

(2009) 03 JH CK 0005

Jharkhand High Court

Case No: Criminal Appeal No. 288 of 2001 in S.T. No. 360 of 2000

Porha Oraon

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision: March 17, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 273, 313, 317
- Penal Code, 1860 (IPC) - Section 300, 302

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

Bench: Division Bench

Final Decision: Allowed

Judgement

1. This Criminal Appeal has been preferred by the Appellant against the judgment of conviction and order of sentence dated 25-06-2001 passed in S.T. No. 360 of 2000 by 2nd Addl. Judicial Commissioner, Khunti (Ranchi). The Court below by the impugned judgment has convicted the Appellant u/s 302 of the Indian Penal Code and sentenced to undergo life imprisonment.

2. The prosecution case, as unfolded in the fardbeyan of Karma Oraon(P.W-8), is that on 01.01.2000 at about 5 P.M., his son Gorla Oraon(deceased) was going towards "Akhara"(Tribal Club) after taking Haria (a kind of liquor used by the tribal), the Appellant intercepted and assaulted him with "Kudal" (spade) on his head and face, causing him severe injuries and resulting into his death after about an hour. The motive disclosed by the informant is dispute between his deceased son and the Appellant was regarding purchase of a land. His deceased son had given Rs. 3,000/- to Jogan Baraik (P.W.-1) for the purchasing land from him and the Appellant was pressurizing Jogan Baraik to return that amount to Gorla Oraon so that he can purchase the land belonging to P.W.-1-Jogan Baraik.

3. An FIR was drawn on his statement and the case was investigated by the police. On conclusion of the investigation, the police submitted charge sheet u/s 302 of the

Indian Penal Code against the Appellant for committing murder of Gorla Oraon.

4. Charge u/s 302 IPC was framed against the Appellant. The Appellant denied the charges and claimed to be tried. He was put on trial. In his examination u/s 313 Code of Criminal Procedure, he claimed to be innocent.

5. In order to prove the charge, the prosecution examined altogether ten witnesses. P.W.-1-Jogan Braik was produced to prove genesis, but was declared hostile. P.W.-2-Karma Oraon, nephew of the informant, did not support the prosecution and was declared hostile. P.W.-3-Bisu Oraon, brother of the informant and P.W.-4-Sania Oraon, named as eye witnesses, were also declared hostile. P.W.-5-Dr. Bijay Kr. Prasad had conducted autopsy on the body of the deceased. P.W.-6-Balu Oraon the brother of the informant and P.W.-7-Rajesh Tigga, a relative of the informant were produced as witnesses to the Inquest report. P.W.-8-Karma Oraon, is the informant. P.W.-9-Gangai tigga @ Mangi is the wife of the informant and has been produced as an eye witness to the occurrence. P.W.-10-Nishar Ansari, is an Advocate's clerk. He is a formal witness. He proved the fardbeyan and the case diary-marked as Ext.-4 and 5. The prosecution has also brought on record post-mortem report (Ext.-1), Inquest report, (Ext.-2), formal F.I.R., (Ext.-3), fardbeyan (Ext.-4) and the entire case diary(Ext.-5).

6. Learned trial court heavily relied on the oral testimony of P. Ws.-8 and 9, as also the medical evidence of P.W.-5 and held the accused/Appellant guilty of the said charge and convicted him u/s 302 of the Indian Penal Code as aforesaid.

7. Learned Counsel for the Appellant has assailed the impugned judgment of the learned trial court on the following grounds:

(i) The very genesis of the case has been falsified by P.W.-1.

(ii) P.W.-8 is not the eye witness of the occurrence, as is evident from the statement of his wife.

(iii) P.W.9 in Paragraph-10 has stated that her husband was ailing for about a month.

8. Learned Counsel for the Appellant submitted that the testimony of P.W.9 was heavily relied upon by the learned trial court, but the entire deposition as also the trial of the Appellant is vitiated due to violation of the mandatory provisions of Section 273 of the Code of Criminal Procedure. There are contradictory evidences of P.W.6 and P.W.7 regarding the preparation of inquest report. The Investigating Officer has not been examined and the defence was unable to confront the Investigating Officer regarding contradiction about the inquest report and other contradictions in the oral testimony of the witness. The defence has also been prejudiced and could not get an opportunity to confront the Investigating Officer regarding the place of occurrence and other relevant facts including the injuries sustained by the accused/Appellant in his hand at the time of his arrest. There was no proper examination of the Appellant u/s 313 of the Code of Criminal Procedure

Learned trial court has not given any consideration on the evidences constituting the private defence, particularly, the statements made in the deposition of P.W.-1, P.W.-2 and P.W.-3 that the accused/Appellant was chased and assaulted. In absence of proof of motive, the prosecution version even if accepted as it is, it does not fall within the ambit of Section 300 I.P.C. There is no positive evidence on record on the basis of which the Appellant can be convicted.

9. Learned APP, on the other hand, has supported the impugned judgment of learned trial court. It has been submitted that P.W.s-8 and 9 are eye witness in this case and the ocular testimony has been supported by the medical evidence. The Doctor found injury on the head and face. In view of the said corroboration, the testimony of those witnesses cannot be discarded only because some of the witnesses including one of the eye witnesses P.W.-4 was declared hostile. It has been submitted that though there is no specific note that the presence of the accused at the time of examination of P.W.-9 was dispensed with, it can be presumed that the presence of the accused must have been dispensed with by the Court. Learned trial court has considered all the said aspects and has rightly come to the conclusion holding the Appellant guilty of committing murder of the Gorla Oraon and has rightly convicted and sentenced the Appellant.

10. We have heard learned Counsel for the Appellant as also learned APP. We have also thoroughly scrutinized the evidences and materials on record. The prosecution claimed that the occurrence was witnessed by P.W.-4., P.W.-8 and P.W.-9. Those witnesses have been examined. However, P.W.-4 has completely denied to have given any statement before the police that he had witnessed the occurrence and he was declared hostile. The motive of the dispute regarding return of money for purchasing the land of P.W.-1, Jogan Braik has been falsified by P.W.-1 in paragraph-1 of his deposition. The prosecution has failed to prove the motive and the very genesis of the occurrence. P.W.-2, Karma Oraon, the own nephew of the informant and P.W.-3 the brother of the informant have not supported the prosecution version. They were produced by the prosecution, but were declared hostile. P.W.-5 Doctor Vijay Kumar Prasad who held the post-mortem on the dead body of the deceased (Gorla Oraon) has found the following injuries:

- (i) Sharp cut injury 3 1/2" x 1 1/2" x 1 1/2" at right forehead horizontal 4" above right eye brow cutting the sub tissue, skin, frontal bone and brain matter under neath.
- (ii) Sharp cut injury 2"x1 1/2" x 1/2" at middle of forehead cutting sub tissue and bone.
- (iii) Sharp cut injury 1/2" x 1/2" x 1/4" at right upper lip.
- (iv) Two upper teeth found broken.
- (v) Sharp cut injury 2" x 1/2" x 1/4" vertical at right cheek.

He also found cranial cavity filled with blackend blood, brain matter under injury No. (i) found sharply cut. In the assessment of the Doctor, weapon used must have 3" wide edge. It is relevant to mention that P.W-9 in her statement in paragraph-7 has said that the spade used had 7"-8" wide edge.

11. P.W.-6 and P.W.-7 are witnesses of the inquest report. P.W.6 in his statement has stated that the inquest report was prepared at about 3 P.M. whereas P.W.-7, Rajesh Tigga has stated that the inquest report was prepared at about 8-9 A.M.

12. According to the prosecution, fardbeyan was recorded at about 2 P.M. on 02.01.2000, whereas P.W.-8 in paragraph-12 of his deposition has stated that the police had taken his statement on 2.1.2000 at about 8 A.M. on Sunday. However, the statement which was taken at about 8 A.M. has not been brought on record. Prosecution has proceeded on the basis of the fardbeyan recorded at about 2 P.M. on 02.01.2000. The very foundation of the prosecution becomes doubtful in view of the said statements of P.W.-6, P.W.-7 and P.W.-8 and the time and date mentioned in the fardbeyan (Ext.-4). P.W.-8 in paragraph-5 has stated that his wife Gangi Tigga @ Mangi (P.W.-9) was first to arrive at the place of occurrence. The informant (P.W.-8) reached at the place of occurrence thereafter. It is said that severe injury was caused with spade, but in paragraph-7, the informant has stated that deceased was not taken anywhere for treatment. In paragraph-11, P.W.-8 has said that the spade(Kudal) which was used for commission of the offence was not seized. P.W.-9 who claimed to be the eye witness has stated that while she was going out for urination she had witnessed the occurrence. In paragraph-5 she stated that the distance from the place of occurrence from her house is 1/2 K.M. In Paragraph-13, she stated that one Karma Oraon, who was present there, was different person and not her husband and in paragraph-2 she stated that her son Gorla Oraon died on the spot after one hour due to injury. She has also stated in paragraph-10 that her husband was ill on that day and he had been ailing for about a month and was at home. This statement of P.W. 9 at paragraph-10 proves that P.W.-8 Karma Oraon was ailing and therefore he was at home and was not present at the place of occurrence. Learned trial court heavily relied on P.W.-8 and P.W.-9, as the eye witnesses to the occurrence, and convicted the Appellant. However, it is clear from the record that P.W.-9 was examined on 08.05.2001 in absence of and behind the back of the accused/Appellant.

13. Section 273 of the Code of Criminal Procedure. provides that except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader. Section 273 of Chapter XXIII of the Code of Criminal Procedure. deals with evidence in enquiry and trial. This provision is in harmony with the right of the accused to be heard and is the part of principle of natural justice. There is nothing on record to show that the presence of the accused was dispensed with by any judicial order and that evidence was taken in presence of

his counsel.

14. It is well established that the party asserting observance of principle of natural justice has to prove that fact. The same can not be presumed against the person who may suffer or has suffered due to non-observance of the said rule. In view of the same, it can not be presumed in absence of any record, that personal attendance of the accused must have been dispensed with by the court.

15. For non-observance of the said provision, not only the evidence of P.W.-9 is unworthy of any consideration, but the entire trial becomes vitiated.

16. Section 317 of the Code of Criminal Procedure. Clearly provides that the Court has to record reasons for dispensing with the personal attendance of the accused. The Court has to be satisfied that the personal attendance of the accused before the Court is not necessary in the interest of justice or that the accused persistently disturbs the proceedings of the Court. Only in those circumstances, his attendance can be dispensed with and the inquiry or trial can proceed in his absence.

17. In view of the said serious legal lacuna coupled with the absence of clinching and cogent evidence to support the prosecution case, we are unable to uphold the impugned judgment of learned Trial Court. There is no legal basis for holding the Appellant guilty of the charge and convicting him u/s 302 IPC.

18. We therefore, allow this appeal and set aside the judgment of conviction and order of sentence passed against the Appellant. The Appellant shall be released from the custody forthwith if not wanted in any other case.