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**(2019) 10 JH CK 0075**

**In the Jharkhand High Court**

**Case No :** Criminal Appeal (DB) No. 348 of 2011, 1095 of 2012

Dadu Munda And Ors

APPELLANT

Vs

Kariya Munda

RESPONDENT

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**Date of Decision :** 23-10-2019

**Acts Referred:**

Indian Penal Code, 1860 — Section 34, 147, 148, 149, 302, 326, 452  
Prevention Of Witch (Daain) Practices Act, 1999 — Section 3, 4

**Citation :** (2019) 10 JH CK 0075

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

**Bench :** Division Bench

**Advocate :** Nivedita Kundu, H.P. Singh

**Final Decision :** Partly Allowed

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## **Judgement**

Shree Chandrashekhar, J

1. The convicts, namely, Dadu Munda, Thakur Thakura Munda, Jura Munda and Soma Munda are the appellants in Criminal Appeal (DB) No. 1095 of 2012 and the convict, namely, Kariya Munda is the appellant in Criminal Appeal (DB) No. 348 of 2011. Both these criminal appeals arise out of a common judgment of conviction under sections 452/34 and 302/34 IPC. The appellants have also been convicted under section 3/4 of the Prevention of Witch (Daain) Practices Act. They have been sentenced to R.I for life and fine of Rs.10,000/-each under section 302/34 IPC. No separate sentence under section 452/34 IPC and under section 3/4 of the Prevention of Witch (Daain) Practices Act has been inflicted upon the appellants.

2. On the basis of the fardbeyan of Nandi Mudain, the wife of the deceased, recorded on 06.02.2008 at about 11.30 a.m in her village, Khunti P.S Case No. 14 of 2008 was registered under section 147/148/149/302 IPC against the appellants. During the trial, the prosecution has examined nine witnesses; the informant is P.W.7 and her daughter, namely, Dulari Mundain is P.W.3.

3. The prosecution has projected P.W.3 and P.W.7 as the eye-witness.

4. The Dr. Susthir Kumar Sinha-P.W.9 who has conducted the post-mortem examination on 06.02.2008 at about 13:45 hrs. has found the following injuries on Birsa Munda, the husband of the informant:

"External: (i) incised wound on left side of neck standing to back of neck. 7" x 4" cavity deep.

(ii) incised wound upon right side of face below right eye to lower part of the face 5" x 1" x 1/2"

(iii) incised wound on left shoulder 4" x 2" x 1/2"

(iv) incised wound at right shoulder 4" x 2" x 1/2"

(v) incised wound at left index finger 3" x 1/2" bone deep.

on dissection: (i) large and small vessels of neck and vessel of neck cut.

(ii) clots around the neck tissue and other injured tissue."

5. According to the doctor, all the injuries were ante-mortem in nature and death was caused within 12 to 18 hrs. of the post-mortem.

6. The Sub-Inspector of Police, namely, Kanchan Kumar who has recorded the fardbeyan of the informant was not examined during the trial but the fardbeyan and his signature over the fardbeyan were identified by Durga Charan Bodra-P.W.8 who has conducted the investigation in the case. The prosecution has disclosed that Kanchan Kumar was not examined during the trial as he was murdered.

7. In her fardbeyan, the informant has stated that in the night of 05.02.2008 after taking meal her husband had retired to bed in his room while she and her daughter were taking meal. In the meantime, she heard the sound of thumping on the door of her house and she saw that Dadu Munda, Thakur Thakura Munda, Jura Munda, Soma Munda and Kariya Munda, all co-villagers, entered her house. They started assaulting her. Thereafter they went inside the room of her husband who by that time had woken up and the above-named accused persons started assaulting her husband indiscriminately. When her husband, badly injured, fell on the ground and the accused persons left, she informed the chowkidaar. She has stated that the occurrence has taken place in the night therefore she did not inform any other person. According to the informant the reason why the accused persons have assaulted her husband was that they suspected that he was practicing witch craft and they had a land dispute with her husband.

8. In her examination-in-chief, the informant has stated that it was the night of Tuesday, about two years back, when the accused persons had assaulted her husband. She has deposed that after breaking open the door of her house the accused persons entered the house and first assaulted her and thereafter they have assaulted her husband. At that time her daughter was also present in the

house, however, the accused persons did not touch her. The accused persons were carrying tonos.

9. The daughter of the informant, namely, Dulari Mundain has deposed in the court that at about 8 O' clock in the night she along with her parents was in the house. She was taking meal with her mother and her father had retired in his room. She has also spoken about the accused persons breaking open the door of the house, entering the house, assaulting her mother and thereafter assaulting her father with dauli and other sharp cutting weapons.

10. P.W.3 and P.W.7 have made a specific allegation of assault by Dadu Munda on the neck of the deceased.

11. In her cross-examination, the informant has stated that after the accused persons assaulted her she became unconscious. Her daughter-P.W.3 has also stated about injuries on her mother.

12. Mrs. Nivedita Kundu, the learned counsel for the appellants has contended that on such evidence, the informant is not an eye-witness. On assault by the accused persons to the informant, the learned counsel for the appellant has submitted that there is inconsistency in the testimony of P.W.3 and P.W.7.

13. The testimony of the eye-witnesses - P.W.3 and P.W.7 - is consistent, cogent and reliable. They are the natural witnesses. Their presence in the house in the fateful night is natural. They are the related witnesses and may be there are inconsistencies in their evidence but their testimony has to be tested in the background of the fact that they are rustic village women and the informant is not well-versed in Hindi. The inconsistencies brought during their cross-examination are not so substantial that those would amount to contradiction and finally cloud the prosecution's case with serious suspicion. P.W.3 and P.W.7, both, have stated about presence of the appellants in their house who entered the house after breaking open the door. The accused persons were carrying sharp cutting dangerous weapons and they have assaulted the informant in the first instance have been proved by the prosecution. The submission made on behalf of the appellants that the informant after being assaulted at the hands of the accused persons, particularly, Dadu Munda became unconscious and therefore she has not seen the actual occurrence is bereft of substance. In her examination-in-chief, the informant has clearly stated that the accused persons have assaulted her husband who after receiving injuries was drenched in blood and fallen on the ground. The testimony of the investigating officer would indicate that the informant was not well versed in Hindi. The informant has reiterated during her cross-examination that after the accused persons had left her house she had informed the village chowkidaar. On reading the testimony of the informant as a whole, we find that may be for a brief moment she had become unconscious but it is not that she has not seen her injured husband and the accused persons.

14. The daughter of the informant has stated that after the accused persons

started assaulting her mother she sneaked out from the house through back door. The informant has also stated that when she was assaulted by the accused persons, afraid, her daughter had fled away. But then, P.W.3 has seen the accused persons entering the house after breaking open the door. She has also seen the appellants assaulting her mother and thereafter going inside the room where her father after taking meal had gone for bed.

15. In the aforesaid state of evidence, we hold that the prosecution has proved the presence of the appellants at the place of occurrence, that is, in the house of the informant and, at the time of the occurrence. The prosecution has also proved assault by the appellants on Birsa Munda. May be the informant has not entered the room in which her husband was assaulted by the appellants, immediately thereafter she has seen her husband injured and drenched in blood. She was assaulted by the appellants and the appellants were carrying sharp cutting deadly weapon. On such facts, it can be safely inferred that the appellants have assaulted and caused grievous injuries to Birsa Munda.

16. Now, the question is whether the conviction of the appellants under section 302/34 IPC is legal and proper.

17. Intention of an accused can be gathered from his words and conduct, the manner of occurrence, the weapon held by him and part of the body on which injury has been caused to him. It is the prosecution's case that all five appellants were carrying sharp cutting weapon. The medical evidence would reveal that five incised wound have been found on Birsa Munda and according to the informant the entire occurrence has taken place within a short span of time. P.W.3 and P.W.7 have stated that they have identified the appellants in the dhibri light (small lamp). In para 26 of her cross-examination, the daughter of the informant has admitted that she has not seen who amongst the appellants has assaulted her father and how many times. For a brief moment the informant had also become unconscious. In the above crime scene, it is difficult to hold that each one of the appellants has caused injury to Birsa Munda.

18. We find that the prosecution has failed to establish that the appellants shared common intention to cause murder of Birsa Munda and death of Birsa Munda has been caused in furtherance of the common intention of all. It has also come in the prosecution's evidence that the accused persons were nurturing a doubt that the deceased was practicing witch craft. From the prosecution's evidence, all that can be gathered is that the prosecution has proved that the appellants intended to cause grievous injury to Birsa Munda. By now it is well-settled that where there are several accused persons who are said to have inflicted many injuries to the victim but it is not possible to establish who amongst the accused persons has inflicted which particular injury, unless it is proved by cogent evidence that they acted in concert, conviction of all the accused persons under section 302 IPC; with or without aid of section 34 IPC or section 149 IPC, is not proper. In the present case, the doctor-P.W.9 has not rendered a definite opinion which out of the five incised injuries found on Birsa Munda has proved fatal. He has stated

that the cause of death was shock and hemorrhage due to injuries caused by sharp-cutting weapon. On such facts benefit must go to the appellants [refer, "Vijay Singh and Another Vs. State of Madhya Pradesh" reported in (2014) 12 SCC 293 and "Dhanna Chaudhary and Others Vs. State of Bihar" reported in (1985) 3 SCC 680].

19. Accordingly, conviction of the appellants, namely, Dadu Munda, Thakur Thakura Munda, Jura Munda and Soma Munda in Criminal Appeal (DB) No. 1095 of 2012 and the appellant, namely, Kariya Munda in Criminal Appeal (DB) No. 348 of 2011 and order of sentence of R.I for life and fine of Rs. 10000/- each inflicted upon them by the learned Additional Judicial Commissioner-I, Khunti in S.T No. 270 of 2008 are set-aside.

20. The appellants are convicted and sentenced to R.I for Ten years under section 326 IPC.

21. Mr. H. P. Singh, the learned A.P.P submits that according to the letter received from the Jail Superintendent, Ranchi the appellant, namely, Dadu Munda in Criminal Appeal (DB) No. 1095 of 2012 has remained in custody for more than Ten years.

22. Therefore, the appellant, namely, Dadu Munda shall be released from custody forthwith, if not wanted in connection to any other case.

23. The appellants, namely, Thakur Thakura Munda, Jura Munda and Soma Munda in Criminal Appeal (DB) No. 1095 of 2012 and the appellant, namely, Kariya Munda in Criminal Appeal (DB) No. 348 of 2011 are on bail and, therefore, the bail-bonds furnished by them are cancelled.

24. The appellants, namely, Thakur Thakura Munda, Jura Munda and Soma Munda in Criminal Appeal (DB) No. 1095 of 2012 and the appellant, namely, Kariya Munda in Criminal Appeal (DB) No. 348 of 2011 shall surrender before the court below to serve the remaining sentence.

25. In the result, Criminal Appeal (DB) No. 1095 of 2012 and Criminal Appeal (DB) No. 348 of 2011 are partly allowed.

26. Let a copy of the Judgment be transmitted to the court concerned through FAX.

27. Let the lower-court records be sent to the court concerned forthwith.