
(2010) 09 JH CK 0017
In the Jharkhand High Court
Case No : Criminal Appeal No. 768 of 2002

Dhiren Chandra Mahato. and Others

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision : 22-09-2010

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 162, 313
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 141, 146, 147, 148, 149

Citation : (2010) 09 JH CK 0017

Hon'ble Judges : Dilip kumar sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Dilip Kumar Sinha, J.—The instant appeals have been preferred by the Appellants in two sets against the judgment of their conviction and order of sentence recorded against each of them by Shri R.K. Srivastava. Additional Sessions Judge, F.T.C.-3rd, Bokaro in Sessions Trial No. 249 of 1997.

2. The Appellants were convicted under Sections 324/149, 148/149 and 341 of the Indian Penal Code and accordingly each of them was sentenced to undergo rigorous imprisonment for a period of two years, again rigorous imprisonment for two years and simple imprisonment of one month respectively on each count. However, it was directed that all the sentences would run concurrently against each of them.

3. The prosecution story, as it stands narrated in the written report of the informant Jyoti Lal Mahato, was that on 07.09.1996 while he was going through the village road for taking bath in the nearest tank at about 7 p.m. he was restrained by Kalpoo Mahato @ Keloo Mahato and as many as 10 other accused persons surrounded him. The informant alleged that amongst the accused, Vinay Mahato assaulted him by means of Paisa, Jai Deo Mahto pinned him down

forcibly on the earth, Bandhu Mahato pelted stones which caused injury in his left arm and against Shankar Mahto the informant alleged that he assaulted him with stick. The informant further alleged that when the inmates of his house attempted to rescue him, they were threatened by Gour Mahato, who stopped them by brandishing pistol and finally. it was alleged that Dhiren Chandra Mahato smashed his chest by standing over it. All the accused persons escaped from the place of occurrence on the arrival of the villagers on hearing "Halla". The occurrence took place at the doors of the Appellants. On the basis of his written report Chandankiyari P.S. Case No. 59 of 1996 was registered on 09.09.1996 against all the eleven named accused persons i.e. the Appellants herein and after investigation, charge-sheet was submitted against them for the offences under Sections 147/148/149/337/341/323/324/307 of the Indian Penal Code as also u/s 27 of the Arms Act.

4. Charge against the Appellants-accused was framed under Sections 148/341/307/149 of the Indian Penal Code and since no material could be found to the satisfaction of the Trial Judge charge u/s 27 Arms Act was not framed.

5. Mr. Jai Prakash, the learned Sr. Counsel assisted by Shri L.C. Roy, Advocate submitted at the outset that there was no legal evidence against the Appellants so as to call for their conviction and sentence in the given facts and circumstances of the case. Charge against the Appellants was framed under Sections 307/149 of the Indian Penal Code but their conviction was made only u/s 324 read with Section 149 of the Indian Penal Code without any legal evidence on the record. Neither the Doctor who examined the injuries of the victim could be examined nor the injury report could be proved by the prosecution and the Trial Court without taking into consideration that the said materials required for constituting the offence u/s 324 of the Indian Penal Code could not be brought on the record, convicted the Appellants u/s 324/149 of the Indian Penal Code which cannot be sustained under law.

6. The Sr. Counsel further submitted that neither the written report of the informant nor the formal F.I.R. has been properly proved in the instant case and therefore, it could safely be inferred that the very basis for setting the law in motion for the alleged crime could not be proved. The informant P.W. 1 Jyoti Lal Mahto was consistent that the occurrence took place on 07.09.1996 at about 7 p.m.. Whereby he sustained injuries inflicted by the Appellants and he was removed to his house by his brother Bansidhar Mahato. Resides, the witness admitted that he went to the Police Station at about 11 p.m. in the same night and communicated the occurrence. Consequently, he was sent to the Hospital on the next day morning at about 8/9 O'clock. He explained that he returned back his home after delivering his statement and the police arrived on the next day at the place of occurrence.

7. The learned Sr. Counsel attracted the attention by submitting that according to the version of the informant, he had delivered his statement at the Police Station in the night of occurrence on 07.09.1996 itself but the written report that was

presented before the Police Station had got hearing of the date of presentation on 09.09.1996 and it was sent to the Court of C.J.M. on 10.07.1996. The learned Counsel asserted that the police instituted the case on the basis of the written statement of the informant aforesaid which cannot be held to be the First Information to the police in the facts and circumstances and the written report which was the basis of lodging F.I.R. therefore, is hit by Section 162 of the Code of Criminal Procedure. The prosecution failed to explain such discrepancy. Neither signature of the Officer-in-Charge of Chandankiyari Police Station could be proved on the: forma. F.I.R. nor ascribed Bandhu Mahato, who happened to be the brother of the informant could prove the said written report, which was signed by the informant in English. There was no endorsement of the ascribe to the effect that the contents of the written report was read over and explained to the informant in the language known to him and that the informant put his signature after finding its contents correct. The Investigating Officer, who submitted the charge-sheet also abstained from the witness box and his such abstinence highly prejudiced the defence of the Appellants for having been denied of the opportunity to cross-examine him on several issues including of applicability of Section 162 of the Code of Criminal Procedure in the facts and circumstances of the case as to how the information which was given by the informant at the first point in time at the Police Station in the night of the occurrence itself was suppressed and the written report based upon after thought was entertained after two days.

8. Advancing his argument learned St. Counsel submitted that altogether eight witnesses were produced and examined on behalf of the prosecution but amongst them P.W. 3, P.W. 5, P.W. 6 and P.W. 7 were unfavourable to the prosecution hence they were declared hostile. P.W. 2 Kartik Mahato was a hearsay witness who testified that he heard about the altercation between the two groups on the issue of obtaining a contract work of the construction of a bridge. He fairly admitted that his statement was not recorded before the police except his name was noted by the police. P.W. 4 Triveni Mahato deposed that he had seen only Jyoti Lal Mahto and Kalpoo Mahato @ Keloo Mahato at the place of occurrence when he arrived here on their alarm raised during altercation. He further admitted having not seen the occurrence. P.W. 8 Yahia Ansari, an Advocate's clerk is formal in nature who proved formal F.I.R. in the pen and signature of Ajay Singh, the then Officer-in-Charge of Chandankiyari Police Station but fairly admitted that the formal F.I.R. was not drawn in his presence and that he had no occasion to see the Officer-in-Charge Ajay Singh ever writing in his presence. Now the left out evidence was the sole testimony of the informant on the record, full of inconsistency and the same cannot be relied upon for want of corroboration by any other witness. According to his statement the witnesses Triveni Mahato, Kartik Mahato to, Sahdeo Mahato and Balaram Mahto had arrived at the place of occurrence on hearing "Halla" but none of them could be produced and examined on behalf of the prosecution which gives rise to illustration (g) of Section 114 of the Indian (Evidence Act, 1872 that, "evidence

which could be and is not produced, if produced, be unfavourable to the person who withholds it."

9. Advancing his argument, Mr. Jai Prakash learned Sr. Counsel submitted that the Trial Court had committed gross error by convicting the Appellants under Sections 148/149 of the Indian Penal Code. Needless to say, the learned Sr. Counsel asserted that Section 148 of the Indian Penal Code deals with rioting, armed with deadly weapons. Rioting has been defined u/s 146 of the Indian Penal Code which speaks, that whenever force or violence is used by an unlawful assembly or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence for rioting. Section 141 of the Indian Penal Code defines unlawful assembly which means assembly of five or more persons with the common object to do certain act prohibited by the law of the land. Section 149 deals with common object of unlawful assembly that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew like to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. According to the prosecution case the subjective offence as alleged amongst others was the offence u/s 148 of rioting, armed with deadly weapon by an unlawful assembly which suggested that there was nexus between the common object and the offence committed by five and more persons and as such every member of the said assembly was liable for the alleged offence of rioting and for such reason the offence u/s 148 of the Indian Penal Code may be established which needed no aid of Section 149 of the Indian Penal Code for the reasons discussed. The prosecution otherwise also failed to prove the charge u/s 148 of the Indian Penal Code that the Appellants were the members of unlawful assembly, who assaulted the informant with the common object and had there been intention of the Appellants to commit murder, there was no intervening circumstance to prevent any of them in doing away the life of the informant.

10. Finally, the learned Sr. Counsel submitted that there was variation in the statements of the informant in so far as the overt act attributed to the individual Appellant of the appeals. In the earlier statement, The informant had stated that it was the Appellant Shankar Mahato, who assaulted him with bamboo stick on his back and Bandhu Mahato assaulted with stones in his right arm whereas Sujan Mahato assaulted him with stones on his chest but in his deposition he had given altogether different attribution of the Appellants that it was Keloo Mahato, who assaulted with stone, Sujan Mahato and Shankar Mahato assaulted him with sticks on his back and Dhiren Chandra Mahato smashed his chest with legs. In this manner the informant failed to corroborate his earlier statement in his substantive evidence which gives rise to a definite conclusion that the occurrence did not take place in the manner presented by the prosecution.

11. Heard the learned A.P.P. on behalf of the Respondent-State, who submitted

that the minor discrepancy in the statements of the informant can be ignored, yet, fairly stated that there cannot be conviction u/s 148 of the Indian Penal Code read with Section 149 of the Indian Penal Code.

12. Having regard to the facts and circumstances of the case, I find substance in the argument advanced on behalf of the Appellants that the prosecution miserably failed to prove the charge as framed against the Appellants beyond reasonable doubt. The very basis of setting the law in motion i.e. written report presented by the informant and the formal F.I.R. could not be proved properly by the prosecution. There is no other material evidence on the record except the solitary evidence of the informant Jyoti Lal Mahto and the other seven witnesses have not supported or corroborated the prosecution case. There appears substance in the argument advanced on behalf of the Appellants that the written report that was submitted by the informant at the Police Station after two days of the alleged occurrence was hit by Section 162 of the Code of Criminal Procedure. The injuries on the person of the informant have not been proved and the Doctor who examined the injuries abstained from the witness box, so is the case of the I.O. whose absence from the Court deprived the Appellants to cross-examine him with respect to the statement recorded at the Police Station first point in time in the night of alleged occurrence and his objective finding when he visited the alleged place of occurrence. I have gone through the statements of the accused-Appellants recorded u/s 313 of the Code of Criminal Procedure and I find that each of the Appellants was confronted with the generalized questions that they had assaulted the informant Jyoti Lal Mahto with "Lathi. "Danda" and "Farsa" and that they had obstructed the inmates of the house of the informant by brandishing pistol when they came out to rescue the informant but surprisingly there was no charge either under the Arms Act nor there was material that the Appellants obstructed the inmates of the informant on gun point. I have no hesitation to hold that the Appellants have been highly prejudiced for being confronted with such materials which were neither incriminating nor brought on the record in course of trial and that the defence of the Appellants was that they were innocent.

13. In the given facts and circumstances, I find that the prosecution failed to prove the charges against the Appellants beyond reasonable doubt and that the occurrence did not take place in the manner presented by the prosecution.

14. In the facts and circumstances of the case, I find that the judgment of conviction and order of sentence recorded against the Appellants by the Trial Court cannot be sustained under the law and a reasonable doubt is created as to the complicity of the Appellants in the alleged offence, accordingly, all the Appellants of both the appeals are acquitted from their guilt. Their bail bonds stand discharged and this appeal is allowed.