Raghu Mukhi @ Radhu Mukhi Vs The State of Jharkhand

Court: Jharkhand High Court

Date of Decision: March 18, 2009

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 313
Evidence Act, 1872 â€" Section 118
Oaths Act, 1969 â€" Section 4, 5
Penal Code, 1860 (IPC) â€" Section 302

Citation: (2011) 1 JLJR 330

Hon'ble Judges: Prashant Kumar, J; Narendra Nath Tiwari, J

Bench: Division Bench

Final Decision: Allowed

Judgement

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 01.05.2001 passed by the 2nd Additional

Sessions Judge, Seraikella in Sessions Trial No. 274 of 1996 whereby Appellant has been convicted u/s 302 of the Indian Penal Code and

sentenced to undergo life imprisonment.

2. The prosecution was launched on the basis of the fardbeyan of Jogai Mukhi (P.W.-7), the husband of the deceased Kamali Mukhi.

3. The prosecution case, in brief, is that on 11.04.1996 the informant had gone to village Golo Kutumb at 9:00 a.m. to collect the price of beating

drum. When he returned at 5:00 p.m. his eight years old daughter Nadi Mukhi told that at about 12:00 p.m., there was some quarrel between his

wife and the Appellant and in course thereof the accused Appellant had given lathi blow on the chest of his wife. When he went inside, he found

her wife lying dead on the ground. The reason for the incident was a quarrel between the informant and the accused about a week ago on

apportionment of wages paid for cleaning latrine at village Haldipokhar. The accused Appellant had earlier assaulted the informant''s wife and had

broken her tooth.

4. On the said fardbeyan, the police registered a case u/s 302 I.P.C. against the Appellant.

5. After investigation, the police submitted charge sheet u/s 302 I.P.C.

6. The charge was framed against the Appellant. He denied the charge and claimed to be tried. He was put on trial. In his examination u/s 313

Code of Criminal Procedure, he denied to have committed any offence.

7. The prosecution in order to establish the charge against the Appellant examined altogether 13 witnesses. P.W.-1 - is the daughter of the

informant aged about 10 years on the date of examination, P.W.-2 - is the minor son of the informant aged about 05 years on the date of his

deposition. These two witnesses are said to be eyewitnesses. P.W.-3, P.W.-4, P.W.-5, P.W.-6 and P.W.-8, were co-villagers and were turned

hostile. They did not support the prosecution version. P.W.-7 the informant Jogai Mukhi, is husband of the deceased. In his fardbeyan, he clearly

stated that he was not present at the time of occurrence. The incident was reported to him by his daughter P.W.-1. P.W.-10 is another co-villager

who was tendered. P.W.-9, P.W.-11 and P.W.-13 are the formal witnesses and they have formally proved some documents. P.W.-12 is the

Doctor who had conducted autopsy on the dead body of the informant''s wife.

8. Learned trial court on conclusion of the trial held the Appellant guilty of committing murder of the informant''s wife. Learned trial court heavily

relied on the evidences of P.W.-1, P.W.-2 and P.W.-7 (informant) and the medical evidence of P.W.-12.

9. Mr. Sen, learned Counsel appearing on behalf of the Appellant assailed the impugned judgment and conviction of the Appellant on the following

grounds:

(i) There is no credible and reliable evidence on record to prove the charges against the Appellant.

(ii) P.W.-1 and P.W.-2 are minor children and it is evident from their statement that they were tutored. The P.W.-1 on the date of occurrence was

aged about eight years and the age of P.W.-2 on the date of occurrence was about 2-3 years.

10. Learned Counsel submitted that trial court even without testing the understanding and the capability of the children to testify, recorded their

evidences and heavily relied on them. The said witnesses i.e. P.W.-1 and P.W.-2 who were the child witnesses are the only eye-witnesses and

learned trial court has erroneously relied upon their testimony and convicted the Appellant without properly testing their understanding and

recording his observation to that regard. Court below has also relied upon the testimony of P.W.-7, the informant, who is a hearsay witness. He

was not in the village at the time of occurrence and the incident was explained to him by the P.W.-1. The other independent witnesses P.W.-3,

P.W.-4, P.W.-5, P.W.-6 and P.W.-8, who are the co-villagers, have not supported the prosecution case. They turned hostile. Thus, there is no

positive evidence to corroborate and prove the prosecution case and establish the charge against the Appellant. Learned court below relying upon

the said inadmissible evidence, has erroneously recorded his finding of conviction of the Appellant. The impugned judgment, thus, is not sustainable

and liable to be set aside.

11. Learned A.P.P., on the other hand, supported the impugned judgment. He submitted that there are two most reliable witnesses in this case

P.W.-1 and P.W.-2. They were present at the time of occurrence. They had seen the occurrence and given clear account of the incident and of

giving lathi blow on the chest of the deceased by the accused Appellant which caused her death. The ocular testimonies of P.W.-1 and P.W.-2

have been supported by medical evidence of P.W.-12 who, on examination of dead body of the deceased, had found fracture injury on the chest

of the deceased. It has been submitted that the learned trial court has arrived at the right conclusion of convicting the Appellant on due and proper

assessment of the evidences on record and there is no infirmity in the impugned judgment.

12. Having heard learned Counsel for the Appellant and learned A.P.P., we scrutinized the evidences on record. It is unusual to see the manner in

which the evidences of P.W.-1 and P.W.-2, who were children of tender age, have been recorded by learned trial court. The court below without

testing the understanding of the child witnesses and without recording its assessment to that regard, simply took down the statement of P.W.-1

aged about 10 years and P.W.-2, aged 5 years on the date of their examination.

13. Section 118 of the Evidence Act provides that all persons shall be competent to testify unless the Court considers that they are prevented from

understanding the questions put to them, or from giving rational answers to those questions, due to tender age, extreme old age, disease whether of

body or mind, or any other cause of the same kind. When however witness of the said category described in the Section is produced before the

Court, normally the Court should consider as to whether the witness produced is competent to testify even with the said infirmities.

14. Though, the said provision of the Evidence Act does not make it obligatory to make any endorsement regarding capacity of understanding of a

child witness, it is always desirable that the court should endorse on record some questions and answers so that the appellate court might conclude

whether the decision of the trial court regarding the competence of the child witness was right and proper.

15. Section 4 of the Oaths Act, 1969 provides that oaths or affirmations shall be made by the persons who appear as witnesses to give evidence

before any court or person having by law or consent of parties authority to examine such persons or to receive evidence. Proviso to Section 4 lays

down that where witness is a child under 12 years of age, and the court or person having authority to examine such witness is of opinion that,

though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the provisions of Section

4 or Section 5 of the Oath''s Act are not applicable. At the time, absence of an oath or affirmation shall not render inadmissible any evidence given

by such witness nor affect the obligation of the witness to state the truth.

16. On conjoint reading of Section 118 of the Evidence Act and Section 4 of the Oath Act, 1969, it is clear that whenever child under 12 years of

age is examined as witness the court in order to form an opinion as to whether the witness understands the duty of speaking the truth and whether

he understands the oath and affirmation and whether he is competent to testify and would understand the question put to him and competent to

answer the questions inspite of his tender age, it has been held to be always desirable that the court should record its opinion that the child

understands the duty of speaking the truth, otherwise the credibility of the witness may be seriously affected and in some cases it may be necessary

to reject the evidence altogether. Reference can be made to the decision of the Supreme Court in Rameshwar Vs. The State of Rajasthan, .

17. The other purpose for brief testing of the understanding of child witness is to elicit from him his veracity and to test whether he has been tutored

to say what is intended and wanted by the prosecution.

18. Without taking the said precaution and without putting some line regarding the understanding or without recording any question or answer so as

to assess the competence of child witness, the learned court below has mainly based his finding on testimony of P.W.-1 and P.W.-2.

19. When we closely scrutinizes the evidence of the said witnesses, we also find several vital contradictions in their depositions.

20. In the fardbeyan, it has been stated that P.W.-1 had narrated about the occurrence to the informant that the accused had come and quarreled

and had given stick blow on the chest of her mother and the mother thereafter went to sleep. According to the informant, he, for the first time

noticed that her wife was dead. In her deposition, in Paragraphs - 1 & 2, P.W.-1 stated that the accused straightway came and gave stick blow on

the chest of her mother and mother immediately died. P.W.-2 is her younger brother aged about 2-3 years on the date of occurrence, repeated the

same statement.

21. In view of the said contradictions, their testimonies do not inspire credence. There is every chance of their being tutored for giving their

statements in their depositions. There is no other eye witness to the occurrence. P.W.-7, informant only said what he heard from P.W.-1. There

are contradictions also in his evidence.

22. In view of the aforesaid legal lacunae in the depositions, the testimony of P.W.-1 and P.W.-2 cannot be relied upon.

23. Further in Paragraph-1, P.W.-1 has said that the occurrence took place in the evening time before sunset whereas in the fardbeyan, the

informant has stated that he was told by P.W.-1 that occurrence took place at about 12 noon. P.W.-7 has said that he had not informed the police

rather the police had come to village on its own. In this case, I.O. has not been examined. We find substance in the submission of Mr. Sen that due

to non-examination of the I.O., the defence was not able to confront regarding the alleged time of occurrence, place of occurrence and in the

manner of the occurrence reported to him and regarding the source/person through whom he got information and nature of information which made

him to come to the village.

24. In view of the contradictory statements of P.W.-1 and the statement in the fardbeyan and also in the evidence of P.W.-7, time of occurrence

could not be properly proved by the prosecution. Though the Doctor on examination has found injury on the chest of the deceased, who caused

the injury could not be proved by the prosecution.

25. The very genesis of the prosecution case is also seriously doubtful. The informant P.W.-7 in Paragraph-2 has stated that after the death of his

wife, he sent the accused Appellant to his in-law''s village to inform the death of his wife. He has stated that there was a good and cordial relation

with the accused Appellant. The wife of the Appellant-Raghu-Mukhi had prepared food and served to the informant family after the said incident.

The informant P.W.-7 waited for a day for police to come. He did not inform the police about the occurrence on 11.04.1996. He came back

home in the evening and knew about the incident but he did not disclose about the incident to anybody else or to the police rather the police on its

own came to village, the next day at about 3:00 P.M.

26. Learned trial court has not taken into consideration the said vital contradictions, infirmities and lacunae appearing on record and has

erroneously held the Appellant guilty of the charge u/s 302 of the I.P.C. The conclusion of conviction is not based on any positive and clinching

evidence.

27. We are unable to uphold the findings and judgment of the learned trial court. We, therefore, allow this appeal, set aside the conviction and

sentence of the Appellant, as also the impugned judgment. The Appellant, above named, who is in custody, shall be set at liberty forthwith, if not

wanted in any other case.