

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.170 of 2009

1. BAHARAN MIAN @ MAHMOOD MIAN @ MD. MIAN @ BAHARAN
2. Manjur Mian @ Manjoor Mian
Both sons of Hakim Mian @ Abdul Hakim, r/v-Gundi, P.S. - Krishnagarh,
District - Bhojpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
Criminal Appeal (SJ) No. 177 of 2009

1. SADHU MIAN
2. Wakil Mian
Both sons of Hoda Mian @ Shamshul Hoda, r/v- Gundi, P.S.- Krishnagarh,
District - Bhojpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (SJ) No. 170 of 2009)

For the Appellant/s : Mr. Ranbir Singh, (Amicus Curiae)

For the Respondent/s : Mr. Syed Ashfaque Ahmad.(App)

(In Criminal Appeal (SJ) No. 177 of 2009)

For the Appellant/s : Mr. Baban Roy, (Amicus Curiae)

For the Respondent/s : Mr. Bind Bihari Singh (App)

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 05-12-2018

On repeated call none appears on behalf of respective appellants on account thereof, Mr. Baban Rai, Sri Ranbir Singh learned counsel have been requested to assist the court as an Amicus Curiae.



2. Appellants Baharan Mian @ Mahmood Mian @ Md. Mian @ Baharan, Manjur Mian @ Manjoor Mian (Cr. APP. 170/2009), Sadhu Mian, Wakil Mian (Cr. APP 177/2009), have been found guilty for an offence punishable under Section 307/34 of Indian Penal Code and sentenced to undergo R.I. for 10 years as well as to pay fine appertaining to Rs. 3,000/- in default thereof to under go R.I. for six months additionally by the Additional District & Sessions Judge, F.T.C. IV, Bhojpur at Arrah in Sessions Trial No. 258/1998 vide judgment of conviction dated 22.01.2009 and order of sentence dated 23.01.2009.

3. P.W. 5 Md. Afzal Ali filed written report on 25.12.1997 alleging inter alia that on the same date at about 3.00 p.m. while he was returning from his orchard to his house and since reached near the orchard of Haji Sattar, Sadhu Mian, Wakil Mian, Manjoor Mian, Mahmood Mian @ Baharan Mian came, cordoned him. Sadhu Mian directed him to compromise Case No. 92/1997 which, he refused. Thereafter, Sadhu Mian took out pistol and threatened of dire consequence. Wakil Mian, Manjoor Mian began to assault him with lathi. During midst thereof, Mahmood Mian @ Baharan Mian gave axe blow over his head causing injury thereupon. He, after sustaining injuries fell down. On hue and cry



raised by him Chhotak Mian, Taj Mohammad came at the occurrence and rescued him.

4. After registration of Barhara (Krishnagarh) P.S. Case No. 156/1997 investigation followed and, concluded by way of submission of charge-sheet facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

5. The defense case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. Furthermore, it has also been pleaded that prosecution is in habit of filing false cases in order to coerce the accused persons to forbid themselves in resisting, obstructing the illegal activity of the prosecution party. However, nothing has been adduced in defense.

6. Altogether, six P.Ws have been examined on behalf of prosecution to support its case who are P.W. 1 Md. Safiullah, P.W. 2 Taj Mohammad, P.W. 3 Md. Perwej Alam, P.W. 4 Md. Chhotak, P.W. 5 Md. Afzal Ali and P.W. 6 Surya Pandey as well as exhibited exhibit 1 written report, exhibit 2 formal F.I.R., exhibit 3 Case diary, exhibit 4 Injury report, exhibit 5 supplementary injury report. As stated above, nothing has been adduced in defense.

7. Learned Amicus Curiae while challenging the finding recorded by the learned lower court have submitted that same is



unsustainable in the eye of law and so, is fit to be set aside. It has further been submitted that from perusal of the judgement impugned it is evident that no case under Section 307 of the Indian Penal Code is made out and for that, the appellants have properly placed the materials before learned lower court, flashed the circumstances falsifying the evidence of the witnesses even then, discarded the submission and convicted the appellants for an offence punishable under Section 307/ 34 of the Indian Penal Code and sentenced, accordingly.

8. It has also been submitted that neither doctor nor Investigating Officer has been examined. There happens to be material development in the evidence of the witnesses and in likewise manner, the witnesses are, inconsistent in getting the proper identification of the P.O. So, the non-examination of the Investigating Officer has caused prejudice to the appellant and that being so, it happens to be a sole ground whereupon, appeal is to be allowed. Furthermore, on account of non-examination of the doctor, it is difficult to observe that alleged injured had sustained injury, if any, from the weapon.

9. In likewise manner, it has also been submitted that irrespective of the allegation that Sadhu Mian was armed with pistol, the same was never used, there was an axe but, none of the



witnesses have stated that the edge side blow was given, none of the witnesses had stated that blow was repeated, did not divulge activity of the appellant to be with an intention to cause death or, with the knowledge that the assault having at their end would ultimately cost life of the victim. Apart from this it has also been submitted that though under Section 307 of the Indian Penal Code the word injury is not there rather, the word hurt is there but, in the facts and circumstances that there happens to be an allegation of assault, nature of injury if any would depict whether assault was with the intention to commit murder or not. Consequent thereupon, no offence under Section 307/34 of the Indian Penal Code is made out so, in worst case it could be a case under Section 323/34 of the Indian Penal Code and for that, appellants have sufficiently been punished having been forced to face trial right from the year 1997.

10. On the other hand, learned Addl. P.P. while refuting the submission having at the end of learned respective Amicus Curiae has submitted that after perusal of the judgement impugned it is evident that learned lower court had taken, considered, explained the points, whatever raised by the learned Amicus Curiae at the present moment and so, the judgement impugned needs no interference. That being so, the same is fit to be confirmed.



11. From perusal of the record as well as having meticulous examination of the judgment, it is evident that learned lower court has taken into account the principle decided soon by this court **reported in 2001 (1) BCCR page 558** and came to the conclusion that non-examination of I.O. as well Doctor could not be fatal to the prosecution, if there happens to be consistency amongst the witnesses so far genesis as well as manner of occurrence is concerned. So, one has to see how the existence of witnesses has come up and whether they are consistent over the manner as well as genesis of occurrence. It has been settled at rest by the Apex Court in **Baldev Singh v. State of Haryana as reported in 2016 Cr. L. J. 154**, that non-examination of Investigating Officer could not be considered deficiency in the prosecution case unless and until there happens to be deformity persisting in the prosecution case on account of inconsistency amongst the witnesses. For better appreciation relevant passage is quoted below:-

“16. Contention at the hands of the learned Senior Counsel for the appellant is that non-examination of Chander Singh-SI who prepared rukka and who investigated the case raises serious doubts about the prosecution case. Material on record would show that Chander Singh-SI who investigated the case was not examined by the prosecution in spite of several opportunities. No doubt, it is always desirable that prosecution has to examine the investigating Officer/police officer who prepared the rukka. Mere non-examination of investigating officer does not in every case cause prejudice to the accused or affects the credibility of the prosecution case. Whether or not any prejudice has been caused to the accused is a question of fact to be determined in each case. Since Ram Singh-PW-1 was a part of the



police party and PW-1 has signed in all recovery memos, non-examination of Chander Singh-SI could not have caused any prejudice to the accused in this case nor dose it affect the credibility of the prosecution version.”

However, it has been settled at rest that on account of non-examination of the doctor, the injury report could not be admitted and be used. Thus, the evidences are to be seen in order to trace out whether the finding recorded by the learned lower court is justifiable or not. Before coming thereto it looks pertinent to see the status of the witnesses. P.W. 1 is the father of the informant, P.W. 3 is full brother of informant, and heresay witness, P.W. 2 Taj Mohammad has been declared hostile. P.W. 4 is the co-villager and P.W. 5 is the informant himself. Because of the fact that P.W. 5 is the injured, on account thereof, his evidence is taken on priority amongst the others.

12. With regard to credibility of evidence of an injured is concerned, it has been settled at rest in **Chandrasekar and Anr. vs. State of Tamil Nadu reported in 2017 (4) P.L.J.R. page 220(SC).**

*“10. Criminal jurisprudence attaches great weightage to the evidence of a person injured in the same occurrence as it presumes that he was speaking the truth unless shown otherwise. Though the law is well settled and precedents abound, reference may usefully be made to **Brahm Swaroop v. State of U.P., (2011) 6 SCC 288** observing as follows: “28.where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with an in-built guarantee of his presence at the scene of the*



crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.”

13. P.W. 5 has deposed that on the alleged date and time of occurrence while he was returning from his orchard and came in front of orchard of Haji Sattar, Sadhu Mian, Wakil Mian, Mahmood Mian and Manjoor Mian conjointly encircled him. Sadhu Mian directed him to compromise Case No. 92/97 whereupon, he stated that let it be decided by the court. Then thereafter, Sadhu Mian took out pistol and began to threaten him. Wakil Mian and Majoor Mian began to assault him with lathi, indiscriminately. During midst thereof, Mahmood Mian @ Baharan Mian with an intention to kill gave axe blow over his head as a result of which, he became injured, fell down. He began to shout in order to save himself attracting so many persons, seeing whom, accused persons fled away. He was taken to hospital where was treated. He had gone to police station and submitted written report exhibited identified the appellants. During cross-examination at para 3 he has stated that since before Case No. 92/97 both the parties were not at all on litigating terms. He has further stated that accused persons have already been bailed out in Case No. 92/97. He has further stated that accused persons for the first time have directed him to compromise the case on the alleged date of occurrence. In para 5 he has stated that altogether 05



minutes time was taken in commission of the occurrence. He was given 3-4 lathi blows then again corrected as each of the accused had assaulted giving 3-4 lathi blows. He remained standing. Then thereafter, he was assaulted by axe. It was a forceful blow. No repetition of blow was there. He remained lying over the ground for a minute. Blood had not fallen over the ground, but it had fallen over sweater as well as muffler which was shown to the I.O. He has further admitted that he had not mentioned in the written report that he was assaulted with an intention to kill but, he during course of statement then not denied suggestion before the police has stated like so.

14. P.W. 1 is the father. He has stated that when he came to his house from Saraiya market, he was informed by another son Perwej with regard to assault over the informant by the accused persons with lathi, axe as a result of which he has sustained injuries and was taken away to hospital by his brother. During cross-examination at para 5 he has stated that he had made statement before the police that after returning from Saraiya market Perwej had disclosed regarding the occurrence.

15. P.W. 3 is the brother of the informant who had stated that on the alleged date and time of occurrence he was going to orchard. When he reached near orchard of Haji Sattar, he had seen



Baharan Mian @ Mahmood Mian giving axe blow over head of his brother Afzal. Before that, Manjoor Mian and Wakil Mian were assaulting Md. Afzal with lathi. At that very time, Sadhu Mian was armed with country-made pistol and was threatening his brother to shoot. He along with Chhotak and Taj Mian rushed seeing whom, accused persons fled away. During cross-examination, at para 2 he has made conflicting statement but lastly, admitted that his orchard lies half mile away from his house. In para 3 he has further stated that he had not rushed after hearing alarm. He has stated that he was 20-25 steps away from the place of occurrence whereupon, has seen the occurrence. He had further stated that he also shouted when Sadhu Mian threatened his brother. None came on his alarm. Accused persons flew towards southern, northern, western side, but he is unable to say who fled in which direction. He had further stated that he has seen the accused persons giving 5-7 lathi blow over his brother. He has denied to have stated before the police that he had seen only assault by means of fists and slaps by the accused persons. In para 5 he has stated that when he reached at the place of occurrence, his brother was lying over the ground in an injured condition. Blood was oozing from his head. He had disclosed to his brother that he had also witnessed the occurrence. After fleeing of the accused persons he took his brother to his



house. In para 7 of his cross-examination there happens to be material contradiction as, he had not stated at earlier occasion before the police that Baharan Mian @ Mahmood Mian was armed with axe and had inflicted axe blow over head of his brother causing injury. In likewise manner, he had not stated that Sadhu Mian was armed with country-made pistol and was threatening.

16. P.W. 4 has stated that on the alleged date and time of occurrence he was at his orchard. After hearing sound of commotion he rushed to the orchard of Haji Sattar which lies 25 steps away to his orchard where, he found Baharan Mian armed with axe, Sadhu with pistol and Wakil and Manjoor with lathi. He had seen Afzal lying over the ground having injury over his head. Blood was coming out therefrom. Again said that he had seen the accused persons assaulting Afzal with lathi as well as had also seen Baharan inflicting axe blow over head of Afzal. Then thereafter, people came and lifted Afzal. Identified the accused. During cross-examination at para 3 he had denied the inter se relationship with the informant. In para 4 he had shown ignorance of a case instituted against him by Sadhu Mian. In para 5 he has stated that the occurrence took place inside orchard of Haji Sattar. He has further shown the boundary of his orchard. In para 6 he has stated that after hearing hue and cry, 5-6 persons assembled at the



place of occurrence whereupon, the accused persons fled away. All those persons came after his arrival at the place of occurrence. Then the accused persons fled towards the village. They have not raised hue and cry. In para 6 he has stated that for the first time he is deposing before the court. Police had not recorded his statement.

17. From the evidence available on the record, it is evident that there happens to be material contradiction in the evidence of the P.W. 3, the brother of the informant as well as informant himself. In likewise manner, there happens to be inconsistency amongst the evidence of the P.Ws with regard to proper identification of the place of occurrence which, as per evidence of the informant P.W5, his brother P.W. 3 happens to be the place nearby orchard of Haji Sattar while according to the evidence of P.W. 4 it happens to be inside the orchard of Haji Sattar. Furthermore, P.W. 4 had not shown presence of P.W. 3 at the place of occurrence since before rather he stated that others came after his arrival at the place of occurrence while, P.W. 3 has stated that he was first to arrive at the place of occurrence and then thereafter, other witnesses came. It is further evident from the evidence of P.W. 3 that there was no hue and cry while P.W. 5 has stated that he shouted after having been assaulted while P.W. 4 has



stated that he reached at the place of occurrence after hearing alarm.

18. Furthermore, it is consistent evidence of the witnesses that no repetition of Tangi blow was made. There happens to be no disclosure even at the end of P.W. 5 that from edge side of the axe he was assaulted. There happens to be no disclosure that save and except threatening no activity was taken up by Sadhu Mian who was armed with pistol. Furthermore, there was no intervening circumstances prevailing which could have defrosted activity of the accused. In the aforesaid background, where appellants/accused were carrying an intention to commit murder is a circumstance, which needs in depth appraisal. So, after scrutinizing the evidence, whatever been stated by the injured P.W. 5 is found duly appreciable and that being so, considering own admission of the informant that he had not mentioned in the written report that he was assaulted at the end of the accused with an intention to commit murder in consonance with the activity of the accused/appellants so depicted at the end of the P.W. 5, it looks difficult to concur with the finding recorded by the learned lower court with regard to section 307/34 of the Indian Penal Code. Consequent thereupon, the same is set aside and is modified as holding all the appellants to be guilty for an offence punishable



under Section 323/34 of the Indian Penal Code and in likewise manner, sentence is also reduced taken into account the rigour which the appellants faced since 1997, to be let off on due admonition in accordance with section 4 of the Probation of Offenders Act and for that, the learned lower court will take proper exercise after having appearance of the appellants on their own. Appellants are on bail which is extended till four weeks. During midst thereof, learned lower court will complete the exercise after having appearance of the appellants on their own. In case, there happens to be non-appearance of the appellants then in that circumstance, the learned lower court will be at liberty to proceed against them in accordance with law as, after four weeks the appellants would not be entitled to avail the privilege of bail so granted.

19. First and last pages of the judgment be handed over to the learned Amicus Curiae for needful. Office to transmit the lower court record as early as possible.

(Aditya Kumar Trivedi, J)

vinita/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	02.01.2019
Transmission Date	02.01.2019

