

(2006) 07 JH CK 0036

Jharkhand High Court

Case No: Criminal Appeal No. 165 of 2001

Shamim Mian

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision: July 4, 2006

Acts Referred:

- Penal Code, 1860 (IPC) - Section 302, 304, 307, 323, 324

Citation: (2007) CriLJ 461 : (2006) 4 JCR 348 : (2006) 3 AIRJharR 523

Hon'ble Judges: Dhananjay Prasad Singh, J

Bench: Single Bench

Advocate: P.K. Mukhopadhyay and Gautam Kumar, for the Appellant; Tapas Roy, APP, for the Respondent

Judgement

D.P. Singh, J.

The sole appellant Shamim Mian has preferred this appeal against the judgment and order of conviction dated 25.4.2001 and sentence dated 30.4.2001 passed by 1st Additional Sessions Judge, Dumka in Sessions Case No. 52 of 1991 whereby and whereunder the appellant has been held guilty for the offence u/s 304 Part-II of the Indian Penal Code and has been sentenced to undergo R.I. for four years and a fine of Rs. 500/- in default of which further period of six months R.I.

2. Brief facts leading to this appeal are that in the night of 29/30.11.1989 the informant Charku Mian along with his two grand sons was sleeping inside a Hut situated in the fields of Mauza Champapur looking after the paddy crop. Further stated in between 1-2 a.m. he felt some one was assaulting him with sharp weapon on the leg. According to the informant when he woke up, he found the appellant along with his father Ishaque Mian in side the Hut. Thereafter he was given two blows with dagger on the right leg. The informant raised alarm on which the minor grand sons of the informant awoke and saw the appellants assaulting him. In the meantime other witnesses also assembled there. Thereafter the appellant and his

father fled away. According to the informant, the appellant Shamim Mian was married with his daughter Phalwano and who due to torture and ill treatment has left the house of the appellant for which a panchayati was held. Phalwano did not agree to return to the house of the appellant which was resented and he was threatened by the appellant.

3. The informant was taken to Narayanpur Police Station where his statement was recorded by police on 30.11,1989 and Narayanpur P.S. Case No. 88 of 1989 u/s 307, 324, 341 of the Indian Penal Code was registered against both of them. The police investigated the case and finally submitted charge sheet against the appellant and his father u/s 302 of the Indian Penal Code as the informant died during his treatment after three weeks. The learned CJM took cognizance in this case and committed it for trial by the court of sessions. During the pendency of the trial, father of the appellant, Ishaque Mian died and his case was dropped on 17.8.1994. The appellant was thereafter charged u/s 302/323 of the Indian Penal Code in the year 1994 to which he pleaded not guilty and claimed false prosecution. The learned trial court after examining the witnesses finally came to conclude that the appellant has assaulted the informant resulting in his death for which he was held guilty u/s 304 Part-II of the Indian Penal Code.

4. The present appeal has been preferred on the grounds that the prosecution story suffers from material contradictions. It is further submitted that the eye witness of the alleged occurrence P.W. 2 Bachuri Mian and P.W. 5 Akhtar Mian have admitted on recall that they have not seen the appellant causing any injury on the deceased. It is also asserted that the evidence of P.W. 3 and 4 should have been discarded being interested. According to the learned Counsel for the appellant, the death of the informant was not due to assault but due to infection, as he was not treated properly. It further mentions that the prosecution suffers from non examination of the I.O. as well as not having brought the fardbeyan and FIR on records. It further mentions that the doctor who, for the first time, attended the injured has not been examined resulting in material prejudice to the defence. As such; the appellant deserves to be acquitted of the charges.

5. From perusal of the lower court records, it appears that the prosecution has examined altogether 11 witnesses. P.W. 11 is Dr. Dhrub Kumar Dhiraj who conducted post mortem on the dead body of Charku Mian who found healing wounds skin deep on right elbow, foot and other parts of the body. He further found stitches on old wounds. According to him the death was from shock due to infective peritonea.

6. P.W. 1 Md. Idrish has asserted that in the night of 29/30.11.1989 he was woke up by his son Akhtar who said that the appellant was assaulting his father. All the family members rushed towards the Khaliyan and found the informant lying in a pool of blood. According to him, the informant narrated to them that the appellant has assaulted him with dagger. He further brought the informant to Narayanpur

Hospital and the statement was recorded by the police. According to him, Narayanpur doctor referred the injured to Jamtara from where he was further referred to Dhanbad. He has been cross examined at length. This witness, on recall by defence, has admitted in cross examination that when he reached at the place of occurrence on Hulla, Akhtar and Bahchuri Mian said that some one unknown has assaulted the deceased. He further admitted that during the treatment of his father he has remained unconscious and now the dispute has been patched up between the appellant and his sister. P.W. 2 Bachuri Mian said to be eyewitness of the occurrence has been declared hostile by the prosecution. He asserted that some one has assaulted the deceased but did not name the appellant P.W 3 Jamruddin Mian reached at the place of occurrence on Hulla and saw the appellant fleeing from the place of occurrence. He is own brother of the deceased. P.W. 4 Mukhtar Mian is another witness related with the deceased, he is a hear say witness of the occurrence. P.W. 5 Akhtar Mian, another eyewitness of the occurrence sleeping with the deceased has supported the prosecution version in examination in chief but on his recall he admitted that he could not see who has assaulted the deceased. He further admitted that the name of the appellant was given to police on suspicion P.W. 6 is another hear say witness of the occurrence. P.W. 7 is the daughter of the informant who is also a hear say witness of the occurrence. P.W. 8 is wife of the deceased who is also a hear say witness of the occurrence. P.W. 9 and 10 are other hear say witnesses of the occurrence.

7. The learned trial court has discussed all these evidences and it has come to hold that in absence of the I.O. as well as the Officer who recorded the statement of the deceased, much reliance cannot be placed on the fardbeyan which is not properly proved vide para 15 of the judgment. It has also been discussed that statement of the eyewitnesses who later on retracted from their earlier statement to have seen the appellant giving blows on the deceased does not create reasonable doubt on the prosecution version. However he found and held that in absence of direct evidence of causing injuries on the deceased by the appellant taking into consideration that he survived for three weeks, appellant deserved to be held guilty for offence u/s 304 Part-II of the Indian Penal Code only.

8. In view of the facts and circumstances discussed above, the prosecution case depended upon the statement of the deceased and his two grand sons. The statement of the deceased has not been brought on record properly. Further more the eyewitness of the occurrence have later on given a different version that they could not see the assailants. This is a case in which only eyewitnesses P.W. 2 and 5 have changed their version regarding identification of the appellant as the assailant. Further more P.W. 1, son of the informant deceased contradicted the prosecution case by saying that the informant deceased has remained unconscious on 30.11.1989 and thereafter. As such the fardbeyan of the deceased recorded in his presence by the police becomes controversial The non examination of the police officer Sukhdeo Prasad who is also the I.O. of this case and recorded the statement,

therefore remains not proved and brought on record properly.

9. In the facts and circumstances discussed above, I find and hold that the prosecution has not been able to bring home the charge u/s 304 Part II of the Indian Penal Code against the appellant beyond all reasonable doubts. Accordingly, I find that the present appeal has got merit in it and deserves to be allowed.

10. In result, conviction of the appellant is hereby set aside. The appellant is further released from liabilities of his bail bonds. In this manner this appeal stands disposed of.