. Yunus was submitted showing appellate Kapileshwar Das absconder. After taking cognizance the case of these appellants was committed to the Court of Session where it was numbered as Sessions Case No. 3/94. Thereafter, when the appellant Kapileshwar Das was arrested by the police supplementary charge-sheet under Sections 302/34, I.P.C. was submitted and his case was also committed to the Court of Session where it was numbered as Sessions Case No. 164/94. Later on both the Sessions cases were tried together and disposed of by the common judgment by Sessions Judge, Madhepura.

3. The defence of the appellants before the Court below as it appears from the witnesses examined on behalf of the appellants and from the trend of cross-examination of prosecution witnesses was that on the night when the murder of father of informant was committed informant was not present in his house and nobody had seen the occurrence and the informant and his brother Bhumi Das, themselves committed the murder of their father somewhere else so that Bhumi Das, the brother of informant, may get employment on compassionate ground and they brought the dead body of their father of "gohal" and have falsely implicated the appellants in this case.

4. Altogether nine witnesses have been examined on behalf of prosecution to prove its case. Arjun Das (P.W. 7) is the informant. Dr. Laxmi Prasad Bhagat (P.W. 6) is the doctor who had conducted autopsy on the dead body of the deceased. Laxmi Kant Thakur (P.W. 9) is the I.O. Krishna Sagar Das (P.W. 8) is a witness who on 28-11-1992 in the morning had gone to the house of informant where he had seen the dead body of father of informant with a bullet injury on his ear and in his presence the police prepared the inquest report on which he as

well as Bindeshwari Das (P.W. 2) put their signatures (Exts. 3 and 3/1 respectively). Om Prakash Das (P.W. 1), Bindeshwari Das (P.W. 2) and Suresh Das (P.W. 5) had gone to the house of informant on hearing hulla where they had seen the deceased with injury on his ear and they were told by informant and his sister Chandra Kala Devi (P.W. 4) about the occurrence, and the names of the appellants. Chandra Kala Devi (P.W. 4) is the sister of informant, who on hearing the sound of firing had woke up and had seen the appellants coming out of her "gohal". Bhumi Das (P.W. 3) is son of deceased and brother of informant who at the time of occurrence was in his another house situate 1 kilometer from the house where the occurrence took place and on hearing the information of the occurrence came to the house of occurrence and was told about the occurrence by informant. Dr. Laxman Prasad Bhagat (P.W. 6) in his evidence has stated that on 28-11-1992, he was posted as Civil Assistant Surgeon at Sadar Hospital, Madhepura and on that day at 4.15 p.m. He held post-mortem examination on the dead body of Kartik Das and found the following ante-mortem injuries on the body:

(i) Lacerated wound the wound of entry 1" x 1/ 2" with charred margin, anterior to the right ear going inside towards left. Upper half of right pinna was missing. Margins lacerated,

(ii) A circular hole 1.25" in diameter behind left ear wound of exit. Injury Nos. (i) and (ii) were inter-communicating.

(iii) There was fracture of skull bone of left side.

On dissection of scalp and skull - Haematoma 2" X 3" was present around the injury Nos. (i) and (ii). Brain matter pale and lacerated.

According to him the cause of death was shock and haemorrhage due to injury Nos. (i) and (ii) which were caused by fire-arm. He has proved the post-mortem report which is marked as Ext. 1. About the time elapsed since death he has said that it was about thirty six hours.

5. The evidence of Dr. Laxman Prasad Bhagal (P.W. 6), who had conducted the autopsy of the deceased, no doubt, suggests that the cause of death was shock and haemorrhage due to injury caused by a fire-arm but then the time of death of deceased does not correspond to the time as given by prosecution. According to the case of prosecution, the occurrence took place on the night of 27-11-1992 at about 12 O'clock. P.W. 6 has said that he held the post-mortem examination on 28-11-1992 at about 4.15 p.m. It means that post-mortem was conducted about 16.15 hours after the death. From the evidence of doctor who has said that when he conducted post-mortem the time elapsed since death was about 36 hours. It appears that the death of deceased occurred at about 4.15 a.m. on 27-11-1992. Now let us examine the other evidence led by prosecution.

6. Arjun Das (P.W. 7), the informant, is the only eye-witness to the occurrence. He in his evidence has stated that on the night of occurrence he after urinating

again went to bed and sometime thereafter he heard whispering sound. At that time he was sleeping in his house on a "chauki" and his sister was sleeping on the floor on a mat. On hearing the whispering sound, he went near the "tatti" (fence) in his "gohal". There was a hole in the "tatti" through which he peeped in the "gohal" where a lantern was burning and his father was sleeping and he then saw all the four appellants in "gohal". Appellant Kapileshwar Das asked to be quick on which appellant Md. Ismail fired from his pistol at his father and thereafter all the appellants fled towards west. He went near his father. His sister Chandra Kala Devi (P.W. 4) also came there. His father had died. His father had received bullet injury on his right ear and the bullet had come out from his left ear. He and his sister raised hulla on which Om Prakash Das (P.W. 1), Bindeshwari Das (P.W. 2) and Suresh Das (P.W. 5) came there to whom he told about the occurrence. About the motive he has stated that the appellants wanted to forcibly capture his land which was objected to by his father. He has stated that after the occurrence he went to police station where he got his fardbeyan (Ext. 2) recorded. Chandra Kala Devi (P.W. 4), the sister of informant, has said that at the time of occurrence she was sleeping in her house and on hearing the sound she woke up and from the window of the house she saw the appellants coming out from the "gohal" and when she went near her father she found him injured by bullet and his clothes were smeared with blood and he had already died and his brother told her that all the four appellants had committed the murder of her father. In examination-in-chief, she simply stated that on hearing the sound she woke up without giving the details of such sound but in para 5 of her cross-examination, she has stated that she woke up on hearing the sound of firing. Om Prakash Das (P.W. 1) has said that on 27-11-1992 at about 12 O'clock in the night he was sleeping in his house when he heard hulla from the house of informant and he went there and found the father of informant lying dead on a "chauki" in "gohal" and his clothes were blood-stained and he had received bullet injury on his right ear and the bullet had come out from the left ear. The informant and his sister Chandra Kala Devi (P.W. 4) were weeping and on being asked they both told him that all the appellants had committed the murder of their father. He further stated that there was a land dispute between appellant Ismail and his family and the deceased. Bindeshwari Das (P.W. 2) has said that on 27-11-1992 at 11.30 O'clock in the night he was watching his paddy field when he heard the sound of firing from the house of informant and he then went there and saw the father of informant lying dead on a "chauki". The deceased had received bullet on his left ear which had come out from the right ear. The informant told him that the appellants had committed the murder of his father. He has also said that the deceased had land dispute with Munshi Mian father of appellants Manzoor and Ismail. Suresh Das (P.W. 5) in his evidence has stated that on the night of occurrence at 12 O'clock he was in his house and on hearing hulla he went to the house of informant where he saw the dead body of father of informant in "gohal" with a bullet injury on his right ear and the informant and his sister Chandra Kala Devi told him that the appellants had committed the murder of his father and at the order of appellant Kapileshwar Das appellant

Ismail had fired at his father.

7. Out of P.W. 1, P.W. 2 and P.W. 5, who are admittedly hearsay witnesses only P.W. 5 is named in the F.I.R. The remaining two witnesses are not named in the F.I.R. In the F.I.R., the informant stated that besides Suresh Das (P.W. 5), Sidheshwar Das (D.W. 2) and Prasadi Das (D.W. 3) had also reached the place of occurrence when he raised hulla. These two witnesses have not been examined by the prosecution but they have been examined by the defence. Prasadi Das is D.W. 1 and Sidheshwar Das is D.W. 2 and they both in their evidence have stated that on the next day of the occurrence in the morning on hearing the information that the deceased had been murdered they went in the house of informant where they did not find the informant. Prasadi Das (D.W. 1) had stated that in those days the informant had gone to his "sasural" to attend the "saradh". Both these witnesses have stated when they had gone to the house of informant they found the daughter of deceased weeping there.

8. As stated above Chandra Kala Devi (P.W. 4), the sister of informant, in her evidence has stated that on hearing the sound of firing she woke up and through the window of her room she saw all the four appellants coming out of "gohal" where her father was sleeping. She has said that at the time of occurrence she was sleeping in her southern house and at the time of occurrence she had only one house and one "gohal" and the opening of "gohal" was towards east. None of the other prosecution witnesses giving the details of place of occurrence has stated that any house of informant at the time of occurrence was situated towards South. Om Prakash Das (P.W. 1) in his evidence has said that at the time of occurrence informant was having three houses, one "gohal", another adjacent east of the "gohal" and third adjacent north to the "gohal" and "gohal" was fenced from the southern and northern side with "tatti" and house adjacent east to "gohal" was also fenced with western, northern and eastern side and "angan" was towards north of the house which was east to the "gohal". Bhumi Das (P.W. 3), the brother of informant, in his evidence has stated that the house situate adjacent east to "gohal" was being used as living room and the house situate west of the "angan" was being used for keeping fuel. Suresh Das (P.W. 5) in his evidence has stated that the deceased was having two houses at the time of occurrence - one in which he was sleeping was having its opening towards north and the house in which the informant was sleeping was having its opening towards north. The informant in his evidence has stated that at the time of occurrence he had three houses, one "gohal", another adjacent north to this "gohal" and third in front of "gohal" towards east which was being used as kitchen. So his evidence is that he and his sister both were sleeping in the house adjacent north to "gohal". The I.O. (P.W. 9) also in his evidence has stated that the house of informant was situate adjacent north to "gohal". So the evidence of Chandra Kala Devi (P.W. 4) that at the time of occurrence she was sleeping in her southern house does not appear to be true. She has stated that she saw the appellants coming out from the "gohal" from the window of her room and on the date of occurrence it was moon-lit night. The I.O. (P.W. 9) has said that he has

not mentioned in the case diary that besides the "gohal" there was any window in any other house of the informant. The occurrence is said to have taken place on the night of 27th November, 1992 at about 12 O'clock. This day corresponds to the third day of the month of "aghan" of bright part of lunar month of Vikram Samvat Year 2048 according to Hrishikesh Panchang, 1992 published by Vikram Panchang Publication, Bhaidani, Varanasi. The bright side of lunar month starts immediately after the complete dark night of the last date of dark part of lunar month and the period of visibility of moon thereafter gradually increases day by day in the bright side of lunar month and on the third day of bright side of lunar month at 12 O'clock in the night the question of visibility of moon does not arise because on that day according to aforesaid Panchang the moon was visible only up to about 8.00 p.m. Therefore, the evidence of Chandra Kala Devi (P.W. 4), that at the time of occurrence it was moon-lit night does not appear to be true which further makes her evidence doubtful that she saw the appellants from the window of her room when they were coming out from the "gohal". This becomes again doubtful when she stated in her evidence that she saw the appellants when they were fleeing towards west and she was towards east of them.

9. The evidence of informant, who is the sole eye-witness to the occurrence, is that he woke up on hearing the sound of movement of some persons in the "gohal". His sister Chandra Kala Devi (P.W. 4) in her evidence has stated that she woke up after hearing the sound of firing and she at that time saw the informant going out from the room and then she also came out. This evidence suggests that the informant also woke up when the firing was already there and in this view of the matter his witnessing the occurrence does not arise. According to informant, he saw the occurrence through a hole in the "tatti" and in his evidence has stated that the "tatti" was covered with paste of soil. The I.O. (P.W. 9) has stated that the informant in his earlier statements did not state that he saw the occurrence through a hole in the "tatti" and at that time he had simply stated that he had seen the occurrence through the "tatti". If this contradiction may not be considered to be a major contradiction, there is evidence of I.O. that he has not mentioned in the case diary that he found any hole in the "tatti". Besides this, the I.O. in his evidence has stated that he seized a fired cartridge from the place of occurrence and prepared a seizure list but neither the fire cartridge nor the seizure list has been produced by the prosecution. The case of defence is that the deceased was killed somewhere else and thereafter his dead body was brought to the place of occurrence, therefore, there was no question of getting blood at the place of occurrence. The non-seizure of blood-stained earth or blood-stained clothes which the I.O. found at the place of occurrence as per his evidence also creates a doubt whether the occurrence had taken at the place of occurrence as alleged. According to the informant, he saw the occurrence in the light of lantern which was hanging in the "gohal" but the I.O. in his evidence has stated that no lantern was shown to him by the informant and he did not find any peg in the "gohal" for holding any lantern. The informant in his fardbeyan has stated that all the appellants were armed with weapons but in his evidence

he has stated that only appellant Ismail was carrying weapon. He has further stated that all the appellants had surrounded his father and he could not see the position of individual appellant towards his father and in view of this fact his evidence that the assailant was towards east and he fired from a very close range cannot be accepted. Out of the remaining prosecution witnesses who are either hearsay witnesses or witnesses on inquest report P.W. 1 and P.W. 8 are related to the informant. Although, P.W. 1 has not admitted his relationship with informant but the evidence of P.W. 8 in his cross-examination shows that he is also related to informant.

10. The land dispute between the appellants and the father of informant is an admitted fact. The informant is the sole eye-witness to the occurrence. In view of his enmity with the appellants his evidence requires cautious scrutiny. In doing so, we find that his evidence does not inspire confidence that he had actually seen the alleged occurrence. This is supported by the medical evidence also because Dr. Laxmi Prasad Bhagal (P.W. 6), as stated above, in his evidence has said that he conducted post-mortem examination on the dead body of the deceased on 28-11-1992 at 4.15 p.m. and the time since death elapsed was about thirty six hours which falsifies the case of prosecution on the point of time of death of deceased which as alleged was the result of firing by appellant Md. Ismail at the time of occurrence. The non-seizure of blood-stained earth from the place of occurrence by I.O. also makes the case of prosecution on this point quite doubtful. In such circumstances, we do not find it safe to rely upon the evidence of informant.

11. In the result, both the appeals are allowed. The judgment and order of Court below convicting and sentencing the appellants is hereby set aside. The appellant Md. Ismail, who is in jail custody, is ordered to be set at liberty forthwith, if not wanted in any other case. The remaining three appellants, namely, Md. Yunus, Md. Manzoor and Kapileshwar Das, who are on bail, are discharged from the liability of their bail-bonds.

S.K. Katriar, J.

12. I agree.