

(1974) 07 PAT CK 0012

In the Patna High Court

Sita Ram Pandey and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 29-07-1974

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 342
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 34

Citation : (1976) CriLJ 800

Hon'ble Judges : Muneshwari Sahay, J; B.D. Singh, J

Bench : Division Bench

Judgement

B.D. Singh, J.—This appeal by six persons, namely, Sita Ram Pandey, Indrasan Pandey, Dular Pandey, Ganesh Pandey, Ram Nath Pandey and Sobha Pandey (hereinafter to be referred for the sake of convenience as the appellants Nos. 1 to 6, respectively) is directed against the judgment and order of the learned Additional Sessions Judge convicting all the appellants u/s 302 read with Section 149 of the Indian Penal Code (hereinafter to be referred to as "the Code") and imposing a sentence of rigorous imprisonment for life on each of them; further convicting appellants Nos. 1 and 2 u/s 148 of the Code and passing no separate sentence on them under the said section; and, lastly, convicting appellants Nos. 3 to 6 u/s 147 of the Code and imposing no separate sentence on them under the said section. The aforesaid conviction and the sentence imposed on the appellants u/s 302 read with Section 149 of the Code were for the murder of Indradeo Pandey. All the appellants are residents of village Tenduni, Police-station Kargahar in the district of Shahabad. Appellant No. 2 is the son of appellant No. 5 whereas appellants Nos. 1 and 4 are full brothers being sons of one Ram Naresh Pandey.

2. The prosecution case, in brief, was that, on the 17th of July, 1967, Dular Pandey (appellant No. 3), at about 10 A. M., was taking his cattle to the Tal, which was then full of water, situated to the east of the Chabutra of Indradeo Pandey, the deceased, in the said village. At that point of time, Indradeo Pandey was sitting on his chabutra in front of his baithak intervened by a lane 4V2 feet

wide. Indradeo Pandey protested appellant No. 3 taking his cattle consisting of two buffalos and two cows through his (deceased's) bharith (filled up land) land. The bharith of the deceased was situated south of his baithka and his ianani kita. According to the deceased, by taking away the cattle through the bharith land, the land would be damaged. This led to an exchange of hot words between appellant No. 3 and the deceased, However, appellant No. 3 took away his cattle through the bharith land of the deceased to the Tal. Thereafter, appellant No. 3 further took back his cattle through the same route, namely, through the bharith land of the deceased. At that point of time, namely, on the return journey also, there was exchange of hot words between the deceased and appellant No. 3 who held out threats to the deceased. Fifteen or twenty minutes thereafter, appellant No. 3, along with the other appellants, came to the chabutra at about 10 A.M. where Indradeo Pandey was sitting. Appellants Nos. 1 and 2 were armed with bhalas whereas the rest of the appellants were armed with lathis. Appellants Nos. 5 and 6 instigated the other appellants to assault Indradeo Pandey. Appellants Nos. 3 and 4 each one of them hurled their lathis on Indradeo Pandey but latter managed to escape from being hit by their lathis. Thereafter appellants Nos. 1 and 2, who were holding bhalas in their hands, hurled bhalas on the chest of the deceased causing serious injuries on him. After having received those injuries, Indradeo Pandey fell down on the ground. According to the prosecution, the occurrence was seen by Basisth Pandey (P.W. 1), the nephew of the deceased, Aditya Pandey (P.W. 4), Harakh Pandey (P.W. 5), and Rarnashray Pandey (P.W. 7), the son of the deceased, and, on hull a, various other persons had assembled there from different parts of the village. After committing the offence and after various persons had arrived, all the appellants ran towards their home in the said village. Basisth Pandey (P.W. 1) tried to remove Indradeo Pandey from the ground to a cot in order to carry him to the hospital. However, in the course of his being removed to the cot, Indradeo Pandey died. Subsequently, P.W. 1 went to Kargahar Police Station, which is at a distance of seven miles from the place of occurrence, and lodged first information report on the same day, i.e., on the 17th of July, 1967, at about 3 P.M. naming all the six appellants which was recorded by Tribeni Singh (P.W. 10) Officer Incharge of the police-station, who investigated the case and examined various witnesses. He also went to the place of occurrence, collected blood from the chabutra in presence of the witnesses and sent it to the Chemical Examiner for examination and report. He also sent the dead body of Indradeo Pandey for post-mortem examination to Dr. Kumar Baneshwar Pd. Singh attached to Sasaram Hospital. On the 18th of July, 1967, at about 9 A.M. he held postmortem examination over the dead body of Indradeo Singh and found the following injuries on his person:

(1) One penetrating wound 1 1/2" x 1" x skin, muscle, bone and entering into the lung tissue causing lacerated injury in the middle lobe of the lung on the right side of the upper chest. The chest cavity was full of blood and blood clots.

(2) One penetrating wound 2" x 1" x skin, muscle, bone and entering into the lung pericardium and upper chamber of the chest right side. The pericardial

cavity was full of blood and blood clots. And the lower lobe of the right lung was lacerated.

3. The evidence of the doctor was tendered in the Sessions Court u/s 509 of the old Criminal Procedure Code. According to him, injury No. 2 was 2" below injury No. 1. In his opinion, both the injuries were caused by a sharp pointed weapon, such as, bhala. The death, in his opinion, was due to injury No. 2 which was sufficient to cause death in ordinary circumstances. He further stated in cross-examination that both the injuries were caused by two separate blows. The area affected by each blow was also distinct as found by the dissection of the body. It was difficult to say for him as to which of the injuries was inflicted first. Injury No. 2 would, according to him, cause instantaneous death.

4. After completing investigation, P.W. 10 submitted charge-sheet against all the six appellants. After usual enquiry under Chapter XVIII of the old Criminal Procedure Code, the appellants were committed to the Court of Session. In the Sessions Court, on behalf of the prosecution, as many as ten witnesses, including those we have already mentioned, were examined to establish its case, apart from the evidence of doctor Kumar Bane-shwar Prasad Singh whose evidence was tendered in the Sessions Court u/s 501 of the old Code of Criminal Procedure. The evidence of Kapildeo Pandey (P.W. 2), Jai-dika Pandey (P.W. 3), Mosst. Lakhni (P.W. 6) and Ram Asis Pandey (P.W. 8) was simply tendered by the prosecution in the Sessions Court. Sheo Nandan Singh (P.W. 9) was examined only as a formal witness, as he had carried the dead body for post-mortem examination to the doctor named above. As mentioned earlier, Tribeni Singh (P.W. 10) was the investigating officer.

5. On behalf of the appellants, none was examined as a defence witness. However, their defence as emerged from their statements u/s 342 of the Code of Criminal Procedure, and to the suggestions to various eye-witnesses in brief was that they were innocent and were falsely implicated due to enmity. They had also challenged the genesis of the alleged occurrence.

6. learned Counsel for the appellants, Mr. Brajeshwar Prasad Sinha, had not laid stress upon the previous enmity between the parties. However, he emphasised that the prosecution had failed to establish the genesis, manner as well as the place of occurrence. Dealing with the genesis of the occurrence, the learned Counsel elaborated that there was no reason for the deceased to become annoyed if the appellant No. 3 had taken his cattle to the Tal, even assuming that the cattle were being taken through the bharith land of the deceased, no damage could have been caused to him. Obviously, this shows that the genesis or the motive might have been different which the prosecution was suppressing. According to him, the deceased was a man of loose character and, therefore, people in the village were annoyed with him and, on that account, he was killed elsewhere and the appellants were falsely implicated. In order to find support to his contention, learned Counsel for the appellants drew our attention to paragraph 18 of the deposition of P.W. 7 wherein it was suggested to him that his

father, namely, Indradeo Pandey was assaulted at Chamartoli and that there was allegation against his father about his character. Those two suggestions, however, were denied by P.W. 7 in the same paragraph. In our opinion, nothing turns on those two suggestions. It is well settled that suggestions, if denied, cannot take the place of evidence.

7. learned Counsel, in this connection, also referred to the evidence of the Investigating Officer. He also drew our attention to the objective finding of the Investigating Officer who stated in paragraph 8 of his deposition that there were marks of trampling by the cattle on the bharith land of the deceased to the south of his house. From that evidence, learned Counsel contended that, if really appellant No. 3 had taken his cattle from his house situated north of the house of Jaidika Pandey (P.W. 3), brother of P.W. 4, and had really come to the bharith land of the deceased situated towards south of the chabutra and his janani kita, it was natural that there would have been various trampling marks of the cattle. Since, in the instant case, P.W. 10 had found trampling marks of the cattle only to the south of the house of Indradeo Pandey, the story of taking away cattle by appellant No. 3 to the Tal becomes doubtful. In our opinion, simply because no other hoofs marks were found or noticed by the Investigating Officer, that part of the prosecution story regarding the genesis cannot be doubted. That apart, it is firmly settled that motive or the genesis of the occurrence is not of much importance where the occurrence is supported by the positive eye-witnesses.

8. learned Counsel then advanced his argument with regard to different versions given by the eyewitnesses relating to the place of occurrence. Firstly, he referred to the evidence of P.W. 1 who stated in paragraph 12 of his evidence that Indradeo Pandey fell down on the chabutra whereas P.W. 4 stated in paragraph 3 of his deposition that all the six accused persons had come to his Sahan land which is situated to the north of the Chabutra of Indradeo Pandey. P.W. 5 also stated in paragraphs 5 & 16 of his evidence that all the accused persons had come to the Sahan of Jaidika Pandey, namely, brother of P.W. 4. Lastly, P.W. 7 stated in paragraph 14 that the assault with bhala had taken place at 5 to 6 cubits north of the Chabutra and that Indradeo Pandey was at that time on the northern edge of the chabutra. It was at that point that he was struck with bhala. In our opinion, after due scrutiny of the evidence on record, we do not find much discrepancy in the evidence of the eye-witnesses regarding the place of occurrence. Reference may be made once again to the evidence of P.W. 7 who stated in paragraph 3 of his evidence that all the accused persons had come to the Sahan of Jaidika Pandey (P.W. 3) which was only two cubits north of the chabutra on which his father was sitting. From his evidence, it is clear that the chabutra of the deceased was situated only at a distance of two cubits from the Sahan of P.W. 3. If an occurrence like murder takes place, it is not expected that the person who is being assaulted by various persons would stand like a statue at one fixed place and would not move about here and there in order to save his life even instinctively. It may also be noticed that the Investigating Officer (P.W. 10) had found as stated in paragraph 6 of his evidence that the place of

occurrence was the chabutra. He had scraped blood from the south-eastern portion of the chabutra and had seized blood in the presence of Kesho Pandey and Maharai Pandey. Later on, he had sent the specimen of blood to the Chemical Examiner for report who detected blood in the specimen. Further it was also sent to the Serologist, who however, could not give the origin of the blood as it was disintegrated. In our opinion, therefore, the objective finding of the Investigating Officer as well as the report of the Chemical Examiner lends support. In that State of evidence, in our opinion, there is no merit in this contention of the learned Counsel which may enable us to doubt the prosecution story regarding the place of occurrence.

9. learned Counsel for the appellants also raised some more points before us in order to throw doubt on the prosecution story regarding the manner of occurrence as well as the place of occurrence. He submitted that, if really the deceased was sitting on his chabutra, and when he saw the appellants coming towards the chabutra variously armed, it was natural instinct for him to run towards his bait.hka which was close to the chabutra imtei<"veried by a narrow lane of 4V2 feet, instead why did the deceased move towards the Sahan upon the land of P.Ws. 3 and 4. In our opinion, it would be difficult to say that, at that point of time, what was passing in the mind of the deceased. In that situation, sometimes, it becomes difficult for a victim himself to give an explanation that, instead of going to a particular direction why he went to a different direction. learned Counsel further contended that the chabutra was very close to the baithka of the deceased as well as of his ianani kita. If the appellants had come variously armed, the deceased or his son and his nephew (P.W. 1) would have easily gathered arms by going to their house and could have armed themselves to counter attack the appellants and, in that situation, there would not have been one-sided injuries. That also, according to us, is not enough to doubt the manner or the place of occurrence. Why they did not assault the appellants, it depends upon various factors. It may be that the arms may not be easily available to them in their houses or the time interval between the appellants1 coming suddenly with arms and starting their assault on the deceased would have been too small to allow any time to the deceased and his helpers to get themselves armed. Similar comment was also made with regard to the fact that none of the eye-witnesses received injuries. In our opinion, simply because they did not receive any injury, in that situation, it is difficult to doubt the prosecution story regarding the manner of occurrence.

10. learned Counsel for the appellants thereafter contended that the evidence of the various eye-witnesses also suffers from various infirmities, which throw doubt as to whether they had seen the occurrence. Referring to the evidence of P.W. 1 learned Counsel commented that he is the nephew of the deceased. It was natural therefore on his part to have made some effort in order to save the life of the deceased. In our opinion, on this ground, it would not be possible for us to discredit his testimony. It may be recalled that he is the informant himself and he is the nephew of the deceased. It is also equally settled that a close relation

would not spare the real assailants and instead falsely implicate some other persons, particularly, in the instant case, where there is no material on record to show that there was any prior enmity between the appellants and the prosecution party. We have gone through the evidence of P.W. 1, who has unfolded the prosecution story. What he has stated before the Sessions Court finds ample support from his statement made in the first information report and it is fully corroborated.

11. Regarding P.W. 4, learned Counsel for the appellants submitted that he was not named in the first information report, and so much so that he was examined by the Investigating Officer on the 23rd of July, 1967. In our opinion, only on those two grounds, it would be difficult to discredit his testimony. Nothing has been pointed out in his evidence to discredit his evidence. He has fully corroborated the prosecution story and he is also a neighbour; but, at the same time he is not in any way interested either with the deceased or with his relations. On the other hand, he stated in paragraph 20 of his deposition that he did not know if the Police had come to his village for holding investigation one day after the occurrence. He had gone to bring alms from Sawan Dehiri. He had returned from village Sawan Dehiri in the evening. In paragraph 21, he further stated that the Police did not come to his village on the third day of the occurrence. He has therefore given reasonable explanation for delay in his examination by the Investigating Officer.

12. Thereafter, the learned Counsel for the appellants took up the evidence of P.W. 5. He submitted that although he was named in the first information report, from the evidence on record, it was apparent that he could not have seen the occurrence. He stated in his evidence that, on the relevant date and time, he was sitting at his dalan and Indradeo Pandey was sitting at his chabutra which was situated 12 to 14 steps east of his dalan. Appellant No. 3, at that time, took two of his buffalos and two of his cows through the bharith lands of Indradeo Pandey to the Tal for the cattle to take water. In his cross-examination, in paragraph 6, he stated that he had seen the entire occurrence from his dalan. He was not doing any particular work then. He also stated that female apartment and his dalan are at the same place. learned Counsel pointed out that this witness had stated in paragraph 9 that the house of Rainath Pandey was situated to the north of his house. Kesho Pandey had his house adjacent east of his female apartment. Adjacent east of the house of Kesho Pandey was the dalan of Indradeo Pandey and not that of Kapildeo Pandey. In our opinion, from this evidence, it is not clear that the house of P.W. 5 was located just by the side of the baithka of the deceased and, therefore, if P.W. 5 was sitting in his house, he would have seen what was happening on the chabutra and as to whether appellant No 3 was taking his cattle to the Tal through the bharith of the deceased, as, according to the learned Counsel, his sight would be obstructed by the baithka of the deceased.

13. In this connection, learned Counsel has also referred to the sketch map (Ext.

4) prepared at the instance of the Investigating Officer (P.W. 10), who stated in paragraph 9 of his evidence that the sketch map of the place of occurrence was prepared by him and the same was marked as Ext. 4. In our opinion, there is no evidence on record to suggest that Ext. 4 was prepared on scale. That apart, one does not know about the position of the doors and windows in the house of P.W. 5 and in the baithka of the deceased. Unless that was so, it would not be possible to imagine as to whether P.W. 5 could have seen the occurrence, while sitting in his house or not. As a matter of fact, this question ought to have been asked to P.W. 5 himself; but no question has been put to P.W. 5 in this regard. Therefore, nothing turns on the evidence of the other indirect evidence on the record to cast doubt as to whether P.W. 5 could have seen the occurrence or not while sitting in his own house. It may also be noticed that P.W. 5 is an independent witness, and nothing has been found of his being interested in any way either with the deceased or with his relations and further it has not been pointed out that he was in any way inimical to the appellants. Therefore, we find no reason to disbelieve him on the point of occurrence,

14. The last eye-witness, as mentioned above, is P.W. 7 who is the son of the deceased. learned Counsel for the appellants submitted that he was also not named in the first information report, although he stated in his evidence in paragraph 16 that he had told P.W. 1 that he had seen the occurrence. learned Counsel submitted that, if really he had told P.W. 1 about the occurrence, there was no reason why P.W. 1 would not have given the name of P.W. 7 as one of the eye-witnesses; particularly when he was the son of the deceased. In our opinion, from the statement of P.W. 7 in paragraph 16, it cannot be gathered that he had stated about the occurrence to P.W. 1 before he had left for the police station and before lodging the first information report. Simply because he is not named in the first information report, we cannot discredit his testimony for two reasons; firstly, he was examined by the Investigating Officer on the same day of the occurrence, as stated by P.W. 10 in paragraph 16 of his evidence; and, secondly, he is closest relation of the deceased being his own son, and therefore highly interested in getting the real culprits punished and brought to book. Besides, nothing has been brought on the record to disbelieve him. His evidence is not at all shaken in his cross-examination.

15. Therefore, on the scrutiny of various eye-witnesses, it is difficult to doubt the main part of the prosecution story.

16. learned Counsel for the appellants, however, contended that, iii the instant case, the prosecution has failed to establish either the common object or the common intention for committing the murder shared by all the appellants. learned Counsel pointed out that except appellants Nos. 1 and 2, the other four appellants have not committed any overt act. Even allegation that appellants Nos. 3 and 4 had hurled their lathis on the deceased is not supported by the objective finding of the medical officer Dr. Kumar Bane-shwar Prasad Singh, as no lathi injury was found on the deceased by him. Against the appellants Nos. 5

and 6, the allegation is only that they were order givers. According to him, their presence also at the place of the occurrence is not free from doubt. Besides, appellant No. 5 aged about 65 years is the father of appellant No. 2. The prosecution has tried to implicate both the father and the son on the allegation that the father had ordered his son to give a Bhala blow on the deceased. learned Counsel submitted that it is doubtful that the father will instigate his son to commit such a heinous crime and himself be present there. Appellant No. 6 is also aged about 65. In our opinion, the contention of the learned Counsel that no common object was established by the prosecution cannot be accepted. It is well settled that, if persons are in a mob holding lathis and are in company of other persons who are holding deadly weapons like bhalas and if they come together and go together after the occurrence, it cannot be held that they did not share the common object. The provision contained in Section 149 of the Code will be attracted, unless it is established that the persons holding lathis at the place of occurrence were mere sight-seers. That is a question of fact which has to be decided on the evidence on record. It is also well settled that, in all cases, it is not necessary that all the persons forming an unlawful assembly must do some overt act. Reference may be made to the case of Bishambher Bhagat and Others Vs. State of Bihar, and Masalti Vs. State of U.P., . In the instant case, we find that there to that all the appellants had come together and after the occurrence they had run away together as mentioned above.

17. learned Counsel, however, with regard to appellants Nos. 5 and 6 has emphasised that their presence was doubtful in the assembly because of their old age and secondly because the son of appellant No. 5 was already amongst one of the assailants as mentioned above. He also drew our attention to a recent decision of the Supreme Court in the case of Jainul Haque Vs. State of Bihar, where their Lordships in paragraph 8 at page 47 observed as follows:

The evidence of exhortation is, re by in the very nature of things, a weak piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant.

In our opinion, after due and careful consideration, this submission of the learned Counsel is acceptable. On the facts and on the evidence on record as mentioned above, we give benefit of doubt to appellants Nos. 5 and 6 and their very presence in the unlawful assembly is doubted, Therefore, we set aside their conviction u/s 302 read with Section 149 of the Code? and also their conviction u/s 147 of the Code and they are set at liberty.

18. Now, as regards, appellants Nos. 1 to 4, we find that there is no escape, but since now it falls short of the requisite number of 5 or more persons to form an unlawful assembly their conviction u/s 302 read with Section 149 cannot be sustained; nor their conviction under Sections 148 and 147 of the Code.

However, in the instant case, there are sufficient materials to hold that appellants Nos 1 to 4 shared common intention as required u/s 34 of the Code. We have already quoted above the medical evidence on the point of injuries on the deceased. From injuries on the deceased, it is apparent that both appellants Nos. 1 and 2 had participated in the injuries which resulted in the death of the deceased. Therefore, there is a clear case of participation by appellants Nos. 1 and 2. Similarly, we find that there is a cogent evidence on the record where almost all the eyewitnesses have stated that first of all appellants Nos. 3 and 4 had hurled their lathis on the deceased, who, by his own efforts, managed to inhence, the occurrence by appellants Nos. 3 and 4 also cannot be doubted. It is now firmly established that a preconcert in the sense of a distinct previous plan is not necessary to be proved for the application of Section 34 of the Code. The common intention to bring about a particular result may well develop on the spot. In the instant case, appellants Nos. 3 and 4 armed with lathis, had come together with appellants Nos. 1 and 2 who were armed with bhalas to the place of occurrence and started hurling lathis on Indradeo Pandey who warded off the lathis blows. Almost simultaneously appellants Nos. 1 and 2 assaulted Indradeo Pandey with bhalas as a result of which he died near the place of occurrence soon after receiving the fatal injury as mentioned above. After the occurrence, appellants Nos. 1 to 4 ran away to their house together. These facts and circumstances go to show that the appellants Nos. 1 to 4 shared common intention in furtherance of which Indradeo Pandey was killed. In our opinion, therefore, the provision contained in Section 34 of the Code is attracted so far as appellants Nos. 1 to 4 are concerned. Hence, we set aside their conviction and sentence u/s 302 read with Section 149 and also their conviction and sentence under Sections 147 and 148 of the Code, and instead convict them (Appellants Nos. 1 to 4) u/s 302 read with Section 34 of the Code and impose a sentence of rigorous imprisonment for life on each one of them.

19. In conclusion, the appeal of appellants Nos. 1 to 4 is dismissed and their conviction and sentence u/s 302 read with Section 149 of the Code are set aside. Instead they are convicted u/s 302 read with Section 34 of the Code and each one of them is sentenced to rigorous imprisonment for life. Further, their conviction under Sections 147 and 148 of the Code is set aside. The appeal of appellants Nos. 5 and 6 is allowed and their conviction and sentence imposed u/s 302 read with Section 149 and their conviction u/s 147 of the Code are set aside, and they are discharged from their bail bonds, if any.

Appeal allowed in part. Conviction of accused appellants Nos. 1 to 4 altered. Sentence maintained.