
(2010) 09 JH CK 0003
In the Jharkhand High Court
Case No : Criminal Appeal No. 876 of 2002

Sabur Mian and Ibrahim Mian	Vs	APPELLANT
The State of Jharkhand		RESPONDENT

Date of Decision : 28-09-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 145
Penal Code, 1860 (IPC) — Section 302, 304, 34

Citation : (2011) 1 JLJR 488

Hon'ble Judges : Dilip kumar sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

D.K. Sinha, J.—This Criminal appeal is directed against the judgment of conviction dated 11.12.2002 and order of sentence dated 12.12.2002 passed by Sri. Udai Narayan Mishra, 4th Additional Sessions Judge, Jamtara in S.C. Case No. 232 of 2001/77 of 2002 arising out of Jamtara P.S. Case No. 144 of 1997.

2. By the aforesaid judgment and order both the Appellants were held guilty for the charge u/s 304 part-II of the Indian Penal Code. The Appellant Sabur Mian was sentenced to undergo rigorous Imprisonment for seven years and fine of Rs. 3000/- considering his old age with default stipulation whereas the Appellant Ibrahim Mian was sentenced to undergo rigorous imprisonment for nine years and fine of Rs. 5,000/- with default stipulation.

3. The criminal law was set on motion on the fardbeyan of P.W.I Sahadat Mian (Informant) recorded on 4.11.1997 before Jamtara police station who narrated Interalla that on previous Sunday the Appellant Sabur Mian had stolen fishes from their common ancestral pond without knowledge of the Informant and others to which on the date of reporting he asked the co-villagers to assemble under a Jack fruit tree to discuss about the conduct of Sabur Mian. The latter was called for in the assembly and when he did not appear there then the members

of Panchayat asked the cousin (brother) of the informant namely Neyaz Ali, (since deceased) to call for Sabur Mian at about 9 O'clock. Neyaz Ali followed their instruction but when he did not return back for a considerable time, then the informant together with on Illias Mian went to the house of the Appellants where they witnessed that the Appellants Sabur Mian, Ibrahim Mian with one Baigni Bibi had been assaulting Neyaz Ali by fists. The informant then raised alarm and approached them but he could not rescue and Neyaz Ali fell down on the ground but even then he was not spared and the assailants continued assaulting him. In the meantime, Baigni Bibi brought an iron rod (Sabbie) from her house probably to be used as the weapon but on the arrival of the villagers on alarm the assailants escaped. The informant found Neyaz Ali dead on the spot. The deceased was removed to his house with the help of the witnesses. Neyaz Ali was very weak and old man and that since he was the head of the family and the eldest, he was asked by the members of Panchayat to call for the Appellant Sabur Mian, the informant added. The occurrence was witnessed as also by Illias Mian and other villagers. On the statement of the informant Jamtara P.S. case No 144 of 1997 was registered for the offence under Sections 302/34 of the Indian Penal Code against the Appellants herein and one Baigni Bibi. The Investigating Officer submitted charge sheet against all the three named accused persons for the said offence, accordingly they were put on trial by the Additional Sessions Judge, Dumka after framing of charge under Sections 302/34 Indian Penal Code. After creation separate sessions court at Jamtara, the Appellants were tried by the Additional Sessions Judge, Jamtara.

4. Altogether six witnesses were produced and, examined on behalf of the prosecution. Amongst them P.W.2 Ilias Mian was unfavourable to the prosecution au such he was declared hostile. P.W.5 Sirajuddin Mian also did not support the prosecution case. The Investigating Officer could not be examined during trial, P.W.6 Dr. Sri. Nath Mishra had held post mortem examination on the body of the deceased who deposed and proved the post mortem report. P.W.3 Enamul Ansari happened to be the son, of the deceased, was admittedly not the eye witness of the occurrence but testified by giving an account of the circumstances leading to death of his father though based upon the information derived from the informant P.W.1.

5. P.W.1 Sahadat Mian, the informant of the instant case, deposed that in the Month of Kartik. some two years ago, at around 8.30 a.m. a panchayati was held in the village Chengaidih on the issue that Sabur Mian had stolen fishes without his knowledge, from their ancestral pond situated in the village. Since Sabur Mian did not appear in the said Panchayati then his brother Neyaz Ali was asked by the members of Panchayati to pursue Sabur Mian to appear before them. Pursuant to such instruction Neyaz Ali went to the house of Sabur Mian and when he did not return back for about 15/20 Minutes then Panches asked him to go and enquire as to why he could not return back. He further testified that he went there and found that Sabur Mian, Ibrahim Mian and Baigni Bibi had been assaulting Niyaz Ali with fists whereupon he and Ilias Mian raised alarm. The

accused continued assaulting Neyaz Ali as a result of which he fell down on the earth. The occurrence took place in the count yard of Sabur Mian and Neyaz Ali was found dead there. He admitted that his statement was recorded by the Jamtara police which was read over to him and he had put his signature on it (Ext.1) He proved the inquest report of the deceased Neyaz Ali which was prepared in his presence, Ext 1/1. He identified the Appellants. In the cross examination the witness deposed that amongst the punch were Abdul Zabbar, Abdul Kudus, Fazlur Rahman and Sohrab all were alive. He admitted that Neyaz Ali was his elder brother and his another brother was Yusuf. All the three were living separately. He further deposed that Neyaz Ali left behind his widow and two sons namely Enamul Ansari (P.W.3) and Samsuddin Ansari (not examined). He clarified by submitting that his father was three brothers namely Iimam Ali, Raju Mian and Rash Mail. The accused Sabur Mian was the son of Iimam Ali and the accused Baigni Bibi was the wife of Sabur Mlan. The witness admitted that accused Ibrahim Mian was married to his daughter but later on divorce was effected between the two, however, he had no grievance against. Ibrahim Mian after such divorce The witness further admitted that the pond in question was in the common share of all the brother. He admitted that Neyaz Ali (since deceased) was an old and weak man. He denied the suggestion that when Neyaz Ail did not return back for some time an alarm was raised that Neyaz Ali had fallen on the way. The witness asserted that he went there and saw that Neyaz Ali war being assaulted by all the three accused persons consequently he fell down and died. There was no blood on the spot but he observed swelling on his chest Neyaz Ali was removed by all the members of Panchayati to his house. He went to the police station at 12 O'clock and informed about the occurrence but the Officer In-charge of the police station instructed that his statement would be recorded at the place of occurrence. Pursuant to that the S.I. came to the place of occurrence at about 2 O'clock. Amongst the persons, removed the dead body to the house of deceased, were Abdul Zabbar Abdul Kudus, Fazlur Rahman, Sahrab and Inayat Ali under instruction of the members" of Panchayati. He had narrated the occurrence to the punch about asrault but he did not approach the assailants. Though Baigni Bibi was holding an iron rod (Sabble) but the road was not used in assault The witness further admitted that he was not chased by the assailants.

6. P.W.2 Iliyas Mian deposed in the court that Neyaz Ali was his cousin brother. Inquest of the dead body was prepared by the police which was signed by him. He proved his signature on the inquest report Ext. 1/2. He admitted that he had not seen the occurrence. This witness was declared hostile but nothing material could be elicited in his cross-examination. This witness yet, testified that he was invited by Neyaz Ali to participate in the Panchayati to which he had asked him to proceed and he would follow him. Neiyaz Ali was elderly and weak man. He heard alarm that Nlyaz Ali had fallen to which he went there and found him lying dead on the earth.

7. P.W.3 Enamul Ansari was the son of the deceased. He deposed that some two

years ago a Panchayati was held under the Jack fruit tree opposite the house of Lukman Mian on the Issue that Sabir Mian had angled fishes stealthily from the pond which was under common possession being the ancestral property. Since the people of other branches raised objection on his conduct a panchayati was convened. He further deposed that when Sibur Mian did not appear in the Panchayati, then Neyaz Ali was asked to call for him. He further narrated that when his father Neyaz Ali did not return back for about one and half hours, Sahadat Mian and Illiash Mian were asked by the members of the Panchayati to look Into the matter. The witness deposed that Sahadat Mian and Illiash Mian went there and witnessed that Sabur Mian, Ibrahim Mian, and Baigni Bibi had been assaulting Neyaz Ali in their courtyard with fists and all the three assailants escaped, by the time the witnesses arrived at the scene. He also went there and found his father lying on the earth sustaining injuries. He was apprised by Sahadat Mian that his father was assaulted by all the three accused. In the cross examination the witness deposed that his father was about 55/56 years old at the relevant time but denied the suggestion that he was 70 years old and was a weak person. When his attention was drawn; this witness stated that it was not a fact that he had stated before the police that his father was 70 years old and was physically weak. The accused were his agnates as Sabur Mian was his uncle. He further denied the suggestion that his father was old and physically weak who fell down and died in his own house where inquest report was prepared by the police and that on account of land dispute the accused were falsely implicated.

8. P.W.4 Alakh Niranjana Choudhary was the Investigating Officer of the case. He testified that on 4.11.1997 he was posted as Officer in charge at Jamtara Police Station. On that date while he was participating in the crime meeting organized by the SDPO he received information regarding death of a person at village Chengadih on account of sustaining assault. He went to village chengadi and recorded the fardbeyan of Sahadat Mian and took up investigation of the case. He proved the fardbeyan, Ext.1. and sent it to the police station on the basis of which formal FIR was recorded giving rise to Jamtara P.S. Case No. 144 of 1997 for the alleged offence under Sections 302/34 of the Indian Penal Code. He proved the formal FIR ext.3 and the Inquest report of the deceased Neyaz Ali ext.4. The dead body was sent to the Jamtara hospital for post mortem examination and he visited the place of occurrence. According to him, the place of occurrence was the courtyard of Sabur Mian surrounded by rooms from three sides and towards north there was mud wall, towards east then was thatched room, in the south there were tiled cover rooms and in the northwest there were uncovered mud walls. Entrance in the house was from the north side and the I.O. was apprised that the deceased was assaulted to death in the said courtyard. He submitted chargesheet against the accused persons. In the cross examination the Investigating Officer admitted that it was not a fact that the informant had reported the occurrence at the police station. He admitted that he did not find an external Injury on the dead body and did not investigate the genesis of the occurrence alleged by the informant he did not record the statement of Yusuf

Mian and Qurban Mian. When his attention was drawn, he admitted that the witness Enamul Ansari had narrated before him during investigation that his father was about 70 years old and was physically weak.

9. P.W.5 Sirajuddin Mian was declared hostile by the prosecution but nothing material could be elicited from his cross examination on behalf of the prosecution yet, the witness deposed that Niyaz Ali was his agnate who was his cousin in relation. He was aged about 70 years and was physically weak as he was suffering from heart disease.

10. P.W.6 Dr. S.N. Mishra had held autopsy on the dead body of Md. Neyaz Ali son of late Raju Mian of village Chengadih P.S. Jamtara on 5.11.1997 at 10.30 a.m. and found the following:

External Features

The body was of average built, dark complexion, mouth was closed, both eyes were closed, black hair on head, rigour mortis present in the upper and lower limbs. He found old scars of scratches in the right scrotum and no apparent external injury was found on his body.

Internal appearance

On opening the skull brain tissues were found pale and the heart chambers contained blood in the thoracic cavity.

Both lungs were examined and it was found that left lung was pale, the upper and middle lobe of the right lung was pale but the lower lobe of the right lung was congested and there was injury to the lung in the back side near the base and there was blood clots on the lungs surface and corresponding surface of thoracic cavity. On opening of abdomen he found haemotoma on the mesentery below the stomach. Liver was congested but stomach was empty. Both kidneys were pale. Urinary bladder was empty. Mesenteric veins were congested.

In the opinion of the witness, cause of death was shock due to injury in the lung. Time elapsed since death at the time of post mortem was determined within 24 hours. He proved the original as well as carbon copy of the post mortem report exts. 5 and 5/1. This witness admitted in his cross examination having not mentioned about the injuries found on lungs as to whether it were ante mortem or post mortem. The lungs in the human body are found in the chest cavity, caged by ribs from two sides and from the upper side caged by muscle and from lower side by diaphragm. He admitted having not mentioned the dimension of the injury found on the lungs and that the cause of injury he could not mention. There was no loose blood in the thoracic cavity but there was blood clots in the corresponding surface of thoracic cavity. Injury was found on the right side of the lower lobe of lung. Although it was not clearly mentioned that there was any puncture to the lungs but injury to the soft tissue was always ruptured injury and may not cause of perforation. He did not find perforation in the lungs and the said injury could not be an old abscess. The witness finally explained that shock

leads to failure of circulatory system causing stoppage of hearts beat. Death was caused due to heart attack.

11. The defence had produced five witnesses after the statement of the Appellants were recorded separately u/s 313 of the Code of Criminal Procedure wherein they were confronted with the materials that were brought on the record. D.W.1 Abdul Zabbar was one of the members of the Panchayati which was held some 4/5 years ago in the month of Kartik. The other punch were Abdul Kudus, Fazlur Rahman, Sahrab, Inayat Ali ,Sirajuddin, Md. Illiyas and Harul Rashid total about 20/25 in number. He deposed that the properties of Sahadat Mian and Sabur Mian were recorded in a common Jamma Bandi. Shadat Mian stated that Sabur Miana had committed theft of fishes from the pond which was in common share of all his brothers to which a Panchayati was held. Sahadat Mian and Illiyash Mian were asked to call for Sabur Mian. The witness further deposed that Neyaz Ali, who was elder brother of Sahadat Mian, fell down opposite the door of Rahaman Mian to which alarm was raised. He along with other witnesses went there but by that time Niyaz Ali died. Niyaz Ali was elder to him having weak physique He admitted that no assault was made by Sabur Mian to Niyaz Ali.

12. D.W.2 Rahaman Mian, who claimed to be the nephew of the deceased Neyaz Ali, deposed that Neyaz Ali died of falling on the ground opposite his house while decision was being taken in Panchayati. He expressed his ignorance as to who had gone there to call for Neyaz Ali. He admitted that Sukur Mian happened to be his uncle in relation. He expressed his Ignorance as to whether Neyaz Ali was suffering from any disease prior to such incident and testified that he had never took him to Doctor at any point of time.

13. D.W. 3 Md. Harul admitted that he was one of the members of Panchayati and others were Kudus, Sirajuddin and Imam Ali. He further deposed that Neyaz Ali fell down on the ground opposite the house of Rahaman Mian while he was coming to attend the Panchayati. Neyaz Ali had died by the time the witnesses rushed to him. He was suffering from heart disease and the witness denied the suggestion that Subur Mian had committed murder of Neyaz Ali.

14. D.W.4 Abdul Kudus deposed that he was Mukkiya of village panchyat. Niyaz Ali was known to him who happened to be his nephew. He had convened a Panchayati in the village at the instance of Sahadat Mian who was the brother of Neyaz Ali the members of Panchayati were Md. Saharab, Md. Illiash, Abdul Zabbar Md. Harul Niyat Ali and many others the Panchayati was held on 4.11.1997 which started at 8 a.m. He testified that Neyaz Ali was informed to participate in the Panchayati but he fell down on the ground opposite the house of Rahabman Mian while he was coming to attend the Panchayati. He along with other went there to see him and the Panchayati could not be held thereafter. He further stated that Neyaz Ali was aged about 75/80 years and was suffering from heart disease. In the cross examination the witness admitted that Panchayati was convened on the issue of fishing in the pond. He admitted that the police

had not interrogated him and also admitted having not stated before the police that Neyaz Ali died of falling on the ground. He denied the suggestion that Niyaz Ali was assaulted to death by Sabur Mian and Ibrahim Mian etc.

15. D.W.5 Md. Sahrab was the Sarpanch of the village Panchayati, who testified that occurrence took place on 4.11.1997. He along with others were sitting in the Panchayati at the Instance of Sahadat Mian who was the brother of Neyaz. Neyaz Ali was invited to attend the Panchayati and while he was coming, he fell down on the ground opposite the house of Rahaman Mian and died. Members of Panchayati went there to see him, as such Panchayati could not be held. Neyaz Ali was aged more than 75 years. The witness deposed that no assault was made to him. In the cross examination the witness admitted that no document was prepared related to issues of Panchayati. He was not interrogated by the police, Sabur Mian happened to be his nephew-in-law in relation. He admitted his access in the house of Sabur Mian.

16. Mr. Jitendra. S. Singh the learned Counsel for the Appellants at the outset submitted that there was no legal evidence against the Appellants who have been erroneously convicted by the trial judge ignoring the long standing enmity between the informant Sahadat Mian and the Appellants. The police, had submitted chargesheet against three accused persons including the Appellants and one Baigni Bibi" but her complicity was disbelieved by the trial judge and she was acquitted from the charges. The judgment of the trial, court is based upon the solitary evidence of P.W.1 who claimed having seen the Appellants assaulting Niyaz Ali only by fists and no weapon was used for such assault. The Trial judge also did not consider the balance of convenience which goes in favour of the Appellants in view of the fact that there was only one witness P.W.1 who claimed to be the eye witness. He went to see Neyaz Ali to the house of the Appellants with Iliyas Mian (P.W.2) and found the Appellants assaulting Niyaz Ali with lists. The learned Counsel pointed out that it would be relevant to mention that Iliyas Mian (P.W.2) did not corroborate the version of P.W.1 Sahadat Mian and he admitted having not seen the occurrence and no question was put to him as to the cause of death of Neyaz Ali. Iliyas Mian P.W.2 clearly stated in his testimony that Neyaz Ali (since deceased) was elderly and a weak man. He on hearing alarm went there and found Neyaz Ali lying on the ground and by that, time he had died. The other witnesses examined on behalf of the prosecution were the members of Panchayat who did not claim to be the eye witnesses of the occurrence except their averments that Neyaz Ali was taken and removed to his house from the house of Sabur Mian and Ibrahim Mian. The autopsy of the deceased was held by P.W.6 who was not definite about the cause of death except his observation that death was possible due to shock on account of injury in the lungs. No corresponding external Injury was found on the body surface of the deceased or any other part of his body and on opening of thoracic cavity the witness found laceration in the tight side of lower lobe of lung but there was blood clots in the corresponding surface of thoracic cavity and no puncture of the lungs could be evident. There was no perforation. The witness failed to give his

opinion as to whether injury found on the lower lobe of the right lung was pre-mortem or post-mortem whether caused by assault with fists by two strong persons.

17. The learned Counsel further submitted that P.W.1 Sahadat Mian testified that when he went to the house of the Appellants, he found them assaulting Neyaz Ali with fists on his body but without any external injury. Neyaz Ali had already died of fallen on the ground by the time he went near him and he did not try to rescue him. On the other hand, all the five witnesses who were examined on behalf of the defence during trial including the Mukhiya and the Sarpanch of the village Panchayat, who had participated the said Panchayat were consistent that when Neyaz Ali was coming to attend the said Panchayat he fell down on the ground opposite the house of Rahaman Mian and died there. They were consistent that Neyaz Ali was aged more than 75 years suffering from heart disease. The possibility of sustaining partial laceration in the lobe of the lungs on account of ailing on the ground keeping in view his ripe old age cannot be ruled out. The prosecution failed to establish and co-relate the injury in the right lobe of the lungs of the deceased on account of infliction of assault with the fists by the Appellants. The occurrence did not take place in the manner presented by the prosecution. Relying upon the solitary evidence of the P.W.1 who had enmity with the Appellants the trial court held them guilty of the serious charge under part II of Section 304/34 IPC. No independent witness could be produced on behalf of the prosecution and in that manner the prosecution failed to prove the charge against the Appellants beyond shadow of reasonable doubts.

18. Mr. Hatim, the learned A.P.P. appearing on behalf of the State submitted that the entire prosecution case is based upon the statements of the solitary eye witness P.W.1 who claimed having seen the Appellants assaulting Neyaz Ali with fists as a result of which he fell down and died in their courtyard. As the Injuries were found in the lungs with blood clots in the post mortem report of the deceased, the allegation against the Appellant cannot be ruled out which finds support from the medical evidence. There was no hard and fast rule that the conviction of the accused cannot be sustained on the statement of the solitary witness. In the instant case P.W.1 had consistently narrated and given statement as to how Neyaz Ali was asked to go and to call for the Appellants to attend the Panchayat and when Niyaz Ali did not return back within reasonable time, the informant was asked to go there and ascertain the cause. Pursuant to that, the witness went there and witnessed the Appellants assaulting Neyaz Ali with fists as a result of which he fell down on the ground and died. The Doctor who held the post mortem examination of the deceased, was definite in his opinion that death of Neyaz Ali was due to shock caused by the injuries to his lungs. The Prosecution case was well proved which needed no interference in appeal, as such this appeal may be dismissed.

19. Having regard to the facts and circumstances of the case, arguments advanced on behalf of the parties and the materials available on the record,

there appears substance in the arguments of the Appellants that the prosecution failed to prove the charge against the Appellants beyond shadow of reasonable doubts. I find that though the injuries were found in the lower lobe of the right lung of the deceased in the post mortem examination but the Doctor who held autopsy failed to clarify as to whether such injuries were pre-mortem or post-mortem. According to P.W.1, he witnessed Neyaz Ali being assaulted with fists in the court yard of the Appellants but no external injury was found at all on the body surface or any part of his body. During post mortem examination the age of the deceased Neyaz Ali was determined by the Doctor to be 70 years and the defence witnesses were consistent that the deceased Neyaz Ali at the relevant time was between 75/80 years, suffering from heart disease and he died of falling on the ground opposite the house of Rahaman Mian while he was coming to attend the Panchayat on the invitation of the Mukhiya and the Sarpanch of the village. I further find from the statements of the Mukhiya and the Sarpanch, who were produced on behalf of the Appellants as defence witnesses that Neyaz Ali was aged about 75 years suffering from heart ailment and he died of falling on the ground opposite the house of Rahman Mianard that he was a weak person. I further find tat the son of the deceased P.W.3 Enanul Ansari did not support the prosecution case substantially though he stated that the age of the deceased at the relevant time was 55/56 years. Though he denied the suggestion when his attention was drawn towards his earlier statement before the police that he had disclosed the age of his father to be 70 years and was physically weak. But the I.O. P.W.4 Alak Niranjana Choudhury affirmed that P.W.3 Enamul Ansari had disclosed before him that his father was about 70 years and physically weak and in that manner the son of the deceased, who was produced on behalf of the prosecution, contradicted his own statement where his statement was drawn u/s 145 of the Indian Evidence Act. For the reason stated above, I find that the prosecution failed to prove its case against the Appellants beyond shadow of all reasonable doubts and whenever any doubt is created as to the complicity of the accused it always goes in their favour. I find substance in the arguments advanced on behalf of the defence that the occurrence did not take place in the manner presented by the prosecution much less narrated in the statement of the P.W. 1 Sahadat Mian who was on inimical term with the Appellants and on his instance Panchayati was convened as against the Appellant No.1 Sabur Mian. I further find that the Investigating Officer of the case failed to establish the place of occurrence in his objective finding as no blood was found in the courtyard of the Appellants, contrary to that all the defence witnesses were consistent that Niyaz Ali died of falling on the ground opposite the house of Rahaman Mian while he was coming to attend the Panchayati on invitation. The I.O. failed to explore the genesis of the case. In the circumstances, after recording benefit of doubt to them the Appellants, above named, are acquitted from their conviction under Part-II of Section 304/34 of the Indian Penal Code and sentence thereof recorded against each of them in S.C. Case No. 232 of 2001/77 of 2002 arising out of Jamtara P.S. Case No. 144 of 1997. Accordingly the Judgment of conviction and order of sentence recorded against them are set aside The Appellants are

discharged from the liability of their bail bonds. Accordingly, this appeal is allowed.