(2014) 04 JH CK 0065

Jharkhand High Court

Case No: Criminal Appeal (DB) No. 640 of 2013

Amrudh Sahu	APPELLANT
Vs	
The State of Jharkhand	RESPONDENT

Date of Decision: April 24, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 154, 161
- Penal Code, 1860 (IPC) - Section 302, 304, 323, 34

Citation: (2014) 4 AJR 265 : (2014) 3 JLJR 441

Hon'ble Judges: Dhirubhai Naranbhai Patel, J; Amitav Kumar Gupta, J

Bench: Division Bench

Advocate: Ravi Prakash, Advocate for the Appellant

Final Decision: Allowed

Judgement

Dhirubhai Naranbhai Patel, J.

This appeal has been preferred through jail and the legal aid has been given by the Jharkhand State Legal Services Authority. There was a delay of 3347 days in preferring the criminal appeal, which was condoned by this Court and looking to the period of custody this appeal was fixed for final hearing and today it has been heard for final hearing.

2. This appeal has been preferred by the appellant being aggrieved and dissatisfied by the judgment and order of conviction and sentence passed by Additional District Sessions Judge ETC., Lohardaga in S.T. No. 193 of 1997 dated 28.04.2004 and 29.04.2004 respectively, whereby this appellant has been convicted for the offence punishable u/s 302 of the I.P.C. for life imprisonment and 3 years simple imprisonment for the offence punishable u/s 323 of the I.P.C.

3. It is a case of the prosecution that P.W. 9 gave fardbeyan before the Lohardaga police came at Sadar hospital on 17.09.1995 at 18.15 hours. That on 17.09.1995 at

about 17 hours his uncle the present appellant came at the house of P.W.-9- Jyotish Kumar Sahu with a stick in his hand and he was addressing P.W.-9 as well as the mother of P.W.-9 and the grand mother of P.W.-9, that go out of the house otherwise he will kill and he will also damage their house. Hearing this threat father of P.W.-9 Laxmi Narayan Sahu (P.W.-3) came out of the house and he told this appellant-accused that why he is damaging the house of P.W.-9 and his house. Immediately this appellant started beating with a stick to the informant as well as to the father of the informant (P.W.-3) and the grand mother (deceased) as well as the mother of the P.W.-9 and other family members. Thereafter upon hearing alarm of P.W.-9 and other family members and other persons residing near the vicinity reached at the place of occurrence and immediately P.W. 9 i.e. the informant, the father of P.W.-9 who is P.W.-3 and the mother of the informant who is P.W.-1 and the grand mother of P.W.-9 were taken to the hospital where the grand mother of the informant-P.W.-9 who is Radho Devi expired immediately on the next date because of the injury sustained by her and therefore, fardbeyan was given by P.W.-9 in Sadar Hospital at Lohardaga. Upon recording the fardbeyan, F.I.R. was lodged, investigation was carried out, statements of several witnesses were recorded and charge-sheet was filed. The case was committed to the Court of Session being S.T. No. 193 of 1997 and on the basis of evidence of P.Ws. 1 to 9 and also on the basis of other documentary evidence on record, Additional District and Sessions Judge, ETC., Lohardaga convicted this appellant for causing murder of the deceased and punished for life imprisonment. This appellant has also been convicted for three months simple imprisonment for the offence punishable u/s 323 of the I.P.C. Against this judgment and order of conviction and sentence passed by'' the trial court dated 28.04.2004 and 29.04.2004 respectively, the present appeal has been preferred.

4. It is submitted by the counsel for the appellant that there was major omissions and contradictions in the depositions of the prosecution witnesses This aspect of the matter has not been properly appreciated by the learned trial court and, hence, the judgment of conviction and order of sentence passed by the trial court deserves to be quashed and set aside.

5. It is also submitted by learned counsel for the appellant that the so called eye witnesses who are P.Ws.-1, 3 and 9 are not the eye witnesses at all and there are a lot of inconsistencies in their depositions and the prosecution has no consistent line of investigation at ah. Moreover, as per depositions given by P.W. 1 and 3 (hey were also injured but neither the doctor who has examined them in the hospital has been produced as prosecution witness. Now the injury certificate has been brought on record and therefore, it cannot be said that they are injured eye witness. This aspect of the matter has not been properly appreciated by the learned trial Court. It is further submitted by the counsel for the appellant that in cross examination of P.W.-1 especially in paragraph No. 6, it has been stated by P.W. 1 that he has not given any statement before the police A u/s 161. Thus, these witnesses given

depositions directly first time in the Court and the prosecution has not examined the Investigating Officer. Similarly, there is cross examination of P.W.-3 about his statement recorded by the police, thus a doubt has been raised by the defence from the very beginning of their examination of recording of the statement before the police but 10 has not been examined and this aspect of the matter is fatal to the prosecution witnesses can not come before the Court first time directly by giving an evidence. Similarly, for the P.W.-4 also in paragraph No. 3 it has been stated that his statement was never recorded before the police. It is also submitted by the counsel for the appellant that looking to para 1 of the deposition given by P.W.-4 that there was internal fight between the family members. Thus, there is no question that this appellant has caused injury upon the body of the deceased. Thus, it is submitted by the counsel for the appellant that the police has not recorded the statement u/s 161 of P.W.-1 and P.W.-3 and therefore, the so called eye witnesses ate not the eye witness at all nor the injury certificate has been proved nor the doctor who has examined P.Ws. 1 and 3 is brought before the Court are the prosecution witnesses. Thus, the prosecution has failed to prove the offence of murder committed by this appellant. It is further submitted by the counsel for the appellant that though in the F.I.R. it has been slated that hearing of alarm of P.W.-9 several persons rushed who has seen the incident but not a single independent eye witness has been examined by the prosecution and single so called eye witness P.W.-4 who has been examined and he has slated in paragraph No. 3 that his statement was not recorded by the police at all. Thus, no independent eye witnesses has been examined though in the F.I.R. it has been stated that there are several eye witnesses of the incident and all these aspect of the matter has not been properly appreciated by the learned trial Court. Hence, the judgment of conviction and order of sentence passed by the learned trial Court is deserves to be quashed and set aside. It is further submitted by the counsel for'' the appellant that looking to the medical evidence, there is only one fatal injury i.e. injury No. 1, which is lacerated wound on left frontal area by hard and blunt substance.. Thus, alternatively, it is submitted by the counsel for the appellant that even if the conviction parts remains as it is, looking to the nature of the weapon and also looking to only one injury on the body of the deceased this is not a pre-planned well designed murder by any specific weapon for committing the murder of the deceased. Therefore, this is not an offence of murder at all but at the highest as an alternative this can be an offence culpable homicide not amounting to murder and therefore, instead of punishment u/s 302 of the IPC. this appellant as an alternative may be punished u/s 304 Part-II of the I.P.C. It is submitted by the counsel for the appellant that in fact as stated by P.W.-4 in his deposition (para-1) that there was an internal fight on which appellant has nothing to do but as this appellant remained in jail for 14 years and S months approximately as on today suffice it will be for the purpose of this appeal, if this appellant is convicted for 10 years rigorous imprisonment because he has already undergone approximately 14 years and 5 months for Rigorous Imprisonment.

6. Learned A.P.P. appearing on behalf of the State vehemently submitted that no error has been committed by the learned trial Court in his evidences on record and the prosecution has proved the offence of murder of Radho Devi beyond reasonable doubt to have been committed by this appellant and the case of prosecution is based upon more than nine witnesses, who are P.Ws. 1 to 8 and P.W. 9, as per F.I.R. given by P.W.-9 who is grand son of the deceased. P.W. 1 and P.W. 3 are also injured eye witness. The F.I.R. has been given when the informant was at Sadar Hospital. It is also submitted by A.P.P. that these witnesses P.Ws. 1, 3 and 9 have proved the offence beyond reasonable doubt. Moreover, the deposition given by P.W.-6 - Dr. Birendra Kumar Pandey is corroborative to the deposition of eye witnesses. Thus, medical evidence and ocular evidence are corroborated and these aspect of the matter have been property appreciated by the learned trial court and therefore, this appellant has been rightly punished for the offence of murder of the deceased and also for the offence punishable tinder Section 323 of the I.P.C. and therefore, this appeal may not be entertained by this Court.

7. Having heard learned counsel for both the sides and looking to the evidences on record, we hereby modify the judgment and order passed by the learned trial Court mainly for the following facts and reasons:

(i) It is a case of the prosecution that P.W.-9 gave fardbeyan before Lohardaga Police Station, district Lohardaga that on 17"'' September, 199S at about 5.00 p.m. this appellant came with stick at the house of the informant-PW.-9 (Jyotish Kumar Sahu) and at that time at the house of the informant his mother was also present, his father was also present and his grand mother was also there. This appellant given a threat that they should leave the house otherwise he will kill them and he will ruin their house. Hearing this challenge given by the appellant father of the informant came out of the house, who is Laxmi Narayan Sahu-PW-3 addressed the appellant why he is damaging their house. Hearing this, the appellant caused injury to Laxmi Narayan Sahu-P.W.-3, who is father of the informant. Similarly, this appellant has also caused injury with stick to mother of the informant who is P.W.-1 and this appellant also caused injury on head to the grand mother of P.W.-9, Radho Devi (deceased). Thereafter, upon hearing the alarm of this injured witnesses several persons rushed and as per the fardbeyan they have also seen the incident. This fardbeyan was recorded in the Sadar Hospital because the informant was at hospital as his father, mother and grand mother all were taken to the hospital. Grand mother expired immediately on the next date i.e.'' 18.09.1995 because of the injury sustained by her. On the basis of the fardbeyan the F.I.R. was lodged, investigation was carried out, charge-sheet was filed and the case was committed to Sessions Court being S.T. No. 193 of 1997 and on the basis of evidence recorded by P.W.-1 to P.W.-9 and other documentary evidence like postmortem report etc., this appellant has been convicted and punished u/s 302 of the I.P.C. for life imprisonment and 3 months simple imprisonment for the offence punishable u/s 323 of the I.P.C. for causing injury to the witnesses.

(ii). Thus, from the aforesaid narration of the facts, it appears that P.W.-1, P.W.-3 and PW-9 are the eye witnesses of the incident out of which P.W.-9 is an informant whereas P.W.-1 and P.W.-3 are the injured eye witnesses who are mother and father of the informant respectively. Looking to the deposition of P.W.-1, P.W.-3 and P.W.-9, it appears that this appellant had gone with a stick at the house of the informant and had given a threat to vacate the house which was opposed by P.W.-3-Laxmi Narayan Sahu and because of this appellant caused injury to PW-1 and P.W.-3 as well as to the deceased by stick and the grand mother of the informant who expired on the next date at Sadar Hospital, Lohardaga. Looking to the cross examination of P.W.-1 in paragraph No. -6, he has stated that her statement was never recorded by the police, thus this witness giving first time deposition before the Court. Prosecution has not examined I.O., this is fatal to the prosecution. Looking to the cross examination of P.W.-1 neither the injury certificate has been brought on record nor the doctor has been examined. Similarly, so far as the P.W.-3 is concerned, there is cross examination of P.W.-3 and doubt has been raised by the defence, whether P.Ws.-3 statement was recorded by the police. It was the duty of the prosecution to bring on record through deposition of Investigating Officer that the statement of injured witness P.W.-3 was also recorded. Despite this consistent cross examination of P.W.-1 and P.W.-3 the prosecution has not examined the Investigating Officer. Likewise, prosecution has failed to prove the injury certificate of P.W.-3 and nor the prosecution has examined the doctor who has given treatment to P.W.-3. Thus, it creates a doubt whether these are the eye- witnesses because there is neither 161 statement before the police nor injury certificates are on record nor the doctor who has given treatment to P.W.-1 and P.W.-3 has been examined by the prosecution.

(iii) Looking to Lite depositions given by the P.W.-4, especially paragraph No. 1 who is an examination in Chief it has been stated by this witness that son of Laxmi Narayan Sahu who is P.W.-9 (informant) informed to P.W.-4 that there was internal fight between the family members but this is a wrong submission because of typographical error there is a wrong typed version. We have perused the original version. It has been stated by this witness that P.W.-9 stated before CW-4 that ''Amru&#65533; i.e. this appellant has caused injury to the mother and father of the P.W.-9. Thus, it appears that he is a hearsay witness and not the eye witness at all. Moreover, this witness has not stated that the grand mother was also beaten by the appellant thus, his deposition is limited to the injured eye witness if at all this witness is believed by this Court. Moreover, looking to paragraph No. 3 of the deposition of P.W.-4 and looking to his statement given for the first time in the Court, this aspect has not been properly appreciated by the learned trial court thus, P.W.-4 is not an eye witness at all. He is absolutely at the highest, is a hearsay witness and his statement was never recorded by the police. In this case prosecution has not examined any witnesses by the Investigating Officer though it was duty of the prosecution especially looking to earlier cross examination of the

witnesses in paragraph No. 4 the deposition of P.W.-1, it appears that she has stated that she is giving statement for the first time directly in the Court.

(iv) Looking to the deposition given by P.W.-9 it appears that he is grand son of the deceased, his presence at the scene of occurrence was natural one. This witness has proved the date of offence, time of offence. He is an informant, therefore, his previous statement is signed by himself as required u/s 154 Cr.PC thereof. This witness has proved his fardbeyan which is Ext.-1/3 and he has also stated clearly the role played by this appellant-accused causing injuries upon the body of the deceased. It has been stated by this witness that injuries were caused by stick by this appellant upon Radho Devi and looking to his cross examination, we have no reason to disbelieve this eye witness is a trustworthy and reliable witness. Looking to the cross examination of this witness nothing has come out in favour of this appellant-accused and the learned trial court has not committed any error in appreciating the evidence of this witness so far as causing injury upon the body of the deceased. Looking to the deposition given by P.W-6, Dr. Birendra Kr. Pandey who has carried postmortem on the body of the deceased on 18.09.1995 the age of the deceased as per medical evidence was 70 years. It has been stated by the medical evidence:

3. (i) that there was one lacerated wound on left frontal area

2" left to middle line size 1" x 1" x bone deep.

(ii) Blackening of both eyes.

(iii) Swelling of right cheek 3" x 2".

4. On dissection:

(i) Cranium- The fracture of left frontal bone 2" left to sagital suture.

(ii) Clotted blood in the left anterior fossa of the brain

(iii) Heart:- Both chambers empty

Langs

Liver

Pale

Spleen

Kidneys

(iv) Stomach:- Contained semi digested food Intestines- Contained gas

5. Time since death:- Within 24 hours.

6. In my opinion cause of the death was due to intra cranial hemorrhage and injuries to the brain.

7. Weapon used:- Hard substance may be by stick.

In view of the aforesaid deposition it appears that the deceased has expired due to hemorrhage and injuries to the brain. The weapon alleged to have been used is stick, thus there is only one fatal injury caused by this appellant. Thus, deposition has given by P.W.-6 is corroborated to the deposition given by HW.-9.

(v) Looking to the whole incident on the basis of the deposition of the witnesses before the trial Court, it appears that this is not a pre-planned well designed murder by any special type of weapon. This appellant has used a stick which is normally available in the house of a farmer or in the house of a labourer. Moreover, there is only one injury upon the body of the deceased and also looking to the totality of the evidence on record and also looking to the fact that this appellant has remained in jail for 14 years and 5 months as on today, we are of the view that ends of justice would be met, if the conviction of the appellant is altered from Section 302 of the I.P.C. to one u/s 304 Part-II of the I.P.C. This appellant is ordered to undergo rigorous imprisonment for 10 years. We therefore, alter the conviction from the offence punishable u/s 302 or the I.P.C. to an offence punishable u/s 304 Part-II of the I.P.C. and we ordered this appellant to undergo rigorous imprisonment for 10 years.

(vi) It has been held by the Hon''ble Supreme Court in the case of Chhotu Vs. State of Haryana, , which read as under:

2. The appellant along with the co-accused Bhallu was convicted u/s 302 read with Section 34 I.P.C. and sentenced, to imprisonment for life and to pay a fine of Rs. 2,000/- by the Additional Sessions Judge, Hissar. The High Court while setting aside the conviction of the co-accused Bhallu, affirmed, the conviction of the appellant herein. This Court while entertaining the SLP of the appellant, issued notice confined to the question of the nature of the offence.

3. Dr. Daya Nand (P.W.-1), who conducted the post-mortem examination on the body of the deceased Dilbagh has opined as follows:

There was no external mark of injuries over the body except a diffused swelling over left temporal region. On cut section of this eechymosis was present in the skin and subcutaneous tissues. On further dissection on removing the scalp haematoma was present under the scalp in left temporal, left parietal and right temporal region. After removing this haematoma skull bone was seen and there was fracture on left temporal bone. Infiltration of the blood was present at the fractured ends. After removing the skull there was extradural haematoma found lying in whole of the temporal region and parietal region of left side.

Admittedly, this was the only one injury found on the body of the deceased. This injury was attributed to the appellant.

4. In the fads and circumstances of this case, we are of the considered view that the conviction of the appellant under Sections 302/34 IPC is inappropriate. In our considered view, the ends of justice would be met if the conviction of the appellant is altered from Sections 302/34 IPC to one u/s 304 Part II IPC and he is sentenced to undergo rigorous imprisonment for ten years.

5. Accordingly, the impugned judgment passed by the High Court is set aside and the appellant is convicted u/s 304 Part II IPC and sentenced to undergo rigorous imprisonment for ten years. The appeal is partly allowed and disposed of accordingly.

Thus, in view of the aforesaid decision also we are altering the nature of offence from murder to culpable homicide not amounting to murder mainly for the reasons that there is only one injury upon the body of the deceased and no special weapon was used, here only stick was used. Moreover, P.W.-6 has not stated that injury sustained by deceased was sufficient in ordinary course of nature to cause the death of the deceased, we hereby convert the offence from murder to culpable homicide not amounting to murder.

(vii) Similarly, it has been held by the Hon''ble Supreme Court in the case of Babu @ Balasubramaniam and Another Vs. The State of Tamil Nadu, especially in paragraphs 19, 24 and 25,

which read as under;

19. We con, therefore, analyse the other evidence and circumstances on record and see whether they support the conviction of A-1 Babu for offence punishable u/s 304 Part-I IPC. In this connection, the medical evidence is of great importance. P.W.-5 Dr. Rajabalan conducted the postmortem on 16.11.1998 at 5.00 p.m. Ext. P-5 is the postmortem certificate. The external and internal injuries are described in the certificate as under:

External injuries: Contusion over the right occipital area close to the midline 2 cm x 3 cm. General appearances do tally with police report. Eyelids closed. Frothy discharge from the mouth and nostrils present. Tongue inside the mouth. Jaws clenched. Teeth 8/7-8/7. Hands empty. No fractured ribs. Heart 200 gm congested. Chambers empty. Hycid bone intact. Lungs left 400 gm, right 450 gm congested. Stomach contains 200 ml of white-coloured fluid with irritant smell Liver 1000 gm congested. Spleen 10 gm congested. Kidney 100 gm each contested. Intestines distended with gas. Uterus normal. Cavity empty. Pelvis normal

On opening the head: Extravasations of blood from the contused area on the right parietal area and occipital area close to the midline. Fracture right parietal bone. Membranes torn on the occipital and parietal area on the right side brain. Weight of

1000 gm pale. 200 ml of fluid blood found on the base of the skull."

PW 5 Dr. Rajabalan opined that the death was due to shock and haemorrhage due to the head injury sustained by the deceased which could have occurred 10 to 12 hours prior to post-mortem. As noted above, on opening the head, extravasation of blood from the contused area on the right parietal area and occipital area closed to the midline was '' found. There was also a fracture on the right parietal bone. The membranes were torn on the occipital and parietal area on the right side brain and 20 ml of blood was found on the base of the skull. This head injury, according to P.W. 5 Dr. Rajabalan, was the cause of death.

24. Considering the medical evidence, particularly the evidence of PW 5 Dr. Rajabalan that the head, injury was ante-mortem and must have been inflicted prior to the consumption, of poison and considering the other circumstances of the case, we concur with the High Court that A-1 Babu first caused the head injury to the deceased and when she became unconscious, in order to create evidence to suggest that the deceased committed suicide, he administered poison to her. It reached her stomach and intestine but before it could reach the kidney and liver she died. When she succumbed to the head injury, the poison did not pass on to the liver and kidney. The High Court has rightly observed that this is the reason why there is no evidence of any resistance being offered by the deceased and no bruises were found on her tips.

25. The trial court has convicted A-1 Babu for offence punishable u/s 304 Part I IPC and not for offence punishable under Section. 302 IPC on the ground that the deceased had suffered only one head injury. The High Court has concurred with the trial court. We see no reason to interfere with the impugned order.

8. In view of aforesaid decision and also looking to the evidences in this case suffice it will be if this appellant is punished for the offence u/s 304 Part II of the I.P.C. instead of offence punishable u/s 302 of the I.P.C. So far as conviction u/s 323 of the I.P.C. is concerned it is maintained as it is, but the sentences are ordered to run concurrently.

9. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncement, we hereby hold this appellant guilty for the offence of culpable homicide not amounting to murder and we hereby alter and modify the sentence of the appellant of life imprisonment u/s 302 I.P.C. to 10 years'' Rigorous Imprisonment for the offence u/s 304 Part-II of the I.P.C. accordingly we hereby set aside the judgment of conviction and order of sentence passed by the trial Court for the offence of murder and the sentence for life and modify it to the aforesaid extent.

10. It is submitted by the counsel for the State-A.P.P. that he has received written instruction from Birsa Munda Central Jail, Hotwar, Ranchi dated 26.03.2014 that this appellant has remained in jail custody for 14 years 3 months and 27 days as on that date, meaning thereby as till date, the appellant has remained in custody for 14

years and 5 months approximately. Thus, if the appellant is not wanted in any other case, he shall be released forthwith from the judicial custody.

11. Accordingly, this appeal is allowed with modification to the aforesaid extent.