
(2003) 02 PAT CK 0023

In the Patna High Court

Case No : Criminal Appeal (DB) No. 126 of 1999

Sube Lal Gope @ Subelal Yadav and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 24-02-2003

Acts Referred:

Citation : (2003) 02 PAT CK 0023

Final Decision : Allowed

Judgement

B.N.P. Singh, J.—Broad features of the prosecution case, as appearing from the earliest version of Bhim Prasad (P.W. 6) and also narrations made by the prosecution witnesses at trial was that at about 6.30 a.m. on 28th September, 1995, Kapil Prasad (hereinafter referred to as the deceased), having noticed Rajendra Gope, Deo Nandan Gope, Subelal Gope, Ramashray Gope, son of Rajendra Gope, Sharan Gope, Ghanshyam Gope, Subhash Gope, Ram Nandan Gope, Ramashray Gope, son of Sube Lal Gope and Mahendra Gope, cutting branches of trees that had fallen on the road due to storm that had visited last night, he restrained them from cutting branches of trees, that being property of the Government and had fallen in front of his house. Allegedly, then Ghanshyam Gope while abusing the deceased, dealt lathi blow on him, pursuant to which it was Subelal Gope, who taking the lead, exhorting Appellants to bring fire-arms from their houses, and shot him, following which both Deo Nandan Gope and Rajendra Gope, brought guns from house, and resorted to firing. It was explicitly alleged that Deo Nandan Gope, fired shot on Kapil Prasad which struck his right hand and the deceased immediately sat down, and when he wanted to make abortive bid to escape, he was chased by the Appellants who surrounded him near the house of Bhism Prasad when fatal shot was given by Rajendra Gope in the neck of the deceased who dropped dead and the Appellants thereafter retreated from the place of occurrence, and with these accusations, fardbeyan of Bhism Prasad was recorded by the Police Officer of Deep Nagar Police Station at about 8 a.m. on 28th September, 1995 which followed collection of evidence. During investigation, the Investigating Officer in the process of collection of

evidence, visited place of occurrence, prepared inquest report over the dead body of the deceased, noticed few blood drops at the place of occurrence which was faint due to getting washed away from rain during last night, got autopsy held over the dead body of the deceased, took steps for apprehension of the Appellants and made over charge to his successor who eventually laid charge sheet before the Court. In the eventual trial that followed, the State examined altogether eight witnesses, who were family members of the deceased, some formal witnesses, the doctor, who held autopsy over the dead body of the deceased and also the Police Officer who largely contributed to the investigation of the case.

2. Three-fold contentions were raised on behalf of the defence to counter allegations attributed to the Appellants and foremost of them was that while deceased was guarding pumping set in the field, preceding night of incident, unknown miscreants executed his killing and his dead body having been brought to the place of occurrence, a concocted case was launched against the Appellants. Other defence of the Appellants was that though with the said assertion, first information report was recorded by the Police Officer on behest of said Bhism Prasad at Dip Nagar Police Station, when he visited the Police Station in the company of the chowkidar, the said first information report was substituted with a concocted version which now happens to be the sheet anchor of the prosecution case. The other contention of the Appellants, as a corollary of the second defence, was that since J.P. Yadav, Police Officer happened to be remotely related to the family members of the deceased, the entire prosecution case was launched at his dictate, there being past feud between the family of the deceased and also the prosecution party. The defence too had chosen to examine three witnesses raising plea of alibi on behalf of Appellant Ramashray Yadav and also Subelal Yadav, and the trial court while recording finding of acquittal against Ramashray Yadav, son of Subelal Gope, rendered finding of guilt, rejecting plea of defence of the Appellants, against Rajendra Gope and Deo Nandan Gope u/s 302 IPC and sentenced them to suffer rigorous imprisonment for life. These two Appellants suffered conviction also u/s 27 of the Arms Act for which they were to suffer sentence of rigorous imprisonment for three years, with direction that both the sentences shall run concurrently. Rest Appellants including Ramashray Gope son of Rajendra Gope suffered conviction u/s 302/149 IPC and they too were sentenced to the same terms of imprisonment as that of Rajendra Gope and Deo Nandan Gope.

3. Unable to find any meaningful criticism, the defence has sought to assail the finding recorded by the court below even in respect of those who were suggested to be assailant of the deceased, and manifold contentions were raised at Bar. Contentions were raised that though testimony of witnesses unequivocally suggests presence of villagers also who had thronged to the" place of occurrence, at the material time of incident, the State had chosen to examine only injured and family members of this deceased, entirely to the exclusion of those independent witnesses, whose evidences could have been quite objective,

and no finger could have been raised about their non-impartiality. Astray arguments were made that even though witnesses were stating about there being copious blood at the first place, where the deceased sustained injury in a ditch, and also the place near the corner of house of Bhism Prasad, where he sustained second shot at the hands of Rajendra Gope, the objective finding of the Police Officer was quite eloquent that he did not notice blood on the second place of occurrence, and other submission is that though witnesses state that due to oozing of blood from the wound of the deceased, right from the ditch, to the corner of the house of Bhism Prasad, there was trail of blood, there was no such objective finding of the Police Officer about presence of blood in these areas. Likewise, absence of empty shells of cartridges at the place of occurrence was also taken to be a ground to counter the accusation attributed to Rajendra Prasad and Deonandan Prasad about they having fired shot on the deceased with their fire arms. Yet, it is urged that though a number of witnesses including P.Ws. 3, 4 and 5 claimed to be ocular witnesses to the incident, presence of these witnesses at the material time of incident to facilitate them to be ocular witness was seriously wanting in the fardbeyan of Bhism Prasad which he rendered before the Police. Some discordant note appearing in the testimony of P.Ws. 3 and 4 was also highlighted at Bar about the mode of the incident, and on these premises, it was urged that though some witnesses state that shortly after the deceased sustained first gun shot injury by Deonandan Gope near the ditch, he was surrounded by the Appellants, narrations made by P.Ws. 5 and 6 were quite at variance as they state that only after the deceased reached near the corner of the house of Bhism Prasad, they were encircled by the Appellants pursuant to which Rajendra Gope fired gun shot causing injury in the neck of the deceased.

4. Learned Counsel would urge that the most incongruous part of the prosecution version which would not feel to catch attention, was that even though Police Case number was inserted in the first information report at about 12.30 noon, on own showing of the Investigating Officer one puzzles to find the case number on the inquest report, which was recorded, preceding the institution of the case, our attention has also been drawn to another discordant note appearing in the prosecution version. Even when the chowkidar was suggested to be the first person to have rendered information to the Police about the incident who was also briefed by the witness about assailant and also details of incident, the said chowkidar was not examined at trial which has brought serious infirmity in the prosecution version about its bona fide, and the last argument was that admitted case of the prosecution was that only Rajendra Gope and Deo Nandan Gope had brought firearm from their houses, who were also assailants of the deceased, there was no evidence about other Appellants having any arms with them or committing any overtact in accomplishment of object with which the assailants might have visited the place of occurrence and fired shots on the deceased, and based on this logic, it is urged that reasonable conclusion that can be drawn in the attending circumstances of the case was that rest Appellants, even if they were members of the unlawful assembly, did not share common object and were

not vicariously liable for the acts committed by the Appellants.

5. Before we give our consideration to the arguments canvassed on behalf of the Appellants, a brief narration of the testimony of witnesses led at trial, which have been spelt out in the judgment of the court below, needs to be discussed.

6. Reiterating his earliest version, which he made before the Police, Bhism Prasad (P.W. 6), who was also maker of the fardbeyan, states that while the Appellants were cutting branches of trees that had fallen on the road due to storm that had lashed last night, the deceased went to restrain them, as the tree apart from being Government property, had fallen in front of his house, pursuant to which it was Ghanshyam Gope who taking the lead, dealt blows with hard and blunt substance on him. Subelal Gope taking another lead, exhorted the Appellants to bring fire arms from their houses, and the witness states that shortly after Deonandan Gope and Rajendra Gope brought fire arms from their houses, Deonandan Gope taking the lead fired shot on the deceased in his right arm, and when deceased in his bid to save himself, ran towards south, he was encircled by the Appellants near the corner of the house of Bhism Prasad when Rajendra Gope fired another shot and the deceased eventually dropped dead. Though good endeavours were made by the defence to impeach the credibility of this witness, the court below has found this witness credible and we endorse view of the court below.

7. Now we advert to the testimony of Ajay Kumar (P.W. 3). This witness too in tune with the assertions made by P.W. 6, states at trial that at about 6.30 a.m. on 28th September, 1995, when Appellants were cutting and removing tree that had fallen last night, his father restrained them, as not only that it was Government property but also had fallen in front of his house, and that followed hurl of abuses on his father by the Appellants, when Ghanshyam Gope assaulted his father with hard and blunt object. Then Subelal Gope exhorting Appellants asked them to bring fire arms and shoot him. It is stated by the witness that Deonandan Gope and Rajendra Gope on command of Subelal Gope brought firearms from their houses, when Deonandan Gope fired first shot on his father when he dropped and shortly after he got up and wanted to make abortive bid to escape, he was shot dead by Rajendra Gope. Narration made by this witness at trial was strongly criticised by the learned Counsel for the Appellants urging that as witness states that while Deonandan Gope and Rajendra Gope had gone to bring fire arms from house, he advised his father, who had received injury, to retire from the place of occurrence, apprehending danger, but he could not escape, he having been encircled by some of the Appellants. Appellants had shortly retired from the place of occurrence. On these premises it is urged that in the backdrop of such narration made by the witness, there was no occasion either for Deonandan Gope or Rajendra Gope for having firing shot on the deceased.

8. Adverting to narrations made by Vijay Prasad (P.W. 4), we notice the witness making same narration before the trial court about Ghanshyam Gope having

dealt lathi blows on deceased, when he restrained him from cutting branches of trees, and thereafter Deonandan Gope and Rajendra Gope having brought firearm from the house, fired shots on him at some intervals, when the deceased dropped dead near corner of the house of Bhism Prasad, and our attention has been drawn towards some discordant note appearing in the testimony of this witness too about the deceased having been encircled by the Appellants even near the ditch where he sustained first gun shot injury by Deonandan Gope. We have carefully given our anxious consideration to the submissions canvassed at Bar and also narrations made by the witnesses and we find that astray narrations made by this witness at some places cannot be read in isolation, as it is totality of evidence of the witnesses, which has to be taken into consideration to assess their probative value and for consideration as to whether they are credible witnesses. These two witnesses would make candid narration in their evidences about deceased having been vitally injured near the house of Bhism Prasad, when being chased by the Appellants he became immobile there, and hence defence cannot make castle of stray statement of two witnesses about the deceased having been encircled near the ditch when first gun shot injury by Deonandan Gope was made. No hairsplitting criticism can be made on this score as some variations in the testimony of witnesses with regard to posture and situation in which the deceased sustained gun shot injury may occur when the witnesses are making statement on details, and such variations would not affect the broad features of the prosecution case unless they are on material particulars. We fail to find any such material variations appearing in the testimony of these two witnesses to discard their credibility.

9. Without repeating narrations made by Sadhu Prasad (P.W. 5), which has been discussed in the judgment of the court below too, we find the witnesses making narrations with same vein and term about Ghanshyam Gope assaulting the deceased with hard and blunt object when he restrained him from cutting branches of trees that had fallen due to storm in the preceding night, and the deceased having suffered injury at the hands of Ghanshyam Gope near the ditch and the other shot having been suffered by him near corner of house of Bhism Prasad in the neck when he dropped dead.

10. Now we may take notice of the landings recorded by the doctor who happens to be Dr. Atma Nand (P.W. 7). The doctor states to have noticed following injuries on the person of the deceased during post mortem conducted by him.

(i) One lacerated wound 1" x 1" on the interior aspect or right forearm with inverted blackening margin i.e. wound of entry.

(ii) One lacerated wound with inverted margin 2" x 2" on the posterior aspect of right firearm i.e. wound of exit.

Injury Nos. (i) and (ii) in estimation of the doctor were communicating to each other and the doctor also noticed ulna bone fractured.

(iii) One wound of entry 1/4" x 1/4" muscle deep on right side of neck. The

doctor states to have noticed bullet lodged on the posterior wall of chest near the inferior angle of left scapula. Death in the opinion of the doctor was caused due to shock and haemorrhage due to these injuries caused by the fire arm.

11. Analysis of prosecution case would remain incomplete, if we do not notice some objective findings of the Police Officer who happens to be Shri Rabindra Kumar Singh (P.W. 8). The witness states that he visited place of occurrence, which situates in village Golapur on receipt of telephonic information about the incident, received from Pramod Kumar, Chowkidar on 28th September, 1995, pursuant to which he recorded fardbeyan of Bhism Prasad on strength of which first information report of the case was registered which was followed by collection of evidence during investigation. The Police Officer stated to have prepared inquest report on the dead body of the deceased. He stated to have found cahua tree fallen, due to storm, on the ground. South east to the dalan of the deceased, the Police Officer noticed some faint blood drops which appeared to have been washed away due to rainfall. Dead body of the deceased with blood stained wearing apparels was sent to mortuary for post mortem examination. The Police Officer states to have taken steps for apprehension of the Appellants and nabbed some of them.

12. Though rest two witnesses were not of much significance but we wish to refer to them and one of them happens to be Soman Yadav. This witness had turned volte face to the State and hence he was cross examined by the State. Jagat Kumar (P.W. 2) was signatory to the fardbeyan of Bhism Prasad and this witness being formal in nature, there was nothing material in his evidence to merit consideration. This is all the evidence that has been adduced on behalf of the State.

13. We may now take notice of some of the lucid arguments canvassed at Bar on behalf of the Appellants, narration of which has been given in the preceding paragraph. True it is that the Police Officer in his objective finding stated to have noticed, blood only near the ditch where the deceased sustained first gun shot injury by Deonandan Gope. True it is that contrary to the assertion made by the witnesses about there being trail of blood right from the ditch to the corner of the house of Bhism Prasad, the Police Officer did not find even blood drop at these places, though the witnesses have stated about there being copious blood at these places. True it is that the Police Officer did not find sign of violence on the wall and also there was no empty shell of cartridges at the place of occurrence but significant it is to notice that these are matters on petty details which would not affect the credibility of the witnesses and also bona fide of the prosecution case. Our answer would be in negative as these are matters of petty details which do not befog the real issue.

14. Narration with same vein were made by witnesses about arrival of the villagers at the place of occurrence and also family members of the house of the deceased who witnessed the incident. Some sort of explanation has also been given by the witness about family members alone to be eye witness and we may

refer to the testimony of P.W. 6. Law which holds good, having been crystallised in a number of decisions of the Court is what the Court is required to assess is not about those who were not examined at trial but probative value of the witnesses examined at trial and to consider whether they were credible. The experience shows that in the present scenario even ocular witness is quite reluctant to attend the court and to be a witness. Though necessity of examination of independent witness has now lost its significance, but concept that has gained importance was that the Court is required to separate grain from the chaff, and on this score we hold the view that even if female members of the deceased were not examined and those who were examined by the State were only family members, unless their testimony had been impaired, we see no reason to discredit them and having analysed testimony of witnesses, we find them credible.

15. Since a good deal of argument was addressed to the Court about non-examination of Pramod Kumar, chowkidar, who rendered first information to the Police, we wish to delve on this issue too. P.Ws. 3, 5 and 6 stated about sending chowkidar to the Police Station shortly after the incident and we find that barring P.W. 3 who states about chowkidar having been briefed by him about details of the incident, none of the remaining witnesses stated about disclosing details of incident and also name of the assailant to the chowkidar. We have considered evidence of the Police Officer also and he too did not lend assurance to the argument made on behalf of the Appellants, about he having been briefed by the chowkidar about details of the incident and once this is accepted, there was no reason to treat the first information report to be a tainted or a substituted document. As for defence of the Appellants, none of the prosecution witnesses ever admitted in their evidences about deceased having been guarding the pumping set in the night preceding the incident and we may, however, refer to the evidence of P.Ws. 3, 4 and 6. Though these witnesses admitted about there being pumping set in the field for irrigation of the land, but simply there being pumping set would not necessarily lead to the conclusion that the deceased was guarding the pumping set in the night preceding incident where he was killed by unknown persons. Though our attention has also been drawn to the evidence of P.W. 1 Sorriari Yadav and also Shanti Prasad (D.W. 3), as on his own showing of Shanti Prasad he was not examined by the Police during investigation, and it was for the first time that he had come to Court to make such narration at trial. As for Somari Yadav (P.W. 1), this witness had turned volte face to the State for which he was also cross examined by the State and we see no reason to treat the defence version to the probable on the solitary testimony of this witness. Defence taken by the Appellants was not only presumptive but in our view also extremely imaginative for which we find no good reason for its acceptance.

16. Though some questions were put to the witnesses also about past enmity between the parties and we find P.Ws. 5 and 6 stating about previous cases instituted in the year 1985. Though institution of this case was denied by other witnesses, even assuming narration made by P.Ws. 5 and 6 to be true about

there being case between parties in the year 1985, which in terms of the defence, was cause of false implication, we find that it was a stale matter and it was not expected that for such stale matter, the prosecution would take recourse to false implication of the Appellants for which there was no good reason. Though the Police Officer stated to have noticed faint blood drops at the place of occurrence and near ditch, true it is that it was not seized by him but in our opinion that being lapse on the part of the I.O. the prosecution should not be a casualty on this score also.

17. Learned Counsel for the Appellants taking objective finding of the Police Officer has argued with much stress that even though genesis of the incident as stated by the State was the cutting of branches of tree by the Appellants, which was restrained by the deceased, the I.O. had not found any sign of it or taking of branch of tree by the Appellants, and on this score, it is urged that since genesis, which was the immediate cause of incident, had not been established by the State, the prosecution case must be discarded in entirety, and reliance on this score was placed on a decision of the Apex Court reported in *Devi Lal and Another Vs. The State of Rajasthan*, But we find that ratio decided of the said case would not be applicable to the instant case as bona fide of the prosecution case was disbelieved by the Court on the score that there was no evidence that the accused knew that was the prosecution case. A part of the prosecution case was not accepted holding the view that if the pivot of the prosecution case is not accepted a new prosecution case cannot be made to imperil defence. Such is not the case with the instant case in hand. Not only in the earliest version of Bhism Prasad (P.W. 6) but even in the narration made by almost all the witnesses, who claimed to be ocular, it was stated with sustained consistency that after Kapildeo restrained the Appellants from cutting branches of the tree, which had fallen due to storm, the incident had followed. It is not the case where the prosecution has introduced distorted version about genesis of the incident.

18. Though the Investigating Officer did not state in his evidence about there being sign of either cutting of tree or removing branches, from the place of occurrence, learned Counsel for the State has sought to draw our attention to the objective finding of the Police officer recorded in Police case diary and we are afraid that for such evidence which is wanting in his evidence we can take notice of the objective finding recorded in the Police case diary, as even when the Public Prosecutor has failed to get contradiction explained, as provided by the last limb of Section 164(1) of the Code of Criminal Procedure, it is not permissible for the Court to invoke powers u/s 172 of the Code of Criminal Procedure for such contradictions, which is dealt with the proceeding in the investigation, and on this score reliance can be placed on a decision of the Apex Court reported in *Mahabir Singh etc. etc. Vs. State of Haryana*,

19. Now, accepting that there has been no such objective finding of the Police Officer about there being evidence of cutting of branches and its dragging by the Appellants, the moot question that concerns and agitates our mind was as to

whether the credibility of the entire prosecution case would be thrown to wind on this score and our answer would be of course in negative.

20. We shall fail in our duty if we do not take notice of the defence witness also. Ramashray Yadav, son of Subelal Gope has been acquitted on the plea of alibi taken by the Appellant. Without making any comment on finding of the trial court on (sic) plea of alibi was taken by the defence, and now firstly we may refer to the evidence of Pitamber Yadav (D.W. 1), who states to have also met Subelal Gope at 6.30 a.m. on 28th September, 1995. The evidence of this witness has to be rejected for more than one reasons. This witness states that Subelal was rental in his house at Biharsharif but he could not say name of the rental who resided in his house since 1978, when house was constructed by him, and to crown all, on his own showing, Golapur village, where the place of occurrence situates is hardly at a distance of 7-8 Kms. from Biharsharif and it takes not more than an hour to negotiate distance by bicycle. Now we take notice of the narrations made by Baleshwar Yadav (D.W. 2) who happens to be a Reader in Chemistry, in Biharsharif college and this witness too states that on 28th September, 1995, Subelal had come with his son Ramashray Yadav for taking tuition in English and this witness too states that it takes only 10-15 minutes for going to Golapur from Biharsharif. We may reiterate that plea of alibi postulates physical impossibility of a person on a given time at a place, and considering distance between Biharsharif and village Golapur, which can be covered within one hour on a bicycle, no conclusion can possibly be drawn that Subelal could not have reached the place of occurrence from Biharsharif at the time of occurrence, and that apart, the evidence of D.Ws. 1 and 2 was not of such clinching nature to lead to irresistible conclusion about his absence from the place of occurrence and hence we hold the view that plea of alibi taken in respect of Subelal was without substance and devoid of merit which can be rejected, for good reasons which we have just noticed.

21. The (sic) had shared object for accomplishment of the task which the assailants namely Deonandan Gope and Rajendra Gope carried with them, and we need not reiterate, which has been crystallised in long catena of decisions of the Court that in order to fasten the vicarious liability on a member of the unlawful assembly, the prosecution must prove that the act constituting an offence was done in prosecution of an object of that assembly or the act was such as to construe the accused persons to be members of the unlawful assembly who knew it likely to be committed in prosecution of common object of that assembly. Since Section 149 IPC, which is usually applied for fastening vicarious liability to the members of the unlawful assembly, imposes constructive penal liability, what is important to find out was as to whether offence was committed, to accomplish the common object of the assembly or was the one which the members knew likely to be committed and there must be nexus of common object and the offence committed, and without multiplying decisions, we may refer to two decisions of the Apex Court reported in AIR 1989 SC 1456 Rambilas Singh and Others Vs. State of Bihar, Now we may take notice of

narrations made by witnesses and also the attending circumstances of the case, as to whether constructive liability can be fastened to the rest members of the unlawful assembly and now we may refer to the evidence of P.W. 2 who states that barring these two Appellants, namely, Rajendra Gope and Deo Nandan Gope, others did not hold arms nor any overtact was committed by them. We may also take notice of the testimony of Bhism Prasad (P.W. 6) who states that other Appellants did not hold arm with them. Even Rajendra and Peonandan Gope who had brought axe with them shortly when they visited the place of occurrence, had not used arms and in view of narrations made by these two witnesses and also attending circumstances of the case, which we have noticed, we find that if it was intention of rest Appellants that the deceased should be done to death, it was unconceivable that they would have come without arms and they would not have launched attack on the deceased and would have rest contended with the blows given by the two assailants. Though we find that the rest Appellants might have constituted unlawful assembly, there was no evidence to fasten vicarious liability on them and on these premises we find that though" finding recorded by the court below as against Rajendra Gope and Deonandan Gope, who were suggested to be assailants of the deceased, was well reasoned, which did not merit interference, finding recorded by the court below finding other Appellants guilty and imposing sentence u/s 302/149 IPC was not sustainable.

22. Having given our deepest consideration to the evidence placed on the record and also contentions raised at Bar, while we uphold the judgment of the court below in respect of Rajendra Gope and Deonandan Gope, and dismiss Cr. Appeal No. 209 of 1999, allow Cr. Appeal No. 126 of 1999. Cr. Appeal No. 163 of 1999, however, succeeds in part. Those who are acquitted are discharged from the liability of the bail bonds.

P.K. Sinha, J.

23. I agree.