
(2019) 03 JH CK 0016

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 130 Of 1996 (r)

Sobрати Mian And Ors

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 12-03-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 109, 147, 149, 302, 323, 325, 342
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2019) 03 JH CK 0016

Hon'ble Judges : Aparesh Kumar Singh, J; Kailash Prasad Deo, J

Bench : Division Bench

Advocate : A.K. Kashyap, Satish Kr. Keshri

Final Decision : Allowed

Judgement

1. Heard Learned Senior Counsel for the appellants Mr. A.K. Kashyap and learned Additional Public Prosecutor Mr. Satish Kumar Keshri representing the State.

2. Three accused persons out of total ten who faced the Sessions Trial No.88/1987 were convicted by learned court of 1st Additional Sessions Judge, Dhanbad for the charge under Section 147 of the I.P.C. and also under Sections 302/109 of the I.P.C. and were sentenced to imprisonment for life under Sections 302/149 of the I.P.C. while no separate sentence was awarded under Section 147 of the I.P.C. by the judgment of conviction dated 28th June 1996 / order of sentence dated 2nd July 1996. These three convicts approached this Court in the present appeal. During pendency of this appeal, appellant Ayub Mian son of Balli Mian died and the appeal stands abated as respects him in view of the order dated 13th February 2019.

3. The prosecution case as unfolded through the Fardbeyan of Saira Bano daughter of the deceased Sikandar Mian, resident of village Amlatanr, P.S. Govindpur, District Dhanbad, recorded at 2.30 hours on 30th March 1983 at village Amlatanr by the Sub-Inspector Enamul Haque of Govindpur Police Station

is the basis for the F.I.R. bearing Govindpur P.S. Case No.56/1983 registered against 10 accused persons under Section 147/302 of the I.P.C. The informant (examined as P.W.2) inter alia alleged that on 29th March 1983 at about 10 P.M. Genda Mian (her uncle) son of Labhu Mian was returning to his village Amlatanr from Govindpur after selling milk. At that time Maulana Abdul Razaque was irrigating his new jackfruit tree. He started abusing her uncle Genda Mian and threatened that her uncle would be taken to task as he used to spoil the jackfruit trees. This resulted in an altercation between two. Her uncle fled away and reached home, informed her father Raghu @ Sikandar. Thereafter her father and others went to inquire and after a while there was loud brawl, on hearing which informant came out and saw that her uncle and Ainul Mian son of Salim, Kaila Mian, Sobrati Mian, Nasaru Mian, Jalal Mian, Khusru Mian, Yunus Mian, Ayub Mian, Ishaque Mian, Alta Mian and Hafiz Subhani, all residents of village Amlatanr, P.S. Govindpur, District Dhanbad were chasing towards the east direction of their village. Informant followed them and thereafter saw that in front of the door of Basudeo Mian, Ayub Mian sat over the chest of her father and Nasaru Mian son of Khidmat Mian started assaulting her with slaps and other accused persons also indulged in fisticuff. Thereafter her father was brought to the road where he died. All the accused persons fled away. The cause of occurrence is previous enmity due to land dispute. She asserted that this incidence was seen by the villager Sultan Mian and wife of Basudeo Mian. The incidence occurred at around 11 P.M. in the night.

4. After completion of investigation chargesheet was submitted against 10 accused persons bearing no. 45/1983 dated 12th May 1983 under Sections 147/342/323/325/302 I.P.C. After cognizance and committal, charges were framed by learned 5th Additional Session Judge on 22nd August 1991 against all the 10 accused persons under Sections 302/34 I.P.C. and Section 147 I.P.C. which were read over and explained to them in Hindi to which they pleaded not guilty and claimed to be tried.

5. During course of trial prosecution examined seven witnesses namely P.W.1- Sarifan Bibi, P.W.2- Saira Bano, P.W.3- Sultan Mian, P.W.4- Md. Hussain, P.W.5- Govinda Devi, P.W.6- Sabir Alam and P.W.7- Dr. Rai Sudhir Prasad who had conducted post-mortem on the dead body of Sikandar Mian (deceased) and proved the post-mortem report in his pen and signature as Ext.1. No other documentary evidence was adduced on behalf of the prosecution. After closure of the prosecution evidence the statement of the accused persons were recorded under Section 313 Cr.P.C. to which they denied their involvement and claimed themselves to be innocent.

6. Learned trial court on appraisal of the evidence on record and upon hearing the case of the parties represented through their counsel acquitted rest seven persons while convicting these three accused for the aforesaid charges.

7. We have carefully scanned the entire material evidence on record to test the correctness of the impugned judgment of conviction and order of sentence. We

noticed the following conspicuous features.

8. The prosecution has neither proved the Fardbeyan nor the left thumb impression of the informant P.W.2 on the Fardbeyan, signature of any of the Fardbeyan witnesses and the formal F.I.R. has also not been proved. The prosecution has also not proved inquest report of the dead body prepared by the Investigating Officer. The Investigating Officer has not been examined as a prosecution witness. P.W.1 and 2 have claimed themselves to be eye-witness whose testimony we will examine later on but the other prosecution witnesses namely P.W.3 Sultan Mian, P.W.5 Govinda Devi and P.W.6 Sabir Alam have been declared hostile on the request of the prosecution. P.W.4 has given a cryptic evidence and not supported the case of the prosecution. P.W.7, as observed, was the Medical Officer who proved the post-mortem report. As such before us is the evidence of P.W.1, 2 and 7 and the only documentary evidence as the post-mortem report which apparently was the basis for the learned trial court to record its conviction. We also find that the charges were framed under Sections 302/34 of the I.P.C., though 10 accused persons were chargesheeted and surprisingly conviction has been recorded under Section 302/109 of the I.P.C. while order of sentence was passed under Section 302/149 of the I.P.C. Apart from that these three accused persons were convicted under Section 147 of the I.P.C. against which no separate sentence has been awarded.

9. From the testimony of P.W.2 we find that the Fardbeyan which is the initiation of the entire prosecution case, though not proved, indicates that the incidence was noticed by Sultan Mian (P.W.3) who has turned hostile and wife of Basudeo Mian who is P.W.5 Govinda Devi who has also turned hostile. As per the Fardbeyan, informant alleged the name of all accused persons, but specifically alleged that Ayub Mian the deceased appellant sat over the chest of her father and pressed it hard and that Nasaru Mian assaulted her by slaps and other accused persons also indulged in fisticuff as a result of which her father died. In the Fardbeyan there is no mention of specific assault by any of the other accused persons including these two surviving appellants. In her testimony before the trial court we find that she has improved her case substantially and stated in chief that her father Raghu @ Sikandar (deceased) was chased from their house by Kaila Mian (appellant), Sobrati Mian (appellant), Usmani Mian who has been acquitted, Ayub Mian the deceased appellant and Anil Mian who has been acquitted. She further states that he was chased up to the house of Govinda Devi which is at a distance of 500 yards and that she was also running with her father. During her statement in-chief she alleges that Kaila and Sobrati both appellants herein assaulted her father by Lathi which is a fact not stated in her Fardbeyan. As per her Fardbeyan one Ayub Mian had sat over the chest of her father and rest of the accused persons indulged in fisticuff. It transpires from her statement in cross-examination that one Maulana Razaque had died just before the death of her father. At para-7 of her cross-examination she states that the Police had chargesheeted Sharifan and Gaida Mian. Sharifan is P.W.1. She further states that Police had asked her in the Police Station to give her statement that who all

have killed her father and then her statement was taken and read over to her on which she inscribed her thumb impression. Perusal of the F.I.R. shows that her Fardbeyan was recorded at village Amlatanr and not at the Police Station. This witness in her Fardbeyan does not refer the presence of P.W.1 Sharifan Bibi as eye-witness to the occurrence. It is to be kept in mind that the case of the prosecution was framed showing assault by unlawful assembly. 10 accused persons were chargesheeted. Therefore, in order to test the veracity of the prosecution story in a case where there were large number of accused persons, the test laid down in the case of Masalti Vrs. State of U.P. reported in AIR 1965 SC 202 as also followed in the recent judgment rendered in the case of Inder Singh & Ors. Vs. State of Rajasthan reported in (2015) 2 SCC 734 have to be followed. It is to be seen whether the allegations of assault by an unlawful assembly was supported by more than two or more prosecution witnesses. We find that in this case P.W.2 who is the author of the Fardbeyan is also not a reliable witness as there are serious contradictions in her testimony.

10. We have scanned the evidence of P.W.1. She is the wife of Gaida Mian, uncle of the informant who has not been examined by the prosecution. She has stated that on hearing Hullah (brawl) she came out and saw that her elder brother-in-law Sikandar (deceased) was being chased by Kaila, Sobrati both appellants, Hafiz Saheb, Ailun, Ayub (deceased appellant) and Adrup. She states that he was chased up to the courtyard of Govinda Devi and she was following them. She further alleges that Adrup and Sobrati assaulted him by Lathi and then rest of the accused persons sat over his chest and pressed it, as a result his ribs were broken and he died. She denies any knowledge of the reason of such murderous assault. In her cross-examination she states that she was running on hearing Hullah and had reached the house of Govinda Gwalin. There were several houses in between, such as house of Sabir Alam (Mukhiya), Sharafat Mian, Chutti Mian, Ultan Mian and Basharat Mian. However, despite of the brawl raised by her daughter Shaira Bano, no one came. She further states that when she first saw the occurrence, she was at a distance of 1-2 steps from Sikandar and the accused persons were chasing him. At para-10 of her cross-examination, she states that Maulana Razaque had died. She does not know who killed him. She denies any dispute between Maulana Razaque and deceased Sikandar over irrigating the jackfruit tree. She again says that there was a pre-existing enmity between Maulana Razaque and Sikandar in relation to land dispute. She again says that their enmity was only trivial. Before the incidence both of them used to indulge in playful banter. She also states that Maulana Razaque had died before Sikandar died. At para-12 of her cross-examination she states that she had seen the accused persons chasing Sikandar from the distance of 20-30 ft. She has named Sobrati Mian and Kaila Mian both appellants among the persons who were chasing them and 2-3 of them had Lathi. She further states that Sikandar fell down as a result of assault by Lathi.

11. From her deposition we find that she has projected the prosecution case at variance from that of the informant. The informant P.W.2 had not alleged any

assault by Lathi and at best had alleged that Ayub Mian (deceased appellant) sat over the chest of her father and pressed it and rest of the accused persons indulged in fisticuff. The testimony of P.W.1 therefore does not also inspire confidence in the eye of the Court to be treated as an eye-witness nor does it corroborate the first information story narrated through the informant. P.W.7 the Medical Officer who has conducted the post-mortem report and proved it as Ext.1. He had found the following antemortem injuries on the deceased :

- (i) Abrasion 1½" x ½" vertically on left side of forehead starting from the eyebrow.
- (ii) Abrasion ½" x 1/3" placed ¾" horizontally away from left eye.
- (iii) Abrasion ¾" x ¾" about 3" below the left eye.
- (iv) Abrasion 2" x ¼" on inner surface of left fore arm just below the elbow.
- (v) Abrasion ¼" x ¼" on right elbow.
- (vi) Abrasion ½" x ¼" on outside of left knee.
- (vii) Abrasion 2" x 1/3" on outside of top of left thigh.
- (viii) Multiple abrasions ½" x ½", ½" x ½", ½" x ¼", ¼" x ¼" and ¼" x ¼" on back of abdomen and pelvis.

12. The description of injuries indicates that there were abrasion injuries 8 in number. Death occurred due to shock and haemorrhage as a result of above injuries and were caused by hard and blunt force. In the cross-examination, the Medical Officer has stated that the above type of injuries are ordinarily fatal but not invariable. If treated timely, the injured may be saved. He could not opine whether the above injuries would lead to causation of death immediately or after sometime. Evidently, the nature of the injuries found on the dead body gave an indication that the deceased suffered an assault by more than one person, but the prosecution has not been able to identify and prove the presence of the members of the unlawful assembly by the evidence brought on record as discussed herein above.

13. A principle of caution was laid down in *Masalti* and subsequently followed in other cases including *Busi Koteswara Rao Vs. State of Andhra Pradesh* reported in (2012) 12 SCC 711. In the case of *Inder Singh* (supra), the ratio rendered in *Busi Koteswara Rao* has been expounded in very clear terms at para-20, relevant extract whereof is quoted hereunder :

"13. It is clear that when a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, the normal test is that the conviction could be sustained only if it is supported by two or more witnesses who give a consistent account of the incident in question."

14. Considered in this light we hardly find any material legal evidence on record

to sustain the findings recorded by the learned trial court. Learned senior counsel for the appellant has pressed the appeal after analysis of the evidence as discussed herein above and submitted that the conviction of these two persons are not justified on any yardstick of legal proof. Though learned Additional Public Prosecutor has laboured hard to support the findings of the learned trial court but the case of the prosecution has suffered on so many counts that it is rather indefensible for him to defend.

15. Before parting, we cannot remain silent but comment upon the approach of the learned trial court who surprisingly has framed charges under Sections 302/34 of the I.P.C. in a case of assault by an unlawful assembly and recorded conviction against the three accused persons under Section 302/109 of the I.P.C. and Section 147 of the I.P.C. also, but order of sentence has been passed under Section 302/149 of the I.P.C. We stop at that, but would expect the learned trial courts to be more cautious in framing the charges and conducting trial of such serious cases in future.

16. In the light of detailed discussion recorded herein above, the impugned judgment of conviction dated 28th June 1996 and order of sentence dated 2nd July 1996 passed by learned 1st Additional Sessions Judge, Dhanbad in Session Trial No.88 of 1987 is set aside. The appellants who are on bail, they are discharged of the liability of their bail bonds. The appeal is allowed.