

(2002) 06 JH CK 0064

In the Jharkhand High Court

Case No : Criminal Appeal No. 70 of 1996 (R)

Birsa Munda and Another

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 27-06-2002

Acts Referred:

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

Citation : (2002) CriminalCC 619

Hon'ble Judges : Vikramaditya Prasad, J; Lakshman Uraon, J

Bench : Division Bench

Advocate : G.C. Sahu and Mr. P.K. Nayak, for the Appellant; Mrs. M. Chourasia, APP, for the Respondent

Judgement

1. The appellants stand convicted u/s 302/34. IPC for committing the murder of Ajul Khan and sentenced to R.1. for life for that. The deceased Ajul Khan, as per the post-mortem report, Ext.3 provided by PW 10 the Doctor, had sustained the following injuries:-

"Abrasions-(i) 3 cm.x 2 cm. over front of left arm middle part (ii) 7 cm. x 2 cm. over right cheek with diffused contusion of soft tissues of right cheek (iii) 4 cm x 3 cm. over left side of the chest with diffused contusion under-neath; Lacerated wounds:- (i) 5 cm x 2 cm x bone deep over right side of forehead. (ii) 3 cm x 1 cm x bone deep over left parietal region of head; Internal injuries:- There were diffused contusion of soft tissues of forehead and both parietal temporal scalp with both temporal muscles. There was a crack fracture of frontal bone and a mosaic fracture of left fronts parietal temporal bones with lacertain of brain under-neath and presence of blood and blood clots over both sides of brain. There was fracture of 2nd and 4th ribs of left side with blood and blood clots on the left chest cavity."

and died of the head injuries and the injuries referred to above were, in his opinion, caused by lathi and danda and the death had occurred between 12 and

36 hours prior to the time of conduct of the Autopsy on 6th November, 1993. Neither the death nor the identity of the deceased is in dispute. No dispute has been raised with regard to the place of occurrence.

2. The fate of this case hinges on two points-(i) whether the evidence of PW 5, the informant, can be taken on its face value to be true in the face of the fact that the two eye-witnesses, PW 1 Dashrath Munda and PW 2 Onga Munda, from whom the informant PW 5 had received information of the occurrence have become hostile to the prosecution and (ii) whether the oral dying declaration allegedly made before the aforesaid three witnesses. PWs.5,6 and 7, should be treated as the dying declaration and the conviction can be based on that.

3. The informant, as per the fardbeyan, Ext.4. when he was in his house, received information from PW 1 and PW 2 that while they were grazing their cattle in the jungle at about 11.00 a.m. on 5.11.1993, where the deceased was also grazing his cattle, suddenly at 12 O'clock Mansa Munda (the accused, who has been declared absconder and against whom charge-sheet has been submitted as such), Tamamu Munda and Birsa Munda (both the appellants), arrived there armed with lathi and danda and first of all, Mansa Munda hit on the head of Ajul by his lathi causing fracture on his head and Ajul fell down and started writhing, thereafter Tamamu Munda and Birsa Munda also assaulted on the head, arm. thigh of Ajul indiscriminately and when the aforesaid two persons, Dashrath Munda (PW1) and Onga Munda (PW2). tried to intervene, they were also threatened as the assailants chased them also. Consequently, they fled away and came to the village and made Hulla and thereupon the informant along with Balu Mahli, PW4, and Shivu Gope. PW 3, went running to the jungle where the informant found his brother in unconscious condition writhing on the land and that his brother (deceased) also told that all the three accused-persons had assaulted him by lathi and after that they fled away; thereafter with the help of the villagers, he brought his brother to his house where his brother died. The reason behind the occurrence is that fifteen days prior to the occurrence, there was a quarrel between the deceased and the accused-appellants over the grazing of the cattle and at that time, the accused had threatened his brother to do away with his life. It transpires that on the same day, i.e. 5.11.1993 at 7.00 p.m. the fardbeyan was recorded by R.N. Ram. PW 11, which was forwarded to the police station vide Ext.5. after being signed by the informant, Ext. 1, on the basis of which the case Ext.5/I. was recorded and on that place, inquest report, Ext.7 being signed in presence of Shamim Mirdhaga and Aiyub Khan, Ext.2/1. was prepared. It also transpires that during the investigation, some blood stained soil was also seized from the P.O. vide, Ext.8.

4. The defence of the appellant, Tamamu Munda, is the denial of the allegations, besides setting up a case that Mohip Khan, the informant, had stolen his Ox and had gone to Sisaibazar to sell it out, then the appellants had gone there and caught hold of him and brought the Ox and Mohip Khan to the village where there was a panchayat and thereafter, it was Mohip Khan, who had brought some

Mohammedan people from the village Mehura, and had chased them to assault. He (Mohip) had also refused to pay penalty and thereafter, case was instituted in the PS but Mohip obliged the Thana people. Consequently, they did not accept the case of the appellants. It was also the defence of the appellants that Mansa Munda (absconding accused) is a man and they came to know later on that it was Mansa Munda, who had killed Ajul Khan and then it was Mohip Khan the informant, who pressurized the appellants to search out Mansa Munda, who was searched but was not found and thereafter. Mohip Khan falsely implicated him in this case.

5. The defence of Birsu Munda, appellant No. 1, is the denial of the charges, plea of innocence and false implication.

6. The learned trial court relied upon the evidence of PWs.5,6 and 7 and took the oral dying declaration made before them by the deceased as credible and consequently, convicted the appellants.

7. The main contention of the learned counsel for the appellant is that the dying declaration is not proved for the following reasons:-

(i) When Mohip Khan, PW 5, had arrived at P.O., the injured was already dead because Mohip Khan also admitted that he brought the deadbody of his brother from the P.O. with the help of the villagers and in carrying the cot they had changed their shoulders many time, vide para 16.

(ii) The witnesses (PWs 3 and 4), who, according to the fardbeyan, had gone alongwith Mohip Khan to the P.O. had not corroborated Mohip Khan on the point of injured having made any dying declaration in their presence because PW3, Shivu Gope, has been declared hostile and PW4, Balu Mahli, has been simply tendered.

(iii) PWs.6 and 7, who are wife and son respectively of the deceased, have said that in their presence, the dying declaration was made at the P.O., but neither in the fardbeyan, nor in the evidence of the informant, it has come that they had also gone to the P.O. along with the informant. So their presence at the P.O. soon after the occurrence or even at the lime of carrying the dead-body of the deceased by the villagers is not corroborated either by PW 5 or by the fardbeyan.

(iv) The occurrence took place at 12.00 p.m. or prior to it because at about 12, according to the fardbeyan, the information was received by the informant from PWs. 1 and 2. According to PW 6, the wife, after her husband was brought in the house, he died one hour later, vide para 3. According to PW 7, the son, his father was brought to house on cot, he was given water and thereafter he died, vide para 2. PW 7, vide, para 14 says that when he was given water at the P.O., his father was alive.

8. The learned counsel appearing for the appellants, referring to these evidence and also the fardbeyan, said that there is inconsistency in the oral evidence of these three witnesses regarding the death and its time, if the evidence of PW 5 is

taken, then the dead-body was brought to the house or if the evidence of PW 6 (wife) is taken, the deceased died in the house one hour after he was brought to the house and if the evidence of PW 7 is taken, the deceased died as soon as he was brought to the house and given water.

9. Learned counsel appearing for the appellants has serious objection to the finding of the learned trial court. He says when PW 5, in clear terms, said that the dead body was brought to the village, then finding of the learned trial Court that this statement was made in the loose manner (para 12 of the impugned judgment) is not at all acceptable and according to him, the learned trial court has erred in appreciating the evidence. Emphasis has been laid on the death by the learned counsel for the appellants for the simple reason that in the aforesaid circumstances that have been discussed above, any person could not have made any dying declaration and according to him, he was already dead before Mohip Khan or anybody arrived there and even in the fardbeyan the exact time of the death has not been given. Referring to the medical jurisprudence, he said that such injuries are fatal and may cause instantaneous death. He says that the learned trial Court appreciated the evidence only to make the dying declaration reliable.

10. The death occurred either at the P.O. or soon after the deceased was brought to the house, but the question remains as to whether the deceased made any dying declaration.

The learned counsel appearing for the prosecution argued that Ajul did make the dying declaration. If we presume that the dead body was brought, then also before the death, he could have made dying declaration, if he made any. We find that the medical evidence is silent on his point as also on the point as to whether in this situation and in the face such injuries, the deceased was in a condition to speak or not. Therefore, we have to content on the oral testimony of the witnesses. As already stated, it were Shivu Gope, PW 3, and Balu Mahli, PW 4, who had gone to the P.O. along with the informant but they have not supported the version of the informant that in their presence, "and dying declaration was made. Even though the fardbeyan was lodged after 7 hours of the occurrence, yet the names of these two witnesses (PWs.6,7) are missing altogether. It is true that the PW 6 the wife of the deceased, was crying at the time when the police arrived there and therefore, she did not make any statement to the police at that time. But Mohip Khan, the informant, being an adult, was not at all in such a mental condition and when he could give the specific names of the two person"s alongwith whom he went to the P.O. Even in his evidence, he did not say that when he went to the P.O. PWs6 and 7 also came there. Thus, their presence at the P.O. becomes doubtful. PW 7, in his evidence, vide para 6. says that his father was brought to the house in injured condition and died 2 or 3 hours later having declared that the accused-persons had killed him. Thus, according to him, dying declaration appears to have been made not in jungle itself but in the house. Again in para 8. he says that his father has told the names of Mansa

Munda, Birsa Munda and Tamamu Munda as the assailants, but he was disclosing this fact for the first time in the court and earlier he had not disclosed this fact either to the sarpanch or mukhiya or to the villagers or even to the police. So his evidence regarding oral dying declaration comes for the first time in the court. The total circumstances show that the only witness on the dying declaration. If at all it was made, is the PW 5, the informant. Even the informant, in his evidence, vide para 18. admitted this much that sometime he sold Oxen and cows. He has denied any dispute with regard to that with the accused and also denied that he sold any time the Ox of the accused-appellant. But as he also sells out these cattle, then in that circumstance, the defence raised by the appellant Tamamu Munda does not appeal to be completely without any basis. In these circumstances, the question now arises as to whether the so called dying declaration made before PW 5 which is not corroborated by any independent eye-witnesses, or even by the evidence of other related witnesses, i.e. PWs.6 and 7 are too discrepant, to be relied.

11, Thus when independent witnesses have not supported the factum of dying declaration made by the injured, the son of the deceased makes the disclosure about the dying declaration for the first time in the court and even does not divulge it to police or village, sooner or even after some late to villagers, and the place and time of death varies according to witnesses, and the informant has some motive to implicate the accused, then in such circumstances, we find it difficult to agree with the trial court finding on the credibility of the PW 5, so far dying declaration is concerned. Oral dying declaration is a weak evidence and in absence of any independent corroboration it cannot be relied Upon.

12. Now we take the factum of assault. PW 1 and PW2 are the only eye-witnesses. They have been declared hostile, though the I.O. said that in their statements u/s 161, Cr. P.C. they have made statement that the three accused-persons (including the appellants) had assaulted. The other most important eye-witness would have been Mehratun who was the grand-daughter of the deceased. She was also present at the time of alleged occurrence. Her evidence was very important as she had seen the occurrence and she had fled away to the village, but this most competent witness has been withheld and even in the case diary, her statement has not been recorded and she had also not been made a charge-sheet witness. Allegedly she had gone to graze the cattle along with the deceased and out of the two eye-witnesses, the trial court, vide para 13 of the impugned judgment, took notice of this fact but did not discuss the consequence of withholding of this eye-witness though she was the grand-daughter of the deceased. PW2 and PW1 have stated the name of only Mansa Munda (absconding accused) as the assailant. PWs.5. 6 and 7 are not the eye-witnesses. The question is who, whether, the eye-witnesses, who become hostile on a particular point or the persons, who derive information as hear-say witness from them, be relied upon with regard to the names of the assailants.

13. If the eye-witnesses do turn hostile, their evidences is not to be discarded as

a whole rather any truth, which can be found therefore, has to be scanned and taken cautiously. So we find ourselves in a bit difficult situation when the PW 1, who was declared hostile, said that it was Mansa Munda, who is the only assailant. He has denied to have said the names of present two appellants to the informant. Even though the PW 1 and PW2 made their statements before the police as the I.O. said so. then in that case also, we can not legally accept the version of the I.O. or the informant on the point of their taking the names of these two appellants. So the evidence of PW5 that these two witnesses. PWs. 1 and 2 took the names of these two appellants also cannot be relied upon. In the evidence of PW 6 it has come that when they had reached the P.O., vide para 6, she saw all the three accused-persons running away from the P.O. being followed by their mother. Thus she saw all the three accused-persons running away from the P.O. being followed by their mother. This very P. W.6 said in her evidence, vide para 5, that the mother of the accused is her friend saheli with whom she had good social interaction and in para 13 she says that when she received the information for PWs.2 and 1, the mother of the accused was also fetching water from the well and was going to her house.

(a) The prosecution has raised an argument that this witness arrived at the P.O. and she saw the two appellants and one absconding accused running away from the P.O. Thus the prosecution wants to say that appellants were the persons who were present when the witnesses, particularly PW 6 arrived there.

(b) Learned counsel appearing for the appellants has argued that according to the I.O., PW 11, the P.O. is at a distance of 1 km. from the house of informant. According to the defence, if the distance is of 1 km, then it will take 15 minutes to cover it and as per the fardbeyan, the informant received information from PWs. 1 and 2, so they had also to cover this distance of 1 km in going from the P.O. to the village and informant coming to P.O. from village and in the process, at least 40-45 minutes would have been consumed before the arrival of the witnesses at the P.O. after the occurrence and in the ordinary course of nature, it is not probate that the assailants should remain at the P.O. standing just only to expose themselves to the view of the witnesses, who assembled there more than half an hour later. Therefore, he disputes the credibility of the evidence of PW6 on this point also that she saw the assailants running away when she arrived at the P.O.

(c) The learned counsel appearing for the appellants referred to para 8 of the evidence of the informant where he said that on 5.11.1993, it was a Friday and he had gone to offer Nawaj to the village Mhcru. which is at a distance of 1 km. from his village:. The learned counsel for the appellants wanted to impress that when had gone to offer Nawaj. he was not at all present in the village and did not receive information from the PWs. 1 and 2 at that relevant time. Thus, by saying this, he wants to impress that this witness also did not reach at the P.O at the time which he claimed rather after much delay and by that time the injured had died and they carried the dead body and this situation belies, according to

him, his claim of listening the oral dying declaration.

(d) Thus, on the basis of above analysis of evidence, we hold that when the eyewitness partially supports the case, even though he has been declared hostile, has to be relied more than a person who derives hearsay information of this occurrence and the name of the assailant from him.

14. Thus, considering the entire facts and circumstances and the evidence as discussed above, we find that the learned trial court has failed in appreciating the evidence of the witness properly and has erred in holding that the dying declaration was a reliable piece of evidence and that these two appellants were also assailants of the deceased, Consequently, we find merit in this appeal and allow the same, reverse the conviction and set aside the sentence. The appellants are acquitted of this charge and are discharged from the bail bonds and set at liberty.