

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.63 of 1993

AGAINST THE JUDGMENT OF CONVICTION AND THE ORDER OF SENTENCE, DATED 12th DECEMBER, 1992, PASSED BY SESSIONS JUDGE, SITAMARHI IN SESSIONS TRIAL NO. 136 OF 1991, ARISING OUT OF MANER POLICE STATION CASE NO.SITAMARHI POLICE STATION CASE NO.112 OF 1990.

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Saikh Kismat, son of Late Md. Yunus, resident of village Bariyarpur, Police Station and district Sitamarhi

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant : Mr. Prasoon Sinha, Advocate
Mr. Prabhat Kumar, Advocate

For the Respondent : Mr. Mayanand Jha, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE I.A.ANSARI

AND

HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 06-05-2015

Under challenge, in the present appeal, are the judgment and order, dated 12.12.1992, passed, in Sessions Trial No. 136 of 19914, by learned Sessions judge, Sitamarhi, convicting the accused-appellant, Saikh Kismat, under Sections 302 of the Indian Penal Code and sentencing him suffer imprisonment for life.

2. The prosecution's case, as unfolded by the First Information Report, may, in brief, be set out as under:

(i) On 19.05.1990, at about 8.30 PM, Anwarul



Haque (since deceased), brother of the informant, Md. Harun, proceeded for his *Khalihan* (i.e., granary), situated near his field, after taking his meals. The informant, Md. Harun, also came out of his house after having his meals and saw his son, Alkam (PW 2), and his sister, Hasida Khatoon (PW 5), standing at the door, talking with one Md. Ansarul. At that time, accused, Sheikh Kismat @ Kismat Mian, Abdul Mallik and Md. Abdul Kayum arrived at their *khalihan* (i.e., granary) and asked Anwarul Haque as to whether he (Anwarul Haque) would withdraw the case or not. To the queries so made, Anwarul Haque replied in the negative. Being annoyed by the refusal, Abdul Kayum took out a knife and handed it over to accused Kismat Mian, accused Abdul Mallik caught hold of Anwarul Haque and, then, accused Kismat Miyan stabbed Anwarul Haque on the left of Anwarul Haque's abdomen. On being so stabbed, the informant's brother, Anwarul Haque, fell at the *veranda*. When the informant, Md. Harun (PW 1), his sister, Hasida Khatoon (PW 5) and his son, Alkam (PW 2) chased the assailants to catch hold of them, but the assailants took to their heels. The informant, then, took his brother, Anwarul Haque, on a cart, for his treatment, but Anwarul Haque succumbed to his injuries on the way near Lakhandai Overbridge.

(ii) The motive behind the occurrence is a previous criminal case having been filed by the said deceased against

the accused persons and the accused persons were pressurizing the deceased to compromise the case.

(iii) An oral information about the occurrence was given to the police and the information, so given by the informant (PW 1), was reduced into writing in the form of *fardbeyan* and treating the said *fardbeyan* as First Information Report, Sitamarhi Police Station Case No. 112 of 1990 was registered, under Section 302/34 of the Indian Penal Code, against the accused, Kismat Mian @ Sheikh Kismat, Abdul Mallik and Abdul Kayum.

3. During investigation, inquest was held over Anwarul Haque's dead body, which was also subjected to post mortem examination, and, on completion of investigation, a *charge sheet* was laid, under Section 302 of the Indian Penal Code, against the accused Kismat Mian.

4. At the trial, while a charge, under Section 302 read with Section 34 of the Indian Penal Code, was framed against two accused persons, namely, Abdul Mallick and Abdul Kayum, a charge, under Section 302 of the Indian Penal Code *simplicitor* was framed against accused Kismat Mian. All the accused pleaded not guilty to the charges so framed.

5. In support of their case, prosecution examined altogether 07 (seven) witnesses. The accused were, then, examined under Section 313 (1) (b) of the Code of Criminal

Procedure and, in their examinations aforementioned, they denied to have committed the offence, which was alleged to have been committed by them, the case of the defence being that of denial. The defence has also adduced evidence by examining one witness.

6. While two of the accused, namely, Abdul Mallick and Abdul Kayum, had, however, been acquitted under the provisions of Section 232 of the Code of Criminal Procedure, having arrived at the finding that accused Kismat Mian @ Sheikh Kismat had been found guilty of the charge under Section 302 of the Indian Penal Code, learned trial Court convicted him accordingly. Following his conviction, sentence has been passed against the convict as mentioned above.

7. Aggrieved by his conviction and the sentence passed against him, accused Kismat Mian @ Sheikh Kismat, as a convict, has preferred this appeal.

8. We have heard Mr. Prasoon Sinha, learned Counsel, appearing on behalf of the appellant, and Mr. Mayanand Jha, learned Additional Public Prosecutor, appearing on behalf of the State.

9. Before we enter into the discussion of the evidence of the informant and his relatives, let us take note of the evidence of the doctor (PW 7), who had, admittedly, performed, on 20.05.1991, at about 01:00 PM, *post mortem* examination on the dead body of Anwarul Haque. According

to the doctor (PW 7), on conducting *post mortem* examination, he found following *ante mortem* injury on the said dead body.

"Incise wound on the left side abdomen 2" x 1" x visceral deep. On opening of abdomen, small intestine was punctured. Abdominal cavity was full of blood."

10. In the opinion of the doctor (PW 7), the death was due to shock and hemorrhage resulting from the above injury which was caused by sharp cutting weapon, such as, knife.

11. Neither the finding of the doctor nor his opinion, with regard to cause of death of the said deceased and/or his opinion with regard to the nature of weapon, which might have been used, for causing assault on, and death of, the said deceased, were disputed either by the prosecution or by the defence. This apart, we, too, do not notice anything inherently incorrect or improbable in the evidence given by the doctor (PW 7).

12. So situated, it becomes clear that Anwarul Haque's death was *homicidal* in nature.

13. The question, however, remains: whether the accused-appellant, Kismat Mian, was the one, who had caused the death of Anwarul Haque?

14. Bearing in mind the medical evidence of record,

when we turn to ocular evidence on record, we find that prosecution has examined Md. Harun (PW 1), informant of this case, Md. Alkam (PW 2), son of the informant, and Hasida Khatoon (PW 5), sister of the deceased, as eye-witnesses to the occurrence, whereas PW 3 and PW 4 are hear-say witnesses.

15. It is in the evidence of the informant, Md. Harun (PW 1), that on 19.05.1990, at about 8.30 PM, the informant, along with his brother, Anwarul Haque (since deceased), was going to their *Khalihan* (i.e., granary) after taking their meals, accused-appellant, Kismat Mian, came and enquired from his brother, Anwarul Haque, as to why without accused-appellant's consent, he (the said deceased) had compromised the case with Abdul Kayum and to this, informant's brother, Anwarul Haque, replied that he was a poor person and, as such, was not in a position to fight the long drawn litigations. Being annoyed by the reply, so given by deceased Anwarul Haque, accused-appellant, Kismat Mian, stabbed Anwarul Haque on his abdomen by means of a knife.

16. Close on the heels of the evidence of PW 1 is the evidence of PW 2 (Md. Alkam), son of the informant, and PW 5 (Rashida Khatoon), the sister of the deceased.

17. PW 3 (Najma Khatoon), wife of the deceased, in her evidence, has deposed that on *hulla*, she came to the

place of occurrence and saw her husband lying on the ground, writhing in pain and, on being asked by her (PW 3), her husband, Anwarul Haque, told her that Kismat Mian had stabbed him.

18. PW 4 (Md. Khalil) has deposed that on hearing *hulla*, he went to the place of occurrence, where he found Anwarul Haque in injured condition with blood oozing out of his abdomen, he (PW 4) learnt that accused Kismat Mian had fled away after stabbing Anwarul Haque by means of a knife.

19. On the strength of the evidence depicted above, Mr. Mayanand Jha, learned Additional Public Prosecutor, has argued that the evidence of eye witnesses, i.e. PWs.1, 2 and 5, clearly establish that it was the appellant, who had killed the said deceased. According to Mr. Mayanand Jha, the *post mortem* report and the evidence of PWs. 3 and 4, namely, Najma Khatoon (PW 3) and Md. Khalil (PW 4) lent full credence to the prosecution's case.

20. On the other hand, Mr. Prasoon Singh, learned Counsel for the appellants, has argued that no one had seen the occurrence and the prosecution utterly failed to prove its case beyond all reasonable doubt inasmuch as PW 2 and PW 5 have, according to learned Counsel for the appellant, falsely projected themselves as eye witnesses, though had not actually seen the occurrence. In this regard, it is pointed out by learned Counsel for the appellant that the place of



occurrence has not been established as the Investigating Officer did not find any sign of blood at the alleged place of occurrence. This apart, points out learned Counsel for the appellant, that the motive, alleged for commission of occurrence has been clearly changed by the prosecution witnesses during trial from the original motive attributed for committing the crime as mentioned in the First Information Report inasmuch as it is the informant's case, in the First Information Report, that the accused had asked the said deceased as to whether he (Anwarul Haque) would withdraw the case or not; whereas the evidence, adduced at the trial, is that the accused-appellant asked the said deceased as to why he had compromised the case. Further-more, the doctor (PW 7), who had conducted the *post mortem* examination, did not find food or food material in the stomach of the deceased, which, too, belies the prosecution's case that the deceased was murdered soon after he had his dinner.

21. We find that it is the specific case of the prosecution, in the First Information Report, that Abdul Kayum handed over knife to Kismat Mian and Abdul Mallik caught hold of the brother of the informant, whereupon accused Kismat Mian gave a knife blow on the left side of the abdomen of the deceased. However, during trial, PWs. 1, 2 and 5, in their evidence, have not named at all the other two accused, namely, Abdul Kayum and Abdul Mallick.

22. We would next examine whether PWs 1,2 and 5 have actually seen the occurrence as the same has been vehemently disputed by the accused-appellant. The defence has argued that the evidence of PWs. 1, 2 and 5 that they were eye-witnesses to the occurrence is demolished by the statement of PW 3, wife of the deceased inasmuch as PW 3 has deposed, in her evidence, that on *hulla*, she rushed to the place of occurrence and found her husband lying on the ground in injured condition. She has further deposed that PWs. 2 and 5, too, came running, behind her.

23. In the face of the evidence as pointed out, we would agree with the submissions of the defence to the extent that the evidence of PW 3 creates doubt as to whether PWs 1, 2 and 5 had seen the actual commission of murder.

24. So far as motive is concerned, we see substance in the submission of the learned counsel for the defence that the motive alleged for commission of occurrence has been changed by the prosecution witnesses during trial from the one attributed for committing occurrence in the First Information Report. The motive for occurrence, as disclosed initially by the informant, in the First Information Report, was that a case was pending between the informant's brother, on one hand, and, accused Abdul Kayum and Abdul Mallick, on the other hand. Both the accused, Abdul Kayum and Abdul Mallick, were pressurizing the deceased for a compromise



against his will. However, in the evidence before the Court, the prosecution witnesses set forth a new story regarding motive for commission of the occurrence. As per the evidence on record, accused Kismat Mian was angry as Anwarul Haque had already compromised the case without the consent of accused Kismat Mian and, hence, accused Kismat Mian stabbed Anwarul Haque in his abdomen by means of a knife. We, therefore, find that the prosecution has deviated from its earlier motive alleged in the First Information Report.

25. As argued by the learned Counsel for the appellant, we find that the evidence of the prosecution witnesses is not consistent before the police and the Court. For instance, PW 3, in paragraph 1 of her deposition, has deposed that her husband disclosed to her the name of the accused, who had stabbed him. However, her attention was drawn towards her previous statement made before the police, wherein she had not made any such statement. The Investigating Officer (PW 6) has deposed, in paragraph 11 of his evidence, that PW 3 had never made any such statement before him during the course of investigation. The evidence of the Investigating Officer (PW 6) supports the defence version that PW 3 had tried to improve the case and the story of disclosure of name of assailant by deceased to her becomes equally doubtful.

26. It has been next argued on behalf of the



appellant that the prosecution has failed to establish the place of occurrence. We notice that PW 2, in paragraph 5, has deposed that there was blood on the ground, where the said deceased had fallen on being stabbed. PW 3, in paragraph 3, also talk of sufficient blood present at the place of occurrence. Even PW 5, in paragraph 5, has deposed in the same terms. The doctor (PW 7) has deposed that the injury, sustained by the deceased, must have caused profused bleeding. However, PW 6, the Investigating Officer, has categorically asserted, at paragraphs 4 and 10 of the evidence, that no blood was found at the place of occurrence.

27. In backdrop of the facts noticed above, we find that the prosecution has failed to prove the place of occurrence beyond all reasonable doubts.

28. Further-more, the learned Counsel for the appellant has argued that no means of identification was disclosed by the prosecution, although the occurrence took place in a dark night. PW 5, during her examination-in-chief, has deposed that a lantern was burning at the *Khalihan* (i.e., granary). However, the said *lantern* was not shown to the police, when the police arrived at the place of occurrence for inspection. Besides this, it is the specific case of the prosecution that the deceased, after taking meals, had gone to his *Khalihan*, where he was murdered, but the doctor, in paragraphs 6 and 7, has deposed that no food or food

particles were found present in the intestine of the deceased. The evidence of the doctor also does not support the prosecution's case that the said deceased, after taking meals, had come to his *Khalihan*, where he was murdered shortly.

29. Situated thus, we are clearly of the view that in the facts and attending circumstances of the present case, the appellant ought to have been accorded, at least, benefit of doubt.

30. In the result and for the forgoing reasons, we allow this appeal. The impugned conviction of the accused-appellant and the sentence passed against him by the judgment and order, under appeal, are hereby set aside. The accused-appellant is held not guilty of the offence, which he stands convicted of, and he is hereby acquitted of the same under benefit of doubt.

31. As the accused-appellant is on bail, his bail bonds are hereby cancelled and his sureties shall stand discharged.

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

(Samarendra Pratap Singh, J.)

I. A. Ansari, J: I agree.

Shashi/NAFR

(I. A. Ansari, J.)

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