

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.343 of 2007

Arising Out of Garkha PS.Case No..9 Year 2003 Thana, District- SARAN, giving rise to Sessions Trial No. 514 of 2003.

Sanjay Upadheuyay, son of Janardan Upadheuyay, resident of Village Mala, Police Station Chapra Muffasil, District Saran

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant : Shri Ram Bilash Rai 'Raman', Advocate

For the Respondent : Shri Abhimanyu Sharma, A.P.P.

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 19-02-2015

The solitary appellant Sanjay Upadheuyay was put on trial by the learned Presiding Officer, Fast Track Court-I, Saran at Chapra in Sessions Trial No.514 of 2003 after being charged with committing the offences under Sections 302 and 384 of the Indian Penal Code. The learned Judge passed the judgment dated 18.8.2006 and held the appellant guilty of committing the two offences he had been charged with and after being heard on sentence on the same day, which was dated 18.8.2006, he was directed to suffer rigorous

imprisonment for life under Section 302 of the Indian Penal Code and rigorous imprisonment for two years under Section 384 of the Penal Code. The two sentences were directed to run concurrently.

2. The appellant appeals against the judgment of conviction and order of sentence dated 18.8.2006 passed in the above noted Sessions Trial.

3. There is no dispute in the fact that the deceased Budhan Ram and the informant of the case Kalika Ram (P.W.3) were full brothers and they were carrying on a trade in purchase and sale of leather. It also does not appear disputed that they were moving around in the adjoining villages in connection with their trade and on 18.1.2003 they had reached Village Mahmada, which was by the side of their own village, and had purchased a piece of animal leather from P.W. 1 Ramdev Ram.

It is alleged in the background of the above undisputed fact that when the deceased and the informant along with their companions P.W.2 Krishna Ram and P.W. 1 Ramdev Ram were moving on brick-laden road in the village, this appellant appeared from somewhere and asked the deceased Budhan Ram to pay up a sum of Rs. 500/- as extortion money. The deceased stated that he did not have the money with him and on that this appellant was said to have pulled out a country made gun from his waist and he is further alleged to have fired a shot on the right ribcage of Budhan Ram and

thereafter, on his head as a result of which he fell down and died there. The accused was chased by the informant and his companions but he succeeded in making good his escape.

The informant (P.W.3) stated that he had telephonically informed the Superintendent of Police, Saran and he had assured him of full assistance and he further stated that the police reached at the place of occurrence at around 12.30 P.M. This evidence appears corroborated by S.I. Rajesh Prasad Rajak (P.W.9) who stated that he picked up a rumour about the incident and made entry in the Police Station diary and with the police force, left the Police Station to reach the place of occurrence where he met the informant and after questioning him had recorded his fardbeyan.

4. We are not detaching ourselves to decide the issue as to whether the informant was true and honest or the S.I.Rajesh Prasad Rajak (P.W.9) was. But, what appears is that it is undisputed that it was the same brick-laden road where the deceased had been shot dead that P.W. 9 took up the investigation by holding inquest upon the dead body and preparing inquest report in presence of the witnesses. He recorded the statements of the witnesses and inspected the place of occurrence where he found copious blood lying there. He had seized that blood also. He dispatched the dead body for post-mortem examination and, accordingly, P.W. 7 Dr. Rabindra Nath Padey held the post-mortem examination and had issued the post-

mortem examination report Ext.3.

5. From the evidence of P.W.7 Dr. Rabindra Nath Pandey it appears that he found two gun shot wounds of entry. First entry wound was lacerated with charged margin measuring 1" X ½" which was going deep inside the abdomen and it was situated on the lower part of the right side of chest wall in mid-exillary region. This wound of entry had a corresponding wound of exit which was described by the doctor as another lacerated wound 1½" X1" in left chondrium in the mammary line along the last rib. The omentum was protuding out of the wound of exit.

The 2nd wound of entry described by the doctors was lacerated wound of tryradian type measuring 2" X 1 ½" X bone deep, over right side of occipital area.

On dissection of the two injuries P.W. 7 found the right lobe of liver with haematoma and the small and large intestine bearing multiple injures. The kidney was torn and haematized and the stomach contained digested food materials. The doctor does not appear stating about the contains of the skull, but we may presume on account of description of the wounds given by P.W. 7 that on account of nature of the wound which had gone into deep into the occipital area, there ought to have been massive damage to the brain matter.. However, what appears concluded from the evidence of P.W. 7 is that the deceased Budhan Ram had died of injuries found by the doctor,

P.W. 7.

6. On conclusion of the investigation of the case, the case was sent up for trial during which course nine witnesses were examined by the prosecution. P.W. 1 Ramdev Ram, who had sold a piece of leather to Kalika Ram (P.W. 3) and Budhan Ram, had stated that both of them had purchased a piece of hide from him. P.W. 2 Krishna Ram and P.W. 3 Kalika Ram had deposed the fact that the deceased and they were moving together around the villages in connection with purchase of hide and the incident had taken place in the manner as alleged.. P.Ws. 4, 5 and 6 had not really seen the shot being pumped into the body of the deceased but still had given evidence on the post occurrence part of it when they stated that they had seen the appellant running away from the place of occurrence. P.W.8 was a witness of formal nature who had brought on record the sanction order which was granted by the District Magistrate, Saran for prosecuting the appellant for committing the offence under the Arms Act. Incidentally, no charge was framed under the Arms Act. We have already noted that P.W. 7 had held post-mortem examination on the dead body of the deceased and P.W. 9 had investigated the case.

7. During the course of trial, the appellant had set up a plea of mistaken identity as appears from the cross-examination of P.W. 3 in paragraph 15 when he was put questions on the identities of the appellant and appears suggesting that he was innocent and had

been falsely implicated in the case by some of his co-villagers.

8. The learned Judge after considering the evidence of the witnesses passed the impugned judgment.

9. Shri Ram Bilsh Rai "Raman" learned counsel for the appellant took us through the evidence of the witnesses and submitted by drawing our attention to paragraph 7 of the evidence of P.W. 9 S.I. Rajesh Prasad Rajak, the Investigating Officer, that the police had reached at 12.30 P.M. and had carried out certain steps towards the investigation of the case, but still the appellant was found sitting at the Jasosati pond by the side where the incident had taken place and had arrested the appellant from there. It was contended that if the appellant had really committed the murder of the deceased, then it could not be supposed that he should be sitting there so as to inviting the police to arrest him. It was contended that it was for the first time that the informant had the occasion to identifying the features of the appellant and he was naming him as appears from the very F.I.R. as also from his evidence. It is, as such, a case of mistaken identity.

10. Shri Abhimanyu Sharma, learned Additional Public Prosecutor, was submitting that the witnesses were consistent in all details of their information and charges were fully established and the judgment and order passed by the court below required no interference by this Court.



11. The genesis of the occurrence, as stated by the prosecution, was that the deceased and his brother P.W. 3 along with P.W. 2 Krishna Ram had set out from their respective houses for purchase of animal- hides and had, in fact, negotiated the purchase of one piece of the same from P.W. 1 Ramdev Ram. P.W. 3 has stated that the hide was purchased on payment of Rs. 25/- and the money was paid. This part of the evidence gets support from the evidence of P.W. 1 Ramdev Ram and P.W. 2 Krishna Ram, who had accompanied the deceased and P.W. 3, the informant. There does not appear even a suggestion thrown to any of the witnesses that there could be any other reason than what was stated by the prosecution. In that view of the matter, we do not have much difficulty in holding that the genesis or substratum of the prosecution story which was put forward in the initial version of the prosecution case was fully established.

12. While being taken through the evidence of the witnesses, we could not be pointed out any reason as to why the witnesses, especially Ramdev Ram P.W. 1, who was not related by blood or otherwise to the deceased, could come in support of the prosecution case. We were also not pointed out any reason as to why the informant could implicate falsely the appellant Sanjay Upadheuyay by excluding the name of the real culprit. We do not have anything on the record to indicate that the appellant was inimically disposed towards the informant or it could be a case vice-



versa. The appellant, as we have already noted, was the resident of the village from which Ramdev Ram P.W.1 was hailing. What was the reason for naming the appellant by the informant, we have consistent evidence of the witnesses. Consistency of the evidence may not be always divulging the truth, but in this case what we find is that there is no real reason for the informant to implicate any innocent person, if at all some one was there. The informant was narrating the truth. He was moving around the village with his brother and two companions P.W. 2 and P.W.1 for negotiating the purchase of hide and they had purchased one piece of hide and just thereafter, the deceased was shot dead. The reason behind shooting out of the deceased by the appellant was his demand to pay Rs. 500/- and that was negatived. In that view of the matter and in view of the consistency of the evidence of the witnesses, i.e., P.Ws. 2 and 3, we do not see any reason not to uphold the finding that the evidence of these two witnesses was trustworthy and fit to be used by the court to convict the appellant.

13. Not only the above witnesses, the other witnesses, i.e., P.Ws. 4, 5 and 6 may not be the eye witnesses to the occurrence, but their presence at the place of occurrence is important as they had stated that they had been attracted to the scene of occurrence on the cry of the informant Kalika Ram and when they reached the place of occurrence they found the appellant running away from the place. This evidence on the conduct of the appellant is

equally accepted as a piece of evidence on his conduct. This evidence lends further support to the evidence of P.Ws. 2 and 3 that it was the appellant Sanjay Upadheuyay who had shot and killed the deceased.

14. The defence that it could be a case of mistaken identity might be appearing at the first instance, but the evidence of P.Ws. 1, 4, 5 as also P.W.6 who had either seen the appellant sitting at the pond or had found the appellant running away from the place of occurrence clearly establishes his identity. It may be true that the informant had not seen the appellant prior to the trial and had identified him in the court, but it is not that he came up suddenly with the name of the appellant and left the name of the real culprits. A person like the informant coming out with such serious case must have had all the things in his memory and sense and when confronted, he recalled them from his memory to recognize this appellant as the accused who had perpetrated the offence. We do not have any doubt that identification of the appellant was correctly made. The reason for mistaken identity was that the informant was identifying the appellant in court and in his cross-examination, but there was no suggestion given to P.W. 3 also that he had not identified him earlier or had been misled as regards identity of the appellant.

15. The other defence is that the appellant was not supposed to be continuously sitting at the pond in question after arrival of the police. It may be true in most of the cases that the



accused after having committed the offence must leave the place of occurrence after accomplishing his goal, but some times some criminals who is as desperate that he pulled out the gun and shot may remain at the scene of the occurrence. Secondly, he might have thought that his own behaviour might have enhanced his status in the society and he was beyond the arm of justice. The police had arrested him after it had arrived at around 12.30 P.M. Before the appellant had been arrested, the police had drawn up a F.I.R. It also held inquest upon the dead body, inspected the place of occurrence and it had dispatched the dead body to the mortuary for Post-mortem examination.

16. During the cross-examination of the witness P.W. 9 the defence did not make any effort to put an oral suggestion as to how the appellant was arrested. We do not have any reason, except the defence plea that the appellant could not be presumed to be there after committing the offence to be arrested by the police, not to hold that the prosecution had perfectly proved the charges against the appellant.

17. While being taken through the evidence and judgment we came across two vital lapses on the part of the learned trial Judge in handing out the judgment of conviction and sentence to the appellant. The Investigating Officer had recorded a confessional statement and in that light he claimed to have discovered a country



made gun from a field with a cartridge. The learned trial Judge had used the recovery of the gun and cartridge against the appellant as additional evidence. We have serious reservations on utilization of the evidence of recovery under Section 27 of the Indian Arms Act. Firstly, there was no whisper in the judgment about the charge under the Arms Act. The second reason is that even if it is accepted for the sake of argument that recovery of the gun and cartridge was an additional evidence and circumstance appearing against the appellant, he ought to have put that circumstance to the appellant while examining him under Section 313 Cr.P.C. The learned trial Judge had not put any question to the appellant in that behalf. Section 313 Cr.P.C required that the learned trial Judge ought to have put that particular circumstance to the appellant so as to eliciting his explanation on that. There appears no compliance of Section 313 Cr.P.C. in the present case.

18. The other part of the infirmity we have been regularly finding is that the learned Sessions Judges, passing judgments in Sessions Trials for an offence under Section 302 of the Indian Penal Code are not passing the order of sentence by imposing fine. Here also the learned trial Judge after holding the appellant guilty of committing offences under Sections 302 and 384 of the Indian Penal Code was missing out on imposition of appropriate sentence of fine which is mandatorily prescribed by the law. The

appellate court has power under Section 386 Cr. P.C. to uphold and modify the sentence. But we are not using that power and we may direct that the learned trial Judges shall consider passing of the sentence by imposing fine in appropriate cases and if the amount of fine is recovered then whole of it or a part of that amount has to be paid as compensation to the person for any loss or injury, as is the requirement of law. We hope, the rationale of imposition of fine can be appreciated by the learned Trial Judges by reading the provision of Section 357 Cr. P.C.

19. We direct that a copy of this judgment be transmitted to the Director, Bihar Judicial Academy, Patna, for organizing a work-shop of the Judicial Officers so as to discussing the need of passing appropriate sentences and that of imposition of fine.

20.. With the above observation, we find the appeal meritless and the same is dismissed.

(Dharnidhar Jha, J)

(Aditya Kumar Trivedi, J)

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