

(2004) 12 PAT CK 0070

In the Patna High Court

Case No : Criminal Appeal (DB) No's. 573 of 2001 and 77 of 2002

Ish. Md. Mian @ Ishmohamad Mian and Another

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 08-12-2004

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 304, 34

Citation : (2004) 3 BLJR 2237

Hon'ble Judges : Mridula Mishra, J; M.L. Visa, J

Bench : Division Bench

Advocate : Rabindra Kr. Priyadarshi, for the Appellant; Lala Kailash Bihari Prasad, APP, for the Respondent

Judgement

Mridula Mishra, J.—Both the appeals arise out of one and the same judgment and order dated 8th August, 2001 passed by the 2nd Additional Sessions Judge, West Champaran, Bettiah, in Sessions Trial No. 494 of 1997 arising out of Sikarpur P.S. Case No. 89 of 1997. Hence, they were heard together and are being disposed of by this common judgment. The appellants have been convicted and sentenced for life imprisonment u/s 302/34 of the Indian Penal Code.

2. Prosecution case based on the fardbeyan of Sattar Ansari, (PW 5) recorded by the S.I. of Sikarpur Police Station on 18th June, 1997 at about 1 p.m. is that on 17th June, 1997 at about 4 p.m. his brother Bikhi Mian had cut away branches of bamboo belonging to Ish Mohamad Mian as branches had covered as shed over Barhar, Kadam and Sarifa trees belonging to the informant. At about 7-30 p.m. Ish Mohamad Mian asked Sattar Ansari (PW 5) from his darwaja as to why he had cut away the branches of bamboo trees upon which Sattar Ansari and his brother replied that they had cut away branches of bamboo as it was damaging their plants. Some altercation took place and Ish Mohamad Mian started abusing the informant and his brother. In the meantime, son of Ish Mohamad Mian, Jamaluddin came out from his house with double edged sword and said that he will cut the person who had cut his bamboo. Bikhi Mian, brother of the informant

also came out and said that he was going to cut bamboo and was ready to see what was done to him. As soon as he came out of the house and reached near the road, Jamaluddin Mian penetrated the double edged sword in the chest of Bikhi Mian, he received serious injury and fell down after proceeding few steps towards the Sahan land of the cattle shed belonging to Nathuni Tiwari and succumbed to his injury.

3. On the basis of fardbeyan Sikarpur P.S. Case No. 89 of 1997 was instituted u/s 302/34 of the Indian Penal Code and after completion of investigation the police submitted charge-sheet against the named accused (appellants) u/s 302/34 of the Indian Penal Code upon which cognizance of the offence was taken and case was committed to the Court of Sessions. The trial Court on completion of the trial has convicted and sentenced the appellants as stated above.

4. In course of trial the prosecution in all examined nine witnesses and defence also examined one witness, namely, Dr. Prakash Kumar Gupta who had examined Jamaluddin Mian and exhibited injury report of Jamaluddin. PW 1 Ayesha Khatoon is the widow of the deceased, who in her evidence has stated that her husband and brother had cut away branches of bamboo tree belonging to Ish Mohamad Mian which was objected by him, upon which altercation took place and Jamaluddin brought a sword from his house and inflicted it in the chest of her husband, on instigation of Ish Mohamad to kill her husband. In her cross-examination she stated that the occurrence took place at her darwaja wherein the blood was flouting after the occurrence. PW 2 Alauddin Mian is a formal witness and has stated that in his presence the Investigating Officer had seized the sword and blood stained soil. PW 3 Wakil Mian in his evidence has stated that at the time of occurrence he was at his darwaja and after hearing hulla he reached at the place of occurrence. He heard that Bikhi Mian had cut away the branches of bamboo trees of Ish Mohamad Mian and upon which Jamaluddin penetrated double edged sword in the chest of Bikhi Mian who after receiving injury fell down at his darwaja and died. PW 4 Rajan Mian has also made the similar statement but in his cross-examination he stated that before the police he had stated that he did not see Jamaluddin penetrating sword in the chest of Bikhi Mian. PW 5 Sattar Ansari the informant has stated that altercation took place on cutting of the branches of bamboo trees upon which Ish Mohamad and Jamaluddin came at his darwaja at 10-30. Ish Mohamad and Jamaluddin stated that they will kill the persons who had cut their bamboo branches. Ish Mohamad instigated Jamaluddin to kill, upon which he came out with double edged sword and penetrated it in the chest of Bikhi Mian. He stated that his brother after moving for some distance fell down and died then and there. He in his cross-examination denied the suggestion that a false case has been instituted by him and falsely implicating the appellants as the informant had brutally assaulted Jamaluddin and on his fardbeyan a case has been instituted against him. PW 6, Tetri Khatoon is the sister of the deceased. She has stated that branches of bamboo tree of Ish Mohamad Mian had covered the Kadam, Sarifa and Barhar trees of Dukhi Mian and was damaging them. Bikhi Mian and Sattar Mian had cut

the branches of bamboo tree which infuriated Ish Mohamad and Jamaluddin. At 7-30 p.m. they came at her darwaja and started abusing her brothers who came out of their house and said that because of bamboo branches had covered as shed to their trees, they had cut the bamboo branches. Ish Mohamad ordered Jamaluddin to cut them as they had cut the bamboo tree and Jamaluddin came out with a double edged sword and penetrated it in the chest of Bikhi Mian. Her brother after moving 2/3 steps fell down near the hut of Nathuni Tiwari and died. Jamaluddin thereafter pulled out the sword and closed the door of the house entering into the house. She has stated that there was no dispute in between the appellants and the informant prior to this occurrence. At the time of occurrence several persons like Ramzan Mian, Allauddin Mian, Khalil Mian, Ishu Mian, Wakil Mian and Dhrub Patel came and they had also witnessed the occurrence. These persons were trying to restrain the accused persons but they were not listening. The Investigating Officer came after the occurrence. Both the accused persons were in their house and from there only they were arrested. The Investigating Officer had come at the place of occurrence at 10 p.m. She admitted that Ish Mohamad has instituted a counter case naming Sattar as an accused. She has denied the suggestion that her brother had assaulted Jamaluddin with lethal weapons. She has also denied that at the time of occurrence she was not present and she was at her husband's house. PW 7 Dukhi Ansari, father of the deceased and the informant, has said that he was not present at the time of occurrence and when he came he heard about the occurrence. He saw Jamaluddin holding blood-stained sword, at the place of occurrence. PW 8, Dr. Purusottam Singh has held post-mortem on the dead-body of Bikhi Mian and he has proved post-mortem and opined that the death was caused due to injury No. 1. On the body of the deceased he found incised wound 5" x 2-1/2" cavity deep on the front of the chest. PW 9 Umesh Prasad is a formal witness. The defence witness DW 1 Dr. Prakash Kumar Gupta stated that he examined Jamaluddin Mian (appellant) and proved the injury report of Jamaluddin Mian. Investigating officer was not examined by the prosecution.

5. The defence of the appellants is that they are innocent and have falsely been implicated. They have also instituted counter case being Sikarpur P.S. Case No. 90 of 1997 under Sections 324, 323 and 504/34 of the Indian Penal Code on the basis of fardbeyan of accused/injured Jamaluddin Mian in which charge-sheet has been submitted under Sections 307, 324, 426/34 and 114 of the Indian Penal Code against the accused Sattar Ansari. According to the case of the appellant, oinformant Sattar Ansari armed with farsa, Bikhi Mian armed with lathi arrived at his darwaja where accused Jamaluddin was standing. Sattar Mian ordered his brother Bikhi Mian to assault on which Bhiki Mian gave lathi blow on the head of Jamaluddin. Sattar Ansari gave farsa blow on his neck with intention to kill him. Jamaluddin caught hold of farsa from his hand and got injured. On account of injury informant Jamaluddin become unconscious.

6. From perusal of the fardbeyan of the informant and the evidence of the witnesses it is apparent that the prosecution has tried to develop the prosecution

story specially relating to appellant Ish Mohamad Mian (appellant in Cr. Appeal No. 573 of 2001). In the FIR the case of the prosecution is that on the alleged date of occurrence Sattar Mian and deceased Bikhi Mian had cut away branches of bamboo trees belonging to Ish Mohamad (appellant in Cr. Appeal No. 573 of 2001) and Jamaluddin (appellant in Cr. Appeal No. 77 of 2002) as it covered as shed over Barhar and Sarifa trees belonging to informant. At about 7-30 p.m. Ish Mohamad asked from his darwaja as to why they had cut away the branches of bamboo trees upon which the informant and his brother replied that they have cut away branches of bamboo and shall cut the bamboo also and they are ready to see what will happen. After putting challenge Bikhi Mian came out from his house and arrived at the northern-western corner of the house. Then Jamaluddin went inside his house and came out with a double edged sword and gave a blow upon the chest of Bikhi Mian, who received serious injury, fell down and died. As per prosecution story in the FIR there is no whisper that Ish Mohamad Main either instigated or ordered Jamaluddin to kill Bikhi Mian. This instigation story has been developed in course of trial. PW 5, the informant, in his evidence stated that both Jamaluddin and Ish Mohamad had said that they will cut the person who had cut their bamboo. Further he stated that Ish Mohamad asked Jamaluddin to assault upon which Jamaluddin came out with a double edged sword and penetrated it in the chest of Bikhi Mian. Attention of PW 5 was drawn towards the evidence before the police and also towards the statement in the fardbeyan that he had not made any such statement either in the FIR or before the police that Ish Mohamad had asked Jamaluddin to assault and to kill Bikhi Mian. PW 1 has not stated in his evidence that Ish Mohamad was the order giver. PW 3, PW 5 and PW 6 had stated that Ish Mohamad ordered on which Jamaluddin penetrated sword in the chest of Bikhi Mian. Attention of PW 3 was drawn that he was examined by the police after 10 to 15 days of the occurrence and he in his statement u/s 164 of the Code of Criminal Procedure has not made any such statement. Accordingly, attention of PW 6 was also drawn. It is also apparent from the evidence of the prosecution witnesses that Ish Mohamad Mian was quite old nearly 80 years at the time of occurrence. This appellant's age on the date when his statement was recorded u/s 313 of the Code of Criminal Procedure was assessed as 80 years. Considering the evidence in respect of this appellant and the prosecution story in the FIR as well, his age, it is clear that this appellant had not participated in any manner in the occurrence. He simply asked the informant and his brother that why they have cut away bamboo trees. He neither instigated or gave any order to Jamaluddin to assault and kill Bikhi Mian. The case of appellant in Criminal Appeal No. 573 of 2001, is case of no evidence. Considering the evidence the appellant Ish Mohamad Mian (appellant in Cr. Appeal No. 573 of 2001) is acquitted of the charge and Cr. Appeal No. 573 of 2001 is allowed.

7. So far the case of Jamaluddin (appellant in Cr. Appeal No. 77 of 2002) is concerned, he is said to be the assailant who penetrated sword in the chest of Bikhi Mian due to which he died. All the witnesses have consistently stated that

Jamaluddin came with a double edged sword and penetrated in the chest of Bikhi Mian. There is no contradiction in the evidence of any witness so far the assault given by this appellant is concerned on the deceased. The evidence of doctor, PW 8, who had conducted post-mortem on the dead body of the deceased, has corroborated the evidence of the prosecution witnesses. He found incised wound 5" x 2-1/2" cavity deep on the front of the chest of the deceased. He also found two other injuries i.e., incise wound 2-1/2" x 1" x muscle deep left shoulder and scratch 1/2" long right side of chest. Cause of death, according to PW 8, is injury No. 1.

8. Argument has been advanced that prosecution witnesses have said only about injury No. 1 and stated nothing about injury Nos. 2 and 3 These two injuries remained unexplained. It indicates that the manner of the occurrence is different and the prosecution witnesses have not actually seen the occurrence. This argument advanced by the appellant has no force. So far injury No. 3 is concerned, this has also no relevance as it is a scratch on the body. Injury No. 2 though not stated in so many words by the prosecution witnesses can be caused, when sword was being pulled out with force after penetrating it in the chest. It cannot be said that prosecution failed to explain, two more injuries on the person of the deceased, when in evidence all witnesses have stated about single blow.

9. The defence has also examined DW 1 who has exhibited the certified copy of the formal FIR of Sikarpur P.S. Case No. 90 of 1997 registered under Sections 324, 323 and 504/34 of the Indian Penal Code. Ext. B, certified copy of fardbeyan of injured Jamaluddin relating to Shikarpur P.S. Case No. 90 of 1997, Ext. C, certified copy of charge-sheet relating to Shikarpur P.S. Case No. 90 of 1997 Ext. C, certified copy of charge-sheet relating to Shikarpur P.S. Case No. 90 of 1997 under Sections 307, 324, 426/34 and 114 of the Indian Penal Code. Ext. D requisition slip issued by Chet Narain S.I. of Shikarpur Police Station. These documents have been exhibited in order to substantiate the defence of the appellant that there was a case and counter-case and the prosecution story is not the correct version of the case. Argument has also been advanced that the prosecution has suppressed the injury on the person of the accused which he received in the same transaction. As such, the prosecution has also suppressed the real incident in which the appellant received grievous injury, so on account of non-explanation of the injury received by Jamaluddin , the prosecution case should be discarded. So far non-explanation of injury is concerned, it is now well settled that if the prosecution evidence is clear and trustworthy then non-explanation of the injuries on the accused is not fatal for the prosecution. In the present case, the witnesses who have been examined they are family members and neighbours of the informant as well as the appellants. Their presence at the place of occurrence cannot be doubted and whatever they have stated in their evidence that is simply being corroborated by the medical evidence. In such case, prosecution case has been proved sufficiently and there is no reason for disbelieving the prosecution story.

10. Another point which has been advanced by the appellants' counsel is that even if it is held that Jamaluddin is responsible for inflicting injury on the chest of Bikhi Mian the evidence on record shows that there was no pre-meditation of mind and no previous planning for commission of offence. The act on the part of Jamaluddin was a result of grave and sudden provocation and due to this sudden provocation, on the spur of the moment he lost his mental balance and assaulted Bikhi Mian which resulted into his death. Thus, submission have been made that case of appellant Jamaluddin is fully covered by Exception-IV u/s 300 of the Indian Penal Code.

11. The necessary ingredients of Exception-IV of Section 300 of the Indian Penal Code are (a) sudden fight (b) absence of pre-meditation and (c) no undue advantage of cruelty. (d) the occasion must be sudden and not as a cloak of pre-existing malice. It is only an unpremeditated assault committed in the heat of passion upon a sudden quarrel which would come within Exception-IV and it is necessary that all the three ingredients must be found. From the evidence on record it is established that initially Ish Mohamad and Jamaluddin only made a query from Sattar Ansari regarding cutting of bamboo branches. This query resulted into altercation, exchange of hot words and exchange of abuses and as Bikhi Mian gave a challenge that he was going to cut bamboo tree and would see that what would happen, Jamaluddin lost his temper and mental balance. He entered into the house and took out the arm which was within his reach and without thinking about the result of his act he penetrated the sword in the chest of Bikhi Mian. From the evidence it is also apparent that he did not repeat the blow which is also supported by the oral evidence of the witnesses, the inquest report and the post-mortem report. It shows that though Jamaluddin had knowledge that the weapon with which he came out if penetrated would result into death but he had no intention to kill Bikhi Mian as he did not repeat the blow.

12. Considering the evidence and the circumstance, in is a case where Exception-IV of Section 300 of the Indian Penal Code is applicable. The appellant at best can be convicted under Section.304, Part II of the Indian Penal Code. The sentence awarded to appellant Jamaluddin (in Cr. Appeal No. 77 of 2002), as such, is modified and for his conviction u/s 304, Part II of the Indian Penal Code, he is sentenced R.I. for seven years and fine of Rs. 5,000/-. Cr. Appeal No. 77/2002 is dismissed with modification in sentence. The appellant is in custody since 18th June, 1997, and, as such, he has already undergone the period of his sentence. He is directed to be released from custody, if not wanted in any other case. He is discharged from the liability of his bail bond. So far fine is concerned, the appellant will deposit the fine within a period of three months from the date of his release. If fine is not deposited within the stipulated period, he will be taken into custody for undergoing R.I. for six months. Cr. Appeal No. 573 of 2001 is allowed and appellant, Ish Mohamad is acquitted of the charge u/s 302/34 of the Indian Penal Code and as the appellant, Ish Mohamad, is already on bail, he is discharged from the liability of his bail bond.

M.L. Visa, J.

13. I agree.