

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.599 of 2007

Arising Out of PS.Case No. -0 Year- null Thana -null District- NAWADA

Ashok Mahto @ Ashok Prasad son of Hari Mahto resident of village Badhauna P.S.
Pakaribarawan, Nawada

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance:

For the Appellant/s : Mr. Akhileshwar Prasad Singh, Sr. Advocate
Mr. Bharat Lal, Advocate

For the State Mr. Abhimanyu Sharma, APP

**CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP
SINGH**

And

HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

Date: 10-03-2015

The appeal on behalf of the sole appellant is directed against the judgment and order of conviction dated 15th March, 2007 and the order of sentence dated 16th March, 2007 passed by the Additional District and Sessions Judge (FTC V) Nawada in S.T. No. 555 of 2006/178/2006 whereby the appellant was held guilty and convicted under section 302/149 IPC and sentenced to suffer R.I. for life and also imposed a fine of Rs. 20,000/- with default clause. He was also held guilty under section 307 IPC for causing injury to the informant (P.W.2) and sentenced to undergo R.I. for ten years with fine having default clause. Further the appellant was held guilty under section 379



IPC and sentenced to undergo R.I. for three years and under section 148 IPC sentenced to undergo R.I. for three years. The appellant was also held guilty under sections 224 and 225 IPC and sentenced to undergo R.I. for 02 years on each count besides the conviction under section 120B IPC and sentenced to suffer R.I. for 02 years. All the sentences were however directed to run concurrently.

On 23.12.2001 Lallan Prasad (P.W.2) lodged the Fardbeyan alleging therein that at about 10.00/10.30 a.m. he was on duty as Jail Guard/Warden at the outer gate of the District Jail, Nawada. The deceased Shashi Bhushan Sharma, Jail Warden-cum-Guard was on duty at the main inner gate of the jail. At about 10-10:30 a.m., 20-25 accused persons forming groups of five persons pretending to be the visitors of the co-accuseds Akshat Singh and the appellant(the two prisoners) reached the Jail precincts and after getting purzas (visitor pass) met the two prisoners at the place fixed for such meeting with the visitors. After few minutes they came to the grill near the main gate of the Jail and requested Amrendra Sharma (P.W.4) for permitting them to give some fruits and sweets which they had carried for those prisoners. P.W. 4 made search of those articles and took the articles to the main gate of the Jail. P.W.4 unlocked the smaller gate of the Jail and directed the deceased Shashi Bhushan Sharma who was on duty at the main gate to open the lock of the



small gate from inside which was accordingly opened by him. No sooner he was about to give the fruits to the accused person, the accused Akshat Singh standing near the main gate fired on the head of Shashi Bhushan Sharma with a country-made pistol and pushed him out of the main gate as a result whereof he fell on the ground and became senseless. The accused Akshat Singh and the appellant Ashok Mahto came out of the smaller gate of the main gate along with six other jail inmates named in the Fardbeyan and on being intercepted someone from amongst the visitors fired at the informant which hit him on his left hand. In the meanwhile, 08 jail prisoners ran about 20 ft away from the main gate. The informant anyhow managed to fire twice which however did not hit anyone. On hearing the sound of firing the appellant Ashok Mahto came back with 10 visitors near the main gate and tried to snatch the rifle from his hand which was objected to by the informant and in the process he along with his rifle was dragged to the main gate where he was hit another gunshot injury on his thigh as a result whereof he fell down and the accused persons managed to flee with the rifle of the informant on Tata 407 vehicle on which the visitors had arrived. They also took away the holster (ammunition pack) carried by the informant in his waist. On hearing **Hulla**, the people assembled there and pelted stones which however did not deter the accused persons from fleeing



away from the scene of occurrence towards Nawada on the said vehicle parked on the road. The informant alleged that all the visitors had come hiding firearms inside the shawl/Chadar. After the retreat the other jail staff came to the place of occurrence and the informant and the deceased were carried to the Sadar Hospital for treatment and in course whereof Shashi Bhushan Sharma succumbed to his injuries. The recording of the Fardbeyan (Ext.1) set the criminal law in motion and the investigation commenced. The post mortem on the cadaver was conducted by Dr. Dheo Dayal Das (P.W.9) who submitted the post mortem report (Ext.3). He also examined the injury on person of the informant and prepared the injury report (Ext. 4). The statements of witnesses were recorded and on conclusion of investigation the charge sheet was submitted against the appellant whereafter cognizance of the offence was taken and the case was later committed to the court of sessions by the Chief Judicial Magistrate, Nawada on 5.12.2006. The trial court framed charges under the penal provision of the IPC, as noticed above, to which the appellant pleaded not guilty. In his statement made under section 313 Cr. P.C., the appellant took the plea of false implication. He set up a plea that in connivance with the other jail officials his escape from the jail custody was facilitated and due to protest by Shashi Bhushan Sharma he was shot at by the informant and thereafter he inflicted injury on his person to save his

skin. The trial court on conclusion of trial, convicted the appellant as noticed above. Hence the appeal.

We have heard Mr. Akhileshwar Pd. Singh learned Sr. counsel in support of the appeal and Mr. Abhimanyu Sharma, learned APP who has assisted the Court on behalf of the State.

In order to prove the guilt beyond shadow of reasonable doubt the prosecution examined as many as 11 prosecution witnesses out of whom P.W.2 (informant/Lallan Prasad), P.W. 3 (Radha Mohan Singh/jail warden), P.W. 4 (Amrendra Kumar/jail warden) & P.W.7 (Dhanusdhari Yadav/jail warden) have given ocular account of the occurrence. P.W. 1 Chandradeo Ram and P.W. 5 Ramesh Prasad Singh have supported part of the prosecution case. P.W. 6 Suresh Prasad deposed to the effect that while driving his jeep on the national highway on the relevant date he saw a Tata 407 vehicle on which the accuseds persons had escaped from the jail custody turning turtle and the occupants thereof snatched at the gunpoint his vehicle and made good their escape. P.W. 8 Binod Kumar is the Investigating Officer of the case. P. W. 9 Dr. Shiv Dayal Das is doctor who conducted the post mortem on the deceased and proved the post mortem report (Ext. 3). He also examined the injured informant (P.W.2) and prepared the injury report (Ext.4). P.W. 10 and 11 are the formal witnesses who have proved the delivery of summons (Ext. 5)

to the witness and writing of the Investigating Officer on the injury requisition prepared by the Investigating Officer Ashok Kumar Sinha (Ext. 6) and the inquest report (Ext.7) of the deceased Shashi Bhushan Sharma.

Before we deal with the relevant witnesses examined on behalf of the prosecution and the submissions of the appellant it appears to us that the following facts are admitted. The place, date and time of occurrence are not in dispute. The fact that the appellant during the relevant time was lodged in jail custody and escaped therefrom is also not in cavil.

Having said so we now proceed to examine the relevant evidence on which the prosecution has placed reliance. P.W. 2 in his evidence has stated that on the relevant date and time he was on duty at the outer gate of the district jail armed with a rifle. Along with him P.W. 7 and P.W. 4 were also on duty at the gate whereas the deceased was on duty inside the main gate. At about 10.30 a.m. several accused persons pretending to be the visitors came in groups and applied for meeting with the two prisoners. They were permitted to meet the appellant and other prisoners whereafter they started requesting the informant to permit them to give articles to the appellant and other prisoners which they had carried along with them. The appellant while standing inside the jail also requested P.W. 4 to



permit them to come inside the outer gate of the jail. While they were in the process of putting the articles, the appellant and Akshat Singh fired thrice from their country made pistols on jail warden Shashi Bhushan Shamra and pushed him aside. The appellant along with others named by him thereafter made attempt to escape from the jail custody which was protested/resisted and in the process he was fired and hit at his left forearm. While the accuseds were fleeing away the informant managed to fire twice from his rifle in order to prevent them from escaping which however did not hit anyone. The firing(s) resorted to by the informant however brought the appellant and few others back to him whereafter they made attempt to snatch the rifle to which he clinged on and in the process he was dragged to some distance towards the main road where the appellant Ashok Mahto fired from his pistol which hit him on his left thigh. The accused persons thereafter fled away on Tata 407 vehicle parked on the main road along with the rifle and cartridges of the informant. P.W.3 is Radha Mohan Singh who was to take charge of the duty later. At the relevant time he was taking tea outside the jail gate. He saw the vehicle carrying the accused persons coming to the jail whereafter those accused pretending to be visitors in groups got permission to meet the jail inmates. They had also carried some fruits and sweets along with them. After few minutes he heard the sound of firing(s)



and saw the appellant along with others accused persons escaping from the jail custody. After the escape of the accuseds from the jail he went to the place of occurrence and saw the informant lying in an injured condition and inside the outer gate of the jail the deceased was lying unconscious. He further deposed that he had seen the appellant escaping from the jail along with the rifle of the informant. P.W. 4 has again given out the ocular version of the occurrence that during the relevant time he was posted as the jail guard/warden. On the relevant date and time he was on duty along with the deceased, the informant and P.W. 7. He was presented visitor pass (Purza) allowing five accused persons to meet Akshat Singh, the appellant and other jail inmates. The visitors met the jail inmates and requested the articles which they had carried to be given to the accused persons inside the jail. When the articles were being carried inside the jail by the deceased in the meanwhile the jail inmates including the appellants opened fire and made attempt to escape from the jail custody. In the process he fell down and recovered only after they made good their escape. He found deceased lying in a pool of blood after receiving the gunshot injury and the informant in an injured condition having received injury at the hands of the accused persons. P.W. 7 is another relevant witness who has given the ocular account of the incident/occurrence. In his deposition he has supported the



prosecution case. During the relevant date and time of the occurrence he was on duty at the Jail. The visitor pass/slip (Purza) for meeting the jail inmates to the visitors was issued by him. Some time thereafter he heard the sound of firing from inside the main gate and also from the outside. The visitors had come concealing their fire arms under shawl (Chadar) and they started firing. When he tried to come to their rescue he was commanded at gunpoint to stay inside by some other accused persons and in the meanwhile 6-8 jail inmates after resorting to firing escaped from jail. He could later see the deceased lying in a pool of blood. He also saw the informant being dragged along with his rifle by the appellant whereafter he was fired at by the accused persons and the jail inmates along with the visitors escaped from the jail custody along with the rifle and the ammunition of the informant. He thereafter ran to inform the Jail authorities about the occurrence who arrived there.

On perusal of the evidence of the prosecution witnesses it appears to us that they have supported the prosecution case to the effect that on the relevant date the accused persons pretending to be the visitors arrived at the jail gate and in the name of giving fruits and sweets to the jail inmates including the appellant they managed to get the inner gate of the jail opened and in the process jail inmates including the appellant forced their escape from the jail custody and

in the process firings were resorted to in which the deceased received fatal injuries on his head, whereas the informant received gunshot injury on his forearm. The evidence of the doctor (P.W.9) is to the effect that on the 23rd of December, 2001 he conducted the post mortem on the person of the deceased and found the following injuries which were ante mortem in nature:-

- (i) lacerating wound on the left temporal area antero posterior in position $\frac{1}{2}$ " above and in front of left ear pinna upper border measuring $1\frac{1}{4}$ "x $\frac{1}{2}$ "x cavity deep, red surface & charred margin. Tattooing found over left side of face & forehead (wound of entry).
- (ii) Lacerating wound on the left side of forehead $1\frac{1}{2}$ " left to midline measuring $\frac{1}{2}$ "x $\frac{1}{2}$ "x bony deep with charred margin, red surface, blood coming out (wound of entry).
- (iii) Lacerating wound on left parietal area oblique measuring $2\frac{1}{2}$ "x $\frac{1}{2}$ "x cavity deep with everted margin.

The injury no. (i) & (ii) were communicating with injury no. (iii) and were caused by firearms. The death in the opinion of the doctor was caused by shock and haemorrhage due to head injury caused by fire-arms. Estimated time of death found by him supported the prosecution case. He proved the post mortem report (Ext.3). On



the same day he claimed to have examined the informant (P.W.2) of his injuries and found lacerated wound on the lateral aspect of the left forearm caused by fire-arms and lacerated wound on the posterior aspect of left fore-arm 1"x 1"x bony deep. Another lacerated wound was found on the posterior aspect ½" behind the above injury which was bleeding. It was wound of exit. The injury no. (ii) & (iii) caused on the posterior aspect of the left forearm were wound of entries. These injuries support in toto the prosecution case that while the accused persons made attempt to flee from the jail gate a resistance was offered whereafter the accused persons fired at the deceased causing head injury and injury on left fore-arm to the informant. P.W. 9 also found lacerating wound on the left hip measuring ½"x ½" bony deep with bleeding which was, however, found simple in nature caused by hard and blunt substance. On suggestion given to him this witness has stated that this injury was possible by fall. The injury report of the informant has been proved as Ext. 4. The evidence of P.W. 6 is that on the relevant date he was coming on the national highway on vehicle when the same was overtaken by the Tata 407 vehicle, which was used by the accused for coming to and escaping from the jail which met with an accident whereafter the occupants at gunpoint relieved him of his vehicle and escaped therefrom on the said vehicle. He has however not claimed to

have identified any of the accused persons.

We have carefully considered the evidence noticed hereinabove which, in our view, go to prove that on the relevant date and time of occurrence the accused persons under a criminal conspiracy and having formed a common object came to the place of occurrence, used firearms and ensured forceful escape of the prisoners including the appellant from the jail custody.

Counsel for the appellant has submitted that there is vital contradiction in the evidence of the informant which he gave in court. His evidence suffers from exaggeration and contradiction. In his examination-in-chief he has stated that Akshat Singh and Ashok Mahto fired three shots on the deceased Shashi Bhushan Sharma wherein in his Fardbayan his statement is that the accused Akshat Singh fired on the head of the deceased Shashi Bhushan Sharma. In his Fardbayan this witness has stated that Ashok Mahto (the appellant) returned with ten persons on hearing the sound of firing made by him but in court he made a statement that Ashok Mahto and Akshat Singh came back and dragged him to the main gate and Ashok Mahto fired at him. Further, drawing attention of the Court to the injury report (Ext. 4) it is submitted that the allegation of firing in the Fardbayan was not attributed to the appellant. However, in court it has been alleged that the appellant fired at him. The doctor found a



simple injury not on the thigh but on the buttock which in the opinion of the doctor was caused by hard and blunt substance. The submission is that the allegation of having made attempt to commit murder of the informant is not compatible with the evidence of the doctor who did not find any such injury on the portion on which he is alleged to have hit him. The injury was also not caused by firearms. This part of the prosecution case in view of the statement of the informant in the FIR (Ext.1) and in course of evidence and in the light of the evidence of the doctor (P.W.9) becomes very much doubtful. We find substance in the submission of the counsel for the appellant that the allegation of having caused injury which formed the basis of charge under section 307 IPC has not been proved to the hilt by the prosecution against the appellant.

Counsel for the appellant has not urged that there were witnesses other than the jail perosnnels present at the place of occurrence but the prosecution has not produced even one of them. An adverse inference be therefore drawn that they were reluctant to support the prosecution case. Referring to the relevant evidence it has also been argued that the witnesses have, in fact, admitted that the procedure prescribed under the Jail Manual were not being followed inasmuch as the prosecution also failed to bring on record the relevant documents to prove that the co-accuseds had applied

for meeting the inmates. The evidence of P.W. 8 Binod Kumar in particular has been placed to demonstrate the same.

Counsel for the State, on the other hand, has submitted that the evidence of P.Ws 2,3,4 and 7 in the light of the objective finding of the doctor (P.W.9) unmistakably prove that on the relevant date and time the accused persons under a criminal conspiracy forming a common object to ensure escape of the jail inmates including the appellant from the jail custody came to the place of occurrence and resorted to firings in order to ensure their forceful escape and in the process the deceased received gunshot injury on his head to which he succumbed. The informant also in the same incident received injury in the forearm caused by firearms which however cannot be said to be self inflicted as has been suggested by the defence. The quantity of the witness would not be relevant. The Court has to see whether the witnesses who deposed generated/inspired confidence of the court or not and whether they were expected to be present at the scene of occurrence or not. The prosecution witnesses noticed hereinabove were all jail staff and were expected in normal course to be present on the place of occurrence when the occurrence had taken place. No vital contradiction in their testimonials has been shown to us.

Counsel for the appellant may be right in his submission that the evidence on record is at variance on the point as to who fired at



the deceased but it has to be kept in mind that the appellant was tried under sections 302/149 and section 120B IPC. Who amongst the mob actually killed the deceased, in such circumstances, would not be of much relevance. The evidence on record unerringly indicates that they had formed a group under a criminal conspiracy. The common object whereof was to ensure jail break for the release of the appellant and other jail inmates. In the process force was expected and, in fact, used in consequence whereof the deceased received fatal injury on head and the informant received firearms injury on his forearm.

After giving our anxious consideration to the submissions of the parties we are of the considered view that the prosecution has been able to prove beyond a reasonable doubt the guilt of the accused/appellant under section 302/149 IPC and section 120B IPC. In so far as charge(s) under sections 148, 379, 224 and 225 IPC are concerned this Court finds no difficulty in view of the evidence on record in holding that those charges are also proved beyond shadow of reasonable doubt. As noticed above, the appellant has also been held guilty under section 307 IPC for causing firearms injury to the informant. The material variance in the ocular evidence on record on this point read with the objective findings of the doctor with respect to the situs and nature of injury persuade us to hold that

the charge under section 307 IPC for having caused injury to the informant has not been proved. The appellant therefore is entitled to be acquitted of the said charge.

Accordingly, the conviction recorded by the trial court under sections 302/149, 148, 379, 120B, 224 and 225 IPC is upheld whereas the conviction recorded under section 307 against the appellant IPC is set aside. He is acquitted of the said charge.

In the result, the appeal is dismissed.

(Kishore Kumar Mandal, J)

I agree
Samarendra
Pratap Singh, J:
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(Samarendra Pratap Singh, J)

HR/-

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