

(2020) 01 JH CK 0161

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 493 Of 2014, 551 Of 2014

Moreng Singh Gagarai @ Jode And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 14-01-2020

Acts Referred:

Indian Penal Code, 1860 — Section 149, 201, 302, 325, 376(2)(g)

Citation : (2020) 01 JH CK 0161

Hon'ble Judges : Shree Chandrashekhar, J; Ratnaker Bhengra, J

Bench : Divison Bench

Advocate : R.P. Gupta, Sudha Gupta, Satish Kr. Keshri

Final Decision : Allowed

Judgement

Shree Chandrashekhar, J

1. Seven persons, namely, Deven Surin, Vijay Surin @ Tui Surin, Saheb @ Gumdi Surin, Damu Surin @ Gundi Surin, Jaipal Surein @ Singrai Surin,

Moreng Singh Gagarai @ Jode , Tulsinath Surin along with other unknown persons are said to have committed murder of Sur Singh Tubid, Jobna

Tubid and Roybari Tubid.

2. After the investigation, twenty-one persons were sent up for trial on the charge under section 302/149 of the Indian Penal Code; section 201/149 of the Indian Penal Code and under section 376 (2) (g) of the Indian Penal Code.

3. During the trial, the prosecution has examined seventeen witnesses; the informant, namely, Gobardhan Tubid has been examined as PW-2.

4. The learned Sessions Judge has held that sixteen accused persons, namely, (1) Vijay Surin @ Tui, (2) Konda Sawaiyan, (3) Gumdi Surin @ Saheb

Surin, (4) Jonko @ Diku Surin, (5) Pagla @ Nauru Purty, (6) Bagun Surin @

kowa, (7) Dama @ Mangta Sawaiyan, (8) Kunsel @ Turam Gagarai, (9) Gumdi Surin @ Koda, (10) Gomeya Surin, (11) Jatung @ Mata Surin, (12) Tulsinath Surin, (13) Sanjay Gagarai, (14) Motai @ Nade Sawaiyan, (15) Dundku Sawaiyan @ Tepe and, (16) Tapuka @ Bhonj Sawaiyan who were put on trial are not guilty of the criminal charges framed against them

in Sessions Trial No. 143 of 2008. For acquitting sixteen accused persons of the charges framed against them, the learned Sessions Judge has held

that no evidence has been laid by the prosecution showing their involvement in the crime.

5. The prosecution has projected Gobardhan Tubid PW-2 and his sister Basanti Tubid PW-3 as the eye-witnesses.

6. The appellants, namely, Moreng Singh Gagarai @ Jode, Damu Surin @ Gundi Surin, Mangru Gagarai @ Leda @ Mugudu Gagrai and Jaipal Surein

@ Singrai Surin have been convicted and sentenced to RI for life and fine of Rs. 3000/- each under section 302/149 of the Indian Penal Code and RI

for three years and fine of Rs. 1000/- each for the offence under section 201/149 of the Indian Penal Code.

7. The charge under section 376 (2) (g) of the Indian Penal Code has failed against the appellants.

8. The learned Sessions Judge has found testimony of PW-2 and PW-3 reliable and trustworthy.

9. Ajay Tubid PW-1 is uncle of the informant. He has stated in the court that Jadunath Tubid and his daughter, namely, Basanti Tubid came to his

house at about 10:00 p.m. in the night and informed him that about 20-25 persons of village Hessabandh surrounded Sur Singh Tubid and others and

assaulted them with lathi and danda. He has further stated that Basanti Tubid told him name of Deven Tui, Saheb, Jaipal, Damu and Jode amongst the

assailants. PW-4 has also stated that on 10.02.2008 at about 8:00 p.m. in the night Jadunath Tubid, Ajay Tubid and Pradhan Tubid came to his house

and informed him that Basanti Tubid has told them that several villagers of Hessabandh have killed Sur Singh Tubid, Roybari Tubid and

Jobna Tubid and amongst the assailants were Deven Surin, Saheb Surin, Tui Surin, Jode Gagarai, Damu Surin and Jaipal Surin. PW-5 is father of the

prosecution witness Basanti Tubid. PW-9 is maternal uncle of Sur Singh Tubid, the deceased. PW-8, PW-10, and PW-12 are the co-villagers. PW-13

is niece of Jobna Tubid and PW-14 has stated that he had acquaintance with Sur Singh Tubid, Roybari Tubid and Jobna Tubid and they also murdered

about four years ago. These witnesses are not eye-witnesses and they have claimed that they were informed about the occurrence by Basanti Tubid

and her father. In his fardbeyan, the informant has stated that on 10.02.2008 he was returning home with his father, mother and an old lady of his

village who was accompanied by her grandchild Basanti Tubid. On that day, they had gone to the house of Gobardhan Master of village Pandabir. On

their return home when they reached near the bridge several persons who were waiting for them started assaulting them with lathi, danda as also fists

and kicks. When he tried to intervene he was also assaulted by them. He has claimed to identify seven accused persons. He has stated that somehow

he escaped and hide himself behind the bushes and next morning he came home and informed his uncle about the occurrence.

10. The informant has been examined in the court on 26.11.2008. At the time of his examination in the court he was 10 years old and PW-3 was aged

about six years when she was examined in the court on 18.03.2009. The learned Sessions has put certain questions to them and having satisfied

himself as to maturity of the witnesses has recorded their testimony.

11. It is true that testimony of a child witness can be accepted if it inspires confidence and it is sufficient to record conviction of an accused. Whether

corroboration is necessary in a case which is solely founded on the evidence of a child witness would depend on the facts and circumstances of the

case. In *K. Venkateshwarlu Vs. State of A.P.* reported in (2012) 8 SCC 73, the Supreme Court has observed as under:

“9. A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or

inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the

influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and

ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and

prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a

child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has

been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the

background and context of other evidence on record is a must before the court decides to rely upon it.â??

12. In the court, PW- 2 and PW-3 have narrated the incident which had happened in the evening of 10.02.2008. At that time they were returning

home. They have identified the appellants as the assailants who have assaulted Sur Singh Tubid, Jobna Tubid and Roybari Tubid. Minor

inconsistencies in their testimony, in our opinion, would not throw a doubt on complicity of the appellants in the crime. In view of sterling quality of the

evidence of PW-2 and PW-3 against the appellants acquittal of sixteen accused persons would not persuade us to disbelieve their testimony. By now

it is well settled that in every case there may be inconsistencies in the testimony of the prosecution witnesses. In â??A. Shankar Vs. State of

Karnatakaâ?? (2011) 6 SCC 279, the Honâ??ble Supreme Court has held as under:

22. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation,

namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the

omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material

improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies,

embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on

which the evidence can be rejected in its entirety.â??

13. From the testimony of PW-2 and PW-3 which is corroborated on the point of occurrence by the evidence of PW-1, PW-4, PW-5, PW-8 as also

by PW-9, PW-10, PW-11 and PW-12, presence of the appellants at the place of occurrence has been proved by the prosecution. They have played a

role in the occurrence is also proved by the prosecution. However, it has come in the prosecutionâ??s evidence that there were more than 20-25

persons who had surrounded PW-2, PW-3 and the deceased persons.

14. A plea has been raised that conviction of the appellants who are less than five in number with the help of section 149 IPC is not proper, but we are

not inclined to accept this submission, particularly, in view of the evidence that several persons have participated in the occurrence and by now it is

well-settled that the conviction with the aid of section 149 IPC can be recorded against less than five persons if it is found that five or more persons

have taken part in the occurrence. In *Ram Dular Rai v. State of Bihar*, reported in (2003) 12 SCC 352, the Supreme Court has observed as

under:

“6. Coming to the question whether Section 149 has application when presence of more than five persons is established, but only four

are identified, Section 149 does not require that all the five persons must be identified. What is required to be established is the presence of

five persons with a common intention of doing an act. If that is established merely because the other persons present are not identified that

does not in any way affect applicability of Section 149 IPC.”

15. In their testimony PW-2 and PW-3 have not stated about assault on Sur Singh Tubid, Roybari Tubid and Jobna Tubid by any weapon. They have

stated that the appellants have assaulted them by fists and kicks. On such evidence, an inference on common object to commit murder of Sur Singh

Tubid, Roybari Tubid and Jobna Tubid cannot be drawn. The prosecution has failed to establish that the appellants shared common object to commit

murder of Sur Singh Tubid, Roybari Tubid and Jobna Tubid and that they had knowledge that murder of Sur Singh Tubid, Roybari Tubid and Jobna

Tubid would be committed in the prosecution of common object of the unlawful assembly.

16. Accordingly, the conviction of the appellants under section 302/149 of the Indian Penal Code is set-aside.

17. Dr. Dhirendra Kumar PW-6, who has conducted the post- mortem examination on 13.02.2008 at 2.:30 p.m., has found the following injuries on Sur

Singh Tubid:

“Rigor-mortis absent in all limbs.

External

1. Incised wound over nose with blood clots. - 1½x1/4x bone deep
2. Nasal bone fractured
3. Swelling over forehead
4. Abrasion over hands and chest
5. Post- mortem injuries on head and leg by fraction and eaten ups by wild animal. Injury No. 1 to 4 were ante-mortem.

18. PW-6 has stated that on the same day, that is, on 13.02.2008 , the Medical Board consisting him has conducted the postmortem examination of

Roybari Tubid and found the following injuries:

External

1. Lacerated wound of (R) chick 3x2x bone deep. Mandible was fractured. Teeth were broken out of the socket. Gum was lacerated.
2. Multiple abrasion over leg. Chest, thigh and perineum (private organ of the body).
3. Her Sari was tight a round the neck. Black colour bruise present around neck.

19. On 13.02.2008, the Medical Board has conducted the postmortem examination of Jobna Tubid at 3:30 p.m and found the following injuries:

External:

1. Post mortem injury over face eaten by wild animal.
2. Bruise over the leftside of the face-3 x 2x2
3. Swelling over left arms 3x2x with fracture of right humerous.
4. Lacerated wound of left of the chest and abdomen. Blood stain present measuring 6x3 into deep to peritoneal cavity. Intestine was producing.

20. According to the doctor, the injuries on Sur Singh Tubid, Roybari Tubid and Jobna Tubid were ante-mortem in nature and caused by sharp-cutting as well as hard and blunt substance.

21. The doctor has found incised wounds as well as lacerated wounds on the body of the deceased persons, however, these injuries have not been explained by the prosecution. PW-2 and PW-3 have not spoken about the assault on Sur Singh Tubid, Roybari Tubid and Jobna Tubid by a sharp-cutting weapon or hard and blunt object. The prosecution has failed to establish which amongst the appellants has inflicted which particular injury to

Sur Singh Tubid, Roybari Tubid and Jobna Tubid. According to the prosecution witnesses, several other persons have surrounded the informant and the deceased persons and there was animosity between the villagers of Hessabandh and Pandabir. The injuries found on the deceased persons, such as, fracture of ribs and bones would fall under the definition of grievous hurt. The appellants have assaulted the deceased persons with fists and kicks and, therefore, we hold that they have voluntarily caused grievous hurt to Sur Singh Tubid, Roybari Tubid and Jobna Tubid and while so, they have committed the offence under section 325 of the Indian Penal Code [refer, *Lal Mandi v. State of W.B.* reported in (1995) 3 SCC 603].

22. Accordingly, the judgment of conviction of the appellant, namely, Moreng Singh Gagarai @ Jode in Cr. Appl. (D.B.) No. 493 of 2014 and the

appellants, namely, Damu Surin @ Gundi Surin, Jaipal Surein @ Singrai Surin and Mangru Gagarai @ Leda @ Mugudu Gagarai in Cr. Appl (D.B.) No.

551 of 2014 under section 302/149 of the Indian Penal Code and under section 201/149 of the Indian Penal Code dated 27.06.2014 and the order of

sentence of RI for life and fine of Rs.3000/-for the offence under section 302/149 of the Indian Penal Code and RI for three years and fine of Rs.

1000/- for the offence under section 201/149 of the Indian Penal Code dated 30.06.2014 in Sessions Trial No. 143 of 2008 passed by the learned

Additional Sessions Judge-I, West Singhbhum at Chaibasa are set-aside.

23. The appellants, named-above, are convicted and sentenced to RI for seven years for the offence under section 325 of the Indian Penal Code.

24. The prosecution has not laid any evidence on the charge under section 201/149 of the Indian Penal Code and, accordingly, the conviction of the appellants for the said charge is also set-aside.

25. Sri Satish Kumar Keshri, the learned APP states that the appellant, namely, Moreng Singh Gagarai @ Jode in Cr. Appl. (D.B.) No. 493 of 2014

and the appellants, namely, Damu Surin @ Gundi Surin, Jaipal Surein @ Singrai Surin and Mangru Gagarai @ Leda @ Mugudu Gagarai in Cr. Appl.

(D.B.) No. 551 of 2014 are in custody for more than ten years.

26. Accordingly, the appellants, above named, shall be set free forthwith, if not required in connection to any other case.

27. In the result, Cr. Appl. (D.B.) No.493 of 2014 and Cr. Appl. (D.B.) No. 551 of 2014 are partly allowed, in the above terms.

28. Let lower court records be transmitted to the court concerned, forthwith.
29. Let a copy of the judgment be communicated to the trial court through FAX.