

Vs.

Vs.

SooperKanoon Citation : sooperkanoon.com/1028449

Court : Patna

Decided On : Aug-20-2013

Judgement :

IN THE HIGH COURT OF JUDICATURE AT PATNA ***** Against the judgment of conviction and order of sentence dated 24th April, 1990 passed by Shri Birendra Kumar Sinha No. 2, the learned 3 rd Additional Sessions Judge, Saran at Chapra in Sessions Trial No. 444 of 1986. ***** Criminal Appeal (DB) No.166 of 1990

===== 1.
Birendra Giri, son of Gopal Giri 2. Bharat Singh, son of Ramagya Singh, both residents of village - Sherpur, P.S. - Chapra Mufassil, District - Saran.
Appellants Versus The State of Bihar Respondent

===== Appearance : For the Appellants : Mr. Y.V. Giri, Senior Advocate. Mr. V.R. Bharti, Advocate. For the Respondent : Mr. Ajay Mishra, APP.

===== CORAM: HONOURABLE MR. JUSTICE SHYAM KISHORE SHARMA and HONOURABLE MR. JUSTICE AMARESH KUMAR LAL ORAL

JUDGMENT

(Per: HONOURABLE MR. JUSTICE SHYAM KISHORE SHARMA) Date:

20. 08-2013 Birendra Giri and Bharat Singh have impugned the judgment and order dated 24th April, 1990 delivered by the learned 3rd Additional Sessions Judge, Saran at Chapra in connection with Sessions Trial No. 444 of 1986, holding

the appellant no. 1 Birendra Giri guilty under Sections 302/380 of the IPC and appellant no. 2 Bharat Singh guilty under Sections 380/302 of the IPC read with Section 34 of the IPC and both were sentenced to undergo R.I. for life for the charge under Section 302 and also 302/34 of the IPC and three years each for the offence Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-2013 2 under Section 380/34 of the IPC with a direction that the sentences to run concurrently.

2. An occurrence of the evening of 31.05.1985, was reported to police on 02.06.1985 at 06.00 a.m., which led to registration of Chapra Muffasil P.S. Case No. 153 of 1985 under Sections 302, 379/34 of the IPC.

3. Madan Nut (P.W.7) lost his son Naresh Nut which led to lodging of the fardbeyan (Ext.

1) recorded by Ramcharitra Mahto the Sub-Inspector (P.W.

9) at Sadar Hospital Chapra at 06.00 a.m. on 02.06.1985. Madan Nut told that Birendra Giri and Bharat Singh demanded Rs. 10/-, but it was refused. On the day following i.e. on 31.05.1985 at about 09.00 a.m., the informant P.W. 7 and his wife Champa Devi P.W. 4 went out to rural area for earning their livelihood. At 06.00 p.m. they arrived and were informed by their daughter Samita Kumari aged 7 years P.W. 8 that two persons took away currency from the box after breaking it and her brother was thrown inside the orchard. The informant and his wife rushed and saw their son was lying. The informants son Naresh Nut told that Birendra Giri and Bharat Singh demanded money and wanted to get the key of the box but that was not given and it was told that the key was taken away by his mother then the accused persons broke the box and took away Rs. Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-201

415. -. When the forcible opening of the box was retorted then accused Birendra Giri caught him as well as sister Samita Kumari P.W.8. Birendra Giri succeeded in opening the box and taken away the money. When the informant cried then he was pushed on by the accused Bharat Singh and thereafter gagged and in that very position the accused Birendra Giri came upon his stomach and pressed it and thereafter he was thrown inside the orchard. He was feeling pain in his stomach

and back. The informant carried his son for treatment and stayed in the line hotel of Jamuna Rai (not examined). At that very time Jamuna Rai the hotelier and villager Thakur Singh told that they had seen the assault being made by both the accused. The informant brought his son through a rickshaw to Sadar Hospital. After coming to Sadar hospital his son started crying and became nervous and subsequently died. The fardbeyan resulted into formal FIR (Ext.

4) and the investigation commenced. In course of investigation, the seizure list (Ext.

5) was made. Though the inquest report was not prepared but post-mortem report (Ext.

3) was obtained. Statement of the witnesses were recorded, place of occurrence was inspected. The case was found to be true by the I.O. and so chargesheet was submitted. The case was found triable by the Court of Sessions so it was committed. Charge under Sections Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-201

302. 380 of the IPC was explained to both the accused persons and they pleaded innocence so the trial proceeded.

4. The defence of the accused persons was of false implication on account of their enmity from before. Their further defence was that the accused persons with the purpose of grabbing the land lodged a false case. In fact, it was month of June and mangoes were available and the deceased Naresh Nut had gone to pluck mango and where he fell down and received some injuries, but due to improper and negligent treatment he died.

5. Before the trial court the prosecution examined altogether nine witnesses they are Baikunth Prasad P.W. 1, Lal Pati P.W. 2, Bishundeo Nut P.W. 3, Champa Devi P.W. 4, Nemi Nut P.W. 5, Dr. Gauri Shankar Prasad Singh P.W. 6, Madan Nut P.W. 7, Samita Kumari P.W. 8 and Ramcharitra Mahto P.W.

9. The defence had not examined any witness. P.W. 1 is a formal witness who has identified signature on the fardbeyan and he is an advocate clerk and his evidence

is not on the occurrence. P.W. 3 is another formal witness who has proved his signature upon the seizure list of old broken wooden box. P.W.5 Nemi Nut has proved the signature on the seizure list (Ext. 2). P.Ws. 4, 7 and 8 are the witnesses whose names have been mentioned in the fardbeyan. P.W. 4 is mother of the deceased, P.W. 6 is father of Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-2013 5 the deceased and informant and P.W. 8 is sister of the deceased. The learned Additional Sessions Judge set out three questions for determination I). Whether or not both the accused committed murder of Naresh Nut in the manner claimed in the prosecution case on the place of occurrence alleged? II). Whether or not the accused committed theft of money from the dwelling house of the informant at the same time and place? III). Whether or not the prosecution has been able to prove these two or any of these charges against the accused beyond shadow of all reasonable doubts? 6. The learned Additional Sessions Judge found that the prosecution has been able to prove the charge against both the accused and so the judgment of conviction and order of sentence has been passed.

7. Learned counsel for the appellant has assailed the judgment and it has been submitted that the prosecution has based its story only on the basis of statement of only witness P.W. 8 Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-2013 6 who was not examined by the I.O. During investigation it has also been submitted that it has come in evidence that the occurrence was seen by Jamuna Rai and Thakur Singh but they were not examined. It has also been submitted that the I.O. has given his objective finding of the conditions of the box and a prima facie investigation of place of occurrence was enough to indicate that there was no tampering. It has also been submitted that hiding of the box was only to prove that the box was not tampered and the I.O. has not found any new tampering mark upon the box. Further submission is that the occurrence was of the evening of 31.05.1985, but the fardbeyan was given on 02.06.1985 and it was received in the court on 02.06.1985. There is no explanation of the delay.

8. Learned APP has submitted that the prosecution has succeeded in proving the charge against the accused persons and the I.O. has found logically that the box was tampered and it was visible. It has also been submitted that P.W. 8 was a

natural witness and the prosecution placed reliance upon the same was only to indicate that the occurrence in the manner as detailed by him was an actual occurrence.

9. Before proceeding further, it would be appropriate to see as to whether the prosecution has been able to prove the Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-2013 7 charge against the appellants beyond shadow of all reasonable doubts or not.

10. Before taking up the ocular evidence, it would be appropriate to go through the evidence of P.W.6 Dr. Gauri Shankar Prasad Singh, who was posted as C.A.S., Sadar Hospital, Chapra, had occasion to hold post-mortem upon the dead body of Naresh Nut on 02.06.1985. The body was brought and identified by Nemi Nut and Constable No. 102 Shekh Munir. The doctor has opined that there was no external injury upon the body. There was a perforation in the part of intestine. The injury was anti-mortem caused by pressure and tortion with the help of hard and blunt substance. In the cross-examination the doctor has accepted suggestion of the defence that such injury caused by fall. It has also come in the evidence of the doctor that the injured was treated by some other doctor but that was not explained to him that the doctor who treated Naresh Nut prior to death has been withheld by the prosecution and no explanation was given as to why he was withheld.

11. The doctors evidence has conclusively proved that Naresh Nut died on account of own injury which he received in and around the time which has been explained to the accused.

12. The oral evidence which was to be discussed was Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-2013 8 of the informant P.W. 7, the unfortunate father of the deceased. The informants son Naresh Nut was at his house on the fateful day. Naresh Nut was accompanied with his sister Samita Kumari. The informant and his wife Champa Devi P.W. 4, had gone to earn his livelihood in the rural area. The informant was living in Sherpur Village in the land of Sheopujan Singh at the relevant time. At the time of deposition the informant was living in another village in the house of Suraj Singh. He has stated that when he returned

along with his wife then he found Naresh Nut was not present there, he enquired from his daughter Samita Kumari who told that Birendra Giri and Bharat Singh came and demanded money from both but on refusal box was broken, money was taken. Bharat Singh caught hold of Samita Kumari and Naresh Nut. Subsequently, Naresh Nut was pushed down and Birendra Giri jumped upon his stomach and smashed it and on the strength of his toes. Naresh Nut was thrown outside of the house. It has been stated that Naresh Nut (the deceased) told about the occurrence to the informant. In the next night at about midnight Naresh Nut succumbed to his injuries. After death, the police was informed and the investigation commenced. He has stated that Jamuna Rai and Thakur Singh had seen the occurrence. He further told that before losing consciousness Naresh Nut described the Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-2013 9 manner in which he was assaulted and the occurrence was committed. P.W. 4 is another witness, who has remained present throughout in the event along with her husband P.W.

7. She has supported the deposition of P.W. 7 and has stated that Naresh Nut has told that Bharat Singh and Birendra Giri have caused the injury which ultimately proved fatal. She has stated that when her son was taken to hospital then he was having his senses and the treatment started at 10.00 a.m. then her son had lost his senses and subsequently he died. Other witnesses are not very material. P.W. 3 is maternal grand mother of the deceased. She has come later on and knew about the occurrence therefore she is a hearsay witness and her evidence is not required to be separately discussed.

13. The most important witness of the case is P.W. 8 Samita Kumari. On the date of deposition she was of ten years and on the date of occurrence her age has been mentioned in the fardbeyan to be of seven years. She was not at administering truth because she was not found up to the mark of understanding meaning of oath. Still she was examined and cross-examined extensively. Though, she has described the occurrence from beginning to end, but it is apparent from the evidence of P.W.9 that he has not taken statement of P.W. 8 because she was not found competent enough to give statement during investigation. Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-2013 10

The I.O. P.W. 9 has stated that he has recorded the statement but regarding the place of occurrence he has stated that he has not found any mark from which any inference could have been drawn that any violence has taken place at the place of occurrence. The objective finding has been recorded in para 10 of his evidence though he has found the box broken but the sign of breaking was not new. The investigating officer has not seen any bed head ticket of the deceased. It has come in evidence that the injured was initially taken to Goldenganj hospital but no entry was found there.

14. Some facts which have appeared on the record are prominent. Two independent witnesses have been cited from beginning of the case they were Jamuna Rai and Thakur Singh and they were not brought to witness box. It has come that Naresh Nut was taken to hospital and he was conscious but there is no explanation as to why his statement was not taken. The I.O. has found the box broken but the sign of breaking was not new rather it was an old sign and the only inference from the fact drawn that the box was not broken on the date and time as claimed by the prosecution. P.W. 8 is the only eye witness who has been relied upon by the prosecution and has not given her statement under Section 161 of the Cr.P.C. and for the first time she has been Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-2013 11 brought to court as a witness. She was a minor girl aged about 6-7 years at the time of occurrence and was not found competent enough to be the person who had capacity to understand the meaning of oath but still she was examined and her statement was not taken on solemn affirmation. The trial court was not correct on relying upon the statement which was on oath. The person who does not understand the meaning of oath found to be competent and the purpose of meaning of oath. The statement of the witnesses must be after oath that is followed as universal law in the country but in this case the court has accepted her testimony though it was found without oath. Those explanations have been given for acceptance of her evidence but the explanation is not worth accepting. The prosecution has based the testimony of two types of evidence (I) statement of only child witness P.W. 8 (II) the statement of the deceased regarding cause of occurrence which led to his death. It has been discussed above that P.W. 8s statement was recorded without oath and the I.O. has stated that he has not found the girl to be competent enough as whose statement has to be recorded

during recording of others statement. The girl was examined for the first time before the court and such evidence cannot be accepted and it is not being accepted. If that evidence is given away then the second type of evidence which Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-2013 12 has been relied upon by the prosecution was evidence of the deceased which he has given to P.W. 4 and P.W.

7. P.W. 4 and P.W. 7 have stated that Naresh Nut was taken to hospital and in the hospital he was conscious on 31.05.1985. Before treatment at Sadar Hospital, Chapra the deceased was treated at Goldenganj hospital but that was not brought on the record and it is not clear that what prevented the prosecution for bringing the treatment on the record. When Naresh Nut was in conscious position up to the hospital, his statement was firstly taken by the doctor who administered him first treatment. It is also not clear that as to why the occurrence was not reported to police by the hospital authority and the occurrence was reported after a long interval only after death of Naresh Nut. The first thing which has to be followed by the hospital is that the matter has to be referred to police and the police thereafter comes and takes the statement but that was not done. The police was not even informed but the injured person was admitted to hospital and he was treated and this long gap between 31.05.1985 to 02.06.1985 tells a lot as to why the information with regard to commission of serious offence was withheld even to police. That itself was enough to cast a doubt with regard to veracity of the prosecution case. On this score also, the evidence of P.Ws. 4 and 7 cannot be accepted that the injured Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-2013 13 prior to succumbing his injuries has named his assailants. There is no corroboration of their version. The objective finding of the case has given altogether a different twist. The corroboration to some extent could have been accepted but some mark of violence was to be found at the place of occurrence but the I.O. has not found any mark of violence though he has found the box broken but that sign was old. This is not the prosecution case. The prosecution case was that the box was broken upon at the place of occurrence by the accused persons and thereafter the theft was committed but that version was not found to be correct version by the I.O. Therefore, there was no reliable evidence upon which any inference could be drawn and that box was broken upon by the police

or the victim. The alternate theory was already on the record when Naresh Nut falls down in the orchard and so he might have received injuries.

15. If the prosecution brings out a case in particular manner then the onus is upon it to prove in that particular manner. If that was not done then it can be said that the entire facts have not been brought on record. In the present case the evidence relied upon by the prosecution is not to the extent that it can be presumed that the offence as alleged was committed by the accused/appellants. The prosecution case appears to be doubtful Patna High Court CR. APP (DB) No.166 of 1990 dt.20-08-2013 14 so far it relates to implication of the appellants. Once a doubt is created then the benefit of doubt goes to the accused alone.

16. In view of the aforesaid discussion, it is held that the prosecution has not been able to prove the charges against the appellants beyond shadow of all reasonable doubts.

17. In the result, the judgment of conviction and order of sentence is set aside. The appeal is allowed. The appellants are already on bail. They are acquitted of the charges and discharged from the liabilities of their respective bail bonds. (Shyam Kishore Sharma, J.) (Amaresh Kumar Lal, J.) KKSINHA/- N.A.F.R.

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