

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction and order of sentence dated 16.09.1994 passed by learned 4th Additional Sessions Judge, Samastipur in Sessions Trial No. 61 of 1987 / 19 of 1991, arising out of Ujiarpur P.S. Case No. 47 of 1986)

Criminal Appeal (DB) No.554 of 1994

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1. Sanjoor Mian, son of Ballam Mian
2. Manjoor Mian, son of Ballam Mian
3. Hakim Mian, son of late Jainuddin Mian
All residents of Village- Balbhadarpur, P.S.- Ujiarpur, District- Samastipur.
..... Appellant/s

Versus

The State of Bihar
..... Respondent/s

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Appearance :

For the Appellant/s : Ms. Uma Kumari, Amicus Curiae
For the Respondent/s : Ms. S. B. Verma, APP

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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

All the three appellants in the present appeal has challenged the judgment of conviction and order of sentence dated 16.09.1994 passed by learned 4th Additional Sessions Judge, Samastipur in Sessions Trial No. 61 of 1987 / 19 of 1991, arising out of Ujiarpur P.S. Case No. 47 of 1986, whereby the appellants have been convicted under Sections 302/201/34 of the Indian Penal Code and they have been sentenced to undergo R.I. for life under Section 302/34 of the Indian Penal Code. However, no separate sentence has been passed under Section 201 of the Indian Penal Code.



2. This appeal was listed on various dates and on 16.01.2018, we appointed Smt. Uma Kumari, Advocate, as Amicus Curiae, to assist the Court, as no one was appearing on behalf of the appellants in the present appeal, which is pending since 1994 in connection with Sessions Trial N.o. 61 of 1987 / 19 of 1991

3. The prosecution case in brief is that on 28.04.1986, at about 3.00 P.M. the informant Ramashish Paswan had gone to village Desua for doing work of one Chatur Singh. On the same day at about 3.30 P.M. one Kallu Mian of his village informed him that in the mango orchard Mansoor Alam, accused Sanjoor Mian and Manjoor Mian, sons of Bawan Nadaf and Hakim Mian, son of late Jainuddin Mian in collusion with each other at about 3.15 P.M. committed murder of his brother Shiv Balak Paswan by pressing his neck and scrotum. He further informed that they were planning to remove the dead body. On getting the said information, the informant went running towards the said orchard where he saw accused Manjoor Alam and Sanjoor Alam carrying Shiv Balak Paswan on a bamboo cot and going towards their house. The informant began weeping and raised halla on which accused Sanjoor Alam, Mansoor Alam and Hakim Mian put down the cot in their Angan and fled away. In the meantime, many people of the village assembled including informant's wife Kunti Devi, Sanfulia Devi and others. The informant



then called the Dr. Polendra Chourasia, who examined Shiv Balak Paswan and declared him dead. The informant then went to Mukhiya and Sarpanch of the village and narrated the incident to Sarpanch Md. Zafrul Hassan, who came and saw the dead body and advised the informant to inform the police station. The occurrence was witnessed by Kunti Devi, Gango Paswan, Laleshwar Paswan, Jageshwar Paswan, Kullu Mian and others. The reason behind the occurrence is that on the same day at about 2.30 P.M. accused Manjoor Mian and Sanjoor Mian came to the Darwaja of the informant and in his presence they called his brother deceased Shiv Balak Paswan and took him in the orchard of Mansoor Alam and asked him to gamble on playing card which the deceased refused upon which accused Sanjoor Mian, Manjoor Mian and Hakim Mian pulled him down and pressed his neck and scrotum, as a result of which he died. The investigating officer after recording the fardbeyan of the informant prepared inquest report in presence of the witnesses. He also seized the cot on which the deceased was lying. He sent the dead body for post-mortem.

4. On the basis of the statement of the informant Ujiarpur P.S. case no. 47 of 1986 dated 24.08.1986 was registered for the offence under Sections 302/201/34 of the Indian Penal Code.

5. The police after investigation submitted charge-sheet



and after taking cognizance, the case was committed to the Court of Sessions for trial. The Sessions Court framed charges against the appellants for the offence under Sections 302/34 and 201 of the Indian Penal Code. The appellants pleaded not guilty and as such they were put on trial.

6. On behalf of the prosecution 11 witnesses were examined. P.W.1 is Laleshwar Paswan, P.W.2 is Nageshwar Paswan, P.W.3 is Kunti Devi, P.W.4 is Gango Paswan, P.W.5 is Mahendra Paswan, P.W.6 is Bhagwan Jha, P.W.7 is Mithilesh Kumar Jha, P.W.8 is Ramashish Paswan, P.W.9 is Dr. Krishna Chandra Singh, P.W.10 is Zafirul Husan and P.W.11 is Sudarshan Prasad Singh. Out of which P.W.1 and P.W.2 claims to be the eye witness of the occurrence. The informant of this case is a hearsay witness. Rest witnesses are either formal witness or the hearsay witness, except investigating officer of the case and the doctor, who conducted the post-mortem on the dead body of the deceased.

7. The defence also examined two witnesses. D.W.1 is Abdul Bari and D.W.2 is Dr. Arun Kumar Jha.

8. The trial court on scrutiny of oral and documentary evidence convicted the appellants and sentenced to undergo R.I. for life, as indicated hereinabove.



9. Learned Amicus Curiae appearing on behalf of the appellants submitted that in the present appeal all the witnesses are hearsay and the trial court has committed error in convicting the appellants without examining the crucial witness Kallu Mian from whom the informant has gathered the information about the murder of his brother by the appellants. At the very outset, she submitted that the informant is not the eye witness. His source of information is Kallu Mian, but he was not examined without any reason by the prosecution. Referring to fardbeyan, she submitted that from the fardbeyan it appears that the deceased was done to death by the appellants about 3.00 P.M. in the orchard and the informant rushed to the orchard and saw the dead body of his brother was being carried out on a cot, then he raised halla and started crying, the informant stated that the assailants left the cot and the dead body and fled away from the Angan of the appellants. Smt. Uma Kumari, learned Amicus Curiae submitted that the prosecution case is silent on the point as to how the dead body reached the Angan of the appellants, as per the prosecution case the deceased was killed in the orchard and his dead body was carried by the appellants on a cot and in the orchard itself it was dropped when the informant started crying and raising halla, appellants fled away leaving dead body then the mystery of entering the dead body with cot in the Angan of the appellants is unexplained,



which creates the prosecution case most improbable and doubtful. She next submitted that in the present case, the informant has mentioned in the fardbeyan that when the miscreants fled away leaving the dead body, many people assembled there including Kunti Devi, Sanfulia Devi, Gango Paswan, Laleshwar Paswan, Jageshwar Paswan, but the prosecution has made pick and choose in the examination of the witnesses and without any explanation they were not examined. She submitted that non-examination of the material witnesses, who would have unfolded the true narrative of the case is fatal for the prosecution and the court is supposed to draw the adverse inference for non-examination of the material witnesses. She referred to the instance of non-examination of Kallu Mian from whom the informant gathered information about the murder of his brother. Non-examination of the Mukhia and Sarpanch of the village, particularly, Sarpanch Zafrul Hassan is also indicative of the fact that the prosecution has withheld these witnesses, as they were apprehensive that the truth may be surfaced in the trial and adversely affect the prosecution case, as the appellants could not have been booked in the present case, if the true story was placed beyond the court. She next submitted that the motive alleged in the present case for killing the brother of the informant is most unrealistic, artificial and unreliable. Refusal to gamble by playing card by itself is not a matter, which can be a ground to



commit murder. Thus, the motive attributed by the prosecution for killing the deceased is most artificial and unnatural. She highlighted the infirmity in the prosecution case saying that the mystery as to how the dead body with cot reached the Angan of the appellants is unexplained and the prosecution has to suffer for non-explanation, the manner in which the dead body and cot entered the Angan from orchard. She next submitted that the previous enmity with witness (P.W.10) in the present case with the appellants was given go bye during trial. She submitted that in case of previous enmity with P.W.10, the appellants have been falsely implicated. She submitted that in the present case, no one has seen the actual occurrence, as to who has committed the murder and the place of occurrence is not proved, as there is no material available in the trial to suggest that the deceased was done to death by the appellants in the orchard. The attending fact and circumstance would suggest that he (deceased) was killed in the Angan, where the dead body was recovered. There may be many story behind the manner of killing by squeezing the tasticle and pressing the neck of the deceased. From the discussion of the trial court, it would be evident that the place, where the dead body was found, was a lonely place and not under habitation, therefore, the real occurrence, the real miscreants and the actual circumstance in which the deceased was killed is not reflected from the prosecution case. She



next submitted that the prosecution case appears to be most artificial in as much as if the deceased was murdered in the orchard then the appellants instead of concealing the dead body elsewhere were seen taking the dead body on cot towards their house, such story of taking the dead body of the deceased to their own house is most unnatural and artificial. Referring to the injury and the deposition of the doctor she submitted that the medical evidence runs contrary to the prosecution case of killing the deceased by pressing neck. Referring to the deposition of the witnesses, she highlighted that the Sarpanch Zafrul Hasan has influenced about the witnesses, as they are the Bataidar of Sarpanch Zafrul Hasan and as such under the influence of Zafrul, the appellants, who are in inimical term, have been falsely implicated in this case. She highlighted the contradiction of the deposition of P.W.1 and P.W.2 as to the manner of occurrence. The two witnesses, who claimed to be the eye witnesses, their account of occurrence of crime runs contrary to each other and, as such they cannot be taken as truthful witness. Referring to the conduct of the P.W.1 and P.W.2 she submitted that the normal conduct of a person, who has seen such occurrence is to inform the police or the family of the deceased, but P.Ws. 1 and 2 have neither reported the police nor the family of the deceased about the occurrence. She also highlighted the nature of injury found by the doctor and the ocular evidence as to



the killing of the deceased where the doctor has opined that the injury would not have been caused by leg or foot, which is the basic case of the prosecution about the killing of the deceased. Referring to the deposition of the witnesses and the discussion of the trial court she highlighted that the trial court on the basis of scrutiny has also noted that the entry of the cot and the dead body in the Angan of the alleged abandon house is most unrealistic and unbelievable. She submitted that the infirmity in the trial, as the trial court ignored the fact that the witnesses are at variance on account of commission of crime. The prosecution story stands falsified by the medical evidence. Non-examination of the material witness also goes against the prosecution case.

10. Ms. S. B. Verma, learned APP appearing on behalf of the State submitted that in the present case, the witnesses have categorically deposed that the crime was committed at 3.00 P.M. in orchard. The identification of the appellants in the orchard in broad day light is most reliable and as such the trial court has rightly convicted the appellants for commission of murder of the deceased.

11. We have gone through the materials available on record and on deeper scrutiny of the evidence, we are in agreement with the submission of the learned Amicus Curiae appearing on behalf



of the appellants. Firstly; that the prosecution has not explained the reason for non-examination of most crucial witness Kallu Mian from whom the informant has gathered information about the murder of the deceased. The non-examination of the material witness like Kallu Mian goes against the prosecution and in view of the judgment of the Apex Court in the case of **Takhaji Hiraji vs Thakore Kubersing Chamansing & Ors.**, reported in **(2001) 6 SCC 145**, the Court is of the view that the prosecution having failed to explain the reason for non-examination of most crucial witness has rendered the prosecution case under serial doubt and the Court is constrained to draw adverse inference on non-examination of crucial witness Kallu Mian in the present case.

12. In this connection the judgment of the Apex Court in the case of **Takhaji Hiraji vs Thakore Kubersing Chamansing & Ors.**, reported in **(2001) 6 SCC 145**, para 19 is clinching on the point, which is quoted for ready reference:

“19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the



prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinize the worth of the evidence adduced. The court of facts must ask itself -whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least witnesses whose presence at the place of the



incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of Thakores was hurt leading to a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not premeditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed them and opened the assault near the house of the accused persons then it could probably be held to be a case of self-defence of the accused persons in which case non- explanation of the injuries sustained by the accused persons would have assumed significance. The learned Sessions Judge has on appreciation of oral and circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the



accused persons. Nothing more could have been revealed by other village people or the party of tight rope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tight rope dance performers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinized the statements of all the eye-witnesses and found them consistent and reliable. The High Court made no effort at scrutinizing and analyzing the ocular testimony so as to doubt, if at all, the correctness of the several findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eye-witnesses consistent and reliable in their narration of the incident. In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case.”

13. On scrutiny of the record, it also transpires that the trial court has committed error in not confronting the accused persons with all the adverse circumstances surfaced during the trial and as such the trial also suffers from non-compliance of mandatory requirement under Section 313 of Cr.P.C. and non-compliance thereof vitiate the trial. In this context, the judgment of the Apex Court in the



case of **Sukhjit Singh Vs. The State of Punjab**, reported in (2014) **10 SCC 270**, para 11 to 14 is settler on the point. Para. 11 to 14 of the judgment is quoted herein below for ready reference:

“11. In this context, we may profitably refer to a four-Judge Bench decision in *Tara Singh v. The State*, reported in AIR 1951 SC 441, wherein, Bose, J. explaining the significance of the faithful and fair compliance with Section 342 of the Code as it stood then, opined thus:

"30. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section 342 of the Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must



therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342 of the Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice."

12. In *Hate Singh Bhagat Singh v. State of Madhaya Bharat*, reported in AIR 1953 SC 468, Bose, J. speaking for a three-Judge Bench highlighting the importance of recording of the statement of the accused under the code expressed thus:-

"8. Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal P.C. are among the most important



matters to be considered at the trial. It has to be remembered that in this country an accused, person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box."

13. The aforesaid principle has been reiterated in *Ajay Singh v. State of Maharashtra*, reported in (2007) 12 SCC 341, in following terms:

"14. The word "generally" in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant



or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."

14. In view of the aforesaid enunciation of law, there can be no scintilla of doubt that the when the requisite questions have not been put to the accused it has caused immense prejudice to him, more so, when there is no evidence to establish his complicity in the alleged abduction."

14. We also find contradiction in the version of the different witnesses examined on behalf of the prosecution. The conduct of the parties are relevant for the purpose of understanding the veracity of the deposition. In the present case many of the conduct of the prosecution witnesses are also artificial and unnatural and as such cannot be believed. We also find substance in the submission of the learned Amicus Curiae that when the murder was committed on secluded place then why the appellants have taken the dead body on cot to visible place that is the house. This part of the prosecution case runs contrary to the basic case that after committing murder the



appellants tried to conceal the dead body. The unexplained mysterious circumstance how the dead body with cot entered in the Angan, which according to the prosecution was the house of appellants Manjoor and Sanjoor Mian create serious doubt about the place of occurrence and the prosecution case of committing murder by the appellants.

15. In criminal jurisprudence, it is the obligation on the prosecution to explain every circumstance as to commission of crime, place of occurrence, manner of occurrence and if there is a reasonable doubt either as to the place of occurrence, manner of occurrence, commission of crime by the accused persons then the settled principle is to extend the benefit to the appellants.

16. In the present case, there are many unexplained circumstance and material, which creates serious doubt about the prosecution version. Thus, taking the totality of the facts situation indicated hereinabove, we are of the view that the prosecution has not been able to explain how the dead body entered the Angan of the accused persons when the informant's definite case is that when he reached the orchard, he saw the appellants carrying the deceased on cot and they left the dead body on seeing the informant crying and raising halla.

17. Thus, the cumulative effect of the infirmity in the



prosecution case as to non-examination of material witness, contradictory version of the witness as to the place of occurrence, manner of occurrence, the contrary medical evidence, which ruled out the manner of occurrence suggested by the prosecution, indicates that the prosecution has not been able to bring home the charges beyond all reasonable doubt.

18. Accordingly, we allow the appeal, set aside the judgment of conviction and acquit the appellants. Since all the appellants are on bail, they are discharged from the liabilities of their bail bonds.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Uday/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	24.02.2018
Transmission Date	24.02.2018

