

(2019) 10 JH CK 0068

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 149 Of 2001

Jahoor Mian And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 21-10-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 307, 326, 341
Arms Act, 1959 — Section 27

Citation : (2019) 10 JH CK 0068

Hon'ble Judges : Shree Chandrashekhar, J; Ratnaker Bhengr, J

Bench : Division Bench

Advocate : Shree Nivas Roy, Satish Kumar Keshri

Final Decision : Partly Allowed

Judgement

Shree Chandrashekhar, J

1. Four persons, namely, Jahoor Mian, Sahadat Mian, Israil Mian and Iftakhar Mian were sent-up for trial for causing death of Md. Muslim Mian and attempting to murder Md. Rafique.

2. The appellant, namely, Iftakhar Mian has been convicted under section 302 IPC and the appellant, namely, Jahoor Mian has been found guilty for the offence under section 302/34 IPC. For the aforesaid offence, they have been sentenced to R.I for life. Both the appellants have been convicted under section 341 IPC, but no separate sentence was passed against them for the said offence. The appellant, namely, Jahoor Mian has been convicted also under section 27 of the Arms Act and sentenced to R.I for three years.

3. The appellant, namely, Jahoor Mian has been acquitted of the charge under section 307 IPC as in the opinion of the learned Additional Sessions Judge, Giridih it was not safe to convict him for the said offence.

4. The accused persons, namely, Sahadat Mian and Israil Mian have been

acquitted of the charges framed against them in Sessions Trial No. 105 of 1998.

5. Initially, six persons, namely, Jahoor Mian, Sahadat Mian, Israil Mian, Iftakhar Mian, Akbar Mian and Rahman Mian were named as accused in the first information report vide Birni P.S. Case No. 77 of 1997 which was instituted on the basis of the fardbeyan of Md. Rafique recorded on 16.09.1997 at 11:00 a.m near Chergo forest. After the investigation, a final form was submitted in favour of Akbar Mian and Rahman Mian. The trial vide S.T. No. 105 of 1998 has commenced only against three accused persons and after charges against Iftakhar Mian were framed on 06.08.1998 the trial in his case vide S.T. No. 171 of 1998 was amalgamated with S.T. No. 105 of 1998, vide order dated 11.08.1998.

6. During the trial, the prosecution has examined 14 witnesses and before S.T. No. 171 of 1998 was amalgamated with the original sessions trial, Dr. S. Bramhachari was already examined as P.W.1. This witness has again been examined in S.T. No. 171 of 1998.

7. The prosecution has projected the informant-P.W.11 as an eye-witness.

8. The prosecution witnesses - P.W.2, P.W.3 and P.W.12 - have corroborated P.W.11 on identification of the appellants. These witnesses have heard hulla raised by P.W.11 and they have seen the appellants running away from the place of occurrence and they tried to catch hold of them, however, they fled away.

9. The investigating officer who has examined himself as P.W. 13 has deposed about the place of occurrence, seizure of a blood-stained dagger (chura), inquest report, postmortem report etc. The other prosecution witnesses are formal witnesses.

10. In his fardbeyan, the informant has stated that in the morning of 15.09.1997, at about 6:00 a.m, he along with Md. Muslim Mian were going to Giridih by bicycle to enquire about a case and when they reached at Chergo jungle near Heeragarha he saw the accused persons variously armed with pistol, knife, lathi and stone. On seeing them they tried to flee away, however, they surrounded them and Jahoor Mian fired a pistol shot on him which, however, missed the target and before he could fire a second shot he hide himself behind a passerby. In the meantime, Iftakhar Mian pounced upon Md. Muslim Mian and Israil Mian fired a shot from his fire arm which hit him on his chest. On receiving injury Md. Muslim Mian fell on the ground and the accused persons dragged his dead body towards north of the road. The informant has stated that Akbar Mian tried to chase him but he continued running away raising hulla. Iftakhar Mian and Jahoor Mian also chased him but he was saved by the earth-cutters who were digging earth nearby. According to the informant, motive behind the murder was old enmity and land dispute between the accused persons and family of Md. Muslim Mian.

11. In the court, the informant has narrated a similar story of the incident which

had taken place in the morning of 15.09.1997. He has named all six accused persons who had surrounded him; Jahoor Mian and Israil Mian armed with pistol, Iftakhar Mian armed with dragger, Sahadat Mian armed with lathi and Rahman Mian and Akbar Mian armed with stone. He has deposed that Jahoor Mian fired at him which, however, did not hit him but the shot fired by Israil Mian has hit Md. Muslim Mian on his chest. He has stated that Iftakhar Mian and Jahoor Mian caught hold of Md. Muslim Mian and the accused persons dragged the dead body towards jungle. He has narrated the story of chase by the accused persons, his raising hulla and the earth-cutters arriving there and saving him from the accused persons.

12. Mr. Shree Nivas Roy, the learned counsel for the appellants has submitted that: (i) evidence of the informant who is the sole eye-witness cannot be relied upon to convict the appellants for murder of Md. Muslim Mian, (ii) serious contradiction in ocular evidence and medical evidence would render conviction of the appellants unsustainable, (iii) the informant is an interested witness and in view of admitted enmity between the parties his testimony cannot be relied upon, and (iv) without establishing the specific role played by Jahoor Mian his conviction with the aid of section 34 IPC is not sustainable in law.

13. Dr. S. Bramhachari-P.W.1, who has conducted the postmortem examination on Md. Muslim Mian, has observed one chest cavity deep wound of the size of 1"x ¼" with clean margin. There was no charring or tattooing mark on the body of the deceased and in his cross-examination P.W.1 has stated that the injury found on Md. Muslim Mian cannot be caused by fire arm.

14. It is the case of the prosecution that Israil Mian fired a pistol shot which hit Md. Muslim Mian on his chest. In his fardbeyan and in the court the informant has stated that the pistol shot fired by Israil Mian has hit Md. Muslim Mian on his chest. This part of the evidence of the informant is inconsistent with the medical evidence and, accordingly, the learned Sessions Judge has acquitted Israil Mian.

15. In a series of decisions it has been held by the Supreme Court that while appreciating medical evidence vis-a-vis ocular evidence, testimony of an eye-witness must get primacy over medical evidence which is basically opinionative. Only when the court finds such inconsistencies between ocular evidence and medical evidence which cannot be reconciled evidence of an eye-witness shall be appreciated in a different prospective by the courts. In "Thaman Kumar v. State (UT of Chandigarh)" reported in (2003) 6 SCC 380, the Supreme Court has observed as under:

"16. The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category

can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eyewitnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight away be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

16. In our opinion, in the present case the inconsistency between medical evidence and ocular evidence is not such that it would improbabilise the prosecution's case. In his fardbeyan the informant has stated that Jahoor Mian has fired a pistol shot at him which could not hit him and before he could fire a second shot he hide himself behind a passerby. He has also stated about attack by Iftakhar Mian on Md. Muslim Mian. The appellant Iftakhar Mian was carrying a dagger (chura) is the prosecution's evidence. In the crime scene which has been narrated by the informant; shot fired at him by Jahoor Mian, his trying to flee away and hiding himself, another shot fired by Israil Mian and the accused persons chasing him, it is not altogether unbelievable that the informant may not have seen that the pistol shot fired at Md. Muslim Mian did not hit him and a chura blow on his chest was given by Iftakhar Mian. The acquittal of Jahoor Mian for the charge under section 307 IPC is not on the ground that there is no evidence at all but on the ground of insufficient evidence and that is the reason the learned Judge has observed that it is not safe to convict him under section 307 IPC, but firing by Jahoor Mian has not been disbelieved by the learned Additional Sessions Judge. Similarly, the acquittal of Israil Mian who is said to have fired a pistol shot on Md. Muslim Mian is on the ground that except the informant no other witness has spoken about his complicity in the crime. Evidently, his acquittal is also on the basis of insufficient evidence laid by the prosecution against him. We further find that it is not that the learned Additional Sessions Judge has disbelieved the testimony of the informant and, in fact, his evidence is reliable and trustworthy and whatever inconsistency has appeared in his testimony is due to the commotion at the place of incident. The doctor-P.W.1 has found one sharp cutting wound, chest cavity deep, caused by a sharp cutting long pointed weapon. It is not disputed by the appellants that dragger (chura) is a sharp cutting long pointed weapon. P.W. 1 has stated that death has been caused within 24 to 36 hrs. from the postmortem examination. Therefore, the evidence of the doctor on the time of death corroborates the evidence of the informant that at about 8:30 a.m in the morning of 15.09.1997 the accused persons surrounded them and Md. Muslim Mian was assaulted; the postmortem examination was conducted at 3:00 p.m on 16.09.1997.

17. P.W.2, P.W.3 and P.W.12 who were digging earth near the place of occurrence are not the eye-witnesses to the actual occurrence in which Md. Muslim Mian has been assaulted, however, they have deposed that they heard sound of firing and immediately thereafter they have seen the appellants running away from the place of occurrence. They have also deposed that they had tried to catch hold of the appellants but they succeeded in fleeing away. These witnesses have given description of the clothes worn by the appellants. From their evidence it is apparent that P.W.2, P.W.3 and P.W.12 had sufficient time to observe their physical features. These witnesses have identified the appellants for the first time in the court and one of the arguments raised on behalf of the appellants is that identification of the accused for the first time in the court cannot be relied upon to convict them for the offence like murder. In "Ronny alias Ronal James Alwaris and Others Vs. State of Maharashtra" reported in (1998) 3 SCC 625, it has been held that if witness had sufficient opportunity to interact with or observe an accused his identification by him for the first-time in the court can be relied upon by the court. It is also well-settled that if an accused is named in the first information report failure of the investigating officer to put him on T.I Parade is of no consequence.

18. In view of the aforesaid facts proved by the prosecution, we hold that the prosecution has established presence of the appellants at the place of occurrence and at the time of occurrence. It is also established that the appellant, namely, Iftakhar Mian has struck chura blow on Md. Muslim Mian and the appellant, namely, Jahoor Mian has also played a role in the occurrence.

19. Now, the question is whether conviction of the appellant, namely, Iftakhar Mian under section 302 IPC and conviction of the appellant, namely, Jahoor Mian with the aid of section 34 IPC for causing death of Md. Muslim Mian are proper.

20. Mr. Satish Kumar Keshri, the learned APP has contended that if testimony of even a solitary witness is reliable and trustworthy and the prosecution has been able to prove the role played by the accused persons notwithstanding some contradiction between ocular evidence and medical evidence, they can be convicted with the aid of section 34 IPC. The learned APP has relied on the decisions in "Prithipal Singh and Others Vs. State of Punjab and Another" reported in (2012) 1 SCC 10 and "Ram Swaroop Vs. State of Rajasthan" reported in (2008) 13 SCC 515.

21. Section 34 IPC embodies constructive liability of an accused. It makes another person liable for the act of an accused. Section 34 IPC is not a substantive offence by itself but if it is found that the offending act was committed in furtherance of the common intention of all, it fastens the liability upon all. But, to rope in an accused with the aid of section 34 IPC it must be proved that there was a pre-arranged plan and all the accused persons were acting in concert and the criminal act was accomplished in furtherance of common intention of all. In the celebrated judgment in "Mahbub Shan V. Emperor" reported in AIR 1945 PC 118, the Privy Council has observed; " when a

criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone".

22. The appellant, namely, Jahoor Mian is said to have fired a pistol shot on the informant which, however, missed the target. The informant has stated that after Md. Muslim Mian was assaulted by the accused persons they dragged him towards north of the road. This evidence would show that Jahoor Mian had sufficient time to fire a second shot but this is not the prosecution's case that he has fired a second shot either on the informant or on Md. Muslim Mian. He along with the other accused persons are said to have dragged the dead body of Md. Muslim Mian towards the forest. The enmity between the appellants and the father of Md. Muslim Mian is admitted. The defence has produced documentary evidence such as first information report, copies of Dhanwar P.S. Case No. 194 of 1995 and Dhanwar P.S. Case No. 52 of 1997 to establish enmity between the parties and the informant has also admitted enmity between the parties in paragraph no. 52 of his cross-examination. On such evidence, it is difficult to hold that Jahoor Mian fired a pistol shot on the informant in furtherance of common intention to murder Md. Muslim Mian. On such facts, all that the prosecution has been able to establish is that Jahoor Mian had knowledge that grievous injury may be caused to Md. Muslim Mian and he has acted in furtherance of common intention to cause grievous injury to Md. Muslim Mian.

23. In so-far-as the nature of injury caused by Iftakhar Mian on Md. Muslim Mian is concerned, few facts, such as : (i) there is no allegation that he has given a repeated chura blow, (ii) only one injury has been found by the doctor on Md. Muslim Mian, (iii) assault by him on Md. Muslim Mian has happened after Jahoor Mian fired a pistol shot on the informant, have emerged from the prosecution's case. In the above facts, from the prosecution's evidence it cannot be inferred that he intended to cause injury on the chest of Md. Muslim Mian to kill him and, therefore, Iftakhar Mian cannot be held guilty under section 302 IPC simplicitor.

24. Accordingly, conviction of the appellant, namely, Iftakhar Mian under section 302 IPC and conviction of the appellant, namely, Jahoor Mian under section 302/34 IPC are set-aside.

25. The appellant, namely, Iftakhar Mian has caused grievous injury with a dangerous weapon and the appellant, namely, Jahoor Mian has acted in furtherance of common intention to cause grievous injury to the deceased and, therefore, they are convicted under section 326/34 IPC and sentenced to R.I for 10 years.

26. Both the appellants are on bail. Therefore, the bail bonds furnished by them are cancelled.

27. Both the appellants shall surrender before the court below to serve the remaining sentence.

28. In the result, Criminal Appeal (DB) No. 149 of 2001 is partly allowed.

29. Let lower-court records be transmitted to the court concerned, forthwith.

30. Let a copy of the judgment be transmitted to the court concerned through FAX.