

[2008] 14 S.C.R. 723

KAPIL DEO SINHA

v.

KIRANDEO PRASAD & ANR.
(Criminal Appeal No. 1112 of 2003)

OCTOBER 17, 2008

**[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]**

Penal Code, 1860: s.302 – Conviction under, by trial Court – Acquittal by High Court – Correctness of – On facts, held: Not correct – Non-examination of investigating officer and doctor without any explanation weakened the prosecution case – Witness stated that the accused was not present when the alleged incident took place – High Court rightly ordered acquittal.

Prosecution case was that in the evening of 25.3.1978, when informant was sitting in the Dalan with PW-5, PW-7 and the deceased, the accused party came there and started attacking them with their respective weapons. This resulted in death of the deceased and injuries to others. Six accused persons faced trial. Sessions Court directed acquittal of five of accused persons, while holding respondent no.1 guilty of offence under s.302 IPC. High Court found that seven witnesses were examined to further the prosecution case. PW 1 the son of the deceased stated that they were singing Holi songs and that due to darkness they could not know as to who was the assailant. PWs 5, 6 and 7 stated contrary to what PW 1 had stated and stated that they were not participating in Holi because of the death of the deceased. The High Court found this to be improbable because death of the deceased by the attacks took place in the evening. It was of the view that non-examination of the Investigating Officer and the Doctor without any explanation being offered by

A the prosecution and the unreliability of the evidence of PWs 5, 6 and 7 was sufficient to discard the prosecution version. Accordingly High Court ordered acquittal. Hence the instant appeal.

B Dismissing the appeal, the Court

B HELD : 1. The Investigating Officer and the Doctor were not examined. No reason was indicated as to why they were not examined. The evidence of PW 1 assumed significance. He clearly stated that the accused respondent No. 1 was not present when the alleged incident took place. Further as rightly noted by the High Court, PWs. 5, 6 and 7 stated that because of the sad demise of deceased they were not celebrating Holi and were not singing Holi songs since morning. Prosecution version itself was that the attacks took place in the evening and, therefore, the family members could not have anticipated that in the evening there would be an attack and loss of life and they would not celebrate Holi. [Para 4] [727-D-F]

E CRIMINALAPPELLATE JURISDICTION : Criminal Appeal No. 1112 of 2003

From the Judgment and Order dated 26.6.2002 of the High Court of Judicature at Patna in Crl. Appeal No. 416 of 1987

Shweta Garg, Rakesh Garg and Khwairakpam Nobin Singh for the Appellant.

F Amit Sharma, Suchit Mohanty, Anupam Lal Das and B.B. Singh for the Respondents.

The Judgment of the Court was delivered by

G DR. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the judgment of a Division Bench of the Patna High Court directing acquittal of the respondent No.1 (hereinafter referred to as the 'accused'). Appellant was the informant in the case. Six accused persons faced trial and learned Sessions Judge, Nalanda, directed acquittal of five of the accused persons, while H holding the respondent No.1 guilty of offence punishable under

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Section 302 of the Indian Penal Code, 1860 (in short the 'IPC'). He was sentenced to imprisonment for life. In appeal, High Court set aside the conviction. A

2. Prosecution case in a nutshell is as follows:

In the evening of 25.3.1978 at about 6 P.M. the informant Kapildeo Singh (PW 6) alongwith his uncle Sukhu Mahton (hereinafter referred to as the 'deceased'), Somar Mahton (PW 5) and father Ramji Prasad (PW 7) were sitting in the Dalan and were talking about the rent matter. In the mean time the respondent no.1 Kirandeo Prasad with gun, the accused Akhilesh Prasad with Saif and rest four accused persons namely, Nandu Prasad, Mathura Prasad, Bhagwat Prasad and Umesh Prasad with lathi came there and started exchanging hot words with Sukhu Mahton. On protest the respondent no.1-Kirandeo Prasad fired from his gun at Sukhu Mahton which hit in the right side of his chest and he fell down. The accused Akhilesh Prasad assaulted Sukhu Mahton with Saif on his head. The accused Bhagwat Prasad assaulted the informant, Kapildeo Sinha (PW 6) with Saif on his head and Umesh Prasad with lathi on his right hand. The accused Mathura Prasad also assaulted the informant on his right shoulder and the accused Akhilesh Prasad assaulted his uncle Somar Mahton from the lathi portion of the Saif which caused injury on his both hands. On hearing their cries the co-villagers including Rajendra Mahton (PW 2) arrived there and he was also assaulted by the co-accused, Nandu. The injured Sukhu Mahton died of fire arm injury at the spot. B
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The motive behind the occurrence has been alleged to be the nonparticipation of the prosecution party at the dinner organised by the respondent-Kirandeo Prasad on the occasion of Satya Narain Puja, 10/12 days prior to the occurrence and the respondent had threatened him with dire consequences. G

The deceased Sukhu Mahton was taken to Islampur Police Station under Nalanda at Biharsharif District. The informant, Kapildeo Sinha (PW 6) put law in motion and on the basis of his statement a formal F.I.R. was drawn up by the police and the H

A case under Sections 147/148/149/302/324 IPC and Section 27 of the Arms Act, 1927 (in short the 'Arms Act') was instituted against the respondent no.1 and five other accused persons. The Investigating Officer switched over to investigation and ultimately chargesheeted all the six accused persons for trial and they were tried by the learned Sessions Judge, Nalanda at Biharshariff.

At trial the prosecution examined seven witnesses and the defence examined none.

The accused persons pleaded their innocence and false implication out of enmity.

On consideration of the prosecution evidence and other materials on record, the trial Judge convicted and sentenced the respondent no.1-Kirandeo Prasad as indicated above. However, he acquitted the rest of the five accused persons of the charges framed against them. Hence appeal was filed by Kirandeo Prasad.

Before the High Court the respondent No.1 pointed out that the police officer who made investigation of the case was not examined in the trial court causing serious prejudice to him. The doctor who conducted autopsy over the dead body of the deceased was also not examined.

The High Court found that seven witnesses were examined to further the prosecution version. Although PW 1 was the son of the deceased, PW 2 was the injured witness, PW 6 the present appellant was the informant, PWs. 5, 6 & 7 i.e. Somar Mahton, Kapildeo Sinha and Ramji Prasad @ Rama respectively were stated to be eye witnesses to the occurrence. PW 1 the son of the deceased stated that they were singing Holi songs. PW 1 also stated that due to darkness they could not know as to who was the assailant. PWs 5, 6 & 7 stated contrary to what PW 1 had stated and stated that they were not participating in Holi because of the death of the deceased. The High Court found this to be improbable because death of the deceased by

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the attacks took place in the evening. The High Court was of the view that non-examination of the Investigating Officer (in short the 'I.O.') and the Doctor without any explanation being offered by the prosecution and the aforesaid unreliability of the evidence of PWs 5, 6 & 7 was sufficient to discard the prosecution version.

The informant-appellant submitted that merely because the I.O. and the Doctor had not been examined, that cannot be a ground to discard the prosecution version. Further the Holi celebration by singing of songs was continuing since morning till late night, therefore, there was nothing unreliable in the evidence of PWs 5, 6 & 7.

3. Learned counsel for the accused-respondent supported the judgment of the High Court.

4. In the instant case it is noticed that neither the I.O. nor the Doctor have been examined. No reason has been indicated as to why they were not examined. Added to that, the evidence of PW 1 assumes significance. He has clearly stated that the accused respondent No. 1 was not there when the alleged incident took place. Further as rightly noted by the High Court, PWs. 5, 6 & 7 stated that because of the sad demise of deceased they were not celebrating Holi and were not singing Holi songs from the morning. Prosecution version itself is that the attacks took place in the evening and, therefore, the family members could not have anticipated that in the evening there will be an attack and loss of life and therefore they would not celebrate Holi. These factors have not been taken note of by the High Court to direct the acquittal. We find no infirmity in the conclusions arrived at by the High court to warrant interference.

5. Appeal is accordingly dismissed.

D.G.

Appeal dismissed.