

Vijay Kumar and ors. Vs. State of Bihar

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Court : Patna

Decided On : Jan-18-2005

Judge : M.L. Visa and Mridula Mishra, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 302; Code of Criminal Procedure (CrPC) - Sections 107 and 161

Appeal No. : Criminal Appeal (DB) Nos. 312 and 318 of 2001

Appellant : Vijay Kumar and ors.

Respondent : State of Bihar

Advocate for Def. : Lala Kailash Bihari Pd., A.P.P.

Advocate for Pet/Ap. : Vindhya Keshari Kumar, Sr. Adv., Kapildeo Singh and Vijay Kumar, Adv. Radhiv Kumar, Adv.

Disposition : Appeal allowed

Judgement :

Mridula Mishra, J.

1. Vijay Kumar is the appellant in Criminal Appeal No. 312 of 2001. Harihar Nath Prasad, Sheo Kumar and Prabhu Kumar are appellants in Criminal Appeal No. 318 of 2001. All these appellants have been convicted under Section 302/34 of the

Indian Penal Code and sentenced to undergo rigorous imprisonment for life by the 4th Addl. Sessions Judge, Siwan, in Sessions Trial No. 89 of 1997 vide judgment and order dated 3-7-2001/5-7-2001.

2. On 5-10-1996 at 9 a.m. one Nagendra Prasad gave his fardbeyan before the Officer-Incharge of Siwan (Mufassil) police station that on the same date at 6 a.m. his father was returning home after attending call of nature. As soon as his father reached in front of the house of Harihar Nath suddenly Harihar Nath and Sheo Kumar with pharsa, Vijay Kumar with bhala and Prabhu Kumar and Shri Ram Kumar with lathi started assaulting him. His father raised alarm and started fleeing but the accused persons surrounded him. Harihar Nath and Sheo Kumar assaulted his father with pharsa, Vijay Kumar with bhala and Prabhu Kumar and Shri Ram Kumar with lathi. He ran there to save his father but was assaulted by Prabhu Kumar and Shri Ram Kumar with lathi. He raised alarm and his grandmother Reshma, mother Bachchi Devi and villagers Parmeshwar Sah, Shankar Sah and others came there, in the meantime, the accused persons fled away. His father sustained injuries at his neck, head and right hand. Due to injuries sustained by him, his father fell down and became unconscious. The motive behind the occurrence is that 4/5 years earlier there was some land dispute with the accused persons. Later on, Panchyati was conducted and the accused persons left the land. One day prior to the occurrence some children from the accused persons family had scattered maize roots kept in the orchard of Sagir Mian due to which informant had scolded them and also assaulted one boy coming from the family of the accused persons. That boy went to his house and complained about it. On which the accused persons came there and started scuffle with him. The matter was pacified as Shiv Govind Prasad and Prabhunath Ram interfered but the accused persons had threatened that they will teach them lesson. The two witnesses, who had seen the occurrence, brought him and his father to Siwan Hospital for treatment. But his father died on way to hospital and the doctor declared him dead. He was treated in the hospital. His father was a constable in the Excise Department and was posted at Siwan at time of occurrence.

3. The case was instituted on the basis of the fardbeyan of the informant which was recorded at Siwan Hospital and a formal FIR was drawn. The case was

investigated, chargesheet was submitted and after taking cognizance the case was committed to the Court of sessions. Finally, after completion of the trial the accused-appellants were convicted as stated above.

4. The defence of the accused/appellants are of innocence and false implication due to enmity. In support of their defence they submitted FIR of Siwan P.S. case No. 94 of 1990 (Ext. A), certified copy of the petition filed in the Court of Siwan against Gyan Chand Prasad and others initiating a preceding under Section 107 of the Code of Criminal Procedure (Ext.B) and certified copy of the order passed in trial No. 57 of 1990 by the Executive Magistrate (Ext. C).

5. Prosecution examined nine witnesses in order to prove its case. Out of nine witnesses, P.W. 1, P.W. 2, P.W. 3, P.W. 4, P.W. 5 and P.W. 7 are on the point of occurrence. P.W. 6 is the formal witness who proved the FIR. P.W. 8 is the doctor who conducted postmortem on the dead body of the deceased Gyan Chand, P.W. 9 is the Investigating Officer who investigated the case.

6. P.W. 1 is the nephew of the deceased. At 6-30 a.m. he was at his house when he heard alarm and went near the house of Harihar Nath. He saw that in the field of Jagarnath Pd, Gyan Chand Prasad was being assaulted by Harihar Nath and Sheo Kumar with pharsa, Vijay Kumar assaulted with bhala and Prabhu Kumar and Shri Ram Kumar with lathi. Nagendra (P.W. 7) son of Gyan Chand went to save his father but he was also assaulted by Harihar Nath, Prabhu Kumar, Shri Ram Kumar and Sheo Kumar. Gyan Chand and his son were taken to hospital for treatment and Gyan Chand died on way to hospital. Gyan Chand was a constable and he was posted in the Excise Department at Siwan. P.W. 1 was the first person who reached at the place of occurrence on hearing alarm and all other witnesses came after him.

7. P.W. 2 had reached at the place of occurrence on hearing alarm and saw the deceased and Nagendra (P.W. 7) lying on the ground receiving injuries due to assault. He did not see the accused persons assaulting either the deceased or P.W. 7. P.W. 2 further stated that P.W. 7 had received injuries one day prior to the occurrence in the altercation which took place in the orchard of Sagir. There was some land dispute in between Gyan Chand and the accused persons 4/5 years

earlier but the dispute was settled through Panchyati in the year 1995. After settlement of the dispute Gyan Chand was in possession of the land and after his death his son Nagendra was in possession of the land. P.W. 2 has stated that he was not examined by the police during investigation and his statement was not recorded under Section 161 of the Code of Criminal Procedure.

8. P.W. 3 is the widow of the deceased and mother of P.W. 7. She has stated that occurrence took place at 6 a.m. and at that time she was in her house. She heard alarm and came out of her house. She saw that in the field of Baldeo Bhagat, Sheo Kumar and Harihar Nath armed with Pharsa, Vijay Kumar armed with bhala and Prabhu Kumar armed with lathi were assaulting her husband and son. They fell on the ground as they were severely assaulted and were injured. Her husband and son were taken to Siwan Hospital but her husband died on way to hospital. Blood had fallen on the ground at the place of occurrence but it was washed away due to rain after the occurrence. Her statement was recorded by police on the date of occurrence itself and the police recorded her son's statement after recording her statement. She has stated that the place of occurrence was at a distance of fifteen metres from her house and when she came out the accused persons had already started fleeing. She had seen the accused persons fleeing from at a distance of two laggi. When she reached at the place of occurrence her husband and son were unconscious. She did not have talk either with her husband or son. Her son regained consciousness on the next day at 9 p.m. Immediately she did not disclose about the death of her husband to her son and it was disclosed to him on the next date.

9. P.W. 4, Reshma Devi, is the mother of the deceased. At the time of occurrence she was also in her house. On hearing alarm she went to the field of Baldeo Bhagat and saw Harihar Nath and Sheo Kumar assaulting her son with pharsa, Vijay with bhala and Prabhu Kumar and Shri Ram Kumar with lathi. Nagendra son of Gyan Chand went to save him but he was also assaulted by the accused persons. Gyan Chand died on way to hospital. She had stated that she is not keeping good health for five years. She has cataract in her eyes. She has also pain in her knee joint and she is unable to move without a stick. Recently she has been operated for cataract. According to this witness, the dead body of Gyan

Chand was brought on the date of occurrence itself in the evening and in that night the dead body was cremated. She has stated that the distance of the field of Baldeo Bhagat is ten laggi from her house.

10. P.W. 5, Sheo Govind Prasad, has stated that he was returning after fishing at 6 O'clock in the morning when he reached near the field of Baldeo Bhagat, he saw the accused persons Harihar Nath, Sheo Kumar, Vijay and Prabhu Kumar assaulting Gyan Chand. Harihar Nath and Sheo Kumar were armed with Pharsa, Vijay Kumar was armed with bhala and Prabhu Kumar was armed with lathi. Nagendra rushed to rescue his father but he was assaulted by the accused persons. Gyan Chand died when he was being taken to hospital for treatment. There was some dispute relating to land in between Gyan Chand and the accused persons. One day prior to the occurrence some altercation had taken place in between Nagendra and the accused persons and then only they have threatened that they will teach him and his family a lesson. A suggestion was given to this witness that he was cultivating the lands of the deceased Gyan Chand on bataidari and this is the reason for coming to depose in this case though he had not seen the occurrence, which has been denied. P.W. 5 had stated that when he reached at the field of Baldeo Bhagat, unconscious Gyan Chand and Nagendra were lying on the ground after receiving injuries. He has also stated that the dead body was brought in the evening on the same date of occurrence from the hospital and it was cremated on the same day. His statement was recorded by the police on the next day at about 10 O'clock at the house of Gyan Chand.

11. P.W. 7, Nagendra Prasad, is the informant and son of deceased Gyan Chand as well as an injured witness. He deposed that on the date of occurrence his father was returning after attending the call of nature and he was going to attend the call of nature. When he reached at the field of Baldeo Bhagat suddenly the accused persons Harihar Nath and Sheo Kumar armed with pharsa, Vijay Kumar armed with bhala and Prabhu Kumar and Shri Ram armed with lathi came there and started assaulting his father. His father raised alarm and he ran towards him to save him but he was assaulted by Prabhu Kumar and Shri Ram Kumar with lathi. His father fell on the ground after receiving injuries. Thereafter, he raised alarm and on hearing this witnesses. Parmeshwar (P.W. 1), Shankar, Reshma (P.W. 4),

mother Bachchi Devi (P.W. 3), Sheo Govind Prasad (P.W. 5), Mahajan Ram and Saraswati Devi came at the place of occurrence. He along with his father was taken to Siwan Hospital for treatment but his father died on way to hospital. He was treated at Siwan Sadar Hospital. He has also admitted that there was some dispute relating to land in between his family and the accused but it was settled through Panchayati. The accused persons had to leave that land and now the informant's family, is in possession of the land. Since the accused persons had to leave the land they had grudge against them. He has also admitted that an altercation had taken place one day prior to the occurrence, in which he had slapped a boy from the accused persons' family. He complained about it and the accused persons came at the orchard of Sagir and has threatened to teach him and his family a lesson. He has admitted that just after the occurrence several persons had assembled at the place of occurrence and near about 25 to 40 persons accompanied them to Siwan Hospital. He has also stated that before recording his fardbeyan the investigating officer had seen the dead body of his father and prepared a note on a blank sheet of paper. Post Mortem of his father was done at 10 O'clock in the morning and he was relieved from the hospital next day. In the night he remained at the hospital itself. He came to his village next day along with the dead body of his father. The investigating officer also visited his village on the next date. His father had received three injuries but he could not see them at the place of occurrence. He noticed his father's injuries at the hospital.

12. P.W. 8 is the doctor who had conducted the post mortem on the dead body of the deceased Gyan Chand Prasad on 5-10-1996 at 12-40 p.m. and found the following external injuries :--

- (1) One lacerated wound 1/2' x 1/4' scull deep on the right of head.
- (2) Incise wound 1/2' x 1/8' x muscle deep on the right side of neck causing injury to great vessels of the neck.
- (3) Lacerated wound 1' x 1/2' x bone deep on the back of the head.
- (4) One abrasion 1/2' x 1/4' on the right arm.

On dissection there was depressed fracture on the occipital bone causing laceration of the brain tissue. There was haematoma beneath the injury No. 2 and injury to the major vessels of the right side of neck. In the opinion of the doctor the death was caused due to haemorrhage and shock as a result of abovementioned injuries. P.W. 8 opined that injuries were caused by hard blunt substance and sharp cutting weapons. The injuries were sufficient to cause death in ordinary course of nature. P.W. 8 had also examined P.W. 7 and he found three injuries on his person. All were simple in nature caused by hard blunt substance. In his examination in chief P.W. 8 stated that injury No. 2 may be caused by bhala but in cross-examination he admitted that incised injuries cannot be caused by bhala. It is possible by sharp edged weapon. Further he admitted that there is distinct difference between incised injury and penetrating wound. Lacerated injuries are usually caused by hard blunt substance or it may be possible due to fall. He has further stated that after receiving injury No. 1 a person is likely to become unconscious, the injured will be in a position to speak only for some time.

13. P.W. 9 is the investigating officer. He stated that on 5-10-1996 he was posted at Siwan Police Station as Assistant Sub Inspector. He received O.T. slip from Siwan Sadar Hospital and made an entry in the station diary as entry No. 75. Thereafter, he proceeded for Siwan Sadar Hospital. He reached there at 9 p.m. where he found Nagendra (P.W. 7) and deceased Gyan Chand Prasad. He recorded fardbeyan of Nagendra Prasad which is Ext. 5. He prepared inquest report of the deceased Gyan Chand Prasad (Ext. 6). He recorded restatement of P.W. 7 and also recorded statement of other witnesses who were present there. He sent the fardbeyan for instituting formal FIR. At 12 p.m. he started for investigation at the place of occurrence and reached there at 12-15 p.m. the place of occurrence is the field of Baldeo Bhagat i.e. plot No. 1265. He found mark of foot steps at the place of occurrence. He saw broken piece of sticks. He was informed by the witnesses that sufficient blood had fallen at the place of occurrence but it had already washed off due to rain. The house of accused persons was at a distance of 100 yards from the place of occurrence. The house of the informant was 250 yards south from the house of the accused persons. The field of Baldeo Bhagat is adjacent, east to the field of Jagdish and Govind. The field of Jagarnath is west to the field of Baldeo Bhagat. He was also shown a

narrow footpath which turned towards the east from the place of occurrence and it was informed that from this footpath the deceased was coming after attending call of nature. He seized the broken stick and prepared a seizure list. On completion of investigation he submitted chargesheet. He had received O.T. slip at 7-45 in the morning and he reached at the hospital at 9 a.m. He did not record restatement of P.W. 7 in the case diary, he had recorded the statement of P.W. 7 Nagendra Prasad, Parmeshwar Sah (P.W. 1), Shankar Sah (not examined) at the hospital. He did not find any blood mark at the place of occurrence and he has not written in the case diary that he found mud and water at the place of occurrence. P.W. 9 has admitted that prior to receiving O.T. slip from the hospital he had already received information about the occurrence and also that Nagendra and Gyan Chand in an injured condition had been taken to Siwan Sadar Hospital.

14. In the background of prosecution evidence submission of the appellants counsel is that a false story has been fabricated by the prosecution. The defence version is that the deceased Gyan Chand was a constable in the Excise Department and he was killed by some veteran criminals in some other manner at some other place. The accused persons have been implicated because of old enmity. It has been submitted that witnesses who have been examined are interested witnesses. P.W. 1 is the nephew of the deceased. P.W. 3 is the wife of the deceased. P.W. 4 is the mother of the deceased. P.W. 5 is also related to the deceased. Only P.W. 2 is an independent witness who has not supported the case of prosecution in totality. P.W. 2 has stated that P.W. 7 had received injuries one day earlier to the occurrence when some altercation had taken place between P.W. 7 and the accused persons. Considering the evidence of P.W. 2. P.W. 7 cannot claim to be an injured eyewitness. P.W. 2 has also not given any description about the weapons Toeing carried by the accused persons and assault made by them on Gyan Chand as well as P.W. 7. The evidence of so called eye-witness, who are all closely related, are inconsistent and in contradiction to each other. All have claimed to see the assault but simultaneously the witnesses like P.W. 1, P.W. 3, P.W. 4 and P.W. 5 have stated that they heard alarm and thereafter proceeded for the field of Baldeo Bhagat. P.W. 7 has said that he was present at the place of occurrence. He raised alarm after assault has already been made by the accused persons on his father as well as on him. If P.W. 7 is to be

believed, in that case, P.W. 1, P.W. 3, P.W. 4 and P.W. 5 had no occasion to see the assault on the deceased. At best they could have seen their fleeing away. In these circumstances, their evidence giving specific description of assault by each and every accused cannot be believed. P.W. 3 herself has admitted that when she reached at the field of Baldeo Bhagat, she found her husband and son unconscious. She had no talk either with her husband or son. P.W. 4 is an old lady. She has deposed in this case after one year of the occurrence. In para 4 of her cross-examination she has admitted that for five years she has several health problems. She has cataract in her both eyes which has been operated recently. She has joint pain and is unable to walk without stick. In these circumstances, she could not have seen and identified the accused persons from a distance of more than 300 yards as the investigating officer has stated that the house of the accused persons is at a distance of 150 yards from the field of Baldeo Bhagat and the house of the informant is 250 yards away from the house of the accused persons. It can also not be believed that P.W. 4 suffering with joint pain will rush to the place of occurrence immediately and will see the accused persons assaulting P.W. 7 and the deceased. P.W. 1 has stated that he was the first man to reach at the place of occurrence on hearing alarm and all other witnesses came subsequent to his arrival. P.W. 1 has not stated that P.W. 5 was present at the place of occurrence when he reached there on hearing alarm raised by P.W. 7. When P.W. 1 had reached at the place of occurrence subsequent to assault then presence of P.W. 5 at the time of assault cannot be believed. In this background, all the eyewitnesses, who are not natural eye-witnesses but chance witnesses, do not inspire confidence. Their vivid description regarding assault on the deceased as well as P.W. 7 is not trustworthy.

15. It has been submitted by the appellants counsel that the evidence of P.W. 1, P.W. 2, P.W. 3, P.W. 4, P.W. 5 and P.W. 7 clearly indicate that several persons had assembled at the place of occurrence. In the FIR besides P.W. 1 Parmeshwar Sah, Shankar Sah has been named as witness but he has not been examined. Investigating Officer has also stated that in the hospital itself he recorded the statement of Rajendra Prasad (not examined). Parmeshwar Sah (P.W. 1) and Shankar Sah (not examined) as they were present in the hospital and they had accompanied the deceased and the injured to the hospital. P.W. 7 in his evidence

has named Shankar Sah, Mahajan Prasad, Saraswati Devi who reached at the place of occurrence immediately with P.W. 1, P.W. 3 and P.W. 4 but none of them have been examined. Only those witnesses who are interested, related and partisan have been examined. In the background of admitted enmity, non-examination of independent witnesses has created doubt about the genuineness of the prosecution story. So far interestedness of the witnesses is concerned, it cannot be a sole ground to reject the case of the prosecution in totality. Evidence of such witnesses requires strict scrutiny. P.W. 3 has stated in para 5 of her cross-examination that in between the field of Baldeo and her house there are houses of Sheo Govind and Bindeshwari. P.W. 3 and P.W. 5 were at a distance of more than 350 yards from the field of Baldeo Bhagat, as stated by the investigating officer (P.W. 9). If it has been admitted by P.W. 4 that she was suffering from cataract at the time of occurrence, in this circumstance, the claim of these witnesses that they have witnessed the occurrence is not believable. They have deposed as a partisan witnesses and conviction cannot be affirmed relying on their evidence. So far P.W. 7 is concerned, he has claimed to be injured and it can be said that since he is an injured witness, his presence at the place of occurrence cannot be doubted but P.W. 2 who is the only independent witness has stated that P.W. 7 received injury one day prior to the occurrence in an altercation which took place in between P.W. 7 and the accused persons. This altercation has been admitted by P.W. 1, P.W. 3 and also by P.W. 7. It is true that if one trustworthy and reliable witness is there to support the case of prosecution, that is sufficient for proving the Case and for conviction but in the present case not a single such reliable and trustworthy witness has been examined. As such, I do not find any reason for affirming the judgment and conviction.

16. It has further been argued that eyewitness account of the prosecution witnesses has also not been supported by the evidence of the doctor and the post mortem report. As per the post-mortem report the deceased had received four injuries on his person 1) lacerated wound on the right side of the head. 2) incised wound muscle deep on the right side of neck causing injury to great vessels of the neck. 3) Lacerated wound bone deep on the back of the head. 4) one abrasion on the right arm. P.W. 8 in his cross-examination has stated that there was no penetrating injury on the person of the deceased. The injuries were caused only by

sharp cutting weapon like Pharsa. Injury Nos. 1 and 3 are lacerated wound. Injury No. 2 is incised wound. Lacerated wounds are usually caused by hard blunt substance. Injury No. 2 incised wound which is stated by P.W. 8 can only be caused by sharp cutting weapon. Injury No. 4 is an abrasion which may be caused due to fall. All witnesses including P.W. 7 has stated that Harihar Nath and Sheo Kumar assaulted the deceased with pharsa. Vijay Kumar assaulted with bhala and Prabhu Kumar and Shri Ram Kumar assaulted with lathi. There was only one pharsa injury. There are two injuries caused by hard blunt, substance and no penetrating injuries caused by bhala. The witnesses have not specified which accused assaulted at what part of the deceased. It cannot be decided as to who should be held responsible for causing injury No. 2. Whether it was Harihar Nath or Sheo Kumar had caused injury No. 2 on the person of the deceased. No injury caused by Vijay Kumar with bhala was there as no penetrating injury was found on the person of the deceased. Certainly there are two injuries caused by hard and blunt substance which can go to the credit of Prabhu Kumar and Shri Ram Kumar. But considering the quality of evidence, conviction of Prabhu Kumar is also not fit to be affirmed.

17. Other argument advanced by the counsel for the appellants is that circumstances also indicate that prosecution has not come with the real story. The place of occurrence and the manner of occurrence as stated by the witnesses are also not proved. P.W. 7 has stated that the deceased was going to attend the call of nature. No utensils carrying the water (lota) was found or seized by the investigating officer from the place of occurrence. He only seized a broken piece of stick. Witnesses have stated that there was sufficient blood at the place of occurrence but it washed off due to rain. Investigating Officer in his evidence has stated that he did not find blood at the place of occurrence. There was no water and mud at the place of occurrence, as such, he did not mention it in the case diary. He did not find soil of the field wet due to rain. P.W. 1 has stated that clothes of the deceased were stained with blood, mud and soil. In the inquest report it has not been mentioned that there was mud in the cloth of the deceased. Post-mortem report also does not suggest that the doctor had found the body of the deceased stained with mud. Since at the place of occurrence there was no blood, the prosecution witnesses in order to overcome the lacuna introduced the story of rain

but the investigating officer when visited the place of occurrence on the same day at 12-15 p.m. did not find any sign of rain. All these circumstances clearly indicate that a false case has been fabricated by the prosecution in which family members have been plotted as eye-witnesses and in order to settle old enmity appellants have been named as accused.

18. Considering evidence of prosecution witnesses, their contradictions, exaggeration and evidence of P.W. 8 the doctor, as well as the evidence of the investigating officer (P.W. 9), a genuine doubt is created against the credibility of the evidence and the prosecution case. The evidence on record does not inspire confidence for convicting the appellants. Accordingly, I am of the view that prosecution has failed to prove its case beyond all reasonable doubt.

19. Appellant Vijay Kumar (Criminal Appeal No. 312 of 2001) is in custody and he is directed to be released forthwith, if not required in any other case. Appellants Harihar Nath Prasad, Sheo Kumar and Prabhu Kumar (Criminal Appeal No. 318 of 2001) are on bail and they are released from liability of their bail bonds. All the appellants are acquitted of their charge framed under Section 302/34 of the Indian Penal Code. Both Criminal Appeal No. 312 of 2001 and Criminal Appeal No. 318 of 2001 are allowed.

M.L. Visa, J.

20. I agree.

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