

Krishna Bihar Pandey and ors. Vs. State

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Court : Patna

Decided On : Jul-30-2002

Judge : Ram Nandan Prasad and Braj Nandan Prasad Singh, JJ.

Appeal No. : Criminal Appeal Nos. 292 of 339 of 1995

Appellant : Krishna Bihar Pandey and ors.

Respondent : State

Disposition : Appeals Dismissed

Judgement :

B.N.P. Singh, J.

1. On being tried by the 1st Additional Sessions Judge, Buxar, while Din Dayal Pandey, Nirmal Kumar Pandey and Narain Pandey suffered conviction under Section 302 of the Indian Penal Code, (IPC) simpliciter, for causing death of Ashok Pandey, appellant Krishna Bihari Pandey suffered conviction under Section 302/34, IPC and all the appellants were sentenced to suffer rigorous imprisonment for life on these Counts. Though Din Dayal Pandey, Nirmal Kumar Pandey and Narayan Pandey suffered conviction also under Section 27 of the Arms Act, no sentence was awarded to them on that count.

2. At the outset, I may refer the salient features of the prosecution case centering round the incident in question. The factual matrix are that in the early hours of 7.45 a.m. of 27th November, 1989 while Ramadhar Pandey, Jagdish Pandey and Ram Nath Pandey were gossiping about election matter, at the door of the house of Ramashray Pandey, they noticed Surya Narain Sharma holding revolver, Bipin Bihari Sharma holding pistol, Dindayal Pandey holding double barrel gun, Narayan Pandey and Nirmal Kumar Pandey too holding guns and Krishna Bihari Pandey alias Kirtan Pandey holding farsa, proceeding towards the door of his house in the western lane. It was alleged that Surya Narain Sharma, while abusing, was in quest of Ashok Pandey and in pursuance of queries made by said Surya Narain Sharma, Ramashray Pandey answered his question stating, inter alia that Ashok Kumar Pandey had gone to answer the nature's call. As bad luck would have it, Ashok Pandey was noticed coming from north direction and shortly after he came within their vision, all those holding arms rushed to assault him. It was Surya Narain Sharma, who set the ball in motion exhorting others to execute killing of Ashok Pandey, pursuant to which Din Dayal Pandey fired shot from his double barrel gun which straightway hit on the face of Ashok Pandey, who dropped there. Accusations were attributed to Surya Narain Sharma, Bipin Bihari Sharma and Nirmal Kumar Pandey about they too having opened fire with their weapons and having retired to south direction from the place of occurrence.

After Ashok Pandey was carried to State Dispensary, Simiri, finding his condition precarious, the doctor referred him to Dumraon Hospital and it is alleged that while he was being carried to Dumraon, he succumbed to the injuries in the midway near Brahmsthan. It was Ramashray Pandey, who set the criminal law in motion by launching prosecution against the appellants, and after fardbeyan of Ramashray Pandey was recorded at 9.30 hours on 27th November, 1989, investigation commenced, in course of which the Investigating Officer recorded statement of witnesses, visited the place of occurrence, seized offending articles from there, referred the deceased to mortuary for postmortem examination and on receipt of report, having concluded investigation, laid charge-sheet before the Court. Two charge-sheets were submitted by the Police and the first one was only in respect of Krishna Bihari Pandey showing Din Dayal Pandey, Nirmal Pandey and Narayan Pandey absconding. The supplementary charge-sheet was,

however, against Nirmal Pandey and Din Dayal Pandey showing Narayan Pandey absconding. After attendance of fugitive accused was secured by the Committing Court, the case was committed to the Court of Session. The trial, however, commenced only against four appellants. In the eventual trial that commenced, the State examined altogether eight witnesses including those who claimed to have witnessed killing of Ashok Pandey from the door of the house of Ramashray Pandey and also the doctor who held autopsy over the dead-body of Ashok Pandey. The Investigating Officer was, however, not examined at trial, he being dead and it is how that fardbeyan First Information Report, inquest report, seizure memo and the police case diary were brought on the record with the aid of Shri Ram Nath Ojha, Advocate Clerk, who was PW 8 among the prosecution witnesses. Though serious contentions were raised at Bar on behalf of the appellants about their innocence stating, inter alia that the station diary entry earlier recorded by the police on receipt of information about some sort of incident in the village on the eve of election had been deliberately suppressed and had been replaced by fardbeyan (Exhibit 4) of Ramashray Pandey and due to heat of animosity generated during voting, on the day preceding the incident, the appellants have been falsely roped in one behest of Ramshary Pandey. The trial Court having bestowed consideration to various contentions raised at Bar and having evaluated evidence of prosecution witnesses in proper perspective, while rejected plea of innocence of the appellants, recorded verdict of guilt against them sentencing them in the manner stated above.

3. Before we delve upon the contentions which were raised at Bar on behalf of the appellants, we wish to analyse the evidence of prosecution witnesses which were principally relied on by the trial Judge in recording verdict of guilt against the appellant. Now advertent to the testimony of Ramashray Pandey, one may notice him reiterating his early version which he rendered before the Police about the appellants along with Surya Narain Sharma and Bipin Bihari Sharma holding weapons proceeding towards his house and questioning about Ashok Pandey. The witness reiterates at trial that shortly after Ashok Pandey came within their notice, who was coming after responding to the nature's call, the appellants proceeded towards him and it was Din Dayal Pandey who fired shot at him which hit face of Ashok Pandey. The witnesses reiterates about other appellants too

having taken recourse to firing while retreating from the place of occurrence. It is stated by the witness that while Ashok Pandey was being carried to Dumraon Hospital, on being referred by doctor, who found his condition precarious, near Brahmsthan, Ashok Pandey breathed his last. The witness stated to have recorded his statement at the Police Station and would assign behind killing of Ashok Pandey due to allegiance of the villagers to different political parties. Narrations almost in similar terms were made also by Ramadhar Pandey (P.W.

4) stating, inter alia at trial that after the appellants and two others came holding arms questioning where a bout of Ashok Pandey, and Ashok was noticed coming from north direction, they ran towards him, pursuant to which Din Dayal fired a shot from his double barrel gun when Ashok Pandey dropped on the ground having sustained injuries on his face, near the western corner of the field of Rajesh Pandey. About the assailants, the witness states that they too fired shots while making good their escape. About the injured, witness stated that while he was taken to Dumraon on being referred by the doctor of Simri Hospital, he succumbed to the injuries near Brahmsthan. The evidence of Jagdish Pandey (PW

5) and Ram Nath Pandey (PW

7) about the appellants arriving towards the house of Ramashray Pandey questioning where a bout of Ashok Pandey and shortly thereafter having noticed him coming from north direction, Din Dayai Pandey firing shot at him on exhortation made by Surya Narain Sharma was quite in conformity with the evidence of the two witnesses which have been discussed earlier.

4. Dr. Chunnilal Prasad (PW 6) who stated to have held autopsy over the dead-body of Ashok Pandey, noticed following ante-mortem injuries on the deceased:

(i) One lacerated wound over outer angle of left eye brow 3 mm in diameter, circular, ragged and inverted margin, skin deep.

(ii) One lacerated circular wound over left side of neck just below the angle of mandible with blackish ragged and inverted margin of size 3 mm in diameter which was wound of entrance.

(iii) One lacerated wound over neck left side 1-1/2' below and medial to the Injury No. (ii), circular, ragged and overrated margin, blackish of size 10 mm in diameter, which was wound of exit.

(iv) One lacerated wound semi circular 3 mm in diameter, ragged and inverted margin over left zygomatic region.

(v) One lacerated wound over tip of shoulder circular 3 mm in diameter, ragged inverted margin blackish x skin deep.

(vi) One lacerated wound over shoulder outside just below the wound No. (v), ragged and inverted margin x skin deep, right side.

(vii) One lacerated wound over anterior axillary fold right side 3 mm in diameter x skin deep.

On dissection, blood vessel was found lacerated and stomach contained digested fluid. Death in the opinion of the doctor was due to shock and haemorrhage as a result of aforesaid injuries which were caused by fire arms and were sufficient in ordinary course to cause death. This is all the evidence that has been adduced on behalf of the State.

5. Besides these witnesses, the State also examined Kapildeo Rai (PW2) and Brij Bihari Gupta (PW 3), who are witnesses of the inquest, stating about preparation of the inquest report by the Police Officer in their presence and the inquest report also bearing their signatures. At this moment, we wish to mention that in the opinion of the doctor injuries on the deceased were fire arms injuries on face which travelled upto neck. Manifold contentions were raised at Bar to discredit the eye-witnesses and also the fardbeyan of Ramashray Pandey, to be a tainted document. The foremost criticism made by the learned Counsel for the appellants was that though fardbeyan of Ramshray Pandey, on return of the Investigating Officer from Simri Hospital, was recorded as Sanha Entry No. 372, that was suppressed by the prosecution and it was substituted by fardbeyan of Ramashray Pandey which is on the record. It was strenuously urged at Bar that, if Sanha Entry No. 372 which was the early version of the prosecution was to be given any

credence, the said sanha did not contain name of the appellants as the assailants. Laying stress on the said sanha entry, it was sought to be urged that the fardbeyan of Ramashray Pandey was recorded prior to 8 a.m. contrary to the time shown in the First Information Report to be 9.30 a.m.. To buttress the argument, the positive finding recorded by the doctor was also referred to and it was urged that since death of Ashok Kumar Pandey in terms of the prosecution version happened at 9 or 9.30 a.m., the estimation made by the doctor about the time elapsed since death and that of holding post-mortem examination being 11 hours was not in tune with the prosecution version and it was extremely incongruous. Death of Ashok Pandey, it is strenuously urged, took place either in the midnight or in the early hours of morning on 27th November, 1989, and it is how that the result of post-mortem led the doctor to assess the lapse of time from death, to be 11 hours. Drawing conclusion from these consistencies in the prosecution version, about time of death of Ashok Kumar Pandey, it was urged that since rigor mortis was present in all the four limbs which usually spreads over the whole body within 12 hours, the defence version about time of death of Ashok Kumar Pandey was most probable suggesting that death in that case would not have occurred at 9 or 9.30 a.m., as asserted by the prosecution and on the other hand, it also fits in with the suggestion of the defence given to PW1 that Ashok Kumar Pandey was killed much prior to sunrise. The other argument, on this score canvassed at Bar also deserves to be noticed, as it is urged that the version propounded by the defence about time of death of Ashok Kumar Pandey to be in the early morning is also buttressed from the positive findings recorded by the doctor who noticed that the stomach contained digested fluid meaning thereby that the deceased had taken food 2-3 hours earlier to death as a result of which digested fluid was in the stomach. 6. For all these manipulations which is credited to the prosecution, it is urged that it was all due to the fact that the Police Station at the relevant time was lodged in the house of Ramashray Pandey and this fact has been admitted also by the witnesses. The Police Station to be at the house of Ramshray Pandey, it is urged, had made it convenient for the Police Officer to substitute the previous sanha entry by another fardbeyan of Ramashray Pandey to suit the design of the prosecution simply to implicate the innocent appellants at behest of one Kedar Pandey, Advocate, who was quite instrumental in their prosecution. Orders drawn

by the Courts below on various dates were also brought to our notice to impress that when they moved the trial Court to call for the original sanha entry from the Police Station, not with standing repeated directions of the Court, Sanha entry was not made available and hence, the appellants felt handicapped to impress the Court that the fardbeyan purported to be of Ramashray Pandey, which is shown to be sheet anchor of the prosecution case, was a tainted document on suppression of the earlier version of the prosecution duly recorded in Sanha Entry No. 372. Accepting the argument as it is, which also looks impressive, we fail to find any good reason as to when original sanha entry was not brought on the record despite repeated direction of the Court, it was well within the jurisdiction and ambit of the defence to lead secondary evidence at trial to impress the trial Court for acceptance of said sanha, in which name of none of the appellants allegedly appears as the assailant. Earned Counsel for-the appellants would fairly admit that even though the appellants had in their custody certified copy of sanha, that was not placed on the record by them and in this view of the matter, all such argument made at Bar about there being another sanha entry to be the early version of the prosecution and fardbeyan of Ramshray Pandey being a substituted document loses much of its force and is fit to be rejected as devoid of merit. Even before commencing of the hearing of these appeals, with the aid of an application filed under Section 391 of the Code of Criminal Procedure, this Court was moved to admit Sanha Entry No. 372 dated 27.11.1989, as additional evidence and for directing the trial Court to get this document proved as defence evidence. A bench of this Court heard Counsel for the parties and negatived the move made on behalf of the appellants assigning good reasons by order dated 10.2.2001.

7. The positive finding recorded by the doctor about time of death as assessed by him appears to be apparently erroneous. But on this score too we are of the view that the period assessed by the doctor about time of death is only an estimation which cannot be rejected, that being not based on mathematical precision. As for rigor mortis appearing on the dead-body of the deceased, no rigid formula can be applied in all cases. As per the opinion of Modi, a celebrated author on medical jurisprudence, as to time of onset of rigor mortis, this varies greatly in different cases. Though the average period of its onset may be recorded as 3 to 6 hours after death in temperate climate and it may take 2-3 hours to develop, in India, it

usually commences in one or two hours after death and takes one to two hours to develop, cases have occurred in which rigor mortis developed and disappeared within an hour and a half after death, and that apart, the feature of appearance and disappearance of rigor mortis on the body also depends on the age of the deceased, muscular condition and activity before death, manner of death and also atmospheric condition and only because rigor mortis was present in all the four limbs, it did not necessarily lead to the conclusion that death of the deceased happened not at the time as suggested by the State.

8. The other limb of argument canvassed at Bar was that the prosecution evidence was most inconsistent also about mode of assault and manner of occurrence. Shri Prakash Narayan Pandey, with his usual persuasiveness, would urge that if PWs 1, 4, 5 and 7, who claim to be ocular witnesses to the occurrence, are to be considered credible, the deceased sustained one and only one gun shot injury on the face for which there has been emphatic assertion made by PW 5 that he noticed only one person firing shot but the doctor who held autopsy over the dead body of the deceased had noticed not less than seven lacerated wounds on the person of the deceased caused by fire arms and hence presence of six number of fire arms wounds on the body of the deceased remained absolutely unexplained by the State and hence, the witness must be considered to be incredible who have not seen the occurrence with their naked eyes. About mode of assault too contentions are raised that the finding of the doctor runs contrast with the ocular testimony of the witnesses, as the witnesses were stating at trial that the deceased sustained injury on face suggesting assailant facing him, as the doctor noticed that none of the seven injuries (one wound of exit) could have been caused, if the firing was done from the front of the victim; About the story of chase of Ashok Pandey propounded by the prosecution, it is urged that, that was also quite incongruous in view of the injuries being on the face of the deceased and it is stated at Bar that this was the major improvement in the early version of the prosecution which did not appear in the fardbeyan of Ramashray Pandey.

9. For appreciation of contention raised on behalf of the appellants, appreciation of testimony of witnesses, who claimed to be ocular, merits consideration. True it is that the story of chase of Ashok Kumar Pandey by the assailant to some distance,

before he was shot at by Din Dayal Pandey was not very much explicit in the fardbeyan of Ramashray Pandey and we must say that the First Information Report was not the last word by the prosecution, though vital improvement over core of the prosecution case is not permissible, the thrust of the prosecution case was that after Surya Narain Sharma questioned about where a bout of Ashok Kumar Pandey and shortly after he came within their vision, while returning, Din Dayal Pandey fired a shot which hit the face of the deceased and he dropped on the ground. Story of chase too would not substantially affect the edifice of the prosecution version and if at all any one was bound with the fardbeyan, it was Ramashray Pandey alone who can be either contradicted with it or can seek corroboration from this document. Evidence of the prosecution witnesses on this score are that of PWs 1, 4, 5 and 7. Ramashray Pandey (PW1) would state that shortly after Ashok Kumar Pandey came within the notice of the assailants, they too proceeded with Ashok Kumar Pandey towards the village. Ramadhar Pandey (PW 4) states that the assailants too ran towards Ashok Kumar Pandey and the witnesses too proceeded behind them. Similar had been the evidence of Jagdish Pandey (PW 5) and also Ram Nath Pandey (PW 7). But attention of neither PW 1 nor PW 5 was drawn by the defence towards their early version to discredit them and to persuade the Court to draw an inference that the witnesses had not made parallel statement before the police.

10. About the posture of Ashok Kumar Pandey, PW 1 states that on seeing the appellants, he ran towards village and shortly thereafter, Din Dayal Pandey fired shots. Likewise, evidence of Jagdish Pandey (PW5) at trial was that before Ashok Kumar Pandey sustained injuries at the hands of the assailants, he made a futile attempt to go inside the door of Gupteshwar Pandey and it is in the process of getting entry in the door of the house, that he sustained injury on his face. Narration made by Ram Nath Pandey (PW 7), however, was that before Ashok Kumar Pandey sustained injuries, he did not run away. The analysis of evidence of these three witnesses would demonstrate that while according to PW 7, Ashok Kumar Pandey did not run away, PWs 1 and 5 would state that he made endeavors to run from the place where he noticed the assailants. Some minor variations in the testimony of witnesses which they render after lapse of time in Court, cannot be considered to be unusual phenomenon, as human memory is not

infallible and some times it may betray human being who may commit error in recapitulating the sequence of events. If narrations made by some witnesses about Ashok Kumar Pandey having sustained injuries on his face, while being chased, is accepted as it is, it is not unlikely that a person being chased, would look backward at short intervals to keep the assailant at distance from him, and if this situation is accepted, in all fairness, Ashok Kumar Pandey would be likely to sustain injury on his face. The doctor's view, who held autopsy over the dead-body of Ashok Kumar Pandey, that none of the seven injuries would have been caused if firing was done from the front of the victim cannot be said to be in conflict with the narration given by the witnesses for the simple reason that the injuries were on face, neck, eye brow and over tip of shoulder. Situs of injuries itself probabilises receipt of such injuries either when the victim is on standing posture or even when one receives them in the process of being chased on looking behind at short intervals. This is not a third case which is sought to be made by the learned Counsel for the State but there is every possibility of Ashok Kumar Pandey sustaining those injuries in both the positions.

11. About the distance of shots, almost similar narrations were made by the defence and we can refer to the testimony of PW 1 who states that shots were fired at Ashok Kumar Pandey, from a distance of about 15 yards. Ramadhar Pandey (PW 4) states that shots were fired at Ashok Kumar Pandey from a distance of 10-11 yards, though according to PW 7 shots were fired at Ashok Kumar Pandey from a distance of about 20/25 yards. The witnesses, who come from countryside or even those living in urban areas are not expected to make narration with mathematical precision about the distance, as it is always based on estimation and observation by an individual. The doctor too noticed that wounds on Ashok Kumar Pandey were of blackish colour and that too suggested that shots were made from close quarters.

12. Now coming to the other aspect of the matter, which is seriously urged at Bar, even recitals made in the fardbeyan of Ramshray Pandey does show that Din Dayal Pandey fired a single shot on Ashok Kumar Pandey shortly after he came within his view. The other too took recourse to Tiring while retreating in the east direction. The prosecution even in its early version had not altogether ruled out the

case of firing by others, pursuant to firing by Din Dayal Pandey. Now let us examine the evidence of the witnesses on this score. Ramashray Pandey, who was the maker of the fardbeyan would reiterate that the assailants while retiring, continued firing. Ramadhar Pandey (PW 4) too states at trial that besides Din Dayal Pandey, other accused too ran towards west while opening fire. Jagdish Pandey (PW 5) made similar narration that after Ashok Kumar Pandey dropped on the ground on receipt of injury by Din Dayal Pandey, others accompanying him, ran towards west making firing and similar had been the evidence of Ram Nath Pandey (PW 7). True it is that there was explicit accusation about firing which hit Ashok Kumar Pandey, only against Din Dayal Pandey but the evidence of the witnesses has not ruled out possibility of the fact that though others resorted to firing, the aim was lost and it did not strike Ashok Kumar Pandey, and once this proposition is accepted, presence of six number of fire arm wounds on the deceased would not improbabilise the prosecution version.

13. Against coherent version of the witnesses about Ashok Pandey having died while being taken to Dumraon Hospital, earned Counsel would draw our attention to the narrations made by Ramadhar Pandey (PW 4) who stated at trial that shortly after receipt of injuries at the hands of Din Dayal Pandey, Ashok Kumar Pandey dropped to the ground and succumbed to them while rolling in pains. Narration made by other witnesses was, however, otherwise, as even PW 4 would state that Ashok Kumar Pandey was firstly taken to Simri Primary Health Centre and after he was referred by the doctor, he was to be taken to Dumraon Hospital when in the mid way, he breathed his last. Non-examination of the doctor at trial, who examined him at Simri Primary Health Centre was not such a vital factor which can negate the prosecution version about Ashok Kumar Pandey having been taken to Simri Primary Health Centre for treatment. Examination of only family members of the deceased entirely to the exclusion of independent witnesses, who flocked to the place of occurrence, was also taken to be a ground to discredit the prosecution version and reliance on this score was placed on a decision of the Apex Court reported in : 1976 CriLJ1883 Ishwar Singh v. The State of Uttar Pradesh, in which observations were made by the Court that witnesses essential to unfolding of the narrative on which prosecution is based, must be examined without giving explanation.

14. From the narrations made by the witnesses, it seems that deceased was the cousin of Ramashray Pandey (PW 1). Ramadhar Pandey (PW 4) was not related to the deceased and he is cousin, distantly related to Ramashray Pandey. Ram Nath Pandey (PW 7) too was distantly related as cousin of Ramashray Pandey. It is not very uncommon that the persons residing in countryside call persons of other community 'uncle' or 'brothers' even if they are not of their community and are not related to him. The relationship of these witnesses is not such which can lead to inference that only family members of the deceased were examined by the State. Even about the place of occurrence, the witnesses had been making coherent statements that Ashok Kumar Pandey sustained injuries at the corner of cabbage field of Ram Ekbal Pandey where, there is also a neem tree. Though we feel that due to non-examination of the Investigating Officer, few questions remained unanswered but the hard fact is that the Investigating Officer was dead and there was no possibility of his examination. About Sanna Entry No. 372 as we have noticed, even secondary evidence was not brought on the record on behalf of the appellant and hence we hold the view that non-examination of the Investigating Officer had not prejudiced the appellants at trial. Analysis of evidence of the witnesses persuade us to believe that the prosecution story was through out consistent in the narration made by the witnesses and it was inherently probable and intrinsically credible.

15. As has been noticed earlier, though prosecution was launched against five persons, namely, Bipin Bihari Sharma, Din Dayal Pandey, Krishna Bihari Pandey, Narain Pandey, Nirmal Pandey and Surya Narain Sharma, trial concluded only against appellants. Evidences were laid at trial and narrations with consistencies were made by eye-witnesses that the appellants, namely, Nirmal Kumar Pandey, Narayan Pandey and Din Dayal Pandey took recourse to firing. Appellant Krishna Bihari Pandey was not suggested to be the assailant with farsa nor there was finding of the doctor about there being incised injury on the person of the deceased. However, evidences do suggest that he came along with other appellants with lethal weapon, pursuant to which, three of them took recourse to firing and in these circumstances, appellant Krishna Bihari Pandey too must be held to have shared common intention as that of the assailants and his case too as such would squarely fall within the mischief of Section 302/34, IPC.

16. Having given our anxious consideration to the evidences and also the contentions raised at Bar, we find that the finding recorded by the Court below cannot be found fault with. Both the appeals being merit less, are accordingly dismissed. Since appellants Krishna Bihari Pandey, Nirmal Kumar Pandey and Narayan Pandey are on bail, their bail bonds are cancelled and the trial Court shall take all coercive steps to cosign them to custody to serve out the sentence.

R.N. Prasad, J.

I agree.

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