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**(2015) 03 JH CK 0006**

**In the Jharkhand High Court**

**Case No : Criminal Appeal (D.B) No. 1765 of 2004**

Qayum Mirza and Others

APPELLANT

Vs

State of Jharkhand

RESPONDENT

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**Date of Decision : 26-03-2015**

**Acts Referred:**

Arms Act, 1959 — Section 27  
Criminal Procedure Code, 1973 (CrPC) — Section 164, 313  
Evidence Act, 1872 — Section 27, 30  
Penal Code, 1860 (IPC) — Section 302, 34, 376(2)(g), 380

**Citation :** (2015) 3 AJR 52 : (2015) 4 CCR 463 : (2015) CriLJ 3751 : (2015) 3 JLJR 14

**Hon'ble Judges :** Ravi Nath Verma, J.; Rakesh Ranjan Prasad, J.

**Bench :** Division Bench

**Advocate :** A.K. Sahani, for the Appellant; M.B. Lal, Advocates for the Respondent

**Final Decision :** Allowed

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## **Judgement**

1. This appeal is directed against the judgment of conviction and order of sentence dated 4.8.2004 passed by the 1st Additional Sessions Judge, FTC, Giridih in S.T. No. 177 of 2003 whereby and whereunder the court while acquitting the appellants for the offences punishable under Sections 376(2)(g), 380 of the Indian Penal Code and under Section 27 of the Arms Act convicted them for the offence punishable under Section 302/34 after finding them guilty for committing murder of three persons, Noorjahan, Guli Khatoon and Md. Sakir, aged about 5 years and sentenced them to undergo imprisonment for life.

2. The case of the prosecution is that the informant, a Choukidar Shyam Lal Turi while was returning home in the morning of 5.1.2003 after doing night patrolling duty and reached at Barkitarh (Maheshmunda), he heard people saying that three dead bodies are lying in a house. He went there and found two women Noorjahan and Gali Khatoon, 37 and 18 years old dead whose neck was cut and had been tied around a cot. A boy Md. Sakir aged about 5 years was found

hanged by the roof with the help of rope.

3. Meanwhile, Faku Zama (P.W.10), the then officer-in-charge of Gonda police station received an information at about 9.30 a.m. that three dead bodies are lying in a house at Barkitarh. He along with his police party came at the place of occurrence where he found the informant Shyam Lal Turi (P.W.8) present over there and recorded his fardbeyan (Ext.3), on the basis of which, a case was registered against unknown and a formal FIR (Ext.4) was drawn. He himself took over the investigation. During which course, inquest reports (Exts.7, 7/1 and 7/2) were prepared and the dead bodies were sent for post mortem examination which was conducted by Dr.Rajesh Kumar (P.W.9). The doctor upon holding autopsy on the dead body of Md.Sakir found ligature mark encircling neck over which there were bruises at places and hyoid bone was found fractured. Doctor issued post mortem examination report (Ext.2) with an opinion that death was caused due to asphyxia, as a result of strangulation. Further doctor upon holding autopsy on the dead body of Md.Noorjahan did find the neck severed with some sharp instrument having incised wound 6" x 1/4 " x (up to bone). All the major vessels of neck were found cut. Wind pipe and oesophagus were also found severed. According to doctor, death was caused due to aforesaid injuries caused by sharp cutting weapon. Doctor proved post mortem examination report as Ext.3. On the same day, the doctor also held autopsy on the dead body of Guli Khatoon and found neck was severed with some sharp cutting weapon having incised wound 5" x 1/4" x (up to bone). All the major vessels of neck were found cut, wind pipe and oesophagus were also severed. According to doctor, cause of death was due to shock and haemorrhage on account of aforesaid injuries. He proved post mortem examination report as Ext.4.

4. The Investigating Officer made inspection of the place of occurrence from where earth smeared with blood was seized under seizure list (Ext.6/1). The Investigating Officer during course of investigation arrested the appellants Pappu @ Amit Kamal Sahu, Buttu @ Hasan, Md.Qayum Mirza, Md. Saddique, Md. Israil and Raju @ Md. Mustkin Ansari from a rented house belonging to Sattar Ansari. They confessed their guilt. On the basis of confession made by them, a bottle of ether (containing one liter ether) was recovered which was seized under seizure list (Ext.5) over which the appellants Pappu @ Amit Kamal Sahu and Md. Buttu @ Hassan made their signatures. On the basis of confession made by the accused persons, sickle (meant for cutting vegetable) was also recovered at the instance of the accused persons which was seized under seizure list (Ext.6).

5. During investigation, the investigating Officer produced one of the accused Buttu @ Hassan before the Magistrate, Kamal Naresh (P.W.12), who recorded his statement under Section 164 of the Code of Criminal Procedure wherein he disclosed that he was a vegetable vendor from whom the accused Md.Qayum Mirza used to purchase vegetable on credit and in course of time, a sum of Rs. 100/- became due to be paid by Md. Qayum Mirza and therefore, when he asked to pay the money, he told him that he will be paying it in his village home and

therefore, if he wants to take money, he should accompany him to his village by a train and asked him to join at Railway Station where he along with his friend Pappu @ Amit Kamal Sahu came where they found Akbar Ansari, Qayum Mirza, Md. Siddique and Israil present at the Station. When train came they boarded on the train for coming to the place known as Maheshmunda. After reaching over there some of the accused persons took him as well as his friend Pappu towards forest whereas Md. Saddique, Akbar and Israil remained there near the Railway line. While they were in the forest, it became dark and then they left forest for coming to Railway crossing where other accused persons looted the belongings of one person who was riding motor cycle. Thereupon the appellants Qayum Mirza and Md. Shyeem Mirza (who seems to have died during investigation) brought him as well as his friend to Barkitarh (Maheshmunda). There he told the accused Qayum Mirza that he as well as Pappu will not stay over there any longer, upon which Qayum Mirza asked him to take train at 10.30 in the night. Meanwhile, the accused Qayum Mirza by scaling the wall came to the neighbouring house but did not succeed to get the door opened. On seeing this, when he asked them that they will not stay further, he as well as his friend Pappu were threatened on the point of pistol not to leave the place. Thereupon he slept in the house. In the early morning when he woke up, he saw two ladies going with containers to fetch water to whom Qayum and Md. Shyeem Mirza caught hold of them and by putting handkerchief having ether on it made them unconscious. Thereupon Qayum and Md. Shyeem Mirza took them to their house where both of them as well as other persons committed rape upon her and after committing rape, they tied their neck by rope and cut it. Thereupon they also hanged a boy by roof through rope and then accused persons took away household goods with them.

6. After completion of investigation, the police submitted charge sheet, upon which cognizance of the offences punishable under Sections 302/34, 376(2)(g), 380 of the Indian Penal Code and under Section 27 of the Arms Act was taken against the appellants. Subsequently, when the case was committed to the court of sessions, the appellants were put on trial.

7. During trial, the prosecution examined altogether 12 witnesses. Of them, P.Ws. 1, 2, 5, 6 and 7 have turned hostile. P.W.3, Gopal Dubey who has been declared hostile happened to be a witness to the seizure of sickle and also seizure of earth smeared with blood. P.W.4 was simply testified that when he came to the house, he saw dead bodies of three persons. P.W.8, the informant has testified same thing as he had made statement in his fardbeyan. P.W.10 is the Investigating Officer, who has testified about the seizure of sickle, bottle of ether at the instance of the accused persons, who had confessed their guilt before him.

8. After closure of the prosecution case, incriminating materials appearing against the accused persons were put under Section 313 of the Code of Criminal Procedure to which they denied.

9. Thereupon the trial court did find three circumstances being there proving the

guilt of the appellants of committing murder of three persons. Those circumstances are as follows:

(i) that the accused persons were inimical to the deceased.

(ii) recovery of bottle of ether used in the commission of offence from the house where accused persons were residing as well as recovery of weapon used at the instance of the accused persons.

(iii) accused persons were criminal.

10. Accordingly, the trial court recorded the order of conviction and sentence against the appellants which is under challenge.

11. Mr. A.K. Sahani, learned counsel appearing for the appellants submits that so far as the circumstances relating to enmity and also the accused persons having criminal background are concerned, these facts have never been established by the prosecution and thereby the trial court should not have used those circumstances against the appellants.

12. Further it was submitted that recovery of bottle claimed to be of ether and also sickle at the instance of the appellants never go to prove the culpability of the appellants as the bottle having liquid allegedly recovered was never sent before the forensic science laboratory to establish that one bottle was containing ether. At the same time, sickle which was having blood mark was also not sent before the forensic science laboratory to establish that the blood which is said to be there over the sickle was of the same group as that of the deceased.

13. Thus, it was submitted that the circumstances which have been used against the appellants have never been established nor they do indicate in any manner about the culpability of the accused persons and thereby the trial court committed illegality in recording the order of conviction and sentence.

14. As against this, learned counsel appearing for the State submits that incriminating materials have been seized on the basis of confession made by one of the accused Md. Butt @ Hassan wherein he has disclosed about the manner in which accused persons committed murder of three persons and thereby confession made by one of the accused before the Magistrate can be used against other accused persons facing trial jointly, in view of the provision as contained in Section 30 of the Evidence Act. Therefore, the trial court acting on the confession made by one of the accused before the Magistrate has rightly found the appellants guilty and thereby the trial court cannot be said to have committed any illegality while recording the order of conviction and sentence.

15. Having heard learned counsel appearing for the parties and on perusal of the record, we do find that whatever materials, which have been taken by the court below to be incriminating, have come either in the evidence of Investigating Officer (P.W.10) or in the judicial confession made by co-accused Md. Butt @ Hassan. According to the trial court, the circumstances as noted below are there

indicating the guilt of the appellants (i) the appellants were inimical to the deceased (ii) pursuant to confession made by the accused persons before the police, the bottle containing ether which was used in the commission of offence has been recovered from the house in which they were living and that apart, sickle weapon used in the crime was also recovered (iii) the accused persons were criminal.

16. It be stated that before the incriminating materials are used against the accused persons, those materials need to be established by the prosecution and therefore, one is required to find out as to whether the incriminating materials used against the accused persons has been established by the prosecution or not?

17. Coming to the first circumstance as indicated above, it be stated that the court has recorded that the Investigating Officer has testified that the accused persons were inimical to the deceased persons but the Investigating Officer in his evidence never seems to have stated like that. However, P.W.1, who has been declared hostile seems to have stated before the police about that fact but the attention of the said fact drawn by the prosecution to the statement made before the police cannot be said to be the evidence and thereby it can be said that there has been absolutely no material to come to the finding that the accused persons were inimical to the deceased. In other words, prosecution failed to establish that fact.

18. Coming to the next circumstance that the appellants were having criminal record, that fact has also not come in the evidence of the Investigating Officer. Even if that would have been there, that cannot be taken to be one of the incriminating circumstances as one cannot draw presumption that the appellants did commit offence as they were having criminal background.

19. Now coming to the third circumstance which relates to recovery of the bottle of ether and also sickle, said to have been containing blood over it, are concerned, those circumstances cannot be taken to be incriminating for the reason that the bottle said to have been containing ether used in the commission of offence was never sent before the forensic science laboratory nor anything is there in the post mortem examination report about use of ether in the commission of murder. Under the circumstances, one can not presume that bottle was containing ether which was used in the commission of offence of crime. Similar is the situation with sickle allegedly containing blood but that was also not sent for chemical examination.

20. That apart, factum of recovery taken to be admissible presumably under Section 27 of the Evidence Act never seems to have been taken in evidence in accordance with law. Section 27 of the Evidence Act reads as follows:

"27. How much of information received from accused may be proved - Provided that, which any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as

relates distinctly to the fact thereby discovered, may be proved". 21. From its perusal it does appear that the first condition necessary for bringing Section 27 into operation is discovery of a fact, in consequence of information received from a person accused of an offence. The second is discovery of such fact must be deposed. The third is at the time of receipt of information accused must be in police custody. The last but the most important is that only "so much of the information" as relates distinctly to fact thereby discovered is admissible. In other words, one can say that under section 27 only that much information given by a person, accused of any offence can be proved which relates distinctly to the fact thereby discovered. The statement of that person alone is admissible who is accused of an offence. Thus, where there were no accusation against the person alleged to have made the disclosure statement, the statement would not be admissible under Section 27. Further we may record that in order to prove the disclosure statement under Section 27, the correct procedure for the police officer when he gives evidence is to say that the accused made a confessional statement admitting his guilt which led to recovery of incriminating materials and then for the purpose of refreshing his memory, to refer to the actual statement, which in all probability may be there in the case diary or on the record and prove before the court by that method what the accused had said and were recovered on the basis of disclosure statement.

22. In the instant case, disclosure statements of the accused have never been brought on the record. The Investigating Officer has simply said that the confession made by the accused led to recovery of bottle of ether and the weapon used in the crime which is never admissible and thereby that piece of evidence of the Investigating Officer whereby he has testified that confession made by the accused led to recovery of the bottle of ether and the weapon used in the crime will have no evidentiary value.

23. Now coming to the submission advanced on behalf of the State relating to confession being made by one of the appellants can be used against other appellants in view of the provision contained in Section 30 of the Evidence Act is concerned, that proposition cannot be denied but in the facts and circumstances appearing in this case, that proposition cannot be applied in the instant case.

24. Before we proceed further in the matter, we may take notice of the provision as contained in Section 30 of the Evidence Act which reads as follows:

"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." 25. From perusal of the said provision, it is evidently clear that before confession of a person jointly tried with the accused can be taken into consideration against him, it must appear that the confession implicates the confessing person substantially to the same extent as it

implicate the person against whom it is to be used in the commission of offence for which accused persons are jointly tried.

26. Coming to the instant case, we find that all the appellants were jointly tried but the confession made before the Magistrate under Section 164 of the Code of Criminal Procedure which we have drawn in details hereinabove never go to show that the appellant Md. Butta in his confession has ever implicated himself in the commission of murder of three persons, rather as per the version of the appellant Md. Buttu, he along with his friend Pappu had been to the house of Qayum Mirza and Md. Sayeem at the instance of those persons in order to take money which was due to be paid by them and in that course, he saw the other accused committing murder. Thereby confessional statement made before the Magistrate by Md. Buttu one of the appellants never appears to be inculpatory and therefore, that confession neither can be used against Md. Buttu the person, who made confession nor against any other accused person.

27. Thus, we do find that virtually there has not been a single circumstance which goes to point out towards guilt of any of the accused persons and hence, the trial court committed illegality in recording the judgment of conviction and order of sentence against the appellants and thereby it is set aside. Consequently, the appellants are acquitted of all the charges. Hence, the appellants No. 1, 3, 4 and 5 who are on bail are discharged from the liability of their bail bonds whereas appellants No. 2, 6 and 7 who are in custody are directed to be released forthwith, if not wanted in any other case.

28. In the result, this appeal stands allowed.