

Manoj Kumar @ Manoj Kumar Tiwary Vs. State

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Court : Patna

Decided On : Sep-02-2013

Appellant : Manoj Kumar @ Manoj Kumar Tiwary

Respondent : State

Judgement :

IN THE HIGH COURT OF JUDICATURE AT PATNA Criminal Appeal (DB) No.5 of 1991

Tarkeshwar Singh son of Shri Debi Singh, resident of Mohalla- Panchmahla Nai Sarak, P.S.- Civil Lines, in the town and District- Gaya..... Appellant Versus The State of Bihar.... Respondent with Criminal Appeal (DB) No. 37 of 1991

1. Manoj Kumar @ Manoj Kumar Tiwary son of Madhusudan Tiwary, resident of village-Eroo, P.S.- Wazirganj, District- Gaya 2. Suresh Sonar @ Suresh Prasad son of Ramdhani Sao, resident of Mohalla- Kath Gachhi, P.S.- Civil Lines, District- Gaya. Appellants Versus The State of Bihar.... Respondent Against the judgment of conviction and order of sentence dated 7th December, 1990 passed by Shree Someshwar Nath Pathak, 8th Additional Sessions Judge, Gaya in Sessions Trial No. 182 of 1989 / 10 of 1989 (A.S.J.

VIII).

Appearance : (In CR. APP (DB) No. 5 of 1991) For the Appellant/s : Mr. N.A. Shamsi, Advocate Mr. Neeraj Kumar @ Sanidh, Advocate For the Respondent/s :

Mr. A. K. Sinha, APP (In CR. APP (DB) No. 37 of 1991) For the Appellant/s : Mrs. Fauzia Shakil, Advocate For the Respondent/s : Mr. Abhimanyu Sharma, APP

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

JUDGMENT

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

02. 09-2013 Above noted both the appeals have been taken up together because both of them have arisen out of common judgment dated 7th December, 1990 passed by the learned 8th Additional Sessions Judge, Gaya in Sessions Trial No. 182 of 1989 / 10 of 1089 (A.S.J.VIII) Patna High Court CR. APP (DB) No.5 of 1991 dt.02-09-2013 2 whereby all the appellants were convicted under sections 302/34 of the Indian Penal Code and were sentenced to undergo rigorous imprisonment for life.

2. Regarding killing of Pinki @ Shailendra Kumar Sinha at 7.00 PM on 4.7.1988 the fard-beyan (Ext.

1) was given by PW 8.Prabodh Ranjan Sinha at 7.30 PM at the place of occurrence wherein the informant described that his brother was having high-tea with the informant. After high-tea, the informant proceeded towards Panchmahala Lane, Manoj, Tarkeshwar Singh and 2-3 unknown persons were also seen going in the lane. Sometime thereafter, shots of firing were heard and the informant noticed Manoj and Tarkeshwar escaping with pistols. Informants cousin Pinki was found killed by the firearms. The accused persons were seen escaping by Arbind Kumar Pathak (PW

2) and other persons of the locality. Pinki was realizing toll on behalf of the contractors of lodging houses. Manoj and Tarkeshwar used to demand ransom which was not given by Pinki which led to his killing. The head was blown up. One country made pistol was found kept near the dead body. The fard-beyan resulted into registration of formal FIR (Ext.

4) vide Civil Lines P.S. Case No. 270 dated 4.10.1988 under sections 302/34 of the IPC and the investigation commenced. The fard-beyan had Arbind Kumar Pathak as its attesting witness. The place of occurrence was investigated into. Statements of witnesses were recorded and chargesheet was submitted. Accordingly, cognizance was taken and the case was committed to the court of Sessions where charge under sections 302/34 of the IPC was explained to the Patna High Court CR. APP (DB) No.5 of 1991 dt.02-09-2013 3 appellants to which they pleaded their innocence and preferred to face trial. Their defence was of false and malicious implication. Their further defence was that the deceased Pinki and the informant were accused in a case registered under section 302 of the Indian Penal Code which was registered as Civil Lines P.S. Case No. 251 of 1987. The deceased and the informant (PW

8) were chargesheeted vide Final Report No. 260 dated 10.11.1987. The informant (PW

8) was coercing the appellant and his father for deposing against them and when that was not accepted, then taking benefit of death of cousin, a false case was lodged.

3. Before the trial court the prosecution has examined PW 1 Farjan Ali Khan, PW 2 Arbind Kumar Pathak, PW 3 Jai Shankar Prasad, PW 4 Jaibendra Kumar Sinha, PW 5 Birendra Prasad Singh, PW 6 Birendra Kumar Sinha, PW 7 Dr. Arbind Prasad, PW 8 Prabodh Ranjan Sinha and PW 9 Raghunath Chaudhary. The inquest report and seizure list were exhibited as Ext. 5 & 6. PW 1 was a formal witness and proved the writing of the Investigating Officer. PWs 2 and 3 have deposed that they have gone to the place of occurrence after hearing the sound of firing and they have been examined as hearsay witness. PWs 2 and 3 are inquest report witness also. PW 4 is another hearsay witness who has come to know about the occurrence from the informant PW 8. PW 5 has been examined as eye witness. PW 6 is a formal witness. PW 7 has held autopsy upon the dead body of Pinki @ Shailendra Kumar. PW 8 is the informant and PW 9 is the Investigating officer.

4. On behalf of the defence a document relating to a case under section 302 IPC has been exhibited as Ext. A. Patna High Court CR. APP (DB) No.5 of 1991 dt.02-09-201

5. Learned trial court after considering the evidence and after analyzing the facts and circumstances of the case, opined and observed that the prosecution has succeeded in proving the case and order of conviction was passed.

6. Now, this Court is to see as to whether the prosecution has been able to prove its case beyond the shadow of all reasonable doubts or not.

7. The post mortem upon the dead body of Pinki @ Shailendra Kumar Sinha was performed on 5.10.1988 by PW 9 who was posted in Magadh Medical College and Hospital, Gaya and has found following ante-mortem injuries:- (i) Entry wound of diameter with blackening around the wound was found over the middle of the radial border of the left hand. (ii) Exit wound of was found over the ulnar border of the left hand at the middle. No blackening or tattooing was found over it. The intervening soft tissues between injury no. (i) and (ii) were lacerated and both the injuries were communicating with each other. Blood clots were present in the path. (iii) Entry wound of size was found in the upper eyelid of the left eye. Slight blackening was present at the wound. Fracture of the upper orbital plate was found just beneath it. Blood clots were present on the left socket. The left eye was found deep inside the socket. (iv) A wound of exit was found over the back of the skull. Explosive appearance was present there. Fracture of the skull bone was found extending from the 1 behind the right ear to 6 crossing the occipital bone and left parietal bone. Scalp was torn along Patna High Court CR. APP (DB) No.5 of 1991 dt.02-09-2013 5 with it to its whole length. Whole of the brain matter was seen lying outside the vent with laceration and tear at most of the places. Blood and blood clots were present inside the cranial cavity. The injury no. (iii) and (iv) were communicating. (v) Entry wound of 1 diameter was found over the right anterior chest wall. Abrasion colour was present around the wound. (vi) Exit wound of 1 diameter was found over the left anterior chest wall. No blackening, tattooing or abrasion colour was found around it. Both the injury nos. (v) (vi) were communicating. There was fracture of the 2nd and 3rd rib behind the injury no. (v)

on the right side and fracture of 2nd rib on the left side. The intervening portion of the lung was found lacerated, blood and blood clots were found in both the chest cavity. One bullet was found embedded in the Baniyan of the deceased which is preserved in a sealed bottle and is handed over to the constable concerned. Time elapsed since death is 24 hours and cause of death is injury to the head and chest by firearm.

8. The doctors evidence conclusively proved that Pinki has received firearm injuries which proved fatal. It was a case of culpable homicide amounting to murder. Once the prosecution has succeeded in proving the case that Pinki has been killed, then it has to be seen as to whether the prosecution has been able to link the appellants with the offence or not.

9. PW 2 is the only eye witness whose name has been mentioned in the fard-beyan as a witness. The informant has deposed that on 4.10.1988 at 6.00 PM, he along with his cousin brother Pinki Patna High Court CR. APP (DB) No.5 of 1991 dt.02-09-2013 6 had there high-tea in a hotel. In the meanwhile Pinki proceeded towards Gali, he was followed by five persons including Manoj, Tarkeshwar Singh and two unknown. The informant heard three shots of firing. The informant proceeded in that direction and saw the appellants and unknown persons escaping with pistols. The dead body of Pinki was noticed there. Near the dead body a pistol was also found. The informant suspected that the accused persons were demanding amount of extortion and when that was not given, then the instant killing was done. In cross-examination he has stated that in Civil Lines P.S. Case No. 251 of 1982 under section 302 IPC the informant and Pinki were accused. This witness is not the witness to the occurrence but has seen the accused persons escaping.

10. PW 2 was also having his high-tea and at that very time he heard sound of firing and when he reached to that direction where the firing was made, he saw the appellants running with pistols. PW 2 saw Pinki dead on the road. Firearm injuries were noticed. This witness is also not a witness to the occurrence but has seen the accused persons escaping after the occurrence. He has seen a pistol near the dead body of Pinki. Other witnesses PWs 3 and 4 are hearsay witness and they

knew about the occurrence from others. They are not on the point of occurrence but have been examined as a hearsay witness, so their evidence is not required to be discussed separately. Similar is the evidence of PW 6.who is also a hearsay witness.

11. PW 5 is the only witness who has been examined as eye witness to the occurrence. He was going to deposit the toll which he has Patna High Court CR. APP (DB) No.5 of 1991 dt.02-09-2013 7 collected on behalf of Pinki. When he reached, then he saw altercation between Manoj, Suresh and Tarkeshwar on one side and Pinki on another side. Manoj fired upon Pinki from behind and the firing caused injury upon the back portion of the head of Pinki. Other two also fired. This witness returned and saw Manoj threw his pistol and has escaped. This witness was realizing toll from cart pullers and the work was entrusted to him by Pinki. Pinki was realizing the amount on behalf of the contractor Upendra. This witness has stated that altogether six shots were fired upon the deceased. He has stated that he has given his statement that firing upon Pinki was made by Manoj which caused injury upon the back portion of the head and others have also assaulted. This witness has denied that he was having knowledge that Pinki was accused in case relating to case of Mahadev Rao Bitthal.

12. Learned counsel for the appellant has stated that the statement of sole eye witness was recorded by the Police on 11.10.1988 wherein this witness has not stated that he has seen the actual killing in which firing was resorted to which hit upon the back portion of the head. Learned counsel for the appellants has further stated that even in evidence, PW 5 has claimed that he has stated specifically that firing was on the back portion of the head but the doctor has not found any corresponding injury. It has also been submitted that the sole witness is a chance witness, who had no occasion to be there and had he been there, then his name would have been mentioned in the fard-beyan itself. It has also been submitted that PW 5 was set up as a witness subsequently and that is why his statement was recorded under section Patna High Court CR. APP (DB) No.5 of 1991 dt.02-09-201

161. Cr.P.C. on 11.10.1988. The prosecution has relied upon the testimony of sole witness whose statement was recorded after a long lapse of time. It has also been submitted that there is contradiction between eye witness account and the medical evidence and the contradiction has not been explained by the prosecution.

13. On the other hand learned APP has submitted that no doubt there is some variation between the eye witness account and the medical account but the variation has not affected the totality of the evidence.

14. It has come on the record that Pinki was described as assailant in the murder of a Panda namely, Mahadeo Lal Bithal which resulted into registration of Civil Lines P.S. Case No. 251 of 1987 and in that case Pinki and the informant were chargesheeted. The prosecution has not been able to explain in the present case as to on what authority Pinki was collecting money from poor Tella Pullers. The Investigating Officer has admitted in his evidence that he has lodged a case against the deceased for offence punishable under sections 25(A), 26 of the Arms Act and the case has been registered vide Civil Lines P.S. Case No. 261 of 1988.

15. The order of conviction can be made even on the testimony of sole witness and there is no rule that a sole witness could not be relied upon. The rule of prudence has to be applied in weighing the evidence of sole eye witness. The present case is based upon the testimony of sole eye witness-PW 5. But evidence of PW 5 has been totally negated by the medical evidence as the doctor has not found the Patna High Court CR. APP (DB) No.5 of 1991 dt.02-09-2013 9 injuries described by PW 5. The doctor's opinion has also to be considered because he had occasion to describe about the occurrence. Sufficient weightage has to be given to the doctor who has conducted post mortem examination. No doubt, post mortem report is not a substantive piece of the occurrence but in the present case the doctor has been examined, if there is discrepancy between the medical evidence and the eye witnesses account, then the benefit has to be given to the accused. The medical discrepancies can be well explained and presumed because no witness can see everything. In the present case, there is stark contradiction between the evidence of sole eye witness and the doctor regarding manner of occurrence and so whole manner of occurrence becomes doubtful. The doubt has

been pointed out because the eye witness was present at the place of occurrence but his statement was recorded after a long lapse i.e. about after 8 days. The delay in examination of eye witness indicates and suggests unfair practice. It makes the prosecution case suspicious and the credibility of the eye witness becomes very much doubtful. If the delay is explained, then it can be well taken but if the delay is not explained, then it can be said that the prosecution has not succeeded in discharging its duty. Delayed recording of statement of eye witnesses in every case do not vitiate the prosecution but in a case depending upon the sole testimony of eye witness which has been found to be wholly negated by the doctor, the delay of 8 days in recording the statement of witness who was present at the place of occurrence creates doubt in the prosecution version. Infirmary in statement is that he has seen six shots being fired Patna High Court CR. APP (DB) No.5 of 1991 dt.02-09-2013 10 but no such corresponding injuries have been found and it indicates the only version that the sole witness has not seen the incident and he cannot be said to be a truthful witness. In view of the aforesaid discussion, it can not be prudent to sustain the conviction and sentence recorded by the trial court.

16. In view of the aforesaid discussions, we are of the view that the prosecution has not been able to prove its charge against the appellants beyond the shadow of all reasonable doubts. In the result, judgment of conviction and order of sentence is set aside and both the appeals are allowed. The appellants are acquitted of charges. Since they are on bail, they are discharged from the liabilities of their bail bonds. (Shyam Kishore Sharma, J) (Amaresh Kumar Lal, J) Patna High Court Dated 2nd September, 2013 Avin/N.A.F.R.

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