
(2014) 01 JH CK 0099
In the Jharkhand High Court
Case No : Cr. Appeal (DB) No. 775 of 2003

Durga Kisku and Lelha Kole	Vs	APPELLANT
State of Jharkhand		RESPONDENT

Date of Decision : 23-01-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 45
Penal Code, 1860 (IPC) — Section 302, 34, 380

Citation : (2014) 3 AJR 48

Hon'ble Judges : P.P. Bhatt, J;Dhirubhai Naranbhai Patel, J

Bench : Division Bench

Advocate : Priya Shreshtha, Advocate for the Appellant; T.N. Verma, A.P.P,
Advocate for the Respondent

Final Decision : Dismissed

Judgement

Dhirubhai Naranbhai Patel, J.—This appeal has been preferred against the judgment of conviction and order of sentence, dated 01st February, 2003, passed by 1st Additional Sessions Judge, Dumka in Sessions Case No. 37/2001, whereby these appellants have been punished for life imprisonment for the offence punishable u/s 302 to be read with Section 34 of the IPC as well as they have been punished rigorous imprisonment for two years for the offence punishable u/s 380 to be read with Section 34 of the IPC. Both the sentences have been ordered to run concurrently vide order dated 01st February, 2003 by the trial court. Against this judgment and order of conviction, present appeal has been preferred by these appellants. The case of the prosecution is that on 25.03.1999 at 17.00 hrs. (i.e. 5 P.M.) the informant Boro Soren (P.W.-4) gave fardbeyan to police that he is 35 years old and earning his livelihood by farming and labouring. In the night of 24/25.3.1999 the informant, his mother Fuchi Devi and his sister Sanjhali were sleeping in his house after taking meal. At about 12.00 hrs. in night suddenly four persons broken the door of his house and entered his house, in which he identified two persons i.e. Durga Kisko and Lelha Kole but could not

identify other two persons. Thereafter all the four accused persons caught hold his mother Fuchi Tudu (deceased) and assaulted her in head by rod (Sabal). The accused persons also assaulted the informant with lathi and they took away kitchen utensils made of Brass and a Tin Box containing cash of Rs. 700/- and clothes. The informant raised alarm but no villager came there. He further alleged that Durga Kisko told his mother a witch (Dayan) for which panchyati is constituted and Durga Kisko always told the informant that his mother is witch (Dayan) and he will cut her.

Five witness were examined by the prosecution

2. It is submitted by the counsel for the appellants that there are major omissions, contradictions and improvements in the depositions of the prosecution witnesses. This aspect of the matter has not been properly appreciated by the trial court and hence, the judgment of conviction and order of sentence passed by the trial court deserves to be quashed and set aside. It is further submitted by the counsel for the appellants that the so-called eyewitness have not seen the occurrence at all. So far as P.W.-2 is concerned, looking to the deposition given by P.W.-2 to be read with the deposition given by P.W.-5, who is Investigating Officer, there is material improvement in her version before the trial court. This aspect of the matter has also not been properly appreciated by the trial court. Moreover, this P.W.-2, has also not stated that the appellants were telling the mother of the informant witch (Dayan). Thus, the very motive, which has been agitated by the informant is not pointed out by this witness. In fact, prosecution has failed to prove the motive. Moreover, this witness has also not stated during her statements u/s 161 of the Code of Criminal Procedure before the Police that the appellants had broken up the door and entered into the house of P.W.-2. It is also not stated by this witness before police u/s 161 statement that two persons had injured her mother. Thus, the factum of assault has also not been established by this witness. Thus, it is submitted by the counsel for the appellants that P.W.-2, is untrustworthy and unreliable witness. It is further submitted by the counsel for me appellants that P.W.-3 is a hearsay witness and in fact, the name of this witness has also not been pointed out as a prosecution witness in the chargesheet. Such type of witness ought not to have been examined at all. So far as P.W.-4 is concerned, it is submitted by the counsel for the appellants that there was a dark night, when the occurrence has taken place and therefore, there is a question of identification of these appellants whatsoever arises by this P.W.-4. Neither in the F.I.R. nor in depositions of the witnesses, there is any reference of light. Thus, in a dark night, it is impossible for this witness to, identify anyone. Moreover, this witness has stated that he has came out of the roof, whereas, P.W.-2, another eyewitness is saying another way of coming out by this P.W.-4. Thus, there is no consistency between these two eyewitnesses in narrating the whole incident and therefore, P.W.-4 is also unreliable and untrustworthy witness. It is also submitted by the counsel for the appellants that these two witnesses are close relatives of the deceased and no independent witness has been examined by the prosecution. There were

approximately 40/50 houses in the village and not a single independent witness has been examined by the prosecution to prove the place of occurrence, the time of occurrence and such other incidental aspects of the case. It is further submitted by the counsel for the appellants that the medical evidence and the ocular evidence are in contradiction with each other. The time stated and the injuries sustained upon the body of the deceased by the medical evidence given by P.W.-1-Dr. Sita Ram Sah is 24 hours from the postmortem report. In this case, postmortem on the dead body of the deceased was carried out at about 12.20 p.m. on 26.03.1999. Therefore, injuries must have been sustained at about 12.00 noon on 25.03.1999, whereas, as per the case of the prosecution, the murder has taken place at about 12.00 midnight between 24/25.03.1999. Thus, the medical evidence is not corroborative to the depositions of the eyewitnesses. Moreover, P.W.-2 has stated that after taking dinner within couple of hours, murder has taken place but there is no undigested or semi-digested food particles in the stomach of the deceased, looking to the postmortem report at Exhibit-1. Thus, the eyewitnesses are untrustworthy and unreliable and this aspect of the matter has not been properly appreciated by the trial court. It is further submitted by the counsel for the appellants that P.W.-2 has also admitted in her evidence that there was some dispute between these appellants and the brother of P.W.-2, who is P.W.-4 (informant) and therefore, there is every chance of false implication of the appellants due, to previous enmity and therefore also, the judgment and order passed by the trial court deserves to be quashed and set aside.

3. We have heard the learned counsel for the State-APP, who has submitted that no error has been committed by the trial court in appreciating the evidences on record. The case of the prosecution is based upon the depositions given by the eyewitnesses and the medical evidence and the evidence given by the investigating officer are corroborative to the depositions of the eyewitnesses. It is submitted by the APP that looking to the depositions given by P.W.-2 and P.W.-4, it appears that they have clearly stated before the trial court that these appellants broke open the door of the house of the informant and P.W.-2. In fact, they were four persons, two were identified and two were not identified and they assaulted the mother of P.W.-2 and P.W.-4 and the injuries were so severe that the mother of P.W.-2 and P.W.-4 expired on the spot. These appellants used rod in causing murder of the deceased. It is submitted by APP that immediate is the F.I.R. and in the F.I.R., sufficient details have been given by the informant and there is no major omission, contradiction or improvement in the depositions of the eyewitnesses. Moreover, the evidence given by the investigating officer is also corroborative to the depositions given by the eyewitnesses. P.W.-5 is investigating officer, who has narrated the position of the house of these eyewitnesses, which is corroborative to the depositions of P.W.-2 and P.W.-4. Moreover, minor omission and contradiction has to be ignored because these witnesses are rustic witnesses and they are giving deposition approximately after 36 months from the date of occurrence in the court. Medical evidence is also

corroborative to the depositions of the eyewitnesses. So far as time of occurrence is concerned. It is submitted by APP that whenever there is a slight discrepancy between the ocular evidence and the medical evidence, weightage ought to have been given to the ocular evidence, because Doctor is not an eyewitness of the incident. Learned APP has further submitted that the ground of enmity is a double edged sword. It can be argued by appellant as well as by the prosecution, both, because of enmity, these appellants entered into the house of the informant, and as they were addressing mother of the informant, dayan, the whole murder has taken place. Motive is not reflected in the court only but in the immediate Version of the informant and i.e. in the F.I.R. also, this motive has been reflected. This aspect of the matter has been properly appreciated by the trial court. Thus, the prosecution has proved the offence of murder of the deceased committed by these appellants beyond reasonable doubt and the trial court has not committed any error in convicting and sentencing these two appellants for causing the murder of the deceased and therefore, this appeal may not be entertained by this Court. Having heard the counsel for both the sides and looking to the evidences on record, we see no reason to entertain this appeal and we see no reason to interfere with the judgment of conviction and order of sentence passed by the 1st Additional Sessions Judge, Dumka in S.C. No. 37 of 2001, dated 01.02.2003, mainly for the following facts, reasons and evidences on record:-

(i) It is a case of the prosecution that P.W.-4, who is the informant had given his fardbeyan to the police on 25.03.1999 that during night hours between 24/25.03.1999, the informant (P.W.-4) along with his mother Fuchi Devi (deceased) and sister Sanjhali Soren (P.W.-2) were sleeping in his house after taking meal. At about 12.00 hours in night, suddenly four persons broke open the door and forcibly entered into the house. Out of which, P.W.-4 (informant) identified two persons, who were these two appellants and rest of the two could not be identified by him. Thereafter, all the four persons caught hold the mother of the informant. They assaulted and caused injuries on head by rod and they also assaulted the informant by lathi. They took away the kitchen utensils and a cash of Rs. 700/- and clothes. Informant raised alarm, but no villager came there. Appellant Durga Kisku was addressing the mother of, P.W.-4, a witch (Dayan) for which panchayati was also convened and Durga Kisku was also giving threat to the mother of the informant that she is a witch (Dayan) and Durga Kisku will murder her. On the basis of this first information report, criminal law was put in motion and the statements of several witnesses were recorded, chargesheet was filed and Sessions Case No. 37 of 2001 was committed to the Sessions Court and on the basis of evidences of P.W.-1 to P.W.-5 and on the basis of other documentary evidences on record, the trial court has convicted these appellants for the offence of murder of the deceased as well as for the offence u/s 380 to be read with Section 34 of the IPC and mainly convicted life imprisonment for causing murder of the deceased and they have also been punished for two years rigorous imprisonment punishable u/s 380 to be read

with Section 34 IPC. Thus, it appears that P.W.-2 and P.W.-4 are the eye-witnesses of the incident.

(ii) Looking to the deposition given by P.W.-4, who is the informant and the eyewitnesses of the incident, it appears that he has clearly stated about the role played by these appellants in causing the murder of the deceased. This witness has clearly stated that in fact four persons forcefully entered into the house by breaking the door at night hours. They assaulted his mother by rod (Sabal), a hard and blunt substance. Appellant No. 1 was addressing mother of this P.W.-4 a witch (Dayan) and therefore, he was giving threat to P.W.-4 that he will kill the mother of P.W.-4 and because of the injuries sustained by the mother of P.W.-4, she expired on the spot. The assailants including these two appellants had also taken away utensils, clothes and Rs. 700/- from the house of the informant. While going out, they had bolted the house from me outside and therefore, he came out from the roof. We have also perused the cross-examination of this witness. Nothing is coming out in favour of these appellants in the cross-examination. To verify the major omissions, contradictions and improvements, we have gone through the depositions given by this eye-witness (P.W.-4) and Investigating Officer (P.W.-5). Looking to the deposition of P.W.-5 also, it appears that there is no major omission, improvement or contradiction in the deposition of this eye-witness and the informant-P.W.-4. His presence at the scene of occurrence is also natural. One. There is no question of mis-identity of these appellants whatsoever arises. It is submitted by the counsel for the appellants that there was night and there was no light and therefore, P.W.-4 could not identify these two appellants. This contention is not accepted by this Court mainly for the reason that looking to the F.I.R. and the deposition of P.W.-4, it appears that without any exaggeration this rustic witness has given F.I.R. and even in his deposition before the trial court he has stated that he could identify only two persons and not rest of the two. In fact, there were total four assailants. These two persons are from the same village. These two assailants were also identified in the court by this witness. Moreover, appellant No. 1, prior to the incident, told P.W.-4 that his mother, who is deceased, was a witch (Dayan) and on any day, he will kill her. When the person is known, then even by voice also, he could be identified during night hours. Moreover, arguments canvassed by the counsel for the appellants is baseless. There is nothing in the cross-examination of this witness by the accused that P.W.-4 was not capable of identifying these appellants. This fanciful idea of identification or misidentification does not arise at the appellate stage at all. There ought to have been proper cross examination of P.W.-4 on this point by the accused at the relevant time. P.W.-4 has proved the date of offence, place of occurrence, identity of these two appellants without any major omission or contradiction. He is a trustworthy and reliable witness and no error has been committed by the trial court in appreciating the deposition given by P.W.-4.

(iii) Looking to the deposition given by P.W.-2, who is the daughter of the deceased and was present in her house has also narrated in detail the whole

incident that these appellants along with two others forcibly entered into their house and they assaulted the mother of this P.W.-2. Injuries were caused on the ear of the mother of P.W.-2 by rod (Sabal) and because of these injuries, her mother expired and we have perused her cross examination but nothing is coming out in favour of these appellants during cross examination. Her examination-in-chief remains intact and as it is without any major contradictions, omissions and improvements. We have also perused the deposition given by P.W.-2 vis-a-vis the deposition given by P.W.-5- Investigating Officer. Investigating Officer has stated in his deposition in paragraph No. 7 about few sentences which were never pointed out by this P.W.-2 in her statement u/s 161 of the Code of Criminal Procedure, but this is not a major improvement at all by this witness before the trial court. Slight deviation in her deposition makes the witness trustworthy, especially, the witness is a rustic witness and has given deposition after as many as approximately 36 months. Her deposition is also getting enough corroboration by the deposition given by P.W.-4 and other prosecution witnesses. Deposition of a witness depends upon the capacity of observation, capacity of memory and capacity of reproduction of memory in the court. There may be slight error in their observation, memory and reproduction in the court that does not render the witness untrustworthy and unreliable, if otherwise, the witness is giving correct narration of the incident which is getting corroboration from the deposition of the eye witnesses, the Doctor and the Investigating Officer. Looking to the deposition given by P.W.-2 and her cross examination and also looking to the deposition of investigating officer-P.W.-5, it appears that her presence at the scene of occurrence is occurrence, manner of occurrence and the manner in which these appellants caused murder of the deceased. She is trustworthy and reliable witness and no error has been committed by the trial court in appreciating the deposition of this P.W.-2.

(iv) Looking to the deposition given by P.W.-5, who is police witness and investigating officer, it appears that he had recorded fardbeyan of P.W.-4 (Exhibit-2) which was also converted into F.I.R. (Exhibit-3) and has also proved inquest panchnama which is at Exhibit-4. This witness P.W.-5 has clearly narrated the place of occurrence i.e. the house of the informant and narration of his house is giving enough corroborations to the deposition of P.W.-2 and P.W.-4.

(v) Looking to the deposition given by Dr. Sita Ram Sah (P.W.-1) who has carried out postmortem which is at Exhibit-1, it appears that he has narrated that following were the injuries upon the body of the deceased:

Ante mortem injuries-

1. Diffused swelling over left parietal region of skull-on dissection there was fracture of left parietal bone and on further dissection brain and meninges found lacerated and collection of blood found inside cranium.

2. In my opinion death was due to shock and haemorrhage as a result of injuries mentioned above and the injury was sufficient enough to cause death in ordinary

course of nature.

3. Weapon used-hard and blunt substance and may sabal.

4. Injuries is within 24 hours.

In view of the aforesaid deposition of this witness, it appears that the deceased has expired due to shock and hemorrhage as a result of the injuries on a left parietal region of the scalp and due to fracture of the left parietal bone. This deposition of P.W.-1 is giving enough corroboration to the deposition given by both the eye witnesses P.W.-2 and P.W.-4. Much has been argued by the counsel appearing for the appellants that injuries sustained by the deceased was within 24 hours. Postmortem was carried out at about 12.20 p.m. on 26th March 1999 noon of 25.3.1999 as per medical opinion, whereas, the eyewitnesses are saying that the injuries were caused during night between 24/25.3.1999 and therefore, it is submitted by the counsel for the appellants that the ocular evidence and the medical evidence are in contradiction as well as inconsistent with each other. This contention is not accepted by this Court mainly for the reason that the time of occurrence given by the eyewitnesses was about 12.00 night. During night hours there may be some variation in this. Both the witnesses are rustic witnesses. They have narrated that during night hours of 24/25.3.1999 the murder has taken place. Both the witnesses have given clear deposition before the trial court. Nothing is coming out in cross examination also in favour of the appellants and no question has been put by the accused about the time of occurrence in the cross examination of these two witnesses. It is ought to be kept in mind that medical evidence is nothing but an evidence given by an expert u/s 45 of the Indian Evidence Act, 1872. Section 45 of the Indian Evidence Act reads as under:

45. Opinions of experts.-When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts.

Such persons are called experts.

(vi) Whenever there is slight inconsistency between the ocular evidence and the medical evidence and when the ocular evidence is given by trustworthy and reliable witnesses, weightage should be given to the ocular evidence and not to the medical evidence. Doctor is not an eyewitness of the incident. The witnesses have stated that at 12.00 hours of night between 24/25.3.1999. Time pointed out may not be accurate because they are not sleeping with their wrist watches and the time given by the expert in the postmortem also is not exact time limit. 24 hours is approximate time limit. It cannot be treated as mathematical one and we do not expect from the Doctor about the exact time of injury with all statistical nicety and mathematical accuracy. Medical evidences are to be seen always in the light of the other evidences on record. Too much independent evaluation of the medical evidence cannot be done by the courts when the case

of the prosecution is based upon the eye-witness who are trustworthy and reliable, which has been also observed by the Hon"ble Supreme Court in the case of Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and Others, .

(vii) In the light of the aforesaid decision also, we see no reason to accept the arguments canvassed by counsel for the appellants that the ocular evidence and the medical evidence is in contradiction with each other and ocular evidence is not reliable. No error has been committed by the trial court in appreciating these evidences on record. Prosecution has proved offence of murder of Fuchi Devi committed by these two appellants beyond reasonable doubt.

(viii) In view of the aforesaid evidences on record, we see no reason to take any other view than what is taken by the trial court in the judgment of conviction and order of sentence passed in Sessions Case No. 37/2001 by the First Additional Sessions Judge, Dumka. There is no substance in this appeal. Hence, the same is, hereby, dismissed.