

(2008) 01 PAT CK 0149
In the Patna High Court
Case No : Criminal Appeal No. 673 of 2002

Ram Bahadur Mahto and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 17-01-2008

Acts Referred:

Explosive Substances Act, 1908 — Section 4
Penal Code, 1860 (IPC) — Section 300, 302, 304, 323, 324

Citation : (2009) 2 PLJR 691

Hon'ble Judges : Shiva Kirti Singh, J;S.K. Sinha, J

Bench : Division Bench

Advocate : Aminesh, Vishwanath Pd. Sinha and Eqbal Asif Niazi, for the Appellant; Ashwini Kumar Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Shiva Kirti Singh & Shailesh Kumar Sinha, JJ.—This appeal is directed against judgment dated 28th August, 2002 passed by learned Additional Sessions Judge (Fast Track Court No. 2), Darbhanga in Sessions Trial No. 476 of 1996 whereby he has convicted all the three appellants for the offence u/s 302/34 of the Indian Penal Code. Appellant No. 1, Ram Bahadur Mahto has been further convicted u/s 4 of the Explosive Substances Act. Appellant No. 2, Bhullar Mahto has been further convicted for the offence u/s 323 of the Indian Penal Code and appellant No. 3, Ram Binod Mahto has been convicted also for the offence u/s 324 of the I.P.C. By the impugned order dated 29.8.2002, for the offence u/s 302/34 of the I.P.C. all the three appellants have been awarded imprisonment for life. For the offence under Explosive Substances Act appellant No. 1, Ram Bahadur Mahto has been awarded seven years rigorous imprisonment. For the offence u/s 323 I.P.C. appellant No. 2, Bhullar Mahto has been awarded rigorous imprisonment for one year and for the offence u/s 324 I.P.C. appellant No. 3, Ram Binod Mahto has been awarded rigorous imprisonment for three years. All the sentences have been ordered to run concurrently. The prosecution case is based upon fardbeyan of Ram Bilas Mahto (P.W. 4) who is nephew of deceased Tetar Mahto. The

Fardbeyan was recorded on the date of occurrence i.e. 21.4.1996 at 11 A.M. at village Mahinam Pohaddi, P.S. Bahera, District-Darbhanga where the alleged occurrence took place at about 10 A.M. The formal F.I.R. was registered on the same date at 13.00 hours leading to Bahera P.S. Case No. 89 of 1996 dated 21.4.1996.

2. According to the prosecution case the informant, Ram Bilas Mahto alongwith his deceased uncle Tetar Mahto father of Jokhan Mahto (P.W. 2) and brother of Ramdeo Mahto (P.W. 1) were constructing a hut since the morning hours on their lands near school situated by the side of road. At about 10 A.M. Ram Bahadur Mahto, appellant No. 1 came and asked them not to construct the hut. The informant and his companions however, continued with the construction of the hut. Appellant No. 1 went back and returned soon with his father Bhullar Mahto (Appellant No. 2) and his brother Ram Binod Mahto (appellant No. 3) and Ram Kumar Mahto (a juvenile whose trial was separated). Appellant No. 1 was having a Jhola (bag) which contained bombs. Appellant No. 2 and Ram Kumar Mahto were having lathies in their hands. Appellant No. 3 was carrying a knife. On his arrival appellant No. 1 again forbade the informant party from constructing the hut but they continued with the construction. Thereupon appellant No. 1 took out a bomb from his bag and assaulted the deceased, Tetar Mahto on his mouth. He sustained injuries and fell down and died soon thereafter. Appellant No. 3, Ram Binod Mahto assaulted the informant with knife on the head causing injury. Jokhan Mahto (P.W. 2), father of the informant was assaulted with lathi by Ram Kumar Mahto and appellant No. 2, Bhullar Mahto. As a result his left hand got fractured. On hue and cry villagers assembled and the accused persons ran away. It was further disclosed in the fardbeyan that deceased Tetar Mahto had no issue and he used to live with the family of the informant but appellant No. 1 used to threaten the informant as well as his uncle Tetar Mahto, the deceased with a view to force Tetar Mahto to live with him and gift his land to the accused persons otherwise the result would be bad. Accused had also received bomb injuries on account of their own acts.

3. It is further case of the prosecution that P.W. 5, Sub-Inspector of Police, Shyam Kumar Singh, Officer-in-charge of Bahera Police Station heard a rumour from some persons and after recording Station Diary Entry on that basis, he came to the place of occurrence. After recording the fardbeyan he proceeded with the investigation of the case. He saw the dead body near the place of occurrence, prepared the inquest report and sent the dead body for post mortem examination. According to the I.O. (P.W. 5) he recorded the statements of witnesses and also came to know that some of the accused have gone for treatment to a doctor and he effected arrest of the appellants 1 and 2 on 21.4.1996. In view of injury in the right hand of appellant No. 1 he was sent to nearby hospital from where he was referred to Darbhanga Medical College and Hospital for treatment. After investigation police submitted charge-sheet against all the three appellants. They denied the charges and faced trial. They have been convicted and sentenced by the judgment and order under appeal.

4. The prosecution in order to prove its case has examined altogether 9 witnesses. P.W. 1, Ramdeo Mahto is brother of the informant. P.W. 2, Jokhan Mahto is father of the informant and P.W. 3, Chandra Kala Devi is wife of P.W. 1 Ramdeo Mahto. As noticed earlier the informant is P.W. 4. These are the only material witnesses relating to the alleged occurrence. Out of them presence of P.W. 3 at the place of occurrence is not mentioned in the fardbeyan. P.W. 5 as noticed is the Investigating Officer. He has proved fardbeyan and F.I.R, as Exts. 2 and 4 respectively and has also given details as to how he conducted the investigation. P.W. 6, Dr. Amarnath Jha had examined the injuries of the informant. He found two simple injuries on his person. The injury report has been proved as Ext. 6. P.W. 7, Dr. V.C.S. Verma conducted autopsy on the dead body of the deceased, Tetar Mahto. He has proved the post mortem report as Ext. 7. The same shows that the deceased had sustained injuries on his face by explosive substance. P.W. 8, Mithilesh Kumar Singh and P.W. 9 Ram Kumar Mahto are formal witnesses who have proved certain documents relating to injuries of P.W. 2, Jokhan Mahto.

5. The defence case is that the manner of occurrence as alleged by the prosecution is not true and in fact the prosecution parties were the aggressors who caused injury to appellant No. 1 by throwing bomb and the deceased also received injuries on account of bomb thrown by Ram Bilas Mahto (P.W. 4), the informant. However, at some place a suggestion has been given that the deceased sustained bomb injuries due to falling on a bomb which he was himself carrying with a view to throw it on the accused persons. The defence has examined four witnesses. D.W. 1, Mahendra Das has proved the fardbeyan and F.I.R, of a case lodged by appellant No. 1 Ram Bahadur Mahto on 25.4.1996 alleging that when he went to protest against construction of a hut by the prosecution party, he was attacked with bombs by P.W. 4 and deceased Tetar Mahto and on that account he received bomb injuries on his right hand due to which that hand had to be amputated below the wrist in course of treatment in the hospital. Some other papers relating to treatment of appellant No. 1 have also been brought on record by D.W. 2, Dr. Shila Shankar Jha and D.W. 3, Dr. Radha Raman Prasad Singh. Appellant No. 1 has been examined as D.W. 4 in support of counter version of the occurrence. He has given the same genealogy to show relationship between the parties as agnates which has been given by the prosecution. He has also deposed on the lines of prosecution witnesses that the properties of the two parties stood partitioned from before and the same included the concerned land on the north of the pitch road where the hut was being constructed. He has asserted that he received information on 21.4.96 at 10 A.M. that Tetar Mahto and others were constructing a house at about one katha vacant land in the bigger plot, by the side of the road. He claims that he and his father went there and asked them not to construct house. This led to altercation and in the meanwhile Tetar Mahto (the deceased) and Ram Bilas Mahto (P.W. 4) threw bomb on him. He stopped the bomb with his right hand and the bomb caused injury in the palm portion of the hand then he and his father

ran away. Tetar Mahto proceeded towards him with bomb but fell down in Khanta (ditch) and there was sound of explosion of bomb. On reaching his house he became unconscious. Then he was taken to Primary Health Centre, Bahera and then referred to Darbhanga Medical College and Hospital where his hand was amputated above the wrist. He has admitted that the fardbeyan given by him to police in D.M.C.H. was read over to him and finding the same correct he put his left hand thumb impression on the same. A perusal of Ext. A, the fardbeyan of this witness (appellant No. 1) shows that even on 25.4.1996 he had not disclosed that the deceased Tetar Mahto had chased him with a bomb and fell down in a ditch and he heard sound of bomb explosion.

6. On going through the evidence of the informant (P.W. 4) it is found that he is an eye witness of the occurrence whose presence at the place of occurrence at the relevant time is beyond any dispute. In fact it is admitted even by the defence. His injuries have been proved by the doctor and the same corroborates his evidence in court that he was assaulted by appellant No. 3, Ram Binod Mahto with a knife. The only major criticism levelled against this witness is that in the fardbeyan he had disclosed that he and others were constructing hut which should mean a new hut whereas in the evidence of this witness and in the evidence of other witnesses as given in court it has come that they were making construction in an old hut with a view to repair the same. Further it has been submitted that the manner of occurrence given by this witness is not trust worthy because it is improbable that after assault by bomb the other companions of the deceased would still remain at the place of occurrence and there would be further assault upon the witnesses by the accused persons with lathi or knife.

7. P.W. 1, Ramdeo Mahto is a brother of the informant. He has also claimed to be an eye witness and has supported the prosecution case in all material particulars such as time, place and manner of occurrence. Same is the position in respect of P.W. 2, Jokhan Mahto who was also injured due to assault by lathi at the hands of appellant No. 2 and another accused. Although he has claimed that due to assault his hand was fractured but the X-ray plate has not been produced and in absence of evidence of doctor who examined him, the court below has rightly treated his injury only to be simple. However, injury to P.W. 2 cannot be doubted and his presence at the place of occurrence is also not doubtful. So far as P.W. 3, Chandra Kala Devi is concerned, her name is not mentioned as witness in the fardbeyan although she is wife of P.W. 1 who is brother of the informant. A careful perusal of her evidence discloses that she has given an unreliable account of the occurrence by stating that after one hour of the occurrence of bomb throwing assault by lathi and knife took place. It is not found safe to rely on her testimony as an eye witness.

8. As would be apparent from the discussions of the prosecution case and the defence case, the time and place of occurrence as well as presence of the accused persons at the place of occurrence is practically admitted. The only issue is whether the occurrence took place in the manner alleged by the prosecution or

it took place in the manner alleged by the defence. For the purpose of this most important issue we have considered all the relevant materials very carefully and we find that the prosecution version of the occurrence as given out in the fardbeyan has been amply supported by the deposition of P.W. 4 in court as well as by the evidence of P.Ws. 1 and 2. These three witnesses are close relations of the deceased who was own brother of P.W. 2, Jokhan Mahto. Two of the witnesses i.e. P.Ws. 2 and 4 are injured witnesses and it can safely be accepted that they were present at the place of occurrence and saw the occurrence with their eyes. The version of the occurrence given by the prosecution appears to be much more probable and has been proved beyond reasonable doubts.

9. The injury on appellant No. 1 stands fully explained by the prosecution because it is indicated in the fardbeyan itself that accused/appellant No. 1, Ram Bahadur Mahto has received injury by bomb through his own action and in court also the prosecution witnesses have given a consistent version of the occurrence which explains how appellant No. 1 received bomb injury only in the palm portion of his right hand when he had taken out second bomb from the bag and was in the process of throwing it at the prosecution party. It has come in the evidence that appellant No. 1 has sustained injury only in the palm portion of his right hand and at no other place of his body. Such injury in all probability is possible only when a bomb will explode while it is being hurled or is in the process of being hurled. If defence version that two persons threw bomb at appellant No. 1 is considered, it becomes clear that the throwing of bomb by two persons at appellant No. 1 cannot cause bomb injury of the type sustained by him. Further even in the version recorded after four days of the alleged occurrence as given by appellant No. 1 there is no explanation of injuries caused to the deceased or to P.Ws. 2 and 4. Although the injuries to the witnesses are simple but non-explanation of injury and death of the deceased renders the defence claim improbable and untrustworthy of acceptance.

10. In view of aforesaid discussions it must be held that the prosecution has succeeded in proving the manner of occurrence also beyond any reasonable doubt. The manner of occurrence suggested by the defence to the witnesses suffers from apparent contradictions. P.W. 1 has been suggested that the deceased threw bomb at appellant No. 1 and the informant, Ram Bilas Mahto threw another bomb which hit the deceased, whereas suggestion to P.W. 2 is that the informant, Ram Bilas Mahto threw both the bombs one hitting appellant No. 1, Ram Bahadur Mahto and the other hitting the deceased. On the other hand, suggestion to P.W. 4 is that Tetar Mahto (deceased) threw bomb at appellant No. 1, Ram Bahadur Mahto which he stopped with his hand and when the accused persons began to flee away then they were chased and Tetar Mahto while carrying another bomb was participating in the chase of accused persons, he fell down in a ditch and due to accidental explosion of the bomb in his hand he sustained injuries. Thus, on a careful appraisals of all the materials, the defence exhibits and statement of defence witnesses including that of appellant No. 1 in the capacity of D.W. 4, we find no merit in the defence case. We are conscious

that defence is not required to prove its case to the hilt and is likely to succeed if it raises reasonable doubt in respect of the prosecution case. However, in the present case no reasonable doubt arises in respect of the prosecution case regarding occurrence leading to assault upon the deceased and upon P.Ws. 2 and 4.

11. Lastly on behalf of appellants it was submitted by the learned Senior Counsel that on the basis of materials brought on record by the prosecution as well as by the defence it can safely be inferred that the accused persons had a bona fide belief that the prosecution party were upon constructing hut/house upon land belonging to the accused persons and therefore as indicated in the fardbeyan itself initially appellant No. 1 has gone all alone to request the prosecution party not to proceed with the construction but when the prosecution party paid no heed to such request, the accused persons went together and again reiterated the request and thereafter some altercation took place leading to assault. Thus, it has been submitted that on a careful and proper appraisal of the aforesaid circumstances and considering that parties are admittedly agnates and have equal share in the plot over which the occurrence took place, a case of bona fide defence of right to property arises in favour of the accused persons. Learned counsel has fairly submitted that since appellant No. 1, in the heat of the moment brought bombs as weapon available with him and used the same against the deceased, he may be held liable for exceeding the right of private defence of property but for that he should not be convicted for the offence u/s 302 of the Indian Penal Code. According to learned counsel for the appellants the case of appellant No. 1 is covered by Exception-2 to Section 300 according to which culpable homicide is not murder if the accused in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation and without intention of doing more harm than is necessary for the purpose of such defence. It has further been submitted that the offence attracted against appellant No. 1 would be one covered by Section 304, Part-II because there is no material to show that in the circumstances of the case the accused persons had any intention of causing death, rather their intention was to force the prosecution party to give up construction on the land in question and hence the act of assault in this case would be only with the knowledge that it is likely to cause death but without any intention to cause death.

12. In view of aforesaid arguments and submissions on behalf of appellants we have applied our mind to the entire prosecution case, the relationship between the parties, the status of property, the absence of any ridge or demarcation line on the land where the occurrence took place, as appears from the evidence of the LO. and we find merit in the submissions on behalf of the appellants that there could have been bona fide belief in the mind of the accused persons that construction by the prosecution was being made upon their share of land and hence they insisted for stopping the construction. Admittedly, the prosecution

party did not pay heed to such request made twice. According to P.W. 2 some altercation also took place between the parties on that account and then the assault followed. Clearly in the facts of the case a reasonable doubt arises that the accused persons being agnates of the prosecution party had no intention of causing death. The prosecution witnesses, while deposing in court have not supported the initial version that there was any threat from the appellants to them or the deceased for property. It is clear that property of the deceased would devolve upon his own brother P.W. 2 and not upon his first cousin, appellant No. 2 or to his sons. Hence we find that enough material and circumstances are available to support the submission on behalf of appellants that plea of right of private defence of property was available to them but in exercise of the said right appellant No. 1 clearly exceeded the limits permissible under law and caused death of the deceased by throwing a bomb at him. There is no material to show that there was any premeditation to cause such an attack with a view to cause death and admittedly the accused persons wanted to get the construction work stopped on account of their claim that the land in question belonged to them. Hence, we are persuaded to accept the submissions noticed above that appellant No. 1 has caused death to deceased Tetar Mahto by exceeding the right of private defence of property and hence he has committed culpable homicide not amounting to murder punishable u/s 304 I.P.C. Although intention of causing death may not be there in the mind of the appellant No. 1 but since he used bomb for causing injury to the deceased, it must be held that the act by which he caused death was with the intention of causing such bodily injury as is likely to cause death and hence it is covered by Part-I of Section 304 of the I.P.C.

13. In view of aforesaid discussions the conviction of appellant No. 1 Ram Bahadur Mahto is converted from one u/s 302/34 I.P.C. to one u/s 304 Part-I of the I.P.C. His conviction u/s 4 of the Explosive Substances Act is found to suffer from no infirmity and the same is confirmed. Since we have held that there was no intention to cause death, conviction of appellant No. 2, Bhullar Mahto and appellant No. 3, Ram Binod Mahto for the offence u/s 302/34 I.P.C. cannot be sustained. They are acquitted of those charges. However, their conviction for the offence under Sections 323 and 324 respectively is confirmed.

14. In the facts of the case and considering the young age of appellants 1 and 3 who were about 20 years and 19 years of age at time of occurrence we feel that a sentence of 7 years R.1. to appellant No. 1 would be sufficient and will meet the ends of justice and so far appellant No. 3, Ram Binod Mahto is concerned, it would not be proper to send him jail for an occurrence which took place 12 years earlier although he has spent only about four months in custody. Hence his sentence u/s 324 I.P.C. is reduced to the period already undergone by him and a fine of Rs. 5,000/-. If such fine is realized the same should be paid to the informant. In default of payment of fine he shall suffer rigorous imprisonment for a further period of six months. So far appellant No. 2 Bhullar Mahto is concerned, now he stands convicted only u/s 323 I.P.C. His sentence is also reduced to the

period already undergone. In respect of appellant No. 1, Ram Bahadur Mahto it is clarified that he is being sentenced to R.1. for seven years for the offence u/s 304 Part-I of the I.P.C. and his conviction and sentence of seven years R.1. for the offence u/s 4 of the Explosive Substances Act is also confirmed. However, both the sentences shall run concurrently. Since appellants 2 and 3 are on bail and their substantive sentence has been reduced to period already undergone, they are discharged from the liabilities of their bail bonds. The appellant No. 3 shall pay the amount of Rs. 5,000/- as fine within a period of three months from today. With the aforesaid modification in the conviction and sentence of the appellants the appeal is dismissed.