

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.488 of 2002

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1. Munna Pandey @ Jai Kumar Pandey son of Gangadhar Pandey,
2. Gangadhar Pandey son of late Hriday Narain Pandey, both are residents of
village Anandipur, P.S. Kahalgaon, Distt-Bhagalpur.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. B.P. Pandey, Sr. Advocate
Mr. P.K. Sinha, Advocate

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

Date: 09-02-2015

Initially, appellant Munna Pandey @ Jai Kumar Pandey, Gangadhar Pandey were the appellants, however, during course of pendency of instant appeal, Gangadhar Pandey died, on account thereof, instant appeal stood abated against him vide order dated 08.01.2015 however, remained alive concerning Munna Pandey @ Jai Kumar Pandey.

2. The instant appeal has been filed against judgment of conviction and sentence dated 29.08.2002 passed by Additional District and Sessions Judge, FTC- Bhagalpur in Sessions Trial No. 485/1994/25/2002 whereby and whereunder, appellants Gangadhar Pandey (since deceased), Munna Pandey @ Jai Kumar Pandey have been found guilty for an offence punishable under Sections 324/34 and 307/34 IPC and each one has been directed to undergo RI for

seven years under Section 307/34 IPC while no separate sentence was passed with regard to 324/34 IPC.

3. Hare Krishna Jha (PW-5) gave his Fard-e-beyan at State Dispensary, Kahalgaon on 26.04.1993 at about 1:20 p.m. before ASI, Kahalgaon PS. Disclosing therein that on the same day, at about 12:00 noon, while he was engaged in repairing boundary wall of his kitchen garden, his co-villagers, Chunna Pandey armed with Bhala, Gangadhar Pandey armed with Bhala and Munna Pandey armed with Garasa came, out of whom on an order of Gangadhary Pandey, Chunna Pandey gave Bhala blow striking over his stomach with an intention to kill. He became injured and fell down. On his alarm, his co-villagers, Gauri Shankar Jha, Sonelal Jha, Dayashankar Jha, Ram Kumar Jha along with others came and took him to hospital. Land dispute has been shown to be the motive for commission of occurrence. After registration of Kahalgaon P.S. Case no. 114/1993, investigation commenced and concluded leading to trial which culminated in a manner as indicated above, hence this appeal.

4. Defence, as is evident from the mode of cross-examination as well as statement recorded under Section 313 Cr.P.C., is of complete denial of occurrence as well as of false implication in the background of prevailing animosity. However, neither any DW nor any document has been exhibited.



5. While assailing the judgment of conviction and sentence, it has been submitted on behalf of appellants that the main accused, Chunna Pandey had already died during course of conduction of trial. In likewise manner, the order giver Gangadhar Pandey had also died during pendency of the instant appeal. So far, appellant, Munna Pandey @ Jai Kumar Pandey is concerned, it has been submitted that though his presence has been alleged but without any overt act and on account thereof, one could fairly infer that at the relevant moment, even considering the prosecution version, he was not carrying intention and being so, the conviction and sentence inflicted by the learned trial court in terms of Section 307/34 IPC, 324/34 IPC is non attractable.

6. It has further been submitted that in the Fard-e-beyan itself, there happens to be specific disclosure that while informant was engaged in getting his boundary wall repaired, there happens to appearance of three accused out of whom Chunna Pandey inflicted Bhala blow on an order of Gangadhar Pandey, however, us found completely soaked with falsehood during course of evidence. Furthermore, PW-8, Shakuntala Devi, who was not at all an eyewitness to occurrence at the initial stage transposed herself as an eyewitness and in the aforesaid background, as well as in the background of conduct of the informant having a static approach

during course of evidence examination of Investigating Officer was necessary which, on account of non examination, had caused prejudice. As such, judgment of conviction and sentence is fit to be set aside.

7. On the other hand, learned APP submitted that the evidence which has been deposed before the Court of justice is the substantial evidence whereupon reliance could be placed. Injured PW-5 as well as his wife PW-8 Shankuntala Devi have categorically supported the version relating to assault by means of Bhala and so the conviction and sentence rendered by learned trial court is fit to be confirmed.

8. In order to substantiate its case, the prosecution had examined altogether nine PWs out of whom PW-1 Sonelal Jha, PW-2, Shri Ballabh Jha, PW-3, Gauri Shankar Jha son of Late Ganesh Jha, PW-4, Gauri Shankar Jha son of Anandi Jha, PW-5, Hare Krishna Jha, PW-6, Prakash Jha, PW-7, Daya Shankar Jha, PW-8, Shankuntala Devi and PW-9, Dr. Indradeo Ranjan, as well as had also exhibited Ext-1, signature of informant over Fard-e-beyan, Ext-2, signature of Fard-e-beyan attesting witnesses, Ext-3, injury report. Neither any DW nor any document has been adduced on behalf of defence.

9. Now coming to the status of the witnesses, it is apparent that PWs-1, 2, 3, 4, 6, and 7 were declared hostile by the prosecution

as they have not supported the case of prosecution relating to assailant in particular. Now remains the evidence of PW-5, Hare Krishna Jha, PW-8, Shakuntala Devi as well as PW-9, Dr. Indradeo Ranjan.

10. As status of appellant, Munna Pandey is of non assailant, therefore, the injuries found by PW-9 while examining PW-5 is not so relevant save and except what he had found on examination of PW-5 on 26.04.1993:-

Omentum extruded out through stabbing wound $\frac{3}{4}$ "x $\frac{1}{2}$ "x not probed on left side of abdomen. Patient was operated on 26.04.93 but O.T. note is not clear to define the type of injury. Requested O.T. surgeon on 10.06.93 to clear the O.T. note and till then the opinion was reserved and patient was discharged on 4.5.93. which never came before the PW-9 as such further opinion found lacking.

11. Now coming to the evidence, it is apparent from the Fard-e-beyan that no specific allegation has been attributed to the appellant save and except having his presence. However, during course of evidence PW-5 had stated that Munna Pandey had caught hold his hand. However, he had not disclosed that Munna was armed with Garasa like Fard-e-beyan rather stated that something was in the hand of Munna Pandey. From para-5 of his cross-examination, it is apparent that his attention was drawn towards the contents of Fard-e-beyan as well as previous statement.

12. PW-8 had claimed that when she came from the house of her Gotni, she saw Gangadhar Pandey and Munna Pandey having caught hold her husband while Chunna Pandey had inflicted *Sang* blow and on that very score para-4 of his cross-examination is relevant containing her previous statement.

13. Apart from material development as is evident from the evidence of respective witnesses and having prevented on account of non examination of Investigating Officer to legally brought on record causing prejudice to the appellant, the status of appellant in its original form has to be adjudged.

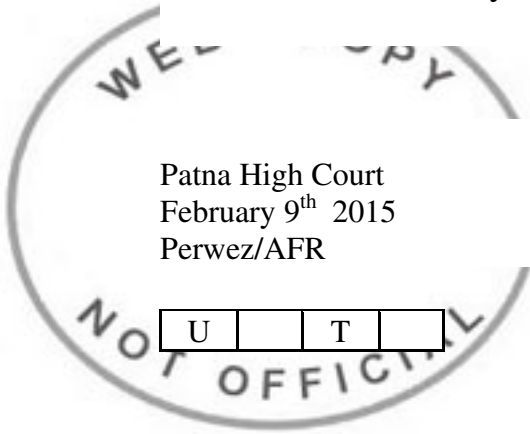
14. From the evidence available on record including that of initial prosecution version by way of Fard-e-beyan save and except presence of appellant nothing more has been attributed to him at the end of prosecution at the relevant moment when Chunna had inflicted Bhala blow on an order of Gangadhar Pandey. Mere presence in such circumstance is a theme which attracts minute consideration. In a case, *State of U.P. v. Rohan Singh* reported in *1996 Cri.L.J. 2884* it has been held:-

4. From the statement of Mashooq Khan, PW 2 it transpires that Rohan Singh had fired on him and at the same time Dulare had fired a shot by his unauthorised single barrel gun on Naqi Raza. Neither Rohan Singh assaulted Naqi Raza deceased nor did Dulare fire any shot

at Mashooq Khan, P.W. 2. After analysing the evidence led by the prosecution we are of the opinion, that the most that can be said in favour of the prosecution is that the two respondents shared a similar intention to shoot at the two victims but from the material on record, it is not possible to positively attribute to them the common intention to commit the crime. There is a material difference between the sharing of similar intention and common intention. Section 34, IPC can be attracted only if the accused share a common intention and not where they share only similar intention. There are no circumstances on the record from which it may be possible to draw the inference that the respondents had shared the common intention. Mere presence together is not sufficient to hold that they both shared the common intention to murder Naqi Raza and injure Mashooq Khan. In this view of the matter, we find that the judgement of the High Court does not call for any interference. The reasons recorded by the High Court are sound and cogent and the same have appealed to us.

15. As such, relying upon the aforesaid pronouncement as well as taking into account the mode of presence shown against the appellant, manner whereunder allegation goes against him, it is difficult to hold him carrying common intention during course of occurrence. Hence, the judgment of conviction and sentence recorded by learned trial court is found unsustainable. Consequent thereupon, the same is set aside. The appeal is allowed.

16. Since appellant is on bail, he is discharged from the liability of bail bond.



(Aditya Kumar Trivedi, J)