

(2022) 07 JH CK 0006

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 1042 Of 2012

Gardi Mundari @ Diku

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 05-07-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 201, 302

Code Of Criminal Procedure, 1973 — Section 164, 313

Evidence Act, 1872 — Section 30

Terrorist And Disruptive Activities (Prevention) Act, 1987 — Section 15

Citation : (2022) 07 JH CK 0006

Hon'ble Judges : Rongon Mukhopadhyay, J; Ambuj Nath, J

Bench : Division Bench

Advocate : Jitendra S Singh, Satish Prasad

Final Decision : Allowed

Judgement

1. Heard Mr. Jitendra S Singh, learned counsel for the appellant and Mr. Satish Prasad, learned A.P.P.

2. This appeal is directed against the judgment and order of conviction and sentence dated 23.05.2012 (Sentence passed on 24.05.2012), by Shri Ghanshyam Kumar Mallik, learned 1st Additional Sessions Judge-Singhbhum West at Chaibasa in S.T. No. 90 of 2001(S), whereby and whereunder the appellant has been convicted for the offences under sections 302, 201/34 and 120B of the Indian Penal Code and has been sentenced to rigorous imprisonment for life for the offence under section 302 of the Indian Penal Code, rigorous imprisonment for two years for the offence under section 201/34 of the Indian Penal Code and rigorous imprisonment for three years for the offence under section 120B of the Indian Penal Code and all the sentences were directed to run concurrently.

3. The fardbeyan of one Palo Hembrom was recorded on 15.3.2010 at 7 a.m., in which it has been stated that her husband-Birsa Hembrom works as a Peon in

Chaibasa Court and everyday he goes out for his duty on his bicycle. On 9.3.2000, her husband had left for his duty at 7 A.M. but he did not return. When on the next day also, he did not return, the informant became suspicious and he informed his son who stays in a hostel and both of them made a search at various places. It has been alleged that on 14.03.2000, the informant came to know that a dead body was found floating in a well at village-Punduguttu. On hearing such news, he went to Punduguttu along with her son and identified the body floating in the well as that of her husband. When the dead body of the husband of the informant was taken out from the well, several injuries were found on his person, which were perhaps inflicted with a sharp cutting weapon. In order to cause disappearance of the dead body, a stone was strapped on his right leg before being thrown in the well. It has been alleged that the husband of the informant was on inimical term with the accused-Gardi Mundari @ Diku for the last six months since the accused on the pretext of marriage had physical relationship with the daughter of Bara Sadhu Kalundia resulting in her becoming pregnant and on account of being related to Bara Sadhu Kalundia, he was pressuring the accused to solemnize marriage with Madey Kui, the daughter of Bara Sadhu Kalundia. Further allegation has been levelled that Gardi Mundari often used to come at night to the house of the informant and threaten her husband to not to get himself involved in the dispute. It was Gardi Mundari who had conspired and committed the murder of her husband and had thrown the dead body in the well to cause disappearance of evidence.

4. Based on the aforesaid allegations Manjhari P.S. Case No. 5 of 2000 was instituted against the appellant- Gardi Mundari @ Diku for the offences under sections 302, 201 and 120B of the Indian Penal Code. On conclusion of investigation, chargesheet was submitted against Pradeep Purty, Gardi Mundari and Chandra Mohan Mundari who has since died. After cognizance was taken, the case was committed to the Court of Sessions. The present accused who was absconding was finally arrested and thereafter charge was framed against him under sections 302, 201/34 and 120B of the Indian Penal Code, which was read over and explained to the accused in Hindi, to which he pleaded not guilty and claimed to be tried.

5. The prosecution has examined as many as twelve witnesses in support of its case. It appears that four of the chargesheet witnesses namely Sura Kalundia, Bara Samad, Narsingh Diggi and Sri Ram Mundari had died during the pendency of the trial.

P.W-1-Lal Krishna Sidiu is a signatory to the inquest report, which has been marked as Ext-1. He has also proved his signature on the seizure list of the rope, which has been marked as Ext-1/1. He had also signed on the fardbeyan of Palo Hembrom, which has been proved and marked as Ext-1/2.

In cross-examination, he has stated that he had reached the place of occurrence after the body was taken out from the well. He had not seen any injuries over the dead body.

P.W-2-Mora Mundari has not supported the prosecution case and accordingly has been declared hostile by the prosecution.

P.W-3-Raghubir Chaki has deposed that the incident is of 8-10 years back. A dead body was taken out from a well situated in his village and the same was identified to be that of Birsa Hembrom. There were injuries on the dead body. He has proved his signature on the inquest report, which has been marked as Ext-2. He has also proved his signature in the seizure list with respect to a rope and which has been marked as Ext-2/1.

In cross-examination, he has deposed that he had gone to the place of occurrence in his capacity of being the Munda of the village.

P.W-4-Bir Singh Gagrai has stated that he knew the deceased-Birsa Hembrom who was a Peon in C.J.M. Court, Chaibasa. On 9.3.2000, he had gone for court duty on a bicycle but did not return back. He has stated that on 14.3.2000, his dead body was recovered from inside a well situated in village-Pundigutu. The dead body was identified to be that of Birsa Hembrom. A stone was tied on the leg of the deceased. He has also stated that there were marks of injuries on his body. He had come to know that prior to the occurrence, a quarrel had ensued between the deceased and Gardi.

In cross-examination, he has stated that the deceased and Gardi had never quarreled in his presence.

P.W-5-Vijay Oraon has deposed that he was having acquaintance with Birsa Hembrom. On 9.3.2000, Birsa Hembrom had gone to attend his duty but he did not return back and on 14.03.2000, he had come to know that his body was tied to a stone and thrown in the well. He had gone to see the dead body and he had found marks of violence over the same.

P.W-6-Arjun Singh Birua has not supported the case of the prosecution and has accordingly been declared hostile by the prosecution.

P.W-7-Palo Hembrom is the informant and the wife of the deceased who has stated that the incident is of 15 years back and on the fateful day her husband had gone on a bicycle to Chaibasa Court but he did not return home. He was searched and the Munda was also informed. She has stated that on Tuesday his body was recovered from inside a well at village-Pundigutu. The dead body was floating in the well and there were marks of injuries on various parts of the body. She has also deposed that the body was tied with a stone which was confined in a bag. The police was informed and her fardbeyan was recorded, in which she had put her thumb impression. She has stated that the accused had a physical relationship with Madey Kui as a result of which she had become pregnant. A Panchayati was called but the accused refused to solemnize marriage with Madey Kui. She has stated that her husband had been vocal in the Panchayat meeting due to which Gardi Mundari had threatened him with dire consequences. Her husband was also threatened by Gardi Mundari even a day before the occurrence.

In cross-examination, this witness has stated that her husband shared a sour relationship with Gardi Mundari from before. She has stated that the Panchayat meeting was held one week prior to the occurrence.

P.W-8-Chokro Birua has proved his signature over the confessional statement of Pradeep Purty, which has been marked as Ext-3.

In cross-examination, he has stated that he had signed on the confessional statement on the dictates of the police and the Munda.

P.W-9-Lakhan Kalundia has proved his signature on the confessional statement of Pradeep Purty, which has been marked as Ext-3/1.

In cross-examination, he has stated that he had made his signature in the presence of the police and the villagers. He does not know the contents of the statement, in which he had put his signature.

P.W-10-Dr. Arun Kumar was a posted as a Medical Officer at Sadar Hospital, Chaibasa on 15.03.2000 and on that date, he had conducted autopsy on the dead body of Birsia Hembrom and had found the following:-

(I) Lacerated wound 2 ½ x 1" x bone deep over left parietal and frontal region.

(II) Lacerated wound 1 x 1/2"x1/2"x1 ½ over left side of neck.

(III) Incised wound 2 ½ "x1/2x2" over abdomen at right hypo chondrium. On dissection:

Head and neck-fracture of left parietal and part of frontal bone, blood & blood clot were present in left cranial cavity. Brain was lacerated.

Chest:

Fracture of VIIIth, IXth and Xth ribs of right side chest. Blood and blood clot were present at fracture side.

Right lung was lacerated. Blood and blood clot was present in the right pleural cavity.

No fluid in the lung and trachea was present.

Abdomen:

Peritoneal cavity was full of blood. Right lobe of liver was lacerated.

Multiple punctures of intestines were present. Stomach was empty.

The cause of death was opined to be due to hemorrhage and shock caused by above injuries and head injuries. The nature of weapon used as per this witness were hard blunt and sharp cutting. He has proved the postmortem report, which has been marked as Ext-4.

P.W-11-Prabhunath Prasad was posted as a Judicial Magistrate, First Class,

Porahat (Chaibasa) and on 18.03.2000 he had recorded the 164 Cr.P.C. statement of the accused-Pradeep Purty. He has stated that the accused Pradeep Purty had voluntarily given his statement which was read over and explained to him, after which he had put his thumb impression over the same. The Bench clerk Chandra Bhushan Prasad had written down the certificate on the statement and this witness had put his signature on the same. The 164 Cr.P.C. statement is in his handwriting and he had signed on the same, which has been proved and marked as Ext-5.

In cross-examination, he has stated that the certificate in the 164 Cr.P.C. statement of Pradeep Puty was written by the Bench Clerk on his orders.

P.W-12-Marshal Topno has proved the formal FIR, Fardbeyan and inquest report, which has been marked as Ext-6, 7 and 8 (with objection) respectively. He has proved the seizure list with respect to seizure of rope, which has been marked as Ext-9. The application given to the C.J.M., Chaibasa for recording the 164 Cr.P.C. statement is in the handwriting of Anirudh Prasad Sharma, Sub Inspector of Police and has been signed by him and it has been proved and marked as Ext-10. This witness has also proved the production cum seizure list of a Titan watch, which has been marked as Ext-11.

6. The statement of the accused was recorded under section 313 Cr. P.C. , in which he has denied to be having any role in the murder of Birsa Hembrom.

7. Mr. Jitendra S Singh, learned counsel for the appellant, has submitted that the conviction of the appellant is based upon a suspicion raised by the informant on account of a previous enmity with her husband and the 164 Cr.P.C. statement of accused-Pradeep Purty, in which Pradeep Purty had made a confession and has implicated the present appellant of being primarily involved in commission of the murder of Birsa Hembrom. Mr. Singh, learned counsel further submits that Pradeep Purty has been tried, convicted and sentenced in a separate trial and in absence of there being a joint trial, the confessional statement of an accused cannot be used against another accused.

8. Reference has been made to Section 30, Illustration (b) of the Evidence Act while submitting that the learned trial court has erred in relying upon Illustration (a) to Section 30 of the Evidence Act and there being no other material available on record to indict the appellant the judgement and order of conviction and sentence dated 15.03.2000 is liable to be set aside.

9. Mr. Satish Prasad, learned A.P.P., has opposed the prayer for bail of the appellant and has submitted that the 164 Cr.P.C. statement, which is inculpatory in nature can clearly be used against the appellant in view of Section 30 of the Evidence Act. Learned A.P.P. has submitted that the circumstances warrant a strong presumption since the appellant was already on inimical terms with the deceased and in view of the confessional statement rendered by Pradeep Purty before the police as well as before the learned Magistrate while recording his statement under section 164 Cr.P.C., the needle of suspicion clearly points

towards the appellant more so in view of the fact that for the same set of allegations, Pradeep Puty has also been convicted by the learned trial court much prior to the conviction of the appellant. As the appellant was absconding, no interference can be made with respect to the impugned judgement.

10. We have heard the respective counsels and have also perused the Lower Court Records. The prosecution case in a nutshell is of the husband of the informant going to attend his duties but having not returned a search was conducted and after almost five days, his dead body which was tied with a stone was recovered from a well situated at village-Pundigutu. The incriminating circumstance, which has been highlighted by the prosecution before the learned trial court is the apparent suspicion the informant had on account of her husband objecting to the immoral act of the appellant in not solemnizing marriage with Madey Kui though she was made pregnant by the appellant on account of a physical relationship he had established on the pretext of marriage and the regular threats extended to the deceased by the appellant. The other incriminating circumstance is the 164 Cr.P.C. statement of accused Pradeep Puty implicating himself as well as the appellant in committing the murder of the husband of the informant and causing disappearance of the dead body by throwing it in the well.

11. It would be pertinent to mention herein that the appellant was absconding since the date of the offence and finally on being apprehended after almost nine years the appellant had faced trial and was convicted and sentenced for the offences under sections 302, 201/34 and 120 B of the Indian Penal Code. The trial of co-accused-Pradeep Puty who is the harbinger of the involvement of the present appellant was tried and convicted vide judgment dated 8.1.2004. The 164 Cr.P.C. statement of Pradeep Puty has been exhibited and a perusal of the same reveals that Pradeep Puty has conveniently implicated the appellant as being the person who had pressed the neck of Birsa Hembrom, taken him to a field and assaulted him with a tangi resulting in his death. As regards his own role is concerned, he has tried to make out a case in the 164 Cr.P.C. statement that he had helped in getting the dead body thrown in the well by catching hold of the legs of the deceased due to the threats meted out by the present appellant.

12. Section 30 of the Evidence Act reads as follows:-

30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.—When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other persons as well as against the person who makes such confession.

[Explanation.—“Offence”, as used in this section, includes the abetment of, or attempt to commit the offence.]

(a) A and B are jointly tried for the murder of C. It is proved that A said—

"B and I murdered C". The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said—"A and I murdered C". This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

13 The learned trial court has relied upon illustration (a) but the facts of the present case would attract illustration (b) of Section 30 of the Evidence Act since the author of the 164 Cr.P.C. i.e. Pradeep Purty was tried and convicted while the present appellant was an absconder and on being arrested was subsequently tried and convicted and sentenced accordingly. In absence of there being a joint trial of Pradeep Purty as well as the appellant, the confessional statement of Pradeep Purty, if taken into consideration for convicting the appellant the same would be against the spirit of illustration (b) of Section 30 of the Evidence Act.

14. In the case of Hardeep Singh Sohal Vs. State of Punjab reported in (2004) 11 SCC 612 the Hon'ble Supreme Court was considering the extra judicial confession of an accused vis a vis the stringent provisions of the Terrorist and Disruptive Activities Prevention Act, 1987 and it was held as follows:-

6. The extra-judicial confession allegedly made by Balwinder Singh can only be considered under Section 30 of the Indian Evidence Act, 1872. The extra-judicial confession cannot be admitted in evidence as Balwinder Singh was not tried along with the appellants. It is interesting to note that though a charge-sheet was filed against Balwinder Singh, in the judgment he is shown as a proclaimed offender. According to the prosecution, Balwinder Singh was arrested on 18-4-1993. PW 45 Gurnam Singh, who was the Station House Officer of Police Station Civil Lines, Patiala, along with a Sub-Inspector and three constables, was on patrol duty near NIS Chowk, Patiala on 18-4-1993. They came to know that one taxi driver who had committed various crimes had been roaming in the city in a vehicle without registration number. In the meanwhile, one Maruti car without registration number came and the same was intercepted and its driver was taken into custody. He was in possession of a .32 bore revolver loaded with five live cartridges. He told them that his name was Balwinder Singh. According to the prosecution he escaped from custody and was later declared as a proclaimed offender. The counsel for the appellants contended that Balwinder Singh was killed in a fake encounter by the police, for which a criminal case also is filed against some of the police officers. In any case, Balwinder was never tried along with the present appellants. The extra-judicial confession made by Balwinder Singh could have been taken into consideration only when he was tried along with the present appellants.

13. Section 15 of the TADA Act as amended by Act 43 of 1993 clearly stipulates that the confession recorded under Section 15 of the TADA Act is admissible only

if the confessor is charged and tried in the same case together with the co-accused. After the amendment of 1993, the addition of the words "co-accused, abettor or conspirator" and the insertion of the new "proviso" to the effect that "the co-accused, abettor or conspirator is charged or tried together with the accused" clearly shows that the confession could be considered by the court only when the co-accused who makes the confession is charged and tried along with other accused.

14. Unfortunately, Balwinder Singh @ Fauji is alleged to have escaped from custody by 4-5-1993 or 5-5-1993 and the charge itself was framed by the court later and Balwinder Singh was treated as a proclaimed offender by the Special Judge. The Special Judge relied on the decision in Esher Singh v. State of A.P.3 and held that merely because one accused died before charges were framed, that does not affect the confessional statement. The learned Judge was also of the view that by operation of Section 30 of the Indian Evidence Act, the confession of the co-accused could be made use of. The stand taken by the Special Judge is incorrect. We do not think that Esher Singh case³ lays down the law that a confession recorded under Section 15 could be made use of as admissible evidence even if the co-accused, who made the confession, was not charged or tried along with other accused. On the other hand, the decision clearly states that after the amendment, the Designated Court could use the confession of one accused against another accused only if the following two conditions are fulfilled:

(1) The co-accused should have been charged in the same case along with the confessor.

(2) He should have been tried together with the confessor in the same case."

15. We, therefore, are of the considered view that the reliance of the learned trial court upon Illustration (a) of Section 30 of the Evidence Act was misplaced and in view of the fact that there is absolutely no evidence on record save and except suspicion, the learned trial court could not have convicted the appellant for the offences under sections 302, 201/34 and 120B of the Indian Penal Code.

16. Consequent to what has been discussed above, we find merit in this appeal and accordingly this appeal stands allowed and the judgment and order of conviction and sentence dated 23.05.2012 (Sentence passed on 24.05.2012), by Shri Ghanshyam Kumar Mallik, learned 1st Additional Sessions Judge-Singhbhum West at Chaibasa in S.T. No. 90 of 2001(S), whereby and whereunder the appellant has been convicted for the offences under sections 302, 201/34 and 120B of the Indian Penal Code and has been sentenced to rigorous imprisonment for life for the offence under section 302 of the Indian Penal Code, rigorous imprisonment for two years for the offence under section 201/34 of the Indian Penal Code and rigorous imprisonment for three years for the offence under section 120B of the Indian Penal Code, is hereby set aside. Since the appellant is in custody, he is directed to be released forthwith if not wanted in any other case.