

**The State of Bihar Vs. Raj Kumar Mahto**

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**Court :** Patna

**Decided On :** Sep-11-2006

**Judge :** Indu Prabha Singh and Ghanshyam Prasad, JJ.

**Acts :** Evidence Act - Sections 26 and 60; Indian Penal Code (IPC) - Sections 302; Code of Criminal Procedure (CrPC) - Sections 235(2) and 313

**Appeal No. :** Death Reference No. 10 of 2003 and Criminal Appeal No. 390 of 2003

**Appellant :** The State of Biharraj Kumar Mahto

**Respondent :** Raj Kumar Mahto the State of Bihar

**Advocate for Def. :** Ashutosh Kumar and Pradeep Kumar Singh, Adv.

**Advocate for Pet/Ap. :** Ashwani Kumar Sinha, A.P.P.

**Disposition :** Appeal dismissed

**Prior history :** Ghanshyam Prasad, J. 1. Both; the Death Reference as well as Criminal Appeal arise out of the same judgment and order dated 13.8.2003 delivered by Sri Tarkeshwar Pathak, Fast Track Court No. 4, Darbhanga in Sessions Trial No. 159 of 2002. The sole appellant has been convicted under Section 302 of the Indian Penal Code and awarded death sentence. The appellant has called in question his conviction and sentence passed by the lower court. 2. The Fardbeyan (Ext.4) lodged by Savitari Devi, P.W.15,

## **Judgement :**

**Ghanshyam Prasad, J.**

1. Both; the Death Reference as well as Criminal Appeal arise out of the same judgment and order dated 13.8.2003 delivered by Sri Tarkeshwar Pathak, Fast Track Court No. 4, Darbhanga in Sessions Trial No. 159 of 2002. The sole appellant has been convicted under Section 302 of the Indian Penal Code and awarded death sentence. The appellant has called in question his conviction and sentence passed by the lower court.

2. The Fardbeyan (Ext.4) lodged by Savitari Devi, P.W.15, unfolds the entire incident which led to murder of her son Pappu Chaudhary @ Santosh Chaudhary. The reason behind the murder is said to be love affairs. The informant has a daughter named Ravi Kumari aged about seventeen years. The appellant used to tease her. The deceased had objection and, therefore, he forbade him not to come to his locality/place. Thereafter, the accused-appellant began to bear grudge against the deceased.

3. On 21.10.2001 at 6.00 P.M. the informant along with her son Pappu Chaudhary @ Santosh Chaudhary was returning to her residence from her laundry and when they reached near Bhinda of Pokhar, all on a sudden the accused-appellant Raj Kumar Mahto armed with pistol/revolver and dagger appeared before the victim, bounced upon him and began to give indiscriminate dagger blows. The informant tried to save her son but she was pushed away by the accused-appellant. Thereafter again he gave several dagger blows on various parts of the body of the deceased as a result of which he died at the spot. Thereafter, the appellant fled away leaving behind blood stained dagger and revolver/pistol on the spot. On hue and cry raised by the informant several persons of the locality including her family members reached at the spot to whom she disclosed about the occurrence as well as name of the accused-appellant as murderer of her son.

4. On the same evening the police came at the spot and at about 7.30 P.M. Sugriv Singh, Sub-Inspector of Police, recorded the Fardbeyan of the Informant and registered Laheriasari P.S. Case No. 253/01 under Section 302 of the Indian

Penal Code against the accused-appellant. He also seized both weapons the dagger and pistol/(sic) from the spot said to be left behind by the accused-appellant. Thereafter, he sent the dead body for autopsy. After completion of investigation the police, ultimately, submitted charge-sheet against the accused-appellant. It is also to be mentioned here that the accused-appellant just after the occurrence surrendered before the police and his confessional statement was also recorded by the police, which is Ext. 7.

5. In course of trial the prosecution examined altogether eighteen witnesses including the informant, Savitri Devi, as P.W.15, doctor P.K. Das as P.W.17 and I.O. Sugriv Singh as P.W.18.

6. As usual, the defence is total denial of the occurrence and false implication. According to accused-appellant, the deceased had illicit relation with one Rubi Kumari and on account of that he might have been killed by the relatives of Rubi Kumari and this accused-appellant has been falsely implicated as a result of dispute with the family of the informant. Two defence witnesses have also been examined in support of the defence story, who are Ganour Mahto, D.W.1 and Amarnath Chaudhary, D.W.2.

7. At Bar several contentions were raised against the impugned judgment. However, main contentions are credibility of eye witness who is closely related with the deceased, uncorroborated testimony of sole eye witness and non-examination of material witnesses. The alternative submission is reduction of death penalty to the lesser punishment of life Imprisonment as the case does not fall within the 'rarest of rare cases'.

8. In case in hand the sole eye witness is Savitri Devi, P.W.15, the Informant, who is none but the mother of the deceased Pappu Chaudhary @ Santosh Chaudhry. The main basis for conviction of the accused-appellant is the evidence of P.W.15. The contention of learned Counsel for the appellant is that P.W.15 being the mother of the deceased is deemed to be the most interested witness and, therefore, conviction of accused-appellant on the basis of uncorroborated testimony of Interested witness is untenable in the eye of law and hence liable to be set aside.

9. I am unable to accept the contention of the learned Counsel for the appellant. The close relative of the deceased is neither Incompetent nor interested witness rather most natural witness. The relations like mother, father and the widow are the last persons to screen the real culprit and falsely implicate the innocent. It is wrong notion in the mind of some persons that close relative of the victim is always considered to be a partisan or interested witness. This question has come for consideration before the Apex Court in a decision reported in : 1977 CriLJ273 (Most. Dalbir Kaur and Ors. v. State of Punjab) and the answer has been given in paragraph 13 of the judgment. The relevant findings of the Apex Court is as follows;

Moreover a close relative who is a very natural witnesses cannot be regarded as an interested witness. The term 'interested' postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted either because he had some animus with the accused or, for some other reason.

There are catena of decisions of the Apex Court consistent with the above view. However, I am tempted to bring to the notice one more decision of the Apex Court reported in : [1954]1SCR145 (Dilip Singh and Ors. v. The State of Punjab) which would dispel the criticism of the learned Counsel for the appellant. The relevant paragraphs are 25 and 26 which run as follows:

Para 25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eye witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in the case of Rameshwar v. State of Rajasthan AIR 1952 SC 4 at p.59(A). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.

Para 26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true when feelings run high and there is personal cause for enmity that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

Learned Counsel for the appellant failed to bring to my notice any strong motive or animus for false implication by P.W. 15, the informant. I have also gone through the evidence of P.W.15 as well as the defence witnesses and statements of the accused-appellant recorded under Section 313 of the Code of Criminal Procedure in order to find out any cogent and strong material for false implication by the mother of the deceased but without success.

10. So far the evidence on the point of occurrence is concerned, there is nothing to cast doubt on her testimony. She has stated in her evidence that on the date and time of the occurrence while she along with her son was returning to her residence from laundry and when they reached near the corner of Bhinda of Pokhar the accused-appellant appeared and pointed pistol on the chest of the deceased and assaulted him with dagger. She has further stated that she tried to save her son but she was pushed away and thereafter the accused-appellant gave seven dagger blows to the victim as a result of which he died on the spot. Thereafter, the accused-appellant fled away after throwing the pistol and dagger. She has also alleged the motive for the crime. Even long and lengthy cross - examination has not shaken this witness.

11. It is not a fact that the testimony of P.W.15 is uncorroborated. It appears that just after the occurrence of murder a large number of persons including family members came on the spot on cry of the informant to whom she disclosed about the occurrence and name of the accused-appellant as assailant. P.Ws. 3,4 and 5 are full brothers of the deceased. P.W.6 is uncle and P.W.7, is the father of the deceased. P.Ws.2,10 and 11 are persons of the vicinity of the place of occurrence. They all have stated in their evidence that on hearing cry of the informant, they rushed to the spot and found the victim lying dead on the ground bearing injuries. They have also stated that the informant who was crying, disclosed to them that the accused-appellant had killed the victim with dagger. Not only it, they have also stated in their evidence that they saw blood stained Chhura and revolver kept at the place of occurrence.

12. The evidence of Pawan Kumar Chaudhry, P.W.4, who is one of the brothers of the deceased, is very important. He not only derived knowledge from his mother about the murder of the victim by the accused-appellant but also personally saw the accused-appellant, Raj Kumar Mahto, fleeing away from the place of occurrence with blood stained hands and shirt.

13. The submission of the learned Counsel for the appellant is that the evidence of all the aforesaid witnesses is based on hearsay and, therefore, inadmissible Under Section 60 of the Evidence Act. There is no gain saying that Section 60 of the Evidence Act postulates that oral evidence must be direct in all cases. However, it is inadmissible only when it proposes to establish the truth of the statement but not the factum of the statement made by other persons. There is fine distinction between proving the factum of statement and proving the truth of statement. In other words, such evidence is admissible for limited purpose when it proposes only to establish factum of the statement i.e. the fact that it was made. The above question has been dealt and answered by the Apex Court in a case reported in : (1982)ILLJ54SC (J.D. Jain v. The Manager of S.B.I). In paragraph 10 of the judgment it has been held as follows:

The Privy Council in the case of Subramaniam v. Public Prosecutor (1956) 1 WLR 965 observed, 'Evidence of a statement made to a witness who is not himself

called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the Statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other persons in whose presence these statements are made.

14. Thus in view of the above decision it is quite clear that the evidence of aforesaid witnesses is not totally inadmissible or irrelevant. Their statements are admissible on the point of conduct of the informant as well as factum of statement given by the informant just after the occurrence. It is also admissible on the point of recovery of blood stained dagger and revolver from the place of occurrence. All these facts lend strong support to the prosecution story as disclosed by the informant, P.W.15.

15. The evidence of the Dr. P.K. Das, P.W.17, who conducted the postmortem upon the dead body of the victim further lends support to the prosecution story. The post-mortem was held on the next day by this witness who found as many as four incised injuries on the vital parts of the body of the deceased. Ext.3 is the post mortem report.

16. The other witness whose evidence is material to prove the prosecution story is Investigating Officer of the case, who is P.W.18, Sugriv Singh. Just after the alleged occurrence he reached on the spot and recorded Fardbeyan of the informant, and took up investigation himself. Apart from preparation of the inquest report (Ext. 5.) he also seized dagger and pistol/revolver from the place of occurrence through seizure list (Ext.6). The material Exts. I and II are pistol and dagger seized from the place of occurrence. In paragraph 6 of the evidence he has stated that in the same night just after the occurrence the accused-appellant surrendered before the police and gave his confessional statement, which is Ext.7. However, it is conceded by the learned Counsel for the State that Ext. 7 is inadmissible under Section 26 of the Evidence Act as it did not lead to recovery of dagger or revolver. In fact both the weapons, pistol and dagger/had already been

recovered by the police prior to the confessional statement of the accused-appellant.

17. The motive or no motive has got little value in this case. Apart from it, I find sufficient material on the record to prove the motive as alleged. Almost all material witnesses including the informant i.e. the mother, father, brothers and uncle of the deceased, have consistently stated that it was the incident of teasing of the sister of the deceased and subsequently protest made by him which ultimately prompted the accused-appellant to commit his murder. Dilip Chaudhary (P.W.2), a man of vicinity and Rajaram Chaudhary (P.W.3), brother of the deceased, are eye witnesses on the point of altercation between the two in which the accused-appellant had threatened the victim to kill.

18. The defence has examined two witnesses to prove the defence version. However, the evidence of these two witnesses is inconsistent with the defence story. According to both the witnesses the accused had differences with Laxmi Mahto over a piece of land, who is friend of the uncle of the deceased, namely, Jwala Chaudhary and, therefore, the accused-appellant has been falsely implicated at the instance of Jwala Chaudhary. The story appears to be quite improbable. Why the mother of the deceased would falsely implicate the accused-appellant with whom she personally had no quarrel? Apparently the defence story has no leg to stand and, therefore, it is of no consequence.

19. Thus, in view of the above discussions of the oral as well as documentary evidence as also the facts and circumstances of the case, I am of the opinion that the prosecution has proved its case beyond all reasonable doubts. The learned lower court has rightly convicted the accused-appellant Under Section 302 of the Indian Penal Code. I am not inclined to interfere with the findings of guilt recorded by the learned lower court.

20. The last but not the least important submission of the learned Counsel for the appellant is on the point of sentence. The learned Counsel has assailed the sentence of death awarded by the learned lower court on two grounds. It is submitted that the learned lower court without effectively complying the mandatory provision of Section 235(2) of the Code of Criminal Procedure has awarded

extreme penalty of death which is apparent from the fact that the sentence has been passed on the same day on which the judgment of conviction was delivered. Second submission is that the case in hand, by no stretch of imagination, falls within the parameter of the 'rarest of the rare cases' as defined by the Apex Court in its several decisions including 1980 SC page 898 (Bachu Singh v. State of Punjab).

21. I find much substance in the submission of the learned Counsel for the appellant. It is quite apparent from the record that the learned lower court has awarded extreme penalty of death to the accused-appellant in disregard to the principles and directions laid down by the Apex Court both in the matter of hearing on the point of sentence and applying the principle of "rarest of rare cases."

22. The Apex Court in a decision reported in (Allauddin and Ors. v. State of Bihar) has laid down the manner of hearing under Section 235(2) of the Code of Criminal Procedure for awarding sentence, particularly in serious nature of cases and held that as a general rule the trial court should adjourn the matter to a future date after recording the conviction and call upon both the parties to place material on the question of sentence. The relevant decision of the Apex Court is in paragraph 10 of the judgment which is as follows;

The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is although more necessary since the Courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the Court in determining the correct sentence to be imposed the legislature introduced Sub-section (2) to Section 235. The said provision therefore satisfied a dual purpose; it satisfied the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the Court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the Court all the relevant material having a bearing on the question of

sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr. Garg was therefore, justified in making a grievance that the trial Court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31st March, 1987 on the same day before the accused could absorb and overcome the shock of conviction they were asked if they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two accused was pronounced. In a case of life or death as stated earlier, the presiding Officer must show a high degree of concern for the statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of sentence.

It is further held in the same paragraph that 'We think as a general rule the Trial Courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender. In the present case, as pointed out earlier, we are afraid that the learned Trial Judge did not attach sufficient importance to the mandatory requirement of Sub-section (2) of Section 235 of the Code.

23. Apparently the lower court has committed serious error by awarding death sentence to the accused-appellant without providing effective opportunity of hearing and therefore, extreme penalty awarded to the accused-appellant is not tenable in the eye of law. Apart from it, the case in hand also does not fall within the category of 'rarest of rare cases' as laid down in a decisions of Apex Court reported in AIR 1980 page 898 (Supra) and : 1997 CriLJ51 (Surja Ram v. State of Rajasthan).

24. In the result, the sentence of death awarded by the lower court to the accused/appellant is hereby set aside and is commuted into the sentence of life. Accordingly, the Criminal Appeal is dismissed with above modification in the order of sentence. The death reference is also answered in negative in a manner said above.

