
(2015) 07 JH CK 0074

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 157 of 2006

Teja Ansari and Others

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision : 21-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 273, 313
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2015) 4 AJR 195 : (2015) 3 JLJR 461

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

Bench : Division Bench

Advocate : A.K. Sahni and Amrita Banerjee, for the Appellant

Final Decision : Allowed

Judgement

Heard.

1. This appeal is directed against the judgment of conviction and order of sentence dated 3rd December, 2005 passed by the then learned Addl. Sessions Judge-cum-F.T.C. No. 1, Gumla, in Sessions Trial Case No. 163 of 1998, whereby and whereunder the Court, having found the appellants guilty for committing murder of Alam Ansari, convicted them for the offence punishable under Section 302/34 of the Indian Penal Code and were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 2,000/- and in default of payment of fine to undergo imprisonment for a period of two months.

2. The case of the prosecution, as has been, projected in the fardbeyan is that on 19.02.1998, Alam Ansari, the husband of the informant- Hafijan Khatoon (P.W.10) came home at 4" O Clock and asked for food from his wife. It was served. While he was taking food, Mumtaj Ansari, the appellant came and asked Alam Ansari to come along with him to take tea. He left home along with the appellant- Mumtaj Ansari. Alam Ansari did not return home till 6" O clock. Thereafter, the informant- Hafijan Khatoon (P.W.10) along with her daughter-

Rubu Begam (not examined) left home in-search of her husband. When the informant came ahead of the house of her father-in-law, she heard distress sound of her husband. She proceeded to that direction and when came near the house of Ram Pahan, he saw the appellants, Teja Ansari and Iqbal Ansari catching-hold the deceased, whereas the appellant, Mumtaj Ansari was assaulting her husband with "bhujali" indiscriminately. When she shouted for help, villagers, Subhan Ansari (P.W.1), Abul Ansari (P.W.6) and also others came over there. Thereupon the accused persons fled away. Thereafter Alam Ansari was taken Sisai Hospital for the treatment. The doctor at Sisai Hospital referred the case to Ranchi. While Alam Ansari was being taken to Ranchi, he died in the way and, therefore, the dead-body was brought to the Sisai Hospital again.

3. On the next day i.e. on 20.02.1998 at about 7.30 a.m. when S.I., B. Lal of Sisai Police Station came, he recorded the "fardbeyan" of the informant- Hafijan Khatoon (P.W.10), wherein she narrated the same story, as has been, stated above. She also stated about the motive, wherein it was stated that the appellant, Mumtaj Ansari wanted to marry Manju Khatoon, cousin of the deceased which the deceased objected, as a result of which, Mumtaj Ansari could not marry Manju Khatoon.

4. On the said "fardbeyan" a formal FIR was drawn against all the appellants. Thereupon the I.O. undertook the investigation during which he held inquest on the dead-body of the deceased and then sent the dead-body for post-mortem examination which was conducted by Dr. Krishna Prasad (P.W.9). Upon holding autopsy, he did find the following injuries:-

Injury No. 1:- Bandaged wound over neck underlying incised wound over left side of the neck size 2 1/2"X1/2"X1/2" tilting towards back.

Injury No. 2:- Left side of the neck over Mastoid size 1 1/2"X1/2".

Injury No. 3:- Bruise over right side of the forehead size 1"X1/2".

Injury No. 4:- Bandaged wound over abdomen underlying which punctured wound over abdominal wall. Intestine was found out of abdomen, small intestine punctured at 2 sides, membrane and vessels were punctured.

Injury No. 5:- Abrasion over front of chest size 3"X1/2"X1/2".

All the injuries were found ante-mortem in nature. Injuries No. 1, 2, and 4 were caused by sharp-cutting weapon, whereas injuries No. 3 and 5 were caused by hard and blunt substance. The doctor issued post-mortem report (Ext.2) with an opinion that death was caused due to hemorrhage and shock on account of Injury No. 4.

5. Meanwhile, the I.O. recorded the statements of the witnesses. On completion of the investigation, when the charge-sheet was submitted, cognizance of the offence was taken against the appellants. Upon commitment of the case, the appellants were put on trial. The prosecution, in order to prove its case,

examined as many as ten witnesses. Of them, P.W.-2 Azam Ansari (brother of the deceased), P.W.6-Abul Ansari (also brother of the deceased) and P.W.10-Hafijan Khatoon (informant), claimed themselves to have seen the appellants committing murder of the deceased. They did testify that when they reached near the house of Ram Pahan, they saw the appellants. Teja Ansari and Iqbal Ansari catching-hold of the deceased, whereas the appellant, Mumtaj Ansari was assaulting the deceased with "bhujali".

P.W.1-Subhan Ansari, P.W.3-Nasiuddin Ansari and P.W.7-Rajab Ansari @ Balal Ansari did testify that when they came to the place of occurrence, they found Alam Ansari severely injured who disclosed to them that it was Mumtaj Ansari who had caused injury to him. The aforesaid witnesses are at variance as some of them has said that the deceased disclosed the name of Mumtaj Ansari, whereas the other say that he disclosed the name of Mumtaj Ansari and Iqbal Ansari, whereas the other one say that Alam Ansari had named all the three appellants. However, this matter would be dealt with later on. P.W.4 and P.W.5 have been declared hostile. P.W.8-Zafir Ansari did not support the case of the prosecution.

6. After the closure of the prosecution case, when the appellants were questioned under Section 313 of the Cr.P.C. about the incriminating materials which they denied.

7. Thereupon the trial court having placed its implicit reliance on the testimonies of the witnesses getting corroboration from the medical evidence, did find all the appellants guilty for committing murder of Alam Ansari and accordingly, recorded the order of conviction and sentence which is under-challenge.

8. Mr. Sahni, learned counsel appearing for the appellants submits that initially three witnesses, P.Ws.1, 2 and 3 were examined by the prosecution in presence of all the accused persons, but thereafter the appellant- Mumtaj Ansari absconded and remained absconding from 28.12.1998 to 07.10.2003, during which rest of the witnesses were examined and thereby, the evidences which were recorded in absence of the appellant, Mumtaj Ansari, cannot be used against them, keeping in view, the provision as contained in Section 273 of the Cr.P.C.

9. Further, it was submitted that so far P.Ws.2 and 3 are concerned, they could not be cross-examined on behalf of the appellant and thereby, the court should not have relied upon the testimonies of any of the witnesses including P.Ws.2 and 3, but the Court did take into account the evidences of the witnesses, who were examined even in absence of the appellant-Mumtaj Ansari, on the premise that accused, Mumtaj Ansari and other accused were being represented by one lawyer who even in absence of appellant, Mumtaj Ansari, did cross-examine the witnesses, but the Court completely overlooked the fact that the appellant, Mumtaj Ansari since had absconded, he cannot be said to have been represented by the same counsel and under these circumstances, the trial court can certainly

be said to have committed illegality in recording the order of conviction and sentence against Mumtaj Ansari.

10. Further, it was submitted that the eye-witnesses such as P.Ws. 2, 6 and 10 though have claimed to have seen the appellants committing murder of the deceased, but the witnesses, in view of the, testimony of the informant (P.W.10) elicited in the cross-examination, disclosing therein, that at the time of occurrence, it was quite dark, none of the witness i.e. aforesaid witnesses could have been in a position to identify any of the assailants, but the court below did not take into account this aspect of the matter in its right perspective.

11. As against this, Mr. Amresh Kumar, learned counsel appearing for the State submits that it is true that the appellant, Mumtaj Ansari had absconded after the examination of P.Ws.1, 2 and 3 and during his absence, rest of the witnesses were examined who at the instance of the appellant, Mumtaj Ansari too had been cross-examined and thereby, the Court was absolutely justified in placing reliance on the testimonies of those witnesses who have testified either that they saw the appellants committing murder or that they were told by the deceased that it were the appellants who committed murder of the deceased and thereby, the trial court was absolutely justified in recording the order of conviction and sentence.

12. Having heard learned counsel appearing for the parties and on perusal of the records, we do find that it is the case of the prosecution, as has been testified by the informant-P.W.10 (Hafijan Khatoon), the widow of the deceased that while her husband, Alam Ansari was taking meal in his house, appellant-Mumtaj Ansari came and took her husband along with him to have have tea outside.

When the deceased did not return home till 6" O Clock, P.W.10-Hafijan Khatoon along with her daughter came out of the house in-search of her husband. In that course, when they reached near the house of Ram Pahan, they found the appellants, Teja Ansari and Iqbal Ansari catching-hold of the deceased, whereas the appellant-Mumtaj Ansari was giving "bhujali" blows upon the deceased. The deceased was taken to Sisai Hospital from where he was referred to Ranchi. While he was being taken to Ranchi, he died in the way. Thereafter, his dead-body was brought to Sisai Hospital. On the next day, when the I.O. came, he recorded the fardbeyan. Charge-sheet was submitted against all the three persons who were put on trial, during which P.Ws.1, 2 and 3 were examined, but were not cross-examined for which fault never lies either with Court or prosecution.

13. According to P.W.1-Subhan Ansari when he heard distress sound of the deceased, he went there and heard the deceased saying that Mumtaj Ansari and Iqbal Ansari had assaulted him. He also saw Mumtaj Ansari and Iqbal Ansari fleeing away from there and Mumtaj Ansari was having "bhujali" in his hand.

14. According to P.W.2-Azam Ansari when he heard hulla being raised by the informant-P.W.10, he came near the house of Ram Pahan, where he saw the

appellants, Teja Ansari and Iqbal Ansari were catching-hold of the deceased, whereas Mumtaj Ansari had been giving "bhujali" blows to the deceased.

15. Apart from P.W.2, P.W.6 and P.W.10 have also claimed themselves to be the eye-witnesses and have testified almost in the same manner as has been testified by P.W.2. Likewise P.Ws.3 and 7 have testified in the same manner as has been testified by P.W.1, wherein they have said that when they reached at the place of occurrence, they were told by the deceased that it were Iqbal Ansari and Teja Ansari who were catching-hold upon him, whereas Mumtaj Ansari had been assaulting him by bhujali.

16. It be stated that testimony of P.W.7 is slightly different wherein he has testified that when he came to the deceased, he disclosed to him that it was Mumtaj Ansari who had assaulted.

17. Thus, two sets of the witnesses were examined on behalf of the prosecution. One set is of the witnesses who had claimed to be eye-witnesses, whereas the other set is of the witnesses who derived knowledge from the deceased about the names of the accused assaulted him.

18. The question which does arise as to whether the witnesses such as P.Ws.2, 6 and 10 who have claimed themselves to be the eye-witnesses are trustworthy?

19. We have already recorded that the aforesaid three witnesses have claimed to have seen the appellants killing the deceased, but their claim of seeing the accused persons assaulting the deceased gets shrouded with doubt, in view of the testimony of P.W.10 as has been elicited in the cross-examination, disclosing therein, that at the time of occurrence, it was quite dark. Thereby, it would not have been possible for the witnesses to identify the accused persons. Not only P.W.10, but also P.W.7 has also admitted in his cross-examination that by the time when the alarm had been raised, it was dark though he has also testified that there was light coming from lantern, but none of the witnesses had made claim that they could identify the appellants in the light of the lantern and thereby, it is not acceptable that illumination was there of the lantern.

20. Taking into account, this aspect of the matter coupled with the fact that the time and the month in which occurrence took place, we are convinced that when the occurrence took place, it was quite dark and, therefore, the claim made by the witnesses to have identified the appellants, is not acceptable to us and, therefore, their testimonies are hereby, rejected. However, so far the testimonies of the other witness, P.Ws.1, 3 and 7 are concerned, who have testified regarding the deceased disclosing the name of the appellants who assaulted him are acceptable though not in its entirety as they appear to be the independent witnesses and further nothing has been elicited in the cross-examination to make any dent over their trustworthiness.

21. In this regard, it be pointed out that P.W.1 has testified that when he came near the deceased upon hearing hulla, he told him that it was Iqbal Ansari and

Mumtaj Ansari who had assaulted him, whereas P.W.3 did testify that the deceased disclosed that it was Mumtaj Ansari who assaulted him, whereas the other two appellants had caught-hold of him, but P.W.7 has testified that the deceased disclosed to him that it was Mumtaj Ansari who had assaulted.

22. Thus, there appears to be variance in the testimonies of those witnesses, but keeping in view the fact that as per the case of the prosecution, it was Mumtaj Ansari who was having grudge against the deceased as he objected marriage in between Mumtaj Ansari and his cousin, whereas these two appellants, namely, Teja Ansari and Iqbal Ansari were having no grudge against the deceased and thereby, they had had no reason to kill the deceased.

23. Under the circumstances, it can very well be said that testimonies of the witnesses are consistent so far as culpability is there on the part of the appellant, Mumtaj Ansari, whereas the testimonies of the witnesses are inconsistent so far as appellant, Teja Ansari and Iqbal Ansari are concerned and, therefore, they are entitled to have benefit of doubt.

24. So far as submission advanced on behalf of the appellants that since the testimonies of the witnesses, particularly of P.W.4 to P.W.10 have been recorded in absence of the appellant, Mumtaj Ansari, the testimonies cannot be used as against them. We are in agreement with the submission advanced on behalf of the appellant, keeping in view the provisions as contained in Section 273 of the Cr.P.C.

25. However, there appears to be no reason not to rely on the testimonies of P.W.1 and P.W.3 for the reason, discussed above and thereby, we do find that Mumtaj Ansari has rightly been convicted by the trial court for committing murder of the deceased but, he instead of Section 302/34 I.P.C., is convicted under Section 302 I.P.C. The sentence passed by the trial court shall remain intact.

26. So far other two appellants, namely, Teja Ansari and Iqbal Ansari are concerned, they are acquitted of the charge and hence, judgment of conviction and order of sentence is hereby, set aside. Accordingly, they are discharged from the liability of the bail bonds.

27. Accordingly, this appeal stands allowed, but in part.