

(2007) 04 JH CK 0041
In the Jharkhand High Court
Case No : Criminal Appeal No. 183 of 2002

Prithibi Bhagat and Mundru Baitha	Vs	APPELLANT
The State of Jharkhand		RESPONDENT

Date of Decision : 11-04-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Evidence Act, 1872 — Section 3, 30
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2007) 2 BLJR 1606

Hon'ble Judges : Rakesh Ranjan Prasad, J; Dabbiru Ganeshrao Patnaik, J

Bench : Division Bench

Advocate : Satya Prakash Sinha, for the Appellant; Chandra Prabha, APP, for the Respondent

Final Decision : Allowed

Judgement

R.R. Prasad, J.—Both the appellants, namely, Prithibi Bhagat and Mundru Baitha were put on trial along with accused Chhantu Munda (since died) to face charges under Sections 302/34 and 201 of the Indian Penal Code for causing death of Arun Singh in furtherance of their common intention and also for causing disappearance of evidence of the offence of the murder with the intention of screening themselves from legal punishment. The trial court on finding the appellants guilty on both counts convicted them u/s 302/34 and also u/s 201 of the Indian Penal Code and sentenced each of them to undergo rigorous imprisonment for life for an offence u/s 302/34 of the Indian Penal Code. However, no separate sentence was passed u/s 201 of the Indian Penal Code.

2. The case of the prosecution is that Arun Singh, son of Hareshwar Singh, the informant (P.W.15) was running a shop for selling shoes at Ghaghra. Everyday he used to go to Ghaghra on Motor Cycle and in the evening he used to come back to his village invariably by 7-8 P.M. But on 13.9.1998 when his son did not return till 10 O'clock in the night the informant became perturbed. However, at 10.15

P.M. one Bhagwan Oraon (not examined) came to his house along with 3-4 persons and informed him that they saw Motor Cycle belonging to Arun Singh lying near "Chhatwar Culvert" where one Bhujali is also lying but they did not see Arun Singh nearby it. On getting this information the informant Hareshwar Singh, father of Arun Singh along with the villagers set out in search of his son and saw the dead body of his son lying in a field situated near that culvert. Meanwhile, Satish Kumar Sinha (P.W.16) the then Sub-Inspector of Police posted at Ghaghra Police Station on getting information that someone has been murdered near Chhatwar Culvert came there and found the dead body of Arun Singh. The father of the deceased and others were also present over there. Hareshwar Singh (P.W.15) father of the deceased gave Fardbeyan (Ext 4) raising suspicion against Chhantu Munda as well as appellant as Chhantu Munda was inimical to the deceased and the said Chhantu Munda and his associates, the appellants, some days before the occurrence had extended threat to the deceased of dire consequence. It was also disclosed by the informant that the appellant as well as Chhantu Munda were seen by passers-by including Ramesh Gope (P.W.4) the salesman of the shop of the deceased, near Culvert having weapons with them. On the basis of said Fardbeyan a case was registered and a formal First Information Report (Ext.7) was drawn and the matter was taken up for investigation by the Investigating Officer, Satish Kumar Sinha, who held inquest on the dead body and prepared an Inquest Report (Ext.6). Subsequently, the dead body was sent to Sadar Hospital, Godda for post mortem examination where Dr. Hemant Kumar (P.W.9) did autopsy on the dead body and found the following ante mortem injuries.

Injury No. 1: Incised wound size 1"x 1/2 "x 1/3" over left side of nose.

Injury No. 2: Incised wound size 1- 1/2" 1/2"x 1/4" on front of nose.

Injury No. 3: Incised wound size 1- 1/2 "x 1/2 "x 1/2 " over middle of front of chest.

Injury No. 4: Incised penetrating wound size 1- 1/2"x 1/2"x3" over left side of front of chest with cutting of lower part of heart. copious blood present in thoracic cavity.

Injury No. 5: Incised penetrating wound size 1- 1/2 "x 1/2 "x3" over left side of front of chest below injury No. 4 with cutting of left lung copious blood present in thoracic cavity.

Injury No. 6 Incised wound size 1- 1/2"x 1/2 "x 1/2 "over left side of lower part of chest.

Injury No. 7: Incised wound size 1"x 1/2" x 2- 1/2 " over left upper abdomen with cutting of left lobe of liver and loops of small intestine at places blood present in abdominal cavity.

Injury No. 8: Incised wound size 1 1/2 "x 1/2" 1/2 " over left hypochondrium.

Injury No. 9: Incised wound size 1- 1/2 "x 1/2 "x 1/2 " over upper middle abdomen

Injury No. 10: Incised wound size 1- 1/2 "x 1/2 "x 1/2 " over right lateral upper abdomen.

Injury No. 11: Three incised wound sizes varying from 1 "x 1/2 "x 1/2" to 1"-1/2" x 1/2 "x 1/2" over dorsum of left hand.

Injury No. 12: Incised wound 1/2 "x 1/2 " x3" over left index finger.

Injury No. 13: Incised wound size 1- 1/2 "x 1/2 "x 1/3" over right middle finger.

Injury No. 14: Incised wound size 2" x 1/2 "x 1/2" over middle of back.

Doctor issued Post Mortem Examination report (Ext1) with an opinion that all the injuries were caused by sharp cutting weapon and injuries 4, 5 and 7 were sufficient to cause death in ordinary course of nature either signally or in combination.

3. In course of investigation, the Investigating Officer (P.W.16) seized Tangi (Ext I) and Bhujali (Ext.II) which were found lying near the dead body under Ext.5. Further the Investigating Officer also recovered Chhura (material Ext.iii) on the basis of confession made by one of the appellants Prithvi Bhagat and seized it under Ext.5/1. In course of investigation, the Investigating Officer also got the statements of Sawna Munda (P.W.6) and Sampati Devi (P.W.7) recorded by the Magistrate Sri Bipin Bihari Mishra (P.W.13) u/s 164 of the Code of Criminal Procedure.

4. After completion of investigation, police submitted charge sheet against the appellants and cognizance of the offence was taken and in due course when the case was committed to the court of sessions, charges were framed to which the appellants pleaded not guilty and claimed to be tried.

5. In course of trial, the prosecution examined as many as 16 witnesses. Out of them, P.W.1 Charku Mahto, P.W.2 Jagmohan Oraon as also P.W.3 Shyam Oraon claimed to have seen the appellant Chhantu Munda assaulting the deceased while they were returning home from the market but the said Shyam Oraon, P.W.3 in course of evidence did not support his earlier version and hence he was declared hostile. P.W.4 Ramesh Gope, Salesman of the shop of the deceased and P.W.5 Chinta Mahto claimed to have seen the appellants along with other accused persons standing near the Culvert and were armed with Tangi and Bhujali. P.W.6 Sawna Munda deposed that when he along with Chhantu Munda came to the house of Sampati Devi (P.W.7) the accused Chhantu Munda disclosed that he and other accused have committed murder of Arun Singh but P.W.7 Sampati Devi did not support the version of P.W.6 and has been declared hostile. P.W.8 Maheshwar Prasad (uncle of the deceased), P.W.12 Shambhu Prasad Singh and P.W.14 Hernant Singh, son of the informant are hearsay witnesses. According to them, when P.Ws.1, 2 and 3 informed them that they saw accused persons assaulting

Arun Singh, they came at the place of occurrence and found Arun Singh dead. P.W.10 Bhola Mishra is the witness to seizure of "Chhura". P.W.11 Upendra Prasad Singh claimed to have seen accused persons talking among themselves near the Flour Mill of appellant Prithvi Bhagat.

6. After closure of the case of the prosecution the appellants were questioned about the incriminating circumstances appearing against them u/s 313 of the Code of Criminal Procedure to which they denied. They pleaded that they have been implicated falsely due to enmity.

7. The trial court having placed implicit reliance upon P.Ws. 1, 2, 3 as well as other evidences adduced on behalf of the prosecution did find the appellants guilty and hence convicted and sentenced them as aforesaid.

8. Being aggrieved with the judgment of conviction and order of sentence the appellants have preferred this appeal.

9. Learned Counsel appearing for the appellants submitted that though P.Ws.1 and 2 have claimed to have seen the appellants and other accused persons assaulting the deceased and then disclosed this fact to the informant P.W.15 but first information report lodged by P.W.15 does not bear the said fact and as such the testimonies of these witnesses hardly inspire confidence to be believed and under this circumstance, the trial court should not have placed his implicit reliance on those two witnesses.

10. Learned Counsel further submitted that Fardbeyan (Ext.4) given by P.W.15 cannot be the first information report in view of the testimony of P.W.8 Maheshwar Prasad (uncle of the deceased) testifying that after knowing the occurrence he came to the police station and gave his Fardbeyan which fact also bears out from the evidence of P.W.14 Hemant Singh (son of the informant) saying that his uncle P.W.8 had given information to the police station which was reduced to writing and was signed by him but the said Fardbeyan was not brought on record. In that view of the matter, an adverse inference can be drawn that the appellants did not figure in the first information report lodged by P.W.8 but this matter was not taken into consideration in right perspective and hence, judgment of conviction and order of sentence passed by the trial court is quite illegal and is fit to be set aside.

11. As against this, learned Counsel appearing for the State submitted that the trial court having found testimonies of the eye witnesses P.Ws.1 and 2 to be trustworthy has rightly convicted the appellants and there has been no reason to discard the testimonies of P.Ws.1 and 2 and, therefore, the judgment of conviction and order of sentence needs not to be interfered with by this Court.

12. Having heard learned Counsel appearing for the parties and on perusal of the records, I do find that P.W.1 Charku Mahto, P.W.2 Jagmohan Oraon and P.W.3 Shyam Oraon initially projected themselves to be the eye witnesses to the occurrence in which deceased was done to death by the appellants and one

Chhantu Munda but in course of evidence P.W.3 Shyam Oraon did not stick to his earlier version and hence he was declared hostile. However, P.Ws.1 and 2 stuck to their earlier stand and claimed that they are eye witnesses to the occurrence by deposing that while they were returning from the market and reached near the Chhatwar Culvert, they saw the appellants and Chhantu Munda assaulting the deceased and when they tried to interfere, they were threatened and hence fled away from there and came to village. Both the witnesses have further deposed that after coming to village, they took some rest and after sometimes when they reached to the house of the informant Hareshwar Singh, P.W.15, he was about to leave his house in search of his son and told to him that they saw the appellants and Chhantu Munda assaulting the deceased near Chhatwar Culvert and they also proceeded along with P.W.15 in search of the deceased and after making search of about one and half hour they did find the dead body of the deceased. It would be significant to note here that it is the case of the prosecution that police came at the place where the dead body was found at about 1.30 A.M. in the night and recorded the Fardbeyan of P.W.15 but it is strange enough that Fardbeyan never bears out about the fact as has been told by P.Ws.1 and 2 to P.W.15. On the contrary, P.W.15 in his fardbeyan named the accused persons only on suspicion as according to him the appellants and said Chhantu Munda were inimical to the deceased. This fact alone creates strong doubt over the truthfulness of the versions of P.Ws.1 and 2.

13. Further testimonies of those two witnesses get shattered by the evidence of P.W.11 Upendra Prasad Singh, who has testified that when he came back home from "Ghaghra", P.Ws.1, 2 and 3 came to his house at about 8.30 P.M. and told him that they had seen Motor Cycle of Arun Singh lying near the culvert and then he along with them went there and saw the dead body of the deceased and also saw shoes, Bhujali and Tangi near the Motor Cycle. As per the evidence of P.W.11, these witnesses never told him that they saw the appellants and Chhantu Munda assaulting the deceased.

14. That apart, there appears to be inconsistencies in the testimonies of P.Ws.1 and 2 on the material points which certainly creates doubt over the truthfulness of the version of those witnesses. It be noticed that P.W.1 in his evidence has said that he saw these two appellants and one Chhantu Munda and two unknown persons assaulting the deceased whereas P.W.2 has named only these two appellants and one Chhantu Munda and has further gone to say that he could identify Chhantu Munda by his voice which itself suggests that at the relevant point of time sufficient light was not there for one's identification and this fact bears out from the evidence of P.W.5, who has deposed that when he was coming home, he reached at Chhatwar Culvert at about 7.15 P.M. and at that time darkness was setting in. Further I do find that it is the evidence of P.W.1 that after he was threatened by the appellants, he came to his own house and took some rest in his house and then came to the house of informant to inform him about the occurrence whereas according to P.W.2 all the three persons namely Charku Manto P.W.1, Jagmohan Oraon P.W.2 and Shyam Oraon P.W.3

stayed in his house. Thus if all these aspects of the matter are taken into account one can safely say that P.Ws. 1 and 2 are not the eye witnesses and, therefore, evidences of P.Ws.1 and 2 are fit to be rejected.

15. Further I do find that P.W.5 Chinta Mahto, P.W.8 Maheshwar Prasad, P.W.11 Upendra Prasad Singh, P.W.12 Shambhu Prasad Singh and P.W.14 hemant Singh are the hearsay witnesses as they have claimed to know about the occurrence through P.Ws.1, 2 and 3 but P.Ws.1 and 2 have never disclosed in their evidences that they ever told about the occurrence to them. On the contrary, P.W.1 in his evidence has categorically stated that he told about the occurrence (sic) none other than the informant P.W.15. In that view of the matter, the evidences of those witnesses are quite inadmissible. Having dealt with the evidences of the eye witnesses and the hearsay witnesses, the evidences of P.Ws.4 and 5 needs to be scrutinized as the trial court has placed reliance on their evidences in holding the appellants guilty. It is the evidence of P.W.4 that while he was returning home and reached near Chhatwar Culvert he saw the appellants holding Tangi and Bhujali whereas according to P.W.5 when he reached near Chhatwar Culvert he saw the appellants taking Tangi, Chhura etc. by wrapping it in a Gamcha (Towel) and at that time darkness had started setting in. In that view of the matter it is beyond one's comprehension that how one can say about the things which had been wrapped in a Towel. It may be noted here that it is the case of the prosecution that it was a day of the festival known as "Jitia" and many persons like that of P.Ws. 1 and 2 would have gone to Totmi Bazar for purchasing essential articles and in the evening so many persons are expected to return to their respective home from the market and in that event one would not display the arms which they may have for committing some offence and in that event testimony of P.W.4 and also in the context of the evidence of P.W.5 where he has stated that it was dark when he saw accused persons standing near Culvert with arms wrapped in a Gamcha, does not appear to be trustworthy.

16. Going further in the matter I may indicate that the trial court while holding the appellants guilty has also relied upon the evidence of P.W.6 Sawna Munda, who has testified that the accused Chhantu Munda on the next morning of the occurrence did confess before him as well as P.W.7 Sampati Devi (who has been declared hostile) that he along with these two appellants committed murder of Arun Singh. It be stated that initially P.W.6 Sawna Munda and P.W.7 Sampati Devi claimed that accused Chhantu Munda confessed before them that Chhantu Munda and these two appellants committed murder of the deceased, but in course of the evidence P.W.7 Sampati Devi did not support that fact and hence was declared hostile. However, P.W.6 Sawna Munda stuck to his earlier stand and, therefore, according to the prosecution one of the accused made self incriminating extra judicial confession which is quite admissible. I am afraid of the correctness of the stand taken by the prosecution regarding admissibility of the extra judicial confession so far co-accused is concerned. As I have noted above it is the case of the prosecution that it was Chhantu Munda, who after the occurrence has confessed before P.W.6 Sawna Munda. The confession of an

accused person is not evidence against co-accused in the sense that conviction on that ground alone could not be fastened. It can only be taken into consideration u/s 30 of the Evidence Act which reads as follows:

Section 30 - Consideration of proved confession affecting person making it and others jointly under trial for same offence - When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

17. From bare perusal of the provision as mentioned above it transpires that any confession made by co-accused can be taken into consideration as against other persons which itself is suggestive of the fact that the confession of co-accused cannot be used as a substantive piece of evidence, rather it may only be taken to lend assurance to any relevant evidence bearing on the complicity of the accused in the crime as admittedly it does not come within the definition of evidence as enshrined in Section 3 of the Evidence Act as it is not given on oath nor in the presence of the accused and cannot be tested by cross-examination. In other words, keeping in view the phrase may take into consideration appearing in Section 30 of the Evidence Act it can be said that extra judicial confession made by co-accused affecting himself and others can be pressed into service against co-accused only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion of guilt which the judicial mind is about to reach on the other evidence. But here in the instant case there has been no other evidence, as discussed above, to establish the guilt of the appellants and as such extra judicial confession made by co-accused Chhantu Munda can not be as substantive evidence against the co-accused, the appellant.

18. In the circumstances, I do find that the trial court has erred in law as well as on fact in holding the appellants guilty and, accordingly the judgment of conviction and order of sentence is hereby set aside.

19. In the result, this appeal is allowed and the appellants are acquitted of the charges levelled against them. Consequently, the appellants are directed to be released forthwith, if not wanted in any other case.

D.G.R. Patnaik, J.

20. I agree.