
(2003) 02 PAT CK 0031

In the Patna High Court

Case No : Criminal Appeal (DB) No. 419 of 1987

Pareman Mahto and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 26-02-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 157, 302, 307, 34

Citation : (2003) 2 PLJR 827

Hon'ble Judges : S.N. Jha, J;P.N. Yadav, J

Bench : Division Bench

Advocate : P.N. Pandey and Bamdeo Pandey, for the Appellant; Lala Kailash Bihari Prasad, for the Respondent

Final Decision : Allowed

Judgement

S.N. Jha and P.N. Yadav, JJ.—There are eleven Appellants in all in this batch of appeals. Two of them namely Bajrangi Mahto and Kanhaiya Mahto are reported to have died during pendency of the appeal, accordingly their appeal stands dismissed as abated.

2. The Appellants have been convicted u/s 302/34 of the Penal Code and sentenced to rigorous imprisonment for life. The prosecution of the Appellants was set in motion on the fardbeyan- also treated as dying declaration-of Barho Singh of Village Bharay, PS Fatehpur, District Gaya.

3. The prosecution case briefly stated is that in the night of 27/28.4.84 Barho Singh was sleeping on a cot in the sahan in front of his darwaja. His two sons. Parshuram Singh and Vishram Singh, brother Kuli Singh and one Junab Khan were also sleeping nearby. At about midnight Barho Singh woke up on receiving injury by sharp cutting weapon on his cheek. He saw the Appellants standing there with farsa, garasa and lathi. While Naresh Mahto and Anant Mahto had garasa in their hand, Rameshwar Mahto had farsa and other Appellants had lathi in their hands. Naresh Mahto gave first blow by a garasa on his cheek. Thereafter

Rameshwar and Anant Mahto also gave blows by farsa and garasa. He tried to ward off the blow with his right hand as a result of which he received injuries in his right hand and two of the fingers were sut. Thereafter other Appellants also assaulted with their weapons. On shout his sons and brother woke up and came to his rescue. The Appellants fled away. Barho Singh claimed to have identified the Appellants in the light of the lantern.

4. The further case of the prosecution is that Barho Singh was immediately taken to Fatehpur State Dispensary where Dr. Arjun Prasad gave him the First Aid and put bandage on his wounds. On the basis of O.D. slip sent by him the Officer Incharge, Fatehpur PS, SI Puran Chandra Das, came to the State Dispensary and recorded the fardbeyan of Barho Singh. In view of nature of the injuries Dr. Arjun Prasad advised his immediate shifting to Magadh-Medical College and Hospital, Gaya for proper treatment. On his arrival there, in the morning at 7.15 AM Dr Surendra Prasad Srivastava, a Resident Surgeon of Magadh Medical College and Hospital, examined the injuries. At about 8 AM Barho Singh died.

5. Meanwhile on the basis of the said fardbeyan, said to have been recorded at 2 AM, the Police had registered Fatehpur PS Case No. 33/84 u/s 307 etc. of the Penal Code. After Barho died, Section 302 was added. In the meantime SI Puran Chandra Das went to village of occurrence and examined the witnesses. In course of time, after completing the required formalities, he submitted chargesheet and the Appellants were put on trial.

6. At the trial the prosecution examined ten witnesses to prove its case. Out of whom, P.W. 8 Jal Narayan Singh and P.W. 9 Harbansh Prasad were examined as formal witnesses to prove certain entries of the Station Diary and O.D. slip in the hand of Dr. Arjun Prasad. Out of the rest, four were official witnesses, namely, P. Ws. 5, 6, 7 and 10. P.W. 5 Dr Bijay Kumar had conducted postmortem on the dead body of the deceased on 29.4.84 at about 10 AM, P.W. 6 Dr Surendra Prasad Srivastava, as stated above, had examined the injuries of the deceased at the Magadh Medical College and Hospital at 7.15 AM on 28.4.87. P.W. 7 SI Puran Chand Das, as seen above, had supposedly recorded the fardbeyan, and had also investigated the case. P.W. 10 Dr Arjun Prasad had given first Aid and put bandage and sent information (S.D. slip) to Fatehpur Police Station. The remaining witnesses namely P.W. 1 Parshuram Singh, P.W. 2 Junab Khan, P.W. 3 Guddi Devi and P.W. 4 Bishram Singh were examined as eye witnesses. Parshuram Singh and Bishram Singh, as noticed above, are the sons of the deceased while Guddi Devi is daughter-in-law of the deceased and wife of Bishram Singh. P.W. 2 Junab Khan is said to be friend of the deceased. The Appellants also examined one Puran Chand Alda on the point of alibi of one of them namely Ramdeo Mahto. At the end of the trial, the trial court convicted and sentenced the Appellants in the manner indicated above.

7. Shri Prakash Narayan Pandey, learned Counsel for the Appellants, challenged the genuineness of the fardbeyan-cum-dying declaration. He referred to the evidence of P.W. 10 Dr Arjun Prasad and the injuries found on the person of

deceased by P.W. 6 Dr Surendra Prasad Srivastava and submitted that having regard to his condition the deceased could not have made such a detailed, graphic and coherent statement regarding the occurrence. In fact, Counsel submitted, in view of the evidence of Dr Arjun Prasad it is unlikely that fardbeyan could at all have been recorded at the Fatehpur State Dispensary at 2 A.M. In any case there is no explanation of delay of about two days in the despatch of copy of the First Information Report, received by the CJM only on 29.4.84, which improbabilises prompt lodging of the case.

8. Shri Lala Kailash Bihari Prasad, learned Counsel for the State, submitted that the prosecution rests on the dying declaration as also the ocular evidence. Though dying declaration may by itself be sufficient to convict an accused, even where the same is found to be doubtful it can be used to lend assurance to the ocular evidence. The occurrence was seen by four persons and having regard to the relationship of three of them with the deceased it is unlikely that they would implicate the innocents, letting go the real culprits. In view of the evidence of the Investigating Officer there cannot be any doubt that the fardbeyan was recorded at Fatehpur PS at 2 AM within few hours of the occurrence, reducing the chance of concoction to the minimum.

9. Let us first consider how far the dying declaration can be relied on the instant case. We will then consider the ocular evidence. P.W. 10 Dr Arjun Prasad stated in his evidence that at 1.30 O clock in the night of 28.4.1984 Barho Singh was brought to the Fatehpur State Dispensary on a cot. Information was sent to the Police Station and he gave First Aid to him. As far as he recollected he also put bandage on the wound. He thereafter sent the injured to Gaya for treatment. In cross examination he stated that though Barho Singh was not in coma and was conscious, his condition was critical and that is why he did not fully treat him and after giving preliminary treatment advised his men to take him to Gaya. Barho Singh stayed in the Hospital for about 15 minutes whereafter he was taken to Gaya. P.W. 10 further stated that as far as he recollected there was sharp cut injury on the face of the injured as a result of which his speech was not audible. His voice was not clear and he was staggering in speech. He was in state of shock. P.W. 10 further stated that as far as he recollected the injured did not make any statement in his presence.

From the evidence of P.W. 6 Dr Surendra Prasad Srivastava it appears that on 28.4.84 at about 7.10 A.M. when he examined the injured Barho Singh he found the following injuries on his person:

(i) Sharp cut extending from right ear lobule oblique cutting all layers up to left lower lip including lower jaw. The size was 6" x 3" x bone deep and bucket cavity deep.

(ii) Sharp cut on forehead 2" x 1" x bone deep.

(iii) Sharp cut on right arm 6" x 3" x cutting lower end of humerus and separating except anterior surface of the arm was attached with skin and muscle.

(iv) Sharp cut on left index finger 4" x 1" x bone deep cutting the meta- carpal bone.

(v) Sharp cut on right hand on dorsum 3" x 2" x muscle deep.

(vi) Sharp cut on left hand on dorsum 3" x 1" x muscle deep.

12. At this stage it may be mentioned that according to the Investigating Officer he had received an O.D. slip at 1.40 A.M. soon whereafter he proceeded to Fatehpur State Dispensary reaching there at 1.50 AM. He recorded the fardbeyan-cum-dying declaration of Barho Singh at 2 AM which is the time mentioned in the fardbeyan too. It was submitted on behalf of the Appellants that it is true that the time of recording of the farcfoeyan-cum-dying declaration has been mentioned in the body and head- ing of the fardbeyan as well as in the evidence of Investigating Officer as 2 A.M. but having regard to the nature of the injuries particularly injury No. 1 as found by P.W. 6, it was well nigh impossible for Barho Singh to make any statementmuchless detailed, coherent and graphic as the one mentioned in the fardbeyan, and in this regard he placed reliance on Mohar Singh v. State of Punjab 1981 (Supp) SCC 18: 1981 SCC (Cr) 638.

13. In the case of Mohar Singh (supra) the deceased was found to have received 21 injuries on various parts of his body. His blood pressure was 60/40 mms of Hg. and pulse was 100 per minute weak. He was in a state of shock. The ASI of Police who had recorded his statement had obtained certificate from the doctor that the deceased was fit to make statement. Submission was made on behalf of the accused that having regard to the serious condition of the injured/deceased even though the might have been conscious he could have made only brief statement regarding the occurrence. The court

observed:

We find that he has given a very detailed and graphic narration of the entire history of the case, starting from the motive, the enmity and minutest feature of the assault excluding the individual acts committed by the Appellants. He has also mentioned that the Appellants assaulted him with Kassi. The ocular evidence however is that the deceased was attacked not by Kassi but by spade. In view of the detailed and extremely coherent nature of dying declaration, we find it impossible to believe that the deceased even if conscious would have made such a detailed statement. We are, therefore, inclined to think that this statement smacks of concoction or fabrication in order to make the present case foolproof. At any rate, we find it wholly unsafe to rely on the dying declaration, particularly, when the Police Officer who recorded the statement did not take the necessary precaution of getting the dying declaration attested by the wife who was stated to be present there or the doctor who was alleged to be present in the hospital.

14. A reading of the fardbeyan-cum-dying declaration, in the instant case, leaves similar impression on our mind. It may be true, as submitted on behalf of the State, that Barho Singh was not unable to make statement but then, as observed

by their Lordships of the Supreme Court, the occurrence could be described in briefest possible words. The manner of occurrence has been described as if the person was in normal condition. Even though Barho Singh was not unconscious, we have no doubt in our mind, having regard to the nature of the injury particularly injury No. 1, that he must be in acute physical pain and in such condition it is highly unlikely that he would describe the occurrence in minute details setting out not only the names of the accused, numbering 11, but also describing the weapons they were carrying, the manner of occurrence and so on. The whole lower left side of the face extending from the right ear to the lower lip including the lower jaw had been cut, the size of the injury being 6" x 3". The effect was so heavy that ten teeth were severed which were found by the Investigating Officer on the cot when he had made local inspection on the following morning at 7 A.M. Thus even though it is assumed that Barho Singh did not lose his power of speech, as observed above, it was highly unlikely that he would have given such a detail account of the occurrence.

15. It is true, as stated by the Counsel for the State, that as per the evidence of the Investigating Officer he had recorded the fardbeyan on the same night at 2 A.M. It is significant to mention that though the case is said to have been formally instituted at the Police Station at 3 A.M. i.e. within one hour of the recording of the fardbeyan, the FIR reached the CJM after two days on 29.4.84. There is no explanation for the delay. If the Investigating Officer was so prompt in recording the fardbeyan, instituting the case, and taking up the follow-up steps by going to the village of occurrence for recording the statement of the witnesses etc. there in early next morning, it is not understandable as to why two days' time could be taken to despatch copy of the FIR to the Magistrate. As rightly submitted on behalf of the Appellants, Section 157 of the Code which obliges the Police to send copy of the FIR "forthwith" provides for a check on the Police in fabricating the case. We are conscious of the fact that mere delay in despatch or receipt of the copy of the FIR is no ground to disbelieve the prosecution case, but, equally, in appropriate cases belated despatch/receipt of the FIR can be taken into account along with other facts and circumstances of the case to disbelieve the prosecution case. It is relevant to mention here that the fardbeyan contains the left thumb impression of the deceased. Though his being unable to put his signature is understandable in view of the fact that two of his fingers were cut in the occurrence, neither of the two sons, Parsuram Singh and Bishram Singh, who were allegedly present at the time of occurrence and accompanied the deceased to the Dispensary where the fardbeyan was allegedly recorded, put their signatures as witness. Instead, two strangers namely Radha Binod Mishra and Ranjit Kumar Singh signed the fardbeyan as witness and none of them was examined in the case.

16. In the facts and circumstances, therefore, we are inclined to think that the fardbeyan-cum-dying declaration is not true and correct account of the occurrence and therefore not much reliance can be placed on it for convicting the Appellants. It was submitted on behalf of the State, as already mentioned above,

that the conviction of the Appellants rests also on the ocular evidence of the eye witnesses namely P.Ws. 1 to 4 and it is thus to be seen as how far their evidence can be relied upon to uphold the conviction.

17. As per the lease of the prosecution, besides his two sons namely P.W. 1 Parsuram Singh and P.W. 2 Bishram Singh, brother Kuli Singh and friend Junab Khan were also sleeping on separate cots in the sahan in front of the darwaja of the house while the female inmates and children were sleeping inside. However when the Investigating Officer reached the place of occurrence early morning he found only one cot. He found blood on the tapestry of the cot. He also recovered ten lower teeth supposedly of Barho Singh from the cot. Obviously Barho Singh had slept on that cot in the night. If four more persons had slept on separate cots the Investigating Officer would have found them when he visited the PO at about 7 AM, It is unlikely that the cots would have been removed in such a short time. There could be no reason to do so. In any view there is no evidence to that effect. It is also the prosecution case that P. Ws. 1, 2 and 4 were sleeping (besides Kuli Singh) in the, Sahan. As a matter of fact from their evidence it appears that Barho Singh had another house described as old house situate at a distance of 500 yards vide evidence of the Investigating Officer. The place of occurrence has been described by some witnesses as dalan. This is prima facie suggestive of the fact that the female members used to sleep in the other house which as per the evidence of P.W. 3 was being used for grainery. Though there is not much cross examination on the point, possibility of the members of the family sleeping in the other house and some of them sleeping in the house where the occurrence took place, cannot be ruled out. Chances are that Barho Singh slept in the sahan alone and none else slept there in the fateful night.

18. Coming to the evidence of the eye witnesses, individually, it would appear that P.W. 1 claimed to be awake at the time of occurrence, he stated that at about 12 mid-night he had woken up to answer the call of nature and was lying on the cot when after 10-15 minutes the Appellants came near the cot where his father Barho Singh was sleeping. He saw Naresh Mahto giving garasa blow on his face, Anant Mahto gave garasa blow on his head and Rameshwar Mahto gave farsa blow on his left hand. He also saw Naresh Mahto giving garasa blow on his right hand causing cut injury in the right hand. Other Appellants were standing in surrounding position with lathi. They however did not commit any assault. He identified the Appellants in the light of lantern. He along with others thereafter took Barho Singh to Fatehpur Hospital and, later, to Gaya Hospital, where Barho Singh ultimately succumbed to his injuries. We find the conduct of the witness very unnatural and unbecoming of a son-He claimed to be awake up but he did not respond at all. The deceased in his /arcfoeyan-cum-dying declaration, on the other hand, stated that on his shouting the sons and brother Kuli Singh came to his rescue, when the Appellants fled away.

19. P.W. 2 Junab Khan is a resident of different village. He has explained his presence by stating! that he had come to the village Barhey to buy vegetables.

The striking feature of his evidence is that he could not identify the Appellants except Parmeshwar Mahto in dock from the witness box. He could identify them only by going nearer to them. If he could not identify the Appellants in the day light it is beyond our comprehension that he could identify the Appellants at mid-night in the "light of lantern. Moreover the story that he had come to Village Barhey to buy vegetable, considering that he lived alone in different village, is itself unbelievable. It is to be mentioned here that before the police he claimed, to identify the Appellants by voice which version apparently on second thought he gave up because it is not the case of the prosecution that the Appellants had spoke at all and therefore there was no question of their being identified by voice.

20. P.W. 3 gave with a more improbable story when she claimed that when she heard the sound of her father-in-law she came out and seeing the occurrence chased the assailants by danda. It is somewhat unusual that while her husband P.W. 4 Bishram Singh and her brother P.W. 1 Parsuram Singh hid themselves behind pillar out of fear, she had the courage to chase the assailants, as many as 11 in number armed with farsa and garasa. She stated that the assailants had indiscriminately (anginat) beaten the deceased by lathi but no lathi injury was found on the deceased. P.W. 1 also in his evidence denied that any of the culprits assaulted by lathi. P.W. 4 stated that he woke up when the assault was complete. Soon after he hid himself behind the pillar. It is difficult to believe that as many as 11 persons would come at a place in the dead of night and assault the deceased in different ways but the person sleeping on the adjacent cot would wake up only after the occurrence is over.

21. In the circumstances we are unable to place any reliance on the ocular evidence of the so called eye witnesses. In the above premises, we are of the view that the conviction, of the Appellants cannot be sustained.

22. In the result, the appeals (except that of Bajrangi Mahto and Kanhaiya Mahto whose appeal stands abated) are allowed. The conviction and sentence awarded to the Appellants are set aside and they are acquitted of the charges. The Appellants are on bail. They are discharged of the liability of bail bonds.