

Cr. Appeal (D.B) No. 186 of 1995 (P)

(Against the judgment of conviction dated 28.06.1995 and order of sentence dated 30.06.1995 passed by 3rd Additional Sessions Judge, Deoghar in Sessions Trial No. 41 of 1993)

1. Khalil Mian s/o Khusru Mian
2. Tabul Mian s/o Afzal Mian
3. Charka Mian s/o Afzal Mian
4. Abdul Mian s/o Sukar Mian
5. Idris Mian s/o Haki Mian
6. Habib Mian s/o Sulaman Mian
7. Rafique Mian s/o Suleman Mian
8. Chuttu Mian @ Chutra Mian s/o Suleman Mian
9. Babu Mian s/o Suleman Mian
10. Nema Mian s/o Suleman Mian
11. Feku Mian s/o Sanu Mian
12. Aabid Mian s/o S.Mian

.....Appellants

Versus

The State of Bihar (Now Jharkhand) ...Respondent

CORAM: **Hon'ble Mr. Justice Rongon Mukhopadhyay**
Hon'ble Mr. Justice Deepak Roshan

For the Appellant	: Mr. Jitendra S. Singh, Advocate
	Mr. Sudhansu Kumar Deo, Advocate
For the State	: Mr. Pankaj Kumar, P.P

C.A.V ON 24.06.2024 PRONOUNCED ON 31 /08/2024

Per Deepak Roshan, J. The instant appeal is directed against the judgment of conviction and order of sentence dated 28.06.1995 & 30.06.1995, respectively, passed by 3rd Additional Sessions Judge, Deoghar in Sessions Trial No. 41 of 1993; whereby the appellants have been convicted for the offence under Sections 302/149 & 147. The appellant Charka Mian @ Rajauddin Mian has been further convicted under Sections 148 and 307. All of them have been sentenced to life imprisonment. However, no separate sentence has been awarded under Section 147,148 and 307 of I.P.C

2. The prosecution case as per the F.I.R is that the fardbeyan of the informant namely Hakim Miyan (P.W.- 5)

recorded on 07.11.1992 at 16:30 hours at Referral Hospital, Madhupur and as per the said fardbeyan there was a well belonging to the injured Guljar Mian at village Chetnari. It is further alleged that the said well situated in front of the house of the injured Guljar Mian and just at a distance of about 30 to 40 hands from the house of the accused Khalil Mian.

It is further stated that on 07.11.1992 at about 8 a.m, Guljar Mian (P.W. 3) was irrigating his potato field. In the meantime, the accused Khalil Mian reached there and told him that he would irrigate his own potato field first upon which Guljar Mian did not agree and replied that he was irrigating his potato field and thus he would continue to irrigate the same. Thereafter some heated exchange of words took place between Khalil Mian and Guljar Mian and in the meantime Khalil Mian raised alarm and called the named accused persons upon which the accused persons came there with deadly weapon.

It is further alleged that Charka Mian attacked on the head of Guljar Mian with farsa due to which he sustained cut-bleeding injury on his head. It is further alleged that Kamruddin Mian immediately rushed to rescue the said Guljar Mian but the accused Kudus Mian gave a heavy lathi blow on his neck due to which he fell down on the ground and thereafter on the instigation of accused Habib Mian he gave repeated lathi blows on the head, leg and neck of Kamruddin Mian when he was lying on the ground in injured condition. Thereafter the informant Hakim Mian rushed there to help him upon which the accused Rafique Mian caused Lathi blow on his nose as a result of which the blood started coming out of the nose of Hakim Mian. Jamunia Mian and Riaj Mian also sustained injuries there. The accused Nema Mian assaulted with Lathi on the head and back of Riajuduin Mian as a result of which he sustained bleeding injuries. Juman Mian also sustained injury on his leg caused by the accused Khalil Mian. Thereafter, alarm was raised, the witnesses named in the fardbeyan (Ext.6) reached there and witnessed the entire occurrence. After assaulting them about 6 to 7 accused persons entered into the house of the accused

Khalil Mian which was situating at a distance of 30 to 40 hands from the place of occurrence and the remaining accused persons fled away and all the injured persons were taken to Referal Hospital, Madhupur where one of the injured persons, namely, Kamruddin Mian died during course of the treatment.

3. Thereafter, an F.I.R was drawn up and the case was investigated and on completion of the investigation the charge-sheet was submitted, on the basis of which the learned Chief Judicial Magistrate, Deoghar took cognizance and the case was committed to the Court of Sessions for trial. The appellants pleaded not guilty and claimed to be tried.

4. The prosecution in order to bring home the charges examined altogether 11 witnesses apart from several documents exhibited by both the parties.

The defence has also examined 5 witnesses and have also got some document exhibited.

P.W-1 is Riajuddin Mian (injured witness). In cross examination at Para-5, he admitted that Khalil Mian has also registered a case against 18 persons including him. As per this witness at Para-6 Ibrahim is not an eye witness; though as per F.I.R. Ibrahim is eye witness. This witness also stated new facts at Paras-9 and 10.

P.W-2 is Jumman Mian (injured witness). This witness also admitted that there was hot conversation/altercation between the Guljan Mian and Khalil Mian; hence no case is made out under Section 149 I.P.C. In cross examination at Para-5, he deposed that for the same occurrence accused Khalil has lodged case against 18 persons. He stated in Para-6 that the case was lodged by Khalil against 18 accused is from the same ancestor. He cannot say the genealogical table of accused persons and they are relatives/ brothers. He did not know in which name the land was mutated and their homes are at the same place.

P.W-3 is Guljar Mian (injured witness). In cross examination, he deposed at Para 6 that in relation to the instant occurrence, Khalil lodged a case against 19 accused including

the present witness. We are from the same forefather. Khalil, Azad, Abid, Khudus, Riajuddin and others were not sustained any injury and all accused persons not belong to same family. Only Habib, Rafique, Babu, Nemo, Chutur were belonging to same family and they are residing near said well about distance of 100 Gaj. They are sons of Suleman and rests accused persons are ancestor of Karmali. Their lands and Parcha are different. There is no land of Habib near the said well. He stated in Para-7 that it is not true that there is land dispute regarding the Draupadi between both parties; but the dispute is regarding the land of Imambara for which case is going on. At the time of occurrence, 16 persons were assembled there on behalf of this witness and 12-14 persons were assembled on behalf of accused persons. There was no previous enmity between them. All of a sudden, altercation took place and bricks and stones were pelted, but I am not sure that how many persons were pelting bricks and whose bricks sustained to whom; hence no case is made out under Section 149 of 1.P.C.

P.W-4 is Madan Mohan Yadav (Advocate Clerk) - Formal witness who identify the handwriting and signature of Sri M.P. Yadav (PW-11), Officer-in-Charge, Karon police station. In cross examination at Para-2, he admitted that he had not worked with Officer-in-Charge and FIR has not been written in his presence and he has no knowledge about the case.

P.W -6 is Tekan Mian @ Teku Mian (Tender witness).

P.W-5 is Hakim Mian (Informant- Injured witness) - This witness also admitted that there was hot conversation/altercation between both of them and in cross examination at Para-4, he also stated that the accused namely Khalil lodged a case regarding the assault against 18 persons including this witness in which this witness along with other witnesses were made accused. There was no injury on the body of Abid Mian, Khudus, Khalil, Azad and Riajuddin. After given Fardbeyan, treatment was started at about 4-4:30 to 5:00 P.M. and in Para -7 he also deposed that the counter case filed by Khalil in which all accused persons belongs to the one family and

accused persons belongs to three families and there were no land near the well and only the land of Sukar and Khudus is near the said well.

P.W-8 is Ibrahim Mian. He is witness of inquest report. In cross examination at Para - 2, he has admitted that in the same occurrence Khalil Mian lodged a case against 18 persons in which I am also accused and Hakim Mian (PW-5) informant is my cousin brother. He signed after one day of the occurrence. Prior to the post-mortem he signed at about 07:00 A.M. morning.

P.W-9 Md. Ishaque - He is also a witness of inquest report. In cross examination at Para-2, he deposed that the informant is my uncle and Khalil Mian lodged a case in which my uncle was made accused.

PW-11 Maheshwar Prasad Yadav (Investigating Officer). In cross examination at Para -5, he deposed that he did not find the mark of blood at the place of occurrence, and also not seized the bricks and stones at the place of occurrence. He did not prepare map, of the place of occurrence. He did not find the Plot No. of the place of occurrence and also not verify the land of plot No. of the boundary at the place of occurrence. He could not say the plot No. of the place of occurrence. In para-6 he stated that he found the injury of the accused Khudus @ Khudus Mian, Charka Mian @Izaul Mian, Tako Mian @ Tabul Mian, Abdul Mian, Khalil Mian, Javed Mian, Idris Mian and he also taken separate statement and they were already examined by the Doctor. In Para -7 he told that Tekar Mian told him that I heard the son of Feku Mian, Afzal Mian, and Hanif and Hakim; all were quarrelling and assault was going on. In Para - 11 he further deposed that Guljar has not taken the name of all the accused persons and he gave the name of only 8 accused persons, and also said during course of quarrel he did not saw all the accused persons. The dispute between the parties regarding the Imambara and the land of Karbala and he has also not seized the blood stains clothes, and they have assaulted to each other and both parties were injured.

In the Cross Examination dated 05.09.1994 on recall by Defence; at Para-4 he stated that he was also Investigation Officer of Karon P.S. Case No. 102/1992 (Exhibit-A and Exhibit B). The Khalil Mian gave a *Fardbeyan* on 07.11.1992 which was registered and I was investigate the case and submitted charge sheet and the place of occurrence was same in the both cases and he found bricks and stones thrown, and also found that the bricks and stones thrown near the house of informant, and charge sheet submitted under Sections 147/148/149/323/324/342/427 of I.P.C. .

5. Learned counsel for the appellants has made the following submissions:

- (i) There is a delay in lodging the F.I.R., the occurrence took place at 08:00 A.M. on 07.11.1992, but the *Fardbeyan* of informant (PW-5) was recorded at 16:30 hours on 07.11.1992
- (ii) There are no independent witnesses examined by the prosecution, all are interested witnesses.
- (iii) There was a case and counter case between the parties. In same occurrence, the informant registered an F.I.R. as Karon P.S. Case No. 101/1992 dated 17.11.1992 and the accused Khalil Mian registered an F.I.R. as Karon P.S. Case No. 102/1992 dated 07.11.1992.
- (iv) There was a free fight between the parties in same occurrence; hence Section 149 of I.P.C. is not applicable.
- (v) The accused side also sustained injuries namely Khalil, Khudus and Riyazuddin, Abid Mian, Azad (Right of private defence of the property).
- (vi) The I.O. did not found any blood stain at place of occurrence.
- (vii) It was a case of free fight between the both parties and Section 149 of the I.P.C. is not applicable in the facts and circumstance of the case as held by the

Apex Court in the case of **Kanwarlal & another Vrs. State of M.P.** reported in **2002 (7) SCC 152.**

(ix) There is also a right of private defence of property in which the Hon'ble Apex Court has laid down the law in the case of **Subramani & others Vrs. State of T.N. at 2002(7) SCC 210 & Kashiram & others Vs. State of M.P. (2002) 1 SCC 71.**

Apart from the aforesaid arguments and the rulings of the Hon'ble Apex Court, Mr. Singh also made reference to the case of **Kanwarlal and another Vs. State of M.P.** reported in **(2002) 7 SCC 152**, wherein the Hon'ble Apex Court has held in paragraphs no. 7 as under:

“7. The High Court has also noticed that PWs 1, 7 and 16 also received injuries in the incident. However, there was no specific evidence as to which of the accused caused these injuries; it is admitted by the witnesses that the stones were pelted from both the sides and injuries to these persons were caused by pelting of stones; it appears that there was some kind of free fight on the spot between the two parties; so unless it was shown that a particular accused caused these injuries, no one can be held responsible by taking recourse to Section 149 IPC.

6. Relying upon the aforesaid grounds Mr. Singh contended that the appellants should be acquitted from the charges as the allegation was against one Md. Khalil Mian, who has now expired and an affidavit to that effect has been filed by Investigating Officer; hence his case may be abated.

Accordingly, the case of the appellant, Md. Khalil Mian has been abated.

At this stage, it is relevant to indicate that appellant no. 10, Nema Mian has already died; hence his case has been abated vide order dated 21.08.2023.

7. Learned counsel for the appellants has made an alternative argument that looking to the allegation and the deposition of the prosecutrix and other P.W.s, in no case it can be said to be an offence under Section 302/149 & 147; as such, conviction under section 302/149 & 147 is bad in law. Even otherwise, punishment for life is a very severe punishment and it is evident that the appellants, Tabul Mian, Abdul Mian and

Indris Mian have remained in custody for about 3 months 20 days; appellant, Charka Mian has remained in custody for 4 months 19 days, the appellants, Habib Mian and Rafiq Mian have remained in custody for 3 months 14 days, the appellants Chuttu Mian @ Chutra Mian, Babu Mian, Nema Mian, Feku Mian have remained in custody for 2 months 15 days and Aabid Mian has remained in custody for 3 months 20 days. Accordingly, the conviction of the appellants may be modified from Section 302/149 & 147 and conviction under Section 307 & 148 to Section 323/324 of I.P.C. and the sentence may be modified for the period already undergone.

8. Learned P.P has opposed the prayer for acquittal and submits that the learned trial court has not committed any error whatsoever in convicting the appellants; as such no interference is required.

9. Having heard learned counsel for the parties and after going through the Lower Court Record, at the outset it is indicated that the conviction of the appellants has been done under section 302 with the aid of section 149 & 147 of the Indian Penal Code.

The doctor Vishwanath Das who has been examined as D.W.3 has proved the injuries sustained by accused Khalil Mian, Khudush Mian, Riajuddin Mian, Azad Mian which suggest that it is a case of free fight between both sides.

However, the prosecution has not explained the injuries sustained by the accused persons and therefore the true picture of the manner of the occurrence has not been brought before the trial court and hence the prosecution has concealed the material fact.

The prosecution has not been able to bring on record any evidence to suggest that the accused persons were sharing common object since the occurrence has taken place in a spur of movement therefore the conviction with the aid of section 149 of the Indian Penal Code is not sustainable.

The allegation of assault upon the deceased is attributed to Kudus Mian who has already died during pendency

of appeal and the prosecution has miserably failed to prove that all the accused persons were sharing common object to commit murder of the deceased.

Further, the prosecution has also not proved as to who were the aggressor since the accused persons have also sustained grievous injury on the vital part of their body and therefore the accused persons have their right to private defence.

10. Admittedly, there is no independent witness examined in the instant case and all P.Ws. are the interested witnesses. It is also an admitted fact that there is a case and counter case between the parties in the same occurrence; inasmuch as, the informant registered F.I.R as Karon P.S. Case No. 101 of 1992 dated 17.11.1992 and accused Khalil Mian (now deceased) registered F.I.R as Karon P.S. Case No. 102 of 1992 dated 17.11.1992; thus we are having no hesitation in holding that there was a free fight between the parties in the same occurrence. Accordingly, Section 149 I.P.C is not applicable. Moreover, admittedly the accused side also sustained injury.

11. As we have stated hereinbefore that there was a free fight and there was no common intention of pre-meditation of mind and there is no specific evidence as to which of the accused caused these injuries and there is evidence of free fight on the spot between the two parties, no one can be held responsible by taking recourse to Section 149 of I.P.C

12. Looking to the overall facts and circumstances of the case, it is clear that since there was no common object as held hereinabove, the appellants are acquitted from the charge under Section 302 I.P.C; however at the same time their presence and fight cannot be ignored and thus they are liable to be convicted under Section 323 I.P.C instead of Section 302 I.P.C and so far as appellant no. 3 is concerned, conviction under Section 148 I.P.C is also set aside and so far as conviction under Section 307 I.P.C is concerned that he caused hurt by using back side of Farsa, which cannot be considered that the act was committed with the intention to cause death; as such his conviction under Section 307 is converted to Section 324 I.P.C.

It appears from the records, all the appellants have remained in custody for about 3-5 months respectively; as such they are sentenced for the offence under section 323/324 IPC for period already undergone.

This appeal is disposed of.

Let the LCR be sent to the court concerned.

(Rongon Mukhopadhyay, J.)

(Deepak Roshan, J.)

Jharkhand High Court
Dated 31 /08/ 2024
jk/AFR