

(2013) 02 JH CK 0105

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 717 of 2002

Kadir Ansari and Others

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision : 21-02-2013

Acts Referred:

Penal Code, 1860 (IPC) — Section 141, 147, 148, 149, 302

Citation : (2013) 3 AJR 506 : (2013) 2 JLJR 268

Hon'ble Judges : Shree Chandrashekhar, J;D.N. Patel, J

Bench : Division Bench

Advocate : Ramawtar Sharma, for the Appellant; M.B. Lal, Assistant Public Prosecutor, for the Respondent

Judgement

Shree Chandrashekhar, J.—The Criminal Appeal has been filed on behalf of the appellants who have been convicted and sentenced in Sessions Trial No. 7 of 2000 by the learned Additional District & Sessions Judge-Ist, Fast Track Court, Giridih. The appellant Kadir Mian has been convicted for the offence u/s 148 & 302 of Indian Penal Code and is sentenced to undergo rigorous imprisonment for life u/s 302 of Indian Penal Code and further sentenced to undergo rigorous imprisonment for 2 years u/s 148 of Indian Penal Code. Appellants Yusuf Mian, Idrish Mian and Hasim Mian have been convicted under Sections 147 and 302 read with Section 149 of Indian Penal Code and are sentenced to undergo rigorous imprisonment for life for offence u/s 302 r/w 149 of Indian Penal Code and they are further sentenced to undergo rigorous imprisonment for 6 months u/s 147 of Indian Penal Code. Appellant Kulsum Bibi has been convicted under Sections 302 r/w 149 of Indian Penal Code and is sentenced to undergo rigorous imprisonment for life.

2. The prosecution case is that on 10.5.1998 at 21.00 hrs. the informant Md. Sakoor Mian gave his fardbeyan to the police that at about 17.00 hrs, when the informant was going towards the mosque accused Kadir Mian pushed him due to which he fell down and when the informant again started to move, accused Kadir

Mian caught hold of the informant by the neck and abused him and assaulted him by fist on his left eye. On hearing "nullah", Modi Mian who is uncle of informant came there and the accused Kadir Mian fled away. When Modi Mian started to proceed towards the house of Kadir Mian, the informant requested him not to go there but Modi Mian said that he was not going there to quarrel with the accused but to ask why he assaulted the informant. The informant also followed Modi Mian. In the meantime, accused Idrish Mian and Kadir Mian came running with lathi in their hand and they started assaulting the informant. Modi Mian and Jabber Mian who had also reached there. Kulsum Bibi, wife of Kadir Mian, brought a Bhala mom inside the house and gave it to her husband and accused Hasim Mian asked Kadir Mian to assault Modi Mian with Bhala, then Kadir Mian gave a Bhala blow in the abdomen of Modi Mian. Thereafter, Kadir Mian fled away leaving the Bhala in the abdomen of Modi Mian, who fell down and became unconscious. Thereafter, Jabbar Mian took out the Bhala from the abdomen of Modi Mian and with the help of villagers, the informant brought Modi Mian to Sadar hospital, Giridih where the doctor declared him dead. On the basis of fardbeyan of informant Md. Sakoor Mian, First Information Report being Birni P.S. Case No. 36 of 1998 was registered under Sections 147, 148, 149, 324, 323 and 302 of the Indian Penal Code against all five accused persons. After investigation charge-sheet was submitted and cognizance of the offence was taken. Charges under Sections 148 and 302 of the Indian Penal Code were framed against accused Kadir Mian. Charges under Sections 147, 323 and 302 read with Section 149 of Indian Penal Code were framed against accused Yusuf Mian, Idrish Mian, Hasim Mian and Kulsum Bibi. The accused Kulsum Bibi has further been charged under Sections 302/149 of the Indian Penal Code. During the trial, the prosecution examined 12 witnesses. The defence has also examined 2 witnesses. The Trial Court on consideration of the evidences on record convicted and Sentenced the accused persons as mentioned above.

3. Heard learned counsel for the parties and perused the documents on record.

4. The prosecution has examined four eye-witnesses namely, Jabbar Mian as P.W. 1, Nuro Mian as P.W. 3, Mahadeo Mian as P.W. 6 and Sakoor Mian as P.W. 7. The complainant Sakoor Mian is an injured eye-witness who was examined by doctor D. Kumar who has been produced by the prosecution as P.W. 2.

5. The post-mortem examination of the deceased Modi Mian was conducted by Dr. Kausalendra, Kumar, who found following injuries.

One incised penetrating wound 2 1/2" x 1" x Abdominal cavity deep through which coils of intestine was portending over at the level of the 10th rib left side in anterior axillary line. On further dissection there was fracture of the 10th rib underneath the wound & lead further deep with cut injury of left lateral aspect of transverse colon & mesentery.

The abdominal cavity was full of blood. Liver, Spleen & Kidney-NAD. Small intestine contained gas. Stomach contained semi digested food material and

there was no peculiar smell from the content, mucosa wall of stomach was normal urinary bladder was empty. Diaphragm was intact. Lungs NAD. Heart all chambers were empty. Sub cut tissue of neck NAD, Hyoid bone was intact. Larynx and Trachea NAD. Skull was normal, Brain NAD.

Dr. Kausalendra Kumar has opined that the injuries were ante-mortem in nature caused by flat and pointed weapon. He has further opined that death was caused due to shock and hemorrhage as a result of injuries sustained by the deceased which was sufficient to cause death in ordinary course of nature.

6. Dr. D. Kumar, who has examined injuries on the person of Md. Sakoor, has been produced by the prosecution as P.W. 2. He has proved injury report which has been marked as Exhibit-1. He found the following injury on Md. Sakoor Mian:

(a) Swelling 1" x 1/2" with bruise 1" x 1/2" on the outer margin of left eye orbit.

(b) Echomosis over the left eye region clinically NAD.

He has further stated that all the injuries were simple and caused by hard blunt substance such as lathi or fist.

He stated in the Court that all the injuries were simple and caused by hard blunt substance such as lathi or fist. During cross-examination, this witness has admitted that he treated the injured first in the hospital. He has further stated that injured had brought the police requisition to the hospital and produced the said police requisition to him.

7. The defence has also examined two witnesses and exhibited seven documents including written report of Kadir Mian, which was registered as Birni P. 5. Case No. 35 of 1998 and charge-sheet in the said case. Injury report of Kadir Mian alias Kadir Ansari who was examined by doctor Subodh Singh has also been brought on record by the defence. The case set up by the defence is that the prosecution party tried to assault the accused persons and during marpeet, Mahadeo Mian tried to hit Kadir Mian by Ballam however, as Kadir Mian saved himself from the attack, Modi Mian who was behind him got injured.

8. The son of the deceased has been examined as P.W. 1 (Jabbar Mian). He has stated that when Sakoor Mian raised hullah, his father came out of the house and after seeing his father, Kadir Mian ran towards his house. He has further stated that Idrish Mian and Yusuf Mian came with lathi and the wife of Kadir Mian brought one bhala (spear) and gave it to Kadir Mian. On the exhortation of Hasim Mian, Kadir Mian assaulted his father with Bhala which hit his father on the left side of his abdomen and thereafter, Kadir Mian fled away leaving the Bhala in the body of his father Modi Mian. In the cross-examination this witness has admitted that Mahadeo Mian came after the occurrence and Nuro had come there following his father and wife of Ramjaan Mian had gone there following Mahadeo Mian. He has further admitted that after his father had gone they assembled near Imli tree. He has also admitted that several other villagers had assembled at the place of occurrence and there were houses of Rahman Mian, Nasir Mian, Money

Mian, Khusar Mian and Dhumar Mian near the place of occurrence.

9. The prosecution has examined Nuro Mian as P.W. 3 who has stated in the Court that the occurrence took place at around 5 O' Clock in the evening of 10.05.1998 and at that time he was in the courtyard of his house. He has stated that Kadir Mian assaulted Sakoor Mian due to which he fell down and Yusuf Mian and Idrish Mian came with lathi and assaulted Sakoor Mian and jabbar Mian. Wife of Kadir Mian brought Bhala and Hasim Mian asked Kadir Mian to kill Modi Mian. Kadir Mian assaulted Modi Mian with Bhala below his abdomen due to which Modi Mian fell down. During cross-examination, he has admitted that three days after the occurrence his statement was recorded by the police. He has also stated that Idrish Mian had assaulted his mother Goli Khatoon also. Sakoor Mian had suffered assault on his hand and back and Jabbar Mian suffered lathi assault on his leg. Both Sakoor Mian and Jabbar Mian fell on the ground.

10. Somar Mian has been examined as P.W. 4. He has not seen the occurrence and he is a hearsay witness.

11. Mahadeo Mian who has been examined as P.W. 6, has stated that about 2 years 9 months ago he was repairing the roof of his house. He has stated that there is a tree of Tetar nearby where Idrish Mian and Yusuf Mian were assaulting Modi Mian with fists. Idrish Mian and Yusuf Mian also assaulted Sakoor Mian with fists and Lathi and Kadir Mian also assaulted Sakoor Mian with Lathi. In the mean time, wife of Kadir Mian brought a Bhala and gave it to Kadir Mian and Hasim Mian asked Kadir Mian to hit Modi Mian with Bhala thereupon Kadir Mian assaulted Modi Mian with Bhala. He has further stated that Gola Mian took out Bhala from the abdomen of Modi Mian and he tied the injury of Modi Mian with his shirt. He has admitted in the cross-examination that near his house, there are houses of Ramjaan Mian, Lochan Mian Nuro Mian, Bhata Mian and others. He has further admitted that he had not seen Kadir Mian and Sakoor Mian coming from the side of mosque, rather he had seen them near the Tetar tree where there was quarrel between them. He has denied the suggestion that he had tried to assault with Ballam. He has stated that Gola Mian had thrown Ballam. He has further stated that nobody from his house had gone to the Police Station and in fact Chowkidar had gone to the Police Station, however, he did not know the name of the Chowkidar. He has further stated that two days after the occurrence he had given his statement to the police. He has also admitted that the police had taken statement of Hussain Mian, Nasir Mian, Dhuma Mian, Padu etc.

12. The informant has been examined as P.W. 7 by the prosecution and he has supported his fardbeyan given to the police. He has stated that Modi Mian had gone upto the Imli tree following Kadir Mian. Thereafter, Yusuf Mian and Idrish, Mian came with Lathi and Jabbar Mian also came there. There was a Marpeet between them. After Kadir Mian assaulted his uncle Modi Mian with Bhala, Modi Mian fell down and Kadir Mian fled away and thereafter, several villagers had assembled there. He has further stated that police had taken his statement at Sadar Hospital, Giridih. He has admitted in the cross-examination that the

incident which took place near the Imli tree, was witnessed by several villagers namely, Rahman Mian, Chotan Mian, Mahajan Mian, Dibana Mian, Biru Mian etc. He has stated in the Court that after seeing accused persons armed with Lathi they ran away towards their house.

13. The Investigating Officers have been examined as P.W. 8, P.W. 9 & P.W. 10. The Investigating Officer who recorded the fardbeyan namely, Amrendra Kumar, P.W. 8 has admitted that he recorded the fardbeyan at the hospital at about 9.00 p.m. He has not stated in the Court that he found any injury on the body of Sakoor Mian or that he referred Sakoor Mian for medical examination. In so far as the place of occurrence is concerned, the Investigating Officer has stated the place of occurrence being about 100-150 yards from the house of the informant and near the house of accused.

14. The Learned counsel for the defence has submitted that the prosecution has withheld several important witnesses. Though, it has been admitted by the prosecution witnesses that several villagers had assembled at the place of occurrence and there were houses of several persons near the place of occurrence, whose names have been disclosed by the prosecution witnesses during their examination in the Court however, those persons have not been examined. The prosecution has suppressed the genesis of the case and withheld important witnesses whose statements were recorded by the Investigating Officer during the course of investigation.

15. The duty of the prosecution to place before the Trial Court testimony to all available eye-witnesses has been dealt with in the case of " Ram Ranjan Roy Vs. Emperor, , in which Jenkin, C.J. has observed as under,

12. The omission of the Public Prosecutor has involved this case as it comes before us in what Mr. Donogh on behalf of the Crown has very justly described as mystery. Indeed he felt this mystery to be so embarrassing that he asked for a retrial or at any rate for an examination of the witnesses that had been called. But having regard to the time already occupied by the case and the expenditure incurred, this was opposed and reasonably opposed by the defence, I and we must, therefore, dispose of the case on the record as it stands.

13. The sequence of events as described by the prosecution is improbable and unnatural mid hardly accords with the connected actions of responsible human beings. There is obviously something kept back, something omitted which is required to link up the narrative, and to present a reasonable and connected story of what occurred.

16. The duty of the prosecution to examine material witnesses has been scrutinized by the Hon"ble Supreme Court in the case of " Habeeb Mohammad Vs. The State of Hyderabad, . Relying on a judgment of Privy Council in the case of " AIR 1936 289 (Privy Council) , the Hon"ble Supreme Court has observed as under,

56. In a long series of decisions the view taken in India was, as was expressed by Jenkins, C.J. In ... *Ram Ranjan Roy Vs. Emperor*, that the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of a public prosecutor is to represent not the police but the Crown, and this duty should be discharged fairly and fearlessly with a full sense of the responsibility attaching to his position and that he should in a capital case place before the court the testimony of all the available eye-witnesses, though brought to the court by the defence and though they given different accounts and that the rule is not a technical one, but founded on common sense and humanity.

This view so widely expressed was not fully accepted by their Lordships of the Privy Council in ... AIR 1936 289 (Privy Council) that came from Ceylon, but at the same time their Lordships affirmed the proposition that it was the duty of the prosecution to examine all material witnesses who could give an account of the narrative of the events on which the prosecution is essentially based and that the question depended on the circumstances of each case. In our opinion, the appellant was considerably prejudiced by the omission on the part of the prosecution to examine Biabani and the other officers in the circumstances of this case and his conviction merely based on the testimony of the police jamedar, in the absence of Biabani and other witnesses admittedly present on the scene, cannot be said to have been arrived at after a fair trial, particularly when no satisfactory explanation has been given or even attempted for this omission.

17. In the case of " *Narain and Others Vs. The State of Punjab*, , the Hon'ble Supreme Court has held, "Whether a witness is material in a case would be decided whether or not such a witness would have given evidence in support of defence, but the test is whether such witness is essential for unfolding of the narrative on which the prosecution case is based. Whether a witness is so essential or not would depend on whether he would have spoken to on any part of the prosecution case or that he would have been able to give evidence of the facts on which the prosecution relied on.

18. In " *State of U.P. and Another Vs. Jaggo alias Jagdish and Others*, , a case in which a witness who was talking to the deceased as mentioned in the First Information Report, was not examined by the prosecution, the Hon'ble Supreme Court has held as under,

14. Ramesh is the person with whom Lalu was talking at the time of the alleged occurrence. Ramesh was mentioned in the first information report. It is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the "unfolding of the narrative" should be called. This salutary principle in criminal trials has been stressed by this Court in the case of *Habeeb Mohammad v. The State of Hyderabad* for eliciting the truth. The absence of Ramesh from the prosecution evidence seriously affects the truth of the prosecution case.

15. This Court in Habeeb Mohammad's case (supra) referred to the observations of Jenkins, C.J., in Ram Ranjan Roy v. Emperor that the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of a public prosecutor is to represent the administration of justice so that the testimony of all the available eye-witnesses should be before the Court. Lord Roche in Stephen Seneviratne v. The King referred to the observations of Jenkins, C.J. and said that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether the effect of their testimony is for or against the case for the prosecution. That is why this Court in Habeeb Mohammad's case (supra) said that the absence of an eye-witness in the circumstances of the case might affect a fair trial. On behalf of the appellant it was said that Ramesh Chand was won over and therefore the prosecution could not call Ramesh. The High Court rightly said that the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness had been won over. In such a case Ramesh could have been produced for cross-examination by the accused. That would have elicited the correct facts. If Ramesh were an eye-witness the accused were entitled to test his evidence particularly when Lalu was alleged to be talking with Ramesh at the time of occurrence.

19. The witnesses examined by the prosecution namely P.W. 1, P.W. 3, P.W. 4, P.W. 6, P.W. 7 & P.W. 11, all are the family members of the informant. The learned counsel for the appellants has submitted that the evidence of the prosecution witnesses particularly P.W. 1, P.W. 3, P.W. 4, P.W. 6 & P.W. 7 cannot be relied upon as they are highly interested witnesses. In the case of " Ram Ashrit Ram and Others Vs. State of Bihar, , the Hon"ble Supreme Court has held that "when all the material witnesses in a murder trial were either related or otherwise interested in the prosecution, it would be extremely hazardous to convict the accused on the basis of the testimony of such highly interested, inimical and partisan witnesses, particularly when it suffers from material infirmities."

20. The learned counsel for the appellants has contended that it was not the common object of the accused persons to cause death of Modi Mian. The accused persons never shared the common object and in fact their presence at the place of occurrence was not to do any illegal act rather they were being assaulted by prosecution party and therefore, the assembly was not an unlawful assembly. Relying on the evidence of the witnesses learned counsel for the appellants has submitted that for causing the penetrating wound in the abdomen of the deceased Modi Mian, no other accused except accused Kadir Ansari can be held responsible and therefore, other accused persons cannot be convicted for the offence of murder of Modi Mian with the aid of Section 149 of Indian Penal Code.

21. In the case of " Chikkarange Gowda and Others Vs. State of Mysore, , the Hon"ble Supreme Court has laid down that, "the first essential element of

Section 149 of Indian Penal Code is the commission of an offence by any member of an unlawful assembly; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object."

22. In the case of " Bhudeo Mandal and Others Vs. State of Bihar , the Hon"ble Supreme Court has held that before convicting accused with the aid of Section 149 of Indian Penal Code, Court must give clear findings regarding the nature of common object and that the object was unlawful. The Hon"ble Supreme Court has held as under,

We would like to point out that whenever the High Court convicts any person or persons of an offence with the aid of Section 149 a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction u/s 149 of the Indian Penal Code, the essential ingredient of Section 141 of the Indian Penal Code must be established. Section 149 creates a specific offence and deals with the punishment of that offence. There is an assembly of five or more persons having a common object and the doing of acts by members is in prosecution of that object. The emphasis is on common object.

23. The Hon"ble Supreme Court while examining the liability of other accused who were convicted with the aid of Section 149 of Indian Penal Code in the case of " Allauddin Mian and Others Vs. State of Bihar , has held,

Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. 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 one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence

committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149, I.P.C.

24. In the case of " Lalji and Others Vs. State of U.P., , the Hon"ble Supreme Court has held as under,

The two essentials of the section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that likely to be committed. Not every person is necessarily guilty but only those who share in the common object The common object of the assembly must be one of the five objects mentioned in Section 141 I.P.C. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

25. In the case of " Rajendra Shantaram Todankar Vs. State of Maharashtra and Others, , while examining the applicability of Section 149 of the Indian Penal Code, the Hon"ble Supreme Court has held that,

14. Section 149 of the Indian Penal Code 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 person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried

by the members of the assembly, their common object and the behavior of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149-either clause-is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act.

26. In the case of " Shaji and Others Vs. State of Kerala , the Hon"ble Supreme Court has held that mere fact that accused persons were armed would not be sufficient to prove common object. In as much as Section 149 creates a specific offence and deals with the punishment of that offence, in order to convict a person or persons with the aid of Section 149 of Indian Penal Code, a clear finding regarding the common object of the assembly must be available and the evidence discussed must show not only nature of the common object but also that the object was unlawful.

27. Again in the case of " Kuldeep Yadav and Others Vs. State of Bihar , the Hon"ble Supreme Court has held as under,

39. It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object of the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object they would be liable for the same u/s 149 IPC.

28. On a closer scrutiny of the evidence of the prosecution witnesses, we find that there are serious discrepancies in the prosecution case. While P.W. 1 has stated about the Imli tree, P.W. 3 has said that they assembled at Tetar tree. Again, P.W. 6 has said that they assembled at Tetar tree whereas the informant P.W. 7 has admitted in the Court that the incident of marpeet took place at Imli tree. It appears that incident has taken place in three phases. Regarding incident near mosque, there is no eye-witness and the alleged place of occurrence of Marpeet between Idrish Mian, Yusuf Mian and Kadir Mian on one side and the informant, Jabbar Mian and Modi Mian on the other side is not established by the prosecution witnesses, The prosecution witness P.W. 6 has admitted in the Court that Investigating Officer has taken statement of Hussain Mian, Nasir Mian, Dhuma Mian Padu etc. During the course of investigation however, those persons have not been examined in the Court and no reason has been given by the prosecution for non-examination of those witnesses. The prosecution witnesses

have also admitted in the Court that there are houses of several persons near the place of occurrence and in fact at the place of occurrence several villagers had assembled however, nobody has been examined by the prosecution in the Court.

29. The informant Sakoor Mian was examined at 7.45 p.m. by Dr. D. Kumar who has been examined as P.W. 2 by the prosecution. The Investigating Officer (P.W. 8) has stated in the Court that he recorded fardbeyan of Sakoor Mian at 9.00 p.m. However, P.W. 2 has admitted in the cross-examination that the injured had brought a police requisition before him for examination of his injuries. The First Information Report therefore, is a manufactured document which has come into existence after much deliberation with the prosecution party. We find force in the submission of the learned counsel for the appellants. The injury report when read with the evidence of Investigating Officer and Dr. D. Kumar would reveal that informant was examined by the doctor before he gave his fardbeyan to the police in Sadar Hospital, Giridih. This raises a doubt on the prosecution story in so far as assault on the informant is concerned.

30. In so far as role played by appellants Yusuf Mian, Idrish Mian, Hasim Mian and Kulsum Bibi is concerned, we find that injury on the body of informant has not been proved. The evidence of the prosecution witnesses is contradictory in so far as assault by Idrish Mian and Yusuf Mian on the complainant and Jabbar Mian, is concerned. The alleged crime weapon has not been produced by the prosecution and in fact the prosecution witnesses have indicated their ignorance as to what happened to the weapon of assault. The defence has taken a specific plea that the prosecution party was the aggressor and during the course of marpeet, Mahadeo Mian had aimed Ballam at Kadir Mian which hit Modi Mian as Kadir Mian had shifted his place. The defence has also brought on record injury report indicating injuries on the person of Kadir Mian. A cross case being Birni P.S. Case no. 35 of 1998 has been registered at the instance of accused Kadir Mian. There is no reliable evidence brought on record by the prosecution in so far as the role played by accused Hasim Mian, Yusuf Mian, Idrish Mian and Kulsum Bibi, is concerned. We are of the opinion that this is a serious lacuna in the case of prosecution in so far as complicity of accused Yusuf Mian, Idrish Mian, Hasim Mian and Kulsum Bibi in the crime is concerned. The prosecution has failed to prove the charges against the accused Yusuf Mian, Idrish Mian, Hasim Mian and Kulsum Bibi. However, in so far as accused Kadir Mian is concerned, we find that the prosecution witnesses have clearly stated that Kadir Mian assaulted Modi Mian with Bhala and due to which he died. In view of the aforesaid discussion, we hereby uphold the order of conviction and sentence passed by the learned Trial Court, that is, Additional Sessions Judge-Ist, Fast Track Court, Giridih in Sessions Trial No. 7 of 2000 , in so far as the appellant Kadir Ansari is concerned who is appellant no. 1. The prosecution has been able to prove the offence of murder of Modi Mian alias Sona Mian committed by the appellant no. 1 beyond reasonable doubt. In so far as other appellants are concerned, the judgment and order of conviction and sentence dated 27.9.2002 passed by Additional Sessions

Judge-Ist, Fast Track Court, Giridih, is set aside. The bail bonds of all the appellants namely Yusuf Mian, Idrish Mian, Hasim Mian and Kulsum Bibi are hereby discharged and their sureties are discharged from the liabilities. The criminal appeal is partly allowed in aforesaid terms.