

(2004) 08 PAT CK 0002

In the Patna High Court

Case No : Criminal Appeal (DB) No. 277 of 2001

Shiv Yadav @ Sheo Raut and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 13-08-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 294

Evidence Act, 1872 — Section 145

Penal Code, 1860 (IPC) — Section 147, 302, 307, 323, 325

Citation : (2005) 2 PLJR 62

Hon'ble Judges : P.N. Yadav, J; Mridula Mishra, J

Bench : Division Bench

Advocate : Kanhaiya Pd. Singh, Ashutosh Kumar, Atal Bihari, Nichiketa Jha, Rajesh Kumar Singh, Pushkar and Brajesh Kumar, for the Appellant; Lata Kailash Bihari, for the Respondent

Final Decision : Allowed

Judgement

Mridula Mishra, J.—Appellants have preferred this appeal against the judgment and order dated 3.5.2001/11.5.2001 passed by the then 6th Addl. District & Sessions Judge, West Champaran at Bettiah in Sessions Trial No. 509 of 1987. Appellants have been convicted u/s 302/34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life. The criminal proceeding was initiated on the basis of fardbeyan of Mahanth Raut recorded by Sub-Inspector of Chanpatia Police Station at Government hospital, Chanpatia, on 10.9.1986 at 11 A.M. In his fardbeyan he stated that on the same day at 7 A.M. Nathu Raut, Kailash Raut, Babban Raut and Banarasi Raut were called for Panchayati. This Panchayati was convened in relation to an altercation which had taken place in between Barhu Ram and the informant. In this dispute Sheo and Shambhu had taken the side of Barhu Ram and also abused him. The Panches asked the informant as to why they have been called. He informed them about the altercation in between him and Barhu Ram. He also informed the Panches that Sheo Raut and Shambhu Raut had also abused him by taking the side of

Barhu Ram. In retaliation he had also abused them. Sheo Raut and Nathu Raut on this assaulted the informant on his left leg. In the meantime, brother of the informant Bijali Raut came there and asked Sheo Raut why he was assaulting his brother. On this Shiv Shankar Raut assaulted Bijali Raut with lathi on the back of his head. Kamal Raut was also standing there and he assaulted Bijali with lathi on the front side of his head. Bijali Raut fell down. On alarm Ramayan Raut alongwith Babban Raut and others came there to rescue Bijali Raut but Mahanth caught hold of Ramayan Raut and tried to take him away. Thereafter, the informant with help of others brought Bijali Raut to Chanpatia hospital. Bijali was being treated in the hospital and his condition was serious.

2. Chanpatia P.S. Case No. 88 of 1986 was registered on the basis of fardbeyan of Mahanth Raut, the informant, under sections 147, 323, 325 and 307 of the Indian Penal Code. Subsequently, injured Bijali Raut died and section 302 of the Indian Penal Code was also added. The case was investigated and on completion of investigation chargesheet was submitted against Sheo Raut, Shambhu Raut, Kamal Raut and Shiv Shankar Raut. Cognizance was taken against the accused persons and the case was committed to the court of sessions. Four accused persons, namely," Sheo Raut, Shambhu Raut, Kamal Raut and Shiv Shankar Raut were put on trial. One of the accused Shiv Shankar died during the pendency of the trial. On completion of trial three accused persons have been convicted and sentenced as stated above.

3. The prosecution in order to prove his case examined twelve witnesses. P.W. 1 and P.W. 4 have been examined as eye witnesses and they have supported the case of the prosecution. P.W. 2 Banarasi Raut, P.W. 3 Gyani Raut, P.W. 7A Mahanth Raut have been declared hostile. P.W. 7A is the informant and brother of the deceased. P.W. 5 Babban Yadav is tendered. P.W. 6 Gopal Prasad has proved the F.I.R. (Ext. 1). P.W. 7 Umesh Prasad has proved the post mortem report (Ext. 3). P.W. 9 has proved paragraphs 1 to 42 of the case diary (Ext. 4). P.W. 8 Khenari Devi is the wife of the deceased and is a hearsay witness. P.W. 10 has proved the fardbeyan (Ext. 5). Investigation Officer of the case and the doctor who conducted the post mortem on the dead body of the deceased have not been examined.

4. P.W. 1 has stated in his evidence that on the date of occurrence at 7 O'clock in the morning he was standing at his darwaja. From there he saw that Bijali Raut and Mahanth Raut were coming runningly from the temple side and they were being chased by Shiv Shankar Raut, Kamal Raut, Rudal Raut, Kailash Raut, Sheo Raut and Shambhu Raut. When they reached near the house of Sheo Raut, the accused persons surrounded Bijali Raut but Mahanth Raut had already moved ahead. Rudal Raut ordered to kill. On which Shiv Shankar Raut assaulted Bijali Raut with a piece of bamboo on the back side of his head. Kamal Raut assaulted on the front side of his head with a lathi and Bijali fell down. P.W. 1 alongwith Ramayan Raut went to save Bijali Raut but Rudal Raut caught hold of him and ordered to kill Ramayan Raut. Banarasi Raut who was present there rescued him.

In his cross-examination he has admitted his relationship with accused persons. He has also stated that at the place of occurrence there are houses of 25 to 26 persons and several persons had assembled at the place of occurrence when Bijali Raut was assaulted. He has further stated that after two days of the occurrence the investigating officer came at the place of occurrence. He was called by the investigating officer and his statement was recorded. His attention was drawn that his statement was recorded after 14 days of the occurrence which he denied. He admitted that when Bijali fell down after assault, no other accused persons assaulted him thereafter. He denied the suggestion that because of enmity he had falsely deposed in the court.

5. P.W. 4 has stated that on the date of occurrence at 7 A.M. he was at his residence. He saw Bijali Raut coming from other direction and being chased by Rudal Raut and Kamal Raut. Shiv Shankar Raut assaulted Bijali on the back side of his head with a bamboo stick and Kamal assaulted with lathi on the front portion of his head. Bijali fell down. He wanted to go near Bijali to rescue him but he was restrained by Mahanth. Bijali was taken to Chanpatia hospital and from there to Bettiah hospital where he died in course of treatment. In his cross-examination P.W. 4 has admitted that Mahanth Raut (P.W. 7A) is his grand-father. He also admitted that he had seen the occurrence from his darwaja and his house is situated at a distance of two laggi north to the place of occurrence. Further he has stated that Bijali was not assaulted by any other accused persons when he fell down. He has stated that several persons had assembled at the place of occurrence after Bijali fell down because of assault. He also stated that Bijali was taken to Bettiah hospital on a tyre cart accompanied by P.W. 2, P.W. 7, P.W. 1 and other persons. Bijali died in course of treatment at hospital. Further he has stated that fardbeyan of Mahanth Raut was not recorded by investigating officer in his presence. He denied the suggestion that he had deposed in this case because of enmity.

6. Learned Counsel for the appellants has assailed the judgment of conviction on the ground that in the F.I.R. five persons were named as eye witnesses. Out of five F.I.R. named witnesses, only two were examined as witnesses in the court. They are P.W. 2 who was declared hostile and P.W. 5 who was tendered. P.W. 1 and P.W. 4 alone have been examined as eye witnesses. These two witnesses are interested, partisan, unreliable and untrustworthy. P.W. 1 and P.W. 5 have admitted that they are related to the informant and the deceased. They have contradicted each other on the point of assault and also on the point of occurrence. P.W. 1 and P.W. 4 have stated that the occurrence took place in the day time. There were houses of several persons near the place of occurrence. P.W. 1 and P.W. 4 have also admitted that several persons assembled at the place of occurrence. Punches were present there but except the interested witnesses like P.W. 1 and P.W. 4 no other witnesses appeared in support of the case of the prosecution. Even being brother of the deceased, P.W. 7A, who is informant, has not supported the case of the prosecution. P.W. 1 in his evidence has stated that P.W. 4 had gone to the place of occurrence to rescue Bijali but this fact has been

contradicted by P.W. 4 in his evidence. P.W. 4 has stated that he witnessed the occurrence from his darwaja which is at a distance of two laggi north from the place of occurrence. P.W. 1 has stated that he did not accompany the injured to the hospital but it has been contradicted by P.W. 4. He stated that P.W. 1, P.W. 2, P.W. 7A and others accompanied the injured to the hospital. P.W. 1 and P.W. 4 have admitted that statement was recorded by the police after two days. Their attention was drawn that in fact their statement was recorded 14 days after the occurrence which is corroborated by the case diary (Ext. 4). It has been submitted by the Learned Counsel for the appellants that in a murder case in which the entire prosecution depended on the evidence of P.W. 1 & P.W. 4, who claim to be eye witnesses, but these two witnesses did not disclose the name of the assailant for 14 days after the incident. No explanation has been offered for non-disclosure of the name of the assailant and the manner of the occurrence by them for 14 long days. In this background, non-disclosure on the part of these two witnesses is a serious infirmity which destroys the credibility of the evidence of these two witnesses. Learned Counsel for the appellants has placed reliance on a decision as reported in State of Orissa Vs. Mr. Brahmananda Nanda, . Wherein it has been held "Where in a murder case the entire prosecution case depended on the evidence of a person claiming to be eye-witness and this witness did not disclose the name of the assailant for a day and a half after the incident and the explanation offered for non-disclosure was unbelievable, held that such non-disclosure was a serious infirmity which destroyed the credibility-of the evidence." Learned Counsel for the appellants has further submitted that no reliance can be placed on the evidence of such untrustworthy witness and any conviction on the basis of the evidence of P.W. 1 and P.W. 4 is unsustainable.

7. Learned Counsel for the appellants has also stated that the appellants have been prejudiced on account of non-examination of the investigation officer. Though paragraphs 1 to 42 of the case diary have been marked as Ext. 4 but the witnesses could not be controverted u/s 145 of the Evidence Act on account of non-examination by the investigating officer. P.W. 1 and P.W. 4 in court have named Sheo and Shambhu but in their statement u/s 161 of the Code of Criminal Procedure they have not named them as an accused. P.W. 1 and P.W. 4 have stated that after two days of the occurrence they were examined but the case diary indicates that they were examined after 14 days of the occurrence. Though their attention was drawn towards the statement in the case diary but the evidence of these two witnesses would have been further demolished if the investigating officer would have been examined.

8. It is also argued that the prosecution has failed to establish the cause of death of the deceased. The doctor who conducted the post mortem was not examined. An advocate clerk (P.W. 7) proved the post mortem report. u/s 294 of the Code of Criminal Procedure the post mortem report cannot be considered as substantial piece of evidence by mere marking it an exhibit. Post mortem report is an extremely relevant and important document in a trial for murder for both the prosecution and the accused. A doctor who conducts the post mortem

examination and prepares post mortem report when appears in court it subjected to cross-examination by the accused. If the author of the post mortem report is not available, a competent person having technical knowledge, connected with the medical jurisprudence can prove the document. A document like post mortem report should not and cannot be brought in evidence mechanically only for the sake of empty formality. In the present case, the post mortem report has been proved by the advocate clerk who has admitted that he has no personal knowledge about the post mortem report and he has not seen the doctor preparing the post mortem report. In such circumstances, even if the post mortem report has been exhibited it cannot be used as an evidence. Learned Counsel for the appellants has placed reliance on a decision as reported in 1986 PLJR 604 (Shiv Balak Rai & 3 others vs. The State of Bihar) wherein it has been held that "post mortem report on record but doctor holding autopsy not examined. No medical evidence to corroborate oral allegations of causing injuries. There is no evidence on record to come to a conclusion about the cause of death of deceased." Considering the argument advanced by the Learned Counsel for the appellants I find that the prosecution has failed to prove the cause of death of the deceased on account of non-examination of the doctor. There was no material before the court to come to a conclusion that it was the assault made by appellant Kamal Yadav which caused death of the deceased.

9. P.W. 1 and P.W. 4, claiming to be the eye-witnesses, were examined by the investigating officer after 14 days of the occurrence. The present case completely depends on the evidence of these two eye witnesses who did not disclose the name of the assailant as well as the manner of the occurrence before the investigating officer for complete 14 days. In the circumstances, their evidence cannot be relied for the purpose of conviction. So far as the case of appellants Sheo Raut and Shambhu Raut are concerned, P.W. 1 and P.W. 4 had not disclosed the names of these two appellants in their statement u/s 161 of the Code of Criminal Procedure. It was for the first time in the court they have been named as accused by P.W. 1 and P.W. 4. There is no consistent and reliable evidence on record to prove the case of the prosecution beyond all reasonable doubt. There is no evidence for conviction of the appellants u/s 302/34 of the Indian Penal Code. In the circumstances, the judgment of conviction passed by the trial court is set aside. The appeal is allowed. Appellants are acquitted. Appellant Kamal Yadav @ Kamal Raut, who is in jail, is directed to be released forthwith, if not wanted in any other case. So far other appellants are concerned, they are released from liability of their bail bonds.

P.N. Yadav, J.

I agree.