

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.239 of 1993

Arising Out of PS.Case No. -null Year- null Thana -null District- SIWAN

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Asgar Mian @ Asgar Ali, son of Late Ish Mohammad Mian, resident of village
Ladhi Bazar, P.S. Goreakothi, District Siwan

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Ashish Giri with
Mr. Anshul, Advocates

For the Respondent/s : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

CAV JUDGMENT

Date: 03-03-2017

This appeal is directed against the judgment and order dated 20th April, 1993 passed by Sri Lakshman Jha, First Additional Sessions Judge, Siwan in Sessions Trial No. 331 of 1988 by which he has convicted the appellant Asgar Mian under Section 304 Part II of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for seven years for committing culpable homicide in respect of deceased Yasin under Section 304 Part II of the Indian Penal Code and further sentenced him to rigorous imprisonment for seven years for committing culpable homicide with respect to deceased Md. Jalil under Section 304 Part II of the Indian Penal Code and both the sentences were directed to run consecutively, i.e., for a term of 14 years rigorous imprisonment and also directed that the appellant is entitled to a set off the period already undergone as under trial prisoner.



The prosecution case, in short, is that statement of deceased Yasin Mian was recorded on 21.5.1988 at 3 P.M. at Sadar Hospital, Siwan by A.S.I. , V.N.Prasad (P.W.5) of Siwan Town Police Station stating, inter alia, therein that on the 21.5.1988 at 1 P.M. while he was at his home he saw a quarrel and marpit going on in between his nephew Ghafur Mian (P.W.10) and accused Muslim Mian and he tried to pacify the matter, due to which accused Muslim Mian exhorted the other accused persons to kill, and on such exhortation, accused appellant Asgar Mian and Mokhtar brought knives from their houses. Further prosecution story is that accused appellant Asgar Mian stabbed him in abdomen by knife which caused profuse bleeding to him and he fell on the ground and thereafter his father Jalil Mian (deceased) intervened but the appellant Asgar Mian stabbed him also in his stomach due to which Jalil Mian (deceased) sustained injuries in his abdomen and he also sustained injuries in his right hand finger. Further accused Mokhtar Mian also inflicted knife blow on the informant which caused injury in his right leg. On hulla, neighbours and other persons assembled there and then the accused persons fled away and they were taken to Sadar Hospital, Siwan where their treatment is going on. He has also stated that that the appellant assaulted both the deceased with an intention to kill them.

On the basis of the aforesaid Fardbeyan (Ext.1), Goreakothi P.S.Case No. 45 of 1988 was instituted under Sections 307, 324 and 302/34 of the Indian Penal Code on 22.5.1988 at 1 P.M.



and police took up the investigation and submitted charge-sheet against the appellant and other accused persons on which cognizance of the case had been taken and the case was committed to the court of sessions for trial.

Record of the case further shows that charge under Section 302 IPC had been framed against the appellant for intentionally committing death of Yasin Mian and Md. Jalil Mian and charge under Sections 302/34 IPC had also been framed against the appellant and other accused persons.

After trial the learned trial court has convicted the appellant Asgar Mian under Section 304 Part II of the Indian Penal Code and sentenced him, as stated above.

Against the aforesaid judgment and order the present appeal has been filed by the appellant Asgar Mian.

From perusal of the record it appears that altogether 13 witnesses have been examined on behalf of the prosecution. P.W.1 is Mainuddin Ahmad, who had been declared hostile, P.W.2 is Khedu Mian, who is also an attesting witness of the fardbeyan (Ext.1), P.W.3 is Md. Hashim, P.W.4 is Dil Hassan, P.W.5 is Vishwa Nath Prasad, ASI, who has recorded the fardbeyan (Ext.1), P.W.6 is Samila Khatoon, wife of the deceased, P.W.7 is Babujan Ansari, who is also an attesting witness to the fardbeyan, P.W.8 is Dr. Anil Kumar Verma, who has conducted Post Mortem of deceased (Ext. 4 & 4/1), and prepared Bed Head Tickets of Md. Jalil and Md. Yasin (Ext.5 &



5/1) and Endorsement over Bed Head Tickets as Ext. 5 & 5/1 and detailed about operation by Dr. T.N.Singh as Ext. 6/2 & 6/3 and death certificates have been marked as Ext. 7 and 7/1. P.W.9 is Imam Hussain, who is a formal witness and proved Ext. 9, 9/1 & 9/2, P.W.10 is Gaffur Mian, P.W.11 is Salima Khatoon, who is a tendered witness, P.W.12 is Mahendra Pandey, who is the I.O. of the case and P.W.13 is Dr. T.N.Singh.

Apart from that, the following documents had been taken into evidence on behalf of the prosecution : (1) Fardbeyan, Ext.1 (without objection), (2) Injury Reports of Yasin Mian & Jalil Mian, Ext.2 (without objection) and Ext-2/A (without objection), (3) Carbon copy of Inquest Report, Ext.3 (without objection), (4) Carbon Copy of Inquest Report, Ext.3/A (without objection), (5) Post Mortem Report of Jalil Mian, Ext.4, (6) Post Mortem Report of Yasin Mian, Ext.4/1, (7) Bed Head Ticket of Yasin Mian, Ext.5, and Bed Head Ticket of Jalil Mian, Ext.5/1, (8) Endorsement on Bed Head Ticket of Yasin Mian, Ext.6 & 6/2, (9) Detailed operation notes on Bed Head Tickets of Yasin Mian and Jalil Mian, Ext.6/1 & 6/3, (10) Death Certificate of Jalil Mian, Ext.7, (11) Death Certificate of Jalil Mian, Ext.7/1, (12) Vakalatnamas, Exts. 8 & 8/1, (13) Bail Petition filed by appellant Asgar, (14) Petitions filed by Salima Khatoon, Ext. 9/1 & 9/2, (15) Forwarding of Fardbeyan, Ext.10, (16) Endorsement, Ext. 10/1, (17) Ext.11 is formal FIR, (18) Seizure list, Ext.12 and (19) Ext.13 is Impression Note.



On behalf of the defence one witness has also been examined as D.W.1, Raghu Nath Rai.

Defence of the appellant as per his statement under Section 313 of the Code of Criminal Procedure is simply denial, however from the statement of Md. Muslim under Section 313 Cr.P.C. as well as from suggestion given to the witness, it appears that defence is that there was altercation between Ghafur Mian (P.W.10) and Ghafur tried to assault Md. Muslim which was objected by deceased Yasin, then Ghafur (P.W.10) assaulted deceased Yasin by knife and when deceased Jalil intervened he was also stabbed.

Learned lower court vide its impugned judgment and order convicted the appellant under Section 304 Part II IPC and sentenced him, as stated above, however acquitted other accused persons of the charges

Against the impugned judgment and order, the appellant has filed the present appeal.

It has also been submitted on behalf of the appellant that the alleged Fardbeyan of Yasin Mian, deceased (Ext.1), cannot be treated as dying declaration and the same cannot be relied upon as the same was recorded on 21.5.1988 at 3 P.M. in Sadar Hospital, Siwan but the evidence of Dr.Anil Kumar Verma (P.W.8) and Dr.T.N.Singh (P.W.13) as well as from the bed head tickets (Ext.5 & 5/1) clearly show that the conditions of the deceased were very bad when he was admitted at 3 P.M. and thereafter he was operated upon at 6 P.M. and



thereafter he died also. Further evidence of Doctor clearly shows that condition of deceased Yasin was precarious at that time and he was pulseless and, in such a situation the recording of Fardbeyan (Ext.1) is a doubtful and same is not reliable as the deceased was not in a position to speak at that time and in spite of the fact that Doctors were available in the Hospital but certificate of the Doctor has not been obtained and even P.W. 8 and P.W.13 have neither stated about the presence of P.W.5, Vishwa Nath Prasad, ASI nor about the recording of Fardbeyan, as such, the same cannot be valid and in this connection learned counsel for the appellant has cited a decision of the Supreme Court in the case of **Brundaban Moharana and another v. State of Orissa, reported in (2010) 13 SCC 381** and has drawn my attention towards **paragraphs 9, 10, 12 and 13** of the said judgment and also cited a decision of the Apex Court in the case of **Meera v. State of Rajasthan, reported in (2004) 11 SCC 231, in paragraphs 17 and 19** of which the Hon'ble Apex Court has held that in such a situation dying declaration could not have been made.

So far as Fardbeyan (Ext.1) is concerned, which is also the last statement of the deceased before he died, that has been recorded by P.W.5 and he has stated in paragraph-1 of his evidence that O.D. Slip was received from the Hospital and then he came to the Hospital and recorded statement of Md. Yasin, son of Jalil Mian and after recording statement he has explained the same to Md. Yasin, who after fully knowing the same as true, deceased has put his thumb



impression on it and he has taken signature of Babujan (P.W.7) and Khedu Mian (P.W.2) as attesting witnesses. Neither any cross examination has been made with regard to the recording of statement of Md. Yasin nor any suggestion has been given to the witness that deceased Yasin was not in a condition to speak. So far as evidence of P.W.8 is concerned, who is Dr. Anil Kumar Verma, who has conducted autopsy on the injured at hospital. It appears from his evidence in paragraph-11 that as condition of both the deceased was very precarious and they were referred to the Surgeon on call. He has further stated that he did not recall whether the patient was unconscious at the time of admission or not without help of bed head ticket. This witness has also stated that injury was caused by either bhala or chura in paragraph-12 of his evidence. In paragraph-18 he has stated that when Md. Yasin was admitted on 21.5.1988 at 2.15 P.M. and his condition was serious and he was pulseless and he died on the same day at 8 P.M. However, this witness was neither cross examined to show that the deceased was not in a position to speak nor any suggestion has been given with regard to condition of Yasin Mian or Jalil Mian that they were not in a position to speak. P.W.13, Dr. T.N.Singh, who has operated the deceased Yasin as well as Md. Jalil, in paragraph 3 has stated with respect to Md. Jalil that he prescribed medicines vide Ext. 6/3 and his condition was serious after administering the restrictive medicine his shock was over and his operation was performed. In paragraph-5 in his cross examination he



has stated that according to attending Doctor both the injured were pulseless but at the same time he volunteers to say that they were not unconscious. This witness has also vigorously cross examined but there is no cross examination on the point that he was not in a condition to speak and even no suggestion was given that the condition of Md. Yasin or Md. Jalil was so that he cannot speak but considering the evidence of Doctor along with P.W.3 and P.W.7, who accompanied both the deceased to the Hospital and are attesting witnesses to the Fardbeyan and evidence of P.W.3 in paragraph-41 shows that after giving injection the condition of both the injured improved and both of them were in conscious condition. Further in paragraph-45 in his cross examination he has stated that at the time of recording Fardbeyan (Ext.1), Yasin Mian and Jalil Mian were in conscious condition and after recording statement of Yasin the statement of Jalil was recorded by Darogaji. Further in paragraph-47 he has stated that when statement of Yasin was recorded Doctor was not there at that time. Similarly P.W.7 has stated in his evidence in paragraph-8 that Yasin and Jalil both were in conscious condition and they were taken to Hospital at Siwan. Even no suggestion has been given to two attesting witnesses, P.W.3 and P.W.7 that Yasin Mian and Jalil Mian were not in a position to speak at the time of recording their statements.

As stated above, learned counsel for the appellant has made much stress on the fact that before recording statement of the



deceased no step has been taken by P.W.5 to obtain fitness certificate of the deceased as Doctors were available in the same Hospital and if he could have tried there is no difficulty in obtaining the certificate and this fact along with the fact that P.Ws. 8 and 13, who are Doctors, have not stated about the presence of P.W.5 in the Hospital or anything about the recording of the statement of deceased Yasin to this effect create serious doubt and make the Fardbeyan a doubtful document, on which no reliance can be placed. I have gone through the evidence of P.W.8 and P.W.13, who are Doctors. No cross examination has been made to P.W. 8 and P.W.13 with regard to presence of P.W.5 and so far the evidences of Doctors are concerned, they are expert witnesses and they are not supposed to make statement on the factual aspect of the case, as such it was open to the defence to cross examine them on the point of presence of P.W.5 and also about recording the statement by P.W.5. Evidence of P.W.5 itself shows that on O.D. slip he has visited the hospital and recorded the statement of the deceased, as such there is nothing unnatural in it. So far non-obtaining of certificate from Doctor is concerned, in support of the same some decisions have been cited by learned counsel for the appellant. From perusal of the injury report it appears that deceased have received injuries on the abdomen, which not a vital part of the body and not related to heart and brain or speech cord and the evidence has also come that he was not unconscious. Much argument has been made that he was pulseless but that does not show that



deceased was not in a position to speak. In this connection, learned court below has relied upon a decision of the Apex Court in the case of **Surajdeo Oza and others vs. State of Bihar, reported in AIR 1979 SC 1505** in which in that case also injury was on the abdomen and the Hon'ble Apex Court in paragraph-3 of the judgment has held as follows :-

“Mr. Mookherjee appearing in support of the appeal submitted that having regard to the large number of injuries sustained by the deceased, he would not be in a position to speak or give dying declaration. We have ourselves examined the injuries and we find that there was no injury which may have affected the brain or the heart and the only serious injuries are on the abdomen which will not make the deceased unconscious immediately. Moreover, the deceased has also given a short statement which is a proof of the manner in which the deceased was assaulted. The shortness of the statement itself, appears to be the guarantee of its truth. Even the Doctors who examined the deceased do not say, that having regard to the injuries, the deceased would have become unconscious immediately. In this view of the matter we are fully satisfied about the truth of the dying declaration.”

Moreover, the Hon'ble Apex Court in a recent decision in the case of State of **Madhya Pradesh vs. Dal Singh and others, reported in (2013) 14 SCC 159** has held in paragraph-20 as follows:-

“The law on the issue can be summarized to the



effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a doctor in respect of such state of the deceased, is not essential in every case.”

As such, considering the entire discussions made above, to my opinion, non-obtaining certificate regarding fitness of the deceased is not essential and will not make the Fardbeyan doubtful in nature and no reliance can be placed specially on the fact that doctor (P.W.13) had also stated that deceased was not unconscious and there is no evidence that the deceased was not in a position to speak. On the other hand, the witnesses who have brought the deceased to the hospital, had categorically stated that he was conscious and the statement of deceased had been recorded by P.W.5 and no cross examination has been made to P.W.5 on the condition of deceased to show that he was not in a position to speak at that time and even in spite of evidence of doctor there is nothing on the record to show that he was not in a position to speak, rather evidence adduced on behalf of the prosecution has clearly stated that the deceased was in conscious position, as such, the statement of the deceased is a dying declaration under Section 32(1) of the Evidence Act supported by P.W.6 and P.W.10 and the other witnesses have also stated that they



came and saw the deceased Yasin and Jalil in injured condition and they have been taken to hospital where they died and the evidence of doctor is concerned, that deceased died to injuries caused to them. As such, submission advanced by learned counsel for the appellant is without merit and is not acceptable on the basis of materials available on the record. In the present case there is statement of the deceased which is admissible under Section 32(1) of the Indian Evidence Act and as per law laid down by Hon'ble Apex Court for recording dying declaration certificate by doctor regarding state of mind of the deceased is not necessary. Neither law provides who can record dying declaration nor is there any prescribed form or format or procedure for the same, rather only requirement is maker must be in a fit of state of mind and capable of making such statement.

It has also been submitted by learned counsel for the appellant that no independent witness has been examined in spite of the fact that the occurrence took place in a day time, as such presence of independent witness cannot be ruled out at that time and so far the witnesses, who have been examined and claimed themselves as eye-witnesses of the occurrence, are actually the interested and P.Ws. 1 to 4 as well as P.Ws. 6, 7, 10 and 11 were not the eye-witnesses and P.W.1 has already been declared hostile and so far other witnesses are concerned, my attention has been drawn towards the statement of P.W.3, Md. Hashim, in paragraphs 1, 2 & 8, which clearly shows that he was not an eye-witness as he reached the place of occurrence



subsequently and P.W.2, Khedu Mian, P.W.4 Dil Hassan and P.W.7 Babujan Ansari also reached the place of occurrence either with him or thereafter. The aforesaid fact is evident from the statement of I.O. in paragraph-24 that he has stated that witness Hashim has not stated that Asgar and Mokhtar were fleeing with Dagger, rather he has stated that he had seen accused Asgar Mian, Muslim Mian and Mokhtar fleeing. Similarly, in his cross examination he has further stated that Babujan has stated on 21.5.1988 he was not at his house and he knew that there was an incident of stabbing and someone died. Thus, the aforesaid evidence clearly indicates that P.Ws. 2,3,4 and 7 were not eye-witnesses of the occurrence. It has further been argued that so far P.W.6 Samila Khatoon is concerned, she is wife of deceased Yasin and from the evidence of Investigating Officer as well as from the evidence of Doctors, P.Ws.8 and 13, they have not stated about the presence of P.W.6 Samila Khatoon. Similarly, so far as P.W.12 is concerned, his statement before police was recorded after 4 to 5 days and he has stated in his evidence that after the incident he went back to his home and later on he came there to see Yasin and Jalil who were in injured condition and blood was oozing from their stomachs. Further co-accused Muslim Mian has also filed a case against P.W.10 bearing Goriakothi P.W.Case No.48 of 1988, which is also supported by the statement of I.O. I.O. has also recorded statement of Muslim Mian on 21.5.1988 in the Hospital.

On the basis of the above argument, learned counsel for



the appellant has submitted that none of the witnesses examined on behalf of prosecution are eye-witnesses of the occurrence, rather they are interested witnesses and prosecution has not taken any step for examination of independent witness in this case in respect of presence at the place of occurrence, which clearly creates serious doubts about the prosecution case.

Learned APP appearing for the State, on the other hand, has submitted that the witnesses are the natural witnesses and all the witnesses are not related to the deceased, as such it cannot be said that they are interested witnesses, rather their presence at place of occurrence is quite natural as occurrence took place at the darwaja of Md. Yasin. Hence presence of P.W.6 Samila Khatoon and presence of other witnesses cannot be doubted and so far P.W.10 is concerned, it is the defence of the accused persons that scuffle was going on between Muslim Mian and Ghaffur Mian and occurrence took place subsequent to that, as such, presence of P.W.10 cannot be doubted. From the evidence of P.W.3 and P.W.7, there is nothing that they are not the witnesses of the occurrence. As such, they are quite natural and reliable witnesses in the present case and their evidence is quite reliable.

So far as wife of deceased Yasin, Samila Khatoon, P.W.6 is concerned, she appears to be an eye-witness of the occurrence and in spite of her rigorous cross examination there is nothing to doubt the veracity of her evidence as she stood the test of cross examination



also.

So far submission of learned counsel for the appellant that Doctor has not stated about the presence of P.W.6 is concerned, Doctor is not an eye-witness of the occurrence, as such non-mentioning of the name of P.W.6 in his cross examination does not make her evidence doubtful and though there are some minor discrepancies in the evidence of P.W.6 her statement clearly supports the manner of occurrence as she has stated clearly in her evidence that Asgar has stabbed Yasin and also Jalil Mian. Evidence of P.W.4, Dil Hassan, paragraph-26 of his cross examination also shows that Samila Khatoon had come before him and that makes presence of P.W.6 Samila Khatoon at the place of occurrence beyond doubt.

So far P.W.10, Ghafur Mian is concerned, no doubt genesis of occurrence starts with scuffle between Ghafur and Muslim Mian and this is the case of defence also, as such his presence cannot be doubted. Defence has tried to make out a case that P.W.10 in paragraph-11 of his evidence has stated that he is not an eye-witness of the occurrence and my attention has also been drawn towards paragraph-11 of evidence of P.W.10. However, from perusal of paragraph-11 it appears that attention of P.W.10 was drawn towards the statement before police and in that connection he has stated that *"Aisa Nahi Kaha Tha Ki Is Ghatna Ko Dekhte hi Mai Ghar Bhag Gaya Tatha Uske baad Jab Aaya To Yasin Aur Jalil Ko Buri Tarah Jakhami Halat Mai Dekhe Tatha Pet Se Dono Jakhamyo Ko Khun Aa*



Raha Tha. Ek bhi nahi kaha tha ki gaon ke log jakhamyo ko Aspatal le gaye. Swatah gaon ke log le gaye.” However, aforesaid statement of P.W.10 clearly shows that he has stated that “*Ghatna Ko Dekhte Hi*”. It does mean that after seeing the occurrence he fled away and when he came back he saw both the deceased in injured condition. Hence, it cannot be said that P.W.10 is not an eye-witness to the occurrence, rather P.W.10 is a natural witness. So far the examination of this witness after much delay is concerned, he has given his explanation that he has gone to Gorakhpur and after giving *Mitti* to Jalil Mian he returned back after one and a half months.

From perusal of the evidence it appears that P.W.1 though has become hostile in this case but his evidence shows that on hulla he had gone to the darwaja of Yasin and saw Yasin and his father Jalil both were in injured condition. Further from the evidence of other witnesses as well as the evidence of I.O. also it appears that place of occurrence is the darwaja of Yasin. Even no suggestion had been given to any witness doubting the same. As such, there is sufficient cogent evidence to establish that place of occurrence is darwaja of Yasin (deceased).

Considering the entire discussions made above, presence of P.W.6 and P.W.10 at the place of occurrence is quite natural and cannot be doubted and hence they appear to be eye-witnesses of the occurrence.

Even if other witnesses may not be the eye-witnesses of



the occurrence but their presence even after occurrence appears to be consistent and their evidence clearly show that they had seen the deceased Yasin and Jalil in injured condition and as such they have also corroborated the prosecution case in such a way.

Another argument, advanced on behalf of the appellant is that there is inordinate delay in lodging FIR and the present Fardbeyan has been recorded on 21.5.1988 at 3 P.M. in Sadar Hospital, Siwan, whereas the FIR was belatedly instituted on the next day, i.e., on 22.5.1988 and the prosecution has not given any cogent reason for the same, which, in the facts and circumstances of the case, is fatal to the prosecution and further case of the appellant that Fardbeyan itself was after thought and not reliable piece of document. In support of the contention learned counsel for the appellant has relied upon a decision in the case of **Kailash Gour and others vs. State of Assam, reported in (2012) 2 SCC 34** where the Court has been pleased to give the appellant benefit of doubt regarding delay in lodging of FIR. In this connection, learned APP has submitted that there is no delay in lodging FIR as Fardbeyan has been recorded in Siwan Hospital on 21.5.1988 at 3 P.M. whereas place of occurrence falls within the jurisdiction of Goriakothi Police Station and further sending of Fardbeyan and registering it as FIR has taken some time and hence there is no much delay in lodging FIR.

From perusal of Ext.1, 10 and 10/1 it appears that fardbeyan was recorded on 21.5.1988 at 3 P.M. and the same was



forwarded to Goriakothi Police Station by V.N.Prasad, ASI on 21.5.1988 and on the basis of that Goriakothi P.S.Case No. 45 of 1988 was instituted on 22.5.1988 at 1 P.M., hence considering the fact that fardbeyan was recorded at Siwan and thereafter has been sent to Goriakothi Police Station and, as such there is no much delay in registering of the FIR in the present case and furthermore considering the dying declaration of deceased supported by witnesses P.W.1 and P.W.10 and also supported by evidence of other witnesses, regarding manner and genesis of occurrence is concerned, to my opinion, the delay in lodging FIR is not of much consequence. Hence, the whole prosecution case cannot be brushed aside on the ground that there is inordinate delay in lodging of FIR. So far decisions cited by learned counsel for the appellant are concerned, they are not applicable to the facts and circumstances of the present case.

Another contention of learned counsel for the appellant is that the prosecution story is highly improbable as first of all there is marpit between Ghafur Mian and Muslim Mian and when present appellant is intervened he is stabbed, as appellant is third person and on the said fact Muslim Mian has been acquitted by the impugned judgment, as such, on the basis of the same the conviction of appellant Asgar cannot be sustained.

So far defence is concerned, nothing has been brought on the record except in the evidence of I.O. it has come that Muslim Mian has also lodged a case bearing Goriakothi P.S.Case No. 49 of



1988 against Md. Ghafur, Yasin and others and in statement under Section 313 Cr.P.C. Md. Muslim Mian has taken a plea that during the scuffle P.W.10 Ghafur Mian assaulted Yasin and Jalil. However, no such plea had been taken by the appellant or other co-accused and no effort was taken to bring FIR of that case or injury report on record in support of the defence case. So far as Md. Muslim and other co-accused are concerned, in the present case, allegation is against accused Asgar, the appellant that he stabbed the deceased Yasin and Jalil and all the witnesses have stated so and there is dying declaration of deceased Yasin. Apart from that a statement of Jalil (deceased) was also recorded by the I.O. in which he has stated that Asgar Mian has stabbed Md. Yasin and when he intervened he was also stabbed and that is also the last statement prior to death of Md. Jalil. Considering the above fact, there is sufficient material available before the court below against the appellant under Section 304 Part II IPC.

Learned court below in its judgment has also discussed the evidence oral as well as documentary in detail and has rightly come to the conclusion that appellant is guilty for the offence punishable under Section 304 Part II IPC and the findings arrived at by the court below are conclusive findings of fact and there is nothing on the record to come to different finding. As such, I find no merit in this appeal so far conviction of the appellant is concerned.

So far sentence is concerned, the appellant has been sentenced to undergo R.I. for seven years for committing death to



Yasin and further R.I. for seven years for committing death to Jalil Mian and both the sentences were directed to run consecutively, i.e., for a term of 14 years R.I. with a further direction that appellant was entitled to a set off the period already undergone as under trial prisoner. Considering the fact that now 28 years has passed after the occurrence and at the time of judgment appellant Asgar was aged 37 years, so he must be now aged about 65 years. Hence, sentence as mentioned above is modified to the extent that both the sentences shall run concurrently and the period already undergone by the appellant as under trial prisoner or during the pendency of the appeal be set off in accordance with law.

In the result, the appeal is dismissed with the aforesaid modification in sentence.

As the appellant is on bail, his bail bonds are cancelled and be taken into custody.

Registry is directed to send the lower court records along with copy of this judgment to the trial court forthwith.

(Vinod Kumar Sinha, J)

spal/-

AFR/NAFR	
CAV DATE	13.02.2017
Uploading Date	03.03.2017
Transmission Date	03.03.2017

