

PETITIONER:
LAKHAN SAO

Vs.

RESPONDENT:
STATE OF BIHAR & ANR.

DATE OF JUDGMENT: 04/05/2000

BENCH:
Ruma Pal, D.P.Wadhwa

JUDGMENT:

RUMA PAL, J.

These appeals have been preferred from the decision of the Patna High Court dated 9th January 1998 dismissing the appeals filed by the appellants against their conviction and sentence by the Additional Sessions Judge, Nawadah under Sections 302/34 of the Indian Penal Code (IPC) and Section 27 of the Arms Act. It is the case of the prosecution that on the night of 22nd March 1987, Kishori Sao (PW 6) along with his brother, Parmeshwar Sao were threshing wheat in their khalihan in village Gangti, P.S. Pakribarawan, District Nawadah. Kishori Sao was operating the threshing machine and his brother, Parmeshwar Sao was bringing the wheat bundles from the khalihan to the threshing machine. Wheat bundles were stocked on the north-east corner of the khalihan. The appellants had concealed themselves behind the wheat bundles. At about 11.30 p.m. to 12.00 p.m. when Parmeshwar Sao went to bring wheat bundles for threshing, he took a lantern with him. He put down the lantern when suddenly Lakhan Sao came out from behind the wheat bundles with a pistol in his hand and grabbed Parmeshwar Sao around the waist from behind. Lakhan Sao told Baldeo Chauhan to shoot Parmeshwar Sao. Baldeo Chauhan shot Parmeshwar Sao in the right upper part of his chest. Parmeshwar Sao fell down. Kishori Sao saw the incident but before he could run to his brothers aid, the accused had fled away carrying their pistols, towards the east. Kishori Sao raised an alarm. Parmeshwar Saos wife, Sarda Devi (PW 2), Saho Devi (PW 4), the mother of Kishori Sao and Parmeshwar Sao, Bishun Sao (PW 3), their uncle and others came running to the spot. Bishun Sao saw the appellants running away while he was coming to the spot. Kishori Sao told PW2, PW 3 and PW 4 that Lakhan Sao had caught hold of the deceased and that Baldeo Chauhan had shot Parmeshwar Sao being ordered to do so by Lakhan Sao. PWs 2 and 3 corroborated this at the trial. Other members of the village had gathered by this time. Parmeshwar was still breathing. He was put into a rickshaw to be taken to the hospital but he died as soon as they reached the main road. Kishori Sao, (PW 6) and Bishun Sao (PW 3) and others took the body of the deceased to the police station. It took them an hour and a quarter to reach there. The First Information Report (Ext. 1) was recorded at 1.30 a.m. that night in which the facts noted above were recorded. The Sub-Inspector (PW 8) prepared an inquest report (Ext. 3). The Sub-Inspector then left for the site where he arrived at 3.45 a.m. The spot was identified by PW

2. PW 8 inspected the spot and found that it was on the land of Chamru Sao and that Kishori Sao had his khalihan there. He found that wheat bundles were kept on the north east corner of the khalihan. The wheat bundles were at a height of 5 ft. On the north of these wheat bundles, he found Newari or straw ropes where he suspected the appellants hid themselves. On the south of the wheat bundles he found blood stains on the wheat bundles and on the ground. He seized the blood stained soil and the blood stained wheat bundles. The seizure list, which was prepared by him, was signed by Kishori Sao and Chando Paswan (Ext. 6). The Sub-Inspector found that the threshing machine was situated 25 yards west of the wheat bundles. He also found that the house of Kishori Sao and Prameshwar Sao was situated to the south-east of the place of occurrence at a distance of about 50 yards. The body of the deceased was sent to the Sadar Hospital, Nawadah. The post-mortem examination was conducted on the body of the deceased by Dr. B.P. Singh (PW 5). The postmortems report (Ext. 2) recorded two wounds on the body, namely, a wound being a wound of entry, over the upper part of the right side of the chest in the first inter costal space and the second, a wound of exit, on the right side of the back of chest in the 4th inter costal space. There was scorching on the first wound. He found the wounds connected with each other. It was opined that the death has been caused by fire arm which could be a pistol. According to the prosecution, the motive for the two appellants to kill Prameshwar Sao was different. As far as Lakhan Sao is concerned, there were serious disputes over land in respect of which a case was also pending under Section 145 of the Code of Criminal Procedure. The deceased was due to give evidence in the matter. As far as Baldeo Chuahan is concerned, it is stated that he had borrowed money from the deceased and had not returned it. The deceased had also refused to lend any further money to Baldeo Chauhan. At the trial, the appellants claimed that they were not guilty and were falsely implicated. The prosecution apart from the formal witnesses, examined five witnesses and tendered PW 4, the deceased's mother for cross-examination. The appellants produced three witnesses, namely, Bhikhari Chauhan (DW 1), Chando Paswan (DW 2) and Latan Chauhan (DW 3), all of whom claimed that they had not heard the sound of the shot but that they had come to the place of occurrence but did not see the appellants. The 1st Additional Sessions Judge, Nawadah by judgment dated 6.9.91 found that the prosecution had fully established the motive as well as the manner of the occurrence. He found Baldeo Chauhan guilty under Section 302 IPC as well as under Section 27 of the Arms Act. He also found Lakhan Sao guilty of the charge under Section 302/34 IPC and under Section 27 of the Arms Act. The appellants were sentenced to life imprisonment for the charges under Sections 302 and 302/34 IPC and three years rigorous imprisonment for the offence under Section 27 of the Arms Act. The sentences were directed to run concurrently. The appellants appealed before the High Court at Patna. The appeal was dismissed on 9th January 1998. After considering the evidence given by the prosecution witnesses, the High Court found that the direct evidence by PW 6 was believable and fully corroborated. Challenging the concurrent finding of fact, it was contended on behalf of Lakhan Sao that he had been held guilty under Section 302/34 IPC but the prosecution has failed to establish any premeditation or common intention. It was pointed out that admittedly the two accused did not have a common motive. It

was further submitted that the evidence of PW 6, the only eye witness, was improbable. According to learned counsel appearing for Lakhan Sao, if Lakhan Sao had a pistol, he would have fired it himself. It is also submitted that the prosecution had failed to establish the presence of any lantern by the light of which PW 6 had seen the accused. Even if a lantern were there, according to Lakhan Sao, the position of PW 6 was such that he could not have seen the face of the person who allegedly grabbed Parmeshwar from the back. Further, since the wound found by PW 5 passed through the body of Parmeshwar, it was improbable that Lakhan Sao could have held Parmeshwar when Baldeo Chauhan allegedly shot him. It was also pointed out that besides the fact that no lantern was found by PW 8, the pistol of Lakhan Sao had never been recovered nor was any cartridge found in the premises. As far as Baldeo Chauhan is concerned, it was submitted that none of the prosecution witnesses had stated that he had a pistol. It is also drawn to the attention of the Court that PW 5 in his evidence has said that wound may have been caused by a pistol. According to Baldeo Chauhan, the place of occurrence had also not been established. At the outset, we note that both the appellants proceeded on the erroneous basis that the identity of the appellants was testified to only by PW 6. The Additional Sessions Judge had in fact accepted the evidence not only of PW 6 but also the evidence of PW 3 who had claimed that he had seen the accused running away. Although the trial Court found PW 3's statement that he was at his khalihan when he heard the halla, the Trial Court said that it may be that he might have seen the accused running while he was coming to the khalihan of Kishori Sao, PW 6. The High Court also said, So far as PW 3, i.e. uncle of the informant is concerned, his statement is true that he had seen the accused-appellants running away, but his statement that he was in his own khalihan nearby, has not been substantiated. As far as PW 6 himself is concerned, both the Courts have found his evidence to be consistent and natural and corroborated by the evidence of PW 2 and PW 3. The time and place of the occurrence was established not only by the prosecution witnesses but also by the three defence witnesses produced on behalf of the appellants. Significantly, learned counsel for the appellants did not rely on the evidence of the defence witnesses at the time of the hearing of the appeal in the High Court. It is not improbable that Lakhan Sao had to catch hold of Parmeshwar so that Baldeo Chauhan would not miss hitting him. Lakhan Sao being armed with a pistol is not inconsistent with the part he was stated to have played in committing the murder of Parmeshwar. The submission that there was no evidence that Baldeo Chauhan was carrying a pistol is contrary to the testimony of PW 6 who said that Baldeo Chauhan shot Parmeshwar. As far as identification is concerned, the evidence was that Parmeshwar was gathering the loose wheat bundles which were lying between the threshing machine and the stock of wheat bundles. Both the accused were known to PW 6 and it was not a question of identifying strangers. PW 6's statement that Parmeshwar had been carrying a lantern was not questioned in his cross-examination. Even assuming the lantern was not there, clearly there was some light which enabled the carry on the work of using the threshing machine. Identification in such a situation has been accepted by this Court in Krishnan and another V. State of Kerala 1996 (10) SCC 508. As far as motive is concerned, PW 6 deposed that Parmeshwar was on inimical terms with Lakhan Sao and Baldeo Chauhan, the first because of a land dispute

and the second because of a money lending transaction. DW 1 also stated that before this incident, there were differences between Parmeshwar and both the accused. The fact that either may have had his own motive for killing Parmeshwar is not relevant in determining the common object or intention required under Section 34 of the Indian Penal Code. The common intention or object in this case was the killing of Parmeshwar. Lakhan Saos facilitating the offence by holding Parmeshwar and asking Baldeo Chauhan to shoot is sufficient to hold Lakhan Sao guilty under Section 302 read with Section 34 IPC. (See Ramaswamy Ayyangar V. State of Tamil Nadu 1976 (3) SCC 779 at p. 783). Apart from the evidence of PW 6 being corroborated by the unshaken testimony of PW 2 and PW 3, his evidence is also supported by PW 5 and the postmortem report. The postmortem report says that Parmeshwar was shot dead from the front from a close distance and from a slight height. This would be in keeping with PW 6s account of Baldeo Chauhans shooting at Parmeshwar while Lakhan Sao held him. There was no suggestion to PW 5 by the accused that the bullet after passing through the body of Parmeshwar would have sufficient force to wound a person holding him. Besides, it is of significance that the wound was near the right collar bone and not through the centre. The non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable. Further, PW 8 was not questioned on the non-recovery of the pistol by the accused. It was not even suggested to PW 6 nor have any of the defence witnesses said that there was any enmity between PW 6 and the accused and that PW 6 had any cause for implicating the accused falsely. No inconsistency has been established in his evidence. The naming of the accused and the detailed account of the incident within a short while of the occurrence in the FIR militates against any suggestion of fabrication. In the circumstances, we see no reason to differ with the conclusion arrived at by the Courts below. The appeals are accordingly dismissed. If either of the accused is on bail, the bail shall stand cancelled and he shall surrender immediately to serve out the sentences imposed.