
(2019) 11 JH CK 0032

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 555, 780, 784 Of 2012

Hanif Mian And Ors

APPELLANT

Vs

Jalal @ Jalaluddin Mian And Ors

RESPONDENT

Date of Decision : 06-11-2019

Acts Referred:

Indian Penal Code, 1860 — Section 141, 147, 148, 149, 302, 307, 323, 325, 341

Citation : (2019) 11 JH CK 0032

Hon'ble Judges : Shree Chandrashekhar, J; Ratnaker Bhengra, J

Bench : Division Bench

Advocate : Jitendra Shankar Singh, Arvind Kumar Choudhary, Arun Kumar Pandey, Aashish Kumar

Final Decision : Partly Allowed

Judgement

Shree Chandrashekhar, J

1. Eight persons, namely, Hanif Mian, Islam Mian, Jalal @ Jalaluddin Mian, Harun Mian, Mustakim Mian, Jamal @ Jainul Mian, Ainul Mian and Sarfuddin Mian were named as accused by Jamshed Ansari in his fardbeyan which was recorded on 13.11.2006 at about 2:00 p.m. After the investigation the police has filed a charge-sheet against seven accused persons and a final form was submitted in favour of the accused, namely, Sarfuddin Mian.

2. The appellants have faced the trial for the offence under section 302/149 IPC for committing murder of Bashir Ansari and under section 307/149 IPC for causing injuries to Sanaul Mian-P.W.1, Rashid Mian-P.W.2, Muslim Mian-P.W.3, Imtiyaz Mian-P.W.5 and Mumtaz Mian-P.W.7. Common charges under sections 147 IPC, 148 IPC and 341 IPC were framed against all the appellants.

3. These three criminal appeals: Hanif Mian in Criminal Appeal (DB) No. 780 of 2012, Jalal @ Jalaluddin Mian, Jamal @ Jainul Mian, Ainul Mian, Harun Mian in Criminal Appeal (DB) No. 555 of 2012 and Mustakim Mian in Criminal Appeal (DB) No. 784 of 2012, have been filed by the above-named appellants

challenging the judgment of conviction and the order of sentence of R.I. for life and fine of Rs. 5,000/- each under section 302/34 IPC against the appellants, namely, Hanif Mian and Mustakim Mian, R.I for five years and fine of Rs. 1,000/- each under section 307/149 IPC, R.I for two years under section 148 IPC against the appellants, namely, Hanif Mian, Harun Mian and Jainul Mian and R.I for one year under section 147 IPC against Jalal Mian, Mustakim Mian and Ainul Mian.

4. The appellants, namely, Hanif Mian, Jalal @ Jalaluddin Mian, Jamal @ Jainul Mian, Ainul Mian, Harun Mian and Mustakim Mian are held not guilty of the charge under section 341 IPC and they are acquitted thereunder.

5. Mr. Jitendra Shankar Singh and Mr. Arvind Kumar Choudhary, the learned counsels appear for the appellants in these criminal appeals and Mr. Aashish Kumar, the learned counsel appears for the informant, namely, Jamshed Ansari.

6. Joint compromise petitions vide I.A. No. 368 of 2019 and I.A. No. 369 of 2019 have been filed by both the parties.

7. The informant, namely, Jamshed Ansari is the son of the deceased. On the basis of his fardbeyan recorded by the police at village-Nagadori, tola-Budhiabad at about 14:00 hrs. on 13.11.2006, Karon P.S. Case No. 92 of 2006 was registered against the above-named accused persons under sections 147, 148, 149, 323, 324, 341, 307 and 302 IPC. In his fardbeyan, the informant has stated that on 12.11.2006 his father left home at 7:30 a.m for observing the paddy crops and at about 8:00 a.m he heard call of Gulam Ansari of his village who was saying "your father has been killed, come". When he ran to the fields he found that Hanif Mian with farsa, Islam Mian with sabal and Mustakim Mian with lathi were assaulting his father. By the time he reached there his father had fallen on the ground and, therefore, he did not go near him and came back home and informed his uncle, Rashid Mian, Sanaul Mian, Butan Mian and others about the incident. When they went to save his father, in the meantime, Jainul Mian, Ainul Mian, Harun Mia, Jalal Mian and Sarfuddin Mian variously armed with farsa, lathi and rod came in the fields and assaulted Rashid Mian, Sanaul Mial, Butan Mian, Imtiyaz Mian and Bhurulin Mian. By that time, the news about mar-pit had spread in the village and the villagers had started assembling there whereafter the accused persons fled away. He has found his uncle, father and others lying in the fields in the injured condition.

8. During the trial, the informant has been examined as P.W.8. The prosecution has projected Sanaul Mian-P.W.1, Rashid Mian-P.W.2, Muslim Mian-P.W.3, Gulam Ansari-P.W.4, Imtiyaz Mian-P.W.5, Birbal Mandal-P.W.6 , Mumtaz Mian-P.W.7 and the informant as eye-witnesses. Amongst these witnesses, P.W.1, P.W.2, P.W.3, P.W.5 and P.W.7 are the injured witnesses.

9. Dr. Ramchandra Prasad-P.W.9, who has conducted the postmortem examination, has found one lacerated injury on the middle of skull of Bashir Ansari @ Bhuswa of the size of 5" x 2", bone deep. The doctor has found depressed fracture of parietal and upper part of the occipital bone. In his opinion,

the death was caused due to hemorrhage and shock as a result of the above injury which was caused by hard and blunt substance.

10. Mr. Jitendra Shankar Singh, the learned counsel for the appellants has submitted that ; (i) claim of Gulam Ansari-P.W.4 that he has seen Hanif Mian, Islam Mian and Mustakim Mian assaulting Bashir Ansari is falsified by his own testimony, (ii) none of the prosecution witnesses including the informant is an eye-witness to assault on Bashir Ansari, (iii) claim of Gulam Ansari that three persons were assaulting Bashir Ansari is contradicted by the medical evidence, (iv) the prosecution has failed to explain injuries on the accused persons and while so, the true account of the manner of occurrence has been suppressed by the prosecution, and (iv) conviction of the appellants with the aid of section 149 IPC for the offence under section 307 IPC is illegal and improper.

11. At the outset, we are inclined to record that none of the prosecution witnesses has seen assault on Bashir Ansari, who according to the prosecution was killed by the appellants. The informant has stated in his fardbeyan that on the call of Gulam Ansari when he rushed to the fields he has seen Hanif Mian, Islam Mian and Mustakim Mian assaulting his father, however, in the same breathe he has also said that by that time his father had fallen on the ground. In the court also he has deposed that he has seen Hanif Mian, Islam Mian and Mustakim Mian assaulting his father and after he had again gone there with his uncle and others the accused persons have assaulted them. At this juncture, the informant does not say that this time also the accused persons were found assaulting his father. In the second occurrence, he simply says that when he has gone to see his father he found him dead. However, P.W.4 says that when the informant and others came to the place of occurrence they tried to save Bashir Ansari whereupon the accused persons started mar-pit with them. He further says that all the accused persons have assaulted Bashir Ansari in such manner that he has died on the spot. In his cross-examination, P.W.4 has again said that when the prosecution witnesses came to the place of occurrence they have tried to save Bashir Ansari. His statement to this extent is contradicted by P.W.8, the informant. Secondly, P.W.8 has stated in his examination-in-chief that Gulam Ansari was calling him saying that some persons are assaulting his father and it has come in the prosecution's evidence that the distance between the place of occurrence and the house of the informant is about half a mile.

12. What would appear from the evidences of P.W.4 and P.W.8 are that; (i) Gulam Ansari has seen three persons assaulting Bashir Ansari but he has not disclosed the manner of occurrence and other necessary details about the assault on Bashir Ansari, (ii) he raises cries and calls Jamshed Ansari-P.W.8, (iii) Jamshed Ansari goes there however finding his father lying in the fields comes back home and informs others, (iv) he along with others goes to the fields and a mar-pit started between both the parties, (v) distance between the place of occurrence and the house of the informant is about half a mile, and (vi) the doctor has found only one lacerated wound on Bashir Ansari. From the

chronology of the above events, it would transpire that claim of P.W.4 and P.W.8 that they have seen Hanif Mian, Islam Mian and Mustakim Mian assaulting Bashir Ansari is unbelievable. In the second occurrence assault on Bashir Ansari by the appellants as claimed by P.W.4 is contradicted by the evidence of P.W.8 in his examination-in-chief. A scrutiny of the testimony of other prosecution witnesses - P.W.1, P.W.2, P.W.3, P.W.5, P.W.6 and P.W.7 - would reveal that when they reached the fields on information given by P.W.8 a fight ensued between both the sides but none of these witnesses have claimed that the accused persons have assaulted Bashir Ansari rather they have specifically stated that before they reached there the accused persons had killed Bashir Ansari (ekdj tehu ij fxjk fn;k Fkk). In fact, this part of the story has been disbelieved by the learned Additional Session Judge. When the testimony of P.W.4 and P.W.8 regarding assault on Bashir Ansari by Hanif Mian, Islam Mian and Mustakim Mian is examined in the context of the testimony of P.W.1, P.W.2, P.W.3, P.W.5, P.W.6 and P.W.7, it becomes apparent that none of the prosecution witnesses has seen assault on Bashir Ansari. Merely because they were found present at the time of the second incident, it cannot be inferred that they have assaulted and killed Bashir Ansari. The story of assault on Bashir Ansari by Hanif Mian, Islam Mian and Mustakim Mian in the first instance and by all the appellants in second instance is also falsified by the medical evidence; P.W.9 has found only one lacerated wound on Bashir Ansari. And, it also cannot be lost sight of that the distance between the place of occurrence and the house of the informant is about half a mile.

13. In the above state of affairs, we hold that the prosecution has failed to establish that Bashir Ansari has been killed in furtherance of common intention of Hanif Mian, Islam Mian and Mustakim Mian. Who has caused death of Bashir Ansari and how he has been killed have not been clearly brought on record and, therefore, conviction of the appellants, namely, Hanif Mian, and Mustakim Mian under section 302/34 IPC is set-aside; the appellant, namely, Islam Mian has died during pendency of Criminal Appeal (DB) No. 537 of 2012.

14. The prosecution witness namely, Sanaul Mian-P.W.1 has stated that Hanif Mian assaulted him with farsa on his head and Harun Mian struck a sword blow on his finger. Dr. Ramesh Kumar-P.W.10 who has examined P.W.1 has found one lacerated wound on his fore-head caused by hard and blunt substance and sharp-cut injury on his left index finger caused by a sharp cutting weapon. However, he does not say anything about assault on other prosecution witnesses by the appellants. The prosecution witness, namely, Rashid Mian who has been examined as P.W.2 has stated that Harun Mian struck a sword blow on his head and Jalal Mian assaulted him on his neck with a lathi. P.W.10 has examined him on 13.11.2006 and found one lacerated wound on his left parietal bone and abrasion on his left neck, both caused by hard and blunt object. P.W.3 is another injured witness. He has said that all the accused persons have assaulted him; he does not attribute specific assault by any of the appellants. P.W.10 has found three lacerated wounds and one sharp-cut injury on his person. Imtiyaz Mian-

P.W.5 has stated that both Hanif Mian and Mustakim Mian have assaulted him with farsa on his head, back, finger, left thigh and finger. P.W.10 has found lacerated wound on his right parietal bone, diffused swelling on his left knee joint, sharp-cut injury on the back of right shoulder and sharp-cut injury on his left dorsum of his palm. Mumtaz Mian-P.W.7 is also an injured witness. P.W.10 has found one abrasion on his left forehead, though he has not alleged assault upon him by any one of the appellants.

15. On the basis of the above evidence, Mr. Jitendra Shankar Singh, the learned counsel for the appellants has contended that the appellants, at best, are liable for their individual act and there was no unlawful assembly as envisaged under section 141 IPC.

16. Section 149 of the Indian Penal Code is a substantive offence which talks of constructive liability of every member of the unlawful assembly. Section 141 of the Indian Penal Code makes an assembly of five or more persons "unlawful assembly" if the common object of the persons composing that assembly is to commit any one of the offences under five clauses of section 141 IPC. Section 149 IPC provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every member who at the time of the committing of that offence is a member of the assembly, is guilty of that offence. In "Joseph Vs. State Rep. by Inspector of Police" AIR 2018 SC 93, it has been held:

"What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was the one which the members knew to be likely to be committed. Once the Court finds that the ingredients of Section 149, IPC are fulfilled, every person who at the time of committing that offence was a member of the assembly has to be held guilty of that offence. After such a finding, it would not be open to the Court to see as to who actually did the offensive act nor would it be open to the Court to require the prosecution to prove which of the members did which of the above two ingredients. Before recording the conviction under Section 149, IPC, the essential ingredients of Section 141, IPC must be established."

17. From the evidences laid by the prosecution, it is apparent that the appellants, namely, Jalal @ Jalaluddin Mian, Harun Mian, Jamal @ Jainul Mian and Ainul Mian reached the place of occurrence after Bashir Ansari was done to death and the prosecution witnesses P.W.1, P.W.2, P.W.3, P.W.5, P.W.6, P.W.7 and P.W.8 have reached the place of occurrence after the informant-P.W.8 informed them about assault on his father. It has also come on record that the prosecution witnesses were armed with deadly weapon and in the incident accused persons have also suffered injuries. The injuries found on the prosecution witnesses were caused within 5 hours of their examination by P.W.10. According to the prosecution, the incident has taken place between 8:00 a.m to 9:00 a.m on 13.11.2006 and the injured persons were examined between 12:20 p.m and

1:00 p.m on 13.11.2006.

P.W.10 has proved the injury reports prepared by him which were marked as exhibits during the trial. From the cross-examination of

P.W.1, P.W.2, P.W.3, P.W.5 and P.W.7, who are the injured witnesses, it would transpire that it is not a case set-up by the defence that these witnesses did not state before the police about the appellants assaulting them and some of them have admitted in their cross-examination that they have seen the accused persons in injured condition in the hospital; a counter case vide Karon P.S. Case No. 93 of 2006 was lodged at the instance of Hanif Mian. Certified copies of the First Information Report and the charge-sheet in Karon P.S. Case No. 93 of 2006, evidence of Dr. Ramesh Kumar who was examined as a witness in the said case also were produced by the appellants to show that the appellants, namely, Mustakim Mian, Harun Mian, Ainul Mian, Jalal @ Jalaluddin Mian, Hanif Mian have suffered grievous injuries at the hands of the prosecution witnesses.

18. On the above facts, presence of the appellants and the prosecution witnesses at the place of occurrence stand admitted. The crime scene which has been described by the prosecution witnesses and the defence side of the story would indicate that a quarrel (mar-pit) has taken place between both the parties and in the incident both sides have suffered injuries, but in view of the consistent evidence led by the prosecution failure to explain injury on the accused persons would not result in acquittal of the accused persons and the appellants would be liable for the offence committed by them [refer: "Vijayee Singh and Others Vs. State of U.P." reported in (1990) 3 SCC 190]. In the commotion which had ensued, apparently, it was difficult for the prosecution witnesses to say with precision how many times they were assaulted by the appellants. The medical evidence led through P.W.10 would largely corroborate their testimony in the court on assault upon them by the appellants. It has also come in the prosecution's evidence that the appellants were armed; five of them namely, Jalal @ Jalaluddin Mian, Harun Mian, Jamal @ Jainul Mian, Ainul Mian and Sarfuddin Mian, also armed, have come there and all of them have started mar-pit. In "Masalti Vs. The State of U.P." reported in AIR 1965 SC 202, the Supreme Court has held, thus:

17. ".....it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly in fact, S. 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly; is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by S. 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every

member of the unlawful assembly."

19. The common object can develop at the spur of the moment and from the prosecution's evidence it is evident that the appellants have formed an unlawful assembly common object of which was to commit murder. However, it is difficult to hold that the common object of the unlawful assembly was to commit murder of the prosecution witnesses. The essential distinction between the offence punishable under section 307 IPC and Section 302 IPC is that the offence under section 307 IPC is not culpable homicide; the victim finally survives. What is required by the prosecution to establish is that the accused had requisite intention or knowledge that if successfully executed the alleged act would have caused death. In "State of Maharashtra Vs. Kashirao" reported in (2003) 10 SCC 434, the Supreme Court has observed as under;

20."The essential ingredients required to be proved in the case of an offence under section 307 are:

(i) that the death of a human being was attempted;

(ii) that such death was attempted to be caused by, or in consequence of the act of the accused; and

(iii) that such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as: (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

20. From the manner of occurrence and the injuries on the prosecution witnesses, we find that the prosecution has failed to establish that the appellants intended to commit murder; the large number of injured witnesses makes it further difficult to infer whose murder was the common object of the unlawful assembly. However, the prosecution has brought clinching evidence which is corroborated by the medical evidence that the appellants have caused grievous hurt to the prosecution party and, therefore, they are liable to be convicted under section 325/149 IPC.

21. All the above-named appellants are sentenced to undergo R.I for three years under section 325/149 IPC.

22. However, the judgment of conviction dated 30.04.2012 and the order of sentence dated 04.05.2012 passed for the offences under section 149 IPC and section 148 IPC against the respective appellants in Sessions Case No. 181 of 2007 are affirmed to that extent.

23. On the question of sentence, Mr. Jitendra Shankar Singh, the learned counsel for the appellants has referred to the decision of the Hon'ble Supreme Court in

"Manjit Singh Vs. The State of Punjab & Anr." reported in 2019 SCC Online SC 896, to contend that compromise between the parties even if the conviction is recorded for a non-compoundable offence is a relevant factor for deciding the sentence.

24. The appellants and the informant as well as the victims have filed joint compromise petition in these criminal appeals. They have sworn separate affidavits stating that they have amicably agreed to compromise the matter.

25. The learned counsel for the informant affirms the same.

26. In view of the joint compromise petition filed by the parties vide I.A. No. 368 of 2019 and I.A. No. 369 of 2019, the sentence of R.I for three years inflicted upon the appellants under section 325/149 IPC and the other sentences inflicted upon the respective appellants under section 147 IPC and section 148 IPC are reduced to the period already undergone, but on payment of compensation of Rs.10,000/- by each of the appellants to the informant, within a period of six weeks from the date a certified copy of the judgment is made available to them. In default of payment of fine, the appellants above-named shall undergo simple imprisonment for three months.

27. The appellants, namely, Jalal @ Jalaluddin Mian, Jamal @ Jainul Mian, Ainul Mian and Harun Mian in Criminal Appeal (DB) No. 555 of 2012 and Mustakim Mian in Criminal Appeal (DB) No. 784 of 2012 are on bail and, therefore, they are discharged of liability of the bail-bonds furnished by them.

28. Mr. Arun Kumar Pandey, the learned APP states that the appellant, namely, Hanif Mian in Criminal Appeal (DB) No. 780 of 2012 is in custody and he has undergone more than Twelve years of imprisonment.

29. Accordingly, the appellant, namely, Hanif Mian in Criminal Appeal (DB) No. 780 of 2012 shall be set free forthwith, if not required in connection to any other criminal case.

30. In the result, Criminal Appeal (D.B.) No. 780 of 2012, Criminal Appeal (D.B.) No. 555 of 2012 and Criminal Appeal (D.B.) No. 784 of 2012 are partly allowed.

31. Let lower-court records be transmitted to the court concerned, forthwith.

32. Let a copy of the judgment be transmitted to the court concerned through FAX.