(2008) 3 PLJR 46

Patna High Court

Case No: Criminal Appeal No. 34 of 2003 (D.B.)

Rajbanshi Mahto		APPELLANT
	Vs	
State of Bihar		RESPONDENT

Date of Decision: Feb. 20, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 154, 313
- Evidence Act, 1872 - Section 32, 6
- Penal Code, 1860 (IPC) - Section 299, 300, 302, 304

Citation: (2008) 3 PLJR 46

Hon'ble Judges: Dharnidhar Jha, J; C.M. Prasad, J

Bench: Division Bench

Advocate: Asit Kumar Jha, Amicus Curiae, for the Appellant; Lala Kailash Bihari Prasad, for the Respondent

Final Decision: Dismissed

Judgement

Dharnidhar Jha, J.

The sole appellant was tried by the learned Additional Sessions Judge, 6th Court, Saran at Chapra, in Sessions Trial No. 255 of 2000 for the charge u/s 302 of the Indian Penal Code and by judgment dated 22.4.2002, was found guilty of committing that offence. The learned Judge, after hearing the appellant on sentence, passed the order on 26.4.2002 directing the appellant to suffer rigorous imprisonment for life as also to pay a fine consequent upon being convicted for the offence u/s 302 of the Indian Penal Code. It was further directed that in case of default in paying the fine, the appellant would have to suffer another term of imprisonment for three months. The above judgment of conviction and order of sentence are being assailed in the present appeal. The appellant filed this appeal from Jail. While taking up the same for admission, the Court appointed Shri Asit Kumar Jha, Advocate, as Amicus Curiae, by its order dated 3.2.2003. Shri Jha appeared for the appellant in the present appeal at the final stage of hearing.

2. The prosecution case as contained in Ext. 4, the Fardbeyan of the deceased Ajit Kumar Ojha; is that the deceased and P.W. 2 were proceeding to offer their prayers in Dharmnath temple and when they had reached near Lalkothi, accused Butan Mahto (since dead), appellant Rajbanshi Mahto and an unknown came and asked the appellant as to where his son Nunu Ojha alias Sanjeev Ojha was The above named son of the deceased was a witness against the accused persons in a murder trial for alleged commission of the murder of one Kanhaiya Mahto. The deceased told the accused persons that his son had been in Bombay upon which they asked for the address of his son in Bombay. In the meantime, accused Butan Mahto started giving blows with Danda and this appellant Rajbanshi Mahto dealt a blow on the deceased with a knife with an intention to kill him which hit the deceased on his abdomen and the deceased got injured. On hulla, many per-sons converged upon the place of occurrence and, as such, the accused persons ran away from there. The deceased was. thereafter, shifted by Bishwanath Singh P.W. 2, and Ram Charan Singh, P.W. 3. to Sadar Hospital, Chapra where the deceased was treated.

3. Ext. 4, the fardbeyan of the informant was recorded by P.W. 6, Sub-Inspector of Police Brajesh Kumar Sinha on the very day of occurrence, i.e., on 20.6.1999 in the Hospital at 9.30 P.M. and on that basis the F.I.R. of the case (Ext. 5) was drawn up at 11.30 P.M.P.W. 6 took up the investigation by issuing the requisition for obtaining the injury on the person of Ajit Kumar Ojha. Though, as appears from the evidence of P.W. 6. there was no light at the scene of the occurrence, still, P.W. 6 went to the place of occurrence to have a glance of the same and revisited it on the next day. While recording the fardbeyan of the deceased in the Hospital, P.W. 6 had also recorded the statements of P.W. ? Bishwanath Singh and P.W. 3 Ram Charan Singh in the Hospital itself.

4. It appears from the record that Ajit Kumar Ojha died on the 4th day of the occurrence and, as such, P.W. 6 prepared the inquest report after holding inquest on the dead body and that document was witnessed by P.W. 4 Badri Narain Ojha and Nirmal Kumar Ojha. P.W. 5 Dr. Ram Ekbal Prasad held the post mortem examination on the dead body and prepared the post mortem examination report, Ext. 2, in that behalf. On the completion of the investigation the appellant was sent up for trial.

5. As appears from the evidence on record and that does not appear challenged or denied, the people who had converged upon the place of occurrence after knowing about the deceased being stabbed in the abdomen by the accused persons, chased the accused persons and beat up accused Butan Mahto and the present appellant Rajbanshi Mahto, so much so, that Butan Mahto died at the spot and appellant Rajbanshi Mahto was brought to the Hospital by some other persons and was hospitalized for treatment of his injuries from where he was remanded to custody on 25.6.1999.

6. There does not appear any direct denial of the occurrence and participation of the appellant or the accused persons. What was suggested to P.Ws. 1, 2 and 3 was that they had not seen the occurrence and that the implication of the accused in the case was

false. What is further found from the statement of the appellant recorded u/s 313 of the Code of Criminal Procedure is that he pleaded being innocent and being implicated falsely in the case in spite of his brother having been murdered in the same occurrence. Thus, the question which was before the trial court and which continues to be before us in the present appeal, is whether the appellant was really innocent and has falsely been implicated in the case.

7. The solitary eye-witness is P.W. 2 Bishwanath Singh and he has stated that he was accompanying the deceased in the fateful evening for having Darshan of the deity in Dharmnath temple and when both of them had reached in front of Lalkothi in the Ratanpur locality deceased accused Butan Mahto and the present appellant met them who were accompanied by a third unknown man. Butan Mahto was armed with lathi while the present appellant was armed with a Chhura. Accused Butan Mahto asked from the deceased Ajit Kumar Ojha as to where his son Nunu was. The deceased replied that he was in Bombay upon which Butan Mahto wanted the address of Nunu in Bombay. The deceased took some time and by that time Butan Mahto caught the deceased by his arm and started dragging him towards the vacant land of Diara. The deceased resisted which resulted in Butan Mahto dealing blows with lathi upon the deceased. P.W. 2 stated that he attempted to save the deceased but was abused by Butan Mahto. Thereafter, this appellant Rajbanshi Mahto dealt a blow with Chhura in the abdominal region of Ajit Kumar Ojha who fell down injured and cried out. P.W. 2 stated that he also cried out which attracted many persons.

The deceased Ajit Kumar Ojha was shifted to Sadar Hospital, Chapra, where he was admitted for treatment and where his statement was also recorded which was ultimately the basis of the case. Subsequently, Ajit Kuimar Ojha died.

P.W. 2 stated that the villagers reacted to a simple man, like the deceased, being assaulted and injured and there was an altercation between the accused persons and the villagers and ultimately Butan Mahto was killed by the mob.

8. While criticizing the evidence of P.W. 2, learned Amicus Curiae drew the attention of the Court towards paragraph 11 of his evidence in which the witness stated that when he reached the place of occurrence, he found the deceased Ajit Kumar Ojha bleeding from his body which had soaked his clothes as also the underlying earth. It was contended that this statement of P.W. 2 in paragraph 11 of his evidence indicates as if P.W. 2 were not an eye-witness and he reached at the place of occurrence subsequent to the deceased having been assaulted and injured. This argument, in my considered view, overlooks the unchallenged circumstance of the case like the one which has been stated by P.W. 2 in paragraph 1 of his evidence. It was stated by P.W. 2 that when Butan Mahto started dealing blows with lathi, he attempted to intervene to save the deceased but P.W. 2 was abused by accused Butan Mahto. This could not be out of place to mention that persons reacted to a particular situation in their own special ways. If a person is peace loving, he shuns violence or violent acts or actions. It is generally seen that such a person instead of

rushing or attempting to intervene into the matter for reclaiming the situation, keeps aloof and stands at a distance and becomes a mute spectator. After having gone through the evidence of P.W. 2 what I could gather was that P.W. 2 also appeared a person of that particular class as indicated above. So the statement in paragraph 11 of P.W. 2 that on coming back to the place of occurrence, he found Ajit Kumar Ojha lying on the ground injured and bleeding does not make him an incompetent witness to the occurrence, so much so, that he could be said not to have seen the occurrence. What I find further on considering the evidence of P.W. 2 is that the witness has stated the truth, wholly and completely and that was also a truth that he had stayed at some distance from the place where the deceased had fallen down so as to coming back to the place after the accused persons retreated from there.

9. The deceased Ajit Kumar Ojha had stated that P.W. 2 was accompanying him. There was no reason to discard this situation, especially, when P.W. 2 was not a person who was disposed towards the appellant or others inimically Not even a suggestion was given to P.W 2 that he had any grudge to feed fat or any special interest in seeing the appellant convicted and sentenced to imprisonment. This background further makes it unacceptable that P.W. 2 would ignore the real culprit ''and implicate an innocent person.

10. P.W. 1 Krishna Kumar Ojha has admitted in paragraph 3 of his evidence that he was one of the cousins of the deceased and has stated that while sitting at his Darwaja at about 5/6 P.M. on 20.6.1999, he found P.W. 2 Bishwanath Singh and P.W. 3 Ram Charan Singh rushing out from the place of occurrence to their respective houses and on being asked the reason therefore, P.W. 1 was told that this appellant had stabbed the deceased in his belly while he was proceeding towards the temple for offering his puja. It was further narrated by P.Ws. 2 and 3 to P.W. 1 that the deceased had been shifted to Sadar Hospital, Chapra and had been admitted for treatment there, upon which P.W. 1 went to the Hospital and enquired from the deceased about the incident and P.W. 1 was told by Ajit Kumar Ojha, the deceased, that this appellant Rajbanshi Mahto stabbed him into his belly while Butan caught him. P.W. 1 returned back after some time.

It is true that the evidence of P.W. 1 contains one fact that Butan Mahto had caught the deceased at the time of occurrence which is not stated either by P.W. 2 or the deceased himself but the central theme of the case that the present appellant stabbed the deceased into his, belly remains as a constant. In his evidence P.W. 1 did not appear telling anything which could discredit him as a witness.

11. As regards P.W. 3, Ram Charan Singh, he was one of the persons who had shifted the deceased Ajit Kumar Ojha to Hospital. He has stated that while he was coming back to his house in Ratanpur locality from Daulatganj and when he was in the lane passing by the side of Lalkothi, he found that three criminals were running away out of whom he could identify the present appellant and the deceased accused Butan Mahto who were having blood stained chhura and a lathi respectively and the three criminals were being chased by the Mohalla people. When P.W. 3 reached in front of Lalkothi, he found Ajit

Kumar Ojha in an injured condition and P.W. 2 Bishwanath Singh was holding him. Ajit Kumar Ojha was bleeding from his stomach and his Lungi had also been soaked with blood. Ajit Kumar Ojha was in great pain and was screaming P.Ws. 2 and 3 brought Ajit Kumar Ojha, to the Hospital where he was hospitalized for treatment. P.W. 3 stated that while being shifted to the hospital the injured Ajit Kumar Ojha stated to him that it was this appellant Rajbanshi Mahto who had stabbed into his abdomen while he and P.W. 2 were on way to the temple. In cross-examination P.W. 3 stated that the injured was shifted to the hospital on a rickshaw and both P.Ws. 2 and 3 also boarded the same rickshaw. P.W. 3 stated that blood had fallen on the ground and the injured was admitted into the Emergency Ward and his statement was recorded in presence of P.W. 3 in the hospital itself. P.W. 3 further stated that the deceased had named his assailants at the place of occurrence also.

12. P.W. 6, the Investigating Officer has stated that he recorded the Fardbeyan besides the statements of P.Ws. 2 and 3. P.W. 6 has stated that the injured Ajit Kumar Ojha was quite conscious at the time of recording of his statement. The Investigating Officer stated that he enquired about the incident from the injured and then reduced the same into writing.

13. It was contended on behalf of the appellant that the statement of P.W. 6 that he questioned the deceased orally and reduced the statement into writing smacks of fabrication and as such the Fardbeyan, Ext. 4, could not be the real statement of the deceased. One has to always live up to the practice and procedure adopted and prevailing in different departments including the police department who have the obligation of drawing up the F.I.R. in case of cognizable offence being reported to them. Section 154 of the Code of Criminal Procedure speaks of First Information Report as the information relating to the commission of a cognizable offence to an Officer-in-charge of a Police Station and further speaks that in case the information is given orally the same has to be reduced into writing by the Officer-in-charge or under his direction any other officer and in that case has to be read over to the informant. The information whether given orally or in writing shall be signed by the person giving it. Thus, it is not that the law does not permit oral information about the commission of a cognizable offence by the persons known or unknown, what is required is that if it is given orally then in that case it has to be reduced into writing and the signature of the informant has to be obtained. Fardbeyan is also an information if it relates to commission of a cognizable offence, which is a document spoken of by Section 154 of the Code of Criminal Procedure. Oral statement made voluntarily or on being questioned by the Officer-in-charge of the Police Station is fully covered, as indicated above, by Section 154 of the Code of Criminal Procedure and there is nothing abnormal or extraordinary or illegal if the Police Officer questioned the informant and thereafter reduced the same into writing. This is the full compliance with Section'' 154 of the Code of Criminal Procedure and in that view, the submission of learned Amicus Curiae appearing for the appellant appears of no substance. The law permits the mode under which P.W. 6 recorded the statement of the deceased which is

Ext. 4.

14. it was contended that P.W. 6, the Investigating Officer of the case who recorded Ext. 4, the Fardbeyan, has stated in paragraph 8 of his evidence that when he reached the hospital the injured was not fully conscious and as such he enquired about the treatment given to the injured from the Doctor and when he found that the injured was in a state of making his statement; he took his statement. It was contended that if this was the state of health of the injured then it becomes extremely doubtful that Ext. 4 is the true and correct statement of Ajit Kumar Ojha which was indeed made to P.W. 6. A reading of the evidence of P.W. 6 in paragraphs 8 and 9 clearly indicates that the deceased was in a fit state of mind and health when he made his statement to P.W. 6. Not only that, the witnesses examined in this case like P.Ws. 1, 2 and 3 have also stated that Ajit Kumar Ojha gave his statement before the Police Office in their presence. P.W. 1 has stated in paragraph 6 of his evidence that the statement was made by Ajit Kumar Ojha in presence of 5 to 20 persons. P.W. 2 has also stated in paragraph 2 of his evidence that Ajit Kumar Ojha was hospitalized in Sadar Hospital, Chapra, where his statement was recorded and the case was instituted. I have already referred to the evidence of P.W. 3 in para-2 in which he has stated that the police recorded his statement in the injured condition in his presence and he signed as a witness to the statement. These witnesses, P.Ws. 1, 2 and 3, were cross-examined on the state of health of the deceased. Not even a suggestion was given to any of them that the deceased Ajit Kumar Ojha was not in a fit state of health so as to making a statement as the prosecution claimed in the form of Ext. 4 and further that it was a fabricated and forged document. After having gone through the evidence of the witnesses I find that the deceased was in a fit state of health in spite of being injured seriously and could definitely have made the statement.

15. It was next contended by learned Amicus Curiae that it could not be a case of any one seeing the occurrence and the evidence of P.Ws. 1 and 3 is in the form of hearsay and the same is not admissible. P.W. 1 has stated that he learnt about the incident from Bishwanath Singh. P.W. 2, and Ram Charan Singh, P.W. 3 when they were rushing out from the place of occurrence. P.W. 2 has stated that many persons came there and learnt about the incident as appears from paragraphs 7 and 8 of his evidence. P.W. 3 has stated that he found the accused persons running away from the scene of occurrence and when he came near the place of occurrence he found P.W. 2 catching hold of injured Ajit Kumar Ojha. They had good reasons for their arrival at the scene of the occurrence and learning about the occurrence from none else than the injured himself. The evidence of P.Ws. indicates that after the deceased was assaulted and was brutally injured, there was a commotion around the scene of occurrence as the assailants had been chased by the people of the locality. The witnesses have stated that one of the accused Butan Mahto was done to death by the mob just after the incident and the present appellant was beaten up so much so that he had to be hospitalized. This fact is further corroborated by P.W. 6, the I.O. who learnt, not about the incident of the de-ceased Ajit Kumar Ojha being injured, but that a particular accused of a particular case had been murdered and when

he had gone to the hospital he found the present appellant lying in an injured condition. The evidence of the witnesses indicates as if everyone knew as to what exactly had happened and everyone thereafter came to the place of occurrence. It is true that P.Ws. 1 and 3 did not see the occurrence but they learnt from the deceased himself as to who had stabbed and injured him. The statement of the deceased relating to the cause of his injury and, as such, the cause of his death is admissible u/s 32 of the Evidence Act. Besides, the statements of P.Ws. or other persons who were speaking about the incident just after the occurrence and is considered in the light of Section 6 of the Evidence Act, the same appear relevant in the light thereof.

16. Learned Amicus Curiae, next contended that the injury on the accused was not explained and as such it appears that the real story about the occurrence has been suppressed by the prosecution and a false story has been told by the witnesses. P.W 1 Krishna Kumar Ojha was not cross-examined on this aspect of the matter. P.W. 2, Bishwanath Singh, has stated in paragraph 6 that the people of the village reacted upon a simple man like the deceased being stabbed and injured and as such they assaulted and killed accused Butan Mahto. P.W. 3 has stated in paragraph 6 in his examination in chief that appellant Rajbanshi Mahto was handed over to the police in an injured condition and that Butan Mahto was killed by the mob of persons. P.W. 3 has stated in his examination in chief itself that three criminals including the two named accused were being chased by a mob of persons of the Mohalla. Thus, what appears from the totality of the evidence, indicated above, is that the people of the locality reacted to the acts of the appellant and his brother Butan Mahto who had stabbed the deceased merely because his son was a witness against the accused persons in a case of murder. This clearly signifies that not only Butan Mahto was killed but the present appellant was injured seriously. The witnesses have fully explained the injuries found on the person of the appellant.

17. P.W. 5 Dr. Ram Ekbal Prasad who held Post mortem examination on the dead body of Ajit Kumar Ojha had found a stitched wound 1 1/2" in length in the supra pubic region with two stitches in place. On removal of the stitches the Doctor found one penetrating wound in the supra pubic region leading to the peritoneal cavity. A hole in the small gut measuring 1"x1/2" was found by P.W. 5 who also found the peritoneal cavity full of purulent and faecal matter. The other organs were intact but congested. In his evidence, P.W. 5, stated that the death was caused due to septiceamia and shock. The Doctor did not state that the injury was sufficient to cause death or was so imminently dangerous to life as to cause death in the ordinary course of nature. The court also does not appear putting any question to the said Doctor about the wound being sufficient to cause death in the ordinary course of nature or was so imminently dangerous as to cause death.

18. It was contended in the light of above evidence that in absence of any opinion of the Doctor that the injury was sufficient to cause death in the ordinary course of nature and in the light of the finding of the Doctor that Septicaemia could be the cause of the death of the deceased, the case could not be one u/s 302 of the Indian Penal Code. It was further contended that the appellant did not have any intention to kill but was simply attempting

to elicit some informations about the son of the deceased or his whereabouts. It was contended that these factors indicated that the appellant was not acting with any intention to kill nor he had the knowledge that the blow inflicted by him could be so imminently dangerous as to cause death. It was as such contended that the appellant could be convicted u/s 304 Part II of the Indian Penal, Code and his sentence be reduced.

19. The question as to what act could be culpable homicide not amounting to murder punishable under either of the Parts of Section 304 or murder, punishable u/s 302 of the Indian Penal Code. has engaged the judicial attention since long and a lot of decisions have been rendered on the issue. I am not going to burden the present judgment by extracting citation, over citation so as to bringing out the difference between the two except to reproduce the Chart which has very often been reproduced by the courts of law so as to indicating the distinction, which is as under:

Section 299 (Culpable homicide)	Section 300 (murder)

It may be gathered that clause (a) of Section 299 corresponds to clause (1) of Section 300 and the act of intentionally causing death is murder. But such intentional act if covered by exceptions appended to Section 300, it could be (sic)able homicide not amounting to murder. This aspect of the matter could be probed by going to the facts of the case and reading the intention by the words spoken and the acts done including the weapons used and site struck, besides the ultimate resultant injury which may have appeared on the dead body. Clause (b) of Section 299 concerns the acts done with the intention of causing such bodily injury as is "likely" to cause death. Here the act, even if intentional, may not be murder as the offender''s knowledge of the likely or probable result of the act is absent. As such, it could simply be culpable homicide not amounting to murder. If this part of Section 299 is compared to Clauses (2) and (3) of Section 300, the real distinction could come out and one could find that the knowledge of the offender and its degree is the real test of deciding the question on application of the two provisions. Clause (2) of Section 300 indicates that the offender should know that the injury intentionally inflicted by him was ''likely to cause death of the person....''. The word ''likely'' connotes ''probably'' which could not be any where near the meaning of the word ''certainly''. It convey the happening of the event, which may or may not happen or occur. The Knowledge implied by clause (2) of Section 300 could be between ''certainty'' and

"uncertainty". On the other hand, the words appearing in clause-(3) of Section 300 regarding inflicting bodily injury indicates of certainty of the event. The words "the bodily injury inflicted is sufficient in the ordinary course of nature to cause death" may not postulate the prior knowledge of the offender, but it envisages something more deeper than that which could indicate the higher degree of mens rea. The clause uses the word "intended" so as to qualifying the intentional act of inflicting bodily injury and that implies the premeditation or planning or, to be exact, a predetermined mind preceding the act of causing such bodily injury as could be sufficient in the ordinary course of nature to cause death. The ordinary sense of certainty and not of mere probability regarding the result of the act appears the central element of clause (3).

20. As regards clause (c) of Section 299 and clause (4) of Section 300 of the Indian Penal Code, it may be noticed that the probable result of the act may not be murder if it is not intentional. However, if the offender has the conscious knowledge about the act done by him being imminently dangerous and also that it must in all probability cause death then it is murder except in cases the offender has some legally recognized excuse justifying his act. This clause of Section 300 speaks, thus, about the act and its impending dangerousness and also the knowledge about the certainty about the ultimate result of the act, that is, death and nothing less than that.

21. The Courts have to scan the facts of a case to isolate the above distinctions appearing in various clauses of Sections 299 and 300 of the Indian Penal Code. The oral evidence has to be read in the light of the medical evidence and the opinion of the Doctor, so as to finding out as to which of the clauses of Sections 299 or 300 I.P.C. could be applicable. This exercise has to be carried out with objectivity, that is, without the personal sentiment or any other factors being allowed to influence the judicial mind. The facts of the case have to be read and considered with complete detachment and without pre-occupation. Objectivity it is, only then.

22. As regards the two parts of Section 304 of the Indian Penal Code, if the act falls within the first category, i.e., doing the act with intention to cause death or causing such bodily injury as is likely to cause death then it has to be punished under that part and imprisonment as prescribed by the part has to be inflicted. If the act is done with the knowledge that it was likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death then it could be an act covered by part II of Section 304 of the Indian Penal Code.

23. Here, in the present case, the evidence indicates that the appellant was armed with dangerous weapon like chhura and he alongwith accused Butan Mahto was enquiring from the deceased about the whereabouts of his son. The deceased not yielding to the enquiries of the accused persons, was first, beaten up by the deceased accused Butan Mahto and the present appellant dealt the single blow on the abdomen of the deceased with chhura. There is no opinion of the Doctor that the injury was sufficient in the ordinary course of nature to cause death or that it was so imminently dangerous that it was to

cause death in all probability. If one considers the evidence of P.W. 5 Dr. Ram Ekbal Prasad one could find that the Surgeon or the Doctor who attended on the deceased in Sadar Hospital, Chapra, simply put a couple of stitches on the external injury without taking any steps to surgically remove the debris from the abdomen of the deceased. The abdomen was full with purulent and faecal matters. The negligence of the Doctor could be gathered from the finding of P.W. 5 who recorded the above finding after holding autopsy on the dead body. The septiceamia as per P.W. 5 was the result of the above mentioned physical condition of the deceased and ultimately it proved fatal. Thus, the negligence of the Surgeon attending on the deceased appears the real cause. It appears to me a case in which proper medical attention and proper surgical action might have saved the life of the deceased. To me, it appears a case of, inflicting a blow with knife with the knowledge of the appellant that the act might result into an injury which may cause death. As such, I am of the considered view that the offence could be one fully covered by Section 304 Part II of the Indian Penal Code.

24. I would, as such, set aside the conviction of the appellant u/s 302 of the Indian Penal Code and convert the same u/s 304 Part II of the Indian Penal Code. I accordingly, sentence the appellant u/s 304 Part II of the Indian Penal Code and convict him to the period already undergone which is for more than 8 years and 8 months. The appellant shall be set at liberty forthwith if not wanted in any other case. The appeal is dismissed with the above modification in the order of conviction and sentence.

Chandra Mohan Prasad, J.

25. I agree.