
(2019) 10 JH CK 0037

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 822, 1032 Of 2007, 301 Of 2009

Nageshwar Mandal And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 15-10-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 114, 149, 300, 302, 326, 448, 452
Code Of Criminal Procedure, 1973 — Section 315

Citation : (2019) 10 JH CK 0037

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

Bench : Division Bench

Advocate : Arbind Kumar Sinha, Mahesh Tewari, Priya Shrestha

Final Decision : Partly Allowed

Judgement

Shree Chandrashekhar, J

1. These three criminal appeals; Criminal Appeal (D.B.) No.301 of 2009 by the appellants, namely, Nageshwar Mandal and Godai Mandal, Criminal Appeal (D.B.) No.1032 of 2007 by Inod Mandal @ Kado Mandal and Criminal Appeal (D.B.) No.822 of 2007 by Sukar Chandra Mandal, arise out of a common judgment of conviction under section 302/34 IPC and under section 452/34 IPC passed in Sessions Case No. 51/06| 46/06.

2. Initially, eight accused persons, namely, Inod Mandal @ Kado Mandal, Sukar Chandra Mandal, Nageshwar Mandal, Godai Mandal, Dani Devi, Hira Devi, Bobby Devi and Murti Devi were put on trial. The learned Sessions Judge has held that the charges against the female accused, namely, Dani Devi, Hira Devi, Bobby Devi and Murti Devi have not been proved.

3. The appellants have been convicted and sentenced to RI for life and fine of Rs.5000/- each under section 302/34 IPC and RI for five years under section 452/34 IPC. In default of payment of fine they are ordered to undergo SI for six months.

4. During the trial, the prosecution has examined altogether seven witnesses; the informant, namely, Bijaly Devi is PW-6 and the Investigating Officer has examined himself as PW-7.
5. The learned Trial Judge has held that Kamdeo Mandal PW-1 is a chance witness. The prosecution witnesses, namely, Bindu Mandal PW-3 and Gujar Mandal PW-4, who according to the prosecution had taken the deceased Binod Mandal to Sadar Hospital, Dumka, have turned hostile.
6. The prosecution has projected Dahru Mandal PW-2 and the informant as eye-witnesses.
7. In Criminal Appeal (D.B.) No.301 of 2009, Mr. Arbind Kumar Sinha, the learned counsel who has been appointed by JHALSA appears for the appellants. In Criminal Appeal (D.B.) No.1032 of 2007 and Criminal Appeal (D.B.) No.822 of 2007, the appellants are represented through Mr. Mahesh Tewari, the learned counsel.
8. The learned counsels appearing for the appellants have submitted that: (i) failure of the prosecution to explain the injuries on the accused Godai Mandal has proved fatal, (ii) there are serious discrepancies in the testimony of the prosecution witnesses, (iii) non-production of the crime weapon and other material objects has thrown considerable doubt on the veracity of the prosecution's case, and (iv) acquittal of as many as four accused persons on the same set of evidence has shaken the foundation of the prosecution's case.
9. The defence has also examined two witnesses; one of the accused, namely, Godai Mandal has examined himself during the trial under section 315 of the Code of Criminal Procedure.
10. The defence raised by the accused persons is that Godai Mandal was assaulted brutally by the prosecution party.
11. As against the above, Mrs. Priya Shrestha, the learned APP has submitted that minor discrepancies in the prosecution's evidence and mistakes in the investigation would not extend the benefit of doubt to the accused persons and in face of the unimpeachable evidence of the informant which is substantially corroborated by the medical evidence, no interference is required with the judgment of conviction of the appellants in Sessions Case No. 51/06| 46/06.
12. In the first place, it needs to be recorded that failure of the prosecution to explain the injuries on an accused caused in the same incident would not prove fatal for the prosecution if the witnesses have given cogent, trustworthy and reliable evidence [refer, Vijayee Singh and others V. State of U.P., (1990) 3 SCC 190]. Secondly, on their own saying it is not the case set up by the accused persons that Godai Mandal has received injury in the same incident. On the contrary, case of the accused persons coming through Godai Mandal himself who has been examined as DW-1 is that about 7:30-8:00 p.m. in the evening of 20.07.2005 when he was returning home from Dumka market he saw Dahru,

Binod, Bindu and others talking to his wife. When he reached near them, Dahru exhorted others to kill him whereupon Dahru and Bindu caught hold of him and other persons started assaulting him with lathi. He has given his statement in the hospital to the police which was marked as Ext.-A. To corroborate this story, the accused persons have examined Dr. Dilip Kr. Keshri DW-2 who has stated that he has examined Godai Mandal and found three injuries, one of which was an incised wound on his scalp. According to DW-2, the injuries found on Godai Mandal were simple in nature and caused by hard and blunt object, such as lathi. In his cross-examination, he admits that such injuries can be caused by a fall. He has not mentioned the date and time in the injury report or examination of Godai Mandal. In the aforesaid state of affairs, we do not find any substance in the contention raised on behalf of the appellants that failure of the prosecution to explain the injuries on Godai Mandal has proved fatal for the prosecution.

13. In her fardbeyan, which was recorded on 21.07.2005 at about 8:00 a.m. in the Sadar Hospital, Dumka, the informant has stated that on the previous evening, at about 7:00 p.m., her son Binod Kr. Mandal was in the house and at that time Godai Mandal who is the elder brother of her husband and his sons, namely, Inod Mandal @ Kado Mandal, Nageshwar Mandal @ Bhutu and Sukar Chandra Mandal variously armed with sharp-edged Dab and iron rod came there and dragged her son out of the house. She has further stated that Sukar Chandra Mandal and Inod Mandal @ Kado Mandal caught hold of her son and other two accused persons, namely, Godai Mandal with iron Dab and Nageshwar Mandal with iron rod assaulted her son with intention to kill him. According to the informant, the female accused persons were standing there armed with lathi. On receiving injuries at the hands of Nageshwar Mandal and Godai Mandal her son fell on the ground and when they tried to save him the female accused persons stopped them. When they raised hulla, co-villagers, namely, Kandeo Mandal, Bindu Mandal, Dahru Mandal and others came there and the accused persons fled away. The injured Binod Mandal was taken to Sadar Hospital, Dumka for his treatment where he died at about 3:00 a.m. The informant has stated that the accused persons have committed marpit due to the family dispute and a case lodged by her son in Dumka court. Just the previous day the accused persons were released on bail in the said case. They have assaulted her son with intention to kill him else they would be convicted in the criminal case. In the Court, the informant has reiterated her fardbeyan and narrated a similar story of the incident what she has seen in the evening of 20.07.2005. She has spoken about the accused persons coming to her house, dragging her son outside the house and their wielding iron Dab and iron rod and assault by them on the neck and head of her son. The other prosecution witnesses, namely, Dahru Mandal PW-2 has stated that when Bijaly Devi informed her about assault on her son she rushed to her house and found the accused persons assaulting Binod Mandal.

14. On a closure scrutiny of the evidence of PW-2 and PW-6, we find some contradictions in their evidence in so far as the manner of assault on Binod Mandal by the accused persons is concerned, but from their evidence presence of

the appellants at the place of occurrence and at the time of occurrence is established. The prosecution has also established that at the initial stage all four appellants caught hold of Binod Mandal and dragged him outside the house.

15. The appellant, namely, Inod Mandal @ Kado Mandal and Sukar Chandra Mandal have been convicted with the aid of section 34 IPC.

16. Section 34 of the Indian Penal Code postulates vicarious liability of all for the act of one if the criminal act has been done in furtherance of the common intention of all. In the celebrated judgment in "Mahbub Shan V. Emperor" reported in AIR 1945 PC 118, the Privy Council has observed; " when a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone". This observation on section 34 IPC was made after the amendment in 1870 by which before the expression "each of such persons", the expression "in furtherance of common intention of all" was incorporated and after that the law on applicability of section 34 IPC has remained the same.

17. By now, it is also well-settled that if evidence has come on record conviction of a person accused of a crime with the aid of section 149 IPC can be converted into one under section 34 IPC. In "Dhanna v. State of M.P.", reported in (1996) 10 SCC 79, the Supreme Court has observed thus:

"8. Legal position on this aspect remained uncertain for a time after this Court rendered a decision in Nanak Chand v. State of Punjab. But the doubt was cleared by a Constitution Bench of this Court in Willie (William) Slaney v. State of M.P., where this Court observed at para 86, thus:

"Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable. In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant."

9. It is, therefore, open to the court to take recourse to Section 34 of IPC even if the said section was not specifically mentioned in the charge and instead Section 149 IPC has been included. Of course a finding that the assailant concerned had a common intention with the other accused is necessary for resorting to such a course. This view was followed by this Court in later decisions also. (Amar Singh v. State of Haryana, Bhoor Singh v. State of Punjab.) The first submission of the learned counsel for the appellant has no merit."

18. The role played by the appellants, namely, Inod Mandal @ Kado Mandal and Sukar Chandra Mandal in the incident has been narrated by the informant in the fardbeyan and in a similar manner in her examination-in-chief. All that she has stated about Inod Mandal @ Kado Mandal and Sukar Chandra Mandal is that they along with two other appellants dragged Binod Mandal outside the house and they caught hold of him. Except stating that other accused persons also assaulted Binod Mandal with lathi, she has not alleged any other overt act by Inod Mandal @ Kado Mandal and Sukar Chandra Mandal. In her fardbeyan, the informant has not stated that these two appellant were holding lathi rather her stand is that the female accused were wielding lathi. However, in para No.2 of her examination-in-chief she has stated that Inod Mandal @ Kado Mandal and Sukar Chandra Mandal were holding lathi. If this statement of the informant has to be accepted, the prosecution's case that these two appellants caught hold of Binod Mandal cannot be believed. It may be of some relevance to record here that no injury caused by lathi has been found by PW-5 on Binod Mandal.

19. Dr. Chandeshwar Pd. Sinha PW-5, who has conducted the post-mortem examination has found the following injuries on Binod Mandal:

- (i) Abrasion $\frac{1}{2}$ " x $\frac{1}{4}$ " at the base of left index finger on palmer surface;
- (ii) Lacerated wound 1" x $\frac{1}{2}$ " x $\frac{1}{4}$ " at the right big toe on sole surface;
- (iii) Incised wound 1" x $\frac{1}{2}$ " x muscle deep over middle of head;
- (iv) Lacerated wound 1 $\frac{1}{2}$ "x 1" x bone deep over back of head in the middle.

20. Now, when we see the evidence of PW-2, we find that he has given a somewhat contradictory picture of the incident, at least, in so far as assault by the appellants on Binod Mandal is concerned. In the above facts, we hold that conviction of the appellant, namely, Inod Mandal @ Kado Mandal in Criminal Appeal (D.B.) No.1032 of 2007 and the appellant, namely, Sukar Chandra Mandal in Criminal Appeal (D.B.) No.822 of 2007 under section 302/34 IPC and under section 452/34 IPC are not sustainable and, accordingly, set aside. However, the prosecution has brought such evidence on record on the basis of which these two appellants are liable to be convicted for the offence of house trespass. Accordingly, they are convicted under section 448 IPC and sentenced to undergo RI for one year.

21. Now, the next question is whether the appellants, namely, Nageshwar Mandal and Godai Mandal have rightly been convicted under section 302/34 IPC.

22. On this issue, we find that not only the testimony of PW-2 and PW-6 is inconsistent, the medical evidence is also a little confusing. Dr. Chandeshwar Pd. Sinha PW-5 has stated that the injury Nos. (i), (ii) and (iv) were caused by hard and blunt substance and injury No.(iii) was caused by a sharp-cutting weapon. These injuries are attributable to the appellants, namely, Nageshwar Mandal and Godai Mandal, but then, the manner of occurrence as disclosed by the informant leaves a room for doubt who has caused the fatal blow to Binod Mandal. In her

cross-examination, the informant has stated that Godai Mandal has given repeated Dab blow on the head of Binod Mandal; iron Dab is a sharp-edged weapon, but the Doctor has found only one incised wound of the extent of 1" x ½", muscle deep, over middle of the head of Binod Mandal. Injury Nos. (i) and (ii) have been found simple in nature and these injuries were not on a vital part of the body. To make the medical evidence confusing, PW-5 says that injury Nos. (i), (ii) and (iv) are possible by a fall on hard and blunt object. He has stated that injury (i), (ii) and (iii) are not the cause for death of Binod Mandal. However, he says that death has been caused due to shock and haemorrhage as a result of injury No.(iv). On such evidence, it is proper to extend benefit to the accused persons [refer: Dhanna Chaudhry and others V. State of Bihar, (1985) 3 SCC 680]. We are of the opinion that all that the prosecution has proved is that the appellants, namely, Nageshwar Mandal and Godai Mandal have caused grievous injuries to Binod Mandal, but it has failed to establish ingredients under any of the four clauses under section 300 IPC for convicting them under section 302/34 IPC.

23. Accordingly, the judgment of conviction dated 22.05.2007 under section 302/34 IPC and the order of sentence dated 25.05.2007 of RI for life and fine of Rs.5000/-each passed by the learned 4th Additional Sessions Judge, FTC, Dumka in Sessions Case No.51/06| 46/06 inflicted upon the appellants, namely, Nageshwar Mandal and Godai Mandal in Criminal Appeal (D.B.) No.301 of 2009 are set aside. The appellants, namely, Nageshwar Mandal and Godai Mandal in Criminal Appeal (D.B.) No.301 of 2009 are convicted under section 326 IPC and sentenced to RI for ten years.

24. The conviction of these two appellants under section 452/34 IPC is confirmed, but the sentence for both the offences inflicted upon the appellants, namely, Nageshwar Mandal and Godai Mandal shall run concurrently.

25. Mrs. Priya Shrestha, the learned APP has tendered a copy of the letter dated 06.09.2019 received from the Superintendent, Central Jail, Dumka according to which Nageshwar Mandal and Godai Mandal have remained in custody for more than 14 years.

26. Therefore, the appellants, namely, Nageshwar Mandal and Godai Mandal shall be set free forthwith, if not required in connection to any other case.

27. The appellant, namely, Inod Mandal @ Kado Mandal in Criminal Appeal (D.B.) No.1032 of 2007 and the appellant, namely, Sukar Chandra Mandal in Criminal Appeal (D.B.) No.822 of 2007 are discharged from the liability of bail bonds furnished by them.

28. In the result, Criminal Appeal (D.B.) No.301 of 2009, Criminal Appeal (D.B.) No.1032 of 2007 and Criminal Appeal (D.B.) No.822 of 2007 are partly allowed.

29. We appreciate the able assistance rendered by Mr. Arbind Kumar Sinha, the learned Amicus.

30. Let lower court records be transmitted to the court concerned, forthwith.

31. Let a copy of the judgment be communicated to the trial court through FAX.