

Md. Allauddin and Another Vs. the State of Bihar

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Court : Patna

Decided On : Feb-26-2014

Judge : I.a. Ansari & Kishore Kumar Mandal

Appeal No. : Criminal Appeal (DB) No. 990 of 2008

Appellant : Md. Allauddin and Another

Respondent : The State of Bihar

Judgement :

I. A. Ansari and K. K. Mandal, JJ.

1. Under challenge, in the present appeal, are the judgment, dated 23rd July, 2008, and, the order, dated 24th July, 2008, passed, in Sessions Trial No. 499 of 2002, by the learned Additional Sessions Judge, Fast Track Court No. 9, Purnea.

2. By the impugned judgment, the two appellants, namely, Md. Allauddin and Md. Jahangir, stand convicted under Sections 148, 342, 323, 504 and 302 read with 149 of the Indian Penal Code. Following their conviction under Section 302 read with Section 149 of the Indian Penal Code, both the appellants aforementioned have been sentenced, under the impugned order, to suffer imprisonment for life with fine of Rs. 10,000/- (ten thousand) each and, in default of payment of fine, to suffer rigorous imprisonment for one year. No separate sentence has been awarded for the appellants conviction under Sections 148 and 342, 323 and 504 read with Section 149 of the Indian Penal Code.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be described as under:

(i) On 17.12.2002, at about 3 PM, PW 7 (Md. Sahabuddin) went to his field and saw that accused Jahangir Ali had left one buffalo and two oxen to graze in the said field, where Kheshari crops (a kind of pulse) were standing. PW 7 scolded Jahangir Ali for having left his cattle to graze in the said field. Accused Jahangir became angry and went back to his house with his cattle. Thereafter, when Sahabuddin (PW 7), accompanied by his younger brother, Md. Sadik Ali (PW 1), had been irrigating their agricultural field, located adjacent to the agricultural field of one Gajendra Biswas, accused Md. Allauddin, Jahangir Ali, Md. Sajjad, Abdul Barik, Ezart Ali, Noor Mohammad, Md. Jamshed Ali, Md. Mansoor Ali and Abdul Mallik, came armed with lathis, surrounded PW 1 and PW 7 and, then, began assaulting them. On being so assaulted, when PW 1 and PW 7 started screaming for help, Sahabuddins brothers, Md. Allauddin (PW 8), Ibarat Ali (PW 4) and Md. Azad Ali (PW 5), came running and, on seeing them coming, accused Sajjad and accused Noor Mohammad caught hold of PW 7 tightly and accused Allauddin caught hold of Sadik Ali (PW 1). In the meanwhile, accused Bibi Memphul, wife of accused Jahangir, came running from her house with a sickle in her hand and handed over the said sickle to her husband (accused Jahangir), whereupon accused Jahangir gave a blow, by means of the said sickle, on the abdominal area of Md. Azad Ali. The blow, so given by sickle, severely cut Azad Alis abdominal area. With his intestine bulging out, Azad Ali fell down writhing in pain and died on the spot. As halla was raised and villagers started assembling at the place of occurrence, the accused persons fled away.

(ii) On being informed about the occurrence, Officer-in-Charge, Kasba Police Station, came to the house of Md. Sahabuddin (PW 7) and recorded, at about 06:30 PM, a fardbayan (Exhibit 5) and, treating the said fardbayan as the First Information Report, Kasaba (Jalalgarh) P.S. Case No. 226 of 2002 was registered, under Sections 147, 148, 323, 342, 504 and 302 read with Section 149 of the Indian Penal Code, against all the accused aforementioned.

(iii) During investigation, police held inquest over the said dead body, which was also subjected to post mortem examination, and, on completion of investigation, laid charge sheet, under Sections 148, 342, 323, 504 and 302 read with Section 149 of the Indian Penal Code, against the accused persons.

4. At the trial, when charges, under Sections 148, 342, 323, 504 and 302 read with Section 149 of the Indian Penal Code, were framed against the appellants, both the appellants pleaded not guilty thereto.

5. In support of their case, the prosecution examined altogether 11 (eleven) witnesses including the Investigating Officer (PW 11). The two accused-appellants were, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure, wherein they denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being, briefly stated, thus :

(i) The two accused-appellants and others were assaulted by Azad (since deceased) and his group of people. As a result thereof, the two accused-appellants and their family members sustained injuries. The two accused-appellants were wholly innocent; whereas Azad Ali and his members of family were the ones, who had attacked the present accused-appellants and their family members. The assaults, so mounted on the accused persons, resulted into mutual assault and, in the process, not only accused Allauddin and accused Jahangir, but others, too, sustained injuries, whereupon a fardbayan was lodged, at Kasba Police Station, which led to the registration of Kasba (Jalalgarh) P.S. Case No. 227 of 2002, under Sections 341, 342, 323, 324, 448, 379 read with 34 of the Indian Penal Code, against the prosecution witnesses aforementioned.

(ii) In support of their case, the defence, too, has adduced evidence by examining two witnesses.

6. Having come to the conclusion that the evidence on record proved both the accused-appellants guilty of the charges framed against them, learned trial Court convicted them accordingly and passed sentences against them as have been mentioned above. Aggrieved by their conviction and the sentences, which have

been passed against them, this appeal has been preferred by the two convicted persons.

7. Heard Mr. Vindhya Keshari Kumar, learned senior Counsel for the accused-appellants, and Mr. Ashwini Kumar Sinha, learned Additional Public Prosecutor appearing on behalf of the State.

8. While considering the evidence, adduced by the prosecution, let us, first, examine the evidence of PW 7 (Md. Sahabuddin), who is informant of the present case. This witness's evidence is that, on 7.12.2002, while he was irrigating his field, at about 4.30 PM, accused Md. Allauddin, Md. Jahangir, Sajjad, Noor Mohammad, Abdul Warique, Abdul Mallick, Ejarat, Mansoor and Md. Jamshed came there, armed with lathis and dandas, surrounded him and Md. Sadik Ali (PW 1) and started assaulting them, whereupon they raised halla and, upon hearing the halla, their brothers, Allauddin, Ebarat, Musak and Azad came running to save them, but accused Bibi Memphul, in the meanwhile, brought a sickle and handed over the same to the accused Jahangir and accused Allauddin told, 'kill the rascal?', whereupon Jahangir gave a blow with the sickle on the abdomen of Azad Ali (younger brother of PW 7), whose intestine bulged out and he died on the spot. It is also in the evidence of PW 7 that they brought Azad Ali to their house, sent information to police, Shashi Bhushan Thakur, Sub Inspector of Police (PW 11), arrived at their house, who recorded the statement of PW 7 and, finding the statement to be correct, he (PW 7) put his thumb impression thereon. It is further in the evidence of PW 7 that PW 11 held inquest over the said dead body.

9. Close on the heels of the evidence of PW 7, PW 1, who, too, claims to have been present at the place of occurrence, has deposed that, on 17.12.2002, at about 3 PM, when he (PW 1) and his brother, Md. Shahabuddin (PW 7), were going to drain out water from their field, they saw, at that point of time, that accused Jahangir had left his one buffalo and two oxen on the field belonging to the family of PW 1 and PW 7, where Khesari crops (a kind of pulse) were standing, and when they forbade Jahangir from making his cattle graze at the said field, Jahangir abused them and went to his house and when both, PW 1 and PW 7, were draining out water from their field, Jahangir Ali, Sajjad Ali, Allauddin, Md.

Barique, Md. Mallick, Md. Ejarat Ali, Noor Mohammad, Jamshed Ali and Mansoor came there, surrounded them and started assaulting them and, when halla was raised by them (PW 1 and PW 7), their brothers Alauddin, Ebarat Ali and Azad Ali came running to save them (PW 1 and PW 7) and, on seeing them coming, accused Allauddin caught hold of Azad Ali, Bibi Memphul brought a sickle from her house and handed it over to her husband (Jahangir), accused Allauddin told accused Jahangir to kill the rascal and accused Jahangir, then, cut Azad Ali's abdomen by means of sickle resulting into Azad Ali's intestine bulging out, Azad Ali fell down and died on spot and, thereafter, Allauddin, Jahangir Ali, Sajjad Ali, Noor Mohammad, Abdul Barique, Md. Mallick, Md. Ejarat Ali, Md. Mansoor and Md. Jamshed assaulted and caused injuries to him (PW 1) Shahbuddin (PW 7), Allauddin and Ebarat Ali by assaulting them with lathis, dandas and sickle and, thereafter, all the accused fled away.

10. While considering the evidence of PW 1 and PW 7, what becomes clearly noticeable is that the informant (PW 7) clearly shows that having carried Azad Ali to their house, police were informed by the family of PW 7 (informant) about the occurrence, PW 11 (Investigating Officer) arrived and recorded statement of PW 7. This statement has been proved as Exhibit-5, which has been treated as fardbayan.

11. However, a bare reading of the fardbayan clearly shows that though this statement (Exhibit-5) has been treated as fardbayan and it became the basis of registration of the case against the present appellants and others, this fardbayan was given by PW 7 at the door of his house.

12. Notwithstanding, therefore, the fact that fardbayan (Exhibit-5) has been treated as the First Information Report of the case, the First Information Report was the information, which had, in fact, been received by the police at Kasba Police Station, which set the law into motion and brought PW 11 (Investigating Officer) to the house of the informant (PW 7), where fardbayan was recorded.

13. The contents of the fardbayan (Exhibit-5) could not have, therefore, been treated as the First Information Report. Apart from this, First Information Report was the information, which the police had received at the said Police Station, and

the fardbayan (Exhibit-5) is, in effect, a statement of PW 7 recorded, during investigation of the case, under Section 161 of the Code of Criminal Procedure. This, in turn, shows that the contents of the so-called fardbayan (Exhibit-5) were not admissible in evidence except as a previous statement of PW 7.

14. Another fall out of the above discussion is, as already indicated above, that the First Information Report was the information, which had been given to the police, at the said police station and which had brought the Investigating Officer (PW 11) to the house of the informant (PW 7). This First Information Report has, however, not been produced, at the trial, by the prosecution and the learned trial Court has also proceeded treating Exhibit-5 as the First Information Report without noticing the fact that the contents of the fardbayan (Exhibit-5) constituted merely a statement of the informant (PW 7), recorded during investigation of the case, under Section 161 of the Code of Criminal Procedure.

15. The question, therefore, which stares at us, is : what was the information, given first in point of time, to the police?

16. Sadly enough, the evidence on record provides no answer to the vital question posed above.

17. Resultantly, therefore, it does not surface on record as to what information had been received by the police, which brought them to the place of occurrence. Consequently, we could not even know as to what was the description of the occurrence given to the police and what allegation or allegations had been made against the present accused-appellants or any one else, but the learned trial Court appears to have paid no attention to this deficient feature of the case.

18. What may also be noted is that while PW 1 claims that he (PW 1) and Sahabuddin (PW 7) were draining out water from the field, PW 7 claims that at the relevant point of time, he (PW 7) and his brother (PW 1) were watering their field. Thus, how the occurrence had commenced has not clearly surfaced from the evidence on record.

19. What is extremely important to note, now, is that though PW 1 has denied that it was PW 7 and the members of his family, who had assaulted the accused persons and the member of the family, the fact remains that the Investigating Officer (PW 11) has clearly deposed that he had visited Purnea hospital and found both the accused persons in the hospital, where they had been admitted, on 18.12.2002, for their treatment and the accused persons, too, had instituted a counter case.

20. Though the defence has not been examined, in the present case, the doctor, who is claimed to have examined injuries on both the accused-appellants, the evidence of the Investigating Officer (PW 11) clearly shows that the accused were, indeed, admitted to the hospital on 18.12.2002 and remained there till 30.12.2002 for their treatment.

21. The evidence on record, thus, clearly reveal that in the occurrence, wherein Azad Ali had died, the accused-appellants, too, had sustained injuries. How the injuries had been caused on the accused persons has not been explained by the prosecution nor is there any explanation discernable, in this regard, from the evidence on record.

22. It is, therefore, clear that not only the genesis of the occurrence, but how the occurrence had taken place has not been truthfully deposed to by the prosecution witnesses and they have, thus, suppressed the truth. Without having known exactly as to what the occurrence was or how the occurrence had taken place, it was too hazardous to convict any of the present two accused-appellants.

23. When we turn to the evidence of PW 2 (Shah Jamal), we notice that according to this witness's evidence, on the day of occurrence, at about 4:00 PM or 4:30 PM, while he was working at the house of one Afsar Ali, he heard halla, went to the land of Ayub Ali and saw scuffle taking place there and noticed that accused Allauddin and accused Sajjad had caught hold of Sahabuddin and accused Allauddin instigated them to commit murder, whereupon accused Bibi Memphul handed over a sickle to accused Jahangir, who stabbed Azad Ali by means of the sickle, cutting Azad Ali's abdomen, Azad Ali fell down writhing in pain and died on the spot.

24. Interestingly enough, it has come in the evidence of PW 2 that the persons, who were involved in the marpit, i.e., scuffle, were Sajjad, Alauddin, Jahangir, Noor Mohammad and Jamshed. It is also in the evidence of PW 2 that he had seen 10-15 persons at the place of occurrence, where they were catching hold of each other and assaulting each other by means of arms and lathis and that sickles were being used as whips in the fight.

25. What appears to have escaped the notice of the learned trial Court is that it is the clear evidence of PW 2 that he had seen cut injuries on both Jahangir and Allauddin, i.e. the two accused-appellants, with blood coming out therefrom and that the marpit (i.e., mutual assault), had taken place at the very place of occurrence and Jahangir had also filed a case.

26. Thus, the evidence of PW 2 clearly shows that even accused persons had sustained cut injuries on their persons in the said occurrence, but the prosecution has failed to explain as to why the accused persons were found to have sustained injuries in the said occurrence or how the accused-appellants had sustained injuries on their person. This fact further strengthens our inference that the prosecution has suppressed the truth and has not presented before the Court the truth and whole of the truth. Without knowing the truth and whole of the truth, it was too hazardous to conclude that the two accused-appellants were the ones, who had, as alleged against them, caused injuries on Azad Ali leading to his death.

27. Coming to the evidence of PW 3, we notice that this witness has deposed about assault on Azad Ali, Sahabuddin and others by accused persons, but he has not said a word about the assault, which had taken place on Jahangir, Allauddin and their relatives. In fact, one cannot ignore that PW 3 claims that Jahangir and Allauddin did not receive any injuries in the assault; whereas the evidence of PW 2, which we have discussed above, clearly shows that both, Jahangir and Allauddin, had, indeed, suffered cut injuries on their persons. PW 3 cannot, therefore, be said to have disclosed the truth before the Court and his evidence was too unsafe to place reliance upon.

28. When we turn to the evidence of PW 4 (Ebarat Ali), who is full brother of the informant and also of deceased Azad Ali, we notice that according to the evidence of PW 4, he (PW 4), along with Naushad and Azad Ali, rushed to the place of occurrence on hearing halla. This witness has deposed that when he reached the place of occurrence, accused Allauddin exhorted to kill, wife of Jahangir gave sickle to Jahangir and, then, Jahangir gave blow, by means of sickle, on the abdomen of Azad Ali, Azad Ali's intestines bulged out and Azad Ali died on the spot. Thereafter, the accused persons fled away from the place of occurrence.

29. PW 5 (Md. Azad) has, in his deposition, stated that while on way to his house, he reached near the house of Allauddin Maulvi, he saw Md. Azad Ali came running and a lady (Bibi Mempul) gave Jahangir a sickle, who stabbed Azad Ali by means of sickle on his abdomen, and, as a result thereof, Azad Ali's intestines bulged out and he died on the spot and, thereafter, the assailants fled away.

30. In her deposition, as an ocular witness, PW 6 (Bibi Sameena), too, has stated that sickle was given to Jahangir by Bibi Memphul, Jahangir stabbed Azad Ali by means of sickle, Azad Ali's intestines bulged out and he died on the spot.

31. PW 8 (Md. Allauddin), brother of the informant and the deceased, has deposed that he reached the place of occurrence with Azad Ali and Ebarat Ali to save the informant (PW 7) and Sadik (PW 1) from assault inflicted by the accused persons. He has also deposed that Jahangir was given a sickle by his wife and, then, Jahangir gave a blow, by means of sickle, on the abdominal area of Azad Ali resulting into bulging out of his intestines leading to his death on the spot.

32. While considering the evidence of PW 4, it needs to be noted that same as PW 3, PW 4 also denies to have seen any injury on the persons of Jahangir and Allauddin. In fact, PW 4 denies that there was any assault on accused persons.

33. The evidence given by PW 3 and PW 4, being contrary to the evidence on record, which we have discussed above, and when the evidence of neither P.W.-3 nor P.W.-4 can be treated to be evidence of a reliable witness, none of these two witnesses could have been treated as reliable witness.

34. The question, however, remains as to how the accused persons were injured and how they happened to have received, in the light of the evidence of the Investigating Officer (PW 11), medical treatment at Purnea hospital. Moreover, the fact that Allauddin and Jahangir had sustained cut injuries on their persons and these injuries were bleeding has been accepted by PW 2.

35. Blowing to pieces the evidence of PW 1 and PW 7, PW 3 has deposed that when he reached the place of occurrence, he saw both the parties assaulting each other.

36. Notwithstanding the fact that PW 6 has claimed that accused Allauddin and accused Jahangir were the ones, who had injured Azad Ali, he has admitted, in his cross-examination, that he went to the place of occurrence on hearing halla that someone had stabbed Azad Ali by means of a sickle. This shows that PW 6 could not have seen Azad Ali being stabbed by accused Jahangir. Further-more, though PW 6 claims that Allauddin had caught hold of Azad Ali, neither PW 1 nor PW 7 makes any such claim. This shows that PW 6 was either not an eye-witnesses or he has not stated the truth at the trial and has, thus, been withholding the truth.

37. According to the evidence of PW 9 (Dr. Krishna Kant Singh), on 18.12.2002, at 8 AM, he examined Allauddin, at Primary Health Centre, Jalalgarh, and found as follows: œ(1) Lacerated wound 1? x 1? over middle scalp (2) Vague tender swelling over left thumb?

38. PW 9 has also examined Md. Ibarat on the same day, i.e. on 18.12.2002, and found œTender swelling 2? x 1? over mid scalp?.

39. It further transpires of the evidence of doctor (PW 9) that he (PW 9) had examined Ayub Ali, too, and found as follows: œ(1) Lacerated wound two in numbers, 1? x 1? over forehead; (2) Tender swelling 1? x ? over right knee; (3) Tender swelling 1? x ? below right eye; (4) Tender swelling over left thumb.?

40. In the opinion of the doctor (PW 9), injuries on the persons of the three injured, were of simple nature and caused within 12 to 24 hours duration due to some solid and concrete material. This witness proved the three injury reports as Exhibits 2,

2/1 and 2/2.

41. Nothing has been elicited from the cross-examination of the doctor (PW 9) to show that his findings or his opinion, with regard to the nature of injuries, are incorrect or untrue.

42. It is the case of the prosecution that the deceased Azad Ali's dead body was subjected to post mortem examination by PW 10 (Dr. Sheikhar Prasad Viswas), who found as follows: æEXTERNAL EXAMINATION:- Average built, black hair, rigour mortis present in both upper and lower extremities. An incised wound of 3? x 2? deep to the underleaved viscera on the abdominal wall. Viscera protruded out of the wound (coils of the small intestine and part of large intestine). ON DISSECTION :- Peritoneal cavity contained full of blood, stomach contained semi-digested food materials, lungs on section-pole, heart “ intact, on section chamber empty, liver-on section pole. CAUSE OF DEATH : Hyperdynamic shock leading to cardio respiratory failure, as a result of injuries mentioned above.?

43. Notwithstanding the fact that the defence denies that PW 10 had conducted the post mortem examination on the dead body of Azad Ali, the fact remains that except the suggestion, so offered to the doctor (PW 10), there is nothing on the record to show that what was suggested to the doctor (PW 10) was true. Therefore, there is no reason for this Court to take a view that PW 10 has not performed post mortem examination, as claimed by him. This apart, there is no reason for this Court to take the view that the findings of the doctor (PW 10), as regards the injury, which the said deceased had sustained, and/or his opinion with regard to the cause of death of the said deceased suffers from any incorrectness, untruthfulness or inaccuracy.

44. Situated thus, we have no reason to doubt, and we do conclude, that Azad Ali had died on having received an incised wound, on his abdomen, as has been described by the doctor (PW 10).

45. Notwithstanding, however, the fact that the prosecution has not presented, at the trial, the whole of the truth, what has emerged unimpaired and unshaken are the facts that marpit (i.e., mutual assault) did take place between the two parties

aforementioned, accused-appellant, Jahangir, was not armed with any deadly weapon and it was, rather, his wife, accused Bibi Memphul (since acquitted), who allegedly brought a sickle and handed over the same to her husband (i.e., accused-appellant Jahangir) and it was, by means of the said sickle, that accused-appellant, Jahangir, assaulted Azad Ali, on the latter's abdominal area, causing injuries, as described above, leading to his death.

46. In the circumstances indicated above, the question is as to what offence, if any, the accused-appellant Jahangir had committed.

47. While considering the question, posed above, it requires to be noted that there is no clear explanation of the injuries, which the accused-appellant, Jahangir, had sustained. The evidence on record also speaks loud and clear that the assault on Azad Ali by the accused-appellant, Jahangir, by means of sickle, was not premeditated but took place on the spur of the moment, when the sickle, as revealed from the evidence on record, was handed over to him by his wife. We cannot also ignore the fact that the accused-appellant, Jahangir, gave merely one blow by the said sickle on the abdominal area of the said deceased. There is nothing to indicate from the evidence on record that the accused-appellant had been obstructed from giving further blows on the said deceased. Had the accused-appellant intended to cause death of Azad Ali, there would have been, in the facts and attending circumstances of the case, more than one blow, on the said deceased, by means of sickle. The case at hand, is, thus, a case of single assault on the said deceased without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner.

48. In the circumstances mentioned above, the accused-appellant, Jahangir, could not have been held and ought not have been held guilty of offence of murder, though he could have been convicted and ought to have been convicted for committing the offence of culpable homicide, not amounting to murder. Since the act of the accused-appellant, Jahangir, was without the intention to cause death of the said deceased, but with the knowledge, which is attributable to him, that his act of assault by sickle on the abdominal area of the said deceased was likely to

cause death of the deceased, we are clearly of the view that the act of the accused-appellant, Jahangir, fell within the ambit of Section 304 (Part-II) of the Indian Penal Code.

49. As far as accused-appellant, Alauddin, is concerned, there is neither any meeting of minds nor is there any evidence to show that Azad Ali had been killed in prosecution of common object of the unlawful assembly, which had been allegedly formed. The question, therefore, of the provisions of Section 149 of the Indian Penal Code being applicable to the case of the accused-appellant, Alauddin, did not arise at all. In such a circumstance, he could not have been convicted under Section 302 read with Section 149 of the Indian Penal Code.

50. In the result and for the reasons discussed above, this appeal partly succeeds. The conviction of the accused-appellants, under Section 302 read with Section 149 of the Indian Penal Code, stands set aside. The accused-appellant, Allaiddin, is, therefore, acquitted of the offences, which he has been found guilty of and convicted.

51. However, the accused-appellant, Jahangir, is held guilty of having committed an offence punishable under Section 304 (Part-II) of the Indian Penal Code and he is hereby convicted accordingly.

52. For the conviction of the accused-appellant, Jahangir, under Section 304 (Part-II) of the Indian Penal Code, he is hereby sentenced to suffer rigorous imprisonment for a period of 6 (six) years and pay fine of Rs. 1,000/- and, in default of payment of fine, suffer rigorous imprisonment for a further period of one month. The sentence so passed shall be subject to the provisions of set off as embodied in the Criminal Procedure Code.

53. Since the accused-appellant, Allaiddin, is already on bail, he and his bailors are discharged from their respective bail bonds. 54. Send back the lower Court record along with a copy of this judgment.