

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.280 of 1993

(AGAINST THE JUDGMENT OF CONVICTION, DATED 10.05.1993, AND ORDER OF SENTENCE, DATED 11.05.1993, PASSED BY SHRI JALESHWAR RAM, 1ST ADDITIONAL SESSIONS JUDGE, EAST CHAMPARAN AT MOTIHARI, IN SESSIONS TRIAL NO. 261 OF 1988/61 OF 1991, ARISING OUT OF MOTIHARI MUFFASIL POLICE STATION CASE NO. 107 OF 1985, CORRESPONDING TO G.R.NO.1509 OF 1985).

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1. Maulvi Mian son of Rahman Mian
2. Dargahi Mian son of Sukhari Mian
3. Wakil Mian son of Rahman Mian
4. Mohammad Jalil alias Jalil Mian son of Noor Mina
All residents of Village-Gorhwa, P.S.-Motihari, Mufasil,
District East Champaran.

.... Appellants

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellants : None

For the Respondent : Mr. Ajay Mishra, A.P.P.

Mr. Pravin Kumar, Advocate as Amicus Curiae

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
and

HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 13-05-2015

Under the judgment, dated 10.05.1993, passed, in Sessions Trial No. 261 of 1988/61 of 1991, by learned 1st Additional Sessions Judge, East Champaran at Motihari, the accused-appellants, namely, Maulvi Mian, Dargahi Mian, Wokil Mian and Md. Jalil, stand convicted under Section 302 read with Section 34 of the Indian Penal Code. Following their conviction, the accused-appellants have been sentenced, under the order,

dated 11.05.1993, to suffer imprisonment for life.

2. The case of the prosecution, as unfolded at the trial, may, in brief, be set out as under:

(i) On 04.08.1985, at about 01:00 PM, Ram Ekbal Mahto (PW 1), Rudal Mahto (PW 2), Ram Swaroop Mahto (PW 3) and Ram Sewak were playing cards in the house of one Kishundeo Mahto. The house was a one-room house and the walls of the house were of timber. While Ram Ekbal Mahto (PW 1), Rudal Mahto (PW 2), Ram Swaroop Mahto (PW 3) and Ram Sewak (not examined) were so playing the cards, they saw accused persons, namely, Maulvi Mian, Dargahi Mian, Wokil Mian and Md. Jalil, coming from eastern direction, accused Maulvi Mian carrying some article on his shoulder covered by a *chadar* (i.e., a sheet of cloth).

(ii) There was a ditch, having chest-deep water, in the agricultural field, at a distance of about 15 feet from the cattle-shed of the informant, Nathuni Mahto (PW 4). Ram Ekbal Mahto (PW 1), Rudal Mahto (PW 2), Ram Swaroop Mahto (PW 3) and Ram Sewak saw that accused Maulvi Mian, having uncovered the article, which he had been carrying on his shoulder, threw the article into the said ditch. Having heard the splash of water as a result of the article having been thrown into the ditch, Ram Ekbal Mahto (PW 1), Rudal Mahto (PW 2), Ram Swaroop Mahto (PW 3) and Ram Sewak went out of the

house, where they were playing cards, they went to the ditch and saw that a boy, aged about two-and-a-half years, had been thrown into the water of the said ditch.

(iii) When Ram Ekbal Mahto (PW 1), Rudal Mahto (PW 2), Ram Swaroop Mahto (PW 3) and Ram Sewak took out the boy, they found that the boy was already dead and they, accordingly, raised alarm, whereupon the informant, Nathuni Mahto (PW 4), came running to the ditch and identified the said dead body as the dead body of his two-and-a-half years old son. Thereafter, the said dead body was taken to the informant's house.

(iv) On 05.08.1985, at 1:00 AM, the informant arrived at Motihari Mufassil Police Station with the said dead body and orally informed DW 3 (Mukteshwar Nath Singh), Sub-Inspector of Police, about how his son's dead body had been found. The oral information, so given, was reduced into writing in the form of Nathuni Mahto's *fardbeyan* and, treating the said *fardbeyan* as the First Information Report, Motihari Mufassil Police Station Case No. 107 of 1985, under Sections 302/201/34 of the Indian Penal Code, was registered against accused Maulvi Mian, Wokil Mian, Jalil Mian and Dargahi Mian.

(v) Having held Inquest over the said dead body, the same was sent to *post mortem* examination, which revealed that there was no external injury on head, but

depressed fracture of the left temporal bone and the doctor opined that the cause of death was shock and hemorrhage resulting from the head injury sustained by the said deceased.

(vi) Having completed the investigation, a *police report*, as envisaged by Section 172(2)(i) of the Code of Criminal Procedure, was submitted alleging to the effect, *inter alia*, that the accused aforementioned had been falsely implicated and praying, therefore, therein that a proceeding be drawn under Section 182 and Section 211 of the Indian Penal Code for lodging false information with the police with intent to use its lawful power to the cause injury to another person and, for leveling false charge of commission of offence of murder with intent to cause injury to the accused persons. However, the informant, Nathuni Mahto (PW 4), filed a protest petition against the said *police report* and, on the basis of the said protest petition, *cognizance* of the offences under Sections 302 and 201 read with Section 34 of the Indian Penal Code was taken leading to the trial of the accused-appellants.

3. At the trial, charges were framed under Sections 302 and 201 read with Section 34 of the Indian Penal Code against the accused persons, namely, Maulvi Mian, Wokil Mian, Jalil Mian and Dargahi Mian. To the charges so framed, all the accused pleaded not guilty.

4. In support of their case, prosecution

examined as many as 06 (six) witnesses including the doctor (PW 5), who had conducted the *post mortem* examination. The accused were, then, examined under Section 313 (1) (b) of the Criminal Procedure Code and, in their examinations aforementioned, the accused persons denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being that of denial and also of being falsely implicated in the case, because of previous animosity of the accused with the informant. The defence, too, adduced evidence by examining three witnesses.

5. Having found the four accused aforementioned not guilty of the offence under Section 201 read with Section 34 of the Indian Penal Code, learned trial Court acquitted them accordingly. Having, however, found all the four accused aforementioned guilty of offence under Section 302 read with Section 34 of the Indian Penal Code, learned trial Court convicted them accordingly and passed sentence against them as has been mentioned above.

6. Aggrieved by their conviction and the sentence passed against them, the accused-appellants aforementioned, as convicted persons, have preferred this appeal.

7. We have heard Mr. Pravin Kumar, learned Counsel, appearing as *amicus curiae*, and Mr. Ajay Mishra,

learned Additional Public Prosecution, appearing for the State.

8. While considering the present appeal, it may be noted that according to the evidence of the doctor (PW 5), who had, admittedly, on 05.08.1985, at 5:00 PM, held *post mortem* examination on the dead body of Chandeshwar Mahto, aged about 3 years, son of the informant, Nathuni Mahto (PW 4), following *ante mortem* injuries were found:-

" (i) *Bleeding from mouth, nose and ear*

(ii) *Face and forehead looked bluish*

2. *On dissection of the head collection of blood under skin and subcutaneous tissue over the left temporal and left frontal region of the scalp. A depressed fracture one inch, over the left temporal bone detected. The blood was oozing from the fracture. On opening the cranium bone the meninges and brain matters found-studded with blood with clots.*

Neck- Trachea- on opening was found clean, no trace of mud or sand particles could be detected.

Thorax was dissected out. Lungs found dry, no trace of water or mud could be detected. Heart both chambers right and left side found empty. Stomach, about two ounces of fluid (gastric juice) was present. No mud or sand particles could be detected in stomach. No mud or sand particles seen in the nails of hands and feet."

9. In the opinion of the doctor (PW 5), the cause of death was shock and hemorrhage resulting from the head injuries sustained by the said deceased, time elapsed since death being within 48 hours.

10. In the light of the medical evidence on



record, which has not been disputed by the defence, when we enter into the determination of the veracity of the ocular evidence on record, we notice that broadly in tune with each other, the evidence of PW 1 (Ram Ekbal Mahto), PW 2 (Rudal Mahto) and PW 3 (Ram Swaroop Mahto) is to the effect that on the day of occurrence (i.e., on 04.08.1985), at about 1 O'clock in the afternoon, four persons were playing cards in the house of Kishundeo Mahto (not examined) and at that time, they saw accused Maulvi Mian, Dargahi Mian, Wokil Mian and Md. Jalil coming from eastern direction, accused Maulvi Mian carrying some article on his shoulder, which was covered by a *chadar*, and having uncovered the article, accused Maulvi Mian threw the article into a ditch.

11. From the cross-examination of PW 1 (Ram Ekbal Mahto), PW 2 (Rudal Mahto) and PW 3 (Ram Swaroop Mahto), it is apparent that the said house of Kishundeo Mahto was a one-room house, the walls of the house having been built with the help of timber. When PW 1, PW 2 and PW 3 were so playing cards as deposed by them, they saw accused Maulvi Mian, Dargahi Mian, Wokil Mian and Md. Jalil coming from eastern direction, accused Maulvi Mian was carrying some article, covered by a *chadar*, on his shoulder, and, by uncovering the said article, accused Maulvi Mian threw the article into the ditch.

12. What is curious to note, while considering the evidence of PW 1, PW 2 and PW 3, is that none of them has deposed that the article, which accused Maulvi Mian had been carrying covered by *chadar*, was thrown into the ditch keeping the article covered by *chadar*. No wonder, therefore, that the said dead body was not found covered by *chadar* and no *chadar* was recovered or seized.

13. Obviously, without removing the *chadar*, the article could not have been thrown into the ditch. It is not the evidence of PW 1, PW 2 and PW 3 that the said dead body was covered by anything other than the said *chadar*. It is also not the evidence of these three witnesses, if we may reiterate, that the said dead body was thrown into the ditch keeping the same covered by *chadar*.

14. Necessarily, therefore, if what the said three witnesses have deposed were true, the dead body would have been seen by these three witnesses and yet none of these three persons has asserted that the article, which had been thrown by accused Maulvi Mian, was a young boy's body into the water of the ditch.

15. Coupled with the above, what surfaces from the consideration of the evidence of PW 1, PW 2 and PW 3 is that each one of them has deposed to the effect that he had heard the sound of splash, because of something having been

thrown into the ditch and, attracted by the sound of splash, they came out of the room. The evidence so given constrains us to infer that the said three witnesses had not seen the article being thrown but had heard the sound of splash of water and, out of curiosity, came out and found the said dead body lying in the ditch.

16. Situated thus, we find it frightfully unsafe to place implicit reliance on the evidence of PW 1, PW 2 and PW 3.

17. The above inference gets reinforced, when we take into account the evidence of the informant (PW 4) and the other concomitant circumstances, which have surfaced from the materials on record.

18. The evidence of the informant (PW4) is that on the day of the occurrence (i.e., on 04.08.1985), at about 01:00 PM, while he was working in his agricultural field, he heard Rudal Mahto, Ram Sewak, Ram Swaroop Mahto and Ram Ekbal Mahto asking him to come running and when he (PW 4) went running to his cattle-shed, he saw that Rudal Mahto, Ram Sewak, Ram Swaroop Mahto and Ram Ekbal Mahto had kept there lying his son, who was aged about two-and-a-half years, and that his son was dead.

19. It is the assertion of PW 4 that PW 1, PW 2 and PW 3 and the said Ram Sweak told him (PW 4) that they had taken out the dead body from the ditch and that Maulvi



Mian, Dargahi Mian, Wokil Mian and Md. Jalil came to the ditch, accused Maulvi Mian was carrying, on his shoulder, some article and threw the same into the water and when these witnesses, namely, Ram Ekbal Mahto (PW 1), Rudal Mahto (PW 2) and Ram Swaroop Mahto (PW 3), along with Ram Sewak, went to the ditch, the accused persons ran away and they (PW 1, PW 2 and PW 3) took out the dead body of the informant's son from the ditch.

20. Clearly thus, the description of the occurrence given by PW 1, PW 2 and PW 3 does not tally with what PW 4 has claimed to have been reported by PW 1, PW 2 and PW 3 inasmuch as the consistent evidence of PW 1, PW 2 and PW 3 is that the article, which accused Maulvi Mian was carrying on his shoulder, had been kept covered by a *chadar*, but the fact that there was a *chadar* had never been disclosed by PW 1, PW 2, PW 3 to PW 4 and if there was no *chadar*, then, PW 1, PW 2 and PW 3 would have obviously seen that accused Maulvi Mian had been carrying on his shoulder a young boy's dead body.

21. Because of the fact that such a description of the occurrence, if given by PW 1, PW 2 and PW 3, would be *ex facie* unbelievable, they (PW 1, PW 2 and PW 3) have purposefully imported into their evidence, the story that a *chadar* was used by accused Maulvi Mian to cover the article,

which he was carrying on his shoulder.

22. Moreover, we have carefully examined the evidence of PW 1, PW 2 and PW 3 and notice that PW 1, PW 2 and PW 3, have, nowhere, deposed, in their evidence, to the effect that they told the informant (PW 4) that they had seen accused Maulvi Mian, Dargahi Mian, Wokil Mian and Md. Jalil coming to the ditch, accused Maulvi Mian was carrying on his shoulder some article and accused Maulvi Mian had thrown the said article into the water.

23. In the light of what we have pointed out above, there can be no escape from a conclusion that the evidence of PW 4 as to what he had been told by PW 1, PW 2 and PW 3 is nothing, but *hearsay* and ought to have been kept, accordingly, excluded from the purview of its consideration by learned trial Court. This apart, it is not the evidence of PW 4 that accused Maulvi Mian was carrying the dead body of his son covered by any *chadar*.

24. Clearly thus, the informant had not been told, even if what he had deposed were true, that one of the accused, namely, accused Maulvi Mian was carrying the said dead body covered by a *chadar*.

25. Further-more, though the occurrence had taken place at 01:00 PM, on 04.05.1985, the First Information Report has been lodged on 05.08.1985, at 01:00 AM.

26. As explanation to the delay, which has crept in lodging the First Information Report, the informant (PW 4) has mentioned, in the First Information Report, that as the members of his family had begun to cry, delay was caused in coming to the Police Station.

27. However, at the trial, the informant has sought to explain the delay in the lodging of the First Information Report by claiming that the police (i.e., DW 3) came to his (informant's) house and, having examined and heard everything, the informant was asked by the police to take the said dead body to the Police Station and it was, then, that the said dead body was taken by him (PW 4) to the said Police Station. If the evidence, so given by the informant, were true, it was incumbent, on the part of the prosecution, to reveal, at the trial, as to what information had been received by the police, which impelled the police to visit the house of the informant. No such evidence was brought at the trial.

28. Interestingly enough, prosecution withheld the Investigating Officer from Court and it was the defence, which had get to the Investigating Officer summoned as a witness and he was examined as DW 3. This witness's evidence is that the informant came to the Police Station with the said dead body and reported the alleged occurrence on 05.08.1985 at 01:00 AM and while the *inquest* was held on the said dead

body at the Police Station, he (DW 3) visited to the place of occurrence, at 04:00 AM, on 05.08.1985. The evidence, so given by the Investigating Officer, remained wholly unchallenged by the prosecution.

29. Inescapably, therefore, one has to hold, and we do hold, that the First Information Report was lodged belatedly with the police and no credible, convincing or plausible explanation has been offered by the prosecution or is discernible, in this regard, from the materials on record.

30. The inference flowing from the belated lodging of the First Information Report is that either the accused-appellants were implicated, because of the existing enmity with the informant or on suspicion that they were the ones, who had put to death the informant's son inasmuch as we find that it has been mentioned in the First Information Report itself that there were enmity between accused Maulvi Mian and the informant on the issue of construction of a *mosque* and that was why, the accused had committed the murder.

31. The motive, so assigned, to the accused-appellants by the informant clearly shows that the relation between the accused-appellants, on one hand, and the informant, on the other, was inimical so much so that the appellants could have killed the informant's son and if the

degree of animosity was so severe, it was equally reasonable to infer that the informant had implicated the accused-appellants, because of the existing enmity or on suspicion.

32. The impression that the accused-appellants had been implicated on the basis of suspicion gets strengthened from the fact, as we have already indicated above, that it is not the evidence of PW 1, PW 2 and PW 3 that they had seen a boy being thrown into the ditch by accused Maulvi Mian and the inference, therefore, which is irresistible to be drawn, is that PW 1, PW 2 and PW 3 had not seen the occurrence and, on being attracted by the splash of the water, they had come to the ditch and seen the dead body.

33. It is relevant, with regard to the above, to note that it has also emerged from the evidence on record that close to the said cattle-shed, there is a hand-pump and from that hand-pump, there is a slippery narrow path to the said ditch and that the informant's said son used to go to the said hand-pump to drink water. The possibility of the informant's son having slipped at the said hand-pump and having fallen into the ditch cannot, therefore, be ruled out.

34. Because of what have been discussed and pointed out above, we are clearly of the view that the prosecution has failed, in the present case, to prove its case beyond reasonable doubt and the accused-appellants were, in

such circumstances, ought to have been granted, at least, benefit of doubt.

35. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellants and the sentences passed against them by the judgment and order, under appeal, is hereby set aside. The accused-appellants are held not guilty of the offence, which they stand convicted of, and they are hereby acquitted of the same under benefit of doubt.

36. Since the accused-appellants are on bail, their bail bonds are hereby cancelled and their sureties shall stand discharged.

37. Let the *Amicus Curiae* be paid a fee of Rs.5000/-.

38. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Court Records.

(I. A. Ansari, J.)

(Vikash Jain, J.)

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