

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.371 of 1994

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1. Sahabuddin Mian son of Jan Ali
 2. Idd Mohammad, son of Pan Mohammad
 3. Jahangir Mian @ Jahangir Alam, son of Pan Mohammad
 4. Pan Mohammad Mian, son of Suleman Mian, all resident of village Mahuli, P.S. Taraiya, District- Chapra

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with
Criminal Appeal (DB) No. 407 of 1994

Alamgir Mian, son of Pan Mohammad, resident of village Mahuli, P.S. Taraiya, District Chapra

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Shravan Kumar, Sr. Advocate
		Mr. Nand Gopal Mishra, Advocate
For the Respondent/s	:	Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)

Date : 23-01-2018

Heard learned counsel for the parties.

2. Both the appeals arise out of the judgment of conviction and order of sentence dated 28.07.1994 passed by 4th Additional Sessions Judge, Saran at Chapra, whereby the appellants of Cr. Appeal No. 371 of 1994 namely, Sahabuddin



Mian, Idd Mohammad, Jahangir Mian @ Jahangir Alam and Pan Mohammad Mian were convicted under Sections 302/149 and 147 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life under Section 302/149 IPC and further for one year under Section 147 IPC and the appellant of Cr. Appeal No. 407 of 1994, namely, Alamgir Mian was convicted under Section 302 IPC and Section 148 IPC and sentenced to undergo rigorous imprisonment for life under Section 302 IPC and further rigorous imprisonment for one year under Section 148 IPC. However, all the sentences were directed to run concurrently.

3. The prosecution case lies in a narrow compass. The informant, Sahabuddin Mian made statement before the ASI R.N.Singh of Pirbahore Police Station, Patna in PMCH Emergency Ward on 11.3.1992 at 9.30 A.M. in regard to the occurrence alleged to have taken place at 8.00 PM on 9.3.1992. It has been alleged that while the deceased Nazare Alam, uncle of the informant was returning from Shyam Kauriya Bazar and when he reached near the Saw Mill of Shri Bhagwan Sharma, he was surrounded by all the appellants. The accused persons assaulted the deceased with 'Danda' and when the deceased fell down, one of the appellants, Pan Mohammad exhorted the other accused persons to kill him by 'Chhura' as he would not die of 'Danda'



injuries upon which Alamgir Mian appellant of Cr. Appeal No. 407 of 1994 took out 'Chhura' from his person and assaulted the deceased at the right-side below the shoulder. The dagger was entangled in the body, a piece of which was broken and remained in the body of the deceased. The deceased raised alarm upon which the informant and his associates namely, Manuwar Mian, Parashuram Singh, Azam Ansari and others rushed to the place of occurrence and saw that and upon their reaching there the accused persons fled away. The said witnesses took the deceased person to Sadar Hospital, Chapra, where the deceased was given First Aid. The deceased became unconscious. Doctor of Sadar Hospital, Chapra, referred the deceased to P.M.C.H. The deceased was brought to P.M.C.H. and in the Emergency Ward an operation was performed and the piece of dagger was taken out from the body. The due treatment was given to the deceased, however, in the night, at 2.35 hours, the deceased died on 11.3.1992. The informant claim that with intention to kill the deceased he was assaulted with Lathi-Danda and Chhura and as a result of which he died. The motive of the occurrence was assigned as a dispute with one Hakim Mian with Alamgir, wherein Alamgir was assaulted by said Hakim Mian, who had a shop of Biri, cigarette, Buja and eggs at a Gumti. The deceased had intervened in the



dispute and pacified the party which resulted in the grievance and the accused party indulged in the offence with the deceased person.

4. On the basis of the fardbeyan dated 11.3.1992, formal FIR was drawn on 17.3.1992 and the formal FIR was sent by special messenger on 18.3.1992 and seen by the Chief Judicial Magistrate on 23.3.1992. The police after investigation submitted charge sheet against the appellants under Sections 147, 148, 149 and 302 of the Indian Penal Code. After cognizance the case was committed to the Court of Sessions and the trial court framed charges against the appellants under Sections 147, 148, 149 and 302. On the appellants pleading not guilty they were put on trial.

5. On behalf of the prosecution altogether 9 witnesses were examined and certain documentary evidence were marked as exhibits. The trial court on scrutiny of the evidence convicted the appellants and passed order of sentence as indicated hereinabove.

6. Mr. Shravan Kumar, learned senior counsel appearing on behalf of the appellants in both the appeals submitted that the present case is an example of not only perfunctory investigation but also of perfunctory trial. He submitted that in the instant case the trial court has not followed the basic norms of fair trial and convicted the appellants only on account of the allegation without



testing the probability of the case in the attending facts and circumstances and admissibility of the evidence and mandatory requirement of fair trial.

7. Mr. Shravan Kumar at the very outset has drawn the attention of the court to the delay in lodging the fardbeyan. The incident is dated 9th March, 1992 but the fardbeyan was lodged on 11.3.1992. From the fardbeyan it appears that the injured was taken to the Sadar Hospital, Chapra and from Chapra he was taken to PMCH for treatment but neither at Chapra nor at PMCH any fardbeyan was lodged and only after the death of the injured the fardbeyan was lodged. He submitted that, in fact, until death the informant and others were waiting for regaining sense of the victim so that they may know about the real assailants but after death of the deceased when they did not find any clue as to the real assailants by due deliberation the informant and others have implicated the appellants herein.

8. Mr. Shravan Kumar submitted that not only there is delay in lodging the fardbeyan but there is inordinate delay of six days in recording the formal FIR when the fardbeyan was recorded on 11.3.1992, there is no explanation as to why the formal FIR was drawn after six days on 17.3.1992, to crown it all, there is further delay of five days in reaching the formal FIR to



the CJM despite the same was sent by special messenger on 18.3.1992 gives serious doubt about the improvement of the prosecution case after due diligence and false implication of the appellants in the present case.

9. Mr. Shravan Kumar submitted that the attending facts and circumstances would indicate that none has seen the occurrence and everyone reached the place of occurrence after the deceased on sustaining injury became senseless. He submitted that in the present case the witnesses named in the fardbeyan were not examined and those who are not named in the FIR have been examined which is indicative of the fact that the prosecution has made pick and choose in the examination of the witnesses and without any justification they have withheld the material witnesses and non-examination of the material witnesses goes against the prosecution and the trial court was required to draw adverse inference of pick and choose of the examination of the witnesses and non-examination of the material witnesses.

10. Mr. Sharavan Kumar submitted that in the present case P.W. 1 Kameshwar Singh was not named in the FIR, as witness. However, he was examined as eye witness. Referring to his deposition Mr. Kumar submitted that this witness in his examination before the court has stated that when he reached the



place of occurrence Parsuram Singh of the Saw Mill was present. This witness claims that at the time of incident Parsuram Singh assembled at the place where the deceased was lying senseless and as such senior counsel submitted that the deposition of Parsuram Singh is most natural and relevant but he was not examined on behalf of the prosecution rather he was examined on behalf of the defence as D.W.1 and the trial court has disbelieved his testimony notwithstanding the fact that he was named by P.W. 1 as a witness who was present at the place of occurrence when the deceased was lying senseless.

11. Mr. Sharavan Kumar further submitted with reference to the deposition of P.W. 2 Manauwar Hussain, who has supported the case of the prosecution, that this witness is not trustworthy for the reasons that source of identification of the deceased in the night in the light of Lantern of the Saw Mill which was approximately 50 yards away from the place of occurrence. Referring to the contradiction in his statement in paras 5 and 6, he submitted that inconsistent statement of P.W. 2 renders this witness unreliable witness.

12. P.W. 3 is Hakim Mian, who is not eye witness and hearsay witness and as such his deposition is not relevant.



13. P.W. 4 is the informant of the case. Referring to his deposition and the fardbeyan Mr. Kumar submits that this witness has claimed that he was returning from the Bazar and was 50 yards behind the deceased who was assaulted. The informant has stated that except Alamgir Mian all other were equipped with Lathi- Danda and have given Lathi-Danda blow. This witness like P.W.1 who stated that not less than five lathi blows were given to the deceased by the appellants has stated before the police and court about various lathi and danda blows on deceased.

14. P.W.5 is the Doctor who examined the deceased at Chapra, P.W. 6 is the doctor in whose presence the operation at PMCH was done and P.W. 7 is the doctor who conducted the post mortem.

15. Referring to the deposition of P.Ws. 5 and 6, Mr. Sharawan Kumar submitted that these witnesses have only found injury of 3x ½ inch and no other injury. P.W. 6 has stated that the deceased was admitted at 4.25 PM at PMCH in unconscious position. P.W. 7 has conducted the post mortem and stated that only one incised wound was found on the deceased. The deposition of P.Ws. 5,6 and 7 runs contrary to the prosecution case that appellants have given Lathi-Danda blows and thereafter one



Chura blow was given by appellant Alamgir Mian, whereas no Lathi or Danda injury was found on the deceased.

16. Referring to the deposition of D.W.1, who, according to the P.W. 1 was present when the deceased was lying senseless after sustaining injuries, Mr. Kumar submitted that this D.W. 1 was most important and impartial witness who was present at the spot and according to D.W.1 none was present at the place of occurrence and on his raising alarm Rajnath, Janardan singh and others assembled at the place of occurrence and the wife of the deceased was the first person of the family who reached the place of occurrence and the deceased was taken to the clinic of Dr. Yogendra but the trial court without any rationale has disbelieved the statement of D.W.1.

17. Mr. Sharavan Kumar next submitted that in the present case Ajam Ansari, Rajnath, Janardan, wife of the deceased and Dr. Yogendra were the material witnesses who could have unfolded true narration of the case. In addition thereto, the attesting witness, Kajami Nazir Haidar was not examined by the prosecution and thus the prosecution has made pick and chose in the examination of the witnesses, persons not stated as FIR witnesses were examined in this case but those who were present at the place of occurrence even according to the prosecution case,



were not examined and the trial court has committed error in disbelieving the deposition of the D.W.1 while convicting the appellants although he was the most natural and competent witness of the entire occurrence that took place near the Saw Mill.

18. Mr. Kumar submitted that the motive in the present case as per the prosecution is most unrealistic and unbelievable. According to the prosecution the reason for killing Najare Alam was that he intervened in the quarrel between Hakim and Alamgir and pacified them. Such intervention and pacifying act cannot be taken as a motive for eliminating the deceased by the appellants.

19. Mr. Sharavan Kumar referring to the source of light for identification of the accused submitted that witnesses claimed that they have seen the assailants in the night and identified them in the light of lantern which was hanging in the Saw Mill situated approximately 50 yards away from the place of occurrence. The identification in such circumstances is unreliable, unbelievable and as such Mr. Kumar submitted that in the present case the prosecution has miserably failed to establish the motive for killing the deceased and source of identification claimed by the prosecution does not inspire confidence in view of the distance of the place of occurrence from the Saw Mill and the story



introduced by the informant and others about their reaching the place of occurrence in the night.

20. He next submitted that in a Medico legal case it is most unnatural on the part of the prosecution that the police was not informed when the deceased was taken to Chapra Sadar Hospital for treatment and even at PMCH when the injured was referred for treatment. Information of the incident was given to the police only after his death at PMCH and fardbeyan was lodged. There was inordinate delay in registering the formal FIR and unexplained and inordinate delay in reaching the formal FIR to the Court of the CJM also renders the whole prosecution case under serious cloud.

21. Mr. Abhimanyu Sharma, learned APP appearing on behalf of the State submitted that the trial court has convicted the appellants on the basis of specific deposition of the prosecution witnesses. However, he could not explain the inordinate delay in registering the formal FIR, i.e. 6 days delay and further 5 days delay in reaching the formal FIR to the court of CJM. The aforesaid two lapses creates reasonable doubt of improvement in the present case.

22. We have gone thorough the entire materials available on record and after hearing the parties and on deeper scrutiny of



the evidence of the parties, we find substance in the submission of learned senior counsel appearing on behalf of the appellants that there is inordinate delay in registering the formal FIR and there is no explanation for such delay. Apart from the fact that in a medico legal case when the injured was treated at Sadar Hospital, Chapra and PMCH but no information was given to the police about the occurrence or the assailants. The unexplained delay in sending the FIR to the CJM and 5 days delay in reaching the FIR despite the fact that it was send by special messenger creates serious doubt about the prosecution case and as such chance of manipulation and false implication of the appellants cannot be ruled out.

23. We find substance in the submission of learned senior counsel appearing for the appellants that the prosecution witnesses including the informant and others have not seen the occurrence and they have no clue otherwise they could have informed the police either at Chapra or at PMCH about the occurrence and the involvement of the appellants and only after the death of the deceased after due deliberation they have inserted the name of the appellants in the present case.

24. The issue with regard to delay in sending the FIR has been discussed by the Apex Court in various cases including in the



case of **State of Punjab Vs. Tarlok Singh: (1972) 3 SCC 869**, in para 5 it has been held out as follows:

5. First, the High Court noticed the suspicion created by the circumstance that the copy of the First Information Report purported to have been lodged at 3.45 p.m. did not reach the Magistrate at Dasuya till 8 a.m. the next day, even though it was sent through a special messenger. The distance between the scene of occurrence & Dasuya was only 15 or 16 miles. The inference sought to be drawn is that, in fact, the report was not lodged at 3.45 p.m., but at a much later hour, after the police had arrived at the scene of occurrence and there were consultations to decide what version should be put forward and who should be implicated for the murder. The prosecution, in fact, made no attempt to explain this delay. Such delay, thus, casts doubt on the prosecution version that the Report was lodged at 3.45 p.m. without lapse of unnecessary time.

In the case of **Ishwar Singh Vs. The State of Uttar Pradesh: AIR 1976 SC 2423**, in paras 5 and 9 the supreme court has held as follows:

“5. Mr. Frank Anthony appearing for appellant Ishwar Singh submitted that in affirming the Judgment of the trial Court, the High Court also overlooked certain important aspects of the case that the Sessions Judge had failed to consider. He pointed



out that the F.I.R. which is stated to have been lodged at 9.05 A. M. on February 14, 1973 was sent out from the police station the next day, February 15; the time when it was despatched is not stated, but it appears from the record that the Magistrate received it on the morning of February 16. The Court of the Magistrate was nearby, which makes it difficult to understand why the report was sent to him about two days after its stated hour of receipt at the police station. Section 157 of the CrPC, 1898 as well as of 1973 both require the first information report to be sent "forthwith" to the Magistrate competent to take cognizance of the offence. No explanation is offered for this extraordinary delay in sending the report to the Magistrate. This is a circumstance which provides a legitimate basis for suspecting, as Mr. Anthony suggested, that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In this case the suspicion hardens into a definite possibility when one finds that the case made in Court differs at least in two very important particulars from that narrated in the F.I.R. Mahabir Singh, who lodged the first information report, stated in-Court that he had invited some people to his house to effect a settlement between him and Ishwar Singh, and that he had also sent Ghanshyam to call Ishwar Singh there. The F.I.R. does not mention anything like this. From the



F.I.R. it appears as if the accused persons came uninvited to his house, demanded why he had demolished the drain, and started assaulting him and the other persons who were present there. It is also difficult to understand why Mahabir should invite anyone to his house for a settlement, if really Ishwar Singh had permitted him to demolish the drain as he claimed. Further, the F.I.R. does not mention that Mahabir and Satyapal wielded lathis in their defence when attacked and that this resulted in some of the accused getting injured; but that is what both Mahabir (P.W. 1) and Satyapai (P.W. 2) stated in their evidence in Court. These variations relate to vital parts of the prosecution case, and cannot be dismissed as minor discrepancies. In such a case, the evidence of the eye-witnesses "cannot be accepted at its face value", as observed by this Court in *Mitter Sain v. State of U.P.*

9. We have pointed out that the trial Court in convicting the appellants overlooked certain significant features of the case, namely, the inordinate and unexplained delay in despatching the first information report to the Magistrate; the difference in the account given by the prosecution witnesses and as appearing from the first information report of the occurrence; the absence of any statement in the first information report as to the injuries received by some of accused, and the non-examination of material witnesses. The High Court in affirming the Judgment of the trial Court also failed to advert to these



circumstances. We do not therefore think that the case against the appellants has been proved beyond reasonable doubt. The appeals are accordingly allowed and the Order of conviction and the sentences passed on the appellants are set aside We direct that the appellants be set at liberty forthwith.”

25. In view of the Apex Court judgment unexplained delay in sending the FIR creates serious doubt about the involvement of the appellants and in the present case it renders the prosecution under serious cloud.

26. We have also examined the record and we do not find any explanation on behalf of the prosecution for non-examination of the witnesses, who, according to the prosecution, were present at the place of occurrence at first instance. There is no explanation for non-examination of the attesting witness and the examination of Parsuram Singh as prosecution witness.

27. In view of the statement of P.W. 1, the D.W.1 was the most natural and competent witness who was present at the spot when the deceased was lying senseless at the place of occurrence. Since he was at the Saw Mill which was nearest point from the place of occurrence, he was most natural and competent witness but the trial court has disbelieved his evidence.



28. Adverting to the post mortem report it appears that one incise wound was found on the deceased which falsify the specific case of the prosecution that before giving Chura blow by appellant Alamgir Mian several Lathi-Danda blow was given to the deceased by other appellants but no such injury was found on the body of the deceased. Moreover, the doctor who conducted his post mortem examination had reserved the opinion saying that opinion cannot be given due to surgical interference in this case but no opinion was obtained from the Surgeon to conclusively arrive at a conclusion that what was the weapon used for the injury which proved fatal.

29. From the examination of the accused under Section 313 Cr.P.C. by the trial court it appears that the trial court has only completed formality of examining the accused under Section 313 Cr.P.C. Law requires that the court should confront all the adverse circumstances to the accused which surfaced during the trial in order to ensure fair trial but contrary to the mandate of law the trial court has not confronted the appellants with all the adverse circumstances as required under law and only formality was completed by putting general questions and without specific material which has surfaced during the trial. The aforesaid infirmity also vitiates the trial.



30. On scrutiny of the entire materials when there is no injury of Lathi- Danda on the deceased, the allegation against the appellant of Cr. Appeal No. 371 of 1994 is not sustainable. There is allegation in the present case of giving Chura blow against the appellant of Cr. Appeal No. 407 of 1994 but that has not been medically established as the doctor who conducted the post mortem has not given any conclusive opinion regarding the nature of weapon used for causing such injury.

31. Thus, in the totality of the fact situation and the infirmities noticed in the trial, we are of the view that the conviction of the appellants in the aforesaid circumstances is not sustainable.

32. Accordingly, we allow both the appeals, set aside the judgment and order of conviction and sentence. Since the appellants are on bail they are discharged from the liability of the bail bond.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

spandey/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	03.02.2018
Transmission Date	03.02.2018

