

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.262 of 1993

Arising out of PS.Case No.-14 Year- 1986 Thana -Bairia District- WESTCHAMPARAN(BETTIAH)

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Barkat Mian S/o Shaukat Mian, Resident of Village-Fatuchhapar, P.S. Bairia,
District- West Champaran.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s : Shri Alok Kumar, Advocate
Shri Raghwendra Pratap Singh, Advocate
For the State : Shri Ajay Mishra, A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH)

Date: 09-10-2017

The present appeal was preferred against the judgment of conviction dated 30.04.1993 and order of sentence dated 01.05.1993 passed in Sessions Trial No. 303 of 1987 (arising out of Bairia P.S. Case No. 14 of 1986) by the learned Sessions Judge, West Champaran, Bettiah.

2. By the said judgment the appellant herein has been held guilty for the offence punishable under section 302 read with section 34 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for life and a fine of Rs. 5,000/- was imposed, in default whereof the appellant was to undergo R.I. for one year.

3. Short fact of the case is that on the basis of the fardbeyan of the informant, namely, Ram Deo Bin (father of the



deceased), an FIR vide Bairia P.S. Case No. 14 of 1986 was registered on 16.03.1986 under sections 302/34 of the Indian Penal Code and section 27 of the Arms Act. It was alleged by the informant that in the preceding night at about mid-night while he was sleeping at his home along with his younger son, namely, Anwat Bin and the lantern was lit, some people came inside the house and he saw in the light of the lantern that his co-villagers, namely, Shaukat Mian, Bande Mian, Barkat Mian and Tabdin Mian were carrying gun and three persons were standing outside, namely, Rustam Mian, Durgami Mian, and Mahmood Mian who were carrying lathi in their hand. Thereafter, Shaukat Mian pointed the gun on the chest of the informant and Bande Mian caught his legs while Barkat Mian and Tabdin Mian dragged the son of the informant and took him outside the door and fired from their gun. It has been further stated by the informant that the accused persons who had caught the informant, left him and went outside the house whereafter the informant also came out of the house and saw that his son was writhing. All the accused persons, after firing gun shots, ran away towards the northern side. When the informant went near his son he saw sign of injury on his chest from which blood was oozing out and after sometime the son of the informant died. After hearing the sound the co-villagers, namely Ali Hasan Mian, Bindeshwari Sah, Mutlal Bin, Bodha Bin and other people arrived. The informant disclosed the motive to be old enmity.



The FIR was lodged against seven persons, namely, (1) Shaukat Mian (since deceased); (2) Barkat Mian; (3) Bande Mian (acquitted); (4) Tabdin Mian (acquitted); (5) Rustam Mian (acquitted); (6) Durgami Mian (acquitted) and (7) Md. Mahmood Mian (acquitted).

4. The case was investigated and thereafter charge sheet was submitted on 14.12.1986 against all the accused persons and cognizance was taken by the learned trial court on 23.04.1987.

5. After completion of supply of police papers, the case was committed to the court of sessions on 24.07.1987 and charges were framed under section 302/34 of the Indian Penal Code against the seven FIR named accused persons on 11.08.1988.

6. During the course of trial, the prosecution produced 11 witnesses to prove the case. P.W. 1 Ali Hasan Mian; P.W. 2 Mandev Mukhiya and P.W. 3 Dihu Mukhiya had turned hostile. P.W. 4 Moti Mukhiya was only tendered. P.W. 5 Babu Ram Mukhiya is a hearsay witness; P.W. 6 Dhruv Narayan Prasad and P.W. 9 Radha Krishna Prasad had seen the accused persons fleeing away. Ram Deo Bin is the informant and father of the deceased and he has been examined as P.W.7. P.W.8 is Suraj Mal Singh; Assistant Sub-Inspector of Police and he had submitted the charge sheet. Girendra Prasad Mishra is the Investigating Officer of this case and he was examined as P.W.10. Nisar Ahmad was examined as P.W.11 and he is a Pharmacist who has proved the signature and hand writing of the doctor on the post-



mortem report as well as has proved the post-mortem report.

7. Shri Alok Kumar has argued on behalf of the appellant and has submitted that the judgment of conviction is liable to be set aside on the ground that the informant i.e. P.W. 7 had identified the accused persons in the light of the lantern, however, the lantern was neither seized nor produced, hence the non-production of the source of identity creates a doubt. It has also been submitted that the material witnesses i.e. P.W. 2, P.W.6 and P.W. 9 had seen the accused persons fleeing away in the dark night and had identified them in torch light. However, the torch was never produced, hence again the source of identification having not been produced creates doubt about the entire incident especially when there is previous enmity between the parties. The learned counsel for the appellant has further argued that there were four FIR witnesses, however, one of them i.e. P.W. 1 was only examined but he had turned hostile and the other three were not examined. It has also been contended that the appellant along with two other accused, namely Man Deo Mian and Tabdin Mian were alleged to have been holding gun on the chest of the informant, however, the said two accused persons, i.e. Man Deo Mian and Tabdin Mian have been acquitted while the appellant has been convicted on the very same set of evidence. It has also been argued that the entire mode and manner of occurrence is doubtful as can be culled out from the evidence led by the prosecution. The learned



counsel for the appellant has relied upon a judgment of the Hon'ble Apex Court reported in (2008) 16 SCC 99 (Kapil Deo Mandal & others vs. The State of Bihar), to buttress the proposition of law that non-production of the source of identification of the accused persons before the Court creates a doubt on the identification of the accused persons.

8. Mr. Ajay Mishra, the learned Additional Public Prosecutor appearing for the State has submitted that there is ample evidence on record to sustain the conviction of the appellant herein. He has submitted that the testimony of P.W. 7 cannot be questioned merely on the ground that the lantern was not produced in view of the fact that he had shown the lantern to the Investigating Officer, hence the benefit of laxity of the Investigating Officer cannot be given to the appellant herein.

9. We have heard the learned counsel for the parties and besides going through the materials on record have also perused the evidence. However, it would be relevant to deal with the evidence of the prosecution witnesses herein below.

10. The informant of the present case is Ram Deo Bin who is the father of the deceased also and has been examined as P.W. 7. In his evidence, P.W. 7 has stated that about three years ago the occurrence had taken place on Sunday at about 12:00 in the night while he was sleeping at his house. His son, namely, Anwat Bin was



also sleeping there and lantern was burning. At that place Tabdin Mian, Barkat Mian, Shaukat Mian, Bande Mian, Rustam Mian, Durgami Mian and Mahmood came. Out of the said people, Shaukat Mian, Barkat Mian and Tabdin were carrying gun. Thereafter, Barkat Mian and Tabdin Mian carried away his son. Shaukat Mian had put gun on the chest of this witness i.e. P.W.7 while Bande Mian had caught hold of his legs due to which he could not get up. Durgami Mian and Rustam Mian were standing there with lathi. His son Anwat Bin was taken away by force near the heap of straw (poonj) and was killed there. After hearing the sound of the gun, P.W. 7 had gone near the heap of straw and saw gun shot injury on the chest of his son and his son was wreathing. The co-villagers had then arrived there. P.W. 7 has further stated that there was previous enmity with the accused persons. In paragraph no. 2 of his cross-examination, P.W.7 has stated that he had recognized Tabdin and Bande Mian from there voice but not by their face. In paragraph no. 3 of his cross-examination, P.W. 7 has stated that Shaukat Mian had filed one case against Swaroop Bin, Man Deo Bin and others. Man Deo Bin is real brother and Swaroop Bin is real nephew of P.W. 7. In paragraph no. 4 of cross-examination, P.W. 7 has stated that his son (deceased) was wearing shirt and baniyan which had become blood stained and were given to the Investigating Officer at the door of the house of the informant. P.W. 7 has further stated that he had recognized the accused persons



in the light of the lantern and he had shown the lantern to the Investigating Officer. P.W. 7 has also admitted that at the time of incident it was a dark night.

11. P.W. 10 is the Investigating Officer, namely, Birendra Prasad Mishra who was posted as Officer In-Charge, Bairia Police Station in the month of March, 1986 and he has stated in his evidence that the basis of the registration of the present case is the fardbeyan of informant which is in the writing of A.S.I Hasmi which he recognizes and the fardbeyan was marked as Exhibit-1. On the basis of the fardbeyan formal FIR was drawn which has been marked as Exhibit-2. It has been stated by P.W. 10 that the witness Hasan Mian had stated before him that in the torch light he had seen Shaukat Mian, Bande Mian, Barkat Mian and Tabdin Mian carrying gun as well as he had seen Rustam Mian, Durgami Mian and Mahmood Mian carrying lathi while they were fleeing away. P.W. 10 has further stated that he had recorded the statement of Man Deo Mukhiya who had taken the name of accused, Bande Mian and Tabdin Mian. P.W. 10 had also recorded the statement of Dihu Mukhiya who had stated that he had recognized and seen Shaukat Mian, Barkat Mian, Tabdin Mian, Rustam Mian, Durgami Mian and Mahmood Mian, going towards north eastern direction. P.W. 10 had also recorded the statement of Radhe Krishna Prasad who is said to have recognized Bande and Tabdin Mian. P.W. 10 in paragraph no. 12 of his cross-examination



has stated that he had only seized blood. In paragraph-15 and 16 of the cross-examination, he has denied that the witnesses/informant had either shown torch or lantern to him.

12. P.W. 6 i.e. Dhruv Narayan Prasad has stated in his evidence that on 15.03.1986 he was at his home and was awake when he heard the sound of firing towards the eastern side whereupon he went to the place of occurrence which is the house of Ram Deo Bin and saw the accused persons including the appellant herein fleeing towards the northern side. P.W. 6 is said to have recognized the accused persons in torch light. P.W. 6 had seen Shaukat and Barkat carrying gun while the others were carrying lathi. P.W. 6 is said to have also seen Anwat Bin lying dead and there was gun shot injury on his chest from which blood was oozing out. In his cross-examination, P.W. 6 has stated that he had shown the torch to the Police, however, the Police said that if they needed, they would ask for it. P.W. 9 i.e. Radhe Krishan Prasad has stated in his evidence that the occurrence dates back to four years when it was around 12:00 in the mid-night and he was at the door of his house where arrangements were being made for Puja and at that moment he heard sound of gun shot from the house of Ram Deo Bin whereafter he and his son went there and saw that dacoits were fleeing away and amongst them he could recognize in torch light some of the accused persons, namely, Shaukat Mian, Barkat Mian, Rustam Mian, Durgami Mian and Mahmood



Mian. Shaukat Mian and Barkat Mian, who were carrying guns. In paragraph-8 of his cross-examination, P.W. 9 has stated that his eye sight is weak. In paragraph no. 19 of his cross examination, P.W. 9 has stated that both he and his son were having torch and when he and his son lit the torch, they saw the dacoits fleeing away towards the northern side. In paragraph no. 28 of his cross-examination, P.W. 9 has stated that he is an accused in the case of murder of Nulum Mian, in which Shaukat Mian is a witness. P.W. 5 i.e. Babu Ram Mukhiya is a hearsay witness and he has stated in his evidence that upon hearing hulla he had gone near the Peepal tree where he saw the dead body of Anwat Bin son of Ram Deo Bin and he was told by Ram Deo that Shaukat, Mahmood Gani, Barkat and Rustam had killed Anwat Bin and fled away. This witness has stated in paragraph no. 2 of his cross-examination that the night was dark. P.W. 1 Ali Hasan Mian has stated in his evidence that he could not recognize the accused persons on account of the dark night. This witness was declared hostile.

13. P.W. 2 Man Deo Mukhiya has stated in his evidence that when he heard the sound of gun shot he went along with his light towards the place from where the sound had come and in light he recognized Shaukat Mian, Barkat Mian, Abdul Gani Mian, Mahmood Mian and Rustam Mian. Shaukat Mian and Barkat Mian were carrying gun in their hand. P.W. 2 heard Ram Deo Bin yelling that his son has been killed by the aforesaid persons. This witness further



stated that Shaukat Mian has filed a case against him for driving away his daughter. P.W. 2 has further stated that he had given statement to the Police, however, he had not taken the name of Bande and Tabdin. On this point, P.W. 2 has been declared hostile. In his cross-examination, P.W. 2 has stated that when he went to the place of occurrence he did not recognize the people present there except his brother Shyam Deo on account of dark night. P.W. 2 has also stated that he had not shown the torch to the Officer In-Charge.

14. P.W. 3 is Dihu Mukhiya and he has stated in his evidence that upon hearing the sound of gun shot firing he went towards the Peepal tree and saw that the dead body of Anwat Bin was lying there. However, he could not recognize any person but he was told by Ram Deo Bin that Shaukat Mian, Barkat Mian, Mahmood Mian have killed his son and fled away. This witness has stated that when he reached at the place of occurrence, no accused person was present there. P.W. 4 is Moti Mukhiya and he has merely been tendered as a witness.

15. Suraj Bansh Singh has been examined as P.W. 8 and he has stated in his evidence that he was handed over the investigation of this case on 15.07.1986 and after completing the investigation he had filed the charge sheet. P.W. 11 i.e. Nisar Ahmad is a Pharmacist, posted at M.J.K. Hospital, Bettiah and he is a formal witness who has proved the post-mortem report of Dr. P.N. Gupta which has been



marked as Exhibit-3.

16. After completion of the prosecution evidence the appellant herein along with the other accused persons were examined under section 313 of the Code of Criminal Procedure and they denied to have committed the alleged occurrence.

17. We have examined the materials on record as well as perused the evidence led by the prosecution. It is apparent that there are four material witnesses i.e. P.W. 2 Man Deo Mukhiya, P.W. 6 Dhruv Narayan Prasad, P.W. 7 Ram Deo Bin (informant) and P.W. 9 Radhe Krishna Prasad. While P.W.2, P.W.6 and P.W. 9 have stated to have recognized the appellant while fleeing away in torch light, the informant herein i.e. P.W. 7 has stated that he had recognized the appellant in the light of lantern. However, neither the torch nor the lantern have either been seized or produced as evidence in the present case. Hence, non-production of the source of identification of the accused persons creates a doubt on the case as put forth by the prosecution. It is also difficult to believe that the appellant was identified in the torch light and the lantern light on a dark night, in absence of either seizure or production of either of the said two source of light/identification. The judgment referred to above by the learned counsel for the appellant in the case of Kapil Deo Mandal & others (supra) squarely covers the present case. It would be relevant to quote paragraph-19 and 27 of the said judgment herein below:-



“19. In the present case, we find from the evidence of the witnesses examined by the prosecution as already noticed that the witnesses are related and their relations were strained with the appellants on account of the litigation. The incident happened at 11.00 o'clock in the night. The witnesses have stated that they have seen the incident and recognised the appellants either in the torch-light or in the lantern-light which was burning at their house. It has come in evidence of the witnesses as well as the Investigating Officer that neither the torch or the lantern was seized by the I.O. during the course of investigation nor was it produced before the court. In the circumstances, it is difficult to believe that the appellants have been identified in the torch-light or in the lantern-light.

27.In the light of the fact that there was a previous enmity between the parties and the eye-witnesses examined are related to the deceased and are interested witnesses; and that in absence of the lantern or the torch, in the light of which the incident was said to have been witnessed, the prosecution case as placed before the court is full of doubts, and as such the accused-appellants are entitled for benefit of doubt.”

18. Another aspect of the matter is that the informant i.e. P.W.7 who is the father of the deceased has admitted previous enmity with the accused persons, hence false implication of the accused



persons can also not be ruled out. Moreover, there were four FIR witnesses out of which only one was produced by the prosecution but he turned hostile, however, the remaining three FIR witnesses were withheld by the prosecution which also creates doubt about the case put forth by the prosecution. The incident is said to have taken place in the mid-night of the previous day of 16.03.1986 but the fardbeyan was recorded at 12:30 in the afternoon on 16.03.1986 but no explanation has been furnished for the delay in recording the fardbeyan, hence the possibility of false implication cannot be ruled out. Another aspect of the matter is that although the Investigating Officer is said to have seized the blood but neither the same was exhibited nor the same was got examined by the Forensic Science Laboratory, thus prejudicing the defence. The inquest report was prepared at 11:30 A.M. on 16.03.1986 and only thereafter the fardbeyan is said to have been recorded on the same day i.e. at 12:30 in the afternoon which also creates doubt about the case of the prosecution. Furthermore, neither the inquest report has been exhibited nor the witnesses to the inquest report have been examined during the course of the trial. As far as the post-mortem report is concerned, the same has been got proved by a Pharmacist. However, the doctor who has conducted the post-mortem, has not been examined resulting in no opportunity being provided to the defence to cross-examine the doctor which have also seriously prejudiced the



defence. It is a matter of record that though the appellant and two other persons, namely, Bande Mian and Tabdin Mian were also holding the gun along with the appellant herein, the said two accused persons have been given a clean acquittal by the learned trial court and on the same set of evidence, the appellant herein has been convicted which further makes the case of the prosecution doubtful on account of the serious contradiction in the evidence of the prosecution witnesses.

19. Upon consideration of the entire evidence it is apparent that there was previous enmity between the informant and the accused persons, there is material contradiction in the evidence of the prosecution witnesses, neither the torch nor the lantern which were the only source of identification of the accused persons on a dark night were seized nor exhibited in the present case, the doctor who has conducted the post-mortem report has not been examined, out of four FIR witnesses, only one was produced and examined but he turned hostile, there is no explanation for delay in recording the fardbeyan, the inquest report was prepared before the fardbeyan was recorded and the witnesses to the inquest were also not examined. Hence, the prosecution case as placed before the Court is full of doubts and the prosecution has not been able to prove the case beyond all reasonable doubts. As such, the appellant herein deserves to be given the benefit of doubt.



20. Accordingly, the judgment of conviction dated 30.04.1993 and order of sentence dated 01.05.1993 passed in Sessions Trial No. 303 of 1987, is hereby set aside. The appellant herein was granted bail vide order dated 14.06.1993. Considering the fact that the appellant has been acquitted, he is hereby discharged from his liability of bail bond.

The appeal stands allowed.

(Mohit Kumar Shah, J)

Rakesh Kumar, J: I agree

(Rakesh Kumar, J)

S.Sb/-

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