State of Bihar

Vs

Ram Padarath Singh and Others

Criminal Appeals Nos. 378-379 of 1989

(V. N. Khare, G. T. Nanavati JJ)

21.07.1998

JUDGMENT

G. T. NANAVATI, J. -

1. Both these appeals are filed by the State of Bihar against the Common judgment of the Patna High Court in Death Reference No. 7 of 1987 and Criminal Appeal No. 407 of 1987. The High Court rejected the reference, allowed the appeal filed by the convicted accused and acquitted them.

2. The prosecution case was that on 29-1-1986, Subhash Kunwar (informant) and his brother Rambilas @ Boudhu (deceased) and Mangal (deceased) left Village Basudevpur in the morning for going to Begusarai. At about 9 o'clock, when they were passing by the "bandh" (embankment) near Village Koria-Haibatpur, accused Ram Padarath, Ram Sugarath, Ram Subodh, Bipin, Dilip (absconding) who were armed with pistols and "katta" attacked them, because of the previous enmity with the informant and his brother. Boudhu and Mangal who were walking ahead of Subhash became their targets. The shot fired by Ram Padarath (Respondent 1) injured Boudhu. After walking a few steps, he fell down in a nearby field where he was given a blow by Ram Sugarath with a "katta" on his head. He died immediately. Mangal who had started running away from that place shouting "bachao bachao" was hit by a shot fired by Dilip. After covering some distance, he fell down and at that time Ram Subodh (Respondent 2), Bipin and Ram Sugarath attacked him by giving katta-blows and killed him. Subhash who was walking behind his two brothers was able to run away from that place before he could be attacked. He went straight to Begusarai, after catching a bus on the way, got a complaint written by his brother-in-law who was an advocate and presented it at Begusarai Police Station. On the basis of this complaint, an offence was registered against all the five accused for the offences punishable under Sections 147, 148 and 302/149 IPC and against Ram Padarath and Dilip for the offence punishable under Section 27 of the Arms Act, 1959.

3. As accused Dilip and Ram Sugarath were found absconding, the trial proceeded against the remaining three accused. The prosecution examined Subhash (PW 7), Navin Rai (PW 1), Vijay Kumar (PW 2), Biso Kunwar (PW 8) and Lal Kunwar (PW 11) as eyewitnesses. The trial court believed their presence at the time and place of the incident. It held that their evidence did not suffer from any infirmity and was truthful. On the basis of their evidence, the three accused were held guilty for the murders of Boudhu and Mangal. All were convicted under Section 148 IPC. Accused Ram Padarath was convicted under Section 302 for the murder of Boudhu and under Section 302 read with Sections 34/149 IPC for the murder of Mangal. He was also convicted under Section 27 of the Arms Act. The remaining two were convicted under Section 302 read with Sections 34/149 IPC for the murders of Boudhu and Mangal. For causing death of Mangal, all the three were sentenced

to suffer imprisonment for life and for the murder of Boudhu, accused Ram Padarath was sentenced to death and the other two were sentenced to suffer imprisonment for life.

4. Aggrieved by their conviction and the sentence imposed upon them, they filed an appeal before the High Court. As Ram Padarath, (Respondent 1) was sentenced to death, a reference was also made to the High Court for confirming his death sentence. The High Court held that all the eyewitnesses stood contradicted by the medical evidence as regards the injury caused to Boudhu with a "katta", inasmuch as they had deposed that accused Ram Sugarath had given a blow above the neck of Boudhu and a piece of flesh had bulged out from that wound while the medical evidence showed that the injury caused by a sharp-cutting weapon was on the vertex and not on the neck of Boudhu and no piece of flesh had bulged out from that wound, but some brain substance could be seen in it. The High Court also held that all the eyewitnesses had failed to explain the incised wound found on the head of Boudhu and that created a serious doubt regarding their claim to have seen the incident. With respect to the injury found on the thigh of Mangal, the eyewitnesses had stated that it was caused by a shot fired by Dilip when he was running away from that place. The High Court held that the eyewitnesses stood contradicted by the medical evidence as the entry wound in that case would have been on the backside of the thigh of Mangal whereas in fact it was in the front. The High Court disbelieved the explanation given by the eyewitnesses that Mangal was hit by the shot when he had turned back for a moment while running away, on the ground that it was highly improbable that Mangal had the courage to turn back and see what was happening behind him. The High Court also disbelieved the eyewitnesses on the ground that their evidence was improbable. It observed that if the three brothers had left together, it was not likely that Subhash would be walking behind his two brothers keeping some distance. It also observed that if Subhash was with his brothers then the accused would not have allowed Subhash to run away. The High Court also disbelieved their evidence on the ground that no independent witnesses from the locality were examined by the prosecution and that the eyewitnesses were selected or got-up witnesses.

5. The High Court rejected the evidence of PWs 2, 7 and 11 also on the ground that they were partisan witnesses. It held that the evidence on record was sufficient to show that relations between them and the accused were inimical and even criminal proceedings were pending between them. The claim of PWs 1 and 3 to have witnessed the incident was doubted on the ground that their names were not disclosed as eyewitnesses in the FIR.

6. The High Court disbelieved the evidence of PW 7 also because it found that what he had deposed was improbable, his conduct was unnatural and he had made material improvements while giving evidence. Apart from the improbabilities referred to earlier, viz., that he was walking behind his two brothers at some distance and that he would not have been spared by the accused if he was really with his two brothers, the other improbabilities found by the High Court were :

> (1) that Subhash would not have failed to inquire from his two brothers the reason why he was taken to Begusarai;
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> (2) if they were really going to Begusarai, then they would have carried some money with them but no money was found from the pockets of Boudhu and Mangal; and
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> (3) the accused would not have failed to prevent Subhash from running away by firing a shot at him. The High Court found his conduct unnatural because :
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> (1) instead of rushing back to his village which was nearby, to inform his relatives

and friends, he went to Begusarai;

(2) even after reaching Begusarai he did not go to Boudhu's house to inform his widow and other family members about the incident; and

(3) instead of rushing to the police station, he went to his brother-in-law's house to get a complaint written by him.

The High Court found that PW 7 had made material improvements as regards the number of shots fired by the accused, the parts of the bodies of Boudhu and Mangal on which injuries were caused by the accused and the weapons with which the accused had caused those injuries. The High Court doubted his evidence and also the prosecution case as a whole for the reason that the complaint which was written down by the brother-in-law of PW 7 was not signed by the brother-in-law, even though he was present when it was presented at the police station.

The evidence of Navin Rai (PW 1) was also disbelieved on the ground that if he had really gone to Koria Chowk for supplying milk to Siyaram Singh, then he would have carried the empty vessel while returning but no such vessel was produced by him before the police. The evidence of Biso Kunwar (PW 8) was disbelieved by the High Court also on the ground that if he had really gone to take medicine from the doctor at Koria-Haibatpur, then his name would have found place in the register maintained by the doctor and a prescription of medicine would have been given to him. As the witness had not produced the prescription nor had his name appeared in the register, it was highly doubtful if he had really gone to take medicine as stated by him.

7. The learned counsel appearing for the State submitted that the High Court has failed to correctly appreciate the evidence of the eyewitnesses and the grounds given by it for discarding their evidence are flimsy. The learned counsel took us through the FIR, evidence of the four witnesses and the medical evidence. After going through the same, we find that the submission made by the learned counsel deserves to be accepted.

8. We will first consider the general reason given by the High Court that all the eyewitnesses stood contradicted by the medical evidence. The eyewitnesses had deposed that a katta-blow was given by accused Ram Sugarath above the backside of the neck of Boudhu. Dr. Bhagat (PW 4) who had done the post-mortem examination had found three injuries on him. Two were bullet wounds and the 3rd was an incised wound on the vertex. Out of the two bullet wounds, one was an entry wound and the other was an exit wound. The bullet had entered from the left temporal area and gone out from the right occipital bone, one inch behind the right ear. According to the doctor, brain substance could be seen from that wound. As regards the 3rd injury, the doctor had stated that it could have been caused by a weapon like a "katta". Thus according to the medical evidence there was no injury on the neck of Boudhu which could have been caused by a katta-blow. It is true that no eyewitness had stated that any katta-blow was given on the head of Boudhu. Thus apparently the eyewitnesses did stand contradicted by the medical evidence as regards these two injuries. But what the High Court failed to appreciate was that all the eyewitnesses had seen the incident from some distance. After being hit by the shot fired by Ram Padarath, Boudhu had walked a few steps and then the katta-blow was given. Boudhu was surrounded by the accused at that time. It was under these circumstances that the eyewitnesses had committed a mistake in describing the part of the head of Boudhu on which the katta-blow had fallen. It was as impression which they had carried when they either saw the blow being given or saw the injuries on Boudhu after going near the place where he had fallen down. The wound which was found above the neck and behind the right ear was 1 inch long, 3/4 inch wide and

bone-deep. It was almost similar in size and shape to the wound which was found on the vertex. If under these circumstances, labouring under some confusion they stated that the katta-blow had fallen on the neck of Boudhu, then on the basis of such an inconsistency or discrepancy, it was not proper for the Court to raise a doubt regarding the witnesses having seen the actual assault on Boudhu. The High Court also did not read and appreciate the evidences of the eyewitnesses correctly when it stated that according to them, some flesh had bulged out of the wound on the neck. We find that what the witnesses had stated was that the muscle of that part of the neck was cut. What the doctor had stated with respect to the wound was that brain substance could be seen inside the wound. He had not stated that brain substance had come out of it. It is therefore difficult to appreciate how the evidence of the eyewitnesses on this point can be said to be contradictory with the medical evidence. The reasoning of the High Court that the eyewitnesses had probably not seen the assault on Boudhu and when they had subsequently gone near that place had seen the three injuries on Boudhu and therefore, they were made to say that the injury on the neck was caused by a katta-blow given by Ram Sugarath thus stands vitiated. If really the witnesses had not seen the assault and had given their statements only after seeing the injuries on the dead bodies of Boudhu, as observed by the High Court, then they would not have committed such a mistake and they would have stated that the katta-blow was given on the head and not on the neck of Boudhu. The eyewitnesses have consistently stated that Boudhu was hit twice - once by the shot fired by Ram Padarath and the second time by the katta-blow given by Ram Sugarath, even though there were three injuries on the head of Boudhu. If the evidence of the eyewitnesses is read carefully, it clearly appears that what they stated was that the shot fired by Ram Padarath had caused an entry wound on the forehead, the katta-blow had caused an injury on the neck and the wound on the vertex was the exit wound. No doubt, to that extent their evidence can be said to be inconsistent with the medical evidence. But it is not an inconsistency of that type where one can say that the ocular evidence and the medical evidence cannot stand together and which would justify raising of a doubt regarding the truthfulness of the evidence of the eyewitnesses. The inconsistency clearly appears to be the result of confusion and does not indicate an attempt to describe the incident by a person who had not really seen it. The High Court therefore was not right in rejecting the evidence of the eyewitnesses as regards the assault on Boudhu, on these grounds.

9. The High Court was also wrong in disbelieving the eyewitnesses, as regards the assault on Mangal. The reasoning of the High Court was that if the shot fired by Dilip had hit Mangal while running away, then in that case the bullet injury would have been found on the backside of the thigh of Mangal and not on its frontside, and as the injury was found on the frontside, that indicated that the version given by the eyewitnesses was not correct. The High Court also observed that it was not believable that Mangal had the courage to turn back and see what the assailants were doing after they had killed Boudhu. What the High Court failed to appreciate was that it was not a matter of courage but it was the instinct of self-preservation which could have prompted Mangal to look back, as he was also being chased. His brother was chased and beaten by the accused who were sworn enemies. It was for that reason that he had started running away from that place. It was therefore not only probable but quite natural for him after covering some distance to look back to find out whether he was being chased or not. Therefore, the evidence of the eyewitnesses that while running away Mangal was shouting "bachao bachao" and the shot fired by Dilip had hit him on his thigh, when he had turned back for a moment while running, was really not inconsistent with the medical evidence and deserved to be accepted.

10. The High Court also rejected the evidence of the eyewitnesses on the ground that no independent witnesses from the nearby place namely Koria-Haibatpur were examined by the prosecution. According to the High Court, it created a doubt regarding the eyewitnesses being

genuine and their evidence being truthful. The High Court failed to appreciate that the incident had happened near the embankment at a little distance from Koria-Haibatpur Chowk. Nothing was brought out in the evidence of any of the prosecution witnesses, including the investigating officer, to indicate that any other person was present near the place of the incident or that he had seen the incident. In the absence of such material on record, the High Court was not justified in assuming and then proceeding on the basis that independent witnesses must have been available and yet they were not examined by the prosecution. The prosecution had examined two persons, Navin Rai and Biso Kunwar who were passing by the Koria-Haibatpur Chowk. There is nothing on record to show that they were in any manner connected with Subhash and his brothers or inimical to the accused. If independent persons were not willing to tell the police that they had seen the incident, the prosecution cannot be blamed for not examining independent persons as eyewitnesses and the veracity of the evidence of the witnesses examined as eyewitnesses cannot be doubted on that ground. The High Court was, therefore, not justified in disbelieving the evidence of the eyewitnesses on this ground.

11. The High Court rejected the evidence of PWs 2, 7 and 11 on the ground that they were partisan witnesses being inimical to the faction of the accused. The evidence of the two remaining eyewitnesses was discarded on the ground that their names were not mentioned in the FIR. We agree with the finding of the High Court that relations of PWs 2, 7 and 11 with the accused were inimical and therefore no implicit faith could be placed on their evidence. But it was not proper for the High Court to reject the evidence of PW 1 and PW 8 on the ground that their names were not mentioned in the FIR as eyewitnesses. The FIR was lodged by PW 7. As soon as he had seen the assault on his brother, he had started running away from that place to save his life. Under these circumstances, it was too much to expect that he should have noticed the presence of these two witnesses and assumed that they had seen the incident. Though the fact that their names did not appear as eyewitnesses in the FIR was a relevant circumstance, the evidence of each of these two eyewitnesses was required to be appreciated on its own merits.

12. Apart from the general grounds stated above, the High Court rejected the evidence of PW 7 on the ground that it was improbable, his conduct was unnatural and that he had made material improvements while giving evidence in the Court. We fail to appreciate how the circumstance that he was walking behind his brothers at some distance can be regarded as improbable merely because they had started together from Village Basudevpur. They had covered quite a long distance by the time they had reached Koria-Haibatpur. Subhash could have remained behind for various reasons. It was not an improbability and particularly when no explanation was sought from the witnesses in that behalf, correctness of the evidence of PW 7 should not have been doubted on the basis of this circumstance. The High Court also found his evidence improbable on the ground that if he had really gone along with his brothers, then the accused would not have spared him. If Subhash was at a little distance from his brother when they were attacked, then he being a young man could have run away from that place before he could be attacked. What the High Court failed to appreciate was that he was not spared by the accused but was able to run away from that place before he could be attacked. It was therefore not proper to doubt the evidence of PW 7 and other eyewitnesses on this ground. PW 7 had reached Begusarai within a short time and lodged a complaint and that makes his version that he was with his brothers when they were assaulted more probable. If he had come to know about the incident later, after learning about it from somebody, then he would not have been able to lodge the complaint at Begusarai so quickly. Moreover, his evidence that they were going together from Village Basudevpur to Begusarai, deserved to be believed as the incident had taken place at Koria-Haibatpur through which they had to pass for going to Begusarai. PW 7 and Mangal were staying at Basudevpur and Boudhu was staying at Begusarai. Unless Boudhu had earlier come

to Basudevpur, as stated by PW 7, they could not have been together at Koria-Haibatpur. The High Court failed to appreciate that this circumstance provided independent corroboration to the evidence of PW 7. Another reason given by the High Court for holding his evidence improbable is that he had not inquired from his two brothers the reason why he was being taken to Begusarai. What the High Court failed to appreciate was that he was the youngest brother and his eldest brother who had come from Begusarai to Basudevpur had told him to accompany him as he had some work. Under the circumstances, his not inquiring about the reason was not unusual and it was not proper to consider his evidence improbable on this ground.

13. The next reason why the High Court considered the evidence of PW 7 improbable was that if they were going from Basudevpur to Begusarai and were required to travel by bus, then they would have carried some money with them but at the time of post-mortem examination, no money was found from the pockets of either Boudhu or Mangal. What the High Court missed to consider was that the incident had happened at 9 a.m. on 29-6-1986 and the post-mortem examination was conducted at 9 a.m. on 30-6-1986. Therefore, the circumstance that no money was found from the pockets of the deceased at the time of post-mortem examination should not have been utilized by the High Court to hold that the version of PW 7 was improbable. The very fact that the incident happened at Koria-Haibatpur and not at Basudevpur where Subhash was staying nor at Begusarai where Boudhu was staying indicates that they were going from one place to the other. The High Court also failed to consider that there was no evidence to show that Subhash also had no money with him when the incident happened.

14. The evidence of PW 7 was considered improbable also on the ground that the accused would not have failed to prevent Subhash from running away by firing a shot at him. As already stated earlier, Subhash was at some distance from his two brothers when the incident had happened and had started running away from the place as soon as he had seen the assault on his brothers. Subhash being a young man of 28 years of age, must have covered quite a long distance by that time. It was quite probable that the accused did not think it fit to fire a shot at him. It is difficult to appreciate how this part of the evidence of the eyewitnesses can be regarded as improbable.

15. It is also not possible to agree with any of the reasons given by the High Court for holding the conduct of PW 7 unnatural. It is true that he did not rush back to his village after the incident to inform his relatives or friends. But seeing the murderous assault on his two brothers by their enemies, if PW 7 thought it fit to rush to the police station, his conduct cannot be regarded as unnatural. It is not unknown that different persons react differently when placed under such circumstances. For the same reason, his not going to Boudhu's house to inform his widow about the incident cannot be regarded as a piece of unnatural conduct. Nor was it proper to consider his conduct unnatural on the ground that before reaching the police station, he had first gone to his brother-in-law's house. He was a villager. He wanted to lodge a complaint. His brother-in-law was an advocate. If under these circumstances, instead of proceeding straight to the police station, he thought it fit to approach his brother-in-law and get a complaint written through him, then that cannot be regarded as unnatural.

16. The High Court discarded the evidence of PW 7 also on the ground that he had made material improvements while deposing before the Court as regards the manner in which the incident had happened. Before the Court, he had stated the number of shots fired by the accused and the parts of the bodies of Boudhu and Mangal on which injuries were caused by them. In the FIR, he had not given all these details. But he had stated in the FIR that while he was going from Basudevpur to Begusarai along with his two brothers and while they were passing by the embankment near Koria-

Haibatpur, the accused had attacked his two brothers who were walking ahead of him. He had also stated that injuries were caused to them by firing a shot and by giving katta-blows. Thus he had stated the weapons with which injuries were caused to his two brothers. By stating that his brothers were injured by the accused "by firing a shot" he did not mean that only one shot was fired, as wrongly understood by the High Court. It was not his version that by one shot, both his brothers were injured. On seeing the assault on his two brothers, he had started running away from the place. He might not have seen at that time how many katta-blows were given by the accused to his two brothers and on which parts of their bodies injuries were caused. If the High Court had considered this aspect, then possibly it would not have held that the witness had made material improvements while giving evidence in the Court. The High Court disbelieved his evidence also on the ground that his brother-in-law Radhey Shyam Singh who was an advocate and who had accompanied him to the police station had not signed the complaint. It is difficult to appreciate how on such a ground, evidence of PW 7 could have been disbelieved. PW 7 was the complainant and he had signed the complaint. There was no reason for his brother-in-law to sign that complaint. It is also difficult to appreciate how the High Court could regard Radhey Shyam Singh as a material witness and draw an adverse inference against the prosecution for not examining him as a witness. Having considered his evidence carefully, we are of the opinion that PW 7 was with his two brothers when the incident happened and that what he had deposed before the Court with respect to the assault by the accused was quite true. The grounds given by the High Court for disbelieving PW 7, except the ground that PW 7 was a partisan witness, are not sustainable.

17. We are also of the view that the High Court was not right in discarding the evidence of eyewitness Navin Rai. While it is true that his name was not mentioned in the FIR, no importance should have been given to that omission, in view of the circumstances in which PW 7 had left the place of incident and lodged the FIR. The High Court was not right in considering his evidence inconsistent with the medical evidence. Earlier, we have pointed out how the medical evidence is not inconsistent with the evidence of the eyewitnesses. It was also not proper to reject his evidence on a flimsy ground that he had not produced the empty vessel in which he had carried milk for supplying it to Ramji Singh. In the cross-examination of the witness, nothing has been brought out to show that there was any reason for him to falsely involve the accused. He was neither close with the family of the deceased nor inimical to the accused. The trial court after close scrutiny of his evidence had held that his presence at the place of incident was quite natural as he had gone to Koria Chowk as usual for giving milk to Ramji Singh. For the same reason, we hold that the High Court committed a grave error in not accepting the evidence of eyewitness Biso Kunwar on the ground that his name did not appear as an eyewitness in the FIR and that his evidence stood contradicted by the medical evidence. Like Navin Rai, he was also an independent witness and his evidence should not have been discarded on the ground that his name did not appear in the register of the doctor, to whom he had gone for taking medicine and that he had not produced the prescription before the police. He could have hardly realised the importance of producing the same before the police. It was not a case where he was asked to produce it but had failed to do so.

18. On a close scrutiny of the evidence and after hearing the submissions of the learned counsel, we find that the High Court did not appreciate the evidence correctly and failed to take into consideration the reasons given by the trial court for accepting their evidence. The discrepancies in the evidence noticed by the High Court were considered by the trial court and good reasons were given for accepting the evidence of PWs 1, 7 and 8, notwithstanding those discrepancies. The High Court gave undue importance to those discrepancies and without valid reasons, doubted the presence of PWs 1, 7 and 8 and discarded their evidence. The erroneous appreciation of the evidence by the High Court and consequent acquittal has led to the miscarriage of justice. We, therefore, allow these

appeals, set aside the judgment and order passed by the High Court and restore the judgment and order of conviction passed by the trial court. We also restore the order of sentence passed by the trial court, subject to this modification that for the murder of Boudhu, accused Ram Padarath, for his consequent conviction under Section 302, shall suffer imprisonment for life instead of the sentence of death as we are of the opinion that this is not a fit case in which death sentence should have been imposed upon accused Ram Padarath. The respondents are directed to custody to serve out the remaining part of their sentence.