

(2004) 03 JH CK 0029

In the Jharkhand High Court

Case No : Criminal Appeal No. 108 of 1999

Nuneshwar Mahato and Another

APPELLANT

Vs

State of Bihar (Now Jharkhand)

RESPONDENT

Date of Decision : 05-03-2004

Acts Referred:

Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 304, 323

Citation : (2007) 1 CurCrIR 238 : (2006) CriLJ 3951 : (2006) 4 EastCriC 351 :
(2006) 2 AIRJharR 852

Hon'ble Judges : Vishnudeo Narayan, J

Bench : Single Bench

Advocate : Kavita Sharma, for the Appellant; Indra Nath Gupta, APP, for the Respondent

Judgement

Vishnudeo Narayan, J.—This appeal at the instance of the appellants has been directed against the impugned judgment and order dated 22.4.1999 and 24.4.1999 respectively passed in Sessions Case No. 86 of 1984 by Sri Prabodh Ranjan Das, 3rd Additional Sessions Judge, Deoghar whereby and whereunder the appellant was found guilty for the offence punishable u/s 304 part 1 of the Indian Penal Code and he was convicted and sentenced to undergo R.I. for five years and also to pay a fine of Rs. 1,000/-and in default thereof to undergo R.I. for two months and the appellant Kodo Tatawa was found guilty for the offence u/s 323 of the Indian Penal Code and he was released on furnishing bond of ten thousand with two sureties of the like amount each for the period of one year u/s 4 of the Probation of Offenders Act. However appellant Nuneshwar Mahto was not found guilty under Sections 379 and 302 of the Indian Penal Code and the appellant Kodo Tatawa was also not found guilty for the offences under Sections 147, 379 and 302/149 of the Indian Penal Code. Other 12 co-accused persons were acquitted of the charges under Sections 147, 379, 148 and 302/149 of the Indian Penal Code.

2. The prosecution case has arisen on the basis of the fardbeyan (Ext. 1) of

informant Barka Rout said to be the victim of assault in this case and died subsequently in the night of the occurrence in course of treatment, recorded by S.I. S.C. Das of Deoghar Police Station in Deoghar Hospital on 28.10.1980 at 17.00 hours regarding the occurrence which is said to have taken place on that very day at 7.00 hours in the paddy field at Malhari Ahritari in village Chihutiya P.S. Mohanpur District Deoghar and the case was instituted against them by drawing of a formal FIR (Ext. 7) on 29.10.1980 at 12.45 hours which was received on 30.10.1980 in the Court empowered to take cognizance.

3. The prosecution case, in brief, is that appellant along with acquitted co-accused persons variously armed with lathi bhala and hasua came to the paddy field of the informant known as Malhari Aharitari (Chihutiya) and they started harvesting the paddy crop forcibly from the land in possession of the informant and the informant protested to them in respect thereof and at this the appellant Nuneshwar Mahto assaulted the informant by hasua causing injuries on his both hands and the appellant Kodo Tatawa also assaulted him by lathi on his both legs. It is alleged that on the alarms raised by the informant Bichhu Rout (not examined), PW 3, Sumita Mahatoin @ Sushila and PW 4, Pano Devi, the brotheer, daughter and wife of the informant respectively came there to rescue him and the appellant and co-accused persons have also assaulted them and co-accused Doman Mahto snatched silvar bangles worth Rs. 400/- from the wrist of PW 4 and the appellant and co-accused persons have removed 15 bundles of harvested paddy from the said field. It is further alleged that PW 1, Bum Shankar Mahto besides Antu Rout and Gauri Shankar Mahto have witnessed the occurrence.

4. The appellants have pleaded not guilty to the charges levelled against them and they claim themselves to be innocent and to have committed no offence and they have been falsely implicated in this case due to enmity.

5. The prosecution has in all examined six witnesses to substantiate its case. PW 3. Sushila Devi and PW 4, Pano Devi is the daughter and widow of the deceased informant and they claim themselves to be the eye witnesses of the occurrence in question. PW 2, Pandey Rout is son of the deceased informant but he has not been named in the fardbeyan but he also claims himself to be the eye witness of the occurrence. PW 1, Bum Shankar Mahto who is a resident of village Chihutiya also claims to be an ocular witness of the occurrence. PW 6, Ramanand Harijan is a formal witness who has proved the fardbeyan (Ext. 6) the formal FIR (Ext. 7) and the Case Diary (Ext. 9) besides Ext. 5, 8 and 8/1. PW 5, Dr. Satya Saran Sen has conducted the postmortem examination on the dead body of the deceased informant and the postmortem report per his pen is Ext. 2 in this case and he has also examined the injuries appearing on the person of PW 3, PW 4 and Bichhu Rout aforesaid and the injury reports in respect thereof are Ext. 1 series are the signatures of the witnesses on the fardbeyan inquest report and the seizure list. Ext. 4 is the endorsement regarding the death of the informant taking place in the hospital. DW 1, Dineshwar Prasad, DW 3, Sukhdeo Mahto and

DW 2, Dr. Ashok Kumar Chatterjee have figured as defence witnesses and in the injury report regarding the injuries appearing on the person of co-accused Sukhdeo Mahto and the appellant Nuneshwar Mahto per pen of DW 2 are Ext. C and C/1 respectively. Ext. A is the certified copy of PCR case No. 386 of 1980 filed by co-accused Sukhdeo Mahto against PW 1, PW 2, PW 3 and PW 4 and others regarding the occurrence of the same day and Ext. 10 is the judgment of the said case in which they were acquitted. Ext. B is the order dated 13.1.1984 passed in Criminal Case No. 35 of 1982/Criminal Misc. Case 575 of 1982 in a proceeding u/s 145, Cr PC between co-accused Sukhdeo Mahto and Harihar Mahto and others in respect of Plot No. 234, 246, 247, 245 and 251 over which the possession of co-accused Sukhdeo Mahto was confirmed.

6. Assailing the impugned judgment it has been submitted that the learned Court below has committed a manifest error in coming to the finding of the guilt of the appellants and he did not meticulously consider and scrutinized the evidence on the record with due care and caution in view of enmity existing and alive between the parties much prior to the occurrence and no independent witness has taken oath in support of the prosecution case and the witnesses who have deposed for the prosecution case are inter se related having animus to depose falsely. It has also been submitted that the trial Court had rejected the evidence of the prosecution witnesses in respect of the acquitted co-accused persons as unreliable and on that very evidence had come to the finding of the guilt of the appellants which cannot be sustained. It has further been submitted that the I.O. has not been examined in this case for the prosecution and place of occurrence of this case does not stand established. It has also been submitted that as per the prosecution case the appellant Kodo Tatawa is said to have assaulted the deceased on his legs by lathi but PW 1 Bum Shankar Mahto in his evidence has not stated regarding the assault by appellant Kodo Tatawa on the legs of the deceased and PW 5, the medical witness in his postmortem report as well as in his evidence has not also stated or deposed regarding existence of any injury on the legs of the deceased and the learned Court below has failed to consider this aspect of the matter and has erred in his finding regarding the guilt of appellant Kodo Tatawa. Lastly it has been contended that there is material contradiction in the evidence of the prosecution witnesses and the place of occurrence as alleged by the prosecution case is also not established due to the non examination of the I.O. which has caused serious prejudice to the appellants and the counter version of the case in the facts, circumstances and evidence on record appears to be natural and probable. Thus the impugned judgment is unsustainable. In support of his contention, reliance has been place of the ratio of the case of Bir Singh and Others Vs. State of Uttar Pradesh, , Ram Ashrit Ram and Others Vs. State of Bihar, , Satya Narain Bhagat and Another Vs. State of Bihar ,

7. Learned A.P.P. has contended that PWs 3, 4 and 2 had followed the deceased immediately when he was going to his paddy field on information that the appellants along with other co-accused persons are forcibly harvesting paddy crop from his paddy field and they are the ocular witnesses of the occurrence in

which they along with the deceased had sustained injuries on their person and the medical witness has found injuries on their person also in course of their examination and as such there is ring of truth in their evidence. It has also been submitted that PW 1 Bum Shankar Mahto is an independent witness and is not related with the deceased and on alarms he had come to place of the occurrence and has witnessed the occurrence and his testimony is equally reliable and the learned Court below has rightly relied upon his testimony for coming to the finding of the guilt of the appellants. It has also been contended that it becomes an established fact that an occurrence has taken place between the parties in view of the counter case regarding harvesting of paddy crop and a scuffle in respect thereof at the relevant time.

8. It will admit of no doubt that an occurrence had definitely taken place between the parties at 7.00 hours on 28.10.1980 for harvesting paddy crop at Malhari Aharitari in village Chihutia, in view of the averments made in the fardbeyan (Ext. 1) of the deceased informant read with the complaint petition (Ext. A) of PCR Case No. 386 of 1980 filed by co-accused Sukhdeo Mahto. According to the prosecution case the appellants along with co-accused were forcibly harvesting the paddy crop in the field of the deceased informant grown by him though the details of the said paddy field have neither been averred in the fardbeyan aforesaid nor in the evidence of the prosecution witnesses whereas it has specifically been averred in the complaint petition that the prosecution party were forcibly harvesting the paddy crop from Plot Nos. 235 and 216 in possession of co-accused Sukhdeo Mahto in which he has grown the paddy crop. PW 4, PW 3 and PW 2 have deposed that the informant went to his paddy field informing them that appellant and others are harvesting the paddy crop from his field. They have further deposed that they along with Bichhu Rout immediately followed the informant and they reached the place of occurrence together. In paragraph 13 of her cross-examination, PW 4 has deposed that she is on litigating terms with co-accused Sukhdeo Mahto in respect of land and the case in respect thereof is subjudice. She has further deposed that the said land belongs to co-accused Sukhdeo Mahto but he has handed over the possession of the said land to her and she is in cultivating possession of the said land from the time of her marriage. She has also deposed that she has grown paddy crop in the said field and she has harvested the paddy crop from there in 4 or 5 days prior to the occurrence in question and in retaliation the appellants and other co-accused persons have harvested the paddy crop from her field. She has also deposed that the place of occurrence i.e. the paddy field of the informant is situated at the distance of 10 hath from the said land which co-accused Sukhdeo Mahto had given to her. However, she has not disclosed the plot number and boundary of the said paddy field in which according to her the appellant and other co-accused persons have forcibly harvested the paddy crop. PW 3 in her evidence has also not disclosed regarding the plot number and boundary of the paddy field from which appellants and other co-accused persons are said to have harvested the paddy crop. Similar is the evidence of PW 1 and PW 2 in respect

thereof. Even the seizure list in respect of the seizure of the blood stained earth from the alleged place of occurrence also does not mention therein the plot number and boundary of the said paddy field. The I.O. has not taken oath in this case to establish the identity of the said paddy field. Therefore, it is doubtful as to whether the occurrence in question had taken place in the paddy field in possession of the deceased informant or the paddy field bearing Plot Nos. 235 and 216 in possession of co-accused Sukhdeo Mahto. There is also another aspect of the matter. PW 4 in paragraph 10 of her evidence has deposed that the appellants and other co-accused persons had forcibly harvested the paddy crop to the extent 1/4th in the said paddy field and five or six days after the occurrence the remaining of paddy crop in the said field was harvested by her. PW 1 has deposed in paragraph 9 of his evidence that paddy crop was harvested by the appellant and co-accused persons from the said paddy field to the extent of 2 decimals and harvested paddy was found kept in the said paddy field. PW 3 in paragraph 10 of her evidence has deposed that the appellant and co-accused persons have harvested the entire paddy crop from the said field the area of which is 10 decimals and after completing the harvesting of the entire field they had assaulted the informant. Therefore, there is inherent material contradictions in the testimony of PW 4 and PW 1 on the one hand and PW 3 on the other hand in respect thereof which had their effect regarding the authenticity of the occurrence as alleged by the prosecution having taken place in the paddy field alleged to be in possession of the informant as well as regarding the reliability of the evidence of prosecution witnesses in respect thereof. It is equally relevant to mention here that in the facts and circumstances of this case the appellants definitely stand prejudiced due to the non examination of the I.O. in this case as they stand debarred from eliciting facts showing their innocence in his cross-examination and further they stand precluded from controverting the evidence of the prosecution witnesses to that of their statement already made before the I.O. in course of investigation.

9. According to the prosecution case, appellant Kodo Tatawa is said to have given two blows by lathi on both the legs of the deceased informant. PW 4, PW 3 and PW 2 in their evidence have stated in respect thereof whereas PW 1, who had come to the place of occurrence earlier to them, is conspicuously silent in respect thereof in his evidence. And to crown all, PW 5 the medical witness, in course of postmortem examination of the dead body of the deceased informant has not found any injury on both the legs of the deceased informant. Therefore, there is no legal evidence on the record to substantiate the prosecution case regarding the assault by appellant Kodo Tatawa on both the legs of the deceased informant and the manner of occurrence as alleged by the prosecution does not stand substantiated beyond all reasonable doubts. The learned Court below did not advert to the evidence referred to above in the impugned judgment for coming to the finding of the guilt of appellant Kodo Tatawa u/s 323 of the Indian Penal Code and has committed a manifest error in respect thereof and as such the conviction of appellant Kodo Tatawa suffers with illegality.

10. It is the consistent evidence of PW 4, PW 3 and PW 1 that on the protest regarding forcible harvesting of the paddy crop grown by him in his paddy field, the informant was surrounded by the appellants and all the co-accused persons and thereafter appellant Nuneshwar Mahto had assaulted him by hasua inflicting four blows repeatedly on his right hand and one blow on his left hand. PW 2 though not named in the fardbeyan of the deceased informant, also claims to have come to the place of occurrence with the other witnesses of the prosecution and has also stated in his evidence regarding the said assault on the deceased by appellant Nuneshwar Mahto. PW 5 has deposed to have conducted the postmortem examination on the dead body of the deceased on 29.10.1980 at 3.00 p.m. and has found the following ante-mortem injuries on his dead body:--

- (i) Incised transverse wound 4" x 1 1/2" x 2" on the outside of right arm.
- (ii) Incised wound 2" x 1/2" x 1" below injury No. (i),
- (iii) Incised longitudinal wound 4" x 1/2" x 1/2" in the back of the right elbow,
- (iv) Incised longitudinal wound 2" x 1/2" x 1/2" on the back of right wrist, and
- (v) Incised transverse injury 5" x 1/2" x 2 1/2" on the outside of the left elbow with complete cut upper end of radius and ulna and cutting the radial arteries.

The medical witness has further deposed that the aforesaid injury may be caused by toddy trappers i.e. hasua and death of the deceased is due to shock and haemorrhage as a result of above injury and the time elapsed since death is within 24.00 hours. The medical witness has further deposed that there was no bone cut in respect of the injury No. (i) to (iv) aforesaid and the aforesaid injuries separately considered cannot cause death and the aforesaid injuries are not on the vital part of the body of the deceased informant. The medical witness has further deposed that toddy trapper i.e. hasua is curved in shape. The medical witness has found chamber of the heart of deceased empty and, therefore, it appears that the deceased has died due to excessive bleeding as a result of the injury No. (v). There is one striking feature in view of the nature of injury as found by the medical witness. None of the injuries aforesaid appearing on the dead body of the deceased is semi-circular or curve injury and as such there is big question mark regarding the injuries appearing on the dead body of the deceased having been caused by hasua, a semi-circular weapon. The assault on the hands of the deceased as alleged does not lead to an inference that the assault has been made by appellant Nuneshwar Mahto with intention or knowledge to cause the death of the deceased and the aforesaid injuries also were not sufficient in the ordinary course of nature to cause death of the deceased. I have already stated above that prosecution has not established the place of occurrence in this case and there is no evidence that occurrence has taken place in the paddy field in possession of the deceased informant and in this view of the matter, the counter version of the occurrence having been taken place in Plot Nos. 235 and 216 in possession of co-accused Sukhdeo Mahto cannot be totally ruled out and in the backdrop of the evidence on the record in

respect thereof the informant and the prosecution witnesses who figured as accused in the counter case filed by co-accused Sukhdeo Mahto appeared to be aggressor and in course of free fight the deceased has sustained Injuries and it is very hard to say specifically that which of the accused persons including the appellants had cause the said injury. And last but not the least, all the alleged ocular witnesses who have taken oath for the prosecution are inter se related with the informant and in view of the existing enmity they have animus to depose falsely against the appellant and other co-accused persons. PW 1 Bum Shankar Mahto has denied to be related with the deceased but he figures with the prosecution witnesses as accused in the case filed by co-accused Sukhdeo Mahto. No independent witness is forth coming to support the prosecution case and even Antu Rout and Gaurishankar Mahto though named as ocular witnesses of the occurrence in question have not come forward to support the prosecution case. It is not incumbent on the prosecution to examine each and every witness so as to multiply witnesses and burden the record. However, it does not apply where the evidence of the eye witness suffers from various infirmities and could be relied upon only if properly corroborated. Here in this case all the alleged ocular witnesses examined by the prosecution has serious animus against the appellant and co-accused and are interested and partisan witnesses in implicating them and as such an adverse inference has to be drawn against the prosecution case due to the non-examination of any independent witness when as per the prosecution case, they are said to be present at the place of occurrence. In the case of Ram Ashrit and others (supra) it has been observed by the Apex Court which runs thus:--

"When all the material witnesses in a murder case were either related or otherwise interested in the prosecution, their testimony had to pass the test of close and severe scrutiny before their testimony could be safely acted upon. In the absence of corroboration to a material extent in all material particulars, it was extremely hazardous to convict the accused persons on the basis of the testimony of these highly interested, inimical and partisan witnesses, particularly when it bristles with improbable versions and material infirmities."

It is, therefore, evident that the prosecution has not been able to substantiate its case beyond all reasonable doubts. The learned Court below did not consider the evidence on the record meticulously in proper perspective and has committed a manifest error in coming to the finding of the guilt of the appellants. I, therefore, see substance in the contention of learned counsel for the appellant. The impugned judgment, therefore, suffers with illegality and, therefore, it is unsustainable.

11. There is merit in this appeal and it succeeds. The appeal is hereby allowed and the impugned judgment is set aside. The appellants are found not guilty and they are acquitted and discharged from the liability of their bail bonds and probation bond respectively.