IN THE HIGH COURT OF JHARKHAND AT RANCHI

Criminal Appeal (D.B.) No.792 of 2002

(Against the judgment of conviction dated 31.10.2002 and the order of sentence dated 01.11.2002 passed by the learned Additional Sessions Judge, FTC II, Hazaribag in Sessions Trial No. 45 of 1991)

Dhanu Gope, son of late Janki Gope, resident of village Kanki, PS Giddi, District Hazaribagh … Appellant(s).

Versus

The State of Jharkhand … Respondent(s).

PRESENT
SRI ANANDA SEN, J.
SRI PRADEEP KUMAR SRIVASTAVA, J.

For the Appellant(s) : Mr. Kaushik Sarkhel, *Amicus Curiae*
For the Respondent(s) : Mr. Saket Kumar, APP

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J U D G M E N T

3rd December 2024

***By Court*:** We have heard the learned *Amicus Curiae* appearing for the appellant and the learned counsel for the State at length.

2. This Criminal Appeal arises out of the judgment of conviction dated 31.10.2002 and the order of sentence dated 01.11.2002 passed in Sessions Trial No. 45 of 1991 whereby and whereunder learned Additional Sessions Judge, FTC II, Hazaribag convicted the appellant under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life.

3. We have gone through the entire depositions and the records of this case. As per the FIR which has been lodged by PW7 father of the deceased, it is alleged that there was some enmity between the family of the deceased and the appellant. The reason of the enmity is on the ground of grazing of the cattle. It is alleged in the FIR that his son who had left his house with his cattle did not return. In search of his son the informant went

to his school but couldn't found him there. He along with the teacher of the school went near the river when someone stated that a dead body was lying near the river. The informant went there and found the dead body which happened to be of son of the informant. It is stated that since there was some enmity between the appellant and the deceased, the appellant might have committed murder of the deceased. On the basis of suspicion, FIR was registered but this appellant was not named in the FIR. The FIR was against unknown, being Giddi PS Case No. 9 of 1990 under section 302 IPC.

4. After investigation, the Investigating Officer submitted chargesheet against this appellant and one another for the offence punishable under Section 302/34 of the Indian Penal Code and the appellant was put on trial.

5. On the basis of chargesheet and materials available on record, cognizance was taken and the case was committed to Court of Sessions where charge was framed under Section 302/34 of the Indian Penal Code and trial proceeded.

6. To prove the prosecution case, altogether 9 witnesses were examined by the prosecution, who are as under:-

i. PW1 :- Bimli Devi
ii. PW2 :- Jirwa Devi
iii. PW3 :- Praduman Ram
iv. PW4 :- Bilaso Devi
v. PW5 :- Jageshwar Yadav
vi.PW6:- Dr. Binay Kumar
vii.PW7:- Gopal Mandal
viii.PW8:- Kaushalya Devi
ix.PW9:- Sri B.N. Prasad, SDJM

7. Following documents have been exhibited :

i.	*Ext.1 –*	*Signature on Fardbeyan*
ii.	*Ext. 1/1–*	*Signature on carbon copy of Inquest Report*
iii.	*Ext.1/2 –*	*Signature on search cum seizure list*
iv.	*Ext.2 –*	*Postmortem report (carbon copy)*
v.	*Ext.3 to 3/7-*	*Statement of witnesses under section 164 Cr.PC*

8. The important witnesses are PW1 and PW4. PW4 is the sister of the informant. She stated that she was also grazing cattle and goats when she saw this appellant assaulting the deceased and committing his murder. She also stated that she had narrated the aforesaid fact to her brother who is the informant. From simple reading the evidence of this witness, one would come to the conclusion that she is an eye witness of the commission of murder. Now if we scrutinize her statement properly, we will have to arrive at a different conclusion. In her statement she stated that she had narrated the entire fact of assault and commission of murder by this appellant, to the informant but surprisingly the informant in his FIR has not whispered about the aforesaid fact. He even does not take the name of PW4 in the entire FIR. A question was put to this witness as to whether she had narrated the same thing to the investigating officer while giving her statement under section 161 Cr.PC or not. She answered it in affirmative. But in this case investigating officer has not been examined. Thus contradiction, if any, could not be verified by the defence.

9. Though we are not supposed to go through the case diary but since the investigating officer was not examined and since there is a major contradiction which has been raised by the defence, we have gone through the statement recorded under section 161 Cr.PC of this witness. After going through the statement under section 161 Cr.PC of this witness, we find that she had not stated before the investigation officer that she had seen this appellant assaulting the deceased and committing the murder. Thus PW4, according to us, is not at all a reliable witness, thus her statement is not considered.

The another important witness is PW1 who had stated that she had seen the deceased going along with the cattle towards

the river and this appellant following him. The prosecution has tried to put forward the circumstances that the deceased was last seen along with this appellant. This PW1 is sister of the deceased and daughter of the informant. But this fact had also not been narrated in the FIR. The theory of last seen is a circumstance. If this circumstance is put forth by any of the prosecution witness in evidence, this circumstance should be placed before the accused when they are examined under section 313 Cr.PC. This fact that they were "last seen" in company of the deceased, had not been put to the accused while they were examined under section 313 Cr.PC. We have gone through the statement recorded under section 313 Cr.PC. Only two questions have put to them, one about the quarrel between them and the second is why the witnesses have stated that this appellant had committed murder of the deceased. Atleast one of the questions is absolutely irrelevant in the fact of this case.

10. If a relevant question is not put to the accused while recording his statement under section 313 Cr.PC., the same can be said to have caused prejudice to the appellant. It is true in terms of the judgment of the Hon'ble Supreme Court in *"Nar Singh vs. State of Haryana"* reported in *(2015) 1 SCC 496* the Appellate Court has an ample power to remand the matter to the Trial Court to get the statement recorded again, but the Hon'ble Supreme Court in paragraph no. 30.4 has held that the Appellate Court may decline to remit the matter to the Trial Court for re-trial on account of long time already spent in the trial of the accused persons. The Appellate Court then has the power to decide the case on merits keeping in view the prejudice caused to the accused.

11. In this case by not putting the relevant question definitely caused prejudice to the appellant. Further this is an incident of

the year 1990 and the impugned judgment is of 31.10.2002. Today, we are in December 2024. Thus, it would not be proper, in view of the judgment of the Hon'ble Supreme Court, to remit matter for re-trial.

12. PW7 is the informant, who is definitely not an eye witness. He went in search of the deceased and found the dead body near the river bank. Be it noted that the FIR is against unknown. Further from the evidence, it is suggestive that PW1 never whispered what PW4 or PW1 had narrated about the incident, before the informant. If at all they had narrated the same to the informant, the FIR would not have been against unknown. Thus, if all the circumstances are discarded, the only circumstance which remains is that a few days ago some quarrel had taken place between the parties. There is no corroborative evidence of the said quarrel. Further as held non-examination of the investigating officer has prejudiced the appellant.

13. PW6 is the doctor who conducted the postmortem on the dead body of the deceased and found the following injuries:

> *"Incised wound over the top of head measuring 2" x 1" x bone deep and incised wound on the right side of forehead measuring 2" x 1" bone deep."*

The postmortem report had been marked as Exhibit-2. He opined that cause of death is due to cut over skull bone by sharp cutting weapon.

14. Though the deceased died homicidal death, as per the evidence of the doctor PW6 and the postmortem report, there is no evidence to link this appellant with the commission of the homicidal death. The chain of circumstances is not complete nor each chain has been proved by the prosecution. Thus, by giving benefit of doubt, we allow this appeal after acquitting this appellant.

15. The conviction of the appellant under Section 302 of the Indian Penal Code vide judgment of conviction dated 31.10.2002 passed by learned Additional Sessions Judge, FTC II, Hazaribagh in Sessions Trial No. 45 of 1991, is hereby set aside and, accordingly, the sentence awarded by the learned Trial Court vide order of sentence dated 01.11.2002 is also set aside.

16. The appellant is on bail. He is discharged of the liabilities of the bail bonds so are the bailors.

17. Before parting, we appreciate the effort of Mr. Kaushik Sarkhel, the learned counsel as *Amicus Curiae* of this case.

18. Let a copy of the judgment along with the Trial Court Records be sent back to the Court concerned forthwith.

(ANANDA SEN, J.)

(PRADEEP KUMAR SRIVASTAVA, J.)

High Court of Jharkhand, Ranchi
Dated : 03/12/2024
Tanuj/

N.A.F.R.