

IN THE HIGH COURT OF JHARKHAND AT RANCHI

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Cr. Appeal (D.B.) No. 159 of 2003

(Against the judgment of conviction dated 10.01.2003 and order of sentence dated 13.01.2003 passed by learned Additional District and Sessions Judge (Fast Track Court No.II), Gumla in S.T. No.187 of 1988)

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Mustafa Mian @ Mustafa Khan, S/o Rahul Mian, R/o Village Jarda, P.S. Dumari, Dist. Gumla

..... Appellant

Versus

The State of Jharkhand

.... Respondent

.....

For the Appellant : Mr. Ayush Kumar Verma, Advocate

For the State : Mr. Pankaj Kumar Mishra, Addl. Public Prosecutor

PRESENT

Sri Ananda Sen, J.

Sri Gautam Kumar Choudhary, J.

J U D G M E N T

25.11.2024

By Court:

This criminal appeal is preferred against the judgment of conviction dated 10.01.2003 and order of sentence dated 13.01.2003 passed by learned Additional District and Sessions Judge (Fast Track Court No.II), Gumla in S.T. No.187 of 1988, whereby the sole appellant was convicted under Sections 302/149 of IPC and sentenced to undergo Rigorous Imprisonment for life.

2. Learned counsel for the appellant submits that except P.W.-1 there is no eye witness to the said occurrence. The other witnesses, who were present at the place of occurrence i.e. P.W.-2, P.W.-3, P.W.-4, P.W.-6 and P.W.-10 have been declared hostile. P.W.-5 is a hearsay witness. He argues that solely on the basis of the statement of P.W.-1, when admittedly there was dispute between her and the other accused persons, being the family members of the deceased, it would not be proper to convict this appellant for committing offence punishable under Section 302 of IPC. He further submits that there is no

application of Section 149 of IPC in the instant case. As per him, the place of occurrence has also not been proved as the Investigating Officer has not been examined in this case, which caused prejudice to the appellant. In fact, the *fardbeyan* and the inquest report has also not been exhibited, which is also fatal for the prosecution. The medical evidence clearly suggests that deceased did not die because of the alleged assault inflicted upon him by this appellant and if Section 149 of IPC is not applicable in this case, the appellant cannot be convicted for offence under Section 302 of IPC. On these grounds, learned counsel for the appellant prays for acquittal.

3. Learned counsel for the State submits that P.W.-1 is the wife of the deceased and is a reliable witness. She had the occasion to witness, both the assaults inflicted upon her husband. The first part of the occurrence had taken place outside the house of Guthli Baraik and the second part of the assault had taken place in front of the house of Mahju Naik. There were more than five persons in the house of Mahju Naik, thus, Section 149 of IPC is applicable. Even though as per P.W.-1, the assault on the head by iron rod was given by one Lepa, the presence of this appellant at the place of the occurrence has been proved by the P.W.-1. He further submits that medical evidence also establishes head injury, which is the cause of death. Thus, this appeal needs to be dismissed.

4. Prosecution story as per the *fardbeyan* of the informant- Sita Devi [P.W.-1], who is the wife of the deceased is that on 03.09.1987 at around 08.00 P.M., Guthli Baraik invited the informant and her husband on the occasion of Karma festival. Both went to her house. After offering prayer of Karma Puja, in the house of Guru Charan Baraik, the informant and her husband returned to the house of Guthli Baraik and they also consumed liquor. At night at about 10.00 P.M., her younger brother-in-law, Sunder Naik @ Lepa Naik and Mustafa Mian

(appellant) came and called for Ritua Baraik. As Ritua Baraik did not go out, the husband of informant namely, Karu Naik (deceased) came out to the house and the informant also followed him. Mustafa Mian (appellant) after catching the hand of the husband of this informant, started dragging him, as a result of which, her husband fell down. Then, this appellant assaulted him twice with stick and fled to the house of Mahju Naik, the uncle of the deceased. Her husband got up and went towards the back door of her house of Majhu Naik and asked his uncle, Mahju to open the door because Mustafa has entered the said house. Majhu opened the door and started questioning and beating him then Lepa, Sudu, Manju and others also started assaulting him on his head, as result of which, he fell down. As she could not save her husband, she started screaming. Several persons of the locality like, Jageshwar Naik, Jagpati Naik, Gulab Baraik, Dalpati, Chaitu Baraik, assembled, then this appellant fled. Her husband started bleeding because of the injury and he became unconscious. She went to inform the chowkidar of the village upon which, the chowkidar went to the police station and informed the police about the occurrence. The reason behind the occurrence is that her father-in-law and mother-in-law were pressuring her husband to leave the house for 2-3 years. They were threatening that they will get their son married with another girl. Due to the fear of the in-laws, the informant went to her paternal home. She also stated that she is a mother of two children. She went to the Block Development Officer (B.D.O.) praying for maintenance where it was suggested that either the husband should pay Rs.500/- per month or must keep her with him. On the very next day, she went to the house of her husband and started living with him. Her husband demanded share in the ancestral property which was denied by the family members of the husband. It is alleged that appellant was called by them from Jarda to commit his murder.

5. On the basis of the *fardbeyan*, Dumri P.S Case No.46 of 1987 was registered under Sections 341/323/147/307 of the Indian Penal Code. Later on section 302 of IPC was added.

6. After investigation police submitted chargesheet against the appellant and cognizance was taken. Thereafter the case was committed to the Court of Sessions where charge was read over and explained to the appellant to which he pleaded not guilty and claimed to be tried. Charge was framed against the appellant under Sections 302/149 IPC and the trial proceeded.

7. Altogether eleven witnesses have been examined in this case by the prosecution, who are as follows:-

- (i) P.W.-1 Sita Ghasin, informant of this case
- (ii) P.W.-2 Jagpati Nayak
- (iii) P.W.-3 Chaitu Baraik
- (iv) P.W.-4 Jageshwar Naik
- (v) P.W.-5 Gulab Baraik
- (vi) P.W.-6 Ritwa Baraik
- (vii) P.W.-7 Dr. Raj Kumar Beck
- (viii) P.W.-8 Suresh Kumar Verma
- (ix) P.W.-9 Bindeshwar Singh
- (x) P.W.-10 Guthail Baraikin
- (xi) P.W.-11 Chaturdhan Pradhan

8. The following documentary evidences were exhibited by the prosecution:-

- Exhibit-1- Postmortem report*
- Exhibit-2 F.I.R.*
- Exhibit- 3 Case diary*
- Marked X for identification- Fardbeyan of informant*
- Marked Y for identification- Inquest report*

9. Surprisingly, in this case, we find that the entire case diary was marked as Exhibit-3. Be it noted that a case diary is not a document which can be exhibited. The Trial Court after closure of the evidence and after recording the statement of the appellant under Section 313 of Cr.P.C. has convicted this appellant for committing offence under Sections 302/149 of IPC, hence this appeal.

10. We have gone through the question which has been put by the Trial Court under section 313 of Cr.PC. After going through

the statement, we find that the circumstances, which surfaced in evidence and which was necessary to put to him, was not put forth. As per the prosecution, this appellant who was not a member of the family, was called to assault the deceased. This important circumstance was not even put before this appellant while he was examined under Section 313 of Cr.P.C. The circumstances which has been put to him is that he has used a sharp cutting weapon to assault the deceased by forming an unlawful assembly, but it is admittedly the prosecution case that this appellant was armed with only stick which is hard and blunt substance. The Doctor also did not find any sharp cutting injury on the person of the deceased. Thus, there is no proper compliance of mandate of examination of an accused under Section 313 of Cr.P.C. in this case. In the instant case, it was only a mere formality, which was performed by the Trial Court, which is not the proper procedure. The Hon'ble Supreme Court in the case of *Nar Singh v. State of Haryana*, reported in (2015) 1 SCC 496 has held at para 11 as under:-

"11. The object of Section 313(1)(b) CrPC is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him. The examination of the accused under Section 313(1)(b) CrPC is not a mere formality. Section 313 CrPC prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. The real importance of Section 313 CrPC lies in that, it imposes a duty on the court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point."

11. After hearing, the learned counsel for the parties, we find that there is only one eye witness in this case, who is P.W.-1, she is the informant and wife of the deceased.

P.W.-2, P.W.-3, P.W.-4, P.W.-6 and P.W.-10 have been declared hostile.

P.W.-5 is a hearsay witness, who had narrated the story as heard by the said witness.

P.W.8 and P.W.-9 are the Advocate Clerks. They had only identified the *fardbeyan* and the inquest report. Neither this *fardbeyan* nor the inquest report has been legally proved by the prosecution. They were only marked as X and Y for the purpose of identification.

We are now only remained with the evidence of P.W.-1, who is the informant and P.W.-7, the Doctor.

12. P.W.-7. Dr. Raj Kumar Beck, conducted the postmortem examination of the deceased. He found the following injuries:-

"1) Lacerated wound 2-1/2" x 1/2" x 1/2" over the occipital region with fracture of underlying bone with blood clot present.

2) Abrasion 3" x 3/4" over the right buttock."

Doctor opined that injury No.1 is grievous in nature cause by hard and blunt substance like lathi and injury No.2 is simple in nature, which is also caused by hard and blunt substance. He opined that cause of death was shock and haemorrhage. From the evidence of the Doctor, we find that injury No.1 by no stretch of imagination can cause death and cause of death is the head injury. Thus, we come to the conclusion that the death is homicidal.

13. Now to ascertain as to who is the person who has inflicted the blow, we have fall back to the statement of the eye witness, who is P.W.-1. As per her, the incident of assault had taken place at two places, firstly in front of the house of Guthli Baraik and secondly in front of the house of Mahju Naik.

14. So far as the first place of occurrence is concerned, which is in front of the house of Guthli Baraik, as per her statement, this appellant came along with one Sunder Naik and called Ritua Baraik. Ritua did not came out, then the husband of the informant came out then, he was assaulted on his head twice by this appellant and thereafter he fled.

15. So far as the second place of occurrence is concerned, which is the house of Mahju Naik. This witness stated that after being assaulted, her husband went to the house of Mahju Naik and called him when Mahju, Bigu, Sudhu, Ramkishun, Lepa and Mustafa came out of the house and all assaulted the husband of the informant with stick and Lepa assaulted him with iron rod on his head, as a result of which her husband fell down and died.

16. Thus, from her evidence, it is clear that the assault made by this appellant was at the first place of occurrence was not fatal as the husband of the informant did not die. His death occurred in the second place of occurrence, which is in front of the house of Mahju Naik. As per this witness, all the six persons have assaulted the deceased, but from the medical evidence, we find that there is only two injuries, one on the head and one on the buttock. The injury on the head resulted in fracture in the occipital region underlying bone. This assault as per this witness was inflicted by Lepa with the help of iron rod. As the weapon was iron rod, there was a fracture in occipital region.

17. The prosecution has taken shelter of Section 149 of the Indian Penal Code in this case. Section 149 of the Indian Penal Code reads as follows:-

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object. — If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

To attract Section 149 of the Indian Penal Code, an offence must be committed by any member of an unlawful assembly consisting of five or more persons and the offence must be committed in prosecution of common object of the assembly and members of the assembly should know that the offence was likely to be committed in prosecution of the common object.

18. From the evidence of P.W.-1, we find that Section 149 of the Indian Penal Code is not attracted at the first place of occurrence as there were only two persons present, this appellant and one Sunder Naik, when this appellant had assaulted the husband of the informant on his head.

19. In the second place of occurrence there were more than five persons, but that was in the house of Mahju Naik. From the evidence of P.W.-1, we find that husband had gone to the house of Mahju and called him, when from his house, six persons including this appellant came out. From the evidence, it is quite clear that six persons were inside the house. There is nothing in evidence that they had conspired or they had common intention to commit murder of the deceased while they were inside the house. Where in a house more than five or six persons reside and thereafter an offence is committed outside the house, it cannot be said that the assemblage of persons which was inside the house was unlawful.

20. Further, it is the deceased who went to the house of Mahju. It was also not within the knowledge of the appellant and others, that he will come to the house of Mahju. When they had no knowledge that the deceased would go to the house of Mahju, then it cannot be presumed that they had any common intention or object to commit murder of the deceased.

21. In this case there is nothing which would attract under Section 149 of the Indian Penal Code. If Section 149 of the Indian Penal Code is not attracted, then any member of an assembly (which is not unlawful), cannot be saddled with the overt act of another.

22. From the evidence of P.W.-1, we also find that six persons came out and started assaulting the deceased. P.W.-1 stated that all of them started assaulting the deceased with stick, but the medical evidence does not corroborate the aforesaid statement as there were only two injuries found on the body of the deceased.

23. In this case admittedly, at the second place of occurrence it is Lepa, who had assaulted the deceased on the head and not this appellant. So far as the assault by others on the deceased is concerned, we have already disbelieved the statement of P.W.-1, in view of the medical evidence which does not support her testimony. Further, since the deceased, who was assaulted first in front of the house of Guthli Baraik, did not die of the said injury and had gone to the house of Majhu Naik, it is clear that the assault made by this appellant was not fatal.

24. Thus, from what has been held above, we find that the prosecution has not been able to prove the guilt of this appellant to convict him under Sections 302/149 of IPC beyond all reasonable doubt. If at all the appellant can be convicted, he can be convicted under Section 323 of IPC for assaulting the deceased at the first place of occurrence.

25. In view of the aforesaid discussion, we acquit the appellant of the charge framed under Section 302 of IPC read with Section 149 of IPC, but we convicting him for offence under Section 323 of IPC and sentence him to the period which he has already undergone. Accordingly, the instant Criminal Appeal stands partly allowed.

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

27. Interlocutory application(s), if any, also stands disposed of.

28. Let the Trial Court Record be transmitted to the Court concerned along with a copy of this judgment.

(Ananda Sen, J.)

(Gautam Kumar Choudhary, J.)