

Niraj Kumar and ors. and Anand Kumar and anr. Vs. State of Bihar

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Court : Jharkhand

Decided On : Jun-27-2005

Reported in : [2005(4)JCR232(Jhr)]

Judge : S.J. Mukhopadhaya and; Hari Shankar Prasad, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 147, 148, 149 and 302

Appeal No. : Cri. Appeal Nos. 289 and 301 of 1998 (R)

Appellant : Niraj Kumar and ors. and Anand Kumar and anr.

Respondent : State of Bihar

Advocate for Def. : A.P.P.

Advocate for Pet/Ap. : T.R. Bajaj, Sr. Adv.,; A.K. Kashyap,; B.P. Jaiswal a

Disposition : Appeal dismissed

Judgement :

Hari Shankar Prasad, J.

1. Both the appeals (Cr. Appeal No. 301 of 1998 and 289 of 1998) are directed against the judgment of conviction and sentence dated 24.9.1998 passed in S.T. No. 122 of 1996 whereby and whereunder the learned Sessions Judge, Palamau at Daltonganj held the appellant, namely, Nazir guilty under Sections 302 and 148

of the Indian Penal Code and sentenced him to undergo R.I. for life under Section 302 of the Indian Penal Code and further sentenced him to undergo R.I. for two years under Section 148 of the Indian Penal Code, but both the sentences were directed to run concurrently. Other appellant, namely, Anil Kumar @ Pintu, Anand Kumar, Dhiraj Kumar and Niraj Kumar were also found guilty under Sections 302, 147 and 148 of the Indian Penal Code and they were also convicted and sentenced to undergo R.I. for life under Section 302 of the Indian Penal Code and further convicted and sentenced to undergo R.I. for one year under Section 147 of the Indian Penal Code, but both the sentences were directed to run concurrently.

2. Case of the prosecution in brief is that Dilip Kumar Dubey gave a fardbeyan on 17.10.1995 at 1.20 p.m. in the evening before the S.I. of, Sadar Police Station in Sadar Hospital that on the same day in the evening he along with his brother-in-law Ved Prakash Tiwari (since deceased) and Sushil Pathak went for stroll and as soon as they reached near Hotel Basant Vihar situated at Daltonganj market, five persons (appellants) who were standing at betel shop, at the sight of these three persons came near them and surrounded them from all sides and Dhiraj Kumar, one out of five appellants caught hold of Ved Prakash Tiwari, then he (informant) along with Sushil Pathak tried to rescue him. In the meantime, Niraj Kumar, Dhiraj Kumar, Anil Kumar and Anand Kumar who were armed with rods challenged to assault them whereupon Nazir took out sword and pierced the sword in the chest of Ved Prakash Tiwari. On this they raised alarm bachao-bachao and when he wanted to take care of Ved Prakash Tiwari, all of them fled away. On the alarm, nearby people assembled there with whose help Ved Prakash Tiwari was taken to the hospital where in course of treatment he died. The cause of occurrence is attributed to the fact that sister of Dilip Kumar Dubey, namely, Pushpa Kumari was appearing in the supplementary matriculation examination on the same day at 10.00 a.m. and she was taken to Ganesh Lal Agrawal High School, Daltonganj where his brother-in-law Ved Prakash Tiwari (since deceased) and his maternal uncle Om Prakash Dubey had gone there and they searched out the seat which sister of the informant was to occupy and at the same time, Niraj Kumar stopped him whereupon this informant asked that he and his other friends be allowed to go out. Thereafter some scuffle in between them took place and on persuasion and mediation of Ved Prakash Tiwari, the matter was settled. But in the second sitting

examination, Dhiraj Kumar with other associates came there and assaulted him and his friends with rod and at this time also, his brother-in-law Ved Prakash Tiwari persuaded them and matter was settled. Thereafter he gave information about this incident at the P.S. at 2.00 p.m. and from there police party came but by that time, the accused persons had fled away. Thereafter in the evening when he along with Ved Prakash Tiwari and Sushil Pathak had gone stroll, then this occurrence took place. On this piece of fardbeyan, a case being Sadar P.S. No. 310 of 1995 under Sections 147, 348 and 302 of the Indian Penal Code was registered and charge-sheet in the case was submitted against all the accused persons-appellants .

3. In course of trial, 13 witnesses were examined, evidence of PWs 1, 2, 3 and 4 is of no help to the prosecution. PW 5 who runs a shop. According to this witness, he was in his shop when he heard noise and he went there and saw Ved Prakash Tiwari (deceased) in injured condition and blood was oozing out from his stomach. Thereafter Ved Prakash Tiwari was taken to the hospital. Later on he came to know that one person namely Nazir was running away with sword in his hand.

4. PW 6 is the eye-witness. He supported the prosecution case. Similarly, informant who is also an eye-witness has supported the prosecution case. Besides this, PW 9 is the doctor who conducted post-mortem examination on the dead body of Ved Prakash Tiwari and found ante-mortem injuries on the person of the deceased. Injuries are incised wound 1 x 1/2' x 1/2' with dorsal aspect of right wrist joint and incised wound 1/2' x 1/2' x 1/2' on several right side of the chest wall and he found those injuries caused by sharp cutting weapons. According to him, about injury No. 2 he was definitely of the opinion that such injury can be caused by sword but he at the same time says that both injuries on the person of the deceased would not be possibly by a single blow.

5. Learned trial Court considered the evidence of witnesses, particularly eye-witnesses 6 and 11 and also the dying declaration (Ext. 5) recorded by PW 12 and came to a finding that murder was committed by Nazir with the help of other persons and thereby convicted and sentenced Nazir under Sections 302 and 148 of the Indian Penal Code and other appellants under Sections 302, 149 and 147 of

the Indian Penal Code.

6. Mr. T.R. Bajaj, learned senior counsel appearing for the appellants of both 'the appeals submitted that the FIR was drawn up at about 7.30 p.m. on 17.10. 1995 and though distance between the P.S. and the Court is about 2 Km, the FIR reached the Court on 18.10.1995. Further contention of the learned Counsel for the appellants was that FIR was drawn up on 17.10.1995 but it was dispatched from the P.S. on 18.10.1995, although fardbeyan was recorded at 19.20 p.m. meaning thereby at 7.20 p.m., it could have been sent to the Court at once but it was dispatched from the P.S. on 18.10.1995, thereby some manipulation have been made. But there is no scope for manipulation as the FIR was drawn up on 17.10.1995 in the night and it is but natural that the FIR will be sent on the next day to the Court and the next day this FIR was sent to the Court and received. Had it been a case that FIR was sent to the P.S. on 18.10.1995 and reached the Court on 19.10.1995, then it could have been a matter of manipulation, but it was sent to Court on 18.10.1995 and the FIR was received in the Court on 18.10.1995 itself and as such, argument advanced by the learned senior counsel on this point is not sustainable.

7. Learned Counsel drew our attention to the fact that the sanha which was brought on behalf of the defence, marked as Ext. A, could not be brought on record from the side of the prosecution even after Court allowed sufficient opportunity to the prosecution to bring sanha which was lodged at about 2.00 p.m. the same day and the police party on the basis of that sanha, went to examine those persons against whom sanha was lodged, but in sanha there was no mention of the name of any person and, therefore, it can safely be said that prior to the occurrence said to have taken place in the evening on 17.10.1995, no scuffle or trouble took place in between the parties at about 2.00 p.m. or near the examination hall in between the parties in the first sitting or in the second sitting of the examination because in sanha, names of these persons are not there and, therefore, previous scuffle cannot be the basis of the occurrence alleged to have taken place in the evening on the same day and this cannot lead to the inference that these appellants collected at the betel shop with weapons in their respective hands were waiting for this informant with Ved Prakash Tiwari and Sushil Pathak

and as soon as they came out for stroll, they were surrounded by these persons. This cannot be the ground that due to previous scuffle, they were bent upon teaching lesson to the prosecution party. If these persons were involved in the earlier scuffle, their names would have definitely come in the sanha lodged by one of three persons but no such sanha has been brought on record by the prosecution and that is the reason why prosecution was not pressing sanha to be brought on record. Another point of argument was that defence could successfully bring sanha on record though it being document of the prosecution but prosecution failed to produce, is no point or is not correct position, but it did intentionally suppress the document from being brought on record and that is why in order to give twist to the occurrence that took place in the night, this sanha was withheld. But on the other hand, learned APP for the State submitted that intention was riot to suppress the document from being brought on record but in spite of best effort by the prosecution, this document could not be brought and at the time of fardbeyan which was given by Dilip Kumar Dubey it was not known to him that this sanha will be suppressed in course of trial. But since he has lodged sanha, may be that he did not give names of the persons who were causing trouble because he did not like his sister's name to come and he did not know that subsequent thereto a bigger occurrence than this would take place and, therefore, he did not mention the names of the persons who were causing trouble and that is why since the names of the persons causing trouble are not in sanha, prosecution was not willing to produce this document. But now such document has been brought on record on behalf of the defence, which has been marked as Ext. A. But the fact is that the scuffle had taken place prior to the occurrence that took place in the evening and all the persons were involved in the occurrence and due to the fact that sister of the informant was involved and because of her the trouble started and the names of the accused persons were not given by informant party and it is fact that names of the persons were not known to them and subsequently thereto after the occurrence that took place in the night, their names have been given because one of the witnesses have stated that they came to know about the names of the persons after scuffle that took place in the day time. It is also a fact that whether names were there or not, but a sanha was lodged and that is enough to show that something had happened there. The explanation advanced on behalf

of the prosecution appears to be acceptable and there is no point in differing with it.

8. It was further contended on behalf of the appellants of Appeal No. 289 of 1998 that no overt act has been committed by them and only overt act is said to have been committed by Nazir who is not appellant in this very appeal and on whose behalf another appeal has been filed. It was pointed out that no doubt, they were said to have been armed with rod and rod is not a sharp cutting weapon; rather it is hard blunt substance and though they were armed with that weapon, they did not apply that weapon in assault and thereby, no overt act can be attributed to them in commission of alleged occurrence and, therefore, their intention cannot be said to commit murder of Ved Prakash Tiwari and they were as strangers there and their intention was not to commit murder, so they cannot be held guilty under Section 302/149 of the Indian Penal Code.

9. On the other hand, learned A.P.P. submitted that from the FIR as well as that of evidence of eye-witnesses, it is clear that all the five persons were together and besides Nazir who was armed with sword, other four appellants were armed with rods and it has also come in the evidence that all the five appellants surrounded three of them and Nazir pierced the sword in the most vital part of the body i.e. chest and as such, Intention of all the appellants including Nazir was to commit murder and, therefore, these two appellants are equally liable with other appellants.

10. Learned senior counsel while submission in Cr. Appeal No. 301 of 1998 was of the view that only one injury is said to have been caused by Nazir by piercing the sword into the chest of Ved Prakash Tiwari but opinion of the doctor is that two injuries by two different blows have been caused on the person of the deceased but from the FIR as well as evidence of eye-witnesses PW 6, it is evident that only one piercing blow by sword was given and, therefore, it can safely be said that there was some manipulation in the FIR and further that other two appellants did not commit any overt act and intention of this appellant namely, Nazir who is said to have given sword blow, cannot be to commit murder of Ved Prakash Tiwari because he did not give any second blow and if his intention would have been to

commit murder, he must have given another blow but he is said to have given one blow only and, therefore, in the backdrop of the fact and evidence, it cannot be a case of murder under Section 302/149 of the Indian Penal Code but it is a case which should have come under Section 304, Part I of the Indian Penal Code and not under Section 302 of the Indian Penal Code.

11. It was also pointed out that PWs 6 and 10 are the only eye-witnesses to the occurrence but they are interested witnesses and from the evidence of PW 6, it appears that occurrence is said to have taken place in the busy area but not a single witness of that area has come to support the case of the prosecution and this is a serious lacuna in the prosecution case. It was further pointed out that PW 6 has admitted in his evidence that he did not know appellants before the occurrence and in the sanha (Ext. A), no names were there, so he was not in a position to name the appellants in his evidence. It was also pointed out that no T.I. Parade of these appellants was held and, therefore, PW 6 was not in a position to name the appellants in his evidence. In this connection, it may be said that so far as sanha (Ext. A) is concerned, about that discussions has been made in para 7. So far as contention of the learned Counsel for the appellants that PW 6 did not know the names of the appellants from before the day of occurrence is concerned, in this connection it may be said that identification in the Court is identification of the appellants and appellants have been identified by the PW 6 in the Court. Further, after occurrence this witness must have come to know about names of the persons and, therefore, it is not unnatural as to how he came to know about the names of the appellants and, therefore, test identification parade was not necessary because this witness has identified the appellants in the dock. It is true that occurrence is said to have taken in the busy area and one of the person has come to say that he saw some persons running away but he did not name them. PW 5, who runs a betel shop, on alarm went and saw Ved Prakash Tiwari lying in injured condition and he immediately came to know that one Nazir was running away with sword in his hand and, therefore, soon after occurrence he went there and came to know that Nazir was running away with sword and this part of evidence of PW 5 is also admissible. Besides this, PWs 6 and 10 have named other appellants and have also stated that they surrounded them along with Ved Prakash Tiwari and, Nazir gave him piercing sword blow and others were armed

with rod, this much of evidence has come against all the persons. PW 6 or 10 cannot be said to be interested witnesses because they were present at the time of occurrence and had even been surrounded by the appellants. Further that even if they are interested persons, they have stated truth because they have got no enmity with the appellants and there appears to be no reason for implication of the appellants falsely because of any other reasons.

12. Having considered the submissions of the learned Counsel for the parties as well as evidence and materials on record and from all these facts, it is apparently clear that prosecution has been able to prove occurrence in the manner as alleged by it beyond all reasonable and the learned Court below has rightly convicted appellant Nazir under Section 302 of the Indian Penal Code and other appellants under Section 302/149 of the Indian Penal Code because other appellants were together with appellant Nazir at the time of occurrence and had even helped Nazir in surrounding Ved Prakash Tiwari and two other persons and were armed with rods, thus they are liable under Section 302/149 of the Indian Penal Code and have rightly been convicted by the learned Court below under Section 302/149 of the Indian Penal Code and the judgment of conviction and sentence passed by the learned Court below does not require any interference.

13. In the result, there being no merit in both the appeals and both are accordingly dismissed.

S.J. Mukhopadhaya, J.

14. I agree.