
(2009) 03 JH CK 0051

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 75 of 1999 (R)

Mithun Karmakar

APPELLANT

Vs

The State of Bihar (Now Jharkhand) and Another

RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302

Citation : (2009) 57 BLJR 2132

Hon'ble Judges : Prashant Kumar, J; Narendra Nath Tiwari, J

Bench : Division Bench

Advocate : P.K. Bhowmik and Radha Rani, for the Appellant; Shekhar Sinha, APP, for the Respondent

Final Decision : Dismissed

Judgement

Prashant Kumar, J.—The present appeal has been filed by the sole appellant against the judgment of conviction and order of sentence dated 27.01.1999 passed by 1st Additional Sessions Judge, Jamshedpur, whereby and whereunder he convicted the appellant u/s 302 of the IPC and sentenced him to undergo imprisonment for life.

2. The case of prosecution in short as per the fardbeyan of Viveka Nand Giri (P.W. 2) is that on 11.02.1993 in the night at 10 p.m. his brother Sudhansu Giri (deceased) had gone to the house of appellant after taking meal. It is further stated that the deceased and appellant (Mithun Karmakar) were friends and they used to work together as labour. It is further stated that Makra Karmakar (P.W. 4) heard some hue and cry in the house of Mithun Karmakar, whereupon he went there and asked as to why they were making noise. It is further alleged that on the asking of Makra Karmakar, deceased Sudhansu Giri requested him to open the door and stated that Mithun Karmakar had given a tangi blow on him. It is further stated that thereafter Makra Karmakar came to the house of informant and disclosed him about the incident. Thereafter informant along with his cousin

brother, namely, Jhagar Giri and Kalu Giri went to the house of Mithun Karmakar and found that his house was closed from out side. He further states that at that time the deceased was raising hul a from inside the house and saying that Mithun Karmakar had fled away after inflicting Tangi wound upon him. It is then stated that thereafter the informant had broken open the door with the help of iron rod and found that his brother was lying in a pool of blood. He had also seen injury on the abdomen, chest and on both the legs of the deceased. It is further slated that the deceased had disclosed that he had some quarrel with Mithun Karmakar in connection with wages and because of that Mithun Karmakar had inflicted injury upon him by Kulhari. It is stated that thereafter the informant had gone for informing the chowkidar, keeping his cousin brother near the deceased. It is also stated that the deceased could not be taken to hospital due to night and after sometime he died.

3. On the basis of aforesaid fardbeyan, Mango (Muffasil) P.S. Case No. 37 of 1993 dated 12.2.1993 was instituted u/s 302 of the IPC against the sole appellant and police took up investigation. After completing the investigation, police submitted charge sheet against the appellant. After taking cognizance, the case was committed to the court of sessions as the offence u/s 302 of the IPC is exclusively trible by the court of sessions. It then appears that in the court below altogether nine witnesses were examined. After close of the case of prosecution the appellant was examined u/s 313 Cr. P.C. in which his defence is of complete denial. After considering the evidence available on record, the learned court below convicted the appellant for the offence u/s 302 of the IPC and sentenced him to undergo imprisonment for life, against that the present appeal has been filed.

4. Sri P.K. Bhowmik, learned Counsel appearing for the appellant has submitted that in the instant case there is no independent witness of the occurrence and the entire prosecution case based on circumstantial evidence. It is submitted that the circumstances relied upon by the learned court below are not such from which it can be presumed that the crime was committed by the accused and none else. It is submitted that the alleged dying declaration of the deceased cannot be relied upon because the injury found on the body of deceased can cause instantaneous death, thus under the aforesaid circumstance, it is not possible for the deceased to make any statement regarding the cause of his death. It is further submitted that it has come in evidence that on the date of occurrence the appellant was not present in his house and he has gone to his sasural after giving the key to the deceased, therefore only because the dead body of deceased was found in the house of appellant it cannot be said that this appellant had committed the murder of deceased. It is further submitted that non production of blood stained axe and blood stained earth, seized from the house of this appellant, is a lapse on the part of prosecution, which cast a serious doubt on the case of prosecution. It is further submitted that the appellant has been falsely implicated in this case merely on suspicion because he had strain relation with the deceased on account of quarrel with regard to wages.

Accordingly, it is submitted that the judgment of the court below cannot be sustained in this appeal.

5. On the other hand, learned Additional P.P. submits that the circumstances relied upon by the court below are so associated with the fact in issue that if the same are taken together they form a chain leading to an inference that only the appellant and none else had committed the present crime. It is submitted that it has been established by oral evidence that the deceased had gone to the house of appellant at 10 p.m. after taking meal. It has further come in evidence that at about 11 p.m., P.W. 4 heard yelling sound of deceased coming from inside the house of appellant. It is then submitted that it has also come in evidence that the house of appellant was close from out side with a lock. Learned Additional P.P. further pointed out that the lock was broken by the informant (P.W. 2) and when he entered inside the house he saw that his brother was lying in a pool of blood. It is further pointed out that on asking the deceased had clearly stated to the witnesses that the appellant had inflicted injury by an axe due to the quarrel in between them in connection with wages. It is further submitted that the I.O. has seized blood stained axe, broken lock and Sikri and also blood stain earth from the place of occurrence. It is further submitted that the appellant was found present prior to the occurrence but after the occurrence he was missing. Accordingly, it is submitted that aforesaid circumstance goes to show that the appellant and none else had committed the present crime. It is, accordingly, submitted that there is no illegality and / or irregularity in the judgment of court below which require any interference by this Court.

6. Having heard the submission, I have gone through the record and evidence available on it. P.W. 1 is the doctor who held autopsy on the dead body of the deceased Sudhansu Giri on 12.02.1993 at 10.30 a.m. and found the following ante mortem injury:

(A) Incised injuries:

(i) 7 cm x 3 1/2 cm x abdominal cavity situated over right pelvic abdomen obliquely, 4 cm inside to right anterior superior iliac spine. Loops of intestines and mesentery coming out through wounds.

(ii) 4 cm x 1 1/2 cm x 1 1/2 cm over right thigh medial side middle third.

(iii) 15 cm x 3 cm x bone-deep over left leg upper front and extending to medial and back side of left leg and adjoining lower part of back of thigh, underlying tibia and fibula bones were cut completely.

(iv) 3 cm x 2 cm x 3 cm over right anterior axillary fold situated transversely. The weapon also cut the underlying right lung partially.

(v) 7 cm x 3 cm x soft tissue over left chest back cutting the underlying scapula bone, lower part.

(vi) 3 cm x 1 1/2 cm x soft tissue over right thigh, back middle part.

(B) Internal

There was contusion of right chest wall. There was cut injury over intestine and peritoneum underlying the injury No. (i). There was blood and blood clot in the chest and abdominal cavity.

The doctor had further opined that the said injuries were caused by a heavy sharp cutting weapon may be Kulhari. He has proved the post mortem report which has been marked as Ext.-(1). During the cross examination the doctor has specifically stated that the said injuries are not possible by road accident. Thus from the perusal of the evidence of P.W. 1, I find that the deceased Sudhansu Giri had died a homicidal head.

7. Now the question arose for determination in this appeal is "whether the appellant has any hand in the commission of present crime?"

It is admitted position that there is no eye witness of the occurrence and entire case is based on the circumstantial evidence as well as on the oral dying declaration of the deceased. It is set at rest that a dying declaration must be closely scrutinized for the truthfulness bearing in mind that the statement was made by a person who has not been examined in court on oath and dying man normally is not likely to implicate innocent person falsely. In the instant case the alleged dying declaration was made before P.W. 2 (the brother of deceased), P.W. 3 (cousin brother of deceased), P.W. 4 (an independent witness) and P.W. 8 (cousin brother of deceased). The aforesaid witnesses had clearly and consistently stated that when they entered inside the house, after breaking the lock of the door, the deceased had disclosed that Mithun Karmakar had inflicted tangi wound upon him and then fled away, due to quarrel between them in connection with wages. From the perusal of cross examination of these witnesses, I find that the defence had not been able to bring anything on record to show that the aforesaid witnesses have any enmity with the appellant or they have any personal grudge to falsely implicate the appellant. Even while cross examining the above witnesses no suggestion given to them that the deceased was not in position to speak when the witnesses entered inside the room. Thus, on the point of dying declaration, the evidence of aforesaid four witnesses remain intact and firm. The submission of learned Counsel for the appellant that the injury found on the body of deceased will cause instantaneous death does not inspire confidence because the defence had not taken the opinion of the doctor in this regard while cross examining him. Even no suggestion was given to the doctor that such injury will cause instantaneous death. However, it is submitted by the learned Counsel for the appellant that from perusal of injury No. (iv) it is clear that due to the said injury right lung of the deceased was partially cut which shows that deceased was not in a position to speak and will die immediately. The aforesaid submission of learned Counsel for the appellant cannot be accepted in view of following opinion given in Modi's Medical Jurisprudence and Toxicology -23rd Edition at page 760:

Few cases have been recorded in which the victims were able to perform some acts requiring some exertion such as walking and climbing and survive for some hours or days after receiving very grave injury which was ordinarily have proved rapidly fatal.

On the same page at the bottom an instance was given in which the post mortem examination showed that the bullet had gone through heart and out into the right lung but even than the deceased have survived for sometime and said to his officer that "I am hit". Under the aforesaid circumstance, in the instance case, only because the deceased had received some serious injury, in the absence of expert opinion, it cannot be said that he was not in a position to speak after receiving such injury. More over as noticed above, there is no enmity between the appellant and P.W. 2, 3, 4 and 8. It is also clear that P.W. 4 is an independent witness and appears to be the caste man of the appellant and his house situates in the neighbourhood of the appellant and he too supported the case of prosecution regarding the dying declaration. Thus, in view of the opinion given in the Modi's Medical Jurisprudence, I am not inclined to entertain the submission of learned Counsel for the appellant and therefore the same is rejected.

8. Now coming to the other circumstances relied upon by the prosecution, it is worth to mention that in the case of circumstantial evidence the prosecution had to fulfill the following condition by adducing cogent and acceptable evidences:

- i. The circumstance from which an inference of guilt is sought to be drawn must be established.
- ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.
- iii. Circumstances taken together should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

Keeping in view the aforesaid law in mind, I am proceeding to consider as to whether the circumstances relied upon by the prosecution are such from which it can be presumed that the appellant and none else had committed the present rime. The prosecution had relied upon the following circumstances.

- (i) The deceased after taking meal had gone to the house of appellant at 10 p.m. on the date of occurrence.
- (ii) P.W. 4 had heard the yelling sound of deceased and request for help from inside the house of appellant.
- (iii) The house of appellant was close from out side with lock.
- (iv) when the door of the appellant's house was open after breaking the lock the deceased was found in injured condition in a pool of blood.

(v) Blood stained axe (Kulhari) and blood stained earth was seized from inside the house of appellant.

(vi) The appellant was found in the house prior to the occurrence but was missing just after the occurrence.

9. P.W. 2, the brother of the deceased had categorically stated in his deposition that on the date of occurrence i.e. 11.02.1993 in the night at about 10 p.m. the deceased Sudhansu Giri had gone to the house of appellant Mithun Karmakar for demanding his wage. From the perusal of cross examination of this witness, I find that the aforesaid version of P.W. 2 has not been challenged by the appellant. From perusal of post mortem report, I find that the doctor has found rice and pulse from the stomach of the deceased. This finding of the doctor supports the version of P.W. 2 that the deceased has gone to the house of appellant after taking his meal. Thus, I find that the aforesaid circumstances have been proved by the prosecution by adducing cogent and acceptable evidence.

10. P.W. 4 is the neighbour of the appellant who appears to be the caste man of appellant. He had stated that at about 11 p.m. on the date of occurrence he heard the yelling sound of Sudhansu Giri who was stating that Mithun Karmakar had inflicted injury upon him and fled away after closing the door. It appears that immediately thereafter he went to the house of P.W. 2, (the brother of deceased) and inform him about the aforesaid incident. From the perusal of cross examination of this witness, I find that he has no enmity with the appellant and his aforesaid version remains intact and there is nothing on which the said part of his evidence can be thrown away. Thus, I find that the second circumstance has also been proved by the prosecution.

11. P.W. 2, 3 and 8 had clearly stated in their deposition that after receiving information regarding the incident they went to the house of appellant along with P.W. 4 and found that door of the house of appellant was closed from outside with a lock. They have stated that the P.W. 2 had broken the lock by using an iron rod. They have further stated that when they entered inside the house, they found that the deceased Sudhansu Giri was injured and lying in a pool of blood. The I.O. P.W. 9 at paragraph 5 had categorically stated that at the time of inspection of place of occurrence he found that the Sikari of the door and the lock was broken. He had also found blood inside the room. He had further stated that he had seized blood stained earth, axe, broken Sikri and lock from the place of occurrence. The P.W. 5 had also stated that in his presence, the Investigating Officer had seized blood stained axe, broken sikri, lock and blood stained earth from the house of Mithun Karmakar (appellant) and prepared the seizure list. Thus, I find that the objective finding of the I.O. and the statement of seizure list witness (P.W. 5) also supports the version of P.W. 2, 3, 4 and 8 that the door of the house of appellant was closed from outside and when it was opened after breaking of the lock, the deceased was found in injured condition inside the house in a pool of blood. Accordingly, I find that aforesaid circumstances had also been proved by the prosecution by adducing cogent and reliable evidence.

12. The I.O. (P.W. 9) had stated at paragraph No. 5 of his deposition that he had seized blood stained earth and an axe from inside the house of appellant and prepared seizure list in presence of P.W. 5 and one Ravi Kant Visane. P.W. 5 had supposed the aforesaid version of the I.O. From the perusal of cross examination of the I.O., I find that the defence had not challenged the aforesaid version of the I.O. that the aforesaid articles were not seized from the house of appellant. The only question was put to the I.O. that the aforesaid seized articles are not before him inside the court to which he answered in affirmative. Thus the evidence of I.O. that he has seized the aforesaid article from the house of the appellant remain intact and therefore there is no reason to discard the same. In that view of the matter, I find that the prosecution has been able to prove the aforesaid circumstance.

13. P.W. 4 who is the neighbour of appellant had categorically stated that at paragraph No. 7 that when they have gone to the place of occurrence they found that Mithun and inmates of his family were not present in the house. This witness had again stated at paragraph No. 12 that before the occurrence the entire family member of Mithun was present in the house. It is worth to mention that aforesaid statement of P.W. 4 has come in his cross examination which remain unchallenged by the defence. Thus, I find no reason to throw aforesaid evidence over board. In this view of the matter it can be held that the prosecution had been able to prove that prior to the occurrence, the appellant and his family members are present in their house who after the occurrence fled away after locking the door from out side. The submission of learned Counsel for the appellant that the appellant was not present in the house on the date of occurrence and he had given key of his house to the deceased Sudhansu Giri is not worth acceptable. It is relevant to mention that in this respect the defence had not adduced any evidence. Even the appellant had not stated so in his statement u/s 313 of the Cr.P.C. though it appears that the learned court below had given him opportunity for the same. It is well settled that if the accused takes the plea of alibi, the burden is upon him to prove the same. From perusal of entire materials available on record, I find that apart from suggestion given to P.W. 2 and P.W. 8 that the appellant was not present in the house no other evidence adduced by the defence. It is relevant to mention that P.W. 2 & 8 had denied the said suggestion. It is well settled principle of law that a denied suggestion is no evidence. Under the said circumstances, I find that the appellant has not been able to prove that he was not present in the house on the date of occurrence.

14. The next submission of learned Counsel for the appellant that non production of blood stained axe in court is fatal to the case of prosecution is also not worth acceptable. It is true that once an article was seized, the non production of the same is a lapse on the part at prosecution but if due to non production of the said article no prejudice has been caused to the accused then the same have no impact on the case of prosecution. In this regard I do no better than to quote paragraph No. 15 of the judgment of Hon''ble Supreme Court in Sukhdev Yadav

and Others Vs. State of Bihar, which is as follows:

True, as noticed above, there are lapses, but the question that arises for consideration is whether any prejudice has been caused by reason of such a lapse; if the answer thereto is in the affirmative, obviously it will have a serious impact on the trial but if in the event, however, it is in the negative, no prejudice can be said to have been caused and correspondingly question of the trial being vitiated would not arise. The eye witnesses' account as available on record cannot but be termed to be trustworthy and by reason therefor, the lapses stand overshadowed by the testimony of the eyewitnesses. The observations above obtain support from the decision of this Court in *Baaleshwar Mandal v. State of Bihar*.

In the instant case, as noticed above, while cross examining the I.O. (P.W. 9) defence had not challenged seizure of blood stain "Axe", "Sikri" and earth. Thus, due to non production of the same no prejudice has been caused to the defence.

15. In view of the discussions made above I find that the prosecution had brought on record the various circumstances along with dying declaration of the deceased, which if taken together are forming a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the appellant and none else. Thus, I find that there is no illegality and/or irregularity in the judgment of learned court below which warrants any interference by this Court.

16. In the result, this appeal fails and is accordingly, dismissed.