
(2003) 04 JH CK 0102

In the Jharkhand High Court

Case No : Criminal Appeal No's. 278 and 308 of 1995

Parmeshwar Kol and Others

APPELLANT

Vs

State of Bihar (Now Jharkhand)

RESPONDENT

Date of Decision : 02-04-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 323

Citation : (2003) 2 JCR 455

Hon'ble Judges : Vinod Kumar Gupta, J; Lakshman Uraon, J

Bench : Division Bench

Advocate : P.C. Roy, Arbind Kumar Choudhary, for the Appellant; Bhaiya Vishwajeet Kumar, APP, for the Respondent

Final Decision : Allowed

Judgement

Lakshman Uraon, J.—Appellants in both the Criminal Appeals have been convicted under Sections 302/149 of the Indian Penal Code and sentenced to undergo R.I. for life. They have also been convicted u/s 452 of the IPC, Appellants Kaila Kol and Bhageshwar Kol (in Cr. Appeal No. 308 of 1995) were further convicted u/s 148 of the IPC and further the rest three appellants (in Cr. Appeal No. 278 of 1995) were convicted u/s 147 and 323, IPC. Appellant Bhageshwar Kol was further convicted u/s 326 of the IPC. However, no separate sentence was passed against the appellants under Sections 147, 323, 552 and 326, IPC. Both these Criminal Appeals arise out of the same order of conviction and sentence dated 1.9.1995 passed in Sessions Trial No. 4 of 1993 by 3rd Additional sessions Judge, Deoghar. Hence both these appeals are being disposed of by a common judgment by this Court.

2. The basis of the prosecution case is the fardbeyan (Ext. 6) of Etwari Kol recorded on 25.4.1992 at 12.30 p.m. at village Suthania, Police Station Mohanpur by ASI, R.P. Singh of Mohanpur Police Station. Informant Etwari Kol has alleged that at 9.00 a.m. on 25.4.1992 he was returning his home from Chaupal and reached near his village, then appellants Ramchandra Kol (since

dead during pendency of Cr. Appeal No. 278 of 1995), Parmeshwar Kol, Bariar Kol, Huro Kol (all in Cr. appeal No. 278 of 1995) Kaila Kol, Bhageshwar Kol (both in Cr. Appeal No. 308 of 1995) and Regha Kol (since dead during pendency of Cr. Appeal No. 278 of 1995), all armed with lathi, whereas Bhageshwar Kol and Kaila Kol armed with sabal, surrounded him and started assaulting him. Informant raised alarm to save him and went to Kadru Mahto. Sharvan Mahto and Fakir Mahto, all of village Mahtoiendih, who were going for their works. They asked the appellants not to assault Etwari Kol, rather settle their differences in consultation with each other. Even then, they assaulted informant Etwari Kol with lathi and sabal Informant fell down on being injured who was dragged and thrown on the road. They went to his house and assaulted his wife (PW 2) Topaii Debi with lathi and sabal causing bleeding injury to her. The reason of the alleged occurrence was alleged that in the night of 23.4.1992 wife of appellant Bhageshwar Kol was stung by scorpion who died on 24.4.1992 at about 12.00 noon. The appellants called Topaii Debi, wife of the informant, as an exorcist who played witchcraft on the wife of Bhageshwar Kol resulting her death.

3. Altogether 14 persons were made accused in the Court below who faced the Trial in Sessions Trial No. 4 of 1993. Appellants in both the Criminal Appeals were charged u/s 302/149, IPC. Appellant Bhageshwar Kol (in Cr. Appeal No. 308 of 1995) was further charged u/s 326, IPC. Appellants Kaila Kol, and Bhageshwar Kol (both in Cr. Appeal No. 308 of 1995) were further charged u/s 148, IPC. Kaila Kol, Bhageshwar Kol, Regha Kol (since dead) (all appellants). Budhan Kol, Ghutha Kol, Maiwa Debi, Megbu Kol, Sakali Debi, Bhinsarea Debi and Bhudhani Debi were charged under Sections 452, 323 and 147, IPC by the learned Trial Court.

4. The prosecution has examined 7 witnesses in order to bring home the charges levelled against the accused persons. PW 1 Peru Kol is the son of the deceased. PW 2 Topaii Debi is the injured wife of the deceased. PW 5 Birni Debi is the daughter-in-law of the deceased. PW 3 Dr. Ashok Kumar Chatterjee conducted the post mortem examination on the dead body of the informant Etwari Kol (who died on 25.4.1992 itself at night) and prepared post mortem report (Ext. 2) PW 4, Dr. Roza Minz examined injured Topaii Debi (PW 2 wife of the deceased on 25.4.1992 at 5.35 p.m. and issued injury report (Ext. 3) PW 6 Raghu-nath Rai is a formal witness who proved formal FIR (Ext. 4) and PW 7 Ram Pravesh Singh is the I.O. of the case.

The defence has examined DW 1 Budhan Mandal who proved S.D. Entry No. 562 dated 25.4.1992 in the pen and signature of Hitlal Singh (Ext. A).

5. The learned 3rd Additional Sessions Judge, Deoghar relied the evidence of PW 1, PW 2 and PW 5 who are eye-witnesses and are closely related to the informant (since dead). They had seen the alleged manner of assault on informant Etwari Kol (since dead) and his wife PW 2 Topaii Debi, corroborated by the medical evidence of PW 3 Dr. Ashok Kumar Chatterjee, PW 4, Dr. Roza Minz and also the evidence of the I.O. PW 7 Ram Pravesh Singh and convicted these

appellants and sentenced to undergo imprisonment for life u/s 302/149. IPC and also for the other offences as stated above.

6. In course of hearing of both these appeals, appellants Ramchandra Kol and Regha Kol (in Cr. Appeal No. 278 of 95) died on 16.9.2001 and 13.9.1995 respectively. Here Cr. Appeal in respect of both these appellants became infructuous and was dropped by order dated 20.2.2003 of this Court.

7. Except these appellants, the other accused Budhan Kol, Ghutha Kol, Meghu Kol, Malwa Debi, Sakali Debi, Binsarea Debi and Budhani Debi were acquitted by the 3rd Additional Sessions Judge, Deoghar.

8. Assailing the order of conviction and sentence passed by the learned 3rd Additional Sessions Judge, Deoghar, the learned counsel for the appellants have submitted that the alleged occurrence took place at 9.00 a.m. in the broad day light near the house of the informant, but no independent reliable witness of the village has been examined by the prosecution. Only the interested witnesses, who are son (PW 1), daughter-in-law (PW 5), and wife (PW 2) of the informant Etwari Kol (since, dead) have been examined in this case Post mortem report (Ext. 2) prepared by Dr. Ashok Kumar Chatterjee (Ext. 3) does not support the ocular evidence of the interested witnesses. Informant-deceased sustained three injuries caused by sharp cutting weapon. As per allegation of the prosecution case, the appellants were armed with lathi and sabal. They were not possessed of any sharp cutting weapon. The learned 3rd Additional Sessions Judge. Deoghar did not consider the evidence of DW 1 Budhan Mandal who proved the Sanha Entry No. 562 dated 25.4.1992 on the statement of PW 1 Peru Kol, son of Etwari Kol, in which he has named Ghutha Kol and others as assailants on his mother calling her exorcist. He has not disclosed in that Sanha regarding any assault made on his father Etwari Kol. Even then, the learned 3rd Additional Sessions Judge convicted and sentenced these appellants appreciating wrongly the evidence of the prosecution witnesses.

9. The learned APP submitted that PW 1 Peru Kol. PW 2 Topali Debi and PW 5 Birni Debi are the eye-witnesses who have supported the prosecution case regarding the manner of assault and the place of occurrence corroborated by the evidence of PW 3 who conducted the post mortem examination on the dead body of Etwari and PW 4 who had examined the injured PW 2 Topali Debi and submitted post mortem report (Ext. 2) and injury report (Ext. 3) respectively and the P/O has well been established as per the evidence of PW 7 Ram Pravesh Singh, the I.O. of this case.

10. The alleged occurrence took place at 9.00 a.m. 25.4.1992 when Etwari Kol (informant-deceased) was returning home from Chaupal and reached near his village, then it is alleged that he was assaulted by these appellants with lathi and sabal. At that time, Kadru Mahto, Sharvan Mahto and Fakira Mahto of Mahtoiendih Tola Bhoja were going, who saw the alleged assault and asked these appellants not to assault, rather settle the matter. Informant-deceased in his

Jardebayan (Ext. 6) has not named his son PW 1 Peru Kol to have been present there and witnessed the alleged occurrence and the manner of assault made on him. He is not the eye-witness regarding the manner of assault on him and his wife PW 2 Topali Debi. When Etwari Kol went to his house and saw his wife Topali Debi injured, she informed that the appellants assaulted her with sabal and tangi. Those three persons of Mahtoiendih Tola Bhoja have not been examined by the prosecution who are the eye-witnesses as named in the fardbeyan (Ext. 6) by the informant Etwari Kol (since dead). The prosecution has not examined any independent village witness of the village who might have seen the alleged occurrence as it had occurred in the morning at 9.00 a.m. On the other hand, only the interested witnesses who are wife, son and daughter-in-law of the informant Etwari Kol (since dead) have been examined by the prosecution. All these interested witnesses have claimed themselves to be the eye-witnesses of the alleged occurrence. PW 1 Peru Kol claims that he was grazing the cattle and saw his father going towards the house from Chaupal. Then these appellants assaulted him with lathi and sabal. Out of fear, he fled away and went to Mohanpur PS where he informed the police and returned back to the P/O along with the ASI. He saw his mother seriously injured with bleeding injury. He also saw bleeding injury on the person of his father. His mother (PW 2) informed that Ghuto, Budhan, Meghu, Ghutha Kol, Kaila, Bhageshwar and others assaulted them. Due to injuries his father died in the hospital at night. The I.O. prepared inquest report on which he signed (Ext. 1). Bloodstained soils were also seized and seizure-list (Ext. 5) was prepared on which also he signed (Ext. 1/1). The fardbeyan (Ext. 6) of his father was recorded at the village itself. He did not raise any alarm out of fear. He has further deposed that out of fear, his wife (PW 5) and Phua had fled away from the house. He has deposed that his marriage was performed three days prior to the alleged occurrence. The appellants had not attended that Barat due to differences. On the other hand, PW 2 Topali Debi has deposed that these appellants had attended the Barat in the marriage of her son PW 1. After the marriage there was scuffle and after three days of the marriage, the appellants assaulted her and her husband alleging that she had practiced witchcraft resulting death of the wife of Bhageshwar Kol. There are 29-30 houses adjacent to her house besides the houses of the appellants. She had not seen any assault made on her husband rather she alleged that appellants entered into her house, dragged her outside and in the Angan, she was given sabal blow by Bhageshwar Kol resulting fracture of her right leg. She was informed by her husband Etwari Kol that these appellants assaulted him causing bleeding injuries. PW 5 Birni Debi is the wife of PW 1 Peru Kol. She claims herself to be the eye-witness, but her husband PW 1 has deposed that out of fear, she along with Phua fled away from the house. Hence she cannot be the eye-witness of the alleged assault on her mother-in-law (PW 2) Topli Debi. She has stated that when these 7 appellants (including the dead appellants) went to her house armed with lathi, Rod and Axe, then her mother-in-law PW 2. Topli Debi climbed on the roof. She has not alleged that who assaulted her mother-in-law resulting fracture of her leg. On the other hand, her mother-in-law PW 2 had informed her that all these

seven appellants broke her leg by assaulting her. On the next morning she claimed to have seen her father-in-law who had sustained injuries on his person. On the other hand, on that very night of 25.4.1992 injured Etwari Kol died. PW 7 Ram Pravesh Singh, I.O. entered S.D. Entry No. 562 dated 25.4.1992 (Ext. A) on the statement of PW 1 Peru Kol in which he has informed that Ghutha Kol and others of his village assaulted his mother (PW 2) saying her witch. The oral version of PW 1 Peru Kol who claims that when he saw his father being assaulted by these appellants, then he tried to save him, but when he was threatened by the appellants, then he fled away and went to the Police Station and informed the police. His information (Ext. A) discloses that Ghutha Kol and others of his village assaulted his mother in the village. He had not disclosed regarding any assault made on his father Etwari Kol. Etwari Kol (informant since dead) had not named his son PW 1, his wife PW 2 and his daughter-in-law (PW 5) to have seen the alleged occurrence. Thus, these closely related and interested witnesses have developed the prosecution case only to implicate these appellants falsely due to enmity. The first information given by PW 1 would have been the First Information Report in the eyes of law.

11. PW 3 Dr. Ashok Kumar Chatterjee conducted the post mortem examination on the dead body of Etwari Kol on 26.4.1992 at 1.20 p.m. and found the following ante mortem injuries on his person:--

- (i) One stitched wound on the middle of scalp 3.5 inch and fracture of right partial hone.
- (ii) One defused swelling 3" x 1-1/2" on the right arm.
- (iii) One incised wound on the right leg in the middle 2 1/2" x 1/2" x bone deep. There was fracture of right tibia.
- (iv) Two incised wound on left leg 1/2" x bone deep and there is fracture of left tibia and fibula.
- (v) One bruise 1-1/2" x 1/2" x bone deep on left forearm and fracture of left radius and ulna.

The doctor opined that time elapsed since death from the time of examination was within 24 hours. He submitted post mortem report (Ext. 2) in his pen and signature. The death was due to shock and haemorrhage as a result of above injuries. Injury Nos. 2, 3 and 4 were caused by sharp cutting instrument such as sabal and Injury No. 5 may be caused by hard and blunt substance such as lathi. The doctor found profuse bleeding from the body of the deceased. Having received the above injuries especially injury on the head, the injured should not have remained conscious. He may be unconscious. After receipt of the above injuries, the injured cannot remain in full senses. He is not definite as to whether injuries caused by sabal can be incised wound or penetrating wound. Anyone after receiving so much above injuries, cannot speak fluently.

12. The evidence of PW 3 shows that injury Nos. 3 to 4 and 6 were caused by

sharp-cutting instrument. Sabal is not a sharp cutting weapon, rather it may cause puncture wound. Only injury Nos. 2 and 5 were caused by hard and blunt substance, whereas the allegation against all the five appellants (Including two dead appellants) in Cr. Appeal No. 278 of 1995 is that they were armed with lathi and assaulted the informant and his wife with lathi. On the other hand, both the appellants in Cr Appeal No. 308 of 1995 had sabal and they injured the informant and his wife with sabal blows. PW 4 Dr. Roza Minz examined PW 2 Topli Debi on 25.4.1992 at 5.35 p.m. and found swelling and lacerated wound on the right leg 4" x 2" x 1/2" swelling and the size of lacerated wound was 2" x 1/2" x bone deep. After X-ray, tibia and fibula were found fractured. There was second lacerated wound on the left thumb 1/2" x 1/4" x skin deep. Injury No. 1 was compound fracture grievous in nature caused by hard and blunt substance such as lathi, within 12 hours from the time of examination. Injury Report prepared by him is Ext. 3 in respect of the injuries found on PW 2 Topli Debi.

13. The I.O. PW 7 Ram Pravesh Singh found the place of occurrence to be the field of Biru Mahto of village Bhoja at a distance of 200 yards South-West from the village Suthania where Etwari Kol was alleged to have been assaulted by these appellants. He found Etwari Kol fallen towards North-East from that place at a distance of 150 yards on the road. He found bloodstained soils there. The second place of occurrence is the house of the informant. He found blood-stains in the courtyard and varandah where PW 2 Topli Debi is alleged to have been assaulted and had fallen down in a pool of blood. Her right leg below knee was found fractured. The I.O. seized bloodstained soils and prepared seizure list (Ext. 5) in presence of the witnesses. He recorded the fardbeyan (Ext. 6) of the informant Etwari Kol (since dead) and also Issued injury slip (Ext. 7). On the same day i.e. 25.4.1992 at night, Etwari Kol died in the Old Male Ward No. 8. The ASI Shashi Kumar Singh on 26.4.1992 prepared inquest report in carbon process and sent the dead body for post-mortem examination. The I.O. has deposed that Etwari Kol was in a position to give statement, although he was injured which is contradicted by PW 3 Dr. Ashok Kumar Chatterjee who has deposed that especially on receiving injury No. 1 on the head, the injured could not have been in a position to speak as he must have been unconscious or semiunconscious. He did not seize blood-stained soil at the P/O where Etwari Kol was assaulted.

14. PW 1 Peru Kol. who was grazing cattle, claims to have seen the assault on his father by the appellants, but he has not named these appellants, as assailants of his father, rather he fled away and went to the Police Station and informed the police resulting S.D. Entry No. 562 dated 25.4.1992 (Ext. A) in which he named Ghutha Kol and others who assaulted his mother in the village. He has not informed that his father Etwari Kol was assaulted by these appellants. His wife PW 5 Birni Debi fled away from the house when his mother (PW 2) Topli Debi was assaulted by the appellants. Hence, PW 5 is also not the eye-witness of the alleged occurrence. PW 2 Topli Debi has alleged that she was assaulted on her right leg below knee with sabal by Bhageshwar Kol (appellant in Cr. Appeal No.

308 of 1995). The others assaulted her with lathi. Dr. Roza Minz (PW 4) examined her and found one swollen and one lacerated wound which was grievous in nature as it was compound fracture caused by hard and blunt substance maybe lathi. Thus, the assault given by Bhageshwar Kol with sabal as deposed by the witness PW 2 is not supported by the medical evidence of Dr. Roza Minz (PW 4). The villagers of Mahtoiendih tola Bhoja, namely Kadru Mahto, Sharvan Mahto and Fakira Mahto, in whose presence Etwari Kol is said to have been assaulted by these appellants would have been the best independent eye-witnesses. But these witnesses have not been examined by the prosecution. On the other hand, the I.O. (PW 7) recorded S.D. Entry No. 562 dated 25.4.1992 (Ext. A) in which PW 1 Peru Kol has named Ghutha Kol and other villagers, who assaulted his mother at the village. He has not seen any assault made on his mother in the house. On the other hand, he was grazing cattle and saw assault on his father by these appellants and fled away out of fear and went to the Police Station and informed the police. He came back to the place of occurrence along with the police. Thus, there is no consistency in his evidence and his statement resulting S.D. Entry No. 562 dated 25.4.1992 (Ext. A) as to whether he saw any assault give on the person of Etwari Kol, rather he had not gone to his house to see the appellants assaulting his mother. On the other hand, from the field itself, he fled away and went to the Police Station. Thus, I find that his evidence deposed in the Court is quite contradictory to his earlier statement made before the police at the Police Station resulting S.D. Entry (Ext. A). Doctor (PW 3) who conducted the post mortem examination is very clear in his evidence that on receiving such injury especially injury No. 1, injured Etwari Kol could not have been able to speak. This creates doubt as to whether the fardbeyan (Ext. 6) is the statement of Etwari Kol as he died at night on the same day of 25.4.1992. The exact time of his death is not on the record but he died before mid-night on 25.4.1992. PW 5 Birni Debi claims that she met her father-in-law (deceased-informant) in the hospital in the next morning is also belied by the evidence of PW 7, the I.O., that he got information regarding death of Etwari Kol in the night of 25.4.1992. Dhanraj Thakur, whose LTI appears in the fardbeyan (Ext. 6) has also not been examined by the prosecution as to whether Etwari Kol was able to speak and narrated the entire story in detail or not.

15. In view of the evidence on the record, I find that the prosecution has examined only interested witness who are of the same family closely related with the decease Etwari Kol and have contradicted the prosecution case. That is why, the prosecution has not examined any independent witnesses including three villagers of Mah-toiendih tola Bhoja, who were present when Etwari Kol was allegedly assaulted by these appellants, as per the averment of the fardbeyan. Thus the fardbeyan (Ext. 6) of Etwari Kol has to be viewed with suspicion. Moreover, there is doubt that whether the deceased was in a position to give the details of the manner of the alleged occurrence in. view of the evidence of PW 3 Dr. Ashok Kumar Chatterjee. Hence, the fardbeyan. (Ext. 6) cannot be considered to be a dying declaration as it could to be corroborated even by nis

son PW 1 Peru Kol who did not allege in the S.D. Entry (Ext. A) that he saw assault on his father Etwari Kol, rather he named Ghutha Kol and other villagers alleging that they assaulted his mother PW 2 Topli Debi and injured her seriously. Whereas he had never gone to his house, rather he fled away and went to the Police Station which gets supported from the evidence of PW 7 I.O. who entered S.D. Entry (Ext. A) on the information given by this PW 1 Peru Kol. The ocular evidence could not be corroborated by the medical evidence. The manner of the alleged occurrence has also not been proved by the prosecution, alongwith only interested witnesses, PWs 1, 2 and 5, have been examined by the prosecution in this case. The genesis of the alleged occurrence has not been proved that PW 2 Topli Debi and her husband Etwari Kol were as- saulted only because they were exorcists and had played witchcraft resulting death of the wife of Bhageshwar Kol. The learned Court below has considered the evidence of the interested witnesses erroneously and failed to consider Ext. A, which was proved by DW 1 Budhan Mandal. There is difference regarding the injuries sustained by the deceased in the ocular evidence and the medical evidence as there were three incised wounds on the person of the deceased and only two injuries caused by hard and blunt substance have been found by the doctor (PW 3). The appellants were not armed with sharp cutting instrument sabal is not a sharp cutting weapon, rather it can cause defuse swelling and bruise.

16. Considering these facts, the order of the conviction and sentence passed by the 3rd Additional Sessions Judge, Deoghar cannot be sustained as I find there is legal infirmity in his findings.

17. In the result, both these Criminal Appeals are allowed. The conviction and sentence passed by the learned Court below against these appellants in Sessions Trial No. 4 of 1993 are set aside. All the appellants aforesaid are found not guilty and they are acquitted. Appellants in Cr. Appeal No. 278 of 1995 are on bail, hence they are discharged from the liability of their bail bonds. Whereas appellants in Cr. Appeal No. 308 of 1995 are in jail. Hence, both the appellants, namely Kaila Kol and Bhageshwar Kol are ordered to be released forthwith if not wanted in any other case.

Vishnudeo Narayan, J.

I agree.