
(2007) 01 JH CK 0027
In the Jharkhand High Court

Zeyaul Haque and Another

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 12-01-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 304, 323, 34

Citation : (2007) 3 JCR 43

Hon'ble Judges : Dilip kumar sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Dilip Kumar Sinha, J.—The appellants have preferred this appeal against the judgment of their conviction dated 16.7.1999 and order of sentence dated 19.7.1999 passed by Shri R.K. Dubey, 8th Additional Judicial Commissioner, Ranchi in Sessions trial No. 119/1990 whereby and whereunder the appellant No. 1 Zeyaul Haque was convicted under Part II of Section 304, IPC and was sentenced to undergo rigorous imprisonment for 7 years whereas the appellant No. 2 Mobarak Hussain was convicted u/s 304 -(II) /34, IPC and was sentenced to undergo imprisonment for four years. Mobarak Hussain appellant No. 2 was further convicted for the offence u/s 323, IPC and was sentenced to undergo imprisonment for three months. Both the sentences against Mobarak Hussain were directed to run concurrently.

2. The brief fact of the case is that the appellants were prosecuted on the statement of the informant Habib Ansari, recorded in the night of 13.4.1989 at the Kanke Hospital with respect to the occurrence which took place on the same day at about 6 p.m. It was narrated therein that when the informant was washing his face at his door the son of the appellant No. 2 namely Mahmood aged about 8 years pelted stone over the younger sister of the informant Laila Khatoon aged about 5 years which enraged the father of the informant Imamuddin Ansari (since deceased) who chastised the boy Mahmood as to why

he had pelted stone and the matter was intervened by the appellant No. 2 Mobarak Hussain which resultant into hot altercation. In the same sequence the other relatives of both the sides assembled and when the informant intervened, it is alleged that one Qamruddin inflicted blow over the head of the informant with Badhana (a metal pot). It is further alleged that Qumruddin abetted the other accused persons Zeyaul Haque (appellant No. 2) and Mobarak Hussain (appellant No. 2) and pursuant to that, it is alleged that the appellants Mobarak Hussain and Zeyaul Haque brought sticks from their house and it is specifically alleged that the appellant No. 1 Zeyaul Haque inflicted lathi blow over the head of Imamuddin who, after sustaining injury fell down and became senseless. When the mother of the informant Raimun-nisha arrived at the scene to rescue her husband on hearing "hallo." it is alleged that appellant No. 2 Mobarak Hussain inflicted lathi blow causing injury on her arm. The occurrence was witnessed by the inmates of the house of the informant. The co-villagers also assembled at the scene. Subsequently the accused Qumruddin including the appellants escaped. Imamuddin (since deceased) was brought to Kanke Hospital and from there he was referred to R.M.C.H., Ranchi where he succumbed his injuries on the next day morning. The informant and Quamruddin were examined by the Doctor at Kanke Hospital and the police case was registered on the statement of the informant and after investigation charge-sheet was submitted by police u/s 304/34, IPC against the appellants and one Qamruddin Ansari. The trial Court framed charge against all the three accused u/s 302/34, IPC with separate charge u/s 323 against the appellant No. 2 Mobarak Hussain. The accused Qamruddin Ansari died during the pendency of trial and therefore, trial proceeded only against the appellants.

3. As many as 11 witnesses were produced and examined on behalf of the prosecution and DW 1 Awal Ansari as well as DW 2 Bijay Oraon were produced as defence witnesses.

4. The judgment passed in this case has been assailed on the ground that the appellants were convicted solely on the testimony of the partisan and interested witnesses who were the near relatives of the informant's family viz. PWs 7, PW 8 and 9. No specific question was put to the appellants while recording their statement u/s 313, CrPC as to the manner of assault and the weapon of assault alleged to have been used in inflicting injury which highly prejudiced the defence in material particulars, otherwise the appellants would have adduced the evidence in support of their defence. The occurrence took place on certain provocation without any motive or prior intention and hence there was no occasion to share common intention by the appellant No. 2 with the appellant No. 1 in the commission of the alleged offence and in this manner the trial Court has given a wrong conclusion by convicting the appellant No. 2 Mobarak Hussain for the offence under part II of Section 304, IPC and for such reason judgment impugned suffers from the vice of non-application of judicial mind by the trial Court in convicting the appellant No. 2 in the aforesaid section. Similarly, there was no direct evidence against the appellant No. 1 Zeyaul Haque of causing

culpably homicide to Imarnud-din Ansari which was not amounting to murder. As a matter of fact the occurrence did not take place in the manner presented by the prosecution, which can be evident from the evidence of PW 11 as contained in para 17 that he had found injuries on the person of the accused Qamruddin Ansari but there was no explanation on behalf of the prosecution about such injury. The appellants as well as the members of the prosecution party are the descendants of common ancestor having land dispute and this fact was ignored by the trial Court as to the false implication of the appellants.

5. In view of the above fact the conviction and sentence imposed upon the appellants are unsustainable and they may be acquitted, learned Counsel on their behalf submitted.

6. On the other hand, Md. Hatim learned APP opposed the contention and submitted that the judgment of conviction and order of sentence passed against the appellants is well discussed and do not call for interference of this Court in appeal.

7. The prosecution case was specific that the appellant No. 1 Zeyaul Haque committed culpable homicide of Imamuddin Ansari which was not amounting to murder and at the same time appellant No. 2 Mobarak Hussain shared the common intention in such homicide and that Mobarak Hussain separately dealt lathi blow on the wife of the deceased Raimun Nisa, an offence u/s 323, IPC. The accused Qamruddin Ansari was alleged to be the order giver to the other accused, (appellants) pursuant to which the appellant No. 1 Zeyaul Haque inflicted blow on the head of Imamuddin Ansari and Mobarak Hussain dealt lathi blow to the witness. But the charge was framed by the trial Court u/s 302/34, IPC against the appellants and Qamruddin Ansari. A separate charge u/s 323, IPC was framed against the appellant No. 2 Mobarak Hussain. The accused Qamruddin Ansari died during the pendency of trial after his statement was recorded u/s 313, Code of Criminal Procedure. The specific defence of the appellants before the trial Court was that they were innocent and the victim Imamuddin Ansari was assaulted by the Tribal people who later on succumbed his injuries.

8. The prosecution before the trial Court produced as many as 11 witnesses and proved several other relevant documents such as formal FIR (Ext. 4) fardbeyan of the informant Habib Ansari (Ext. 1) the post-mortem report of the deceased Imamuddin (Ext. 2), injury report of the informant Habib (Ext. 3) injury report of the accused Qamruddin (Ext. 3/1) requisition of the I.O. for the examination of the injuries of the informant Habib and Imamuddin (since deceased) by referring them to the medical officer of Kanke Primary Health Centre (Ext. 5) and (Ext. 5/1), the seizure list of blood-stained shirt and blood-stained towel (Ext. 6) and the inquest report of the deceased Imamuddin (Ext. 7).

9. The defence produced only two witnesses such as DW 1 Awal Ansari and DW 2 Bijay Oraon in support of the fact that there was dispute between Tribal people at

one side and the members of the prosecution as well as accused party as the other side. DW 1 Awal Ansari deposed that Imamuddin and Qamruddin both were assaulted by the Tribal people. In the cross-examination the defence witness deposed that a case was instituted in respect of assault made by the Tribal People to Imamuddin but he could not apprise the Court about the case number and no relevant document related to the institution of police case was filed in support of his contention. On the other hand DW 2 Bijay Oraon deposed that the accused Qamruddin Ansari was known to him. Qamruddin along with his son Zeyaul Ansari was living at village Nawadih but on account of dispute with the Tribal People both shifted from Nawadih to village Baro and the home as well as homestead land of Qamruddin situated at Nawadih was encroached by his uncle Allaiddin etc. Both the witnesses are silent about the altercation or assault either as the eye-witness or otherwise in support of the defence case that there was dispute with the Tribal people and consequent to that Imamuddin was assaulted by them to death.

10. PW 1 Rahimuddin has simply deposed that Imamuddin was done to death but by whom, he did not disclose and for such reason he was declared hostile by the prosecution. Similarly PW 2 Sobrati Mian was also declared hostile by the prosecution. PW 3 Hanif Ansari though is the son of the deceased Imamuddin, he admitted that he was not present at the place of occurrence at the relevant time. He derived information about the occurrence from his brother informant Habib Ansari and narrated the accounts of the occurrence in sequence.

11. PW 4 Dr. Niranjan Minz. Had held post-mortem examination on the body of Imamuddin on 14.4.1989 while he was posted as Medical Officer in the Department of Forensic Medicine, R.M.C.H. Ranchi. He found the following ante-mortem injuries.

(i) Abrasion 1 c.m.x1/2 cm. on the right shoulder top;

(ii) Lacerated wound stitched 4 cm. x 1 cm. bone deep on the vertex of the head. There was diffused contusion on the whole scalp; and crack fracture of the fronto-parieto-temporal bone of head, both sides. There was laceration of brain under the site of the fracture. There was presence of subdural blood and blood clots over both sides of the brain.

12. In the opinion of the Doctor (witness), the injuries were ante-mortem, caused by hard and blunt substance and the death was due to head injury. The time since death was assessed between 6 to 24 hours. However, in the cross-examination the expert witness opined that such injuries were possible by fall of any heavy substance on the head of the deceased.

13. PW 5 Habib Ansari, informant of the case deposed the account of the occurrence as the eye-witness and that he was also the victim witness produced on behalf of the prosecution. He supported his statement [fardbeyan] in his substantive evidence before the trial Court with specific allegation against that on command of Qamruddin who abetted the appellants for assault, all the three

including Qamruddin and the appellants returned inside the home and came out with sticks in their hands. Though the accused Qamruddin commanded Zeyaul Haque and Mobarak Hussain to commit murder but it was the appellant Zeyaul Haque who inflicted blow with the stick on the head of Imamuddin as a result of which Imamuddin fell down after sustaining injury and there started bleeding. He became unconscious. When the mother of the informant Raimun Nisa rushed there to rescue her husband it was the appellant No. 2 Mobarak Hussain who inflicted blow with the stick, which caused injury in her left hand. The informant Habib Ansari further deposed. that blood was oozing from ear and mouth of Imamuddin. He went to Kanke Police Station with his father and from there he was referred to Kanke Hospital, The police came to Kanke Hospital and recorded his statement. From Kanke Hospital Imamuddin was referred to Rajendra Medical College Hospital. Ranchi for the better management of his injuries but on the next day at about 6 a.m. he succumbed his injuries.

14. The learned Counsel appearing on behalf of the appellants at the outset had pointed out that there was contradiction in the statement of the informant Habib An-sari in respect of recording of his statement by the police. In the first part of his statement under examination-in-chief the informant stated that his statement was recorded by the police at Kanke Hospital whereas in the cross-examination informant developed that it was at the Kanke Police Station where his statement was recorded by the police.

15. In am of the firm view that such contradiction is not as such for psychological reasons so as to disbelieve the entire prosecution story as brought about by the informant. He admitted that both the parties were the descendants of common ancestor sharing common courtyard in the house. He further deposed that only the Ansari people were living in his village and no people of other community including the Tribal people used to live there. He admitted that after occurrence the accused persons shifted to another village Baro after disposing of their land in favour of the informant and his brothers by executing sale deeds and that their land was in possession of the informant. He denied the suggestion that with the intention to usurp the lands of the appellants the case was brought about.

16. PW 6 Dr. Bhola Nath Sahay had examined the informant PW 5 on 13.4.1989 at Primary Health Centre, Kanke and found the following injuries.

(i) Scratch 1"x1/2" just below the left eye; and

(ii) Swelling 1"x1/2" on the right hand. The injuries were simple caused by hard and blunt substance like sticks within 12 hours.

17. The witnesses admitted having further examined the accused Qamruddin on the subsequent day on 14.4.1989 at 9 a.m. and found only one scratch 1/2"x1/4" on his head, simple in nature caused by hard and blunt substance like stick within 12 hours.

18. PW 7 Raimunnisha is the widow of Imamuddin who is also victim witness.

She has also given the corroborative account of the occurrence as to how when she rushed to rescue her husband she was assaulted by the appellant Mobarak Hussain by inflicting injury on her arm and it was Qamruddin who had abetted. PW 2 Jaitunnisha is the wife of the informant Habib Ansari. She in her deposition has also given an account of the occurrence as the eyewitness and supported the prosecution case. Both the witnesses stood to the test of cross-examination nothing material could be elicited by the defence to disbelieve their evidence.

19. PW 9 Hasina is the wife of another son Hanif Ansari (PW 3) of the deceased. She appeared at the scene of occurrence on hearing alarm. She by her deposition has also supported the manner of occurrence as the other eye-witnesses. PW 10 Khalil Ansari was tendered on behalf of the prosecution and nothing material could be obtained from his statement.

20. PW 11 is the Investigating Officer of the case who had recorded the statement of the informant Habib at Kanke Hospital and he proved several documents. The witnesses admitted having visited the place of occurrence on 14.4.1989 and found that the place of occurrence was washed by the use of dung which appeared to have recently washed. He seized Kurta and Towel of Imamuddin, which was used for stopping bleeding from his injuries and it were blood-stained. He proved the seizure list of such cloths as well as the inquest report which was prepared at R.M.C.H., Ranchi. The I.O. is specific that he had recorded the statement of the informant Habib at Kanke Hospital and that he could not record the statement of the boy Mubarak Hussain and the girl Laila Khatoon. He had found simple injury on the person of the accused Qamruddin but he did not enquire as to the cause of such injury.

21. On the basis of such evidence adduced and produced on behalf of the prosecution, the learned trial Court below observed that the occurrence had taken place on trifling dispute, which initiated on hot exchange of words and converted into altercation between the witness and the appellants which caused sudden provocation to the members of the accused party and one of the accused took out stick and without pre-meditation inflicted single blow over the head of Imamuddin and another blow on his shoulder. The learned Court further observed that the blow over the head fell on the vertex of head resulting crack fracture of the skull causing laceration of the brain matter. The Court found that Imamuddin was man of 55 years and the injury on his head caused fatal. The Court further observed that there was no intention from the side of the accused persons to commit murder of Imamuddin and the injuries were not as such to cause death and the injury was not sufficient as to cause death in ordinary course of nature rather the Court inferred that there was knowledge to the accused persons that such injury could cause death if inflicted on head. On such notion the Court convicted the appellant No. 1 Zeyaul Haque for the charge under Part II of Section 304, IPC and I do not find any irregularity or illegality so as to interfere therein. The judgment of conviction and order of sentence passed against the appellant Zeyaul Haque does not call for interference hence it is

maintained and upheld. But as regards the materials against appellant No. 2 Mobarak Hussain for the charge u/s 304/34 is concerned I do not find any material to share the view of the trial Court on the evidence adduced on behalf of the persecution and I find that in spite of the abetment of his father Qamruddin, the appellant Mobarak Hussain did not come forward to assault Imamuddin rather only on the arrival of the widow of the deceased to rescue her husband from being more assaulted, he inflicted blow with stick, which caused injury on the arm of PW 7 Ramunnisha. I am of the firm view that the materials on the record do not suggest that the appellant Mubarak Hussain had ever shared the common intention with the appellant Zeyaul Haque in inflicting bodily injury to Imamuddin (since deceased) with the knowledge that such assault may cause culpable homicide not amounting to murder. Therefore, I find and hold that the conviction of the appellant Mobarak Hussain under Part II of Section 304/34, IPC is unsustainable, illegal which calls for interference of this Court in appeal and accordingly it is set aside. The appellant Mobarak Hussain, therefore, is acquitted from his conviction and sentence in the aforesaid section.

22. But at the same time I find that there are sufficient materials on the record and the learned trial Court below has rightly convicted the appellant Mobarak Hussain for the offence u/s 323, IPC and was accordingly sentenced imprisonment for three months which does not call for interference of this Court in appeal and it is upheld. I am not inclined to modify his sentence of three months imprisonment in view of the fact and on the evidence that he had inflicted blow with stick when PW 7 rushed to rescue her husband Imamuddin (since deceased) from being more assaulted which displayed the dominant intention and the state of mind of the appellant Mobarak Hussain at the relevant time of occurrence.

23. With such modification, this appeal is allowed in part in favour of the appellant Mobarak Hussain in so far as his conviction under Part II of Section 304/34 is concerned and is dismissed against the appellant Zeyaul Haque with the observation made against Mobarak Hussain hereinabove.