

(2018) 05 JH CK 0056

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 984 of 2006

Sudhir Mukhi

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 15-05-2018

Acts Referred:

Indian Penal Code, 1860 — Section 302, 307, 324

Arms Act, 1959 — Section 27

Code Of Criminal Procedure, 1973 — Section 313

Citation : (2018) 05 JH CK 0056

Hon'ble Judges : H.C. MISHRA, J;B.B. MANGALMURTI, J

Bench : Division Bench

Advocate : P.P.N. Roy, S.K. Murari, Pragati Prasad, Pankaj Kumar

Final Decision : Allowed

Judgement

1. Heard learned counsel for the appellant and learned counsel for the State.
2. The sole appellant is aggrieved by the impugned Judgment of conviction dated 22.05.2006 and Order of sentence dated 24.05.2006, passed by the learned 5th Additional Sessions Judge, East Singhbhum, Jamshedpur, in Sessions Trial No. 250 of 1994, whereby, the appellant has been found guilty and convicted for the offences under Section 302 of the Indian Penal Code and Section 27 of the Arms Act. Upon hearing on the point of sentence, the appellant has been sentenced to undergo R.I. for life for the offence under Section 302 of the Indian Penal Code, and R.I. for seven years for the offence under Section 27 of the Arms Act, and both the sentences were directed to run concurrently.
3. The prosecution case is based on the fardbeyan of the deceased Ashok Vishwakarma himself, while he was alive and undergoing treatment at Tata

Main Hospital, Jamshedpur. His fardbeyan was recorded on 05.09.1993 at about 06:30 P.M., at Bed No.3 of Post-Operative Ward in the hospital, wherein he has stated that on the previous Thursday at about 09:30 A.M., he was in his quarter when the appellant Sudhir Mukhi called him from the gate of the quarter. The informant came out from his quarter and both of them went towards the back of the quarter, where it is alleged that the accused assaulted the deceased by fire arm. Upon being injured, the informant ran towards his quarter raising the alarm and he fell down at the verandah of his quarter. Upon the alarm raised by the informant, several persons assembled there, including his family members, and he informed them that the accused Sudhir Mukhi had assaulted him by fire arm and had fled away. Thereafter, he became unconscious and when he gained consciousness, he found himself on the bed of the hospital, when he gave the fardbeyan. On the basis of the fardbeyan, Kadma P.S. Case No. 74Â of 1993, corresponding to G.R. No. 1742 of 1993, was instituted for the offences under Sections 307 and 324 of the Indian Penal Code, and Section 27 of the Arms Act, against the sole accused Sudhir Mukhi, and investigation was taken up. It may be stated that while undergoing the treatment in the hospital, the informant died on 10. 09.1993, and Section 302 of the Indian Penal Code was also added. After investigation, the police submitted the charge-sheet in the case.

4. After commitment of the case to the Court of Session, charge was framed against the sole accused for the offences under Section 302 of the Indian Penal Code and Section 27 of the Arms Act, and upon the accused's pleading not guilty and claiming to be tried, he was put to trial. In course of trial, eight witnesses were examined by the prosecution, including the I.O. and the Doctor, who had conducted the post-mortem examination on the dead body of the deceased. It may be stated that the Doctor, treating the appellant in the hospital, has not been examined. The defence has also examined two witnesses in this case Â

5. Out of the material witnesses examined, P.W.-2 Â Deoki Vishwakarma, who is the aunt of the deceased, and P.W.-6 Kishore Vishwakarma, who is the brother of the deceased, have turned hostile and have not supported the prosecution case. P.W.-5 Brijlal, who is the uncle of the deceased, has only stated that he had heard that someone had assaulted the deceased by fire

arm, but he had no knowledge as to who had assaulted the deceased.

6. P.W.-3 Rami Bai Vishwakarma is the aunt of the deceased. She has stated that the occurrence had taken place at about five and half years ago

and at the time of occurrence she was in the house taking her meal. She saw Ashok at the gate and thereafter he went out. She heard a sound like

cracker and thereafter Ashok came in injured condition shouting that Sudhir had assaulted him by fire arm. He was bleeding profusely. This witness

has stated that her elder brother-in-law brought Ashok to TMH, where he remained alive for eight days and thereafter he died. She has identified the

accused in the Court. In her cross-examination, this witness has stated that after Ashok was taken to the hospital, police had visited her house and she

had given the same statement before the police also. She had also shown the blood stains at the verandah to the police. The police recorded her

statement, upon which she had put her thumb impression and her sisters-in-law (gotnis) Deoki and Padma had put their signatures on her statement.

She has also stated that Ashok was her nephew. She has denied the suggestion of giving false evidence.Â Â

7. P.W.-4 is Gyan Prakash Viswakarma, who appears to be the neighbor of the deceased. This witness has stated that the occurrence had taken

place on 02nd September, 1993 at about 09:30 to 09:45 P.M. He was in his house taking his meal when he saw Ashok coming in injured condition,

profusely bleeding, and he was shouting that Sudhir had assaulted him. This witness has stated that he along with other persons brought Ashok to

TMH where he was treated for about 7-8 days. During his treatment, he gave his statement and thereafter he died. He is also witness to the inquest-

report of the dead body on which he proved his signature, which was marked Ext.2. In his cross-examination, this witness has admitted that in TMH

there is a Police Camp, but they had not given any information at the Police Camp. This witness has also denied the suggestion of giving false

evidence.Â

8. P.W.-1 is Dr. Lallan Choundhary, who had conducted theÂ Â Â Â Â Â post-mortem examination on the dead body of the deceased on

11.09.1993 and had found the following ante-mortem injuries on the dead body of the deceased:-

1) 25 cm long stitched wound was present over right paramedian plain of

abdomen. Stitches were 10 in number.

2) Stitched wound of size 1 cm x 1 cm with drainage rubber tube was present over right iliac fossa.

3) Penetrating wound of size 1cm x 1 cm x cavity deep was found over right side back near 10th thoracic vertebra. 7 cm x 7 cm surrounding wound

was scratched skin deep by surgical intervention. Blackening was found of size 9 cm x 9 cm surrounding the wound.

On dissection â?

Chest and Abdomen â?" About 2 litre of blood and clot was present in the abdominal cavity. Right side liver was stitched. Intestine was stitched.

Right kidney was contused. 9th inter costal space was pierced on the posterior aspect of right side..

Â Skull â?" intracranial hemorrhage was present over posterior aspect of right hemisphere of brain.

Â This witness has stated that the cause of death was severe hemorrhage and shock and the opinion regarding the weapon may be taken from the

surgeon who had handled the case. He has identified the post-mortem report to be in his pen and signature, which was marked Ext.1. 9. P.W.-7

Shyam Narayan Bhaskar is the I.O. of the case. This witness has stated that on 05.09.1993 he was posted as A.S.I. at Kadma Police Station and he

was sent to record the statement of Ashok Vishwakarma. He reached the TMH at about 06:30 P.M. and recorded the statement of the injured Ashok

Vishwakarma, which he has proved to be in his pen and signature, which was marked Ext.3. He has also proved the endorsement on the fardbeyan

which was marked Ext.3/1 and the formal F.I.R., which was marked Ext.4. He has stated that he was given the charge of investigation and he visited

the place of occurrence, which he has detailed in his evidence, which shows that nothing incriminating was found by him at the place of occurrence.

He recorded the statements of the witnesses and on 11.09.1993, he was informed about the death of the deceased in the hospital. He has proved the

inquest-report of the dead body which was marked Ext.5. After completing the investigation he submitted the charge-sheet against the accused. In his

cross-examination, this witness has also stated that in TMH there is a Police Camp in which the police personnel are available 24 hours. He has also

admitted in hisÂ Â Â Â Â Â Â Â Â Â cross-examination that he had not obtained the

signature of any nurse or doctor on the fardbeyan. He has also admitted that he had not seized any blood stained soil, nor had he seized the blood stained cloth of the deceased.

10. P.W.-8 Admal Bagchi had produced the death register of TMH, containing the entries from 1st September, 1993 to 31st December, 1993, which showed that the deceased was admitted in the hospital on 02.09.1993 and he expired on 10.09.1993 at 20:15 hrs. He was also operated upon on 03.09.1993 at 03:00 A.M., for the removal of the bullet and repair of liver. This witness has proved the relevant entries in the register, which was marked Ext.6.

11. The statement of the accused was recorded under Section 313 of the Cr.P.C., wherein he has denied the evidence against him. The defence has also adduced two witnesses, who are D.W.-1 Kamleshwar Ram and D.W.-2 Lakshmi, who have deposed that the accused is an innocent person. On the basis of the evidence on record, the Court below has found the appellant guilty, convicted and sentenced him for the offences, as aforesaid.

12. Learned senior counsel for the appellant has submitted that the impugned Judgment of conviction and Order of sentence passed by the Trial Court below cannot be sustained in the eyes of law, in as much as, the prosecution has failed to prove the charge against the accused beyond all reasonable doubts. It is submitted that the F.I.R. has been wrongly treated as dying declaration of the deceased, as even though the statement of the deceased appears to have been recorded in the hospital in precarious condition, but it is admitted that it does not bear the signature of any nurse or the doctor attending the informant in the hospital. Learned counsel further submitted that even though in the F.I.R. it is stated that when the deceased reached the verandah of his quarter, several persons including the family members had reached there, to whom the deceased had informed about the occurrence stating that this accused had assaulted him by fire arm, but it is an admitted fact that no information was given to the police at the hospital on 02.09.1993 which is the date of occurrence, by any family member, or even by P.W.-4 Gyan Prakash Vishwakarma, who had brought the deceased to the hospital, even though they were fully aware of the entire occurrence, rather, the fardbeyan of the informant was recorded only on 05.09.1993 after he gained consciousness. Learned senior counsel has further

submitted that P.W.-3 Rami Bai Vishwakarma has admitted in her cross-examination that after the deceased was taken to the hospital, the police had reached the place of occurrence and had inspected it. The police was also shown some blood stains on the verandah and her statement was recorded on which she had put her thumb impression and two of her Gotnis had also put their signatures thereon. It is submitted that this shows that there was an F.I.R. lodged by P.W.-3 which was much prior to the present F.I.R., but the same has been concealed by the prosecution for which no explanation is available on record. Learned counsel accordingly, submitted that the fardbeyan of the informant does not inspire such confidence, so that it could be treated as the dying declaration of the deceased, upon which the conviction of the accused could be based, and in the facts of this case, the appellant was entitled at least to the benefits of doubt.

13. Learned counsel for the State, on the other hand, has opposed the prayer submitting that P.W.-3 Rami Bai Vishwakarma and P.W.-4 Gyan

Prakash Vishwakarma have fully supported the prosecution case stating that they were informed by the informant deceased that he was assaulted by

fire arm by this accused. The ocular evidence of these witnesses, as also the FIR, which is the dying declaration of the deceased, are also

corroborated by the medical evidence of P.W.-1 Dr. Lallan Chaudhary. Learned counsel accordingly, submitted that the prosecution has been able to

bring home the charge against the accused beyond all reasonable doubts and in the facts of this case, the Trial Court below has rightly convicted and

sentenced the appellant on the basis of the F.I.R., treating it to be dying declaration which was corroborated by the evidence of P.W.-3 Rami Bai

Vishwakarma and P.W.-4 Gyan Prakash Vishwakarma. Learned counsel accordingly, submitted that there is no illegality in the impugned Judgment of conviction and Order of sentence passed by the Trial Court below.

14. Having heard learned counsels for both the sides and upon going through the record, we find that admittedly the occurrence had taken place on

02.09.1993 in the night at about 9.30 â?" 9.45 P.M. The fardbeyan of the deceased informant was recorded on 05.09.1993 in the hospital in which it is

clearly stated that at the time of occurrence, when he had reached the verandah, he had informed his family members and the persons who had

assembled there, that this accused had assaulted him by fire arm. This fact is

corroborated by P.W.-3 Rami Bai Vishwakarma as also P.W.-4 Gyan Prakash Vishwakarma. Even though it is admitted by P.W.-4 Gyan Prakash Vishwakarma that he had brought the deceased to the hospital and he was knowing the entire occurrence, it is absolutely surprising that he did not give any information to the police. In his cross-examination, this witness has admitted that he was aware of the fact that a Police Camp was available at the hospital, still he did not give any information to the police. None of the family members has given any information before the police. Though the cross-examination of P.W.-3 Rami Bai Vishwakarma shows that her statement was recorded by the police on which her thumb impression and the signatures of two witnesses were obtained, but this statement has not been shown the light of the day. Even P.W.-7 Shyam Narayan Bhaskar, who is the I.O. of the case, has admitted that he had recorded the fardbeyan of the informant in the hospital bed and it is admitted by him in his cross-examination that he had not obtained the signature of either any nurse or doctor present in the hospital. When the fardbeyan was recorded while the informant was in such a precarious condition, it was the duty of the I.O. to have taken all precautions in recording the fardbeyan of the injured informant who had soon gained consciousness after his surgical operation. It was required to be ensured that the informant was in his full senses to give such statement. From the evidence of P.W.-1 Dr. Lallan Chaudhary, who had conducted the post-mortem examination, we find that he had not given any opinion about the weapon used for committing the offence, rather, he has stated that such opinion could be taken from the Surgeon attending the case. Admittedly, the Surgeon, operating upon the deceased, has not been examined in the case. There is no recovery of any fire arm from the appellant. The fact that no information was given to the police from 02.09.1993 to 05.09.1993, in spite of presence of the police in the hospital round the clock, and in spite of the fact that the family members and the witnesses were aware about the facts of the case, makes the prosecution case absolutely doubtful and is fatal to the prosecution case.

15. For these reasons, we are of the considered view that even though the appellant Sudhir Mukhi is named in the F.I.R., and is also named by two witnesses namely, P.W.-3 Rami Bai Vishwakarma and P.W.-4 Gyan Prakash Vishwakarma, but in the facts of this case the appellant was entitled at

least to the benefits of doubt, and the impugned Judgment of conviction and Order of sentence passed by the Trial Court below, cannot be sustained in the eyes of law.

16. For the foregoing reasons, the impugned Judgment of conviction dated 22.05.2006 and Order of sentence dated 24.05.2006, passed by the learned

5th Additional Sessions Judge, East Singhbhum, Jamshedpur, in S.T. No. 250 of 1994, convicting and sentencing the appellant Sudhir Mukhi for the

offences under Section 302 of the Indian Penal Code and Section 27 of the Arms Act, are hereby, set aside. Consequently, the appellant Sudhir Mukhi

is given the benefits of doubt and he is acquitted of the charges. The appellant is in custody undergoing the sentence. Let him be released and set at

liberty forthwith, if his detention is not required in any other case.

17. This appeal is accordingly, allowed. Let the Lower Court Records be sent back to the Court concerned forthwith, along with a copy of this

Judgment.