

(2011) 11 PAT CK 0101

Patna High Court

Case No: Criminal Appeal (DB) No. 364 of 1989

Baliram Prasad and Nityanand
Sharma

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision: Nov. 17, 2011

Final Decision: Allowed

Judgement

Honourable Mr Justice Navaniti Prasad Singh

1. These two appeals arise from the judgment dated 27.07.1989 passed by Additional Sessions Judge IV, Nalanda at Biharsharif in Sessions Trial No 377 of 1986/8 of 1989. Cr Appeal No 438 of 1989 has been preferred by Jagdish Prasad who, by the said judgment, has been held guilty of offence u/s 302 of Indian Penal Code (IPC) and has been sentenced to rigorous imprisonment for life. Cr Appeal No 364 of 1989 has been preferred by Baliram Prasad and Nityanand Sharma, who have been held guilty by the said judgment for an offence punishable u/s 307, IPC and have been sentenced to rigorous imprisonment for five years each. It may be noticed here itself that altogether nine persons were put on trial but only the three aforesaid persons have been found guilty of various offences, as noted above. The rest have been acquitted on the same set of evidence.

2. It appears from the records of these cases that when Cr Appeal No 438 of 1989 was admitted, informant had appeared through his counsel. When these appeals were taken up for final hearing by this Court, learned counsel, who had entered appearance on behalf of the informant, submitted that he has no instructions from the informant to appear and oppose the appeals. We have heard Shri Shakil Ahmad Khan, learned Senior Counsel in support of the two appeals and Miss Shashi Bala Verma, learned Additional Public Prosecutor for the State at length and perused the records.

3. The prosecution case starts from the Fardbayan (Exhibit-9) of one Kedar Singh of village - Markatta in the district of Nalanda who is PW 9. The said Fardbayan is recorded on Friday (21.06.1985) at State Dispensary, Giriak. It is in the handwriting of Shri K N Choudhary of Giriak Police Station who has been examined as PW 14 and is the Investigating Officer (IO) as well. The informant (PW 9) has stated in the First Information Report (FIR) that Kishori Singh (the deceased), Umesh Singh (PW 4), Baikunth Singh (not examined), Ram Swaroop Singh (not examined), Ram Jee Singh (PW 5), another Baikunth Singh (PW 2), Ganauri Singh (PW 3), Vijay Singh (PW 6), Tapeswar Singh, one of the injured (PW 8), Ram Sagar Singh, another injured (PW 7) and Yogendra Sharma (PW 1) were playing Kabaddi near the village - Markatta, PS - Giriak, District - Nalanda in the field of Juran Singh. This was being witnessed by Kedar Singh, the informant (PW 9) and several other persons of the village. It is alleged that all of a sudden, appellants Jagdish Prasad, Nityanand Sharma, Baliram Prasad and several others alongwith Jay Nandan Prasad, Dukh Haran Prasad, Sadhu Sharan Yadav, Ajit Prasad @ Chotey Prasad, Lalan Thakur, all armed with firearms (each has been ascribed either a gun or a rifle or a countrymade gun specifically) turned up and upon order of Jagdish Prasad, who initiated the firing, all started indiscriminate firing on the people playing Kabaddi. Jagdish Prasad fired single fire from his rifle injuring Kishori Singh on the head who fell down unconscious. In this indiscriminate firing, Tapeswar Singh and Ram Sagar Singh were injured. Tapeswar Singh fell unconscious profusely bleeding. Hearing the firing, villagers from Markatta arrived and the accused persons managed to escape. The motive for this incident was ascribed to the fact that there had been a serious difference between the villagers of village - Markatta where the incident took place and the villagers of village - Tarokhar, the neighbouring village with regard to construction of a road. The road having been constructed as per the desire of people of village - Markatta, the people of village Tarokhar had umbrage against them.

4. Injured were all brought to the State Dispensary at Giriak but on way, Kishori Singh died. Tapeswar Singh was unconscious. At the State Dispensary, the doctor referred Tapeswar Singh and Ram Sagar Singh for treatment to Bihar Sharif Sadar Hospital. It is here at Giriak that this Fardbayan is recorded at 8 pm about this incident which took place at about 6 pm.

5. The further case of the prosecution is that Ram Sagar Singh and Tapeswar Singh were then brought to the Bihar Sharif Sadar Hospital. Their injuries were examined and they were admitted for treatment.

6. The case was then registered at about 10.45 pm on 21.06.1985 as Giriak PS Case No 63 of 1985 under Sections 302, 307 and other Sections of IPC read with Section 27, Arms Act. Inquest report (Exhibit-10) was prepared at 9 pm in relation to the deceased Kishori Singh at the State Dispensary, Giriak where the dead body had been brought. It was witnessed by Birendra Singh who was not examined and Yogendra Sharma (PW 1). It notes, apart from other things, that the deceased was

wearing a round collar vest and an old lungi. It is alleged that the deceased had been playing Kabaddi. Thereafter, the IO went to the place of occurrence and at midnight, with the help of petromax, saw the place of occurrence, allegedly seized five empty cartridges of 12 bore gun, seized blood-stained mud from three places, took statements of some of the alleged witnesses, found the accused persons absconding. Upon completion of investigation, chargesheet having been submitted, case was committed to the Court of Session for trial. All the nine accused persons chargesheeted pleaded not guilty and were, accordingly, tried and, as noted above except for the three appellants in the two appeals, the rest others were acquitted on the same set of evidence.

7. In order to establish its case, the prosecution has examined in all 14 witnesses. PW 1 Yogendra Sharma is the alleged witness to the occurrence playing Kabaddi and is also witness to the inquest report (Exhibit-10). PW 2 is Baikunth Singh who is also said to be playing Kabaddi. Ganauri Singh is PW 3 who is also said to be playing Kabaddi. PW 4 is Umesh Singh, PW 5 is Ramjee Singh, PW 6 is Vijay Singh, all of whom were also playing Kabaddi. Of some importance is PW 7 Ram Sagar Singh who was one of the injured and PW 8 Tapeswar Singh who was another injured Kabaddi players, the later who had become unconscious at the place of occurrence. PW 9 Kedar Singh is the informant who was witness to the Kabaddi and had accompanied the injured to the State Dispensary, Giriak where his statement was recorded together with others. PW 10 is Dr B B Singh who conducted the post mortem examination which has been exhibited as Exhibit-5 which is dated 22.06.1985. He was Civil Assistant Surgeon at Biharsharif Sadar Hospital. PW 11 is Jamuna Singh who had brought the material exhibit (five empty cartridges and blood-stained earth from the Malkhana to the Court) and, as such, is the formal witness. PW 12 is Dr B P Keshav who is also a Civil Assistant Surgeon at the Biharsharif Sadar Hospital and had examined the two injured persons, namely, Tapeswar Singh (PW 7) and Ram Sagar Singh (PW 8) and prepared injury reports being Exhibits-5/1 and 5/2 respectively. PW 13 is Dr C M Singh, a private doctor who had conducted the radiological examination of Tapeswar Singh. PW 14 is the all important K N Choudhary who was the IO.

8. Before proceeding to analyse the evidences on record, we think it appropriate to set the time schedule, as available from the evidences, brought on record by the prosecution. The incident took place at 5 pm on 21.06.1985 in village - Markatta as per the Fardbayan. Ram Sagar Singh that is PW 7 was examined at Biharsharif Sadar Hospital by Dr B P Keshav (PW 12) for his injuries at 7.40 pm (Exhibit-5/1). Fardbayan is recorded at the State Dispensary, Giriak at 8 pm. At 8.30 pm, Tapeswar Singh (PW 8) is examined for his injuries at Biharsharif Sadar Hospital by Dr B P Keshav (PW 12) (injury report, Exhibit-5/2). At 9 pm, inquest (Exhibit-10) is prepared at State Dispensary, Giriak by the IO (PW 14) K N Choudhary. FIR is registered at 10.45 pm at Giriak Police Station. The FIR was then sent to the Chief Judicial Magistrate (CJM), Nalanda at Biharsharif on 22.06.1985 which is received by the CJM on 24.06.1985.

9. In support of the appeal, Mr Shakil Ahmad Khan, learned Senior Counsel submits that if we look to the Fardbayan and the evidence of the informant (PW 9) in Court, we would find that the whole story has been changed which creates serious doubt about the story, as set up by the prosecution. This is further fortified by evidence of other witnesses. He then submits that the FIR, having been registered on 21.06.1985 and sent to the Court on 22.06.1985, was received on 24.06.1985 when the Giriak PS is only about 45 minutes away from Biharsharif where the CJM Court is. This delay, without explanation, shows that the story, as per the FIR, is not correct. He then submits that as per the Fardbayan, the two injured persons, that is Tapeswar Singh and Ram Sagar Singh were referred by doctor at the State Dispensary, Giriak to Sadar Hospital, Biharsharif for treatment, does not appear to be correct inasmuch as even before the Fardbayan is recorded, Ram Sagar Singh is examined by doctor at Biharsharif Sadar Hospital as per injury report (Exhibit-5/1). He further submits that when the doctor first examined him at Giriak State Dispensary, no injury report was prepared or if prepared, it has not been produced. The most important part of his submission is that when Ram Sagar Singh reached Biharsharif Sadar Hospital, without any forwarding, doctor there sent OD slip to the Bihar PS. One Madan Prasad, Sub Inspector (SI) of Bihar PS, after making Sanha entry, was deputed for the purposes. Madan Prasad, SI of Bihar PS has been withheld which becomes materially important in view of subsequent facts. Madan Prasad then goes and requisitions for injury report. As noted above, Ram Sagar Singh is examined at 7.40 pm on 21.06.1985 by the doctor but the injury report ultimately given to the police is dated 03.07.1985. Tapeswar Singh was examined on the same day at 8.30 pm but the injury report is dated 27.06.1985 both prepared by Dr B P Keshav (PW 12). This Madan Prasad also recorded a Fardbayan of Ram Sagar Singh at Biharsharif Sadar Hospital. This is duly entered in a Sanha entry in Bihar PS. This Fardbayan has been withheld by the prosecution. Then there is yet another Sanha entry at Bihar PS in which it is noted that the Circle Inspector from Giriak PS came and collected the Fardbayan of Ram Sagar Singh for taking it to Giriak PS. Neither this Fardbayan nor this Circle Inspector is produced in Court. All these three Sanha entries of Bihar PS were brought to the attention of the IO by the defence and he admits them and their contents but is unable to give any explanation as to why the Circle Inspector, why Madan Prasad have not been examined and what happened to the Fardbayan of Ram Sagar Singh. It is, thus, submitted that this would show that the prosecution has deliberately concealed material evidences and set up a different and a false story. He then submits that if we refer to the post mortem report and the two injury reports, they are consistent in one aspect. All the pellet injuries have charring mark at the entry point. He submits that it is well established that this could only happen in a very close range firing of upto 4 to 6 feet maximum but the prosecution evidence is consistent that the firing took place from near the Mahua tree which was about 6 to 7 yards away from the place where the injured were standing. That would make it about 20 feet or beyond. Firing from that distance cannot cause charring. Thus, the true incident was suppressed by the prosecution and a false story sought

to be established falsely implicating the appellants.

10. We have examined the evidence minutely. In our view, the submissions on behalf of the appellants are correct. The appeals have to be allowed and the judgments of convictions and the sentences deserve to be set aside.

11. As noticed above, the Fardbayan categorically gives names of about 10 people playing Kabaddi and states as many people watching the sport when the incident takes place. About 6 persons indiscriminately fired injuring only 3 but when we come to the evidence of the informant (PW 9) in the Court, we find there is a material change in the whole story. He now deposes that there were only 3 persons who were playing Kabaddi who were the 3 injured and he was the only adult who was watching the sport and rest were children. His attention was drawn to the Fardbayan and he gave no explanation for this change. This is material because not only it falsifies the Fardbayan in material particulars, it establishes, if anything, that all other witnesses that is PWs 1 to 6 who allege that they were eye witnesses were not present there. Their presence becomes doubtful. The whole prosecution case on this itself crumbles. Then we find that though in the Fardbayan, PW 9 specifically refers that Jagdish Prasad fired from his rifle at Kishori Singh, the deceased, in his deposition, he changes totally. He states that Jagdish Prasad fired from his gun twice hitting Kishori Singh, the deceased. The reason for this drastic and material change is obvious. He was confronted in his cross-examination whether he knew the distinction between a rifle and gun. He emphatically stated that he was knowledgeable about the said difference. The reason for the change was the post mortem report. No bullet injury fired from a rifle was found on Kishori Singh. What was found were three pellets which could only be from a gun and that too on two sides of the body. Thus, from a single rifle shot, the story is now changed from the two shots from a gun. How the charring came about remains totally unexplained. Similarly, there is change of weapon with other accused persons as well. There is yet another material change. In the FIR, which is the first report of the crime and the manner thereof, apart from attributing Jagdish Prasad to have specifically shot at Kishori Singh, the deceased, no specific roles are ascribed to the other shooters, apart from stating that there was indiscriminate firing. In the deposition which is made after more than three years in Court, specifics are said. It is clearly stated that Nityanand Sharma, using his countrymade gun, fired at Tapeswar Singh, Baliram Prasad fired hitting Ram Sagar Singh from his gun. We need not discuss the evidence of PWs 1 to 6 inasmuch as they all have given evidence parrot like evidence ascribing the fatal shot to Jagdish Prasad, firing by Nityanand and Baliram but, as noticed above, informant's own statement makes their presence at the place of occurrence doubtful.

12. Now we come to another interesting aspect. It is alleged that the firing was from near the Mahua tree. Witnesses, including the IO, have admitted that from where the injured had fallen, the Mahua tree would be about 6 to 7 yards. That would

make it about 20 feet. Mr Shakil Ahmad Khan, learned Senior Counsel is correct when he submits that this is totally incompatible to the injuries, as found. All injuries on the deceased and PWs 7 and 8 had charring mark which means that the shots were fired at a very close range not exceeding 6 feet. This even the doctors admitted. This creates serious doubt about the prosecution version because as per the IO himself the five empty 12 bore cartridges were recovered from near the Mahua tree which was more than 20 feet away. Prosecution is, thus, surely concealing the true facts.

13. This conclusion of ours is reaffirmed from the following facts. In the Fardbayan, it is stated that Tapeswar Singh, who was unconscious and Ram Sagar Singh, who was the other injured were referred by the doctor from Giriak State Dispensary to Biharsharif Sadar Hospital. Surely by then, it would be assumed that the Fardbayan had been recorded and they had been examined by the doctor. If that be so, an injury report must have been prepared. No such injury report or for that matter forwarding of the doctor has been brought on record. What is more curious is what happens later. The Fardbayan at Giriak State Dispensary is recorded at 8 pm whereas Ram Sagar Singh is examined by Dr B P Keshav (PW 12) at Biharsharif Sadar Hospital at 7.40 pm without any forwarding. At 8.30 pm, Tapeswar Singh is examined at the Sadar Hospital. Both these persons are examined upon requisition of Madan Prasad, SI of Bihar PS on OD slip sent from the Sadar Hospital, Biharsharif to Bihar PS. This falsifies the assertion, as made in the Fardbayan. Now is the most curious aspect. The IO has clearly admitted that there is a Sanha entry at the Bihar PS with regard to Madan Prasad, SI returning with a Fardbayan recorded as per the statement of Ram Sagar Singh from Sadar Hospital, Biharsharif. There is yet another Sanha entry of the Circle Inspector from Giriak PS having come to take the Fardbayan of Ram Sagar Singh to Giriak PS where the case was initially registered. This Madan Prasad, SI is not examined. The statement of Ram Sagar Singh vanishes. The Circle Inspector, who carried the statement from Bihar PS to Giriak PS, is not examined. In cross-examination, both Ram Sagar Singh and the IO have been confronted with these facts. Ram Sagar Singh first admits giving a statement then conceals the fact. IO admits a statement but cannot explain why it has not been brought on record. Both are suggestive that in fact the statement so recorded gave a totally different story which would have demolished the prosecution case in toto and, therefore, the statement has been withheld. These are material facts which the prosecution had but has chosen to withhold. If we see these facts then the relevance of timely registration and dispatch of the FIR to the Court of the CJM becomes relevant. As noted above, FIR was registered at 10.45 pm on 21.06.1985 and on 22.06.1985 sent to the Court of CJM which is only about 45 minutes away. It is received in the Court of the CJM only on 24.06.1985. This raises serious doubts about the authenticity of Fardbayan itself. In this connection, I may refer to the case of [Arjun Marik and Others Vs. State of Bihar](#), wherein this fact and the legal implications thereof has been considered in detail and it has virtually been held that

this, if remained unexplained, would falsify the prosecution case. We may usefully refer to what is noted in paragraph-25 of the reports and quoted hereunder:

25. He submitted that in Bihar State even in murder cases FIR is never sent to the residence of a Magistrate on Sundays and holidays. If that be so, we are afraid such a practice can never be said to be healthy practice which renders the mandatory provision nugatory. If such a practice is prevalent it must be deprecated and it is high time that the authorities concerned should wake up and see that the provisions of Section 157 CrPC are complied with in letter and spirit.

14. Here, it is apparent that this delay gave enough time to the prosecution to build a story but there were other evidences which falsify the entire story, as noted above. The manner of occurrence, as alleged, is not compatible to the facts, as found. The presence of witnesses is doubtful. The story set up about people going to Bihar Sharif being treated and the statement being given therein belies the story set up by the prosecution. The manner in which the use of rifle changes to use of gun after receipt of post mortem report shows that prosecution has concealed more truth than disclosed. Rather what has been disclosed is totally false and unestablished. The truth has been completely concealed. We may, in this connection, refer the case of [Ishwar Singh Vs. State of U.P.](#), and, in particular paragraph-9, material part thereof is quoted hereunder:

9. We have pointed out that the trial Court in convicting the appellants overlooked certain significant features of the case, namely, the inordinate and unexplained delay in dispatching the first information report to the Magistrate; the difference in the account given by the prosecution witnesses and as appearing from the first information report of the occurrence; the absence of any statement in the first information report as to the injuries received by some of accused, and the non-examination of material witnesses.

15. We may also refer to the decision of the Apex Court in the case of [State of U.P. and Another Vs. Jaggo alias Jagdish and Others](#), and, in particular, what is stated in paragraphs-15 and 16 thereof:

15. Ramesh is the person with whom Lalu was talking at the time of the alleged occurrence. Ramesh was mentioned in the first information report. It is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the "unfolding of the narrative" should be called. This salutary principle in criminal trials has been stressed by this Court in the case of [Habeeb Mohammad Vs. The State of Hyderabad](#), , for eliciting the truth. The absence of Ramesh from the prosecution evidence seriously affects the truth of the prosecution case.

16. This Court in [Habeeb Mohammad Vs. The State of Hyderabad](#), (supra) referred to the observations of Jenkins, C J in [Ram Ranjan Roy Vs. Emperor](#), that the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence

and to determine the guilt or innocence of the accused and the duty of a public prosecutor is to represent the administration of justice so that the testimony of all the available eye-witnesses should be before the Court. Lord Roche in *Stephen Seneviratne v The King*, AIR 1936 PC 289, referred to the observations of Jenkins, C J and said that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether the effect of their testimony is for or against the case for the prosecution. That is why this Court in [Habeeb Mohammad Vs. The State of Hyderabad](#), said that the absence of an eye-witness in the circumstances of the case might affect a fair trial. On behalf of the appellant it was said that Ramesh Chand was won over and therefore the prosecution could not call Ramesh. The High Court rightly said that the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness has been won over. In such a case Ramesh could have been produced for cross-examination by the accused. That would have elicited the correct facts. If Ramesh were an eye-witness the accused were entitled to test his evidence particularly when Lalu was alleged to be talking with Ramesh at the time of the occurrence.

16. In the result, these appeals are allowed. It is held that the prosecution has miserably failed to prove its case. The judgments of convictions are set aside. The appellants are freed from the liabilities of their bail bonds.