Nawal Singh Vs State Of Bihar

Court: Patna High Court

Date of Decision: Dec. 23, 2021

Acts Referred: Indian Penal Code, 1860 â€" Section 34, 302, 449
Arms Act, 1959 â€" Section 27
Code Of Criminal Procedure, 1973 â€" Section 161, 162, 313

Hon'ble Judges: Ashwani Kumar Singh, J; Rajeev Ranjan Prasad, J

Bench: Division Bench

Advocate: Ajay Kumar Thakur, Md.Imteyaz Ahmad, MalayKumar Choudhary, Shivam, Vaishnavi Singh, Abhimanyu Sharma, Manohar Prasad Singh, Nagendra Kumar, Samir Kumar Sinha

Final Decision: Allowed

Judgement

1. The present criminal appeal arises out of the judgment dated 10th January, 2014 passed by learned Adhoc Additional District & Sessions Judgte-4,

Bhagalpur in Sessions Trial No. 1155 of 2010 arising out of Sabour P.S. Case No. 154 of 1995 dated 05.07.1995 by which the sole appellant has been

convicted for the offences punishable under Sections 302 and 449 of the Indian Penal Code (in short Ã¢â‚¬ËœIPCÃ¢â‚¬â„¢) as also Section 27 of the Arms

Act. The appellant has also challenged the order dated 15.01.2014 by which consequent to the judgment of the conviction the learned trial court has

sentenced the appellant to under go rigorous imprisonment for life and fine of Rs.25,000/- under Section 302 IPC and further ordered that in case of

non-payment of fine the appellant shall suffer an additional imprisonment of three years, for the offence under Section 449 IPC the appellant has been

sentenced to undergo five years rigorous imprisonment and to pay a fine of Rs.5000/-, in default one year extra imprisonment and further under

Section 27 of the Arms Act the appellant has been awarded a sentence of three years and fine of Rs.2000/-, in case of default of payment of fine six

months extra imprisonment has been imposed. All the sentences are to run concurrently.

Prosecution Case

2. One Ashish Kumar Singh (PW-2) lodged his fardbeyan on 05.07.1995 at 09:30 A.M. in village Nadiyawa under Sabour Police Station before the

Officer-In-charge of the Police Station. He alleged that on 04.07.1995 at about 09:00 P.M., he had been sleeping at the veramda of his house after

taking dinner. His father was sleeping in the angan (Courtyard) on the floor. Whereas his mother was sleeping in the western side of the veramda on

a Ã¢â‚¬Ëœchowkiâ€™ with her two little grandsons.

At about 12 Oâ€™clock in the night, the informant heard a sound as somebody jumped in his angan whereupon he got awaken and found that the co-

villager Nawal Singh (the appellant) and Anil Singh (brother of the appellant) both sons of late Jagdish Singh were standing having gun in their hands.

Nawal Singh asked Ã¢â‚¬Å“Sale chup chap rahoÃ¢â‚¬ and Anil Singh opened the eastern side door of the house whereafter co-accused Suresh Mandal,

Bulla Mandal, Kapoori Tanti and Rana Singh being the co-villagers of the informant, Jitendra Singh and Surji Singh residents of village Ã¢â‚¬ËœChhoti

Zameenâ€™ under the same police station together with 8-10 other unknown persons entered in the angan of the informant. The informant thereafter

taking the opportunity and saving himself from the eyes of the accused persons entered inside the room of the house situated in the middle towards

western side and after concealing himself he was watching the occurrence. He alleged that Bulla Mandal (acquitted in Sessions Trial No. 632 of

1996) asked Ã¢â‚¬Å“Dekhte kya ho goli maroÃ¢â‚¬, on this the co-accused Suresh Mandal (acquitted in Sessions Trial No. 632 of 1996) fired from his gun on

the father of the informant who was lying on the floor of the angan being afraid of the accused persons. The informant further claimed that at this

stage when his mother came to save his father, Nawal Singh (the appellant) fired on her by his gun, thereafter co-accused Jitendra Singh fired on the

face of the mother of the informant and another co-accused Anil Singh fired on the father of the informant. The accused persons had fired 7-8 bullets

at the mother and the father of the informant and fled away from the door of the eastern side. The informant claimed that after the accused persons

fled away he and his elder sister Nandini Devi (P.W.-1) wife of late Munna Singh resident of village Budhshan, P.S. Meharma, Dist Godda who was

at the residence of P.W. 2 raised hulla shouting and crying whereupon co-villagers assembled there and the members of the force deputed in the

village came who were told about the occurrence. The informant alleges that the occurrence had taken place because of the enmity with the family of

Nawal Singh (the appellant) as the parties are fighting several litigations in the court. On the basis of fardbeyan of P.W. 2, the FIR was lodged and the

investigation was handed over to Shri B.D. Tiwari, Sub-Inspector of Police (not examined).

Chargesheet and the Charges Framed

3. Upon completion of the investigation, the police submitted chargesheet bearing no. 151/1995 showing co-accused Surji Singh, Bulla Mandal, Suresh

Mandal and Rana Singh in judicial custody whereas co-accused Jitendra Prasad Singh, Anil Singh, Karpuri Tanti and this appellant were shown

absconding. Cognizance of the offence under Sections 449, 302/34 of the Indian Penal Code and Section 27 of the Arms Act were taken on

07.12.1995. The records of the absconding accused including that of the present appellant were separated. Charges were framed in Sessions Trial

No. 632 of 1996 against the co-accused Surji Singh @ Suraj Narayan Singh, Bulla Mandal, Suresh Mandal and Rana Singh for the offences

punishable under Sections 302/34 and 449 of the Indian Penal Code. Accused Suresh Mandal was further charged for the offence under Section 302

IPC and Section 27 of the Arms Act. In ultimate analysis, all of them were acquitted by the trial court. PW-2 was declared hostile.

Evidence Against the Appellant

4. So far as present appellant is concerned, he was produced in this case pursuant to the production warrant issued by learned SDJM on 28.06.2007

after his arrest in the another case being Sabour Goradih P.S. Case No. 25 of 2005 giving rise to Sessions Trial No. 1283 of 2006 in which also the

appellant has been convicted by the learned 1st Additional Sessions Judge, Bhagalpur and has been awarded life imprisonment and other sentences.

Charges were framed against the appellant for the offence under Sections 302 and 449 IPC as also under Section 27 of the Arms Act.

5. In course of trial, altogether five witnesses were examined on behalf of the prosecution. They are:- P.W.1 Nandini Devi (daughter of the

deceased), P.W. 2 Ashish Kumar Singh (informant and son of the deceased), P.W. 3 Fakir Singh (Seizure list witness), P.W. 4 Ram Swaroop Singh

(inquest report and seizure list witness) and P.W. 5 Dr. Kailash Jha who had conducted the autopsy of the body of Meena Devi and Naresh Singh

both the deceased.

6. PW-2 proved his signature on the fardbeyan (Ext.-1). PW-3 proved his signature on the seizure list (Ext.-2). P.W. 4 proved his signature on the

inquest report (Ext.-3) and the seizure list (Ext.-4). P.W.

5 proved both the post mortem reports and his signature thereon as Ext.-5 and Ext.-5/1 respectively.

7. On behalf of the prosecution, certified copy of the evidence of the Investigating Officer Brahamdev Tiwary in Sessions Trial no. 632 of 1996 got

exhibited as a public document (Ext.-6).

8. The defence did not examine any witness. In his statement under Section 313 Cr.P.C., the appellant simply denied the question put to him and he

claimed his innocence.

9. The case of defense was that the sanha entry recorded in the police station prior to registration of the formal FIR has not been proved in the court,

therefore, the case of the prosecution becomes suspicious. The defense argued that the fardbeyan on the basis of which the FIR has been lodged

cannot be said to be Ã¢â‚¬Ëœ First InformationÃ¢â‚¬â„¢ and it will be taken to have been made under Section 161 Cr.P.C. which would be hit by the mandate of

Section 162 Cr.P.C. It was further argued that there is no eye witness to the occurrence and none of the prosecution witness is reliable. The defense

submitted that P.W. 1 and P.W. 2 are full brother and sister, they are, therefore, related witnesses hence, their evidence should not be believed.

10. Submission was that in Sessions Trial No. 632 of 1996 which arises out of this very case, and in the present trial P.W. 1 and P.W. 2 have given

conflicting and contradictory evidences in both the cases, benefit of contradictions will go in favour of the accused. The suggestion was that to falsely

implicate the appellant in order to usurp the land property of the appellant, he has been falsely implicated. There is no motive of the occurrence and no

independent witness or persons from neighbourhood have been examined. The defense argued that Investigation Officer (I.O.) in this case was a

material witness but he has not been examined. The learned trial court, however, agreed with the prosecution case, rejected the contention of the

defense and held the appellant guilty of the offence as stated at the top of the judgment and sentenced accordingly.

Submissions on behalf of the appellant

11. Mr. Ajay Kumar Thakur, learned counsel for the appellant has made the following submissions:-

12. The occurrence is said to have taken place on 04.07.1995 (night hours) at 12 OÃ¢â‚¬â„¢clock. In his fardbeyan, PW-2 has stated that after he and

PW-1 raised hulla, the co-villagers and the members of the police force posted in the village reached there and they were told about the occurrence

but in course of investigation no independent person could be examined, even the co-villagers of the neighbouring houses and the members of the

police force about whom it was stated that they were told about the occurrence have not been examined. It is his submission that the fardbeyan of

PW-2 is not the Ã¢â‚¬Ëœfirst informationÃ¢â‚¬â„¢ and according to him, Ã¢â‚¬Ëœthe first informationÃ¢â‚¬â„¢ was the information given to the members of the police

force stationed in the village who had come at the place of occurrence soon after the alleged occurrence took place. Learned counsel points out that

in his cross-examination P.W. 2 has stated that there is no police camp in his village (paragraph Ã¢â‚¬Ëœ16Ã¢â‚¬â„¢).

13. Learned counsel submits that P.W. 1 and P.W. 2 are not at all reliable witnesses and any conviction based on their testimony would not be safe. It

is submitted that P.W. 1 is widow daughter of the deceased. She has stated in her examination-in-chief that she was sleeping in the house of her

father. Her father was sleeping in the Angan. Nawal Singh entered in the house and fired upon her father, thereafter Anil Singh fired on him and

Kapoori Tanti fired on her father. When her mother came to save her father, accused Nawal Singh fired on her cheek followed by the firing by Anil

Singh and Kapoori Tanti.

14. Learned counsel submits that P.W.1 did not hear any sound of somebodies jumping into the Angan as has been claimed by P.W. 2. Further P.W.1

no where claims in her examination-in-chief that she had awaken and could see from the room what were happening in the Angan. She has not

claimed that she saw the occurrence from her naked eyes in the dead of night. In para Ã¢â‚¬Ëœ3Ã¢â‚¬â„¢ after of her deposition P.W. 1 has stated that her

father and mother died upon suffering the bullets. She shouted whereafter people assembled and saw the occurrence.

15. In her cross-examination her attention was drawn towards her deposing as a witness in which co-accused were acquitted. She did not remember

whether in her evidence she had stated that Nawal Singh (the appellant) jumped into the Angan, but she claims to have told the I.O. that the appellant

had jumped into the Angan.

16. Mr. Thakur submits that from her own evidence in the present trial it is evident that this witness was sleeping inside the room when the

occurrence took place and she had not seen the appellant jumping into or entering into the Ã¢â‚¬ËœAnganÃ¢â‚¬â„¢. She does not claim that she got awaken in

course of the occurrence or had heard the voice of the appellant, she did not remember whether it was night of Ã¢â‚¬ËœAmawasyaÃ¢â‚¬â„¢ or

Ã¢â‚¬ËœPurnimaÃ¢â‚¬â„¢. Learned counsel submits that the defence though drew the attention of this witness on this point to know the source of light if any

during the night hours, P.W. 1 did not disclose any other source of light and simply said that she did not remember whether it was Ã¢â‚¬ËœAmavasyaÃ¢â‚¬â„¢

or Ã¢â‚¬ËœPurnimaÃ¢â‚¬â„¢. In para 9 of her deposition P.W. 1 admits that in the night of occurrence she was sleeping in the room which was made of straw

from all sides and there was no door.

17. Learned counsel submits that the veracity of this witness may be further tested from her statement made in Para Ã¢â‚¬Ëœ12Ã¢â‚¬â„¢ and Ã¢â‚¬Ëœ13Ã¢â‚¬â„¢ of the

deposition. In para Ã¢â‚¬Ëœ12Ã¢â‚¬â„¢ she says that within one minute from the death of her father and mother she had hugged her father and then her

mother. In para Ã¢â‚¬Ëœ13Ã¢â‚¬â„¢ she claims that her father had said that he was killed by Nawal Singh (the appellant). It is submitted that P.W. 1 went to

the dead body of her father, she herself says that she touched the body of her father within one minute of his death, therefore, she confirms that when

she went to her father he was already dead, therefore, her statement in para Ã¢â‚¬Ëœ13Ã¢â‚¬â„¢ is nothing but a material contradiction with her own statement

in paragraph Ã¢â‚¬Ëœ12Ã¢â‚¬â„¢.

18. It is submitted that in paragraph Ã¢â‚¬Ëœ13Ã¢â‚¬â„¢ itself P.W. 1 says that she and her brother (P.W. 2) had concealed themselves, therefore, they did not

talk about the occurrence. Later on they talked with each other about the occurrence. Thus, it is submitted that the very presence of this witness is

highly doubtful and the defence suggested to this witness in course of her cross-examination (para 22) that she was neither present at the place of

occurrence nor she had seen the occurrence.

19. It is pointed out that in para Ã¢â‚¬Ëœ14Ã¢â‚¬â„¢ of her deposition, this witness has stated that in the night of the occurrence Ã¢â‚¬Å“HUM LOG ROTI SABJI

DUDH KHAYE THEIÃ¢â‚¬ but the post-mortem report Exts. 5 and 5/1 show no food particles in the abdomen of the deceased, thus, P.W. 1 stands

contradicted by the doctor (P.W. 5) and it raises grave doubt on the evidence of P.W. 1.

20. In para Ã¢â‚¬Ëœ16Ã¢â‚¬â„¢, P.W.1 says that she had heard 100 rounds of firing and in para Ã¢â‚¬Ëœ18Ã¢â‚¬â„¢ she says that at the place of occurrence different

kinds of bullets were fired. Learned counsel submits that a careful reading of these two paragraphs would lead to the suggestion of the defence that

the family members of the deceased and the deceased Naresh Singh were engaged in commission of crime and they were killed in gang war of

supremacy. P.W. 1 admits that her brother Indradeo was killed by Police in an encounter and her father had gone jail in connection with kidnapping

case of the son of Anant Mandal. Her two brothers were earlier murdered and she had herself gone to jail in the murder case of Awadh Kishore @

Awadhi.

21. Learned counsel submits that 100 rounds of firing would have taken place somewhere else only. It is submitted that P.W. 1 is contradicting the

prosecution case on many score and all are material contradictions. This witness is related and inimical witness and her deposition is not trustworthy.

22. The defence suggested her that she was not present at the place of occurrence and had not seen the occurrence which was denied by her

(paragraph Ã¢â‚¬Ëœ22Ã¢â‚¬â„¢ of her deposition). Learned counsel submits that her examination-in-chief is contrary to the claim of P.W. 2 in his fardbeyan

(Ext. 1).

23. Learned counsel points out that in paragraph Ã¢â‚¬Ëœ19Ã¢â‚¬â„¢ PW-1 has stated about the persons residing in the neighbouring houses but none of these

persons have been examined. She has stated that first of all her neighbour Rajendra Singh and Sushil Tanti came to the place of occurrence but even

these two persons have not been examined.

24. Learned counsel submits that the learned trial court could not appreciate the evidence of P.W. 1, apparently, she was making a false statement in

Paragraph Ã¢â‚¬Ëœ13Ã¢â‚¬â„¢ where she said that her father had told that this appellant had killed him. It is submitted that her statement materially differs with

the statement of P.W. 2. Learned counsel submits that P.W. 2 has stated in his fardbeyan (Ext. 1) that he somehow slipped in middle room situated

western side of veramda of his house saving himself from the eyes of the accused persons but in course of trial in his examination-in-chief, P.W. 2

states that when he got awaken on hearing the sound of someone jumping into the courtyard, he found that Nawal Singh and Anil Singh were there

having guns in their hands and both of them asked him to stop otherwise they would kill him, they also threatened P.W. 2 not to shout, therefore, in his

examination-in-chief, P.W. 2 does not say that he had been watching the alleged occurrence from inside the room. This witness says that the reason

for the alleged occurrence was that his brother Vidya Singh was earlier murdered in which this appellant is the accused and the father of the P.W. 2

was a witness.

25. This witness has stated in his cross-examination that he is not literate and had not got his fardbeyan read over by any other person than the

daroga. He had not seen daroga. He states that he had not taken name of the accused Surji Singh @ Suraj Narayan Singh, Bulla Mandal, Suresh

Mandal and Rana Singh. He did not remember to have given any application in any court regarding wrong recording of these names in the fardbeyan.

He remembers to have given evidence in Sessions Trial No. 632 of 1996 and in that he was declared hostile and the accused persons in the said trial

were acquitted. P.W. 2 states that in Sessions Trial No. 632 of 1996, he had stated about this appellant having shot dead his father. He denied that

there was any case against his father, the brothers and sister. In Paragraph Ã¢â‚¬Ëœ11Ã¢â‚¬â„¢ of his deposition, P.W. 2 states that he cannot say that the

injury was caused by which weapon, he did not remember that police had seized any article from the place of occurrence. In Paragraph Ã¢â‚¬Ëœ20Ã¢â‚¬â„¢

this witness says that he could not have any talk with his father. This witness says about the people residing in the neighbouring houses and states that

10 minutes after the occurrence, Sogarat Singh and Gopal Thakur had come there and he had not given information about the occurrence.

26. Learned counsel submits that this part also differs with the statement of PW-1 who claims that her father told about the appellant killing him, PW-

2 says that he could not have any talk with his father and this witness does not take name of Rajendra Singh and Sushil Tanti as the persons who had

come at the place of occurrence as stated by PW-1.

27. Mr. Thakur submits that the veracity of the witness (PW-2) has to be examined keeping in mind the deposition of this witness in Sessions Trial

No. 632 of 1996 in which he was declared hostile. His deposition in present case itself contains his statement that he was declared hostile in the earlier

case. In the present trial P.W. 2 says that there was no police camp in the village (para 16), his attention was drawn on this point to his deposition in

S.T. No. 632 of 1996 in which in para Ã¢â‚¬Ëœ18Ã¢â‚¬â„¢ P.W. 2 has stated that after the occurrence the police force posted in the village had arrived. When

confronted, P.W. 2 says in para Ã¢â‚¬Ëœ17Ã¢â‚¬â„¢ that he did not remember that in S.T. no. 632 of 1996 he had deposed that after the occurrence police

force posted in the village had arrived.

28. Learned counsel, therefore, submits that P.W. 2 is changing his stand from one case to another. He is also making false statements regarding the

criminal antecedents of his family members, his deceased father and also about P.W. 1. This P.W. 2 heard 7 rounds of firing whereas P.W. 1 claimed

100 rounds of firing and different kinds of bullets were fired. In para Ã¢â‚¬Ëœ12Ã¢â‚¬â„¢ P.W. 2 says he did not remember whether Daroga had seized any

article from the place of occurrence. P.W. 2 himself makes conflicting statement when he says in paragraph Ã¢â‚¬Ëœ2Ã¢â‚¬â„¢ that the cause of occurrence is

that this appellant had killed the brother of P.W. 2 and in that case the deceased father of P.W. 2 was a witness but at the same time in para

Ã¢â‚¬Ëœ7Ã¢â‚¬â„¢ P.W. 2 says he had no enmity with this appellant. Learned counsel submits that P.W. 2 is inimical, related and interested witness of this

case. His interest in conviction of the appellant is crystal from the fact that in the fardbeyan he implicated co-accused Suresh Mandal as assailant but

S. T. No. 632 of 1996 he disowned his own statement recorded in fardbeyan and took name of this appellant. The explanation furnished by him to

deviate from his fardbeyan are only liable to be rejected as not trustworthy.

29. Learned counsel submits that non-examination of the investigating Officer has highly prejudiced the case of the appellant. Had the I. O. been

examined, the defence could have extracted his contradictions on the changed version of the informant. The attention of the informant P.W. 2 was

drawn towards his fardbeyab (Ext. 1) and his deposition in S. T. No. 632 of 1996 in which he was declared hostile. Thus, this much may be looked

into without looking into the evidence of the PW-2 in the earlier Sessions Trial No. 632 of 1996.

30. Regarding PW-3 and PW-4, learned counsel submits that PW-3 is the seizure list witness and he has stated that he did not know about the alleged

occurrence. Nothing was seized in his presence. Similarly, PW-4 who is witness on the inquest report and the seizure list has proved his signature on

Ext.-3 and Ext.-4 but in his cross-examination, PW-4 states that none of these exhibits were prepared in his presence and daroga had not read out the

contents thereof to this witness.

31. Learned counsel submits that Dr. Kailash Jha (P.W.5) has proved from the post-mortem reports Ext.-5 and Ext. 5/1 that the deceased Naresh

Singh had suffered four firearm injury- wound of entry and exit of injury No. 3. He had recovered pellets from lungs tissues. The deceased Meena

Devi had suffered two anti-mortem injuries i.e. (i) lacerated wound at right cheek size 3-1/2cm Ãƒâ€” 2cm and (ii) firearm wound of entry at right supra

clavicular and clavidle fractured at mid-zone. PW-5 has been examined at length. He stated that firing had been made from some distance and some

upper place. He did not find any charring or burning on the wounds. He has further stated that injury no. 1 may be caused by side of the back of the

person as injury No. 1 is on buttock and injury nos. ii and iii on Naresh Singh are on front side andÃ, from close range. No food article was found in

the abdomen of Meena Devi and same is the position in the case of Naresh Singh. Both the deceased had not taken meal before the occurrence. The

doctor has further opined that after sustaining injury, Meena Devi could not have spoken even a single word whereas Naresh Singh can speak for an

hour and he may survive for an hour.

32. Learned counsel further submits that P.W. 1 has stated that in the night at about 10:00 P.M. they had taken food but the doctor has not found any

food in the stomach in course of post-mortem.

33. It is the specific submission of Mr. Thakur that the prosecution has developed the case during trial. As per fardbeyan of PW-2, this appellant had

only fired one shot on the mother of the informant, however, P.W. 1 has stated that three persons had fired upon her mother, the post-mortem report

shows two injuries on her body. P.W. 2 had specifically claimed in Ext. 1 that his father was shot at by co-accused Suresh Mandal but in course of

trial, however, P.W. 2 has completely changed his version and has stated that this appellant and co-accused Anil Singh and Kapoori Tanti had fired

upon his father.

34. Learned counsel submits that there is no proof that in the angan the alleged occurrence took place. No empty cartridges were recovered from the

place of occurrence. No blood stains have been found and non-examination of I.O. of this case has hugely prejudiced the case of the defence. Had

the I.O. been brought in the dock, the defence could have asked about the place of occurrence and the rooms in which P.W. 1 claims to be sleeping

and P.W. 2 concealed himself whether the police outpost is in the village or not. the I.O. was the material witness, withholdment of him would lead to

an adverse inference. It is submitted that deposition of I.O. in Sessions Trial No. 632 of 1996 could not have been exhibited as a public document.

Nobody came in dock to say that the I.O. is no more, thus, if the I.O. is still alive, his deposition in earlier trial is not admissible and it cannot be used

against the appellant.

35. Learned counsel has relied upon the judgment of the HonÃ¢â‚¬â„¢ble Supreme Court in the case of Arjun Marik & Others Vs. State of Bihar reported

in (1994) Supp. (2) 372 ; Mohan Lal & Others vs. The State of Rajasthan reported in 2000 Cr.L.J. 2982; Nallabothu Ramulu Seetharamaiah & Ors.

Vs. State of Andhra Pradesh reported in 2014 (12) SCC 261 ; Amar Nath Jha Vs. Nand Kishore Singh & Others reported in AIR 2018 SC 3597;

Govindaraju @ Govinda vs. State by Sriramapuram Police Station and Another reported in (2012) 4 SCC 722.

Submission on behalf of the State

36. Mr. Abhimanyu Sharma, learned Additional Public Prosecutor for the State has opposed the case of the appellant. Learned counsel submits that

both the witnesses i.e. PW-1 and PW-2 are the eye witnesses to the occurrence and they had identified this appellant that he jumped into the

courtyard (angan) of their house and fired upon their father and mother. They are related witnesses but are trustworthy and wholly reliable.

Consideration

37. Having heard the rival contentions and upon perusal of the records, I find that the foundation of the present case is the fardbeyan (Ext.-1) of PW-

2. This Court, therefore, first examines the fardbeyan and the deposition of PW-2 in the present case and the impact of his admission that in Sessions

Trial No. 632 of 1996 he was declared hostile. Whereafter the co-accused who were facing trial in the said case were acquitted, then the material

contradiction between P.W. 1 and P.W. 2 and the evidentiary value/trustworthiness of their evidence would be looked into.

38. In his fardbeyan (Ext. 1), this witness P.W. 2 has stated that the occurrence had taken place in the night of 04.07.1995. According to him, he had

concealed himself in the middle room situated towards the western side of his house and was watching the occurrence from the said room. The

occurrence had taken place at 12 OÃ¢â‚¬â„¢clock in the night hours and even if it is assumed for sake of assumption that he identified this appellant

standing there having a gun in his hand, the actual occurrence of killing has taken place after all other co-accused entered into the courtyard with 8-10

other unknown persons. P.W. 2 claims that it was co-accused Bulla Mandal (already acquitted) who had ordered to kill whereupon Suresh Mandal

fired at his father. In course of his deposition in Sessions Trial No. 632 of 1996, PW-2 has stated that he had not taken the name of Bulla Mandal and

Suresh Mandal (paragraph Ã¢â‚¬Ëœ6Ã¢â‚¬â„¢ of the deposition in the present case). He changed his version in course of trial in S. T. No. 632 of 1996 saying

that this appellant had killed his father but in the present trial he has implicated Nawal Singh (the appellant), Anil Singh and Karpuri Tanti as the

persons who had fired on his father. It is true that the I.O. has not been examined in this case and attention of this witness has not been drawn

towards the statement made by him under Section 161 Cr.P.C., but at the same time this Court finds that the attention of this witness was drawn

towards his fardbeyan (Ext.-1) and this witness has turned around to say that he had not taken the names of Surji Singh @ Suraj Narayan Singh, Bulla

Mandal, Suresh Mandal and Rana Singh.

39. PW-2 says that he is an illiterate person but he has proved his signature on the fardbeyan which makes it clear that PW-2 can read and write in

Hindi. His signature is coherent and gives an impression to this Court that he knows Hindi, therefore, this Court believes that in course of Sessions

Trial No. 632 of 1996 this witness improved and deviated from his fardbeyan and materially contradicted his own statement (Ext. 1). He was declared

hostile.

40. This Court further finds that PW-2 changed his statement as respect firing upon his mother as well. In his fardbeyan he named this appellant as

the person who had fired upon his mother by gun and then co-accused Jitendra Singh had fired on the face of his mother. But in his deposition, he is

naming Anil Singh and this appellant Ã, as the person who had fired upon his mother. PW-2 nowhere states as to how in the darkness of the night

from inside the room he could see as to who fired on whom. No source of light has been disclosed in which he could have identified as to who fired on

whom. In his fardbeyan, he claims to have watched the whole occurrence after concealing himself inside the room. It seems highly improbable given

the presence of at least 9 named and 8-10 other unnamed persons. This witness has though denied the suggestion in paragraph Ã¢â‚¬Ëœ7Ã¢â‚¬â„¢ of his cross-

examination that he had enmity with this appellant and for that reason he had deposed against him, the witness has himself stated in paragraph

Ã¢â‚¬Ëœ2Ã¢â‚¬â„¢ of his examination-in-chief that his brother was earlier killed, this appellant and Anil Singh had killed him and in the said case his father was

a witness. Reading of paragraph Ã¢â‚¬Ëœ2Ã¢â‚¬â„¢ and paragraph Ã¢â‚¬Ëœ9Ã¢â‚¬â„¢ of his deposition makes it clear that this witness was inimical to this appellant as

he had a suspicion that this appellant had killed his brother and because his father was a witness in the said case he has been killed by this appellant.

41. If the deposition of PW-2 is read together with the deposition of PW-1, it would appear that both of them materially differ with each other.

According to PW-1, she had heard sound of 100 rounds of firing. Different kind of bullets were fired whereas P.W. 2 heard only seven rounds of

firing. She had admitted that her father (deceased) had gone to jail though in connection with kidnapping case and in the case of a land dispute. Her

brother Inderdev was killed by police in an encounter. P.W. 1 states in paragraph Ã¢â‚¬Ëœ13Ã¢â‚¬â„¢ that she and her brother Ashish had concealed

themselves and they had talked about the occurrence after some time. P.W. 1 says in paragraph Ã¢â‚¬Ëœ13Ã¢â‚¬â„¢ of her deposition that her father told that

this appellant had killed him but at the same time P.W. 2 says that his father was shot at by co-accused Anil Singh and this appellant and he died

whereafter she went and hugged her fatherÃ¢â‚¬â„¢s body and then her motherÃ¢â‚¬â„¢s body. Both P.W. 1 and P.W. 2 are said to have gone to the dead

body simultaneously shouting about the occurrence but P.W. 2 says he could not have any talk with his father. Thus, it is not believable that P.W. 1

was told by her father that this appellant killed him, if it is so why P.W. 2 does not support this version. P.W. 2 has concealed the correct information

while stating in paragraph Ã¢â‚¬Ëœ10Ã¢â‚¬â„¢ that his father, brother and sister were not facing any case, the fact is that P.W. 1 has admitted that her father

had gone to jail in connection with kidnapping case and in the case of land dispute, she had herself gone jail in connection with the murder case and

her one of the brothers was killed in an encounter by police. Two other brothers were murdered. Both the witnesses are quite inconsistent and

standing at poles apart in the matter of hearing of sound of firing. The credentials of these two witnesses are not looking clean and trustworthy to this

Court.

42. In the case of Govindaraju @ Govinda (supra), the HonÃ¢â‚¬â„¢ble Supreme Court has occasion to consider the testimonies of the witnesses and for

that purpose, the HonÃ¢â‚¬â„¢ble Supreme Court referred the judgment of the HonÃ¢â‚¬â„¢ble Apex Court in the case of Lallu Manjhi versus State of

Jharkhand reported in (2003) 2 SCC 401. Paragraphs Ã¢â‚¬Ëœ24Ã¢â‚¬â„¢ and Ã¢â‚¬Ëœ25Ã¢â‚¬â„¢ from the judgment of Govindaraju @ Govinda (supra) are quoted

hereunder for a ready reference:-

Ã¢â‚¬Å“24. It is a settled proposition of law of evidence that it is not the number of witnesses that matters but it is the substance. It is also not necessary

to examine a large number of witnesses if the prosecution can bring home the guilt of the accused even with a limited number of witnesses. In Lallu

Manjhi v. State of Jharkhand (2003) 2 SCC 401 :2003 SCC (Cri) 544 (SCC p. 405, para 10), this Court had classified the oral testimony of the

witnesses into three categories:

(a) wholly reliable;

(b) wholly unreliable; and

(c) neither wholly reliable nor wholly unreliable.

In the third category of witnesses, the court has to be cautious and see if the statement of such witness is corroborated, either by the other witnesses

or by other documentary or expert evidence.

25. Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and

after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be

cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the

testimony of a sole eyewitness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not

be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of

the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty.Ã¢â‚¬â€‹

43. In this case, this Court is of the considered opinion that the evidence of PW-1 and PW-2 who are inimical, related witnesses as also interested

witnesses would not be safe to convict the appellant unless their evidences are corroborated by some independent material particulars.

44. In this case, the I.O. was a material witness. He could have unfolded the genesis of the incident and the essential parts of the prosecution case. It

is evident from the materials on the record that even though the P.W. 1 and P.W. 2 disclosed two separate sets of neighbours who had come to the

place of occurrence and according to P.W. 2 the two neighbours named by him came 10 minutes after the occurrence, the I.O. has not examined

them. Examination of such witnesses could have filled up the gaps and infirmities in the case of the prosecution. P.W. 1 and P.W. 2 has stated the

names of neighbours who visited the place of occurrence and were narrated about the incident, P.W. 2 also disclosed in his fardbeyan about the

members of the force visiting the place of occurrence who were given the narrative of the incident, he accepted this fact in S. T. No. 632 of 1996 but

tried to mislead the court in the present trial by denying that there was a police camp in the village. The members of the police force have not been

examined which certainly raises a suspicion. The investigating officer (I.O. of this case) has not turned up but his deposition in Sessions Trial No. 632

of 1996 has been exhibited as a public document and has been used against the appellant, the learned trial court has apparently fallen in error of law in

the matter of appreciation of evidence in accordance with law.

45. In the case of Nallabothu Ramulu @ Seetharamaiah and Others (supra), the HonÃ¢â‚¬â„¢ble Supreme Court reiterated that the paramount

consideration of the court is to ensure that miscarriage of justice is prevented. The miscarriage of justice, according to the Hon'ble Apex Court may

arise from an acquittal of the guilt as well as from the conviction of an innocent. In the said case, 50 persons were involved in the brutal attack on the

prosecution side during the dead of night. The trial court had noticed that neither in the FIR nor in the inquest report there was any mention of

availability of light. The High Court, however, turned the finding of the learned trial court on the ground inter alia that witnesses were deposing after

five and half years of the incident and there are bound to be some discrepancies in their evidence. The HonÃ¢â‚¬â„¢ble Supreme Court noted the fact that

neither in the FIR nor in the inquest report there is mention of availability of light is important.

46. In the present case, this Court has noticed that PW 1 was cross-examined and she stated that PW 1 did not remember as to how many days after

Amawasya or Purnima the alleged occurrence took place. Despite this neither PW 1 nor PW 2 disclosed the source of light.

47. This Court is conscious of the legal position that the evidence of hostile witness may also be looked into if it is supporting the prosecution case on

any particular point but in the kind of evidence, Court is of the view that even looking into the statement of P.W. 2 claiming that he had stated in

Sessions Trial No. 632 of 1996 that this appellant had shot dead his father, in want of any independent material, considering that this witness has

improved upon his version in the fardbeyan (Ext. 1) and materially differed on the point of his watching the occurrence, and further improved in the

present trial by naming the appellant and two others, this Court is of the considered opinion that it would not be safe to rely upon the evidence of P.W.

1 as well as P.W. 2.

48. In the case of Mohan Lal and others (supra) it was contended before the HonÃ¢â‚¬â„¢ble Supreme Court that the evidence of one Moti Lal (PW 7)

bristles with infirmities, omissions and contradictions with reference to the earliest version recorded under Section 161 Cr.P.C. and inconsistent with

the other evidence on record and therefore, the said witness by no stretch of imagination can be said to be a wholly reliable witness on whose

testimony the conviction can be passed in a serious charge of murder. The HonÃ¢â‚¬â„¢ble Supreme Court rejected the contention of the prosecution that

the evidence of PW 7 has been accepted by two courts of facts and has been held to be trustworthy and therefore, there is no justification for the

Apex Court to re-appreciate the evidence. The HonÃ¢â‚¬â„¢ble Supreme Court observed that ordinarily the Apex Court does not re-appreciate the

evidence where two courts have already appreciated the same but, in a serious charge of murder on whose testimony the conviction on a charge of

murder is based, the court would be failing in itÃ¢â‚¬â„¢s duty if for the purpose of satisfying as to whether the courts below are justified in placing

reliance upon the said testimony it will not examine the same. The HonÃ¢â‚¬â„¢ble Apex Court found on the fact that witness PW 7 had made several

omissions and contradictions from his earliest version under Section 161 Cr.p.C. and the only explanation which was offered by him was that the

earliest version is wrong. In such circumstance the HonÃ¢â‚¬â„¢ble Apex Court held that the evidence of this witness is tainted one and no reliance can

be placed on the same. If the said test is applied in the facts of the present case, it would appear that in the present case PW 2 has proved his

fardbeyan (Ext. 1). In Ext. 1 he said that, after the occurrence, members of the force posted in the village came to the place of occurrence and they

were narrated the occurrence but in course of his deposition he turned around and said that there is no police camp in the village. His attention was

drawn on this point towards his deposition in S. T. No. 632 of 1996 in which he had admitted about the presence of police camp and that members of

the force had arrived at the place of occurrence. In his fardbeyan (Ext. 1) he takes name of several other accused including Suresh Mandal who fired

upon his father but in course of his deposition when his attention was drawn towards his fardbeyan, he says that he had not taken name, in these

circumstances the evidence of PW 2 is to be taken tainted one and no reliance can be placed on the same.

49. If testimony of PW1 and PW 2 are excluded from consideration, on the rest of the evidence no conclusion in a charge of murder can be based. As

a result, I am of the considered view that the prosecution has failed to establish the charge beyond all reasonable doubts. I therefore, sets aside the

conviction and sentence against the appellant and acquit him all of the charges levelled against him.

50. This appeal is allowed. The appellant is reported to be in custody, he is directed to be released forthwith.