
(2007) 04 PAT CK 0102

In the Patna High Court

Case No : Criminal Appeal No's. 335, 336 and 514 of 2002 (DB)

Narmadeshwar Dubey and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 26-04-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 109, 120B, 149, 302, 307

Citation : (2007) 2 BLJR 2664 : (2007) PLJR 52 Supp

Hon'ble Judges : Subash Chandra Jha, J; Shiva Kirti Singh, J

Bench : Division Bench

Advocate : Rana Pratap Singh, Abhitabh Kumar and Anurag K. Shikla, in Cr. Appeals Nos. 335 and 514 of 2002, Promod Kumar and Amrendra Kr., in Cr. Appeal No. 336 of 2002, Dhananjay Kumar Upadhyaya, for the Appellant; Ashwini Kr. Sinha, APP, for the Respondent

Final Decision : Allowed

Judgement

Shiva Kirti Singh and Subash Chandra Jha, JJ.—All the three appeals have been heard together because they arise out of the same impugned judgment and order and are, therefore, being disposed of by this common judgment.

2. From the impugned judgment dated 15th June, 2002, passed by Additional District and Sessions Judge, F.T.C.III, West Champaran at Bettiah, in Sessions Trial No. 53 of 1999, it appears that six accused persons were put on trial but out of them one Paras Dubey died during pendency of the trial and remaining five accused persons have preferred these three criminal appeals against their conviction. Appellant Narmadeshwar Pandey has been convicted for the offence under Sections 302/109 and 149 of the Indian Penal Code. Appellant Basanti Kunwar has been convicted for the offence u/s 302 read with Section 120B of the Indian Penal Code. Both of them (appellants of Cr. Appeal 335/02) have been awarded R.I. for life and a fine of Rs. 5000/- each and in default to undergo R.I. for further period of three years. The sole appellant of Cr. Appeal No. 336/02, Pargat Narayan Pandey, has been convicted for the offence under Sections

302/149 and 307 of the Indian Penal Code as well as under the Arms Act. For the offence under Sections 302/149 I.P.C. he has been awarded R.I. for life and a fine of Rs. 5000/- and in default to undergo further R.I. for three years and for the remaining two offences he has been awarded R.I. for ten years and three years respectively. Both the appellants of Cr. Appeal No. 514/02, Pramod Dubey and Arbind Dubey, have been convicted for the offence u/s 302 I.P.C. for which they have been awarded R.I. for life and a fine of Rs. 5000/- each and in default to undergo R.I. for further period of three years. They have also been awarded under the Arms Act to undergo R.I. for three years.

3. The prosecution case, as appearing from the fardbeyan of Sanjay Dubey (P.W.7), recorded by S.I. Akhilesh Kumar (P.W.14) of Chautarwa P.S. on 28.7.1997 at 8.15 A.M., is to the effect that on the same date at about 6 A.M. the informant Sanjay Dubey along with the deceased Madhav Chaubey started from village Tarkulawa for bus stand at Inglisia. In the middle at Rajgir-Bhagauli Sare on the Kachcha road when they proceeded some distance, from the right side, out of a sugarcane field seven persons came out, armed with country-made guns. On the orders of Narmadeshwar Dubey and Paras Dubey, Pramod Dubey fired his gun at the deceased causing injury in the abdomen and Arbind Dubey also fired causing injury in the chest of the deceased. One Sukhal Mallah also fired causing injury in the thigh of the deceased. As a result Madhav Chaubey fell down and died at the spot. When the informant raised nulla then accused Pargat Narayan Pandey and Chhathu Yadav fired from their guns but the informant fortunately received no injury and managed to run away. In the way he informed about the occurrence to Nawal Kishore Dubey, Saru (brother-in-law of the deceased) who was coming from behind. Nawal Kishore Dubey also saw the accused persons fleeing away with their weapons. The deceased was a teacher in a High School, Nonia, East Champaran. The reason for the occurrence was alleged to be dispute over lands which the deceased had received at his sasural as the wife of the deceased had no brother. The father-in-law of the deceased had two marriages. From the first wife, who is no more, he had only two daughters, the elder one was married to the deceased and the second wife of the father-in-law of the deceased, accused Basanti Kunwar had no issues. It was alleged that, appellant Basanti Kunwar in conspiracy with Paras Dubey and Narmadeshwar who are as per relationship her dewar and nephew, made a conspiracy to eliminate the deceased.

4. The alleged offence was investigated by the police. It appears that during investigation the I.O.(P.W.14) prepared inquest report as well as seizure report in respect of two empties found near the dead body. He sent the dead body for post mortem examination, recorded statement of witnesses and submitted chargesheet against six persons including the five appellants but failed to apprehend two named accused Sukhal Mallah and Chhathu Yadav. After cognizance and commitment to the court of sessions, charges were framed against accused-appellants to which they pleaded not guilty leading to their trial and conviction as noticed earlier.

5. In order to prove its case the prosecution has examined altogether 15 witnesses whereas defence has also examined six witnesses in support of its main plea that the deceased had been actually killed by two persons named in the F.I.R., namely, Sukhal Mallah and Chhathu Yadav who were veteran criminals and who managed to abscond and could not be put on trial. It is further defence of the accused persons that the occurrence took place when the deceased had gone alone to attend call of nature and the informant, the sole eye-witness, did not see the actual occurrence but has named several persons who are close agnates and relations of father-in-law of the deceased on account of suspicion and to prevent them from raising any dispute in future with regard to lands of father-in-law of the deceased. It is further defence of the accused persons that since the deceased had three daughters, and the wife of the deceased had another sister whose husband Nawal Kishore Dubey has also been named as a witness and second wife of father-in-law of the deceased is also alive these appellants cannot have any interest in the property of father-in-law of the deceased and, therefore, there could be no plausible motive for commission of the offence by accused-appellants.

6. P.W.1 Chhedi Dubey is a hearsay witness. He is a brother of father-in-law of the deceased and has claimed that in the morning hours of the date of occurrence he had accompanied the deceased and the informant upto some distance and thereafter he had gone to another place and he returned to the village after two hours, and came to know from the informant that Sukhal Mallah, Chhathu Yadav and some other criminals have shot and killed the deceased Madhav Chaubey. He denied to have named other accused persons, the appellants, before the police as persons involved in the offence. He denied to have gone into collusion with the accused persons. P.W.2 Radheshyam Pandey has been declared hostile. In chief he has only stated that in the morning at about 6 he was at his darwaja and he heard Sanjay Dubey shouting that the deceased had been killed. He denied to have identified any of the criminals. In cross examination by the prosecution he denied to have given any statement to the police that while coming from the field he had seen six persons towards north near school running away with gun and rifle and out of them he had identified Sukhal Mallah and Chhathu Yadav. He also denied to have stated before the police that he came to hear in the village that in the offence of murder Basanti Kunwar is a conspirator. The Investigating officer (P.W.14) has also stated that before him P.W.2 had claimed to identify only Sukhal Mallah and Chhathu Yadav.

7. P.W.3 Ram Nath Sahni, P.W.4 Naga Sah, P.W.5 Dinanath Sah, P.W.6 Ram Nath Barai, P.W.8 Jai Narayan Sahi, P.W.10 Sheo Pujan Pandey and P.W.11 Ram Chandra Thakur have been declared hostile and are not of any use to the prosecution. P.W. 7 Sanjay Dubey is the informant, P.W.9 Tara Devi is wife of the deceased who has claimed to have heard the names of the assailants from P.W.7. P.W.12 Triyogi Narayan Chaubey is brother of the deceased who has also claimed to have heard about the occurrence from others when he came to the place of occurrence after few hours on getting information of the occurrence. P.W.13 Dr.

P.K. Pravin held autopsy over the dead body of the deceased and proved post mortem report as Ext.3. P.W.14 S.I. Akhilesh Kumar is the I.O. who recorded the fardbeyan and investigated the case. P.W. 15 Rajesh Mishra is a formal witness who has proved certain documents relating to gift and sale of lands which are not of much significance. It is relevant to notice here that Saru (brother-in-law) of the deceased Nawal Kishore Dubey who was said to be coming behind the deceased and the informant and who allegedly saw the accused persons fleeing away after the occurrence has not been examined as a witness and there is no explanation available on record for his non-examination.

8. From the deposition of prosecution witnesses, noticed above, it is clear that the prosecution case rests mainly upon the alleged eye-witness's account of the informant (P.W.7) as there is no other eye-witness of the alleged occurrence. On behalf of the appellants it has been submitted with all seriousness that P.W.7 is not reliable as he has admitted in cross examination several facts which disclose that he is neither a nephew of the deceased as claimed by him in the F.I.R. nor he is in any way related to the deceased. It has further been submitted that although he has claimed that he was looking after the agricultural operation of the deceased since about a year, he had admitted that he cannot say the name of even a single person of the concerned village or of a single labourer. Reference was made to deposition of this witness in paragraph 27 where he admitted that till the year 1999 he was residing at his own village which is at a distance 15-16 kms. away from the village of occurrence. The occurrence is of the year 1997. Hence, it was submitted that earlier the witness had falsely claimed to be residing with the deceased and looking after his agricultural works since one year. From paragraph 72 of his deposition it has been shown that four of the persons examined as P.Ws. in this case are not known to this witness and they include P.W.1 Chhedi Dubey, a brother of father-in-law of the deceased. Thus, it has been submitted that the claim of this witness that he was present in the village of occurrence and had accompanied the deceased and had witnessed the actual occurrence should not be believed.

9. On the other hand, on behalf the State and the informant it was submitted that the presence of this witness in the village concerned on the date of occurrence is clear from the evidence of P.W.1 Chhedi Dubey who has claimed that upto some distance he had accompanied the deceased and the informant in the morning hours and thereafter he had gone to another village and returned after two hours and heard the names of Sukhal Mallah and Chhathu Yadav as the assailants of the deceased. It was further submitted that P.W.11 Ram Chandra Thakur, a barbar, has also stated that at about 6 in the morning he heard about the killing of Madhav Chaubey and went to the place of occurrence on a cycle and there he saw dead body of Madhav Chaubey and also saw informant Sanjay Dubey who was crying and at that time Sanjay Dubey was uttering names of Paras Dubey, Pramod Dubey, Arbind Dubey, Sukhal Mallah and Chhathu Yadav and was alleging that they have jointly fired and killed the deceased. Thus, it has been submitted that presence of the informant (P.W.7) in the village of

occurrence on the relevant date cannot be doubted and, therefore, reliance should be placed on his testimony as a eye-witness to sustain conviction of the appellants.

10. The main issue is not the possible presence of the informant in the village of occurrence or near the place of occurrence at the relevant date and time but the issue is whether he actually saw the actual occurrence as claimed by him. The connected relevant issue is whether he deserves to be given full reliance as the solitary-eye-witness to sustain the conviction of the appellants. In this context the submission of learned Counsel for the appellants deserves detailed consideration. He submitted that according to this witness the kachcha road at the place of occurrence was running from west to east and the sugarcane field was on the right side, i.e., towards south and while the deceased and the informant were moving towards east, the accused persons suddenly came out of the sugarcane field from the south side, i.e., right-hand side and started firing from the front. According to this witness the accused persons were standing near to each other and from there only they fired at the deceased. It has been submitted that since no other eye-witness has been produced by the prosecution, the veracity of this witness requires to be tested by objective findings of the Doctor who has been examined as P.W. 13 and has proved the post mortem report as Ext.3. From the evidence of Doctor and the post mortem report it has been shown that the Doctor found the following injuries on the person of the deceased:

1. Lacerated wound 1" round margin inverted charring around the round on the back of left ear adjacent to pina.
2. Lacerated wound 2-1/2" x 1-1/2" deep to interior margin inverted on left side of upper chest.
3. Lacerated wound 2" round on right hypocondrim coils of intestine out through the wound.
4. Multiple lacerated wound 1/6" round on the area of 4" round of right middle of thigh.

It was highlighted that the first injury was situated on the back of left ear and showed charring marks. It was also highlighted that injury No. 2 was on the left side of chest and this injury as well as injury Nos. 3 and 4 did not show any charring or blackening mark. The point requiring consideration on the basis of aforesaid submission is whether injury No. 1 on the back of left ear adjacent to pina was possible by firing being made from the front or from the right side of the deceased or not and whether one of the injuries showing charring mark and, therefore, firing from 3-4 feet and other injuries showing firing from some distance were possible when all the assailants had allegedly fired together almost standing at the same place. On a careful consideration of manner of occurrence as given by P.W.7 and the points raised on behalf of the appellants, noticed above, it appears that injury No. 1 could not have been caused if the occurrence

of assault by fire arm upon the deceased had taken place in the manner alleged by the informant (P.W.7). Further had the assailants fired from same place and, therefore, almost from the same distance either all the injuries would have shown signs of firing from close range or all the injuries would have been caused from some distance. But clearly injury No. 1 appears to be from a very close range whereas other three injuries are from a distance. This also does not fit in with the manner of occurrence as given by the sole eye-witness, P.W.7, the informant.

11. In view of aforesaid finding it is no longer necessary to go into details of other arguments but the submission advanced on behalf of the appellants about the lack of motive also appears reasonable. Even in respect of co-accused Basanti, most of the witnesses including brother of the deceased have not alleged that there was any land dispute or any kind of dispute. No documents have been filed to show that there was any proceeding to show dispute of property between the accused Basanti and the deceased, when it is the prosecution case that father-in-law of the deceased had died two years before his death and the deceased had been taking care of agricultural operation in the village of his father-in-law for the last one year. Since the deceased has left behind his widow as well as three daughters, it does not stand to reason as to how the other accused persons or Basanti would gain from the death of the deceased. However, motive is not of any significance when the sole eye-witness, P.W.7, has been found to be not reliable.

12. It may be relevant to mention that the cross examination of P.W.7 has revealed that he is involved in several criminal cases and it also appears that he is absconding in many of those cases. He has admitted in paragraph 14 of his deposition that he has been sentenced to 7 years imprisonment in a criminal case. As noticed earlier, he is not at all related to the deceased and in fact he did not belong to the family of the deceased or to the family of in-laws of the deceased.

13. The prosecution case as per the informant is that the deceased used to go to attend to his duties as teacher in a Govt. School by bus at least once in a week and that on the fateful day he was going to catch a bus for going to the school. The evidence of the investigating officer as well as the inquest report shows that deceased was not carrying any papers, articles or money with him and the only articles found with the deceased were his wearing apparels such as dhoti, kurta, vest, a towel, a pair of sleepers and a spectacle. It has further come in the evidence of witnesses that the route for the closest place where bus could be found was different and was shorter than the route taken by the deceased. These materials also raise doubt about the prosecution case and a reasonable doubt arises whether the informant was actually aware of the purpose for which deceased had gone out early in the morning and whether he had actually seen the occurrence.

14. For the aforesaid reasons it is not possible to place reliance upon P.W.7, the

informant, so as to sustain the conviction of the appellants on the basis of his deposition alone as a eye-witness of the alleged occurrence. The doubt in respect of prosecution case is aggravated by the claim of P.Ws. 1 and 2 that soon after the occurrence, only the names of Sukhal Mallah and Chhathu Yadav were disclosed as the assailants of the deceased. Those two persons could not be apprehended to face the trial and it has come in the evidence of some of the witnesses that Sukhal Mallah was a veteran criminal wanted in several cases.

15. For all the aforesaid reasons the conviction of the appellants by the impugned judgment is set aside. The appellants are given benefit of doubt and acquitted of all the charges. All the three appeals stand allowed. It appears that appellants Pramod Dubey and Arbind Dubey are in jail custody. They shall be released forthwith if not required in any other case. The remaining appellants, namely, Narmadeshwar Dubey, Basanti Kunwar and Pargat Narayan Pandey, shall stand discharged from liabilities of their bail bonds.