

(2016) 05 PAT CK 0133

PATNA HIGH COURT

Case No: Criminal Appeal (DB) No. 1033 of 2010 {Against the Judgment of conviction dated 27.07.2010 and Order of sentence 04.08.2010 passed by the Additional Sessions Judge, Fast Track Court No. 4, Jehanabad, in Sessions Trial No. 128 of 2004 (Old)/145 of 2006(New

Satyendra Sharma, son of Sri
Jaram Sharma, village - Kanauli,
P.S. Makhdoompur, District -
Jehanabad - Appellant @HASH
The State of Bihar

APPELLANT

Vs

RESPONDENT

Date of Decision: May 16, 2016

Acts Referred:

- Arms Act, 1959 - Section 27
- Penal Code, 1860 (IPC) - Section 148, Section 302

Citation: (2016) 4 ECrC 142 : (2017) 1 PCCR 158

Hon'ble Judges: Anjana Prakash and Rajendra Kumar Mishra, JJ.

Bench: Division Bench

Advocate: M/s. Kanhaiya Prasad Singh, Senior Advocate, Harish Kr. and Avinash Kumar, Advocates, for the Appellant; Mr. Ashwini Kumar Sinha, A.P.P, for the State; Mr. Sunil Kumar, Advocate, for the Informant

Final Decision: Allowed

Judgement

Smt. Anjana Prakash, J.(Oral) - Appellant Satyendra Sharma {in Criminal Appeal (DB) No. 1033 of 2010} has been convicted under Sections 148 and 302 of the Indian Penal Code and Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for life and fine of Rs.5000/- under Section 302 of the Indian Penal Code and in default of payment of fine to undergo further simple imprisonment for one year and to undergo rigorous imprisonment for three years and fine of Rs.3000/- under Section 148 of the Indian Penal Code and Section 27 of the Arms Act

under both counts and in default of payment of fine to undergo further simple imprisonment for six months vide Judgment of conviction dated 27.07.2010 and Order of sentence dated 04.08.2010 passed by the Additional Sessions Judge, Fast Track Court No. 4, Jehanabad, in Sessions Trial No. 128 of 2004(Old)/145 of 2006 (New) whereas the Appellants of Criminal Appeal (DB) No. 768 of 2007, namely, Bhagwan Sharma alias Bhagwan Prasad Sharma, Bharat Bhushan Sharma and Arbind Sharma and of Criminal Appeal (DB) No. 780 of 2007, namely, Sidhanath Sharma, Ashutosh Sharma and Ajay Sharma, have been convicted under Sections 302 and 149 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life vide Judgment of conviction dated 24.05.2007 and Order of sentence dated 29.05.2007 passed by the Additional Sessions Judge, Fast Track Court No. 4, Jehanabad, in Sessions Trial No. 128 of 2004/S.J. No. 333 of 1992.

2. The case of the prosecution, according to the Fardbeyan of the Informant Shyamdeo Singh (P.W.8) is that on 06.07.1991 at about 06.00 A.M. when he along with his brother Karorepati Sharma deceased was going to ease in the field and he had walked at a little ahead, he saw his brother returning and suddenly screaming at which he ran there. He saw the deceased having been caught hold of by the Appellants Bhagwan Prasad Sharma, his son Bharat Bhushan Sharma, Sidhanath Sharma and Arbind Sharma and the deceased struggling. The Appellant Satyendra Sharma is then said to have fired at the deceased on the point blank range on the face on account of which he fell down staggering to a little distance. When he tried to intervene, Brajendra Sharma, Ashutosh Sharma and Ajay Sharma caught hold of him but he felled down Brajendra Sharma, slapped Ashutosh Sharma and kicked Ajay Sharma and ran towards his house. Five accused persons chased him but he concealed himself amongst sugarcane crops. Just then, Kishori Sharma (not examined) came and started to scream that the deceased had been killed. On "hulla" his brother Fulendra Sharma (P.W.2), son Sahjanand Sharma (P.W.7), his father Triveni Singh (not examined) all came. There were 7-8 unknown miscreants along with the aforesaid named accused who all were armed with rifles. Having committed this occurrence, the accused persons left towards Hajisarai.

The motive for the occurrence was that he had taken the lands of his cousin brother Banwari Singh on "Batai" for which Batai Case had been instituted in the year 1990 and was pending. Before the institution of the Batai Case, the said Banwari Singh had settled the land in favour of Bhagwan Sharma and about 10 days back Bhagwan Prasad Sharma and Banwari Singh had executed some sale deeds and it was for this reason the said occurrence had taken place.

3. During trial, the prosecution examined altogether 10 witnesses.

It appears that initially, there was one trial but, thereafter, one Appellant Satyendra Sharma absconded on the date of Judgment, so his trial was split up. Thereafter, he appeared and, therefore, the witnesses are common in both the trials.

4. P.W.1 Ram Nandan Prasad is a formal witness who proves his signature on the Fardbeyan as Ext.1 and the formal First Information Report as Ext.2.

5. P.W.2 Fulendra Sharma, the brother of the Informant, stated that on 06.07.1991 at about 06.00 A.M., he suddenly heard Shyamdeo Sharma screaming that the deceased Karorpati Sharma had been shot dead. He then went there and saw the Appellant Satyendra Sharma armed with a pistol firing and going towards east. Further, he saw the rest of the accused persons who he names also following him. He did not identify 7-8 unknown miscreants. When he reached, he saw Karorepati Sharma dead. P.W.8 Shyamdeo Sharma told him that the Appellants Bhagwan Sharma, Sidhanath Sharma, Bharat Bhushan Sharma, Arbind Sharma and others had caught hold of the deceased whereas the Appellant Satyendra Sharma had shot him at the point blank range.

In the very first paragraph of his cross examination, his attention was drawn to his earlier statement that, in fact, he had not stated that he had seen the Appellant Satyendra Sharma firing with a pistol and going towards east nor had he stated that Shyamdeo Sharma(P.W.8) had disclosed to him about the manner of occurrence. The Investigating Officer (P.W.10) in paragraph-10 has confirmed this fact. We also find that P.W.8, the Informant, did not support the factum of disclosure of the manner of occurrence to him. In such circumstances, his hearsay account is not admissible.

It was suggested to him that for the reasons that since he belonged to the same family, he had given false evidence and implicated the Appellants for the reasons of the land dispute.

6. P.W.3 Sunil Sharma, the son of the Informant and nephew of the deceased stated that on the date of occurrence at about 06.00 A.M., he suddenly heard "hulla" and firing from the east of the village, so he reached there and saw his uncle Karorepati Sharma lying dead. His father, the Informant (P.W.8) Shyamdeo Sharma was standing there. He stated that he saw 10-11 persons firing and going towards the east of the village - Hajisarai and he did not identify any of the accused persons. The Informant told him that while the Appellants Bhagwan Sharma, Bharat Bhushan Sharma, Sidhanath Sharma and Arbind Sharma had caught hold of the deceased Karorpati Sharma, the Appellant Satyendra Sharma had fired at him on his face on account of which he fell down dead.

In cross examination, some questions were put to him with regard to the land dispute but the same is not important.

At this point in time itself, it would be important to note that even though this witness has given hearsay account on the basis of disclosure made by P.W.8 but P.W. 8 does not support this fact and, therefore, the hearsay account is inadmissible in law.

7. P.W.4 Ram Binay Sharma is the brother of the Informant who stated that on the date of occurrence, he was informed that the deceased Karorepati had been murdered so he came to the village and saw him dead. Thereafter, the Informant Shyamdeo Sharma (P.W.8) disclosed to him about the manner of occurrence as disclosed in the First Information Report.

His attention was drawn to his earlier statement in the cross examination and he admits that he had not stated before the police that when he went to the place of occurrence, the Informant Shyamdeo Sharma (P.W.8) had disclosed to him about the manner in which the Appellants had caught the deceased and shot him dead.

He stated that he used to live in Ghosi since the last many years.

Once again this witness does not find any corroboration from the evidence of P.W.8. Therefore, his hearsay account is also discarded.

8. P.W.5 Deo Balak Sharma has stated that on the morning of the occurrence, he heard that the deceased Karorpati had been murdered but he did not know about the occurrence. He appears to be a formal witness.

9. P.W.6 Deo Nandan Sharma is a tendered witness.

10. P.W.7 Sahajanand Sharma is the nephew of the deceased who stated that on the date of occurrence while he was going to ease, he suddenly heard "hulla" at which he went to the place of occurrence and saw 4-5 persons having caught hold of the deceased Karorepati Sharma whereas he was struggling. Appellant Satyendra Sharma is then said to have fired at him with the pistol at which he fell down staggering to a little distance. He identified only one of the persons who had caught hold of the deceased who was Appellant Sidhanath Sharma. He stated that Kishori Sharma (not examined), Fulendra Sharma (P.W.2) and Triveni Singh (not examined) had also reached there. He further stated that the Informant Shyamdeo Sharma had escaped from the clutches of Brajendra Sharma, Ashutosh Sharma and Ajay Sharma and he ran and concealed himself in the sugarcane field.

In cross examination, his attention was drawn to his earlier statement that he had not stated about the Appellant Satyendra Sharma having fired at the deceased or that Appellant Sidhanath Sharma was one of the persons who had caught hold of him. He had also not stated about the Informant Shyamdeo Sharma having been escaped from the clutches of Brajendra Sharma, Ashutosh Sharma and Ajay Sharma. He admitted that no Protest Petition was filed against the police.

The attention of the Investigating Officer was drawn to this part of his evidence, in paragraph-12 and he confirmed that he was neither an eye witness nor had he disclosed the names of the Appellants as mentioned above.

In cross examination, he further stated that his father, the Informant Shyamdeo Sharma (P.W.8), had reached 2-3 minutes after he had reached at the place of

occurrence and when he was coming to the place of occurrence, he had been surrounded by the Appellant Brajendra Sharma and others on the way and they kept him detained for about 5 minutes and he saw that his father had been detained by Brajendra, Ashutosh and Ajay. It was suggested to him that, in fact, for the reasons of the land dispute, he falsely implicated the Appellants, which he denied.

11. P.W.8 Shyamdeo Sharma, the Informant and brother of the deceased had stated that on the date of occurrence he and his brother, the deceased, were going to ease themselves in the field and while he stayed, his brother, the deceased, proceeded to a little distance and just a bit later, he saw his brother having been caught hold of by the Appellant Sidhanath Sharma and both of them were grappling with each other. Just then, the Appellant Satyendra Sharma is said to have fired at the deceased on account of which he fell down about 10 steps ahead and died. When he reached screaming on the filed of Rajdeo Singh, Brajendra Sharma and the Appellants Ashutosh Sharma and Ajay Sharma started to scuffle with him, However, he felled down Brajendra Sharma, slapped Ashutosh and also kicked Ajay Sharma and ran towards the west. He was chased by the Appellants Satyendra Sharma and Sidhanath Sharma but he hid himself. In course of running, he saw Kishori Sharma (not examined), Sahjanand Sharma (P.W.7) and others also screaming that the deceased had been killed. He also joined them and, thereafter, a number of persons came.

He repeated that the motive for the occurrence was the land which he was ploughing on Batai from his uncle Banwari Singh, who, later on, entered into an agreement with the accused persons and, therefore, a Batai Case was instituted and the dispute started between them. He proves the documents of the lands in question.

In cross examination, he stated that after 15-20 minutes of separating from his brother he had heard his screams and he had scuffled with three persons for about two minutes. It was then that his brother Fulendra Sharma (P.W.2), his father Triveni Singh (not examined), his son Sunil Sharma (P.W.3), Brajnandan Sharma (not examined) Dudheshar Sharma (not examined) and 10-15 persons were seen coming from the direction of the village. He then returned with them and saw his brother dead.

He admitted that a case under the Arms Act had been instituted against him and his two sons as also he was a suspect in a case under Section 302 of the Indian Penal Code and a case of dacoity in which he was later on acquitted.

We, thus, find from his evidence that while narrating the manner of occurrence, he materially differs from the one he had given in the Fardbeyan. He has not stated that any of the Appellants had caught hold of the deceased and he only states about the Appellant Sidhanath Sharma grappling with the deceased. We further find that he discredits eye witness account of P.W.2 Fulendra Sharma and P.W.3 Sunil

Sharma.

12. P.W.9 is Dr. Kameshwar Sharma, who conducted the Post-Mortem Examination of the dead body of the deceased and found the following injuries on his person:

(I). A clean circular punctured and aperture about $2\frac{1}{2}$ " X $2\frac{1}{2}$ " X mouth cavities deep with fracture of maxilla and absent of lateral insizer end and cauiana teeth of left side of mouth due to its fracture. The injury is situated just below the left nose with margin inverted.

(II). Lacerated wound $2\frac{1}{2}$ " X 2" X brain deep on posterior side of left ear (back of ear) with fracture of mastoid process of temporal bone with everted margin.

(III). On dissection, injury no.(I) was continued to injury no.(II). Injury No. (I) was wound of entrance whereas Injury No. (II) was wound of exit to each other.

(IV). Fracture of maxilla bone with also fracture of temporal bone (left) found.

(V). Heart chamber was found empty, brain lacerated at the side of Injury No. (II).

(VI). Stomach liquid substance in little amount present.

(VII). All the muscles soft tissues from Injury No. (I) and (II) is damaged.

(VIII). Blood and blood clots found at the side of Injury No. (II) in scalp cavities.

(IX). No any foreign body found from the injury.

(X). Mode of death: Due to firearm injury such as pistol mentioned above which caused severe shock and haemorrhage.

Time since death-within twenty four hours.

Opinion:- in the opinion of the Doctor, the cause of death was shock and haemorrhage caused by above mentioned injury of firearm. The above mentioned injury was sufficient to cause death in normal course of human life.

He proves the Post-Mortem Examination Report as Ext.4.

13. P.W.10 Baijnath Singh is the Investigating Officer, who stated that on 06.07.1991 while he was Officer Incharge of Makhdumpur Police Station, he recorded the Fardbeyan of Shyamdeo Sharma (P.W.8), the writing of which, he proves as Ext.3/1. He also proves the endorsement on First Information Report as Ext.5 as also the formal First Information Report as Ext.6. He inspected the place of occurrence which was about 200-400 yards on the east of the Informant's field. On the east of the Aar (boundary), which was about three feet high was a tree and on the west side of this Aar, was the dead body in a pool of blood. On the south of this area, was the field of the informant and still south was that of Rajdeo Singh and on the west, there was a big Taal of Newari. He proves the seizure list (Ext.9) of the articles which was recovered from the place of occurrence and the Inquest Report (Ext.7).

His attention was drawn to the statement of Fulendra Sharma (P.W.2), Sunil Sharma (P.W.3), Sahjanand Sharma (P.W.7) which we have already discussed above. He stated that P.W.5 Deo Balak Sharma had disclosed the complicity of 10-12 unknown persons but he could not give any names. P.W.6 Deo Nandan Sharma, who was tendered, had not disclosed the names of any of the accused persons. From the tree, near the place of occurrence, one could not see the place where the deceased had been found dead. He did not find any marks of trampling at the place of occurrence.

14. The two defence witnesses, Birendra Sharma (D.W.1) and Sakaldeo Sharma (D.W.2) have proved the documents from which it appears that the land in question was in the occupation of the Appellants. D.W.2 Sakaldeo Sharma further stated that there was a "Panchayati" held in respect to the land in question and all land relating disputes had come to an end.

15. Learned counsel for the Informant submits that the case is well proved in view of the consistence evidence of the P.W.3, P.W.7 and P.W.8, who were three eye witnesses and, therefore, the conviction of the Appellants is required to be maintained.

16. However, we are inclined to take a different view on account of the following inconsistencies which create a doubt as to the manner of occurrence and complicity of the present Appellants:

(i). All the material witnesses, i.e., P.W.2 Fulendra Sharma, P.W.3 Sunil Sharma, P.W.4 Ram Binay Sharma, P.W.7 Sahajanand Sharma and P.W.8 Shyamdeo Sharma belong to the same family.

(ii). P.W.2 Fulendra Sharma, the brother of the Informant deposed as a hearsay witness but is fit to be disbelieved because he had developed this case story during the trial as discussed above.

(iii). P.W.3 Sunil Sharma, the son of the of the Informant and nephew of the deceased strangely stated that he did not identify any of the accused persons. No doubt, he gives a hearsay account but this version is also an improvement during trial,

(iv). P.W.4 Ram Binay Sharma has given hearsay account of the occurrence during trial but he was not supported by P.W.8 on this point. Moreover he himself admitted that he had not given a hearsay account to the Investigating Officer at the earlier instance.

(v). P.W.7 Sahajanand Sharma, the son of the Informant and the nephew of the deceased gave a part eye-witness and a hearsay account which does not find support from the statement of P.W.8 and it is inadmissible. His attention was drawn to the earlier statement according to which he was not an eye witness to the occurrence. We also find that he has named only Appellants Sidhanath Sharma and

Satyendra Sharma as being directly involved in the murder of the deceased whereas rest of the Appellants were grappling with the Informant. However, his evidence is fit to be disbelieved since he had not given such an account earlier.

(vi). P.W.8 Shyamdeo Sharma, the sole eye witness, has given a completely different story from one he had given in the Fardbeyan which gives rise to suspicion as to whether at all he was an eye witness. More so, because his son P.W. 3 Sunil Sharma did not support him on the point of complicity of the Appellants and his other son Sahjanand Sharma (P.W.7) has stated that his father had come even after he had reached the place of occurrence and, thus, absolute reliance cannot be placed on his sole eye witness account which has to be completely unimpeachable as laid down as a sound principle of law.

(vii). The fact of land dispute is admitted by the prosecution and, therefore, there was sufficient cause for false implication of the Appellants.

17. In view of the discussion all along the judgment, these appeals are allowed. The Judgment of conviction and order of sentence passed against the Appellants, above named, is set aside. They are acquitted of the charges. Appellant Satyendra Sharma {in Criminal Appeal (DB) No. 1033 of 2010} is in jail custody, so he is directed to be released forthwith, if not wanted in any other case. So far as the rest Appellants of other appeals are concerned, they are on bail, therefore, they are discharged from the liabilities of their bail bonds.