

(2011) 09 PAT CK 0001

In the Patna High Court

Case No : Criminal Appeal (DB) No. 169 of 1989

Wakif Mian @ Makaiya Mian

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 307, 324, 34

Citation : (2012) 4 PLJR 788

Hon'ble Judges : Navaniti Pd. Singh, J;Ashwani Kumar Singh, J

Bench : Division Bench

Advocate : Manoj Kr. No. 1 and Sanjay Kr. No. 7, for the Appellant; Shashi Bala Verma and Mr. Raja Surendra Mohan for the Informant, for the Respondent

Final Decision : Allowed

Judgement

Navaniti Pd. Singh, J.—We have heard the learned counsel for the sole appellant, learned Additional Public Prosecutor (APP) and the learned counsel for the informant who has made a late appearance. The appellant has been convicted by the learned Additional Sessions Judge-II, Madhepura in Sessions Case No. 8 of 1985 for an offence u/s 302 of Indian Penal Code (IPC) for causing the death of one Liyakat Mian and sentenced to life imprisonment. It may be mentioned here that there were three other accused persons who were charge-sheeted for offence under Sections 302/34 of IPC but have been acquitted by the trial Court.

2. The prosecution case is based upon a Fardbayan of PW-4 which is Exhibits. In the Fardbayan, it is alleged that on 27.4.1984 early in the morning, the appellant Wakif Mian @ Makaiya Mian was affixing pegs for hoisting his thatched roof. This was objected to by Liyakat Mian who warned him that if he did not stop, he would report the matter to the police. Upon this, the appellant is said to have assaulted the deceased with farsa which he had in his hands because of which the deceased fell down. Other accused persons were also there armed with Lathi. This statement was recorded by the Sub-Inspector (SI), S.N. Prasad of Kumarkhand Police Station (PS), District-Madhepura at about 6 am. Later first

information report (FIR) was registered under Sections 307, 324 of IPC at about 7 pm on the same day.

3. The injured was then taken to Kumarkhand State Dispensary and was examined by Dr. Tulsi Prasad (PW-6), the Medical Officer present therein. He drew up an injury report which is Exhibit-2. Seeing the seriousness of the patient, he referred the injured to Sadar Hospital, Madhepura. The injured was under treatment and ultimately died on 11.5.1984, after about two weeks, at the Madhepura Sadar Hospital. PW-7 is Or. B.N. Mishra who was then the Junior Medical Officer who conducted the post mortem examination which has been exhibited as Exhibit-3. Consequent to the death of the injured, Sections 302/34, IPC was added and ultimately charge-sheet filed against the appellant and three others. Upon cognizance being taken and the case being committed to the Court of Session and the appellant and others not pleading guilty, charges were framed. As against the appellant, he was charged u/s 302, IPC and others were charged under Sections 302/34, IPC. The defence of the appellant was total denial and false implication.

4. In order to establish the charge, prosecution has examined eight witnesses. PWs-1 and 2 Reyasat Mian and Ishak Mian are brothers of the deceased. PW-3 Md. Rojit Mian is the only independent witness but he has been declared hostile, PW-4 is Sagir Mian who is the informant and is the son of the deceased. PW-5 is Bibi Allo Khatoon who is the wife of PW 4. PW-6 Dr. Tulsi Prasad, as stated earlier, is the doctor who prepared the injury report and referred the injured to Madhepura Sadar Hospital. PW-7 Dr. B.N. Mishra is the Junior Medical Officer who conducted the post mortem examination on 12.5.1984 and PW-8 is Raghubansh Narayan who conducted the investigation. Defence did not lead any evidence.

5. Learned counsel for the appellant has submitted that PW-4 Sagir Mian who is the informant and the son of the deceased claimed to be an eye witness as per the Fardbayan. As per the Fardbayan, the only allegation is against the appellant of giving one farsa blow on the head of the deceased with other accused persons were there with lathis. Learned counsel points out that when this witness comes in Court to depose, there is material change in the shape of improvement in the prosecution story. He not only states that appellant gave one farsa blow on the head which had caused a wound of about 1" x 1-1/2" on the right hand side of the skull of the deceased, he adds that the rest of the three persons, who were armed with Lathi, assaulted the deceased once he had fallen down. In his cross-examination, he states that while getting the Fardbayan recorded, he had disclosed this fact of assault by Lathi after assault by farsa. When we refer to the Fardbayan, this aspect is totally missing. Learned counsel for the appellant then draws our attention to the injury report that was first prepared which is Exhibit-2 and the deposition of PW-6 Dr. Tulsi Prasad in that regard. The injury report clearly shows that there was only a singular wound which was a lacerated wound of 1-1/2" x 1" scalp deep over the right side of the scalp caused by hard and blunt substance. In his cross-examination, the doctor has clearly admitted that

he had examined the whole body of the injured and found only one injury on his person and that was on the head. Then our attention is drawn to the deposition of PW-1 Reyasat Mian who is the brother of the deceased. He, in his deposition, has also improved the prosecution story. He also adds that after the appellant assaulted the person by hitting farsa blow on the head, others indiscriminately assaulted the injured with Lathi because of which the injured became unconscious. In his cross-examination, he has admitted in paragraph-11 that upon hearing the altercation and the sound of assault when he reached the place of occurrence, Liyakat Mian, the injured was already on the ground unconscious. Thereafter, Ishak Mian (PW-2), Md. Rojit (PW-3) and Sagir Mian (PW-4), the informant came. In para-12 of the cross-examination, he has stated that the injured must have received over twenty Lathi blows. Then our attention is drawn to the evidence of PW-2 Ishak Mian who is also the brother of the deceased. He, in paragraph-6 of his cross-examination, admits that after he had reached the place of occurrence, Md. Rojit (PW-3), Reyasat (PW-1) and Sagir (PW-4) came. PW-3, as noted earlier, is the only independent witness but he has been declared hostile as he did not support the prosecution case. He stated that he had heard that the accused persons had assaulted the injured with Lathi and the main Lathi blow was given by this appellant. Then we come to PW-5 Bibi Allo Khatoon who is the wife of the informant being the daughter-in-law of the deceased. As noted above, no other prosecution witness has even mentioned her name in regard to persons present and seeing the occurrence but she claims to have seen the occurrence alongwith others. She reiterates that once the injured had fallen down, he was mercilessly beaten with lathis.

6. Learned counsel for the appellant submits that if these evidences, as brought in Court, are looked into, it would be seen that the very presence of the prosecution witnesses, at the time when farsa assault was said to have been made, becomes doubtful. He rightly submits, in our view, that virtually each of the prosecution witness says that as if he was the first one who came when assault was made and the others came later. They all consistently talk about assault by farsa which is attributed to the appellant and brutal merciless assault by Lathi thereafter by the three other charge-sheeted accused whereas this latter part of brutal assault by Lathi is not even pleaded in the Fardbayan which is lodged by PW-4, the son of the deceased nor stand supported by injury report as the doctor specifically mentions only one injury.

7. Having considered these evidences, we are of the view that the prosecution version is not free from doubt. The manner in which the four prosecution witnesses have deposed in Court creates a doubt as to whether any one of them had seen the occurrence. As noted above, PW-1, the brother of the deceased categorically states that when he reached the place of occurrence, the injured was already on the ground unconscious. He categorically states that PWs-2, 3 and 4 came to the place of occurrence thereafter. Thus, his evidence clearly belies the claim of PWs-2, 4 or for that matter PW-5 who is not even mentioned to be present from being an eye witness. He has not been declared hostile and,

therefore, the prosecution is stuck with his evidence. Similarly, when we come to PW-2, another brother of the deceased, he also paints a picture as if he had seen the occurrence first and the rest came later. He also alleges indiscriminate Lathi assault. Then we come to PW-4 who again paints a picture as if he was the person who was there when assault was made followed by Lathi assaults and the rest came later. Even he, in his deposition like PWs-1 and 2, does not even mention the presence of his wife. Then PW-5, the wife of PW-4 is again examined as if she was there though her name is not found in the deposition of either PWs-1, 2 or 4 as being present there or even in the FIR. This clearly creates a doubt as to whether any one had seen the occurrence or not and further what is the occurrence apart from the fact that the injured fell down unconscious. There is not a single Lathi blow on the body contrary to the consistent allegation that there was indiscriminate Lathi assault after the injured had fallen down. These two major contradictions, if we may say so, create a doubt upon the entire prosecution story.

8. The only person who was competent to clear this doubt was the injured himself who, as noted above, was under treatment at Madhepura Sadar Hospital for almost 15 days before he dies. The best person to bring this clarification on record would have been the Investigating Officer (IO) but we find that even though the injured was alive and under treatment for over 15 days, the IO did not bother to visit the Hospital even once. Not only this, he had not even seen the injured even once, as admitted by him in his cross-examination. He admits that the injured was forwarded to the doctor for examination by the Officer-in-charge after recording the Fardbayan. This failure on part of the prosecution has caused serious prejudice to the defence. Further, out of the four prosecution witnesses, PWs-1 and 2 are brothers of deceased and PWs-4 and 5 are the deceased's son and daughter-in-law. They are not only very closely related but as we would point out they are interested witness as well.

9. The allegation that has been made is that the appellant was putting pegs for hoisting hatched roof. About 10 pegs he had put which were on his land, the 11th was allegedly encroaching upon the land of the prosecution party who were all having their huts adjacent to each other. The land between the two parties was only about 1-1/2 to 2 cubic (hanth), as admitted by PW-5. They had every reason to stop the said attempt of the appellant. Thus, being highly interested and related witnesses, their evidence has to be scrutinized with care and caution.

10. Upon noticing the two major discrepancies in the prosecution story that is the manner of assault, the story being improved and the very doubtful presence of the prosecution witnesses at the time of assault alongwith the IO making no efforts to examine the injured in the Hospital, we are of the view that it would not be safe to convict the appellant on this evidence especially when the learned trial Court itself acquitted three other persons on the same evidence against which neither the informant nor the State has filed any appeal. In that view of the matter, we have no option but to hold that the prosecution has failed to

establish the charge beyond reasonable doubt as against the appellant. The conviction and the sentence are, thus, set aside. The appeal is allowed. The appellant is discharged from the liabilities of his bail bonds.

Ashwani Kumar Singh, J.

I agree.