

(2002) 10 PAT CK 0029

In the Patna High Court

Case No : Criminal Appeals (DB) No. 205 of 1997

Surgriv Thakur and Radhey Mistri

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 28-10-2002

Acts Referred:

Arms Act, 1959 — Section 27

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302

Citation : (2003) 4 PLJR 694

Hon'ble Judges : P.K. Sinha, J;B.N.P. Singh, J

Bench : Division Bench

Advocate : P.N. Pandey, Amrendra, Pramod Kumar and Binit Kumar, for the Appellant; Ganesh Prasad Jayaswal, for the Respondent

Final Decision : Allowed

Judgement

P.K. Sinha and B.N.P. Singh, JJ.—The three appeals aforesaid have been heard together, all having arisen out of the judgment in Sessions Trial No. 261 of 1987/71 of 1995, and are being disposed of by this judgment.

2. Appellants Ashok Prasad alias Ashok Kumar and Rameshwar Mahto have been convicted under Sections 302 and 148 of the Indian Penal Code (hereinafter referred to as "the Code") and sentenced to undergo rigorous imprisonment for life, and rigorous imprisonment for two years, respectively. Appellant Ashok Prasad has also been convicted u/s 27 of the Arms Act and has been sentenced to undergo rigorous imprisonment for three years whereas Appellants Radhey Mistri and Sugriv Thakur have been convicted under Sections 147 and 302 read with Section 149 of the Code, having been sentenced to undergo rigorous imprisonment for one year, and for life, respectively. The sentences were ordered to run concurrently.

3. The occurrence had taken place in the night between 17th and 18th day of February, 1982 at about 11.00 P.M. The first information report (Exhibit-1), is a written application handed over by the informant Shyam Narain Pandey (P.W. 5)

to the Police at Tharthari Outpost, which was sent to Chandi Police Station for registration of case which was duly registered at 6.30 P.M. on 18.2.1982. As per evidence of the informant (P.W. 5) he had started for the Police Station at 3.30 A.M. and had reached Tharthari Outpost where at 8.30 A.M., after narrating the incident, he had also handed over the written first information report. The allegation in the first information report is that when in the preceding night at about 11.00 P.M. the family members were sleeping inside rooms and the uncle of the informant, Mangaldeo Pandey, was sleeping at the verandah, they heard shouts of "Chor-Chor" and thereafter they heard a firing sound. Out of fear, for some time, they did not come out though they had started shouting, but when the situation calmed down, all the family members opened their doors and came to the verandah where they saw a bleeding wound in the neck of the uncle who had already died. They started crying and the miscreants fled away, firing, without taking anything. As per informant, he did not know with whom his deceased uncle had enmity. The informant also named five persons of the village who came on hulla who, however, have not been examined as witnesses.

4. In the case prosecution had examined eight witnesses in all including P.W. 8 who was a formal witness and P.W. 6, Ram Narayan Singh, a witness of inquest. P.W. 7 is Dr. Binoy Prasad Keshav, who had held post mortem on the dead body, whereas, apart from the informant, other witnesses, P.Ws. 1 to 4, were members of the family, namely, Kanti Devi, Champa Devi, Giran Devi and Kaushalya Devi.

5. Though the first information report, that was handed over about nine and half hours after the incident, did not contain any name, some witnesses, however, have given out the names of the miscreants as having been seen by them at the place of occurrence, which includes Kaushalya Devi, wife of the deceased, who has come out as an eye-witness to the occurrence.

6. In brief, first the evidence of witnesses may be seen. P.W. 1, daughter-in-law of the deceased, said that she was sleeping with her Nanad, P.W. 3, inside the room whereas her mother-in-law was sleeping in another room and the informant and his wife were sleeping in yet another room. Deceased in the night shouted "Chor-Chor," while sleeping at the Osara, and after some time they heard firing sound where after her mother-in-law came out of the room and started crying and thereafter P.W. 2 came out and saw five persons fleeing away. This witness did not identify anyone as she had arrived at her Sasural only a few days back. She claimed that her sister-in-law (Nanad, P.W. 3) and mother-in-law (P.W. 4) had identified the miscreants. P.W. 3 had informed her the names of the miscreants who were fleeing away and in that context she named the present Appellants also. She saw that her father-in-law had a wound at the left temporal region and mouth was cut, and half of the tongue was pasted on the wall. She claimed that a Dhibri was burning. About motive she said that since the miscreants were teasing the girls for which they were scolded by the deceased, that was the reason why he was killed. In cross-examination she admitted that she had seen five persons fleeing away. When her attention was drawn towards

her statement made to the Investigating Police Officer, she claimed to have made those statements. P.W.2, Champa Devi, wife of the informant, also stated as to where they were sleeping and how on "nulla" of her father-in-law they woke up whereafter they heard firing sound and the cry of the mother-in-law. She said that when she came out, she saw five persons fleeing away, in the light of Dhibri. She did not identify any of those but her mother-in-law told her the names including that of the Appellants. She also supported that her father-in-law was dead, having received fire arm injury, whose severed tongue was pasted on the wall. It appears that in the court she identified one whom she had seen fleeing away. However, in this case no test identification parade was held. In the cross-examination she said that in the night her mother-in-law had not named the miscreants but in the after noon she had told the names. She also said that her husband had met his mother.

7. P.W. 3, Giran Devi, also has similarly stated about killing of the deceased and about hearing of the firing sound. She opened the door of her room on hearing the cries of her mother whereafter she saw five persons fleeing away whom she identified in the light of Dhibri and torch. She said that she had told about her identification to her sister-in-law, P.W. 1. This witness has also said about the motive, that about a month back the miscreants, sitting at the dalan of Appellant Radhey Mistri, had teased her which she had told the deceased who had scolded them for which reason the murder was committed. She also said that Appellant Ashok Prasad had a gun in his hand whereas Rameshwar Mahto had a Bhujali, and Radhey Mistri had a torch in his hand, but others were empty handed. In cross-examination she said that immediately after gun sound her mother had started crying whereafter she came out, but she denied that she had any torch in her hand. She also admitted that informant was in the house that night and, in the night itself, the informant had talked with her, her Bhabhi and her mother (all witnesses) and that she had told her brother about identifying the miscreants. She also asserted that on return from the Police Station the informant told her that he had instituted case against those accused.

8. P.W. 4, Kaushalya Devi, also supported about hearing of the firing sound but she also claimed that from inside her room, from a chink in the door she saw that Ashok Prasad had fired at her husband and Rameshwar Mahto had assaulted with Bhujali, whereafter Ashok Prasad had cut the tongue and threw that on the wall. According to her, when the accused started fleeing away, she opened the door but when she saw her husband dead, she started crying and thereafter she fell unconscious. According to her, she regained consciousness in the morning. But she admitted that she had told P.W. 1 about identifying the miscreants. She supported the motive and about scolding of the Appellants by her husband when they had teased her daughter. She also admitted that she had shown the crack in the door, from which she had peeped out, to the Investigating Police Officer and had seen the entire occurrence from inside the room.

9. The informant himself supported the prosecution case so far hearing of the

firing sound was concerned, and said that he opened the door when her aunt, P.W. 4, started crying. He found her unconscious and the uncle dead. He also claimed that "Daroga" was shown the Dhibri. In cross-examination he claimed that before proceeding to the Police Station he had not talked with any family member. He denied that he had given in writing to the Police that he had come out only after the situation had calmed down, and that he did not remember as to whether he had told the Police about the wife of the deceased having fallen unconscious. However, he admitted that he had told the Police that he neither had seen any one fleeing away nor had seen any one doing any overt act. From the evidence aforesaid it is clear that the informant himself has claimed that when he came out he did not see any one fleeing away, but P.W. 4 and P.W. 3 have claimed that they, who also had come out almost the same time, had seen the miscreants fleeing away. P.W. 3, who has so claimed, has also admitted in her evidence that in the night itself, which means that before informant's departure to the Police Station, he had talked with her, his wife (P.W. 2) as well with his mother (P.W. 4). The mother claimed that she had told P.W. 1 the names of the miscreants. P.W. 3 also has claimed that she also had told the informant about her identifying certain persons including the Appellants. Therefore, from the evidences it will appear that the witnesses who have claimed to have seen the miscreants fleeing away, two of them duly armed, had talked with the informant and also had told the informant or another witness, about identifying the miscreants. Still the first information report which was lodged about nine and half hours of the occurrence does not carry any name rather in that the informant has admitted that he did not even know as to with whom the deceased had enmity. At that time, he did not tell about the Appellants having earlier teased his cousin, Giran Devi, or P.W. 4 having fallen unconscious but claimed that they all had come out of their rooms after things had calmed down. The facts aforesaid create serious doubts about the witnesses having identified the Appellants even while fleeing away and the possibility of implicating the Appellants as an "afterthought" cannot be ruled out. On an important aspect of the prosecution case which goes to the root of the allegations if the evidence on record supports the defence and if that aspect has not been satisfactorily explained by the prosecution, the benefit of that must go to the defence.

10. Important, in this regard, is also the evidence of P.W. 6, Ram Narayan Singh who has said that on hearing the firing sound he had gone to the house of the deceased where he saw the ladies weeping and Mangaldeo Pandey dead. This witness also said that when he had gone there, the males in the family were also there, but the ladies of the family had told that they had not identified any of the dacoits nor did they tell him the name of any such person. He himself had not seen any one fleeing away. This witness is an independent witness.

11. P.W. 7 is the doctor who supports that the deceased was indeed murdered. However, in face of the state of evidence in the case, the evidence of the doctor will hardly sustain the prosecution case against the Appellants.

12. It may also be noted here that the Investigating Police Officer in this case has not been examined though the attention of the witnesses were drawn towards their statements made to the Police, including on important aspects of the case. It has not come in the evidence as to why the Investigating Police Officer could not be examined but from the judgment of the lower court it appears that he was dead. Learned Additional Public Prosecutor, on perusal of case diary, informed that the original investigating officer had died while investigation was going on, and investigation was completed by another police officer who also, however, has not been examined. The court, in such circumstance, cannot look to the case diary with a view to find out as to what the investigating Police Officer had found out at the place of occurrence or what the witnesses actually had told him, as that is not legally permissible. However, it appears that the learned lower court had gone through the case diary and had noted as to when the place of occurrence was inspected and what the witnesses had said to the Police Officer. As already said, the materials in the case diary cannot be used as evidence.

13. It, therefore, has not come in evidence as to what was the state of place of occurrence and as to whether a Dhibri was found there by the Investigating Police Officer and seized, or whether the Police Officer did notice the crack in the door from which P.W. 4 could peep out, and see the occurrence.

14. In view of the circumstances mentioned above, we find that the Appellants deserve benefit of doubt and it must be held that the prosecution has failed to prove its case beyond reasonable doubts. That being so, the Criminal Appeals (Nos. 205, 245 and 246 of 1997) are hereby allowed and the judgment of the lower court is set aside. The Appellants are acquitted of the charges framed against them and are set at liberty and those on bail are also discharged from the liabilities of their bail bonds. Appellant Ashok Prasad @ Ashok Kumar of Criminal Appeal No. 246 of 1997 is in custody who will be released at once, if not wanted to be detained in connection with any other case.