
(2002) 12 PAT CK 0084
In the Patna High Court
Case No : Cr. Appeal (DB) No. 116 of 1998

Naimullah Mian

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 10-12-2002

Acts Referred:

Citation : (2002) 12 PAT CK 0084

Final Decision : Dismissed

Judgement

P.N. Yadav, J.—Since both these ap-peals are directed against the judgment and order dated 9.2.1998 passed by Shri Shiveshwar Narain, 3rd Additional Sessions Judge, Bettiah in Sessions Trial No. 466 of 1996, they have been heard together and are being disposed of by this common judgment. By the aforesaid judgment the trial court has convicted both the Appellants u/s 302/34 of the Indian Penal Code (hereinafter referred to as the Code) as well as under Sections 25(1B) and 27 of the Arms Act and sentenced them each to undergo imprisonment for life u/s 302/34 of the Code and rigorous imprisonment for one year each under each of Sections 25 and 27 of the Arms Act and the Appellant Nathu Mian was also convicted and sentenced to undergo rigorous imprisonment for one year u/s 379 of the Code, the sentences having been ordered to run concurrently.

2. Deceased Ahmad Hussain left his home on a bicycle for Englishia Market at about 3.00 P.M. on 17.1.1995. He was carrying his licensee gun with him. After making certain purchase he set out for his home. At about 5.00 P.M. he reached near the house of Bishundeo Kurmi of village Moti Tola enroute to his house. No sooner had he arrived there than the Appellants along with Habib Mian, Shakoor Mian, Ramji Mahto, Md. Ali, Chhathu Yadav and Wakil Yadav having armed themselves with various lethal weapons including guns and Pharsa intercepted and surrounded him. Appellant Nathu Mian opened fire upon him as a result of which he sustained injury and fell down. Thereafter Appellant Naimullah Mian and Wakil Yadav shot at him. Shakoor Mian allegedly dealt a Pharsa blow on the deceased. The other miscreants referred to above also resorted to firing. The

deceased succumbed to the injuries so inflicted on him instantaneously on the spot. The motive attributed behind the commission of murder of the deceased is said to be long drawn enmity between the parties.

3. Informant Amin Mian (P.W. 7) and Anwar Hussain (P.W. 5) who happened to be the brothers of the deceased hearing sound of firing rushed to the place of occurrence. Other witnesses including P.W. 6 Saheb Hussain, son of the deceased, also arrived there. When P.Ws. 5 and 7 tried to intervene and save the deceased, they were chased and shot at, however, the shorts so fired did not hit them.

4. Venkateshwar Ram, Sub Inspector of Police (P.W. 9) on the basis of rumour that certain person was murdered at village Moti Tola rushed to the place of occurrence. He recorded there Fardbeyan (Ext. 4) of the informant (P.W. 7) at about 10.00 P.M. on the same day. He took up investigation and prepared inquest report (Ext. 6) and recorded statements of witnesses. On the basis of the Fardbeyan referred to above the formal F.I.R. (Ext. 5) was drawn up and Chautarwa P.S. Case No. 4/95 was registered. After completing investigation, P.W. 9 submitted chargesheet against the Appellants and Habib Mian, keeping continuity of investigation against other accused persons and finally the trial commenced after commitment.

5. The Appellants did not enter into defence. However, from the trend of cross examination of the prosecution witnesses, the defence seemed to be that of total denial and false implication out of sheer enmity. It was pleaded that the deceased had criminal antecedent and he was killed by his associates themselves and as Razzaque Mian, father of the Appellants, as well as accused Habib Mian deposed against the Appellants and others in Sessions Trial No. 152 of 1991 pending in the court of the 1st Additional Sessions Judge, Bettiah, which was in respect of murder of one Idris Mian the instant case was concocted.

6. In order to prove its case the prosecution examined nine witnesses in all. Amongst them are P.W. 8 Dr. Kedar Nath Bhagat, P.W. 1 Mokhtar Mian, P.W. 2 Israil Mian, P.W. 3 Mansoor Alam and P.W. 4 Bishundeo Kurmi besides P.Ws. 5, 6 and 7 who along with Pahari Sheikh and Rahman Mian were named in the F.I.R. P.Ws. 5, 6 and 7 are eye witnesses. P.Ws. 1 to 4 turned hostile.

7. The trial court after considering the facts, Circumstances and evidence brought on record found and held the Appellants guilty and it convicted and sentenced the Appellants as stated above, acquitting accused Habib Mian vide the impugned judgment and order.

8. The Appellants have assailed the judgment and order of conviction and sentence passed against them by contending that though P.Ws. 5, 6 and 7 are claimed to be eye witnesses to the incident, they cannot be believed and accepted to be the eye witnesses; that P.Ws. 5 and 7 being brothers and P.W. 6 being the son of the deceased are related to and interested in each other and their evidence cannot form the basis of conviction particularly when P.Ws. 1, 2, 3

and 4, who were also said to be the eye witnesses, did not support the case and were declared hostile by the prosecution; that the evidence of the eye witnesses was discrepant and inconsistent in material particulars and that no legal and valid sanction for prosecution of the Appellants u/s 25(1B) of the Arms Act was accorded by the competent authority and hence the entire conviction and sentence of the Appellants under Sections 302/34 and 379 of the Code as well as under Sections 25 and 27 of the Arms Act was vitiated in law and the same cannot be maintained.

9. Having P.Ws. 1, 2, 3 and 4 been declared hostile, we would come direct to the discussion of evidence of eye witnesses (P.Ws. 5, 6 and 7). P.W. 5 Anwar Hussain stated that in the evening at about 4.00 P.M. on the fateful day he was in his sugarcane field situated by the side of the village temple and the place of occurrence and he was getting sugarcane loaded on a tyre cart. He hearing the sound of firing rushed to the scene of incident and he saw Appellant Nathu Mian taking out empty cartridge from his gun and just then Appellant Naimullah Mian shot at the deceased. He added that accused Wakil Yadav also opened fire upon the deceased and accused Shakoore Mian inflicted a Pharsa blow on him. He named altogether 7 miscreants including the Appellants and all of them were said to be armed with guns, save and except Shakur Mian who was having Pharsa with him. It is also in the evidence of P.W. 5 that the Appellant Nathu Mian chased him and opened fire upon him, however, the shot so fired passed off his head and while retreating the miscreants opened fire and Appellant Nathu Mian also took away the gun of the deceased and the same was ultimately recovered and seized by the police from possession of Wakil Yadav in course of encounter with the police and that gun was later on released to the witness. In his cross examination P.W. 5 stated that after the first bullet hit the deceased he fell down and thereafter two shots were fired upon him and he sustained altogether three fire arm injuries. On an analysis and scanning of his evidence it would be crystal clear that P.W. 5 did not see Appellant Nathu Mian opening fire upon the deceased and he merely saw the Appellant Naimullah Mian and accused Wakil Yadav firing shots at the deceased. However, the witness saw the Appellant Nathu Mian taking out empty cartridge from his gun and that would go to suggest that Appellant Nathu Mian opened fire upon the deceased first of all and thereafter he was taking out empty cartridge from his gun.

10. Saheb Hussain (P.W. 6) also arrived at the scene of incident after hearing the sound of firing. He saw the deceased lying injured. He saw and identified the Appellants as well as accused Wakil Yadav, Chhathu Yadav and Md. Ali there. He has stated that Appellant Naimullah Mian and Wakil Yadav opened fire upon the deceased in his presence whereafter he died. In his cross examination he stated that after the villagers arrived at the scene of incident the Appellants and other accused persons fled away. It is in his cross examination that after he went to the place of occurrence, the miscreants uttered that he should also be killed and they chased him to a distance of one and a half laggi. Even if the witness after being chased kept himself a little away from the place of occurrence, he could

have seen the occurrence from there.

11. Informant Amin Mian (P.W. 7) supporting the prosecution case has stated that at about 5.00 P.M. on 17.1.1995 he was near the temple referred to above and he rushed to the place of occurrence after hearing sound of iring. He further stated that Appellant Nathu Mian shot at the deceased as a result of which he fell down whereafter Appellant Naimullah Mian and Wakil Yadav opened fire upon him and one of the miscreants inflicted Pharsa blow on him and when he tried to save the deceased, he was also fired upon by Appellant Nathu Mian but he escaped. The witness first of all stated that after he arrived at the place of occurrence he saw the deceased lying injured. He appears to have made exaggerated and embellished statement that Appellant Nathu Mian shot at the deceased in his presence. The fact seemed to be that P.W. 7 like P.Ws. 5 and 6 arrived at the scene of occurrence after hearing sound of firing caused by the shot fired by Appellant Nathu Mian on the deceased and in that view of the matter none of P.Ws. 6 and 7 can be said to have witnessed infliction of fire arm injury by Appellant Nathu Mian upon the deceased and they merely saw Naimullah Mian and Wakil Yadav opening fire upon him. P.W. 7 also stated that the gun of the deceased was taken away by Appellant Nathu Mian.

12. The evidence of P.Ws. 5, 6 and 7 is quite consistent and corroborative. Nothing was elicited in their cross examination to demolish their veracity. They are truthful witnesses. Their evidence abundantly established that the deceased was first shot at by Nathu Mian and after he fell down the Appellant Naimullah Mian and another opened fire upon him as a result of which he died.

13. It has been contended that as per the evidence of P.W. 5 he arrived at the place of occurrence before P.W. 7 while according to P.W. 7 he reached the place of occurrence prior to P.W. 5 and that would go to suggest that none of them actually witnessed infliction of injuries on the deceased. The contention cannot be accepted. Both the witnesses were in the vicinity of the place of occurrence and they appeared to have reached there simultaneously and fraction of moments might have intervened between the arrival of the two and quite possibly P.Ws. 5 and 7 might not have exactly marked as to which of them arrived at the place of occurrence a bit earlier or later. This inconsistency in their statements must be ignored. Attention of P.W. 7 was drawn to his statement u/s 161 Code of Criminal Procedure regarding shots fired by Habib and Ramjee Mahto upon the deceased which he denied to have made in the court but the crux of the matter is that the Investigating Officer (P.W. 9) was not put question to contradict the witness and in that view of the matter the statement to which the attention of P.W. 7 was drawn in his cross examination is of no consequence and the same must be ignored. It has again been pointed out that P.W. 5 has stated in the Court that when he arrived at the place of occurrence, Appellant Nathu Mian was taking out empty cartridge from his gun but he was contradicted by P.W. 9 who stated that no such statement was made by him in course of investigation and P.W. 7 has further stated that the police arrived at the scene of

occurrence after they were in-formed by his cousin Rahman Mian but P.W. 9 has stated that he had rushed to the place of occurrence after he heard rumour that certain person was murdered at village Moti Tola. P.W. 7 has further stated the names of 8 accused persons in his statement before the Investigating Officer but in the Court he named only seven miscreants. No contradiction or discrepancy has been pointed out in the evidence of P.Ws. 5 and 6.

14. The settled principle of law is that contradiction, inconsistency, exaggeration or embellishment is not the sole ground for discarding the evidence of the witnesses. Some minor variations and discrepancies in the testimony of witnesses which they render after lapse of time cannot be considered as unusual phenomenon. The court is not expected to give undue importance to minor discrepancies. What is required is that the court should scrutinise the evidence carefully. Certain contradictions or exaggeration or embellishment is bound to occur in the evidence of natural witnesses for, a witness when passing his way through cross examination ventures to give some answer which is not necessarily true for fear that this statement regarding the main incident he has witnessed may not be disbelieved. But that is not to mean that his evidence must be discarded. However, if such contradiction or discrepancy goes to the root of the case or it adversely affects the core or edifice of the prosecution case, it must be rejected. Whatever discrepancy or exaggeration or embellishment has cropped up in the evidence of the eye witnesses in the present case is of minor and trifling nature and the same does not destroy the substratum of the prosecution case and hence the same must be ignored.

15. In the case of Gopal Singh and Others Vs. State of Bihar and 7 Ors., the evidence of the prosecution witnesses suffered from inherent infirmities and improbabilities and the facts and circumstances established that the witnesses were not to be believed as eye witnesses to the incident. There were many irregularities in investigation. Identification of the accused in the night was also held to be doubtful. No independent witness supported the prosecution version that the deceased had disclosed the names of the accused. The medical evidence too was inconsistent with the eye witness account of the incident and the hypothesis of guilt of the accused. In the case of Jagdish Barhi and Others Vs. State of Bihar, all the witnesses were interested and partisan and directly inimical to the accused and the deceased were hardened criminals. The prosecution case regarding genesis, manner and the place of occurrence was not established by cogent and reliable evidence. The prosecution party was clearly aggressor. There was evidence showing that the death was caused by accused in exercise of right of private defence. Under such circumstances the accused were extended the benefit of doubt. The facts and circumstances of the cases, referred to above, were entirely different from those of the case at hand and as such they were of no avail to the Appellants before us.

16. It is true that P.Ws. 5, 6, 7 and the deceased are related to and interested in each other. It has been vehemently contended that no conviction can safely be

based on the evidence of such witnesses. The contention is devoid of merit and force and the same cannot be accepted. The settled principle of law is that the evidence of witnesses closely related to and interested in the victim cannot be discarded out right. What is required is that the evidence of relatives and interested witnesses should be closely scrutinised and if on such scrutiny their evidence is found to be reliable, it can be accepted without corroboration by some independent witness. The witness may be interested in the victim and he may not necessarily be hostile to the accused. In that case the fact that the witness is related to the victim may not introduce any infirmity in his evidence. Where the witness is a close relative of the victim and at the same time he shares hostility of the victim to his assailants the court is required to examine and scrutinize his evidence carefully. In scrutinising the evidence of such relative and interested witness, it may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice even though he was not concerned with the assault inflicted on the victim. In the case at hand, the evidence of P.Ws. 5, 6 and 7 corroborated by the medical evidence and physical findings at the place of occurrence of the Investigating Officer (P.W. 9) such as seizure of blood from the place of occurrence has on close scrutiny been found to be over board and free from inherent taint and infirmity.

17. Let us now switch over to consider whether medical evidence is supportive of the prosecution version regarding Infliction of fire arm injuries on the deceased. P.W. 8 Dr. Kedar Nath Bhagat conducted autopsy on the dead body of the deceased at about 11.00 A.M. on 18.1.1995. He found the following antemortem injuries on the person of the deceased.

- (i) Lacerated wound on right sub-mendicular region measuring 4" x 1/4" x 1/2.
- (ii) Abrasion on right clavicle near externum measuring 2" x 1".
- (iii) Near about round hole 3 in number 1/2" in diameter, distance of each wound from the other being 2". Margin of the wound was black and inverted.
- (iv) Oval wound 1" in diameter on right back of the chest below the rib near vertibral column. Margin of wound was black, inverted and irregular. It was the wound of entry caused by fire arm.
- (v) Exit wound 1 and a half inch in diameter over the left back of the chest below the scapular angle with margin everted and irregular.

18. The doctor prepared the post mortem examination report (Ext. 3). A perusal of the evidence of the doctor and the post mortem examination report would reveal that there were four fire arm injuries caused by three shots on the person of the deceased. Injury Nos. 4 and 5 being wound of entry and wound of exit were communicating to each other. The cause of death was shock and haemorrhage as a result of the injuries on the vital organs of the body caused by

fire arms and the time elapsed since death was said to be within 24 hours. The doctor has also stated that the injuries referred to above were sufficient to cause death in the ordinary course of nature. In his cross examination the doctor has said that he did not collect any pellet from the body of the deceased. Nothing material was elicited in his cross examination to give rise to any doubt in regard to the bona fide of his report. The medical evidence is in consonance with the eye witness account of the incident leading to commission of murder of the deceased.

19. The Investigating Officer (P.W. 9) stated that while he was posted as Sub Inspector of Police at Chautarwa police station on 17.1.1995, he got a rumour that certain person had been killed at village Moti Tola and hence he making Sanha entry bearing No. 274 set out for the place of occurrence. After arriving at the place of occurrence he recorded the Fardbeyan of P.W 7 at 10.00 P.M. in the night, prepared inquest report (Ext. 6), inspected the place of occurrence and recorded statements of the witnesses. He gave vivid description of the place of occurrence. He found profused bleeding there. He seized blood stained earth and prepared seizure list (Ext. 7). It is a fact that the Investigating Officer did not get the blood seized from the place of occurrence examined by chemical analyst to ascertain as to whether it was blood of human being or it was something else. Of course, he ought to have got the blood chemically analysed. Investigation to that extent may be said to be faulty. However, faulty investigation or padding in evidence cannot by itself lead to total demolition of the prosecution case if it can otherwise stand. The case we are in seisin of stands well proved by direct, cogent and reliable evidence and it cannot be thrown over board merely because the I.O. did not get the blood seized from the place of occurrence chemically examined.

20. As already stated above, P.Ws. 1, 2, 3 and 4 did not support the prosecution case and they were declared hostile. Their attention was drawn to their previous statements made during investigation. They were contradicted by the I.O. P.W. 9. The witnesses appear to have turned hostile to the truth. Be that as it may, their evidence is of no avail to the prosecution.

21. It has come in the evidence of P.Ws. 5 and 6 that Pahari Sk., Rahman Mian, Inshaque Mian, Akhtar Mian and Mahar Mian had also arrived at the place of occurrence at the time of incident but none of them has been examined by the prosecution. For arriving at a correct conclusion what matters is the quality of evidence and not the number of witnesses. Non examination of the witnesses, referred to above, is immaterial and of no consequence, for they were not eye witnesses to the incident inasmuch as P.W. 6 categorically stated that they had arrived at the place of occurrence. after the deceased was shot dead. Besides, it is a matter of common experience that where murders are committed in villages due to factions existing among the villagers or family feuds independent villagers seldom come forward to give evidence for fear that giving evidence might invite the wrath of the assailants and they may be exposed to very serious risks.

22. The entire evidence adduced by the prosecution is to be considered in the back drop of promptitude with which the case was lodged and investigation taken up. The occurrence took place at about 5.00 P.M. The Police Officer, i.e. the Investigating Officer (P.W. 9) after getting rumour regarding commission of murder of a person at village Moti Tola set out for the place of occurrence and reached at about 10.00 P.M. even though the police station from where P.W. 9 rushed to the scene of incident situated at a distance of 18 Kms. And he just then recorded the Fardbeyan, prepared the inquest report, inspected the place of occurrence and recorded the statements of the witnesses. There was not even the slightest delay in lodging the F.I.R. and commencement of investigation. There was no opportunity or scope for making deliberation and embellishment in the prosecution version. All this would suggest that true and correct version of the prosecution case has been depicted in the F.I.R. and the evidence of the prosecution witnesses.

23. Learned Counsel finally submitted that no legal and valid sanction for, the prosecution of the Appellants u/s 25(1B) of the Arms Act was accorded by the competent authority and hence the entire conviction and sentenced awarded to them u/s 302/34 of the Code as also under Sections 25(1B) and 27 of the Arms Act was vitiated and the same Cannot be maintained. This fallacious sub-mission has been advanced only for being rejected out right. Reliance was placed on the case of Amrendra Singh and Another Vs. The State of Bihar, and the case of Kapildeo Baitha v. State of Bihar 1986 PLJR 449. In the case of Amrendra Singh (supra) a country made Pistol was recovered from possession of the accused and he was convicted under Sections 25 and 26 of the Arms Act. His conviction was set aside for want of sanction while in the case of Kapildeo Baitha (supra) the accused was convicted u/s 307 of the Code and u/s 27 of the Arms Act. The conviction of the accused u/s 27 of the Arms Act was set aside on the ground that no sanction for his prosecution was obtained from the competent authority and in the light of the facts and circumstances attending to the case, conviction u/s 307 of the Code was altered to one u/s 324 of the Code. With great respect of the Hon'ble Judge, I venture to observe that even conviction u/s 27 of the Arms Act cannot be set aside for want of sanction as sanction is required only for prosecution u/s 25 of the Arms Act. None of the two cases relied upon by the Appellants can lend assurance to the submission put forward on their behalf that their entire conviction and sentence is liable to be set aside for want of sanction. However, conviction of the Appellants u/s 25(1B) of the Arms Act must be said to have been vitiated in law and the same cannot be sustained as no sanction was accorded by the competent authority but by no stretch of imagination, conviction and sentence u/s 302/34 of the Code and Section 27 of the Arms Act can be said to have been vitiated in law for want of sanction for prosecution u/s 25 of the Arms Act.

24. A few words on defence version. Admittedly the deceased and his brothers (P.Ws. 5 and 6) were accused in the case of murder of Idris Mian in which Razzaque Mian, father of the Appellants was a prosecution witness and he even

deposed in that case. It has been urged with vehemence that the deceased was a dacoit and he was killed by his associates on account of some dispute between them and the Appellants have been falsely implicated out of sheer enmity. Certain documents have been brought on records to show that the deceased was accused in certain cases but there is nothing on records to suggest that he was a bandit, rather it has come in evidence that a dacoity was committed in the house of the deceased in which his father and mother were killed by the dacoits whereafter the deceased was issued licence for gun and since then he had been having a gun. As regards family feud and animosity existing between the family of the deceased and that of the Appellants it is to be observed that enmity is a double edged weapon and it cuts both ways. It is just possible that the Appellants out of enmity by taking law and order in their own hands decided to eliminate the deceased and they did so. Considering the materials on records and broad probabilities the defence set up by the Appellants is not plausible and acceptable and the same cannot be accepted.

25. Both the Appellants were convicted and sentenced u/s 302 read with Section 34 of the Code as well as under Sections 25 and 27 of the Arms Act. They are the main assailants and they along with Wakil Yadav opened fire upon the deceased as a result of which he died. Both the Appellants obviously had intention to cause the death of the deceased. They used their guns as weapons of inflicting fatal injuries. There is also evidence of P.Ws. 5 and 7 that after shooting at the deceased the Appellant Nathu Mian had taken away his gun which was later on recovered from possession of Wakil Yadav in course of police encounter with him. The evidence on records does justify conviction and sentence of both the Appellants u/s 302/34 of the Code and Section 27 of the Arms Act and conviction and sentence u/s 379 of the Code awarded to Appellant Nathu Mian.

26. In view of what has been stated and observed in the preceding paragraphs it is to be held that the prosecution has brought home the charges levelled against the Appellants beyond all reasonable doubts and their conviction and sentence u/s 302/34 of the Code and Section 27 of the Arms Act and conviction and sentence of the Appellant Nathu Mian u/s 379 of the Code do not warrant interference by this Court. However, conviction of the Appellants u/s 25(1B) of the Arms Act is set aside.

27. In the result there is no merit in the appeals which must fail and the same are, accordingly, dismissed with modification in conviction and sentence as indicated above. The Appellant Nathu Mian is already in jail custody. The Appellant Naimullah is on bail. His bail bond is cancelled. Let him be directed to surrender in the court below within four weeks failing which the Court shall take coercive steps for procuring his surrender for serving out the sentences imposed on him.