

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.101 of 2013

Arising Out of PS.Case No. -46 Year- 1995 Thana -BARHARA District- BHOJPUR

Tuntun Singh, son of Late Jangi Singh, resident of village-Ekawana, P.S. Barhara, Bhojpur

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

With

Criminal Appeal (DB) No. 109 of 2013

Arising Out of PS.Case No. -46 Year- 1995 Thana -BARHARA District- BHOJPUR

- 1. Dhanjit Singh S/O Late Jangi Singh R/O Village - Ekawana, Police Station - Barhara In The District Of Bhojpur
- 2. Surendra Singh @ Dhedhi Singh S/O Late Jangi Singh R/O Village - Ekawana, Police Station - Barhara In The District Of Bhojpur

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

Appearance:

(In Cr. Appeal No. 101 of 2013)

For the Appellant/s : Mr. Akhileshwar Prasad Singh, Sr.Advocate
Mr. Bimal Kumar
Mr. Amrit Kumar
Mr. Abhishek Anand
For the State Mr. S. N. Prasad, APP

(In Cr. Appeal No. 109 of 2013)

For the Appellant/s Mr. Akhileshwar Prasad Singh, Sr.Advocate
Mr. Bimal Kumar
Mr. Amrit Kumar
Mr. Abhishek Anand
For the State Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
And

HONOURABLE MR. JUSTICE SANJAY KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 11-05-2017



The appellant Tuntun Singh of Cr. Appeal No. 101 of 2013 and the appellants Dhanjit Singh and Surendra Singh @ Dhedhi Singh of Cr. Appeal No. 109 of 2013 have filed the present appeals aggrieved by the judgment of conviction dated 18.12.2012 and the order of sentence dated 19.12.2012 passed by the learned Ad hoc Addl. Sessions Judge (F.T.C. IInd) Bhojpur, Ara in S.T. No. 266 of 1996 (arising out of Barahara P.S. Case No. 46 of 1995, whereby all the appellants were held guilty under sections 302, 307 and 148 IPC and sentenced to undergo R.I. for life. The Trial court has, however, not specified the charge under which they were sentenced.

2. The prosecution case unravelled in the Fardbayan lodged by the co-villager namely Nageshwar Singh (not examined) in village Ekawana and recorded by the officer-in-charge of Barhara police station on 01.04.1995 at 7.30 A.M., in brief, is that on the relevant morning at 6.00 A.M., he was washing his mouth near the hand pump of Baban Singh when he noticed the deceased coming after attending the call of nature. Co accused Faticher Singh @ Vijendra Singh, the appellant Surendra Singh @ Dhedhi Singh, both sons of Jangi Singh, co accused Rajiv Ranjan Singh @ Gudu Singh were also going towards the south from their house. The deceased Daroga Singh demanded from the co-accused Faticher Singh his dues which was flatly refused by him. The deceased insisted for payment, which ensued heated exchange of words between the deceased and co-accused Faticher Singh. Co-accused Faticher Singh and the appellant Surendra Singh then caught hold of the deceased and started assaulting him with fists and slaps. In the meanwhile, co- accused Gudu Singh rushed to his house and returned armed with pistol along with the appellants Tuntun Singh (armed with a rifle), Dhanjit Singh (armed with a pistol) and co-accused Papu Singh, armed with



a Lathi. The appellant Tuntun Singh fired at the deceased from his rifle which hit him in his chest. Co-accused Faticher Singh again exhorted to assault him whereafter co-accused Gudu Singh shot from his country-made pistol at the deceased which hit him in the left wrist. On receiving those injuries, the deceased fell on the ground. Lalbabu Singh (not examined), Daksh Narain Singh (P.W.3), Sunil Singh (P.W. 4) and Janardan Singh (P.W.7) ran to the place of occurrence and saw the deceased yelling on the ground. It is further alleged that the appellant Dhanjit Singh fired at Lalbabu Singh which however did not hit him whereafter co-accused Papu Singh assaulted Lalbabu Singh with a Lathi on his head causing him injury. After completing the assault, the accused persons brandishing/flaunting their weapons fled away. The deceased died instantaneously at the place of occurrence. The fardbayan made by the informant Nageshwar Singh was attested by P.W. 3 Daksh Narain Singh. The signature of the attesting witness on the fardbayan is marked as Ext. A. A formal FIR was thereafter registered and investigation was taken up wherein the Investigating Officer sent the dead body for autopsy on the cadaver, inspected the place of occurrence and after recording the statement of the witnesses, submitted the charge-sheet against the present appellants whereon cognizance was taken and after committal proceeding, it came on the file of the learned trial court where the charges were framed and read over/explained to the appellants to which they pleaded not guilty. The defence of the appellants is complete denial of the prosecution case and their false implication.

3. To further the prosecution case at trial, the prosecution examined 08 witnesses besides placing on record the post mortem report (Ext.1), the injury report of Lalbabu Singh (not examined) as Ext. 2 and the signature of the



attesting witness on the fardbayan was proved in course of investigation by P.W. 3. P.W. 1 Dr. Purushottam Singh is the autopsy surgeon who held the post mortem on the deceased and proved the post mortem report (Ext.1). P.W. 2 Dr. Ramesh Mishra is the doctor who had examined/treated Lalbabu Singh of his injury. He has proved his injury report (Ext.2). P.W. 3 Daksh Narain Singh, P.W. 4 Sunil Kumar Singh and P.W. 5 Brajesh Kumar Singh (son of the deceased) have supported the prosecution case and narrated the ocular account of the prosecution case. P.W. 6 being the Bhabhi of the deceased and P.W. 7 being the nephew of the deceased have been declared hostile. P.W. 8 Dev Narayan Singh (cousin brother of the deceased) has been tendered. On a critical analysis of the evidence adduced by the prosecution, the learned trial court held the appellants guilty and sentenced in the manner stated above.

4. Heard Mr. Akhileshwar Pd. Singh, Sr. Counsel in support of the appeals and Mr. S. N. Prasad, APP for the State.

5. It has been submitted that in the present case neither the informant nor the injured Lalbabu Singh has been produced and examined. The court should draw adverse inference against the prosecution. The I.O. of the present case has also not been examined which caused serious prejudice to the defence and has occasioned a complete miscarriage of justice. Referring to the evidence of P.W. 3, it has been submitted that the Fardbayan of the case has not been formally proved. P.W. 3 had clearly stated that the same was neither recorded in his presence nor read over/explained to him before he signed thereon as an attesting witness to the Fardbayan. Mr. Singh would also urge that in the setting of the aforesaid facts manifesting from the record, the delay of 04 days in transmission of the FIR to the court completely shrouds the



prosecution case under the thick/dense cloud of suspicion. The prosecution has failed to prove the case beyond shadow of reasonable doubts.

6. In contra, the counsel for the State supported the judgment that the prosecution on the strength of the evidence of P.Ws. 3, 4 and 5 has proved the prosecution case. Witnesses have clearly spoken about dropping of the blood at the place of occurrence and recovery of empty shell scattered close to the place of occurrence. The delay in transmitting of the FIR to the court may be for diverse reasons. Only account of such delay the prosecution case will not fail if the witnesses have fully supported the prosecution case. He would also urge that non-examination of the I.O. has not caused prejudice of any serious nature to the defence.

7. In the light of the submissions made at Bar, we shall examine the relevant evidence adduced by the prosecution. Out of 08 PWs, P.W.6, who is Bhabhi of the deceased and P.W. 7 who has claimed the deceased as his uncle were got declared hostile by the prosecution. In other words, the prosecution does not rely on their evidence as they were not prepared to support the prosecution case. P.W. 8 Dev Narayan Singh is the cousin brother of the deceased and cited witness in the charge-sheet. He has been tendered by the prosecution. He was not even examined-in-chief before being tendered. In the case of **Sukhwant Singh vs. State of Punjab [(1995) 3 SCC 367]** on which the prosecution has relied, it has been held that without first being examined-in-chief if the witness has been tendered it amounts to giving up the witness by the prosecution. Seen thus, the prosecution at the trial has not placed reliance on P.Ws. 6, 7 and 8. The court is left with the evidence of P.Ws 3, 4 and 5 to find whether they have narrated the prosecution case which proved beyond shadow of reasonable doubts the prosecution case.



8. Before we examine their evidence, it is pertinent to take notice of the submissions of the counsel for the appellants that as per the narration of the prosecution case in the Fardbayan and at the trial, only one witness namely Lalbabu Singh was injured at the hands of the accused. He had allegedly received an assault by Lathi on his head caused by co-accused Papu Singh. He has been withheld by the prosecution for which there is no plausible explanation. Although, the informant is a co villager and not related to the deceased, but his narration of the prosecution case being the first version assume significance/relevance. He has also not been produced by the prosecution. If the material witnesses like the injured witness have not been examined without there being any explanation, the Court in the light of the ratio laid down in the case of **Mehraj Singh vs. State of U.P. (1994) 5 SCC 188** can reasonably presume that they were not prepared to support the false case put up by the prosecution. Having noticed the legal principle on the presumption for non examination of the materials witnesses necessary to unfold the prosecution case, we turn to medical evidence. P.W. 1 is the autopsy surgeon, who held the post mortem on the deceased and proved the post mortem report. The doctor found the following ante mortem injuries:-

“A. An oval $\frac{3}{4}$ diameter lacerated wound margin charred and inverted. Dark blood coming out of the wound. Injury going the posteriorly backward on middle of sternum $2\frac{1}{2}$ below the manubrium sterni.

B. One lacerated wound $1\frac{1}{2}$ ”x $1\frac{1}{2}$ ”xcavity deep-margin everted on right side of chest poosteriorly 1” right side to tenth thoraces spine.”

9. Both the injuries, on dissection, were found communicating to each



other. The doctor also found 1 ½” diameter oval lacerated wound with charred and inverted margin on radial aspect of left wrist. These injuries were opined to have been caused by firearms possibly by a pistol.

10. It has been submitted by the defence that the said finding of the doctor contradicts the prosecution case as the doctor found the wound of exit on right side of the chest posteriorly 1” right side to tenth thoraces spine. On close scrutiny of the evidence of the doctor and the post mortem report, in our view, the contention on this point of the appellants appears hollow. The doctor found lacerated wound charred and inverted on the middle of sternum and posteriorly backward. On going through his evidence we have not much doubt that the deceased died of firearm injury and that it was a homicidal death.

11. P.W. 4 has stated that on the relevant date and time he was at his Darwaza with P.W.3 when he saw exchange of heated words between the deceased and co accused Faticher Singh. In the meantime, other appellants also arrived with the fire arms. At the orders of the co accused Faticher Singh, Tuntun Sinh fired at the deceased twice hitting on his body. He is the witness who generally lives in Patna with his family and also previously faced the accusation of rape. Only few days prior to the occurrence he had come to the village in connection with assembly election which his father was contesting. He, however, did not cast his vote. A Suggestion is given to him that some of the appellants were the polling agents of the candidates who had won the said elections. He has further stated that he along with P.W. 3 had hurried/hurtled to place of occurrence and could see the assault. P.W. 3 is an attesting witness of the FIR. This witness has narrated the prosecution case in detail and supports the place of occurrence, the manner of occurrence and the



implication of the appellants in the crime. It has been submitted by the defence that in his deposition, this witness at para 22 has stated that without reading the Fardbayan of the informant, he had signed as an attesting witness. His signature on the FIR has been marked at the instance of the defence as Ext. A. The defence besides above has not extracted any material contradiction in his deposition. P.W. 5, although not named in the FIR, is the young son of the deceased. According to him, he was also present at some distance from the place of occurrence and washing his mouth when the occurrence had taken place. In his examination-in chief, he has supported the prosecution case. He has also stated about recovery of empty shell near the place of occurrence. He identified the appellants present in dock.

12. On scanning the evidence it is found that there are material contradictions in the evidence of the witnesses on the presence of P.W. 4 at the place of occurrence. P.W. 3 at para 21 has stated that he remained present near the dead body for about two hours i.e. till the dead body was dispatched for autopsy. At para 20 he says that Lal Babu sustained injury on his head and he was moved to hospital for treatment. But he did not say as to who accompanied him to the hospital. As about P.W. 4, who also claims to be an eye witness, at para 14 of his evidence it is stated that the police had accompanied the injured Lal Babu Singh for his treatment. Thus the evidence of P.W. 4 rules out the presence of P.W. 3 near the dead body. If we consider the evidence of P.Ws 3 and 4 in juxtaposition, the presence of P.W. 5(son of the deceased) at the place of occurrence also becomes doubtful. P.W.5 has been examined as an eye witness. He has stated that he saw the manner of occurrence from his Darwaza. He has stated that a shot was fired on Lal Babu Singh which missed and thereafter accused assaulted him on his head when he



moved to save his father from being assaulted by the accused persons. None of the witnesses examined in this case has stated about the presence of P.W.5 (son of the deceased). It further appears that it was rather impossible for P.W.5 (son of the deceased) to see the occurrence and hear the conversation of his father with the assailants as his residence is quite at some distance. P.W. 3 at para 2 has said that the deceased had his residence towards east-south of the village. P.W.3 at para 9 and 10 of his deposition has stated about the topography/distance of the house of the deceased from the place of occurrence. The distance of the house of the deceased is about 200 yards from the place of occurrence. The details of topography of the house of the appellants and the victim as provided by P.W.3 at para 10 make it almost impossible for P.W.5 to see the every detail of the manner of occurrence including the conversation between his deceased father and the appellants. In the light of these evidence(s), we are unable to place full reliance on him.

13. On the one hand, we have the evidence of P.Ws. 3, 4 and 5 who have spoken about the prosecution case without their being much at variance and, on the other hand, we find that the injured witness was not produced for examination by the prosecution. That apart, P.W. 6, own Bhabhi of the deceased, P.W. 7, one of the nephews of the deceased and P.W. 8, cousin brother of the deceased, although produced, but the prosecution did not rely on their evidence and they were declared either hostile or tendered. There is some explanation with regard to non-examination of the informant who was not in any way related to the deceased. We could have fully placed reliance on the evidence of P.Ws. 3, 4 and 5 but the fact that the FIR was withheld by the police for an unexplained delay of at least 03 days throws the dense cloud and shakes the prosecution case. It has been argued before us that non-



examination of the I.O. without there being any explanation that caused prejudice as the defence could not cross examine the said witness on the place of occurrence, presence of the blood at the place of occurrence and recovery of the sandal and empty shells found near the place of occurrence. The prosecution has not placed on record any seizure made of those cartridges at the place of occurrence by the I.O. The I.O. could have been also examined on abnormal delay in transmitting the Fardbayan which, according to the law, could have been promptly dispatched to the nearest Magistrate. Such delay in forwarding the copy of the FIR to the court, in law, gives an impression that the prosecution consumed time either embellishing the allegation or introduction of coloured version or exaggerated the story. Sending of the FIR promptly to the court is one of the checks which is generally applied before accepting the prosecution version. The delay in sending the FIR takes out the sheen of the first version of the prosecution on which the entire case is structured. There is another well established legal principle stemming from section 114 of the Evidence Act. If the prosecution fails to produce the witnesses who could have narrated the ocular account of the prosecution case, it can safely presumed that they were not prepared to support the false case. In the case at hands Lalbabu Singh was the solitary witness who received injury in course of the occurrence and his evidence was due to receive some more credibility, but the prosecution failed to produce this witness. That apart. P.W. 4 has spoken about the presence of P.W. 8 at the place of occurrence. He has, however, been tendered. There is another circumstance which impels us to doubt the prosecution case. The informant has not been produced. P.W.3 who is an attesting witness of the FIR, in his deposition, has stated that the Fardbayan was not recorded in his presence.



He was later made to sign the same without reading over to him the contents thereof. In this background, non transmission of the FIR promptly to the court, in our view, is a serious obstacle in placing full reliance on the prosecution case as narrated by the three of the prosecution witnesses. To add to it, non examination of the I.O. who could have disclosed several relevant facts with regard to the place of occurrence, presence of blood at the place of occurrence and recovery of incriminating articles such as sleepers, sandal by one of the co accuseds and recovery of the empty shells is a severe jolt to the prosecution case.

14. One of the contentions of the defence is that incriminating circumstances were not put to the appellant(s) while recording his/their statements under section 313 of the Code of Criminal Procedure. A general question was put that they were jointly responsible for causing the death of the deceased. Insofar as the charge under section 307 IPC is concerned, the relevant circumstance were not disclosed to the appellant(s) with a view to solicit his/their response(s). It has been argued relying on the case of **Baleshwar Sah & Ors. Vs. The State of Bihar (2011 (1) PLJR 423)** that if the prosecution has not put all incriminating materials to the accused(s) then it can not rely thereon for the purpose of establishing the prosecution case. We accept the said contention of the appellants only in respect of charge punishable under section 307 IPC as the first question put to the appellants was whether they had heard the witnesses speaking against them at the trial to which they answered in affirmative. The second question was with respect to the appellants being responsible for causing homicidal death of the deceased on the relevant date and time of the occurrence by firearms. We are not impressed by the contention of the defence that in the facts and



circumstances of the case the prosecution ought to have put the specific allegation attributed to each of them. Such a pedantic view would frustrate the cause of justice.

15. In conclusion, it is found and held that the prosecution has not been able to prove its case beyond shadow of reasonable doubts. The conviction recorded against the appellants is set aside and the appeals are allowed. The appellant Tuntun Singh of Cr. Appeal No. 101 of 2013 be set at liberty, if not required in any other case. The appellants Dhanjit Singh and Surendra Singh @ Dhedhi of Cr. Appeal No.109 of 2013 are on bail. They are discharged from the liability of their bail bonds.

(Kishore Kumar Mandal, J)

I agree (Sanjay Kumar, J)

HR/-

AFR/NAFR	NAFR
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