(2015) 05 JH CK 0059

Jharkhand High Court

Case No: Criminal (Jail) Appeal [DB] No. 596 of 2005

Nirmal Bhengra		APPELLANT
	Vs	
State of Jharkhand		RESPONDENT

Date of Decision: May 21, 2015

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 118, 145
- Penal Code, 1860 (IPC) - Section 302

Hon'ble Judges: Virender Singh, C.J; P.P. Bhatt, J

Bench: Division Bench

Advocate: Jai Shankar Tiwary, Amicus Curiae, for the Appellant; Pankaj Kumar, APP, Advocates for the Respondent

Final Decision: Dismissed

Judgement

Virender Singh, C.J
As per custody status supplied by the concerned Jail Superintendent, appellant is languishing in jail for the last more than 17 years (17 years 12 days), therefore, we have given priority to the instant appeal for its final consideration.

2. Police swung into action on statement (Fardbayan) of the minor daughter of deceased (P.W.10), who gave her statement before police at her village on 05/05/1998 at 11 A.M. She alleged that today i.e. 05-05-1998 at around 6 A.M while her father Bardan Demta was going to till his field, having tiller on his shoulder with oxen towards north on the village Kachchi road, Nirmal Bhengra (hereinafter, to be referred to as "accused") was going behind him holding a tangi in his hand. She also followed them on same kachchi road to go to her school meanwhile accused dealt a tangi blow on the head of her father from behind as a result of which he fell down. Thereafter, accused again dealt tangi blow on the neck of her father. Having seen this occurrence, she started shouting and rushed towards her home out of fear and narrated about this occurrence to her grand mother

Elisa-ba. She again returned to place of occurrence and found her father dead. Several co-villagers had assembled there having heard her shouting. The genesis of occurrence and motive attributed behind this crime has also been stated by informant on the foot of fardbeyan as 5-6 months ago accused was uprooting Kolhu from the courtyard of her grand mother Elisa-ba whereupon her father tried to stop him, which triggered an altercation between her father and the accused and at that time he had threatened to her father saying that he would take revenge soon and since then he had inimical terms with her father.

3. On the basis of the aforesaid information, formal F.I.R. 17/1998 dated 05th May, 1998 came to be registered in police station Gumla under section 302 I.P.C and the investigation started by sub-Inspector of police Y.P. Singh (not examined). After competition of investigation, challan was filed against the accused to face trial. He was, accordingly, charged for the offence punishable under section 302 I.P.C for which he stands convicted and sentenced to undergo life imprisonment vide impugned judgment of learned Additional Sessions Judge F.T.C. Gumla.

4. The case of accused, as one finds from his statement recorded under section 313 Cr.P.C., is of denial simplicitor. During cross-examination, it has been suggested to some prosecution witnesses by learned defence counsel that accused has been falsely implicated. Further, accused has not chosen to adduce any evidence in his defence.

5. Learned counsel for the appellant pointed out the certain flaws in the case of prosecution viz; P.W-10 is child witness and the competency of child witness to testify as a witness is condition precedent but from the deposition of this so called eye witness, there be nothing to show that learned lower court had tested her competency to testify as witness and, which itself is fatal for case of prosecution; there are vital contradictions in the evidence of witnesses; and I.O. has not been examined, hence appellant may be extended the benefit of doubt to disturb the conviction as already slapped upon him. Learned counsel for appellant has cited the case laws in support of his contention i.e.; Ratansinh Dalsukhbhai Nayak Vs. State of Gujarat, AIR 2004 SC 23 : (2004) CriLJ 19 : (2003) 8 JT 53 : (2004) 1 SCC 64 : (2003) 4 SCR 1030 Supp : (2004) 1 UJ 156 , Shivasharanappa and Others Vs. State of Karnataka, AIR 2013 SC 2144 : (2014) 1 CCR 485 : (2013) CriLJ 2658 : (2013) 7 JT 66 : (2013) 3 RCR(Criminal) 86 : (2013) 6 SCALE 757 : (2013) 5 SCC 705 : (2013) AIRSCW 2719 : (2013) 4 Supreme 38 and Radhey Shyam Vs. State of Rajasthan, (2014) AIRSCW 1398 : (2014) 4 JT 271 : (2014) 3 SCALE 7 : (2014) 5 SCC 389 .

6. Per contra, learned A.P.P. submitted that defence has admitted the genesis of occurrence and motive attributed behind the crime i.e. "some months ago deceased had prevented accused-appellant from uprooting kolhu in the courtyard of Elisa-ba and at that time he had given threatening to take revenge from deceased" by not cross-examining the prosecution witnesses on this material point. He, in same breath has contended that non-examination of I.O. (who has died as per evidence brought on record) is not fatal for

the prosecution because place of occurrence established by prosecution witnesses has not been disputed by defence and further during cross-examination, no any contradiction from the previous statement of prosecution witnesses has been taken u/s. 145 Indian Evidence Act to be confronted from I.O. He also submitted that sole eye witness (P.W-10) was competent to take oath and she is wholly reliable. Hence, the appeal is devoid of any merit and fit to be dismisses.

7. Before embarking upon the re-appreciation of evidence, it is important to see whether P.W.10, aged about 14 years, should have been allowed to testify by learned lower court without recording about any test to the effect that she was intelligent enough to understand the questions and give rational answers, on her deposition?

8. Section 118 of the Indian evidence Act speaks like, "All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind". Explanation- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

9. Under this section, all persons are competent to testify, unless they are, in the opinion of the Court (a) unable to understand the questions put to them, or (b) to give rational answers to those questions, owing to (i) tender years, (ii) extreme old age, (iii) disease of mind or body, or(iv) any other such cause. Even a lunatic, if he is capable of understanding the questions put to him and giving rational answers, is a competent witness.

10. People are born with a nearly full complement of the brain''s neurons, but the numbers of synapses, the junctions that connect neurons, proliferate throughout childhood, reaching their peak during early adolescence-at about age 11 for girls and age 14 for boys.

11. There is no definition of tender age in Indian Evidence Act but as per ''tender years'' doctrine'' which is legal principle and has existed in family law since the late nineteenth century, it presumes that a child''s tender years (generally regarded as the age of four and under) the mother should have custody of child. The doctrine often arises in divorce proceedings.

12. It has been held in case law reported in The State and Others Vs. Dukhi Dei and Others, AIR 1963 Ori 144 : (1963) CriLJ 294 , ''Ordinarily, girls have full power of understanding and give rational answer after attaining age of 12 or 13 years, when they normally attain puberty.

13. It has also been observed by Hon''ble Supreme Court in case of Tehal Singh and Others Vs. State of Punjab, AIR 1979 SC 1347 : (1979) CriLJ 1031 ''Regarding

appreciation of the evidence of a child witness, the Court has to see the surrounding circumstances and probabilities, to assess the credibility and trust-worthiness of the evidence. Whether a child witness could be believed or not depends upon the circumstances of each case. A boy of thirteen years from rural area with mature understanding cannot be treated as a child witness".

14. As a rule of caution, now it is important to decide in the light of aforesaid decision, whether the girl witness aged about 14 years in the case on hand was intelligent enough to understand the question and give rational answers or not?

15. To examine the correctness of the trial court"s decision to permit P.W 10 to adduce evidence in its court, we have gone through her early statement (FIR), her examination-in-chief on oath and lengthy cross-examination conducted by learned counsel and found that (i) this witness is girl child of age 14 years from rural area (ii) police had relied her intellectual capacity at the time of recording FIR (iii) Oath was administered to her at the time of deposing evidence in court (iv) trial court had fully acquainted the fact that P.W.-10 was of 14 years old girl at the time of adducing her evidence as it mentioned at the time of discussion of the evidence of this witness in its judgment about her age as 14 years meaning thereby the learned trial judge relied her competency to testify as witness and most importantly (iv) she has faced cross-examination conducted by an astute learned defence counsel and intelligently discharged her obligation to state truth by giving rational answers to his questions. Hence, we have no doubt in our mind that P.W. 10 had full power of understanding and give rational answers and thus competent to testify as a witness in the case on hand.

16. It has also been held in case laws reported in Shanker Lal Vs. Vijay Shanker Shukla and Others, AIR 1968 All 58 , Jai Singh Vs. State, (1973) CriLJ 1466 ; and Santosh Mandal Vs. State, (1983) CriLJ 773 that though it may be desirable to make a record of the questions and answers for testing the competency of a person to testify as witness, the failure to record the same is not fatal, as the decision primarily rests with the trial judge.

17. The prosecution, in order to bring home the charge, examined altogether 13 witnesses in this case.

"P.W-1, Monika Demta she deposed hearsay evidence about occurrence but stated about that quarrel arisen for uprooting kolhu in front of her house during cross-examination.

P.W.2, Meera Devi daughter of deceased- Hearsay witness.

P.W.3, Irini Demta wife of deceased-Hearsay witness.

P.W.-4, Sisir Demta has stated the hearsay evidence on the point of occurrence but during cross-examination she has affirmed the presence of P.W.10 at P.O. She has also supported about the dispute arisen for uprooting Kolhu before this occurrence.

P.W.5 Anita Demta daughter of deceased-Hearsay witness.

P.W.6 Mala Demta daughter of deceased-Hearsay witness.

P.W.7 Imanual Topno witness of inquest report only.

P.W.8 Turia Topno witness of inquest report and hearsay witness to occurrence.

P.W.9 Satyanand Demata- Hearsay witness to occurrence but he has stated that he reached at P.O. having heard alarm raised by P.W.10, who was present there.

P.W.10 Enzilina Gress Demta (eye witness/informant)

P.W.11, Dr. Ramesh Prasad has proved P.M. report as exhibit 2 and deposed medico legal evidence.

P.W.12 Asian Demta has stated that he reached at P.O. having heard cry of P.W.10 and during cross-examination he affirmed the presence of P.W. 10 at P.O. but has deposed hearsay evidence on the point of occurrence.

P.W. 13 Paneshwar Prasad is formal witness, who has proved that I.O. has died. He has also formally proved fardbeyan and carbon copy of inquest report as exhibit 3 and 4 respectively."

18. P.W.-11 is Doctor Ramesh Prasad, who conducted the post-mortem examination on the dead body of Bardan Demta in sadar hospital Gumla on 06.05.1998 and found the following: Rigor Mortis present in both upper and lower limb

"(i) incised wound of skull on right occipital region 1 1/2 "X 1" X bone deep with blood clot,

(ii) incised wound in front of neck 3 1/2 " X 1" Trachea and esophegous cut, large vessel of neck also cut with blood clot. Nature of both the injuries were grievous and opined by the doctor to be caused by sharp cutting weapon like Tangi.

Cause of death was hemorrhage and shock and due to asphyxia, Time elapsed since death till the time of post-mortem examination was 24-36 hours."

19. We do not feel the necessity of entering into a detailed discussion with regard to each and every witness, who had arrived at P.O. after occurrence and seen the injuries over the body of deceased only.

20. This case is based on evidence of solitary eye witness P.W.10 Enzilna Gress Demta (informant), who has deposed on oath that on 05.05.1998 at around 6.00 A.M. her father was going to till the field with tiller and oxen. When she came out from her house to go to school, at that time she saw that the accused was also going, holding a Tangi in his hand, behind her father. He dealt tangi blow on the head of her father from behind, due to which

her father fell down. Thereafter, he dealt Tangi blow on his neck as a result of which her father died. Meanwhile, he fled away. The occurrence took place beneath the mango tree. Having seen the occurrence, she started crying whereupon her family members came there. During cross-examination she answered to the question put by learned defence counsel about date of quarreling for uprooting kolhu by saying that it happened about 5-6 months ago since murder of her father when the accused had given threatening to take revenge from her father and thus she has affirmed about the genesis of occurrence and motive behind murder. To test her memory, learned defence counsel had asked about the name of day on 3.5.1998 thereupon she correctly replied that it was Sunday on 3/05/1998. (FIR speaks that it was Tuesday on 05/05/1998) She has affirmed her presence at P.O. by describing the manner of occurrence in details to the effect that at the time of occurrence she was behind her father and saw that the accused gave first tangi blow at her further from behind and shortly after he dealt second blow on the neck of her father, when he fell down due to first blow. She has also affirmed the P.O. by saying that it situates 100 yards from her house. On being asked when she used to go to school, she replied that at 8 A.M but it was pointed out by learned A.P.P that in this area it is prevalent that coaching classes start before timing of school and hence we are of view that the said answer of child witness to the vague question put by learned counsel intelligently (without clarifying the fact as why was she going to her school at 6 A.M on the day of occurrence?) can not wash away testimony of this witness, if she is found to be truthful and reliable on all material aspects.

21. On scrutiny of evidence, we found that P.W. 10 has proved her presence at P.O. at the time of occurrence and this fact has also been corroborated by P.W.4, P.W.9 and P.W.12, who had arrived at P.O. after occurrence having heard her cry. This eye witness has stated that first tangi blow was dealt on the head of her father from behind and autopsy report reveals that anti-mortem injury No. 1 was found on occipital region of deceased. On the basis of reality test, we are of the view that the circular motion of tangi blow can only cause such injury on occipital region of deceased when it is dealt from behind and thus medical evidence has not only nicely corroborated the manner of occurrence as stated by P.W. 10 but also proved the fact that P.W. 10 is a trustworthy eye witness to occurrence. Weapon of assault as per FIR and evidence deposed by P.W.10 is tangi and medical expert has also opined seeing the injuries on person of deceased that such type of sharp injuries could be caused by sharp cutting weapon like tangi. Genesis of occurrence and motive behind occurrence has also been proved by P.W. 10 by the test of cross-examination and this fact has also been corroborated by P.W. 1 and P.W.4.

22. After churning the entire prosecution evidence once again in its right perspective, we do not find any reason to disbelieve Enzilna Gress Demta (PW-10), daughter of the deceased (Bardan Demta), who has turned out to be a wholly reliable eye witness to the occurrence as her evidence on oath not only gets support from all other attending circumstances, even medical evidence also fully corroborates her statement.

23. Viewed thus, appellant has no escape from the charge of Section 302 IPC, for which he stands convicted and sentenced. We thus maintain his conviction and sentence as already recorded by the learned trial court.

24. The net result is that appeal on hand stands dismissed, being devoid of any merit in it.

25. Since instant appeal has been filed through jail, Registry is directed to inform the appellant of the outcome of the instant appeal without any delay.

26. A sum of Rs. 3,300/- shall be released to Mr. Jay Shankar Tiwary for giving assistance to the court after having been appointed as Amicus Curiae for defending the cause of accused.