

Arjun Mahto Vs. the State of Bihar

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Court : Patna

Decided On : Sep-30-2002

Judge : Prabhat Kumar Sinha and B.N.P. Sinha, JJ.

Appeal No. : Criminal Appeal No. 389 of 1987

Appellant : Arjun Mahto

Respondent : The State of Bihar

Disposition : Appeal Allowed

Judgement :

B.N.P. Singh, J.

1. Though seven persons including the appellant were put on trial on accusation of executing killing of Degan Thakur, the appellant alone suffered conviction under Section 302 of the Indian Penal Code (IPC) and was sentenced to suffer imprisonment for life, others having been acquitted of the charges under Section 302/149 IPC, in a finding recorded by 4th Additional Sessions Judge, Nalanda at Biharsbarif, which is impugned in this appeal.

2. Factual matrix as appearing from the fardbayan of Ram Rati Devi (PW 7), wife of the deceased Degan Thakur, and also narrations made by the witnesses at trial, are that during evening house of 15th January, 1976, the appellant alone with

others (who have been acquitted of the charges), holding arms, came in front of door of her house and hurled abuses and exhorted Degan Thakur to come out of the house to meet his tragic end. Deceased Degan Thakur along with his wife Ramrati Devi, on hearing the call, came in the courtyard of the house. Shortly thereafter, it was the appellant, who took recourse to firing causing injuries to Degan Thakur on his left arm and also left abdominal region and dropped on the ground rolling in pains. Screaming of Ramrati Devi collected villagers who were Tannu Paswan (PW 2), Rewa Thakur (PW 5), Dhani Dusadh (PW 1) and others. The injured was carried to Nagarnausa Hospital where the doctor declared him dead. The dead-body of Degan Thakur was subsequently brought to the Police Station where fardbayan of Ramrati Devi was recorded by Shri J.N. Singh, Sub-Inspector of Police, Nagarnausa Outpost, at about 1.30 hours on 16th January, 1976 on strength of which first information report was drawn up at Chandi Police Station and investigation commenced, during which, Investigating Officer took a number of steps to ascertain bona fide of accusations attributed to the appellant and others. The Police Officer recorded statements of witnesses, prepared inquest report, sent the dead-body of the deceased to mortuary for post-mortem examination, inspected the place of occurrence and on conclusion of investigation, laid charge-sheet before the Court. In the eventual trial that commenced, the State examined altogether nine witnesses including wife and son of the deceased, host of other witnesses who showed their familiarity with the facts of the incident, the Police Officer and also the doctor who held autopsy over the dead-body of the deceased.

3. Defence of the appellant had been denial of his complicity/and persisting feud between the parties was suggested to be the reason for false implication. The witnesses too were attributed to have deposed falsely, they being partisan to the deceased and inimical to the appellant. The trial Court, however, on marshalling the evidences, while acquitted rest, of the charges, recorded finding of guilt against the appellant and sentenced him in the manner stated above.

4. Three fold contentions were raised at Bar on behalf of the appellant and before we bestow our due consideration to them, we wish to appreciate the testimony of witnesses for consideration of their probative value and also to consider the

probability of the manner of occurrence sought to be established by the State. We may begin our exercise with the testimony of Ramrati Devi (PW 7), who happens to be the wife of the deceased and also maker of fardbayan, reiterating her earliest version, about assemblage of others in front of her house, who had been abusing her husband holding arms. About the appellant, the witness states about his presence on the roof of his house when he fired shots causing injuries to her husband who was in the courtyard of his house and dropped on the ground sustaining injuries on his person. She sent Bindu Thakur (PW 4) to call Bhuneshwar Thakur and Chhotu Thakur from village Fajalpur and it was only after their arrival that the injured was carried to Nagamausa Hospital where the doctor declared him dead. After the dead-body of Dagan Thakur was brought to the Police Station, her statement was recorded by the Police. Narrations almost in similar vein and terms were made also by Dani Paswan (PW 1), Tanu Paswan (PW 2) and Shyam Sunder Devi (PW 3) about assemblage of six accused persons, put on trial, on the door of her house who had been abusing her husband and also holding arms with them. However, as for the appellant, these witnesses too stated that the appellant was at the roof of his house from where he fired shots causing gun shot injury to Degan Thakur, who was in the courtyard.

5. Bindu Thakur (PW 4), son of the deceased and Rewa Thakur (PW 5) were tendered by the State and there was nothing material in their evidences to merit consideration. Brihaspati Jamadar (PW 6) turned hostile to the State learning no assurance to the prosecution allegation either about assemblage of others at the door of the house of the deceased or the appellant to be the killer of Degan Thakur. Chhotu Prasad (PW 8) was a witness to the seizure of cartridges, blood stained straw and earth from the courtyard and also bark of neem tree by the Police Officer. A few bands of bullets were also seized by the Police Officer, for which seizure memo had been prepared on which he also appended his signature. He was also a witness to the preparation of inquest report of dead-body of the deceased. Mahesh Kumar (PW 9), a Pleader Clerk was, however, a formal witness who brought on the record the endorsement made by Jai Narain Singh, ASI on the fardbayan of Ramrati Devi, First Information Report, some parts of Police case diary and also the postmortem report, author of which was Dr. T.P. Singh, who was dead.

6. From narrations made by the witnesses, it would appear that the State had sought to establish that Degan Thakur was shot dead by the appellant when the later was at the house top. While house of the deceased situates in west and door of the house opens towards east in the lane, house of Arjun Mahto (appellant) lies in east and its door opens towards west in the lane. Commenting on the situation of the two houses of the deceased and that of the appellant, contentions are raised at Bar that no where in the fardbayan of Ramrati Devi, the appellant was suggested to have shot fire from the roof of his house as all the accused including the appellant were shown to have been standing in front of the house of the deceased holding arms from where they were abusing and exhorting the deceased. The said Ramrati Devi, who was maker of the fardbayan, in her evidence, however, saddled the appellant for having opened fire from the house top causing injury to her husband in the courtyard. Since the maker of fardbayan had over-pitched her earliest version, her evidence has to be appreciated with a pinch of salt. The wife of the deceased stated that while the accused persons were abusing her husband at the door of her house and while she was making entreaties before them, she heard sound of firing and when she turned back, noticed her husband dropped in the courtyard. If narrations made by the witness are to be given due consideration, that would admittedly rule out the possibility of her being ocular witness about her husband sustaining injuries at the hands of the appellant. Dani Paswan (PW 1) too states that the appellant fired from the roof of his house when deceased, standing in the courtyard, sustained gun shot injuries. However, during his cross-examination, the witness states that he noticed the appellant near the door of the house of the deceased and while he was looking around, he heard the sound of firing and only after alarms were raised that he noticed the deceased dropped injured in the courtyard. The credibility of this witness to be an eye-witness to the injuries sustained by the deceased allegedly by the appellant in the backdrop of such assertions made by the witnesses is seriously open to question.

7. Now adverting to the evidence of Tanu Paswan (PW 2), this witness too states that the appellant fired shots from the top of his house. He stated further that while he was looking towards north and west, he noticed deceased falling in the courtyard and only after the assailant had retired from the place of occurrence that

he went to the deceased and noticed two gun shot holes on his body, Now coming to the evidence of Shyam Sunder Devi (PW 3), the witness stated to have noticed the appellant holding fire arms aiming towards sky and in that posture, he fired shots. As about the place where she noticed the deceased and his wife, the witness stated that she had noticed them at the verandah of the door of house. If narration. made by these witnesses, who claim to be ocular, is given due consideration, possibility of these witnesses witnessing gun shot injuries sustained by the deceased at the hands of the appellant appears to be extremely remote.

8. Other contention raised on behalf of the appellant was that persisting feud between the parties had been admitted even by witnesses and the learned Counsel would draw our attention to the evidence of Ramrati Devi (PW 7), who states about some previous criminal proceeding pending between the parties. Yet it is urged that though the deceased was shown to have been subjected to post-mortem examination, the doctor was not examined at trial and post-mortem report was sought to be placed on the record with the aid of Mahesh Kumar (PW 9) who was none else but a private pleader's clerk. Though the doctor was reported to be dead, the positive finding of the expert was sought to be placed on the record with the aid of the private clerk, who cannot be expected to be conversant or to have skill in the field of medical, jurisprudence. If the factual findings recorded in the post-mortem report are taken into consideration, that would suggest that following findings were recorded by the doctor:

(i) Lacerated wound on left arm 2' 3/4' deep through and through. Opening on the inner side of the arm lacerated wound 1/4' x 3/4'. Former wound has inverted margin blackening around and later has everted edges.

(ii) Lacerated wound 1-1/2' 1/2' on left side of chest inside leading to interior of thorax and abdomen with inverted margin and blackening around.

(iii) A lacerated injury on back region 1' 1/2' leading to interior of abdomen with everted margin. Injury No. (ii)(would of entry) was found communicating to Injury No. (iii)(would of exit).

9. The learned Counsel commenting on the finding of the doctor, would urge that since the doctor had noticed that Injury No. (ii), which was found on left side of chest, was leading to interior thorax and abdomen, the witnesses including maker of fardbayan were stating that the appellant had fired from the house-top only to suit the finding of the doctor, A person who claims to have seen the injury would be the only person to say as to what he has seen and found. Further this would be manifest from a bare perusal of Section 60 of the Indian Evidence Act that oral evidence must, in all cases, whatever, be direct. It explicitly provides that if an evidence refers to a fact which could be seen, it must be the evidence of a witness who says he saw it. This fact also cannot be lost sight of, which has been consistently reiterated by Courts in catena of decisions, that post-mortem report by itself, does not prove anything and it is not a substantive piece of evidence and it is the evidence of the doctor on oath in regard to injury which alone is substantive evidence. The injury report/post-mortem report can only be used to corroborate or contradict the doctor and it cannot be a substitute for evidence of the doctor. In case the doctor is not available by reason of his death or due to his non-availability for other reasons, the post-mortem report can be pressed into service taking recourse to the provisions enjoined under Section 32 of the Indian Evidence Act by examination of a doctor who is conversant with the writing of the doctor in question. A formal witness or an Advocate's clerk cannot be a substitute for a doctor who is author of the postmortem report and is expert by virtue of having skill and knowledge in the subject. We, while reiterating the significance of testimony of a doctor, may profitably refer to a decisions of the Apex Court reported in 2001 Cr.L.J. 4708 Munshi Prasad and Ors. v. The State of Bihar in which observations were made by the Apex Court that the post-mortem report, a document by itself, is not a substantive evidence but it is the doctor's statement in Court which has the credibility of the substantive evidence and not the report which in normal circumstance ought to be used only for refreshing memory of the doctor-witness or to contradict whatever he may say from the witness box. Since the doctor, who may be familiar with the writings of the deceased doctor, was not examined and the post-mortem report was sought to be placed on the record with the aid of Pleader's clerk, we are afraid that we can take notice of the findings recorded by the doctor about cause of death of the deceased. Though death of Degan Thakur

cannot possibly be disputed in view of ocular evidence, there is no medico-legal evidence that the deceased died of the injuries which the appellant was shown to have inflicted on his person.

10. Regard being had to be contentions raised at Bar and also the infirmity that have crept in the prosecution version, we hold the view that the finding recorded by the Court below cannot be sustained. The finding of guilt and sentence is accordingly set aside and the appellant is acquitted of the charges levelled against him. He is also discharged from the liability of the bail bonds. This appeal accordingly succeeds.

P.K. Sinha, J.

I agree.

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