
(2003) 07 JH CK 0031

Jharkhand High Court

Case No: Criminal Appeal No. 246 of 1990

Hifazat Mian

APPELLANT

Vs

State of Bihar (now Jharkhand)

RESPONDENT

Date of Decision: July 8, 2003

Acts Referred:

- Penal Code, 1860 (IPC) - Section 396

Citation: (2004) CriLJ 3218 : (2004) AIR Jhar HCR 1892 : (2004) 3 EastCriC 209

Hon'ble Judges: Vishnudeo Narayan, J

Bench: Single Bench

Advocate: Afsari Begum, A.C, for the Appellant; R.P. Gupta, APP, for the Respondent

Final Decision: Allowed

Judgement

Vishnudeo Narayan, J.

The sole appellant named above has preferred this appeal against the impugned judgment and order 23-5-1990 passed by Shri Arun Chandra Das, 3rd Additional Sessions Judge, Dumka in Sessions Case No. 253 of 1988/6 of 1988 whereby and whereunder this appellant was found guilty for the offence punishable u/s 396 of the Indian Penal Code and he was convicted and sentenced to undergo R. I. for ten years.

2. The prosecution case has arisen on the basis of the fardbeyan (Ext. 2) of P. W. 7 Mangru Munda, the informant recorded by A. S. I. K. Paswan of Tirwabari O. P. on 3-7-1987 at 3.00 hours in the Sadar Hospital, Sahebganj regarding the occurrence which is said to have taken place in the night between 2nd and 3rd July, 1987 in village Kaluwa Toli, P.S. Gorio, District Sahebganj. On the basis of the said fardbeyan the case was instituted by drawing a formal F. I. R. (Ext. 5) on that very day at 15.00 hours.

3. The prosecution case, in brief, is that the informant with his 12 years old son Jhalka Munda was sleeping on a Chowki in front of the Gohalghar of P. W. 2 Sumara

Munda and he awoke on the barking of the dogs and he saw 10-12 dacoits armed with bomb and pistol flashing their torch and they came there and assaulted him and they confined his son in the said Gohalghar and closed the door of the said Gohalghar from outside. It is alleged that he identified eight dacoits, namely, Ranglal Mian, Rupu Mian, Musu Mian, Kalua Mian, Bhutka Mian, Dukhiya Mian and Natka Anishua in the flash of the torch and they all entered into the houses of P. W. 2 Sumara Munda and Somra Munda and committed dacoity there and in course of the commission of the dacoity they were exploding bombs also and after committing the dacoity all the dacoits numbering about 15-20 fled away towards west from that place. It is alleged that the informant, thereafter, went towards the houses of Sumara Munda and Somara Munda and found Soma Munda (who is the deceased in this case) injured fallen at the door of one Mauza Munda and the said injured told him that Sohraie Mian, Hifazat Mian (the appellant), Belal Mian and Akaluwa Mian have thrown bombs at him as a result of which he has sustained injuries and he also told to have identified them in the flash of the torch. It is further alleged that ornaments, radio and other household effects from the house of Sumara Munda and Somra Munda were taken away by the dacoits. Thereafter, injured Soma Munda was taken to the hospital for treatment but he died in the way to the hospital.

4. The appellant has pleaded not guilty to the charge levelled against him and he claims himself to be innocent and to have falsely implicated in this case on mere suspicion.

5. The prosecution has examined 12 witnesses to substantiate its case. P. W. 7 Mangru Munda is the informant in this case. P. W. 2, Sumara Munda and P. W. 5 Ramu Munda besides P. W. 7, the informant are said to be the witnesses before him the deceased aforesaid had made his oral dying declaration regarding this appellant besides other three dacoits throwing bomb at him and to have identified them in the flash of the torch. P. W. 1, Dr. Bijay Kumar has conducted the postmortem examination on the dead body of Soma Munda and the postmortem report per his pen is Ext. 1 in this case. P. W. 8 Kameshwar Paswan and P. W. 12 Prakash Kumar Bari are the Investigating Officers of this case. P. W. 4 and P. W. 10 have been tendered whereas P. W. 9 and P. W. 11 have been declared hostile and P. W. 3 is not the ocular witness of the dacoity in question. No oral and documentary evidence has been adduced on behalf of the appellant.

6. The learned Court below after consideration of the evidence on the record and relying upon the testimony of P. W. 7, P. W. 2 and P. W. 5 regarding the oral dying declaration made before them by the deceased found the appellant guilty for the offence punishable u/s 396 of the Indian Penal Code and convicted and sentenced him as stated above.

7. Assailing the impugned judgment as unsustainable it has been submitted by Ms. Afsari Begum, the learned Amicus Curiae that the appellant does not dispute the

factum of dacoity in the house of Sumara Munda and Somra Munda and the death of the deceased due to explosive substance but in view of the nature of injury as found by P. W. 1, Dr. Bijay Kumar who has conducted the postmortem examination on the dead body of the deceased, the oral dying declaration alleged to have been made by the deceased is highly improbable and unworthy of credit as a person having the injuries of the nature as found by the medical witness must have instantaneous death. It has also been submitted that evidence of P. W. 7, P. W. 5 and P. W. 2 in respect of the said oral dying declaration is replete with inherent inconsistencies and material contradictions and their evidence is unworthy of credit and it can never form the basis for the conviction of the appellant and the learned Court below has failed to consider their evidence meticulously and has committed a manifest error in coming to the guilt of the appellant.

8. The learned A. P. P. has deposed that in this case the deceased had made oral dying declaration before P. W. 7, P. W. 5 and P. W. 2 and they have in their evidence on oath have deposed regarding the said oral dying declaration which is to the effect that this appellant along with the three other dacoits had thrown bomb at the deceased causing injuries on his person and he had identified the appellant along with the other dacoits in the flash of the torch. It has also been submitted that in view of the evidence of the aforesaid three witnesses the participation of this appellant stands established in the commission of the dacoity in question and causing the murder of the deceased and viewed thus there is no illegality in the impugned judgment.

9. It will admit of no doubt that a dacoity has been committed in the house of Sumara Munda and Somra Munda situate in village Kaluwatoli, P.S. Borio, District Sahebganj in the night between 2nd and 3rd July, 1987 and dacoits had taken away the household effects besides ornaments and radio from their houses and in the said dacoity one Soma Munda had sustained injuries by explosive substance and he was injured and was found fallen in front of the house of one Mauza Munda. P. W. 1, Dr. Bijay Kumar has conducted the postmortem examination on the dead body of the deceased and has found the following ante mortem injuries on his person :--

"Lacerated wound about 10" x 6" peritoneal cavity entered over the right lower abdomen which led to bulging of stomach and intestine outside."

The medical witness has further deposed to have found the urinary bladder and peritoneal ruptured and according to him the nature of the said injury is grievous caused by explosive substance. The medical witness has also deposed that the death of the deceased is due to haemorrhage and shock as a result of the injury aforesaid and time elapsed since death is between 10-12 hours. The postmortem report per his pen corroborates his evidence. However, in para 9 of his cross examination the medical witness has deposed that the injury aforesaid can be possible by attack from near or by an attack by distance but with force. It is pertinent to make it clear here that there is no ocular witness regarding the

throwing of bomb at the deceased by the dacoits in the course of commission of the dacoity. Therefore, the facts emanating in para 9 of the evidence of the medical witness has no relevancy in the facts and circumstances of this case. P. W. 7, the informant has deposed in para 5 of his evidence that after the fleeing away of the dacoits he met injured Soma Munda. In para 6 of his evidence the informant has specifically deposed that Soma Munda had told him that appellant Hifazat Mian besides Akalua Mian, Belal Mian and Shoraie Mian have caused injury on his person by throwing bomb. In para 10 of his cross examination he has deposed that P. W. 5 Ramu Munda and P. W. 4 Bihari Munda were making queries with Soma Munda. He has further deposed that Soma Munda himself had told him about the names of the dacoits who had thrown bomb at him. He has denied that P. W. 5, Ramu Munda has disclosed him the names of the dacoits who had thrown bomb at Soma Munda. However, P. W. 7, the informant does not whisper regarding the presence of P. W. 2 Somra Munda at the time when there had talk between injured Soma Munda and Ramu Munda in his presence. P. W. 2 in para 3 of his evidence has deposed that after the fleeing away of the dacoits he came to his house and, thereafter, he went to injured Soma Munda. He has further deposed that Soma Munda had told him in presence of other co-villagers that the appellant besides Belal Mian, Shoraie Mian and Akalua Mian had thrown bomb at him causing injuries on his person. However, P. W. 2 in his evidence on oath does not disclose the presence of Ramu Munda as well as P. W. 7, the informant. P. W. 5 has deposed that he found Soma Munda fallen at the door of Mauza Munda and he had sustained injury on his person by bomb and he was conscious and on query he named appellant Hifazat Mian besides Shoraie Mian, Belal Mian and Akalua Mian having thrown bomb at him causing injuries on his person and also regarding their identification in the flash of the torch. In para 7 of his cross examination he has deposed that 30 or 40 co-villagers had assembled at the place where Soma Munda was found fallen and the chowkidar of the village first made queries from him and, thereafter, he and other co-villagers had enquired from him when the chowkidar reported him that injured Soma Munda is naming some of the dacoits who had thrown bomb at him. However, P. W. 7 in para 9 of his cross examination denies the presence of village chowkidar at the place where Soma Munda had fallen after sustaining injuries. P. W. 2 also in para 5 of his evidence denies the presence of the chowkidar when injured Soma Munda had disclosed the name of the appellant besides others. P. W. 7 has further deposed in para 11 of his evidence that injured Soma Munda was brought to the police station where he has also disclosed the name of the appellant besides others regarding throwing of the bomb at him. P. W. 8 and P. W. 12 who are the I. Os. of this case do not whisper in their evidence regarding the fact that injured Soma Munda was brought to the police station where he had disclosed the name of the appellant besides other persons responsible of throwing bomb at him which has caused injuries on his person. It is pertinent to mention here that the distance of the police station is 30 Kms. from the place of occurrence and Sadar Hospital, Sahebganj is at a distance of only 3 miles and while being taken to the hospital Soma Munda had

died. It is pertinent to mention here that in view of the nature of the injuries found by the medical witness the injured must have instantaneous death and in such a situation Soma Munda, the deceased of this case can have no occasion to disclose the name of the dacoits who had thrown bomb at him. Therefore, the evidence of P. W. 7, P. W. 2 and P. W. 5 referred to above does not appear to be reliable that Soma Munda, the deceased had made oral dying declaration before them. Moreover, there is inherent inconsistencies in their evidence and in this view of the matter the oral dying declaration cannot be said to be free from blemish. The village chowkidar who is said to be present as per the testimony of P. W. 5 has not come forward to support the alleged oral dying declaration made by the deceased before the aforesaid witnesses. P. W. 4 Bihari Munda also does not whisper regarding the said oral dying declaration allegedly made by the deceased. Therefore, in the facts and circumstances of this case the oral dying declaration made by Soma Munda cannot be relied upon. The basis for the conviction of the appellant by the learned Court below is only the oral dying declaration of the deceased made before P. W. 7, P. W. 2 and P. W. 5 which in view of the medical witness does not stand to be natural and probable as in the existence of such an injury Soma Munda cannot be said to be conscious to make oral dying declaration as alleged. Therefore, the learned Court below has committed a manifest error in coming to the finding of the guilt of the appellant on the sole basis of the said oral dying declaration of the deceased. Viewed thus, the impugned judgment cannot be sustained.

10. There is merit in this appeal and it succeeds. The appeal is hereby allowed. The appellant is found not guilty and he is, accordingly, acquitted and discharged from the liability of the bail bond.