

(2016) 08 PAT CK 0097

In the Patna High Court

Case No : Criminal Appeal (DB) No. 967 of 2013, (Arising Out of PS.Case No. - 105 Year - 2001 Thana - Danarua District - Patna).

**Raj Ballabh Bind, S/O Late Nandu Bind, R/O Village - Barbigha
Moriyama, P.S. - Dhanarua, District-Patna - Appellant @HASH The State
of Bihar**

Date of Decision : 03-08-2016

Acts Referred:

Arms Act, 1959 — Section 27

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

Citation : (2016) 4 ECRC 394 : (2017) 1 PCCR 303

Hon'ble Judges : Samarendra Pratap Singh and Rajendra Kumar Mishra, JJ.

Bench : Division Bench

Advocate : Mr. Janardan Prasad Singh, Sr. Advocate, Mr. Rakesh Kumar, and Mr. Satyeshwar Prasad, Advocates, for the Appellant; Mr. S.C. Mishra, A.P.P, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Samarendra Pratap Singh, J. (Oral)—All the five appeals arise out of a common judgment of conviction, dated 01.10.2013 and order of sentence, dated 03.10.2013, passed by the Additional Sessions Judge-II, Patna, in Sessions Trial No. 1007 of 2003, arising out of Dhanarua P.S. Case No. 105 of 2001.

2. By the aforesaid judgment, Appellant, Ramesh Bind @ Jogi, was convicted under Section 302 IPC and Section 27 of the Arms Act, whereas, the rest of the Appellants were convicted under Section 302/149 IPC. For the offence under Section 302 IPC, the Appellant Ramesh Bind @ Jogi was sentenced R.I. for life and a fine of Rs. 20,000/- and in default in payment of fine, further to undergo S.I. for 4 months. For the offence under Section 27 of the Arms Act, he was sentenced R.I. for 7 years with a fine of Rs. 5,000/- and in default in payment of fine, he was further to undergo S.I. for 1 month. The rest of the Appellants, for the offence under Section 302/149 IPC, was sentenced to life imprisonment with a fine of Rs. 5,000/- each and in default of payment of fine, further to undergo one month's S.I. However, in all the cases, the sentences were directed to be

run concurrently.

3. The prosecution case, as set out in the fardbeyan of the informant, Akhilesh Bind (PW-8), is that on 11.07.2011 at about 04:00 p.m., the informant was on the roof of his house along with his children, Rita Kumari, aged about 13 years, (PW-5); Rinku Kumari, aged about 5 years (not examined); and Jitendra Kumar, aged about 11 years (not examined). His wife, deceased Lalti Devi, was sitting at the door of the house. At the relevant time, the accused persons named in the F.I.R, armed with riffle and guns, arrived and surrounded his house. Thereafter, Ramesh Bind, pointing his riffle at the head of his wife, asked her to call her husband and child, otherwise, he would kill her. Thereafter, the informant came down along with his children in the courtyard. In the meantime, Krishna Bind and Kamlesh Bind entered into the house. Krishna Bind, on the point of riffle, caught him as well as his children, whereas, Kamlesh Bind started looting household articles and lifted the box of his wife and began to move away.

Thereupon, his wife obstructed Kamlesh Bind from taking the box, upon which, Gorakh Bind ordered that this woman would not relevant unless and until she is killed. Upon instigation of Gorakh Bind, Ramesh Bind fired at his wife with his riffle, which hit her left pakhura, on account of which, she fell at her darwaja. In the meantime, on hearing hulla, co-villagers, Ram Ishwar Bind (PW- 7), Mithilesh Bind (PW-1), Ram Babu Bind (PW-2), Mahendra Bind (PW-6), Shivendra Bind (not examined), Bimlesh Bind (PW-4) and others came there, by which time, the accused persons fled away. Thereafter, the informant along with others took his wife for treatment to Dhanarua Hospital, however, she died in the way. The cause of occurrence is the personal dispute between the informant and the accused persons, on account of which, they killed his wife.

4. Prosecution examined altogether 10 witnesses in support of his case. Out of these 10 witnesses, PW-1, Mithilesh Bind; PW-2, Ram Babu Bind; and PW-4, Bimlesh Bind, came at the place of occurrence, after hearing the sound of firing. P.W. 3, Ram Prasad Bind, is the father of the informant, whereas, P.W. 5, Rita Devi is the daughter of the Informant and P.W. 7 is the uncle of the informant. P.W. 9, Dr. Arun Kumar Singh, conducted the post mortem of the dead body of the deceased, whereas, P.W. 10, Ramesh Kumar Mishra, is the I.O. of the case, who also recorded the statements of the witnesses.

5. PW-1, Mithilesh Bind, is a hearsay witness. He stated that the occurrence took place on 11.07.2001 at about 04:00 p.m. At the relevant time, he was working in the field and upon hearing hulla and the sound of firing, he came to the house of Akhilesh Bind (PW-8). On reaching his house, he saw, Lalti Devi in injured condition, lying on the ground, near the door. He stated that informant, who is his cousin, informed that the accused persons, total 13 in numbers, entered into his house and caught Lalti Devi and compelled her to call her husband from the roof. As soon as, the informant came from the roof, he was taken into custody by the accused persons. When one of the accused, Kamlesh Bind, tried to take her box, his wife, Lalti Devi, obstructed him. Thereupon, accused Gorakh Bind

instigated that unless and until she is not assaulted, she would not allow them to carry the box. Thereafter, Ramesh Bind fired at her left pakhura and she fell down at the door. While being taken to the hospital, she died on the way. In his cross-examination, his attention was drawn that he did not state before the Police that informant narrated the incident to him.

6. PW-2, Ram Babu Bind, has given similar statement. He stated that the occurrence took place on 11.07.2001 at about 04:00 p.m. At the relevant time, he too was working in his field. About 10 to 12 accused persons armed with riffle and guns surrounded the house of the informant, Akhilesh Bind (PW-8). On hearing hulla, he reached there. As soon as he arrived at his house, he saw the wife of the informant, Lalti Devi, lying on the ground in injured condition. He further stated that he had not seen anyone opening fire. However, he saw Kamlesh Bind moving with a box. He saw other accused persons also fleeing away from the place of occurrence. On inquiry, Akhilesh Bind narrated him the entire incident. His attention too was drawn to his statement before the Police, wherein, he did not state that Akhilesh Bind (PW-8) narrated the incident to him.

7. PW-3, Ram Prasad Bind, is the father of the informant, Akhilesh Bind (PW-8). He stated that the occurrence took place about four years back. At the relevant time, he was also present in his house. He saw Ramesh Bind @ Jogi, Krishna Bind and Kamlesh Bind, entering into his at about 05:00 p.m. One Krishna Bind had taken Akhilesh Bind into his custody on the point of riffle. Kamlesh Bind lifted a box from his house. When his daughter-in-law, Lalti Devi, made a protest, accused Gorakh Bind instigated Ramesh Bind to kill her, upon which, Ramesh Bind fired at her from his riffle causing injury at her left pakhura. Consequently, she fell at the door of the house. Thereafter, he raised hulla. On the hearing the sound of firing, the villagers also arrived at the place of occurrence. Thereafter, Lalti Devi was taken to hospital with the help of others. In his cross-examination, he stated that the accused persons Rampati and Ram Ratan are own brothers. He further stated that Rampati had four sons, namely, Samu Bind, Nandu Bind, Rameshar Bind and Gorakh Bind. From the evidence of this witness, it appears that the prosecution side and accused sides are own agnates. It is also relevant to point out here that this witness has named only three accused Kamlesh Bind, Krishna Bind and Ramesh Bind @ Jogi.

8. PW-4, Bimlesh Bind, stated that the occurrence took place on 11.07.2001 at about 04:00 p.m. His statement too is similar to that of PW-1 and 2. He stated that at the relevant time, he was working in his field. On hearing sound of firing, he proceeded towards the house of the informant. On reaching there, he saw 12 to 13 accused armed with riffle and guns fleeing away from the house of the informant. He saw the wife of the informant lying on the ground having sustained fire arm injury. On inquiry, the informant Akhilesh Bind, narrated the entire story.

9. PW-5, Rita Devi, is the daughter of the informant, Akhilesh Bind (PW-8). She stated that incident took place 6 years back at about 05:00 to 05:30 p.m. At the relevant time, she was along with her father and brothers on the roof of the

house. Her mother was sitting at the door of the house. In the meantime, the accused persons named in the F.I.R., came to her house. Ramesh Bind told her mother to call her husband (informant). Thereupon, her father came down from the roof into the courtyard. Krishna Bind pointed pistol at his father, whereas, Kamlesh Bind took out box from the roof, upon which, her mother protested. On the order of Gorakh Bind, Ramesh Bind fired at her mother causing injury on her left pakhura, whereupon, her mother fell on the ground. On hearing hulla, the villagers gathered and took her mother to hospital for treatment, but she died on the way. In her cross-examination, she stated that her father came down from the roof with the help of bamboo ladder. Thereafter, on hearing sound of firing and hearing hulla, she too came down in the courtyard. She saw her mother having sustained fire arm injury and was lying at the door of the house. From the evidence of this witness, it would appear that she is not the eye witness of the assault on her mother.

10. PW-6, Mahendra Bind, is a co-villager and his version is similar to PW-1 and PW-2. He stated that the incident took place on 12.07.2001 at about 04:00 p.m. At the relevant time, he was working in his field. He stated that on hearing hulla, he came to the house of Lalti Devi. On reaching the house, he saw Krishna Bind, having taken custody of Akhilesh Bind. Kamlesh Bind was moving out after taking a box from the house, to which, Lalti Devi protested. On the order of Gorakh Bind, Ramesh Bind @ Jogi, fired from his riffle causing fire arm injury on the left pakhura of Lalti Devi, who fell down. In the meantime, 5 to 7 persons also came to the place of occurrence. According to him, cause of occurrence is land disputes between the parties. A panchayati was held but the accused persons did not obey the order of the panchayati. In his cross-examination, he stated that his evidence was recorded by the Police after 10 days. From the evidence of this witness, it would appear that he is not an eye witness of the occurrence and his statement was recorded after 10 days of occurrence. We are thus of the view that this statement would not have any credence.

11. P.W. 7, Ram Ishwar Bind, stated that he is the uncle of the informant (PW-8). He stated that at the time of occurrence, he was working in his field. On hearing hulla, he saw the accused persons having surrounded the house of the informant, Akhilesh Bind. They were armed with riffle and revolver. Lalti Devi obstructed Kamlesh Bind, who was carrying a box from her house. On instigation of Gorakh Bind, Ramesh Bind fired at Lalti Devi causing injury on her left pakhura. She fell on the ground and she was carried to the hospital but unfortunately, she died on the way. In his cross-examination, he stated there are land dispute between the parties. He further stated that while he was working in the field, had not heard the sound of firing.

12. PW-8, Akhilesh Bind, is the informant of the case. In his evidence, he has supported the prosecution case. He stated that occurrence took place on 11.07.2001 at about 04:00 pm. At the relevant time, he was on the roof of his house along with his children, Jitendra Kumar (not examined), Rita Devi (PW-3)

and Rinku Devi (not examined). At the relevant time, her wife, Lalti Devi, was sitting at the door of his house. At that time, accused persons, named in the F.I.R., armed with various weapons, came there. Ramesh Bind while pointing revolver at the head of his wife, asked her to call her husband, thereupon, the informant along with his children came down in the courtyard. In the meantime, Krishna Bind and Kamlesh Bind entered into the house. Krishna Bind had taken him and his children into his custody. Kamlesh Bind entered into one of the rooms and took the box of his wife. When his wife protested, Gorakh Bind instigated Ramesh Bind to shoot her. Thereupon, on the instigation of Gorakh Bind, Ramesh Bind opened fire at his wife which her left pakhura. Consequently, his wife fell on the ground. On hearing hulla, Ram Babu Bind, Narayan Bind, Rameshwar Bind, Mahendra Bind, Shivendra Bind and Mithilesh Bind, arrived. On seeing them, the accused persons fled away. Thereafter, with the help of others, he carried his wife for treatment to Dhanarua hospital. However, she died on the way. Thereafter, he took his deceased wife to the Police Station. Some co-villagers had also accompanied him to the Police Station. The cause of occurrence is attributed due to old enmity. Her statement was recorded by Daroga Ji and finding the same as true, he put his signature on it, which was marked as Ext.-2. He claims to have recognised all the accused persons who were present in the dock. In his cross-examination, he admitted that he had not filed any application for adding the allegation of theft against the accused persons. He also admitted that prior to the present incident, no other incident took place in between him and the accused persons.

13. PW-9, Dr. Arun Kumar Singh, held the post mortem of the dead body of deceased, Lalti Devi on 12.07.2001 at 10:45 a.m. The following ante mortem external and internal injuries were found on dead body:-

- i) One entry of 2 & 1/2" x 2 inch on upper part of left arm at 2 and 1/2" below from left shoulder tip and 6 and 1/2" above the left elbow.
- ii) On dissection blood was found in the chest cavity. Left Hummerous bone was found fractured on upper part. Left fifth rib was found fractured entirely. Left lung heart and diaform was found lacerated. Blood was found in the abdomen cavity. Stomach, liver and gut were found lacertated. Stomach contained about 200 gram semi digested food material. One metallic bullet was found in small gut. Utrus was found normal and non-pregnant. In general all vescera were found pale.

The doctor found fire arm injuries on her person. According to him, cause of death was due to hemorrhage and shock. The post mortem report was exhibited as Ext. 3.

14. PW-10, Ramesh Kumar Mishra, was the Investigating Officer of the case. He stated that on 11.07.2001, he was posted at Dhanarua Police Station as Sub-Inspector of Police. On the instructions of the Officer Incharge of the said Police Station, he made the investigation of the instant case namely, Dhanarua P.S.

Case No. 105 of 2001. Earlier, he had recorded the fardbeyan of the informant, which is already proved and marked as Ext.2. He proved the F.I.R. as well as the inquest report, which are marked as Ext. 4 and 5 respectively. In course of investigation, he had visited the place of occurrence. He gave the detailed account of the place of occurrence. He stated that Lalti Devi, after sustaining fire arm injury, fell at the door of the house. In his cross-examination, he submitted that he has recorded the statements of the witnesses and after collecting the post mortem report, submitted the charge-sheet. In his cross-examination he has also stated that PW-1 and 2 has not stated before him that PW-8, Akhilesh Bind, had narrated the incident to them.

15. Mr. Krishna Prasad Singh, learned Senior Counsel appearing for the Appellant, Ramesh Bind, submitted that it would appear from the evidence of the witnesses that one of the accused persons pointed riffle on the head of the deceased Lalti Devi and asked her to call her husband. Thereupon her husband came down. In the meantime, accused Kamlesh Bind, picked up the box of Lalti Devi, to which she protested. Thereafter, on the instigation of Gorakh Bind, Ramesh Bind is said to have fired at her causing injury on her left pakhura leading to her death. On these premises, learned counsel submits that there was no intention to kill Lalti Devi, rather, the intention was to harm her husband, who was asked to be called down from the roof. He further submits that only when Lalti Devi protested, she was shot at by the Appellant, Ramesh Bind with his riffle. However, there was no repetition of fire, which would also show that he has no intention to kill her. He next submits that even assuming the prosecution case is to be true, the same would fall under Section 304 IPC and not under Section 302 IPC.

16. Mr. Janardan Prasad Singh, learned Senior Counsel appearing for the rests of the Appellants, submits that out of a number of witnesses examined, PW-1, 2, 7 and 8 have taken their names as the persons, who were standing in the premises with riffle. However, these witnesses have not alleged any overt act against the Appellants. He next submits that out of these four witnesses, PW-1 and 2 are hearsay witnesses and PW-3, Ram Prasad Bind, is the father of the Informant. The accused persons and the informant are own agnates and as such, their presence at the place of occurrence, would not be presumed as unnatural. He next submits that mere presence will not establish a charge under Section 302/149 IPC in absence of any overt act. In support of his submissions, learned counsel has relied upon decisions of Hon"ble Supreme Court in case of Kuldip Yadav and Others v. State of Bihar, reported in AIR 2011 SC 1736; and in case of Shaji and others v. State of Kerala, reported in AIR 2011 SC 1825.

17. On the other hand, learned counsel appearing for the State, has justified the conviction of Appellant, Ramesh Bind, under Section 302 IPC and 27 of the Arms Act and rest of the Appellants under Section 302/149 IPC. He submits that the witnesses, in their evidences, have established the place of occurrence, manner of occurrence and time of occurrence. He next submits that the medical report is

also in consonance with the prosecution case.

18. We find that the factum of death is not in dispute. The defence side has neither disputed the time of occurrence nor the place of occurrence. The Inquiry Officer too has found bloodstain at the door of the informant's house. On consideration of the evidence of the witnesses, we do find that the informant (PW-8) and his father (PW-3) had consistently stated that accused persons, at the first instance, asked the deceased to call her husband, Akhilesh Bind (PW-8), who was sitting on the roof of the house. We may agree with the submissions of the learned counsel for the Appellants, there was no intention to kill the deceased Lalti Devi, as nothing stopped them from killing her at the very first instance. Furthermore, we find that only when the deceased Lalti Devi protested to lifting of the box by Appellant Kamlesh Bind, the Appellant Ramesh Bind opened fire with his riffle causing injury on her person. There is no repetition of flows. Furthermore, none of the Appellants even tried to assault the informant or the deceased or any of his family members, though all are said to be armed with fire arms.

19. In view of the facts and circumstances appearing before us, we find it difficult to convict the Appellant, Ramesh Bind, under Section 302 IPC for charge of murder and his conviction, as such, is altered to Section 304 IPC and 27 of the Arms Act. We find that the Appellant, Ramesh Bind, has remained in custody for more than 12 years 11 months which is near to 13 years, therefore, we modify his sentence to the period which he has already undergone.

20. So far as the rests of the Appellants are concerned, we find that though they were all alleged to be armed with riffle, but no overt act is alleged against them. Admittedly, these Appellants are agnates of the informant and as such, and their mere presence at the place of occurrence would not be sufficient to convict them under Section 302/149 IPC. The Hon'ble Apex Court in the case of Kuldip Yadav and Others v. State of Bihar (supra) in para-26 observed as follows:-

"26. The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 141 IPC must be established. The above principles have been reiterated in Bhudeo Mandal and Others v. State of Bihar (1981) 2 SCC 755 : (AIR 1981 SC 1219)"

21. In the result, Criminal Appeal (DB) No. 1006 of 2013 filed on behalf of the

appellant, Ramesh Bind @ Jogi, is dismissed with the aforesaid modification in the judgment of conviction and order of sentence passed against him.

22. Criminal Appeal (DB) No. 967 of 2013 filed on behalf of the appellant Raj Ballabh Bind, Criminal Appeal (DB) No. 1001 of 2013, filed on behalf of the appellant Govind Bind, Criminal Appeal (DB) No. 1013 of 2013, filed on behalf of appellants, Suresh Bind, Yadunandan Bind, Kameshwar Bind, Krishna Bind and Bindeshwar Bind and Criminal Appeal (DB) No. 1017 of 2013, filed on behalf of appellants, Mukesh Bind and Nagendra Bind, are allowed. The impugned judgment of conviction and order of sentence passed in respect of these appellants are set aside and they are acquitted of the charges.

23. These appellants are on bail, therefore, they are discharged from the liabilities of their bail bonds.

24. Cr. Appeal (DB) No. 1006 of 2013 dismissed, Cr. Appeal