

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.156 of 1994

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1. Subbedar Mian, son of Lutter Mian
 2. Alif Mian, son of late Gainu Mian
 3. Asgar Mian, son of Late Kamal Mian
 4. Jalil Mian, son of Late Ramzan Mian, all resident of Mohalla Kali Prasad Feku Tola, P.S. Pirpainty, District- Bhagalpur Appellant/s

Versus

The State Of Bihar Respondent/s

with

Criminal Appeal (DB) No. 282 of 1994

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1. Tajamul Mian, son of Hullu Mian
 2. Sabir Mian, son of Bhutu Mian Appellant/s

Versus

The State Of Bihar Respondent/s

Appearance :

For the Appellant/s	:	Mr. N.A.Shamsi, Advocate
		Mr. S. Ehteshamuddin, Advocate
For the State	:	Mr. S.B.Verma, APP
For the complainant	:	Dr/ Rajesh Kumar Singh, Advocate.

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)

Date : 26-02-2018

Heard learned counsel for the parties.

2. Both the appeals arise out of the judgment of conviction and order of sentence dated 30th March, 1994 passed by 5th Additional Sessions Judge, Bhagalpur in Sessions Trial No. 437 of 1991 whereby the two appellants of Cr. Appeal No. 282 of



1994 have been convicted under Sections 302 and 148 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life under Section 302 and two years rigorous imprisonment under Section 148 of the Indian Penal and the four appellants of Cr. Appeal No. 156 of 1994 have been convicted under Section 302/149 and Section 148 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life under Section 302/149 and two years rigorous imprisonment under Section 148 of the Indian Penal Code. However, all the sentences were directed to run concurrently.

3. It is stated that during the pendency of the appeal appellant No. 3 of Cr. Appeal No. 156 of 1994, namely, Asgar Mian has died and as such the present appeal, so far as appellant No. 3, Asgar Mian is concerned, stands abated.

4. From the pleadings and the discussions of the trial court, it appears that for the occurrence of 14.11.1989, FIR was lodged on 15.11.1989 at the instance of D.W.1 and regular Pirpaiti P.S. Case No. 156 of 1989 was registered and the police after investigation submitted report that '**the occurrence is true but there is no clue**' and as such the case was closed.

5. The prosecution case arises out of complaint case No. 593 of 1989 dated 22.12.1989 filed by one Shiv Pravesh Singh,



P.W. 2. The complaint petition was filed after 40 days of the occurrence on 22nd December, 1989. On 16.3.1989 the complaint petition was sent to the police under Section 156(3) Cr.P.C. for instituting and investigating the case. Even after a reminder by the Chief Judicial Magistrate to the Pirpaiti police for registering the case and investigation the same was not carried out. Under the aforesaid circumstances the Chief Judicial Magistrate recalled the order dated 30th November, 1989 and transferred the case to the file of SDJM, Bhagalpur under Section 192(1) of the Code of Criminal Procedure for necessary enquiry and appropriate order. Learned SDJM thereafter made enquiry under Section 202 Cr.P.C. and having found the case prima facie true, he took cognizance under Sections 302/149 of the Indian Penal Code and committed the case to the Court of Sessions vide order dated 6.7.1991.

6. The prosecution case, as per the complaint of P.W. 2 is that on 14.12.1989 at about 10 P.M. when the complainant was standing at the door Satya Narayan Singh together with Binay Kumar Singh, Singheshwar Mandal, Laxmi Mandal and Baidyanath Mandal, he heard sound of firing and on hulla, he saw 15-20 persons appeared from east from the bamboo clumps and turmeric field and all of them were variously armed with



lethal weapons. The Complainant has stated in the complaint that it was moonlit night and the 15-20 persons were also having Lukkas and in that light he could identify the accused Sabir Mian and safdar Mian having guns. Accused Tajmul Mian and Alif Mian were having 303 rifles and accused Asgar Mian and Jalil Mian were armed with daggers and Lukkas. Accused Asgar Mian ordered to kill whereupon the accused Sabir fired a shot from his gun which hit at the chest of Binay Kumar Singh, son of the complainant, who fell down and died. Further statement of the complainant, P.W.2 is that the accused Tajmul Mian then fired from his 303 rifle which hit at Singheshwar Mandal, who also fell down and succumbed to injuries. The further statement of the complainant is that he and others raised alarm and thereafter the accused persons fled away towards east and they had set the house of Narsing Mandal and Narayan Mandal at fire and thereafter fled away towards east. At about 4.00 in the morning on 15th November, 1989 the police together with the Circle Officer arrived at the place of occurrence. The complainant narrated the story but none of them have recorded the statement of the complainant. The further statement of the complainant is that at 6.00 A.M. the police force came there and they took the dead bodies from the place of occurrence.



7. As stated above, when no action was taken by the police despite the order of the CJM for registering the case and investigation, enquiry was conducted by the SDJM under Section 202 Cr.P.C. and being satisfied about the prima facie case made out, the learned SDJM took cognizance and the case was committed to the Court of Sessions. The charges were framed under Sections 302/149 and 148/436 IPC. The accused persons denied the charges and thereafter they were put on trial.

8. On behalf of the prosecution six witnesses were examined, out of whom P.W.1 is the doctor who conducted post mortem. P.Ws. 2 to 5 claim to have seen the occurrence. P.W. 6 is the formal witness.

9. On behalf of the defence 4 witnesses were examined. D.W.1 was posted at the relevant time as Co-operative Extension Officer. D.W.2 is the Officer-in-charge of Pirpainty Police Station, who was also I.O. of the police case registered at the instance of D.W.1. D.W. 3 is the constable P.C. Das. who was a member of the CRPF force involved in the process of maintaining public order in the riot affected area. D.W.4 is the Habildar Kulwant Singh, who was also a member of the police force present at the alleged occurrence of communal violence and firing.



10. The trial court on the basis of the scrutiny of evidence of the prosecution and defence witnesses convicted the appellants and sentenced them in the manner as indicated above.

11. Mr. N.A.Shamsi, learned counsel for the appellants submitted that in a communal riot the victim sustained police fire injury as they were aggressors in the riot and succumbed to the injuries, referring to the version of the witnesses as to the communal riot in the area in question he submitted that deceased sustained police firing injury as is evident from the deposition of D.Ws. 1 and 2. Referring to the deposition of D.Ws. 3 and 4 he submitted that in fact the CRPF personnel have admitted in the trial that firing was done by the CRPF personnel seeing the aggression and riotous behavior of the irate mob, who were adamant to put on fire the houses belonging to another community. Referring to the deposition of D.Ws. 1 and 2 he submitted that in view of the statement of D.Ws. 1 and 2 and the FIR lodged at the instance of D.W.1, the entire prosecution case has to be discarded as concocted and designed to falsely implicate the appellants on account of communal bias. He submitted that no case as indicated by the complainant in the complaint was in fact made out and after 40 days of the alleged occurrence the complainant and the witnesses have conspired



together and concocted the case in which falsely implicated the appellants. Referring to delay of 40 days in filing complaint, he submitted that the trial court has committed error in believing the story of the complainant and convicting the appellants.

12. Learned counsel for the appellants submitted that in the present case only highly interested witnesses have been examined and on the basis of evidence of such highly interested family members conviction of the appellants is unsustainable.

13. Mr. Shamshi referring to the deposition of D.Ws. 1 to 4 submitted that all the witnesses are public officer and police personnel and they have no grudge or ill will and as such their statement before the trial court was the most trustworthy statement and in disbelieving the statement of the D.Ws., the trial court has committed error. He submitted with reference to the entire facts and circumstances that as an after thought these appellants were made accused for satisfaction of their communal bias and animosity.

14. Referring to the deposition of P.W. 1 he submitted that from the deposition of P.W. 1, the doctor who conducted post mortem, one does not find the case of the prosecution corroborated and supported. He submitted that in fact the complaint was lodged by the complainant when his application



for compensation as a riot victim was rejected by the District Magistrate and as a counter blast of rejection of claim for compensation as victim of riot, the present complaint was filed. He has referred to the deposition of P.W.4 that there was a mob of more than 1000 persons and as such identification of the accused persons in the actual commission of crime is doubtful. He also submitted that the appellants have no criminal antecedent and that aspect of the matter was totally ignored by the trial court while convicting the appellants.

15. On behalf of the complainant submission was advanced that the official witnesses have been examined by the defence which is indicative of the fact that they have sought to favour the real assailant in the crime. Referring to the version of the D.Ws. 1 and 2 he submitted that the deposition of D.W. 1 would indicate that the rioters were moving towards south from north and according to the deposition of D.W. 1 Muslim population was dominating in northern side and the Hindu population in the southern side and referring to that of statement of D.W. 1, he submitted that according to the version of D.W.1 the rioters were moving from Muslim populated area to Hindu populated area so the aggressors were from the area dominated by the Muslims and not by the Hindu. Counsel for the



complainant submitted with reference to his further deposition that this witnesses who claim that at his instance firing was made by the CRPF personnel and the deceased died in the police firing. He submitted that the statements of D.W. 1 and D.W. 2 contains major contradiction. D.W.1 has stated in the court that rioters were Hindus, D.W.2 has not stated that he has not seen as to rioters were Hindu or Muslim.

16. Learned counsel submitted that in the Bhagalpur worst riot took place in the year 1989 which continued for a span of more than a month and persons belonging to both communities have lost their lives and properties in the communal riot. He submitted that the D.W. 1 and D.W. 2 have deposed in favour of the accused persons only because they have committed blunder in discharge of their duty. Referring to the deposition of D.W1. 1 and D.W. 2 he submitted that the police has acted in most partisan manner. Although the witnesses examined on behalf of the defence suggested that the dead bodies of the deceased were recovered in the northern side of Margaj or at the place in the northern side, referring to para-9 of the deposition of D.W.1 he submitted that this witness has admitted that the area where the riot took place is dominated by the population of Muslim. This witness in his deposition in para-9 has submitted that Margaj is in



the northern side of Fekutola. He has stated that Margaj is from east to west and the width of the Margaj is 10 hands = 18 fts. According to him said Marganj can be taken as Nala and the Muslim populated area is 3-4 hands from the Margaj and the house of Satyanarayan Singh from Margaj is 10 hands, whereas D.W. 2 has described the width of the Margaj as 100 yards and the Marganj is not a dry but was full of water at many places. He has admitted that minimum knee deep water was available in the Margaj. The aforesaid contradiction was highlighted by counsel in the deposition of D.Ws. 1 and 2. He referred to deposition of D.W.2 at paras 16 and 17 to indicate that according to him the dead body was recovered from northern side of Margaj at 1.30 A.M. D.W.1 has not explained in his deposition in the court as to why not they have prepared the inquest report. Referring to the version of different D.Ws. i.e. D.W.1, D.W.2, D.W.3 and D.W.4 he submitted that D.W.1 claimed that he has passed order for non-effective firing. In his deposition he has admitted that in fact he in consultation with Darogaji directed for firing. D.W.3 in his deposition has stated that firing was resorted by the police personnel on the direction of the Company Commandant. According to D.W.1 the person who was sitting on horse died in police firing. Referring to the deposition of D.Ws. 3 and 4 he



submitted that from their deposition it is apparent that they have not seen the effect of their firing whether any person sustained injury and succumbed to injury or not. Referring to the deposition of D.W.2 he submitted that the conduct of the police in the present case was partisan. He has referred to deposition of P.W. 2 to indicate that only empty formality was completed in the name of investigation. IO of the case has deposed in the court that he has not recorded the statement of the complainant, father of the deceased or the other relative of the deceased and it appears from his deposition that after perfunctory investigation he submitted final report as 'the occurrence is true but no clue'.

17. Counsel for the complainant has submitted that the high handedness of the officials is apparent from the fact that they were examined as defence witnesses notwithstanding the fact that they were the officials of the State. They were examined in this case because they have extended patronage to the accused persons in the commission of the crime.

18. Learned State counsel submitted that the trial court on the basis of deeper scrutiny of the materials available on the record convicted the appellants and there is no infirmity in the judgment of the trial court. Focus of the appellants counsel on delay in lodging the complaint is not sustainable in view of the



fact that the complaint filed by the complainant was sent to the police under Section 156(3) of the Cr.P.C. and even after reminder, the police failed to register case and under compulsion the CJM has transferred the case for enquiry before the SDJM. The aforesaid circumstances are indicative of the fact that the police was totally reluctant in the matter of entertaining the case of the complainant and in that view of the matter, the trial court has not committed any error in entertaining the case and conducting the trial. The delay of 40 days in the present case cannot be accepted as crucial for the trial.

19. We have heard the parties and examined the record. So far as the delay in lodging the complaint, on perusal of the judgment of the trial court, paras 5 and 36 to 42 are relevant on this point which are quoted below:

“5. It appears from the record of the court of the Chief Judicial Magistrate, Bhagalpur that the petition of complainant was registered on 22.12.89. Further, by order dated 16.3.90, the complainant’s petition was sent to the officer-in-charge Pirpainty P.S. under the provisions of Section 156(3) Cr.P.C. for instituting and investigating the case fixing to 7.5.90. But, the record shows that inspite of repeated adjournments and the time allowed to the police, the orders of the learned Chief Judicial Magistrate, Bhagalpur, passed u/s 156(3) Cr.P.C on 16.3.90 was not carried out. In this position, the learned Chief Judicial Magistrate recalled its order on 30.11.90 and then transferred the case to the file of the learned Sub-divisional Judicial Magistrate, Bhagalpur under the provisions of



Section 192(1) Cr.P.C. for necessary enquiry and orders. Consequent upon this order of the learned Chief Judicial Magistrate an enquiry u/s 202 Cr.P.C was held by the learned Sub Divisional Judicial Magistrate and he having found a case, prima facie, u/s 302/149 I.P.C took the cognizance, accordingly. Thereafter, in course of lawy the appearance of the accused persons was secured and by order dated 06.07.91 the learned Magistrate committed the case to Sessions, where from this case was received in this court for disposal. Thereafter, on 07.09.91, the accused persons were charged as indicated above and, thus, the trial has been concluded.

36. Explaining this aspect of delay, learned prosecutor sought to submit that the worst communal riot had unfortunately taken place in the district of Bhagalpur. It started from 24.10.89 and continued for a considerable long time causing disaster and loss of lives and properties of the members of both the communities – Hindus and Muslims. He submitted that during the time of riot all sorts of weapons were freely used, indiscriminately and without any sense of humanity and brother hood in the society and as such the entire Bhagalpur district was engulfed in communal violences. The learned prosecutor stated that the situation had become so grim that the Civil Administration was finding it very difficult to control, therefore, an order of curfew was clamped and para-military forces were called out and placed into services to pacify the riot and restore peace and communal harmony in the society. In this situation, every person if the each community was compelled to be confined and restrict his movements. He stated that even the vehicular traffic was out of road. Placing the picture of riot and the situation prevailing during the time, the learned prosecutor urged that the court may take judicial notice of the fact and communal disturbances of Bhagalpur. In support of his submission he referred to a decision reported in A.I.R. 1965 Supreme Court, page 1666 in paragraphs 2,7 and 29. The learned prosecutor stated that in the case under reference before the Hon'ble Supreme Court there was a situation of communal



disturbances between the Hindus and the Muslims particularly to the north of Delhi in the month of August and September, 1947 and it was held by the Hon'ble Apex Court that the court may take judicial notice of the fact that in those days there were communal disturbances between Hindus and the Muslims particularly to the north of Delhi.

37. Therefore, the learned prosecutor argued, the delay in filing the complaint in the situation prevailing at that time was natural. Moreover, the learned prosecutor submitted, the complainant (P.W.2) in his deposition in court at para-7 has also explained the reason of such delay in filing the petition of complaint in court. He stated that according to P.W.2 there was communal disturbance in Bhagalpur, itself, and there was no means of conveyance at that time. Besides, the complainant was waiting for the action of the police, but on the failure of the latter he presented a petition of complaint after one and quarter months from the occurrence. No doubt, the learned prosecutor could not deny the delay in instituting the complaint in court but submitted that according to the settled law the delay in giving the F.I.R. by itself can not be a ground to doubt the prosecution case. In this context, he placed a decision of the Hon'ble Supreme Court reported in the A.I.R. 1991 at page 63. He submitted that the Hon'ble Supreme Court has observed unless there are indications of fabrication the court can not reject the prosecution version as given in the F.I.R. and later substantiated by the evidence merely on the ground of delay. He submitted that the Hon'ble Court has further observed that they are all matter for appreciation and much depends on the facts and circumstances of each case. The learned prosecutor argued that in instant case also there are four eye witnesses and they have consistently deposed. So, the case of the complainant can not be outrightly rejected merely for the reason that it was filed after lapse of one and quarter months. Besides, a decision reported in 1994 P.L.J.R. page 52 has also been cited by the learned prosecutor on the point.

38. On the other hand, the learned defence lawyer very forcefully submitted that this petition of complaint was



filed after about 40 days from the occurrence, so it can not be denied that the complainant moved the law with an unreasonable delay and during the time he get sufficient time to manufacture and concoct the story implicating the accused persons for his gain and also to satisfy the communal sentiments and feelings. Argument has been advanced on behalf of the accused persons that there was absolutely no reason of delay mentioned in the petition of complaint save and except that the police was in connivance with the guilty persons, therefore, the police did not take action and got filed a false report. Further, argument has been made by learned defence lawyer that final report in the police case (i.e. Pirpaity P.S. Case No. 156/89) was submitted on 23.1.1990 whereas the complaint was filed much earlier, therefore, it cannot be said that the complainant was awaiting the result of the police case for filing the petition of complaint. In this context, the learned defence lawyer referred to paragraph 6 of p.w. 2 and submitted that according to the statements of p.w. 2 C.O. Saheb (meaning by the Circle Officer) had gone to the place of occurrence together with the police force before whom the story of the prosecution was narrated but none of them had recorded the same. The learned defence lawyer argued that it is improbable that a report of cognizable offence would not be taken note of either by the police or by the CO. if it was placed before them specially when the names of the culprits were also disclosed. The learned defence lawyer submitted that there is nothing in the evidence of the P.Ws. that the civil administration was inimical to the complainant and as such, his statement was not recorded by them.

39. In this context the learned defence lawyer argued further that by presenting the petition of complaint attempts have been made to suppress the earliest version of the occurrence. He referred to paragraph 17 of the p.w.2 and stated that it is the statement of the complainant that the police did not accept his case, therefore, he had sent registered letters to the S.P. and also to the Collector retaining the copies thereof with himself. The learned



lawyer submitted that the copy of the petition presented before the different authorities have not been produced in court. Besides, the learned lawyer stated that p.w. 2 in paragraph 11 of his cross-examination admitted that on the 8th day, house (meaning by the house of Singheshwar Mandal) was burnt for which no case was lodged but a Sanha was given. The learned lawyer argued that the said Sanha in respect of burning of the house has not been produced in court. The learned lawyer contended that suppression of these documentary evidences, which probably contained the information about the occurrence to the police at the earliest opportunity, leads to an adverse inference against the prosecution that the documents were withheld only because they did contain the true picture of the occurrence to which the prosecution did not like to place. To substantiate his contention learned lawyer cited a decision of the Hon'ble Court reported in 1970 PLJR page 172. It is true that in case of suppression of the documents containing the earliest version of the prosecution case shall, definitely, give an occasion to draw an adverse inference against the prosecution; but in the instant case, it does not seem to be applicable for the reason that the alleged "Sanha", if at all filed in respect of burning of the house of Singheshwar Mandal (the deceased), does not relate to the merit of the instant case. Undisputedly, the house of the deceased Singheshwar Mandal was burnt about a week earlier to the occurrence and that was not an act of the rioters or the accused persons. As regards the claim of the complainant that he sent registered information to the authorities concerned about the occurrence and copies thereof were retained by him does not cast any doubt on the bona fide of the complainant in the circumstances that it was never challenged or disputed by the defence. So, in this position, there does not appear any good ground to draw inference presuming that the earliest version of the prosecution case has been suppressed.

40. Further impeaching the truthfulness and credibility of the P.Ws the learned defence lawyer argued that they have



after due deliberation re-produced the story and manufactured case only to secure the conviction of the accused persons. He stated that the complainant (P.W-2) in his examination in paragraph-6 did state that at about 4 A.M. police and the Circle Officer had gone there before whom the P.Ws had narrated the entire occurrence but none of them took notice of that. The learned defence lawyer pointed out that P.W-3 Baidyanath Mandal also stated that he met the police in the early morning and gave his statement before it. Like wise, P.W-4 Satyanarayan Singh also claimed to have disclosed every thing about the occurrence before the police when the latter came there at about 2 A.M. Argument has been made that either the police officer or the civil Administration had no occasion to go hostile to the case of prosecution because they had neither any gain or loss if the true picture of the occurrence was brought on record. The learned lawyer pointed out to the statement of P.W-2 at para-24 and stated that the names of these accused persons did not transpire during the course of investigation nor any of the P.Ws, including the complainant Shiv Pravesh Singh had stated the names of the present accused persons. In the view of the statements of the investigating officer of the police case, the learned lawyer contended the P.Ws for their gain have falsely named the accused persons and, as such, this false case has been brought after due deliberation.

41. This argument advanced on behalf of the defence has been strongly refuted by the learned prosecutor. He stated that admittedly the P.Ws. 2,3 and 4 are close relatives of the deceased and they have categorically named the accused persons and, also, narrated the manner in which the deceased persons were killed and the alleged occurrence took place. But, this fact of relationship would definitely add to the value of their evidence because they would be interested in getting the real culprits punished and not the innocent persons. To substantiate this contention, the learned prosecutor placed reliance upon the decisions reported in A.I.R. 1971 Supreme Court page 296 and A.I.R. 1974 Supreme Court page 39. The learned



prosecutor submitted that the Hon'ble Courts have observed that the close relatives of the deceased would normally be most reluctant to spare the real culprits and falsely implicated the name of another person. He stated, it is a circumstance in the instant case that P.W. 2 is the father of the deceased Binoy Kumar Singh and P.W. 3 is the son of the deceased Singheshwar Mandal and this would add to the value of their evidence because they would be interested in ensuring that the real culprits, responsible for the murder of their kith and kin, are punished and not the innocent persons.

42. Lastly, the learned prosecutor appearing on behalf of the State criticised the conduct of the Investigating Officer of the police case (Pirpainty P.S. Case No. 156/89) who has been brought and examined by accused as defence witness No.2. Also, the informant of the said case namely (D.W.1) Devendra Pd. Mishra – the Magistrate on deputation – is another defence witness. It has been criticised by the learned prosecutor that the magistrate and the Investigating Officer having gone in collusion with the accused persons have manufactured the police case diary. To substantiate his contention the learned prosecutor pointed out that the police case diary is available on record and many of its pages are missing. He stated that altogether about 20 pages are missing from the volumes of the case diary, which is an indication of the fact that the case diary has been manipulated and fabricated by the Investigating Officer (D.W.2). The learned prosecutor submitted that had any of the pages been missing from the volumes of the case diary since before it was incumbent upon the Investigating officer to make a note of that fact in the case diary. He further pointed out that though the final report was sent to the court of the Chief Judicial Magistrate but the case diary was not forwarded by the Investigating Officer which was required under the law to accompany the final report. The learned prosecutor contended that these are the facts on record and judicial notice thereof can be taken by the court also. However, the learned defence lawyer resisted this criticism made on behalf of the State and submitted that



continuity of the paragraphs of the case diary is not broken so if any serial number is missing from the case diary carries no material value for consideration.”

20. The Trial Court has discussed the deposition of D.Ws. 1 to 4 and the comment of the P.P. in para-42 particularly perfunctory investigation of Pirpainty P.S. Case No. 156 of 1989, missing of 20 pages of the case diary, non-submission of the entire case diary along with final report and most crucial fact that the IO of the case has not even bothered to record the statement of the father of the victim who had filed the present complaint indicate that the IO has not conducted the investigation properly. From the deposition of D.W.2 it appears that in the Pirpainty P.S. Case No. 156 of 1989 not only the investigation was perfunctory but the superior officials have failed in discharge of their duty in supervising the investigation.

21. From the deposition of D.W.1 it appears that the mob was moving from north to south and holding opinion that the rioters were Hindues is not supported by the deposition of D.W.1 in as much according to D.W.1 the north side was dominated by Muslim population and southern side was Hindu population. Reference of the D.W. 1 and D.W. 2 about the width of Marang is difficult to reconcile. Failure of the police and the Magistrate in this case that they have not prepared the inquest report to



establish the place where the dead body were recovered is also crucial.

22. On scrutiny of deposition of P.Ws. 2 to 5, it is seen that all the witnesses who claim to have seen the occurrence are consistent on the point of place of occurrence, manner of occurrence and the identification of the accused persons out of 15-20 people in the moonlit night with Lukkas is all convincing. The deposition of P.Ws. 2 to 5 are consistent on the point that Tajmul was equipped with rifle 303 and Sabir was equipped with gun. They are also consistent on the point that Sabir fired on the chest of Binay whereas Tajmul fired on the Sidheshwar Mandal. Their version is of firing from gun and 303 rifle is supported by the doctor, P.W. 1 who found corresponding injury on the body of the deceased in the post mortem.

23. On scrutiny of the deposition of D.W. 3 and D.W. 4 it appears that these witnesses have not seen the deceased falling at spot on receiving fire arm injury. Their deposition is specific on the point that only rifle was used by them in the matter of dispersing the rioters but the gun shot injury found on Binay Kumar Singh ruled out the case of sustaining police firing injury as pellet was recovered by the doctor during the course of post mortem as is evident from the deposition of P.W.1. There is no



case that police has fired from a close range less than 3 yards. This caused fatal injury on Singheshwar Mandal as from the post mortem report and the deposition of P.W. 1 it is apparent that firing was made from a range less than 3 yards as such the doctor has found blackening mark on the dead body which cannot be caused from a fire arm from a distance of more than 3 yards. Thus, the medical evidence rule out the cause of death of Binay Kumar Singh and Singheshwar Mandal in police firing. The nature of injury found by the doctor during post mortem are on the line of the prosecution case that the injuries were caused by Sabir Mian and Tazmul by gun and 303 rifle respectively on Binay Kumar Singh and Singheshwar Mandal.

24. The submission of learned counsel for the appellants that highly interested and family members have supported the case of the prosecution does not cut much ice in the present case. The trial court has discussed this aspect of the matter and referring to the judgment of the Apex Court has held out that truthfulness of the witnesses cannot be impeached only on the ground that these witnesses are close relative. The trial court in the present case has discussed the entire facts and circumstances including the delay in filing the complaint and after due scrutiny



of the evidence of the prosecution as well as defence has convicted the appellants.

25. In the totality of the fact situation, after evaluating the evidence of the P.Ws. And the D.Ws. and on consideration of the detailed discussions in the reasoned judgment of the trial court, I am of the view that in the present case the trial court has not committed any error warranting any interference so far as the appellants in Cr. Appeal No. 282 of 1994 is concerned. However, the trial court has not found any overt act of the appellants in Cr. Appeal No. 156 of 1994. On scrutiny of the evidence of P.W. 1 we do not find any material as to the active participation of the appellants of Cr. Appeal No. 156 of 1994 and as such in case of worst communal riot spanned for a period of one month in the district of Bhagalpur, the Court does not find any convincing material to conclude that the appellants in Cr. Appeal No. 156 of 1994 are guilty for offences under Section 302/149 of the Indian Penal Code more so when they have been acquitted from the charge under Section 436 IPC.

26. Accordingly, in the peculiar facts and circumstances, I am of the view that the appellants of Cr. Appeal No. 156/1994 deserve to be extended the benefit of doubt in the communal riot and as such, I am of the considered view that the conviction of



the appellants in Cr. Appeal No. 156 of 1994 requires interference. Cr. Appeal No. 156 of 1994 is, accordingly, allowed. The judgment and order of conviction passed by the trial court so far as the appellants of Cr. Appeal No. 156 of 1994 are concerned, is set aside. Since they are on bail, they are discharged from the liability of the bail bond.

27. So far as the two appellants of Cr. Appeal No. 282 of 1994 is concerned, on scrutiny of entire materials, I do not find any error in the judgment of conviction and order of sentence. Their appeal is accordingly dismissed. They are directed to surrender and serve the remaining part of the sentences.

(Anil Kumar Upadhyay, J)

Rajendra Menon - I agree.

spandey/-

(Rajendra Menon, CJ)

AFR/NAFR	NAFR
CAV DATE	01.02.2018
Uploading Date	27.02.2018
Transmission Date	27.02.2018

