

(2021) 02 JH CK 0109

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 446, 481, 482 Of 2011

Chota Dugo Hembram And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 11-02-2021

Acts Referred:

Indian Penal Code, 1860 — Section 34, 38, 300, 302, 326
Code Of Criminal Procedure, 1973 — Section 313
Evidence Act, 1872 — Section 45

Citation : (2021) 02 JH CK 0109

Hon'ble Judges : Shree Chandrashekhar, J; Ratnaker Bhengra, J

Bench : Division Bench

Advocate : Aman Shekhar, Swati Shalini, Vandana Bharti, Ravi Prakash, Saket Kumar

Final Decision : Dismissed/Allowed/Partly Allowed

Judgement

1. In Boarijore (Lalmatiya) PS Case No. 26 of 2008, Sufal Hembram, Chota Dugo Hembram, Bara Dugo Hembram, Dubbo Hembram, Kadbo Soren

@ Chajja Soren and Som Soren were made accused on an 2 Cr. A.(DB) No. 481 of 2011 with analogous cases allegation that in furtherance of

common intention they have committed murder of Bajal Murmu. The wife of Bajal Murmu gave her fardbeyan at 19:00 hrs. on 29.02.2008 at village

Babupur before N.K. Sah, SI of Lalmatiya police station. In his fardbeyan, Talamai Marandi stated that she had accompanied her husband to Hatia

and while returning when they reached west of Dorma Chowk at about 05:00 PM, she saw that the accused were standing near the bicycle shop of

Pradeep Pandit. When they reached near the bicycle shop, Chota Dugo Hembram caught hold of her husband and they started assaulting him.

According to the informant, Chota Dugo Hembram attacked her husband with

knife and when he fell on the ground Sufal Hembram threw a big stone on the head of her husband - her husband breathed his last on the spot. She has further alleged that when Hanju Murmu tried to intervene to save her husband, Chota Dugo Hembram chased him threatening with knife. About the reason for the murder of her husband, she has stated that two months back the accused with an intention to kill her husband had come to her house but when found that her husband was not there, they took away her goat. A First Information Report was lodged against the above named six accused under section 302/34 of the Indian Penal Code and on completion of the investigation a charge-sheet was filed against five of them, except Som Soren. The learned Chief Judicial Magistrate, Godda took cognizance of the offence vide order dated 28.06.2008 and a charge was framed against five persons, namely, Sufal Hembram, Chota Dugo Hembram, Bara Dugo Hembram, Dubbo Hembrom and Kadbo Soren @ Chajja Soren under section 302/34 of the Indian Penal Code vide order dated 20.11.2008.

2. The records of Cr. Appeal (DB) No. 447 of 2011 which were tagged along with these appeals would reveal that a separate charge under section 302/34 of the Indian Penal Code was framed against Som Soren on 17.11.2008 and he has faced the trial in Sessions Case No. 238 of 2008 - he has been convicted and sentenced to RI for life and a fine of Rs. 2000/- under section 302 of the Indian Penal Code. The judgments in both the sessions cases are written by the same learned Sessions Judge and we do not find any reason why the trial with respect to Som Soren was conducted simultaneously but separately in the same Court. In course of hearing, we were also apprised that Dubbo Hembrom and Kadbo Soren @ Chajja Soren

3 Cr. A.(DB) No. 481 of 2011 with analogous cases who were facing trial along with these appellants in SC No. 172 of 2008 had jumped the bail at the stage when their statement under section 313 of the Code of Criminal Procedure was to be recorded by the Court and, accordingly, their case records were separated awaiting for their appearance. In Sessions Trial No. 172A of 2008, they have been convicted and sentenced to RI for life with a fine of Rs.2000/- under section 302/34 of the Indian Penal Code. We have seen the order dated 31.07.2018 passed in Cr. Appeal (DB) No. 537 of 2018 with Cr. Appeal (DB) No. 547 of 2018 by which Dubbo Hembrom and Kadbo Soren @ Chajja Soren were granted bail by a co-ordinate Bench

of this Court. We find that in the order dated 31.07.2018 there is no reference of these criminal appeals and reason for that appears to be a mistake on

the part of the Registry. The learned counsel appearing in Cr. Appeal (DB) No. 537 of 2018 with Cr. Appeal (DB) No. 547 of 2018 is not ready with

the matter and we have already heard these three criminal appeals in substantial parts. Therefore, we are not inclined to adjourn these matters and

would proceed to dispose of Cr. Appeal (DB) No. 481 of 2011, Cr. Appeal (DB) No. 446 of 2011 and Cr. Appeal (DB) No. 482 of 2011- the

appellants in other appeals were convicted by separate judgments.

3. In the trial, the prosecution has examined thirteen witnesses out of whom, the prosecution has projected PW1- Hanju Murmu who is nephew of

Bajal Murmu, PW3-Barnvas Marandi, PW4-Talamai Marandi who is wife of the deceased, PW7-Maradhan Marandi, PW8-Naika Murmu, and;

PW10- Baran Murmu, as the eye-witnesses. PW9, Dr. Pradeep Kumar Sinha who conducted the postmortem examination on 01.03.2008 has found

one bruise and four sharp cut injuries around the neck and occipital region of Bajal Murmu.

4. The learned Additional District & Sessions Judge, FTC-V, Godda has held that the prosecution has proved the date, time and place of occurrence

where the accused assaulted Bajal Murmu and caused his death. The learned trial Judge has further held that the informant has fully supported the

prosecution case and it was established that murder of Bajal Murmu was caused in furtherance of common intention of all.

5. The learned trial Court has discussed the evidence of the informant together with medical evidence in the following manner:

4 Cr. A.(DB) No. 481 of 2011 with analogous cases ""10. From perusal of the evidence of PW-9 Dr. Pradeep Kr. Sinha it is quite clear that the

deceased Bajal Murmu died on account of homicidal violence. The medical officer has stated that the injury no.1 was caused by hard and blunt

substance and other injuries were caused by sharp cutting weapons. According to the prosecution case the accused Chota Dugo, inflicted injury by

knife and the accused Sufal Hembrum dropped a big piece of stone on the head of the deceased and the deceased died on the spot. The medical

evidence fully corroborated the cause of death and injury as stated by the prosecution. PW-4 Talamai Marandi is none else rather she is the wife of

the deceased and she was accompanying her husband at the time of occurrence. She was also coming back from Hatia along with her husband on his

bicycle. Thus, I do not find any reason to disbelieve her testimony. Other witnesses have also supported the prosecution case and there is sufficient

evidence on record to show that while the deceased Bajal Murmu was coming from his bicycle from Hatia along with his wife Talamai Marandi

(informant) these accused persons along with others assaulted him and then accused Chota Dugo Hembrum inflicted injury by knife and Sufal

Hembrum threw a big piece of stone on his head by which he succumbed to injury on the spot.

On the basis of the material on record, I find that these accused persons along with others assaulted the deceased and accused Chota Dugo Hembrum

caused injury by means of knife and accused Sufal Hembrum gave a stone piece blow on the head of deceased and due to this the deceased died on

the spot. The informant has fully supported the prosecution case who was all along with her husband at the time of occurrence. Thus, I am of the

view that the murder of the deceased was committed in furtherance of common intention of all by these accused persons.

6. In SC No. 172 of 2008, the appellants were convicted and sentenced to RI for life and a fine of Rs. 2,000/- each for the offence under section 302

of the Indian Penal Code, with a default stipulation to undergo further RI for three months.

7. Mr. Aman Shekhar, the learned counsel for the appellants has contended that the requisite intention as envisaged under clause Firstly to section 300

of the Indian Penal Code or knowledge on the part of the accused so as to bring their acts under clause Fourthly are not found in the prosecution

evidence and, therefore, conviction of the appellants under section 302/34 of the Indian Penal Code is not proper and liable to be interfered with.

8. The informant has deposed in the Court that on 29.02.2008 she was returning home from Hatia and at about 05:00 PM when she approached

Dorma Chowk she found the accused at the shop of Pradeep Pandit. Her evidence in the Court is in tune with her fardbeyan and she has made

specific allegations of assault upon her husband by Chota Dugo Hembram and Sufal Hembram. PW1 has also claimed that at about 05:00 PM when

he was returning from Hatia near the shop of Pradeep 5 Cr. A.(DB) No. 481 of 2011 with analogous cases Pandit he has seen Bajal Murmu and his

wife returning home on a bicycle. The accused persons caught hold of Bajal Murmu and started assaulting him. PW2 who was going to Dorma

Chowk in the evening of 29.02.2008 received an information on the way that Bajal Murmu has been killed. He has gone to Dorma Chowk where he

has seen the dead body of Bajal Murmu and the people present there told him that Sufal Hembram, Chota Dugo Hembram, Bara Dugo Hembram,

Dubbo Hembrom, Kadbo Soren @ Chajja Soren and Som Soren had assaulted him. PW3 was present at Dorma Chowk and he has seen the accused

apprehending and assaulting Bajal Murmu near the bicycle shop of Pradeep Pandit. PW4 is the informant and, PW5 and PW6 were declared hostile.

PW7 has claimed himself an eyewitness and he has stated in the Court that his statement was recorded by the police. However, his evidence does not

inspire confidence for the reason that he has stated that when he started from Hatia he was drunk and after about one hour he reached there (Dorma

Chowk). PW8 who is uncle of Bajal Murmu has deposed in the Court that he has seen the incident in which Bajal Murmu was killed. His statement

was recorded by the police and he has stated that he had gone to the police station with the dead body. PW10 was also present at Dorma Chowk at

the time of the occurrence, has seen the accused near the bicycle shop of Pradeep Pandit and assault upon Bajal Murmu. PW11 who was the

Chaukidar brought the dead body to hospital for postmortem examination; PW12- Dheni Hembrom has stated in the Court that on hearing hulla he

had gone to the place of occurrence where he has seen the dead body of Bajal Murmu, and; PW13 is the the second Investigating Officer in the case

- the first Investigating Officer was not examined during the trial. While examining the evidence of the prosecution witnesses we have taken due care

in respect of PW1, PW2, PW4 and PW8 who are intimately related to Bajal Murmu. The conduct of PW2 who has said that after seeing the dead

body of Bajal Murmu he had gone to his in-laws' place at Dorma Chowk may not appear natural and evidence of PW10 who has admitted in his

cross-examination that his house is at a distance of about one and half kilometre away from the shop of Pradeep Pandit was challenged by the

defence on the ground that he is a chance witness, but, on an overall assessment of the prosecution evidence we find that the witnesses have fully

supported the prosecution as regards presence 6 Cr. A.(DB) No. 481 of 2011 with analogous cases of the appellants at the place of occurrence along

with the other accused. The minor inconsistencies in the evidence of these witnesses; PW5 and PW6 who were the independent witnesses turning

hostile, and; PW7 stating that his statement was not recorded by the police - would not affect the prosecution case that the appellants along with Som

Soren, Dubbo Hembrom and Kadbo Soren @ Chajja Soren were standing near the bicycle shop of Pradeep Pandit, and; Bajal Murmu was

apprehended, dragged near the bicycle shop and assaulted.

9. Now we shall examine whether the appellants shared common intention to cause death of Bajal Murmu or some of them were bystanders and onlookers.

10. In ""Bharwad Mepa Dana and Anr. v. The State of Bombay"" AIR 1960 SC 289 the Hon'ble Supreme Court has observed that the principle which

section 34 IPC embodies is participation in action with the common intention of committing a crime and once such participation is established section

34 is at once attracted. A common intention necessarily implies a pre-arranged concert, however, merely because it is shown that all the accused

persons carried the same intention but independently of each other it is not enough to attract application of section 34 IPC (refer, ""Pandurang v. State

of Hyderabad"" AIR 1955 SC 216).

11. In ""Girija Shankar v. State of U.P."" (2004) 3 SCC 793 the Hon'ble Supreme Court has observed, thus:

9..... In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that

there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-

arranged or on the spur of the moment; but it must necessarily be before the commission of the crime.....

12. The prosecution has laid evidence that Chota Dugo Hembram caught hold of Bajal Murmu and dragged him from the bicycle. He is the one who

has started assaulting him with knife and after Bajal Murmu fell on the ground Sufal Hembram threw a stone on his head. The witnesses have made

general and omnibus statement about other accused assaulting Bajal Murmu. None of the witnesses has stated that except Chota Dugo Hembram

other accused were also carrying any weapon. Besides him and except as regards Sufal Hembram, the witnesses are completely silent whether any

other accused has played a specific role in the occurrence. There is specific 7 Cr. A.(DB) No. 481 of 2011 with analogous cases allegation against

Sufal Hembram and Chota Dugo Hembram that they have assaulted Bajal Murmu with stone and knife, but the prosecution evidence is not sufficient

to hold that they also shared common intention to murder Bajal Murmu. We are of the definite opinion that death of Bajal Murmu was not caused in

prosecution of the common intention of all. On the evidence laid by the prosecution during trial, the accused are liable for their individual act(s).

Section 38 of the Indian Penal Code provides that several persons engaged or concerned in the commission of a criminal act may be guilty of different

offences by means of that act. The statutory illustration to Section 38 makes it more than clear that several persons may share same or similar

intention, still, they may not have common intention in furtherance of which the final act was accomplished. This is not the prosecution evidence that

after Bajal Murmu was caught hold of by Chota Dugo Hembram he tried to flee away and then others have also chased him. The prosecution has

brought evidence on motive through the informant that about two months back the accused took away her goat and her husband had made a complaint

in this regard, but there is no other evidence to support the prosecution on his point. The motive as spoken by the informant is too weak and slender to

motivate the other accused to commit murder of Bajal Murmu. In our opinion, the prosecution evidence does not implicate Bara Dugo Hembram in

commission of the crime. There is no evidence that he shared common intention to murder Bajal Murmu. His presence near the bicycle shop of

Pradeep Pandit and notwithstanding the witnesses making a statement that all the accused started assaulting Bajal Murmu, we find that the

prosecution evidence is not sufficient to infer his complicity in the crime in any manner whatsoever.

13. Accordingly, the judgment of conviction and the order of sentence of RI for life and a fine of Rs. 2,000/- for the offence under section 302 of the

Indian Penal Code, both dated 11.03.2011, passed by the learned Additional District & Sessions Judge, FTC-V, Godda against the appellant, namely,

Bara Dugo Hembram [in Cr. Appeal (DB) No. 446 of 2011] in SC No. 172 of 2008 are set-aside.

14. Mrs. Vandana Bharti, the learned APP states that the appellant, namely, Bara Dugo Hembram who has served the sentence for more than two

years and three months, with remission, is on bail.

8 Cr. A.(DB) No. 481 of 2011 with analogous cases

15. Accordingly, Bara Dugo Hembram who is the appellant in Cr. Appeal (DB) No. 446 of 2011 is discharged of liability of the bail bonds.

16. PW9, Dr. Pradeep Kumar Sinha who conducted the postmortem examination has found the following injuries on the dead body of Bajal Murmu:

1) Ante-mortem injuries:-

(I) Bruise 3" x 2" over frontal scalp with fracture of frontal bone.

(II) Sharp cut 1" x 1/2" x 1/2" over right side of upper part of neck.

(III) Sharp cut over occipital region of scalp 2" x 1/4" x 1/4".

(IV) Sharp cut 1" x 1/2" x 1/2" over left side of upper part face.

(V) Sharp Cut 3" x 2" x 3" over left side of lower part of neck including muscles and blood vessels.

17. According to PW9, the injury No.(I) was caused by hard and blunt substance whereas the injury Nos.(II) to (V) were inflicted by sharp cutting

weapon - all the injuries were antemortem and grievous in nature. He has further opined that death of Bajal Murmu occurred due to shock and

haemorrhage caused by injury No.(I).

18. The evidence tendered by the prosecution reveals that Chota Dugo Hembram had specific intention to kill Bajal Murmu. He has dragged Bajal

Murmu from the bicycle, chased PW4 who tried to intervene and caused four sharp cut injuries around neck and occipital region of Bajal Murmu. A

sharp cut injury over neck would be highly dangerous and life-threatening. There may not be any doubt that the injuries around the occipital region

would also be very serious. Chota Dugo Hembram has given repeated knife blows on the vital part of the body, he has taken undue advantage and

acted with cruelty. The assault by him on Bajal Murmu clearly indicates that he intended to commit his murder. The medical evidence that the injury

No.(I) has caused death is not sufficient to take his case out of the purview of section 302 of the Indian Penal Code. There is one proposition which is

now quite settled in law, that on the basis of the materials produced on record and after giving due regard to the medical evidence the Court may form

its own judgment. Under section 45 of the Indian Evidence Act which speaks of opinion of the experts evidence of the doctor is only a relevant fact.

19. In ""State of H.P. v. Jai Lal and Others"" (1999) 7 SCC 280 the 9 Cr. A.(DB) No. 481 of 2011 with analogous cases Hon'ble Supreme Court has

held as under:

18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the

necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application

of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor

and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons

stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.

20. Bajal Murmu suffered five grievous injuries and considering the nature and extent of those injuries it cannot be said that one particular injury has

caused death. PW9 has found large amount of blood in the frontal region of the brain and in the cross-examination he has said that the area over

which sharp cutting injury was found on the occipital region of Bajal Murmu is part of the head. We are not medical experts but with our experience in

the subject jurisdiction, we think that all that the medical man could have opined is that the injury No.(I) was sufficient in normal course to cause

death.

21. For the aforesaid reasons, we hold that the injuries caused by Chota Dugo Hembram were cumulatively sufficient to cause death, he intended to

cause those injuries and he is liable to be convicted under section 302 of the Indian Penal Code.

22. Accordingly, the judgment of conviction and the order of sentence of RI for life and a fine of Rs. 2,000/- for the offence under section 302 of the

Indian Penal Code, both dated 11.03.2011, passed against the appellant, namely, Chota Dugo Hembram [in Cr. Appeal (DB) No. 481 of 2011] by the

learned Additional District & Sessions Judge, FTC-V, Godda in SC No. 172 of 2008 are upheld.

23. The allegation against Sufal Hembram is that he picked up a stone and assaulted Bajal Murmu on his head. He was unarmed and from the

prosecution evidence it appears that he picked up a stone lying at the place of

occurrence. The possibility of his act being premeditated is thus ruled out. The evidence of the doctor that the death has occurred due to head injury which can be attributed to him is also not sufficient to hold him guilty for murder. The learned APP has contended that the act of Sufal Hembram would fall under clause Thirdly to section 300 of the Indian Penal Code.

10 Cr. A.(DB) No. 481 of 2011 with analogous cases

24. Clause Thirdly to section 300 of the Indian Penal Code is extracted below:

3rdly.--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death"".

25. Under clause Thirdly to section 300 of the Indian Penal Code the prosecution is required to establish that the accused intended to cause the

particular injury and that injury was sufficient to cause death in the ordinary course. There are two distinct parts of clause Thirdly to section 300 of the

Indian Penal Code, the first part refers to intention of the accused. In ""Jagrup Singh v. State of Haryana"" (1981) 3 SCC 616 the Hon'ble Supreme

Court has held that in order to bring a case within clause Thirdly of section 300 of the Indian Penal Code it must be proved that there was an intention

to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death. The stone was not seized by the

Investigating Officer and therefore size and weight of the stone with which Sufal Hembram has assaulted Bajal Murmu are not known. From the

medical evidence, it also does not appear what was the extent of fracture of the skull and, as noticed above, the finding of the doctor about injury No.

(I) was a stray statement. The circumstances in the case do not establish that Sufal Hembram intended that particular injury which could have been

sufficient in ordinary course to cause death. At spur of the moment he picked a stone lying at the place of occurrence and hit Bajal Murmu. In our

opinion, Sufal Hembram cannot be convicted for murder - he has caused grievous injury which was likely to cause death.

26. Accordingly, the judgment of conviction under section 302/34 of the Indian Penal Code dated 11.03.2011 passed against Sufal Hembram who is

the appellant in Cr. Appeal (DB) No. 482 of 2011 by the learned Additional District & Sessions Judge, FTC-V, Godda in SC No. 172 of 2008 is set-

aside.

27. The appellant, namely, Sufal Hembram is convicted and sentenced to RI for fourteen years under section 326 of the Indian Penal Code.

28. Mr. Saket Kumar, the learned APP states that the appellant, namely, Sufal Hembram who is in custody has served the sentence for more than sixteen years and five months, with remission.

11 Cr. A.(DB) No. 481 of 2011 with analogous cases

29. The appellant, namely, Sufal Hembram [in Cr. Appeal (DB) No. 482 of 2011] shall be set free forthwith, if not wanted in connection to any other case.

30. In the result, Cr. Appeal (DB) No. 481 of 2011 is dismissed; Cr. Appeal (DB) No. 446 of 2011 is allowed, and; Cr. Appeal (DB) No. 482 of 2011 is partly allowed, in the aforesaid terms.

31. Let lower Court records be transmitted to the Court concerned, forthwith.

32. Let a copy of the judgment be transmitted to the Court concerned through 'FAX'.