

(2024) 04 JH CK 0012

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 1184 Of 2016

Budheswar Gope

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 03-04-2024

Acts Referred:

Indian Penal Code, 1860 — Section 302
Code Of Criminal Procedure, 1973 — Section 313
Evidence Act, 1872 — Section 101, 106

Citation : (2024) 04 JH CK 0012

Hon'ble Judges : Ananda Sen, J; Subhash Chand, J

Bench : Single Bench

Advocate : Pawan Kumar Pathak, Sanjay Kr. Singh, Virendra Kumar, Priya Shrestha

Final Decision : Dismissed

Judgement

Ananda Sen, J

1. This criminal appeal is directed against the judgment of conviction and order of sentence dated 09th August 2016 passed by Sri Subhash, the learned Addl. Sessions Judge-V, Jamshedpur, in Session Trial No. 134 of 2014, arising out of Mango P.S. Case No. 557 of 2013, whereby and whereunder, the appellant has been punished to undergo rigorous imprisonment for life for committing the offence punishable under Section 302 IPC and further pay a fine of Rs.20,000/-. In default of payment of fine, the appellant is liable to undergo imprisonment for further period of six months.

2. The learned counsel for the sole appellant argued that as per the FIR, it is the nephew of the appellant, who rushed to the informant and informed that the appellant was assaulting the deceased, but surprisingly the said nephew was not examined as a witness. He further argued that the best witnesses, who, in fact, are two children of the deceased, who were present at the place of occurrence, were not examined as witnesses and withholding this material witnesses,

according to him, is fatal for the prosecution, benefit of which should go the appellant. He also argued that no eye witness has been examined in this case. In fact, all witnesses, who had deposed before the Court admittedly they had not seen the appellant giving any fatal blow on the deceased. As per him, P.W.3 cannot be said to be the eye witness, as he reached the place of occurrence after several people have assembled. He argued that the entire case is based on circumstances and since the chain has not been completed, the conviction of the appellant is bad. He further argued that there is no evidence to suggest that this appellant was in the same room where the deceased was found dead. Since during evidence, it has come that there were other rooms in the said house, it was the duty of the prosecution to establish and prove that the appellant was in the same room. He also argued that the confessional statement of the accused should not have been considered by the Court and the same legally cannot be exhibited. So far as complete chain is concerned, he submitted that the Forensic Science Laboratory (FSL) has not mentioned that the blood stains found in the garments of the appellant and also on the murder weapon of the deceased. The Investigating Officer has stated that he recorded the information of murder in the station diary, but surprisingly the station diary was not exhibited. He lastly argued that the police has not investigated the case properly thus the benefit of the same should be given to the appellant. On the aforesaid ground, he prayed for acquittal of the appellant.

3. Learned A.P.P submitted that there are eye witnesses of the occurrence and all the witnesses categorically stated that the appellant was standing with the murder weapon beside the dead body of the deceased and the appellant was apprehended by others. None of the witnesses have stated that the deceased was not present, thus none of the witnesses can be disbelieved. It has been argued that the blood stained weapon was sent to Forensic Science Laboratory for examination along with vests and underwear of the appellant, which were smeared with blood. As per the report, the blood, which was found in the murder weapon and the garments of the deceased has matched and as per the report the blood is of human. When the circumstance was put to the appellant while examining him under Section 313 Cr.P.C, he apparently has taken a false plea that he had chopped chicken. Thus, thus these are all the materials against the appellant. She further argued that Section 106 of the Evidence Act is attracted in this case. On the aforesaid back ground, she submitted that the appellant's conviction is sustainable.

4. Heard the learned counsel for the appellant and learned A.P.P for the State and have gone through the impugned judgment, the evidence, exhibits and the Trial Court Records.

5. The FIR of this case is based on statement of the informant Rohit Gour. He stated that on 1.10.2013 in the morning he was in his house when the nephew of the appellant came to him and informed that this appellant is assaulting his wife, who happens to be the sister of the informant. Receiving the said information, he

reached at the house of the appellant where he saw the dead body of the deceased on cot in the room. The head was severed from the body and was placed on the chest of the body. The nephew and niece who are aged about 6 and 4 years respectively were crying. The informant thereafter immediately rushed out and informed others. He started making enquiry and he came to know that a day prior, this appellant sold some land with his brothers in Mango, which led a dispute between the husband and wife. He also stated that the appellant used to assault the deceased earlier, thus this murder has been committed by him.

On the basis of the aforesaid Fardbeyan, Mango P.S. Case No. 557 of 2013 was registered under Section 302 of the Indian Penal Code.

6. The police submitted chargesheet under Section 302 IPC after conclusion of investigation. After taking cognizance, the case was committed to the Court of Sessions. As the appellant pleaded not guilty, the charge was explained and he was put on trial. The prosecution has examined ten witnesses and some documentary evidences were also produced. After closure of evidences, the accused was examined under Section 313 Cr.P.C. and he did not choose to lead any evidence in defence. The Trial Court, thereafter convicted the appellant for life for committing the offence under Section 302 IPC and sentenced him as aforesaid.

7. In this case, we find that ten witnesses were examined, which are as follows:-

P.W.1 Naren Singh has deposed that he went to the house of Budheshwar and saw the dead body of the deceased whose head was severed. The police came and prepared the inquest report. He signed on the inquest report. He further stated that on 30.9.2013 the appellant sold some land to his brother, resulting in quarreling between the husband and wife resulting in the aforesaid incident. He categorically stated that the appellant was present there and he was arrested.

P.W.2- Sukumar Mohanty has deposed that on hearing hue and cry, he reached the house of the appellant where some persons were also present. He saw the dead body of the deceased. The head was severed from the body of the deceased and was kept on the chest. The appellant-Budheshwar was standing with the murder weapon, which is 'bathi/sickle (sharp cutting weapon to cut vegetable and others). The said weapon was smeared with blood. He deposed that he informed the police. The children of Budheshwar were also present there, who are minor, aged about 3 and 5 years. He stated that there was quarrel between the appellant and the deceased on the previous night. The police seized the murder weapon in his presence and he signed the seizure list. He admitted that he had not seen the Budheshwar murdering the deceased.

P.W.3-Amulya Gope stated that upon hearing hue and cry, he rushed to the house of Budheshwar Gope when he saw the appellant murdering the deceased, who was his wife by 'baithi'. He stated that Rohit Gaur (informant) also reached there and this witness by catching hand of Budheshwar Gope forbade him from

assaulting Rohit also. After some time, the villagers reached including Sukumar Mohanty, Laxman, Ratan, Subhash etc. He stated that the police prepared the inquest report and he has put his signature therein which was marked as Ext.-'X'.

In cross-examination, he stated that he reached the place of occurrence within fifteen minutes after hearing the hue and cry. He stated that before he reached there, children were also present. Laxman and his wife were also present there. He also stated that he had seen Budheshwar giving fatal blow upon the deceased. He stated that he firstly gave a blow and thereafter severed the head from the neck, but he admitted that he did not stop the appellant. He stated that Budheshwar kept the head of the deceased on the chest of the dead body. He also admitted that he did not try to snatch the 'bathi'.

On this point, the Court noted that the witness was getting agitated time to time and was speaking at high speech. The Court also recorded the following:-

"On the prayer of the prosecution witness is recalled and examined by the prosecution and he is declared hostile."

We failed to understand on what point and why, the aforesaid noting was made at the instance of the prosecution when he has supported the prosecution case.

P.W.4- Laxman Gaur deposed that after hearing hue and cry, he reached the place of occurrence. He had seen the dead body and head was severed with the body of the deceased. The police came and recovered the murder weapon from the hand of the appellant.

In cross-examination, he stated that he saw the dead body in the first room after entering the house. He denied the suggestion of false implication of the appellant.

P.W.5-Ratan Gope, who deposed that on hue and cry, he reached the place of occurrence and when he entered the room, he saw the dead body of Asha Devi. The head was severed and kept on the chest of the dead body and the appellant was standing with the murder weapon and the children were crying. He stated that the police seized the blood stained cloths and prepared the seizure list, which he signed. He also identified the seizure list and marked as Ext.-4. He admitted that the informant gave his statement before him. He also signed the fardbeyan, which is marked as Ext.-5.

In cross-examination, he stated that the murder weapon was seized in his presence. He further stated that he had given statement before the police that the accused was standing with murder weapon in his hand.

P.W.6- Subhash Gope deposed that on hearing hue and cry he went to the place of occurrence i.e. house of the appellant where he found that this appellant was standing with murder weapon in his hand and the dead body was there and head was severed and kept on the chest of the body. He stated that the police came and seized the blood stained garments of the appellant which he was wearing and Rohit's statement was recorded in his presence. He identified his signature in

the fardbeyan. He also identified his signature in the seizure list. He stated that the distance between his house and house of the appellant is 300 feet. He also stated that he had informed the police that he had seen the appellant standing with the murder weapon in his hand.

P.W. 7- Doctor Akhilesh Kr. Choudhary conducted the postmortem examination over the dead boy and found the following injuries:-

(i) Head separated from trunk, through upper most neck by a sharp cut injury measuring 9 cm x 8 cm x through and through with head line separating with trunk and all the tissues in the line of wound cleanly severed.

(ii) 2-1/2 cm x 1 cm x muscle and bone deep, sharp cut over center of chin with sharp cut mark over bone would horizontal.

(iii) 4.5 cm x 1-1/4 cm x muscle and bone deep, sharp cut along left eyebrow with sharp cut mark over bone.

(iv) 5 cm x 1/1/2 cm x muscle deep antero posterior along right parietal scalp.

The opinion of the Doctor is as follows:

(i) Injuries noted above were antimortem and caused by sharp cutting weapon moderately heavy.

(ii) Death was due to severance of head from trunk through neck.

(iii) Time lapsed since death within 6-12 hours approximately.

In cross-examination, he stated that he had ascertained that both part of the body i.e. head and rest body is of the same person. He had aligned the head with the neck to confirm such fact though he had not mentioned the said fact in the postmortem report.

P.W.8-Rohit Gaur, who is the informant of this case, has deposed that in the morning Ajay came to his house and told that the appellant is assaulting his sister. When he went to the house of Budheshwar, he saw his sister lying dead and head head was severed and was kept on the chest of the body. The appellant was standing with vegetable cutter (sickle). The vest of the appellant was fully smeared with blood. This witness went to the house and informed their family members and the police. He stated that he had received information that the entire occurrence had taken place as the appellant had sold land in Mango. He has proved the fardbeyan, which was marked as Ext.-7. He also stated that the police came and arrested this appellant and seized the murder weapon.

P.W.9- S.I. Dilip Gagrai has deposed that he received information that a lady has been murdered in the village Pokhari. He recorded Sanha and proceeded thereafter. He reached the place of occurrence and recorded the fardbeyan of Rohit Gaur. He also prepared the inquest report. He also recorded the confessional statement of accused and as per disclosure of the appellant, the murder weapon was recovered from the place of occurrence. The dead body was

sent for postmortem. He recorded the statement of witnesses. He had also sent the murder weapon and the garments of the appellant for examination to the FSL.

In cross-examination, he stated that Sukumar Mohanty, Amulya Gope and Laxman Gope had not stated before him that the deceased was standing with murder weapon. The murder weapon was recovered from the room itself. Even the said statement was given by witness- Ratan Gope.

P.W.-10: Arun Kr. Tiwari produced the murder weapon in Court, which was marked as material exhibit-I.

8. From the evidence we find that the deceased is the wife of this appellant. The homicidal death is proved by the Doctor and the Postmortem report. The place of occurrence is the first room after entering in the house of the appellant. The place of occurrence has been proved by the witnesses P.Ws. 4 and 5 who stated that the dead body was in the first room. All witnesses have stated that the head of the deceased was severed from the neck and was kept near the chest. P.W-. 5 has deposed that this appellant, who is the husband of the deceased was standing beside the dead body and his vest was smeared with blood. The garments and murder weapon were seized. Though, in this case, the Investigating Officer has stated that these witnesses have never stated before him that they have seen the appellant committing the murder, but this is not a fatal contradiction to affect the merit of this case, when there is consistent evidence that this appellant was seen standing beside the dead body. The murder weapon was also recovered from the house where the dead body and this appellant were present.

9. The vest smeared with blood and under garments of this appellant along with blood stained murder weapon were sent for forensic examination. The report was received and marked as Ext.- 18/1. As per report, the blood which was found in the murder weapon, on vest and on underwear of accused are human blood. The appellant failed to explain the human blood properly rather in his statement under Section 313 Cr.P.C, he has stated that he had cut chickens which statement is contradictory to the scientific evidence, as it was clear that blood was not of chicken but that of a human being. Thus, deliberately the appellant had given a false statement under Section 313 Cr.P.C with intention to mislead. Except P.W. 3, none had seen this appellant giving the fatal blow. So far as P.W. 3 is concerned, we hold that he is not fully reliable witness as he has stated that he has seen the appellant chopping the head of the deceased, but he did not forbid him. He also stated that he held the hand of the appellant and kept him away from the informant otherwise the appellant would have killed him. This fact has not been mentioned in the FIR by the informant but that statement that the appellant was present next to the dead body and the dead body was lying in a cot and her head was severed cannot be doubted as all other witnesses i.e. P.Ws. 2, 4, 5 and 6 and the informant have stated in the similar manner. Even P.W. 1 also stated that the appellant was present at the place of occurrence. In statement under Section 313 Cr.P.C, he also stated that he was present in the

house of the deceased. All these clearly lead to only one inevitable conclusion that the appellant was present with the deceased and the blood stained garments of the deceased along with FSL report clearly suggest the guilt of the appellant. The entire chain is complete without any break and there is no doubt that the prosecution has been able to prove beyond all reasonable doubt that the appellant is guilty of the offence, as alleged. It is also not the case of the defence that any other person had committed the murder of the deceased. In fact, it is no once case that there were other person present. There is no scope of doubt in this case.

10. Section 106 of the Evidence Act reads as under;

106. Burden of proving fact especially within knowledge. -- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

It is true that if the prosecution has discharged the initial burden of establishing, prima facie, the guilt of the accused, beyond all reasonable doubt then only Section 106 of the Evidence Act is attracted. Section 106 of the Evidence Act is exception to Section 101 of the Evidence Act and Section 106 cannot be attracted unless the burden is proved by the prosecution.

To discharge the initial burden with certainty, it must be proved that the accused is guilty of the offence. There is no question of 'may' or 'may be'. All possibility and hypothesis should be excluded and the chain must be complete. The five golden principles are laid down by the Hon'ble Supreme Court in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra reported in (1984) 4 SCC 116, which in para 153 of the judgment. The Hon'ble Supreme Court has laid down the rules. It is necessary to quote the paragraph 153 as under;

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of

Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

11. These golden principles are the basic principles of proving a case based on circumstantial principles. In this case, the appellant has failed to discharge the burden of proving the fact, which was upon him in terms of Section 106 of the Evidence Act as the prosecution has proved the guilt of the appellant beyond all reasonable doubt. He was standing next to the dead body of his wife with blood smeared garments and he did not even whisper nor gave statement under Section 313 Cr.P.C as to how she died. The fact that he tried to mislead the Court, is apparent from the statement recorded under Section 313 Cr.P.C as he had stated that he had chopped chicken when admittedly from the scientific examination, the blood which was found in his garments and the murder weapon was detected as of human blood.

12. We also hold that non examination of the child witness and the nephew of the accused, who came and informed the informant about the assault upon the deceased is not fatal, as with the help of other witnesses, who immediately rushed to the place of occurrence, the prosecution has established its case beyond all reasonable doubt against the appellant.

13. Thus on overall consideration, we find that there is no merit in this appeal and the same is thus liable to be dismissed and the judgment of conviction and order of sentence dated 09.08.2016 passed in S.T. No. 134/2014 is confirmed.

14. In the result, this appeal is dismissed. Let the Trial Court Records be sent back to the Court concerned forthwith, along with a copy of this judgment.