
(2019) 10 JH CK 0067

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 106, 107, 134 Of 2002

Sushil Hembrom And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 21-10-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 141, 147, 148, 149, 302, 324, 325
Explosive Substances Act, 1883 — Section 3, 5
Code Of Criminal Procedure, 1973 — Section 161

Citation : (2019) 10 JH CK 0067

Hon'ble Judges : Shree Chandrashekhar, J; Ratnaker Bhengr, J

Bench : Division Bench

Advocate : Ankit Kumar, Zaid Ahmed, Arun Kr. Pandey

Final Decision : Partly Allowed/ Dismissed

Judgement

Shree Chandrashekhar, J

1. These three criminal appeals; Cr. Appeal (D.B.) No. 106 of 2002 on behalf of the appellants, namely, Sushil Hembrom, Dangur Korah, Mahendra Korah, Manoj Kumar Korah, Chinta Korah, Ram Lal Korah, Cr. Appeal (D.B.) No. 107 of 2002 by Ponde Ram Kora @ Ponde Ram Hembrom, Purushottam Hembrom and Cr. Appeal (D.B.) No. 134 of 2002 by Ravindra Purty, arise out of a common judgment of conviction under sections 147 and 302/34 IPC and under sections 3 and 5 of the Explosive Substance Act passed against the appellants and Budhan Singh Korah in Sessions Trial No. 361 of 1999.

2. In Cr. Appeal (D.B.) No. 106 of 2002, the appellant, namely, Dangur Korah and in Cr. Appeal (D.B.) No. 107 of 2002, the appellant, namely, Purushottam Hembrom have died during pendency of these criminal appeals. Sri Arun Kr. Pandey, the learned APP submits that an affidavit on death of the appellants, namely, Dangur Korah and Purushottam Hembrom has been filed and their death certificates have also been brought on record.

3. There is no application on behalf of the legal heirs and successors of the appellants, namely, Dangur Korah and Purushottam Hembrom for their substitution in their place.

4. Accordingly, Cr. Appeal (D.B.) No. 106 of 2002 qua the appellant, namely, Dangur Korah and Cr. Appeal (D.B.) No. 107 of 2002 qua the appellant, namely, Purushottam Hembrom have abated.

5. During pendency of these criminal appeals, by the orders passed by this Court the appellants have been enlarged on bail.

6. The informant of this case is the brother of Mohan Singh Kora, the deceased. In his fardbeyan, which was recorded on 07.06.1999 at about 19:00 hrs. at Matkamsai Bazaar, the informant has stated that at about 16:30 hrs. he had gone to Matkamsai Bazaar with his younger brother Mohan Singh Kora for drinks and snacks. His brother had walked 25-30 yards ahead of him. He stopped in the market and when he was taking snacks (chana) he saw that his brother was coming back. Suddenly, the accused persons, namely, Sushil Hembrom, Dangur Korah, Mahendra Korah, Manoj Kumar Korah, Chinta Korah, Ram Lal Korah, Ponde Ram Kora @ Ponde Ram Hembrom, Purushottam Hembrom, Ravindra Purty, Burhan Korah, Kaira Korah, Purushottam Korah and 3-4 others variously armed with bow & arrow and bomb came behind his brother and Ravindra Purty threw a bomb on his brother which exploded, whereupon his brother fell on the ground wreathing in pain. Thereafter, the other accused persons exhorting "Maro-Mar" started kicking his brother with legs. When he and Durga Charan Kora who was sitting with him raised hulla Kaira Korai threw two bombs due to which Arjun Kora, Kolai Kora, Ghasia Kora and Potko who were standing nearby sustained injuries. There was a commotion in the market and when the nearby persons started raising hulla, the accused persons fled away towards the forest. His brother had died on the spot and the other injured persons were wreathing in pain. The informant has stated that a land dispute and the criminal case filed for murder of his family member were the reason why the accused persons have killed his brother.

7. On the basis of his fardbeyan, Goilkera P.S. Case No. 13 of 1999 was registered on 07.06.1999 under sections 147/ 148/ 149/ 302 IPC and under sections 3/ 5 of the Explosive Substance Act. Later on, the offence under sections 324/ 307 IPC was added in the report.

8. After the investigation, a charge-sheet was submitted showing Kaira Korai as absconder.

9. The appellants have faced the trial on the charge under sections 147, 149, 302/ 149, 307/149 IPC and under sections 3/5 of the Explosive Substance Act for murder of Mohan Singh Kora with bomb attack and for attempting to murder Arjun Kora, Kolai Kora, Ghasia Kora and Potko Pradhan.

10. The informant has been examined in the court as PW-7. In his examination-

in-chief, he has stated that at about 4:30 p.m. in the evening he had gone to Matkamsai Bazaar which is situated just behind his house. His brother was walking about 25-30 yards ahead of him. At that time, Durga Charan Kora was also taking snacks (chana) in the market. When his brother was coming back, the appellants along with others suddenly appeared there and Ravindra Purty threw a bomb on his brother, who sustained injuries and fell on the ground. Thereafter, the other accused persons exhorting "Maro-Mar" assaulted his brother with legs. The informant has deposed that Kaira Kora has also thrown two bombs which had injured 3-4 persons. He has further stated that he has given the evidence against Ravindra Purty in a case filed by Omno Kora and there was a land dispute between him and the other accused persons. He has stated that his statement was recorded by the police and his fardbeyan was evidenced by Durga Charan Kora and Suresh Kora, who have put their signature on the fardbeyan. The police has prepared an inquest report and the dead body of Mohan Singh Kora was sent to Chaibasa sadar hospital. The police has also issued requisition for medical examination of the injured persons who were sent to the hospital. He has identified the accused persons in the dock. During his cross-examination he has denied that his brother and father were sent to jail in G.R. Case No. 163 of 1991 which was lodged on death of Jagmohan Kora in Goyalkera Haat. He has also denied that the accused persons have deposed against them in that case. He admits that his cousin Sita Ram Kora has been killed. In the said case he and his cousin Mahesh have deposed against these accused persons. He has also admitted that he has deposed against Ravindra Purty in a case lodged for death of Omno Kora. In paragraph No. 16 of his cross-examination, the informant has admitted that there is enmity between the parties which has continued prior to the death of his brother.

11. The prosecution witnesses PW-5, PW-8, PW-10 and PW-12 are the other eye-witnesses. They have also given a vivid account of the incident which has taken place at Matkamsai Bazaar in the afternoon of 07.06.1999 at about 4:30 p.m. They have named the appellants among the assembly of persons who according to the prosecution along with Ravindra Purty have kicked Mohan Singh Kora after he fell on the ground. The evidence of these witnesses in respect of the appellant, namely, Ravindra Purty who has hurled a bomb on Mohan Singh Kora is also consistent. During their cross-examination, nothing material could be elicited from them by the defence which would throw a doubt on the role played by Ravindra Purty and the other appellants in the occurrence.

12. The learned counsels appearing for the appellants have submitted that: (i) the ocular evidence is partly not corroborated by the medical evidence, (ii) injured witnesses have not supported the prosecution's case and while so, the foundation of its case has gone, and (iii) conviction of the appellants except Ravindra Purty with the aid of section 149 IPC is improper and not sustainable in law.

13. We shall first examine the medical evidence. Dr. B. Dayal PW-11 who has

conducted the post-mortem examination on 08.06.1999 at 11:30 a.m. has found a ragged wound over back of Mohan Singh Kora of the extent of 6" x 6" x1" between second lumbar and 8th thoracic vertebrae. PW-11 has observed that the wound was full of iron kanti and glass pieces of different size; maximum size of kanti was of 1 ½", were engraved in the wound. This part of the evidence of PW-11 corroborates the allegation of throwing bomb by Ravindra Purty which has exploded and caused injuries to Mohan Singh Kora.

14. On the basis of the opinion of PW-11 that death of Mohan Singh Kora was caused within 36 hrs. of the post-mortem examination which was conducted on 08.06.1999 at 11:30 a.m. and a statement of PW-14 who has proved the injury reports of PW-1, PW-2, PW-3 and PW-4 that he has not mentioned in the injury reports that the injuries were caused by bomb blast, the learned counsel appearing for the appellants contended that the medical evidence does not support the prosecution's case.

15. In "Mohinder Singh vs. The State" reported in AIR 1953 SC 415, the Supreme Court has observed that it is elementary that where the prosecution has a definite or positive case, it must prove the whole of its case, however, in a series of decision the Supreme Court has also held that while appreciating the variance between the medical evidence and the ocular evidence, testimony of an eye-witness must get primacy over the medical evidence which is basically opinionative. Only when the court finds such inconsistencies between the ocular evidence and the medical evidence which cannot be reconciled evidence of an eye-witness shall be appreciated in a different prospective by the courts. In "Thaman Kumar v. State (UT of Chandigarh)" reported in (2003) 6 SCC 380, the Supreme Court has observed as under:

"16. The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eyewitnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight away be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

16. There are as many as five eye witnesses who have fully supported the prosecution's case. They have remained unshaken during their cross-examination. Their evidence is cogent, reliable and trustworthy. They have consistently spoken about death of Mohan Singh Kore due to bomb blast.

Now, in the aforesaid state of evidence opinion of the doctor that the death of Mohan Singh Kora was caused within 36 hours was just an estimation about the time of death. There is no other objective finding by the doctor on the basis of which it can be conclusively said that the death of Mohan Singh Kora had not happened at around 16:30 hrs. on 07.06.1999.

The doctor's opinion is that the death has occurred "within" 36 hours. Similarly, the mistake committed by PW-14 in not writing on the injury reports that the injuries were caused by bomb blast and the injured witnesses turning hostile would not create a cloud over the prosecution story which has been firmly proved by the eye witnesses.

17. Dr. Arvind Kumar Yadav, PW-14 has examined Ghasia Kora on 07.06.1999 and found the following injuries:

- i. Superficial injury right leg (Blast injury) 1 c.m. x ½ c.m. x skin deep
- ii. Injury of over abdomen ¼ c.m. x ½ c.m. x skin deep
- iii. Injury on right arm ½ c.m. x 1/4 c.m. x skin deep

On the same day, PW-14 has examined Arjun Kora and found the following injuries:

- i. On left arm:- two in number, ½ c.m. x 1/2 c.m. x skin deep
- ii. On back:- 3 in number ½ c.m. x 1/4 c.m. x skin deep
- iii On back of right arm ¼ c.m.x ¼ c.m. x skin deep

PW-14 has examined Kolar Kora also on 07.06.1999 and found the following injuries:-

- i. On left side of face:- Two in number 1 c.m. x ½ c.m. x skin deep
- ii. On abdomen :- Three in number 1 c.m. x ¼ c.m.x skin deep
- iii. On left arm:- 2 in number.

On the same day, PW-14 has also examined Patka Pradhan and found the following injuries:-

- i. On chin:- 1 c.m.x ½ c.m. X skin deep
- ii. On left thigh:- Five in number ½ c.m. x ¼ c.m. x skin deep
- iii. On right leg:- Two in number ½ c.m. x ¼ c.m. X skin deep.
- iv. On scrotum:- One in number ½ c.m. X ¼ c.m. x skin deep.

18. We find that on the injury report of every injured witness "blast injury" is clearly written. The requisition slip of the Investigating Officer referring the injured witnesses to the hospital for their medical examination mentions the injuries caused to them by bomb blast. Since the injury reports reflect that injuries to the witnesses were caused by bomb blast, the statement of PW-14 in his cross examination that he has not written on the injury reports that the injuries were caused by bomb blast is not only factually incorrect, it is inconsequential also.

19. It is consistent case of the prosecution that after sustaining injuries due to bomb explosion thrown by Ravindra Purty, Mohan Singh Kora fell on the ground and thereafter the other accused persons have kicked him. PW-5, PW-7, PW-8, PW-10 and PW-12, who have consistently spoken about presence of the appellants at the place of occurrence and at the time of occurrence, have also stated that the appellants have kicked Mohan Singh Kora when he fell on the ground. PW-11 has found fracture of 10th and 11th ribs of both sides of the deceased. He has also found that 12th thoracic vertebrae, 1st and 2nd lumbar vertebrae, bladder and kidney of the deceased were fractured, ruptured. This part of the medical evidence is in conformity with the prosecution's case that other appellants have kicked Mohan Singh Kora who on receiving bomb injuries fell on the ground.

20. In the aforesaid facts, we do not find any inconsistency in the ocular evidence and the medical evidence. By now it is also well-accepted that testimony of a hostile witness cannot be discarded altogether and his evidence can be used by the prosecution for corroboration. In "Lahu Kamlakar Patil v. State of Maharashtra" reported in (2013) 6 SCC 417, Hon'ble Supreme Court has observed thus:

"15. It is settled in law that the evidence of a hostile witness is not to be rejected in toto. In Rameshbhai Mohanbhai Koli v. State of Gujarat, reiterating the principle, this Court has stated thus: (SCC p. 117, paras 16-17)

"16. It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide Bhagwan Singh v. State of Haryana, Rabindra Kumar Dey v. State of Orissa, Syad Akbar v. State of Karnataka and Khujji v. State of M.P.)

17. In State of U.P. v. Ramesh Prasad Misra this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, Gagan Kanojia v. State of Punjab,

Radha Mohan Singh v. State of U.P., Sarvesh Narain Shukla v. Daroga Singh and Subbu Singh v. State."

16. Recently, in Bhajju v. State of M.P., a two-Judge Bench, in the context of consideration of the version of a hostile witness, has expressed thus: (SCC p. 341, para 35)

"35. ... Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 CrPC, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution."

(emphasis added)

17. In Manu Sharma v. State (NCT of Delhi), while discussing about the evidence of a witness who turned hostile, the Bench observed that his evidence to the effect of the presence of the accused at the scene of the offence was acceptable and the prosecution could definitely rely upon the same."

21. The prosecution witnesses - PW-1, PW-2, PW-3 and PW-4 - have stated about the death of Mohan Singh Kora due to bomb explosion. They have also deposed about enmity between the appellants and the family of the informant. This part of their evidence in the court, thus, can be relied upon by the prosecution.

22. There are as many as five eye-witnesses who have fully supported the prosecution's case. The hostile witnesses- PW-1, PW-2, PW-3 and PW-4 - have also partly supported the prosecution's case. The doctor PW-11 has opined that the death has occurred within 36 hours of the post-mortem examination which was conducted at 11:30 a.m. on 08.06.1999. The First Information Report has been lodged within few hours of the incident and the appellants were named as accused persons by the informant in his statement given to the police. In these facts, we hold that presence of the appellants at the place of occurrence and at the time of occurrence have been proved by the prosecution.

23. The prosecution has also proved that Ravindra Purty has thrown a bomb on Mohan Singh Kora which has caused fatal injuries to him on account of which he has died. We, therefore, find no merit in Cr. Appeal (D.B.) No. 134 of 2002, which has been preferred by the appellant, namely, Ravindra Purty and, accordingly, it is dismissed.

24. Now, we shall examine the complicity of other appellants in the incident.

25. Section 141 of the Indian Penal Code makes an assembly of five or more persons "unlawful assembly" if the common object of the persons composing that assembly is to commit any one of the offences under five clauses of section 141 IPC. Section 149 of the Indian Penal Code is a substantive offence which envisages constructive liability of every member of the unlawful assembly. Section 149 IPC provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every member who at the time of the committing of that offence is a member of the assembly, is guilty of that offence. In "Rajendra Shantaram Todankar V. State of Maharashtra and others" reported in (2003) 2 SCC 257, explaining the scope of section 149 IPC the Supreme Court has held thus:-

"14..... In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the Court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behavior of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149- either clause- is attracted and the Court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149, IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act..." [underlining added]

26. Through PW-5, PW-7, PW-8, PW-10 and PW-12 the prosecution has brought on record evidence that the appellants have kicked Mohan Singh Kora after he fell on the ground. Mr. Ankit Kumar, the learned counsel for the appellants has tried to contend that after Mohan Singh Kora died if at all the appellants have kicked him it would not attract any criminal liability. This is an argument more in desperation than in substance. It is not the prosecution's case that on receiving pellet injury from a bomb explosion Mohan Singh Kora had died instantly and it is not a case set up by the defence that after Mohan Singh Kora died the appellants kicked him. He has suffered internal injuries and those injuries were ante-mortem in nature.

27. However, in our opinion, on the basis of the evidences led by the prosecution

the other appellants cannot be convicted under sections 302/149 IPC.

28. The prosecution has failed to prove that death of Mohan Singh Kora has been caused in furtherance of common object of the unlawful assembly or that the other appellants (except, Ravindra Purty) had knowledge that death of Mohan Singh Kora can be caused in furtherance of common object of all. In fact, it was Ravindra Purti who had a recent grudge against the informant and his family as he was acquitted in a case filed by Omno Kora. On such facts, all that the prosecution has been able to prove is that all the appellants except Ravindra Purti had intended to cause grievous injuries to Mohan Singh Kora. They have kicked Mohan Singh Kora with legs which has resulted in fracture of his ribs, liver, kidney etc. and, therefore, they are liable to be convicted under sections 325/149 IPC (refer, "Lal Mandi Vs. State of W.B," (1995) 3 SCC 603).

29. Accordingly, conviction and sentence of the appellants, namely, Sushil Hembrom, Mahendra Korah, Manoj Kumar Korah, Chinta Korah and Ram Lal Korah in Cr. Appeal (D.B.) No. 106 of 2002 and appellant, namely, Ponde Ram Kora @ Ponde Ram Hembrom in Cr. Appeal (D.B.) No. 107 of 2002 under sections 302/149 IPC are set aside. They are convicted under section 325/149 IPC and sentenced to RI for five years. Their conviction under section 147 IPC is affirmed, however, their conviction and sentence under sections 3 and 5 of the Explosive Substance Act are set-aside.

30. In the result, Cr. Appeal (D.B.) No. 106 of 2002 and Cr. Appeal (D.B.) No. 107 of 2002 are partly allowed, whereas Cr. Appeal (D.B.) No. 134 of 2002 is dismissed.

31. The bail-bonds furnished by all the appellants, who are on bail, are cancelled. They shall surrender before the court-below to serve the remaining sentence.

32. Let lower court records be transmitted to the court concerned, forthwith.

33. Let a copy of the judgment be communicated to the trial court through FAX.

34. We appreciate the able assistance rendered by Mr. Zaid Ahmed, the learned Amicus.

35. The Secretary, Jharkhand High Court Legal Services Committee shall reimburse the learned Amicus on submission of bill(s).