

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Criminal Appeal (D.B.) No.7 of 2011

(Against the judgment of conviction dated 30.11.2010 and order of sentence dated 06.12.2010 passed by learned Additional Judicial Commissioner, Fast Track Court X, Ranchi in Sessions Trial No. 325 of 2009)

Anil Oraon @ Oraon @ Anil Bhagat, aged about 35 years, son of late Shilvanus Oraon, resident of village Chama, Baltharwa, PS and PO Chanho, Ranchi
... Appellant(s).

Versus

The State of Jharkhand
... Respondent(s).

PRESENT
SRI ANANDA SEN, J.
SRI GAUTAM KUMAR CHOUDHARY, J.

For the Appellant(s) : Mr. Indrajit Sinha, Advocate
Mr. Suraj Verma, Advocate
For the Respondent(s) : Mr. Tarun Kumar, APP
.....

J U D G M E N T

CAV on : 07th August 2024

Pronounced on : 22/08/2024

Per Ananda Sen, J.: This Criminal Appeal arises out of the judgment of conviction dated 30.11.2010 and order of sentence dated 06.12.2010 in Sessions Trial No. 325 of 2009 whereby and whereunder learned Additional Judicial Commissioner, Fast Track Court X, Ranchi convicted the appellant under Section 302/34 of the Indian Penal Code and Section 27(1) of the Arms Act and sentenced him to RI for life with fine of Rs. 500/- and in default of payment of fine, further RI for 15 days for the charge under Section 302/34 of the Indian Penal Code and RI for 3 years with fine of Rs. 500/- and in default of payment of fine, further RI for 15 days for the charge under Section 27(1) of the Arms Act.

2. The learned counsel for the appellant submits that the conviction is based on the testimony of the sole witness i.e. PW7 and as per the ratio laid down by the Hon'ble Supreme Court in

“State of Maharashtra vs. Dinesh” reported in (2018) 15 SCC 161 he could not have been convicted.

It is further argued that the Investigating Officer has not been examined in this case and the credibility of PW7 is in doubt. As per his deposition, he remained hidden and had seen the occurrence from the house of Jitu Munda, whereas the wife of Jitu Munda (PW9) has deposed that no one had entered her house. After the occurrence, as per his deposition, he found a mobile phone there, which belonged to one of the assailants and he handed over it to the police but no such mobile was seized or produced to fix the identity of the assailant(s) in the present case.

It is submitted that failure to prove the same should be a circumstance for drawing adverse inference under the Indian Evidence Act. He submits that the conviction with the aid of section 34 of the Indian Penal Code is bad as there is nothing about the other assailants.

3. The learned counsel for the State submits that there is no material to discredit PW7. PW7 is the cousin brother of the deceased and was with the deceased when the deceased was shot dead. PW7 is a reliable witness as he was along with the deceased on the same cycle when the assault had taken place. Place of occurrence is in front of the house of PW9, who saw the dead body in the ditch near the house. He further submits that the ocular evidence matches with the medical evidence. PW3 has admitted that a mobile phone was seized from the place of occurrence which corroborates the statement of PW7 who is eye-witness to the occurrence. PW4 also admitted recovery of a mobile phone from the place of occurrence where the dead body was lying. Both PW3 and PW4 supported their respective statements and the statement given by each other, which proved recovery of mobile phone. The place from where the dead body

was recovered was also proved from the evidence of PW7 and PW8. Doctor also found gunshot injury on the deceased. Thus, he claims that the prosecution has proved the guilt of the appellant beyond all reasonable doubt and there is no scope of acquittal of the appellant.

4. The case of the prosecution based on the fardbeyan of Vinay Lakra (informant), who is the cousin brother of deceased-Arun Tirkey. On 29.10.2008 he along with Arun Tirkey went to village Navatoli and at 11:30 a.m. while returning from Nawatoli after watching a cock fight, on the way their cycle got punctured. Anil Bhagat and two unknown persons came on a motorcycle and Anil Bhagat fired shot upon Arun Tirkey and when Arun Tirkey tried to flee, the other two assailants chased and shot him dead. Due to fear Vinay Lakra hide himself in the house of Jitu Munda and when the assailants fled away, he went to that place and found Arun Tirkey dead. The informant stated that Anil Bhagat with his associates had committed murder of the deceased due to previous enmity.

5. After investigation, the Investigating Officer submitted chargesheet on 31.01.2009 against the appellant for the offence punishable under Section 302 of the Indian Penal Code and Section 27 of the Arms Act.

6. On the basis of chargesheet and materials available on record, Chief Judicial Magistrate took cognizance on 20.02.2009 for the offence punishable under Section 302 of the Indian Penal Code and Section 27 of the Arms Act. The case was committed to the Court of Sessions where charges were framed under Section 302/34 of the Indian Penal Code and Section 27 of the Arms Act and trial proceeded.

7. To prove the prosecution case, altogether 11 witnesses were examined by the prosecution whose names are here under:-

- i. PW1 :- Birsa Uraon*
- ii. PW2 :- Basant Uraon*
- iii. PW3 :- Manoj Tirkey*
- iv. PW4 :- Anit Tirkey*
- v. PW5 :- Mehendi Hassan*
- vi. PW6 :- Sanjay Uraon*
- vii. PW7 :- Vinay Lakra*
- viii. PW8 :- Prakash Munda*
- ix. PW9 :- Sumitra Devi*
- x. PW10 :- Dr. Samarina Kamal*
- xi. PW11 :- Rameshwar Mahto*

8. PW1 (Birsa Uraon) and PW2 (Basant Uraon) have been declared hostile because they showed ignorance about the occurrence.

PW3 (Manoj Tirkey) was the cousin of the deceased. He stated that he had gone to Pani Mahua village to take the dead body. The police prepared the inquest report and he put his signature on the inquest report which was marked as Ext.1. A mobile phone was also recovered from there which was seized and the seizure list of mobile phone which was signed by him was marked as Ext.2. In his cross-examination he stated that at about 1:30 to 2:00 PM he went to take the dead body but he got it on the next day at about 11:00-12:00 O'clock. He further stated that seized mobile was not in the Court. He and Anit Tirkey together signed the paper.

PW4 (Anit Tirkey) stated that he put his signature on the inquest report prepared by the police and further stated that a mobile phone was seized near the dead body and he had put his signature on the seizure list which was marked as Ext. 2/1. In his cross-examination he stated that he does not know what was written in the paper. He further stated that seized mobile was not produced. He stated that he and Manoj Tirkey together signed the paper.

PW5 (Mehandi Hassan) was the brother-in-law of the deceased. He stated that on 29.10.2008 at about 1:30 PM Vinay Lakra informed him about murder of Arun Tirkey by Anil Oroan, Shambhu Bhagat and one more person. On reaching the place of occurrence he saw fire arm injury on the back of the deceased and one mobile phone ringing but he did not receive the call. They saw three persons coming in a motorcycle to retrieve the mobile phone but on seeing them they returned. In his cross-examination he stated that his statement was recorded after the fardbeyan was recorded. He further stated that he told the police that the accused persons came to take mobile phone but seeing them, they returned and at that time no one was there except them. When they reached the place of occurrence, police was not present there. He stated that he informed the police about the occurrence at about 1:30 PM. He went to the matrimonial home to inform about the occurrence. Police reached the place at about 3:30 to 4:00 PM when Vinay Lakra was present at the place of occurrence.

PW6 (Sanjay Uraon) has also been declared hostile.

PW7 (Vinay Lakra) is the informant and cousin brother of the deceased. He has stated that on 29.10.2008 at about 11:00 AM when they were returning from Navatoli after seeing a cock fight and reached near Pani Mahua, their cycle got punctured and they were on their foot. By that time accused Anil Bhagat and two more persons came there by a black Bullet and Anil Bhagat fired shot upon Arun Tirkey. The deceased tried to run away but the accused persons chased and shot him dead. Out of fear he hide himself in the house of Jitu Munda. When the accused fled away he went to the place of occurrence and found that blood was oozing from back and buttock of the deceased. One black colour Nokia mobile set was lying there. He stated that he

informed the police. After reaching the place of occurrence, police has recorded his fardbeyan. In his cross-examination he stated that he informed Mahandi Hassan after half an hour about the occurrence and Mahandi Hassan has informed the police through mobile phone. He stated that he reached the place of occurrence after five minutes.

PW8 (Prakash Munda) stated that one year back at noon on hearing sound of firing he went outside and saw one dead body lying in a ditch which he could not identify. In his cross-examination, he stated that he had seen one dead body in the ditch but did not find any mobile or any motorcycle near the place of occurrence.

PW9 (Sumitra Devi) stated that the occurrence took place one year back on the occasion of Diwali festival at noon. While hearing a sound like cracker she went outside and saw one person lying in the ditch and was dead. She does know who he was. In her cross-examination she denied any person was hiding in her house and had not seen any mobile in the ditch or any motorcycle near the place of occurrence.

PW10 Dr. Samarina Kamal, who conducted the postmortem examination of the deceased-Arun Tirkey on 30.10.2008 at about 11:15 AM and found the following fire arm injuries:

- i. First wound of entrance - 1 cm x $\frac{1}{2}$ cm with abraded and inverted margin over medial side of right thigh upper part. The projectile passes through soft tissues and makes exit wound. $\frac{1}{2}$ x $\frac{1}{2}$ cm of middle of right buttock. The track of wound contused.
- ii. Second wound of entrance - 1 cm diameter which is surrounded by muzzle impression situated over back of right side of chest 3 cm right to mid line at the level of 4th thoracic vertebra. Projectile passes through soft tissues breaks the 4th thoracic vertebra then perforates left lung, breaks left second rib, then passes through soft tissues and breaks the left humerus bones, from where a bullet has been found lodged.

Track of wound is contused and lacerated with presence of blood and blood clot in thoracic cavities.

iii. Third wound of entrance grazing the middle finger proximal phalanx with fracture of proximal phalanx.

The doctor opined that the injuries are ante mortem, caused by fire arm and death is due to hemorrhagic shock as a result of above noted fire arm injuries. The doctor also opined that the time of death is between 12 hours to 36 hours from the time of conducting the postmortem.

PW11 (Rameshwar Mahto) formally proved the fardbeyan, endorsement thereon, formal FIR, seizure list and carbon copy of the inquest report.

9. Following documents have been exhibited :

- i. *Ext.1 and 1/1 – Signatures of witnesses on inquest report.*
- ii. *Ext.2 and 2/1 – Signatures of witnesses on seizure list.*
- iii. *Ext.3 – Signature of informant on fardbeyan*
- iv. *Ext. 4 – Post-mortem Report of the deceased*
- v. *Ext. 5 – Fardbeyan*
- vi. *Ext. 5/1 – Endorsement on fardbeyan*
- vii. *Ext. 6 – Formal FIR*
- viii. *Ext.7 – Seizure list*
- ix. *Ext. 8 – Carbon copy of the inquest report.*

10. After conclusion of the evidence, the statements of the appellant was recorded under Section 313 of Cr.P.C.

11. Ultimately the Trial Court after hearing the arguments and appreciating the evidence found the appellant guilty and convicted him under Section 302/34 of the Indian Penal Code and Section 27(1) of the Arms Act and sentenced him as aforesaid.

12. From the evidence laid by the prosecution, I find that Investigating Officer of the case has not been examined. The defence has to show prejudice for non-examination of the Investigating Officer. In the instant case the defence has stated that PW9 denied the fact that any person came running to hid in her house nor she has seen any mobile phone in the ditch nor

any motorcycle. Her statement could have easily been verified if the Investigating Officer would have been examined. But non-examination of the Investigating Officer has thus caused prejudice. PW8 also stated that he did find any motorcycle or mobile phone at the place of occurrence.

13. In my opinion, there is no much substance in the argument of the learned counsel appearing on behalf of the appellant on this point. PW7 is the eye-witness to the occurrence and he was all along with the deceased. He stated that this appellant along with two persons came in a motorcycle and shot at the deceased. The deceased tried to run away but the accused persons chased and shot him dead. A black color nokia mobile set fell at the place of occurrence. Recovery of this mobile set from the place of occurrence has been proved by PW3 and PW4 who are the seizure list witnesses. They categorically stated a mobile phone was recovered from the place of occurrence and these two witnesses have put their signature in the seizure list. They stated that seizure was in their presence. As per their statement mobile phone was recovered near the body of the deceased. PW3 stated that PW4 was a seizure list witness and in their presence mobile was seized. Same was the statement by PW4. Thus presence of mobile phone near the dead body and seizure of the same has been proved by the prosecution. Their statement clearly suggest that PW9 is not a fully reliable witness.

14. So far as the occurrence is concerned, PW7 is the informant, and the eye witness. He stated that he was all along with the deceased. When they were returning from village Navatoli and as their cycle got punctured they were on foot when this appellant and two other persons came on black bullet motorcycle and shot upon the deceased. The deceased tried to flee but he was shot dead. He stated that blood was coming from

the back and buttock of the deceased. Out of fear he fled and took shelter in the house of PW9. Though on the point of taking shelter in the house of PW9, PW9 has denied the fact but as stated earlier she is not a fully reliable witness. She admits that she had seen the dead body lying near her house and has heard gunshot (though said sound of cracker) but denies the other facts. From the evidence of the doctor PW10 who has conducted postmortem, I find that the statement of PW7 so far as the injuries are concerned is corroborated. The first wound of entrance is on the upper part of the right thigh and the exit wound is from the middle of right buttock. Second entrance wound is on the chest which perforated the lungs and ribs. The bullet was also found. This clearly proves the statement of PW7 i.e. the informant who was the eye-witness. PW5 who reached the place of occurrence after the incident had taken place also stated that he had seen fire arm injury on the back of the deceased. He also stated about the presence of mobile phone next to the body of the deceased.

15. It is true that when there is single eye-witness in support of the crime, his statement should be weighed cautiously. If there is any element of doubt the Court should not believe his statement. In this case the entire prosecution case hinges on the statement of PW7. This PW7 was with the deceased throughout and he has seen the occurrence. There is nothing to disbelieve him. The defence tried to doubt his credibility by taking a plea that this witness has stated that he has fled to the house of PW9 but PW9 denied the aforesaid fact. PW8 and PW9 also denied the presence of mobile phone on the place of occurrence, but this argument of the defence is not accepted. I am really doubting the integrity of PW8 and PW9 because as held earlier it was PW3, PW4 and PW5 who have clearly supported PW7 about the presence of mobile

phone and place of the occurrence and its seizure. Further the statement of PW7 so far as injury is concerned is corroborative with the medical evidence thus I find nothing to disbelieve PW7. Further PW7 stated that the deceased was shot from behind which is also corroborated by the postmortem report. PW8 and PW9 did not deny the existence of the dead body in front of their house, which is the place of occurrence. I don't find any materials from the evidence to disbelieve the sole eye witness PW7.

16. In "*Amar Singh vs. State (NCT of Delhi)*" reported in (2020) 19 SCC 165 the Hon'ble Supreme Court has held as under:

16. Thus, the finding of guilt of the two appellant-accused recorded by the two courts below is based on sole testimony of eyewitness PW 1. As a general rule the court can and may act on the testimony of single eyewitness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony, the courts will insist on corroboration. It is not the number, the quantity but quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise [see *Sunil Kumar v. State (NCT of Delhi)* [*Sunil Kumar v. State (NCT of Delhi)*, (2003) 11 SCC 367 : 2004 SCC (Cri) 1055]].

17. Further, I find that in this case there are two other accused also. However, the police has not submitted chargesheet against those accused. Thus, convicting the appellant with the aid of section 34 of the Indian Penal Code is bad as there is nothing about the other accused. However, in view of the evidence of witnesses and the documentary proof, the prosecution has fully proved its case against the appellant under 302 of the Indian

Penal Code. Thus, taking aid of section 34 of the Indian Penal Code is of no relevance.

18. In view of what has been held above, I hold that the prosecution has been able to prove the guilt of the appellant beyond all reasonable doubt. The judgment of the trial Court calls for no interference. Thus, the judgment of conviction and order of sentence passed by the trial Court in the case is thereby sustained.

19. Criminal Appeal (DB) No. 07 of 2011 is thus dismissed.

20. Since the appellant is on bail, his bail is cancelled. He is directed to surrender before the Court concerned within four weeks to serve the rest of the sentence failing which the trial Court will take appropriate steps to take the appellant in custody.

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

(ANANDA SEN, J.)

GAUTAM KUMAR CHOUDHARY, J. - I agree.

(GAUTAM KUMAR CHOUDHARY, J.)

High Court of Jharkhand, Ranchi

Dated : 22/08 / 2024

Tanuj/

.A.F.R.