

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.907 of 2019

Arising Out of PS. Case No.-67 Year-2019 Thana- BHAPTIAHI District- Supaul

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1. Md. Zuber Son of Late Usman, Resident Of Village - Jhila Dumri, P.S.- Bhaptiyahi, Dist.- Supaul.
 2. Md. Farookh Son of Late Usman Resident Of Village - Jhila Dumri, P.S.- Bhaptiyahi, Dist.- Supaul.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Arun, Advocate Ms. Kanika, Advocate
For the Informant	:	Mr. Nafisuzzoha, Advocate
For the State	:	Mr. Dilip Kumar Sinha, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 07-08-2023

We have heard Mr. Arun for the appellants and Mr.

Nafisuzzoha for the informant. The state has been represented by Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor.

2. The appellants have been convicted under Sections 302/34, and 120B of the I.P.C. vide judgment dated 28.06.2019 passed in Sessions Trial Court No. 184 of 2018, arising out of Bhaptiyahi P.S. Case No. 67 of 2018 by the learned Fast Track Court No.-II, Supaul and by order



dated 03.07.2019, both the appellants have been sentenced to undergo imprisonment for life for the offence under Sections 302/34 I.P.C. and life term for offence under Section 120B of I.P.C.

3. The sentences have been ordered to run concurrently.

4. The appellants have been held to be entitled to the set off Section 428 of the Code of Criminal Procedure, 1973.

5. Mr. Arun, learned advocate has urged that the case is absolutely false. Since the appellants are having some dispute with the informant and the deceased, therefore, they have been named in this case. The entire story is false for several reasons but particularly with respect to the injuries suffered by the appellants for which they were hospitalized and which was never explained by the prosecution, thereby making the initial version and the deposition at trial highly doubtful.



6. He has further submitted that several persons are said to have assaulted the deceased by sharp cutting weapons but the Doctor conducting the post-mortem examination only found one fatal injury which was a piercing injury which has been attributed to appellant/Md. Zuber. He has further submitted that Md. Meraz (P.W. 10), who is the informant of this case cannot be believed that he cannot be the eye witness to the occurrence.

7. Similarly, other prosecution witnesses also who claimed to be eye witnesses cannot be believed for their stories are absolutely inconsistent and not at all in consonance with the probable version. There is no explanation whatsoever for the body of the deceased having been subjected to post-mortem examination on the next day at 08:45 A.M. Even if it were in normal course of events, the rigor-mortis would have passed off from the body as the occurrence is said to have taken place at around 09:30 P.M. on the previous night.



8. Several motives have been attributed, Mr. Arun argues and therefore, the story about the appellants having caught hold of the deceased and pierced a knife through and through is not believable.

9. As opposed to the aforementioned contentions, Mr. Nafisuzzoha and Mr. Dilip Kumar Sinha, learned counsel for the informant and the State respectively have submitted that in the event of the informant (P.W. 10), Noor Alam (P.W. 1) and two others having witnessed the occurrence, all the grounds raised by Mr. Arun fades into background.

10. It is highly improbable, both the learned advocates have argued, that the informant would leave the main assailant and would attribute act of assault to somebody else only for feeding fat the old grudge.

11. A cliched argument was also made that motive does not assume any significance in a murder trial especially when there are eye witnesses to the occurrence and that all contradictions in their statements cannot be so magnified so as to discard the entire prosecution version especially in the



background of enmity and reasons to eliminate the deceased.

12. In order to test the correctness of the prosecution version, we have examined the FIR as also the deposition of the P.W. 10 (Md. Meraz) in detail. P.W. 10 lodged the FIR at about 02:30 in the morning in the night intervening between 19th and 20th of June 2018, alleging that in the night of 18.06.2018 at about 09:45 P.M., while he was having dinner at his house, one Md. Mahboob, son of Md. Muslim came and requested his brother Noor Alam (deceased) to come to the house of Md. Muslim for some conference. The brother of the informant (deceased) went to Md. Muslim's house, where he was surrounded by the appellants and eight others who have been named in the FIR. All of them were armed with *lathi*, *farsa*, *bhala* etc. One of them was armed with a pistol as well. On the *halla* raised by the deceased after seeing so many armed persons, P.W. 10 claims to have arrived hurriedly to the house of Md. Muslim. There, he found that



appellant/Farookh had immobilised the deceased and appellant/Zubair pierced a long dagger in the chest of the deceased. Md. Muslim, who has not faced trial along with the appellants and there is nothing recorded in the judgment about the status of his case, is also alleged to have assaulted the deceased by means of *farsa*, a sharp cutting weapon. One Md. Mehboob, who has since been acquitted, is alleged to have opened fire which did not hit anybody. P.W. 10 then claims to have taken his injured brother to a hospital at Bhaptiyahi, where after preliminary treatment, the injured/deceased was referred for better treatment to Sadar Hospital Supaul. While on way to Supaul hospital, the deceased succumbed to the injuries.

13. So far as the reason for occurrence is concerned, P.W. 10 has alleged that Md. Muslim had dispute with the deceased regarding some land and, therefore, he had full belief that all the persons named in the FIR conspired and killed the deceased.



14. On the basis of the aforementioned written report by P.W. 10 Bhaptiyahi P.S. Case No. 67 of 2018 dated 19.08.2018 was registered for investigation for offences under Sections 302, 34 and 120B of the I.P.C.

15. We have no idea as to what happened to the cases of the other accused persons, but it appears that charge-sheet was submitted against three persons viz. the two appellants and one Md. Mahboob, who as we have noticed, has been acquitted.

16. All the aforementioned three persons were put on trial. The learned Trial Court after having examined 12 witnesses on behalf of the prosecution, convicted the appellants as aforesaid but acquitted the third accused viz. Md. Mahboob who was assigned the role of calling the deceased to the house of Md. Muslim and then having opened fire without hitting anybody.

17. During the trial, P.W. 10 has improved upon his story in different ways. He has supported the first version by deposing that on 18.06.2018 while he along with



his other family members, whom he has not named, was having dinner, Md. Mahboob came and called his brother to the house of Md. Muslim. The deceased went to the house of Md. Muslim where he was assaulted by many persons, who have been named in the F.I.R. as also in the deposition of P.W. 10.

18. P.W. 10 claims to have gone to that place on the shouts of the deceased when he saw everybody named therein as accused, assaulting the deceased. Appellant/Farookh is alleged to have given repeated sword blows on the deceased. The deceased was dragged to the main door of the house of Md. Muslim, where the deceased was *coup de graced* by appellant/Zuber. The injured brother of P.W. 10 was taken to Bhaptiyahi Hospital from where he was referred to Supaul and on way he died.

19. In his Examination-In-Chief only, P.W. 10 has admitted that the deceased was having dispute from before with Md. Muslim, the two appellants and one Mazharul. The cause of occurrence was attributed to the aforementioned land



dispute. In the same breath, P.W. 10 has given another motive for killing the deceased namely of misappropriating Rs. 2 lakhs, which was obtained by the accused persons from the deceased, which they never wanted to return.

20. Though, P.W. 10 has claimed to have seen the occurrence but such tall claims could not be proved at the trial for the reason that he specifically has stated in his cross-examination that after the occurrence, he and his brother sat down and took a decision of lodging the F.I.R. with specific allegation.

21. Apart from this, he has submitted that he had seen the occurrence in the torch-light but he never handed over the torch to the investigator. He also claims that many persons who had arrived at the scene of occurrence had torches in their hands. Apart from this, P.W. 10 has further proved himself to be wrong when he stated during cross-examination that when all the witnesses to the occurrence reached the place of Md. Muslim, the deceased ranted out the names of the assailants and then only P.W. 10 could



know about the specific role played by each of the accused persons including the appellants.

22. The counter case, the details of which has neither been referred to in the judgment nor has been adverted to by any one of the witnesses of this case including the investigator, was said to have been filed as a defence.

23. Similarly, he has further stated that the police party reached the house at about 3 to 4 o'clock in the morning on 19th of June 2018 and before that, he had not seen any one of the weapons used in the assault. This again makes his statement full of doubts, as he has claimed to have seen the entire occurrence where Farookh initially assaulted the deceased by sword a number of times and then immobilised him by catching hold of his hands, whereafter, appellant/Zuber thrust a long knife into his body.

24. The Doctor (P.W. 9), who has conducted the post-mortem has not found any such corresponding injury



except the one fatal injury attributed to Zuber. The post-mortem report (Ext. 2) discloses that P.W. 9 only found generalized pallor on the body of the deceased. However, there was a sharp cut and penetrative wound of the dimension of 2"x1/3rd" which was communicating with the exterior in the thoracic cavity in the 7th inter-costal space laterally. There was also a sharp cut wound in the 8th inter-costal space on the right side. The two sharp cut penetrative wound referred to above could have only been caused by the thrusting of the *gupti* (a long knife) in the body of the deceased.

25. Surprisingly, P.W. 9 has not found any sword/cut/incised wound on the hand or other parts of the body of the deceased, even when a specific accusation by P.W. 10 was made that appellant/Farookh had given several sword blows on his body. There were no dragging mark found on the body of the deceased.

26. In this context, we also have examined the deposition of the Investigating Officer/Brajesh Kumar



Chauhan (P.W. 11). He has stated before the Trial Court that after recording the F.I.R., he took over the investigation himself. However, before recording the F.I.R., he had learnt at the police station only at about 10 o'clock in the night of 18.06.2018 that one person is being assaulted by his neighbors with the intention to kill him. On such information, he immediately proceeded along with the police party to the place of occurrence, where they were told that the deceased has been taken to Bhaptiyahi Hospital for treatment.

27. After receiving such written report of P.W. 10, he searched the houses of the accused persons and in the process came to learn that the two appellants namely Zuber and Farookh were undergoing treatment in hospital. Though, he took note of such injuries on the appellants but has candidly expressed that he did not make any investigation with respect to cause of the injuries on the person of the appellants.



28. With respect to place of occurrence also, the statement in the written report and the deposition of P.W. 10 do not appear to have been confirmed. The investigator found the place of occurrence to be the house of appellant/Farookh. The deceased had gone to the house of Md. Muslim and not Md. Farookh, where the informant had also followed him and then only he saw the deceased being assaulted by all the accused persons including the appellants.

29. Apart from this, in his cross-examination, the Investigating Officer has further submitted that the weapon of assault was handed over to him by Md. Noor Alam (P.W. 1), who is a villager of the deceased with the same name. He did not send the weapon for any serological/forensic examination. The weapon was a sword and not a *gupti* as claimed, which was rusted but it had some blood like substance smeared over it. The I.O. did not take any care of seizing the blood on the weapon of assault and sending it for serological examination to confirm whether it was human



blood or something else. The real weapon of assault as claimed P.W. 10 namely the *gupti* which was thrust in the body of the deceased by the appellant/Zuber did not have any blood mark on it. That the aforementioned *gupti* was used in the murder was neither told to the Investigating Officer nor did he confirm the same during the investigation.

30. He has further admitted during cross-examination that the accused persons including the appellants had not received any injury by any action taken by the police party. He had no idea nor did he investigate whether the weapons which were produced before him by P.W. 1 and others was the weapons used by the accused persons or by the members of the prosecution party, even though he had positively learnt that two of the appellants required hospital treatment because of the injury suffered by them.

31. On being further questioned, the I.O. has again repeated that he entertained no doubt about the correctness of the version of P.W. 10 and, therefore, there



was no reason for him to doubt the entire course of events. As a sequitur thereof, he did not investigate the reasons for the injuries on the persons of the appellants or of their having filed any counter-case.

32. He had never seized any torch though the prosecution claims that not only P.W. 10 but all other onlookers had torches in their hands and that was the source of light for all of them to have seen the occurrence themselves. The I.O. did not even find out whether there was any electric pole there at the place of the occurrence.

33. A holistic reading of the deposition of P.W. 10 and the Investigating Officer thus makes the prosecution case highly redolent with suspicion and doubt.

34. It appears that there would have had been a fight between the parties for some reason or the other where two of the appellants received injuries for which they required hospitalization and unfortunately, the deceased died.



35. In such a milieu, it further appears to us, that it would not have been possible for P.W. 10 or P.W. 1 to have seen the occurrence.

36. We have started entertaining doubts about the prosecution version to be correct right since the beginning because if there was bad blood between Md. Muslim and the deceased, there was no reason for the deceased to have acceded to the request of Md. Muslim to come to his house.

37. That apart, who all were dining with P.W. 10 at the time when Md. Mahboob (since acquitted) had come for calling the deceased has also not been disclosed by P.W. 10 neither in the F.I.R. nor during his deposition.

38. The deceased ostensibly had visited the house of Md. Muslim. There is no evidence that Muslim and Farookh stay together. The place of occurrence was found to be the front of the house of Md. Farookh according to the deposition of the Investigating Officer.

39. The weapon which was used for killing the deceased by Md. Zuber could also not be proved. A sword



with a blood mark was presented before the Investigating Officer by Noor Alam (P.W. 1). That was not the weapon attributed to appellant/Zuber. The *gupti* allegedly used by appellant/Zuber was neither produced before the Investigator nor any investigation was made on that account. The Investigating Officer, therefore, was not even sure whether the weapons produced or talked about were the weapons in the hands of the appellants or was used by the prosecution side leading to injuries on the two appellants.

40. In the absence of any serological/forensic examination of the blood on the sword which perhaps is attributed to Md. Farookh but without any corresponding injury on the body of the deceased, was also not sent for any forensic examination.

41. Thus, we have no piece of evidence which would conclusively prove that it were the appellants, who immobilized and killed the deceased respectively for which they have been convicted and sentenced.



42. In order to further test the correctness of the prosecution version, we have gone through the deposition of another eyewitness, the namesake of the deceased/Md. Noor Alam (P.W. 1). He has come up with a narrative with an absolutely different story-line and perhaps a motive which appears to be a product of the fecundity of his mental faculties.

43. He claims to have overheard the accused persons at about 4 to 5 P.M. in the evening of 18.06.2018 that the amount of Rs. 2 lakhs which was taken from the deceased for sale of a plot of land shall not be returned to the deceased nor the sale deed would be executed. He also overheard the appellants speak that when such money would be demanded by the deceased, he would be killed. After overhearing the appellants and others talk like this, he proceeded for his in-laws house which was about fifty feets away from the place of where he had overheard them. After about two to three hours, while he was eating food in his in-law's house, he heard that a pandemonium had broken out.



He came out of his house where he found the appellants assaulting the deceased. He claims to have seen appellant/Farookh having thrown his *lathi* on the deceased and then trying to strangulate him. The deceased was, according to him, brought to the house of Md. Farookh, where he was killed. Five other persons also were present at the time of occurrence viz. Md. Rahmatullah (P.W. 2), Md. Meraj (P.W. 10), Md. Jalaluddin (P.W. 7), Md. Zahir (P.W. 3), Md. Saifullah (P.W. 6), Md. Mushafir @ Musharraf (P.W. 5), Md. Salim (P.W. 8) and others. When people from the neighbourhood arrived, the accused persons threw away their weapons and fled away.

44. This story-line is further contradicted by his statement in the cross-examination that he could see and identify the act and the assailants in the light of the bulb which was burning on the pole. No investigation, as noted above, has been made with respect to the presence of any electric pole and most of the eye witnesses claim to have



seen the occurrence in the torchlight through the torches held by them in their hands.

45. He is further to be disbelieved for the reason that in cross-examination, despite having made such tall claims of having seen the occurrence from the first to the last, he has deposed that he did not see how Noor Alam (deceased) was injured and he also did not see the appellants getting injured in the occurrence.

46. Similar discrepant statements have been made by the other witnesses, who have been referred to by P.W. 1 and have been examined at the trial.

47. But the fact remains that there is enmity between the parties and the appellants also have received injuries.

48. We, thus, do not have the correct version of the occurrence.

49. This is the prime reason coupled with the factors indicated above that we doubt the version of P.W. 10 and P.W. 1 in its entirety.



50. For the aforementioned reasons, we need to give benefit of doubt to the appellants.

51. The appeal is allowed.

52. The appellants are acquitted of the charges levelled against them.

53. Both the appellants are in jail. They are directed to be released forthwith from jail, if not required or detained in any other case.

54. A copy of the judgment shall be transmitted to the Superintendent of Police of the concerned jail for record and compliance.

55. The records of this case also be sent back to the Trial Court.

(Ashutosh Kumar, J)

(Vipul M. Pancholi, J)

Sachin/Krishna

AFR/NAFR	AFR
CAV DATE	NA
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