

## **Raj Kishore Jha vs State Of Bihar And Ors on 7 October, 2003**

**Equivalent citations: AIR 2003 SUPREME COURT 4664, 2003 (11) SCC 519, 2003 AIR SCW 5095, 2003 AIR - JHAR. H. C. R. 1302, 2004 CRILR(SC&MP) 36, 2003 (8) SCALE 271, 2003 (6) SLT 113, 2003 (4) LRI 161, 2003 ALL MR(CRI) 2339, 2004 SCC(CRI) 212, 2004 CRILR(SC MAH GUJ) 36, (2003) 11 ALLINDCAS 1 (SC), 2003 (11) ALLINDCAS 1, 2004 (1) SRJ 232, 2003 (3) BLJR 2194, 2003 BLJR 3 2194, (2003) 4 PAT LJR 202, (2003) 11 INDLD 514, (2004) 1 EASTCRIC 4, (2003) 26 OCR 819, (2004) 1 RAJ CRI C 86, (2003) 4 RECCRIR 935, (2003) 4 CURCRIR 165, (2003) 7 SUPREME 152, (2004) 1 ALLCRIR 444, (2003) 8 SCALE 271, (2003) 4 JLJR 190, (2003) 47 ALLCRIC 1068, (2003) 3 CHANDCRIC 428, (2003) 4 ALLCRILR 704, (2003) 4 CRIMES 248, 2003 (2) ALD(CRL) 1005**

**Author: Arijit Pasayat**

**Bench: Doraiswamy Raju, Arijit Pasayat**

CASE NO.:

Appeal (crl.) 2000-2001 of 1996

PETITIONER:

RAJ KISHORE JHA

RESPONDENT:

STATE OF BIHAR AND ORS.

DATE OF JUDGMENT: 07/10/2003

BENCH:

DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:

JUDGMENT 2003 Supp(4) SCR 208 The Judgment of the Court was delivered by ARIJIT PASAYAT, J. : Questioning legality of the judgment whereby Division Bench of Patna High Court directed acquittal of 9 respondents, this appeal has been filed by the informant. Originally there were 15 accused persons and 5 of them were acquitted by the trial Court. They were accused nos. 9 to 13. The convicted accused persons filed appeals before the Patna High Court. Crl. Appeal No. 485/89 was filed by 9 accused persons, while Crl. Appeal No. 521/89 was filed by one accused.

Accusations which formed foundation for the prosecution case are as follows :

For Nawal Kishore Jha (hereinafter referred to as 'the deceased') 9.4.1980 was the last day in this earth. He allegedly suffered homicidal death at the hands of the accused persons. There was longstanding enmity between Rajendra Jha (A-6) and one Deo Chandra Jha and there were several rounds of litigations between them. Raj Kishore Jha (PW-15) was going with the deceased for a walk in their village towards the chowk. They found Bundeo Jha (A-1), Bindeshwar Jha, Rajender Jha (A-6), Arjun Jha (A-2), Lalo Jha (A-3), Daya Nand Jha (A-7), Parmanand Jha (A-15), Arjun Jha (A-14), Gopal Jha (A-4), Madnanand Jha (A-8) and others were armed with various weapons and came to the Darwaja of Deo Chandra Jha to loot his Khalian. The deceased protested as to why they were doing so. Hearing the protestations, Daya Nand Jha (A-7) and Rajender Jha (A-6) ordered Bundeo Jha (A-1) to shoot down the deceased. Bundeo Jha (A-1) fired at once from his gun. The pellets hit deceased on the forehead, front portion of the neck and chest and he fell down unconscious. Accused-Daya Nand Jha (A-7) asked the other members of the mob to leave as a murder had been committed Raj Kishore Jha- informant with the help of Prem Chandra Jha and Kaushal Kishore Jha and others tried to take the deceased to the hospital for treatment but on the way he breathed his last. The informant, therefore, went to the police station to lodge the report. Investigation was undertaken and charge-sheet was placed on completion thereof. The accused persons took the plea as evident from the suggestions given to the PWs and examination under Section 313 of the Code of Criminal Procedure, 1973 (for short 'the Cr. P.C.') that on 9.4.1980 at about 5.00 p.m. Sri Kant Jha, the informant along with Deo Chandra Jha, Nawal Kishore Jha and some other PWs and others formed a mob of 50-60 persons and were variously armed and they went to the house of accused-Daya Nand Jha. They asked him to withdraw the case instituted against some of them and started looting wheat and other articles. Many persons from the village assembled there and requested the members of the mob to stop, but they did not listen to them and started pelting stones upon the villagers. In retaliation the villagers also started pelting stones. Deo Chandra Jha who was armed with a gun opened fired. The villagers forced the members of the mob to retreat and while they were doing so, Deo Chandra Jha also retreated towards south-west while still firing. Members of the mob committed theft of valuables and one of the gun fires made by Deo Chandra Jha hit deceased which proved fatal. Total 20 witnesses were examined to further the prosecution version. Out of them Hardeo Jha, Chandra Shekhar Jha, Prem Chandra Jha, Bishwanath Jha, Govind Kumar Jha, Deo Chandra Jha (PWs 1, 3, 6, 7, 8 and 12 respectively) claimed to be eye witnesses, in addition to the informant. To substantiate its stand the defence also examined 15 witnesses. After considering the evidence on record, the Trial Court found the accusations were not established against 5 persons. Accused-Bundeo Jha (A-1) was convicted for offence punishable under Section 302 of Indian Penal Code, 1860 (in short the 'IPC') and sentenced to undergo imprisonment for life. He is also sentenced to undergo RI for 5 years under section 27 of the Arms Act, 1959 (for short the 'Arms Act'). Other convicted persons were directed to undergo imprisonment for life for offences punishable under Section 302 IPC read with Section 149 IPC. Accused-Rajendra Jha and Daya Nand Jha were

further sentenced to undergo imprisonment for life for offences punishable under section 302 read with Section 109 IPC. Accused Bundeo Jha, Arjun Jha and Parmanand Jha were sentenced to undergo RI for 3 years for commission of offence punishable under Section 148 IPC. Accused-Bishundeo Jha, Rajendra Jha, Daya Nand Jha, Arjun Jha (A-14), Lalo Jha and Madananand Jha were sentenced to undergo RI for two years each for the offence relatable to Section 147 IPC.

In appeal, the primary stand of the appellant was that the prosecution had not come with clean hands. When on the night of occurrence the Investigating Officer (PW-16) had inspected the place, he did not find any blood. In the morning, however, when he visited the occurrence, he found some blood like substance, but it was so scanty that it was not possible to scrap and forensic examination was ruled out. He also stated that he had not seen any sign of looting the wheat etc. and there was no mark trampling at the spot of occurrence. He further stated that in the night of occurrence, he had visited the house of Daya Nand Jha and had found brickbats there. He further stated that he found trampling marks on the road near the house of Daya Nand Jha. According to the accused, the Investigating Officer had exposed the weakness in the prosecution version and probabilised the defence version. With reference to the post-mortem report, it was submitted that according to prosecution the accused fired from a distance of 70-80 ft. The medical evidence was not consistent with the prosecution case as disclosed in the FIR. The witnesses appeared to be not reliable because names of some were not indicated in the FIR and some of the prosecution witnesses were accused in the counter case. It was pointed out that the Investigating Officer had died during the pendency of the trial and the accused persons were greatly prejudiced because they were denied the opportunity of cross-examination. These factors weighed with the High. Court. It noted that the stand of explosion at the spot has been discarded by the Trial Court. Further more, names of the A-9 to A-13 were introduced for the first time in Court. The distance between place from where the A-1 fired and the place where the deceased stood was very short and that was a significant factor.

In view of the above conclusions the conviction was held to be bad by the impugned judgment and directed acquittal. It recorded the following findings:

- "(1) the Investigating Officer who died before completion of his testimony had recorded objective findings;
- (2) the place of occurrence might be as has been suggested by the defence;
- (3) the medical evidence is not consistent with prosecution case as the doctor has stated in his evidence that gun might have been fired from a distance of 70-80 ft while the first information report reveals that it might have been fired from a close range;
- (4) since the Investigating Officer had died, it had caused prejudice due to non-examination of the Investigating Officer.
- (5) there were exaggerations made regarding explosion of bomb and looting.

It was demolished by the findings recorded by the Trial Court who had acquitted the accused persons of the allegations;

(6) the names of PWs. 1, 7 and 8 were not there in FIR;

(7) PWs. 3, 8, 11, 12 and 15 were accused in the counter case; and (8) PWs. 3, 6 and 9 appeared to have helped the informant in accompanying PW 15 while he was taking injured to the hospital and they were not eyewitnesses.

With these findings the accused persons were held to be not guilty and acquittal was directed. It is to be noted that the appeal has been filed by the informant and no appeal has been filed by the State Government.

Learned counsel for the appellant submitted that judgment of the High Court is based on surmises and conjectures and no reason has been indicated to discard the plausible and cogent prosecution testimony. Non-examination of the investigating Officer has not caused any prejudice to the accused. Further, there is no inflexible rule that when name of any witness does not appear in the first information report his version is to be discarded. The conclusion so far as PWs. 3, 6 and 9 that they had not accompanied the informant and were not eye witnesses by referring to the first information report is on a clear misreading of the first information report. No reason has also been indicated as to why the evidence of PWs. 3, 8, 11, 12 and 15 were to be discarded. It has been mentioned that they were accused persons in the counter case. That does not make them unreliable witnesses.

Since the judgment is practically non-reasoned, the same has to be upset and that of the Trial Court which is reasoned, has to be restored.

In response, learned counsel for the accused persons submitted that the High Court has indicated several reasons to find prosecution version vulnerable. Merely because the judgment has not indicated the reasons in an expressive way, that does not take away the effect of its conclusions which are on terra firma. It has been submitted also that the forensic laboratory report which goes in favour of the accused has been kept out of the consideration with ulterior motive. That is an additional factor which would strengthen the order of acquittal passed by the High Court. The fact that the Investigating Officer had recorded objective findings reading presence of brickbats in the house of the accused strengthens the defence version and falsifies the place of occurrence as indicated by the prosecution. The genesis of prosecution case as indicated by the prosecution has been clearly demolished after findings recorded about the claim regarding looting and throwing of bombs. The last limb of the occurrence as projected by the prosecution is the alleged firing. When the major plank of the version has been disbelieved, the residue cannot stand. It was also submitted that only one shot was fired even according to the prosecution version from a distance of 70-80 ft. That itself goes to show that the death was not intended, even if the prosecution version is accepted in toto. With reference to Section 145 of the Indian Evidence Act; 1872 (in short 'the Evidence Act') it was submitted that since the Investigating Officer was not examined, that caused great prejudice as the accused could have obtained clarifications on certain material aspects. Finally it was

submitted that this being a case of acquittal there should not be any interference when the State has not preferred any appeal.

Learned counsel for the respondent-State submitted that though it has not preferred any appeal, according to it the judgment of acquittal cannot be maintained.

A bare perusal of the judgment of the High Court shows that it has disposed of the appeal in a rather casual manner. Most of the conclusions arrived at by the High Court are per se not on sound footing. The appellate Court will not abjure its duty to prevent miscarriage of justice by interfering where interference is imperative. Where doubt is based on irrelevant grounds or where the Court allows itself to be deflected by red herrings drawn across the track, or where the evidence accepted by the Trial Court is rejected by the High Court after a perfunctory consideration or where the baneful approach of the Court has resulted in vital and crucial evidence being ignored or for any such adequate reason, the Court should feel obliged to secure the ends of justice, to appease the judicial conscience, as it were. The High Court has noted that the names of witnesses do not appear in the first information report. That by itself cannot be a ground to doubt their evidence as noted by this Court in *Bhagwan Singh and Ors. v. State of M.P.*, JT (2002) 3 SC 387, *Chittar Lal v. State of Rajasthan*, (2003) AIR SCW 3466 and *State of Madhya Pradesh v. Man Singh and Ors.*, (2003) 6 Supreme 202. There is no requirement of mentioning the names of all witnesses in the first information report. No reason has also been indicated by the High Court as to why the evidence of PWs. 3, 8, 11, 12 and 15 was to be obliterated merely because they were accused in the counter case. In a case of this nature, when counter case has been registered, the Court hearing the same has to scrutinize the evidence with greater detail and even in such a situation the evidence which is cogent, credible and trustworthy cannot be totally wiped out because of the only circumstance that they were accused in the counter case. Additionally, we find that PWs. 3, 6 and 9 have not been merely described in the first information to have taken the deceased to the hospital, as observed by the High Court. A bare reading of the first information report clearly shows that they were described as eyewitnesses also. Here again, the High Court has committed error.

Mere non-examination of Investigating Officer does not in every case cause prejudice to the accused or affects the creditability of the prosecution version. In *Ram Dev and Anr. v. State of U.P.*, [1995] Supp. 1 SCC 547, it was noted that non-examination of the Investigating Officer does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of the eye witnesses. It was, however, indicated that it is always desirable for the prosecution to examine the Investigating Officer. In the present case after examination- in-chief and partial cross-examination, the Investigating Officer had died. Therefore, this cannot be a case which can be stated to have caused any prejudice to the accused on account of Investigating Officer's non-examination. The prosecution cannot be attributed with any lapse or ulterior motives in such circumstances. In *Behari Prasad and Ors. v. State of Bihar*, [1996] 2 SCC 317, it was held that case of prejudice likely to be suffered mostly depends upon facts of each case and no universal straight Jacket formula should be laid down that non-examination of Investigating Officer per se vitiates the criminal trial. The said view has been found echoed in *Ambika Prasad and Am. v. State (Delhi administration)*, [2000] 2 SCC 646, *Bahadur Naik v. State of Bihar*, [2000] 9 SCC 153 and, *Ram Gulam Chaudhury and Ors. v. State of Bihar*, JT (2001) 8 SC 110.

The requirement of compliance with Section 145 of the Evidence Act was highlighted by learned counsel for the accused-respondents.

The question of contradicting evidence and the requirements of compliance with Section 145 of the Evidence Act has been considered by this Court in the Constitution Bench decision in the case of *Tahsildar Singh v. State of U.P.*, AIR (1959) SC 1012. The Court in the aforesaid case was examining the question as to when an omission in the former statement can be held to be a contradiction and it has also been indicated as to how a witness can be contradicted in respect of his former statement by drawing particular attention to that portion of the former statement. This question has been recently considered in the case of *Binay Kumar Singh v. State of Bihar*, [1997] 1 SCC 283 and the Court has taken note of the earlier decision in *Bhagwan Singh v. State of Punjab*, AIR (1952) SC 214 and explained away the same with the observation that on the facts of that case there cannot be a dispute with the proposition laid down therein. But in elaborating the second limb of Section 145 of the Evidence Act it was held that if it is intended to contradict him by the writing his attention must be called to those parts of it which are to be used for the purpose of contradicting him. It has been further held that if the witness disowns to have made any statement which is inconsistent with his present stand, his testimony in Court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of section 145 of the Evidence Act. The aforesaid position was indicated in *Rajender Singh and Ors. v. State of Bihar*, [2000] 4 SCC 298.

Since the judgment of the High Court is practically non-reasoned, one course open is to remit the matter back to the High Court to rehear appeal and pass a reasoned judgment dealing with all relevant aspects. But considering the long passage of time, we think it appropriate to decide the case by analyzing the evidence brought on record.

One salient feature of the case is, there was only one gunfire by Bundeo Jha (A-1) from a considerable distance as per the prosecution version. Here again, the High Court has fallen into an error by observing that the fire was done from a close range as if the prosecution version was that. On the contrary, right from the beginning the prosecution version is that the gun was fired from about a distance of 70-80 ft. On that score also the High Court's conclusion that the medical evidence varied with the ocular evidence suffers from vulnerability. Taking into account the fact that the only shot was fired from a considerable distance in this case application of Section 302 IPC, is ruled out, though there cannot be any rule that whenever one shot is fired from a distance, Section 302 IPC would not be applicable. It would depend upon the nature of the gun, the position of the assailant and the victim, obstructions from any intermediary object which may cause deflection of the shot and several other relevant factors. The appropriate applicable provision on the facts of the case is Section 304 Part II IPC so far as Bundeo Jha (A-1) is concerned. Rest of the accused persons who were convicted by the Trial Court were implicated by application of Section 149 IPC.

On a reading of the prosecution evidence as analysed in great detail by the Trial Court, we find that definite roles have been ascribed to Bundeo Jha (A-1), the assailant with the gun, Arjun Jha (A-2), Gopal Jha (A-4), Rajendra Jha (A-6) and Daya Nand Jha (A-7). But the accusations have not been clearly established against rest of the accused persons. Therefore, the acquittal as directed by the

High Court, so far as they are concerned, stands confirmed. Accused-Bundeo Jha (A-1) is convicted under Section 304 Part II IPC and Section 27 of the Arms Act with corresponding sentences of 7 years RI and 5 years RI respectively. Accused Rajendra Jha (A-6) and Daya Nand Jha (A-7) are guilty for offences punishable under Section 304 Part II read with Section 109 IPC with custodial sentence of 7 years RI. Daya Nand Jha (A-7), Rajendra Jha (A-6), Parmanand Jha (A-15). Gopal Jha (A-4) and Arjun Jha (A-2) are convicted under Section 304 Part II read with section 149 IPC with custodial sentence of 7 years. Accused-Bundeo Jha (A-1), Arjun Jha (A-14), Gopal Jha (A-4) are found guilty for offence punishable under Section 148 IPC and sentenced to RI for 3 years. The sentences are directed to run concurrently.

The appeals are allowed to the extent indicated. The respondents who are on bail shall surrender to custody forthwith to serve the remainder of their sentence, if any.

Before we part with the case, we feel it necessary to indicate that non- reasoned conclusions by appellate Courts are not appropriate, more so, when views of the lower Court are differed from. In case of concurrence, the need to again repeat reasons may not be there. It is not so in case of reversal. Reason is the heartbeat of every conclusion. Without the same, it becomes lifeless.