

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.83 of 1995

1. Md. Nasiruddin, son of Newazzi Mian
2. Md. Quadir, son of Sadik Mian
3. Md. Aziz @ Aziz Mian, son of Alam Sain
4. Md. Hussan @ Hussan Mian, son of Sadik Mian
5. Khalik Mian, son of Newaz Mian
6. Munna Sah, son of Kishun Sah
7. Md. Quddus Mian, son of Habib Mian
8. Abbas Mian, son of Habib Mian

All resident of village-Mahamadpur Purkhi (Kazi) P.S. Paroo,
District Muzaffarpur

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s	:	Mr. Arun Kumar, Adv. Mr. Nirmal Kumar Sinha, Adv. Mr. Deepak Kumar, Adv.
For the State	:	Mr. Shiwesh Chandra Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

and

HONOURABLE MR. JUSTICE PARTHA SARTHY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

Date : 06-05-2019

1. Heard learned counsel appearing for the appellants as well as learned Additional Public Prosecutor for the State.



2. This criminal appeal has been preferred against the impugned judgment of conviction and sentence order dated 06.05.1995 passed by learned 1st Additional Sessions Judge, Muzaffarpur in Sessions Trial No. 165 of 1991/74 of 1995 by which and whereunder, he convicted the appellants for the offence punishable under Section 302 read with Section 149 of the I.P.C. and sentenced them to undergo rigorous imprisonment for life there under. However, by the impugned judgment, the learned trial court acquitted the co-accused Zakir Mian and Most. Dularia.

3. Sahebganj P.S. Case No. 94 of 1990 was registered against unknown for the offence punishable under Section 302 of the I.P.C. when an unknown dead body was recovered and PW-9 Gobri Rai, the then local chowkidar, gave his ferdbeyan to Officer-In-charge of Sahebganj police station on 03.07.1990 at 6:30 P.M. at village Pakari Basarat near the field of Janak Rai to this effect that on the same day at about 4:00 P.M. while he was going to his field and reached near Khajurbani, he noticed that a mob of several persons had assembled near the field of Janak Rai and having seen the aforesaid mob, he went there and found dead body of an unknown person lying in the field of Janak Rai. He noticed injury on the neck of aforesaid dead body. He also noticed that a bicycle had been kept on the aforesaid dead body and a



gunny bag and some coins were lying by the side of the dead body. He also found that one bag was hanging with the frame of the aforesaid bicycle and in the aforesaid bag, weighing scale and Batkhara were found. PW-9 guessed that deceased was in business of iron scrap. PW-9 also noticed that aforesaid dead body was of a Muslim. One slip was recovered from the pocket of dead body on which Azim Munna of village Mahammadpur was written. No one could identify the dead body.

4. PW-11 Raghunath Ram having got information about the recovery of dead body went at the place of occurrence and recorded the ferdbeyan of PW-9. The formal FIR was prepared and PW-11 took charge of investigation. He prepared inquest report, inspected the place of occurrence, sent the dead body for postmortem examination and on the basis of slip recovered from the dead body, PW-11 went to village Mohammadpur where he came to know that village Mohammadpur lies under the jurisdiction of Paroo police station. However, in the meantime, the Officer in charge of Devariya police station sent a wireless message giving information that recovered dead body was of Md. Munna son of Sahban Mian of village Kajimohammadpur P.S. Paroo. PW-11 sent the aforesaid information to concerned hospital where the dead body of deceased had been sent for postmortem



examination. However, the Officer-In-charge of Paroo police station had already given information regarding recovery of dead body to PW-7 Sahban Mian, who happens to be father of the deceased. PW-11 recorded the statement of PW-7 on 05.07.1990 and thereafter, searched the appellants and others but they were found absconding. On 15.07.1990, PW-7 gave photostat copy of affidavit said to be sworn by PW-6 and thereafter, on 21.08.1990 PW-11 recorded the statement of PW-6. Moreover, after completion of investigation, PW-11 submitted charge sheet against the appellants and co-accused Zakir Mian and Most. Dulariya for the offences punishable under Sections 302, 201/34 of the I.P.C.

5. The cognizance of the offence was taken and the case was committed to the court of sessions, in usual way. The appellants along with charge sheeted accused Zakir Mian and Most. Dularia were put on trial before the learned court below and charge sheeted accused Most. Dularia stood charged for the offence punishable under Section 109 read with Section 302 of the I.P.C. whereas appellants and charge sheeted accused Zakir Mian stood charged for the offence punishable under Section 302 read with Section 149 of the I.P.C. The charges were read over and explained to the appellants and others but they denied the charges and claimed to be tried.



6. In course of trial, prosecution examined, altogether, eleven witnesses and also got exhibited inquest report, postmortem report as well as other documents as documentary evidence. The statements of appellants were recorded under Section 313 of the Cr.P.C. in which they reiterated their innocence and claimed their false implication.

7. No evidence was adduced by the appellants in support of their defence but from perusal of trends of cross examination of prosecution witnesses as well as statements recorded under Section 313 of the Cr.P.C. it is obvious that the defence of the appellants was denial of their participation in the alleged crime.

8. The learned trial court after analyzing the evidence available on the record convicted the appellants having relied upon testimonies of PW-1, PW-2, PW-3, PW-5, PW-7 and PW-8. However, the learned trial court doubted the credibility of testimony of PW-6 and excluded his testimony while convicting the appellants.

9. Learned counsel appearing for the appellants assailed the impugned judgment of conviction and sentence order arguing that admittedly, the learned trial court disbelieved the testimony of PW-6 and except PW-6, none of the prosecution witnesses claimed to have seen the actual killing of the deceased. He submitted that



PW-1, PW-2, PW-3, PW-7 and PW-8 claimed to have last seen the deceased in the company of the appellants but as a matter of fact, it is admitted case of the prosecution that appellants and deceased were in business of iron scrap and they used to leave their village for the purpose of their business together and, therefore, even if it assumed for the sake of argument that the appellants and deceased left their village together, then, also, the aforesaid circumstance is not sufficient to come on the conclusion that it were appellants who committed the murder of the deceased.

10. Learned counsel appearing for the appellants, next, submitted that the prosecution came with definite assertion that prior to the alleged occurrence, the mother of the deceased (PW-4) was called as witch by the appellants and appellants had given threatening to kill her but the learned trial court after evaluating the prosecution evidences discarded the aforesaid theory of prosecution. He submitted that although the learned trial court discarded the above stated theory of prosecution, but even then convicted the appellants on the grounds that it was not possible for the prosecution witnesses to know the motive of the alleged occurrence. He submitted that no doubt, it is not necessary for the prosecution to prove the motive of the occurrence in each and every case but when prosecution comes with definite assertion of



motive, then in that circumstance, prosecution is duty bound to prove the motive, particularly, in the cases of circumstantial evidence. He submitted that in the present case, prosecution has not only failed to prove the motive of the occurrence but also failed to bring sufficient circumstantial evidence to prove the guilt of appellants. He submitted that the learned trial court has convicted the appellants only on the basis of surmises and conjectures and, therefore, the appellants are entitled to get benefit of acquittal.

11. On the other hand, learned Additional Public Prosecutor supported the impugned judgment of conviction and sentence order arguing that almost all the material witnesses claimed to have seen the deceased in the company of the appellants prior to the alleged occurrence and, therefore, it is sufficient to prove that it were appellants who committed the murder of the deceased.

12. Having heard the contentions of both the parties, we went through the record as well as lower court records. Admittedly, the learned trial court has doubted the credibility of PW-6 and rejected his testimony. It is also an admitted position that except PW-6, not a single prosecution witness claims to have seen the actual killing of the deceased. It is also an admitted



position that entire prosecution case hinges upon circumstantial evidence and, therefore, the only question arises for determination as to whether the prosecution has brought sufficient circumstantial evidence to prove the guilt of appellants or not.

13. PW-1 Wakil Mian claims that on the alleged date of occurrence at about 8:00 A.M., he saw appellants Abbas Mian, Kuddus, Azim Mian, Hasan Mian, Kadir Mian, Nasiruddin, Khalik and Munna Sah going towards west side on bicycle and deceased Md. Munna was also going with them on his bicycle. This witness further claims that when deceased Md. Munna did not return to his home till late evening, his father (PW-7) searched him but could not succeed to trace him out. He, further, claimed that however, on the next day, it came to light that dead body of Md. Munna was lying at Pakri Basarath. On being cross-examined by the defence, this witness admitted that one Asir Mian is his cousin brother and the daughter of aforesaid Asir Mian was wife of deceased Md. Munna.

14. PW-2 Md. Sarfuddin claims that he is neighbour of deceased Md. Munna and on the alleged date of occurrence at about 8:00 A.M., he saw appellants Abbas Mian, Kuddus Mian, Hasan Mian, Kadir Mian, Nasiruddin Mian, Khalik Mian, Munna Sah and Azim Mian who were talking with deceased Md. Munna



on the road near the house of deceased Md. Munna and after that deceased Md. Munna went to his house and again came out and went with the aforesaid persons on his bicycle. On being cross-examined by the defence, this witness admitted that he had not talked either with the appellants or with the deceased Md. Munna.

15. PW-3 Narain Sah claims that on the alleged date of occurrence at about 10:00 A.M. while he was returning from Sahebganj Bazar and reached Devaria, he saw the appellants and PW-6 Punit Ram as well as deceased Munna Mian going on bicycles towards north side. This witness, further, claimed that on the next day, he came to know that Munna Mian was killed at Jhaphi Devi. This witness admitted in his cross examination that distance between Sahebganj Bazar and Devaria is about 4 KOS. This witness also admitted that he did not talk with appellants and deceased. This witness, further, admitted that he did not disclose the aforesaid fact before any person prior to giving of statement before the police. This witness, further, admitted that after four days of above stated occurrence, the dead body of the deceased Munna was brought to his house and after that his statement was recorded by the police. This witness denied that he had not named Abbas, Hasan, Nasiruddin and Khalik before the police.



16. PW-4 Taimul Khatoon is mother of the deceased. She claims that on the alleged date of occurrence at about 8:00 A.M. appellants along with PW-6 and Dulari came to her house and asked her son to accompany them for purchasing iron and after that her son Md. Munna went along with them and only Dulari remained there. She, further, claims that appellants returned to their home in the evening but her son did not return and after that her husband enquired from the appellants about the whereabouts of her son Munna Mian but the appellants did not give any satisfactory answer. She, further, claims that when her husband went in search of her son, she as well as PW-8 started weeping and appellants Abbas and Kuddus Mian came at her house and consoled them. She, further, claims that on the next day, her husband disclosed that a dead body had been recovered at village Pakri Basarath. She, further, claims that on Thursday, her husband came to his home with dead body of her son. She also claims that prior to the alleged occurrence, Abbas, Kuddus, Dularia, Munna Sah and Khalik had called her witch and had assaulted her by means of danda. She, further, claims that a Panchayati was held in respect of aforesaid occurrence and the dispute was resolved in the aforesaid Panchayati but Abbas, Kuddus and Dulariya had given threatening to kill the deceased



Munna Mian. On being cross-examined by the defence, she admitted that appellants and other accused were in business of iron scrap. She also admitted that the appellants and other accused used to go in connection with their work together but they used to purchase iron scrap separately. She, further, admitted that even after panchayati, her son used to go along with appellants to purchase iron scrap. She also admitted that she did not give any information to police in respect of threatening given by the appellants nor had discussed with her co-villagers regarding the aforesaid threatening. She, further, admitted that she did not lodge any case when the appellants assaulted her by calling witch. This witness, further, admitted that she had not gone in the aforesaid panchayati. She, further, admitted in her cross examination that even after panchayati, the appellants used to visit to her door.

17. PW-5 Jhunna Mohammad is brother of the deceased. This witness also claims that on the alleged date of occurrence, appellants along with acquitted accused Dulariya and PW-6 came at his home and took the deceased Md. Munna on the pretext to purchase iron. This witness, further, claims that his brother did not return till late evening and on next day, his father came and informed that one person was killed near Jhaphi Devi. This witness admitted at para 8 of his cross examination that deceased and



appellants used to go together in connection with their business and prior to the alleged occurrence, his brother used to go to the house of appellants and similarly, the appellants also used to visit his house. This witness also admitted that all the appellants had kept gunny bags on their respective bicycles and his brother had also kept gunny bag on his bicycle. This witness, further, stated that he had made statement before the police that appellant Hasan, Kadir and PW-6 Punit Ram had also come at his house on the alleged date of occurrence.

18. PW-7 Sahban Mian is father of the deceased. He also stated almost the similar statements made by PW-6. This witness, further, stated that when his son Md. Munna did not return to his home till late evening, he asked from Abbas, Kuddus and Munna Sah about his son but they stated that they knew nothing about Md. Munna. However, this witness stated that Azim disclosed that he had seen the deceased Md. Munna in Devaria Bazar in the morning. This witness, further, stated that he went to Devaria but he could not succeed to find out his son. He, further, stated that acquitted accused Zakir met him and he noticed that Zakir was carrying dab on the carrier of his bicycle. This witness, further, claimed that on the next day, he again went to Devaria where one Razzak Saheb met him and disclosed that one person was killed at



Jhaphi Devi and, thereafter, he went to Jhaphi Devi where he came to know that one person was killed at Pakri Basarath and thereafter, he came to Devaria police station where he was informed that recovered dead body had been sent for postmortem examination. He claimed that having got the aforesaid information he returned to his house and gave the above stated information to his wife. He, further, stated that again on Thursday, he went to hospital where he saw the dead body of his son. He, further, claimed that he received the dead body of his son and gave his statement to police. This witness also claims that prior to the alleged occurrence, the appellants had called his wife witch and had assaulter her for which a panchayati was held and prior to the alleged occurrence, the appellants Abbas, Kuddus and acquitted accused Dulariya had given threatening to kill the deceased Munna. This witness, too, admitted that he had not lodged any case when the aforesaid appellants called his wife witch and also assaulted her. This witness also admitted in his cross examination that his son used to go to purchase iron along with appellants and prior to four to five days of the alleged occurrence, his son along with appellants had gone to purchase iron. This witness, further, admitted that acquitted accused Zakir was well known to him from before and the aforesaid acquitted accused Zakir was in business



of selling meat. This witness, further, admitted that after two days of the alleged occurrence, his statement was recorded by the police.

19. From perusal of testimonies of aforesaid prosecution witnesses, it is obvious that the aforesaid witnesses claimed to have seen the appellants in the company of the deceased prior to recovery of his dead body but PW-4, PW-5 and PW-7 admitted that deceased along with appellants used to go to purchase iron and even prior to four to five days of the alleged occurrence deceased along with appellants had gone to purchase the iron. It is also obvious from the testimonies of aforesaid witnesses that appellants and deceased were in same business and PW-4 has admitted in his testimony that the appellants and deceased used to leave the village together but they used to purchase iron separately. Therefore, it is obvious that the appellants and deceased left their village on the alleged date of occurrence in usual way as they earlier used to leave their village.

20. PW-6 Punit Ram claims to have seen the actual killing of the deceased but admittedly, the statement of this witness was recorded before the police on 21.08.1990 as it is evident from perusal of para 14 of deposition of PW-11. However, PW-6 has also admitted in his statement that he made his statement before



the police on 21.08.1990 as it is evident from perusal of para 13 of cross examination of PW-6. PW-6 claimed that he along with other appellants and acquitted accused Dulariya had gone to the house of deceased in the morning of alleged occurrence and in their company deceased left his house but it is surprisingly enough that PW-1 and PW-2 have not named PW-6 in their respective depositions and the aforesaid prosecution witnesses have, nowhere, stated in their depositions that PW-6 was also with the appellants and deceased prior to the alleged occurrence. Moreover, as we have already stated that the credibility of this witness has been doubted by the learned trial court as this witness was not found trustworthy and, therefore, the learned trial court rejected the claim of PW-6.

21. On overall evaluation of prosecution evidence, we find that except only one circumstance that deceased left his house in the company of the appellants, there is no any other circumstance available on the record to show that it were appellants who committed the murder of the deceased and, therefore, in our view, the learned trial court has committed error in convicting and sentencing the appellants as there was no sufficient evidence to convict the appellants for the offence punishable under Section 302 read with Section 149 of the I.P.C.



22. On the basis of aforesaid discussions, we are of the considered opinion that this appeal is liable to be allowed and accordingly, this criminal appeal is allowed and the impugned judgment of conviction and sentence order is, hereby, set aside. The appellants are acquitted of the charge framed against them. The appellants are on bail. They are discharged from the liabilities of their respective bail bonds.

(Hemant Kumar Srivastava, J)

(Partha Sarthy, J)

shahzad/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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