Rajendra Singh & Ors vs The State Of Bihar on 7 April, 2000

Equivalent citations: AIR 2000 SUPREME COURT 1779, 2000 (4) SCC 298, 2000 AIR SCW 1314, 2000 (4) LRI 1303, 2000 (3) SCALE 137, 2000 CRIAPPR(SC) 303, 2000 SCC(CRI) 796, 2000 (5) SRJ 338, (2000) 2 KER LT 32, 2000 (2) BLJR 1560, (2000) 4 JT 293 (SC), (2000) 2 BLJ 847, (2000) 3 CRIMES 21, (2000) 3 CRIMES 107, (2000) 2 DMC 384, (2000) 2 HINDULR 460, (2000) 2 RECCRIR 624, (2000) 2 CHANDCRIC 9, (2000) 1 ALLCRILR 19, 2000 CHANDLR(CIV&CRI) 520, (2000) SC CR R 732, (2000) 2 PAT LJR 205, (2000) 2 EASTCRIC 582, (2000) 2 RECCRIR 537, (2000) 2 CURCRIR 67, (2000) 4 SUPREME 435, (2001) 1 ALLCRIR 443, (2000) 3 SCALE 137, (2000) 41 ALLCRIC 696, (2000) 3 ALLCRILR 685

Bench: R.P.Sethi, S.V.Patil

PETITIONER:
RAJENDRA SINGH & ORS.

Vs.

RESPONDENT:
THE STATE OF BIHAR

DATE OF JUDGMENT: 07/04/2000

BENCH:
R.P.Sethi, S.V.Patil, G.B.Pattanaik

JUDGMENT:

PATTANAIK,J.

The two appellants, Rajendra Singh and Triloki Singh have assailed their conviction and sentence passed by the First Additional Sessions Judge, Saran in Sessions Trial No. 189 of 1981, which has been upheld in Appeal by the High Court of Patna in Criminal Appeal No. 146 of 1985. Before the learned Trial Judge in all there were nine accused persons but six of them were acquitted and only two appellants alongwith one Prabhunath Singh were convicted but said Prabhunath died during the pendency of appeal in the High Court, and as such, there are two appellants in this Court. The prosecution case in nutshell is; that on 4th July, 1977 an incident occurred in village Jaidpur Tola Pilui in the district of Saran and one Kameshwar Singh was murdered. Satyanarain PW 8 gave the First Information Report at 6.00 p.m. at Sadar Hospital, Chapra where he was lying injured,

alleging therein that at 11.45 a.m. while the informant was getting his field ploughed by a tractor which he had hired from PW 5 these appellants and others came and asked the informant party not to plough the field but when the informant protested he was abused and then accused no. 1 assaulted him by means of Bhala on his abdomen whereas accused no. 2 assaulted him on his chest. Deceased Kameshwar who was the nephew of the informant was assaulted by accused no. 1 in his abdomen and thereafter all the accused persons assaulted him. The prosecution also further alleged that brother of the informant Banwari Singh had also been assaulted by accused nos. 7, 1 and 2 and the acquitted persons assaulted him by means of lathi. It is also the further case of the prosecution that PW 7 who is the nephew of the informant had also been assaulted. On the basis of the aforesaid First Information Report Sub Inspector of Police PW 9 registered a case and started investigation. The Investigating Officer went to the village and held the inquest over the dead body at 9.45 p.m. and prepared an Inquest Report Exhibit 7. The dead body was sent for autopsy which was conducted by doctor PW 3. The said doctor had also examined the injuries on the person of the informant on the requisition of the Investigating Officer. Finally Chargesheet was submitted as against 9 accused persons, as already stated, against Rajender Singh, Prabhunath Singh and Triloki under Section 302 for the murder of Kameshwar and against all the nine accused persons including the six acquitted under Section 302/149 for being members of an unlawful assembly in prosecution of the common object of which assembly Rajender and others assaulted the deceased and then murdered. Rajender Singh and Prabhunath Singh were further charged under Section 307 and there were charges under Section 148 and 147 and also under Sections 324 and 323 of Indian Penal Code. From the evidence of doctor- PW 3 who conducted the postmortem on the dead body of Kameshwar it is crystal clear that the death was homicidal and the said conclusion of the learned Sessions Judge has been affirmed by the High Court in appeal and had not been assailed before us. To bring home the charges against the accused persons the prosecution relied upon four eye witnesses, namely, PWs 2, 4, 7 and 8. The defence also examined the Magistrate as DW 1 who is alleged to have recorded the statement of informant PW 8 at the hospital on the date of occurrence while he was lying in injured condition. The said statement has been marked as Exhibit B. From the cross-examination of the prosecution witnesses, the defence case appears to be that the occurrence in fact took place on Plot No. 4514 belonging to the accused lying contiguous south of plot no. 4513 while the accused persons were on their field and, therefore, it is the prosecution party who are the aggressors and the accused persons are entitled to right of private defence of property as well as person. On a thorough analysis of the entire evidence on record the learned Sessions Judge came to the conclusion that the occurrence took place on plot no. 4513 which admittedly belongs to the informant and, therefore, the plea of the accused that they were exercising their right of private defence of property as well as person on their land is not acceptable. This conclusion of the learned Sessions Judge has been re-affirmed in appeal by the High Court and Mr. P.S.Mishra, learned senior counsel appearing for the appellants also fairly did not assail the same. The learned Sessions Judge convicted the appellants on the basis of the ocular evidence of four eye witnesses, namely, PWs. 2, 4, 7 and 8 of whom PWs 7 and 8 had been injured. He had also relied upon the evidence of the doctor-PW3 who was posted at Sadar Hospital, Chapra and who had conducted the autopsy on the dead body of deceased Kameshwar and had submitted the postmortem report Exhibit 2 and who had also examined the injured persons. The Sessions Judge convicted the appellants under Section 302/34 IPC and sentenced them to imprisonment for life. They were also convicted by the Sessions Judge under Section 307 and sentenced to imprisonment for 7 years and for their conviction under Section 324

they were sentenced to undergo RI for one year. The High Court in appeal has affirmed the conviction and sentence of the appellants on all three counts. It may be stated at this stage that since 9 accused persons stood their trial facing a charge under Section 302/149 IPC the Sessions Judge disicussed the evidence of the prosecution witness, more particularly, PWs 2 and 7 and came to the conclusion that at no point of time five accused persons had come together and, therefore, the necessary ingredients for formation of unlawful assembly having the common object to cause murder of Kameshwar is not satisfied. Consequently the question of constructive liability of all the accused persons does not arise. It also positively found that it is only Rajendernath, Prabhunath and Triloki who had made overt act by assaulting the deceased. According to the doctor PW3 the deceased had the following three antimortem injuries:

> (i) Penstrating injury 1 x ½ x 1-1/2 in the chest cavity arising first above, left nipple and one inch 1 lateral to the nipple pieroring in 4th intercostal space.

On further examination, the left alura was found punctured at the said site and thereby punctured the left lung to its upper portions 1/3 x ½. The left side of chest cavity was having about 8 ones of altered blood.

On further disection, both lungs were found pale, right side of chest was having blood in its chambers. Left side was found empty. On desoretion of abdomen liver was sound pale. The stomach contained about 10 ones of rice mixed food materials. The bladder was empty.

(ii) There was penetrating injury in the posterior aspect of upper part of right leg ½ x ¾ x 1-1/4 and ruptuned the popliteal blood vessels. On further examination about ¾ once of altered blood came out.

(iii) Incised wound on the back in fourth theorasic vertabral column 1/3 x ¼ x 1/5.

In the opinion of the doctor death was due to shock and hemorrhage and injury no. 1 was sufficient to cause death in the ordinary course of nature.

Mr. Mishra, learned senior counsel appearing for the appellants raised the following contentions:-

> (i) The serious injury on accused Rajender not having been explained the prosecution case must be held to be untrue and, therefore, the conviction and sentence cannot be sustained.
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> (ii) In view of the statement of Satyanarain recorded by the Magistrate on 4th July, 1977 which has been exhibited as Exhibit- B clearly giving out a different prosecution story than the one which was presented in the Court during trial the entire prosecution case must fail.
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> (iii) In any view of the matter and taking into consideration the narration of events as unfolded through the prosecution witnesses there being no pre-meditation and on

account of a sudden quarrel in course of sudden fight, the accused persons having assaulted the deceased in heat of passion exception 4 to Section 300 Indian Penal Code can apply and, therefore, the offence will be not under Section 302 but under Section 304 Part I Indian Penal Code.

(iv) Even taking the prosecution case in toto accused Triloki cannot be held liable by attracting Section 34 in view of the fact that there is no material to indicate that Rajender assaulted the deceased in furtherance of common intention shared by him and Triloki.

Mr. B.B. Singh, learned counsel appearing for the State on the other hand contended, that in the facts and circumstances of the case non-explanation of injury on Rajender cannot be held to be fatal, more so, when the oral testimony of the four eye witnesses has been found to be trustworthy. He further contended that the former statement of Satyanarain has not been confronted to him while he was examined as PW 8, and therefore, the provisions of Section 145 of the Evidence Act has not been complied with, and in this view of the matter the said document cannot be relied upon. He has also contended that even in the said statement Rajender assaulted deceased Kameshwar with Bhala had been stated, and therefore, the entire prosecution case cannot be said to be a concocted one. According to Mr. Singh the very fact that accused persons went to their adjacent land brought out the weapon of offence and assaulted the deceased, would negate the contention of the defence that there was no pre-meditation. That apart, common intention developed at the spur of the moment when both Rajender and Triloki came armed and assaulted deceased and, therefore, the question of applicability of exception 4 to Section 300 does not arise.

He has lastly contended that in the facts and circumstances of the case Triloki also must be held liable by applicability of Section 34 and no error has been committed in convicting both the appellants in Section 34 of Indian Penal Code.

So far as the question whether non-explanation of the injuries on accused Rajender ipso facto can be held to be fatal to the prosecution case, it is too well settled that ordinarily the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in course of the occurrence, if the injuries are minor in nature, but at the same time if the prosecution fails to explain a grievous injury on one of the accused person which is established to have been caused in course of the same occurrence then certainly the Court looks at the prosecution case with little suspicion on the ground that the prosecution has suppressed the true version of the incident. In the case in hand accused appellant Rajender had one penetrating wound, three incised wound and one lacerated wound and of these injuries the penetrating wound on the left axillary area in the 5th inter costal space ½ x 1/3 x ¾ was grevious in nature as per the evidence of doctor PW-3 who had examined him. On the basis of the evidence of PW-3 as well as PW-11 the Courts have come to the conclusion that there is no room for doubt that the appellants and their men had injuries on their person on the date of occurrence. The question, therefore, remains to be considered is whether non-explanation of said injuries on accused appellant Rajender can form the basis of a conclusion that the prosecution version is untrue. In Mohar Rai and Bharath Rai vs. State of Bihar (1968) 3 SUPREME COURT REPORTS - 525, this Court had held that the failure of the prosecution to offer any explanation regarding the injuries found on the accused shows that the evidence of the

prosecution witness relating to the incident is not true or at any rate not wholly true and further those injuries probabilise plea taken by the accused persons. But in Lakshmi Singh vs. State of Bihar (1976) 4 Supreme Court Cases (Crl.) 671, this Court considered Mohar Rai (Supra) and came to hold that non-explanation of the injuries on the accused by the prosecution may affect the prosecution case and such non-explanation may assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. The question was considered by a three Judge Bench of this Court in the case of Vijayee Singh vs. State of U.P. (1990) 3 Supreme Court Cases 190, and this Court held that if the prosecution evidence is clear, cogent and creditworthy and the Court can distinguish the truth from the falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence and consequently the whole case and much depends on the facts and circumstances of each case. In Vijayee Singhs case (supra) the Court held that non-explanation of injury on the accused person does not affect the prosecution case as a whole. This question again came up before a three Judge Bench recently in case of Ram Sunder Yadav and Others vs. State of Bihar (1998) 7 Supreme Court Case 365, where this Court re-affirmed the statement of law made by the earlier three Judge Bench in Vijayee Singhs case(supra) and also relied upon another three Judge Bench decision of the Court in Bhaba Nanda Sarma and Others vs. State of Assam (1977) 4 Supreme Court Cases 396, and as such accepted the principle that if the evidence is clear, cogent and creditworthy then non-explanation of the injury on the accused ipso facto cannot be a basis to discard the entire prosecution case. The High Court in the impugned judgment has relied upon the aforesaid principle and examined the evidence of the four eye witnesses and agreeing with the learned Sessions Judge came to the conclusion that the prosecution witnesses are trustworthy and, therefore, non- explanation of injury in question cannot be held to be fatal, and we see no infirmity with the said conclusion in view of the law laid down by this Court, as held earlier. We, therefore, are not persuaded to accept the first submission of Mr. Mishra, learned senior counsel appearing for the accused appellants.

So far the second contention of Mr. Mishra is concerned, it is no doubt true that on 4th July, 1977 Satyanarain who has been examined as PW-8 in course of trial had been examined by a Magistrate as he had been seriously injured and that statement has been exhibited as Exhibit-B and in fact the Magistrate who had recorded the statement has been examined by the defence as DW-1. This statement of Satyanarain recorded by the Magistrate may be a former statement by Satyanarain relating to the same fact at about a time when the fight took place and when said Satyanarain was examined as PW-8 during trial it would be open for a party to make use of the former statement for such purpose as the law provides. But if the witness during trial is intended to be contradicted by his former statement then his attention has to be drawn to those parts of the statement which are required to be used for the purpose of contradicting him before the said statement in question can be proved as provided under Section 145 of the Evidence Act. Mr. Mishra learned senior counsel appearing for the appellant relying upon the decision of this Court in Bhagwan Singh vs. The State of Punjab - (1952) Supreme Court Reports 812, contended before us that if there has been substantial compliance of Section 145 of the Evidence Act and if the necessary particulars of the former statement has been put to the witness in cross- examination then notwithstanding the fact that the provisions of Section 145 of the Evidence Act is not complied with in letter i.e. by not drawing the attention of the witness to that part of the former statement yet the statement could be

utilised and the verasity of the witness could be impeached. According to Mr. Mishra the former statement of PW-8 which has been exhibited as Exhibit B was to the effect that Kameshwar was assaulted with Bhala by Rajender and Surender and he did not see whether any other person had been assaulted or not, whereas in course of trial the substantive evidence of the witness is that it is Rajender and Triloki who assaulted the deceased and, therefore, it belies the entire prosecution case. The question of contradicting evidence and the requirements of compliance of Section 145 of the Evidence Act has been considered by this Court in the Constitution Bench decision in the case of Tahsildar Singh and another vs. The State of Uttar Pradesh 1959 Supp. 2 Supreme Court Reports 875. 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 & Ors. Etc. etc. vs. State of Bihar - (1997) 1 Supreme Court Cases 283, and the Court has taken note of the earlier decision in Bhagwan Singh (Supra) and explained away the same with the observation that on the facts of that case there cannot be 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 for 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. Bearing in mind the aforesaid proposition and on scrutinising the evidence of DW-1, we find that the Magistrate who is supposed to have exhibited the document in his cross- examination categorically admitted that neither any signature nor seal of either of the Chief Judicial Magistrate or of his office on the statement Exhibit B. If according to the Magistrate on recording the statement of Satyanarain he had sent the same to the Chief Judicial Magistrate, it is inconceivable as to how the document would not bear the signature nor seal of either of the Chief Judicial Magistrate or of his office. The Magistrate in his examination-in-chief also does not state as to who identified Satyanarain in the hospital before recording his statement. It is under these circumstances it is difficult to hold that Exhibit-B has been legally proved to be the former statement of Satyanarain who has been examined as PW-8. Then again on scrutiny of the evidence PW-8 it is crystal clear that the witness has not been confronted with that part of his alleged former statement which the defence want him to be contradicted. The witness has merely been asked as to whether he stated before the Magistrate that accused Surendra has assaulted Kameshwar to which he had replied he does not recall as to what he stated before the Magistrate. In this state of affairs it is difficult for us to hold that the provisions of Section 145 of the Evidence Act has been complied with in the case in hand. Then again, so far as accused Rajender is concerned, there has been no variance in his so-called former statement Exhibit B and his statement in the Court when he was examined as PW- 8 clearly asserting that Rajender assaulted the deceased Kameshwar by means of Bhala. In the aforesaid premises, we are unable to accept the second submission of Mr. Mishra and the same accordingly stands rejected.

So far as the third contention of Mr. Mishra is concerned, the question for consideration would be as to whether the ingredients of Exception 4 to Section 300 of the Indian Penal Code can be said to have been satisfied? The necessary ingredients of Exception 4 to Section 300 are :

> (a) a sudden fight; (b) absence of pre-meditation (c) no undue advantage or cruelty, but the occasion must be sudden and not as a cloak for pre existing malice. It is only an un-premeditated assault committed in the heat of passion upon a sudden quarrel which would come within Exception 4 and it is necessary that all the three ingredients must be found. From the evidence on record it is established that while the prosecution party was on their land it is accused who protested and prevented them from continuing with ploughing but when they did not stop accused persons rushed to the nearby plot which is their land and got weapons in their hands and assaulted the prosecution party ultimately injuring several members of the prosecution party and causing the death of one of them while they were fully unarmed. In this view of the matter on scrutinising the evidence of four eye witnesses PWs 2, 4, 7 and 8 who have depicted the entire scenario it is not possible for us to agree with the submission of Mr. Mishra, learned senior counsel appearing for the appellants that the case is one where exception 4 to Section 300 would be applicable. We, therefore, reject the said submission of the learned counsel.

The only contention that survives for our consideration is whether Triloki could be held liable by application of Section 34. From the injuries on the deceased as found by the doctor PW-3 it is crystal clear that the injury no. 1 was found to be sufficient to cause death in the ordinary course of nature and said injury is attributable to the assault given by accused Rajender on the chest of the deceased. So far as Triloki is concerned, as per the evidence of PW-2 he has given a blow on Satyanarain PW-8 and Banwari, the other injured who has not been examined and he had not inflicted any injury on the deceased. According to PW- 4 Triloki had given a blow on the leg of Kameshwar. According to PW-7 Kameshwar was assaulted by Rajender, Triloki and Prabhunath but he has not ascribed as to which accused assaulted which part of the body of the deceased and narration is one of general nature. So far as the evidence of injured PW-8 is concerned Triloki Singh hit Kameshwar on his leg. Leaving aside the contradiction amongst each other with regard to the assault by Triloki and taking into account the entire scenario it is difficult for us to hold that Triloki also shared the common intention with Rajender when Rajender gave a fatal blow on the deceased. It may be noticed at this stage that though the prosecution had made out the case that nine accused in all formed an unlawful assembly the common object of which assembly was to murder deceased Kameshwar but the learned Sessions Judge on appreciation of the evidence came to the conclusion that there had been no unlawful assembly nor there was any common object to cause assault or murder of deceased Kameshwar. From the evidence of PW-8 it is apparent that while he was on Plot No. 4513 Rajender Singh, Prabhu Nath and Ramdev reached near PW-8 and told him not to plough the field at that point of time the accused persons had no arms with them. It is further apparent that there was altercations between the prosecution party, more particularly PW-8 and the accused persons and that the accused persons picked up some weapon and assaulted Kameshwar as well as other persons injured. It is further established that in course of the occurrence accused Rajender sustained a grievous injury. The said evidence of PW-8 also indicates that Kameshwar himself was armed with a Farsa while Ramdeo Singh, Surender, Kishun Pandit and Rudal Singh were armed with lathis and when Rajender Singh gave a lalkara Prabhunath Jagnarain and Kishun Pandit assaulted PW-8. It is under these circumstances when Triloki Singh has been ascribed to given a blow on the leg of the deceased. It is difficult to hold that he also shared the common intention with Rajender for causing

murder of the deceased which developed at the spur of the moment. In the case of Dukhmochan Pandey and others etc. vs. State of Bihar (1997) 8 Supreme Court Cases 405 , this Court has held that there lies a distinction between the common intention and similar intention and question whether there exists common intention in all the persons who made some overt act resulting in the death of some of the persons of other party is a question of fact and can be inferred only from the circumstances. This Court had held that the distinction between a common intention and the similar intention may be fine, but is nonetheless a real one and if overlooked, may lead to miscarriage of justice. Following the ratio in the aforesaid case and applying to the facts and circumstances of the present case, as unfolded through the eye witnesses, it is not possible for us to hold that Triloki also shared the common intention with accused Rajender and his conviction under Section 302/34 cannot be sustained. We accordingly set aside the same and instead convict him under Section 324 Indian Penal Code and sentence him to imprisonment for a period of two years.

Conviction of appellant Rajender is altered to one under Section 302 Indian Penal Code instead of 302/34 Indian Penal Code and sentence of imprisonment for life is affirmed. All other conviction and sentence of the two appellants remain unaltered. Appeal is thus partly allowed.