

(2015) 10 PAT CK 0091

In the Patna High Court

Case No : Criminal Appeal (DB) Nos. 379 and 386 of 2012

Radhe Shyam Sahani and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 12-10-2015

Acts Referred:

Arms Act, 1959 — Section 27(1)
Penal Code, 1860 (IPC) — Section 120-B, 302

Citation : (2015) 10 PAT CK 0091

Hon'ble Judges : Anjana Prakash and Rajendra Kumar Mishra, JJ.

Bench : Division Bench

Advocate : Surendra Singh, Sr. Advocate and Madanjeet Kumar, Advocate, for the Appellant; S.N. Prasad, APP, for the Respondent

Final Decision : Allowed

Judgement

Anjana Prakash, J.

1. Both the Appellants have been convicted under Section(s) 302/120-B Indian Penal Code and sentenced to undergo rigorous imprisonment for life with fine of Rs. 5,000/- (five thousand). Further, Appellant Radheshyam Sahani has been convicted under Section 27(1) of the Arms Act and sentenced to undergo rigorous imprisonment for three years with fine of Rs. 1,000/- (one thousand). In default of payment of fine, they have to further undergo rigorous imprisonment for three months vide judgment and order of conviction dated 22.02.2012 and 29.02.2012 respectively passed by the 3rd Additional Sessions Judge, Bettiah, in Sessions Trial No. 203 of 2009 arising out of Bettiah Muffasil P.S. Case No. 156 of 2007.

2. The case of the prosecution, according to the Informant Rabindra Kumar Singh is that on 30.06.2007 he along with his brother-in-law Raghwendra Kumar Rai @ Pappu Rai was going to Bettiah on the motorcycle of the deceased, at about 8.00 AM, to attend a meeting. At around 9.00 AM, when they reached the main road of Nautan near the canal, suddenly one motorcycle overtook and intercepted

them. Thereafter, two other motorcycles arrived and parked themselves on both the sides. The person, who was driving the motorcycle whipped out a pistol at which the deceased said as to why Radheshyam was doing such a thing but the other person, who was sitting along him shot at him on account of which the deceased was injured. The miscreants thereafter threw a bomb, pellets of which hurt one Babloo Kumar (PW 17), a passerby on account of which he became injured. The deceased thereafter goes himself to the hospital where he was being treated. At the hospital, the deceased disclosed that Radheshyam Sahani had shot him but before he could utter the name of anybody else he became unconscious. He, therefore, alleged that the Appellant Radheshyam Sahani along with three unknown accused in conspiracy with each other had shot his brother-in-law.

3. It, thus, appears that Appellant Baban Ram @ Rajesh Ram is not named in the First Information Report.

4. During trial, the prosecution examined seventeen witness; PW 2 Nandu Nonia, PW 3 Manager Yadav, PW 4 Lalchand Choudhary, PW 5 Uma Shankar Choudhary, PW 6 Jalbojhi Mahto, PW 14 Ravindra Singh and PW 17 Bablu Kumar, have deposed as eye witnesses.

5. PW 7 Adhyanand Rai, PW 8 Kripa Sindhu Rai, PW 9 Pramod Rai, and PW 11 Shambhu Sharan Rai have deposed on the factum of oral dying declaration.

6. PW10 Jai Choudhary, PW 12 Ambika Choudhary and PW 13 Dina Nath Mukhiya have been declared hostile. PW 15 Zafar Javed Khan is the Investigating Officer, whereas, PW 16 Dr. Sarangdhar Jha was the Doctor, who held Post Mortem Examination and proved Ext. 6.

7. PW 1, Indrajeet Yadav, stated that about 9.00 AM when he was sitting in the temple suddenly he heard shots of gun fire at which he went to the place of occurrence and found an injured person having fallen from the motorcycle. Number of persons were there, who disclosed that the deceased was the Mukhiya of Dabariya Panchayat. He had seen two motorcycle borne miscreants whom he did not identify. He stated that he was not an eye witness to the occurrence nor anyone else disclosed the name of the miscreants. He asserted that the deceased was alone on the motorcycle and no one else was with him. He was also not in a position to speak.

8. PW 2, Nandu Nonia, stated that on the date of occurrence he was loading earth on the tractor when he heard gun shots. He went to the place of occurrence and he saw a person fallen from the motorcycle in an injured condition. Number of persons had gathered there, who took him to the hospital. Those present there disclosed that the injured was the Mukhiya of Dabariya Panchayat but neither he identified any accused nor did he learn names of any of them. He asserted that the deceased was going alone on the motorcycle and when he reached the place of occurrence he had already died. He had seen the persons, who were fleeing away on the motorcycle, but they were not present in

Court. He asserted that no co-villager or relatives of the deceased was present there.

9. PW 3, Manager Pathak, stated that he was sitting in the temple on the date of occurrence at about 9.00 AM, when he suddenly heard shots of gun firing. He then reached the place of occurrence where he found an injured person fallen on the ground. The persons, who had reached there before him disclosed that the deceased was the Mukhiya of Dabariya Panchayat and four persons had shot at him and fled away. He was in a position to identify them but could not disclose their names. He ruled out the complicity of the Appellants, who were present in the dock. He also stated that the deceased was all alone and none of his relatives were with him. People were saying that the Mukhiya was dead and he did not find any life in him. No one had disclosed the name of any of the accused persons there.

10. PW 4, Lal Chand Choudhary, also stated that on the date of occurrence he was near the place of occurrence and on hearing gun shots he had gone there, where he found two motorcycles borne four miscreants having shot at the Mukhiya. He stated that he was in a position to identify the accused, who were not present in the dock. He also stated that he was never called for Test Identification Parade and that the deceased was already dead and that none from the family of the deceased was present there. The village of the deceased was about 15 KM south from the place of occurrence.

11. PW 5, Uma Shankar Choudhary, stated that on the date of occurrence he was going along with Ambika Choudhary on the motorcycle when he saw the shooting and the deceased having fallen down with gun shot injuries on stomach. Who shot him, he did not see. He asserted that the deceased had died. In cross-examination, he stated that the deceased was all alone and it was the local public, which had taken the deceased to the hospital, and none had disclosed the name of anyone in the crowd. He had seen the deceased going on motorcycle and he was known to him from before.

12. PW 6, Jalbojhi Mahto, stated that on the date of occurrence he was fishing when he heard shots of gun fire, so, he rushed towards the place of occurrence. He then saw a person having sustained gun shot injuries and the people gathered there who were saying that he was a Mukhiya. He was then taken to the hospital. He learnt that two motorcycle borne miscreants had shot at him. He has been declared hostile on the point that he had heard the name of Radheshyam having been disclosed by someone. He stated that the deceased was not in a position to speak since he had lost lot of blood.

13. PW 10, Jai Choudhary, is said to have arrived at the place of occurrence after the same. He has been declared hostile on the point of enmity between the deceased and his cousin Anil Rai and that Radhey Shyam Sahani was a rival candidate of Pappu Rai in the Mukhiya election on account of which it was suspected that he had engineered this occurrence.

14. PW 12, Ambika Choudhary is the next hostile witness but only on speculation of involvement of present Appellants and Anil Rai. Similarly, PW 13, Dina Nath Mukhiya has also been declared hostile on the same point as PW 12.

15. PW 14, Rabindra Singh, the Informant is the next eye witness, who stated that at about 9.00 AM while he and his brother-in-law Raghwendra Rai @ Pappu Rai were going to Bettiah to attend a meeting suddenly one motorcycle intercepted them and two other motorcycles came and stood by their side. One of the miscreants pulled out arms from a bag and shot at his brother-in-law, whereas, another miscreant whipped out a pistol from his waist and fired at the deceased due to which he became injured. The deceased himself drove the motorcycle to the hospital where rest of the relatives came. While he was being prepared for operation, the deceased disclosed that Radheshyam Sahani had shot at him. He was, thereafter, taken to the Operation Theater where unfortunately he died. The Informant stated that he could identify the persons, who had committed the act and identified the two Appellants. In cross-examination, he stated that a cousin brother of the deceased Anil Rai used to deal with counterfeit notes and he had been arrested by the police, so, he used to suspect that, in fact, it was at the dictates of the deceased that he had been arrested and on this account they were not on talking terms and he had been hostile towards the deceased. In further cross-examination, he stated about the antecedents of the deceased, his father as also himself. His attention was drawn to the earlier statement in regard to having said that the deceased had become unconscious before he could disclose any names as also that none of the villagers disclosed the name of the miscreants. He stated that even after having been shot at, Pappu Rai did not leave the handle of the motorcycle nor was he given any first aid. He drove the motorcycle even while he was bleeding. The hospital was about one kilometer from the place of occurrence and the entire motorcycle was blood soaked. He stated that the police did not record any statement of the deceased.

16. PW 17, Babloo Kumar, stated that on the date of occurrence while he was going on the road he heard gun shots at which he reached there and saw the injured having fallen on the ground. He had seen the miscreants fleeing away. He himself was injured on account of bomb having been blasted there by the accused. He ruled out the presence of the accused, who were in the dock, and stated that he and the deceased had been taken to the hospital for treatment. Later, he learnt that the deceased was Mukhiya of Dabariya Panchayat. He also stated that the deceased had become unconscious after having sustained fire arm injury and none of his relatives were present when he was being taken to the hospital. It was his co-villagers, who had taken the deceased to the hospital. Till such time he had been taken for operation, none of the family members had come there. He further stated that it had taken 1/2 hour for them to reach the hospital from the place of occurrence.

17. PW 7, Adhyanand Rai, father of deceased, stated that on hearing about the

occurrence he went to the hospital where on asking the deceased disclosed that the Appellants had shot at him. He conceded that he had not been examined during investigation on account of which we do not think it prudent to rely on his statement.

18. PW 8, Kripa Sindhu Rai, who is the uncle of the deceased states that he had gone to the hospital with PW 7 where the deceased gave a detailed statement as to how he had been shot at. However, he appears to have been examined after 15-20 days and hence we do not think it safe to rely on him.

19. PW 9, Pramod Rai, is the brother of the deceased, who is said to have gone to the hospital and repeats the oral dying declaration. He stated that while he was at the local college at 10.00 AM, he had received information about the occurrence and had gone to the hospital. His attention was drawn to the earlier statement to the effect that he had learnt that someone had shot his brother.

20. PW 11, Shambhu Sharan Rai, cousin uncle is the next witness on the oral dying declaration. He has stated about the earlier threat by the Appellant Baban Ram. He concedes that he was examined 10 days after the occurrence and thus, we are inclined to reject his evidence.

21. From the evidence discussed above, it appears that there are two types of evidence in the present case: (i) direct by way of PWs 2, 3, 4, 5, 6, 14 and 17, (ii) oral dying declaration by way of evidence of PWs 7, 8, 9, and 11. However, none of the eye witnesses have named or identified the Appellants except PW 14, who identified the Appellants in Court. When we test his evidence, we find that as against him, the earlier witnesses, who were examined i.e. PW 2, 3, 4, 5, 6, when specifically asked as to whether they identified the Appellants present in Court being involved in the occurrence, they denied to do so.

22. In such circumstances, when there is sole evidence on the point of identification, we would like to test the same on the anvil of objective evidence. We find that PW 14 had disclosed in the First Information Report that the name of the Appellant Radhe Shyam Sahani was uttered when he was confronted by the deceased, but he gives a complete go by to that part of the prosecution story in his examination-in-chief in the Court. His presence at the place of occurrence also appears to be doubtful in view of the consistent evidence of the independent witnesses that none of the family members of the deceased was present when the occurrence took place on account of which it was the co-villagers, who had picked up the deceased and taken him to the hospital. Also PW 14 gives an absurd statement that the deceased had himself driven up to the hospital which was 1 KM from the place of occurrence which does not seem probable in view of nature of injuries which was sustained by him. Also, when the Appellants were all along present in Court when the earlier witnesses were being examined, their identification in Court by the Informant, who was examined subsequently, does not inspire confidence to the hilt. Hence, his evidence is rejected.

23. As for oral dying declaration, we find that father and the two brothers and uncle who were examined after an undue delay have stated that the deceased had disclosed the name of both the Appellants in the hospital. However, we find that in the First Information Report only the name of Appellant Radhey Shyam Sahani is mentioned as having been disclosed in the oral dying declaration. Moreover, we find the consistent evidence of the independent eye witnesses is that the deceased lost consciousness as soon as he was shot at. Further, PW 8 has stated that when the deceased disclosed names of the Appellants, the police had arrived there. He stated police was there at 9.55 A.M. i.e. even before the fard-e-beyan was recorded. There is no explanation as to why the statement of the deceased was not recorded in such circumstances if he was conscious and able to speak. In fact, the Investigating Officer, PW 15, has stated that he had noted in the Case Diary that the deceased was unconscious. The Doctor on looking to the injury has also stated that death would have been caused instantaneously in the nature of injury sustained by the deceased. In such circumstances, we are also not inclined to give any credence to the oral dying declaration.

24. Since apart from the above two circumstances, there is no other material which the prosecution has brought on record during trial and both of them have been rejected for the reasons aforesaid, we allow both the appeals. The impugned judgment and order of conviction passed by the Court below is hereby set aside and the Appellants are acquitted of their respective Charges.

25. Appellant, Radhey Shyam Sahani, who is in jail, is directed to be released forthwith if not wanted in any other case. Appellant, Baban Ram @ Rajesh Ram, who is on bail, is discharged from the liabilities of his bail bond.

26. In the result, both the appeals are allowed.