

A VINAY KUMAR RAI AND ANR.

v.

THE STATE OF BIHAR
(Criminal Appeal No. 371 of 2006)

AUGUST 18, 2008

B **[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]**

Penal Code, 1860:

C ss. 302/34 – Murder – Two accused caught hold of deceased and on their exhortation, third accused fired at deceased resulting in his death – Incident witnessed by witnesses – Conviction of first two accused u/s. 302 r/w s. 34, and third accused u/s. 302 and u/s. 27 of the Arms Act by courts below – Justification of – Held: Justified – Witnesses being close
D relative or partisan witness, their evidence should not be discarded – Evidence of prosecution witnesses and eye-witnesses established the occurrence of incident, thus s. 34 applicable – Also, there was no discrepancy between medical evidence and ocular evidence – Arms Act – s. 27.

E *Evidence Act, 1872:*

s. 3 – Related witness – Testimony, evidentiary value of – Held: Relationship is not a factor to affect credibility of a witness.

F *Medical evidence vis-a-vis ocular evidence – Discrepancy between – Effect on prosecution case.*

G According to the prosecution case, there was enmity between NK and the appellants-A1, A2 and A3. On the fateful day, when NK had gone to his fields, the appellants came their. A1 and A3 caught hold of NK and exhorted A-2 to fire at NK. A 2 fired NK on the temple which later resulted in his death. Thereafter, the appellants ran away. On hearing the alarm raised by NK, PW 7-father of NK and his

nephew-PW 4 reached the scene of occurrence. They witnessed the entire incident. FIR was lodged. The case was registered u/s. 302/34 IPC and s. 27 of the Arms Act. Investigations were carried out. The witnesses were examined. The trial court convicted A 1 and A 3 u/s. 302 r/w s. 34 IPC, and A 2 u/s. 302 IPC and imposed rigorous imprisonment for life. A 2 was also convicted u/s. 27 of the Arms Act and sentenced to rigorous imprisonment for three years. Aggrieved, appellants filed appeals on the ground that there was discrepancy between the medical evidence and the oral evidence and the eye-witnesses were related to the deceased. The High Court upheld the conviction of the appellants. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1.1 Merely because the eye-witnesses are family members, their evidence cannot per se be discarded. When there is allegation of interestedness, it has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused, cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. [Para 6] [152,E-G]

1.2 The over insistence on witnesses having no relation with the victims often results in criminal justice going away. When any incident happens in a dwelling house the most natural witnesses would be the inmates of that house. It is unpragmatic to ignore such natural witnesses and insist on outsider who would not have even seen any thing. If the Court has discerned from the evidence or even

A from the investigation records that some other independent person has witnessed any event connecting the incident in question then there is justification for making adverse comments against non-examination of such person as prosecution witness. Otherwise, merely on surmises
 B the Court should not castigate a prosecution for not examining other persons of the locality as prosecution witnesses. Prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighborhood may be replete
 C with other residents also.[Para 13] [154,G-H; 155,A-C]

1.3 In the instant case, the ground that the witness being a close relative and consequently being partisan witness, should not be relied upon, cannot be accepted. PWs 4 and 7 stated in their evidence about the presence
 D of PWs 5 and 6. PW-1 in his statement also stated about their presence at the place of occurrence. Though it was pleaded by counsel for the appellants that PW-1's evidence cast a doubt about the prosecution version, it is to be noted that PW-1 never claimed to be an eye witness.
 E The evidence of PWs and eye witnesses clearly established that accused A 3 and A 1 caught hold of deceased and on their exhortation appellant A 2 shot at the deceased. Therefore, s. 34 has application. [Paras 9 and 14] [153,F; 155,C-E]

F *Dalip Singh and Ors. vs. The State of Punjab AIR 1953 SC 364; Guli Chand and Ors. vs. State of Rajasthan 1974 (3) SCC 698; Vadivelu Thevar vs. State of Madras AIR 1957 SC 614; Masalti and Ors. vs. State of U.P. AIR 1965 SC 202; State of Punjab vs. Jagir Singh AIR 1973 SC 2407; Lehna vs. State of Haryana 2002 (3) SCC 76; Gangadhar Behera and Ors. vs. State of Orissa 2002 (8) SCC 381; Babulal Bhagwan Khandare and Anr. vs. State of Maharashtra 2005 (10) SCC 404; Salim Sahab vs. State of M.P. 2007 (1) SCC 699; State of Rajasthan vs. Teja Ram and Ors. AIR 1999 SC 1776 –*
 H referred to.

1.4 The medical evidence was clearly in line with what has been stated by eye-witnesses. The High Court noted that the expression used by witnesses cannot be analysed in hypothetical manner. Therefore, it cannot be said that medical evidence is contrary to the ocular evidence. [Para 15] [155,F]

Case Law Reference

AIR 1953 SC 364	Referred to.	Para 7
1974 (3) SCC 698	Referred to.	Para 8
AIR 1957 SC 614	Referred to.	Para 8
AIR 1965 SC 202	Referred to.	Para 10
AIR 1973 SC 2407	Referred to.	Para 11
2002 (3) SCC 76	Referred to.	Para 11
2002 (8) SCC 381	Referred to.	Para 11
2005 (10) SCC 404	Referred to.	Para 12
2007 (1) SCC 699	Referred to.	Para 12
AIR 1999 SC 1776	Referred to.	Para 13

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 371 of 2006

From the final Judgment and Order dated 18.8.2005 of the High Court of Judicature at Patna in Criminal Appeal No. 71 of 2002

WITH

Crl. No. 382 of 2006

Nagendra Rai, Rajeev Singh, Anshul Raj and Rajesh Prasad Singh for the Appellants.

Gopal Singh and Anukul Raj for the Respondents.

The Judgment of the Court was delivered by

Dr. ARIJIT PASAYAT, J. 1. Challenge in these appeals is

A to the judgment of a Division Bench of the Patna High Court
upholding the conviction of the appellants for offence punish-
able under Section 302 read with Section 34 of the Indian Pe-
nal Code, 1860 (in short 'IPC') so far as accused Ajeet Kumar
B Rai @ Ajeet Narayan Rai and Vinay Kumar Rai, appellant No.1
in Criminal appeal 371 of 2006 and Ashutosh Kumar Rai @
Sanjay Kumar Rai, appellant in other Criminal Appeal. Ashutosh
Kumar Rai was further charged for committing the murder of
Nanda Kumar Singh punishable under Section 302 IPC and
Section 27 of the Arms Act, 1959 (in short 'Arms Act'). The High
C Court dismissed the appeals. The present appeals had been
filed by Vinay Kumar Rai (A-3) and Ajeet Kumar Rai @ Ajeet
Narayan Rai (A-1) and Ashutosh Kumar Rai (A-2). The Presid-
ing Officer, Additional Court No.1, Fast Track Court in Sessions
D Trial Nos. 578/96 and 1/2001 held Ajeet Kumar Rai and Vinay
Kumar Rai guilty under Section 302 read with Section 34 IPC
and accused Ashutosh Kumar Rai under Section 302 IPC and
sentenced to undergo RI for life. He was also found guilty of
offence under Section 27 of the Arms Act and sentenced to
undergo RI for three years. Two appeals were filed before the
E High Court which by the impugned judgment dismissed the
same. All accused were put on trial for committing the murder
of Nanda Kumar Singh (hereinafter referred to as the 'de-
ceased') in furtherance of their common intention for offence
punishable under Section 302 read with Section 34 IPC.

F 2. Prosecution version in a nutshell is as follows:

According to the first information report given by
Vishwanath Singh (PW-7) before the police on 26.7.1996 at
1.10 p.m., at about 12 noon, while he was sitting on the veran-
dah of the house and his son Nand Kumar Singh, the deceased
G had gone to the field to inquire as to whether the land has been
ploughed or not, he did not find tractor there and while he was
returning he saw the appellants and started shouting. Hearing
the alarm, the informant along with Sachida Nand Singh (PW-
4) rushed there and found that appellants Vinay Kumar Rai and
H Ajeet Kumar Rai alias Ajeet Narayan Rai had caught hold of his

son and appellant Ashutosh Kumar Rai @ Sanjay Kumar Rai had put pistol on his right temple. The moment they saw him and Sachida Nand Singh, appellant Vinay Kumar and Ajeet Kumar Rai @ Ajeet Narayan Rai exhorted to fire at which appellant Ashutosh Kumar Rai alias Sanjay Kumar Rai fired at his son on the temple. Sustaining the injuries his son fell down and all the appellants fled away brandishing the pistol. When the informant and his nephew Sachidanand Singh reached there, they found injury above the temple and immediately put him on a rickshaw and brought to the Government Hospital, Sasaram where the doctor declared him brought dead. On the basis of the aforesaid information, Sasaram (M) P.S. Case No.386 of 1996 was registered under Section 302/34 of IPC and 27 of the Arms Act.

According to the first information report, the motive for the occurrence is the pendency of litigation before the Director of Consolidation.

The police, after investigation, submitted charge sheet against the appellants and they were ultimately committed to the court of Sessions where all the appellants were charged for offence under section 302/34 of IPC whereas, appellant Ashutosh Kumar Rai alias Sanjay Kumar Rai was further charged for offence under section 302 of IPC and section 27 of the Arms Act.

The appellants denied to have committed any offence and pleaded false implication on account of previous enmity and their further defence was that the deceased was killed on the same day at about 12 noon by fire arm by some unknown persons near the house of Ram Nagina Singh.

Prosecution in order to substantiate the accusations examined nine witnesses out of which Sachidanand (PW-4), Sunil Kumar Singh (PW-5), Srikant Singh (PW-6) and Vishwa Nath Singh (PW-7) claimed to be eye-witnesses. The last named person was the informant. In order to prove their innocence, the accused persons examined four witnesses. The trial Court believed the evidence of the eye-witnesses and found the accused guilty.

A 3. In appeal, it was submitted that there was discrepancy
between the medical evidence and the oral evidence and, there-
fore, the prosecution version should not have been accepted. The
primary stands were regarding the alleged discrepancy between
B the medical evidence and the ocular evidence and the eye-wit-
nesses being related to the deceased. The High Court did not find
any substance in any of these stands and dismissed the appeals.

C 4. The stands taken before the High Court were reiterated
in these appeals. It was highlighted by learned counsel for the
appellants that it is unusual that eye witnesses who are closely
D related to the deceased did not try to intervene to save the de-
ceased from the assailants.

E 5. Learned counsel for the State on the other hand with
reference to the conclusions of the High Court pointed out that
D the witnesses have said that they saw the incidence from a dis-
tance of about 15 to 20 yards. They stated that the deceased
was shot dead even before they reached the place of occur-
rence. Therefore, there was no question of intervening to save
the life of the deceased.

E 6. Merely because the eye-witnesses are family members
their evidence cannot per se be discarded. When there is alle-
gation of interestedness, the same has to be established. Mere
statement that being relatives of the deceased they are likely to
falsely implicate the accused cannot be a ground to discard the
F evidence which is otherwise cogent and credible. We shall also
deal with the contention regarding interestedness of the wit-
nesses for furthering prosecution version. Relationship is not a
factor to affect credibility of a witness. It is more often than not
that a relation would not conceal actual culprit and make alle-
G gations against an innocent person. Foundation has to be laid
if plea of false implication is made. In such cases, the court has
to adopt a careful approach and analyse evidence to find out
whether it is cogent and credible.

H 7. In *Dalip Singh and Ors. v. The State of Punjab* (AIR
1953 SC 364) it has been laid down as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

8. The above decision has been followed in *Guli Chand and Ors. v. State of Rajasthan* (1974 (3) SCC 698) in which *Vadivelu Thevar v. State of Madras* (AIR 1957 SC 614) was also relied upon.

9. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh's* case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their

A testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in – *Rameshwar v. State of Rajasthan* (AIR 1952 SC 54 at p.59). We find, however, B that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.”

10. Again in *Masalti and Ors. v. State of U.P.* (AIR 1965 SC 202) this Court observed: (p. 209-210 para 14):

C “But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence D on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; E but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.”

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11. To the same effect is the decisions in *State of Punjab v. Jagir Singh* (AIR 1973 SC 2407), *Lehna v. State of Haryana* (2002 (3) SCC 76) and *Gangadhar Behera and Ors. v. State of Orissa* (2002 (8) SCC 381).

F 12. The above position was also highlighted in *Babulal Bhagwan Khandare and Anr. v. State of Maharashtra* [2005 (10) SCC 404] and in *Salim Sahab v. State of M.P.* (2007 (1) SCC 699).

G 13. The over insistence on witnesses having no relation with the victims often results in criminal justice going away. When any incident happens in a dwelling house the most natural witnesses would be the inmates of that house. It is unpragmatic to ignore such natural witnesses and insist on outsiders who would H not have even seen any thing. If the Court has discerned from

the evidence or even from the investigation records that some other independent person has witnessed any event connecting the incident in question then there is justification for making adverse comments against non-examination of such person as prosecution witness. Otherwise, merely on surmises the Court should not castigate a prosecution for not examining other persons of the locality as prosecution witnesses. Prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighborhood may be replete with other residents also. [See: *State of Rajasthan v. Teja Ram and Ors.* (AIR 1999 SC 1776)].

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14. It is to be noted that PWs 4 and 7 have stated in their evidence about the presence of PWs 5 and 6. Interestingly, Raj Kumar Singh (PW-1) in his statement also stated about their presence at the place of occurrence. Though it was pleaded by learned counsel for the appellants that PW-1's evidence cast a doubt about the prosecution version it is to be noted that PW-1 never claimed to be an eye witness. The evidence of PWs and eye witnesses clearly established that accused Ajeet Kumar Rai and Vinay Kumar Rai caught hold of deceased and on their exhortation appellant Ashutosh shot at the deceased. Therefore, Section 34 has application.

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15. Coming to the alleged discrepancy between the ocular evidence and the medical evidence as rightly noted by the High Court there was no discrepancy. The medical evidence was clearly in line with what has been stated by eye-witnesses. The High Court has noted that the expression used by the witnesses cannot be analysed in hypothetical manner. According to the eye witnesses gunshot injury was caused on the right temple but the injury was found on the upper eyelid and everted wound on the right oricle margin. Therefore, it can never be said that medical evidence is contrary to the ocular evidence.

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16. Looked at from any angle, the appeals are without merit and deserve dismissal which we direct.

N.J.

Appeals dismissed.

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