

SAJJAN SHARMA

v.

STATE OF BIHAR

(Criminal Appeal No. 1283 of 2010)

JANUARY 7, 2011

[AFTAB ALAM AND R.M. LODHA, JJ.]

*Penal Code, 1860 – s.302 – Murder – Unlawful assembly carrying fire-arms caused the death of informant's uncle – Appellant's father and brother were seen as members of the unlawful assembly and were duly named in the Fard-e-beyan/ FIR – Weapons carried by them were also identified and expressly mentioned in the Fard-e-beyan – Though appellant was not identified as one of the accused at the time of the commission of the offence, he was later named among the accused – Conviction of accused-appellant – Challenge to – Dispute as to whether appellant was one of the accused taking part in the commission of the offence – Held: The informant did not name the appellant as one of the accused – The appellant was not named in the FIR – Had the appellant been actually present at the place of occurrence, there is no reason why his name along with his father and brother, should not have figured in the FIR – In the circumstances, it will not be wholly safe to maintain the conviction of the appellant under s.302 IPC and applying the rule of caution, he must be given the benefit of doubt – Conviction of appellant set aside.*

*Criminal Trial – Framing of charges and examination of accused under s.313 CrPC in the State of Bihar – Patna High Court asked to take note of the neglectful way in which some of the Courts in the State appear to be conducting trials of serious offences and take appropriate corrective steps – Code of Criminal Procedure, 1973 – s.313.*

**According to the prosecution, in view of old enmity, an unlawful assembly carrying fire-arms caused the**

A death of PW4's uncle. The prosecution case is based on the Fard-e-beyan of PW4.

B The police submitted chargesheet against seven accused persons of whom five (including the appellant's father and brother) were named in the Fard-e-beyan/FIR while the other two accused (including the appellant) were not so named in the Fard-e-beyan/FIR. In the charge-sheet three accused were shown as absconders and the rest were in custody. Later one more accused was apprehended and he was also put on trial along with the accused who were in custody. The case of the two accused who remained absconding was separated and the other five accused were put on trial. Later on, the appellant's father died and in so far as he was concerned, the proceedings abated. The trial continued in respect of D the four accused, including the appellant. The trial court finally convicted all the four accused under section 302 IPC and section 27 of the Arms Act and sentenced them to rigorous imprisonment for life under section 302 IPC and rigorous imprisonment for 1 year under section 27 E of the Arms Act. One accused died after the judgment of the trial court. The rest three accused, including the appellant and his brother preferred appeals before the High Court. The appeals were dismissed.

F Against the judgment of the High Court, the appellant and his brother jointly filed SLP before this Court. The third convict did not file any further appeal against the judgment of the High Court. The SLP insofar as the appellant's brother was dismissed while the appellant was granted leave to appeal.

G Allowing the appeal, the Court

H HELD: 1. Curiously, the trial court charged all the five accused (before the appellant's father died) only under section 302 IPC, without the aid of either section 149 or section 34 of IPC. Equally inexplicably, the trial court did

not charge the accused under section 148 IPC. Apart from section 302 IPC all the accused were charged under section 27 of the Arms Act; one accused was additionally charged under section 379 of the Penal Code for taking away the rifle of the deceased. [Para 12] [638-F-G]

2.1. The charge framed by the trial court was highly flawed. The appellant was examined by the court under section 313 of CrPC. This examination too is highly unsatisfactory and sketchy. [Paras 13, 14] [638-H; 639-C-D]

2.2. This is not an isolated case but it is almost a stereotype. In criminal trials in Bihar no proper attention is paid to the framing of charges and the examination of the accused under section 313 of the Code of Criminal Procedure, the two very important stages in a criminal trial. The framing of the charge and the examination of the accused are mostly done in the most unmindful and mechanical manner. The Patna High Court should take note of the neglectful way in which some of the Courts in the State appear to be conducting trials of serious offences and take appropriate corrective steps. [Para 15] [639-G-H; 640-A-B]

3.1. In any event, in the instant case, there is no reason to go into that technical aspect of the matter since the appellant has a good case on merit as well. [Para 16] [640-C]

3.2. The prosecution examined eight witnesses in support of its case. PWs 1 and 2 stated that they did not know anything about the occurrence and they had not given any statement before the police. They were declared hostile. PW3 who was the brother-in-law of the deceased and who was not only present at the time of recording of the Fard-e-beyan but had also signed it as a witness also turned hostile. In cross-examination he also said that

A his brother-in-law had enmity with a large number of  
people. PW4 and PW6 are the two eye witnesses. PW5  
did not claim to have witnessed the actual occurrence but  
said that on the date of occurrence, at about 2:30 in the  
afternoon he heard the report of the gun shots and saw  
B some of the accused fleeing away with .315 rifles. In view  
of the evidences of PWs 4, 6 and 5 coupled with the  
medical evidence there is no room for doubt that the  
deceased was killed in the manner as stated by the  
prosecution. But the question is whether or not the  
C appellant was one of the accused taking part in the  
commission of the offence. [Paras 17, 18] [640-D-H; 641-  
A]

3.3. PW4 in his deposition before the court stated  
what he had said in the Fard-e-beyan. He did not name  
D the appellant as one of the accused. The name of the  
appellant figures in the deposition of PW6. PW6 named  
the appellant and two other accused (one absconding  
and one not charge-sheeted), in addition to the five  
E accused named in the FIR. He did not assign them any  
particular weapon but said that they were carrying  
different arms and weapons. He then stated that all the  
accused surrounded the deceased but beyond this he  
did not assign any role to the appellant. PW5 stated that  
F on the date of the occurrence he was scattering fertilizer  
in his banana field when all of a sudden on hearing the  
sound of firing and noise, he looked around and saw the  
accused persons, including the appellant coming. He  
saw a rifle in the hands of the appellant's brother and 2  
G rifles in the hands of one accused who passed him close  
by. The rest of the accused were carrying some small  
and big '3 noughts'. In cross examination he stated that  
he had told PW4 that he had seen the accused persons  
running away. But he had not said the names of all the  
accused persons to PW4. He further stated that the  
H Inspector recorded his statement about 10-20 days after

the occurrence. [Para 19] [641-B-E]

3.4. The appellant was not named in the FIR. The appellant lived in the same village as the informant and PW6. The appellant's father and brother were seen as members of the unlawful assembly and were duly named in the Fard-e-beyan/FIR. The weapons being carried by them (.315 rifle) were also identified and expressly mentioned in the Fard-e-beyan. In the circumstances, had the appellant been actually present at the place of occurrence, there is no reason why his name along with his father and brother, should not have figured in the FIR. In case the Informant missed him, PW6 would have given his name who was undeniably present at the time of recording of the Fard-e-beyan and who had signed it as one of the witnesses. [Para 20] [641-F-H; 642-A]

3.5. In this country, even while correctly naming the accused in cases of serious offences, it is endemic that some other innocent persons or even such of the members of the family of the accused who might not be present at the time of commission of offence are also roped in and falsely implicated. Had the appellant been identified at the time of commission of the offence, his name would have surely figured in the FIR. Though he was not identified as one of the accused at the time of the commission of the offence, he was later named among the accused. It is difficult to accept the evidence of PW6 insofar as he names the appellant also as one of the members of the unlawful assembly. [Paras 22, 23] [642-D-G]

3.6. This leaves PW5 only who claims to have seen the appellant among the accused while they were going away after the commission of the offence. But his statement was admittedly recorded by the police after ten or twenty days of the occurrence and till then he had not disclosed the name of the appellant as one of the accused

A to PW4 or to any one else. In the facts and circumstances, it becomes difficult even to accept the testimony of PW5 insofar as the appellant is concerned. [Para 24] [642-G-H; 643-A]

B 3.7. In view of the evidence in the instant case, it will not be wholly safe to maintain the conviction of the appellant under section 302 of IPC and applying the rule of caution, he must be given the benefit of doubt. The conviction of the appellant and the sentence given to him is set aside. [Para 25] [643-B-C]

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1283 of 2010.

D From the Judgment & Order dated 10.9.2007 of the High Court of Judicature at Patna in Criminal Appeal Nos. 427 and 394 of 2001 (DB).

Nagendra Rai, Smarhar Singh, Preeti Reshmi and Alok Kumar for the Appellant.

E Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

F AFTAB ALAM, J. 1. The appellant Sajjan Sharma stands convicted under section 302 of the Penal Code and sentenced to rigorous imprisonment for life.

G 2. The prosecution case that led to the conviction and sentence of the appellant is based on the Fard-e-beyan (Ext. 3) of one Mukesh Kumar (PW4) recorded by the officer-in-charge of Bihpur Police Station on November 24, 1994, at 4.00 p.m. at David Door Bahiar of village Marba (in local dialect 'bahiar' is the word for the agricultural lands at a distance from the dwelling part of the village). In his statement before the police officer, Mukesh Kumar stated that on that day at about 10.00 a.m., he along with his uncles Narain Kunwar and Bauku Kunwar had gone to the corn fields in David Door Bahiar.

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carrying a licensed .315 rifle and some rounds. There, they supervised the scattering of fertilizer over the land by the farm labourers. The work was over by 2.30 p.m. and then the labourers left. In the meanwhile, one Gunanand Sharma/Sanghai, (PW3) s/o Ram Avtar Sharma of Amarpur Village came there to meet Narain Kunwar. He (the informant) and his uncle Bauku Kunwar were chatting, sitting at the other corner of the field. At that time the accused, Bodhan Rai @ Prabhu Narain Rai s/o Basu Rai came there carrying a rifle which is called a semi-rifle. He was wearing around his neck a belt full of cartridges. Accompanying him were Satto Sharma s/o Lalho Sharma who was carrying a .315 rifle, Shambhu Sharma s/o Satto Sharma carrying a .315 rifle, Sukesh Kunwar s/o Naney Kunwar holding a '3 nought' rifle, Paro Kunwar s/o Naney Kunwar holding a '3 nought' rifle and three unknown persons who were also carrying rifles. All the named accused were from the same village as the informant.

3. All the accused went up to his uncle, who on seeing them asked Gunanand to call the informant and his other uncle Bauku. As Gunanand came towards them, Bodhan Rai snatched the rifle from the hands of his uncle and pushed him towards south. Watching this, the informant, Bauku Kunwar and Gunanand started shouting as to where they were taking his uncle. Suddenly, Bodhan Rai fired a shot from his rifle in the air and warned them to go back, whereupon they got frightened and slowly fell back. Then, he took his uncle to the field of Laxmi Mishra that was vacant. All the while they were shouting and raising alarm to save their uncle. Then, Bodhan Rai, calling his uncle as "the bastard" exclaimed that he should be killed there only, lest others would come on alarm. Uttering those words, Bodhan Rai fired a shot hitting his uncle in the abdomen. His uncle fell down twisting on the ground. Then, Bodhan Rai again said that they would torture the bastard to death. On this, Shambhu Sharma and Sukesh Sharma also fired shots at him. His uncle was writhing in pain when Bodhan Rai put the barrel of the rifle near the ears of his uncle and fired another shot and

A said to his fellow accused that they should go as he was finished.

B 4. The informant further said that they were watching from a little distance when Bodhan Rai turned towards them and said that if they gave evidence, they would also meet the same fate. The informant also said that his uncle was killed due to enmity from before, and earlier also Bodhan Rai had tried to kill his uncle. The informant further said that after the accused persons had left, he went near his uncle and saw that his uncle was lying dead with the face downward on the ground. On the report of the gun shots and their shouting, several persons from the vicinity gathered there. Bodhan Rai also carried away the licensed rifle of his uncle. He did not remember the number of his rifle.

D 5. The informant concluded by saying that his uncle was killed by Bodhan Rai @ Prabhu Narain Rai s/o Basu Rai, Satto Sharma s/o Lalho Rai, Shambhu Sharma s/o Satto Sharma, Sukesh Kunwar s/o Naney Kunwar, Paro Kunwar s/o Naney Kunwar, and other unknown persons, colluding together, due to old enmity, who also snatched away his licensed rifle no.AB0202.

F 6. He finally said that what was recorded by the police officer was his statement; he had read and understood it and finding it true put his signature in the presence of witnesses. The Fard-e-beyan was signed besides the informant Mukesh Kumar, by Bauku Kunwar and Gunanand Sanghai as witnesses.

G 7. The Fard-e-beyan was incorporated in the formal FIR (Ext. 5), instituted at 9.00 p.m. on the same date, giving rise to Bihpur P.S. case no.224/94 dated November 24, 1994 under sections 302, 379, 34 of the Penal Code and under section 27 of the Arms Act.

H 8. The first thing that needs to be noted in connection with

the Fard-e-beyan is that the appellant Sajjan Sharma is not named there as one of the accused. The Fard-e-beyan was recorded soon after the occurrence when there was hardly any time for deliberation and for false implication of anyone who was actually not among the accused. It gave the names of five accused, apart from the three persons who were unknown. All the five named accused were from the same village as the informant and his uncle Bauku Kunwar. Among the five accused the Fard-e-beyan gave the names of Satto Sharma, the father of the appellant and his brother Shambhu Sharma, the other son of Satto Sharma. More importantly, Bauku Kunwar, who later named the appellant in his deposition before the court was not only present at the time of recording of the Fard-e-beyan but had actually signed it as one of two witnesses.

9. The police after investigation submitted chargesheet against seven accused persons of whom five were named in the Fard-e-beyan/FIR and two namely, Sajjan Sharma (the appellant) and Mantu Chaudhri were not named in the Fard-e-beyan/FIR. In the charge-sheet three accused namely, Sukesh Kumar, Paro Kunwar and Mantu Chaudhri were shown as absconders and the rest were in custody. Later Paro Kunwar was apprehended and he was also put on trial along with the accused who were in custody. The ACJM, Naugachia separated the case of the two accused who remained absconding by order dated August 16, 1996, and the other five accused were put on trial. Later on Satto Sharma, the father of the appellant and the accused Shambhu Sharma died and in so far as he was concerned, the proceedings abated. The trial continued in respect of the four accused, including the appellant.

10. On the basis of the evidences adduced before it, the trial court (First Additional District and Sessions Judge, Naugachia) found and held that the prosecution was able to fully establish the guilt of the accused and by judgment and order dated August 2, 2001, convicted all the four accused under

A section 302 of the Penal Code and section 27 of the Arms Act and sentenced them to rigorous imprisonment for life under section 302 of the Penal Code and rigorous imprisonment for 1 year under section 27 of the Arms Act. Bodhan Rai was also convicted under section 379 of the Penal Code and sentenced to rigorous imprisonment for 3 years. All the sentences of the accused were directed to run concurrently.

11. Bodhan Rai died after the judgment of the trial court. The rest of the three accused, including the appellant preferred separate appeals before the Patna High Court (being Criminal Appeal Nos. 391, 394 and 427 of 2001). All the three appeals were consolidated and heard together and were dismissed by judgment and order dated September 10, 2007. Against the judgment of the High Court, the two brothers Shambhu Sharma and Sajjan Sharma (the present appellant) jointly filed the SLP. (It is reported the third accused Paro Kunwar did not file any appeal against the judgment of the High Court). The SLP insofar as Shambhu Sharma is concerned was dismissed but the appellant was granted leave to appeal. That is how the appellant alone stands in appeal before this Court from amongst the several accused who were charge-sheeted and who later faced trial on the charge of killing Narain Kunwar.

12. Before advertng to the merits of the appellant's case, we need to take a look at the charge framed against the accused. Curiously, the trial court charged all the five accused (before Satto Sharma had died) only under section 302 of the Penal Code, without the aid of either section 149 or section 34 of the Penal Code. Equally inexplicably, the trial court did not charge the accused under section 148 of the Penal Code. Apart from section 302 of the Penal Code all the accused were charged under section 27 of the Arms Act; accused Bodhan Rai was additionally charged under section 379 of the Penal Code for taking away the rifle of the deceased.

13. Taking advantage of the highly flawed charge framed by the trial court, Mr. Nagendra Rai, Senior Advocate,

appearing for the appellant submitted that the appellant's conviction cannot be legally sustained under section 302 of the Penal Code alone. Mr. Rai further submitted that both PWs 4 and 6, the two prosecution witnesses who in their deposition before the court mentioned the name of the appellant did not attribute to him any overt act at all but simply named him among the accused. Hence, even if the prosecution evidence were to be accepted without any question the appellant could not be held guilty of committing murder without imputing to him a shared object or intention to commit the offence with the other accused.

14. Here we may also take a look at the examination of the appellant by the court under section 313 of the Code of Criminal Procedure. This examination too is highly unsatisfactory and sketchy. The first question by the court to the appellant (and for that matter to all the accused) was:

"There is evidence against you that on 24.11.94 at Davidor Bahiyar in concert with the other accused (you) killed Narain Kunwar by firing shot at him."

The appellant replied:

"It is wrong (to say that)"

Whereupon the court put the second and the last question:

"In defence you wish to say anything?"

The appellant replied:

"I am innocent."

15. We are constrained to say that this is not an isolated case but it is almost a stereotype. It is our experience that in criminal trials in Bihar no proper attention is paid to the framing of charges and the examination of the accused under section 313 of the Code of Criminal Procedure, the two very important

A stages in a criminal trial. The framing of the charge and the  
examination of the accused are mostly done in the most  
unmindful and mechanical manner. We wish that the Patna High  
Court should take note of the neglectful way in which some of  
the Courts in the State appear to be conducting trials of serious  
B offences and take appropriate corrective steps.

16. Having regard to the charge that was framed against  
the appellant and his examination by the court under section  
313 of the Code of Criminal Procedure the point raised by Mr.  
Rai cannot be said to be entirely without substance but we see  
C no reason to go into that technical aspect of the matter since  
we find that the appellant has a good case on merit as well.

17. The prosecution examined eight witnesses in support  
of its case. PWs 1 and 2 (Bihari Mandal and Sadanand Kumar)  
D stated that they did not know anything about the occurrence and  
they had not given any statement before the police. They were  
declared hostile. PW3 (Gunanand Sharma) who was the  
brother-in-law of the deceased, Narain Kunwar and who was  
not only present at the time of recording of the Fard-e-beyan  
E but had also signed it as a witness along with Bauku Kunwar  
also turned hostile and said that he did not know who killed  
Narain Kunwar. In cross-examination he also said that his  
brother-in-law had enmity with a large number of people. PW4,  
Mukesh Kumar, the informant and PW6, Bauku Kunwar are the  
F two eye witnesses. PW5, Binodanand Kumar did not claim to  
have witnessed the actual occurrence but said that on the date  
of occurrence, at about 2:30 in the afternoon he heard the report  
of the gun shots and saw some of the accused fleeing away  
with .315 rifles. PW7 is the doctor who conducted post mortem  
G on the body of Narain Kunwar. PW8, Ranjit Kumar Mishra is  
the investigating officer of the case.

18. In view of the evidences of PWs 4, 6 and 5 coupled  
with the medical evidence there is no room for doubt that  
Narain Kunwar was killed in the manner as stated by the  
prosecution. But the question is whether or not the appellant  
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was one of the accused taking part in the commission of the offence. A

19. PW4, Mukesh Kumar in his deposition before the court stated what he had said in the Fard-e-beyan. He did not name the appellant as one of the accused. The name of the appellant figures in the deposition of PW6, Bauku Kunwar. PW6 named the appellant and Mantu Chaudhri (absconding) and Munna Sharma (not charge-sheeted), in addition to the five accused named in the FIR. He did not assign them any particular weapon but said that they were carrying different arms and weapons. He then stated that all the accused surrounded Narain but beyond this he did not assign any role to the appellant. PW5, Binodanand Kumar stated that on the date of the occurrence he was scattering fertilizer in his banana field when all of a sudden on hearing the sound of firing and noise, he looked around and saw the accused persons, including the appellant coming from the Gohal. He saw a rifle in the hands of Shambhu Sharma and 2 rifles in the hands of Bodhan Rai who passed him close by. The rest of the accused were carrying some small and big '3 noughts'. In cross examination he stated that he had told Mukesh (PW4) that he had seen the accused persons running away. But he had not said the names of all the accused persons to Mukesh. He further stated that the Inspector recorded his statement about 10-20 days after the occurrence. B  
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20. It is noted above that the appellant was not named in the FIR. The appellant lived in the same village as the informant and PW6, Bauku Kunwar. The appellant's father and brother were seen as members of the unlawful assembly and were duly named in the Fard-e-beyan/FIR. The weapons being carried by them (.315 rifle) were also identified and expressly mentioned in the Fard-e-beyan. In regard to Shambhu Sharma, it was stated that after the first shot fired by Bodhan Rai, he and Sukesh Sharma also fired at the victim. In those circumstances, had the appellant been actually present at the place of occurrence, there is no reason why his name along with his F  
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A father and brother, should not have figured in the FIR. In case the informant missed him, PW6 Bauku Sharma would have given his name who was undeniably present at the time of recording of the Fard-e-beyan and who had signed it as one of the witnesses.

B 21. PW6 in his deposition before the court made a statement suggesting that his statement was recorded by the police on the date of the occurrence itself after recording the statement of Mukesh but Mr. Nagendra Rai submitted that from the records it appeared that his statement was taken by the police on the day following the date of occurrence.

C 22. In this country, even while correctly naming the accused in cases of serious offences, it is endemic that some other innocent persons or even such of the members of the family of the accused who might not be present at the time of commission of offence are also roped in and falsely implicated. Satto Sharma, named as accused no.5 in the FIR, had two sons- Shambhu Sharma and Sajjan Sharma, the present appellant. Satto Sharma himself and Sambhu Sharma were duly named as the accused. Had the appellant been identified at the time of commission of the offence, his name would have surely figured in the FIR. It appears that though he was not identified as one of the accused at the time of the commission of the offence, it was later realized that one of the sons of Satto Sharma was left out and he too was later named among the accused.

D 23. For the reasons as discussed above, we are unable to accept the evidence of PW6 insofar as he names the appellant also as one of the members of the unlawful assembly.

E 24. This leaves PW5 only who claims to have seen the appellant among the accused while they were going away after the commission of the offence. But his statement was admittedly recorded by the police after ten or twenty days of the occurrence and till then he had not disclosed the name of the

appellant as one of the accused to Mukesh or to any one else. In the facts and circumstances as discussed above, it becomes difficult even to accept the testimony of PW5, Binodanand Kumar insofar as the appellant is concerned.

25. In this state of evidence, it will not be wholly safe to maintain the conviction of the appellant under section 302 of the Penal Code and applying the rule of caution, he must be given the benefit of doubt. We, accordingly, allow the appeal and set aside the conviction of the appellant and the sentence given to him. The appellant is directed to be released forthwith unless he is wanted in some other criminal case.

26. Let a copy of this order be placed before the Hon'ble Judge of the Patna High Court, in-charge of the State's Judicial Academy.

B.B.B.

Appeal allowed.