**Jhunka Sao Vs. State of Bihar (Now Jharkhand)**

**Jhunka Sao Vs. State of Bihar (Now Jharkhand)**

**SooperKanoon Citation** : sooperkanoon.com/523296

**Court** : Jharkhand

**Decided On :** Apr-17-2002

**Reported in** : 2002CriLJ4230; [2003(1)JCR504(Jhr)]

**Judge** : Lakshman Uraon and; Vikramaditya Prasad, JJ.

**Acts** : Indian Penal Code (IPC), 1860 - Sections 302; Code of Criminal Procedure (CrPC) - Sections 164

**Appeal No.** : Criminal Appeal No. 100 of 1996 (R)

**Appellant** : Jhunka Sao

**Respondent** : State of Bihar (Now Jharkhand)

**Advocate for Def.** : Malti Chourasia, APP

**Advocate for Pet/Ap.** : P.P.N. Roy and; Praveen Kumar, Advs.

**Disposition** : Appeal dismissed

**Judgement** :

ORDER

1. The sole appellant in this case stands convicted for the offence under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life vide judgment and order dated 24.5.1996 and 25.5.1996 respectively, passed by the learned Additional Sessions Judge, Gumla, in Sessions Trial No. 40 of 1995.

2. The aforesaid conviction arose out of the following facts. The prosecution story, as per the fardbeyan (Ext. 3) of Kalawati Devi (PW 1) is as follows. The informant Kalawati Devi gave her fardbeyan on 15.5.1993 before the Officer-in-Charge of Sisai Police Station, on the road in front of the house of Akhil Mohan Sao, stating therein, inter alia, that on that day at about 2.00 p.m. in the afternoon she along with Urmila Devi (deceased), wife of late Sadanand Thakur, and her daughter Sarita Kumari (PW 7), aged about 7 years, had gone to bring water from the well of Raghu Sao, which is situated at the south of the village. After taking water, all the three of them were returning to their house. Sarita Kumari was in the front, she was in middle and behind the informant Urmila Devi (deceased) was going. It is stated that as they reached near the paddy field of Upendra Sao, she saw that Jhunka Sao son of Chita Sao of Village Bargaon came from the front and suddenly started giving chhura blow to Urmila Devi. Urmila Devi cried and fell down on the ground. When she fell down, Jhunka Sao again gave three or four chhura blows on her person. Seeing this, she and Sarita Kumari (PW 7) raisedhulla and ran towards their house. Seeing this, Jhunka Sao also ran towards west of the road. Having seen accused running away, the informant and Sarita Kumari (PW 7) came near the injured Urmila Kumari and found that she had got injuries on her chest, stomach and face as also head and she is dead. The cause of the occurrence is that Urmila Devi had lodged a case against Akhil Mohan Sao and he is in jail and Jhunka Sao is the nephew of Akhil Mohan Sao and due to the said enmity he murdered her. On the basis of the aforesaid

fardbeyan a formal First Information Report (Ext. 4) was lodged and police started investigation.

3. It appears that during the course of investigation, inquest report (Ext. 5) was also prepared and the post-mortem examination on the dead body of Urmila Devi (deceased) was also conducted by Dr. Mani Bhushan Prasad (PW 6), who proved the post-mortem report (Ext. 1) and it also transpired that during the course of investigation statement of PW 7 was recorded under Section 164 of the Code of Criminal Procedure, which has been proved by Achyutanand Upadhyaya (PW 9), Judicial Magistrate, who recorded the same.

4. After investigation, police submitted charge-sheet and the appellant pleaded not guilty of the charge under Section 302 of the Indian Penal Code, which was levelled against him and claimed to be tried.

5. The defence version of the case, as per the trend of the cross-examination and the statements, made by the appellant in his statement under Section 313 Cr PC is that he does not know as to why he has been implicated and at the relevant time he was hearing Ramayan in the neighbourhood and more than that he does not know anything.

6. In support of prosecution case, altogether nine witnesses have been examined and out of those nine witnesses, all the witnesses, except Sarita Kumari (PW 7), the doctor (PW 6), who has conducted the postmortem examination, and the learned Magistrate (PW 9), who has recorded the statement of P.W. Sarita Kumari (PW 7), have been declared hostile whereas Yadu Mahli (PW 3) has been tendered.

7. The following points have been argued in this case on behalf of the appellant :

(i) Sarita Kumari (PW 7), who is a child witness, appears to be a tutored one and, as such, her evidence can not be relied on.

(ii) On the basis of the sole testimony of PW 7, conviction and sentence can not be upheld.

(iii) When there is discrepancies in the ocular evidence and the medical evidence, the conviction can not be sustained .

(iv) Station diary, which was the earliest version of the case, received by the police, if not produced, then the whole prosecution case becomes doubtful.

8. Now we will deal with the aforesaid arguments one by one. Evidence of PW 7, who is a child witness, according to the defence, she is tutored one and, as such, her evidence can not be relied on. In support of his contention, learned counsel for the appellant relied on a decision of the Hon'ble Supreme Court in the case of Arbind Singh v. The State of Bihar, reported in AIR 1994 SC 1068 : 1994 (1) East Cr C 525 (SC), while the learned counsel for the State relied on the decision of the Apex Court in the case of Suryanarayana v. The State of Karnataka, reported in (2000) 9 SCC 129. According to the learned counsel for the prosecution, there is no bar on placing reliance on a sole testimony of a child witness, but it is to be excepted with caution. The case relied upon by the learned counsel for the appellant differs on many substantial facts from the facts of this case. In the case, relied upon by the learned counsel for the appellant, the child witness was only four years old. The occurrence had taken place at night hours and she allegedly had woken up on the quarrel of the mother and father. When the police tried to take her statement at the earliest, she was always found weeping and after many days her, statement under Section 164 of the Code of Criminal Procedure was recorded and in that evidence she had not stated that her mother had been hanged. But in the Court she stated that her mother had been hanged and thus, she had developed the story whatever she had said in herstatement under Section 164 of the Code of Criminal Procedure.

9. In the instant case, as per the fardbeyan, the child witness (PW 7) was herself going along with the informant of the case. The occurrence had taken place in day hours at about 2.00 p.m. in broad day light and in the fardbeyan her name had appeared as a witness. The statement of this witness was recorded on that very day by the police officer in paragraph No. 6 of the case diary and her statement before the Magistrate

under Section 164 of the Code of Criminal Procedure was recorded on 2.7.1993 i.e. after two months. Ext. 2 further shows that the learned Magistrate, who recorded the statement of PW 7, has given a note, which is as follows: 'SAKSHI KI UMRA KAM HONE KE PASCHAT BHI WAH PRASHNO KO SAMAJH KAR SAHI UTTAR DENE ME SAMARTH HAI'. The witness was a student of Class-Ill at that time whereas in the case, relied upon, the child witness was only a child witness, not at all reading in any school, by virtue of her age. When the earlier statement of this witness was recorded under Section 164 of the Code of Criminal Procedure, she was reading in the Village-Bargaon i.e. in the village, where the occurrence had taken place, though during her evidence, she came in the Court from Village-Marda, where she is living with her grand-father (Nana). When her statement was recorded before the Court, the Court gave the following certificate. The witness understands questions and answers properly. She is a fit minor to depose and she reads out the oath properly. Thus, it can not be said that this witness for the reasons of her age, was not understanding the questions either at the time of statement under Section 164, Cr PC or at the time of recording of her evidence during trial. The aforesaid facts distinguish the case of this child witness from the child witness, who was considered in the case relied upon by the learned counsel for the appellant. Thus, we can hold that this child witness was competent witness to the Court at all the relevant times. The question now is whether she is a tutored one or not. It may be stated here that the informant, who is the own aunt of Santa Kumari (PW 7) hasbecome hostile. But when the fardbeyan was recorded, she has given her L.T.I, thereon in the village itself and at that time, the name of this witness came in the fardbeyan itself. It has also come in the evidence on this witness (PW 7) that her father had earlier been killed and consequently she was living in her paternal house at the relevant time. Even if it is found that for some reasons, the informant became hostile, then the question of tutoring this eye-witness on the part of the informant and other prosecution witnesses does not arise. Because if they became hostile for the reasons best known to them, then in that circumstance one would naturally expect that they would have tutored this witness also to become hostile. But it is not the case. When her statement was recorded under Section 164 of the Code of Criminal Procedure, she was living in her paternal house, presumably in the company of the witnesses. So whatever statement was recorded, it was recorded faithfully because the witness has herself said that Daroga has said only this much that 'you will say this much, which she have seen'. Thus the Investigating Officer also has not tried to influence her to give a particular statement before the Magistrate. After the death of her mother, it appears from her evidence, she was also threatened by some persons of the village and she has said that it were the Baniyas of the village, who threatened her to do away with her life. It appears, therefore, that a girl who has lost her father earlier and subsequently her mother also, was being threatened in the village. Therefore, it appears very reasonable that the threats was due to the fact that she was the eye-witness of the occurrence. When other witness had been gained over, then it is quite natural that she was being threatened so that she may also be gained over. Consequently in such a situation, it appears that she came to her maternal house, because the bad relations had developed as per the evidence of this witness. We now further examine the fact that when she came from the custody of her maternal house to the Court, was there any chance of her being tutored by the prosecution. At that stage as she has fully corroborated thestatement what she had made at the earliest i.e. before the police as also under Section 164 of the Code of Criminal Procedure and did not make any development. Therefore, it appears that whatever she stated before the Court, she confirms to her original statements and, thus, in our opinion, it appears to us that she has hot at all been tutored.

10. Therefore, distinguishing the present case from the case, relied upon by the learned counsel for the appellant, we hold that this witness, though a child witness, in absence of any positive or substantial proof of being tutored, is a dependable witness.

11. In this case, learned counsel for the appellant has argued that it is a case of serious nature of heinous murder and, therefore, the Court should not have relied upon the uncorroborated testimony of a child witness and he placed reliance on a decision of the Apex Court in the case, of Badri v. The State of Rajasthan, reported in AIR 1976 SC 560 as also in the case of Ramji Surjya Pandvi and Anr. v. State of Maharashtra, reported in AIR 1983 SC 810.

12. There are cases where the only witness is a child witness and no other witness is cited in the First Information Report. The case on which reliance has been placed, the sole child witness had simply seen the accused coming with a single barrel gun and without verifying the effect of that firing, he had run away and reported that his brother has been killed. Therefore, it was held by their Lordships that in absence of any other evidence, this witness could not have been relied upon, because he had jumped to the conclusion, without seeing the entire occurrence. Moreover in that case, there was no other witness on the fact. In the instant case, there is no birth of the evidence. PW 1 was the eye witness of the occurrence. But for the reasons, best known to her, she became hostile. If there are many eye witnesses alleged in the First Information Report and particularly if the maker of the First Information Report who herself/himself is an eye-witness, subsequently becomes hostile, then in that circumstance it can not be said that the only eye witness of the occurrence has become hostile. It is another fact thatin the Court she has been the residual eyewitness. Therefore, it is not the case that only eye-witness had seen the occurrence, as per the fardbeyan also. It distinguishes the present case from those cases, where the only child or elder witness is said and taken as eye-witness, even in the fardbeyan.

13. We also find that the statement of PW 7 under Section 164, Cr PC is very consistent and there has been no development. Consequently her statement remain unpolluted even during the test of cross-examination.

14. But before giving a final verdit on this aspect, we still go to examine whether the evidence of PW 7 has been corroborated by other circumstantial evidence or not. The Investigating Officer has been examined in this case as PW 8. He found some broken pitch at the place of occurrence as also some blood stained soil, which he seized in presence of the witnesses. This witness (PW 7) has said that when she was coming along with her aunt, her aunt was keeping a pitcher on her head and that has broken. In paragraph No. 5, she says that when she was coming after taking water at the time of occurrence the pitcher on her head had fallen though she vide paragraph No. 7 has said that pitcher, which was being carried by her aunt had not fallen and broken. She has also said that on the head of her mother and aunt, there were earthen pitchers, in which they were carrying water, vide paragraph No. 1. The Investigating Officer also found some broken pieces of earthen pitcher. Thus, it corroborated the statement of this witness.

15. It was also argued on behalf of the learned counsel for the appellant that when there is discrepancies in the ocular evidence and the medical evidence, then it will not be safe to rely on the oral evidence of the witness. He relied on a decision of the Supreme Court in the case of Amar Singh v. The State of Punjab, reported in 1987 East Cr C 721 (SC). In that case different type of weapons were allegedly used in assaulting the deceased but the nature of the injuries, found on the person of the deceased, were quite different in nature and could not be attributed to the weapons alleged to have been used and, therefore,there was a big discrepancy between the oral evidence and the medical evidence. In this case, the discrepancy is only to the extent of number of wounds. The child witness says that dager was used. The doctor says that such injuries can be caused by chhura or knife and out of all the nine injuries, that have been found on the person of the deceased, five are stab wounds and rest four are incised. The doctor has not distinguished the stab wounds and incised wounds rather has said that the nature of weapon may be chhura or knife. Nothing has been brought in the cross-examination of the doctor to show that a different weapon was used for causing the different type of injuries. Thus, it is conclusively proved that all the injuries were caused by knife or chhura. The question then only remains that when the witness says that three or four chhura blows were given then wherefrom nine injuries were found. The witness has also said that chhura blows were given indiscriminately. When such a ghastly dagger (chhura) blows are being given, it is just possible that one can not come to the exact number of blows and if that is said by any person that simply means that he is a person not to be believed upon. So this discrepancy in the number of injuries, in our opinion, is not such a big discripancy so as to make the oral evidence disbelievable rather we find that this medical evidence also corroborates the evidence of PW 7.

16. Therefore, when we consider that this witness though a child witness, has stood the test of cross-examination and her statement has been corroborated by the statement, recorded under Section 164 Cr PC

by the objective evidence of the Investigating Officer at the place of occurrence and by the medical evidence, then we find no reason to disbelieve this child witness.

17. The next question that was raised before us is that there is evidence, in the evidence of PW 7 herself that Deo Narain Thakur had gone to the Police Station and, therefore, in that circumstance the non-production of Sanha entry shows that the prosecution has tried to suppress the first information that had been received. According to the learned counsel for the appellant, prosecution case becomesdoubtful and as such, adverse inference is required to be drawn. He relied in this context on a decision of Patna High Court, in the case of Harinandan Singh v. The State of Bihar, reported in 1970 PLJR 172. In that case one person was sent to Police Station by the Mukhiya and that person was coming in a bus along with the police to the place of occurrence. Then naturally inference was drawn that when the person had gone to the Police Station and from there he was coming to the P.S., then in such a situation he must have given some information to the police, which must have been recorded in a routine manner as station diary entry and, therefore, it was a necessity to find out the first version of the case, which was received by the police. Here in this case, though this witness says that Deo Narain Thakur had gone to the Police Station on a cycle and thereafter, the police had arrived after half an hour of his arrival. Thus, there is no positive evidence that Deo Narain Thakur actually reached the police station or not or made any statement there at the police station.

18. Learned counsel for the appellant wants to draw such an inference because of the fact that since the said Deo Narain Thakur is the cousin brother of Santa Kumari (PW 7), therefore he must have reached the police station, as the police has come to the place of occurrence just after half an hour. Therefore, the non-production of Sanha diary entry is a fatal circumstances in this case. He went to the extent by (sic) saying that if this view is not taken then it may be presumed that some crow went to the police station, whispered something in the ear of the police officer and thereafter, the police reached at the place of occurrence. Though he said it jockingly, but even it is presumed that a crow can speak, then also that will be a rumour, received by a police officer. In this modern age, many things are received by many means. The Investigation Officer himself has said that he received a rumour, made a recording in the station diary and then he proceeded to the village. He has received a rumour that in a particular village a lady has been killed. Therefore, the circumstances of this case are quite distinguishable from the circumstances of the case, reliedupon by the learned counsel for the appellant, for the simple reason that in the said case there was a positive evidence that the person, who was sent to the Police Station, had reached the police station and was coming along with the police and this fact is wanting in this case. Therefore, on this score alone, we are not prepared to accept the contention of the learned counsel for the appellant that the first version of the occurrence has been suppressed. This argument is, therefore, rejected.

19. The last but not the least, learned counsel for the appellant advanced an argument that though there is evidence of PW 7 that her father had been killed allegedly by Akhil Mohan Sao and this appellant is the bhagina of said Akhil Mohan Sao and her mother was a witness in that case and, therefore, she has been killed by this appellant and this important evidence has not been brought to the notice of the accused, when he was examined under Section 313 of the Code of Criminal Procedure and consequently in view of the decision of the Apex Court in the case of Gulam Din Buch v. The State of J & K, (1996) 9 SCC 239, the conviction can not be upheld.

20. The question that was not asked by the learned trial Court from the appellant in his examination under Section 313 of the Code of Criminal Procedure, relates to the victim being an eye witness of the murder of her husband and, therefore, it was the motive for cause the death of the deceased. True it is that it was a serious lapses on the part of the learned trial Court, but while appreciating the judgment, we have relied more on the ocular evidence in this case and when the ocular evidence has established this case, then motive is not very important to be proved. In this appeal we have taken care not to base our findings on this evidence. Thus, this evidence against the appellant practically stands excluded and it has not been used against him. If it has not been used against him then the compliance of Section 313 of the Code of Criminal Procedure is complete, because without drawing the attention of the accused towards an evidence that had come against him, that

part of the evidence can not be used. The learned trial Courtthough in paragraph No. 8 of the judgmenthas stated this fact but in the concludingportion of the judgment he has not statedthat this evidence is one of the grounds forconviction of the appellant. Thus, it meansthat he did not base the conviction on thisevidence. In such a situation, the learnedtrial Court also excluded it from theevidence to base his conviction and, assuch, if this question was not put, noprejudice has been caused to the appellantand consequently it is found that if thequestion was not asked with regard to aparticular evidence and the evidence wasalso not used as the basis of conviction orone of the basis of the conviction, then inthat situation, the decisions referred toabove did not apply in the facts and circumstances of this case. Consequently, wefind that there is no merit in this appealand, accordingly, the conviction and sentence, passed against the appellant, arehereby confirmed and the appeal is, thus,dismissed.