

(1999) 04 PAT CK 0060

In the Patna High Court

Case No : Criminal Appeal No. 550/86 (D.B.)

Ram Khelawan Sharma and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 12-04-1999

Acts Referred:

Arms Act, 1959 — Section 27

Criminal Procedure Code, 1973 (CrPC) — Section 210, 225, 226, 227, 228

Penal Code, 1860 (IPC) — Section 148, 149, 302, 34, 49

Citation : (1999) 2 BLJR 1080

Hon'ble Judges : R.N. Sahay, J;D.P.S. Choudhary, J

Bench : Division Bench

Final Decision : Allowed

Judgement

R.N. Sahay and D.P.S. Choudhary, JJ.—On 25.1.85 at 3 p.m., Ramnugrah Sharma, who was the local Mukhia was brutally murdered at village Paraman, P.S. Ghosh in the district of Jehanabad. According to post-mortem report, the deceased had received as many as 15 injuries. The injuries had been caused by fire-arms. Not a single pellet was detected in the body.

The F.I.R. of the occurrence was lodged by Rajendra Sharma (P.W. 4), The F.I.R. of the occurrence was recorded at village Paraman by the officer incharge Ghosi police station at 10 p.m. in the night. The officer incharge reached the village on being informed by local chowkidar that the Mukhia has been murdered by Naxalites. The details of the occurrence were not given by the chowkidar to the officer incharge. According to the F.I.R., Mukhia Ramanugrah Sharma of village Paraman was sitting in his Khalian situated on the western side of the village. He was talking to the first informant Rajendra Sharma. About 30-40 persons armed with fire-arms came to the khalian which was bounded by a boundary wall 4 to 5 ft. high and there was an entrance on the eastern side of the khalian. The Mukhia was not pulling on the well with the Naxalites of the locality and he was apprehensive from before and therefore, as soon as he located the

culprits approaching the khalihan he uttered that Naxalites had come to kill him, and ran towards the village. As soon as he came out of the entrance of the khalihan, he was surrounded by the miscreants and firing started from all sides by rifles and guns. The Mukhia could cover only a little distance towards north-east of the entrance of the khalihan where he received fire-arm injuries and fell down in the field of Parsuram Sharma (P.W. 8) in which Barsim grass was grown. The culprits, on being satisfied that the Mukhia was dead, left the place of occurrence and went away towards west. Some witnesses, who were present near the place of occurrence at the time of occurrence witnessed the occurrence and some witnesses also came running from the village. P.W. 7 Ramnandan Sharma, a teacher of local primary school has also seen the accused persons while retreating from the place of occurrence after the commission of the offence. Subsequently, the choudidar was called and asked to go to police station and he informed the officer incharge of Ghosi police station.

2. As many as 27 persons were named in the F.I.R. After investigation charge-sheet was submitted against 22 persons in which five accused persons were absconder.

3. During the trial three accused persons were namely, Ram Lakhan Kewat, Krishna Thakur and Feku Mian, were found to be minors. Their case was referred to Juvenile Court for trial. Five accused persons, namely, Suresh Rai, Ratan Mistry, Umesh Sharma, Jagdeo Rai and Girja Rai, were acquitted. Sixteen accused persons were convicted u/s 302/149, I.P.C. and 27 of the Arms Act.

4. It is significant to note that charge u/s 27 of the Arms Act was framed against all the accused persons. It appears that due to inadvertence no charge under Sections 302/149, I.P.C. and 148, I.P.C. was framed against four accused persons. Appellant Nos. 5, 6, 8 and 14 were left out of the charge. The first question for consideration is whether the accused persons were not at all charged u/s 302/149 and Section 148, I.P.C. could be legally convicted. From the order-sheet no doubt, it appears that the charges were framed against all the accused persons but it is to be remembered that the order-sheet is only record of the proceeding and if no charge was framed against the appellants it cannot be argued that charge were framed.

5. Section 228, Cr.P.C. reads as follows:

Framing of charge-(1) If, after such consideration and hearing as aforesaid, the judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may frame a charge against the accused and by order transfer the case for trial to the chief judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

6. Section 464, Cr.P.C. provides-

Effect of omission to frame, or absence of, or error in, charge. (1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge/framed in whatever manner it thinks fit;

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts provide, it shall quash the conviction.

7. Learned Counsel for the State submits that the conviction of appellants who were not charged is not vitiated since they were not prejudiced by omission to frame the charge. Learned Counsel has referred the decision of Supreme Court in *Bhoor Singh and Another Vs. State of Punjab*, . In this case charge u/s 302/149, I.P.C. was framed against the appellants and they were convicted u/s 302/34, I.P.C. The Supreme Court held that no prejudice was caused against the accused. The conviction u/s 302/34 was not illegal.

8. In *Willie (William) Slaney Vs. The State of Madhya Pradesh*, decided by five Hon"ble Judges of the Supreme Court, it was held in paragraph No. 85-

The Sections referred to indicate that in the generality of cases the omission to frame a charge is not per se fatal. We are unable, therefore to accept as sound the very broad proposition advanced for the appellants by Mr. Umrigar that where there is no charge, the conviction would be illegal, prejudice or no prejudice. On the other hand, it is suggested that the wording of Section 535 of the Code of Criminal Procedure is sufficiently wide to cover every case of "no charge" It is said that it applies also to the case of a trial in which there has been no charge of any kind even from the very outset.

We are unable to agree that Section 535 of the Code of Criminal Procedure is to be construed in such an unlimited sense. It may be noticed that this group of Sections relating to absence of a charge, namely, Sections 225, 226 and 232 and the powers exercisable there under are with reference to a trial which has

already commenced or taken place. They would, therefore, normally relate to errors of omissions which occur in a trial that has validly commenced.

There is no reason to think that Section 535 of the Code of Criminal Procedure is not also to be understood with reference to the same context. There may be cases where, a trial which proceeds without any kind of charge at the outset can be said to be a trial wholly contrary to what is prescribed by the Code. In such cases, the trial would be illegal without the necessity of a positive finding of prejudice. By way of illustration, the following classes of cases may be mentioned:

(a) Where there is no charge at all such required by the Code from start to finish from the committing Magistrate's Court to the end in the Sessions trial, the Code contemplates in Section 226 the possibility of a committal without any charge and it is not impossible to conceive of an extreme case where the Sessions trial also proceeds without any formal charge which has to be in writing and read out and explained to the accused (Section 210(2) and Section 251 (A) and Section 227).

The Code requires that there should be a charge and it should be in writing. A deliberate breach of this basic requirement cannot be cured by the assertion that everything was orally explained to the accused and the assessors or jurors, and there was no possible or probable prejudice.

(b) Where the conviction is for a totally different offence from the one charged and not covered by Sections 236 and 237 of the Code. On a charge for a minor offence, there can be no conviction for a major offence e.g. grievous hurt or rioting and murder. The omission to frame a separate and specific charge in such cases will be an incurable irregularity amounting to an illegality.

This was the view of Chandra Sekhar Aiyar, J. speaking on behalf of himself and Jagannadhadas, J.

Imam, J. agreeing with Chandra Sekhar Aiyar, J. held in para 97 as follows:

The framing of a charge in trial of cases in which a charge is required to be framed is one of the important elements in the mode of a trial. On the charge framed after it has been explained to the accused, the plea of guilty or not guilty is recorded.

If the accused pleads guilty, certain consequences follow. If he pleads not guilty, the trial must proceed according to law. When a charge is not framed, obviously no plea of the accused with reference to it is taken and the trial has proceeded without such a plea.

Is the framing of a charge and the recording of the plea of the accused merely a ritual or a fundamental provision of the Code concerning procedure in a criminal trial? I think, it is the latter. Are the express provisions of the Code as to the manner in which a trial is to proceed to be ignored, or considered as satisfied,

merely because the Court explained to the accused as to what he was being tried for? I apprehended not. For to do so is to replace the provisions of the Code by a procedure unwarranted by the statute itself.

In my opinion, a total absence of a charge from start to finish in a case where the law requires a charge to be framed is a contravention of the provisions of the Code as to the move of trial and a conviction of the accused of an offence in such a case is invalid and the question of prejudice does not arise. None of the decision of the Privy Council suggests that in such a case the conviction will be deemed to be valid by virtue of the provisions of Section 535, unless the Court is satisfied that there has been a failure of justice.

The trial of four appellants who were not illegal and without is jurisdiction. Hence, the conviction is to be quashed straightway. It is not a case in which retrial should be ordered. The conviction u/s 302/149, I.P.C. is absolutely illegal and hence, it is quashed.

9. Now, we are proceeding to decide propriety of conviction of the remaining accused. It is pertinent to mention that Shyam Nandan Sharma (P.W. 2) is the full brother of the deceased and was an important witness of the whole episode was declared hostile and as he did not support the prosecution case. This witness was in his house. Deceased was in the Khalihan. Khalihan was 500 yards from the house. He heard hulla. He did not verdure to go there.

10. The learned Additional Sessions Judge has considered the evidence of remaining witnesses on the point of occurrence in para 9 of the judgment. It is useful to reproduce the said paragraphs:

The remaining witnesses who deposed on the point of occurrence are P.W. 4 the first informant Rajendra Sharma P.W. 8 Parsuram Sharma, P.W. 10 Ramanuj Sharma and P.W. 11 Ramashish Sharma. Apart from them, P.W. 7 Ramnandan Sharma has also stated about the occurrence. It appears that the first informant (P.W. 4) was setting with the deceased Mukhia when the assailants came and while deceased Mukhia started running away, this witness hid himself behind a poonj of straw and he saw the occurrence P.W. 8 Parsuram Sharma is the owner of the P.O. field where the deceased had fallen down after sustaining injuries at the lands of the assailants. He was going to out grass from the P.O. field and when he came near the Khalihan he saw the assailants surrounding and assaulting the Mukhia. He stood near the south-western corner of the Dalan of Rajendra Sharma and saw the occurrence. It has been stated by the witnesses that the Dalan of Rajendra Singh lies to the east of the Khalihan and, therefore, the witness was in a position to see the occurrence from the place where he was standing P.W, 10 Ramanuj Sharma was sitting at his Dalan when he heard hulla and he came running to the Khalihan. He also stood near the south-east corner of the Dalan of Rajendra Singh and saw the occurrence. P.W. 11 Ramashish Sharma was going to market and when he came near the Khalihan he heard hulla and went to the south-west corner of the Khalihan and saw the occurrence

from the place. All these four witnesses have given the details of the occurrence and have also named many of the accused persons facing trial. P.W. 4 the informant has named 14 of the accused facing trial. P.W. 8 has named 8 of them. P.W. 10 has named 15 of them and P.W. 11 has named 13 accused persons facing trial in this case. It is significant to note that P.W. 7 Ramanandan Sharma was present in the school which situates to the west of the village and further west of the Khalihan and when he was teaching his students, small children, he heard the sound of gun fire and took the children inside the school building. From that distance, he saw the Mukhia being surrounded and attacked by several persons and when the Mukhia was killed the assailants started retreating towards west from near the school building. At this stage, this witness (P.W. 7) saw some of the assailants and identified 14 of the accused facing trial in this case among them. It was submitted on behalf of the defence that some of these witnesses have got enmity with some of the accused, and, therefore, their evidence should not be believed and accepted. It is true that in the cross-examination of the P.Ws., it has come that some of the witnesses have got enmity with some of the accused in this case but only on this account the entire evidence of these witnesses cannot be disbelieved and discarded. From the entire set of evidence and circumstances appearing from the evidence in this case, it becomes clear that the deceased was killed at the P.O. which is a field near the Khalihan of the deceased and he was also killed at the alleged time of occurrence in the alleged manner. It is clear from the evidence that the Mukhia was not pulling on well with the extremists elements known as Naxalities and, therefore, he was already apprehensive of danger of his life. The accused persons, no doubt, belonged to the P.O. village and nearby villages and there is no direct evidence to connect them with the Naxalities activity, but it is also certain that they have been proved to have participated in the commission of this offence. However, it has come in evidence that some unknown persons in Khakhi uniform were also present at the P.O. at the time of occurrence and they had also participated in the commission of the offence but as they were not known to the witnesses they could not be named and the investigating agency was also unable to locate and identify them. Therefore, the accused persons named by the witnesses have been brought on trial in this case and they are proved to have actively participated in the commission of this offence. From the entire facts and circumstances, it becomes clear that the prosecution has succeeded in proving that the occurrence took place on the alleged date at the alleged place at the alleged time in the manner as alleged in the prosecution story in this case and the accused persons facing trial have actively participated by joining an unlawful assembly with the common object to commit murder of the deceased. It is also clear that deceased Mukhia was murdered in prosecution of the common object of this unlawful assembly and as members of the unlawful assembly each individual of the unlawful assembly had definite knowledge that such an offence is going to be committed. Therefore, every such member of the unlawful assembly becomes liable for the offence u/s 302 read with Section 149, I.P.C.

11. The learned Additional Sessions Judge has accepted the evidence of Shyam Nandan Sharma (P.W. 8), Parsuram Sharma (P.W. 8), Ramanuj Sharma (P.W. 10) and Ramashish Sharma (P.W. 11). No exception can be taken to the finding of the learned trial judge.

12. Learned Senior Counsel for the appellants highlighted certain crucial circumstances in order to show that five witnesses on whose evidence the appellants have been convicted were utterly unreliable. These circumstances are Firstly-the occurrence had taken place at 3 p.m. No information of the occurrence was sent to the police station which is at a distance of 18 kilometres from the place of occurrence village. The informant was silent in the Ferdbeyan on the point that any person was sent to police station. He asserts that Choukidar had come to the place of occurrence and was dispatched to police station.

13. Ganga Prasad Jha, officer Incharge of Ghosi police station, stated that Choukidar Suku Gope gone to the police station at 19 hours and only disclosed that Mukhia of Paraman village has been murdered by Naxalities. The choukidar has also heard about this. This witness his evidence has stated that he came on information of the choukidar. If choukidar had been sent by the informant he must have been given the full version of the occurrence, It appears that he had not gone to the place of occurrence The informant stated that Mukhia was sent to police station. The choukidar who was a very important witness was not examined by the prosecution, hence an adverse inference has to be drawn against the prosecution.

14. Now, according to the prosecution, Mukhia was killed by Naxalities. Not a single witness has stated that these appellants belong to the this militant organization. Learned Counsel for the appellants submitted that the appellants are well to do cultivators could not be Naxalities. One of the accused in this case Rambilas Gope, who was an orderly of S.D.O. Fulwaria Dame. S.D.O. was examined as a defence witness stated that the appellant was not only on that day.

15. Learned Counsel for the appellants submitted that Mukhia was killed by unknown Naxalities. The witnesses who have seen the occurrence had not identified the culprits. There is another infirmity in the evidence. Mukhia had been shot and fell down near his Khalihan. The police came and found the dead body lying on the darwaza of the Mukhia. How the dead body was removed and who removed the dead body, there is no evidence.

16. Learned Counsel for the appellants further submitted that Ramnandan Sharma (P.W. 7), who is an eye-witness, was examined on 27.1.85 i.e. two days after the occurrence. Satish Kumar Singh (P.W. 9) also an eye-witness stated that he went to khalihan on hearing sound of firing. He could not have seen the occurrence. P.W. 3 (Jadunandan Sharma) had seen the occurrence from his darwaza. There were two houses in between the house of this witness and

khalian could not have seen the occurrence from the darwaza. Further evidence is that some of the witnesses are on litigating terms with some of the accused.

17. On overall assessments of the evidence, we are extremely hesitant to concur with the finding of the learned trial judge. As stated earlier, information was given by local Choukidar. He only stated that Naxalities had murdered the Mukhia. There is no evidence that the appellants belong to Naxalities. They are local people. They have landed property, as submitted by the learned Counsel for the appellants. No explanation has been given why a large number of persons were engaged to commit the murder of Mukhia on that day. There is no evidence that the appellants had enmity with Mukhia.

18. In the result, we hold the prosecution has not been able to prove the case beyond reasonable doubt. The appellants deserve benefit of doubt. The appeal is accordingly allowed. The conviction and sentence is set aside. They are acquitted and they are discharged from the liability of bail bonds.