
(2003) 07 JH CK 0099

In the Jharkhand High Court

Case No : Criminal Appeal No. 55 of 1996

Madhua Hembrum and Another

APPELLANT

Vs

State of Bihar (now Jharkhand)

RESPONDENT

Date of Decision : 24-07-2003

Acts Referred:

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

Citation : (2003) 3 BLJR 1766

Hon'ble Judges : Hari Shankar Prasad, J;Deoki Nandan Prasad, J

Bench : Division Bench

Advocate : G.C. Sahu, for the Appellant; Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Deoki Nandan Prasad, J.—Both the appellants have been convicted u/s 302/34 I.P.C for committing murder of Manta Kui and Jonga Kui and they are sentenced to undergo R.I. for life there under and against the same, this appeal has been directed for setting aside the judgment of conviction and sentence passed by the 3rd Addl. Sessions Judge, Chaibasa in connection with Sessions Trial Case No. 209 of 1992.

2. The prosecution case in brief is that the informant, Kanu Hembrum gave fard bayan before the police alleging therein that on 20-9-1991 there was Jamuna Festival in the village and in the night at about 8.30 p.m. the accused persons, namely, Rasika Hembrum, Madhua Hembrum, Birbal Hembrum and Chami Kui had come to the house of the informant and asked for Handia but the informant said that there is no Handia available, on which the accused/appellant Rashika Hembrum attacked on him with Bhujali which was warded off by his Palm resulting injury on the Palm. Thereafter the informant fled away out of fear towards Jungle. It is further alleged that he came back in the next morning from the Jungle and found his wife Manta Qui and his elder brother's wife lying dead in the house. The informant's daughter Tulsi Qui and elder brother's daughter

Somri Qui narrated the incident to him. According to them, accused Chami Qui, Rasika Hembrum, Madhua Hembrum and Birbal Hembrum assaulted them (deceased) with Bhujali and rod. The cause of occurrence is said to be that Chami Qui claimed her right over six acres of land which belonged to the informant and due to the dispute, they committed such occurrence in order to grab the land, they committed murder. On the basis of the fard bayan, the First Information Report was lodged for the offence under Sections 324/307/302/34 I.P.C. against four named accused persons. The police investigated into the case and submitted charge sheet against six accused persons against whom charge was framed before the trial Court for facing trial to which the accused persons denied the allegation. Witnesses were examined in the trial Court and after hearing both sides, the trial Court convicted and sentence the appellants in the manner as mentioned above. After being aggrieved, both appellants preferred this appeal.

3. While assailing the impugned judgment of the trial Court, Mr. G.C. Sahu submitted vehemently that the trial Court committed gross error in convicting the appellants when other accused persons, who were also charged for the offence u/s 34 of the Indian Penal Code have already been acquitted and the allegations against all the six accused persons, who were facing trial together, was the same and similar but even then the trial Court has not considered the evidence meticulously. It is further argued that the offence u/s 307 I.P.C. has not been made out as neither the injury report has been produced nor the doctor who said to have examined the informant, has been examined in this case and so, the story as propounded by the prosecution has not been believed by the trial Court. It is further argued that actually there is no eye witness to the occurrence to say that these two appellants had ever caused injury due to which, death was occurred and as such, the impugned judgment is fit to be set aside.

4. Obviously, the trial Court has not found the case true u/s 307 I.P.C. and the accused/appellants Rasika Hembrum has already been acquitted there under. It is also manifest that six accused persons were charged u/s 302/34 I.P.C. for committing murder in furtherance of common object of which four accused persons have already been acquitted by the trial Court.

5. Now let us examine as to how far the prosecution has been able to establish the charge against these two appellants?

6. The allegation as made out in the fard bayan which reads as under: Accused Rasika Hembrum, Budhwa Hembrum, Birbal Hembrum and Chami Kui came there and demanded Handia to which the informant said that there is no Handia then Rasika assaulted with Bhujali which caused injury in his palm thereafter he fled away towards Jangal out of fear. That when the informant, Kanu Hembrum came back from the jungle in the morning, his daughter Tulsi Qui and niece Somri Qui narrated him that accused Chami Qui, Rasika Hembrum, Madhua Hembrum and Birbal Hembrum assaulted the deceased with Bhujali and rod and after seeing the occurrence, both Tulsi and Somari also fled away out of fear.

7. P.W. 1 is Munda of the village. He claimed to have seen the dead body of the wife and Bhabhi of the informant. The informant did not say any thing to him about the occurrence. P.Ws. 2 and 3 are formal witness.

8. P.W. 4 is the informant who is admittedly not an eye witness though he claimed to have sustained injury on his Palm caused by Rasika Hembrum but admittedly this part of the occurrence could not be believed for want of any medical evidence and also for non-examination of the Doctor to support the injury on the person of the informant. Whatever he stated about the death of his wife and Bhabhi, he is the hear say witness as he came to know from his daughter and niece in the next morning when he returned from Jungle. According to him, he had stated before the police that there were three accused persons came to his house and demanded Handia.

9. P.W. 5 the daughter of the informant, stated that both Rasika Hembrum and Madhua Hembrum started assaulting to his father with Knife and they also assaulted with Bhujali. Thereafter, his father fled away towards jungle out of fear and then Chami Qui came there and ordered to kill them. She further deposed that Subudhia, Tukuf, Tasika, Birbal were also present there when Chami was giving order to finish them. She stated that all the accused persons assaulted Mukta Qui with Chaku, Bhujali, Tangi and Lathi and thereafter they also assaulted Jonga Qui with Lathi and Tangi. She denied to had gone to the house of Munda in the said night, but PW 1 (Munda) stated that PW 5, Tulsi Qui had come to his house in the morning. She further stated that she has enmity with Chami and other accused persons and she (P.W. 5) also fled away out of fear.

10. P.W. 6 above deposed in the same line claiming that accused Rasika Hembrum, Madhua Hembrum, Chami Kui, Birbal Hembrum Subdia Hembrum, Pupul and Rasika Hembrum assaulted Mukta when Chami ordered to kill them. Thereafter accused Madhua Hembrum and Rasika Hembrum assaulted Jonga Qui. But she clearly stated in her cross-examination in para 13 that all the accused persons assaulted first to Mukta and then to Jonga. She further deposed that at the time of occurrence, they raised hulla but none of the villagers/neighbours came there and the night was dark and she narrated the incident to Mana, Mora, Shinku and Pachai Hembrum. She further claimed to had named Chami Qui, Tulsi, Rasika, Birbal and Subdia before the police P.W. 7 stated in his cross-examination that neither Somri nor Tulsi or Kanu had ever stated anything about the occurrence.

11. P.W. 8 is the Doctor who held post mortem on the dead body of Jonga Qui and found the following ante mortem injuries:

(i) Incised wound muscle deep extending from right angle of mendible, further extending from his posterior side to left side of the neck. Neck vessels cut open.

(ii) Right side mandible and maxilla fractured.

(iii) Frontal bone and right side fractured open. Brain matter exposed. Weapon

used sharp cutting weapon and heard blunt substance.

12. He also held post mortem on the dead body of Manta Qui and found the following ante mortem injury:

(i) Whole head and face have crushed open. At few places scalp & scalp bone were cut off. Brain matter exposed.

(ii) Eyes and nose were lost. Facial muscle badly lacerated and at some places were lost.

Weapon used : Hard and blunt substance and injury No. (ii) is by sharp cutting. He proved the post mortem report Ext. 4 and 4/1.

13. No any other witness has been examined and as such, all the accused persons including the appellants were examined u/s 313 Cr. P.C. and they have denied the allegation.

14. It is evident that the informant (P.W. 4) is not the eye witness about assault to the deceased. He came to know about the incident from P.W. 5 and 6 who stated in clear terms in their deposition that all the accused persons came there and assaulted both the deceased with Knife, Bhujali, Tangi, Lathi etc. None of these two witnesses who said to be eye-witnesses stated any thing specifically or directly against these two appellants for assaulting rather the allegations are in the general nature. I have already discussed above that four accused persons including the order giver, Chami, have already been acquitted by the trial Court as the prosecution has failed to establish the charge against them beyond all reasonable doubts. Apart from this, there is a vital contradictions/discrepancies in the testimony of the P.W. 5. P.W. 6 stated in paragraph 14 of her cross-examination that when the accused persons were assaulting Mukta Kui, she along with Jongo Kui were inside their house. If she was in her house at the relevant time her identification of the accused or the story of being eye witness becomes very doubtful. She further stated in paragraph 20 that he had narrated the incident to Mana, Mora, Sinku and Pochai Hembrum but none of them has been cited as a witness in the charge sheet nor they have been examined in the instant case as they could have been competent material witnesses on the point P.W. 1 Munda of the village stated that Tulsi had come to his house in the morning to call him and thereafter he visited the house and place of occurrence but she (P.W. 5) stated in her cross-examination that she had never visited the house of Munda. P.W. 6 stated in paragraph 9 that the appellants Rasika Hembrum and Madhua Hembrum assaulted Jonga Qui with Tangi, Chaku, Bhujali and danda which is apparently un-believable story as it is not possible for two persons to will assault by four weapons at a time. But in cross examination (P.W. 6) she stated that all the accused persons had assaulted the deceased Mukta and Jonga (vide para 13). It is also surprising to note here that she claimed to have raised hulla but none of the villagers rushed to the spot. The occurrence said to have taken place at about 8.30 p.m. but there is nothing to indicate as to what was the source of identification and, therefore, identification of the accused is

also very suspicious and this has not been meted out by the prosecution. It is to be noted here that the Investigating Officer has not been examined in this case. Non-examination of the I .O. in the instant case also causes prejudice to the case of the accused as the material contradictions in the testimony of the P.Ws. have not been confronted. Non-examination of Manea, Mora, Sinku and Pochai also makes the entire story doubtful.

15. P.Ws. 5 and 6 who claimed to be the eye witnesses, have deposed in clear terms that all the accused persons including the appellants assaulted the deceased. It is also evident that all the accused persons including these two appellants were charged u/s 302/34 I.P.C. for murdering in furtherance of common intention and admittedly four accused persons out of six accused persons have been acquitted by the trial Court.

In the case of State of West Bengal Vs. Vindu Lachmandas Sakhrani alias Deru, . It has been held that both husband and wife were charged with an offence u/s 302 read with Section 34 I.P.C. The charge which was based on the common intention of the two failed with the acquittal of the husband and there being no charge u/s 302 simpliciter against the wife, she could not be convicted.

16. Obviously when four accused persons having been acquitted and there being no independent charge u/s 302 I.P.C. against these two appellants, therefore, they cannot be convicted for the said offence.

17. It is well settled that common intention within the meaning of Section 34 I.P.C. implied a pre-arranged plan and the criminal act was done pursuant to the pre arranged plan. The said plan may also developed on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a Court can convict a person u/s 302, read with Section 34 it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence. In the instant case, the trial Court had already acquitted four accused persons charged for an offence u/s 302 read with Section 34 I.P.C. finding the case false against them but at the same time, the trial Court convicted these two appellants u/s 302 read with Section 34 I.P.C. on the ground that they had committed the offence along with others of the acquitted accused. But, it at all depends of the facts and circumstance of each case and it may differ from case to case.

18. Obviously, the conviction of these two appellants have been made on the basis of testimony of two witnesses P.W. 5 and P.W. 6 but they have also made general and omnibus allegations against all the accused persons including these appellants for assaulting by different weapons and as such, it is not certain or definite as to by whose assault, actually the deceased succumbed to the injury. It is significant to note that the trial Court acquitted four accused persons on the ground that there is no sufficient evidence against them whereas P.Ws. 5 and 6 deposed in general manner putting allegations against all the accused persons

and therefore both appellants are entitled for the same and similar treatment.

19. Thus, it is evident that the whole allegations as made out against these two appellants are also very suspicious, doubtful and not sufficient and for which these appellants are also entitled to be acquitted for the benefit of doubt.

20. Having regard to the above discussions, coupled with the material, I find that the prosecution has totally failed to establish the charge against these appellants beyond all reasonable doubts. In the result, I find that the trial Court committed error in convicting the appellants by the impugned judgment which is fit to be set aside. Accordingly, this appeal succeeds and it is allowed. The judgment of conviction and sentence passed by the trial Court is, hereby, set aside. The appellants are acquitted for the offence charged. They are on bail and, therefore, both appellants are discharged from the liability of their bail bonds.