
Ram Pratap Rai Vs The State of Bihar

Criminal Appeal (DB) No. 24 of 1991

Court: Patna High Court

Date of Decision: Aug. 5, 2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 217, 232, 311, 313#Penal Code, 1860 (IPC) â€” Section 201, 217, 302, 311, 34

Citation: (2014) 3 PLJR 750

Hon'ble Judges: Dharnidhar Jha, J; A.K. Lal, J

Bench: Division Bench

Advocate: Akhileshwar Prasad Singh, Sr. Adv, Advocate for the Appellant; Abhimanyu Sharma, APP, Advocate for the Respondent

Judgement

Amaresh Kumar Lal, J.

This appeal is directed against the judgment of conviction and order of sentence dated 19.12.1990 passed by the

learned 4th Additional Sessions Judge, Ara in Session Trial No. 329 of 1984 by which the appellants have been convicted and sentenced to

rigorous imprisonment for life under Section 302/ 34 IPC.

2. The prosecution case, in brief, is that on 18.3.1984 at about 5 p.m. the villagers including the informant Chhedhi Bhar (P.W. 6) and others were

singing at Thakurbari at Ramjanki Temple on the occasion of Holi. All of a sudden, the appellants Ram Pratap Rai and Subash Sharma sons of late

Vindhyachal Rai and one Ram Dular Rai came there. The accused Ram Dular Rai instigated the other two accused to kill Bishram Bhar, the son of

the informant (P.W. 6) who was also there, thereafter, the appellants shot fire which caused injury to his son Bishram Bhar, who got injury and fell

down. There was stampede. The co-villager Ramayan Bhar was taking Bishram Bhar (deceased) towards the northern side in a lane but the

accused dragged the injured towards their house in the vicinity of flour mill and assaulted him with garasa which caused the death of Vishram Bhar,

the son of the informant. It has further been alleged that in the vicinity of Ramjanaki Thakurbari where there was firing a person Sitaram Singh also

got injury and he also succumbed to the injuries after sometime there. The reason for the occurrence is the old enmity between both the parties.

The occurrence was witnessed by Ramayan Bhar (P.W. 3), Rampati Bhar (P.W. 4), Raj Kishore Bhar (P.W. 1), Bindhyachal Bhar (P.W. 2) and

others. The fardbeyan was recorded by ASI, R. Alam (not examined) at the house of Subash Sharma, the son of late Bindhyachal Rai at village

Dehri on 18.3.1984 at 21.30 hours. On the basis of it Rajpur P.S. Case No. 31 of 1984 was instituted for the offence punishable under Sections

302/ 201/ 34 IPC against the appellants and Ram Dular Rai who died during the trial. After investigation charge-sheet was submitted cognizance

was taken. Charges were framed against all the accused including the appellants for the offence punishable under Section 302 read with Section 34

and section 201 of the Indian Penal Code to which they denied and claimed to be tried.

3. During the pendency of the appeal accused Ram Dular Rai died and the trial against him was abated vide order dated 8.9.1989 by the learned

Trial Court.

4. The defence of the accused-appellants is false implication on account of old enmity.

5. After trial both the appellants have been held guilty under Section 302/ 34 IPC and were sentenced as aforesaid. They have not been held guilty

under Section 201 of IPC.

6. Learned counsel for the appellants has submitted that non-examination of the investigating officer has prejudiced the case of the appellant and

they should be given the benefit of doubt. Although, P.Ws. 1, 2, 3, 4 and 6 have supported the prosecution case but on recall they have

contradicted their previous statement before the trial court and they have not been declared hostile. Since these appellants have not been declared

hostile, their evidence is binding on the prosecution. In support of his contention, he has relied upon two decisions; (2005) 5 SCC 272 (Raja Ram

vs. the State of Rajasthan) and Sanjai Paswan, Ramji Paswan and Binay Paswan Vs. State of Bihar, .

7. Learned counsel for the State has submitted that the witnesses have supported the prosecution case as such they have not been declared hostile.

After a long gap they have been recalled without any justification to demolish the prosecution case. The order to recall those witnesses is against

the principles of law. However, no specific question has been asked by the accused. Previous statement made by the witness before the learned

Magistrate has not been put before the witness as such the statement of witnesses after recall by the Court at the instance of the accused is not

relevant and no benefit can be derived by the accused. Since the previous statement was not placed before the witnesses either to deny or accept.

8. It appears that prosecution has examined seven witnesses to prove its charge. P.W. 6 Chhedi Bhar is the informant of this case. He has stated

that on the date and time of occurrence his son Bishram Bhar and others were signing songs on the eve of Holi in Thakurbari in group. In the

meantime, both the appellants and Ram Dular (died) came there. P.W. 6 and others came out from Thakurbari after singing song. The appellants

Ram Pratap Rai shot fire which caused injury to Bishram Bhar. The fire shot was made by Ram Pratap Rai at the instigation of Ram Dular Rai. The

appellant Subhash also shot fire which hit the another deceased. After getting injury the deceased Bishram Bhar rushed towards northern side and

stopped near a wall. Ramayan Bhar (P.W. 3) tried to take him into his house but Ram Pratap Rai (appellant), Ram Dular Rai and Subhash

(appellant) came there and caught hold of Bishram Bhar and dragged him towards southern side in the vicinity of flour mill and they killed Bishram

Bhar by garasa. P.W. 6 went to the police station and brought the police officer to the place of occurrence. The police officer recorded his

statement at the place of occurrence which was read over and explained to him and thereafter he put his signature (Ext. 1) after finding it correct.

He has stated that the reason for the occurrence is enmity. He has identified all the accused including the appellants.

In his cross-examination he has stated that fire shot caused by Ram Pratap Rai hit Bishram Bhar and Subash Sharma shot fire which caused injury

to Sita Ram which proved fatal. He had also stated that the son (deceased) Bishram was killed by three accused with garasa causing him injury.

He has been cross-examined at length but the defence has failed to demolish his evidence. In paragraph 11 he has stated that when the firing was

made he was in the eastern side of his son Bishram Bhar. Bishram had started departure. In the meantime, fire was shot in the thakurbari, the

people including the singers of his group started escaping. P.W. 6 did not escape. After firing there was stampede and people started escaping. He

has further stated in paragraph 12 that he has seen his son being killed. It appears that the evidence of P.W. 6 remains intact and his evidence is

convincing. After examination-in-chief and detailed cross-examination this witness (P.W. 6) has been recalled on the basis of the petition filed on

behalf of the accused. In his cross-examination, he has stated that he was at his house on the date of occurrence. He did not go to thakurbari and

the police officer came to his house on the next date of the occurrence and got his signature.

9. The recall of prosecution witnesses for reexamination or re-cross-examination is not at the sweet will of a party or of a court. The witness can

be recalled or resummoned and examined and cross-examined in case there is alteration or addition to charge under Section 217 Cr.P.C. and also

under Section 311 of the Code of Criminal Procedure, when the evidence of such witness appears to the Court to be essential to the just decision

of the case. It means the witnesses cannot be recalled or recross-examined without any rightful purpose. It appears from the record that the charge

has neither been alerted. But without any cause of action for cross-examination of witnesses the petition was filed by the accused to recall P.Ws. 1

to 4 for further cross-examination as their attention has not been drawn to their previous statement in the affidavit. It appears that such petition was

dismissed by the learned trial Court vide order dated 2.2.1988 on the ground that the evidence of these witnesses were recorded before

23.1.1986. But no effort was made by the defence to recall the witnesses although the affidavit alleged to be sworn by them was known to them. It

was considered by the learned trial Court that the petition to recall the witness was just to delay the disposal of the case and hence it was rejected

and the case was fixed for statement of the accused under Section 313 Cr.P.C. It appears that the said order was not challenged before any

Court. On 15.3.1988 the statement of the accused under Section 313 Cr.P.C. was recorded. On 5.4.1988 both the parties were heard under

Section 232 Cr.P.C. and the case was fixed on 26.4.1988. On 26.4.1988 a petition was filed on behalf of the accused to recall the witnesses. It

appears that vide order dated 28.6.1988 the learned trial Court has reviewed its earlier order dated 2.2.1988 and allowed the petition of the

accused to recall the witnesses P.Ws. 1 to 4 and the prosecution was directed to produce P.Ws. 1 to 4 on 16.8.1988. It appears that the

Additional Public Prosecutor did not object to the prayer of the accused to recall the P.Ws. 1 to 4 for the reasons best known to him. It appears

from order dated 28.6.1988 that no cogent reason has been given to recall the witnesses P.Ws. 1 to 4 who were examined and cross-examined

by the accused. As such the order dated 28.6.1988 cannot be deemed to have been passed in accordance with law and such order is non est in

the eye of law. It appears that on 6.6.1989 P.W. 5 Sheo Kumar Koiri was cross-examined on recall. It does not appear from the record that any

order was passed for recall of P.W. 5 and to reexamine him. It appears that P.W. 5 was examined and cross-examined on 26.2.1986. There was

no justification for recalling P.Ws. 5 for recross-examination on 6.6.1989. Similarly, it further appears that P.W. 6 was examined on 4th June 1986

(not on 4th May 1986 as mentioned in the form of deposition). He was cross-examined on the same date 4.6.1986 in part and his cross-

examination was completed on 5.6.1986. It appears that there is no petition filed for his recall. However, P.W. 6 Chedi Bhar was recalled and his

cross-examination was made on 8.8.1989 without any justification, as such his cross-examination on recall is not in accordance with law and it is

not fit to be considered.

10. P.W. 1 Raj Kishore Bhar has supported the version of the prosecution and has stated that at the time of occurrence singing of song in

Thakurbari was going on. The deceased Bishram Bhar was also among the singers. The deceased Sitaram was also there. Ram Pratap Rai,

Subhash Sharma (appellants) and Ram Dular (died) came there. Subhash Sharma and Ram Pratap Rai were armed with firearms. Ram Pratap Rai

shot fire at the instance of Ram Dular. The projectile hit Bishram and Sitaram (deceased). Bishram ran and fell down at some distance thereafter all

the three accused dragged him towards their darwaja and killed him by garasa. Bishram and Sitaram both died. He has also been cross-examined,

but his evidence has not been demolished by the accused. His evidence has remained intact. This witness has also been cross-examined on recall

and has stated that he did not see as to who had killed the deceased and he has filed an affidavit to this effect. It has been stated earlier that the

statement of witnesses on recall has no significance as the order of recall was itself without any substance and illegal. The petition filed for recalling

the prosecution witness, has already been rejected by the learned trial Court earlier vide order dated 2.2.1988 and the same court has reviewed its

order without any jurisdiction. Criminal court has no power to review its own order except to correct the clerical and mathematical error.

11. P.W. 2 Bindhyachal Bhar was also present in Thakurbari and he has also supported the prosecution case as an eye witness. He has also been

cross-examined on recall in which he has contradicted his previous statement.

12. P.W. 3 Ramayan Bhar has stated that at the time of occurrence he was present in Thakurbari for singing a song. He also sang in the

Thakurbari. He has also stated that all the accused including the appellants came there. Ram Prasad Rai shot fire at Bishram which caused injury.

Bishram ran away from there. Subhash Sharma shot fire which caused injury to Sitaram Koeri who fell down and died. Bishram ran towards

northern side and stopped near a wall. Thereafter, both the appellants and Ram Pratap Rai came there and took Bishram towards the vicinity of

their house and started cutting Bishram with garasa. In this way, P.W. 3 has also supported the prosecution case. He was examined and cross-

examined on 23rd January 1986. On recall he has been cross-examined on 6.11.1988.

13. P.W. 4 Rampati Bhar has stated that he was also present in Thakurbari when he was returning after singing songs. In the meantime, all the

accused including the appellants came there. Subhash Rai and Ram Pratap Rai were armed with small firearms. Ram Pratap Rai shot fire at

Bishram who after getting injury removed from there and at some distance he took the shelter of a wall. Subhash Sharma shot fire which caused

injury to Sitaram Koyari which proved fatal. Ramayan Bhar (P.W. 3) was dragging Bishram to his house. In the meantime, the appellants

overpowered Bishram and took him towards their house and started to assault Bishram with garasa. After seeing this occurrence P.W. 4 fled away

due to fear. He has also faced the cross-examination and the defence has failed to demolish his evidence. He was examined and cross-examined

on 23.1.1986 and he has been recross-examined on 20.12.1988 on recall.

14. P.W. 5 Sheo Kumar Koeri is the father of the deceased Sitaram Koeri. He has stated that he has stated that he was at a distance of 100-200

steps north of Thakurbari. At the time of occurrence, he heard the noise of fire and rushed to Thakurbari, his son was trampling. He had injury in

his chest. He claims to know that Subash Sharma and Ram Pratap Rai caused injury to his son. Bishram has also got firearm injury. His son

succumbed to the injury within 10 minutes in his presence.

15. P.W. 7 Radha Raman Prasad, Civil Assistant Surgeon, Sadar Hospital, Buxar has held the post-mortem examination on the dead body of

Sitaram Singh on 19.3.1984 and found the following ante-mortem injury on his person:-

(i) One circular wound 1/4" in diameter x thoracic cavity deep margin, ragged, inverted, charred 1"/medial to left nipple. The wound of entrance.

(ii) One circular wound 1/2" in diameter, margin ragged, everted just below the inferior angle left scapula.

On dissection, extensive ecchymosis around injury no. 1 and fracture corresponding ribs to injury no. 1. 6th and 7th ribs fractured. The death was

caused due to shock and haemorrhage as a result of injury no. 1 caused by firearm. The post-mortem report was marked (Ext. 2).

He has stated that he also held the post-mortem examination on the dead body of Bishram Bhar on the same date and found the following ante-

mortem injuries:-

(i) One incised wound 4" x 1/2" x bone deep one the left side of head with blood clot.

(ii) One incised wound 3" x 1/2" x bone deep in front of the left ear on temporal bone.

(iii) One incised wound 4" x 1" cutting across the left side of mascila.

(iv) One incised wound 5" x 1" bone deep cutting across left side of mascila upper part of the left side neck, upper part of the nose and eye.

(v) One incised wound 3" x 1" x bone deep cutting across the right side of mascila.

(vi) Three circular wound 1/4" in dia x neck deep margin ragged inverted on the left side of base of neck with charring about 1/2" and 1" apart of

each other. Wound of entrance.

(vii) One circular wound margin ragged enverted 1/2" diameter on the right side of the neck 1" below the right angle of jaw.

On dissection extensive subcutaneous ecchymosis corresponding to injury nos. 1 to 5 and multiple fracture of the corresponding leons. Left side of

wind pipe and ossifegus lacerated. Haematoma present in frontal lobe of brain and brain substance lacerated.

In the opinion of the doctor, the death was caused due to shock and haemorrhage as a result of the above injuries. Injury Nos. 1 to V were caused

by sharp heavy cutting weapon like farsa and garasa. Injury Nos. 6 and 7 were caused by firearms. The time elapsed since death was within 12 to

24 hours. The above injuries were sufficient to cause death. The post-mortem report is Ext. 2/1. He has also been cross-examined.

16. It appears that ocular evidence of P.Ws. 1, 2, 3, 4 and 6 stands corroborated by the medical evidence, P.W. 7. In this case, admittedly, the

Investigating Officer has not been examined. None examination of the Investigating Officer has not caused any prejudice to the accused-appellants.

The defence has right to prejudice the case of the prosecution by getting the prosecution witness recalled and got the statement eliminating the

evidence which had earlier been given by them in the Court in their examination-in-chief and cross-examination. It has been found earlier that the

petition was filed to recall the prosecution witnesses 1 to 4 which was rejected by the trial Court vide order dated 2.2.1988, but later on again the

petition was filed to recall the prosecution witness which was not protested by the Public Prosecutor and the learned trial Court reviewing its earlier

order and passed the order to recall the prosecution witnesses vide order dated 28.6.1988 without any cogent reason and also without jurisdiction

which had already been seen in forgoing paragraphs. It also appears that the previous statement of those witnesses have not been produced before

him for their admission or refusal as such their statement in re-cross examination is meaningless and have no value in the eye of law and no reliance

can be made on such statement under re-cross examination.

17. In case of Raja Ram vs. State of Rajasthan [(2005) 5 SCC 272] (Supra), the case was based on dying declaration in view of the statement of

Dr. P.W. 8, the dying declaration was found suspicious. P.W. 12 Police Officer had also seen P.W. 5 conversing with the deceased before he

started recording the dying declaration. In this view of the matter, dying declaration was found suspicious and the prosecution witnesses were not

declared hostile, as such the statement was found binding on the prosecution. This judgment has been followed in the case of Sanjai Paswan, Ramji

Paswan and Binay Paswan Vs. State of Bihar, . In this case there was a solitary eye witness and his evidence was full of infirmity and improbability

and he was also on inimical terms with the appellants. It was held that where a single eye witness is not found to be wholly reliable, the Court

should generally insist upon some independent corroboration of his testimony on material particulars before recording conviction.

18. In the present case, it has been found earlier that prosecution case has been supported by P.Ws. 1, 2, 3, 4 as well as 6. They are eye

witnesses to the occurrence and they have seen the occurrence. Their evidence stands corroborated by the medical evidence. P.Ws. 1, 3, 4, 5 and

6 have remained constant. The defence has not able to demolish their evidence in cross-examination. Their evidence stands corroborated by the

medical evidence. After examination of accused under Section 313 Cr.P.C., the prosecution witnesses 1, 2, 3, 4, 5, and 6 have been recalled after

a long delay without any justification. The prayer of the defence to recall those witnesses had been rejected by the learned trial Court vide order

dated 2.2.1988 and without any justification that order has been reviewed vide order dated 28.6.1988 and the order has been passed to recall the

prosecution witnesses 1 to 4. There is also no justification for recalling the prosecution witnesses 5 and 6. Since the order of recall was itself illegal,

as such in pursuance to the illegal order the recross examination of those witnesses has also no substance and is non est in the eye of law. On recall

all the witnesses have changed their earlier version, such order and such evidence is not in the interest of justice. The recall of witness is without any

justification and is not permissible in view of provision contained in Section 217 and 311 of the Indian Penal Code. The order of recall of witnesses

passed by the learned trial Court is without jurisdiction and illegal and any action based on this order is of no consequence giving any benefit to the

accused-appellants. In view of the matter, the aforesaid decisions are not applicable in the facts and circumstances of the present case.

19. For the foregoing reasons, we do not find any ground to interfere with the impugned judgment of conviction and sentence. This appeal is

dismissed. The appellants are on bail. Their bail bonds are cancelled and they are directed to surrender before the learned Trial Court to serve out

the sentence.

Dharnidhar Jha, J.

I agree.