

(2003) 07 JH CK 0034
In the Jharkhand High Court
Case No : Criminal A. No. 318 of 2001

Teklal Mahto and Others

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 16-07-2003

Acts Referred:

Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 300

Citation : (2004) CriLJ 84 : (2003) AIR Jhar HCR 1351 : (2003) 3 EastCriC 143

Hon'ble Judges : Hari Shankar Prasad, J;D.N. Prasad, J

Bench : Division Bench

Advocate : P.P.N. Roy, Shree Nivas Roy and Ram Prakash Singh, for the Appellant; T.N. Verma, APP, for the Respondent

Final Decision : Allowed

Judgement

Deoki Nandan Prasad, J.—This appeal has been preferred by the three appellants against the judgment of conviction and sentence dated 30-5-2001 and 31-5-2001 respectively passed by 5th Additional Sessions Judge, Giridih in Sessions Trial No. 171 of 1999 whereby and whereunder the learned Additional Sessions Judge convicted the appellants u/s 302/34 and 201/34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life u/s 302/34 of the Indian Penal Code whereas they were sentenced to undergo rigorous imprisonment for two years each for the offence u/s 201/34 of the Indian Penal Code. How ever, the sentences were ordered to run concurrently.

2. The prosecution case lies in a narrow compass as alleged that Mungia Devi daughter of the informant was married with Teklal Mahto, appellant No. 1 in the year 1994 and after marriage, the in-laws of Mungia Devi started torturing her on the ground that she had brought ghost from her Naihar resulting the family of the appellants has badly been disturbed. Mungia Devi was suffering from boil (abscess), which was believed to be Leprosy by her in-laws, and she was assaulted for this reason by them and Mungia Devi made complaint about torture

to the members of her Naihar. It has further been alleged that in the year 1997, there was a Panchayat in which it was decided that the informant was to cure his daughter and the informant started her treatment at Dhanbad and thereafter she started living in her Sasural. In the year 1997 Arun Mahto son of the informant had brought his sister to the parents' house, where she lived for about one year. On 2-10-1998 Bhuneshwar Mahto, younger brother of the husband of Mungia Pevi and Masusa of the husband of Mungia Devi, namely, Kula Mahto took away Mungia Devi to her in laws house on Bidagri. In the evening of 25-10-1998 at about 7 P. M. when the informant was sitting in his courtyard, his nephew Anil enquired the whereabouts of Mungia Devi on which the informant replied that she is in Sasural. Anil asked him to open the door and when the informant came out, he found Anil Mahto and Shankar Mahto keeping Mungia Devi on their lap. Thereafter Mungia Devi was brought to the courtyard where Mungia Devi (deceased) told them to save her life as her father-in-law, mother-in-law, devar and husband assaulted and administered poison forcibly resulting which she would not survive. She also asked for water. The informant along with others went to a Doctor and when they were coming back with Doctor, he was informed by Etwari Mahto and Sita Ram Mahto that Mungia Devi died and there was no need in taking the Doctor there. Thereafter the informant came to the house and found Mungia Devi dead.

3. On the basis of the fard beyan, a first information report was lodged against the appellants under Sections 328, 302, 201/34 of the Indian Penal Code. The police investigated into the case and submitted charge-sheet. All the accused persons appeared before the Trial Court and, accordingly, charge under Sections 328/34, 302/34 and 201/34 of the Indian Penal Code was framed against them. The witnesses were examined from the side of the prosecution. The defence has also examined witnesses. After hearing both sides, the learned trial Court convicted and sentenced the appellants in the manner as stated above, hence, this appeal.

4. Obviously the deceased died in the house of the informant and at the first opportunity of time, she was found to be in the Bari of the informant (Sukar Mahto). It is alleged that Mungia Devi stated before her father/informant and others that she was given poison forcibly by the appellants and thereafter the informant also went to call a Doctor for treatment of Mungia Devi but Mungia Devi already died before the Doctor reached at the place of occurrence. It is an admitted position that though viscerae were preserved for chemical examination to ascertain about the poison but no chemical report has been brought on the record to establish that actually the cause of death was due to poison. The Doctor (P.W.7) who held post mortem on the dead body of Mungia Devi, did not find any external or internal injury and, in the opinion of the Doctor, death might have been caused by poisoning. Thus the Doctor, who conducted autopsy, is not certain or definite that actually Mungia Devi was suffering from poisoning or she died because of poisoning. Viscerae have been preserved for confirmation of the cause of death but there is no viscerae report. The Trial Court also could not

ascertain by any material evidence in respect of poisoning thereby he acquitted all the appellants of the charge u/s 328/34 of the Indian Penal Code. Now it is evident that the prosecution has totally failed to establish the charge u/s 328/34 of the Indian Penal Code beyond all reasonable doubts.

5. Hence a simple question arises for consideration at this juncture as to whether the appellants are liable to be charged/convicted u/s 302/34 of the Indian Penal Code ?

6. Altogether nine witnesses have been examined on behalf of the prosecution in support of its case. P. W. 1 stated that he was going to sleep in his house when he heard the sound of crying. Thereafter he came out from the house along with his brother Shankar Mahto and he saw in the light of lantern that his cousin sister (Mungia Devi) was crying there. She was brought to the house of his uncle where Mungia Devi stated that her mother-in-law, father-in-law, devar and husband administered poison and they brought and threw her. Thereafter his uncle (informant) went to call a Doctor but Mungia Devi died before the Doctor reached to that place. He further stated that Mungia Devi was tortured by the appellants on the pretext that she was suffering from leprosy. He is quite silent in his evidence to say as to how Mungia Devi was brought in the Bari of the informant. He also stated in his cross-examination that he and his uncle (informant) have been residing in the same Aagan.

7. P. W. 2, mother of Mungia Devi, stated that she had seen Mungia Devi lying on the cot and she was saying that she would not survive, She admitted in her cross-examination that Mungia Devi came to her house in the month of Ashwin and thereafter she (Mungia Devi) did not return to her Sasural.

8. P. W. 3 is the brother of the deceased who stated that Mungia Devi was in her Sasural at the time of occurrence and she was lying in the Bari of the informant when she was in precarious condition and she stated that members of her in-laws brought and threw her and they had also administered poison. He further deposed in Paragraph-18 that Mungia Devi used to live in disappointment in her Naihar.

9. P. W. 4 claimed to be a Medical Practitioner but admittedly he is neither M. B. B. S. nor he has obtained any degree in the medical science. He stated that he was coming with the informant to examine Mungia Devi but on the way he was informed that Mungia Devi already died. Admittedly he has not examined Mungia Devi nor he had examined the Cough of Mungia Devi. He is also silent to say about the cause of death.

10. P. W. 5 claimed to have seen Mungia Devi lying in the Aagan and, according to him, she (Mungia Devi) stated that in-laws members had administered poison. He further deposed in his cross-examination that village Kurpania, where the appellants are residing, is situated at a distance of 30 Kilometres from his house. He further admitted in paragraph 9 that his niece Mungia Devi was suffering from ailment for the last six months.

11. P. W. 6 stated that her Bhaisur brought Mungia Devi from the Bari where she was lying and Mungia Devi stated that she was administered poison by the members of in-laws and she was thrown in the Bari. She admitted in her cross-examination that Mungia Devi was being treated at Dhanbad. She also admitted in paragraph-15 that Mungia Devi stated that she was administered poison but she did not disclose where the poison was given to her. She further admitted that she had not seen any vehicle at the relevant time.

12. P. W. 8 is the informant, who stated that he was lying on the Cot in his courtyard when Anil Mahto and Shankar Mahto asked to open the door and thereafter he saw Mungia Devi in their lap and she was in precarious condition. According to him, Mungia Devi stated that the appellants along with her Devar administered poison. Thereafter the informant along with others went to call a Doctor, but in the way he came to know that Mungia Devi already died, He proved the fard beyan (Ext. 2). He is also silent to say as to how Mungia Devi was brought in his Bari at the relevant Lime. He stated that Professor Dhaneshwar Vidyarthi was present in the Panchayati but admittedly the said Professor Dhaneshwar Vidyarthi has not been examined to establish the fact that any Panchayati was ever held.

13. P. W. 9 is the Investigating Officer who claimed to have recorded the fard beyan (Ext. 4) and also registered first information report on the basis of the fard beyan. He recorded the evidence of the witnesses and submitted charge-sheet. He visited the place of occurrence. According to him, the place of occurrence is Bari of the informant where Mungia Devi (deceased) was said to be lying. He clearly deposed that Viscera report could not be received. The appellants were examined u/s 313 of the Code of Criminal Procedure and they have totally denied the allegation.

14. Three witnesses were examined on behalf of the defence. D. W. 1 stated that Mungia Devi was taken to her Naihar in the year 1997 and thereafter she has not come to Sasural. D. W. 2 also stated that Mungia Devi was suffering from Leprosy and she had gone to her Naihar in the year 1997 on the occasion of Karma festival and thereafter she did not return to Sasural. D. W. 3 also stated that Mungia Devi was not residing at her Sasural.

15. Mr. P. P. N. Roy, the learned counsel while assailing the judgment of the trial Court argued that the trial Court committed gross error in convicting the appellants u/s 302/34 of the Indian Penal Code when the appellants have already been acquitted from the charge of poisoning, being the main allegation already vanished. It is further argued that actually Mungia Devi never went to her Sasural after coming back to her parents house on the occasion of Karma and she was at her parents house at the time of occurrence and she died in natural way, but in order to harass the appellants, such type of story has been manufactured after thought, which cannot be accepted. In the last, he argued that such type of dying declaration, which has not been corroborated by any independent witness, cannot be relied upon.

16. It has been alleged in the fard beyan recorded by the father of the deceased Sukar Mahto (P.W.8) that Mungia Devi was lying in his Bari and she was brought by Anil Mahto and Shankar Mahto in their lap and she narrated that father-in-law, mother-in-law, devar and husband administered poison forcibly to her. He also alleged that she was subjected to torture on the allegation that she was suffering from Leprosy. According to the informant, Mungia Devi (deceased) had been in her Sasural at the relevant time as she was taken to her Sasural in Bidai on 2-10-1998, whereas the occurrence took place on 25-10-1998 but the mother of the deceased (P.W.2) stated in clear terms that her daughter came to her Naihar in the month of Ashwin, which falls in October, and thereafter she did not return to Sasural, which proves that she had been to her parents house from before. It is an admitted position that Mungia Devi had been residing at her Naihar for the last one year and she was being treated at Dhanbad, which has also been admitted by P. W. 6 (Bhabhi) as she used to go to Dhanbad along with Mungia Devi in connection with her treatment. The father of the deceased (P.W. 8) also claimed that Mungia had been staying in his house, but according to him, she was taken in Bidai on the day of Vijayalaxmi, which fact has not been supported by any independent witness. P.W.5 admitted that Mungia Devi was suffering from ailment for the last six months. According to the informant, village Kurpania, where the accused persons are residing, is situated at a distance of 61/2 Kms. away from his house and there is no evidence, either oral or documentary to show as to how Mungia Devi was brought at her Naihar on the day of occurrence at about 7 P.M. and was thrown in the Bari of the informant as none of the witnesses had seen any body bringing Mungia Devt at the relevant time. Mungia Devi (deceased) also has not stated before the informant and others as to how she was brought there and who had brought her at the Bari and this circumstance itself makes her entire statement doubtful. It is an implicit condition of the admissibility of a dying declaration that it must be made by the person who is physically and mentally in fit condition to make a statement. There is no such indication in the instant case that Mungia Devi was physically and mentally in fit condition to make statement. The Court has to be satisfied that the deceased was in fit condition to make statement voluntarily, Thus the entire story that Mungia Devi was brought and thrown in the Bari of the informant comes under the ambit of suspicion and not trustworthy. P. W. 6, Bhabhi of the deceased, admitted in her cross-examination that Mungia Devi did not say anything as to where poison was administered. I have already discussed above that the Doctor, who held post mortem, did not find external or internal injury on the person of the deceased and he is not definite that it was a case of poison as he admitted specifically in Paragraph 8 that as Visceras report is not before him, as such, it is not a confirmed case of poisoning and the Visceras report has not been produced by the prosecution in this case.

17. The fard beyan said to be a dying declaration has not been corroborated either by the medical evidence or by any independent witness. Moreover the informant claimed that Mungia Devi stated at the relevant time that the

appellants administered poison to her, but her statement has not been recorded independently with her thumb impression or signature, as the oral statement made by Mungia Devi before her father and others, who are her own relatives, becomes very suspicious and unreliable in view of the fact that the said statement has neither been corroborated by any independent witness nor it has been substantiated by the medical evidence. The statement also appears to be vague as there is nothing specific or direct allegation against either of the appellants as to who actually administered poison and who had thrown her in the Bari. Neither any kind of poison was recovered from the possession of the accused persons nor the deceased stated anything as to what type of poison was given to her. However, apparently the poison has not been detected nor any chemical report has been filed as well as the Trial Court has already acquitted the appellants for the offences u/s 328/34 of the Indian Penal Code in absence of poisoning.

18. A dying declaration/ can form the basis of conviction provided it passes the test of reliability. In the instant case, the alleged dying declaration is beyond the scope of reliability. Thus the appellants cannot be held charged or convicted for the offence u/s 302/34 of the Indian Penal Code in absence of positive and definite evidence.

19. In view of the discussions made above, it can safely be held that the prosecution has miserably failed to establish the charge u/s 302/34 of the Indian Penal Code as well against the appellants beyond all reasonable doubts. The Trial Court seriously erred in convicting the appellants only on mere assumption, which cannot form the basis of conviction of the accused. Thus the judgment is liable to be set aside.

20. In the result, I find merit in this appeal, which is, accordingly, allowed and the appellants are acquitted of the charge. The judgment of conviction and order of sentence is set aside. Appellant No. 1 (Teklal Mahto) appears to be in custody and. as such, he is set at liberty forth with if he is not wanted in any other case. Other two appellants, namely, Bhagirath Mahto and Daulti Devi, are on bail. Hence they are discharged from the liabilities of their bail bonds.

Hari Shankar Prasad, J.

21. I. agree.