

(2013) 12 PAT CK 0032

In the Patna High Court

Case No : Criminal Appeal (DB) No. 455 of 1989

Shankar Singh and Kanhaiya Singh

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 11-12-2013

Acts Referred:

Arms Act, 1959 — Section 27

Criminal Procedure Code, 1973 (CrPC) — Section 161

Penal Code, 1860 (IPC) — Section 148, 149, 302, 34, 379

Citation : (2013) 12 PAT CK 0032

Hon'ble Judges : Shyam Kishore Sharma, J; Amaresh Kumar Lal, J

Bench : Division Bench

Advocate : Rakesh Kumar, Amicus Curiae, for the Appellant; Ajay Mishra, APP, for the Respondent

Final Decision : Allowed

Judgement

Shyam Kishore Sharma, J.—Above named both the appellants have preferred the instant appeal against the judgment of conviction and order of sentence dated 25th July, 1989 passed in Sessions Trial No. 91 of 1988 whereby the appellants have been found guilty for the offence punishable under sections 148 and 302/149 of the Indian Penal Code and section 27 of the Arms Act and they were sentenced to undergo imprisonment for life under sections 302/149 of the Indian Penal Code and further they were sentenced to undergo imprisonment for 2 years u/s 148 IPC and section 27 of the Arms Act. All the sentences were directed to run concurrently. The occurrence is of the evening of 16.5.1986 at 5.30 P.M. On that date the informant PW 6 Budhram Singh left the village Makhdumpur in the district of Bhojpur along with his cousin Ramdhani Singh (deceased) to attend the Tilak ceremony in the house of Jagdish Singh of village Belauna Kharauni. Ramdhani Singh was carrying his licensee rifle. As soon as they proceeded towards south of Makhdumpur and north of Kharauni and while they were about 200 yards north of Chakra Badhari Mauja Belauna Kharauni, then it was 5.45 PM. At that very time, his villager Shankar Singh (appellant No.

1) and Kanahiya Singh (appellant No. 2) along with 2-3 unknown persons having rifle and guns came. Shankar Singh and Kanahiya Singh fired from rifle and gun causing injury to the informant's cousin Ramdhani Singh. He died on the spot and the miscreants took away his rifle and cartridges kept in the belt. The three other persons pointed pistol upon the informant but he protested which caused injury in his left palm and wrist. On the cry of the informant, five miscreants retreated towards north-west of the village. One month prior to the occurrence, the accused persons had quarreled and it was suspected that killing was to take revenge of the altercation which had occurred in the month back. The fardbeyan was witnessed by PW 3 Janardan Singh and PW 2 Bhikhari Singh. The fardbeyan (Ext. 4) resulted into formal FIR (Ext. 5) and case under sections 302, 379/34 of the Indian Penal Code and section 27 of the Arms Act was registered and investigation started. In course of investigation, inquest report of dead body (Ext. 2) was prepared. Post mortem report (Ext. 3) was obtained. Seizure of the blood stained soil (Ext. 6) was made available, injury report (Ext. 7) of the informant (PW 6) was also obtained and chargesheet was submitted. Accordingly, cognizance was taken and the case was committed to the court of sessions where both the accused persons were charged under sections 302/149 and 148 of the Indian Penal Code and section 27 of the Arms Act. The accused persons pleaded innocence, so the trial proceeded.

2. The defence was of false implication on account of enmity and also that the deceased was involved in killing of Triloki Singh of village Anar and he was having strong enmity with the family of Triloki Singh. There was all possibility that murder was committed by the family members and friends of Triloki Singh.

3. In order to prove its case, the prosecution has examined PW 1 Sakaldeo Narain, an advocate clerk, as a formal witness, PW 11 Hit Narain Tiwari another formal witness. PW 2 Bhikhari Singh is an FIR attesting witness and he is a hearsay witness. PW 3, Janardan Singh son of Shri Bhagwan Singh another FIR attesting witness, as a hearsay witness. PW 4, Murat Ram, a formal witness of inquest report. PW 5, Ranjeet Singh, is a hearsay witness. PW 7, Janardan Singh son of Amir Singh, is another hearsay witness. PW 8 Nand Bihari Singh has been tendered. PW 9 Raj Kishore Singh has performed the post mortem examination upon the dead body of Ramdhani Singh. PW 10 Basudeo Prasad Singh is the Investigating Officer. No defence witness was examined but the doctor who treated the informant has been examined as Court Witness No. 1 and he has proved the injury report of the informant.

4. PW 1 has proved the writing of the fardbeyan which was written in the writing of Basudev Prasad Singh (PW 10). PW 4 has identified the writing of Basudev Prasad Singh, Sub Inspector of Bihiya Police Station, on inquest report which was marked as Ext. 4. He is a clerk of PP Office. PW 11 was a pharmacist of Bihiya State Dispensary who has proved the writing and signature of CW 1 Dr. Gorakh Nath Prasad which was the injury report of the informant. PW 8 has been tendered. Therefore, the witnesses can be summarized into the following

category: PW 6 the informant is only eye witness, PWs 1, 4 and 11 are formal witness, PWs 2, 3, 5 and 7 are hearsay witness, the official witnesses are PW 10 the Investigating Officer and the Doctor PW 9 who has held the post mortem upon the dead body of Ramdhani Singh.

5. The learned Trial Court after considering the evidences, came to the opinion that the prosecution has succeeded in proving the charge against the accused persons beyond the shadow of all reasonable doubts and, so the order of conviction was passed.

6. Now, this Court is to see as to whether the prosecution has succeeded in proving the charge against the appellants beyond the shadow of all reasonable doubts or not.

7. The contention of the learned Amicus Curiae appearing on behalf of the defence is that sole eye witness was not only interested rather he has altered during evidence and he has deviated much from his initial fardbeyan. His statements u/s 161 Cr.P.C. and during trial were quite different which have gone to the root of the matter and his evidence was not fit to be accepted. Once his evidence is doubted, then there remains no evidence in the prosecution version. It has also been submitted that the doctor Gorakh Nath Prasad was not examined by the prosecution deliberately because his evidence has raised pointing finger towards the informant himself. It has also been submitted that no independent witness has been examined.

8. Before taking up eye witnesses, it would be proper to go through the evidence of the doctor who has held autopsy upon the dead body of the deceased. The doctor PW 9 has found following ante mortem injuries on the person of Ramdhani Singh: (i) one lacerated wound with black and inverted margin 1" in diameter over middle of right arm in postero lateral directed anterior with scorching and tattooing of skin around, (ii) one lacerated wound round 2" in diameter with inverted margin over middle and medial of right arm with laceration of soft tissue and muscles (wound of exit). The very small and round pillets taken out from the soft tissue exposed in wound and (iii) one lacerated wound penetrating wound 1" diameter with inverted margin, blackening scorching and tattooing of surrounding skin over right lateral and lower part of chest.

9. The injury was caused by firearm and it was within 24 hours. The post mortem examination was performed on 27.5.1987 at 8.30 AM. The doctor has found blackening, scorching and tattooing around the skin. In cross-examination in paragraph 15 he has stated that injury No. 1 and 3 could not have been caused by a single shot. The doctor's opinion has proved that killing of Ramdhani Singh was in the evening of 26.5.1987 by use of firearms and the number of firing was more than one.

10. Once it has been proved that it was a homicide amounting to murder, then the prosecution was required to adduce the evidence to link the accused with the offence. The evidence of the informant is being scanned firstly because he is the

sole eye witness.

11. While deposing as PW 6 the informant has stated that on 26.5.1987 at 5.45 PM he and Ramdhani Singh (deceased) were going to attend a Tilak in the house of Jagdish Singh at village Kherauni and as soon as the informant and Ramdhani Singh reached at Chakra Badhar, then five persons suddenly came and Ramdhani Singh was having rifle and a belt containing cartridges. He was a licensee holder of the rifle. The informant could identify only Shankar Singh and Kanahiya Singh- his villagers and other three could not be identified. All were having rifle and gun. Shankar Singh fired which was followed by firing of Kanahiya Singh. The firing of Shankar Singh caused injury to Ramdhani Singh. The informant did not see as to whether firing of Kanahiya Singh caused injury or not. Ramdhani Singh fell down thereafter, rifle of Ramdhani Singh was taken away by Shankar Singh and cartridges by Kanahiya Singh. Other three persons were having rifle. The informant caught the rifle of one of those three and on account thereof he received a scratch injury. On cry of the informant, accused persons escaped. One month prior to the occurrence the family members of Ramdhani Singh and Kanahiya Singh and Shankar Singh quarreled and there was fight between them. On that occasion father of Shankar Singh was assaulted by Ramdhani Singh and it was suspected that on account of that assault the killing was done. On cry of informant, Raghunandan Singh (not examined), Ramjeet Singh (PW 5), Munsu Singh (not examined), Nand Bihari Singh (PW 8), Mahanth Singh (not examined), Janardan Singh (PW 7) and Devlal Singh (not examined) came. The informant detailed the occurrence to them. The blood was there at the place of occurrence. Ramdhani Singh was carried to the pitch road where the tracker was hired and he was carried to Bihiya Police Station but in the way Ramdhani Singh died. Bhikhari Singh and Janardan Singh accompanied the informant up to the Police Station. After reaching the Police Station, he narrated about the occurrence which led to registration of the case. Though in examination-in-chief, the informant has supported the prosecution case thoroughly but in paragraph 15 he has categorically stated that Shankar Singh was having gun and the first firing was by the gun. He has stated that he, in his statement before Police, has denied that Shankar Singh was having rifle and Kanahiya Singh gun. His firing was at the distance of two steps.

12. Learned defence counsel has stated that the informant has given much twist in his evidence. In the fardbeyan he has stated that Shankar Singh and Kanahiya Singh were having rifle and gun and, so the simple meaning was that Shankar Singh was having rifle and Kanahiya Singh gun. But, in the evidence, the informant has given another version that Shankar Singh was having gun. It has been pointed out that before the investigating officer, informant has stated that Shankar Singh was having rifle, though the informant has denied this fact but the Investigating Officer, PW 10, has stated in his evidence that the informant has told that Shankar Singh was having rifle and Kanahiya Singh was having gun, so it has been submitted that the informant has deviated from his evidence and it is enough to disbelieve his credibility as a witness. It has also been

submitted that the Investigating Officer has seized the blood but in paragraph 18 of his evidence, he has stated that he has neither sent the seized blood nor the seized cartridges for chemical examination, so it has been submitted that the place of occurrence has not been established.

13. Other witnesses are hearsay and they have known the occurrence through PW 6, the informant. Therefore, the only witness whose evidence has come on the record is the deposition of the informant about the occurrence. The informant was treated by CW 1 on 27.5.1983 at 6.00 AM and the doctor has found one circular blackish spot measuring ?" in diameter with an abrasion ?" x ?" on the left palm. The injury was simple in nature caused by gut powder.

14. The informant in his evidence has stated that he has caught the rifle of one of the three persons who has not fired. He has not stated that he has even touched the gun from which firing was made. The prosecution is utterly failed to explain what was the occasion for presence of gun powder upon the palm of the informant if he has not touched the barrel from which firing was made.

15. Learned APP has tried to support the prosecution version saying that PW 6 was a natural witness. No doubt, he has altered at some places but that is not enough to discredit his entire evidence.

16. Altogether 15 persons have been named as witness in the chargesheet out of whom six were examined. According to FIR, the deceased was hit by rifle and gun shot and died instantaneously but during deposition, the informant, PW 6, in paragraph 4 of his evidence, has stated that the deceased has died on way to Police Station. In paragraph 18 of his evidence he has denied that the deceased has died on the spot.

17. The fardbeyan mentions that all the three unknown persons aimed their guns at the informant but during trial only one person is alleged to have aimed his rifle and whose rifle was caught by the informant as a result thereof he sustained injury (PW 6 in paragraph 1). The fardbeyan shows that Shankar Singh was having rifle but the informant changed his statement and attributed gun to Shankar Singh. His attention was drawn towards his previous statement made before the Police in paragraph 16 of his evidence. The fardbeyan does not mention name of any person who arrived at the place of occurrence after hearing the noise but the informant in paragraph 3 of his evidence has stated that Raghunandan Singh, Ramjeet Singh, Munsu Singh, Nand Bihari Singh, Mahanth Singh, Janardan Singh and Devlal Singh arrived at the place of occurrence but these witnesses were not examined. Another fact which has to be taken into account that five persons were having arms but the informant was the person who was recognizing them. Generally, there is a tendency to eliminate the eye witnesses, so that the offenders could not be caught. But in the present case, no attempt was made to do away the informant and from the narration given by the informant, it is apparent that the accused persons could have very well eliminated the informant himself, if they would have desired to do so. Though the

informant has claimed that he has caught the gun of one of the three persons who were present but still no firing was made upon him.

18. If the evidence on the record is analyzed, then it is apparent that the informant is the sole witness of the occurrence. The Evidence Act does not postulate the number of witnesses rather the quality of witnesses is always important. Conviction can also be based upon the testimony of sole witness if it is appropriately supported. In the judgment reported in AIR 1996 (Criminal Law Journal) 889 SC Kartik Malhar V. State of Bihar the order of conviction was maintained though it was based on sole testimony of the witnesses but it was supported by medical evidence. The single prosecution witness needs corroboration from other sources also. Even if there is no corroboration, the version can be accepted. But if the evidence is doubtful and not supported rather contradicted, then it has to be discarded at all.

19. The informant has attributed different weapons to different accused at different stages. That was the vital evidence and his altering at different stages goes to the root of the matter and his evidence cannot be trusted. Another fact which has come through evidence of court witness No. 1 is that the informant has gun powder injury. The prosecution has utterly failed to show as to what caused gun powder presence upon the palm of the informant. It creates grave doubt as to whether the informant was involved with commission of offence or not. There was no explanation as to why the Investigating officer kept sitting after seizure of blood stained soil and cartridges and it is not clear as to why he did not send the same for chemical examination. The doctor's evidence, who has held autopsy upon the dead body, has given a different version of the occurrence. The consistent evidence of the informant was that one firing was made but doctor in his evidence, in paragraph 15, has stated that injury of the deceased was caused by more than one firearms. Regarding nature of injury the doctor has opined that it was blackening charring, meaning thereby that firing was made from very close range but PW 6, in paragraph 9 of his evidence, has stated that at the time of firing the accused persons were at two steps, meaning thereby that they were not in such a proximity which could cause injury of blackening, tattooing or charring. These are vital facts, affecting the root of the occurrence and has also created grave doubt about the version of the informant, who was the sole eye witness to the occurrence. If the evidence of sole eye witness is doubtful, then it can be held that prosecution has not come with clean version, rather it has come with deviated version and has failed to explain as to what was the cause of presence of gun powder upon the palm of the informant, which shows that the prosecution was more interested in saving the informant, than making out a case. In the result, we are of the view that the prosecution has not been able to prove its case beyond the shadow of all reasonable doubts. Once doubt is created, then the benefit of the same has to be passed upon the accused. Accordingly, the judgment of conviction and order of sentence is set aside and this appeal is allowed. Since the appellants are on bail, they are discharged from the liabilities of their bail bonds.