

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.83 of 1992

Against the judgment of conviction dated 03.04.1992 and order of sentence dated 07.04.1992 passed in Sessions Trial No.279 of 1991 arising out of Bettiah P.S. Case No.118 of 1991 by 2nd Additional Sessions Judge, Bettiah.

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Dil Mohammad Mian @ Bengali Mian, son of Delsen Mian, resident of Mohalla Mahawat Toli, Police Station Bettiah Town, District- West Champaran.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

With

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Criminal Appeal (DB) No. 110 of 1992

Against the judgment of conviction dated 03.04.1992 and order of sentence dated 07.04.1992 passed in Sessions Trial No.279 of 1991 arising out of Bettiah P.S. Case No.118 of 1991 by 2nd Additional Sessions Judge, Bettiah.

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Afzal Mian son of Dil Mohammad Mian, resident of Mohalla Mahawat Toli, Police Station Bettiah Town, District- West Champaran

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

(In both the appeals)

For the Appellant/s : Ms. Bandana Sinha, *Amicus Curiae*.

For the Respondent/s : Dr. Mayanand Jha, A.P.P.

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CORAM: HONOURABLE THE CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 25-06-2015

These two appeals arise out of the judgment dated 03.04.1992, rendered by the Court of 2nd Additional Sessions Judge, Bettiah, West Champaran, in Sessions Trial No.279 of 1991.

The appellant in Criminal Appeal No.83 of 1992, figured as A-2 in the case before the trial Court and he is the father of the appellant in Criminal Appeal No.110 of 1992, i.e. A-1.

The case arose out of an incident which took place on 12th April, 1991 in Mohalla Mahawat Toli of West Champaran district. It was the last day of Ramjan and the prayers took place at the Masjid. The deceased, by name Samsul Enam is said to have been killed by A-1 at the instance of his father A-2 when the deceased was coming out of Masjid after offering prayer. No written complaint as such was filed with the police. It was only after the police reached the spot, that the statement of P.W.7, i.e. one of the brothers of the deceased, was recorded.

He stated that himself, the deceased, his other brother, P.W.5 and the brother-in-law of the deceased, P.W.3, were in the Masjid offering prayers, and when they were coming out after the prayers and taking right turn, A-2 stopped the deceased by putting his hands across and asked his son A-1 to kill him and thereupon A-2 fired bullet. P.W.s 7 and 3 are said to have shifted Samsul Enam to the hospital, and there he was declared dead. He pleaded that large number of persons from the Muslim community were also present at that place. The motive attributed by P.W.7 to the accused is that the deceased went to the cloth shop of the accused, few days prior to the

incident, and even after seeing large number of clothes; he did not purchase anything feeling that the rates are high. The accused are said to have grudged in that regard and killed the deceased.

After recording the fardbeyan, the Inspector of Police arranged for the inquest and postmortem and conducted investigation. After completion thereof, he filed the charge sheet alleging offence punishable under Section 302 of the Indian Penal Code against the accused. On their pleading not guilty, the Sessions Court took up the trial. P.Ws.1 to 10 were examined and the postmortem report and the inquest report were filed by the prosecution. No evidence whatever was adduced in defence.

Through the judgment under appeal, the trial Court found both the accused guilty of offence punishable under Section 302 of the Indian Penal Code. Through a separate order, the trial Court imposed the punishment of imprisonment for life against the accused.

Obviously because the appeals are of the year 1992 and the accused are on bail, no interest is evinced either by the accused or their counsel. Therefore, we requested Ms. Bandana Sinha, learned counsel to assist the Court.

It is argued on behalf of the appellants that if, in fact, the incident had taken place soon after the conclusion of the prayer



in the Masjid, that too at 5 P.M., the question of accused being escaped from the scene does not arise. It was also argued that the facts that no written complaint was submitted and there are several discrepancies in the version put forward by the witnesses and the contents of the ferdbeyan disclose that it was a concocted case against the accused. Learned counsel further submits that if, in fact, the father of the deceased P.W.2 and P.W.6 were present at the scene, P.W.7 would not have failed to mention that in the ferdbeyan. She further contends that the only person who can be said to be the independent witness is P.W.6, and it has been demonstrated clearly that he figured as accused in Sessions Trial No.910 of 1991 and the P.W.2, the father of the deceased, figured as a defence witness, and in that view of the matter, the evidence of P.W.6 cannot be treated as reliable. It is also pleaded that the presence of P.W.4 becomes highly doubtful when he has clearly stated that he was never visitor to the Masjid where the incident has taken place, and there is separate Masjid near by his house. The learned counsel further points out that no effort was made by the prosecution to recover the weapons said to have been used in committing offence, much less to connect the injuries on the dead body of the deceased, to any weapon whatever.

Dr. Mayanand Jha, learned Assistant Public Prosecutor, on the other hand, submits that this is a rare case in



which there are several eye witnesses, and all of them are consistent in their evidence. He submits that the incident has taken place soon after the conclusion of the prayers and much before any lapse of time, the police arrived and recorded the ferdbeyan. Learned counsel submits that P.W.7 has mentioned several names in his evidence, and failure to mention one or two names does not make much of difference. He submits that the trial Court has analyzed the evidence of each and every witness, and has arrived at correct and proper conclusion, and that the conviction and sentence do not warrant any interference.

The incident is said to have taken place right at threshold of the Masjid at about 5 P.M. on 12.04.1991. The eye witness of the occurrence i.e. P.W.7, who is one of the brothers of the deceased. According to him, he himself and the deceased Samsul Enam came out of the Masjid after prayers and when they were taking right turn, A-2 stopped the deceased by putting his hands across and asked his son A-1 to kill him. Thereupon A-1 is said to have fired shots. Either in the ferdbeyan or in his deposition, P.W.7 did not state the nature of weapon that was used or the number of shots that were fired at.

It has already been mentioned that no written report was submitted before the police about the incident. This can be

attributed to the fact that on the occurrence of incident, P.W.7 and others may be under shock and busy in shifting the deceased to the hospital, than to go to the police station. The fact remains that on arrival of the Police, the statement of P.W.7 was recorded.

The salient feature of the statement recorded from P.W.7 is that when the incident took place, himself, his other brother, P.W.5 and brother-in-law of the deceased, P.W.3, were present apart from others. Secondly, several others in the Masjid were said to be present. Thirdly, he attributed the motive to the appellants stating that the deceased visited the shop of the accused on earlier occasion and since no purchase was made, they bore grudge against him. It is also important to note that P.W.7 did not mention the presence of his father, P.W.2 or of P.W.6.

Though P.W.2 gave a detailed account of the incident, leading to the death of his son, acceptability of the evidence becomes doubtful for more reasons than one. The first is that he is an interested witness, and the second is that his name was not mentioned in the ferdbeyan by his other son, P.W. 7.

Another important witness examined by the prosecution is P.W.3, brother-in-law of the deceased. From his evidence, we gather that he was not the visitor to the concerned Masjid and there is a separate Masjid nearby his residence. Since the



date of occurrence was the last day of Ramjan, the devotees would prefer to visit the Masjid in which they usually offer prayers. However, we do not reject the evidence of P.W.3 on this count. All the same, he is too an interested witness, being the brother-in-law of the deceased.

P.W.4, who was named in the ferdbeyan is an independent witness. However, the trial Court had to eschew the evidence of this witness since he did not turn up for cross-examination, at some stage.

P.W.5 is another brother of the deceased. Though his name was mentioned in the Ferdbeyan, he is too an interested witness and the Court has to be very cautious before it accepts the evidence of such a witness.

The only witness, who can be said to be independent, is P.W.6 since he is not related to the deceased, in any way. However, the name of this witness was not mentioned in the ferdbeyan. In case, P.W.6 was actually present at the scene of occurrence, the mere fact that his name was not mentioned in the ferdebayn may not make much difference. However, it was elicited from him that he figured as accused in Tr. No.910 of 1991 and the P.W.2, the father of the deceased, i.e. P.W.2 was figured as a defence witness to support him. This factor cannot be omitted from

consideration. The plea of the appellants that P.W.6 was a planted witness becomes relevant.

If the incident leading to the death of the deceased had taken place in a remote area where no persons were present, the Court has to depend upon circumstantial evidence. In this case, the incident is said to have taken place at 5 P.M. in April, in the right middle of large gathering. P.W.7 did not mention that accused had run away from the scene of occurrence or any attempt was made to nab them. Even if one or two close relatives of the deceased were busy in attending to him, others could have apprehended the assailants. The very fact that no arrest of these accused was made till they surrendered before the Court on 07.05.1991 and 2.11.1991 respectively when they came to know about their having been implicated, discloses that the version of the prosecution is not readily acceptable.

That the deceased died out of bullet injuries is evident from the postmortem report, which was filed through the doctor, P.W.8. Two bullet injuries were noticed on the dead body. P.W.8 has also stated that the bullet recovered from the body was preserved and handed over to the police. However, no effort was made to make the bullet as part of the court record, by marking it as material object. It is axiomatic that whenever a death of the individual is found to be on



account of bullet injuries, the accused can be convicted unhesitatingly if the corresponding weapon is seized from him and produced before the Court. No effort whatever, was made in this behalf. It was not even mentioned that the police attempted to recover the weapon from A-1. These serious lapses would certainly tell upon the findings recorded by the trial Court.

One of the important requirements to prove an offence against an individual is existence of motive. We are conscious of the fact that law does not require any particular standard, as to the motive. In a given case, it may be highly provocative, and in some case it may be trivial. However, motive, as such, must exist. In the instant case, the only motive attributed to the accused for killing the deceased is that the latter did not purchase the clothes from their shop, even after considerable display of the material was made. It is highly difficult to believe this version. It is a matter of common knowledge that in every cloth shop, the shopkeeper would be ready to display the stock, to impress upon the customer and it is not uncommon that a customer may not make any purchase, whatever be the reason. The failure of the customer may sometimes lead to dissatisfaction of the shopkeeper. However, one just cannot expect that the shopkeeper would go to the extent of committing the murder of a customer simply because he did not purchase the material. There is

every possibility that the motive which was suggested by the prosecution is non-existent.

The cumulative effect of our discussion is that the prosecution has failed to prove its case, beyond any reasonable doubt against the appellants.

We, therefore, allow the appeal and set aside the conviction and sentence awarded by the trial Court against the appellants. The bail bonds executed by the appellants shall stand cancelled.

(L. Narasimha Reddy, CJ)

(Sudhir Singh, J)

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