

Cr. Appeal (D.B.) No. 176 of 2006

.....

(Against the judgment of conviction dated 26.06.2004 and order of sentence dated 28.06.2004 passed by learned Additional District and Sessions Judge, Fast Track Court, No.1, Gumla in Session Trial No.65 of 2003).

.....

Biro Kharia, S/o Haru Kharia, P.S.- Palkot, District- Gumla..... **Appellant**

Versus

The State of Jharkhand

.... Respondent

.....

For the Appellant : Mr. Sanjay Kumar Pandey No.2, Advocate

For the State : Mr. Bhola Nath Ojha, Additional Public Prosecutor

PRESENT

Sri Ananda Sen, J.

Sri Gautam Kumar Choudhary, J.

J U D G M E N T

CAV On 09.09.2024

Pronounced On 17/09/2024

Per Ananda Sen, J.:

The instant criminal appeal is directed against the conviction of the sole appellant under Sections 302 of the Indian Penal Code vide judgment of conviction dated 26.06.2004 and order of sentence dated 28.06.2004, whereby he has been sentenced to undergo rigorous imprisonment for life.

2. The prosecution case is based on the *fardbeyan* of Sukra Kharia (P.W.-5). He stated that his younger brother, Budhwa Kharia went to Palkot market and while returning at about 07.00 P.M., when he reached near Village- Upar Khambhan, the accused, Biro Kharia, who is his uncle, along with his wife, daughter and Lohar Kharia assaulted Budhwa Kharia with stones and sticks on his head. When Budhwa Kharia became seriously injured, all the accused persons fled from there. This information was conveyed to him by the villagers of 'Upar Khambhan'. After receiving such information, his whole family went to the place of occurrence and he found his younger brother injured seriously and he was not speaking. Then they brought him to Primary Health Centre, Palkot from where the

Doctor referred him to the Sadar Hospital, Gumla. On the way he died. It has been stated that cause of this incident was land dispute.

3. On the aforesaid *fardbeyan*, Palkot P.S. Case No.14 of 2002 was registered under Sections 302/34 of the Indian Penal Code. The police after investigation filed chargesheet against the appellant under Sections 302/34 of the Indian Penal Code.

4. Thereafter the Court took cognizance and committed the case to the Court of Sessions. As the appellant pleaded not guilty, charge was framed and he was put on trial. Seven witnesses have been examined in this case, who are as follows:-

- (i) P.W.-1 Yugal Singh
- (ii) P.W.-2 Gulpa Ram Negasia
- (iii) P.W.-3 Ratia Kullu
- (iv) P.W.-4 Sukro Devi
- (v) P.W.-5 Sukra Kharia, informant of this case
- (vi) P.W.-6 Dr. Ajit Kumar Agrawal
- (vii) P.W.-7 Rana Vijay Kumar Singh, Investigating Officer in this case.

5. The following documents and material objects were also exhibited by the prosecution:-

- Exhibit-1 Signature of Jugal Singh on inquest report (carbon copy)*
- Exhibit-1/1 Signature of Ratia Kullu on carbon copy of inquest report*
- Exhibit- 2 Signature of Sukra Kharia on fardbeyan*
- Exhibit-2/1 Signature of Pairo Tirkey*
- Exhibit-3 Postmortem report*
- Exhibit-4 fardbeyan*

The Trial Court after completion of the prosecution evidence examined this appellant under Section 313 of Cr.P.C. and after hearing the parties, convicted the appellant under section 302 of IPC and sentence as aforesaid.

6. Challenging the judgment, learned counsel appearing on behalf of the appellant submitted that it is the prosecution case that P.W.-2 and P.W.-3 are the eye witness. P.W.-2 stated during evidence that he is an eye witness and seen the occurrence, but his statement cannot be believed as the Investigating Officer (P.W.-7) in his evidence had clearly stated that, no such statement was given by him that he had seen the occurrence, during investigation. Further, P.W.-3 is also a hearsay witness, who gathered the information of the occurrence

from P.W.-1, who himself was declared hostile. As per him the statement of P.W.-4, who is the wife of the deceased to the effect that she went to the place of occurrence and saw her husband lying in pool of blood in injured condition, who stated before her that it is this appellant, who had committed murder, is also not believable as in the F.I.R. itself, the informant had not stated that the deceased made any disclosure regarding this incidence, rather he stated that he was not in a position to speak. Thus infact there is no other eye witness in this case. Further, he stated that the deceased died due to an accident, which is evident from the post-mortem report, which suggest that he fell over some rock while cycling and the cycle was also found lying over the deceased, when the informant and others reached the place of occurrence. On this ground, he prays that this appeal will be allowed.

7. Learned counsel for the State argues that from the medical evidence and post-mortem report, it is clear that the death is homicidal. P.W.-2 clearly stated that he had seen this appellant assaulting the deceased. He stated that it is not necessary to divulge the name of the person, who had informed the informant about the occurrence and about the involvement of this appellant. P.W.-2 is also from Upar Khambhan thus, non-mentioning his name in the F.I.R. is not fatal.

8. The prosecution in this case through P.W.-6, the Doctor proved that the death of the deceased is homicidal. The post-mortem report is Exhibit-3. The Doctor found the deceased was bleeding from the left ear and also found the following injuries:-

"(i)Bandaged head and face on opening, one unstitched lacerated wound of about 4"x 1" brain deep vertically placed over left side of occipital region of head with fracture of left parieto occipital bone 4" size in sagittal plane. On cut section there was subdural hematoma with laceration of brain and meninges.

(ii)Unstitched one lacerated wound of about 3"x ½"x ½" below left eye.

(iii)One abrasion 1"x ½" below right eye.

(iv)One lacerated wound of 1"x ½"x scalp deep over left eye-brow.

(v)Two abrasions 1"x 1" over right knee and ½"x ½" two inch below right knee.

(vi) One abrasion 2"x 1/2" over left side of face."

He opined that all the above injuries were antemortem in nature caused by hard and blunt substances. Injury No.1 was grievous and the same was sufficient to cause death in ordinary course of nature. The doctor further opined that the cause of death is shock due to brain injury and hemorrhage. He further stated that these types of injuries can be caused by stone and stick. Though in cross-examination, he stated that the injury can also be caused due to fall on rocky area, but considering the nature of injuries and numbers of injuries on the person, we are not inclined to accept the argument of the learned counsel for the appellant that death is accidental. We hold that the death is homicidal. Thus, the prosecution has proved the death to be homicidal.

9. Now, the next issue is whether the prosecution is able to prove the charge against the appellant that he assaulted the deceased or not. To prove the charge there are two main witnesses i.e. P.W.-2 and P.W.4. P.W.-2 stated that while he was returning from the market, he saw the appellant, his wife, daughter and another accused assaulting the deceased with stone and stick. As per the statement of this prosecution witness, he appears to be an eye witness. In cross-examination, he stated that his statement was recorded by the police during investigation. He was confronted that he had not narrated the fact of the incident to the police during investigation to which, he denied it. However, P.W.-7, the Investigating Officer at paragraph- 8, specifically admitted that this witness had not stated before him during investigation that it is this appellant and others, who assaulted the deceased and committed the murder. Though in the F.I.R., the informant stated that he had received information about the fact that it is this appellant along with his family members, who had assaulted the deceased, but surprisingly, reference of P.W.-2 is not there in the F.I.R. From the aforesaid evidence, it is clear that for the first time in the Court, this witness had stated about the

involvement of this appellant. Weighing his testimony, we hold that he is not actually an eye witness to the occurrence. He is not a reliable witness.

10. Another witness to substantiate the prosecution case is P.W.-4, who is none, but the wife of the deceased. She states that on receiving information about the injury and assault upon the deceased, she along with family members went to the place of occurrence, where she found her husband in injured condition, who stated that it is this appellant, his wife, daughter and nephew, who had assaulted him by stick and stone. She further stated that thereafter she took him to Palkot Hospital and from where the Doctor referred him to Gumla, but on the way, he died. However, P.W.-7 the Investigating Officer at para 10 of his evidence has stated that the said witness did not disclose before him that when she reached the place of occurrence, her husband asked him for water and disclosed the fact and then, he fell unconscious. Further she did not disclose also that her husband had told her the name of the assailants. Thus, there is improvement in her version while deposing in Court. Accordingly, to us she is also not a reliable witness.

11. The informant is P.W.-5, who admittedly is not an eye witness. He stated that on receiving the information, he went to the place of occurrence where the deceased asked for water and narrated to him that it is this appellant and others, who had assaulted him. This fact which, he states in his evidence is surprisingly missing in the *fardbeyan*. In the *fardbeyan*, he had not stated that the deceased was in a position to talk when he reached the place of occurrence. He, rather in the F.I.R. stated that the deceased was not in a position to speak. This fact clearly suggest that this witness had developed and improved the story and tried to introduce a dying declaration by the deceased. This important information and disclosure of the important fact is missing in the F.I.R., which in the very first version of the prosecution about the offence. This makes the testimony of the informant on this point, to be unreliable.

12. From the discussion of the aforesaid evidence, the credibility of three witnesses i.e. P.W.-2, P.W.-3, P.W.-4 and P.W.-5 becomes doubtful. Except these witnesses, admittedly there is no eye witness to the occurrence and those witnesses only stated that there was a land dispute between the parties. To prove the said land dispute there is no other material before us save and accept the oral statement. Since we have rejected the evidence of P.W.-2, P.W.-3 and P.W.-5 on the ground that they are unreliable, there are no material before us on record to come to a conclusion that this appellant had committed the offence.

13. In absence of any credible eye witness, this case is thus based on circumstances. However, no circumstances have been proved by the prosecution to implicate this appellant. There is reasonable doubts in the case of the prosecution. Thus, I acquit the appellant holding that the prosecution has failed to prove the guilt of this appellant beyond all reasonable doubts. The judgment of conviction dated 26.06.2004 and order of sentence dated 28.06.2004 passed by learned Additional District and Sessions Judge, Fast Track Court, No.1, Gumla in Session Trial No.65 of 2003 is hereby set aside.

14. Accordingly, the instant Criminal Appeal is allowed.

15. As the appellant is already on bail, he and his bailors are discharged from the liabilities of the bail bonds.

16. Let Trial Court Records along with a copy of this judgment be sent to the concerned trial court forthwith.

17. Interlocutory application, if any, also stands disposed of.

(Ananda Sen, J.)

Gautam Kumar Choudhary, J: I agree.

(Gautam Kumar Choudhary, J.)