

(2011) 08 PAT CK 0001

In the Patna High Court

Case No : Criminal Appeal (DB) No. 210 of 2005

Prakash @ Jai Prakash Mahto and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 26-08-2011

Acts Referred:

Evidence Act, 1872 — Section 157

Penal Code, 1860 (IPC) — Section 149, 302

Citation : (2013) 1 PLJR 119

Hon'ble Judges : Sheema Ali Khan, J; Aditya Kr. Trivedi, J

Bench : Division Bench

Advocate : Rana Pratap Singh, Sumant Singh in Criminal Appeal DB Nos. 210 and 261, S. Ashfaque Ahmad, Rao Tundan Kumar Karmvir in 222 and Mr. Abhimanyu Sharma, Amicus Curiae in 409, for the Appellant; Ashwini Kumar Singh, for the Respondent

Final Decision : Allowed

Judgement

Sheema Ali Khan, J.—These four appeals arise out of the same judgment. Hence, they are being heard together and are being disposed of by this common judgment. In Criminal Appeal No. 201/2005, Prakash @ Prakash Mahto, Nato Mahto @ Ashok Kumar Mahto, Chhotelal Mahto and Suraji Mahto @ Suraj Mahto are the appellants. They have been convicted to undergo rigorous imprisonment for life under Sections 302/ 149 of the Penal Code.

2. In Criminal Appeal No. 222/2005, Bijoy Mahto, Anup Lai Mahto, Chokar Mahto and Chhanguri Mahto are the appellants. Out of the four appellants, Chokar Mahto and Chhanguri have been convicted u/s 302 of the Penal Code and sentenced to undergo rigorous imprisonment for life, whereas the other appellants have been convicted under Sections 302/ 149 of the Penal Code and sentenced to undergo rigorous imprisonment for life.

3. In Criminal Appeal No. 261/2005, Murlidhar Mahto @ Mahilal Mahto is the sole appellant who has been convicted u/s 302 of the Penal Code and sentenced to

undergo rigorous imprisonment for life.

4. in Criminal Appeal No. 409/2005, Phulo Mahto @ Phoolo Mahto, the sole appellant has been convicted and sentenced to undergo rigorous imprisonment for life u/s 302 of the Penal Code. All the aforesaid appellants have also been convicted under Sections 302/ 149 of the Penal Code in ST. No. 364/ 1992/Trial No. 55/2002 by the Additional Sessions Judge, FTC-V, Bhagalpur by judgment and order dated 26.2.2005.

5. Briefly stated the prosecution instituted on the basis of the fard-e-beyan of Shiv Narain Mahto on 28.5.1987 at 8 AM alleging therein, inter alia, that in the night of 27/28.5.1987 at about 10 P.M., he heard a sound coming from the house of his cousin brother Prakash Mahto. He went near the house of Prakash Mahto and from the wall of the house of Prakash Mahto, he claims to have seen and identified Suresh Mahto, Phulo Mahto. Satya Narain Mahto, Mahilal Mahto, Nato Mahto, Ganga Mahto who had surrounded Prakash Mahto. It is further alleged that Mahilal Mahto and Phulo Mahto were cutting the neck of Prakash Mahto with Hasuli. He says that he was able to identify the aforesaid persons by means of torch light. On witnessing this occurrence he left the place of occurrence and on his way he met Suresh Mahto who disclosed that he witnessed the murder of Banarsi Mahto and had identified Chokar Mahto, Anuplal Mahto, Mahilal Mahto, Baiju Mahto, Chhotelal Mahto. Prakash Mahto. Suraji Mahto, Babu Mahto, Bijoy Mahto, Chhanguri Mahto and Baldeo Ram who were allegedly present at the residence for the murder of Banarsi Mahto. It is specifically alleged that Suresh Mahto with Chokar Mahto, Anuplal Mahto, Mahilal Mahto and Baiju Mahto were cutting the neck of Banarsi Mahto. The informant and Suresh Mahto raised a hue and cry which led the accused to flee away from the place of occurrence. The informant did not go to the police station during the night out of fear. The fard-e-beyan was recorded in the next morning at 8 AM.

6. The motive for the said occurrence has been disclosed by the informant wherein he has stated that Sitaram Mahto and Ramdeo Mahto had been murdered a few days earlier and it is said that Banarsi Mahto was a witness in the said case. It is alleged that Banarsi Mahto was not inclined to favour the accused persons in the aforesaid murder case and as such this occurrence had taken place.

7. On the basis of the aforesaid fard-e-beyan, criminal investigation was set in motion. After the charges were framed, all the appellants were put on trial which ended in their conviction and sentence as afore said.

8. In order to establish its case, the prosecution has examined eight witnesses. Defence witnesses have also been examined to say that the involvement of the appellants is absolutely false. It is submitted that the motive for the occurrence cannot be proved, and that the identification of the appellants is doubtful. A defence has also been taken in this case that the evidence would reveal that there has been improvement and development in the manner of occurrence and in fact

the informant had not witnessed the occurrence and, therefore, his evidence should be struck down and not considered as reliable by this court.

9. PW-1 does not claim to be an eye witness of this case. He is a hearsay witness. PWs.-6, 7 and 8 have been declared hostile. PW-3 has proved the inquest report. PW-5 is the informant of the case whereas PW-4 claims that she had met some of the accused persons, while she was returning after attending a function in the village.

10. Thus this case hinges on the sole testimony of PW-5, the informant who claims to be eye witness of the occurrence. This court will, therefore, have to examine the evidence of this witness with care, keeping in mind that the I.O. of the case has not been examined and the question of identification of the accused is in dispute.

11. Dealing with the evidence that has been led in this case, the only eye witness PW-5, the informant of the case. The informant in his examination-in-chief has stated that in the night of the occurrence he saw Suresh Mahto, Satya Narain Mahto, Gangi Mahto, Nato Mahto and Phulo Mahto at the place of occurrence. He has given a go-by to the case in the First Information Report, wherein a specific allegation had been leveled against Mahilal Mahto and Phulo Mahto of assaulting Prakash Mahto. To support the case that he met Suresh Mahto, his uncle in the night of the occurrence who disclosed the names of Chokar Mahto, Chhanguri Mahto, Anuplal Mahto, Chhotelal Mahto, Baiju Mahto and Kalicharan Mahto as present at the house of Banarsi Mahto and had surrounded him being variously armed. Again the informant has given a go-by to the version as made out in the First Information Report, where specific allegation has been levelled against Chokar Mahto, Anuplal Mahto, Mahilal Mahto, Baiju Mahto and Chhotelal Mahto. In the cross-examination this witness has stated that there are several houses close to the place, where the occurrence had taken place. He admits that the torch by which he has identified the accused persons was not produced before the I.O. Regarding the motive of the occurrence he has stated that he does not know the name of the accused persons in the murder case of Sitaram Mahto and Ramdeo Mahto nor was he present when the said murder had taken place. He specifically states that he was living in Punjab when Sitaram and Ramdeo was killed. He came to know through his cousin and uncle that Banarsi Mahto had been threatened by the accused persons. This is basically the only evidence that has come during the examination of witnesses in this case. This witness has tried to give an explanation regarding non-production of the torch, by stating that it was a moonlit night and therefore he could identify the accused persons.

12. We would refer also to the evidence of PW-4 who is a widow and is related to one of the deceased i.e. Banarsi Mahto, who is said to be her uncle. She claims in her chief that she was returning after attending function in the village late in the night, when she met some persons (name not disclosed), on her way home, who told her not to go towards the place of occurrence. After some time she claims to have identified Chokar Mahto, Chhanguri Mahto, Anuplal Mahto, Pakul

Mahto and Ganga Mahto running away from the place of occurrence. Apart from the aforesaid facts, she has stated that Lattu Mahto was armed with a sickle. In the examination-in-chief she says that she is living at her in-laws' place and just near the house of Banarsi Mahto alongwith other family members.

13. The I.O. in this case has not been examined. The doctor has been examined as PW-2 who supports the fact that the neck of two deceased persons had been cut in the said injury, was responsible for their death."

14. This court finds that on the basis of the sole testimony of PW-5 who has given a go-by to the manner in which the occurrence took place, cannot be relied upon, for more than one reason. In the First Information Report specific allegation is made against two persons, whereas during evidence this part has been given a complete go-by. It is further highlighted on behalf of the appellant that Suresh Mahto has not been examined, for the reason, that he was not alive, by the time the trial commenced, therefore, apart from the evidence of PW-5, who is a hearsay witness as far as the death of Banarsi Mahto is concerned, this court cannot hold that the persons named by Suresh Mahto through PW-5 were actually present at the P.O. It has not been disclosed that in what manner Suresh Mahto could have identified the persons who allegedly surrounded Banarsi Mahto before killing him either in the FIR or in court. The fact that the I.O. has not been examined to support the investigation conducted by him indicating the place of occurrence, the circumstances and the manner in which the occurrence took place, prejudices the accused persons a great deal and as such the evidence of PW-5 becomes unreliable.

15. Apart from these facts, one of the glaring circumstances, which strikes this court is that, although two murders had taken place during the night, none of the villagers or the relatives of the deceased, who have their house adjacent to the house of the deceased were informed or gathered at the place of occurrence. This fact emerges on reading the evidence of PW-5. PW-5 states at paragraph 5 that near the house of Banarsi (deceased) there are 15 to 20 house. The house of Koie Lall, Kannu and Shivnandan is west to the house of the deceased Banarsi. She states at paragraph-13 that immediately after the occurrence Ganesh who is next door neighbor of Suresh came to the place of occurrence. Yet this fact is not mentioned in the FIR.

16. We would also like to state that the trial has been conducted in a very careless manner by the trial court. The post mortem, although exhibited, has not been signed by the presiding officer. However, since the order sheet indicates that the post mortem report was exhibited on 8.8.1994, the defect, if any, is cured by the recording of this fact in the order sheet.

17. It has been argued that the first Information Report has not been exhibited and as such the evidence of the informant PW-5 ought not to be considered. Reliance has been placed on a decision in the case of Damodarprasad Chandrikaprasad and Others Vs. State of Maharashtra, . In this case the

informant as well as the I.O. were not examined and the Apex Court came to the conclusion that the First Information Report is the piece of evidence for commencing the criminal prosecution and is a very strong corroborative evidence. Although the First Information Report is not a piece of substantive evidence, it can be used for the purpose of corroborating or contradicting the makers thereof. "Another purpose for which the First Information Report can be used is to show the implication of the accused to be not an afterthought or for that reason in formation is a piece of evidence resgestae". It, therefore, cannot be said to be admissible u/s 157 of the Evidence Act. In the present case the First Information Report was to be formally proved by the I.O. Due to the fact that the I.O. was not examined, it cannot be said that it would be fatal to the prosecution since the contents thereof have been accepted by PW-5 as discussed earlier.

18. This court doubts that the informant had actually seen the occurrence, due to the fact that the occurrence took place late at night, the torch which is the source of identification was not produced before the Investigating Officer.

19. The place of occurrence as described in the First Information Report indicated that the house of Prakash Mahto and Banarsi Mahto were at different places. The informant PW-5 lives in a separate house. He allegedly heard some sound of murmuring and thus went near the wall of the house of Prakash Mahto and saw one part of the occurrence as per the case made out in the First Information Report, which version he retracts in court. The informant has not been able to substantiate the motive for the occurrence as he claims that he was in Punjab and he thus has no knowledge regarding the genesis of occurrence.

20. Considering the entire gamut of the facts, this court concludes that the prosecution has not been able to prove its case beyond doubt that the appellants were responsible for the death of Prakash Mahto and Banarsi Mahto.

21. Accordingly, the impugned judgment and order of conviction and sentence is hereby set aside and the appeals are allowed. Appellants 3 and 4 namely, Chokar Mahto and Chhanguri Mahto of Cr. Appeal No. 222/2005 and appellant Phulo Mahto @ Phoolo Mahto of Cr. Appeal No. 409/ 2005 who are in custody are directed to be set at liberty forthwith if not wanted in any other case and the rest of the appellants in all the appeals who are on bail are discharged from the liabilities of their bail bonds.

Aditya Kumar Trivedi, J.

I agree.