

(2016) 05 JH CK 0088

JHARKHAND HIGH COURT

Case No: Criminal Appeal (D.B.) No. 587, 590 of 2005 (Against the judgment of conviction and order of sentence dated 18.03.2005 & 21.03.2005 respectively passed by the 7th Addl. Sessions Judge, F.T.C.-IV, Godda in connection with S.C.No.37 of 2004/38 of 2004).

Pappu Mandal @ Hiralal Mandal
(in Cr. Appeal (D.B.) No. 587 of
2005) - Appellant @HASH The
State of Jharkhand (in both the
appeals)

APPELLANT

Vs

RESPONDENT

Date of Decision: May 10, 2016

Acts Referred:

- Arms Act, 1959 - Section 27
- Penal Code, 1860 (IPC) - Section 302, Section 34

Citation: (2016) 4 JBCJ 364 : (2016) 4 JLJR 470

Hon'ble Judges: D.N. Upadhyay and Ratnaker Bhengra, JJ.

Bench: Division Bench

Advocate: Mr. A.K. Kashyap, Sr. Advocate, Mr. Anurag Kashyap and Mrs. Supriya Dayal, Advocates, for the Appellants; A.P.P, for the State

Final Decision: Dismissed

Judgement

D.N. Upadhyay, J. - These Cr. Appeals have been directed against the judgment of conviction and order of sentence dated 18.03.2005 and 21.03.2005 respectively passed by the 7th Addl. Sessions Judge, F.T.C.-IV, Godda in connection with S.C.No.37 of 2004/38 of 2004, corresponding to G.R.No.674/2003, arising out of Pathargama P.S. Case No. 94/2003 whereby the appellants have been held guilty for the offences punishable under Sections 302/34 of the Indian Penal Code and 27 of the Arms Act and sentenced to undergo R.I. for life under Section 302/34 of the Indian Penal Code and to pay fine of Rs.5,000/- each, in default of payment of fine each of the appellants shall further undergo R.I. for three months. Under Section 27

of the Arms Act, imprisonment for one year. The sentences so passed were directed to run concurrently.

2. The facts appearing from the fardbayan of Rekha Devi are that between intervening night on 1/ 2 July, 2003 at about 2 a.m. the informant woke up after hearing some noise. She had noticed presence of 6-7 miscreants in the house and they were armed with gun, pistol, lathi etc. The informant apprehending danger made her husband woke up but till then appellant-Pappu Mandal @ Hiralal Mandal and accused Mukesh Mandal opened fire from their gun causing injury to Jugal Mandal (husband of the informant). It is disclosed that Jugal Mandal in order to save himself, ran towards northern door of the house to escape but he was chased by the miscreants, who are named in the F.I.R. Further occurrence took place outside the house in the field of Sildhar Choudhary and husband of the informant was done to death. The informant tried to save her husband but she was assaulted by accused Jaldhar Mandal by means of butt of the gun. On "Hulla" people of the locality assembled, who are also named in the F.I.R. At the time, the informant was going outside the house to save her husband, she had noticed presence of other accused including Usha Devi and Jira Devi. These two ladies had pulled "Sari" of the informant as a result she fell down. Seeing the villagers coming towards the place of occurrence, the accused persons fled away. The reason behind the occurrence was old dispute relating to village rasta. On the basis of fardbayan of Rekha Devi, recorded on 02.07.2003 at 9:40 hours at her resident, Pathargama P.S. Case No. 94/2003, under Sections 302/34 of the Indian Penal Code and 27 of the Arms Act against the appellants and their associates, who are named in the F.I.R., was registered.

The investigation was carried out. During investigation attendance of appellants and accused persons namely, Parmeshwar Rai, Laddu Mandal and Sahayam Mandal was secured. Since remaining accused remained absconding, charge-sheet against the appellants and aforesaid three accused was submitted. Accordingly cognizance was taken and the case of the appellants was committed to the court of Sessions and registered as S.C.No.37 of 2004/38 of 2004.

Charges under Sections 302/34 of the I.P.C. and 27 of the Arms Act against the appellants and their associates were framed to which they pleaded not guilty and claimed to be tried.

To substantiate the charges, the prosecution has examined altogether 16 witnesses whereas Santona Haldar has been examined as D.W.1 on behalf of the appellants. Gugal Mandal (P.W.1) who had seen part of the occurrence. Kundan Mandal (P.W.12) happens to be son of the deceased, Rekha Devi (P.W.14) is the informant and wife of deceased and they are eye-witnesses to the occurrence. Jai Prakash Mandal (P.W.2) also reached to the place of occurrence after hearing sound of firing but he was threatened by the miscreants after which he returned back. Foto Mandal (P.W.3) had seen the appellants and their associates fleeing from the place of occurrence. He

had seen dead body of Jugal Mandal lying near hand pump in front of the house. Pappu Mandal (P.W.4) is a hearsay witness. Dinesh Mandal (P.W.5) had also reached to the place after hearing sound of firing. He had also seen the appellants and their associates present in the field of Sildhar Choudhary. He had also seen Jugal Mandal lying on the cot. Ajay Mandal (P.W.6), Bhairo Mandal (P.W.7) and Magan Yadav (P.W.8) are the witnesses, who had reached to the place of occurrence after assault was over. Vikash Mandal (P.W.9) and Sunil Mandal (P.W.10) are the witnesses to the seizure list and they have proved their signatures Ext. 1 to 1/b respectively. Ashok Kumar Mandal (P.W.11) and Meena Devi (P.W.13) have turned hostile and they have not supported the prosecution case. Kundan Mandal (P.W.12) is the son of deceased and he has supported the prosecution case. Rekha Devi (P.W.14) is the informant and she has supported her contention made in the fardbayan. Dr. Shobhan Murmu (P.W.15) had conducted postmortem examination on the dead body of Jugal Mandal and she has proved postmortem report (Ext.3). Vishnu Kumar Yadav (P.W.16) is the formal witness and he has proved fardbayan (Ext.4), formal F.I.R. (Ext.5) and signature of Officer-in-Charge of Pathargama Police Station on the seizure list (Ext.6 and 6/a).

3. The appellants have assailed the impugned judgment on the ground that P.W.12 is a child witness. He was sleeping and he had not seen the occurrence. P.W.14, who is the informant and wife of deceased, has tried to project herself as eye-witnesses. As a matter of fact P.W.14 is not fully and wholly reliable witness. She has failed to describe the entire episode, no occurrence had taken place inside the house of deceased. The admitted evidence available on record is that the deceased was having criminal antecedent, he was an accused in a case of dacoity and arms act. The witnesses, who reached to the place of occurrence after hearing gun sound, had seen the deceased lying in the field of Sildhar Choudhary. The possibility cannot be ruled out that the deceased might have been killed by some criminals outside the house because he was found lying in the field of Sildhar Choudhary and from there dead body was picked up and brought to the house of informant. There are vital contradictions in the statement of P.W.12 and P.W.14. P.W. 12 says that after shots were fired on the deceased, he along with his mother (P.W.14) went outside the house to inform the villagers and relatives but this contention of P.W.12 does not find support from evidence of P.W. 14. Non-examination of the I.O. is fatal to the prosecution because place of occurrence has not been proved by the witnesses. The informant has stated that her husband had sustained only gun shot injury on his person but postmortem report (Ext.3) indicates that deceased was also having incised wound on his person. How the deceased sustained incised wound, has not been explained by any of the witness including so-called eye-witnesses P.W. 12 and P.W.14. Furthermore the informant has stated that bullet fired on the face of deceased disappeared after creating exit wound in the skull but no such injury was noticed by the Doctor during postmortem examination. Therefore the manner of occurrence as described by P.W.12 does not find support from the postmortem

report (Ext.3).

Appellant Pappu Mandal @ Hiralal Mandal has taken plea of alibi and he has examined D.W.1 and proved the certificate as Ext.D and attendance register (Ext.E). D.W.1 has clearly stated that Pappu Mandal was working as night guard in the school and he was all along present on his duty in the night shift from 01.07.2003 to 25.08.2003. Finding of trial court and the reasoning for disbelieving D.W.1 is not tenable. Incorrect finding has been given. As a matter of fact, appellant-Pappu Mandal was all along attending his duty till 25.08.2003 and after knowing the fact that his appearance is required, he has surrendered on 29.08.2003 and remanded to jail custody. It is not a case that Pappu Mandal was remanded to jail custody on 10th July, 2003 and again non-examination of the I.O. Has become fatal because it could not be asked as to what investigation was done on the plea of alibi taken by the appellant-Pappu Mandal. Old enmity prevailing between the parties is admitted. Prior to institution of present case, mother of appellant-Pappu Mandal had lodged a case in which the deceased was figuring as accused. In such case of old enmity implication of more and more person of other side is always expected and that has been done in the case at hand. The informant has named so many persons including appellant-Pappu Mandal, who was not present at the scene of occurrence. There are vital contradictions in the statement of other witnesses too. The witnesses who have been claiming that they had reached to the place of occurrence after hearing sound of firing have given contradictory description of the place of occurrence, the place where the deceased was lying, the place where the appellants were standing and also contradiction is appearing in the names of accused persons present at the scene of occurrence. Somebody has stated that they had seen the deceased lying in the field of Sildhar Choudhary, somebody has stated that they had seen the dead body of Jugal Mandal lying in front of his house near "Chapa Kal" whereas some witnesses have stated that they had seen dead body of Jugal Mandal lying on a cot inside the house. On the point of alibi learned Counsel has referred the statement of Bhairo Mandal (P.W.7), who has stated that Pappu Mandal @ Hira lal Mandal was working in West Bengal and that contention of P.W.7 find support from the evidence of D.W.1 and the documents Ext.D and Ext.E. Bhairo Mandal (P.W.7) is an independent witness and he has not been declared hostile.

Last but not the least, it is submitted that altogether 5 accused persons including appellants were charge-sheeted and they were put on trial but out of them three have been acquitted from all the charges. Remaining accused, who are named in the F.I.R., have not been charge-sheeted till the date. What happened to those accused persons remain unknown due to non-examination of the I.O. The impugned judgment is highly erroneous, based on misappropriation of facts and evidence and therefore it is liable to be set aside.

4. Learned A.P.P. has opposed the argument and submitted that non-examination of the I.O. has not caused prejudice to the appellants and the trial shall not vitiate only

because of that reason. P.W.12-Kundan Mandal and P.W.14-Rekha Devi (informant) are most natural witnesses and they have given true account of the occurrence. The time of occurrence is 2 a.m., the place of occurrence is the house of the deceased, P.W.12 and P.W.14 are son and wife respectively of the deceased and their presence in the house at that wee hour was expected and quite natural. Learned A.P.P. has submitted that the informant woke up after hearing some noise inside the house and she had seen 6-7 miscreants who were having firearm, lathi etc. in their hand. It was not expected that she would have explained respective weapons held by each and every accused but then she has stated that miscreants were having long barrel gun, small firearm gun, lathi and other weapon. The occurrence commenced inside the house of the deceased when Pappu Mandal and Mukesh Mandal opened fire from their gun causing injury to deceased. When the deceased tried to escape by opening the northern door of the house, he was chased and later part of the occurrence had taken place in the field of Sildhar Choudhary and that part of the occurrence was witnessed by P.W.1, P.W.2, P.W.3 and P.W.5. When these witnesses tried to intervene, they were chased and threatened and thereafter they disappeared from the place where assault on deceased was going on. Learned A.P.P. has submitted that appellants have given much stress that place of occurrence has not been proved because I.O. has not been examined. Under such circumstances the place of occurrence described in the case diary may be perused to find out the truth.

It is submitted that prosecution has proved its case beyond shadow of all reasonable doubt by examining the witnesses who reached to the place of occurrence after hearing sound of firing. P.W. 12 and P.W. 14, who are eye-witnesses, also proved inquest report, seizure list, fard bayan etc. There is no merit in this appeal and the same is liable to be dismissed.

5. We have considered the rival submission and we find that it is not a case in which conviction has been recorded on the solitary testimony of P.W. 14. The prosecution case brought on record by informant find support from the evidence of P.W. 12, P.W.1 to P.W. 3, P.W.5 and P.W. 15 (Dr. Shobhan Murmu). It is consistently stated by the witnesses that occurrence took place between intervening night 1/ 2nd July, 2003 at about 2 a.m. According to the appellants, occurrence took place inside the house of deceased but according to prosecution witnesses the occurrence commenced inside the house while the deceased was sleeping on a cot with his wife. P.W.12, who happens to be son of the deceased was also sleeping in the house. It was argued by Counsel for the appellant that prosecution story is completely silent as to how and when and by which way the appellants entered into the house of deceased. The circumstances under which the informant has been claiming that she woke up does not appear to be acceptable and therefore, her contention made in the fardbayan that she had noticed presence of accused persons in the house stood falsified. She had not seen the appellants causing assault to her husband inside the house. It was submitted to the extent that no

occurrence took place inside the house. To find out the answer, we have examined the evidence of P.W.12 and P.W. 14. The informant has clearly stated that she woke up after hearing some noise in the courtyard and prior to that she was sleeping.

Therefore, it is not expected that while informant was sleeping she could learn how the appellants entered in the house and by which way. When she identified the appellants and their associates she apprehended danger and made her husband Jugal Mandal woke up. Since he was in deep sleep he could not understand the situation after he woke up but till then appellant Pappu Mandal and Mukesh Mandol opened fire causing injury to him. He tried to escape by opening northern door of the house but chased by the appellants and their associates. Later part of the occurrence had taken place outside the house in the field of Sildhar Choudhary, therefore, facts remained that P.W. 12 and P.W. 14 had witnessed the occurrence which had taken place inside the house and evidence of P.W. 12 and P.W. 14 is that Pappu Mandal and Mukesh Mandal opened fire from their gun causing injury to deceased Jugal Mandal. We do not find that contradiction raised by appellants that P.W. 12 has stated that he along with his mother (P.W.14) had gone outside the house to inform relatives and villagers but P.W. 14 has not said like that in her deposition in Court. This contradiction or omission appearing in the statement of these two witnesses is not sufficient to discard or disbelieve their entire evidence brought on record by them. The informant has stated that she had followed her husband then she was chased by the appellants but she was intercepted and assaulted by butt of gun by one of the accused Haldhar Mandal. It is also disclosed that two of the ladies namely Usha Devi and Jira Devi, who were standing outside the house, had pulled her "Sari" and restrained her. The informant has clearly stated that those two ladies at the time of fleeing from the place left their slippers and those slippers were seized by the police in course of investigation. The seizure witnesses have stated that slippers were seized from the place of occurrence. Therefore, we find that contention made by the informant find support that she was restrained at the door step and she was not allowed to move.

6. We have examined the evidence of P.W. 1 to 3 and P.W.5. These witnesses have stated that after hearing sound of firing they were attracted towards the place of occurrence. When they reached near the house of Jugal Mandal they had seen Jugal Mandal lying in the field of Sildhar Choudhary. The appellants and their associates were present. They had been threatened to go away. P.W. 1 has stated that he had seen the appellants and their associates causing assault to deceased Jugal Mandal. Jai Prakash Mandal (P.W.2) had also seen the appellants and their associates present in the field of Sildhar Choudhary. He was threatened by them to move from the place. After the appellants fled away from the place he brought Jugal Mandol from the field of Sildhar Choudhary and put the dead body in front of the house. P.W. 3 has also repeated almost the same fact in his deposition in Court. He has stated that he was having torch in his possession and at the time of occurrence he had seen the appellant fleeing from the place. He was also asked to do preparation for last rituals.

It is true that what overt act was committed by which of the accused outside of the house has not been explained by any of the witness but the facts remain that after hearing sound of firing witnesses namely, Jai Prakash Mandal, Foto Mandal and Dinesh Mandal reached to the field of Sildhar Choudhary and they had seen the appellants. They had also seen the deceased Jugal Mandal having injury on his person lying in the field of Sildhar Choudhary.

In a case where eye-witnesses are available and they have described the place of occurrence and evidence of those eyewitnesses is reliable and trustworthy, non-examination of the I.O. is not sufficient to disbelieve the place of occurrence. Admittedly, the I.O. has not been examined and the appellants have vehemently challenged that the place of occurrence has not been proved by the witnesses. It was contended that dead body of Jugal Mandol was seen in the field of Sildhar Choudhary and from there it was brought to the house of deceased. Learned Counsel has submitted that no occurrence inside the house ever took place rather entire occurrence had taken place either in the field of Sildhar Choudhary or somewhere else. From the evidence available on record it appears that there are two places of occurrence first was the second one was the field of Sildhar Choudhary where the deceased was seen lying by the witnesses who reached to the place of occurrence after hearing sound of firing.

Since we are not ready to discard evidence of P.W.12, P.W.14, P.W. 1,2,3 and 5, the evidence of P.W.1, P.W.2, P.W.3 and P.W.5 appears to be trustworthy and reliable but even then to find out the truth and to have support too as to what was the actual place of occurrence, we feel inclined to peruse the case diary for the limited purpose to see the place of occurrence noted by the I.O. We find that place of occurrence has been described by the I.O. in para 6 of the case diary.

It is disclosed that place of occurrence is the Pucca house of deceased-Jugal Mandal. Internal portion of the house has also been described. It is indicated that in the internal verandah of the house on a cot the deceased with his wife was sleeping. At the time of inspection I.O. noticed blood stained in the verandah and also beneath the cot. I.O. has further described that towards northern side to go out of the house, a gate of tin was fixed over there.

Now coming to the evidence of P.W. 14. She has stated that at the time of occurrence at about 2 a.m. she was sleeping on a cot in the internal verandah of the house. First part of occurrence had taken place inside the house when appellant Pappu Mandal and Mukesh Mandal opened fire causing injury to Jugal Mandal. The evidence on record is that after having injury Jugal Mandal tried to escape by opening that tin sheet gate. He was chased by the appellants and their associates and later part of the occurrence took place outside the house. Therefore, we find that place of occurrence described by P.W. 12 and P.W. 14 find support from the description of place of occurrence noted by the I.O. in para 6 of the case diary. The second place of occurrence find full support from evidence of P.W. 1, P.W.2, P.W.3

and P.W. 5, therefore, we are not ready to accept that place of occurrence has not been proved and non-examination of the I.O. in this regard is fatal.

Now coming to the plea of alibi taken by Pappu Mandal @ Hiralal Mandal we find that the appellant has examined D.W.1 Santona Haldhar. She has stated that she is the head mistress of Radha Rani Nari Shiksha Mandir, Shantipur, Nadia (W.B.). She has stated that Hiralal Mandal was employed as night guard and he was all along attending his duty from 2.7.2003 to 25.08.2003. She has issued certificate to this effect and that certificate has been marked as ext. D. One of the page of attendance register has been marked Ext. E.

7. We have gone through the evidence of D.W.1 which indicates that father of the appellant Pappu Mandal told that his son has been arrested and he is in need of certificate and accordingly a certificate to this effect dated 10.07.2003 was issued. From the evidence of D.W.1 it is clear that Jaldhar Mandal, who is an accused in this case (father of appellant-Pappu Mandal) had gone to collect certificate on 10.07.2003. This facts go to show that he was well aware about the situation of present case in which he himself was an accused and his son Pappu Mandal was also figuring as main assailant. It is apparent that he has not disclosed true fact before D.W. 1 for obtaining certificate. Furthermore appellant was also knowing that he was figuring as accused in the case lodged by P.W. 14 but surprisingly enough he was all along attending his duty till 25.08.2003 which does not appear to be natural conduct of accused in a case of murder. We further find that Ext. E bears the signature of only appellant Hiralal from July 2nd, 2003 to August, 25, 2003. D.W. 1 has stated that there are 25 staff in the school but name of remaining employee does not appear in this page of attendance register.

8. For the reason aforesaid we are not ready to accept this plea of alibi. Besides the above, it is no where stated that this information was ever given to I.O. or the certificate which was brought on 10.07.2003 was ever handed over to the I.O. for any investigation. Plea of alibi taken by the appellant Pappu Mondol @ Hiralal Mondal is hereby rejected for the reasons stated above.

9. Now coming to the evidence again, the fact remains that consistent evidence available on record is that Pappu Mandal was seen by P.W. 12 and P.W. 14 that he opened fire causing injury to the deceased. No overt act attributed against Hemkant Mandal except that he was identified by P.W. 12 and P.W. 14. What overt act was committed by which accused outside the house has not been brought on record by prosecution witnesses.

10. Considering all these aspects of the matter, we feel inclined to give benefit of doubt to the appellant-Hemkant Mandal and accordingly judgment of conviction and order of sentence dated 18.03.2005 & 21.03.2005 respectively passed by the 7th Addl. Sessions Judge, F.T.C.-IV, Godda in connection with S.C.No.37 of 2004/38 of 2004 against Hemkant Mandal is hereby set aside. Cr. Appeal (D.B.) No. 590/2005

stands allowed.

11. So far Cr. Appeal (D.B.) No. 587/2005 preferred by appellant-Pappu Mandal @ Hira lal Mandal is concerned, the same is hereby dismissed.

12. The appellant, namely, Hemkant Mandal (in Cr. Appeal (D.B.) No. 590/2005), who is lodged in jail, is directed to be released forthwith, if not wanted in any other case and for that the Convicting/Successor Court shall issue appropriate direction, if needed.