

(2005) 02 PAT CK 0109

In the Patna High Court

Case No : Criminal Appeal No's. 241 and 269 of 2001

Yogi Choudhary and etc.

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 03-02-2005

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 144
Penal Code, 1860 (IPC) — Section 201, 302, 306, 328, 34

Citation : (2005) 2 BLJR 1336 : (2005) CriLJ 2285 : (2005) 2 PLJR 331

Hon'ble Judges : Sadanand Mukherjee, J; Manohar Lal Visa, J

Bench : Division Bench

Advocate : Ashok Kumar Choudhary and Dharmesh Kr. Srivastava, in Cri. A. No. 241/01 and Sanjay Kumar alias Manu, in Cri. A. No. 269/01, for the Appellant; Lala Kailash Bihari Prasad, APP, for the Respondent

Final Decision : Allowed

Judgement

M.L. Visa, J.—Both these appeals arising out of the same judgment and order dated 9-5-2001 passed by 5th Additional Sessions Judge. Begusarai, in Sessions Trial No. 53/99 convicting and sentencing both the appellants to undergo R. I. for life u/s 302/34 of the Indian Penal Code (in short IPC) and to undergo R. I. for life u/s 27 of Arms Act but ordering both the sentences to run concurrently are being disposed of by this common judgment.

2. The case of prosecution briefly stated is that on 27-6-1998 informant Sadhu Sharan Paswari (PW-10), the then chaukidar of Bit No. 10/4 was on duty at the house of Shailendra Kunwar (PW-9) Situate at Village Kunwar Toil, P. S. Karpura, District-Begusarai, where he was deputed after the murder of Pankaj Kunwar son of Shailendra Kunwar in the month of April. On that day in the night when informant was making preparation for going to bed at about 12.30 O" Clock in the night he found 5-6 persons flashing torch light coming from south direction and when they came at a distance of 50-60 yards from informant; they hurried

towards him and when he inquired who they were, one of them asked his companions to eaten hold of informant and his voice to informant appeared to be of appellant Yogi Choudhary. Out of fear, informant ran towards west in the house of Gango Pandit (not examined) and fell down. After some time, he heard sounds of firing from the roof of the house of Shailendra Kunwar where Bhagwati Devi, mother of Shailendra Kunwar, Birendra Kunwar alias Gonga brother of Shailendra Kunwar and Md. Muslim, servant of Shailendra Kunwar were sleeping. After some time informant from the house of Gango Pandit saw that all miscreants were running away towards south. Informant raised "hulla" but no body from neighborhood or village came there. The informant then went to the Police Station at about 3 O" Clock in the morning and along with police force came to the house of Shailendra. Kunwar where he found the doors of the house opened and when he went on the roof of the house he found Bhagwati Devi, Birendra Kumar and Md. Muslim lying dead with fire arm injuries and also found blood in copious quantity fallen on the roof of the house. The Fardbeyan of informant was recorded at the place of occurrence by S. I. Adi Kant Mahto (PW-11). I. O. About the motive of occurrence informant in his Fardbeyan has stated that all the three deceased had deposed in Court in a murder case which was lodged for the murder of Pankaj Kunwar, son of Shailendra Kunwar and 4 days prior to occurrence deceased Bhagwati Devi told the informant that appellant. Yogi Choudhary in front of Rabi Mahto (not examined) had told that he will teach a lesson to Shailendra Kunwar. He further stated that appellant Yogi Choudhary and others were accused in that case. He further raised a suspicion against the persons who were accused in the case of murder of Pankaj Kunwar for directly or indirectly participating in the occurrence of this case. On the basis of Fardbeyan of informant a. case under Sections 302/34 IPC and 27 of the Arms Act against the appellant Yogi Choudhary and some unknown was registered and police after investigation submitted charge sheet against both the appellants. Cognizance of the case was taken and case was committed to the Court of session where charges under Sections 302/34 and 27 of Arms Act were framed against the appellants who after trial were found guilty and were convicted and sentenced as indicated above.

3. The case of defence as it appears from the trend of cross examination of prosecution witnesses and defence witnesses examined on their behalf is that they have been falsely implicated in this case on account of enmity.

4. In order to prove its case the prosecution has examined 14 witnesses. Natho Rai (PW-1) is a formal witness who has proved his signature (Ext. 1) on the inquest report prepared in respect of dead body of deceased Birendra Kunwar. Lalan Pandit (PW-2) has been declared hostile by the prosecution. Birendra Kumar Jha (PW-3) has proved his signature (Ext. 1/1) on the inquest report prepared for the dead body of deceased Md. Muslim. Dr. Bijay Kumar (PW-4) is the doctor who had held post mortem examination on the dead body of all the three deceased. Sariphan Khatoon (PW-5) is wife of deceased Md. Muslim, one of the three deceased and she has said that she knows nothing about the

occurrence and she has been declared hostile Md. Aziz Mian (PW-6) is brother of Md. Muslim and he has also said that he knows nothing about the occurrence and has been declared hostile. Ramkant Singh (PW-7), Sarhu of Shailendra Kunwar, Kritika Devi (PW-8), wife of Shailendra Kumar and Shailendra Kunwar (PW-9) were not present at the place of occurrence and were at Danapur. Sadhu Sharan Paswan (PW-10) is the informant. S. I. Adi Kant Mahto is the I. O. Mahesh Kumar (PW-12) is a formal witness who has proved his signature (Ext. 8) on the inquest report prepared for the dead body of deceased Bhagwati Devi. Sikandar Paswan (PW-13) is a formal witness who has proved his signature on the seizure list (Ext. 9) which was prepared when five empty cartridges and one front portion of a bullet were seized by the police from the place of occurrence. Anup Das (PW-14) has proved his signature on the inquest report (Ext. 10) prepared for the dead body of deceased Bhagwati Devi.

5. Dr. Bijay Kumar (PW-4), in his evidence, has said that on 27-6-1998 at about 1.45 PM he conducted post mortem examination on Md. Muslim Mian. and found seven Lacerated wounds on different parts of the body and out of them some were wounds of entrance and some wounds of exit and all the injuries were caused by fire arm and a bullet was recovered from the muscle plane anteriorly just above the right elbow joint and death was due to hemorrhage and shock caused by fire arm injuries and time elapsed since death was within 6 to 24 hours. He has proved post mortem examination report (Ext. 2). He has further said that on the same day at about 2.15 PM he held post examination on deceased Bhagwati Devi and found wound of entry lacerated 1 1/2" x 1" with inverted margin and charring all round, left temporal region 1 1/2" anterior to left tragus with fracture of left temporal and left maxillary bone. Haematoma was present over the floor and roof of the buccal cavity on the left, side. A bullet was recovered at the level of cervical 7th vertebra. According to him, death was due to hemorrhage and shock and time elapsed since death was within 6 to 24 hours. He has proved post mortem examination report (Ext. 2/1). He has further said that he performed post mortem examination on the dead body of Birendra Kunwar and found seven lacerated wounds on different, parts of body out. of which some were wounds of entry and some were wounds of exit and death was caused by hemorrhage and shock due to fire arm injuries and time elapsed since death was within 6 to 24 hours. He has proved post mortem examination report which is marked Ext. 2/2. His evidence establishes that death of all the three deceased persons was homicidal and was result of fire arm injuries inflicted on them. Now it has to be seen what evidence has been adduced on behalf of the prosecution for making the appellants responsible for the injuries which were found on the dead body of all the three deceased.

6. Ramakant Singh (PW-7), "Sarhu" of informant, has said that on 26-6-1998 at about 8 AM he was at Danapur where Shailendra Kunwar was living with his entire family and on that day 4 persons came there on a car out of them he identified appellant Satish Mahton who asked Shailendra Kunwar and his family members including his daughter Pushpa to go with him to DGP for giving

statement. On this, wife of Shailendra Kunwar became ready to go with him but Shailendra Kunwar himself and his daughter Pushpa did not agree to go with him and on this issue there was altercation between Shailendra Kunwar and appellant Satish Mahton and in the meantime, some neighbours also assembled there and appellant Satish Mahton left the place giving threatening to Shailendra Kunwar that he will see how Shailendra Kunwar performs the marriage of his daughter. This witness has further said that appellant Satish Mahton was insisting to allow Pushpa to go with him and at that time he was carrying a revolver and a mobile phone. He has further said that because of such type of threatening given earlier by appellant Satish Mahton that he would not allow the marriage of Pushpa, Shailendra Kunwar was living in Danapur for the purpose of marriage of his daughter Pushpa. He has further said that son of Shailendra Kunwar was murdered earlier and during investigation of that case, name of appellant Satish Mahton had figured and he was giving threatening to Shailendra Kunwar that he would not allow him to perform the marriage of his daughter and for this fear Shailendra Kunwar was living in Danapur. In para 6 of his evidence he has said that information of death of mother, brother and servant of Shailendra Kunwar was received by him when he was at Deoghar because after threatening by appellant Satish Mahton he, Shailendra Kunwar and his family members had gone to Deoghar. Kritika Devi (PW-8), wife of Shailendra Kunwar; has also said that at the time of occurrence she was at Danapur along with her husband (PW-9) and his daughter Pushpa (not examined) and they had gone to Danapur in connection with the marriage of her daughter Pushpa because appellant Satish Mahto had given threatening earlier that he would not allow the marriage of Pushpa to take place. She has further said that her son Mritunjay (alias Pankaj) was murdered about 1 or 2 months prior to occurrence of this case and police was searching appellant Satish Mahto in connection with that case and appellant Satish Mahto used to come to her house and tell that his name should not figure in that case otherwise entire family will have to face consequences and he had also given threatening that the marriage of Pushpa would not take place. She has further said that after the aforesaid threatening she got her mother-in-law and her servant Md. Muslim to give their statement in favour of appellant Satish Mahton but in spite of it appellant Satish Mahto used to vex them and for this reason she along with her husband, daughter and PW-7 came to Danapur and at Danapur one day in the morning, appellant Satish Mahton along with his three companions came to her residence and asked her to allow Pushpa to go with him for giving statement and when she replied that Pushpa would not go and only she and her husband would accompany him for giving statement, appellant Satish Mahto started shouting and giving threatening on which a number of persons assembled and thereafter he left her house giving threatening of facing consequences. She has further said that on the next day she and her family members went to Deoghar where Tek Narayan Choudhary (not examined) came and informed him that her mother-in-law, "devar" Birendra and servant Muslim had been killed in shooting from fire arms and then she believed that appellant Satish Mahton who had given her threatening at Danapur must have

committed their murder. Shailendra Kunwar (PW-9) supporting the evidence of PWs-7 & 8 has said that on 26-6-1998 he was in Danapur when appellant Satish Mahton along with three unknown persons came there and asked him to go to DGP along with his family and when he replied that his daughter Pushpa will not go. One of the companions of appellant Satish Mahton was carrying a wireless set and he told that he would call police and would get them arrested and some persons from neighbouring area assembled there and then appellant Satish Mahton and his companions left the place giving him threatening. He has further said that in the night mother, brother and servant were killed and he came to know about this fact from Tek Narayan Choudhary at Deoghar and he then firmly believed that murder must have been committed by appellant Satish Mahton and his companions because they had given threatening.

7. Sadhu Sharan Paswan (PW-10) is the informant of this case. He, in his evidence, has said that the occurrence took place on the night between 26-6-1998 and 27-6-1998 and at that time he was on duty at the house of Shailendra Kunwar and at 12.30 he found 5-6 persons coming from south direction and when they were at some distance he inquired from them who they were, on which they shouted for catching and killing him and he then realised that voice of appellant Yogi Choudhary and he then out of fear fled away in the house of Gango Pandit and fell in the courtyard and from there he heard sounds of 9-10 firing from the roof of the house of Shailendra Kunwar. According to him, at that time on the roof of house of Shailendra Kunwar, mother, brother and servant of Shailendra Kunwar were sleeping and he came from the house of Gango Pandit and found the miscreants going towards south and he raised "hulla" but no body from village came to the place of occurrence and he also out of fear did not go to the police station at that time and at about 3 O" Clock in the morning he went to the police station and informed about the occurrence and from there he along with a police inspector and armed force came to the house of Shailendra Kunwar and when he went to the roof of the house he found Bhagwati Devi, Birendra and Muslim Lying dead with fire arm injuries on their bodies. He has said that he does not know the cause of occurrence. He has proved his signature on his fardbeyan (Ext. 3) and in cross examination he has said that it was dark night and so when first of all his vision fell on miscreants he could not see their faces from the place where he was and he could not identify anyone out of 5 miscreants and when he inquired who they were, out of them one replied by shouting but he could not identify him. He has clearly said that on the basis of suspicion he named Yogi Choudhary in his fradbeyan. In para-10 of his evidence he has said that he did not get any chance for talking with appellant Yogi Choudhary.

8. In this case there is no eye witness on the point of occurrence. The case of prosecution is that at the time of occurrence only informant was present at the house of Shailendra Kunwar where he was deputed and was performing his duties. Occurrence is said to have taken place on the roof of house of Shailendra Kunwar whereas informant was admittedly sitting on a "chouki" in an open land

in front of the house. He was not on the roof of the house where occurrence took place. So far appellant Satish Mahton is concerned he is not named in the FIR and against him there is evidence of only PWs. 7, 8, and 9 that on 26-6-1998 he had gone to Danapur where he insisted Shailendra Kunwar and his family members for going to DGP for giving their statements. They have further alleged that he was not allowing them to perform marriage of Pushpa, daughter of Shailendra Kunwar. When Kritika Devi (PW-8) was examined her attention was drawn by defence that before I. O. she had told that her daughter Pushpa had illicit relationship with appellant Satish Mahton which was denied by her but when Adi Kant Mahto (PW-11), I. O. of this case was examined he in para 15 of his evidence has admitted that Kritika Devi (PW-8) had stated before him that Pushpa had illicit relationship with appellant Satish Mahto. Notwithstanding this fact, the only material against appellant Satish Mahton in this case is that on 26-6-1998 in the morning he had gone to the house of Shailendra at Danapur and had given threatening. Admittedly, occurrence had taken place in the night of 26-6-1998. There is no evidence in the entire record that this appellant Satish Mahton was seen even near the house of Shailendra what to talk on the roof of house where firing is said to have been made. Learned APP has argued that because both the appellants were accused in a case lodged for the murder of Pankaj son of Shailendra Kunwar, therefore, they had strong motive for committing the murder. Kritika Devi (PW-8) in para-2 of her evidence has clearly stated that because of threatening by appellant Satish Mahton she got her mother-in-law and her servant Muslim to give statements in favour of appellant Satish Mahton. Her mother-in-law and her servant Muslim are amongst the three deceased persons. If they had already deposed in favour of appellant Satish Mahton then the question of his having a motive to eliminate them does not appear to be convincing. He is alleged to have been armed with a revolver when he had gone to give threatening to Shailendra Kunwar and his family members at Danapur. There he did not make any attempt to commit murder of Shailendra Kunwar and his wife who were also witnesses in the murder case lodged against him for the murder of their son. However, only motive can not be made a basis for conviction of an accused without any direct or circumstantial evidence of his participation in any manner in the commission of offence. It is true that prosecution has brought on record the FIR of Garhpura P. S. Case No. 29/98 lodged by Shailendra Kunwar against appellant Yogi Choudhary and others for the murder of his son Mritunjay alias Pankaj Kunwar but then at the same time it is also brought on record the FIR of Garhpura P. S. Case No. 9/96 which was lodged by Arbind Kumar against Upendra Kunwar alias Bhutta and others for the murder of father of Arbind Kunwar and Ext. 4 is chargesheet submitted in this case which shows that appellant Yogi Choudhary was a witness in that case. Shailendra Kunwar (PW-9), in his evidence, has admitted that he had land dispute with Arbind Kunwar and there was a proceeding u/s 144 Cr. P. C. between him and Arbind Kunwar.

9. The defence has also got protest petition filed by Shailendra Kunwar in a case

of murder of his son proved which is marked Ext. C in which although Shailendra Kunwar has named appellant Yogi Choudhary but has not named appellant Satish Mahton and has said that murder of his son was committed by Arbind Kunwar, Ashok Kunwar, Yogi Choudhary, Pappu Choudhary, Janardan Roy, Nawal Singh and one another. So, I find that against appellant Satish Mahton the evidence of PWs. 7, 8 and 9 is in respect of two aspects. One is that he was not allowing Shailendra Kunwar to perform the marriage of his daughter and this fact has got no bearing with the offence of the present case in which mother, brother and servant of Shailendra Kunwar were killed and second aspect is that because name of Satish Mahton has figured in the case which was lodged by Shailendra Kunwar for the murder of his son. In absence of any material against Satish Mahton his conviction only on this ground cannot be upheld.

10. About appellant Yogi Choudhary I find that in Fardbeyan informant has stated that when he inquired from the miscreants who they were, out of them one shouted for catching hold of him and from his voice he found that he was appellant Yogi Choudhary. The informant has given a complete go-by to this statement made in the Fardbeyan when he was examined as a witness in Court because as stated earlier he in his evidence has clearly said that when he inquired from miscreants as to who they were one of them replied by shouting but he could not identify him and he has further deposed that only on the basis of suspicion he named appellant Yogi Choudhary in this case. This witness has further said that he had no occasion to talk with appellant Yogi Choudhary. I find that the Court below has not taken this evidence of informant reliable considering Ext. B/1 and Ext. 14/1. Ext. B/1 is a final report of Garhpura P S Case No. 42/92 which was lodged by informant against appellant Yogi Choudhary under Sections 306/328/201/34 IPC. Ext. 14 is final report of a case lodged by Arvind Kunwar against Upendra Kunwar alias Bhutta, brother of Shailendra Kunwar and others in which Yogi Choudhary has been shown as witness. Ext. 14/A is final report of a case filed by Shailendra Kunwar against Yogi Choudhary and others in which after investigation the case was found false. Ext. 14 and 14/A do not show that informant of tills case was in any way connected with those cases. He was neither informant, nor accused or witness in those cases and I fail to understand how the Court below has observed that at least during investigation of Exts. 14 and 14/A informant must have occasion to talk to appellant Yogi Choudhary. About Ext. B/1 as I have earlier stated that this is final report in a case which was lodged by informant: against Yogi choudhary and others and merely because informant of this case was informant in that case also, it can not be presumed that he got opportunity of having talk with appellant. Yogi Choudhary. I say so because in the present case also, informant has stated that he saw 5-6 persons coming towards the house of Shailendra Kunwar but he does not claim for getting opportunity for having talk with all of them. Besides this, when it, is own evidence of the informant that he did not get any chance to have any talk to appellant Yogi Choudhary merely on the basis of Ext. B/1 which is a final report in a case earlier lodged by informant against appellant Yogi

Choudhary and others it can not be presumed that informant had occasion to talk with appellant Yogi Choudhary.

11. Considering the entire evidence on record, I find that there is absolutely no evidence against the appellants in this case.

12. In the result, both these appeals are allowed and the appellants are not held guilty of the offence and they are acquitted of the charges under Sections 302/34 IPC and 27 of Arms Act. The judgment and order of the Court below is hereby set aside. Appellant Yogi Choudhary is in custody. Issue release order for his release from jail custody immediately if not required in any other case. Appellant Satish Mahton who is on bail is discharged from the liability of his bail bonds.

Sadanand Mukherjee, J.

13. I agree.