

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.62 of 2012

Arising Out of PS. Case No.-18 Year-2009 Thana- ADHAURA District- Bhabhua (Kaimur)

Sahabu Miya, son of Jahur Miya, resident of village Chainpur P.S. Adhaura
District Rohtas (Sasaram)

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Sri Tribhuwan Narayan, Advocate
For the Respondent/s : Sri Ajay Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 10-04-2018

1. The present Appeal was preferred by the sole appellant under Section 374(2) of the Code of Criminal Procedure , 1973 (hereinafter referred to as the “Cr.P.C.”).

2. The Appeal was admitted on 25.01.2012 and it was also noticed that there was no prayer for bail. Record suggests that he surrendered on 21.07.2009 and since then he is in custody. The appellant was convicted on 28.11.2011 for commission of offence under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as the “ I.P.C.”) in Sessions Trial No. 269 of 2009/ 65 of 2009 by Sri Ravi Shankar Tiwary, learned Additional District & Sessions Judge , F.T.C. I, Kaimur at Bhabua (hereinafter referred to as the “trial judge”) and by order dated: 29.11.2011 he was



sentenced to undergo imprisonment for life for commission of offence under Section 302 of the I.P.C. and was imposed a fine of Rs. 1,00000/-. In case of default of payment of fine, he was directed to undergo further imprisonment for five years. It was directed that 50% of the fine amount should be paid to the family members of the deceased.

3. Short fact of the case is that on 15.07.2009 at 16.30 Hours (4.30 P.M.) Sub Inspector of Police Sri Om Prakash Singh (P.W.9) recorded *fardbyan* of Sameena Khatoon [P.W.1, wife of Safikul Miya (deceased)] of village: Chainpura , P.S.- Adhaura, District – Kaimur. The said *fardbyan* was recorded in the vacant field of Ali Hussain Miyan in the village:- Chainpura. In the *fardbyan* the informant disclosed that on the same day i.e. on 15.07.2009 at about 3.00 P.M. (evening) on the border of her husband's field Sahabu Miya (appellant) was erecting bar. The informant and her father-in- law Ali Hussain Miyan were also present there. Her husband Safikul Miya asked Sahabu Miya not to erect. On this, altercation took place. In the meanwhile, Sahabu Miya with *tangi* (axe) which he was carrying gave repeated blow on her husband. While the informant and her father- in- law ran to save, Sahabu Miya (appellant) proceeded towards them carrying *tangi*. Being frightened, both informant and her father -in-law fled



away. Again Sahabu Miya returned back to the place where her husband had already fallen and on second occasion also Sahabu Miya gave blow by *tangi* on her husband. The informant further disclosed that from some distance her villager - Aamna Khatoon [P.W. 3, wife of Mainuddin (P.W. 4)] was witnessing the occurrence and on alarm being raised by the informant and her father-in-law others also arrived there, and thereafter, Sahabu Miya carrying *tangi* fled away towards the Western side. The informant further disclosed that while Sahabu Miya was giving blow by his *tangi* on her husband, son of Sahabu Miya namely: Jubair was flashing *lathi*. After Sahabu Miya fled away the informant went nearer to her husband and she noticed that her husband had already died. The said *fardbyan* was read over to her and finding it correct the informant put her R.T.I. on the *fardbyan*. Ali Hussain Miyan [P.W. 2, father -in-law of informant) also put his signature on the fardbeyan.

4. On the basis of said *fardbyan* on 15.07.2009 at 6.30 P.M. a formal F.I.R. vide Adhaura P.S. Case No. 18 of 2009 was registered under Section 302 of the I.P.C. against the sole appellant. It was pointed out by learned counsel for the appellant that immediately after coming to know regarding his involvement the appellant voluntarily surrendered in the court below on



21.07.2009 and since then he is in custody. Thereafter, on 31.08.2009 Police finding the accusation true against the appellant filed charge – sheet. On 06.11.2009 learned Magistrate took cognizance of offence and on the same day the case was committed to the court of Sessions, and as such, it was numbered as Sessions Trial No. 269 of 2009. In the case on 01.02.2010 charge under Section 302 of the I.P.C. was framed against the appellant.

5. During trial to establish its case from prosecution side altogether nine witnesses were examined. Out of nine witnesses, P.W. 1 (Sameena Khatoon, wife of deceased) , P.W. 2 (Ali Hussain Miyan, father of deceased), P.W. 3 (Aamna Khatoon), P.W. 4 (Mainuddin) were examined as eye witnesses to the occurrence, whereas, P.W. 5 (Rustam Miyan), P.W. 6 (Idrish Miyan) and P.W. 7 (Atim Miyan) were examined as hearsay witnesses. P.W. 8 (Dr. Shyam Kumar) had conducted post – mortem examination on the dead body of deceased and he proved the post- mortem examination report, which was marked as Exhibit- 3, whereas, Sri Om Prakash Singh, who had recorded *fardbyan* also investigated the case and he was examined as P.W. 9. P.W. 9 during trial proved *fardbyan*, which was marked as Exhibit- 4, formal F.I.R. (Exhibit- 5) and inquest report, which



was marked as (Exhibit -6). After closure of prosecution evidence, evidences and circumstances collected during trial against the appellant were explained to him and his statement under Section 313 of the Cr.P.C. was got recorded, however, from the defence side no witness was examined. In the statement recorded under Section 313 of the Cr.P.C. the appellant took the plea of innocence and claimed that due to land dispute he was falsely implicated.

6. Sri Tribhuwan Narayan, learned counsel for the appellant after placing entire evidence at the very outset has argued that the whole trial has vitiated due to the reason that most of prosecution witnesses could not be cross examined since the appellant was not in a position to get assistance of any lawyer and this was the reason that after examination- in- chief of P.W. 1 , P.W. 2 , P.W. 3 , P.W. 5, P.W. 6, P.W. 7, P.W. 8 and P.W. 9, those witnesses were not cross- examined. Sri Tribhuwan Narayan, learned counsel for the appellant submits that it was flagrant contravention of provision contained under Section 304 of the Cr.P.C. He highlights that the appellant due to poverty as well as due to his remote background was neither in a position to get services of any Advocate on each and every date of examination of the witnesses, nor he was aware as to whether there was any provision for providing legal aid to the appellant at the expenses



of State. Sri Tribhuwan Narayan, learned counsel for the appellant highlighting poverty of the appellant has argued that the appellant right from the date of his surrender i.e. 21.07.2009 is languishing in jail. Of -course, on one occasion on his behalf a bail petition was filed, but same was filed in the court of learned Sessions Judge, and thereafter, despite the fact that without any fault he was languishing in jail, he could not avail the privilege of filing a petition for grant of bail either under Section 439 of the Cr.P.C. during investigation or trial or a petition under Section 389 (1) of the Cr.P.C. after his conviction. He submits that Appeal was filed only under Section 374(2) of the Cr.P.C. and at the time of filing Appeal no prayer for bail was made, and even thereafter, despite the fact that Appeal was admitted in the month of January, 2012 he never got any opportunity to file a petition for bail during pendency of Appeal. In sum and substance, Sri Tribhuwan Narayan, learned counsel for the appellant has shown such circumstances with a view to impress upon the Court that genuinely appellant due to paucity of fund, poverty and a person hailing from remote area was not in a position to get assistance of any legal expert during trial. Sri Tribhuwan Narayan, learned counsel for the appellant has argued that it appears that whole trial has proceeded in perfunctory manner and virtually it was a case of



complete violation of principle of natural justice. He submits that once the statute provides for providing legal assistance to an accused in poverty, it was mandatorily required on the part of the State or on the part of the learned trial judge to provide such assistance.

7. On merit it has been argued that even though the investigating officer was not cross-examined the investigating officer in his entire evidence has not at all indicated as to whether at the place of occurrence he could notice any blood mark or not. According to Sri Tribhuwan Narayan, learned counsel for the appellant in the present case the prosecution has miserably failed to establish the place of occurrence itself. It has also been argued that it was the case of prosecution that deceased had received multiple incised injury and on the place of occurrence itself he was found dead, in such a situation, according to learned counsel for the appellant, there was every possibility to notice huge blood at the place of occurrence, but same has been shown to be unnoticed by the investigating officer. Sri Tribhuwan Narayan, learned counsel for the appellant has tried to persuade the Court that it appears that deceased was done to death at a place somewhere else, and subsequently, it was shown as if he was done to death in his own field by the appellant. According to learned



counsel for the appellant there was land dispute in between the parties, but since he was prevented from representing his case properly, all those facts could not be brought to the notice of the trial court.

8. Learned counsel for the appellant has further argued that of -course, as per prosecution, the alleged occurrence had taken place at 3.00 P.M. and it is case of the prosecution that at the time of occurrence number of other co-villagers were present in their field, none of those witnesses have come forward claiming to be eye witness to the occurrence. In the case almost all the witnesses who have claimed to be eye witnesses are none else but close relatives of the informant side . P.W. 1 is none else but wife of the deceased, P.W. 2 (Ali Hussain Miyan) is the father -in -law of informant and father of deceased. P.W. 3 (Aamna Khatoon) of- course in her evidence has not disclosed her relationship with the deceased or informant, her such concealment has been exposed from the evidence of P.W. 4 (Mainuddin) who is non else but husband of Aamna Khatoon. Sri Tribhuwan Narayan, learned counsel for the appellant has argued that P.W. 4 (Mainuddin) was the only witness who could be cross -examined on behalf of the appellant and in his cross-examination this witness has admitted that he was cousin brother of deceased. This witness



has stated that P.W. 2 (Ali Hussain Miyan, father of deceased) was own uncle of P.W. 4 and daughter of Ali Hussain Miyan namely Aamna Khatoon was his wife. This witness has further stated that P.W. 1 (Sameena Khatoon) daughter of P.W. 2 (Ali Hussain Miyan) was wife of younger brother of P.W. 4. According to him, in the present case despite the fact that occurrence had taken place at 3.00 P.M. when number of villagers were present around the field where alleged occurrence had taken place, none of the independent witnesses have come forward claiming to be eye witness, however, some of the witnesses i.e. P.W. 5 (Rustam Miyan) , P.W. 6 (Idrish Miyan) , P.W. 7 (Atim Miyan) have only deposed as if they heard about the occurrence, however, none of those witnesses have said as to from whom they got information regarding the occurrence. Sri Tribhuwan Narayan, learned counsel for the appellant submits that in absence of disclosure of name by which source those hearsay witnesses had heard about the occurrence, no reliance can be placed on such evidences. In sum and substance, it has been argued that without any fault of the appellant, in a trial which was *void ab initio*, the appellant was held guilty and he is languishing in jail since the date of his surrender i.e. 21.07.2009.



9. Sri Ajay Mishra, learned Additional Public Prosecutor has opposed the Appeal. He submits that there is no reason to raise any doubt on the evidence of eye witnesses i.e. P.W. 1, P.W. 2, P.W. 3 & P.W. 4. He submits that there is consistency in their evidences. He further submits that all those witnesses have categorically said that they were present at the time of occurrence and they had witnessed that this appellant had given repeated blow of *tangi* on the person of the husband of P.W. 1 which was the cause of death. He further submits that oral evidence has also been corroborated by medical evidence. Sri Ajay Mishra, learned Additional Public Prosecutor by way of referring to evidence of P.W. 8 (Dr. Shyam Kumar) who had conducted post- mortem examination as well as by way of referring to Exhibit- 3 i.e post-mortem examination report, submits that on the person of the deceased about five incised injuries were found, which suggests that ocular evidence is truthful. However, he has not disputed the fact that save and except P.W. 4 none of the witnesses were cross-examined.

10. Besides hearing, we have also minutely examined entire evidence on record. It is not in dispute that appellant had voluntarily surrendered on 21.07.2009 and he is continuing in custody since then. Of -course, on merit we are not going to



discuss much, but fact remains that the trial has not proceeded in accordance with law. Before proceeding, it would be necessary to re-produce the provision, which provides for providing legal assistance to an accused in poverty i.e. Section 304 of the Cr.P.C., which is re-produced hereinbelow:-

“304. Legal aid to accused at State expense in certain cases.- (1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for-

(a) the mode of selecting pleaders for defence under sub-section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before the Courts of Session.”

11. On examination of the aforesaid provision there is no doubt that if an accused who is being tried is not represented by a pleader or he is not in a position to hire any Advocate, the Court shall direct for providing counsel at the expenses of the State. If the word “shall” has been incorporated in Section 304 of the Cr.P.C. it means that in all cases in which the Court feels that the accused is not being represented by a pleader or he is not in a



position to get legal aid due to poverty, it is mandatory duty on the part of trial court to provide such aid to such accused. Admittedly, from entire evidences it is evident that appellant is coming from a poor background and he was not in a position to get legal assistance, and as such, in such circumstances, it was duty on the part of the trial court to provide some Advocate for proper trial, otherwise there was no meaning of a "fair trial". Fair trial includes trial with proper opportunity to the accused to defend his case. This also mandate to follow principle of natural justice, which is cardinal principle either in criminal law or any civil law. Since eight witnesses who were examined on behalf of prosecution were allowed to go without cross -examination, certainly, on those evidences much reliance may not be placed. In such situation, it was a fit case for passing an order for setting aside the impugned judgment and remitting back the case to the trial court for cross examination of such witnesses. However, considering the fact that occurrence had taken in the month of July, 2009 and since 21.07.2009 the appellant is inside jail, at this juncture no purpose would be served in remitting back the matter to the court below for enabling the appellant to get the aid of legal expert provided on the cost of State to cross- examine those witnesses i.e. all witnesses except P.W. 4, who were not cross- examined, to cross



them examine, and as such, the Court is refraining from passing any order for remitting back the matter to the court below.

12. Considering the fact that apparently the trial has been vitiated due to non- giving opportunity to the appellant to get legal assistance at the cost of State due to his poverty, there is no reason to allow the conviction and sentence of the appellant to continue. Accordingly, the judgment of conviction dated: 28.11.2011 and sentence dated 29.11.2011 passed by Sri Ravi Shankar Tiwary, learned Additional District & Sessions Judge, F.T.C. I, Kaimur at Bhabua in S.T. No. 269 of 2009 / 65 of 2009 (arising out of Adhaura P.S. Case No. 18 of 2009) is hereby set aside and Appeal is allowed. Since the appellant is in custody and his conviction and sentence has already been set aside, he is directed to be released forthwith, if not required in any other case.

(Rakesh Kumar, J)

(Arvind Srivastava, J)

praful/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	13-04-2018
Transmission Date	13-04-2018

