

(2013) 02 PAT CK 0036

In the Patna High Court

Case No : Criminal Appeal (DB) No. 34 of 1989

Ram Kishun Rai and Ram Baran Rai

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 14-02-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 323

Citation : (2013) 02 PAT CK 0036

Hon'ble Judges : Shyam Kishore Sharma, J;Aditya Kumar Trivedi, J

Bench : Division Bench

Advocate : Vinay Kirti Singh, for the Appellant; Ajay Mishra, APP for the State, for the Respondent

Judgement

Aditya Kumar Trivedi, J.—Appellant no. 2 Ram Baran Rai who has been found guilty for an offence punishable u/s 302 IPC has been directed to undergo R.I. for life as was as appellant no. 1 Ram Kishun Rai who has been found guilty for an offence punishable u/s 323 of the IPC and has been directed to undergo R.I. for six months by 2nd Additional Sessions Judge, Samastipur vide judgment dated 06.01.1989 passed in Sessions Trial No. 6/1985/26/1987 have preferred the instant appeal. The prosecution case, in a nut shell, as is evident from Fardbeyan of Ram Pratap Rai (PW-10) recorded on 05.02.1979 at about 11 p.m. at Sadar Hospital, Samastipur alleging inter alia that on the same day while he along with his father, Baleshwar Rai (deceased) were basking bone-fire, his co-villager Ram Kishun Rai began to abuse him. His father Baleshwar Rai forbade him and went near him to enquire as to why he was being abused, over which Ram Kishun disclosed that his she-goat has grazed his wheat crop. His father told him that he was ready to pay the fine and forbade him not to abuse further. On this, Jhapsi Rai, Ram Kishun Rai, Sinhesar Rai, Ram Baran Rai, Bachchu Rai, Rameshwar Mahto cordoned his father having been armed with Lathi, Danda and Musar and began to assault. During said course, Ram Baran gave a Musar blow on the head of his father on account of which he sustained injury and became

unconscious. When he along with Manki Rai had intervened, they both were assaulted by Ram Kishun Rai and Jhansi Rai with Lathi. On hue and cry, co-villagers Ram Guleb Rai (PW-8), Nandlal Rai (not examined), Haricharan Rai (PW-6), Ram Pukar Rai (PW-4) along with others came seeing whom the accused persons fled away. Then thereafter, he lifted his father to Railway Hospital on account of being a railway employee but in the midst of way, he died.

2. On the basis of the aforesaid Fardbeyan Samastipur P.S. Case No. 14 of 1979 was registered whereupon investigation commenced and after concluding the same charge-sheet was submitted against some of the accused out of whom Ram Kishun Rai, Ram Baran Rai and Rameshwar Mahto were put on trial. Rameshwar Mahto had been exonerated while the appellants as named above have been found guilty in the manner as indicated above. Hence, this appeal.

3. The defence case as is evident from the mode of cross-examination as well as from their statement recorded u/s 313 of the Cr.P.C. is of innocence as well as complete denial of the occurrence.

4. It has been submitted on behalf of the appellants that they have been falsely implicated in the false and concocted case on account of land dispute prevailing amongst the parties. While challenging the finding recorded by the learned trial court, learned counsel for the appellants submitted that the impugned judgment is bad, erroneous and suffers from conjectures and surmises. It has further been submitted that neither the witnesses who have claimed themselves to be eyewitnesses of occurrence, virtually, stood for on account of presence of contradictions and embellishment in their evidence. They all are not even consistent with each other on each and every material aspect.

5. It has further been submitted that so many lapses are apparent from the conduct of the prosecution because of the fact that from the Fardbeyan itself it is evident that apart from assault having been made over the person of deceased Baleshwar Rai, informant himself including PW-9 Manki Rai had also sustained injury at the hands of appellants. It is also evident from the Fardbeyan itself that the deceased on the way to hospital had died. The Fardbeyan did not speak with regard to presence of Manki accompanying the informant as well as deceased and further it also appears to be an absurd event that the informant leaving the dead body of Baleshwar Rai at the Railway Hospital will come to Sadar Hospital and get the Fardbeyan of informant recorded at that very place. If the informant would have stayed at the Railway Hospital along with Manki Rai, accepting for a moment, his presence along with them, certainly there was no question of refusal at the end of the doctor having been deployed there to provide medical facility to the informant as well as Manki Rai. Contrary to it, the informant was not at all examined by any doctor and so far injury relating to Manki Rai is concerned, that appears to be not above board.

6. Apart from this, the objective finding of the I.O. goes against the prosecution version and on account thereof the status of the prosecution witness could not be

accepted as an eyewitness as well as being a victim. Therefore, the cumulative effect, as has been submitted gives a clear-cut impression and indication with regard to false implication of the appellants.

7. It has further been submitted that right from the initial stage, the appellants Ram Baran Rai along with Bachchu have pleaded their status to be that of a juvenile. The case of Bachchu, a juvenile as appears from lower court record was separated and transmitted to Juvenile Justice Board while the appellant, Ram Baran along with other co-accused were proceeded with. During course of statement, Ram Baran Rai had shown his age as well as from the impugned judgment itself the age shown by the learned trial court brought the status of the appellant Ram Baran Rai to be juvenile on the alleged date of occurrence and so it was incumbent upon the learned trial court to bifurcate his trial even at the time of pronouncement of judgment and instead of passing punishment against him, should have transmitted it to Juvenile Justice Board to pass orders in accordance with law taking into account the prohibition prescribed under Bihar Children Act followed with Juvenile Justice Act wherein substantial sentence is forbidden.

8. On the other hand, learned APP while supporting the finding recorded by the learned trial court urged that the finding is based upon the proper scrutiny of the materials placed by the prosecution during trial. It has further been submitted that all the eyewitnesses are consistent with regard to the part played by each of the appellant including Ram Baran. It has further been submitted that none of the prosecution witnesses including the informant has been suggested or cross-examined with regard to juvenility of appellant, Ram Baran. The court is not expected to proceed on vague disclosure unless and until it is being properly proved. Therefore, there has not been any error at the end of the trial court while concluding the finding and recording sentence against the appellant more particularly, Ram Baran.

9. In order to substantiate its case the prosecution had examined altogether 14 PWs out of whom PW-1 is Kewal Prasad Rai, PW-2 is Md. Umar. PW-3 is Rajeshwar Pd. Singh, PW-4 is Ram Pukar Rai, PW-5 is Gaya Pd. Rai, PW-6 is Haricharan Rai, PW-7 is Deoki Rai, PW-8 is Ramguleb Rai, PW-9 is Manki Rai, PW-10 is Ram Pratap Rai, PW-11 is Shatrughan Choudhary, PW-12 is Dr. Anil Kishore Choudhary, PW-13 is Devendra Kumar, PW-14 is Dr. B.N. Prasad. Prosecution has also exhibited Ext-1, Fardbeyan, Ext-2, Formal First Information Report, Ext-3, endorsement over Fardbeyan, Ext-4 series, seizure list, Ext-5 series, signature of respective witnesses over respective documents, Ext-6-inquest report, Ext-7 series-seizure list, Ext-8, injury report, Ext-9-letter, Ext-10, postmortem report. Side by side, the defence had also examined one witness, Nathuni Chaudhary who had exhibited certificate of Mukhiya as well as four Ex-ray plates marked for identification as X to X/3.

10. Before coming to the evidence the status of the witnesses shows presence of PW-1, PW-2, PW-3, PW-5 and PW-13 as formal witnesses while PW-4 has been

tendered for cross-examination. Two doctors by way of PW-12, Dr. Anil Kishore Choudhary and PW-14, Dr. B.N. Prasad have been examined on behalf of prosecution to support the version of the prosecution. PW-14 had conducted postmortem over the body of the deceased Baleshwar Rai on 06.02.1979 at 8.15 a.m. and found the following:-

One lacerated wound of size 2"x1/4" running vertically on the back of occipital bone of skull upto bone deep. On dissection fracture of occipital bone of skull 1-1/2" linear was seen. Blood clots were present on the margin of wound and on the right cerebral hemisphere of brain and underneath scalp of left side of skull.

11. In the opinion of doctor the injuries were ante-mortem in nature and caused by hard and blunt substance. Time elapsed since death within 48 hours. The death in the opinion of the doctor was due to shock and haemorrhage as a result of above noted injuries which was found sufficient in the ordinary course of nature to cause death. During cross-examination nothing vital has been procured by the defence to discredit the finding recorded by the doctor.

12. Now coming to the ocular evidence, PW-6, Haricharan Rai is an FIR witness who had deposed that on the alleged date and time of occurrence while he was at his Darwaza lying four Laggi south to the house of Ram Pratap Rai, he had seen Jhapsi Rai, Ram Kishun Rai, Ram Baran Rai, Bachchu Rai, Rameshwar Mahto, Singheswar Rai abusing Baleshwar Rai which was protested by him. Baleshwar Rai had offered to pay compensation for the loss caused on account of grazing of wheat crop by his she-goat. Accused persons did not concede and began to assault him by Lathi, Danda and Musal. Ram Baran Rai gave Musal blow over the head of Baleshwar Rai while other assaulted with Lathi and Danda. Ram Pratap Rai and Manki Rai came in his rescue who were also assaulted by them. Baleshwar Rai died on the way to hospital. During cross-examination, he in paragraph-5 had narrated that while he was at his house he heard sound " Maar Diya, Khoon Kiya ". When he reached at the place of occurrence, found oozing injury on the head of Baleshwar Rai. He had also seen injury over his person. Baleshwar Rai was lying in a ditch having circumference of 4-5 hands, depth 1 1/2 Bitta. Blood was spread over in an area of 2 or 3 hands. He had also seen Manki Rai and Ram Pratap Rai in injured condition having injuries over his person. Then, he raised alarm attracting so many persons. In paragraphs-10 and 11, there happens to be contradiction but of no use.

13. PW-8, Ramguleb Rai is another FIR named witness. He, in chief, has said that when he reached after hearing alarm, he had seen Baleshwar Rai having sustained Musal Injuri. Ram Baran Rai was possessing Musal. Ram Pratap Ram and Manki Rai came there to his rescue but they were also assaulted but by whom he had not seen. Then he had shown presence of accused persons at the place of occurrence but without any specific allegations. However, his attention was drawn towards his previous statement without declaring him hostile which he accepted. During cross-examination, he had stated that his house was 32-40 Lagga south-eastern corner from the place of occurrence. He had further stated

that when he reached at the place of occurrence he found Baleshwar Rai unconscious having injury over his head. Blood was oozing out. At that very time, he had not seen Ram Pratap Rai and Manki Rai in injured condition. In para-9, he has disclosed that Baleshwar Rai was taken to Railway Hospital. He is unaware with the fact whether Ram Pratap Rai had gone to P.S. or not. Baleshwar succumbed to his injuries in the midst way to the hospital.

14. PW-9, Manki Rai is one of the injured witnesses. He had deposed that on the alleged date and time of occurrence while he was at his Darwaza, accused persons began to abuse Baleshwar Rai. Baleshwar forbade them and further offered to pay the compensation for the loss caused on account of grazing of wheat crop but the accused persons did not pay heed to him. Then thereafter Ram Baran Rai gave Musal blow on the head of Baleshwar Rai. Baleshwar Rai fell down. He along with Ram Pratap Rai rushed to save him and during course thereof Ram Kishun Rai and Jhapsi Rai had assaulted him (PW-9) over his head and shoulder. He was taken to hospital. Baleshwar Rai died at the spot. Ram Pratap Rai had not sustained injury. During cross-examination, he had stated that Ram Pratap Rai is his nephew. In para-9, he had disclosed that as soon as he rushed to save Baleshwar Rai, the accused persons pounced upon him as a result of which he rushed towards his house to save his skin and during said course he was assaulted over his head on account of which he fell unconscious. He regained his sense at hospital.

15. PW-10, Ram Pratap Rai the informant himself is son of deceased. He had deposed that on the alleged date and time of occurrence while he along with his father were basking bone-fire, accused Ram Kishun began to abuse. His father Baleshwar Rai forbade him and further offered to pay compensation for the loss sustained on account of grazing of wheat-crop by his she-goat. However, the accused persons did not pay heed to it and encircled his father and during course of which accused Ram Baran was armed with Musal while remaining were armed with Lathi. Ram Baran Rai gave a single blow over head of his father on account of which his father fell down and became unconscious. He along with his uncle Manki Rai rushed to his rescue but they were also assaulted by Jhapsi Rai and Ram Kishun Rai. On hue and cry villagers including witnesses came seeing whom the accused persons fled away. As his father, Baleshwar Rai (deceased) was a railway employee, he was lifted to Railway Hospital during course of which, his father succumbed to the injuries. His uncle was taken to Samastipur Hospital. He could not examine his injury on account of attending his father as well as his uncle. While he was at the Sadar Hospital, Samastipur, police official had come before whom he gave his Fardbeyan and exhibited the same. During cross-examination in para-19, had admitted that there was some sort of dispute amongst them with regard to land lying near his house. Then he had said that his she-goat had grazed the wheat-crop on the same day at about 10:00/11:00 a.m. Then he had disclosed that Darwaza of his uncle Manki Rai was adjacent to his house where at the relevant time Ramguleb Rai, Haricharan Rai, Suresh Rai, Rampukar Rai, Nandlal Rai along with his uncle were basking bone-fire. Then, he

had disclosed that for the last half an hour accused Ram Kishun Rai was abusing his father. They had not gone near the accused persons rather from the place they were sitting forbade the accused. Then he had disclosed that when other accused persons came near Ram Kishun Rai, at that very moment he had not seen any kind of weapon having in their hands. He further narrated that all the accused persons pounced upon him and began to assault. He was likely treated. His uncle was also assaulted in the same sequence who became unconscious. Then his father along with his uncle were lifted to hospital. Then, he disclosed that his father had sustained only one injury. In para-32, he had disclosed that Chaukidar or Dafadar had not come to his place after occurrence. He had gone to Sarpanch at night and handed over a written complaint. Sarpanch had examined him. Apart from this, he had also given statement before the police at Samastipur.

16. PW-11, Shatrughan Choudhary is an Investigating Officer who had deposed that on 05.02.1979 while he was posted at Samastipur P.S. he had recorded Fardbeyan of Ram Pratap Rai. Then thereafter, he came to Railway Hospital, Samastipur where he prepared inquest report of deceased Baleshwar Rai and sent the dead body to mortuary. He came to place of occurrence which happens to be eight steps east to Bathan of accused Ram Kishun Rai. The occurrence was committed in the field of Munilal Rai lying north to this place at a distance of eight yards. He had found blood spot over vegetable which was seized by him. He had given topography of the place of occurrence detailing location of house of accused as well as prosecution party. He had seized blood stained earth as well as Musal having blood mark and prepared seizure list. He recorded statement of witnesses and as he was transferred he handed over charge to ASI, Jagdish Lal Ram who had submitted charge-sheet. During cross-examination he had disclosed that he had also received O.D. slip from the railway hospital over which he rushed to railway hospital. He had found injury over back portion of head. He had not found apparel soaked with blood. He further disclosed that he had not found lowland/ditch near the place of occurrence. He had not sent blood stained Musal or soil for forensic examination.

17. Thus, after going through the evidence adduced on behalf of prosecution, it is evident that save and except presence of minor variance amongst the witnesses, which is evident, was but natural on account of delay of their examination, they are consistent over the manner of occurrence much less relating to assault made on the person of deceased as well as over Manki Rai. In likewise manner, certain lapses have been found during objective finding of the Investigation Authority who had not found low-land/ditch near about place of occurrence wherein the witnesses have said that deceased had fallen down.

18. While the judgment impugned has been gone through, it is evident that the age of appellant, Ram Baran Rai, assailant of the deceased has been shown as 25 years. The judgment is dated 06-01-1989 while the occurrence took place on 05-02-1979. So, on the date of alleged occurrence, Ram Baran Rai must have

been around 15 years after deducting approximately 10 years, the intervening period. To ascertain the same when his statement recorded u/s 313 of the Cr.P.C. has been gone through, it is evident that he had disclosed his age as 20 years which was over-written as 25 years. The court had also estimated his age as 25 years.

19. From the evidence as referred above, it is evident that none of the prosecution witness has been cross-examined on this score. Although, there happens to be Bihar Children Act 1970 which applicability/enforcement could not be properly ascertained on account of non co-operation of rival parties and could not be able to have Bihar Children Ordinance 1973 (Ordinance No. 33 of 1973 & onwards). However, with great effort Ordinance No. 59 of 1979 has been traced after going through Section- 26 thereof, it is evident that the case of the appellant, Ram Baran Rai is found to fully covered therewith. For better appreciation Section- 26 thereof is being incorporated hereinbelow:-

Section- 26. Special provision in respect of pending cases.-Notwithstanding anything contained in this ordinance all proceeding in respect of a child pending in any court in any area on the date on which this ordinance comes into force in that area, shall be continued in that court as if this ordinance had not been passed and if the court finds that the child has committed an offence, it shall record such finding and, instead of passing any sentence in respect of the child, forward the child to the children's court which shall pass orders in respect of that child in accordance with the provision of this ordinance as if it has been satisfied on enquiry under this ordinance that the child has committed the offence.

20. There was a matter before Hon"ble the Apex Court in the case of Bhola Bhagat Vs. State of Bihar, wherein date of occurrence is 29.09.1978 and the same plea of juvenility was raised before Hon"ble the Apex Court which was acceded to certain parameters. The relevant paragraphs are 8, 14, 15 and 18 which are as follows:-

8. To us it appears that the approach of the High Court in dealing with the question of age of the appellants and the denial of benefit to them of the provisions of both the Acts was not proper. Technicalities were allowed to defeat the benefits of a socially oriented legislation like the Bihar Children Act, 1982 and the Juvenile Justice Act, 1986. If the High Court had doubts about the correctness of their age as given by the appellants and also as estimated by the trial Court, it ought to have ordered an enquiry to determine their ages. It should not have brushed aside their plea without such an enquiry.

14. The judgment of the two-Judge Bench of this Court in the case of State of Haryana v. Balwant Singh, 1993 Supp. 1 SCC 409 , which has been relied upon by the High Court is clearly distinguishable. The Bench in that case recorded: (SCC p. 410, para 2)

Admittedly, neither before the committal court nor before the trial court, no plea was raised on behalf of the respondent that he was a child and that he should

not have been committed by the Magistrate and thereafter tried by the Sessions Court and that he ought to have been dealt with only by the court of Juveniles. When it is not the case of the respondent that he was a child both before the committal court as well as before the trial court, it is very surprising that the High Court, based merely on the entry made in Section 313 statement mentioning the age of the respondent as 17, has concluded that the respondent was a "child" within the definition of the Act on the date of the occurrence....

In the instant case, however, the plea had been raised both in the Trial Court as well as in the High Court and both the Courts even considered the plea but denied the benefit to the appellants for different reasons which do not bear scrutiny. That apart, the earlier judgments of this Court reported in Gopinath Ghosh and Bhoop Ram, were not even noticed or considered in Balwant Singh case. Since the view expressed in Gopinath Ghosh case and Bhoop Ram case receive support from the three-Judge Bench judgment in the case of Pradeep Kumar v. State of U.P. the appellants cannot be denied the benefit of the provisions of the Act on the basis of Balwant Sings case.

15. The correctness of the estimate of age as given by the trial court was neither doubted nor questioned by the State either in the High Court or in this Court. The parties have, therefore, accepted the correctness of the estimate of age of the three appellants as given by the trial Court. Therefore, these three appellants should not be denied the benefit of the provisions of a socially progressive statute. In our considered opinion, since the plea had been raised in the High Court and because the correctness of the estimate of their age has not been assailed, it would be fair to assume that on the date of the offence, each one of the appellants squarely fell within the definition of the expression "child". We are under these circumstances reluctant to ignore and overlook the beneficial provisions of the Acts on the technical ground that there is no other supporting material to support the estimate of ages of the appellants as given by the trial Court, though the correctness of that estimate has not been put in issue before any forum. Following the course adopted in Gopinath Ghosh, Bhoop Ram and Pradeep Kumar cases while sustaining the conviction of the appellants under all the charges quash the sentences awarded to them.

18. Before parting with this Judgment, we would like to re-emphasise that when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. Keeping in view the beneficial nature of the socially oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions to an accused. The court must hold an enquiry and

return a finding regarding the age, one way or the other. We expect the High Courts and subordinate courts to deal with such cases with more sensitivity, as otherwise the object of the Acts would be frustrated and the effort of the Legislature to reform the delinquent child and reclaim him as a useful member of the society would be frustrated. The High Courts may issue administrative directions to the subordinate courts that whenever such a plea is raised before them and they entertain any reasonable doubt about the correctness of the plea, they must as a rule, conduct an inquiry by giving opportunity to the parties to establish their respective claims and return a finding regarding the age of the concerned accused and then deal with the case in the manner provided by law.

21. Where plea of juvenility (Child) was raised before the learned trial court or not is irrelevant for the purpose of exercising and complying with the mandate of the law by the learned trial court that too when during course of statement recorded u/s 313 of the Cr.P.C. he became well-aware with the fact that certainly there was probability of appellant/accused, Ram Baran to be juvenile (Child) on the alleged date and time of occurrence. At that moment, instead of proceeding ahead with the trial the learned trial court should have followed with the requirements prescribed under relevant Act or instead of imposing substantial sentence should have transmitted the case of the appellant, Ram Baran to the Board for passing appropriate sentence in accordance with law. Now, as much water has flown and in case such order is being passed, the same will not serve any purpose taking into account the intervening long gap of more than 33 years.

22. Consequent thereupon, the finding of the substantial sentence recorded by learned trial court against the appellant, Ram Baran Rai is set aside after accepting the plea of appellant Ram Baran Rai to be child on the date of occurrence. With regard to other appellant, Ram Kishun Rai taking into account the genesis as well as manner of occurrence and the period consumed in getting this appeal heard and being decided, if directed to serve out the remaining part of the sentence inflicted by the learned trial court will serve no purpose because of the fact that at the time of judgment he was aged about 65 years now approaching 87 years of age. Hence, it is directed that the quantum of sentence will find satisfied with the period undergone.

23. The instant appeal is accordingly, disposed of in terms as referred above.

Shyam Kishore Sharma, J.

I agree