
(2002) 08 JH CK 0063

In the Jharkhand High Court

Case No : Criminal Appeal No. 160 of 1990 (R)

Koka Sao and Others

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 20-08-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2002) 08 JH CK 0063

Hon'ble Judges : Vinod Kumar Gupta, J; Vikramaditya Prasad, J

Bench : Division Bench

Advocate : N.N. Sinha, N.K. Sinha and S.N. Singh, for the Appellant; APP, for the Respondent

Judgement

Vikramaditya Prasad, J.—The appellants, who stand convicted for the offences under Sections 302/34 and 201, IPC on trial and were sentenced to undergo R.I. for life and 7 years respectively, have preferred this appeal against the aforesaid conviction and sentence.

2. Dashrath Sao, PW 5, had lodged the FIR. Ext. 3, on 6.2.1985 at 10.00 a.m. stating therein that on the previous day at about 9.00 p.m. in the night, when he was taking his rneal in his house then all of a sudden his father (deceased) started crying from the lane adjoining west to his house. On his cries, the informant, his wife, Munua Devi, PW 1, his mother Bhutki Sahuwain, PW 3, younger sisters Meena Kumari. PW 2, and Nersha. PW 4, came out of the house running and saw that in the adjoining western lane of the house, Ghuran Sao armed with Tangi, Shankar Sao armed with Tangi, Koka Sao armed with Churi and Tulsi Sao armed with Mungra were assaulting his father. In their presence Ghuran Sao. Shankar Sao assaulted on the head of his father. His father being badly injured fell down on the ground and after that Koka Sao. Tulsi Sao were assaulting him by kudal and mungra, then the informant's mother and sisters and wife moved forward to surround him, then the assailants run towards them to assault and Ghuran Sao even caught and pulled the shirt of the informant and

started telling that he should also be assaulted and killed. Then the informant by giving a jerk released himself, but it resulted in tearing the shirt of the informant and he has also received certain blood splashes which was oozing from his father and out of fear, they did not go very close to the assailants and stood at a certain distance. All the four persons carried the body of his father after assaulting (MARKAR) (this term means both after assaulting or after killing) and threw it into a common well and then fled away. On alarm the villagers namely Rajendra Sao, PW 7, Bhutka Mahato, PW 9, Baleshwar Singh (not examined) and many other villagers came there running and with their help and with the help of net (chhalni) rope, they brought out the dead body of his father from the well and then it was carried to his home on the southern verandah of his house and the dead body was there in that veranda (when the FIR was being lodged) and the inmate of his house were taking care of it. In the night, because of fear, he could not go to the PS and consequently, on that date, he came to the PS with the chaukidars Balka Oraon and Sarge Oraon and has got his statements recorded. The FIR bears his signature, Ext. 1.

3. The defence version of the case, as appearing from the statements of the appellants u/s 313, Cr PC is the denial of the occurrence and false implication. The appellant, Shankar Sao, besides the aforesaid plea also took the plea that he had not thrown the dead-body into the well, rather as deceased was a drunkard, he, after taking wine, had fallen into the well.

4. It transpires that after recording the FIR, the inquest report marked Ext. 4 was prepared by one S.N. Singh, I.O. of the case, which has been proved by a constable, PW 10. The maker of the inquest report has not turned up before the court. This inquest report has been marked without objection and this shows that the dead body was found from the southern verandah of the house of the informant lying on the ground flat. Both legs were slightly bent near knees and right hand was also bent on the left side of the rib. Incised wounds were also on the right side, Panjra scratches with some blood stains on the right hand near elbow and above two injuries were apparently by sharp cutting weapons. In the elbow, some blood marks which were apparently wounds, both legs fractured near knees and in the left leg near knee, there were some blood stains. On the back, there were some swelling, a gamcha was also found wrapped around the dead body having blood stains, it also transpires that the blood stained soil was seized from near the well, vide Ext. 9. Then it appears that the post-mortem over the dead body was done by PW 6, Renu Bala, who also proved the post-mortem report and found the following injuries :--

"Lacerated wound.--(1) 3 x 1 cm. x 1/2 cm. on the right side of the forehead. (2) 1-1/2 x 1 x 1 cm. on the left temporal region. (3) 1 x 1 on the outer side of right forearm with fracture of forearm bones. (4) 2 x 1 cm. on the right thigh front and lower part with fracture of right thigh bone. (5) 9 x 1 x

1 cm. on the left parital region. (6) 3 x 1 x 1 cm. on the left parital eminence.

Abrasion.--(1) 1 x 2 cm, (2) 3 x 2 cm. on the right infrascapular region. (3) 2x1 cm. (4) 1 x 1/2 cm. on the left cheek (5) 7x6 cm. the outer side of right arm (6) 1x1 cm. on the back of right elbow (7) 1/2 x 1/4 cm. (4) 1/2 x 1/2 cm. on the back of left elbow (9) 3 x 2 cm. (10) 2 x 1 cm. (11) 1/2 x 1/2 cm. on the right flank of abdomen (12)

2 x 1/2 cm. (13) 1 x 1/2 cm. on the front of right knee joint. (14) 3x2 cm. (15) 1x1 cm. on the front and lower part of left thigh with fracture of left thigh bone. (16) 3x1 cm. on the joint of the left leg.

Internal.--There is fracture of right hip bone. (2) There is bearing of small intestine of one place. (3) Contusion of right frontal and temporal lobes of the brain.

1. The injuries are ante-mortem.
2. Caused by hard and blunt substance.
3. Cause of death--Head injury.

Time since death -- 12-24 hours."

5. The occurrence had taken place at about 9 p.m. The presence of the informant, his mother, his wife and his sisters at that relevant time cannot be doubted and has also not been controverted in cross-examination by the defence. PWs 1, 2, 3, 4 and 5 are the related witnesses to the deceased, which is obvious from the statements which have been made. PW 7 is named in the FIR as one of the villager who came to the P.O. on alarm. This witness has turned hostile and completely denied to have any information regarding the occurrence. He has denied to have made any statements to the police. PW 8, who was not named as a witness in the FIR, and has been tendered, has stated in his cross-examination that at the relevant time, he was not in his house and when he came back from duty, he could know that Fheku had died of drowning in the well and this information he had received from the family members of Fhaku himself. Bhutka Mahato is yet another tendered witness, though he was named in the FIR. In his cross-examination, he has said that he had gone on night duty and more than that, he has not said anything in his evidence. As stated, PW 10 is a constable who has proved the signature of the A.S.I. on the FIR and also on the inquest report and the seizure list, Ext. 5. In his cross-examination, he has said that he has never worked with the said ASI. He does not know his full name and these papers were not prepared by this witness.

6. The fate of this appeal in the aforesaid circumstances rests on the findings as to whether or not PWs 1, 2, 3, 4 and 5 are the eye-witnesses of the occurrence and how much weight be given to the evidences of these highly interested witnesses, when none of the independent witnesses has come to support the prosecution version of the case, rather one of the prosecution witnesses, who had been tendered, has categorically said that he came to know from the family members of the deceased that Fheku had died of drowning into the well.

7. PWs 1, 2, 3, 4 and 5 are related to one another. PW 1 Munua @ Basant Devi is the wife of the informant (PW 5). PW 2, Meena Kumari. is the daughter of the deceased and sister of the informant. PW 3 is the wife of the deceased and mother of the Informant. PW 4, Nersha, is the daughter of the deceased and the PW 5 is the informant. As the alleged occurrence took place at about 9.00 p.m. in night allegedly in the lane near the house of the informant, the presence of these witnesses in the house is quite natural and in absence of any other evidence, it cannot be doubted. Therefore, if any hulla is raised from the lane by the side of the house, much less of the deceased, who was closely related and whose cries and voice could have been identified, their coming at the P.O. is also not disbelieved. But even though they are natural witnesses, considering their interestedness, their being eye-witnesses has to be ascertained from the attending circumstances.

8. PW 1, in her examination-in-chief, states that she went out of the house on hulla and she saw the accused appellants and also disclosed their names and said that Ghuran Sao assaulted with Tangi, Shankar with Tangi and Koka by the Bat of kudal and Tulsi Sah by wood (Mungra) and hence they wanted to save Fheku, but as they were threatened, they retreated and stood at some distance. She has said that thereafter assailants carried the body to the well and threw it down into the well, from where the dead-body was recovered. She also admitted that there was land disputes between the appellants and prosecution party. She says in cross-examination that there was no litigation. In paragraph 3 of her cross-examination, she says that the police had never taken her statement and about 500 people had assembled there but she had not taken the names of accused persons at any time. In paragraph 4, though she names the persons who live in the nearby houses of hers, but she was unable to say that they had come or not. She has said that at the time of occurrence, it was a dark night, but she has also said that after hearing hulla when they came out, they found her father-in-law (deceased) lying and saw the accused persons assaulting her father-in-law from her own eyes. She also says that they had not come out of the house, taking a diya, nor they had raised hulla at the time of assault and had not resisted the accused persons for fear of being beaten by the accused. In paragraph 7, she says that she saw the assault being made by Ghuran on the entire body of her father-in-law, but she could not say as to on which part of body of her father-in-law was being assaulted by Ghuran. She further says that Koka was also assaulting. Tulsi was also assaulting, but she could not say as to which part of the body of her father-in-law was being assaulted. In paragraph 8, she says that the dead-body of her father-in-law was in the well nearby their house.

From her evidence, it transpires that she was not examined by the police during investigation. She did not identify any persons even of the neighbourhood, who had assembled there. Night was dark and no means of identification even a lamp was brought. She did not disclose the names of the assailants to any person and she could not see as to which part of the body of her father-in-law was hit by

Ghuran, Tulsi or anyone else. Thus, it is clear from her evidence that she is taking the names of the assailants for the first time before the court and she is disclosing the names of the appellants for the first time before the court. It is very easy for any one to say that he/she saw the occurrence but an eye-witness, if he is an eye-witness, is expected to express his/her experience of his impulsive acts when the occurrence was taking place. She says that she did not raise hulla because of fear of being beaten, then can it be believed that when such a close relation was being beaten, was it natural for her not even to raising a hulla and to remain a mute spectator to witness the brutal assault. General statement of witnessing the occurrence can be claimed even by any one, but the eyewitness of the occurrence must give details of the manner of the assault, though, of course, with the passage of time, there may be some variation. This type of general statement that he saw the accused assaulting the injured/deceased but he could not say that as to which part of the body was hit and by whom. This circumstances read with other circumstances discussed above leads me to draw a conclusion that she is not an eye-witness of the occurrence.

9. PW 2 stated the same thing in the examination-in-chief. In paragraph 4, she says that all the five persons, i.e. all the PWs had come out of the house altogether and the moon was in the sky. She again says that she could not see as to on what portion of the body of her father, Ghuran had assaulted, vide para 5 last line. She has stated in para 7 that on the next day, police had inquired from her and also from her other family members whereas PW 1 says that from her sister or Nanod Daroga never made any enquiry in her presence. With this difference that she was examined by the police, the value of her evidence is the same as has been in the case of PW 1. With this addition that she admitted that her father used to drink and it was in the night when the moon was in the sky.

10. PW 3 in her examination-in-chief has stated the same facts. In her cross-examination, she has said that sometimes her husband drank Haria (local liquor). She also says that the police had taken her statement. Her attention was drawn to her previous statement before the I.O., vide para 3, that she has stated before the police that accused Koka had assaulted her husband by the Bat of Spade, because of non-examination of the I.O., this contradiction had not been taken. She also admits that it was a dark night, vide para 3 last line. Further she has said that all PWs had come simultaneously. She raised hulla but they retreated and raised hulla from that place. She says that some persons had assembled there, but she did not identify them because it was a dark night. She further says that about 100 persons had assembled at that time but she had not disclosed the names of the assailants to them vide para 5. In para 5 she says that she cannot say as to which of the accused assaulted her husband and at which part of his body, rather they were discriminately assaulting. She has admitted that sometimes, there were some quarrel between her husband and the accused persons, though there was no quarrel of enmity. Now the question is if she could not identify due to darkness, as per her own admission, the persons who assembled there or took out the dead body from well, then how could she

identify only the assailants and why she did not disclose the names of the assailants to the people who assembled at P.O. These two questions require to be answered by prosecution.

11. PW 4 is the daughter of the deceased. She repeats almost the same story in her examination-in-chief and she also adds that her sister, PW 2, had gone to P.O. with an earthen lamp.

12. The defence argued that this means of identification is being introduced at a later stage just to create a means of identification, which was not either in the fardbeyan or in the evidence of the witness Nos. PW 1 and 3. Though she (PW 4) said that there was an earthen lamp but in her cross-examination, she said that it was a dark night. In para 2, she further says that she could not say as to whom of the accused assaulted at which part of the body of her father. In cross-examination, again in para 3, she has said to I.O. that her sister had gone with a dhibri and because of non-examination of the I.O., this point was not contradicted from her previous statements. She went to the extent of saying that Tulsi was assaulting by Mungra.

The defence said that Tulsi was a small boy at that time and was not in a position to beat. This witness was telling a lie even while making her statements. They did not spare even a small child which is a circumstance indicative of the fact that there was full-fledged plan to implicate the whole family of the appellants falsely including the small child.

13. PW 5 is the informant, he has said the same thing in examination-in-chief, besides that he had been caught hold of by Ghuran and somehow he got himself relieved and he stood at some distance and watched the incident. In F.B. he had said that in course of getting himself relieved from the catch of Ghuran, some splashes of blood had fallen on his shirt. But in his evidence he did not state this fact. The natural impulse of a son was there though he failed to rescue him, but why he did not state this fact in court is not understood. The shirt on which there were splashes of blood has not been seized. Had such statement been made (supra) and the shirt would have been produced, these two would have been an unimpeachable evidence to prove him as eye-witness. He has said that his father did not drink. In para 4, he said that it was not dark. He again said that it was a moonlit night. But subsequently, he said that it was a dark night. He has also said that her sister had come with an earthen lamp. He raised hulla. He admits that at the time of assault, nobody from the village has come and after that many persons had come. He has admitted that near his house, there are many houses in which Ram Chander Singh, Muneshwar Singh etc. live. When hulla was raised, only the family members of the informant had come out. The neighbours are generally expected to come out at least out of curiosity whose houses are adjacent to the house of the informant. He has said that dead body was taken out of the well with the help of the villagers. Regarding the manner of occurrence, he says that Ghuran and Shankar assaulted his father by Iron axe but he could not say as to whether they assaulted by the wooden portion or

sharp cutting portion of the axe as they were indiscriminately assaulting. Therefore, he could not say that how many assault were made by whom and who assaulted at which part of the body of his father. Thus, again in para 6, he said that at which part of the body was assaulted by Tulsī, he could not say.

From his evidence it is clear that none of the villagers even the next door neighbours arrived at the P.O. during hulla and saw the occurrence. Thus, he excludes the possibility of the neighbours being the eyewitness of the occurrence. Thus, he was as silent spectator and he could not give any other details than the stereotype statements that all the assailants had assaulted indiscriminately. No witness has come at least to say that he had helped the informant in taking out the body of the injured from the well. Even on this point, there is no witness.

14. Now I take up the question whether the witnesses in the face of the aforesaid discussions are really the eye-witness, PW 1 was not examined by I.O, why PW 1 or PW 3 did not disclose the names of the assailants soon after the occurrence to the villagers/neighbours, who had arrived at P.O. Admittedly, the police station is only at a distance of 1/2 km. according to the FIR and according to PW1. the P.S. is near their house mere ghar se thana nasdik hai. But none went to the PS immediately after the occurrence. The explanation is that because of fear they did not go. When a large number of witnesses had come even to take out the body from the well and the accused persons had fled away after the occurrence, then it does not appeal to reason why the informant even with the help of other villagers did not go to the PS in that night though the PS is at a stone's throw distance from the P.O. The FIR was lodged at 9.00 a.m. on the next day and if thereafter the I.O. came and, some witnesses made statements, then such a delay in lodging the FIR leaves scope/room for deliberation among the family members to make out a prosecution case or to implicate or not to implicate the persons, particularly when the names of the assailants were not disclosed to neighbours, who assembled at the P.O. soon after the occurrence. So, this delay of 12 hours in the aforesaid circumstances, in my opinion, becomes very fatal for the prosecution case and the explanation that has been given for not informing the police soon after the occurrence is not acceptable to me.

15. The second question is if the PWs had already seen the occurrence, then there was no reason as to why the accused persons would have taken the burden of carrying the dead body and throwing in into the well for the purpose of disappearance of the evidence. The question of disappearance of evidence arises when no body knows or has seen that an occurrence had been committed and committed by whom, but when it is known to many and occurrence had already been seen, then it would not amount to disappearance of the evidence.

16. In the result, considering the facts that as the witnesses have given stereotype evidence, which sans any detail of the manner of occurrence and when there is inordinate delay in lodging FIR without acceptable explanation and there is scope for deliberation when the means of identification is doubtful,

identification by the related witnesses only of the assailants and not of any the members of the crowd due to darkness, then the witnesses, though may be natural, cannot be treated to be the eye-witnesses of the occurrence. Accordingly, I hold that the prosecution has failed to prove the charges against the appellants under Sections 302/34 and 201, IPC beyond all reasonable doubts. This appeal is accordingly allowed and the impugned order of conviction and sentence passed against the appellants is set aside. As the appellants are on bail, they are discharged from the bail bonds.