

Bihari Vs. State of U.P.

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Court : Allahabad

Decided On : Jan-21-1999

Reported in : 2000CriLJ3836

Judge : D.K. Trivedi and ;R.P. Nigam, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 304

Appeal No. : Criminal Appeal No. 66 of 1966

Appellant : Bihari

Respondent : State of U.P.

Judgement :

D.K. Trivedi, J.

1. The present criminal appeal is directed against the judgment and order dated 4-3-1994 passed by the Sessions Judge, Sitapur convicting the accused-appellant under Section 302, IPC and sentencing him to Imprisonment for Life in connection with an incident which allegedly took place on 21-5-1992 at about 9 a.m. in village Bari, P.S. Reosa, District Sitapur.

2. Accused appellant Bihari is the son of Jodhey deceased and complaint Mani Ram (PW 1) is another son of deceased Jodhey. It is said that Mani Ram as well as Bihari were living in separate portions of the same house and deceased Jodhey

used to live with Mani Ram. It is said that Bihari, appellant was not having good character and therefore, often quarrel used to take place between him and Jodhey (deceased). It is said that just two or three days before the incident, one Dhoti and one Katori had been found missing from the house of Jodhey (deceased) and therefore, Jodhey had scolded Bihari in this respect in anger. It is said that Bihari then started abusing Jodhey and on this some quarrel took place and upon this Bihari gave a 'khurpa' blow causing injuries on the hand of Jodhey. It is said that PW 1 Mani Ram also reached there and both Jodhey and Mani Ram snatched the khurpa from the hand of Bihari. Bihari then, went into the house, came with a Kudal and saying that he will finish Jodhey, gave a Kudal blow in the stomach of his father Jodhey. An alarm was raised and on hearing the alarm, several persons reached there but the accused ran away along with the 'Kudal'. It is said that a written report scribed by Ramesh Chandra (PW 3) was lodged at the Police Station Reosa on the same day at about 10 a.m. PW 2 Head Constable Virendra Singh Bhadauria registered the case and prepared the chik report etc. and made entries in the G.D. The injured Jodhey was sent to P.H.C. Reosa for medical examination, wherefrom he was referred to District Hospital, Sitapur. It is said that Jodhey died in the way and therefore, the case was converted under Section 302, IPC. As there was no Sub Inspector present at the Police Station, at the time of lodging of the F.I.R., therefore, the papers were sent to PW 10 S.I. Ramesh Chandra Sharma who after receipt of the papers immediately went to P.H.C. Reosa and recorded the statement of Mani Ram as well as Jodhey. He also recorded the statements of the other witnesses and prepared site plan Ext. Ka. 16. He also made a search of the house of accused Bihari and recovered one Kastori and Dhoti from there and prepared recovery memo Ext. Ka. 17. It is said that thereafter, the investigation was taken up by PW 6 S.O. Ashok Singh who recorded the statement of Gyani and arrested the accused on 25-5-1992. As S.O. Ashok Singh was also transferred therefore, the investigation of this case was handed over to S.O. R.P. Singh who after completing the investigation submitted the charge sheet Ext. Ka 5 on 14-8-1992 against the accused. It is said that Jodhey (when he was in injured condition) was examined by Dr. O.P. Verma (PW 11) at P.H.C. Reosa on 21-5-1992 at 10.50 a.m. and he found the following injuries on the body of injured Jodhey:-

1. An incised wound of 5.5 cm x 1.5 cm. x muscle deep on the right side of abdomen 3 cm below the right costal margin with fresh bleeding present.
2. An incised wound of 20 cm x 0.3 cm x skin deep on medial side of left forearm 6 cm below the elbow. Bleeding absent.
3. The doctor had also mentioned that the injuries Nos. 1 and 2 were simple, caused by sharp object and were about 4 hours old. The injury report is Ext. Ka 19.
4. On receipt of the information of the death of Jodhey, PW 8 S.I. Ram Babu Misra was then deputed to prepare inquest etc. and therefore, he prepared the inquest report Ext. Ka 8 and other relevant papers Ext. Ka 9 to Ka 11 and sent the dead body of Jodhey to mortuary for autopsy through constable Ram Mohan (PW 9).
5. The autopsy on the dead body of deceased Jodhey was conducted by Dr. L.N. Verma (PW 7) on 22-5-1992. The doctor found the following ante mortem injuries on the dead body of deceased Jodhey :-
 1. Stitched wound 7 cms on right abdomen 1 cm lateral to umbilicus.
6. In internal examination, according to doctor the heart and small and large intestines of the deceased Jodhey were found empty. The descending colon was found punctured at the level of 4th lumbar vertebra. Peritoneum and mesentery were found cut and filled with about 2 litres of blood. The cause of death, according to the doctor was shock and haemorrhage. The post mortem report is Ext. Ka. 6.
7. The prosecution in support of its case, examined as may as 11 witnesses, out of them PW 1 Mani Ram (complainant), PW 4 Gyani and PW 5 Chhotey Lal are the witnesses, of fact. PW 2 Head Constable Virendra Singh Bhadauria on receipt of the F.I.R. registered the case and prepared the chik report etc. PW 3 Ramesh Chandra is scribe of the F.I.R. PW 6 Ashok Singh, S.O. was the second Investigating Officer as mentioned above, PW 7 Dr. L.N. Verma conducted autopsy on the dead body of deceased Jodhey and proved the post mortem report Ext. Ka 6, PW 8 S.I. Ram Babu Misra prepared the inquest report and sent the

dead body to mortuary for autopsy. PW 9 Constable Ram Mohan brought the dead body to mortuary for autopsy. PW 10 S.I. Ramesh Chandra Sharma conducted the initial investigation in this case, and PW 11 Dr. O.P. Verma examined the deceased Jodhey when he was alive at P.H.C. Reosa.

8. On the other hand the accused denied the prosecution case as well as the fact that he committed the murder of his father. In his statement, he stated that he had gone to do labour work and when in the evening he came back, he was arrested by the Investigating Officer, and was falsely implicated in this case by the 'Daroga'.

9. On behalf of the defence D.W. 1 Dhirendra Kumar, Advocate was produced to prove the affidavit alleged to be filed by PW 4 Gyani, a witness, before the Magistrate stating therein that he had not seen the incident.

10. The learned Sessions Judge after considering the evidence on the record, came to the conclusion that the prosecution has successfully proved the guilt of the accused beyond reasonable doubt and therefore, he convicted and sentenced the accused appellant as mentioned above.

11. The accused-appellant aggrieved by the said judgment and order, preferred the present criminal appeal from Jail. The said appeal was time barred but we by order dated 11-3-1996 condoned the delay and directed that the appeal be listed at an early date. In these circumstances, the present criminal appeal has come up for hearing.

12. During the pendency of the appeal, Mrs. Begum Sahiba Qamal, Advocate filed power on behalf of the appellant and therefore, we have heard the learned counsel for the appellant as well as the Government Advocate and have perused the record.

13. The main contention of the appellant's counsel is that in the instant case, PW 1 Mani Ram who lodged the F.I.R. did not support the prosecution case and was declared hostile. The learned counsel for the appellant further pointed out that PW 4 Gyani no doubt had supported the prosecution case before the Sessions Court but he filed an affidavit before the Magistrate stating that he had not seen any

occurrence, therefore, there is no guarantee that this witness is telling the correct facts. According to the appellant's counsel, the testimony of PW 1 Mani Ram as well as PW 4 Gyani did not prove anything, therefore, after exclusion of their evidence, there remains only the testimony of PW 5 Chhotey Lal which is not sufficient to prove the guilt of the appellant beyond reasonable doubt.

14. We are unable to accept this contention.

15. PW 1 Mani Ram lodged a written report in the Instant case. The said report was admittedly scribed by PW 3 Ramesh Chandra. PW 3 Ramesh Chandra appeared before the Court and supported the prosecution case and stated that he had scribed the report on the dictation of Mani Ram PW 1 Mani Ram is admittedly the real brother of accused Bihari and therefore, he has some soft corner to him and due to the fact he did not support the prosecution case. PW 4 Gyani, no doubt, filed an affidavit Ext. Kha 1 in which he stated that he had not seen the incident and he was wrongly shown as eye witness but before the trial Court he clearly stated that one Bhagauti the brother-in-law (Bahnoi) of Bihari accused got his thumb impression on some paper. He further stated that he is an illiterate person and therefore, it would not be said that what was written in the said paper. PW 4 Gyani further supported the prosecution case before the Investigating Officer as well as before the Sessions Court. Apart from the fact that his affidavit was filed before the Magistrate, there is nothing on the record to show that he was not telling the correct facts. Apart from this, even if, we exclude the testimony of PW 1 Mani Ram and PW 4 Gyani, there remains the testimony of PW 5 Chhotey Lal and in our opinion the evidence of PW 5 Chhotey Lal is sufficient to convict the appellant in this case.

16. PW 5 Chhotely Lal is totally an independent witness, he used to live in the same village. He has stated that at about 9 a.m. when he was taking water from the well, , then, he heard the cries of Jodhey and saw Bihari assaulting Jodhey with Kudal. He also stated that Gyani as well as Mani Ram were also present at the time of the incident. PW 5 Chhotey Lal was cross-examined at length but there is nothing in his cross-examination on which basis it can be said that he is not telling the correct facts. In fact, PW 5 Chhotey Lal was not even cross-examined

on the fact of murder. PW 5 Chhotey Lal is totally an independent person and there is nothing on the record to show as to why he implicated Bihari, the accused in this case. There is also nothing on the record to show that in any way he was inimical to accused Bihari. The name of PW 5 Chhotey Lal further finds mention in the F.I.R. alleged to be lodged immediately after the incident. The statement of Jodhey was also recorded by the Investigating Officer and there is nothing on the record to show that there was any contradiction or discrepancy in his statement. In these circumstances in our opinion PW 5 Chhotey Lal is truthful and independent witness. The testimony of this witness further finds support from the medical evidence because the doctor who conducted autopsy on the dead body of deceased Jodhey found injury on the stomach of the deceased. The deceased Jodhey (when he was in injured condition) was medically examined at P.H.C Reosa just after the incident and the doctor found two wounds; one on the hand and the second on the stomach of Jodhey which further corroborate the prosecution case. Apart from this, at least the testimony of this witness further finds corroboration with the testimony of PW 4 Gyani who supported the prosecution case before the Court. In any case the whole testimony of PW 5 Chhotey Lal is sufficient to convict the accused and therefore, in our opinion, the learned Sessions Judge has committed no illegality in holding that the prosecution has successfully proved the fact that the accused is the person who caused injuries to the deceased on the said date, time and place.

17. Lastly, it is contended by the learned counsel for the appellant that even accepting the findings recorded by the Court below, no case under Section 302, IPC is proved but the case falls under Section 304(ii), IPC.

18. We find force in this contention. Even according to the prosecution case, the incident was not pre planned but the incident took place due to some altercation between father and son. The accused had no motive to commit the murder of his father. Just before the incident some altercation took place between father and son regarding stealing of Dhoti and Katori and on which accused Bihari gave a khurpa blow on the hand of the deceased. Jodhey (deceased) with the help of Mani Ram (PW 1) snatched the 'Khurpa' from his hands and this further provoked Bihari, the appellant and therefore, the appellant picked up a kudal from his house

and gave one Kudal blow on the stomach of the deceased Jodhey. It is undisputed that the blow was not repeated and further the doctor who examined Jodhey when he was alive, at P.H.C. Reosa found that both the injuries were simple. From the above mentioned facts, it cannot be inferred that the intention of the; accused-appellant was to murder his father even though in anger he might have committed this crime. The testimony of PW 5 Chhotey Lal does not show anything on which basis it can be said that the appellant had any intention to kill his father. It is not disputed that there was no major ill-will between the parties namely, the father and son. The accused caused only one injury and looking into the nature of the injury, it can neither be said that the accused was intended to cause such injury. According to the doctor who medically examined the deceased just after the incident when he was alive, found both the injuries as simple injuries. The incident also took place just at the spur of moment, it appears that the accused caused these injuries just in the heat of passion and altercation between the parties. The above mentioned view finds further support from the cases of State of U.P. v. Hari Om reported in 1998 SCC (Cri) 979 : 1998 AIR SCW 4130 as well as Ram Prakash Singh v. State of Bihar reported in 1998 SCC (Cri) 1045 : AIR 1998 SCW 1190. In view of these facts, it is proved that in any case after some altercation at the spur of moment the appellant who is son of deceased Jodhey, gave a single blow of Kudal to deceased and on the basis, it cannot be presumed that the appellant had any intention of causing death of his father Jodhey, though he may have the knowledge that in doing so, he may cause the death of his father Jodhey (deceased) and in those circumstances, in our opinion the culpability of the accused would not travel beyond Section 304(ii), IPC.

19. In our opinion this criminal appeal deserves to succeed to the extent that the offence committed by the appellant would not fall under Section 302, IPC. We therefore, set aside the conviction and sentence of the accused-appellant Bihari for the offence under Section 302, IPC and instead thereof, we convict appellant Bihari for the offence under Section 304(ii) IPC and impose a sentence of Seven Years Rigorous Imprisonment. Appellant Bihari is in Jail. He is directed to serve out the sentence of Seven Years Rigorous Imprisonment.

20. Accordingly, the present criminal! appeal is hereby, allowed with the aforesaid' modification.

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