
(2014) 07 JH CK 0068

Jharkhand High Court

Case No: Criminal Appeal (D.B.) Nos. 1809 of 2003, 83 of 2004 and I.A. No. 2881 of 2013

Sancha

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision: July 23, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 302, 34

Citation: (2014) 4 LJLR 426

Hon'ble Judges: P.P. Bhatt, J; Dhirubhai Naranbhai Patel, J

Bench: Division Bench

Advocate: D.K. Prasad and A.K. Pathak, Advocate for the Appellant; Pankaj Kumar, APP, Advocate for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Dhirubhai Naranbhai Patel, J.

Cr. Appeal (DB) No. 83 of 2004:

1. Learned counsel appearing for both the sides submitted that this appellant (original accused No. 1 of Sessions Trial No. 93 of 2003), namely, Koyo Paharia, has expired on 22nd January, 2013 and hence this appeal [Cr. Appeal (DB) No. 83 of 2004] may be disposed of, as abated.

2. In view of the aforesaid submission, this appeal is disposed of, as abated, because the death of the sole appellant, namely, Koyo Paharia, has taken place on 22nd January, 2013.

Cr. Appeal (DB) No. 1809 of 2003:

3. This appeal has been preferred by the original accused No. 2 of Sessions Trial No. 93 of 2003, namely, Sancha Paharia, against the judgment and order of conviction

and sentence both dated 15th October, 2003, passed by learned 7th Additional Sessions Judge (F.T.C. No. 4), Godda, in Sessions Case No. 93 of 2003, arising out of Boarijore P.S. Case No. 11 of 2001, whereby, the sole appellant, namely, Sancha @ Surja Paharia, has been convicted for the offence under Sections 302/ 34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life for causing murder of one Budhawa Paharia. Further, a fine of Rs. 2,000/- has also been imposed upon him and in default of payment of fine, the appellant has been sentenced to undergo rigorous imprisonment for six months.

Facts of the case:-

4. If the case of the prosecution is unfolded, the facts are as under:

On 2.02.2001 at 1.30 P.M. the informant Surji Paharin (P.W.-4) gave her fardbeyan to police that her husband Budhawa Paharia (deceased) was allotted one Indira Awas from Boarijore Block and for this some money was allotted to her husband by Block for making house. The informant further alleged that seven persons of her village were also allotted Indira Awas. When construction of Indira Awas was going on, informant's co-villagers, namely, Koyo Pahariya, Budhwa Pahariya, Sancha Pahariya and Samay Pahariya (accused persons) were in anger after seeing Indira Awas. For construction of Indira Awas, Koyo Paharia and other aforesaid persons were intending to act as an agent but the same was not given to them. Due to this anger, Koyo Pahariya, Budhwa Pahariya, Sancha Pahariya and Samay Pahariya came to the house of informant at night on 31.01.2001 (Wednesday) and took her husband with them and in the morning Suriya Paharia informed the informant that Budhawa Paharia was killed by the aforesaid accused persons after pressing his chest and neck and dead body of Budhawa is lying in the cot inside the house of Koyo Paharia and after committing murder they had fled away from the village. Hearing this, the informant with other persons of her Tola went to the house of Koyo Paharia and saw her husband lying dead on a cot and blood was coming out from his mouth and nose and serum was coming out from the mouth. Chest and neck was swollen. The informant further alleged that Koyo Pahariya, Budhwa Pahariya, Sancha Pahariya and Samay Pahariya had killed her husband by pressing his chest and neck.

Summary of Prosecution Witnesses:-

Arguments of the appellant:-

5. It is vehemently submitted by the learned counsel for the appellant that there are major omissions, contradictions and improvements in the depositions of the prosecution witnesses and this aspect of the matter has not been properly appreciated by the learned trial court and hence, the impugned judgment and order of conviction and sentence, passed by the learned trial court deserves to be quashed and set aside. It is further submitted by the learned counsel for the appellant that there is no eye witness of the incident and the case of the prosecution is based upon the circumstantial evidence. Neither the chain of circumstance has

been completed nor the circumstances of even incomplete chain have been proved beyond reasonable doubts. The whole case of the prosecution is based upon the last seen together theory.

PW 4, who is wife of deceased-Budhawa Paharia, is the informant in this case. As per the First Information Report, P.W. 4 was informed by P.W. 2 about the death of her husband, namely, Budhawa Paharia, and hence P.W. 4 is a hearsay witness. It is submitted by the learned counsel for the appellant that P.W. 1 is also claiming that she was present in the house of P.W. 4, when the accused persons had called the deceased and taken him with them whereas looking to the deposition of the informant, there are major omissions, contradictions and improvements about this aspect of the matter. P.W. 4 has stated in paragraph No. 2 of her deposition that she had informed P.W. 2 about the death of her husband whereas in the First Information Report, the facts are otherwise.

Likewise, in paragraph No. 7 of her deposition, this P.W. 4, who is informant, has stated that accused-Koyo Paharia had informed her about the death of her husband-Budhawa Paharia, but, this vital aspect of the matter has also not been stated in the First Information Report. In paragraph No. 1 of her deposition, this P.W. 4 has stated that her husband was called by the accused persons and by that time, there was nobody in the house whereas P.W. 1 has stated that she was present in the house of P.W. 4: All these aspect of the matter are highly relevant, because P.W. 4 is the wife of the deceased and she is a highly interested witness. P.W. 4 being close relative of the deceased, her examination-in-chief as well as cross-examination must be viewed by by this Court with all circumspections and with all scrutiny.

6. Looking to the overall deposition of P.W. 4, it is submitted by the learned counsel for the appellant that she is untrustworthy and unreliable witness. This aspect of the matter has not been properly appreciated by the learned trial court and hence, the impugned judgment and order of conviction and sentence, passed by the learned trial court deserves to be quashed and set aside.

7. It is also submitted by the learned counsel for the appellant that as per the First Information Report, given by the P.W. 4, she was informed by P.W. 2 about the incident. Now, looking to the deposition of P.W. 2, at paragraph No. 7 of his deposition P.W. 2 has stated that accused Koyo Paharia has committed the murder of Budhawa Paharia (deceased) and not the present appellant. In paragraph No. 17, question was asked in cross-examination that though this witness is giving statement that Koyo Paharia has committed murder of the deceased for the first time, but, this fact was never stated in the statement under Section 161 of the Code of Criminal Procedure. Looking to this question, the Investigating Officer must have been examined by the prosecution to prove the statement under Section 161 of the Code of Criminal Procedure, but, the Investigating Officer has not been examined in this case, which is fatal to the prosecution.

8. It is submitted by the learned counsel for the appellant that P.W. 1 is a hearsay witness and P.W. 2 has been declared hostile. Thus, the major witnesses, who are P.W. 2, P.W. 3 and P.W. 4, have failed to prove the offence of committing murder of deceased-Budhawa Paharia by this appellant, since there are material omissions, contradictions and improvements in their depositions and hence, the impugned judgment and order of conviction and sentence, passed by the learned trial court, deserves to be quashed and set aside.

Arguments of State:-

9. We have heard learned A.P.P., appearing for the State, who has submitted that no error has been committed by the learned trial court in appreciating the evidences on record and the case of the prosecution is based upon the last seen together theory. P.W. 4, who is informant and wife of deceased Budhawa Paharia, has clearly stated in the First Information Report as well as in her deposition that on 31st January, 2001, during night hours, this appellant and other co-accused had called her husband and her husband had gone in the company of this appellant and other co-accused and thereafter, he never returned and was murdered. His dead body was also found out from the house of one of the co-accused, namely, Koyo Paharia. This P.W. 4 came to know about the murder of her husband from P.W. 2. It is further submitted by the learned counsel for the State-APP that the depositions of P.W. 2, P.W. 3 and P.W. 4 are getting enough corroboration from the deposition of P.W. 6-Dr. S.K. Jha. There were several injuries upon the body of the deceased and, thus, no error has been committed by the trial court in appreciating the evidences on record, including place of occurrence, date of occurrence and proximity of the murder from last seen together, looking to the First Information Report. It is further submitted by the learned counsel for the State-APP that there is no contradiction with regard to taking away the deceased by the accused persons and, therefore, this appellant has been rightly punished by the trial court for committing the offence of murder of the deceased-Budhawa Paharia and, therefore, this appeal may not be entertained by this Court.

Reasons:-

10. Having heard learned counsels for both the sides and looking to the evidences on record, it appears that P.W. 4 - the informant Surji Paharin, who is wife of deceased-Budhawa Paharia, has given her Fardbeyan on 2nd February, 2001 at about 1.30 p.m. before Boarijore Police Station within the district of Godda, that on 31st January, 2001 during night hours, this appellant as well as other co-accused had called her husband and had taken away her husband, who has never returned thereafter and she was informed by P.W. 2 during morning hours on 2nd February, 2001 that her husband has been murdered and his dead body is lying in the house of one of the co-accused, namely, Koyo Paharia.

Looking to the First Information Report it appears that the accused persons were not given contract for construction work of Indira Awas for which a land was allotted to the deceased and he was constructing house at his own and, therefore, this appellant along with other co-accused have committed murder of her husband.

Looking to the evidence on record, it appears that P.W. 1, P.W. 2, P.W. 3 and P.W. 4 are the crucial prosecution witnesses. P.W. 5 has been declared hostile and P.W. 6 is a doctor, namely, Dr. Sunil Kumar Jha.

11. Looking to the deposition, given by P.W. 1-Budhani Paharin, it appears that she is a hearsay witness. She has stated that on 31st January, 2001 she was at the house of P.W. 4-Surji Paharin when this appellant along with other co-accused had called the husband of P.W. 4 and have taken away her husband, during night hours. Looking to the cross-examination of this witness at paragraph No. 4, it appears that this witness had no knowledge about the incident, at all rather she was informed by the villagers. Thus, this witness is not proving anything against this appellant.

12. Looking to the deposition, given by P.W. 2-Surya Paharia in paragraph No. 1, this witness has stated that he has heard that Budhawa Paharia has been murdered by the appellant and other co-accused. Thus, this witness has also no personal knowledge of any facts relating to the offence. Moreover, this witness has never stated in his deposition that he has informed P.W. 4 about the murder of her husband whereas in the First Information Report, P.W. 4 has stated that she was informed by P.W. 2 about the murder of the deceased.

Looking to paragraph No. 7 of the deposition of this P.W. 2, it appears that this witness has stated that Koyo Paharia had made oral confession before him that he has committed murder of the deceased. As per First Information Report, P.W. 4 was informed about the murder of the deceased by P.W. 2, but, P.W. 4 has never stated that P.W. 2 was informed by Sancha Paharia that Koyo Paharia has committed murder of the deceased. Such a vital aspect of the matter about extra judicial confession by Koyo Paharia was never conveyed by P.W. 2 to P.W. 4. Thus, from paragraph No. 7 of the deposition of P.W. 2, it appears that this appellant had conveyed to P.W. 2 that Koyo Paharia had committed murder of the deceased. Thus, P.W. 2 is absolutely a hearsay witness and nothing has been proved against this appellant by P.W. 2.

Moreover, looking to paragraph No. 17 of the deposition of P.W. 2, it appears that there is a suggestion by the defence that P.W. 2 is stating such a vital fact of murder committed by Koyo Paharia, for the first time in the court and the police has never recorded his statement, under Section 161 of the Code of Criminal Procedure. In such type of cross-examination, examination of Investigating Officer is necessary by the prosecution, whenever defence is taken that such a vital and important aspect of the matter, the prosecution witness is saying for the first time in the court. In the facts of the present case, the Investigating Officer has not been examined, despite

the cross-examination in paragraph No. 17 of the deposition of P.W. 2. Moreover, looking to the deposition of P.W. 4 and looking to the First Information Report, it appears that it is P.W. 2 who had informed P.W. 4 about the incident. Nowhere P.W. 2 has stated this aspect of the matter before the learned trial court. Thus, looking to overall deposition of this witness, especially paragraph Nos. 1, 7 and 9 to be read with paragraph No. 17, this P.W. 2 is not a reliable witness.

13. Looking to the paragraph Nos. 9 and 10 of the deposition of P.W. 3-Kotu Somay Paharia, he is giving deposition for the first time before the trial court. Looking to paragraph No. 13 of the deposition of this witness, it appears that he has informed the wife of deceased i.e. P.W. 4 whereas, as per the First Information Report, given by P.W. 4, she was informed by P.W. 2. Moreover, looking to paragraph No. 13 of his deposition, he has referred the names of one Mangla Paharia and Mangli Paharin, in whose presence the accused had made confession of the offence committed by him. Neither Mangla Paharia nor Mangli Paharin has been examined by the prosecution nor they have been cited in the charge sheet as witnesses. Moreover, looking to paragraph No. 14 of the deposition of P.W. 3, it appears that this witness has come out with a new story of the occurrence, which has never been stated by P.W. 4-informant nor by P.W. 2-Surya Paharia that this P.W. 3 had gone to see the dead body of the deceased and they tried to catch hold the appellant and other co-accused, but, ran away and while running away, they caused injuries to Mangli Paharin. Neither the injury report has been produced by the prosecution nor Mangli Paharin has been examined as a prosecution witness. Thus, as per the deposition of P.W. 3, there is injured eye witness also, but, this fact has neither been stated by P.W. 4 in her deposition nor in the First Information Report nor by P.W. 1 and P.W. 2. Thus, looking to overall deposition of P.W. 3, he is untrustworthy and unreliable witness.

14. Looking to the deposition, given by P.W. 4-informant, who is wife of the deceased, the incident has taken place on 31st January, 2001 and the Fardbeyan was given on 2nd February, 2001 at about 1.30 p.m. As P.W. 4 is a close relative of the deceased, being his wife, we will examine deposition with all circumspections and with all scrutiny. She has stated in her Fardbeyan that she was informed by P.W. 2 about the murder of her husband whereas looking to the deposition of P.W. 2, he has never stated that he has informed P.W. 4 about the murder of her husband. Moreover, looking to paragraph No. 1 of the deposition of P.W. 4, she has stated that there was nobody at her house, when her husband was called by this appellant and other co-accused whereas P.W. 1 has stated that she was in the house of P.W. 4. P.W. 4 has stated in paragraph No. 7 of her deposition that one of the co-accused, namely, Koyo Paharia, had informed her about the murder of her husband. This is a material improvement, looking to the First Information Report, given by herself. Thus, looking to overall deposition of this witness, there is material improvement and material omission in her deposition and her deposition is also no in consonance with the evidences, given by other prosecution witnesses. Thus, there are not only

major contradictions, omission and improvements in her deposition, but, there is also inconsistency in the prosecution case, looking to the depositions of other prosecution witnesses. Therefore, P.W. 4 is untrustworthy and unreliable witness. These aspects of the matter have not been properly appreciated by the learned trial court.

15. The appellant, namely, Sancha alias Surja Paharia, has remained in judicial custody, as submitted by the learned APP, upon instructions from the Superintendent of Central Jail, Dumka, for approximately 13 years. 2 months and 2 days, as on 9th July, 2014.

16. Thus, looking to overall depositions of P.W. 1, P.W. 2, P.W. 3 and P.W. 4, the prosecution has failed to prove the charges of offence, committed by this appellant, beyond reasonable doubts, looking to the cross-examination of these witnesses especially when there is suggestion from the defence that the witnesses are narrating crucial aspect of the matter for the first time in the court and no such statement was ever given by these witnesses when their statements were recorded by the Investigating Officer under Section 161 of the Code of Criminal Procedure. When there is such type of suggestion by the defence in the cross-examination of the prosecution witness, it is a duty of the prosecution to get the Investigating Officer examined. Non-examination of the Investigating Officer in this case has proved fatal to the prosecution.

Thus, the prosecution witnesses i.e. P.W. 1, P.W. 2, P.W. 3 and P.W. 4, have failed to even complete the chain of circumstances nor even the circumstances of the chain have been proved, beyond reasonable doubts.

17. As a cumulative effect, we hereby quash and set aside the impugned judgment and order of conviction and sentence both dated 15th October, 2003, passed by learned 7th Additional Sessions Judge (F.T.C. No. 4), Godda in Sessions Case No. 93 of 2003. This appellant, namely, Sancha alias Surja Paharia, shall be released forthwith from the judicial custody, if his presence in jail is not required in any other offence. This Criminal Appeal is, accordingly, allowed and disposed of.

I.A. No. 2881 of 2013:

18. The letter dated 24th April, 2013 sent by the Superintendent of Central Jail, Dumka, on the basis of a letter written by the appellant for early disposal of the Criminal Appeal (DB) No. 1809 of 2003, has been converted by this Court into interlocutory application and has been numbered as I.A. No. 2881 of 2013. In view of disposal of Cr. Appeal (DB) No. 1809 of 2013, I.A. No. 2881 of 2013 stands disposed of.