
(2009) 03 JH CK 0116

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 330 of 2000

Prabhash Kumar Singh and Durga Prasad Singh @ Burhan Singh

APPELLANT

Vs

The State of Bihar (Now Jharkhand)

RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Arms Act, 1959 — Section 27

Penal Code, 1860 (IPC) — Section 109, 302, 34

Citation : (2009) 57 BLJR 1893 : (2009) CriLJ 3844 : (2010) 7 RCR(Criminal) 821

Hon'ble Judges : Prashant Kumar, J; Narendra Nath Tiwari, J

Bench : Division Bench

Advocate : J.P. Jha and Sanjay Kumar, for the Appellant; I.N. Gupta, APP, for the Respondent

Final Decision : Dismissed

Judgement

Prashant Kumar, J.—The present appeal has been filed by the appellants, namely, Prabhas Kumar Singh and Durga Prasad Singh @ Burhan Singh against the judgment of conviction and order of sentence dated 14.8.2000 and 21.8.2000 respectively passed by 1st Additional Sessions Judge, Bokaro at Chas in S.T. No. 15 of 1995 whereby and whereunder, the appellant No. 1 was convicted u/s 302 IPC whereas appellant No. 2 was convicted u/s 302 read with Section 109 of the IPC and both the appellants were sentenced to undergo imprisonment for life.

2. The case of prosecution in short as per the fardbeyan of Nun Chand Rewani (P.W. 3) is that in the night of 22.01.1993 at about 10 p.m. he along with deceased Ashok Rewani and Rupesh Kumar Rewani had gone to Mahuar Chowk on a Hero Honda motorcycle bearing registration No. BR20A-0182. It is further alleged that while they were standing there, appellant No. 2, Durga Prasad Singh @ Burhan Singh came and started abusing deceased Ashok Rewani. Whereupon deceased asked him as to why he was behaving in such manner. Whereupon the

appellant No. 2 became furious and called Prabhas and exhorted him to kill the deceased. It is further alleged that on the said call, appellant No. 1 came and he too abused the deceased. It is further alleged that again appellant No. 2 exhorted appellant No. 1 for killing the deceased, whereupon the appellant No. 1 took out a pistol from his waist and fired upon the deceased because of that the deceased received injuries on his left chest and fell on the ground. It is further alleged that Rupesh Rewani had tried to catch hold appellant No. 1 but he again made a fire and thereafter fled away towards the village. It is further stated that thereafter the informant (P.W. 3) and P.W. 1 (Rupesh Kumar Rewani) took the deceased to Bokaro General Hospital on motorcycle, where he had been declared dead by the doctor. It is also stated that, several time, prior to the said occurrence, the deceased had quarrel with the appellants.

3. On the basis of aforesaid fardbeyan, the police instituted Harla P.S. Case No. 10 of 1993 dated 23.01.1993 u/s 302/34 of the IPC and also u/s 27 of the Arms Act and took up investigation. It appears that after completing the investigation, police submitted charge sheet against the appellants under Sections 302/34 of the IPC. It then appears that learned CJM, Chas took cognizance of the offence and thereafter committed the same to the court of Sessions as the offence u/s 302 of the IPC is exclusively triable by the court of Sessions. It further appears that charges were framed against the appellants and thereafter the prosecution had examined altogether five witnesses in support of its case. Out of whom, P.W. 1, Rupesh Kumar Rewani, P.W. 3 Nun Chandra Rewani had claimed themselves to be the eye witnesses of the occurrence. P.W. 2 Ashirbad Rewani is the elder brother of deceased, P.W. 4 Indradeo Singh is the I.O. whereas P.W. 5, Dr. Satya Narain Lal had conducted the autopsy on the dead body of the deceased.

4. The prosecution had also brought on record fardbeyan (Ext.-1), FIR (Ext-2), Inquest Report (Ext-3) and P.M. report (Ext-4). It appears that the court below considering the evidence of P.W. 1 and 3 coupled with the medical evidence come to the conclusion that appellant No. 1 on being exhorted by appellant No. 2 had inflicted the fire arm injury on the chest of deceased Ashok Rewani and accordingly convicted and sentenced the appellants as stated above by the impugned judgment against that the present appeal has been filed.

5. Sri Jay Prakash Jha, the learned senior counsel appearing for the appellants has submitted that it is admitted position that there is prior enmity with the deceased and these appellants. He further submits that it is also an admitted position that the witnesses of fact, namely, P.W. 1, 2 and 3 are closely related with the deceased and therefore they are most interested in the prosecution case. It is then submitted that since no independent witnesses have been examined by the prosecution only on the basis of uncorroborated testimony of P.W. 1 and 3, the conviction of these appellants not warranted. It is further submitted that during the autopsy the doctor had found digested food in the stomach. It is further submitted that the doctor had also given opinion that food take 3 to 4 hours to pass from stomach and function of digestion ceases at the

time of death. It is further submitted that it has come in evidence of P.W. 1 and 3 that they had gone to the Mahuar More just after taking meal and then immediately the occurrence took place. In view of the aforesaid facts, it is submitted by Mr. Jha, learned Counsel for the appellants that the aforesaid finding of doctor goes to show that the deceased had died 4 to 5 hours after he took his meal. Accordingly, it is submitted that the time of death could not have been at 10 p.m. rather the same might have taken place at 5 to 6 p.m. Accordingly, it is submitted that evidence of P.W. 1 and 3 is not reliable; therefore, the same cannot become the basis for conviction of these appellants.

6. It is further submitted by learned Counsel for the appellants that admittedly the occurrence took place in the night but there is nothing on record to show that there was any source of identification. Accordingly, it is submitted that in the absence of any source of identification, the claim of P.W. 1 and 3 appears to be doubtful. It is further submitted that the I.O. had not found any blood on the place of occurrence, which also cast a serious doubt on prosecution case. It is further submitted that non-production of bullet/pellets in court also makes the case of prosecution doubtful. Accordingly, it is submitted that the prosecution have not been able to bring home the charges leveled against the appellants beyond the shadow of all reasonable doubts. Therefore, the impugned judgment of learned court below cannot be sustained in this appeal.

7. On the other hand, learned Additional P.P. submitted that it is well settled that only because the witnesses are related to each other, their evidence cannot be brushed aside. The law only demands that their evidences be scrutinized with all care and caution. It is submitted that the court below, keeping in view the aforesaid law, had carefully evaluated the evidence of P.W. 1 and 3 and come to the conclusion that their evidence is wholly reliable and acceptable. It is submitted that on careful scrutiny of the evidence of P.W. 1 and 3, it is clear that their statement is consistent with regard to the genesis of occurrence, manner of occurrence, place of occurrence and time of occurrence and during the cross examination the defence has not been able to elicit any material from their evidence on which their credibility can be impeached. It is further submitted that only because digested food was found in the stomach of deceased, it cannot be said that the occurrence took place on an earlier point of time than the time stated by the P.W. 1 and 3. It is submitted that as per the Medical Jurisprudence, the process of digestion in normal, healthy person may continue for a long time after death. It is submitted that admittedly in the instant case, the post mortem was conducted on 23.01.1993 at 11 a.m., thus might be, during that period the food consumed by the deceased have been digested. Thus, it is submitted that the aforesaid submission of learned Counsel for the appellants appears to be misconceived. It is further submitted that the doctor (P.W. 5) has found huge collection of blood and blood clots within the chest cavity. It is further submitted that it has come in evidence that deceased was immediately removed from the place of occurrence and taken to hospital on the motorcycle. It is also submitted that the occurrence took place on 21.1.1993 in the night at about 10.30 p.m.,

thus it is apparent that the occurrence took place during winter and therefore the deceased must have been wearing woolen cloths apart from other cloths. Accordingly, it is submitted that because of the aforesaid circumstances, the blood might not have fallen on the ground and because of that, the I.O. might not have been able to collect the same from the place of occurrence. Under the aforesaid circumstance, it cannot be said that the occurrence might have taken place at some other place and not at the place as claimed by the prosecution witnesses. It is then submitted that it has come in evidence of P.W. 1, 2, 3 and 4 that the occurrence took place in front of hotel of Krishna Rao. It is also submitted that at the time of occurrence, the deceased was taking tea. It has also come in evidence that at that time 5 to 6 persons were also taking tea in the said hotel, this shows that at the time of occurrence the hotel was open. It is submitted that the aforesaid circumstance shows that some light was burning in the hotel. Accordingly, it is submitted that since both the appellants are residing in the back of P.W. 1 and 3, therefore in the said light the appellants can easily be identified by P.W. 1 and 3. It is further submitted that lapses on the part of the prosecution in not producing the pellets in court have of no consequence in view of the fact that the direct evidence on the point of occurrence coupled with the medical evidence fully supports the case of prosecution. Accordingly, it is submitted that there is no illegality or irregularity in the judgment of court below which warrants any interference by this Court.

8. Having heard the submissions, I have carefully scrutinized the evidence available on record. P.W. 5 is the doctor who held autopsy on the dead body of deceased. From perusal of evidence of doctor, I find that he has found a lacerated wound on the left ventricle of heart he had also found wound of entrance on the left side of chest having its size 1/4"x1/4", however he did not find any wound of exit. The doctor has also found a projectile having its length of 1" in the right side of chest. He has found that the left lung was badly lacerated. He further found huge collection of blood and blood clots within the chest. The doctor had given opinion that the death has been caused due to haemorrhage and shock caused by bullet injury i.e. fire arm. He had also stated that he had handed over the projectile to the police. Thus, on the basis of evidence of P.W. 5 and also taking into account the inquest report, I find that the prosecution have been able to bring home that the deceased Ashok Rewani had died a homicidal death. The aforesaid position was also not challenged by the appellants by giving any suggestion to the doctor and/or to any other witnesses. Thus now the question arose for determination in this appeal is as to whether these appellants have any hand in the commission of present crime?

9. It is admitted position that to prove the charges leveled against the appellants, the prosecution had relied upon the ocular testimony of P.W. 1 and 3. It is also admitted position that P.W. 1 is the nephew of deceased whereas P.W. 3 is the maternal uncle of P.W. 1. It is also admitted position that P.W. 2 is the father of P.W. 1. Thus from the material available on record, it is clear that P.W. 1, 2 and 3 are the family members of deceased. Under the aforesaid

circumstance, the question arose as to whether because of the aforesaid reason, the evidence of P.W. 1, 2 and 3 can be thrown over board. Paragraph No. 7 of a recent judgment of Their Lordships of Supreme Court in Daulatram v. State of Chhattisgarh reported in 2009(1) J.L.J. 1 is the complete answer to the aforesaid question, which reads as under:

Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

10. Now, keeping in view the aforesaid law laid down by Their Lordships of Supreme Court, I am proceeding to scrutinize the evidence of P.W. 1 and 3 as to whether their evidence is cogent, credible and worth acceptable? From perusal of evidence of P.W. 1 and 3, I find that they have very consistently stated that on the date of occurrence i.e. 22.01.1993 at about 10 p.m. they along with deceased Ashok Rewani had gone to Mahuar Chowk on motorcycle. They have also stated that at Mahuar Chowk, they were standing in front of the hotel of Krishna Sao. They have further stated that during that period, appellant No. 2 came and started abusing the deceased Ashok Rewani. Both the witnesses had further stated that when the deceased forbid him from abusing, appellant No. 2 called appellant No. 1 and exhorted him to kill the deceased. Both the witnesses had further stated that on the said call appellant No. 1 arrived from a nearby shop and he too started abusing the deceased. The witnesses further deposed that appellant No. 2 again exhorted appellant No. 1 for killing the deceased whereupon the appellant No. 1 took out a pistol from his waist and fired on deceased due to that the deceased received fire arm injury on his left chest and fell on the ground. It appears that the defence had cross examined both the aforesaid witnesses at length. From perusal of the cross examination of these witnesses, I find that both the witnesses stood to the test of cross examination and the defence has not been able to elicit anything on which their evidences is liable to be discarded. The defence has not been able to bring anything on record to show that the aforesaid witnesses have any personal grudge to falsely implicate the appellants. Under the aforesaid circumstances, as the evidence of P.W. 1 and 3 are clear, cogent and consistent, therefore, their evidences is wholly acceptable. Thus, in view of the aforesaid law laid down by Their Lordships of Supreme Court (Supra), their evidences is not liable to be discarded only because they are family members of the deceased. Accordingly, I am of the view that the submission made by the learned Counsel for the appellants, in this

regard cannot be accepted.

11. So far the submission of learned Counsel for the appellants that the claim of identification made by P.W. 1 and 3 is doubtful, as there is no source of identification, is concerned it is stated that it has come in the evidence of P.W. 1 and 3 that at Mahuar Chowk they were standing in front of the hotel of Krishna Sao. These witnesses had also stated that at the time of occurrence the deceased was taking tea and at that time the workers of the tea shop were also doing their job. It has also come in the evidence that at the time of occurrence, 5 to 6 persons were also present in the tea shop and were taking tea. The aforesaid fact stated by the witnesses in cross examination goes to show that at the time of occurrence tea shop was open and therefore it can be presumed that there must be some light in the said shop. Witnesses had also stated that on the call given by appellant No. 2, appellant No. 1 arrived at the place of occurrence from a near by shop. This also shows that other shops near to the P.O. were also open. The I.O. who has inspected the place of occurrence had stated that near the place of occurrence other shops are also situated and the place of occurrence is at a close distance from road at Sector-IX of Bokaro Steel City. One can take judicial notice that in Bokaro Steel City, which is industrial town, electric lamps are lying installed on the road giving sufficient lights on the streets. It is admitted position that appellants and P.W. 1 and 3 are resident of same place and the house of appellants situates just behind the house of P.W. 1 and 3. Under the said circumstance, the parties are known to each other from before. It has also come in evidence that the occurrence took place from a distance of about 4 to 6 ft. Under the said circumstance even in a dim light, it is possible for P.W. 1 and 3 to identify the appellants. It has also come in evidence that before firing, appellants had abused the deceased from close range and during that period P.W. 1 & 3 were standing at that place itself. Thus they have sufficient time to identify the appellants even by their voice. Therefore, the submission made by the learned Counsel for the appellants does not inspire any confidence hence the same is rejected.

12. Now, coming to the next submission of learned Counsel for the appellant that the prosecution has failed to prove the time of occurrence, it is relevant to mention that it is true that doctor (P.W. 5) has found digested food in the stomach of deceased at the time of post mortem examination. It is also true that the doctor had stated at paragraph No. 9 of his deposition that the food takes 3 to 4 hours to pass from stomach. It is also true that P.W. 1 and 3 had stated in their deposition that they had gone to Mahuar More along with deceased just after taking meal. But only because of the aforesaid facts it cannot be field that the occurrence might have taken place much earlier than to the aforesaid time of occurrence as stated by P.W. 1 and 3. In *P. Venkaiah v. State of Andhra Pradesh* reported in AIR 1985 SC 715 it has been held by Hon'ble the Supreme Court that medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerized or mathematical fashion so as to be accurate to the last second.

13. In this regard following opinion of Modi's Medical Jurisprudence and Toxicology, 23rd Edition at page 450 is very relevant:

It must also be remembered that the process of digestion in normal, healthy persons may continue for a long time after death.

It has come in evidence that at the time of death, the deceased was aged about 28 years. Thus it is apparent that at that time deceased was a young man. It has also come in evidence that the post mortem was held on 23.1.1993 at 11 a.m. Under the aforesaid circumstance because the deceased was a normal young man of 28 years of age, digestion process might have been continuing after the death of the deceased till the period of post mortem and in that view of the matter only because digested food has been found in the stomach of deceased it cannot be held that the prosecution had failed to prove the time of occurrence that too in view of the cogent, clear and acceptable evidence of P.W. 1 and 3.

14. The submission of learned Counsel for the appellant that since the I.O. has not found any blood at the scene of occurrence therefore the prosecution had failed to prove the place of occurrence, is not acceptable in the facts of this case. P.W. 1 in paragraph No. 8 had clearly stated that no blood had fallen on the ground rather the blood was soaked in the cloth. The I.O. had also stated at paragraph No. 7 that at the time of inspection of place of occurrence he had not found any blood lying on the ground. It has also come in evidence that immediately after the occurrence the deceased was taken to Bokaro General Hospital on the motorcycle. The doctor had further found huge collection of blood and blood clots within the chest. In view of the aforesaid evidence, which has not been challenged by the defence, there is sufficient explanation on record to show as to why the blood was not found on the place of occurrence. The Hon'ble Supreme Court in Nirmal Singh and Another Vs. State of Bihar, has held "that in view of the explanation offered by the prosecution witnesses it appears probable that no blood had fallen on the ground at the place of occurrence and in any event, if some blood had fallen at the place of occurrence which the Investigating Officer failed to notice that by itself would not be fatal to the prosecution case." it is worth to mention that in that case (before Hon'ble Supreme Court) also the prosecution witnesses had given explanation that the blood was soaked in the cloth. In the instant case also P.W. 1 during cross examination has categorically stated that no blood had fallen on the ground rather the same was soaked in the cloth. Thus, in view of the aforesaid decision of Hon'ble the Supreme Court, the submission of learned Counsel for the appellants has of no help to the defence.

15. The last submission of learned Counsel for the appellants that the I.O. had not produced the pellet or projectile in court caused serious doubt in the case of prosecution, is also not worth acceptable. It has come in evidence of P.W. 5 that he has found a projectile having its length of 1" from the right side of the chest of the deceased. P.W. 5 had further deposed at paragraph 4 on his testimony that he had handed over the said projectile to the police. The I.O. (P.W. 4) has admitted in his evidence at paragraph No. 11 that the doctor had handed over

the pellet to him along with report which was recovered from the dead body. There is nothing in cross examination of P.W. 5 to disbelieve his aforesaid statement. In Ext.-4 (the Post Mortem Report) it is also mentioned that the projectile having its length of 1" was found in right side of the chest. In the said circumstance, non production of the said projectile in court by the prosecution though appears to be a lapse on its part, but, in my view, the aforesaid lapse on the part of prosecution would not have caused any prejudice to the accused persons because in the post mortem report as well as evidence of P.W. 5 it is clearly mentioned that such projectile was found in the right side of the chest of the deceased but in spite of that the same has not been challenged by the defence by giving any suggestion to P.W. 5 that no such projectile was found by him. Their Lordships of Supreme Court in Sukhdev Yadav and Others Vs. State of Bihar, has considered as to when the lapses do not affect the prosecution case and held at paragraph No. 15 as follows:

True, as noticed above, there are lapses, but the question that arises for consideration is whether any prejudice has been caused by reason of such a lapse; if the answer thereto is in the affirmative, obviously it will have a serious impact on the trial but if in the event, however, it is in the negative, no prejudice can be said to have been caused and correspondingly question of the trial being vitiated would not arise. The eye witnesses' account as available on record cannot but be termed to be trustworthy and by reason therefor, the lapses stand overshadowed by the testimony of the eyewitnesses. The observations above obtain support from the decision of this Court in Baaleshwar Mandal v. State of Bihar.

As I have already come to the conclusion that due to non production of pellet, no prejudice has been caused to the defence because the defence has not challenged the recovery of projectile by giving any suggestion to the doctor (P.W. 5). Thus in view of the aforesaid law laid down by Their Lordships of Supreme Court, the submission of learned Counsel for the appellants can not be accepted.

16. In view of the clear, cogent and consistent ocular version of P.W. 1 and 3 which find full corroboration from the evidence of doctor (P.W. 5), I am of the view that the learned court below has rightly convicted and sentenced the appellants by the impugned judgment and thus there is no illegality and/or irregularity in the judgment of learned court below which requires any interference by this Court.

17. In the result, this appeal fails and is accordingly, dismissed. It appears that appellant No. 2, namely, Durga Prasad Singh @ Burhan Singh is on bail, thus his bail bond is cancelled and he is directed to surrender within two weeks from today in the court below to serve out the sentence. In the event of his failure of doing so, the learned court below is directed to take all coercive steps for his appearance.