

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.269 of 2017

Arising Out of PS. Case No.-327 Year-2010 Thana- MAJHAULIA District- West
Champaran

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Shahid Akram @ Munna, Son of Late Sk. Ekram, Resident of Village-
Semraghat, P.S.- Majhauria, District- West Champaran

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Udit Naryan Singh, Advocate
Mr. Ram Adya Singh, Advocate
For the State : Mr. Ajay Mishra, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE SHAILENDRA SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 20-06-2023

We have heard Mr.Udit Naryan Singh for the
appellant and Mr. Ajay Mishra for the State.

2. The sole appellant stands convicted under
Section 302 of the IPC and has been sentenced to
undergo R.I. for the remainder of his life and a fine of
Rs.50,000/-. The fine so realized from the appellant has
been directed to be paid to Soni Khatoon, the widow of



one of the deceased (Faiyaz) and in her absence, to her legal heirs *vide* judgment of conviction and order of sentence dated 03.02.2017 and 10.02.2017, respectively, passed in Sessions Trial No.482 of 2011 arising out of Majhaulia P.S. Case No.327 of 2010 by the learned 5th Addl. Sessions Judge, West Champaran.

3. The case of the prosecution is that after a discussion in the family in front of the *Panches* for partition of property, a dispute arose between three brothers, one being the appellant and the two others being the deceased, with respect to apportionment of family property. When the suggestion of the appellant that a land contiguous to the house owned by the brothers which stood in the name of Faiyaz, one of the deceased, be given to him was denied by the two other brothers, the appellant got enraged and attacked Faiyaz with a knife and when the other brother, namely, Neyaz came to the rescue of Faiyaz, he too was assaulted by knife. This led to the death of both the brothers (Faiyaz



and Neyaz). The weapon of assault was handed over to the appellant by his wife / Mahe Ara, who has not been put to trial. After the occurrence, the appellant is said to have fled away with the weapon of assault. On the cries raised by the wife of Faiyaz / Soni Khatoon / P.W. 5, many persons of the neighbourhood arrived and attempted to take both the injured brothers to hospital for treatment; but both of them succumbed to the injuries a little later. Thereafter, their bodies were brought back to the house and police was informed. The father of P.W. 5, on being informed by her about the occurrence, arrived but only after the police had arrived.

4. On the basis of the *fardbeyan* statement lodged by P.W. 5, Majhaulia P.S. Case No.327 of 2010 dated 04.12.2010 was instituted for investigation for the offence under Sections 302/34 of the Indian Penal Code against the sole appellant.

5. The police, after investigation, submitted charge-sheet, whereupon cognizance was taken and the



case was committed to the Courts of *sessions* for trial.

6. The Trial Court, after having examined eighteen witnesses on behalf of the prosecution and two on behalf of the defence, convicted the appellant and sentenced him to undergo R.I. for life by taking resort to the provisions contained under Section 211(7) read with Sections 236 and 298 of the Code of Criminal Procedure, as noted above.

7. Mr. Udit Narayan Singh, the learned Advocate for the appellant, while assailing the judgment of conviction and order of sentence, submitted that even P.W. 5 is not an eye-witnesses to the actual assault, whereas majority of the prosecution witnesses turned hostile and did not support the prosecution case. He has further submitted that P.Ws. 1, 2 and 7, who have supported the prosecution case along with P.W. 5, are only hearsay witnesses. He has further submitted that there has been an inordinate delay in dispatching the *fardbeyan* to the nearest Magistrate, which makes the



prosecution case highly doubtful. Additionally, it has been argued that there was no reason for subjecting the dead bodies to *post-mortem* on the next day when the F.I.R. had already been recorded on 04.12.2010 by around 06:30 p.m. The evidence in the case, it has been argued, is absolutely lacking in as much as even the witness on the point of recovery of knife on the pointing of the appellant, which weapon was presumably used in the commission of crime, has not supported such recovery.

8. Apart from this, it has been urged that the tenor of the evidence of P.W. 5 clearly indicates that there was consultation and confabulation before naming the appellant as the assailant of the two brothers. This was not without any motive. One of the deceased / Neyaz was unmarried and issueless, whereas the appellant had only daughters. In case the appellant would be convicted, the family property would have devolved upon P.W. 5 or her children / heirs. Such



suggestions were also given during trial to P.W. 5 and her father (P.W. 2).

9. Lastly, it has been urged that the sentence slapped upon the appellant is also not in tune with the legal provisions in as much as, no such charge was framed regarding the previous conviction of the appellant in a case of murder where he was sentenced to life nor was such charge added during the course of trial. In that case, there was no occasion or the justification of the Trial Court to have sentenced the appellant for the remainder of his life as such sentence for a fixed period / whole life could be awarded only by Constitutional Courts, viz., the Supreme Court and the High Courts as has been held in ***Union of India vs. V. Sriharan @ Murugan and Ors.; 2016(7) SCC 1*** and ***Vikash Chaudhary vs. State of Delhi; 2023 SCC OnLine SC 472.***

10. As opposed to the aforesaid contentions, Mr. Ajay Mishra, the learned counsel for the State has



submitted that no doubt many of the witnesses have turned hostile, but that does not take away the sterling quality of the evidence offered by the wife of one of the deceased, in whose presence the murder was committed. It has further been submitted that only because P.W. 5 vacillated for a while in lodging the F.I.R. even on the timely arrival of the police and waited for her father (P.W. 2) to come, it cannot for sure be inferred that the *fardbeyan* lodged by her was the product of consultation and planning to falsely frame one of the surviving brothers in the case. He has also submitted that the contention of the appellant that the recovery of knife was inadmissible as no *Panchnama* was drawn up with respect to such pointing by the appellant and the discovery of knife from the room occupied by the appellant in the common house not being supported by one of the witnesses to the recovery, the entire case falls, is incorrect. The purpose of admitting that part of the information which had led to the discovery is only to



ascertain that *prima facie*, the statement made by the accused / appellant could be relied upon.

11. True, that such recovery has not been proved to the extent that it ought to have been, but that itself, would not efface the clear version of the sole eye-witness of the occurrence, who is the wife of one of the deceased.

12. In order to appreciate the contention of the parties, it would be necessary to refer to the deposition of P.W. 5 / Soni Khatoon, who has out-rightly supported the prosecution case. The occurrence took place on 04.12.2010 at about 02:30 in the day. The discussions amongst the brothers and the *Panches* with respect to apportionment of the family property continued for the whole day till about 2 O'clock, whereafter the *Panches* had left for their respective homes. At about 02:30 in the day, only the three brothers were discussing amongst themselves about giving final shape to the partition agreement, when there



was an insistence of the appellant that a land registered in the name of Faiyaz, located in the southern direction of the house, be given to him as family arrangement. This was not agreeable to either Faiyaz or Neyaz. According to P.W. 5, this denial of the two brothers to the demand of the appellant enraged him to such an extent that he accepted the exhortation of his wife / Maheara to kill both the brothers. The wife of the appellant is said to have handed over a knife to the appellant with which he first attacked Faiyaz. Then Neyaz came to his rescue. The appellant attacked him with the same weapon, leaving both the brothers seriously injured. At this point of time, P.W. 5 claims to have rushed near the slain husband and brother-in-law and raised cries, which attracted the attention of many others who came and took the two brothers to hospital for treatment. However, the two brothers could not survive. In the meantime, somebody had informed the police about the occurrence for which a station diary



entry also was recorded, which fact stands confirmed by the evidence of the I.O. (P.W. 16). Though the police arrived at about 04:30 p.m., but P.W. 5 wanted her father (P.W. 2) to come before she would give her statement to the police.

13. P.W. 5, in her deposition, has admitted that both the deceased brothers resided together. The agricultural operations were conducted by her husband / Faiyaz, who only maintained Neyaz, who at the relevant time was studying at *Aligarh*. The appellant was separate in mess and business. She has completely denied the suggestion that the case has been lodged at the instance of her father, who stands in the relation of maternal uncle to the appellant. She has also denied the suggestion that there was dispute between the two deceased and when Neyaz demanded the account of the family expenditure, Faiyaz attacked him, and as a reprisal, Neyaz also attacked Faiyaz and in which scuffle, both the brothers died. Though Neyaz was unmarried



and issue-less and the appellant had five daughters, whereas P.W. 5 had two sons and one daughter, she has rubbished the suggestion that the appellant has been framed in this case only for the purposes of securing the entire family property in her or her children's name.

14. When questioned in cross-examination, P.W. 5 has candidly admitted that she could not prevent Mahe Ara from handing over knife to her husband / appellant for hurting the two deceased persons. Both, she and Mahe Ara, were pregnant at that time.

15. Mr. Singh, however, has submitted that from the statement of P.W. 5, it appears that she was made to know about the occurrence only after the two brothers had died. Such proposition does not appear to be correct for the reason that P.W. 5 was present all through the discussion between the brothers and the assault on the two deceased by the appellant.

16. We have not found any discrepancy in the deposition of P.W. 5 to disbelieve her on any point



whatsoever, be it the genesis of the occurrence or the actual assault. If heated discussions were being held between the brothers, P.W. 5 would not have realized that the appellant would loose his nerve and would commit such an act. Precisely for this reason, we do not find anything unusual in P.W. 5 not immediately jumping in the fray for preventing Mahe Ara from handing over the weapon of assault to the appellant. There was some hiatus between the assault and death, which becomes very clear from the deposition of P.W. 5. The statement of P.W. 5 that she was brought to the *veranda* of the house to see the dead persons, therefore has to be seen in that context. P.W. 5, we recon, saw the occurrence of assault in which both, her husband and the brother-in-law, lost their lives. The dead-bodies of the two slain were brought back home when they succumbed to the injuries. It was then that P.W. 5 was escorted to the *veranda* to see the dead-bodies. This does not mean that P.W. 5 had not witnessed the occurrence.



17. We have no reasons to accept the proposition of the learned counsel for the appellant that the vacillation of P.W. 5 in lodging the F.I.R. when the police had already arrived and her waiting for her father before such report was indicative of a studied consultation for deliberately and maliciously framing the appellant for ultimately securing the entire family property in the name of P.W. 5. A woman, in whose presence, her husband and the brother-in-law are killed would become nonplussed and would wait for any family or emotional support. The conduct of P.W. 5 in waiting for her father before lodging the F.I.R. does not justify any inference of such consultation and confabulation.

18. We have examined the deposition of the I.O. of this case (P.W. 16). He admits of having learnt telephonically at about 04:00 p.m. that somebody in village *Semraghat* has been killed. On such information, he went to the village *Semraghat* and recorded the *fardebyan* of P.W. 5. Thereafter, he recorded the



statement of Nasir Ahmad (P.W. 2), Kallimullah (P.W. 12) and others. In presence of these witnesses, inquest was prepared (Ext. 2/2). In presence of P.Ws. 2 and 12, the blood-stained earth and grass was also seized and a seizure-list was prepared (Ext. 4/2). Since darkness had dawned by that time, the dead-bodies were not sent for *post-mortem*. However, one *Dafadar* and *Chowkidar* were deputed by P.W. 16 for the safety of the dead-bodies. After recording the F.I.R., he visited the place of occurrence on the next day and sent the dead-bodies for *post-mortem*. The other witnesses were also examined by him on the next day. The appellant was arrested on 06.12.2010 from a sugarcane field and his confession was recorded. While confessing his guilt, the appellant agreed to show the place where he had hidden the weapon of assault. On such pointing, the knife was recovered in presence of Javed Ahmad and Amirul Hasan, P.Ws. 3 and 15 respectively.

19. It is necessary to note that P.Ws. 3 and



12, both, were declared hostile, but only P.W. 12 was cross-examined about his being a witness to the recovery of the knife, which he denied. Most of the witnesses, who have later turned hostile during the trial, stated before him (P.W. 16) during investigation that the three brothers had fought amongst themselves and the appellant had killed the two other brothers. In fact, P.W. 16 has asserted that Khairati Amin (P.W. 10) had stated before him that after the measurement of the land, he had learnt that there was a fight between the brothers for division of the property.

20. When questioned during cross-examination, P.W. 16 has stated that because the information on telephone was received on number 403, therefore the name of the informer could not be registered. Precisely for this reason, the name of the deceased persons also could not be known before he reached *Semraghat* village. He had recorded the receipt of such telephonic information in the case diary. Only



five minutes later than recording of such information, he had proceeded for the place of occurrence and reached there by 06:30 p.m. He had also inquired as to who all persons had taken the two injured for treatment, but on way, both the injured brothers died. They were Javed Ahmad, Kanihya Lal Prasad and Mangi Lal Gupta.

21. P.Ws. 2 and 12 have also supported the version of P.W. 5, though as a hearsay witnesses only.

22. Mr. Singh has submitted that even though the police station was located only at a distance of about 12 to 15 kilometers from the place of occurrence, but it took an unreasonable time for the I.O. to reach the place of occurrence. In the same strain, he had submitted that the F.I.R. was dispatched after a delay. Both delays, according to him, reflect that the prosecution has not come with true version.

23. We are unable to accept such submissions for the reason that the deposition of the witnesses appear to be consistent and reliable as well. The seized



blood-stained earth and the weapon of assault were though sent to the Forensic Science Laboratory for its forensic examination, but the report does not prove anything.

24. The result for the test of blood groupings remained inconclusive.

25. Notwithstanding the aforesaid as also the absence of proof of the recovery of the weapon of assault at the instance of the appellant, we find that the evidence of P.W. 5, the sole eye-witness to the occurrence of assault, is highly reliable and cannot be discarded on any score. The time of occurrence also fits in the prosecution version. It was a winter afternoon when the occurrence had taken place. While performing the *post-mortem*, Dr. Ashok Kumar Chaudhary (P.W. 7) found incised wounds on the bodies of the dead and also found *rigor mortis* in both the dead-bodies. There is no definite opinion regarding the onset of such *rigor mortis*. The *post-mortem* examination was done at 09:00 a.m.



Even during winter months, *rigor mortis* would set in and since it had not worn off, the timing of death suggested by the P.W. 7, *i.e.*, within 24 hours of the *post-mortem* examination, appears to be consistent with the prosecution case. What is important to note is that P.W. 7 denied that such injuries on the dead can positively be said to have been caused by same weapon by each other. Otherwise also, such an explanation / defense does not appear to be probable. If Faiyaz had assaulted Neyaz, it would be too much to expect that Neyaz would take out such weapon of assault from his own body and would assault Faiyaz leading to their death.

26. From the evidence during trial, it becomes very clear and without any doubt that the only assailant of the two brothers was the appellant and no one else.

27. This takes us to the sentencing of the appellant. The factum of the appellant having been convicted and sentenced earlier in a murder case was never put in the charge. Section 211(7) of the Code of



Criminal Procedure provides that *"if the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before the sentence is passed". (emphasis provided).*

28. The charge against the appellant does not mention the factum of the appellant's earlier conviction and sentence. Nor was it ever added by the Trial Court prior to sentencing him. Per force, the *proviso* to Section 236 of the Code of Criminal Procedure is also to be noticed. It provides that *"no such charge shall be read out by the Judge nor shall the accused be asked to*



plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under Section 229 or Section 235”.

29. The appellant has been convicted under Section 235 of Code of Criminal Procedure. During his arguments under Section 235(2) of the Cr.P.C., he never disputed the factum of his earlier conviction and sentence, but only submitted that such judgment is under appeal which has yet not been decided. Thus, there was no necessity of proving such conviction by the Court. However, in the absence of any such mention in the charge, the previous conviction of the appellant could not have been taken into account while sentencing the appellant for imposing imprisonment for whole of his life. As noted above, even otherwise such power of modified sentence or sentence for a fixed term or for the remainder of life is not in the domain of the Trial Court but in the Constitutional Courts, namely, the Supreme



Court and the High Courts. [refer to ***Union of India vs. V. Sriharan @ Murugan and Ors. and Vikash Chaudhary vs. State of Delhi*** (*supras*).

30. On that score, we find flaw in the decision of sentencing the appellant.

31. Thus, affirming the conviction of the appellant, we deem it appropriate to modify the sentence to imprisonment for life simplicitor which would enable the appellant to seek admissible remission unless otherwise refused.

32. The appeal, thus, is dismissed with the modification in the sentence.

33. Interlocutory application/s, if any, also stand disposed off.

(Ashutosh Kumar, J)

(Shailendra Singh, J)

Sanjay/Praveen

AFR/NAFR	AFR
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