
(2009) 11 PAT CK 0061

In the Patna High Court

Case No : Criminal Appeal No's. 403 and 493 of 2003

Raju @ Rajendra Kahar and Others and Umesh Kahar

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 06-11-2009

Acts Referred:

Arms Act, 1959 — Section 27

Criminal Procedure Code, 1973 (CrPC) — Section 157, 164, 313

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

Citation : (2009) 11 PAT CK 0061

Hon'ble Judges : Dharnidhar Jha, J;C.M. Prasad, J

Bench : Division Bench

Advocate : Krishna Prasad Singh, Sarvasri Rana Pratap Singh, Ajay Kumar Thakur, Rabindra Kumar Priyadarshi, Aruni Singh and Sumant Singh, for the Appellant; Ashwani Kumar Sinha, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

C.M. Prasad and Dharnidhar Jha, JJ.—The two appeals arise out of the judgment of conviction passed by the learned Additional Sessions Judge - I, Gaya on 27th August, 2003 in Sessions Trial No. 257 of 1994. They have been heard together and are being disposed of by this common judgment.

2. The appellants were tried for the charges u/s 302/149 of the Indian Penal Code as also u/s 27 of the Arms Act. Appellant Umesh Kahar was sentenced separately u/s 302 of the Indian Penal Code and as regards joint charge of the appellants, the learned trial judge held the charges brought home by the prosecution and directed the five appellants of Cr. Appeal No. 403 of 2003 to suffer R.I. for life for having committed the offences under Sections 302/149 of the Indian Penal Code and further R.I. for two years for their individual convictions u/s 27 of the Arms Act. Appellant Umesh Kahar was found guilty u/s 302 of the Indian Penal Code and was inflicted R.I. for life for committing that offence whereas for having committed the offence u/s 27 of the Arms Act he was

directed to suffer R.I. for two years, as was directed in respect of the other five appellants.

3. The prosecution case, in brief, is that the informant was keeping a watch over his Khalian and gram fields just at the outskirts of his village. His brother Madan Mohan Singh, who is deceased in the present case, was a R.P.F. personnel, posted in Danapur and had come home on that day. He along with his son Shamser Singh, P.W. 5, came to see the informant Ram Vijay Singh, P.W. 6, in the Khalian by a Rajdoot motorcycle so as to offering Abir as the festival of Holi was being celebrated on that day. After having offered Abir to P.W.6, the deceased along with his son Shamser, P.W. 5, were returning home and when they had reached near the house of one Banti Sah, he had to slow down his motorcycle on account of a drainage being situated there. All the accused persons emerged from their wait and surrounded the deceased and at the orders of appellant Jaggu Kahar, appellant Umesh Kahar fired a shot at Madan Mohan's chest causing injury to him. It is stated by P.W. 6 in Exht. 7, the fardbeyan, that Madan Mohan Singh pushed down his son asking him to run away as the two would be killed and accordingly, Shamser Singh, P.W. 5 came running to the informant P.W. 6 in his field to inform him. It was stated that Shamser Singh had splashes of blood on his shirt on account of his father being injured by gun shot and further that the deceased died on that account in a few moments. It was stated that the occurrence had occurred on account of previous enmity.

4. P.W. 7 S.I. Parashuram Prasad, on receipt of Exht. 7, ordered institution of the FIR (Exht. 7) and, accordingly, a literate Constable posted in the police station, drew the document up which was signed by him. P.W. 7, thereafter, took up investigation and went to the village and seized blood stained earth, blood stained clothes and empty cartridge from near the dead body and also prepared the inquest report. Thereafter, he sent the dead body for postmortem examination. He took statement of different witnesses, inspected the place of occurrence and on receipt of the post mortem examination report and finding the accused fit to be sent up for trial, sent the accused persons for trial which, ended in their conviction as indicated in the initial paragraph of the judgment.

5. During the course of their trial, the appellants had set up a defence of false implication on account of previous admitted enmity between the parties who had earlier litigated criminal cases and who had also dispute for certain land. As may appear from the suggestion given to P.Ws. 6 and 7, the I.O., the deceased was a man of criminal antecedent and he was killed in a manner different from what was alleged by P.W. 6 and in order to wreak vengeance upon the appellants, they were falsely implicated. The same defence appears taken by all the appellants in their statements u/s 313 of the Code of Criminal Procedure as may appear from one such statement of appellant Deva Kahar which is available to us at page 151 of the paper book.

6. We have heard Sri Rana Pratap Singh, learned senior counsel and also Sri Ajay Kumar Thakur, learned Counsel for the appellants. The evidence adduced by the

prosecution in the case was read out to us by Sri Aruni Singh, learned Counsel for the appellants. We have also heard Sri Krishna Prasad Singh, learned senior counsel for the informant as also Sri Ashwini Kumar Sinha, for the State.

7. Sri Rana Pratap Singh, senior counsel for the appellants, castigated the prosecution evidence from a good number of angles and has submitted that in spite of the fact that the occurrence was taking place in the street of the village which was surrounded by so many houses and in spite of many persons having come forward to support the prosecution case during investigation, none except the family members of the deceased, came forward to depose in court. It was submitted that admittedly there was enmity between the parties on account of land dispute or otherwise also and as such, it was essential for us to have a very cautious approach in analyzing the evidence of the witnesses and placing reliance upon their evidence. It was contended that in order to make Shiv Kishore Singh (P.W. 4), a competent witness, a new story of his presence at the Khalihan was introduced and the story was further improved by giving evidence that both P.Ws 4 and 6 saw the occurrence from Khalihan itself, which was never stated during entire investigation. It was contended that the initial version that P.W. 6 learnt about the incident from P.W. 5 was given up so that there was no doubt in the minds of the courts about the competence of P.W. 4 who was never an eye witness. The other aspect of the case also appears doubtful. It was contended that the fardbeyan contains the story of the deceased and P.W. 5 coming to the Khalihan by a Rajdoot motorcycle but if the court considers the statement of P.W. 5 given to the magistrate u/s 164 of the Code of Criminal Procedure, which statements have been brought on record by cross-examination of P.W. 5 in paragraphs 37 and 38, then it could be evident that the story that the deceased and P.W. 5 had come to see and offer Abir to P.W. 6 from their residential house in the village may not be acceptable on account of the reason that the fardbeyan contained the story of deceased driving a Rajdoot motorcycle whereas his son who was definitely a pillion rider, stated that they were moving by a Hero Honda motorcycle. Besides, the statement of P.W. 5 indicated that they had supported to meet P.W. 6 from a house which was situated not in the village but somewhere near Paharpur Railway station and further that the occurrence may not have taken place in the village as the statement initially indicated its taking place near a Mahua tree in between the residence of the deceased situated near Paharpur Railway station and that in the village. It was contended that it was curious as if at all Rajdoot motorcycle was used by the deceased and if at all it was lying at the place of occurrence, what compelled the I.O., P.W. 7 not to seize it, not to bring it at the police station and without observing legal formalities, handed the same over to P.W. 6 without any Jimmanama. It was further contended that evidence of P.W. 7 indicates that he did not investigate about the ownership of the vehicle and in spite of having known during investigation that the deceased was moving by a Hero Honda motorcycle, left it uninvestigated as to whose motorcycle it could be. It was contended that this was a reason that P.W. 6 initially, in paragraph 5, undertook to the court to submit the documents in

respect of the ownership of the vehicle in court but during his cross-examination in paragraph 36, he changed his stance and stated that the documents were not in his possession and as such, they could not be produced in court.

8. Sri Singh, learned senior counsel for the appellants submitted that the manner of occurrence, as alleged by the prosecution in its basic document, i.e., Exth. 7, the Fardbeyan of P.W. 6, which is supported by the evidence of P.Ws 4 and 5 does not appear supported by the medical evidence. It was contended that the very substratum of the prosecution case that the deceased had come to offer Abir to the informant along with his son also appears doubtful inasmuch as the investigating officer did not find any such material on the person of P.W. 6. It was lastly contended that the fardbeyan was drawn up on 19.3.1992 and the evidence of the I.O. indicates that the place of occurrence, i.e., Paharpur was well connected by the railways and road both to Gaya and in spite of that, it reached the Chief Judicial Magistrate on 21st March, 1992 which could, very well, give an inkling of a delayed and fabricated report being presented by the police in the collusion of informant so as to implicating the appellants.

9. Sri Krishna Prasad Singh, learned senior counsel appearing for the informant fairly conceded that it is doubtful that P.Ws 4 and 6 could be the eye witnesses to the occurrence and their claims appear not acceptable on the very strength of the evidence adduced by the prosecution during trial. However, there was strong possibility and circumstances that P.W.5's presence and his claim of seeing the occurrence by accompanying his father, the deceased, could never be ruled out and his evidence inspired confidence and thereby, justified the conviction of the appellants.

10. P.W. 4 who happens to be the full brother of P.W. 6, has given the genealogy of both the accused and the prosecution witnesses. In paragraph 8 of his evidence, the witness has stated that appellant Deva Kahar had three sons, namely, Baran, Kedar and Umesh and all his sons and he himself are accused in this case. Similarly, he has stated in the same paragraph that a case for murder of Raj Kumar Kahar had been instituted in 1996 and his deceased brother Madan Mohan Singh, his another brother Saryu Singh along with his brother Ram Vijay Singh (informant, P.W. 6) and the son of the informant named Santosh were accused. Thus, the evidence which has been led by the prosecution, came from persons who are not only closely related but were family members living under the same roof. It is true that the same witness has stated that they were separate in mess and business, but they are blood relations and had faced the attempt of his foes to be dragged into a case together. In such a background, what puts us on guard is to appreciate the evidence of such inimical and interested witnesses with care and caution because, there always could be a possibility that the witnesses may be motivated to settle scores against the appellants and as such there could be a tendency in them to implicate the appellants falsely. We have considered the evidence of all the witnesses and specially of P.Ws 4 and 6 with alertness so as not to be misled in jumping any

wrong conclusion.

11. While appreciating the evidence of witnesses, we have been conscious of many circumstances appearing in the case. As regards the competence of witnesses of seeing the occurrence or remaining present on or around the place of occurrence, P.W. 4 Shiv Kishore Singh, full brother of the informant and the deceased, was not named in the F.I.R. It was for the first time that he came in court to support the prosecution case by claiming that he was also guarding the Khalihan and gram crop together with P.W. 6. The presence of P.W. 4 in the Khalihan or somewhere around it was never spoken of by P.W. 6 in the basic prosecution document, Exht. 7. Besides, when we were are considering the evidence of P.W. 4, we found that he was not coming out honestly to answer the questions put to him during cross-examination. This appears from paragraph 9 of the evidence of P.W. 4 when he could not be honest in admitting that his deceased brother and another brother, the informant along with one of his nephews, were accused in a case of murder lodged in the year 1986. He simply stated that he had heard about the case being instituted. We did not have any reason to believe a witness on this point because he might not have been accused himself in the case but how could it be possible and acceptable to any reasonable man that he could not be knowing about his close family members being made accused in a case of murder. Similarly, the witness was cross-examined in paragraph 11 of his evidence as regards a case which was lodged by one Bhuneshwari Devi against Madan Mohan Singh, the deceased probably either for enraging her modesty or attempting to violate her. He was again showing his ignorance about the case in which the deceased had been made an accused in a case of committing burglary in the railway wagon so as to looting away the consignment of explosive substances. These facts were admitted by P.W. 6, the informant when he was being cross examined in paragraph 17, 18 and 19 and he was also admitting the enmity of his family with that of the appellants and the bad antecedent of his deceased brother. In paragraph 46 of his evidence, P.W. 6 was further admitting the existence of land dispute between his family and that of the appellants. P.W. 4 was none else than the brother of P.W. 6 and the deceased. P.W. 6 has stated that he and P.W. 4 rushed towards the place of occurrence after seeing the occurrence. Whether the above two witnesses could see the occurrence is another point which we shall be discussing a bit later, but this story that the two were together keeping a watch on the gram crop and that they rushed towards the place of occurrence appears to us one of the most vital attempts on making improvement by them so as to be accepted as eye witnesses to the occurrence. As we have already indicated, we have alerted ourselves on making such attempts by the witnesses by reminding ourselves that fouler the crime, the stricter must be the proof and further the prosecution must prove the charges and there is difference between "may prove" and "must prove" and that difference, as has been explained by the Supreme Court in some of the judgments, has been be traversed by the prosecution by acceptable and admissible evidence. We feel great difficulty in persuading ourselves to accept

P.W. 4 as a witness to the occurrence. We could go a bit further in pointing out that we do not have any reservation in our mind that P.W. 4 was a got up witness, probably, garnered, to support the prosecution in a case in which the villagers were not coming out to relate the lies against some of the innocent persons. This opinion, we hold, for the reasons which shall follow hereinafter.

12. The star witness of the prosecution is P.W. 5, Shamser Singh who on the day of the occurrence, was aged about seven years as he was fifteen years on the day of his examination in court as P.W. 5 and the gap between his examination and the date of occurrence being about eight years. This is one reason that has alerted us to be slow in accepting him as a competent witness because a child of seven years who was confronted with such a ghastly situation of seeing his father shot at and killed, may have a faint memory but must not remember its detail in as fineness as has been stated by P.W. 5. The other reason which we find is his statement which was recorded by a magistrate u/s 164 of the Code of Criminal Procedure and to which P.W. 5 was confronted during his cross-examination. P.W. 5 admitted that he had stated in it that he and his father were coming from the house which was situated somewhere around Paharpur railway station. P.W. 5 in paragraph 14 has stated that his father had two houses; one is the ancestral house which was near the house of the appellants and the other which was his father's own house and that was near the above noted railway station. He has further admitted that his family was residing in the house situated near Paharpur railway station and on the day of Holi festival he and his father were coming to the house which was situated near that of the appellants. He further stated that he had left his house near the railway station in between 1.30 and 2.00 P.M. on the day of occurrence (P.W. 5, paragraph 15) to reach the house which was situated near the house of the appellants. The statement of the witness which was brought on record in paragraphs 37 and 38 of his cross examination points out to us as if the occurrence had taken place at a place where a Mahua tree was standing. The fardbeyan and the evidence of P.Ws 4 and 6 and also of P.W. 5 in court, does not indicate that there was any Mahua tree or any tree on or about the place of occurrence which was situated by the side of the house of one Banti Sah. Thus, we find that there is a great variance in the statements of P.W. 5 which were recorded earlier during investigation and during the course of the trial. This variance in his statement appears to us not peripheral rather material. It touches upon the very core of the prosecution case, specially, its claim as regards the place where deceased Madan Mohan Singh was shot and killed.

13. The other aspect of the evidence of P.W. 5 is about the description of the vehicle by which the deceased and he was traveling. The prosecution case, right from the stage of fardbeyan (Exht. 7), claims that the deceased was traveling by a Rajdoot motorcycle. Evidence of the I.O., P.W. 7, indicates that it was a black coloured Rajdoot motorcycle which was found lying near the place of occurrence where the prosecution has claimed the deceased being shot at. P.W. 5 in his initial statement, recorded by the magistrate had stated, and that is admitted by

him during the cross-examination, that he and his father were traveling by Hero Honda motorcycle. This was the reason that the defence was prompted to cross examine the I.O. at a greater length about the ownership of the vehicle which was found by him at the place of occurrence. P.W. 7, in paragraph 21, has stated that he had found a black coloured Rajdoot motorcycle with spots of blood but he did not seize it. He has admitted that he did not investigate as to who was the owner of the vehicle and what was the implication of its registration number as regards the state of registration. In paragraph 42 the witness was asked whether he had the knowledge about the deceased and his son traveling by the motorcycle, but still he did not investigate as to what was the details about the Rajdoot motorcycle found by him at the place of occurrence. In paragraph 57, P.W. 7 stated that he did neither seize the motorcycle nor bring it to the police station and without investigating the ownership of the vehicle, handed over the same to P.W. 6 without mentioning these facts in his case diary. Thus, the contention that the motorcycle which was found by the I.O. at the place of occurrence may not have been really the vehicle by which the deceased and P.W. 5 had traveled, appears quite weighty and as such, the contention appears material that the Hero Honda motorcycle was either concealed by the prosecution or was made to disappear so as to give a turn to the prosecution case during the course of investigation so that the appellants might be sent up for trial.

14. The witnesses appear not seeing the occurrence on account of one reason that P.Ws. 4 and 5 have stated that the appellant Umesh Kahar fired his pistol by putting the weapon on the right chest of the deceased (P.W. 4 paragraph 3 and P.W. 5 paragraph 4). P.W. 6, the informant though, has not made the above statement in his evidence and has simply stated that Umesh Kahar shot at his brother but he has faulted in saying that it was the left chest which was hit by the shot. The doctor was not examined but the postmortem examination report was brought on record by examining P.W. 8, one of the colleagues of the doctor who had held postmortem examination and that document indicates that there was neither any tattooing nor any singing or any further signs which could indicate that the weapon was fired while it was touching the chest of the deceased. The injury appeared caused by a shot which could have been fired from a range outside a close range. We find that the prosecution after having examined P.Ws 4 and 5 could realize the difficulty that the medical evidence was not supporting the story of shot being fired from a close range and, as such, gave up the initial prosecution story contained in the fardbeyan that the appellant Umesh Kahar put his pistol on the chest of the deceased and fired the shot and got a statement from P.W. 6 that Umesh Kahar fired a shot by deleting the closeness of the weapon of touching the chest of the deceased.

15. The medical evidence is an opinion evidence, but that does not lessen the importance of the document inasmuch as it could be utilized by the prosecution to impress upon the court that the manner of occurrence as alleged by it was being corroborated by the medical evidence. At the same time, the defence could

also utilize the medical evidence or the document like the injury report and the postmortem examination report, to argue before a court that the manner of occurrence appears not established on account of the inconsistencies which might be occurring between medical and ocular testimony and, as such, the court could be called upon to reject the claim of the prosecution witnesses of being eye witnesses. We could not have, in an ordinary case in which the witness had been independent and trustworthy, rejected the oral testimony by noting that the witnesses appear telling the facts out of their imagination but in a case like the present one in which there is a long standing enmity, the parties have litigated so badly and appear carrying on the bad relationship and animosity further, we have great difficulty in rejecting the contention of the learned defence counsel that their evidence on the manner of occurrence cannot be accepted.

16. The very substratum or the genesis of the prosecution case, as stated by the informant and also by other witnesses, that the deceased had traveled with his son by a two wheeler to offer Abir to P.W. 6 also appears doubtful. The occurrence took place as may appear from the narrations of the prosecution witnesses and its fundamental document, Exht 7, just when the deceased was returning after having offered Abir to P.W. 6. It was expected that the coloured material must have remained on some part of the body of P.W. 6 as happens when such a material is applied to a person. P.W. 7, I.O. of the case, has stated in paragraph 24 of his evidence that the informant was all along with him after giving his fardbeyan and he did not find any Abir on any part of his body. Thus, we have no hesitation in recording that the very genesis or substratum of the prosecution case appears doubtful. One more important aspect of the case is that P.W. 5 and other witness stated that the child was sitting on the motorcycle behind his father. It is the consistent evidence of the prosecution witnesses as also of the medical man that the shot was fired on the frontal part of the body of the deceased hitting his chest. There was no wound of exit, there was only a wound of entry. We are still groping in darkness to get an answer to a query which is consistently raising itself in our minds as to how P.W. 5, a child of seven years, could happen to have splashes of blood on his shirt in absence of any wound of exit. We felt that probably the occurrence occurred in a manner which was altogether different and there was no plausible explanation on the above point by it. This appears more a probability in view of the evidence of P.W. 5 and all other witnesses that the child was pushed out to run away and he indeed ran away from the place of occurrence immediately after the deceased was shot and injured. There is no evidence indicating that the child had touched his injured father or even his dead body.

17. The last contention was on the delayed receipt of the report by the magistrate. Section 157 of the Code of Criminal Procedure requires that the copy of the report must reach the magistrate forthwith. It has been held by a catena of decisions of the Supreme Court and different courts that undue delay must not be countenanced in dispatch and receipt of such reports to and by the magistrate. Any delay which goes unexplained, appearing on the face of the

record, will entail a presumption of the document being fabricated after due deliberation so as to weave out a false story and implicate innocent persons. It is admitted that the Fardbeyan (Exht.7) was drawn up at 3.45 P.M. on 19.3.1992. P.W. 7, in his evidence at paragraph 39 has stated that the signature of the C.J.M. Gaya on Exht. 7 was bearing date "21.3.1992". Thus, what is deduced from the above evidence is that the C.J.M. had received copy of the report on 21st March, 1992 i.e. on the third day of the institution of the case. P.W. 7 has admitted in paragraph 37 of his evidence that there were many trains for going to Gaya from Paharpur and buses also ply on the road between Gaya and Paharpur. Thus, it was an ordinary expectation that the copy of the report should have reached the magistrate within a reasonable time. There is no explanation coming as to why it could not reach on 20th if not on 19th March, 1992. In the background of serious enmity between the parties, we view the document with quite some suspicion.

18. After having considered the evidence in the manner as we have just indicated in this judgment, we find that the prosecution has not come out with clean hands to tell the real story about the manner in which Madan Mohan Singh had been murdered. Madan Mohan Singh, undisputedly, was a man of criminal antecedent. There could be many persons who could be wishing to settle scores with him for his acts of criminality. He appears to us a person who did not have respect for law and peace in society. He appears a person who did not have respect for the system. Might be that he was liquidated by any of his enemies at some place and finding the opportunity, the prosecution implicated the appellants as was suggested to P.W. 4, 6 and the I.O. of the case, P.W. 7. For the reasons as have been recorded by us, we find that it was a fit case in which the appellant ought to have been given the benefit of doubt and ought to have been acquitted. They deserve that benefit and we, accordingly, extend that benefit to them. We allow the two appeals and acquit the appellants. All the appellants except Umesh Kahar are on bail. They shall stand discharged from the liabilities of their respective bonds. As regards Umesh Kahar (appellant in Cr. Appeal No. 493 of 2003) he shall be released forthwith from custody if not wanted in any other case.

19. The two appeals are allowed in the above terms.