

(2007) PLJR 711

Patna High Court

Case No: Criminal Appeal No's. 95 of 1988

Ramashish Yadav and
Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision: July 5, 2007**Acts Referred:**

- Arms Act, 1959 - Section 27
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 164
- Penal Code, 1860 (IPC) - Section 149, 302, 34, 379

Citation: (2007) PLJR 711**Hon'ble Judges:** Syed Md. Mahfooz Alam, J; Shiva Kirti Singh, J**Bench:** Division Bench**Advocate:** Mukteshwar Singh, Arvind Kumar and Dr. Vidya Nand Kumar, for the Appellant;
Ashwini Kumar, for the Respondent**Final Decision:** Allowed

Judgement

Shiva Kirti Singh and Syed Md. Mahfooz Alam, JJ.

Both the Criminal Appeals arise out of same judgment and order and therefore they have been heard together and are being disposed of by this common judgment. The three appellants of Criminal Appeal 95 of 1988 namely Ramashish Yadav, Bahadur Yadav and Bira Dusadh and the two appellants namely Inder Yadav @ Inderdeo Yadav and Sheopujan Dusadh of Criminal Appeal No. 125 of 1988 have been convicted for the offence u/s 302 read with Section 149 of the I.P.C. and awarded rigorous imprisonment for life. They have been acquitted of the charge u/s 379/34 of the I.P.C. and Section 27 of the Arms Act by the impugned judgment and order dated 25th day of January, 1988 passed by 2nd Additional Sessions Judge, Rohtas at Sasaram in Sessions Trial No. 454/276 of 1986 arising out of Nokha P.S. Case No. 159(10) of 1985.

2. The prosecution case as contained in the Fardbeyan of the informant Baleshwar Prasad (P.W.2) is to the effect that on 8.10.1985 at about 12 noon he alongwith Chhathu Choubey and Ayodhya Choubey (both are deceased in the present case) and Mahendra Mishra left from Baroda Bank at Nokha for village Ghosia by Jeep of Chhathu Choubey who belongs to village Ghosia. At about 12.15 hours Chhathu Choubey left his jeep in the premises of Congress office on the main road and all the four persons proceeded towards house of Chhathu Choubey. When they reached near the house of Sheopujan Dusadh, one of the appellants then from his house 5-6 persons armed with rifle and gun came out firing. The first shot hit Ayodhya Choubey who was holding the rifle of Chhathu Choubey in the capacity of a body-guard. Ayodhya Choubey on being hit fell down in the field of one Parikh Sah. Thereafter 7-8 more shots were fired out of which 2-3 shots hit Chhathu Choubey. The informant hid himself behind a Pipal tree. Chhathu ran and fell down in the field of Parikha Sah. He tried to fire from his revolver but in the meantime the miscreants again fired at him with rifle which hit him on the head causing injury to the head and both the eyes. Thereafter the miscreants took out the Kurta, vest and revolver of Chhathu Choubey. They also took away the rifle of Chhathu which was in the hand of Ayodhya. The informant thereafter stealthily went towards house of Chhathu Choubey and raised hulla that Chhathu Choubey and Ayodhya Choubey had been shot and killed. The informant claimed to identify appellant Sheopujan Dusadh belonging to the same village. According to him 4-5 other persons had concealed half of their faces and he could not identify them. The miscreants escaped towards south while firing.

3. Further case of the prosecution is that after recording the fardbeyan on 8-10-1985 at 13 hours P.W.16, Ishwari Prasad sent the Fardbeyan for recording of formal F.I.R. which was recorded on the same day and in the meanwhile he took up investigation and examined a number of persons including the witnesses examined in court. He also prepared inquest report and seizure list of some empties of fire arms as well as blood-stained earth. The dead bodies were sent for postmortem examination and post mortem reports were obtained.

4. He also obtained police custody of appellant Sheopujan Dusadh by making prayer to that effect to the learned Magistrate when Sheopujan Dusadh had surrendered in court. However, statement of Sheopujan Dusadh before the police was recorded by Sri Krishna Chandra Dubey (P.W.14) who had taken over charge of investigation on 16.10.1985. Thereafter he produced Sheopujan Dusadh before the Magistrate on 18.10.1985 and on that date confessional statement of that accused was recorded by Sri Prakash Chandra Gupta, Judicial Magistrate (P.W.15) u/s 164 of the Code of Criminal Procedure. On the basis of investigation, charge sheet was submitted against the appellants and they were put on trial. They pleaded not guilty to the charges and hence they were tried by the learned Trial Court leading to the impugned judgment and order of conviction.

5. The defence of the appellant Sheopujan Dusadh is that his confessional statement was not voluntary and was obtained by the police by coercion and torture applied to him when he was taken on police remand. The common defence of all the accused

persons/appellants is that they are innocent and have been falsely implicated.

6. In order to prove the charges, the prosecution has examined altogether sixteen witnesses. Some of the witnesses including the informant (P.W. 2) have been declared hostile. This category includes P.W. 3 Mahendra Prasad, P.W. 6 Dadan Choubey and P.W. 13 Deomuni Chaudhary. P.W.1 Bhuneshwar Prasad, P.W.8 Hari Shankar Choubey, P.W. 11 Rishimuni Choubey and P.W. 12 Radhey Shyam Choubey alias Chunnu Choubey have claimed to be eye-witnesses of the entire occurrence whereas P.W. 4 Kameshwar Choubey, P.W. 5 Lakshman Choubey, P.W.7 Brij Kumar Pandey and P.W. 9 Kapildeo Choubey have claimed to have arrived at the place of occurrence on hearing the sound of fire shots and they have claimed to have seen the one or other appellants while they were fleeing away. P.W. 10 Dr. Chandra Shekhar Prasad Singh conducted autopsy and proved the post mortem reports as Exhibits 2 and 2/1. As noticed earlier, P.W. 16 is the First Investigating Officer and P.W. 14 is the subsequent Investigating Officer, who completed investigation and submitted charge sheet. It has also been noticed that P.W.15 Sri Prakash Chandra Gupta is the Judicial Magistrate, who recorded confessional statement of appellant Sheopujan Dusadh and the same has been marked as Exhibit 7.

7. The defence has not examined any witness nor it has brought on record any document as Exhibits. However, attention of the Judicial Magistrate, P.W. 15 was drawn to an application alleged to be sent by accused Sheopujan Dusadh from jail and the same has been marked as "X" for identification.

8. On behalf of the appellants it was first submitted that the confessional statement of Sheopujan Dusadh, Exhibit 7 is not voluntary and that should not have been taken into consideration and relied upon by the Trial Court for the purpose of convicting either Sheopujan Dusadh or three other appellants Ramashish Yadav, Bahadur Yadav and Indradeo Yadav, who have been allegedly named by Sheopujan Dusadh in his confessional statement as persons involved in the offence. For this purpose, attention was drawn to his application marked as "X" which appears to have been sent from jail custody soon after recording of confessional statement of Sheopujan Dusadh u/s 164 of the Code of Criminal Procedure with a view to retract from that confession. The deposition of P.W. 15 and Exhibit 7 leave no manner of doubt that the confession of Sheopujan Dusadh as contained in Exhibit 7 was recorded by the Judicial Magistrate u/s 164 of the Cr. P.C. after taking all the necessary precaution and after the Magistrate had satisfied himself that the statement was being made voluntarily. Even in respect of application marked as "X". When it was put up before the learned Magistrate, P.W. 15, he dealt with the same in fair manner by examining the accused Sheopujan Dusadh in court and he has deposed that accused Sheopujan claimed that he was not aware of the contents of the said application which somebody had prepared in the jail and he again before P.W. 15 stuck to his earlier 164 statement as being correct. In the light of such facts and circumstances we find no good ground to accept this submission that the confession of the accused Sheopujan Dusadh was not voluntary or was on account of any torture or coercion.

9. It was next submitted on behalf of the appellants that in the First Information Report, the informant has named only accused Sheopujan Dusadh and has clearly stated that other miscreants were concealing their faces and could not be identified. It has further been submitted that in that view of the matter, the claim of the witnesses who have claimed to have seen the entire occurrence i.e. P.Ws. 1, 8, 11 and 12 as well as the claim of P.Ws. 4, 5, 7 and 9 that they identified other appellants while they were fleeing away is not worthy of acceptance because in the earliest version of the occurrence it is clearly indicated that other miscreants had concealed their faces. It has further been submitted that the very presence of the aforesaid witnesses at or near the place of occurrence is doubtful because neither they are named as witnesses in the fardbeyan nor their presence appears to be natural nor they are independent.

10. On close scrutiny of the evidence of the witnesses in the category of eyewitnesses i.e. P.Ws. 1, 8, 11 and 12, it is found that P.W.1 is a nephew of one of the deceased Chhathu Choubey, P.W. 8 is his Gotia and P.Ws. 11 and 12 are his sons. Similarly it is found that P.Ws. 4 and 9 are also close relations of deceased Chhathu Choubey as per genealogy given out by P.W. 4. Thus, out of total eight witnesses noticed above, only P.W. 5 Lakshman Choubey and P.W. 7 Brij Kumar Pandey are found to be independent in the sense that they are not related to the deceased Chhathu Choubey. P.W. 5 has claimed that on hearing the sound of firing he rushed towards the place of occurrence and in the way he met the informant who disclosed the name of Sheopujan Dusadh as one of the miscreants and thereafter he saw Sheopujan Dusadh and his son Bira Dusadh fleeing away from the place of occurrence. P.W. 7 Brij Kumar Pandey has signed on the fardbeyan as a token of the fact that he witnessed the making of the fardbeyan. As noticed earlier, the fardbeyan discloses only the name of Sheopujan Dusadh but this witness has claimed that he saw and identified all the five appellants while they were running away from the place of occurrence. It is remarkable that even the relation witnesses who claimed to have seen the accused persons while they were fleeing away, as would appear from perusal of deposition of P.W. 4, Kameshwar Choubey and P.W. 9, Kapildeo Choubey are not consistent. While P.W. 4 has claimed to have identified only Sheopujan Dusadh and Bira Dusadh. P.W. 9 has claimed to have identified two more persons namely Bahadur Yadav and Inder Yadav. It is also remarkable that in the category of eye witnesses who claimed to have seen the entire occurrence, while P.W. 1, Bhuneshwar Choubey has named all the five appellants, P.W. 8 Harishankar Choubey named only Sheopujan Dusadh, Bira Dusadh and Inder Yadav. P.W. 11, Rishimuni Choubey who is son of deceased Chhathu Choubey did not claim to be an eye witness before the Investigating Officer as appears from deposition of P.W. 16. P.W. 12, Radheshyam Choubey @ Tunu Choubey and the last eye witness who claimed to have seen the entire occurrence is another son of deceased Chhathu Choubey and at the time of occurrence was aged about 8 years. He had claimed to have identified Sheopujan Dusadh, Bira Dusadh and Inder Yadav but the I.O. (P.W. 16) has clarified that this witness had not named Inder Yadav as one of the assailants in his statement u/s 161 Cr.P.C.

11. On a careful scrutiny and analysis of the aforesaid witnesses it is found that except P.Ws. 5 and 7 all witnesses are related to one of the deceased and their claim of having seen the entire occurrence or a part of it appears to be doubtful because the fardbeyan was recorded in the village near the place of occurrence itself after about 1 1/2 hours of the alleged occurrence in which two persons had been killed in broad-day light. Atleast one of the deceased Chhathu Choubey appears to be a prominent person of the area having political links because the Congress Party office was situated in his premises by the side of the road which was also used as a garage for his jeep. He was apparently a man of means who had hired a private body guard who was carrying his rifle and he was himself having a revolver. The place of occurrence is only about 50-60 yards from the house of the deceased Chhathu Choubey. In such a situation had the witnesses been present and in a position to identify the appellants, they would have definitely disclosed this fact to the informant even before recording of the fardbeyan or in all likelihood going by the normal conduct of the police, the close relations such as sons of the deceased would have been chosen by the police to give out the fardbeyan. Hence the circumstances and the relevant facts create doubt regarding the claim of P.Ws. 1, 8, 11 and 12 that they actually saw the occurrence and they identified one or the other appellants as the miscreants. Similar is the position in respect of P.Ws. 4 and 9 who are also related to one of the deceased. It is also clear that the alleged eye witnesses do not figure as eye witnesses in the fardbeyan and their explanation as to how and why they were present near the place of occurrence shows that they are really chance witnesses.

12. So far as P.Ws. 5 and 7 who have been found to be independent are concerned, from the discussions made above in respect of P.W. 7, Brij Kumar Pandey it is clear that his evidence is not free from doubt because if he had actually identified other appellants besides Sheopujan Dusadh, he was likely to disclose this fact to the informant with whom he was present at the time of recording of the fardbeyan on which he has signed as a witness. Hence the evidence of P.W. 7 is also not free from doubt. The only remaining witness P.W. 5, Lakshman Choubey, has claimed to identify Sheopujan Dusadh and his son Bira. So far as the prosecution case against Sheopujan Dusadh is concerned, it is supported by this witness as well as almost all other witnesses and from his confessional statement, Exhibit 7 which can safely be relied upon and used against Sheopujan the maker of the confessional statement but so far as the evidence against appellant Bira Dusadh son of Sheopujan Dusadh is concerned, it is found that in absence of re-assuring evidence in respect of his identification when his name was not mentioned in the fardbeyan, he deserves benefit of doubt. There are materials to show that there was previous enmity between Sheopujan and deceased Chhathu Choubey, therefore, there is definite possibility of false implication of Bira Dusadh in course of investigation because he is son of Sheopujan Dusadh. So far as other appellants, namely, Ramashish Yadav, Bahadur Yadav and Indradeo Yadav are concerned, it is found that the confessional statement of Sheopujan Dusadh, Exhibit 7 cannot be relied upon to convict them for the offence because Sheopujan Dusadh has clearly given a confession which is almost exculpatory in nature and therefore, not worthy of being made the basis for conviction of

his co-accused. As discussed above, the earliest version of the prosecution that the other miscreants had concealed their faces coupled with the fact that most of the witnesses are related to one of the deceased and to some extent interested, does not persuade us to rely upon the claim of these witnesses that they could identify the remaining miscreants who, as per F.I.R., had concealed their faces. In the aforesaid facts and circumstances the conviction of Sheopujan Dusadh u/s 302/149 of the Indian Penal Code and award of rigorous imprisonment for life made to him is confirmed but conviction of the remaining appellants i.e. Ramashish Yadav, Bahadur Yadav, Bira Dusadh and Indradeo Yadav is set aside by extending to them the benefit of doubt. Their appeals are, accordingly, allowed. The bail bond of Sheopuja Dusadh shall stand cancelled and he should be taken into custody to serve out the remaining period of sentence in accordance with law. Other four appellants who are also on bail shall now stand discharged from the liabilities of their bail bonds.