

(2017) 02 PAT CK 0053

In the Patna High Court

Case No : Criminal Appeal (DB) No.425 of 2016, (Arising of the judgment of conviction dated 30.01.2016)

Naresh Sada

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 03-02-2017

Acts Referred:

Arms Act, 1959 — Section 27

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

Citation : (2017) CriLJ 2431 : (2017) 2 ECRC 272

Hon'ble Judges : Mr. Samarendra Pratap Singh and Mr. Aditya Kumar Trivedi, JJ.

Bench : Division Bench

Advocate : Mr. Binod Kumar, Advocate, for the Appellant; Mr. A.K. Sinha, APP, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Samarendra Pratap Singh, J. (CAV) - The instant appeal has been filed against the judgment of conviction dated 30.01.2016 and order of sentence dated 06.02.2016 passed by the Additional Sessions Judge IV, Khagaria in Sessions Trial No. 377/05/336/08/08/07, arising out of Alauli (Morkahi) Police Station Case No. 72 of 2004, dated 29.05.2004 under sections 302/34 of the IPC & 27 of the Arms Act. The sole appellant has been sentenced to undergo imprisonment for life along with fine of Rs.5000/- for the offence under sections 302/34 of IPC, R/I for three years with a fine of Rs.5000/- for the offence under section 27 of the Arms Act. Both the sentences are directed to run concurrently. However, in the event of failure to deposit the fine, the appellant was directed to undergo simple imprisonment for a further period of three months.

2. The prosecution case, as made out in the fard beyan of Satyanarain Sah s/o Late Gena Sah of village Mohanpur Police Station Morkahi District Khagaria recorded by S.I.Chitrnanjan Mishra, Officer-in-charge of Morkahi Police Station on 29.05.2004 at 10 PM in front of house of Jawahar Sah of village Mohanpur, in

short, is as follows:-

(a) The informant stated that his elder brother Jawahar Sah, aged 50 years runs a small grocery shop in his village. On 29.05.2004 at about 3 PM he had gone to collect ration for his shop from Chatar Bazar along with his son Police Kumar Sah (PW 4) aged 12 years.

(b) After purchasing rations, both were returning home from Chatar Bazar on foot carrying grocery items on their head. At 6 PM, when they were south to Kargil tola near Jilabia Gachhi, the accused Naresh Sada, Biran Sada and three unknown persons, variously armed, emerged from a Maize field and ran towards Jawahar Sah. On seeing them, Jawahar Sada and his son Police Kumar Sah started fleeing towards Dahma Bahiar, south to Jilebia Gachhi raising hulla. In order to run fast, they also threw the rations which they were carrying on their heads. However, the accused persons caught him in the ploughed field after some chase. The informant's nephew somehow escaped and managed to reach his house, where after he narrated the entire incident to the informant. He stated that Biran Sada shot at his father, near his ear and thereafter Naresh Sada also fired at him.

(c) On hearing the news, the informant along with his brothers Suresh Sah (PW 3), Anandi Sah (PW 5) and villagers Sajjan Sah (PW 7) and Shankar Sah (PW 2) ran towards the place of occurrence with a cot. On reaching the place of occurrence, the informant found his brother Jawahar Sah dead having sustained fire arm injury near his ear from which blood was flowing. Thereafter they brought the dead body to their door.

(d) The reason behind the occurrence is said to be a long standing dispute between families of Sah community with the family of Kamalkishore Sada of village Santosh. On 23.05.2004, notorious criminal Komla @ Kamalkishore Sah had come to the village of Sah community in order to take revenge, but members of Sah community caught him and was handed to the police. On 27.05.2004, a member of Sah community Pankaj Kumar Sah was shot at by the Sada community near Paras Bhatta. However, the former survived. The accused persons this time, in order to take revenge, were lying in ambush in a maize crop and as soon as Jawahar Sah reached there, he was intercepted and shot dead.

3. On the basis of fard-beyan of the informant, Alauli (Morkahi) Police Station Case No. 72 of 2004, dated 29.05.2004 under sections 302/34 of the IPC and 27 of the Arms Act was instituted. Police after completion of investigation submitted three separate charge sheets. The first charge sheet bearing Charge sheet No. 44 of 2004, dated 29.09.2004 was submitted against Tarni Sada, Hulo Sada, Sattan Sada, Bhim Sada keeping the investigation pending against the accused Naresh Sada, Biran Sada, Kailash Sada, Ranjit Sada, Suraj Sada, Saudagar Sada, Thithar Sada for the offence under sections 302/34 IPC. On 31.01.2008, police submitted second charge sheet, bearing Charge sheet No. 04 of 2008 against the accused Naresh Sada, Biran Sada, Thithar Sada, Saudagar Sada, Suraj Sada

showing them absconders. The last charge sheet, bearing Charge sheet No.36, dated 30.07.2008 was submitted against accused Ranjit Sada. All the charge sheets were submitted for offence under sections 302/34 IPC and under section 27 of the Arms Act. The learned Magistrate took cognizance of the offence under sections 302/34 IPC and section 27 of the Arms Act against all the accused persons and committed the case to the court of sessions in three separate stages, as such, there are three sessions number in this case, which has been amalgamated on 09.06.2008 and 02.12.2008 respectively with the original Sessions case no. 377 of 2005, during trial. The defence of the accused in their statements under section 313 of the Cr. P.C. was complete denial of the occurrence.

4. The prosecution, in order to substantiate the charge, examined altogether seven witnesses, namely, PW 1 Niranjana Kumar, PW 2 Shankar Sah, PW 3 Suresh Sah, PW 4 Police Kumar Sah, PW 5 Anandi Sah, PW 6 the informant himself and PW 7 Sajjan Sah.

5. Out of these seven witnesses, PW 6 Satnarain Sah (the informant), PW 3 Suresh Sah and PW 5 Anandi Sah are own brothers of the deceased. PW 4 Police Kumar Sah is the son of the deceased and he claims to be an eye witness to the occurrence. PW 1 Niranjana Kumar is a formal witness who has exhibited fard-beyan of the informant marked as exhibit 1. PW 2 Shankar Sah is a tender witness and PW 7 Sajjan Sah, a co-villager is a hearsay witness. Apart from this, prosecution also exhibited Ext 1 series, signature of informant as well as FIR attesting witness. The defence did not examine any witness nor produced any document in support of its case.

6. On consideration of materials on record, the trial court convicted the appellant under section 302/34 IPC and while acquitting the other accused persons facing the trial, held the appellant guilty under sections 302/34 of the IPC and under section 27 of the Arms Act.

7. It is submitted on behalf of the appellant that he is innocent and has not committed any offence. All the material witnesses examined in the case are family members, except PW 7 Sajjan Sah, who is also a co-villager. He further submits that there are vital contradictions in the evidence of prosecution witnesses and in any view of the matter, only PW 4 Police Kumar Sah, son of the deceased would fall in the category of an eye witness. However, his evidence too suffers from grave infirmities. He next submits that the post mortem report of the deceased has not been brought on record, as such, nature of injury as well as cause of death has remained unexplained. Further more, there happens to be no explanation at the end of prosecution over non-examination of IO due to which, appellant's interest is found severely prejudiced as neither the contradiction persisting into evidence of respective PWs have been legally brought exposed and in likewise manner, nor the objective finding as to place of occurrence, which may improbabilise the prosecution version, could be brought upon the record. That being so, the prosecution case suffers from inherent

improbabilities.

8. On the other hand, learned Additional Public Prosecutor representing the State submits that PW 4, son of the deceased has fully supported the prosecution case. The informant PW 6 and Suresh Sah (PW 3) and Anandi Sah (PW 5), though not an eye witnesses, have fully corroborated the prosecution's case. He lastly submits that non submission of the post mortem report will not affect the prosecution case as there is no denial that the deceased was found murdered in the field near Dahma Bahiar and in like wise manner explained that on account of non-examination of IO, the defence is not at all found prejudiced.

9. The issue for consideration is whether the prosecution has succeeded in proving the charge of murder against the appellant Naresh Sada. As noticed earlier the prosecution examined PW 4 Police Kumar Sah, the son of the deceased who claims to have been present with his father/the deceased at the time of occurrence. Besides this, the prosecution has also examined PW 3 Suresh Sah and PW 5 Anandi Sahay as corroborative witnesses apart from informant. The following witnesses are of no use as PW 1 is formal, PW 2 was tendered while PW 7 was declared hostile.

10. We will first take up the evidence of the informant's nephew Police Kumar Sah (PW 4) for consideration. PW 4 in his evidence has fully supported the prosecution case. He stated that the occurrence took place six years ago. On the fateful day i.e. 29.05.2004 at about 3 to 4 PM, he along with his father had gone to Chatar Bazar to fetch ration for his shop. While they were returning from the Bazar and reached near Jilebia Gachhi, they were ambushed by the accused persons. PW 4 and his father ran towards Dahma Bahiar to save themselves, but somehow his father fell in a field, and the accused persons caught him. The appellant Naresh Sada shot him dead. In his examination-in-chief, he stated that he did not recognize the other accused persons, whereupon he was declared hostile. On these premises, the defence argued that this witness does not seem to be truthful witness as in the FIR, while narrating the incident to the informant, he has stated that it was Biran Sada who shot at the temporal region of his father, where after appellant Naresh Sada also fired at him. It is true that this witness, in his evidence, has not claimed to have identified any other accused persons other than the appellant Naresh Sada. Nonetheless, he has substantially supported the prosecution case. His evidence is consistent on point of place of occurrence as well as the time of occurrence. PW 4 has further stated that the police had seized blood from the place of occurrence and had prepared a seizure list. We also find that this witness has not been cross examined on the point that he had named Biran Sada also in the FIR as the person who shot at his father. There is no cross-examination on the point of place of occurrence from this witness. From the evidence of this witness, it is established that the occurrence took place in the evening, when he along with his father were returning to his house after purchasing rations from Chatar Bazar.

11. Suresh Sah (PW 3) is another brother of the deceased. He stated that he was

at his house at 5 PM, when his nephew came and gave the news that his father was murdered near Jilebia Gacchi by he accused Naresh Sada (the appellant), Tarni Sada and Sattan Sada, whereupon he along with Shankar Sah (PW 2), Satan Sada (PW 6), the informant Satyanarain Sah (PW 6), Gandri Sada (not examined) and Anandi Sada (PW 5) went to the place of occurrence with a cot. He saw his deceased brother lying dead, being shot at his temporal region from which blood was coming. He stated that while he was returning along with his father at about 5 PM, they were surrounded by the accused persons and his father was shot dead near Jilebia Gachhi. He also stated that the Daroga jee seized the articles purchased at Chhater Bazar. Though this witness is not an eye witness to the occurrence however, his testimony corroborates the prosecution case with respect to the time of occurrence, place of occurrence and the manner of occurrence as stated in fard beyan of the informant. There is nothing in the evidence of this witness to render him unworthy of reliance.

12. PW 5 Anandi Sah is a co-villager. He stated that at the time of occurrence, he was returning from Chattar bazaar after doing majdoori, when he heard firing sound. On reaching place of occurrence, he found his brother Jawahar Sah lying dead in the field. His nephew Police Kumar Sah was also standing near the dead body. On enquiry, Police Kumar Sah stated that Naresh Sada shot dead his father. He also stated that he saw three accused persons running, out of whom he recognised only Naresh Sada. This witness was declared hostile as he did not name the other accused persons. The defence has criticized this witness on more than one score. Learned counsel appearing for the appellant argued that this witness has tried to project himself as an eye witness to the occurrence. Elaborating his submissions, learned counsel submits that the informant (PW 6) as well as son of the deceased, namely, Police Kumar Sah (PW 4) had deposed that Anandi Sah (PW 5) was at his house at the time of occurrence and on hearing the news, all of them rushed to the place of occurrence with a cot. This contradicts the version of Anandi Sah (PW 5) that he saw the occurrence, while he was returning from Chatar Bazar after doing mazdoori. Besides this, PW 5 further stated that he along with PW 4 lifted the dead body and brought it to the door of his house, which is not even the prosecution case.

13. We find that the evidence of PW 5 is in conflict with the evidence of Police Kumar Sah (PW 4) and the informant (PW 6). As such, we hold this witness not reliable.

14. Now we will take up the evidence of informant Satyanarain Sah (PW 6), who is full brother of the deceased and uncle of Police Kumar Sah (PW 4). He stated that on the alleged date of occurrence at 5 PM, he was coming from Chatar market and his deceased brother and nephew (PW 4) were going ahead of him. Round about that time, he saw the accused Naresh Sada and 10 to 20 other persons chasing his deceased brother in course of which they overpowered him at Jilebia Gachhi bandh, whereupon appellant Naresh Sada shot him at temporal region causing his death. The informant has been declared hostile relating to his

subsequent part as he has not named accused Biran Sada as the person who killed the deceased.

15. The defence has argued that this witness too should be held un-reliable because not only his statement is in conflict with the statement of the son of the deceased Police Kumar Sah (PW 4), but it has also deviated from his earlier statement made before the police on material points. Elaborating his submission, learned counsel submits that it is the evidence of son of the deceased that PW 4 came to the place of occurrence only after he (PW 4) informed him of the incident. Besides this, PW 6 in his statement before the police, did not state that he too was returning at the time of occurrence from Chatar market ahead of the deceased and his son (PW 4). He also contended that non-examination of the Investigating officer has seriously prejudiced the defence case.

16. We may agree with the submissions of the leaned counsel appearing for the appellant that the evidence of the informant (PW 6) runs contrary to the evidence of the son of the deceased (PW 4). However, the evidence of this witness is consistent with the evidence of other witnesses with respect to the place of occurrence and time of occurrence. This witness has not been cross examined on the point that the occurrence did not take place near Jilebia Gacchi.

17. On careful scrutiny of the evidence of the witnesses, we find that all of them have consistently stated that the occurrence took place near Jilebia Gachhi. The defence has not questioned the witnesses on the factum of the place of occurrence. Similarly, it has also not cross examined the witnesses that the occurrence took place in the evening between 5 to 6 PM. It has merely been argued that neither the post mortem report has been brought on record, nor the doctor has been examined nor the cause of death of informant's brother has been established. The defence of the appellant is that the occurrence did not take place in the manner as alleged by the prosecution side.

18. We find that the defence has also argued that the evidence of witnesses should not be taken into considerations as they are all family members and thus interested witnesses. There is admittedly enmity between the sides. It is well settled that the evidence of a witness cannot be discarded merely because one happens to be a relative and close associate of the deceased, if his evidence is otherwise worthy of reliance. Reference can be made to the judgment rendered by the Hon"ble the Supreme Court in case of State of Punjab v. Suraj Prakash and others, reported in 2016 Cr.L.J. 1604.

19. In the instant case, we find that PW 4, son of the deceased as well as PW 6, the informant have consistently supported the prosecution case. The evidence of PW 3 Suresh Sah fully corroborates the evidence of PW 4. The evidence of these witnesses at least has not been contradicted on material points in any manner particularly with respect to the time of occurrence and place of occurrence as well as the manner of occurrence. It is well settled that an ocular evidence of unimpeachable character cannot be relegated nugatory, on the ground that the

doctor has not been examined and the post mortem report has not been brought on record. In this case, all the witnesses have consistently stated that the deceased sustained gunshot injury on his head. PW 4 was consistent in his evidence that it is Naresh Sada, who fired at the deceased causing his death. The factum of death is not in dispute.

20. Besides this, the defence too has accepted that the deceased died on account of fire arm injury, as it had put suggestion to PW 6 that the deceased was murdered at his shop itself in the village by some unknown person and on account of long standing enmity, the appellant has been dragged in the case. The suggestion of the appellant supports the case of the prosecution that the informant's brother was murdered.

21. None examination of IO is also not found adverse to interest of the defence as PW 4, the sole eye witness gave vivid picturisation of occurrence, and that his father, deceased Jawahar Sah, was murdered was also elaborated during course of cross-examination at paragraph 10, 13 and 14. It is also apparent from the evidence of PW 4 that save and except PW 6 at para 10, no contradiction has been found contrary to it. On account of conduct of prosecution, whereso, the witnesses were perceived to be giving some sort of benefit in favour of other accused (since acquitted) were declared hostile. PW 4, the widow of a solitary eye witness can justify conviction. In *Sudip v. State of West Bengal*, reported in 2016 Cr.L.J. 1121, para 12 it has been observed:-

"12. Observing that there is no impediment for recording conviction based on the testimony of a single witness provided it is reliable in *Prithipal Singh & Ors. v. State of Punjab & Anr.*, (2012) 1SCC 10, it was observed as under:-49. This Court has consistently held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number or the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. [See *Vadivelu Thevar v. State of Madras*, AIR 1957 SC614, *Sunil Kumar v. State (Govt. of NCT of Delhi)*, (2003) 11 SCC 367, *Namdeo v. State of Maharashtra*, (2007) 14 SCC 150 and *Bipin Kumar Mondal v. State of W.B.*, (2010) 12 SCC 91]

22. Though PW 4 had remained unshaken with regard to his testimony against the appellant however was found averse to the prosecution's case with respect to others and on account thereof, was declared hostile. However, such

declaration would affect prosecution's case as has been discussed by the Apex court in case of *Raja v. State of Karnataka*, reported in (2016) 10 SCC 506, para 31 and 32.

"31. The evidence of PW2 Geeta who admittedly had offered shelter to the prosecutrix and her minor daughter, though had been declared hostile, her testimony as a whole cannot be brushed aside. In her testimony, this witness indicated that the prosecutrix used to take financial help from the accused persons and that she used to indulge in dubious late night activities for which her husband had deserted her. The defence plea of false implication as the accused persons had declined to oblige the prosecutrix qua her demand for financial help therefore cannot be lightly discarded in the overall factual scenario. Her version therefore is a plausible one and thus fit in with the defence plea to demolish the prosecution case.

32. That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in *Himanshu @ Chintu* (supra) by drawing sustenance of the proposition amongst others from *Khujii v. State of M.P.* [JT 1991 (3) SC 151 : 1991 (3) SCC 627] and *Koli Lakhman Bhai Chanabhai v. State of Gujarat* [JT 1999 (9) SC 133]. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."

In *State of U.P. v. Lakhmi*, reported in (1998) 4 SCC 336, para 15 it has been held as follows:-

"15. Learned counsel for the respondent, however, pointed out that as the doctor who conducted post-mortem examination on the dead body was not put in the witness-box in this case and it was argued on its strength that in the absence of legally proved medical evidence no finding can be reached that the deceased died due to blows inflicted with "phalli". No reason is seen noted by the trial court or the High Court for the non-examination of the doctor who conducted the autopsy. No doubt it is the duty of the prosecution to prove post-mortem findings in murder cases, if they are available. Absence of such proof in the prosecution evidence in a murder case is a drawback for prosecution. However, we are not disposed to allow this case to be visited with fatal consequences on account of such a lapse because the accused has admitted that death of the deceased was a case of homicide."

23. Situated thus, and in the background of the discussions made above, we find that the prosecution has established the charge of murder against the appellant alone, as such, we convert the conviction one under section 302 of the IPC and 27 of the Arms Act, from one under sections 302/34 of the IPC and 27 of the Arms Act.

24. It is made clear that 50% of the fine amount would go to PW 4, Police Kumar

Sah, who is son of the deceased.

25. In the result, the appeal is dismissed with the aforesaid modification in the judgment.

Samarendra Pratap Singh, J.—I agree.