

State of Jharkhand Vs. Ashok Kumar Dubey

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Court : Jharkhand

Decided On : Sep-08-2015

Appellant : State of Jharkhand

Respondent : Ashok Kumar Dubey

Judgement :

Death Reference (D.B) No.3 of 2009 with Cr. App. (D.B) No.929 of 2009 -----
Against the judgment of conviction dated 15.9.2009 and order of sentence dated 16.9.2009 passed by the Additional Sessions Judge, FTC-II, Chatra, in S.T.No.02 of 2004. In Death Reference (D.B) No.3 of 2009 The State of JharkhandAppellant VERSUS Ashok Kumar Dubey.. Respondent In Cr. App. (D.B) No.929 of 2009 Ashok Kumar Dubey @ Ashok Dubey.. Appellant VERSUS State of Jharkhand . Respondent In Death Reference (D.B) No.3 of 2009 For the Appellant-State: Mr.Rajeev Anand, A.P.P For the Respondent :M/s. O.P.Pandey, Anil Kumar Jha and Arun Kumar Sahay, Advocate In Cr. App.(D.B) No.929 of 2009 For the Appellant :M/s. Om Prakash Pandey, Anil Kumar Jha and Arun Kumar Sahay, Advocate For the Respondent : Mr.Amaresh Kumar, A.P.P P R E S E N T HONBLE MR. JUSTICE R.R.PRASAD HONBLE MR. JUSTICE R.N.VERMA By Court: The appellant Ashok Kumar Dubey and others were put on trial in S.T.No.02 of 2004 on the charge of committing murder of Suresh Kumar Dubey. The then Additional Sessions Judge-cum- FTC No.II, Chatra having found the appellant guilty of the said charge recorded the judgment of conviction dated 15.9.2009 and awarded death sentence to the appellant Ashok Kumar Dubey, vide

its order dated 16.9.2009. Being aggrieved with the judgment of conviction and order of sentence, an appeal has been preferred on behalf of the State, whereas the court referred the matter under Section 366 of the Code of Criminal Procedure for confirmation of the order upon which Death Reference (D.B) No.3 of 2009 has been registered. Accordingly, Reference as well as Appeal were heard together.

2. 2. The case of the prosecution as has been made out in the Fardbeyan (Ext.1) is that in the year 1992, this appellant and the co-accused Himanshu Dubey had killed one Alakh Narain Dubey, father of the informant Rajesh Kumar Dubey (P.W.3) for which the appellant and other co-accused were facing trial in which some of the eye witnesses, P.W.1 and P.W.2 had even deposed against the appellant and co-accused. The informant (P.W.3) was supposed to give evidence on 11.8.2003. Before that on 6.8.2003 as per Fardbeyan Himanshu Dubey, co-accused and one Ajay Dubey had sent a message to the informant through a person, [which in course of evidence has come as Chandra Basu Debey (P.W.2),] not to depose in the case on the date fixed but the informant Rajesh Kumar Dubey was adamant to give evidence on the date fixed.

3. On account of the said reason when the informant Rajesh Kumar Dubey was sleeping in the house in the night on 7.8.2003 along with his brother-in-law Suresh Kumar Dubey (deceased) over a cot while Jaimala Devi (P.W.5), wife of the informant was sleeping over another cot in a room having no door of the house which was newly constructed, the informant and his wife heard sound of firing in the midnight and woke up. The informant immediately took out his torch light which he had kept under the pillow and came out and saw this appellant and co-accused Himanshu Dubey running away. On seeing this, the informant raised alarm, upon which Kailash Singh and Binod Singh (not examined) residing in the neighbourhood came running over there and asked from them as to where firing has taken place. When the informant and his wife came back, they saw the deceased dead. Thereupon the informant and his wife with the help of villagers took the deceased to police station where the informant gave his Fardbeyan on 8.8.2003 at 7 a.m stating therein about the incident as has been stated above. It was also stated that the deceased was sleeping by wearing lungi belonging to the informant which led the assailant to misidentify him as Rajesh Kumar Dubey and

fired shot upon him on account of the reason that the appellant and co-accused Himanshu Dubey wanted that the informant should not depose in the case on the date fixed to which the informant did not agree for. Upon such Fardbeyan, a formal first information report (Ext.4) was drawn. Thereupon the case was taken up for investigation by the Investigating Officer (not examined) who held inquest on the dead body at the police station and prepared inquest report. Thereupon the dead body was sent for post mortem examination which was conducted by Dr.B.P.Singh (P.W.6), who on holding autopsy on the dead body did find the following injuries. (1) External:- wound of entry - total 17 numbers out of which 9 were transversing as anterior chest wall and anterior abdominal wall as shown in picture. All wound had collar of grease and abrasion and there was corresponding holes in gerua colour Ganjee (ii) On exploration of chest and abdomen there was blood in pleural cavity, right lung was lacerated 5 x 3 x 2 red in colour. Transverse mesocolon and transverse colour was lacerated 2 x 1 x 1 cm. red in colour. One big x cartridge and 3 pillets recovered and preserved. One cartridge was lodged in D7 vertebra. One large wound of entry in mid Auxiliary line in 4th space near left nipple in diameter having collar of ridge and abrasion communicating to to pleural cavity. Rest wound of entry also communicated with pleural and abdominal cavity. (iii) Wound of exit - total 4 in number on posterior chest wall was seen. Margins everted and red in colour. Heart was found lacerated badly. Doctor issued post mortem examination report (Ext.3) with an opinion that death was caused due to shock on account of above mentioned firearm injury from smooth barrel weapon fired from short distance resulting into cardiogenic and haemorrhagic shock.

4. Meanwhile, the Investigating Officer recorded the statements of the witnesses. On completion of investigation when charge sheet was submitted against the appellant and the co-accused Himanshu Dubey, cognizance of the offence was taken and they were put on trial after the case was committed to the court of sessions.

5. During trial, the prosecution examined altogether seven witnesses. Of them, P.W.1, Dinesh Kumar Dubey, brother of the informant, P.W.2, Chandra Basu Dubey, uncle of the informant, P.W.3, the informant, Rajesh Kumar Dubey have testified that while the deceased after taking meal was sleeping in a room having

no door in a newly constructed house over a cot along with the informant in which room Jaimala Devi was also sleeping over another cot, they in the midnight heard firing of shot, upon which the informant Rajesh Kumar Dubey (P.W.3) and his wife Jaimala Devi (P.W.5) woke up. When the informant came out of the house and flashed torch light, they saw Himanshu Dubey having firearm with him whereas this appellant having lathi with him fleeing away. When both of them raised alarm, P.W.4, Ram Singh, co-villager came to the house of the informant where he heard the informant Rajesh Kumar Dubey saying that this appellant and co-accused Himanshu Dubey having shot dead the deceased fled away.

6. The defence with which the appellant came as has been suggested to the witness is that the deceased was a petty contractor from whom levy was demanded by the members of a banned organization but when was not paid, they killed him and taking advantage of it, he was falsely implicated as the informant was inimical on account of the fact that in a case of murder of the father of the informant the appellant was one of the accused.

7. After closure of the prosecution case, when the incriminating evidences were put to the appellant as well as co-accused Himanshu Dubey under Section 313 of the Code of Criminal Procedure, they denied. Thereupon co-accused Himanshu Dubey absconded and therefore, the court after separating the case of Himanshu Dubey proceeded with the case relating to this appellant.

8. The trial court did find following circumstances as incriminating to the appellant. (i) Rajesh Kumar Dubey was an important witness in a case of murder of his father in which the appellant and co-accused Himanshu Dubey were accused. (ii) The accused had sent a message through Chandra Basu Dubey (P.W.2) to the informant (P.W.3) not to depose on the date fixed but as the informant was adamant to give evidence on the date fixed, he was done to death by the appellant. (iii) The appellant and the co-accused was seen running away after firing shot upon the deceased during which the co-accused Himanshu Dubey was having gun with him.

9. Having taken into account those circumstances, the court did find that the circumstances appearing against the appellant point towards the guilt of the

appellant and co-accused only and therefore, recorded the order of conviction, vide order dated 15.9.2009. So far the sentence is concerned, the appellant was awarded with death penalty mainly for the reason that the appellant, who was an accused in a case of murder of the father of the informant (P.W.3) has been convicted for the offence punishable under Section 302 of the Indian Penal Code and has been sentenced to death. Whereupon the matter was referred to the High Court in terms of the provision as contained in Section 366 of the Code of Criminal Procedure for confirmation of the death sentence awarded to the appellant, who on being aggrieved with the judgment of conviction and sentence has also preferred the aforesaid criminal appeal.

10. Mr.Om Prakash Pandey, learned counsel appearing for the appellant submits that the court while convicting the appellant has taken into account the circumstances that the appellant, who was one of the accused in a case of murder of the father of the informant (P.W.3) had asked the informant through P.W.2 not to depose in the case on the date fixed, i.e. 11.8.2003 but the informant was adamant to give evidence and that the appellant and other co-accused was seen running away in the torch light after committing murder of the deceased but the trial court did not take into account number of other circumstances appearing in the case showing innocence of the appellant. Moreover, the prosecution has palpably failed to establish the circumstances which have been taken to be incriminating against the appellant and thereby it committed illegality in recording the order of conviction.

11. Further it was submitted that had the appellant been committed murder of the deceased, he would not have dared to accompany the dead body to the police station which fact has been testified by none other than one of the prosecution witness, P.W.2 and further innocence of the appellant gets reflected from the fact that the appellant was arrested from his house on the next day of the occurrence. Had the appellant been guilty for committing murder, he would have left the village but it is not so.

12. Further it was submitted that the appellant is said to have been identified under the torch light flashed by P.W.3 and P.W.2 but the Investigating Officer never

seized that torch light nor it was produced by the witnesses either before the police or court.

13. Further submission which has been advanced is that the appellant was never seen running away with firearm, rather it was co-accused Himanshu Dubey, who has been allegedly seen by the witnesses, P.Ws.1, 2., 3 and 5 and thereby it was quite obvious that the appellant would not have been the person to have fired shot at the deceased, still the court took it a case of rarest of the rare case and awarded death penalty which order is out rightly liable to be set aside.

14. As against this, Mr.Rajeev Anand, learned counsel appearing for the State submits that admittedly the appellant was one of the accused along with others in a case of murder of the father of the informant and thereby admittedly there was enmity in between the parties. Since Rajesh Kumar Dubey was intending to depose in a case of murder of his father, the appellant and co-accused Himanshu Dubey and also others wanted him not to depose in the case and therefore, the appellant and other accused sent a message to the informant (P.W.3) through P.W.2 to that effect but the informant was adamant to give evidence and therefore, the appellant along with other co-accused came to the house of the informant in the midnight and fired shot upon the deceased misidentifying him to be the informant as the deceased was wearing lungi of the informant and while fleeing away, they were identified by P.Ws. 1,2,3 and 5 under the torch light and that there does not appear to be any reason for the informant to falsely implicate the appellant and hence, the trial court was absolutely justified in recording the order of conviction.

15. Having heard learned counsel appearing for the parties and on perusal of the record, it be recorded that it is the case of the prosecution that while the informant was sleeping in his house along with his brother-in-law Suresh Kumar Dubey (deceased) over a cot in which room Jaimala Devi, wife of the informant (P.W.5) was also sleeping, they heard sound of firing and as such, woke up and both P.W.3 and his wife P.W.5 saw the appellant and other accused fleeing away under the torch light. They raised alarm, upon which P.W.1 and P.W.2 came out and saw the appellant and others fleeing away. That apart upon alarm being raised, P.W.4

woke up and came to the house of the informant, who was telling that it was the appellant and co-accused Himanshu Dubey who after killing his brother-in-law has fled away. The motive, as per the case of the prosecution for committing offence, is that the appellant and also other accused were accused in a case of murder of the father of the informant. In that case, date was fixed as 11.8.2003 for the evidence of the informant (P.W.3) to whom a message was sent by the appellant and others through P.W.2, Chandra Basu Dubey, uncle of the informant for not deposing on the date fixed but he did not agree to that proposal and therefore, the appellant and others under mistaken identity killed the deceased taking the deceased to be the informant (P.W.3). Both the said motive cannot be said to have been established so far this appellant is concerned as in the Fardbeyan it has been stated by the informant that a message for not giving evidence was sent by the co-accused Himanshu Dubey and Ajay Dubey, not by this appellant. However, during evidence it has come that it was Himanshu Dubey and this appellant, who had sent the message. The said message, as per the statement made in the Fardbeyan, was sent on 7.8.2003 through a person, who has not been named in the first information report. However, in evidence, P.W.2, uncle of the informant has claimed to have been told by the appellant on 6.8.2003 to convey the informant not to depose. Similar is the testimony of P.W.1 whereas according to P.W.3, that message was sent on 5.8.2003. Thus, there appears to be a variation in the testimony of the witnesses on the point of the date when that message had been given to the informant. It is said that in spite of receiving the message, the informant (P.W.3) was adamant to give evidence and therefore, it is alleged that the appellant and other co-accused has committed murder but there does not appear to be any evidence to the effect that when P.W.3 received message from P.W.2 he rejected their proposal, it was communicated to the appellant or other co-accused. In absence of such evidence, the motive as has been assigned to the effect that on account of the fact that the appellant was adamant to give evidence, the appellant committed murder of the deceased on misidentifying him to be the informant falls flat.

16. In this regard it be further noted that in the said case of murder of the father of the informant, P.W.1 and P.W.2 who were the eye witnesses had already given evidence and in such circumstances, it does not appear to be probable that the

appellant wanted to eliminate the informant. Furthermore, the involvement of the appellant in the alleged offence is ruled out from that fact as has been testified in the cross-examination by P.W.4 wherein he has stated that when the dead body was taken to the police station, the appellant and also co-accused Himanshu Dubey were there at the police station. The trial court has ignored this fact by observing that this has come by way of suggestion given to the witnesses but on perusal of the evidence of P.W.4, it does not appear that it is the positive evidence that the appellant and co-accused had gone to the police station and furthermore, the appellant was arrested on the next date from his house. Had the appellant involved himself in the alleged offence, he would not have dated to go to the police station and to remain in the village.

17. Apart from the aforesaid circumstances, other circumstances are also there which create doubt over the prosecution case. In this regard, it be stated that the informant and others instead of informing the police about the occurrence, straightway took away the dead body along with Matress having blood mark, as a result of which, the police did not visit the place of occurrence immediately after the occurrence. Had the police/Investigating Officer would have come to the house of the informant for recording Fardbeyan, he simultaneously would have inspected the place of occurrence to find out as to whether occurrence has taken place in the room. In this regard it be pointed out, as per evidence of P.W.3, they had fixed mosquito net over the cot which was having number of holes on account of firing being made. That apart, wall was also having marking of firing even the pilletes were there. Whether all these things had been seized by the Investigating Officer, it could not be ascertained on account of non-examination of the Investigating Officer and thereby grave prejudice seems to have been caused to the appellant on account of non-examination of the Investigating Officer.

18. In this regard it would be worth mentioning that the doctor during post mortem examination did not only find injuries being caused by the pil;etes but also by bullets as according to him, cartridges as well as pilletes had been recovered which also creates a serious doubt over the prosecution case as according to the evidence of P.Ws. 1, 2, 3 and 5 only co-accused Himanshu Dubey was having firearm whereas this appellant was allegedly having lathi with him.

19. Further we do find that the deceased had number of pilletes injuries spreading to whole of the belly area, which injuries having no blackning of charring do suggest that firing may not have been made from a very close range. In that event, chances were there of pilletes being spread out larger area, which in fact, seems to have occurred as according to P.W.3 pilletes mark were also there over the wall but surprising thing is that the informant (P.W.3) who was sleeping by the side of the deceased did not receive any pillete injury.

20. All these circumstances go to create a grave doubt over the prosecution case and hence, in such situation, it can never be said that it could be only the appellant who had committed offence as alleged.

21. Under the circumstances, the trial court seems to have committed illegality in recording the order of conviction and awarding death sentence hence, it is set aside.

22. In the result, this appeal stands allowed and the death reference is answered accordingly. (R.R.Prasad, J.) (R. N. Verma, J.) Jharkhand High Court, Ranchi, The 8th September, 2015, NAFR/N.Dev.

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