

Kanhai Singh Vs. the State of Bihar

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Court : Patna

Decided On : Mar-19-1999

Judge : N.N. Singh and D.P.S. Choudhary, JJ.

Appeal No. : Criminal Appeal No. 530 of 1986

Appellant : Kanhai Singh

Respondent : The State of Bihar

Disposition : Appeal Allowed

Judgement :

1. Appellant, Kanhai Singh has been convicted under Section 302/34 IPC and sentenced to undergo imprisonment for life by the judgment and order dated 4th October, 1986 of the IVth Addl. District and Sessions Judge, Patna, in S.T. No. 336/81. Co-accused Ramayan Singh died during the pendency of the trial.

2. The prosecution case, in brief, is that in his ferdbeyan (Ext. 3), which was recorded at 12.30 in the night on 21.5.79, at the place of occurrence at village Khaprail Chak, P.S. Phulwari Sharif, District Patna, the informant, Sampat Sao (P.W. 4) stated that at about 11 in the night on 20.5.79, while he was preparing to retire in bed, he heard gun-firing shot. He along with his nephew Gopal Sao (P.W. 1) came out of house. They heard the cry of Shiv Narain Sao (deceased), brother of the informant 'Dauro Ho, Kanhai Singh and Ramayan Singh are killing me.' They rushed towards east and saw in the electric light the accused persons

running towards north. They indentified them. Accused Ramayan Singh (since deceased) having a small country-made pistol and appellant-accused Kanhai Singh with had a lathi. In the nearby field, they found Shiv Narain Singh, lying dead and blood was oozing out from his chest. It is the further case of the prosecution that in the meantime, deceased's wife, Dulari Devi (P.W. 2) and informant's wife, Bedami Devi (P.W. 5) and other villagers arrived at the place of occurrence. The further case of the prosecution is that the deceased Shiv Narayan Sao was returning from Patna where he had gone to sell some grains. It is further alleged that there were series of litigations pending between the deceased and the accused persons and this was the motive of the murder.

3. The prosecution has examined in all 8 witnesses. P.W. 6, Dr. R.B. Choudhary had conducted the post-mortem examination on the dead body of Shiv Narayan Sao and his report is Ext. 1 (a). He found the following ante-mortem injures:

1. Round punctured wound of 1/4' diameter with inverted margin on the middle of left chest at front side.
2. Round lacerated wound of 1/3' diameter with everted margin on the back of left part of chest on its middle and lateral.
3. Area of tatooing was found around injury No. 1.
4. Injury No. 1 was wound of entrance and injury No. 2 was wound of exit.
5. On dissection pericardium and heart were found punctured, left lung was also punctured with large quantity of blood in chest cavity.

In the opinion of the doctor, the injuries were caused by fire arm and the time elapsed since death was 36 hours. The doctor further opined that the injury in the chest was sufficient to cause death in ordinary course of nature. The doctor further stated that firing was made from a close distance of about 21/2 feet. Thus it was a case of homicidal death.

4. The Investigating Officer has not been examined in this case. The two formal witnesses, namely, P.Ws. 7 and 8 have proved the inquest report (Ext. 4), Police

case diary (Ext. 5), Sketch map of the Place of occurrence, prepared by the Investigating Officer (Ext. 6) and the formal F.I.R. (Ext. 7).

5. The learned lawyer for the appellant submitted that non-examination of the Investigating Officer has caused serious prejudice to the defence. The appellant has been deprived of proving the contradictions made in the statements of the witnesses, namely, P.Ws. 1, 3 and 4 before the Investigating Officer. The benefit of all these lacunas of the prosecution must go in favour of the appellant. Learned A.P.P. submitted that if the involvement of the accused is proved in a crime by the evidence of eye-witnesses and the evidences are in conformity with the case made out in the F.I.R., the prosecution case will not fail due to non-examination of the Investigating Officer. It also does not vitiate the criminal trial as held in the case of *Bihari Prasad v. The State of Bihar* reported in : 1996 CriLJ1653 . After analyzing the evidences of P.Ws. 1, 3 and 4 we find that the prosecution has not been able to draw any vital contradictions in the evidence of these witnesses and their earlier statement made before the Investigating Officer. The learned lawyer for the appellant could not point out as to what serious prejudice has been caused to the appellant due to non-examination of the Investigating Officer. We, therefore, find substance in this contention of learned A.P.P. that non-examination of the Investigating Officer has not caused any prejudice to the appellant, nor on this score the prosecution case has suffered any damage.

6. P.W. 1, Gopal Sao, P.W. 3, Bijendra Sao and P.W. 4, Sampat Sao (informant), are the eye-witnesses. P.W. 1 stated that in the night of the occurrence, while he was preparing to go to bed, he heard the sound of gun firing towards the east. He along with P.Ws. 3 and 4 rushed towards the place of occurrence. He heard the cry of his uncle, Shiv Narayan Sao, that accused Ramayan Singh and Kanhai Singh were killing him. After going ahead, he saw Ramayan Singh armed with pistol or gun and appellant accused Kanhai Singh armed with lathi, fleeing towards north, He identified them in the light of electric bulb which was glowing at that place. He said that there were series of litigations in between his deceased uncle and the accused persons and it appears that due to this enmity, they have killed his uncle, Shiv Narain Sao. The witness found his uncle Shiv Narain Sao lying dead in the field of Ramkrit Singh 3-4 yards from the along and from injuries blood

was oozing out. He stated that this along is the passage for coming from Parsa station to the village. He stated that his uncle had gone to Patna to sell some grains and while returning home he was killed.

7. In his cross-examination, P.W. 1 stated that while he was sleeping, he heard gun-firing coming from east. He further clarified that he awoke P.Ws. 3 and 4 who were sleeping in their rooms and then he rushed towards the place of occurrence. In paragraph 18, he stated that after going about 15 yards, from his house he heard the cry of his uncle Shiv Narayan Sao. He cried only once. There was only one shot of gun-firing. He further stated that in the way several villagers assembled and then he proceeded towards his uncle. He saw the accused persons fleeing away and indentified them from a distance of about 30 yards. In paragraph 19, he stated that at the place of occurrence, he arrived first and after 10 minutes his family members arrived there.

8. P.W. 3 is the brother of P.W. 1. He stated that at about 11 p.m. in the night of 20.5.79, he heard gun-shot firing. He along with P.Ws. 1 and 4 rushed towards east. He heard the cry of his Uncle Shiv Narayan Sao that accused Ramayan Singh and Kanhai Singh were killing him and when he reached at the place of occurrence, he saw, accused Ramayan Singh armed with pistol and Kanhai Singh armed with lathi, fleeing towards north. He indentified them in the electric light. He found his uncle, Shiv Narayan Sao lying dead in the field of Ramkrit Singh with gun-shot injuries in the chest. He further stated that after their arrival at the place of occurrence, P.Ws. 2 and 5, namely, Dulari Devi, wife of the deceased and Bedami Devi, wife of the informant arrived at the place of occurrence to whom they disclosed the names of the accused persons. In paragraph 12 of his cross-examination,, he stated that he saw the accused persons fleeing away from a distance of about 40 cubics. In paragraph 13 of his cross-examination he stated that after their arrival at the place of occurrence, villagers arrived there after five minutes, but he did not ask any of them either to search for the accused persons or to inform the police station.

9. P.W. 4, Sampat Sao, the informant, stated that in the night of 20.5.79, at about 11 p.m., he heard the gun-shot firing. He along with P.Ws. 1 and 3 rushed towards

east and heard the cry of Shiv Narayan Sao, his brother, that accused Ramayan Singh and Kanhai Singh were killing him. Near the place of occurrence, he saw accused Ramayan Singh, armed with pistol and Kanhai Singh armed with lathi running towards east. He identified them in the electric light. He found his brother Shiv Narayan Sao lying dead with gun-shot injuries in his chest. He further stated that after their arrival, P.Ws. 2 and 5 arrived at the place of occurrence, to whom he narrated the names of the accused persons. According to him, his brother had gone to Patna to sell grains and while returning in the way he was murdered. He further stated that there were litigations in between the accused persons and the deceased and due to this, his brother was killed. The police arrived at the place of occurrence and his fardbeyan was recorded by the Investigating Officer, wherein he had signed, which is Ext. I.

10. P.W. 2, Dulari Devi stated that she arrived at the place of occurrence on hearing the sound of gun firing along with P.W. 5 and found her husband Shiv Narayan Sao lying dead. Her family members told her the names of the accused persons. She also stated that there were series of litigations in between the deceased and the accused persons and this was the cause of his murder. P.W. 5, the wife of the informant has been tendered for cross-examination.

11. Learned lawyer for the appellant has submitted that on careful scrutiny of the evidence of P.Ws. 1, 3 and 4 it is crystal clear that they had not identified the accused persons at the place of occurrence. The injuries found on the deceased suggest that he died instantaneously. These witness stated that they heard the gun-shot firing in their house and thereafter, they ran towards the place of occurrence. After going about 40-50 yards, they heard the cry of Shiv Narayan Sao, the deceased and from a distance of about 30 steps they saw both the accused fleeing away. This appears to be improbable because after firing at the deceased, the accused persons shall not remain standing there. All the three witnesses stated that they heard the gun-shot firing at their house. P.W. 1 stated that at that time he was on the upper stairs of his house and was sleeping. He came to downstairs and then awoke P.Ws. 3 and 4 and rushed towards the place of occurrence. Therefore, there was sufficient time gap in Between the gun-shot firing and the arrival of these witnesses near the place of occurrence. Thus, there

was sufficient time for the accused persons to flee away from the place of occurrence.

12. The learned lawyer for the appellant has further submitted that in view of the evidence of P.W. 1, P.Ws. 3 and 4 reached after 10 minutes of his arrival. Therefore, it was impossible for these witnesses to identify the accused persons near the place of occurrence.

13. It was further submitted on behalf of the appellant that the means of identification is also doubtful. According to these witnesses, some electric bulbs were glowing near the place of occurrence. From their evidence, it appears that Parsa Bazar, Rly. Station is near the place of occurrence and according to them, these electric bulbs were glowing in the electric poles, which were in the vicinity of the Rly. station. Therefore, it was not possible to identify the accused persons because there was no sufficient light to identify them from a distance of about 30 steps as stated by P.W. 1. The witnesses have stated that the accused persons were running towards north and then towards east. Therefore, if they had seen the accused fleeing away, it must be from behind and in that case it is doubtful to identify them.

14. It was further submitted by the learned lawyer for the appellant that from the evidence of P.W. 1, it is clear that P.Ws. 3 and 4 had arrived about 10 minutes after his arrival at the place of occurrence and, therefore, they cannot be the eye-witness to identify the accused persons. The evidence of P.Ws. 1 eliminates the presence of P.Ws. 3 and 4 at the place of occurrence along with P.W. 1. The evidence of P.Ws. 3 and 4 therefore, becomes doubtful that they arrived at the place of occurrence along with P.W. 1. In view of the evidence of P.W. P.W. 1, the evidence of the informant, P.W. 4, as an eye-witness becomes doubtful. Therefore, the very basis of his ferdbeyan as an eye-witness is not reliable.

15. Learned A.P.P. has submitted that from the evidence of P.Ws. 1, 3 and 4, it is clear that just after hearing of gun-shot firing, they rushed to the place of occurrence and in the way they heard the cry of the deceased, Shiv Narayan Sao. The gun-shot injury was not in the throat nor his vocal cord was cut. Therefore, it is possible that after receiving the gun-shot injury, he was in a position to cry and

then he fell down and died. From the sketch map prepared by the Investigating Officer (Ext. 6), it appears that, the distance between the place of occurrence and the house of these witnesses is about 50 yards. Therefore, it was possible for them to have arrived at the place of occurrence within a few minutes and identify the fleeing accused persons. It is the consistent evidence that electric bulbs were glowing near the place of occurrence. Therefore, there is consistent and reliable evidence on the point of identification of the accused persons.

16. On close scrutiny of the evidence of P.Ws. 1, 3 and 4 and after considering the submissions of both sides, we are of the view that on the point of identification of the accused persons, their evidences are doubtful. In ordinary course of nature, a person with such gun-shot injury in his chest should have caused, his instantaneous death, and as such he will not be able to cry and to name the accused persons. From the evidence of P.W. 1 it is clear that he was asleep when he heard the gun-shot firing. He awoke and then came down-stairs of his house and then awoke P.Ws. 3 and 5, who were sleeping in their respective rooms and then rushed to the place of occurrence which was at a distance of about 50 yards away. Therefore, there was sufficient time-gap in between the firing and the arrival of the witness at the place of occurrence. During this time-gap, it was not natural on the part of the accused persons to remain standing at the place of occurrence. In ordinary course of nature, after firing at the deceased, the accused persons must have fled away. Therefore, their evidence becomes doubtful on the point of identification of the accused persons. Their evidences are full of contradictions. As discussed above, P.W. 1 stated that after his arrival at the place of occurrence, P.Ws. 3 and 4 arrived 10 minutes thereafter. In that case, the evidence of P.Ws. 3 and 4 as eye-witness are not reliable. The electric bulbs are said to be the means of identification which were glowing, near Parsa Bazar Rly, Station. From the sketch map prepared by the Investigating Officer, it appears that the bulbs were glowing at a distance from the place where the dead body of Shiv Narayan Sao was lying. The witnesses stated that from a distance of 30 steps from the dead body, they had identified the accused persons fleeing away towards north. Therefore, in such a dim ' light to identify the accused persons from behind is not possible. It has. come in the evidence that it was a dark night. The evidence of P.Ws. 2 and 5 are not on the point of identification.

17. Learned lawyer for the appellant has submitted that all the P.Ws. examined on behalf of the prosecution are from one family and interested witnesses. P.Ws. 1,3 and 5 stated that villagers had arrived at the place of occurrence and they were told about the occurrence but surprisingly, no one has deposed in favour of the prosecution. There is no valid explanation for their non-examination. This makes the prosecution case doubtful. Learned A.P.P. submitted that it is true that P.Ws. 1, 3 and 4 are of one family and no independent witness of the village has been examined, but on this score, their evidence should not be disbelieved. These days villagers want to remain neutral more so when both the parties are of the same village. In our view, there is substance in the contention of the learned A.P.P. village usually avoid to be cited as a witness in such cases where both the parties are co-villagers. Besides, if the family witnesses are otherwise reliable and consistent only on the ground of their interestedness, their testimony should not be discarded. We have come to the conclusion, as discussed above, that the evidence of P.Ws. 1, 3 and 4 on the point of identification of the accused persons is doubtful and no independent witness has been examined to corroborate their evidence.

18. Learned lawyer for the appellant has submitted that as per the prosecution case, appellant Kanhai Singh was armed with lathi. The postmortem report and the evidence of the doctor, P.W. 6, shows that the deceased had no lathi injury. If the appellant had a common intention along with the deceased-accused, Ramayan Singh, to commit murder of Shiv Narayan Sao, then in ordinary course, - he should have also assaulted the deceased with lathi. This leads to the conclusion that the appellant was not present at the place of occurrence along with accused Ramayan Singh, but because of previous enmity he was implicated in the case.

19. Learned lawyer for the appellant has further submitted that from the seizure list prepared at the place of occurrence, it is clear that no cash was found from the possession of the deceased. All the witnesses who are the family members have stated that the deceased had gone to Patna to sell grains. Thus it is possible that in the night when he was returning home with the sale proceeds he was murdered in the way by some unknown persons and the cash were looted. We have

carefully examined the seizure list (Ext. 2), which shows that no cash was found in possession of the deceased. Therefore, there appears to be some substance in the submission of the learned Counsel for the appellant.

20. It was further submitted by the learned Counsel for the appellant that from the case record, it appears that the F.I.R. reached before the C.J.M. at a belated stage on 24th May, 1979. The F.I.R. was drawn up in the night of 21st May, 1979. The prosecution has not assigned any reason for this abnormal delay, and this makes the prosecution case doubtful. Learned A.P.P. submitted that although there is delay in receipt of the F.I.R. in the office of the C.J.M., but this is not fatal for the prosecution case. In ordinary course, F.I.R. is received in the office of the C.J.M. and thereafter in due course, it is placed before the C.J.M. Therefore, unless it is proved that the delay was motivated, it is not fatal for the prosecution case. The learned A.P.P. relied on the case of *State of U.P. v. Gokaran and ors.* reported in : 1985 CriLJ511 and *Madru Singh and Ors. v. The State of Madhya Pradesh* reported in : 1997 CriLJ4398 , and submitted that in these cases, there was delay of three days in receipt of the F.I.R., but it was held by the Supreme Court that this delay is not fatal, if otherwise, the prosecution has been able to substantiate its case by producing reliable evidence. We, therefore, do not find much substance in this contention of the learned lawyer of the appellant.

21. On analysis of the evidences discussed above, we are of the view that the evidences of the witnesses do not appear to be consistent on the point of identification of the accused and its benefit must go to the appellant. In view of the aforesaid discussions, and the infirmities in the evidence of the witnesses, we are constrained to differ with the findings recorded by the learned Court below, who convicted and sentenced the appellant as above. We, therefore, hold that the prosecution case is not free from doubt and accordingly, the appellant is given benefit of doubt.

22. In the result, the appeal is allowed, the order of conviction and sentence passed against the appellant is set aside and he is acquitted of the charge. He is accordingly discharged from the liability of his bail bond.