
(2013) 02 JH CK 0064

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 367 of 1990 (P)

Mangal Hembrom and Ishwar Hembrom

APPELLANT

Vs

The State of Bihar (Now Jharkhand)

RESPONDENT

Date of Decision : 25-02-2013

Acts Referred:

Evidence Act, 1872 — Section 25, 26, 27
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2013) 4 AJR 202

Hon'ble Judges : Shree Chandrashekhar, J;D.N. Patel, J

Bench : Division Bench

Advocate : Indu Shekhar Gupta, for the Appellant; Amaresh Kumar, Assistant Public Prosecutor, for the Respondent

Judgement

Shree Chandrashekhar, J.—The appellants have filed the criminal appeal against the judgment and order of conviction and sentence dated 18/20th August, 1990 in Sessions Case No. 10 of 1989/116 of 1989. The appellant no. 1 is original accused no. 1 and the appellant no. 2 is original accused no. 2 before the trial court. The case of the prosecution is that on 27.04.1988 at 8.30 hours the informant (Lukhi Hansda) gave her Fardbeyan to police in presence of witnesses that her daughter Ludaki Baski was married to Mangal Hembrom eight years ago and from their wedlock they had one son and one daughter. Again her daughter became pregnant and her son-in-law namely, Mangal Hembrom suspected that her daughter was entangle with another man and due to which there was an altercation between them. Her son-in-law and his elder brother namely, Ishwar Hembrom used to threaten her daughter and her daughter made complaint to her several times. The complainant has further stated that she received a rumor that a body of a Santhal female of Jiyapani village had been thrown in Kusumnala Bahiyar and suspecting foul play she went to Sasural of her daughter where she did not find her daughter. She asked her son-in-law Mangal Hembrom about her daughter who informed that one day before his wife had gone away without saying anything to him. Thereafter, the complainant started searching

her daughter and at Kusumnala she saw a dead body thrown in the Nala. She identified the dead body of her daughter Ludaki Baski. The complainant further stated that her son-in-law Mangal Hembrom and his elder brother Ishwar Hembrom have killed her daughter and thrown her dead body in the Nala and covered the dead body with stone to conceal the dead body. On the basis of the statement of the complainant Maheshpur Police Station Case u/s 302 and 201 /34 of the Indian Penal Code was instituted.

2. After investigation the police submitted charge-sheet under Sections 302 and 201 /34 of the Indian Penal Code and cognizance of the offence was taken and charges under Sections 302 /34 and 201 /34 of the Indian Penal Code were framed against both the accused persons. The prosecution examined eight witnesses altogether. The post-mortem report has been exhibited as Exhibit-1, the Fardbeyan has been exhibited as Exhibit-2, carbon copy of the Inquest Report has been exhibited as Exhibit-3, the formal F.I.R. has been exhibited as Exhibit-4 and seizure list has been exhibited as Exhibit-5. The learned trial court convicted the accused Mangal Hembrom for the offence u/s 302 of the Indian Penal Code and both the accused persons have been found guilty for offence u/s 201 /34 of the Indian Penal Code. The appellant no. 2 namely, Ishwar Hembrom has been acquitted of the charge for murder u/s 302 /34 of the Indian Penal Code. The appellant no. 1 namely, Mangal Hembrom has been punished to undergo R.I. for life for the offence u/s 302 of the Indian Penal Code and he has further been sentenced to undergo for R.I. for 7 years and with fine of Rs. 1,000/-and in default to undergo R.I. for six months, for the offence u/s 201 of the Indian Penal Code. The appellant no. 2 namely, Ishwar Hembrom has been sentenced to undergo R.I. for four year with fine of Rs. 1,000/- and in case of default of payment of fine to undergo R.I. for six months, for the offence u/s 201 of the Indian Penal Code.

3. The appellants have preferred the present criminal appeal challenging the order of conviction and sentence passed by the Sessions Court.

4. The record of the case reveals that date of incident is in the night of 25/26th April, 1988 and the Fardbeyan was recorded at 8.30 a.m. on 27.04.1988. The First Information Report was lodged on the same day at 15.00 hours and Maheshpur PS. Case No. 32 of 1988 was registered.

5. The prosecution has examined one Munshi Marandi who is a witness of Inquest Report and Seizure List. The prosecution has examined one Som Besra as P.W. 2, who has stated in the court that when he had gone to graze grass to the cattle one person informed him that one dead body was lying at Kusumnala Bahiyar. He went there and he saw the dead body of a female covered with stone. He has admitted that several other persons had also come there.

6. Dr. M.M. Sinha has been examined as P.W. 3. He conducted the postmortem examination of the dead body of Ludaki Baski. He found the following injuries on her person,

1. Lacerated wound on the left side of temporal region from mid parieto temporal region extending to preauricular region scalp 2 1/2" x 1" x bone deep. Upper portion of the left ear torn. On opening the skull-depressed fracture of the temporal bone piercing the brain matter. Dark coloured fluid and liquefied brain matter trickled after opening the bone.

2. Ligature marks two in numbers in the lower region both legs about 3" in distance with Knot mark on the anterior region legs.

The Doctor has stated that the death was caused due to injury no. 1 which was grievous in nature and was sufficient in ordinary course to cause death of the person. He further opined that injury no. 1 could have been caused by big stone and injury no. 2 could have been caused by rope.

7. The informant Lukhi Hansda has been examined by the prosecution as P.W. 4. She has stated in the court that her daughter was married to accused Mangal Hembrom and she gave birth to one son and a daughter and when she again became pregnant her husband suspected that she had illicit relationship with another person and for that reason, there was altercation between them. She is a hearsay witness. She has stated that when she heard the rumor that her son-in-law and his brother had killed her daughter with Kulhari and thrown the dead body in Kusumnala Jharna, she went there and saw the dead body of her daughter. When the Sub-Inspector of police came there, she gave her statement. She has identified the accused.

8. On the point of altercation between the deceased and the appellant no. 1, the prosecution has examined one Bagha Hansda as P.W.-5. He has stated that his house is adjacent to the house of the accused persons and the courtyards of both the houses are in front of each other. He has deposed that prior to the occurrence altercation took place between the deceased Ludaki Baski and Mangal Hembrom. He has further stated that he heard about the occurrence on Wednesday and when he asked Mangal Hembrom about Ludaki Baski then Mangal Hembrom replied that he did not know as to where she had gone.

9. P.W. 6 and 7 have been declared hostile by the prosecution. The Investigating Officer has been examined as P.W. 8 who has stated that when he received the information that one dead body of unknown female was lying at Kusummala, he alongwith Sub-Inspector Ramsagar and Constable Janardan Singh and Garib went there. He has further stated that accused Mangal Hembrom was arrested on 28.04.1988 and on the same day on the basis of confessional statement of Mangal Hembrom he recovered one blood stained Gendra from the verandah and bamboo and rope from the house of the accused. The aforesaid articles were seized in presence of the witnesses. He has further deposed that in his confessional statement the accused-Mangal Hembrom confessed his guilt.

10. The learned counsel for the appellants has submitted that there is no legal evidence on the basis of which the appellants can be convicted. The depositions of the witnesses suffer from contradictions, inconsistencies, exaggerations and

embellishments. There is no eye witness of the occurrence and merely on the basis of suspicion of the complainant the appellants have been convicted which is not permissible in law. On the other hand learned A.P.P. appearing for the State has supported the judgments and order of conviction and sentence.

11. For proving its case the prosecution has heavily relied upon the circumstance that there were altercation between the deceased and the accused Mangal Hembrom prior to the occurrence. The second circumstance relied upon by the prosecution is the confessional statement of the accused Mangal Hembrom and the recovery of blood stained Gandra, bamboo and rope at the instance of the accused Mangal Hembrom. Admittedly, there is no eye witness of the occurrence. The complainant and all other witnesses have stated that they heard the rumor that accused Mangal Hembrom and his brother Ishwar Hembrom had killed the deceased and thrown the dead body in the Kusumnala. While the informant has said that she heard that her daughter had been killed by Kulhari, the Doctor has opined that the injury no. 1 could have been caused by heavy stone. The Investigating Officer has recovered a blood stained bamboo from the front of the house of accused Mangal Hembrom which allegedly is the weapon used in crime.

12. When a conviction can be based on the basis of circumstantial evidence, has been discussed by the Hon"ble Supreme Court in the case of Kishore Chand Vs. State of Himachal Pradesh, as under,

4. The question, therefore, is whether the prosecution proved guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. All the facts so established should be consistent only with the hypothesis of the guilt of the accused. The proved circumstances should be of a conclusive nature and definite tendency, unerringly pointing towards the guilt of the accused. They should be such as to exclude every hypothesis but the one proposed to be proved. The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. It is not necessary that each circumstance by itself be conclusive but cumulatively must form unbroken chain of events leading to the proof of the guilt of the accused. If those circumstances or some of them can be explained by any of the reasonable hypothesis then the accused must have the benefit of that hypothesis.

5. In assessing the evidence imaginary possibilities have no role to play. What is to be considered are ordinary human probabilities. In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established. The chain of events furnished by the circumstances should be so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused. If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt.

6. In assessing the evidence to find these principles, it is necessary to distinguish between facts which may be called primary or basic facts on one hand and inference of facts to be drawn from them, on the other. In regard to the proof of basic or primary facts, the court has to judge the evidence in the ordinary way and in appreciation of the evidence in proof of those basic facts or primary facts, there is no scope for the application of the doctrine of benefit of doubt. The court has to consider the evidence and decide whether the evidence proves a particular fact or not. Whether that fact leads to the inference of the guilt of the accused or not is another aspect and in dealing with this aspect of the problem, the doctrine of benefit would apply and an inference of guilt can be drawn only if the proved facts are inconsistent with the innocence of the accused and are consistent only with his guilt. There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused and those circumstances should be of conclusive nature and tendency and they should be such as to exclude all hypothesis but the one proposed to be proved by the prosecution. In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that in all probability the act must have been done by the accused and the accused alone.

13. In the case of Balwinder Singh Vs. State of Punjab, , the Hon"ble Supreme Court while examining a case based on circumstantial evidence where a father was charged for murder of his own daughters, held as under,

4. In a case based on circumstantial evidence, it is now well-settled that the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond a reasonable doubt and the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In a case based on circumstantial evidence, the Court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof. It is in the context of the above-settled principles, that we shall analyse the evidence led by the prosecution.

14. In a recent judgment the Hon"ble Supreme Court in the case of Madhu Vs. State of Kerala, has again stressed the care and caution with which circumstantial evidence has to be evaluated. In paragraph-5, the Hon"ble Supreme Court has held,

5. The care and caution with which circumstantial evidence has to be evaluated stands recognised by judicial precedent. Only circumstantial evidence of a very high order can satisfy the test of proof in a criminal prosecution. In a case

resting on circumstantial evidence, the prosecution must establish a complete unbroken chain of events leading to the determination that the inference being drawn from the evidence is the only inescapable conclusion. In the absence of convincing circumstantial evidence, an accused would be entitled to the benefit of doubt.

15. It has been settled by a catena of judgments of the Hon''ble Supreme Court that to justify an inference of guilt the circumstances from which such inference is sought to be drawn must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. In case of circumstantial evidence, the prosecution must establish different circumstances beyond reasonable doubt and all those circumstances taken together must lead to no other inference except that of the guilt of the accused.

16. The learned Sessions Judge has heavily relied upon the confessional statement of accused Mangal Hembrom and the recovery of blood stained Gendra, blood stained rope and blood stained bamboo at his instance. The learned Sessions Judge has held,

..... As such this evidence in ext. is admissible which is also in consonance with the statement of P.W. 8 as discussed above and the confessional statement of Ext. A. para 20 made Ishwar Hembrom is also admissible as per section 27 of evidence act because the blood stained rope and bamboo were recovered on the confessional statement of accused Mangal Hembrom who had also stated and confessed that alongwith him Ishwar Hembrom also had thrown the dead body of his wife by trying and he had also tied the feet of the dead body with rope by the help of bamboo and the said rope and bamboo were recovered in front of the house of Mangal Hembrom on the basis of his confessional statement. As such it can be said on the basis of the evidence of the P.W.s specially on evidence of P.W. 8 and confessional statement of the accused that altercation took place in between the deceased Ludaki Baski and accused Mangal Hembrom who is the husband of the deceased Ludaki Baski. It can further be said that the accused Mangal Hembrom had killed her wife Ludaki Baski.....

17. The learned counsel for the appellants has submitted that it would appear from the case diary and evidence of the Investigating Officer that he started writing case diary on 27.04.1988 and he wrote paragraph nos. 1 to 15 on the same day in which he has given full description of recovery of articles. He has further stated in the court that he arrested the appellants on 28.04.1988. Therefore, the alleged recovery of articles could not have been made at the instance of the accused and in any event these are inadmissible in evidence. The learned trial court has dealt with this aspect of the matter as under,

.....It has been argued on behalf of the accused that the diary ext. A would reveal that on 28.4.88 the accused Mangal Hembrom was arrested who confessed before the police who is the I.O. of this case where as ext. 5 the

seizure list goes to show that the seizure list was prepared on 27.04.88 as evident from perusal of ext. 5 but in my opinion the learned lawyer of the defence has not construed properly the date mention in ext. 5 the seizure list because the fardbeyan ext. 2 goes to show that the fardbeyan was recorded on 27.4.88 and this seizure list goes to show that the Maheshpur P.S. case no. 32/1988 dated 27.4.88 U/s 302 and 201 I.P.C. it does not mean that it was prepared on 27.4.88 because at the bottom of the seizure list. The I.O. had put his signature and given the date as 28.4.88 and at the top of the seizure list he has mentioned the date of P.S. case number and not the date of preparing the seizure list. Hence, his argument is not tenable in law.....

18. While examining the original seizure list we find that there is overwriting in the date mentioned in the seizure list. It appears that 27.04.1988 has been overwritten as 24.08.1988. However, without going into these details we find that the articles allegedly recovered and seized were neither produced in court nor exhibited. The confessional statement of the accused Mangal Hembrom has also not been exhibited and marked as exhibit. Further, the blood stained articles were not sent for examination to find out whether those were stained with human blood or not. The Investigating Officer P.W.-8 has stated that the articles recovered and seized were not sealed whereas P.W. 1 has stated that the seized articles were sealed and as such the evidence of P.W. 1 and P.W. 8 are contradictory.

19. In the case of Madhu Vs. State of Kerala, the Hon''ble Supreme Court while dealing with the issue of confessional statement of the accused made before the police, has held as under,

49. As an exception, Section 27 of the Evidence Act provides that a confessional statement made to a police officer or while an accused is in police custody, can be proved against him, if the same leads to the discovery of an unknown fact. The rationale of Sections 25 and 26 of the Evidence Act is, that police may procure a confession by coercion or threat. The exception postulated u/s 27 of the Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance under the exception postulated by Section 27 aforesaid, is limited "... as relates distinctly to the fact thereby discovered....". The rationale behind Section 27 of the Evidence Act is, that the facts in question would have remained unknown but for the disclosure of the same by the accused. The discovery of facts itself, therefore, substantiates the truth of the confessional statement. And since it is truth that a court must endeavour to search, Section 27 aforesaid has been incorporated as an exception to the mandate contained in Sections 25 and 26 of the Evidence Act.

20. In the case of Abdulwahab Abdulmajid Baloch Vs. State of Gujarat, , the Hon''ble Supreme Court has held that only because the weapon was recovered and the expert opinion that the bullet found in the body of the deceased was fired from one of the weapons seized, by itself cannot be the basis for recording an order of conviction u/s 302 of the Indian Penal Code.

21. In the case of Brijesh Mavi Vs. State of NCT of Delhi, , the Hon''ble Supreme Court has acquitted the accused at whose instance, the recovery of the weapon was made.

22. In the present case also, we find that the evidence brought on record by the prosecution is wholly insufficient. The only circumstance which has been relied upon by the prosecution is that there were altercations between the appellant no. 1 and the deceased. The alleged recovery of the blood stained Gendra, blood stained bamboo and blood stained rope are not admissible in evidence at all. All that have been brought on record by the prosecution is a suspicion only, but that by itself is not enough to record an order of conviction specially in a case where the sentence can be Capital Punishment.

23. In the case of Ashish Batham Vs. State of Madhya Pradesh, , the Hon''ble Court has observed,

8. Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by the heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and graver the charge is, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between "may be true" and "must be true" and this basic and golden rule only helps to maintain the vital distinction between "conjectures" and "sure conclusions" to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.

24. On consideration of the evidences on record we find that the prosecution has failed to establish its case beyond all shadows of reasonable doubt. There are several infirmities in the case of the prosecution and the chain of circumstances is not completed rather there are several infirmities in the circumstances relied upon by the prosecution. We further find that the appellant no. 2 Ishwar Hembrom, though acquitted of charges u/s 302 of the Indian Penal Code, has been convicted for the offence u/s 201 /34 of the Indian Penal Code only on the basis of the confessional statement of co-accused Mangal Hembrom which is clearly impermissible in law.

25. In view of the aforesaid evidences on record, the prosecution has failed to prove beyond reasonable doubt the offence of murder by these appellants. The prosecution has also failed to establish the chain of circumstances leading towards guilt of these appellants for the murder of the deceased. We therefore,

set-aside the judgment and order of conviction and sentence, passed by the Additional Sessions judge, Pakur in Sessions Case No. 10 of 1989/116 of 1989 dated 18/20th August, 1990. Both these appellants are acquitted from the charges levelled against them by the prosecution. Both the appellants are on bail and therefore, they are discharged from their liabilities of bail bonds and sureties.