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**(2003) 10 PAT CK 0041**

**Patna High Court**

**Case No:** Criminal Appeal No. 426 of 2002

Ashok Kumar Gupta

APPELLANT

Vs

State of Bihar

RESPONDENT

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**Date of Decision:** Oct. 29, 2003

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 34

**Citation:** (2003) CriminalCC 508

**Hon'ble Judges:** Sachchidanand Jha, J; B.N. Prasad Singh, J

**Bench:** Division Bench

**Advocate:** Lala Kailash Behari Prasad, app, for the Appellant; Vishwanath Prasad Sinha, Sujit Kumar Singh, Rajesh Kumar, Sanjay Kumar Singh, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

1. The sole appellant of Criminal Appeal No. 426 of 2002 has been convicted u/s 302/34 of the Indian Penal Code and sentenced to death. He has also been convicted under Sections 323 and 341 of the Penal Code but no sentence has been awarded separately thereunder. The sentence of death has been referred to this Court for confirmation in terms of Section 366 Criminal Procedure Code. Both the Criminal Appeal and Reference were taken up for hearing together.

2. On 2.12.1997 at 9.15 p.m. Radhey Prasad Gupta of village Kurhwa Ratanpur within Chakmahesi Police Station of Samastipur District made fardbeyan before Officer-in-Charge of Chakmahesi PS., S.I. Akshayabat Chaturvedi, stating therein that in the preceding evening at about 7.30 p.m. he closed his cement shop at Kurhwa Batti Chowk and left for his house along with his son Shambhu Prasad Gupta. When they reached the toddy shop of Sitaram Mahto, Shambhu Prasad Gupta told him that he wanted to ease himself. He took a pot from Sitaram Mahto and went to answer the call of nature asking him to go ahead. Radhey Shayam Gupta proceeded but stopped near the mosque when he heard sound he returned. Near the house of

Sitram Mahto he heard groaning sound of his son Shambhu Prasad Gupta and when he went near, he saw one Premlal Rai and Ashok Kumar Gupta, the appellant herein, standing there with country made pistols in their hand uttering that the job was done. They caught hold of Radhey Prasad Gupta and after beating him with slaps at pistol point covered his face by a wrapped with the help of 2-3 unknown persons. They took him Radhey Prasad Gupta to an orchard south of the village on pistol point. There he was threatened not to divulge the incident to anybody lest his entire family would be eliminated. In the next morning, on "the pretext of attending the call of nature he fled away from the place, reached his house and narrated the incident to the family members. He stated that 15-20 days prior to the occurrence, hot discussion had taken place between Shambhu Prasad Gupta on the one hand and Premlal Rai and Ashok Kumar Gupta on the other in course of which Shambhu Prasad Gupta had been threatened with dire consequences.

3. After recording fardbeyan which led to Chakmahesi P.S. Case No. 100/97 S.I. Akshayabat Chaturvedi took up the investigation. He held inquest, sent the body for post-mortem recorded the statements of witnesses and at the end of the investigation, after completing necessary formalities submitted charge-sheet against the appellant, showing Premlal Rai and others as absconder, thus putting the appellant on trial.

4. At the trial the prosecution examined 12 witnesses, out of which PWs 1 Vishwanath Gupta, PW2 Kedar Prasad Gupta, PW3 Ashok Kumar Mishra, PW6 Baijnath Das and PW10 Ram Kishun Mahto were formal witnesses who proved the inquest, seizure of cartridges and blood-stained body from the place of occurrence. Three witnesses, namely PW5 Abdul Rashid, PW8 Sita Ram Mahto and PW9 Rampari Devi did not support the prosecution case and they were declared hostile. Amongst the rest two are official witnesses, namely, PW1 1 Dr. Arun Kumar Jha who had held post-mortem on the dead body of Shambhu Prasad Gupta and PW12 S.I. Akshayabat Chaturvedi who had investigated the case. The material witnesses on facts are PW4 Radhey Prasad-Gupta, the informant himself, and PW7 Renu Devi, his daughter-in-law i.e., wife of the deceased. The appellant also examined one Kameshwar Lai, a formal witness, to prove the FIR of another case. At the end of the trial, the trial Court convicted and sentenced the appellant in the manner stated at the outset.

5. Shri Vishwanath Prasad Sinha, learned counsel for the appellant, submitted that there is no witness on the point of actual killing and though the informant claimed to have reached the place of occurrence and seen the appellant and the said Premlal Rai present there with fire-arms making incriminating utterances, the circumstances do not lead to that inference. The evidence on record rather suggests that he went to the place of occurrence for the first time in the next morning. However, he concocted the story of confinement for the whole night in order to cover the delay because fardbeyan was lodged after 14 hours of the occurrence. Counsel also

submitted that though the prosecution is not required to prove motive, specially where the case is based on ocular evidence, where the prosecution suggests some motive, the Court may consider to whether the alleged motive was sufficient for committing the crime. In the instant case, it was submitted, an incident involving exchange of hot words 15-20 days prior to the date of occurrence could not be the motive for committing the crime of murder.

6. On behalf of the State it was submitted that though the informant did not see the actual firing, he reached there immediately after the occurrence and on reaching there saw the appellant and his companion Premlal Rai there with fire-arms and, in the circumstances, it cannot be said that there is no direct evidence regarding the occurrence. It was submitted that where the person is found at the place of occurrence and soon after the occurrence with fire-arms and the deceased is found to have died of fire-arm injury, the natural inference would be that it is the person(s) present at the place of occurrence who had killed him. It was submitted that there is no bar to convict the person on the evidence of the solitary eye-witness.

7. It is true that the evidence of solitary witness may form the basis of conviction provided the witness is wholly reliable and his evidence is unimpeachable. In the instant case, it is thus to be seen whether the informant as solitary witness of the case, PW7 Renu Devi being merely hearsay witness, can be said to be wholly reliable so as to justify conviction of the appellant on the basis of his evidence. As seen above, according to him, after he moved ahead, parting company with the deceased who had gone to answer the call of nature, he heard sought of gunshot and returned. When he returned to the place i.e., shop of Sitaram Mahto he saw the appellant with fire-arms along with 2-3 unknown, he also saw his son lying with grievous injuries. Though it is difficult to predict human behavior to does not stand to reason that the assailants would remain present at the place of occurrence after accomplishing their object. As seen above, when the informant reached the place of occurrence he heard the accused making utterances about accomplishing the object. If that was so, it is not understandable as to why they would keep standing. The normal conduct of an assailant is to flee away from the place rather than remain present so as to be seen by witnesses and, further, disclose committing the crime to them, according to the informant, the deceased had taken pot from Sitaram Mahto who had a toddy shop there and also used to live in the same house, but neither Sitaram Mahto nor his wife Rampari Devi supported the prosecution case.

8. The case of the informant that he was taken to the orchard on pistol point and kept in confinement for whole of night also does not inspire confidence at all. According to the informant, he was threatened with dire consequences if he dared disclose the incident to any person. If the miscreants thought that the informant was a potential witness who could land them in trouble, nothing prevented them from killing the informant too. Keeping the informant in the confinement for whole of night and letting him go in the morning so easily on the pretext of answering the

call of nature, in our opinion, is a story which is difficult to believe. We find substance in the submission of the appellant's counsel that the story of confinement has been concocted to cover the time intervening between occurrence and the fardbeyan.

9. Our attention was drawn to the evidence of PW Renu Devi to the effect that after her father-in-law i.e., the informant did not return, she thought that he had slept in the shop. It was submitted that this statement suggests that it was not unusual for the informant to spend the night in the shop itself and, may be, in the fateful night to he slept in the shop. This inference finds support from the further statement of Renu Devi to the effect that in the morning the people of locality came there and informed about the death of her husband i.e., deceased. Thereafter, father-in-law (informant) and other family members went to the place where the dead body was lying. It was submitted that this statement of no less than the wife of the deceased strongly suggests that the informant too went to the place of occurrence for the first time in the morning after coming to know about the occurrence from the residents of the locality and that he had himself no idea about the occurrence from before. This falsifies his claim of being present at the place of occurrence and spending the night in the wrongful confinement of the appellant and others.

10. Counsel for the appellant also drew our attention to the evidence suggesting that Ramlila was being played at a nearby place during the relevant time and submitted that possibly the deceased might have gone to see the Ramlila and killed sometime after the same was over. It is not necessary to go into this argument. The conviction of the appellant is based on the solitary evidence of the informant who does not qualify as a "wholly reliable" witness and, therefore, we are of the opinion, that it would not be safe to uphold the conviction of the appellant on the basis of his evidence.

11. In the result, the appeal is allowed, the conviction and sentence awarded to the appellant are set aside and he is acquitted of the charge. He is directed to be released forthwith, if not wanted in any other case. The reference is answered accordingly.