

(2013) 07 PAT CK 0084

In the Patna High Court

Case No : Criminal Appeal (SJ) No. 106 of 2001

Pawan Kumar Rai, Birbal Rai and Vijay Kumar Rai

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 02-07-2013

Acts Referred:

Arms Act, 1959 — Section 27
Penal Code, 1860 (IPC) — Section 307, 448

Citation : (2014) 1 PLJR 152

Hon'ble Judges : Hemant Kumar Srivastava, J

Bench : Single Bench

Judgement

Hemant Kumar Srivastava, J.—This criminal appeal has been directed against the judgment of conviction and order of sentence dated 26.02.2001 passed by learned 2nd Additional Sessions Judge, Samastipur in Sessions Trial No. 174 of 1994/73 of 2000 by which and whereunder he convicted the appellant no. 1, namely, Pawan Kumar Rai for the offences punishable under Sections 448, 307 of the Indian Penal Code and 27 of the Arms Act whereas appellants no. 2 and 3, namely, Birbal Rai and Vijay Kumar Rai respectively were convicted for the offence punishable u/s 448 of the Indian Penal Code. By the same impugned judgment, learned 2nd Additional Sessions Judge, Samastipur acquitted the appellant no. 1 of the charges framed against him under Sections 323 and 324 of the Indian Penal Code and similarly, appellants no. 2 and 3 were acquitted of the charges framed against them under Sections 323, 324 and 307/34 of the Indian Penal Code. The appellant no. 1 was sentenced to undergo rigorous imprisonment for ten years for the offence punishable u/s 307 of the Indian Penal Code, to undergo rigorous imprisonment for three years for the offence punishable u/s 27 of the Arms Act and to undergo rigorous imprisonment for one year for the offence punishable u/s 448 of the Indian Penal Code. However, all the sentences were ordered to run concurrently. Appellants no. 2 and 3 were released u/s 4(i) of Probation of Offenders Act, 1958 on their entering into bonds with two sureties of the like amount each to appear and receive sentence when

they called upon during the period of one year and in the meantime to keep peace and be of good behaviour. In brief, the prosecution case, is that P.W. 5, Horil Rai gave his Ferdbeyan on 20.06.1993 at about 03:15 P.M. in injured condition to A.S.I., Kalyanpur police station to this effect that on the same day at about 02:00 P.M., he was taking meal at his Verandah. In the meantime, appellants having shared common intention came there and appellant Pawan Kumar Rai shot fire of his pistol which hit on the palm of his left hand as a result of which blood started oozing out from his palm and he sustained injury on his finger also. Having heard the sound of firing, his brother and his younger brother (P.W. 3) came there and saved him. He was brought to the State hospital, Kalyanpur where his treatment was done. He claimed that due to previous land dispute the appellants committed the above stated occurrence.

2. On the basis of aforesaid ferdbeyan, Kalyanpur P.S. Case No. 77 of 1993 under Sections 307, 323, 324 of the Indian Penal Code and 27 of the Arms Act was registered and on the same day, formal first information report for the above stated offences was drawn up against the appellants. Police started investigation and after completion of investigation, charge sheet under Sections 448, 323, 324, 307/34 of the Indian Penal Code and 27 of the Arms Act was submitted against the appellants. The cognizance of the offence was taken and the case was committed to the court of sessions, in usual way.

3. The appellants were put on trial and accordingly, they were jointly charged for the offences punishable under Sections 448, 323, 324, 307/34 of the Indian Penal Code whereas appellant no. 1, namely, Pawan Kumar Rai was separately charged for the offence punishable u/s 27 of the Arms Act. The appellants denied the charges and claimed to be tried.

4. In course of trial, prosecution examined, altogether, seven witnesses and besides it, prosecution also proved certain documents including the entry in injury register of Darbhanga Medical College Hospital, Darbhanga regarding the injuries of P.W. 5. The statements of appellants were recorded u/s 313 of the Cr. P.C. in which they reiterated their innocence and claimed their false implication. The defence also examined two witnesses to prove this fact that wall situated between the courtyard of P.W. 5 and appellant Pawan Kumar Rai was more than 10 feet in height at the time of alleged occurrence. Besides it, the certified copy of order sheet dated 16.03.1994 and 30.11.1999 passed in G.R. No. 537 of 1994/ Trial No. 24 of 1999 as Exhibit-A series and certified copy of order dated 13.01.1999 passed in Kalyanpur P.S. Case No. 07 of 1999 as Exhibit-B series were also adduced on behalf of the defence. From perusal of evidence adduced on behalf of the defence as well as trends of cross examination of prosecution witnesses, it appears that the defence of the appellants was total denial of prosecution story.

5. The learned trial court having analyzed the evidences available on the record convicted and sentenced the appellants in the manner as stated above.

6. Learned counsel appearing for the appellants challenged the impugned judgment of conviction and order of sentence arguing that no independent prosecution witness was examined on behalf of the prosecution in course of trial and the Investigating Officer was also not examined and non examination of the Investigating Officer has caused serious prejudice to the appellants. He further submitted that prosecution witnesses developed their statements in course of trial saying that appellants came in the courtyard of P.W. 5 scaling from the wall which was standing between the courtyards of the parties and in course of trial, D.W. 1 and D.W. 2 specifically stated that the height of aforesaid wall was more than ten feet and it was not possible to scale the aforesaid wall and therefore, the aforesaid fact makes the entire prosecution case improbable. He further submitted that there was land dispute between the parties and as a matter of fact, P.W. 5 was a man of criminal character and he got injury somewhere else but due to above stated land dispute, the P.W. 5 and his family members implicated the appellants in this case. He further submitted that the aforesaid submission is fortified because neither any blood nor any empty cartridge was found in the courtyard of P.W. 5. He further submitted that charges were not properly framed against the appellants and similarly, the statements u/s 313 of the Cr. P.C. were also not properly recorded and the aforesaid defects have caused serious prejudice to the appellants. In support of his contention, he referred a decision reported in 2011(I) BBCJ V-380 in which it has been held by the Division Bench of this Court that if the statement of accused is not recorded properly u/s 313 of the Cr. P.C. the entire trial of the aforesaid accused would be vitiated and would entitle the accused to acquittal in spite of the fact that the evidence or record appears complete and acceptable. He further submitted that P.W. 5 and appellants are full cousin brothers and according to prosecution case, the alleged occurrence took place in the year 1993 but now the circumstances have already been changed and both the parties have entered into compromise which is evident from I.A. No. 172 of 2013 and, therefore, in the aforesaid changed circumstance, it would not be desirable to send the appellants behind the bars and ends of justice will meet, if the appellant no. 1 is sentenced to period already undergone by him in course of trial as well as during pendency of this appeal in case the appellant no. 1 is found guilty for the above stated offences.

7. On the other hand, learned Additional Public Prosecutor supported the impugned judgment of conviction and order of sentence arguing that P.W. 5, injured of this case as well as other eye witnesses have supported the prosecution case and the statement of injured is corroborated by the doctors, who examined the P.W. 5 after the alleged occurrence and so far as non examination of Investigating Officer is concerned, the appellants could not succeed to point out as to how they were prejudiced due to non examination of Investigating Officer.

8. As I have already stated that, altogether, seven prosecution witnesses were examined on behalf of the prosecution, out of them P.W. 2, the mother of P.W. 5,

P.W. 3, the brother of P.W. 5, P.W. 4, the sister of P.W. 5 are said to be eye witness of the alleged occurrence. All the aforesaid witnesses claimed themselves to be eye witness and supported the version of P.W. 5. P.W. 6 is a doctor who examined P.W. 5 on 20.06.1993 at 03:00 PM. i.e. just after the alleged occurrence and proved the injury report as Exhibit-2. P.W. 7 is also a doctor who examined P.W. 5 when he was referred to Darbhanga Medical College Hospital, Darbhanga by P.W. 6. This witness proved the entry of injury register of Darbhanga Medical College Hospital, Darbhanga as Exhibit-3.

9. P.W. 5, the injured and informant of this case, stated that on 20.06.1993 at about 02:00 PM., he was taking meal at Verandah of his courtyard and in the meantime, appellants came there and at that time appellant no. 1 was carrying pistol whereas rest two appellants were carrying a bag. He further stated that all the appellants came after scaling the wall of his courtyard and appellant no. 1 opened fire which hit on his left hand. He further stated that he sustained injury on his hand and some front portion of his hand was chopped off. He further stated that his mother, sister, brother and father came there having heard the sound of firing and after that the appellants fled away from there after scaling the above stated wall. He further stated that he was taken to hospital and his statement was recorded by the police. He proved his signature on Ferdbeyan. He stated that appellants wanted to grab his land and that was the reason they committed the aforesaid occurrence. He also stated that he was referred to Darbhanga for better treatment and he got treatment for near about one month at Darbhanga. This witness admitted in his cross examination that appellants are his full cousin brothers but they were separate at the time of alleged occurrence. He also stated that there was some dispute between him and appellants due to one acre of land. He denied this fact that he had made statement before the police to this effect that appellants had grabbed his lands. At para 7 of his cross examination, this witness stated that there was a wall between his house as well as house of the appellants. At para 8 of his cross examination, he stated that the aforesaid wall was six feet in height. He denied this fact that the height of the aforesaid wall was at about ten feet. This witness also stated that his family members were present in the courtyard at the time of alleged occurrence. At para 11 of his cross examination, he admitted this fact that only appellant no. 1 shot fire on him and when he sustained injury, the appellants returned from there and they did not chase him. This witness denied the suggestion of the defence that he had sustained firearm injury somewhere else.

10. P.W. 6 stated that on 20.06.1993 at about 03:00 PM., he examined P.W. 5 and found lacerated wound auto amputated little finger of left hand and abrasion 1" in diameter in front of chest. This witness also stated that age of injury was within six hours and nature was grievous caused by firearms may be possible by bomb also. This witness also stated that he referred the P.W. 5 to Darbhanga Medical College Hospital, Darbhanga. In his cross examination at para 5, this witness stated that he prepared his report (Exhibit-2) on the basis of the report of Dr. Ram Narayan Jha of Darbhanga Medical College Hospital, Darbhanga.

11. P.W. 7, Dr. Ram Narayan Jha stated that on 20.06.1993, he examined P.W. 5 who had been referred from Kalyanpur hospital vide reference no. 103 E dated 20.06.1993 and found lacerated wound with auto amputated little finger of the left hand with bones and tissues of the palm fully exposed with profused bleeding from the wound and one abrasion 1" in diameter in front of the chest. This witness stated that the aforesaid injuries were within six hours and grievous in nature caused by firearm. This witness proved the injury register of Darbhanga Medical College Hospital, Darbhanga as Exhibit-3. He admitted this fact that there was some cutting in the aforesaid entry register but on the aforesaid cutting, there was initial signature.

12. According to P.W. 5, the alleged occurrence took place in his courtyard and except his family members no one was present in his courtyard at the time of alleged occurrence. The aforesaid statement of P.W. 5 appears to be quite natural because the occurrence is said to have taken place in the courtyard of P.W. 5 and, therefore, the presence of independent witnesses in the courtyard of P.W. 5 at the time of alleged occurrence was not possible and, therefore, even if no independent witness has come forward to support the prosecution case, then also, the prosecution case cannot be doubted only on the ground of non examination of independent witnesses.

13. According to ferdbeyan of informant (P.W. 5) while he was taking meal at his verandah, appellants came there and appellant no. 1 opened fire on him causing injury on his left hand. In course of trial, this witness stated that he was taking meal at verandah of his courtyard. It is well settled principle of law that ferdbeyan is not an encyclopedia and it is not necessary to give each and every detail in the ferdbeyan. Moreover, there is nothing in the deposition of prosecution witnesses to show that except the aforesaid verandah, there was any other verandah in the house of P.W. 5. Moreover, all the eye witnesses including P.W. 5 proved the place of occurrence as well as manner of occurrence and there is nothing in their depositions to disbelieve their testimonies.

14. No doubt, D.W. 2 stated that height of wall of courtyard of P.W. 5 was about ten feet but this witness is resident of another village though he claimed himself to be Purohit of both the parties and also claimed that he used to visit the house of P.W. 5. In my view, no reliance can safely be placed upon the deposition of D.W. 2.

15. Similarly, D.W. 1 also claimed that he used to visit the house of P.W. 5 but he could not say the exact height of the aforesaid wall.

16. As I have already discussed that the alleged occurrence took place on 20.06.1993 at 02:00 PM. and immediately P.W. 5 was brought to Kalyanpur Primary Health Centre where he was examined by P.W. 6, Mahesh Chandra Thakur on the same day at about 03:00 PM. i.e. just within an hour of the alleged occurrence and, thereafter, P.W. 5 was referred to Darbhanga Medical College Hospital where he was examined by P.W. 7 on the same day at about

06:00 PM. and both the doctors found firearm injury on the left hand of P.W. 5. Therefore, I am of the opinion that prosecution succeeded to prove this fact that on the alleged date of occurrence, appellants entered the house of P.W. 5 and appellant no. 1 shot fire causing firearm injury to P.W. 5 and in my view, the learned trial court rightly convicted the appellants for the offences as stated above.

17. So far as framing of charge against the appellants as well as recording their statements u/s 313 of the Cr. P.C. are concerned, all the appellants were charged for the offence punishable under Sections 448, 323, 324 and 307/34 of the Indian Penal Code and appellant no. 1 was separately charged for the offence punishable u/s 27 of the Arms Act. The charge u/s 307/34 of the Indian Penal Code has been framed in a manner as stated hereunder:-That you on or about the same day, same time and at same place you with common intention did an act namely shooting with such intention and under such circumstances that if by that act you have caused the death of informant Horil Roy you would have been guilty of murder and that you were when you committed the act aforesaid were liable to imprisonment for life and thereby committed an offence punishable u/s 307/34 of the Indian Penal Code. No doubt, no separate charge u/s 307 of the Indian Penal Code was framed against the appellant no. 1 but admittedly, appellant no. 1 was separately charged for the offence punishable u/s 27 of the Arms Act which reads as under:-That you on or about 20th day of June, 1993 at 2 PM. in village Singhia, P.S. Kalyanpur, District-Samastipur used the arm ammunition to wit informant Horil Roy in contravention of Section 5 of the Arms Act, 1959 and thereby committed an offence punishable u/s 27 of the said Arms Act, 1959. The object of explaining the charge to an accused is to give an opportunity to accused to understand as to for which offence he is being tried. The combined perusal of charges framed u/s 307/34 of the Indian Penal Code and 27 of the Arms Act shows that in both the charges it was explained to the appellant no. 1 that he along with other appellants entered the house of P.W. 5 and having shared common intention appellant no. 1 used firearm. Therefore, it appears to me that there was no confusion to appellant no. 1 to understand the fact as to for which offence he was being tried. So far as Statements recorded u/s 313 of the Cr. P.C. are concerned, it would appear from perusal of statement of appellant no. 1 recorded u/s 313 of the Cr. P.C. that the trial court put the manner of occurrence as well as weapon used in commission of the occurrence in the question before the appellant no. 1 in course of recording his statement u/s 313 of the Cr. P.C. and, therefore, in my view, the statement of appellant no. 1 was properly recorded u/s 313 of the Cr. P.C.

18. So far as decision reported in 2011(1) BBCJ V-380 Baleshwar Sah vs. State of Bihar is concerned, the fact of the aforesaid case was quite different because in the aforesaid case, in the format of charge, it was mentioned that the accused persons of the aforesaid case used dabia whereas in statement recorded u/s 313 of the Cr. P.C. it was placed before the accused persons that they had used lathi and bhala in commission of the occurrence and the description of dabia was

completely omitted but in the present case, the appellants were charged for having shared common intention and use of firearm and specific question regarding use of firearm was put before the appellant no. 1 in course of recording his statement u/s 313 of the Cr. P.C. Therefore, I am of the opinion that the above stated decision is not applicable in this case and the submission of learned counsel for the appellants in the above stated regard flats on ground.

19. It has been argued on behalf of the appellants that appellants and P.W. 5 are full cousin brothers and there was land dispute between both the parties but later on, both the parties resolved their dispute with happy note of compromise and, therefore, if the appellants are found guilty, a lenient view should be taken in awarding the sentence to them.

20. As I have already stated that appellants no. 2 and 3 have been released u/s 4(i) of Probation of Offenders Act, 1958 and, therefore, in my view, it is not desirable to interfere into the sentence of appellants no. 2 and 3 but so far as appellant no. 1 is concerned, he has been sentenced to undergo rigorous imprisonment for ten years u/s 307 of the Indian Penal Code, to undergo rigorous imprisonment for three years u/s 27 of the Arms Act and to undergo rigorous imprisonment for one year u/s 448 of the Indian Penal Code. The minimum punishment prescribed u/s 27 of the Arms Act is up to three years and the court cannot award the punishment u/s 27 of the Arms Act less than three years. Therefore, this Court feels difficulty to reduce the sentence awarded to appellant no. 1 u/s 27 of the Arms Act. So far as Section 307 of the Indian Penal Code is concerned, the aforesaid section says that whoever does any act with such intention or knowledge, and under such circumstances that, if by that act death caused, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. The second part of Section 307 of the Indian Penal Code says that if hurt is caused to any person by such act, the offender shall be liable either to [imprisonment for life], or to such punishment as is hereinbefore mentioned.

21. The bare perusal of Section 307 of the Indian Penal Code shows that if offender commits second part of offence of Section 307 of the Indian Penal Code, it is discretion of the Court either to award the offender imprisonment for life or to such punishment which has been mentioned in part one of Section 307 of the Indian Penal Code. Admittedly, first part of Section 307 of the Indian Penal Code says that the offender shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Therefore, even the offender commits second part of offence of Section 307 of the Indian Penal Code, the court can award him punishment for imprisonment of either description for a term which may extend to ten years.

22. In the present case, prosecution has succeeded to prove this fact that P.W. 5 had sustained firearm injury on his left palm and the aforesaid injury was grievous in nature but admittedly, the informant as well as appellants have already resolved their dispute with happy note of compromise and furthermore,

all the appellants are full cousin brothers of P.W. 5. Therefore, in the aforesaid circumstance, I am of the opinion that ends of justice will meet, if the sentence awarded to appellant no. 1 for the offence punishable u/s 307 of the Indian Penal Code is reduced up to three years and accordingly, the appellant no. 1 is sentenced to undergo rigorous imprisonment for three years for the offence punishable u/s 307 of the Indian Penal Code. So far the sentence awarded to the appellant no. 1 for the offence u/s 27 of the Arms Act is concerned, this court does not find any ground to interfere into the aforesaid sentence but so far the sentence awarded to appellant no. 1 for the offence u/s 448 of the Indian Penal Code is concerned, the same is reduced to the period already undergone by the appellant no. 1 in course of trial as well as during pendency of this appeal. It goes without saying that all the sentences of appellant no. 1 will run concurrently and the period already undergone by appellant no. 1 in course of trial as well as during pendency of this appeal, shall be set off against the terms of imprisonment imposed on him u/s 428 of the Cr. P.C. The learned 2nd Additional Sessions Judge has not imposed any fine upon the appellant no. 1 for the offence punishable u/s 307 of the Indian Penal Code whereas Section 307 of the Indian Penal Code mandates that not only sentence for imprisonment but fine shall also be imposed upon the accused and, therefore, rupees two thousand as fine is also imposed upon the appellant no. 1 for the offence punishable u/s 307 of the Indian Penal Code. On the basis of aforesaid discussions, this criminal appeal stands dismissed with modification in order of sentence in the manner as stated above. The appellant no. 1 is on bail. His bail bonds stand cancelled. He is directed to surrender before the court below within a month from today. If he fails to do so, the learned court below shall take the necessary step to procure the attendance of appellant no. 1 so that he could serve out his sentences.