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**(2009) 09 JH CK 0066**  
**In the Jharkhand High Court**

Francis Xavier Bara

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

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**Date of Decision :** 07-09-2009

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313  
Penal Code, 1860 (IPC) — Section 304

**Citation :** (2009) 09 JH CK 0066

**Hon'ble Judges :** Pradeep Kumar, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

Pradeep Kumar, J.—Heard learned Counsel for the appellant and learned Counsel for the State.

2. This appeal is directed against the judgment of conviction dated 04.07.2002 and order of sentence dated 08.07.2002 passed by Shri Rajeev Kumar, 5th Additional Sessions Judge, Palamu at Daltonganj in Sessions Trial No. 219 of 1995 by which judgment learned Additional Sessions Judge found the appellant Francis Xavier Bara guilty u/s 304 of the Indian Penal Code and sentenced the appellant to undergo R.I. for three years and to pay a fine of Rs. 10,000/-.

3. It is submitted by learned Counsel for the appellant that absolutely there is no evidence against the appellant that he committed the murder of anybody nor there is evidence that even with intention or without intention he caused any injury to the deceased. In that view of the matter, the conviction of the appellant is bad in law and accordingly in view of the facts this case is fit to be set aside.

4. On the other hand learned Counsel for the State submitted that the learned Sessions Court has relied upon the statement of the informant as given in the First Information Report as also the statement given by P.W.5 Mangla Pushpa Bara u/s 164 of the Cr.P.C. had given finding for the offence u/s 304 of the Indian Penal Code, and even the accused has admitted the same in his examination u/s

5. After hearing both the parties and going through the record prosecution case was started on the basis of First Information Report given by P.W.3 Md. Shamim @ Bablu stating therein that on 11.11.1994 he had gone to Daltonganj from Ranchi in the morning and was staying at jail hata house of his mother. It is stated that at about 7:00 a.m. accused Francis Xavier Bara and Kindo Bara came there and started talking his mother Mangla Pushpa Bara. Then after sometime his mother asked him to call her father on phone then at 7:30 and he made a phone call to his father that Xavier Bara and Kindo Bara have come and they want to take their mother whereupon his father Taiyab Hussain said that he is going to Daltonganj. His father reached at Daltonganj at 1:30 and started talking to both the accused persons. His mother came back from bank for taking lunch at 3:15. The accused Xavier Bara asked him to bring Jalebi from any shop then he left for the hotel and when came back from hotel then he found that door of the house was closed and his father was soughting from inside for his life then he also started forcibly pressing the door whereupon the accused Xavier Bara open the door and both of them went out side then he saw his father was coming behind them, he was staggering and subsequently he fell down. He found blood coming out from his body then on his hulla neighbours also came then with the help of the neighbors he took him to the hospital where he died. He claimed in the F.I.R. that the two accused persons Xavier Bara and Kindo Bara have committed the murder by inflicting Chhura injury on the body of his father. The F.I.R. was signed by the informant Shamim and witnessed by P.W.5 Mangla Pushpa Bara. Subsequently, Mangla Pushpa Bara gave her statement u/s 164 of the Cr.P.C. before Judicial Magistrate, Daltonganj which has been marked as Ext.6 in the trial.

6. The police after investigation submitted charge sheet against both the accused persons showing accused Xavier Bara in custody and Kindo Bara absconder.

7. Since, the case was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions and finally the case was tried by 5th Additional Sessions Judge, Palamu at Daltonganj who after trial found the accused guilty u/s 304 of the Indian Penal Code and convicted them there under.

8. After going through the prosecution evidences, t find that prosecution has examined seven witnesses P.W.1 is Krishna Prasad and P.W. 2 is Kedar Nath Tiwary both are the seizure witnesses, P.W.3 is Md. Shamim Hussain @ Bablu who is the informant, P.W. 4 is Anwar Ali witness of inquest, P.W. 5 is Mangla Pushpa Baraa mother of the informant, P.W.6 is Dr. Kamendra Singh who conducted post-mortem examination on the person of the deceased. P.W. 7 is Zafar Fatmi who is witness of inquest.

9. After going through the evidences, I find that P.W. 1 & P.W.2 are witness of seizure of some blood stain earth and except that they have stated nothing about the occurrence. P.W.4 is witness of inquest and P.W.7 is equally witness of the

inquest. The doctor P.W.6 who examined the deceased stated in Court that he found as many as eight sharp cutting injuries on the person of the deceased and stated that in his opinion deceased died due to aforesaid injuries and due to shock hemorrhage by sharp cutting injury. The inquest report has also stated that they saw the dead body of the deceased.

10. So there is no doubt that the Taiyab Hussain was done to death and he was brutally assaulted by sharp cutting weapon knife.

11. However, to prove the fact as to who inflicted the injury, whether the appellant Xavier Bara, or the other accused has to be seen.

12. In order to prove the offences the prosecution has got only two witness P.W.3 Md. Shamim Hussain and P.W. 5 Mangla Pushpa Bara.

13. P.W.3 is the informant who turned hostile in the Court and he stated that when he left the house for bringing Jalebi and came back then he found that his father was murdered and people have taken him to hospital on rickshaw. He was declared hostile saying that he does not know who inflicted the injury on his father and he admitted the signature as Ext.3 in the First Information Report but when the F.I.R. statement was put to him then he said that he had not made such statement and stated that he does not know Mangla Pushpa Bara nor he recognized the accused Xavier Bara and Kindo Bara. He refused to identify the accused Francis Xavier Bara. P.W. 5 Mangla Pushpa Bara was examined in Court. She also stated that she does not know the deceased Taiyab Hussain and on the date of occurrence he was on duty of her bank and when she returned at 4:30 then she heard that somebody was killed in front of her house. In the evening police came then he stated that seeing the occurrence she chocked. She had gone to the Sadar hospital. She said that she does not know as to how Taiyab Hussain died. She admitted her signature on her Fardbeyan which was marked as Ext. 5. She also admitted that she has given this statement before the Judicial Magistrate, Shri K.G. Diwedi at the Civil Court which statement was marked as Ext.6/1. She admitted that the accused Xavier Bara is her brother. In her cross-examination she denied that she had any relation like husband- wife with Taiyab Hussain. She denied her statement made u/s 164 of the Cr.P.C. that at the time of occurrence her brother was present in her house and he had no altercation with the deceased.

14. Thus, as per the implication of the accused brother Xavier Bara is concerned it appears that the statement given by the informant and the F.I.R. has not been admitted by him in Court. So statement is not corroborated by him nor the statement given before the Magistrate by P.W.5 Mangla Pushpa Bara admitted or corroborated by her in her statement in Court. Both of them retracted from her previous statement. I.O. has not been examined in the case which is another handicap. Although the Trial Magistrate has tried his level best by putting questions to the accused that he was arrested on the same date and he had received injuries to corroborate the statement of P.W.5 Mangla Pushpa Bara

made in her 164 statement. But on that score he can not be convicted. In that view of the matter since although there are some witnesses here and there before the trial but there is no evidence to corroborate the same in the trial and as such in my opinion the conviction of the appellant is bad in law and accordingly fit to be set aside.

15. Accordingly, this appeal is allowed and sentenced passed by 5th Additional Sessions Judge, Daltonganj at Palamu in Sessions Trial No. 219 of 1995 is set aside.