

(2014) 12 PAT CK 0014

In the Patna High Court

Case No : Criminal Appeal (DB) Nos. 635 and 726 of 2014

Pashupati Nath Jha

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 24-12-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 221(2), 222, 313

Evidence Act, 1872 — Section 37(ii)

Penal Code, 1860 (IPC) — Section 149, 300, 302, 304, 304A

Citation : (2014) 12 PAT CK 0014

Hon'ble Judges : V.N. Sinha, J; Aditya Kumar Trivedi, J

Bench : Division Bench

Advocate : Satyendra Kumar Srivastava, Advocate for the Appellant; C.P.D. Jaiswal, APP, Advocate for the Respondent

Judgement

Aditya Kumar Trivedi, J.—Cr. Appeal (DB) No. 635 of 2014 wherein Bikram Jha happens to be the appellant while Cr. Appeal (DB) No. 726 of 2014 wherein Pashupati Nath Jha @ Sona Babu happens to be the appellant commonly originate against the judgment of conviction dated 24.06.2014 and sentence dated 25.06.2014 passed by Additional Sessions Judge, 2nd, Madhubani in Sessions Trial No. 57 of 2012/78 of 2012 arising out of Pandaul P.S. Case No. 130 of 2011 convicting both the appellants named above for an offence punishable under Section 323, 302/ 149 of the IPC and directed each of them to undergo R.I. for life as well as fined of Rs. 10,000/- in default thereof, to undergo S.I. for three months as well as R.I. for one year under each head respectively.

2. Informant, Satya Narayan Thakur (PW-3) gave his fardbeyan on 18-05-2011 before ASI of Beta O.P., Darbhanga after death of his father Mahendra Sharma who was undergoing treatment on account of injuries sustained by him at DMCH which was inflicted on 07-05-2011 and for which the narration goes as follows.

3. On 07-05-2011 at about 06:00 AM he came over road adjacent to his Darwaja and found accumulation of rain water. In order to drain out, while he was making

the drain, his neighbour Pashupati, Deoti, Gautam, Baidhnath, Vikram, Sabitri came and began to abuse. On his protest, they began to assault over which he raised alarm attracting his father who was assaulted with lathi by Pashupati over his head causing injury thereupon. Blood oozed out therefrom. Subsequent assault was made over stomach by Pashupati. His father fell down and then thereafter was taken to Madhubani Hospital from where he was referred to DMCH and during course of treatment he died.

4. The aforesaid fardbeyan was transmitted to Pandaul P.S. over which Pandaul P.S. Case No. 130 of 2011 was registered thereupon under Section 341, 302, 323, 504, 34 IPC whereupon investigation commenced and after concluding the same, charge sheet was submitted against all the accused however, on account of absence of others, the proceeding spelt and proceeded only against these two appellants after cognizance and met with ultimate result, the subject matter of instant appeal.

5. The defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial. However, neither any DW nor any kind of document has been exhibited on behalf of appellants.

6. Learned counsel for the appellants while assailing the judgment of conviction and sentence has submitted that the finding recorded by the learned lower court is cryptic, perverse, vexatious on account of non-application of judicious mind. To support the same, it has been submitted that at a very first glance of the judgment impugned it gives a clear cut impression of mechanical approach of the learned lower court recording finding of guilt as well as sentence, as deflected from basis principle of criminal jurisprudence where under innocence of accused is the elementary principle. It has also been submitted that it is the prosecution who has to prove its case, and as per evidence whatever been adduced by the prosecution, it is abundantly clear that prosecution has miserably failed to prove the same. To illustrate the same, it has been submitted that in spite of non-examination of the doctor who had conducted postmortem examination, and having it proved by a formal witness, the learned lower court based its finding which legally could not have been discarding the postmortem report, on account of its inadmissibility, the cause of death, as disclosed and accepted by the learned lower court happens to be in utter violation of law.

7. It has also been submitted that delay in recording fardbeyan has not properly been explained. In criminal case, the delay smacks foul smell and on account thereof, the whole prosecution case became doubtful apart from the fact that on account of non-examination of Investigating Officer, appellants are found prejudiced on this very score. Further were due to non-examination of Investigating Officer prosecution suffers from grave lacuna as failed to dazzle objective finding relating to P.O. Simultaneously status of the witness.

8. It has also been submitted that right from initial stage, the prosecution had

disclosed lifting of the injured/deceased to Madhubani and then thereafter DMCH, however prosecution failed to produce the injury report, if any, issued by the Madhubani Sadar Hospital as well as of DMCH. Contrary to it, from the evidence of the PWs, it is evident that deceased as well as informant were taken to Pandaul PHC and then thereafter, to DMCH. PW-11 Dr. Mithilesh Kumar Mishra who has been examined by the prosecution claimed himself to be the Incharge of PHC, Pandaul.

9. It has also been submitted that majority of the material prosecution witnesses have not supported the prosecution case as were tendered by the prosecution, while remaining halfheartedly and on account thereof, it is evident that prosecution has failed to substantiate its case. The prosecution case jolt on account of non-examination of Investigating Officer due to which the previous statement of hostile witness became inadmissible. Therefore, the cumulative effect, as submitted make the prosecution case untrustworthy, unreliable, non-acceptable, consequent thereupon, the finding of the learned lower court monocular. It has also been submitted that there happens to be no specific allegation against accused Bikram Jha. So, the learned counsel for the appellants concluded that appellant Bikram Jha is entitled for acquittal while latter is liable to be convicted for an offence punishable under Section 323 IPC and for that he remained under custody for such long period.

10. Refuting the submission made on behalf of appellant, it has been submitted on behalf of learned Additional Public Prosecutor that the judgment of conviction and sentence recorded by the learned lower court is based upon facts available on the record as well as sound principle of law. It has also been submitted that even during course of cross-examination, the appellant had cross-examined the witnesses by suggesting leading question admitting the occurrence as well as place of occurrence therefore it happens to be an admission on the part of the appellants which, the learned lower court had rightly appreciated, admitted being admissible in the eye of law. It has further been submitted that when appellant had himself admitted the occurrence then in that event, non-examination of doctor is not going to give benefit to the appellant side by side will not found adverse to the prosecution case. In likewise manner, the events given over non-examination of Investigating Officer.

11. Now coming to the ocular evidence, it has been submitted that material witnesses have categorically supported the prosecution version and on account thereof, the judgment impugned did not justify interference.

12. On perusal of the lower court record, it is evident that altogether twelve PWs have been examined out of whom PW-1 is Bibha Kumari daughter of deceased, PW-2 Purnima Devi wife of deceased, PW-3 Satya Narain Thakur, injured, son of deceased, PW-4 Sobha Devi did not support the case of the prosecution and on account thereof, was declared hostile while PW-5 Arhulia Devi, PW-6 Pitamber Ram, PW-7 Saryug Thakur, PW-8 Sunar Thakur, PW-9 Raju Kamat, PW-10 Bulchun Mandal were tendered, PW-11 is doctor Mithilesh Kumar Mishra who had

examined both the injured and PW-12 Subhash Chandra Mishra is the formal who had exhibited the relevant documents. Prosecution had also exhibited Ext.-1 Signature of informant over fardbeyan, Ext. 1/A Signature of FIR attesting witnesses, Ext.-2 Injury Report relating to informant Satya Narayan Thakur, Ext. 2/A-Injury report relating to deceased Mahendra Sharma, Ext.-3 fardbeyan, Ext.-4 forwarding, Ext.-5 endorsement, Ext.-6 PM Report.

13. In order to appreciate the rival contention, it look incumbent upon us to firstly go through the materials available on the lower court record. So far ocular evidence are concerned, PW-5, PW-6, PW-7, PW-8, PW-9 and PW-10 were tendered and on account thereof, they have become worthless for the prosecution because of the fact that during cross-examination they all have stated that they knew nothing about the occurrence. In likewise manner PW-4 had stated that she had got no knowledge with regard to occurrence and was declared hostile on that very count and her attention was drawn towards previous statement but on account of non-examination of Investigating Officer the aforesaid part of her evidence remained sterile. PW-2, wife of informant who simply stated that she had gone to bring grass. After her return she found none inside her house. On query she came to know that people have taken away her husband to Police Station. She followed. She gone to Pandaul Hospital from P.S. and then to Madhubani. Thereafter her husband was referred to Darbhanga where after eleven days her husband died. Her husband was suffering from pain and to provide treatment thereof, he was taken to hospital. She had further stated that police had interrogated her and she had stated before police that her husband was suffering from pain. Then she stated that she had stated before the police that Bikram Jha, Pashupati Nath Jha @ Sona Babu and others have assaulted her husband and then thereafter she was declared hostile. Her attention was drawn towards her previous statement. During cross-examination she had stated that on account of pain her husband was taken for treatment. She had further stated that she was not remembering when she had gone to Pandaul Hospital. She had further stated that police had recorded her statement. She further stated that her husband died due to stomach ache. She claimed identification of accused being her co-villager. So from her evidence, it is evident that the part of deposition which has been on the basis of her previous statement has got no relevancy in the eye of law on account of non-examination of Investigating Officer. However, the defence, reason best known to it did not opt to cross-examine on the score wherein she had stated that she had made police statement that Bikram Jha and Pashupati Nath Jha @ Sona Babu and others had assaulted her husband. Furthermore, from her cross-examination her presence at Pandaul Hospital is admitted one as well as regarding her previous statement before police.

14. The remaining material witnesses are PW-1 and PW-3. PW-1 is Bibha Kumari, daughter of deceased who had stated that on the alleged date and time of occurrence, she was at her house. Her brother Satya Narayan Thakur was removing water from road which was protested by Baijnath Jha, Moti Jha,

Gautam Jha, Bikram Jha, Savitri Devi, Pashupati Jha @ Sona Babu, who began to abuse. As her brother resisted they began to assault with lathi. Her brother raised cry over which her father Mahendra Sharma came who was also assaulted by the accused persons with lathi, on account of which blood came out from his head. Thereafter Sona Babu assaulted with lathi over stomach on account of which her father felled down. He was lifted to Pandaul Hospital from there he was referred to Madhubani and from there, he was taken to Darbhanga. After eleven days he died. She identified Bikram and Sona in court and further disclosed that they have assaulted her father on account of which he died. During cross-examination she had stated in para-3 that she had not identified anybody at the place of occurrence. She had not seen anybody while assaulting her father. She had not seen anybody while assaulting her brother. At that very moment large numbers of persons have assembled there. In para-4 she had stated that her father slipped and on account thereof, he sustained hurt and accordingly, was lifted for treatment. Her father was operated upon at Darbhanga. On cross-examination on behalf of Bikram Jha she had stated that Bikram had not assaulted her father. In para-8 she had stated that at the time of Marpit rain water was not present. In para-9 she had stated that "Marpit" took place on account of removal of water accumulated in front of her house. She had further stated that she had not seen the occurrence of cutting of mango tree.

15. PW-3 is the informant, Satya Narayan Thakur also an injured who had stated that on the alleged date and time of occurrence while he was removing the rain water accumulated in front of his house, Pashupati Nath Jha, Moti, Bikram, Baijnath, Savitri came and began to assault him with stick. On his cry his father Mahendra Sharma came in his rescue who was also assaulted and on account thereof, he became injured and fell down. His father was lifted to Madhubani Hospital and then to DMCH where during course of treatment, he died after eleven days. Police come at DMCH where he gave his fardbeyan on 18.05.2011, in presence of Chatrapati Thakur, his material uncle. He had identified the accused. During cross-examination he had stated under para-3 that only two accused had arrived at the place of occurrence at that time. In para-4 of his cross-examination he had stated that his father slipped on account of which he sustained injury over his head, stomach and for that he was shifted to Madhubani where he was treated and then was shifted to Darbhanga. He had further stated that his father was suffering from stomach ache since before. He had further stated that his father was operated upon and during course thereof, he died.

16. PW-11 is the doctor who had examined both the injured Satya Narayan Thakur as well as Mahendra Sharma on 07.05.2011 at about 12:55 P.M. and found the following injuries:-

(A) Satya Narayan Thakur

Complain of pain and swelling on and above left knee joint.

X-ray left knee joint suggested.

Nature-Opinion reserved till X-ray produce.

Time of Injury-Within 4 to 6 hrs, caused by hard and blunt substance. As the X-ray plate was not produced therefore nature of injury could not be disclosed.

(B) Mahendra Sharma

1. Swelling about 3"x2" on upper part of skull.
2. Pain in neck but no sign of injury seen.
3. Abrasion about 1/2 cm x 1/2 cm on middle finger of left hand.
4. Acute abdomen pain with recants vomiting Nature of Injury-As pain abdomen and vomiting not cured even after treatment, thus patient is referred to Sadar Hospital, Madhubani for further management otherwise all are simple caused by hard and blunt substance.

Time of Injury-Within 4 to 6 hrs. During cross-examination he had admitted the suggestion that these injuries even could be caused on fall.

17. The Hon"ble Apex Court in Richhpal Singh Meena Vs. Ghasi, has occasion to adjudicate and give the distinction between culpable homicide amounting to murder as well as culpable homicide not amounting to murder and after discussing the facts of the case coupled with the relevant decisions on this very score has concluded.

"Position of law

46. Having considered all the decisions cited before us (and perhaps there are many more on the subject but not cited), in our opinion, a five step inquiry is necessary : (i) Is there a homicide? (ii) If yes, is it a culpable homicide or a "not-culpable homicide"? (iii) If it is a culpable homicide, is the offence one of culpable homicide amounting to murder (Section 300 of the IPC) or is it a culpable homicide not amounting to murder (Section 304 of the IPC)? (iv) If it is a "not-culpable homicide" then a case under Section 304-A of the IPC is made out. (v) If it is not possible to identify the person who has committed the homicide, the provisions of Section 72 of the IPC may be invoked. Since this five-pronged exercise has apparently been missed out in the first category of decisions, learned Amicus was of the opinion that those decisions require re-consideration.

47. In our view none of the decisions require any reconsideration. The position in law is as we have culled out from the cases cited before us making it clear that in most cases the person who has committed homicide (culpable or not culpable) can be identified. But it is quite possible in some cases, such as in Ninaji Raoji Boudha and Another Vs. State of Maharashtra, and Ram Lal Vs. Delhi Administration, that conclusive or specific evidence is lacking to actually pin down the person who has committed homicide (culpable or not culpable). In such

case, the accused would have to be given the benefit of Section 72 of the IPC. Such cases arise if the investigation is defective or if the evidence is insufficient. But where it is possible to ascertain who is responsible for the homicide, the five-step inquiry can easily be carried out."

18. From the evidence available on the record, it is apparent that PW-1 as well as PW-3 in their examination-in-chief have categorically stated regarding assault as well as death of deceased Mahendra Sharma however during cross-examination, PW-1 while being cross-examined at the end of accused Pashupati Nath Jha @ Sona Babu had clearly stated that she had not seen occurrence while her brother as well as father were assaulted. She had also disclosed that as her father slipped, he sustained injury and on account thereof, was taken away to Hospital, however during course of examination at the end of Bikram Jha she had stated that Bikram Jha had not assaulted her. At the time when "Marpit" took place rain water was not there. She had further stated that "Marpit" took place on account of accumulation of rain water in front of her house.

19. In likewise manner PW-3 had stated regarding the occurrence during his examination-in-chief, however did not support the case of the prosecution during cross-examination save and except stating that only two persons at a time came at the place of occurrence. When the aforesaid evidence is taken together with the evidence of PW-11, the doctor, prima facie commission of an occurrence whereunder both the injured sustained injury is found fully proved. Apart from this, from the mode of cross-examination advanced on behalf of appellant, it is apparent that they have not challenged presence of injuries over the person of both the injured as well as regarding death of Mahendra Sharma at DMCH coupled with occurrence taken place at removal of water.

20. Defence is at liberty to cross-examine the witness by suggesting leading question. How far the impact of questionnaire in form of leading question and its relevancy is to be taken into consideration, that has already been decided by the Hon'ble Apex Court in Tarun Bora @ Alok Hazarika Vs. State of Assam, .

"16. In cross-examination the witness states as under:

"Accused-Tarun Bora did not blind my eyes nor he assaulted me."

17. This part of cross-examination is suggestive of the presence of accused-Tarun Bora in the whole episode. This will clearly suggest the presence of the accused-Tarun Bora as admitted. The only denial is the accused did not participate in blind-folding the eyes of the witness nor assaulted him."

21. Appreciation of evidence of hostile witness as well as its reliability to the extent of prosecution case has been taken into consideration and explained in Paulmeni and Another Vs. State of Tamil Nadu tr. Insp. of Police, .

"15. Paulmeni (PW. 2) has supported the case of the prosecution so far as the present appellants are concerned. He was declared hostile when he did not name the other accused, who stood acquitted by the courts below and there could be

no difficulty to accept his deposition to that extent.

16. This Court in *Ramesh Harijan Vs. State of U.P.*, while dealing with the issue held : (Para 18 of AIR, AIR SCW)

"It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof." [Vide *Bhagwan Singh Vs. The State of Haryana*, ; *Shri Rabindra Kumar Dey Vs. State of Orissa*, ; *Syad Akbar Vs. State of Karnataka*, ; and *Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh*, "

17. In *State of U.P. Vs. Ramesh Prasad Misra and another*, , this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon.

A similar view has been reiterated by this Court in *Sarvesh Narain Shukla Vs. Daroga Singh and Others*, ; *Subbu Singh Vs. State by Public Prosecutor*, ; *C. Muniappan and Others Vs. State of Tamil Nadu*, ; and *Himanshu @ Chintu Vs. State of NCT of Delhi*, .

Thus, the law can be summarized to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."

22. Admittedly, doctor who had conducted postmortem had not been examined and the postmortem has been exhibited in casual manner by PW-12, a formal witness. So far admissibility of postmortem report on account of non-examination of doctor is concerned, unless and until it satisfies the ingredients incorporated under Section 37(ii) of the Evidence Act, the same cannot be taken into consideration and for that purpose, the prosecution is under obligation to explain before the court by cogent evidence the reasons for non-presence of the doctor on account of his death, having abroad or his presence could not be procured without spending the time. While examining PW-12, the prosecution had failed to fulfill the aforesaid ingredients. At the other end, had simply notified that this postmortem report happens to be in pen of doctor and on account thereof, appreciation of postmortem report by the learned lower court while concluding and recording the finding of guilt against the appellants under Section 302 of the IPC de hors the legal mandate.

23. Investigating Officer also not been examined. The elementary rule commanding the situation where there happens to be non-examination of Investigating Officer speaks that due to non-examination if the defence is found prejudiced then in that case, defence has been en-heartened. So far instant case

is concerned, the defence had lost the opportunity to raise such plea on its own fault by way of cross-examining at least PW-1 as well as PW-3 relating to commission of the occurrence as well as P.O. Therefore, the non-examination of Investigating Officer is not found and held prejudicial to the interest of defence. However, due to non-examination of Investigating Officer the prosecution is found desert in bringing the previous statement of evidence of hostile witnesses legally on the record.

24. There happens to be delay of eleven days in recording fardbeyan of PW-3, Satya Narayan thakur. At an initial stage, the prosecution was suffering from some sort of infirmities regarding shifting of informant PW-3 as well as deceased Mahendra Sharma to the hospital because of the fact that in the fardbeyan of PW-3 had stated that they both were shifted to Madhubani and thereafter to Darbhanga. However, PW-1, the daughter, PW-2 the wife, PW-3 the son had consistently deposed that they were taken to Pandaul Hospital where they were examined and then were sifted to Madhubani and then to Darbhanga where deceased had gone treatment for eleven days and then succumb. The aforesaid fact is found further supported with the evidence of PW-11, doctor of Pandaul PHC who had examined PW-3 as well as deceased at first instance and then thereafter, he immediately directed shifting of deceased to Madhubani and thereafter taken to DMCH, Darbhanga. The Police Officer who had recorded fardbeyan of PW-3 has not been examined but by an exhibit of the fardbeyan which speaks about its recording at DMCH, Darbhanga followed with inquest report did satisfy presence of PW-3 as well as deceased Mahendra Sharma at DMCH, Darbhanga.

25. Prime duty of the people should be to provide medical aid to the injured in order to save his life than to chase and got the fardbeyan recorded and on account thereof, in case there happens to be concrete material available on the record that on account of such activities, delay has been caused, then in that event, the delay, whatsoever may be, did not axe upon the prosecution case.

26. In Jeewan and Others Vs. State of Uttarakhand, , it has been explained under para-30.

"30. Lastly, we should deal with the contention of the appellant dealing with the delay in institution of the FIR. Admittedly, the occurrence took place at about 10 p.m. on 12-3-1991 and the FIR was lodged on 13-3-1991 at about 8.45 a.m. There is some delay in lodging of the FIR, but this delay stands fully explained by the statement of the witnesses and the conduct of such witnesses. PW 1 is the author of the FIR. According to his statement, he had first taken the deceased to the hospital and he remained in the hospital and went to the police station in the morning hours of 13-3-1991. This conduct of PW 1 is natural. He is the brother of the deceased and was grieving the death of his brother. His priority would be to ensure that his brother gets the best of the medical aid at the earliest and then to look after him. There is some distance between the hospital and the place of occurrence and he remained in the hospital to look after his brother.

Unfortunately, his brother was declared dead."

27. After making overall analysis of the materials available on the record, it is apparent that defence by leading cross-examination had exposed themselves in vulnerable position whereunder they admitted an occurrence whereunder "Marpit" took place at their end upon PW-3 as well as deceased Mahendra Sharma. As stated above, when the aforesaid event is taken together with the evidence of PW-11, the doctor who had examined PW-3 as well as deceased Mahendra Sharma, it is apparent that PW-3 as well as deceased have sustained injuries on account of assault having made at the ends of accused including these two appellants though, PW-1 had stated Bikram Jha had not assaulted but is found completely ruined from subsequent cross-examination.

28. At the other end, apart from having shortfall in the prosecution case on account of insufficient materials regarding mode of assault leading to death of deceased Mahendra Sharma after eleven days on account of injuries whatever been sustained by the deceased, is further found disconnected as the doctor who had conducted postmortem has not been examined. On account of non-examination of doctor who held postmortem as well as the doctor who had treated the Mahendra Sharma at DMCH during course of his treatment completely vanished the major portion of evidence whereupon one could infer and conclude that the injuries whatever been inflicted during course of an occurrence as alleged by the prosecution happens to be the root cause of death of deceased Mahendra Sharma. As such, the finding of the learned lower court on this very score is found perverse.

29. Now coming to the other aspect, as discussed above it is apparent that PW-3 as well as deceased have sustained injuries on account of assault and for that these two appellants along with others (not on trial) were responsible. From the evidence of doctor PW-11, it is apparent that PW-3 had sustained simple injuries. In likewise manner the injuries over deceased was also observed simple save and except as the vomiting continued even after administering medicines where upon deceased was referred to Madhubani, and in the aforesaid background, the learned trial court had rightly convicted and sentenced both the appellants for an offence punishable under Section 323 of the I.P.C., the lesser offence than of 302 and happens to be permissible in accordance with Section 221(2) as well as Section 222 of the Cr.P.C.

30. Accordingly, both the appellants are found and held guiltily for an offence punishable under Section under Section 323 of the IPC and on that very score, the judgment of conviction recorded by the learned trial court is confirmed. In likewise manner, the sentence inflicted by the learned trial court against each of the appellant. The period of incarceration having been spent by each of the appellant will be set off while counting, calculating the period of incarceration. With the aforesaid modification, appeal is dismissed.

31. Appellant, Pashupati Nath Jha @ Sona Babu is under custody and so, the

learned lower court is directed to calculate the period of incarceration and will pass appropriate order on that very score in accordance with. Bail bond of appellant Bikram Jha is cancelled and is directed to surrender before the lower court. While remanding appellant, Bikram Jha to judicial custody to serve out the remaining part of sentence, the learned lower court will see the period already undergone by him.

V.N. Sinha, J.

I agree