

Chowa Mandal and ors. Vs. State of Bihar

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Court : Patna

Decided On : Dec-09-1996

Judge : Lok Nath Prasad and Prasant Kumar Sarkar, JJ.

Appeal No. : Criminal Appeal No. 119 of 1989 (R)

Appellant : Chowa Mandal and ors.

Respondent : State of Bihar

Advocate for Pet/Ap. : Mr. P.S. Dayal

Disposition : Appeal Dismissed

Judgement :

Prasanta Kumar Sarkar, J.

1. This appeal is directed against the judgment and order of conviction and sentence dated 28.3.1989 passed by Sri. Baleshwar Prasad Singh, 1st Addl. Sessions Judge, Giridih, in S.T. No. 79 of 1981/50 of 1983 where by and whereunder he convicted the accused-appellants-Prayag Mandal and Rameshwar Mandal under Sections 302/109 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life. The court below further found the other four accused persons appellants guilty under Section 302/34 of the Indian Penal Code and sentenced each of them to undergo rigorous imprisonment for life, Koka

Mandal, Kalo Mandal and Ghanshyam Mandal were found guilty under Section 323 of the Indian Penal Code and they were sentenced to undergo rigorous imprisonment for six months each by the court below. Accused-appellant Prayag Mandal was further found guilty under Section 148 of the Indian Penal Code and rest of the accused persons were also found guilty under Section 147 of the Indian Penal Code and were convicted accordingly, but no separate sentence was passed on this count. However, it was ordered that all the sentences would run concurrently.

2. Fardbeyan of Ugan Mandal son of Kaila Mandal of village-Karmat and, P.S. Birni, district-Giridih, was recorded in the Sadar Hospital, Giridih, on 25.6.1980 wherein he alleged that he is having one mango tree situated at village-Mahuat and, which has planted by his ancestors. The said tree is situated at the ARE of the land of accused Koka Mandal. It was further alleged that accused-Koka Mandal, Chowa, Mandal, Ghanshyam Mandal, Kalo Mandal and Ors. were planning to cut that mango tree on the previous night, on which they protested. Some altercation had taken place between the parties. It was further alleged that on 23.6.1980 in the morning at about 7 a.m. the informant (Ugan Mandal) along with his cousin-Shankar Mandal was ploughing the land situated towards the Eastern side of the village, when the accused-Chowa Mandal, Koka Mandal, Ghanshyam Mandal, Kalo Mandal, Prayag Mandal and Rameshwar Mandal came over there armed with lathi and Tangi etc. As soon as they came, they started abusing and chasing them in order to assault them. The informant and his cousin-Shankar Mandal started running away and the accused persons followed them and when they could not get the informant and his cousin, they returned, as when they reached near the house of Shyamlal Mandal, the uncle of the informant namely, Jhalar Mandal was standing there who enquired from them as to what is matter, on which Chowa Mandal hit him on his head with lathi, as a result of which he received injuries and fell down and thereafter Koka Mandal, Ghanshyam Mandal and Kalo Mandal assaulted him with lathi. Prayag Mandal and Rameshwar Mandal were instigating them to kill. It was further alleged that the uncle of the informant raised alarm, as a result his son-Dhanu Mandal and nephew-Bhuneshwar Mandal also reached there. They were also assaulted by Chowa Mandal, Kalo Mandal and Ghanshyam Mandal by lathi. Bhuneshwar Mandal was assaulted by Koka Mandal

by lathi on his head. On alarm the villagers came and saw the occurrence. As the condition of Jhalar Mandal became serious, he was taken to Darpahari on a rot and from there he was shifted to Giridih Hospital by a bus, where he died.

On the basis of the aforesaid fardbeyan of Ugan Mandal a formal first information report was drawn up and the police took up investigation of the case. Post mortem on the dead body was conducted in the hospital and after completing investigation the police submitted charge-sheet against all the six accused persons. ;

3. During the trial, the accused-appellants were found guilty under different heads of the Indian Penal Code and were convicted and sentenced in the manner indicated above.

4. The prosecution in all has examined eight witnesses in this case. Out of whom, PW 7 is Doctor K.P. Verma who conducted postmortem on the dead body of the deceased-Jhalar Mandal son of Tulshi Mandal of village-Karmat and. PW 7 has stated that he found the followings:

Rigor motis present, mouth open, eyes closed with an antemortem injury on vault above 1-1/2' x 1/2' bone deep. On dissection depressed fracture of occipital bone partial and temporal bone right side seen with laceration of brain substance and intracranial haemorrhage other viseras NAD

The death in his (PW 7) opinion was due to above head injuries causing shock and hemorrhage. Time elapsed since death about 24 hours. The above mentioned injury was caused by hare and blunt substances such as lathi. PW 7 proved the P.M. report as written and signed by him, which was marked exhibit 3.

From the aforesaid evidence of the doctor, the death of the deceased Jhalar Mandal is, therefore, established. The fact of death has also not been disputed by the defence.

5. The only question for consideration is whether the accused persons have caused the aforesaid death by committing his murder. From the evidence of the doctor, it is also clear that there was only one injury on the vault above 1-1/2' x 1/2' x bone deep, which subsequently caused the death of the deceased.

6. PW 4 Ugan Mandal, the informant, PW 5, Dhanu Mandal, son of the deceased and PW 3 Budhni Devi, wife of the deceased, have fully corroborated the occurrence and the prosecution case as stated in the first information report. PW 1 (Dhani Mandal) and PW 2 (Ram Lai Mandal) have also corroborated the statement of the aforesaid three witnesses. From the statement of these witnesses, it appears that all the six accused persons out of whom Prayag Mandal was armed with Tangi the rest with Lathi, came in the field where the informant and others were ploughing the same. The accused persons started abusing the informant and others, so they tried to run away from that place. Thereafter the accused persons chased them, but the informant and his companion succeeded in running away. The accused persons thereafter returned and when they came near the house of Shyamlal they found Jhalar Mandal standing near his house, who enquired from them about the dispute. Then the accused Chowa Mandal assaulted him on his head with a Lathi. Then Koka Mandal also assaulted him with Lathi on his head and he fell down. Thereafter rest of the accused persons assaulted him. On the alarm of Jhalar Mandal, Dhanu and Bhuneswar Mandal came there to save him. Koka Mandal assaulted Bhuneshwar with Lathi and Ghanshyam Mandal, Prayag Mandal, Kalo Mandal and Rameshwar Mandal assaulted Dhanu Mandal with Lathi.

7. PW 6 is Khublal Mahto, who is witness on the Inquest Report and has also proved his signature on it, which is marked as Exhibit 2. PW 8 is Mohd. Salim, who is a formal witness and has proved the fardbeyan and the formal first information report, marked as Exhibits 4 and 5 respectively.

From the above statements of the witnesses, therefore, it appears that Chowa Mandal gave a Lathi blow on the head of Jhalar Mandal. Thereafter Koka Mandal also assaulted him on his head with Lathi. Subsequently different accused persons assaulted the deceased.

8. Mr. P.S. Dayal, learned Counsel for the appellants, submitted that from the statements of the witnesses, it will appear that the statements of the witnesses regarding the assault by different accused persons do not find support from the medical evidence and this fact raises a doubt on the statement of these witnesses.

It is further submitted that from the statement of PW, i.e. the wife of the deceased, it will appear that he is also an eye-witness to the occurrence, but this is not corroborated by the fardbeyan, wherein only the son of the deceased has been named. However, then son of the deceased has only tried to corroborate the statement of his mother by stating that she tried to save his father. Thus these statements are contrary to the prosecution case and raises a clear doubt on the occurrence in the manner alleged by the prosecution.

Mr. Dayal, further submitted by that no injury report or Dhanu Mandal and Bhunshwar Mandal has been proved to corroborate that they actually got any injury. All these facts, therefore, clearly raises a doubt in the statement of the witnesses regarding the occurrence as alleged by the prosecution Mr. Dayal also submitted that as per the statement of the witnesses, Chowa Mandal assaulted Jhalar Mandal with a Lathi on his head, Koka Mandal also assaulted the deceased with Lathi and then rest of the accused persons assaulted him. Thus the witnesses have clearly stated that both Chowa Mandal and Koka Mandal assaulted the deceased with Lathi on the head. The doctor found only one injury on the head of the deceased. Thus it is difficult to say as at who caused the aforesaid injury, out of the aforesaid two accused appellants-Chowa Mandal had Koka Mandal. It was further submitted that originally the accused persons wanted to assault the informant and his companion, armed with Lathi. Tangi etc. with an intention to assault him, but when he ran away the accused persons returned and while returning they were intercepted by the deceased Jhalar, who asked them about the matter as a result, it is said, they assaulted him and thus caused his death. In that view, it was submitted that it is difficult to say that the accused persons formed an unlawful assembly with common object to assault Jhalar Mandal. Admittedly, there was no enmity of the accused persons with Jhalar Mandal and hence there was no motive to cause his death and was not entire occurrence even if happened was at the spur of the moment and was not with an intention or knowledge of causing the death. Thus not only the prosecution has failed to establish the motive for the occurrence, they also failed to establish the fact that the assault on Jhalar Mandal was made with an intention to cause his death and thus by no means the mischief of the offence can be said to be within the four corners of the offence under Section 302 of the Indian Penal Code.

9. I have carefully gone-through the submissions of the learned Counsel for the appellant. There is no doubt on the fact that the occurrence happened and in which Jhalar Mandal died. The defence has also not disputed this point specifically, Now the submission of Mr. Dayal that the accused person actually went with common intention either to assault or to commit of the informant and others, but when they escaped, on the way back they assaulted the deceased and caused his death and, therefore, the elements of common intention is missing in this occurrence cannot be discharged. From the evidence of the doctor (PW 7), it appeared that Jhalar Mandal had only one injury on his head, which is said to be the cause his death. The statement of the witnesses on the fact of assault is also consistent, inasmuch as all of them have stated that Chowa Mandal Koka Mandal assaulted the deceased on his head with Lathi. It is stated that Chowa Mandal assaulted first and thereafter Koka Mandal assaulted on the head with Lathi. Since the doctor who performed post-mortem of the deceased found only one injury, it is quite possible that the assault of any one of the above accused might not have hit on the same place.

10. Mr. S.Y. Hussain, learned Additional P.P. appearing for she State, submitted that the Inquest Report clearly shows that the deceased had a bandage on the head, on both of his right and left hands and there were other swelling also. This fact shows that the deceased had more then one injury but unfortunately, whatever may be the reason, the doctor who conducted the postmortem did not support the fact. The signature of the seizure list witness, namely, Khublal Mahto, has been marked as Exhibit 2. He has fully supported the fact that the Inquest Report was prepared in his. presence. If this aspect of the case is taken into consideration, Mr. Hussain submitted, the prosecution has fully established the fact that there were more injuries on the body of the deceased. Since the Inquest Report has been proved and marked Exhibit in this case, I am afraid, the same cannot be used to support the prosecution case as submitted by Mr. Hussain. However as both-Chowa Mandal and Koka Mandal assaulted the deceased on his head with Lathi, one of which it appears actually struck the common intention of both the accused to cause the death of the deceased Jhalar Mandal appears apparent and to that extent I feel that the prosecution case has been established.

Since the common intention of assault and committing the murder of Jhalar Mandal by Kalo Mandal and Ghanshyam Mandal has not been established and similarly the abatement of the offence by Prayag Mandal and Ramshwer Mandal also could not be proved beyond reasonable shadow of doubt, commission of the aforesaid offence by them does not appear to have been established by the prosecution beyond all reasonable shadow of doubt. Similarly it appears that the unlawful assembly was formed with common object to assault the informant and others who was away, but while returning as the assembly did not remain unlawful the commission of the offence i.e. the murder of Jhalar Mandal by Chowas Mandal and Koka Mandal- cannot be said to be in furtherance of common intention of all. It also appears that the prosecution did not examine the doctor who examined the injuries of Dhanu and Bhuneshwar Mandal and hence their injuries did not find corroboration. Moreover, the prosecution also subsequently it appears was not very careful/alert in establishing this aspect of the occurrence.

11. Mr. Dayal has submitted that the attention of the witnesses were drawn towards certain statement made before the police, but since the Investigating Officer was not examined this could not be corroborated. It is an establishing principles of law that non-examination of the Investigating Officer is not fatal until such non-examination materially prejudice the defence case. I do not find any such prejudice caused to the defence for non-examination of the Investigating Officer.

12. In this case, the defence has also examined five DWs. DW 1- Lallan Prasad has proved Exhibit A, i.e. the fardbeyan and Exhibit B, the formal first information report of the counter case filed by these accused persons against other DW 2. (Ghanshyam Mandal) DW 4 (Prayag Mandal) who are accused-appellants in this case, have stated about their claim regarding Plot No. 952, Khata No. 84 of the village in question. DW 3 (Satyadeo Prasad) has proved the injury register and the carbon copy of the injury reports marked Exhibits E and E/I regarding Ghanshyam Mandal. DW 5-Gurcharan Singh, has also alleged about the allegations in the counter case regarding the assault of accused-Ghanshyam and others.

From the evidence of the DWs and the documents marked Exhibit on behalf of the defence, it appears that the accessed-appellants have claimed the land in question, dispute for which is the motive for the occurrence.

13. Now the aforementioned materials, both oral documentary, establish the fact that there was an occurrence. Since the occurrence did not happen on the land in question, the ownership or possession of the land are not of much importance in this case for either of the parties. Admittedly, Jhalar Mandal (the deceased) had nothing to do with the land and commission of his murder therefore, does not help the defence much even if it is admitted for the sake of argument that they are the owners of the land.

14. In view of the facts stated above, I feel that the prosecution has been able to establish the fact beyond all shadow of reasonable doubt that the accused-Chowa Mandal and Koka Mandal assaulted the deceased (Jhalar Mandal) with common intention to cause his death. Thus the prosecution has been able to establish the charge under Section 302/34, IPC, only against these two appellants, Chowa Mandal and Koka Mandal. Hence, the findings of the court below so far these two accused-appellants under these Sections are concerned are up-held,

However, the prosecution has failed to establish the charges under Sections 302/34, IPC against Kalo Mandal and Ghashyam Mandal beyond all shows of reasonable doubt. Similarly the prosecution has also failed to establish the charges under Sections 302/109, IPC against Prayag Mandal and Rameshwar Mandal. The prosecution has also failed to establish the charge under Section 148, IPC against Prayag Mandal and the charge under Section 147, IPC against rest of the five accused-appellants. The prosecution has further failed to establish the charge under Section 323. IPC against Chowa Mandal, Kalo Mandal, Koka Mandal and Ghanshyam Mandal appellants herein. Accordingly, the conviction and sentence of these accused appellants, aforementioned as ordered by the court below the set aside. Since the accused-appellants Chowa Mandal and Kola Mandal are found guilty under Section 302/34 of the IPC, the order sentence passed by the court below against them, i.e. rigorous imprisonment for life is hereby confirmed and the bail bonds of both these accused appellants are hereby

cancelled. They are directed to surrender before the court below forthwith to serve out the sentence. The other accused persons are, however, discharged from the liability of their bail bonds.

15. In the result, this appeal is dismissed with the aforesaid modification in the order of conviction and sentence passed by the court below against the appellants.

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