
(2024) 09 JH CK 0072

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 1152 Of 2012

Madan Pahariya @ Madan Malto

APPELLANT

Vs

State Of Jharkhand `

RESPONDENT

Date of Decision : 11-09-2024

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313

Indian Penal Code, 1860 — Section 302

Evidence Act, 1872 — Section 106

Citation : (2024) 09 JH CK 0072

Hon'ble Judges : Ananda Sen, J;Gautam Kumar Choudhary, J

Bench : Division Bench

Advocate : A.K. Kashyap, Lina Shakti, Pankaj Kumar

Final Decision : Dismissed

Judgement

Ananda Sen, J

1. This appeal is directed against the judgment of conviction dated 10.09.2012 and order of sentence dated 12.09.2012 passed by Sri Rajesh Kumar Vaish, the learned Principal Sessions Judge, Sahibganj, in Session Trial No. 177 of 2011, arising out of Borio(J) P.S Case No. 60 of 2011, whereby and whereunder, the appellant has been punished to undergo rigorous imprisonment for life and fine of Rs.5,000/- for committing the offence punishable under Section 302 of the Indian Penal Code.

2. Learned senior counsel appearing on behalf of the appellant-convict submitted that none of the witnesses in this case are eye witnesses, rather all of them have been declared hostile. He further submitted that when all the prosecution witnesses have been declared hostile, there was no material to convict the appellant for the offence under Section 302 of the Indian Penal Code. He also submitted that the Court witnesses i.e. C.W. Nos. 3, 4 and 5 are also not eye witnesses rather are the hearsay witnesses. As per him, the appellant has been solely convicted on the basis of the statement of the Investigating Officer. Only

on the basis of statement of the Investigating Officer, a person cannot be convicted under Section 302 I.P.C. The defence version that the deceased died after falling from a tree in course of collecting wood has not been believed by the Trial Court without any basis. It is his case that the prosecution has to prove the guilt of the appellant beyond all reasonable doubt, but in this case the prosecution has failed, thus the appellant needs to be acquitted.

3. Counsel appearing on behalf of the State submitted that as per the FIR the witnesses have clearly stated that they had seen the appellant beating the deceased with stick and when the witnesses tried to intervene, they were also threatened. Further, as per the FIR, the witnesses have also stated that they have seen this appellant dragging the deceased in a room while beating her and she was also beaten inside the room as sound of cry was coming from the said room and the injuries found on the person of the deceased were numerous. There were injuries on the hand, wrist, palm, Leg, chest, throat, back, buttock etc. The murder weapon, which was wooden stick, was also recovered by the Investigating Officer and he produced the same in the Court. The above fact finds support from the statement of the prosecution witnesses also. The dead body was recovered from the house of the appellant, which suggests that except this appellant, no one can commit murder of the deceased. He further added that the appellant did not give any plausible explanation as to how the deceased died thus there is application of Section 106 of the Evidence Act in this case also. It is his case that the prosecution has to prove the guilt of the appellant beyond all reasonable doubt, but the doubt in the mind of the Court to acquit the appellant should be reasonable. Unreasonable doubt cannot be ground to acquit the appellant by giving him any benefit. He also submitted that the defence version cannot be believed, as if a persons falls from a tree, there will be one or two injuries and not numerous injuries as found in this case. He lastly submitted that there is no ground to acquit the appellant, thus he prayed that the judgment of conviction and sentence is fit to be upheld.

4. In this appeal, the appellant has been charged and convicted under Sections 302 of the Indian Penal Code. The prosecution case is based upon the fardbeyan of the informant, Doman Pahariya recorded on 7.4.2022 by the Officer Incharge of Borio(J) Police Station. It has been stated that on 6.4.2011 in the evening, the accused Madhan Pahariya started beating his wife in the courtyard of his house without any basis by a wooden stick. On hearing cry of the deceased, the informant along with other villagers assembled there and intervened, when the accused also threatened them. The accused, thereafter took his wife inside the room of his house and closed the door and also assaulted her again. The informant and others tried to save the victim but they could not succeed because the appellant threatened them of dire consequences. Thereafter, the matter was informed to the police, who reached the house, and when entered the house of the accused, they found that the deceased was lying there on the ground dead and there are several injuries on the person of the deceased.

5. On the basis of the aforesaid fardbeyan of the informant, Borio(J) P.S. Case No. 60 of 2011 was registered for offence punishable under Section 302 of Indian Penal Code, against the appellant. Subsequently, the matter was taken up for investigation and after completion of investigation, charge sheet was submitted under Section 302 IPC, against the appellant and, accordingly, cognizance of the offence was taken and the case was committed to the Court of Sessions for trial.

6. To prove the prosecution case, the prosecution has produced seven witnesses, who are P.W. 1, Doman Pahariya (the informant), P.W.2-Bijay Pahariya @ Birju Pahariya, P.W.3- Chamaru Paharia, P.W.4- Bangaru Pahariya, P.W. 5- Mangala Pahariya, P.W.6- Bobe Pahariya and P.W.7-Mantu Pahariya.

P.W.1, Doman Pahariya, the informant of this case, has identified and proved his signature in fardbeyan dated 7.4.2011, which has been marked as Ext.-1. He also identified his signature on the seizure list, which has been marked as Ext.-2. He also identified his signature on the inquest report of the deceased, prepared by the Investigating Officer, which was marked as Ext.-3. He deposed that the fardbeyan was written by the police, but the same was not read over before him. He has been declared hostile.

In cross-examination, this witness has denied about the allegation as alleged in the FIR. In paragraph 7 of cross-examination, he denied about the incident as well as recovery of dead body, but in para 8, this witness has supported that he had seen the dead body of the deceased in the hospital and the deceased is the wife of the appellant.

P.W.2, Bijay Pahariya, deposed that deceased Dharma Paharin was the wife of the appellant. This witness turned hostile as this witness had not answered that who killed the deceased.

P.W.3, Chamaru Pahariya, did not support the case of the prosecution and he has been declared hostile.

P.W.4, Bangaru Pahariya, deposed that he came to know that the deceased was killed by this appellant. He further deposed that his statement was not recorded by the police. He has also been declared hostile.

P.W.5, Mangala Pahariya, did not support the prosecution case and he has been declared hostile.

P.W.6 (Bobe Pahariya) and P.W.7 (Mantu Pahariya), have also been declared hostile.

7. In this case, there are five court witnesses, who are as follows;

C.W.1, Tej Naryan Sharma, is the Investigating Officer of this case, who deposed that he has recorded the fardbeyan of Doman Pahariya (P.W1 i.e. the informant) and has proved his writing and signature on the fardbeyan, which has been marked as Ext.-4. He also proved the formal FIR, which has been marked as Ext.-5. He also deposed that he inspected the place of occurrence, which was the

house of the appellant, where the dead body of the deceased was recovered. He prepared the inquest report which was marked as Ext.- 3/1. This witness has further deposed that there were several injuries found on the dead body of the deceased. He further deposed that he arrested the appellant and on his statement he recovered the wooden stick, which was used in murder of the deceased, and the same was produced before the court, which has been marked as Material Ext.-I. This witness has also proved the seizure list, which was prepared by him on 7.4.2011 in presence of the witnesses, which has been marked as Ext.-2/1 and he has identified his writing and signature on it. He deposed that he also recorded the confessional statement of the accused which was written by him, which has been proved and marked as Ext.-6. He further deposed that during the course of investigation, he has recorded the statement of the witnesses as well as other villagers, who had supported the allegations written in the FIR. He also deposed that the postmortem report, which was prepared by Dr. Shiv Shankar Bhagat, was also received by him which has been marked as Ext.-7.

In cross-examination, he deposed that the accused had tried to flee from the place of occurrence, but he was chased and arrested by the police. This witness further deposed that he recorded the confessional statement of the accused, but he admitted that the accused had not given the confessional statement voluntarily.

C.W.2- Dr. Shiv Shankar Bhagat: This witness is the doctor, who has proved the postmortem report, which has been marked as Ext.-7. He deposed that he found several ante-mortem injuries and there were multiple bruise on both hands about 30 in numbers and bruise on both legs about 30 in numbers. He also found multiple bruise on abdomen and on opening the abdomen, there was rupture of spleen and peritoneal cavity was full of blood and multiple bruises on back. He opined that the cause of death was due to shock and haemorrhage. He further deposed that Injury No. 3 was sufficient to cause of death in ordinary course of nature. He opined that the aforesaid injury may be possible by hard substance and and it is possible by stick i.e. material exhibit. He further opined that injury No. 3 may be possible if one may fall from a tree.

C.W.3- Surja Pahariya: This witness is the father of the deceased, who deposed that Madan Pahariya killed the deceased i.e. his wife. On receiving the informant about the incident through telephone, he reached the house of the appellant, where he saw that dead body of the deceased was lying and several injuries were found on the person of the deceased.

C.W.4- Maisi Pahariya: This witness is the mother of the deceased and has also deposed that Madan Pahariya killed the deceased i.e. his wife by beating her by a wooden stick. This witness has deposed that she came to know about the incident over telephone and after that she reached the house of the appellant, where she saw that dead body of the deceased was lying and several injuries were found on the person of the deceased.

C.W.5- Budhani Paharin: This witness has deposed that Madan Pahariya killed the deceased. On receiving the informant about this incident over telephone, she reached the house of the appellant, where she saw the dead body of the deceased was lying there and several injuries were found on the person of the deceased. In cross-examination, in para- 6, this witness deposed that she had not seen the incident, but she heard about the same. This witness also admitted that before the incident, quarrel had taken place between the husband (the appellant) and the wife (the deceased). She also denied that the deceased used to climb trees for collecting woods. In para-12, she further admitted that she had seen the dead body of the deceased in the house of the appellant.

8. After closure of prosecution evidence, the statement of the appellant was recorded under Section 313 Cr.P.C in which he has denied the charges levelled against him and claimed himself to be innocent.

9. The trial court after appreciating the evidences of both sides, held that the appellant is guilty for committing the offence under Section 302 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life.

10. The defence has also produced two witnesses namely Vijay Pahariya and Gangi Paharia , who are as follows:-

D.W.1: Vijay Pahariya- deposed that the deceased went to jungle to cut fire woods and climbed a tree and fell down, resulting in injury. He stated that they had carried the dead body from the forest to the village. He also stated that relationship between the deceased and the appellant was cordial. In cross-examination, he admitted that he has not received any notice from the Court and on the insistence of this appellant through his well wishers, he has come to depose before the Court. He stated that he does not know the name of the place where the incident had happened nor he had given any information to the police. As per him, the dead body was carried by Dharma Pahariya and this witness from the forest to the house. They travelled 7 k.m. to bring the dead body in a cot.

D.W.2: Gangi Paharin- deposed that the deceased died as she fell from a tree while cutting fire wood. The deceased was brought in a cot by her. Vijay Pahariya and Dharma Pahariya were also there and at that point of time, the appellant was not present at the house as he had gone to sell fire wood in Sahibganj. This witness admitted that she is the mother of this appellant. She stated that the cot was taken from the house to the forest where the deceased died and from there again the body was brought. She also stated that the forest is far away from the house and it at least takes three hours to travel to that place and they had walked from the forest to bring the cot and again walked back with the cot to the forest to bring the body.

11. The prosecution has exhibited material documents, which are as follows:-

Ext.1- Signature of P.W.1 Doman Pahariya (Informant) on fardbeyan dated

7.4.2011.

Ext.2- Signature of Doman Pahariya on seizure list dated 7.4.2011.

Ext.2/1- Seizure list dated 7.4.2011 prepared by C.W.1 (IO) Tej Narayan Sharma.

Ext. 3- Signature of P.W. 1 Doman Pahariya on death inquest report dated 7.4.2011.

Ext.3/1- Death inquest report dated 7.4.2011 prepared by CW1 -Sri Tej Narayan Sharma.

Ext.4 -Fardbeyan dated 7.4.2011 written by S.I. T.N. Sharma (CW1)

Ext. 4/1- Endorsement on fardbeyan regarding registration of Borio(J) P.S. Case No. 60 of 2011.

Ext.5- Formal FIR dated 7.4.2011.

Ext.6- Confessional statement dated 7.4.2011 of accused Madan Pahariya written by SI Sri T.N. Sharma(I.O.).

Ext.7- Post mortem report of the deceased Dharmi Paharin prepared by Dr. Shiv Shankar Bhagat (CW2).

Material Ext.I- Phonkni made of Bomboo .

12. After hearing the learned counsel for the parties and after going through the evidences of this case, we find that none of the prosecution witnesses supported the prosecution case, though in the fardbeyan the informant had narrated the entire story how the deceased was assaulted with stick by this appellant in the house and when he and others tried to forbid him and save the deceased, they were also threatened with axe, but the informant has also been declared hostile. In fact, all the prosecution witnesses of the occurrence had turned hostile. The Hon'ble Supreme Court in the case of Ramesh Harijan v. State of U.P., (2012) 5 SCC 777 has held as follows;

23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examine him.

"6. ... The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof."

[Vide Bhagwan Singh v. State of Haryana [(1976) 1 SCC 389 : 1976 SCC (Cri) 7 : AIR 1976 SC 202] ; Rabindra Kumar Dey v. State of Orissa [(1976) 4 SCC 233 : 1976 SCC (Cri) 566 : AIR 1977 SC 170] ; Syad Akbar v. State of Karnataka [(1980) 1 SCC 30 : 1980 SCC (Cri) 59 : AIR 1979 SC 1848] and Khujji v. State of M.P. [(1991) 3 SCC 627 : 1991 SCC (Cri) 916 : AIR 1991 SC 1853] (SCC p. 635, para 6).]

24. In *State of U.P. v. Ramesh Prasad Misra* [(1996) 10 SCC 360 : 1996 SCC (Cri) 1278 : AIR 1996 SC 2766] (SCC p. 363, para 7) this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde v. State of Maharashtra* [(2002) 7 SCC 543 : 2003 SCC (Cri) 112] , *Gagan Kanojia v. State of Punjab* [(2006) 13 SCC 516 : (2008) 1 SCC (Cri) 109] ; *Radha Mohan Singh v. State of U.P.* [(2006) 2 SCC 450 : (2006) 1 SCC (Cri) 661 : AIR 2006 SC 951] , *Sarvesh Narain Shukla v. Daroga Singh* [(2007) 13 SCC 360 : (2009) 1 SCC (Cri) 188 : AIR 2008 SC 320] and *Subbu Singh v. State* [(2009) 6 SCC 462 : (2009) 2 SCC (Cri) 1106] .

"83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."

[See also *C. Muniappan v. State of T.N.* [(2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402 : AIR 2010 SC 3718] (SCC p. 596, para 83) and *Himanshu v. State (NCT of Delhi)* [(2011) 2 SCC 36 : (2011) 1 SCC (Cri) 593]

13. P.W. 1 admitted that he had given statement before the police and on the basis of which, the fardbeyan was recorded but that was not read over to him. This fact was admitted that he had narrated the fact to the police official. From his statement, at paragraph 9, it is clear that the deceased was assaulted by this appellant as because he says that when the appellant was assaulting the deceased, he had not gone to the place of occurrence but the villagers had gone. The distance of the house of this appellant and the house of this witness is 100 feet, which is very near. This witness also stated that he had come to Court to depose along with the brother of this appellant. This gives a clear impression that this witness is withholding himself. This witness has admitted his fardbeyan, which forms basis of the FIR, wherein, the details of the incident had been mentioned and also admitted that this appellant had assaulted the deceased, but at that point of time he was not present there and heard the same from the villagers, whereas in the FIR, he stated that he was present at the place of occurrence.

14. P.W.2, who was also declared hostile, in paragraph 2 stated that the dead body was found in the house of this appellant. Though he stated that who had committed the murder, is not known to him, but surprisingly, in his cross-examination, he admits that it is correct that he had stated before the police that in the evening, this appellant was assaulting the deceased in his house and he along with other villagers forbade him, for which they were being threatened. Though, all the witnesses have been declared hostile but the evidence of P.Ws. 1 and 2 can be considered in this case from where it is clear that this appellant has assaulted the deceased in his house.

15. The defence witnesses stated that the deceased had went to the forest to collect fire wood where she died as she fell from the tree and then the body was brought back to the village. From the evidence of these witnesses, the aforesaid plea is not believable. D.W. 2 stated that it takes three hours from the village to reach the area in the forest where the deceased died. They further stated that after the deceased died, they came to the village to bring a cot and again went to the forest and brought back the body of the deceased, this means, nine hours would consume to bring the dead body. None of the defence witnesses have stated that when they reached the village to bring the cot, any villager was informed about the death or the villagers accompanied them to bring the dead body. Further D.W. 1 could not even say the name of the place of the jungle where the deceased died. He stated that it is at the instance of this appellant, he was brought to depose and even he was not even noticed by the Court. Further D.W.2 is none but mother of the deceased. All these statements clearly suggest that the defence witnesses are absolutely unreliable.

16. It is an admitted case that the dead body was found in the house of this appellant and it is the prosecution case that the appellant had assaulted the deceased in his house. Though all witnesses have been declared hostile but from what has been gathered from the statement of P.Ws. 1 and 2, it is clear that the deceased was being assaulted. There is nothing on record that this appellant was not present at the place of occurrence, which is his house.

17. Since the dead body was found in the house with numerous injuries, it is for this appellant to explain how the deceased died. This is one of the circumstances, which the appellant had to explain. In this aspect we must take note of Section 106 of the Evidence Act, which reads as under:-

106. Burden of proving fact especially within knowledge. -- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

This provision is applied, specially in the cases where the offence is committed within the four corners of the house. The Hon'ble Supreme Court in the case of Anees vs State Govt. of NCT reported in 2024 SCC OnLine SC 757 in paragraph 43, 44 and 50 has held as under;

"43. Thus, from the aforesaid decisions of this Court, it is evident that the court should apply Section 106 of the Evidence Act in criminal cases with care and caution. It cannot be said that it has no application to criminal cases. The

ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.

44. Section 106 of the Evidence Act cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden on the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a prima facie case is established by such evidence, the onus does not shift to the accused.

50. Section 106 of the Evidence Act would apply to cases where the prosecution could be said to have succeeded in proving facts from which a reasonable inference can be drawn regarding guilt of the accused."

In this case, the appellant failed to explain the cause of death of the deceased, as the deceased died in his house. Be it noted that the explanation given by the D.Ws. has already been discarded by us.

18. The weapon, with which the deceased was assaulted has also been seized by the Investigating Officer. It is a stick, which is used for blowing to lit the oven, which is made of bamboo and the same was produced before the Court and the same was marked as material Ext.- 1.

19. The doctor, who conducted the postmortem of the deceased, found numerous injuries on the body of the deceased. Bruises were thirty in numbers in hands and thirty in legs. There were multiple bruises in abdomen and the spleen was ruptured. The doctor opined that the Injury No. (iii), which is multiple bruises on abdomen and rupture of spleen is sufficient to cause death in ordinary course of nature. The injuries are caused by hard and blunt substance and is possible by stick, used in kitchen. The doctor was shown the murder weapon i.e. stick (material Ext.-1) and seeing the same, the doctor opined that it is possible to inflict the injury with this. Thus, from the evidence of the doctor, it is proved that the death is homicidal and can be caused by the weapon, which was seized and marked as material Ext.-1.

20. The Court Witnesses 3 and 4 clearly stated that they received information about the incident on phone and reached the house and saw the dead body of the deceased. They stated that they had also seen the murder weapon and mark of injuries on the dead body. They also proved the place from where the body was found i.e. the house of the appellant. Though both these witnesses have stated that just a month before the occurrence, this appellant also killed the child

of the deceased but there is no such evidence in support of the same, but the fact remains that they had gone to the house of this appellant and had seen the dead body along with the injuries. P.Ws. 2 and 5 also in cross-examination had stated that there was altercation between this appellant and the deceased and the appellant had abused the deceased and the same incident had also occurred in their house. This suggests that the relationship between the appellant and the deceased was not cordial.

21. Thus, from what has been discussed above, I find that the prosecution has been able to prove the guilt of this appellant beyond all reasonable doubt. Thus, on overall consideration, we find that there is no merit in this appeal and the same is thus liable to be dismissed. Accordingly, the judgment of conviction dated 10.09.2012 and order of sentence dated 12.09.2012 passed by Sri Rajesh Kumar Vaish, the learned Principal Sessions Judge, Sahibganj, in Session Trial No. 177 of 2011 is confirmed.

22. In the result, this appeal is dismissed. Let the Trial Court Records be sent back to the Court concerned forthwith, along with a copy of this judgment.

23. Pending interlocutory application, if any, also stands disposed of.