
(2019) 10 JH CK 0066

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 663 Of 2011, 13, 108, 294, 428 Of 2012

Md. Mazrul @ Mazzo And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 21-10-2019

Acts Referred:

Indian Penal Code, 1860 — Section 141, 147, 148, 149, 302, 307, 323, 324, 341, 504
Code Of Criminal Procedure, 1973 — Section 315

Citation : (2019) 10 JH CK 0066

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

Bench : Division Bench

Advocate : Purnendu Kr. Jha, S.P. Roy, Ranjan Kumar Singh, Ravi Prakash

Final Decision : Partly Allowed

Judgement

Shree Chandrashekhar, J

1. These five criminal appeals; Criminal Appeal (D.B.) No.663 of 2011, Criminal Appeal (D.B.) No.108 of 2012, Criminal Appeal (D.B.) No.13 of 2012,Criminal Appeal (D.B.) No.294 of 2012 and Criminal Appeal (D.B.) No.428 of 2012, arise out of a common judgment of conviction of the appellants in Sessions Case No.31 of 2008/16 of 2011.

2. The appellants have been convicted under section 302/149 I.P.C for intentionally causing death of Md. Nizam. The appellant, namely, Sk. Afsar was convicted under section 148 I.P.C and the other appellants have been convicted under section 147 I.P.C. They have been sentenced to undergo R.I for life and fine of Rs.5,000/- each under section 302/149 I.P.C. Except the convict, namely, Sk. Afsar, the other appellants have been sentenced to R.I for One year and fine of Rs.1,000/- each under section 147 I.P.C.

3. During the trial the prosecution has examined 7 witnesses; the informant has been examined as P.W 3. The investigating officer of the case has not been examined during the trial.

4. Dr. Subhan Murmu-P.W 4, who has conducted the post-mortem examination, has found the sharp cutting wound, scalp deep to the extent of 3" x 2" over the right parietal region of Md. Nizam, which according to him was caused by a sharp cutting weapon. P.W 4 has also noticed diffused swelling over the occipital region, bruise over the left eye-lid, diffused swelling with bruise over the left elbow region and multiple longitudinal bruises over the back of Md. Nizam.

5. The prosecution has projected P.W 1, P.W 2, P.W 3, P.W 5, P.W 6 and P.W 7 as eye-witnesses, may be their narration of the incident is not in a systematic manner.

6. P.W 1 and P.W 2 are brothers of the deceased, P.W 3 is the father and P.W 5 is the wife of the deceased. The prosecution witnesses, namely, Nabida Khatoon-P.W 6 and Sk. Shahid-P.W 7 are the independent witnesses. The learned Additional Sessions Judge has held that Kamrunnissa-P.W 5 is also a reliable witness insofar as the second part of the occurrence is concerned.

7. The accused persons have set-up a defence that Sk. Afsar and Sk. Tamiz were assaulted by the prosecution party on 05.10.2007 and in a counter-case they have been falsely implicated. They have produced Anant Rai-D.W 1 who has proved the injury reports of Sk. Afsar and Sk. Tamiz which were prepared by Dr. Ram Udgar Ram of P.H.C, Maharma, order sheet in G.R No.1020 of 2007, a formal First Information Report of Meharma (Balbadda) P.S Case No.142 of 2007, the written report of Sk. Afsar dated 05.10.2007 and the certified copy of the charge-sheet in Meharma (Balbadda) P.S Case No.142 of 2007 were tendered in evidence.

8. The learned counsels appearing for the appellants have contended that; (i) failure of the prosecution to explain the injuries on Sk. Afsar and Sk. Tamiz would throw considerable doubt on the prosecution's case, (ii) the prosecution has failed to establish that there was a unlawful assembly and the appellants were part of that unlawful assembly, and (iii) without establishing that death of Md. Nizam has been caused in furtherance of the common object of the unlawful assembly conviction of the appellants with the aid of section 149 I.P.C is improper and unsustainable.

9. Admittedly, the fatal blow on Md. Nizam has been given by Sk. Afsar who has died during pendency of Criminal Appeal (D.B) No.763 of 2012 and, accordingly, the Criminal Appeal on his behalf has been dismissed as abated.

10. On complicity of the other appellants, the learned Additional Sessions Judge has found as under:

17. I have perused the record though only P.W 4 is a formal witness remaining witnesses P.W 1,2,3,5,6 & 7 have named accused persons but not in a systematic way. Accused Mazrul has been named by P.W 3 Sk. Nashib, P.W 5 Kamrunnissa and P.W 6 Nabida Khatoon while accused no.2 Afsar has been named by P.W 1, P.W 2, P.W 5, P.W 6 and P.W 7. Accused No.3 Md. Manjur has been named by P.W

1, P.W 2 and P.W 5. Accused No.4 Md. Gafoor has been named by P.W 1, P.W 2, P.W 3. Accused No.5 Md. Mubarak has been named by P.W 1, P.W 2, P.W 3 and P.W 5. Accused No.6 Sk. Tamiz has been named by P.W 1, P.W 2, P.W 3, P.W 5, P.W 6 and P.W 7 while accused no.7 Md. Yakoob has been named by P.W 1, P.W 2, P.W 3, P.W 5, P.W 6 and P.W 7. Accused No.8 Md. Ekbal has been named by P.W 1, P.W 2, P.W 3, P.W 5, P.W 6 and P.W 7 while accused no.9 Md. Basir has been named by P.W 1, P.W 2, P.W 5, P.W 6 and P.W 7. Similarly accused no.10 named by P.W 1, P.W 2, P.W 3, P.W 5, P.W 6 and P.W 7 and lastly accused no.11 Sk. Asgar has been named by P.W 2, P.W 3, P.W 5, P.W 6 and P.W 7. By this way minimum seven and maximum ten accused persons have been named by the witnesses in sequence who are facing trial in this case. By this way complicity of these accused persons is well proved by the prosecution.

11. There is a case and counter-case instituted by both sides. The occurrence, according to the accused persons, has happened in respect of a quarrel which took place at the mosque at about 2:00 p.m. on 05.10.2007. Dr. Ram Udgar Ram, who has prepared the injury reports of Md. Afsar and Sk. Tamiz, both dated 05.10.2007, has not been examined by the accused persons. The appellants have not examined any witness in their defence to establish the incident in which Sk. Afsar and Sk. Tamiz have suffered injuries at the hands of the prosecution party. They have also not chosen to examine themselves under section 315 Cr.P.C, at least Sk. Afsar. In "Vijayee Singh and Others Vs. State of U.P" reported in (1990) 3 SCC 190, it has been held that failure of the prosecution to explain injury on an accused would not prove fatal for the prosecution if cogent and clinching evidences have been led by the prosecution during the trial. The evidence of P.W 1, P.W 2 and P.W 3 who have spoken in unison about presence of the appellants at the place of occurrence and at the time of occurrence is corroborated by the testimony of P.W 5, P.W 6 and P.W 7. In view of testimony of the prosecution witnesses, particularly, P.W 1, P.W 2 and P.W 3, we find that on participation of the appellants in the incident of 05.10.2007 in which Md. Nizam has suffered injuries has been proved by the prosecution.

12. In the fard-beyan the informant has stated that at about 1:00 p.m. he had gone for prayer in the mosque in his village with his sons, namely, Md. Nizam, Ekram and Enamul. At about 1:30 p.m. the prayer had ended and when they came out of the mosque they found Majrul Sheikh, Sk. Samir @ Sammo, Md. Seraj, Sk. Razwa and Asgar there who started a quarrel with them in respect of repair of a fan in the mosque. They came back home, however, at about 2:00 p.m. the accused persons, 18 in number, variously armed with lathi, farsa, gadasa, bow and arrow came near bansbiti adjacent to the eastern side of his house and started abusing him and his sons. There a quarrel took place between them in which Sk. Afsar inflicted a farsa blow on the head of Md. Nizam which caused serious injury to him. When he fell down on the ground the other accused persons started assaulting him with lathi and danda. According to the informant, his sons have also suffered injuries in the occurrence when they were trying to save Md. Nizam. After the accused persons left the place of occurrence they

brought Md. Nizam to P.H.C, Meharma for treatment, however, the doctor declared him dead. On the basis of his fard-beyan, Meharma (Balbadda) P.S Case No.143 of 2007 was lodged under section 147/148/149/341/323/324/307/302/504 I.P.C.

13. P.W 1 and P.W 2 are the brothers of Md. Nizam, the deceased. They were present at the place of occurrence and according to the prosecution they are the injured witnesses. However, no injury report has been produced by the prosecution during the trial and this is the main reason why the accused persons have been acquitted of the charge under section 307, 324, 341, 323 and 504 I.P.C framed against them for causing injury to Md. Nizam, Ekram and Enamul. But, their statement regarding injuries caused to them can be taken note of if otherwise their testimony is found reliable. P.W 1 and P.W 2 have also deposed about prayer at the mosque, some of the accused persons quarrelling with them at the mosque and later on their assembly near the eastern side of their house. They have spoken about assault by Sk. Afsar on the head of Md. Nizam and assault to them by other accused persons. The learned Additional Sessions Judge has found that P.W 5, P.W 6 and P.W 7, who have spoken about assault on Md. Nizam by Sk. Afsar, are reliable and trustworthy witnesses.

14. In the above state of affairs, we are of the opinion that non-examination of the investigating officer has not shaken the foundation of the prosecution's case. The fard-beyan of the informant was recorded promptly at about 7:30 p.m. on the same day and the appellants have been named by the informant in his statement given to the police. On the next day at about 4:00 p.m., P.W 4 has conducted the post-mortem examination. In these facts, we find that no prejudice has been caused to the appellants on account of non-examination of the investigating officer during the trial. There is no universal rule or strait-jacket formula that non-examination of the investigating officer would automatically cause prejudice to the accused; the prejudice likely to be suffered by the accused must be demonstrated. In "Behari Prasad Vs. State of Bihar" reported in (1996) 2 SCC 317, the Supreme Court has held as under:

"23.... In the facts of the case, it appears to us that the involvement of the accused in committing the murder has been clearly established by the evidences of the eye-witnesses. Such evidences are in conformity with the case made out in FIR and also with the medical evidence. Hence, for non-examination of investigating officer, the prosecution case should not fail. We may also indicate here that it will not be correct to contend that if an investigating officer is not examined in a case, such case should fail on the ground that the accused were deprived of the opportunity to effectively cross-examine the witnesses for the prosecution and to bring out contradictions in their statements for the prosecution and to bring out contradictions in their statements before the police. A case of prejudice likely to be suffered by an accused must depend on the facts of the case and no universal strait-jacket formula should be laid down that non-examination of investigating officer per se vitiates a criminal trial....."

15. Section 149 of the Indian Penal Code is a substantive offence. It embodies 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. The offence under section 149 IPC postulates 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. Once section 149 I.P.C comes into play every member who at the time of the committing of that offence was a member of the assembly would be guilty of that offence. In "Joseph Vs. State Rep. by Inspector of Police" reported in AIR 2018 SC 93, it has been held that section 149 IPC consists of two parts:

"9. Section 149, IPC consists of two parts:

*The first part of the section means that there exists common object and that the offence has been committed in prosecution of the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member.

*The second part of the section means that even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149, if it can be shown that the offence was such as the members knew was likely to be committed."

"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."

16. The doctor has found that other injuries, such as diffused swelling over the occipital region, bruise over the left eye-lid, diffused swelling with bruise over the left elbow region and multiple longitudinal bruises over the back of Md. Nizam were caused by hard and blunt substance. The prosecution witnesses have deposed that the appellants have assaulted Md. Nizam with lathi and danda. The observation of P.W 4, the doctor, about the injuries on Md. Nizam corroborates

the prosecution's case of assault by the appellants on Md. Nizam. However, on such evidence conviction of the appellants under section 302 with aid of section 149 I.P.C is not proper. There was enmity between the informant and Sk. Afsar and Sk Basir. The occurrence has taken place on a trivial matter which has led to quarrel between the parties. On these facts, in our opinion all that the prosecution has been able to prove is that the appellants intended to initiate a Mar-peat and assault Md. Nizam but the prosecution has failed to establish that death of Md. Nizam has been caused in furtherance of the common object of unlawful assembly. The injuries such as bruises and diffused swelling found on the person of Md. Nizam; one of the injuries was on the occipital region of Md. Nizam would make the appellants liable for conviction under section 324 I.P.C.

17. Accordingly, conviction of the appellants, namely, Md. Mazrul @ Mazzo [in Criminal Appeal (D.B.) No.663 of 2011], Md. Manjur and Md. Fasso [in Criminal Appeal (D.B.) No.108 of 2012], Md. Ekbal, Md. Mubarak and Md. Gafoor @ Gafo [in Criminal Appeal (D.B.) No.13 of 2012], Sk. Basir @ Md. Basir and Md. Yakub @ Md. Yakoob [in Criminal Appeal (D.B.) No.294 of 2012], Sk. Asgar and Sk. Tamiz [in Criminal Appeal (D.B.) No.428 of 2012] under section 302/149 I.P.C is set-aside and they are convicted and sentenced to undergo R.I for Two years with fine of Rs.5,000/- each under section 324/149 I.P.C.

18. The bail-bonds furnished by the appellants, who are on bail, are cancelled. They shall surrender before the court below to serve the remaining sentence.

19. Accordingly, Criminal Appeal (D.B.) No.663 of 2011, Criminal Appeal (D.B.) No.108 of 2012, Criminal Appeal (D.B.) No.13 of 2012, Criminal Appeal (D.B.) No. 294 of 2012 and Criminal Appeal (D.B.) No. 428 of 2012 are partly allowed.

20. Let a copy of the judgment be transmitted to the court concerned through 'Fax'.

21. Let lower-court records be sent to the court concerned forthwith.