

(2024) 12 JH CK 0101

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No.981 Of 2003

Md. Farooque Hussain Khan @ Md. Farooque Hussain

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 20-12-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 313

Indian Penal Code, 1860 — Section 302

Evidence Act, 1872 — Section 106

Citation : (2024) 12 JH CK 0101

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

Bench : Division Bench

Advocate : Binod Kumar Dubey, Manoj Kumar Mishra

Final Decision : Dismissed

Judgement

Ananda Sen, J

1. This Criminal Appeal is preferred on behalf of the appellant being aggrieved by the judgment of conviction dated 17.06.2003 and order of sentence dated 19.06.2003 passed by Learned Sessions Judge, Hazaribag, in Sessions Trial No.215 of 2002, whereby and where under the appellant has been convicted for offence under Section 302 IPC. He was sentenced to undergo rigorous imprisonment for life under Section 302 IPC.

2. Heard learned counsel for the appellant and learned A.P.P. for the State and perused the material available on record.

3. Learned counsel representing the appellant submits that only on the basis of the sole testimony of the child witness, this appellant has been convicted. There were other witnesses in the house but they were not examined which caused great prejudice to the appellant. The appellant admittedly was not present in his house. The appellant in fact was a School Teacher who was serving at a distant place, and when he was returning after hearing the information about death of

his wife, he was arrested. This aforesaid fact was narrated by this appellant while recording his statement under Section 313 Cr.P.C., but the Trial Court has not considered the same. He submits that there is no reason to commit murder of the deceased. The Doctor has opined that the head injury can be caused due to fall also. Thus, the statement of the child witness can be easily negated. Reliance has been placed to the judgments reported in (2009) 15 SCC 292 and 2024 (1) JLJR 592.

4. Learned A.P.P. representing the State submits that the appellant has committed murder of his wife and he does not deserve to be acquitted. The informant in his fardbeyan as well as in his deposition has clearly stated that the appellant always used to fight with his sister on the pretext of one or other excuse and assaulted his sister with fists and slaps. The Doctor who conducted post-mortem on the body of the deceased has found several grievous ante mortem and burn injuries which are sufficient to cause death in ordinary course of nature. He also stated that the child witness (P.W.-7) is the eye-witness of this case and she stated about each and every cruelty meted out to her mother. On these grounds, he stated that the appeal is liable to be dismissed.

5. The case of the prosecution as delineated in the fardbeyan of Md. Sah Nawaz Khan, is that the marriage of his deceased sister – Nigar Sultana, had been solemnized with Md. Farooque Hussain Khan (appellant herein) in the month of May, 1990 and four children were born out of the said wedlock. His brother-in-law used to work as a Teacher in Primary School and was a resident of Katkamsandi. In the year 1992, his brother-in-law had built a house on the land given to him by his father and started living near their house. Since 3 - 4 years, behaviour of his brother-in-law towards his sister was not good and he always used to fight with his sister on the pretext of one or other excuse. On 21.04.2001 also, at about 07:00 P.M. a feud occurred between his sister and brother-in-law over some issue, which was somehow pacified. Then the appellant threatened the deceased. Thereafter like every day, they went to sleep after having dinner. In the midnight at about 02:30 A.M., when the informant went for nature's call, he smelled something burning. Then he saw that smoke was coming out from the kitchen of his sister. He ran to the house of his sister and opened the door of the kitchen, where he found that his sister was completely burnt and lying on the floor and his brother-in-law was not there. They got panicked and took out the children of his sister out of the house and raised alarm. On his alarm, people of the vicinity gathered there and with their help they extinguished the fire. By then, his sister was dead.

6. On the basis of aforesaid fardbeyan F.I.R. being Sadar P.S. Case No.203 of 2001 was registered under Section 302 IPC and charge-sheet was submitted against the appellant. The Court took cognizance and the case was committed to the Court of Sessions where charge was framed against the appellant.

7. To prove the prosecution case, altogether 10 prosecution witnesses have been examined :-

a) P.W.-1 namely Md. Sah Nawaz Khan, is the informant of this case. He deposed that his sister (deceased) had been married to the appellant. He stated that his brother-in-law (appellant) set ablaze his sister to death. He stated that on 21.04.2001 in evening, a feud occurred between his sister and brother-in-law. He stated that the appellant assaulted the deceased with fists and slaps to which when they tried to pacify, his brother-in-law threatened her. On the ill-fated day at about 02:30 A.M., when the informant went for nature's call, he smelled something burning and on looking around he saw that smoke was coming out from the kitchen of his sister. When he went there and opened the door of the kitchen, he found that his sister was completely burnt and after extinguishing the fire, he found his sister dead. They got panicked and took out the children of his sister out of the house and raised alarm. His statement remains consistent in his cross-examination also.

b) P.W.-2 namely Kesar Ali, deposed that he heard about the incident and when he went to the place of occurrence he saw the deceased in burnt condition in the kitchen.

c) P.W.-3 namely Naushad Khan, deposed that when he was sleeping in the midnight, he awoke on hearing the voice of the informant. When he went there he saw that the deceased was burning in the kitchen. He stated that the appellant was not present there at that time. He further stated that fight commonly used to arise between the appellant and the deceased. He stated that just a day before the incident, a fight had taken place between them. When they were taking out the children of the appellant, one of the girl children told that her father assaulted her mother on head with a hammer. His statement remained unshaken in his cross-examination.

d) P.W.-4 namely Md. Farukh Khan, is the father of the deceased. He stated that the appellant had married his daughter in the year 1990. After 2-3 years of marriage, his son-in-law was unemployed. In the fourth year, he got employment as a teacher. Thereafter, behaviour of his son-in-law towards his daughter was not good. On the date of incident he got information on phone that his daughter has been ablaze to death. He reached there and found his daughter badly burnt and there was injury on her head.

e) P.W.-5 namely Rehana Begam, is the mother of the deceased. Her statement is on the same line as that of her husband (P.W.-4).

f) P.W.-6 namely Md. Israfil Khan, deposed that after hearing the scream, he went to place of occurrence and saw that the deceased was burning. Quarrel always used to take place between the deceased and the appellant. He also supported the prosecution case till last.

g) P.W.-7 is a child witness and the most important witness in this case. She had correctly introduced herself by giving correct answer to each and every questions put to her. In her statement, she deposed that a quarrel took place between her father and mother. Then her father struck with a hammer on the head of her

mother and her mother fell down. She further stated that her father took a pillow and pressed the mouth of her mother by that pillow and dragged her to the kitchen. Thereafter, her father sprinkled kerosene on her mother's body, lit the matchstick and set her mother on fire. The defence could not able to shake her credence in cross-examination.

h) P.W.-8 namely Dr. Rajesh Kumar Gupta, who conducted the post-mortem report has observed as hereunder:-

The body was completely burnt. Rigormotis present in all limbs. Pugilistic attitude present.

On internal examination finding, brain was congested. Larynsk and trachea carbon shot particles present. Wall congested. Lungs both shrunken. Heart was shrunken and empty. Stomach was congested and empty. Visceras like small intestine, large intestine, liver, spleen and both kidneys congested. Bladder was empty. The antimortem burn of whole body was found as follows:-

- (1) Head and face, 9% with skull bone fractured with blood clot.
- (2) Upper limbs both right and left. 18% completely burnt
- (3) Chest front and back 18% completely burnt.
- (4) Abdomen front 5%
- (5) Back of abdomen 5%
- (6) Perineum 1%
- (7) Right thigh 9%
- (8) Right leg 9%
- (9) Left thigh 8%
- (10) Left leg 7%

Altogether 89% burnt Dermo epidermal. Nature of injury: Antimortem, grievous responsible for death in due course.

The Doctor at the very beginning observed that the body was completely burnt. He opined that the cause of death is asphyxia and shock due to ante mortem burn and the above burn injuries are sufficient to cause death in ordinary course of nature.

In Court question he stated that the fracture of the scalp may be caused by fall on hard surface.

i) P.W.-9 namely Ranjit Kumar Sinha, the Officer Incharge, Sadar Police Station, stated that after getting information he reached the place of occurrence. He recorded the fardbeyan of the informant (P.W.-1). He proved the fardbeyan and the same was marked as Ext.4. He proved the F.I.R. and the inquest report. He

inspected the place of occurrence. He went to the kitchen in which the deceased was alleged to be burnt.

j) P.W.-10 namely Anuranjan Kispotta, has stated that he received the post-mortem report of the deceased. He recorded the statement of the child witness and submitted the charge sheet.

8. Several documents were also exhibited:-

i. Ext.1 :- signature on fardbeyan of Md. Sah Nawaz Khan

ii. Ext.2 & 2/1 :- Signature on inquest report of Ishmail Khan and Kamruddin

iii. Ext.3 :- Postmortem report

iv. Ext.4 :- Fardbeyan

v. Ext.5 :- Formal F.I.R.

vi. Ext.6 :- Inquest report

9. On factual dissection of the case at hand, we find that P.W.-6 who is the child witness, is the direct eye-witness of the occurrence. She is also a reliable witness.

10. The Hon'ble Supreme Court has held that only on the basis of the sole testimony of the child witness, the accused can be convicted provided the deposition of the child witness inspires confidence and is beyond any doubt.

11. The Hon'ble Supreme Court in the case of Suryanarayana v. State of Karnataka reported in (2001) 9 SCC 129, at para-5, has held as hereunder:-

"5. Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child

being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not."

The above settled law has also been reiterated by the Hon'ble Supreme Court in the case of Hari Om v. State of U.P. reported in (2021) 4 SCC 345.

12. It is true that the statement of the child witness was recorded by the Police after one month from the date of occurrence but that by itself is not sufficient to discard the entire testimony of the child witness. The Hon'ble Supreme Court in the aforesaid judgment passed in the case of Suryanarayana (supra), has held that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. In this case, the child witness has stated that a quarrel took place between her father and mother. Then her father struck a hammer on the head of her mother and her mother fell down. She further stated that her father took a pillow and pressed the mouth of her mother by that pillow and took her by dragging to kitchen. Thereafter, her father sprinkled kerosene on her mother's body, lit the matchstick and set her mother on fire. The statement of this child witness that the deceased was first assaulted on her head by hard object such as hammer stands corroborated by the medical evidence. The Doctor who conducted post-mortem found fracture on the skull bone. Thus, the fact narrated by the child witness is substantiated. Further, deceased was burnt to death. The Doctor found burn injuries and opined that the cause of death is the burn injury. The statement of child witness corroborates with the medical evidence. The judgment on this point referred to by the appellant is different on the facts of this case and is not applicable.

13. Another ground taken by the appellant is that the appellant was not present at the time of occurrence. He has taken this alibi that he was in his School and while he was returning after hearing the news, he was arrested. When a plea of alibi is taken by any accused person, the duty is upon him to prove the same. In his case, since the specific plea has been taken by this appellant that he was in the School and while he was returning, he was arrested, he should have proved the same by cogent evidence. The Hon'ble Supreme Court in the case of Subramaniam v. State of T.N., (2009) 14 SCC 415, has held that if the alibi is taken and is not proved, it will become the additional circumstance which will go against the accused.

14. In this case, the appellant has not led any evidence. Not even the attendance register of the School has been produced by this appellant. Since the appellant has taken plea of alibi and thereafter failed to prove the same, we disbelieve his statement and this is an additional circumstance against him. Be it noted that the child witness has stated that it is the appellant who has committed the murder which means that he was present in the house.

15. In context of this case, Section 106 of The Indian Evidence Act comes to

play. It reads as follows:-

"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."

Admittedly, the occurrence had taken place in the house of this appellant. The death is due to extensive burn injuries. Before that there was an assault on the head, as the result, the scalp got fractured. This assault has been corroborated by medical evidence and also by the P.W.-8. The Hon'ble Supreme Court in the case of Uma & Anr. Vs the State Rep. by the Deputy Superintendent of Police reported in 2024 SCC OnLine SC 2994, has held that Section 106 of The Indian Evidence Act is applicable only in these type of cases where the occurrence takes place within the four corners of the wall. It is necessary to quote para-24 of the said judgment, which is as hereunder:-

"24. In the case of Trimukh Maroti Kirkan v. State of Maharashtra, [2006] Supp. (7) S.C.R. 156, this Court has pointed out that there are two important consequences that play out when an offence is said to have taken place in the privacy of a house, where the accused is said to have been present. Firstly, the standard of proof expected to prove such a case based on circumstantial evidence is lesser than other cases of circumstantial evidence.

Secondly, the appellant would be under a duty to explain as to the circumstances that led to the death of the deceased. In that sense, there is a limited shifting of the onus of proof. If he remains quiet or offers a false explanation, then such a response would become an additional link in the chain of circumstances. In terms of Section 106 of the Evidence Act, the Appellants have not discharged their burden that the injuries sustained by the deceased were not homicidal and not inflicted by them."

16. It is the appellant who has to give an explanation as to how his wife has died. He failed to give any explanation. This is an additional circumstance. His alibi fell flat as he could not prove the same. Circumstantial evidence, thus corroborate direct eye-witness i.e. P.W.-8, to prove the charge against the appellant. The Trial Court has considered all these facts and passed the impugned judgment of conviction and order of sentence. Thus, the judgment does not warrant any interference and the same is sustained.

17. Accordingly, this Criminal Appeal is dismissed. The impugned judgment of conviction dated 17.06.2003 and order of sentence dated 19.06.2003 passed by Learned Sessions Judge, Hazaribag, in Sessions Trial No.215 of 2002, are hereby affirmed.

18. Pending I.A., if any, stands disposed of.

19. Trial Court Record be transmitted back to the Court concerned.