Md. Ashab @ Md. Asahab Vs State Of Bihar

Court: Patna High Court

Date of Decision: May 1, 2023

Acts Referred: Indian Penal Code, 1860 â€" Section 34, 302
Evidence Act, 1872 â€" Section 27

Hon'ble Judges: Ashutosh Kumar, J; Harish Kumar, J

Bench: Division Bench

Advocate: Viveka Nandsingh, Archana Palkar Khopde, Mayanand Jha, Surya Nilambri, S.B.Verma

Final Decision: Allowed

Judgement

1. Heard Mr. Vivekanand Singh, the learned Advocate for the appellant in Criminal Appeal (DB) No. 793/2015. Ms. Archana Palkar Khopde, who

had been appointed as Amicus has also been heard for the appellant Md. Ashab @ Md. Asahab. Ms. Surya Nilambri, the learned Advocate has

assisted this Court in Criminal Appeal (DB) No. 793/2015 for the appellant / Md. Tauhid. The State is represented by Mr. Mayanand Jha, the learned

APP.

2. Both the appellants stand convicted vide judgment dated 14.07.2015 passed by the learned 1st Additional Sessions Judge, Araria in Sessions Trial

No. 948/10 / Trial No. 41/15 for the offence under Sections 302/34 of the Indian Penal Code and by order dated 16.07.2015, they have been

sentenced to undergo R.I. for life, to pay a fine of Rs. 20,000/- in default of which, they have been directed to undergo further Simple Imprisonment

for one year.

3. The appellants are alleged to have killed the deceased/Maulana Asgar only for his fault of having flashed a torch-light which had momentarily

blinded them.

4. The case was lodged by the father of the deceased, namely, Md. Abdul Aziz, who has been examined as PW5 in this case. In his fardbeyan, he has

alleged that on 27.07.2009, he along with one of his sons, namely, Maulana Asgar (deceased) had gone to the filed at about 5.00 P.M. and while

returning, he further asked his son to go back home and wait for him and that he would, in the meantime, tend his cattle back to home. When some

time was consumed by his father, the deceased came in search of him with a torch-light. They met each other in front of Amna Public School, a local

school in the village, when the deceased is said to have flashed the torch to identify the informant. In the meantime, some of the persons, who were

coming from the other direction including the appellants appeared to have been blinded by the torch-light flashed by the deceased, which was the flash

point between the accused persons especially the appellants and the deceased. According to the First Information Report, no sooner was the torch

light flashed by the deceased, appellants/Tauhid and Ashab abused him, dashed him to the ground and started assaulting him. The deceased in order to

save himself rushed inside the school but was chased by the afore-noted two appellants. The deceased was shortly overpowered and both the

appellants then inflicted dagger and knife blows on him. The informant kept on raising alarm which attracted the attention of the villagers, who came

immediately and caught appellant / Md. Tauhid. Md. Ashab and others any how managed to escape. Simultaneously but surprisingly, the police also

arrived at the place of occurrence and nabbed appellant / Md. Tauhid whereafter a case vide Forbesganj (Simraha) P.S. Case No. 236/09 was

registered against the appellants and others.

5. It further appears from the record that the torch which was used by the deceased was recovered from the place of occurrence. The appellant /

Md. Tauhid was interrogated, who confessed his guilt and on the basis of his confession, there was recovery of the weapon used in the assault which

was found to be wrapped in a yellow T-shirt and a bicycle at some distance from where the occurrence had taken place over which the name of

appellant /Md. Tauhid was inscribed. Later, appellant / Md. Ashab was also arrested.

6. Chargesheet was submitted against them whereafter cognizance was taken and the case was committed to the court of Sessions for trial.

7. It further appears that the Trial Court examined seven witnesses in all including the Investigating Officer as PW6 and the Doctor, who had

conducted the autopsy on the deceased as PW7.

8. The informant (PW6), who is the father of the deceased deposed before the Trial Court that because of the torch-light falling on the faces of

appellants/ Md. Tauhid and Md. Ashab, who were accompanied by two more persons, who were not identifiable by him, his son was abused and

assaulted. In his deposition, he has stated that the afore-noted two appellants had forced the deceased to get inside the school where he was assaulted

by knife leading to his death. On hulla raised by him, people of the vicinity arrived and caught hold of the appellant / Md. Tauhid but could not catch

appellant / Md. Ashab, who could manage to run away. He had given his statement at the place of occurrence when the police had arrived. With

respect to the place of occurrence, he has clearly stated that only on the western side of the school is there some habitation whereas other sides are

all vacant land meant for agriculture. Even in the school, there are only three thatched houses. In the same breadth before the Trial Court, the PW5

has deposed that while his son was being assaulted, he did not shout but kept on imploring the accused persons not to assault his son. Only when the

deceased was dashed on the ground inside the school campus, did he raise hue and cry, when the villagers had arrived. The informant (PW5) could

clearly see that the appellant /Md. Tauhid had given four blows by his weapon whereas appellant /Md. Ashab gave three blows to the deceased.

9. Md. Shamim and Md. Owais, who are related to the informant and the deceased and who were not named by PW5, have been examined as PW1

and PW2 in this case. Both of them claimed to have reached the place of occurrence on the cry and summons by the informant (PW5). While they

had reached the place of occurrence, the fight was on and the deceased was almost decapitated but was alive. With theirs and others support,

appellant/Md. Tauhid was detained whereas the appellant / Md. Ashab and two others could manage to escape.

10. Similar is the statement of PW4/Md. Israil, who also is related to the informant.

11. None of these persons were named by the appellant when he got his fardbeyan recorded. It was only later in his deposition before the Court that

PW5 named PW1.

12. Md. Shamim (PW1) claimed before the Trial Court that he runs a provision Shop at his own house which is situated at a distance of about one

kilometer from the place of occurrence and that he could reach the place of occurrence on hearing the voice of his uncle / PW5, within a minute.

13. Md. Owais (PW2), who is one of the cousins of PW5, who claims to be sitting along with PW1 at his Shop also came at the place of occurrence

shortly after Md. Shamim (PW1). Whereafter others also came.

14. The Investigating Officer, who has been examined as PW6, as noted above, has stated that he could seize the torch and blood stained lathi and

had prepared a seizure list (Ext. 3). Md. Kamal and Md. Afzal, the two of the witnesses who are the signatories to the seizure list have not been

examined at the trial. He had received information on telephone that one person has been injured by knife blows. On this information, he had

proceeded to Amna Public School where he found one person dead and thereafter recorded the statement of PW5, which was the basis for initiating

the criminal case against the appellants. After recording the F.I.R., one black coloured torch, blood stained lathi, blood stained earth and a bicycle

were also seized for which seizure list was prepared. He has further deposed before the Trial Court that Md. Tauhid, one of the appellants, who was

caught by the villagers, was formally arrested and his confession was recorded.

15. On the basis of the afore-noted confession, PW6 is stated to have gone to a nearby bamboo clumps from where the weapon of assault, namely,

the blood stained dagger and a blood stained yellow T-shirt was seized (Ext. 5). Over that seizure report also, one Kamaluddin and Md. Afzal Hussain

have put their signature but as stated above, the afore-noted two persons have not been examined before the Court. The place of occurrence on being

examined by the I.O. was found to be a public school standing in isolation. Habitation was only towards the western side of the school; whereas all the

sides were vacant agricultural field. PW6 is also said to have examined Kamaluddin, Afzal, Anwarul, Ibadat apart from Pws 1 to 4 and one Nagina

Khatun, who is the wife of the deceased. The dead body was kept at the same place in the night and a Constable was put In-charge of the dead body.

It was sent for postmortem only on the next day and the postmortem was conducted at 11.00 A.M.

16. In his cross-examination, PW6 (I.O.) has stated that he reached the place of occurrence at about 10.00 P.M. He had met the informant outside

the school. At the time of recording of the fardbeyan, approximately 4 to 5 persons were available including Nagina Khatun, the wife of the deceased

and Kamaluddin and Afzal. The torch which was recovered from near the dead body was not put on test identification and on his enquiry, it was

found that the torch belonged to the accused. Md. Nazrul (PW3) had told him that the torch belonged to Md. Tauhid. He did not send the blood

stained lathi or the weapon for forensic examination. Even the inquest report is stated to have been prepared on the next day. Obviously, no finger

print also was taken about which it has been explained that such facility was not available.

17. Mr. Vivekanand Singh, the learned Advocate assisted by Ms. Khopade (Amicus) appellant / Md. Ashab and Ms. Surya Nilambari, the learned

Advocate for appellant/Md. Tauhid have stated that the prosecution has not been able to prove the case beyond all reasonable doubts. They have

submitted that it was rather unusual for PW5 (informant) not to have named his own relatives, namely, Pws 1, 2 and 4, who had come on his call and

who had helped nab the appellant / Md. Tauhid. A general statement has been made by PW5 that on his call, many villagers arrived. It has further

been urged in defense of the appellants that there was no means of identification and the only known means possibly was the torch carried by the

deceased who had flashed it in order to see his father (PW5) but which offended the accused persons including the appellants, which was the trigger-

point for the skirmish and ultimate death of the deceased. Somehow or the other, the learned Advocates have stated, the torch used by the deceased

was never seized. The seized torch, according to PW6, was of appellant / Md. Tauhid. It has further been argued that the whole story appears to be

doubtful. There is no reference of the reason for the presence of the appellants at about 8 Ã¢â‚¬Ëœ Clock in the night near the school where there

was no habitation. It has also not come during the course of Trial that the appellants were residing nearby or they were returning back to their homes.

It is really surprising that only four persons closely associated with the informant and deceased came and caught one of the appellants.

18. The other point of doubt with respect to the correctness of the prosecution version is that if at all, one of the appellants was caught in -flagrante

delicto, where was the occasion for him to have hidden his weapon of assault in a bamboo clump, situated at some distance. The evidence does not

indicate that he was allowed to have a run for some distance where he could have shed his weapon. Where was the occasion for either the deceased

or the accused persons including the appellants to have shed their clothes as according to the prosecution version, one blood stained yellow T-shirt was

also found near the place of occurrence. Whose was this apparel is not known. Even otherwise, such blood stained articles which were seized, were

neither sent for chemical examination nor exhibited. There is no statement of Nagina Khatun, who was an aggrieved person and should have come

before the trial court to depose. PW6 had found her present at the place of occurrence when he had visited the place and had arrested the appellant/

Md. Tauhid.

19. The Learned advocate for the State, however, submits that the occurrence took place in front of the father of the deceased, who not only tried to

intercede with the accused persons to spare his son but also raised hulla which brought in the other prosecution witnesses and it was only because of

their active assistance that one of the appellants could be apprehended. It has further been argued that there is nothing in the statement of P.Ws.1 and

2, which is at variance with the prosecution version as narrated in the fardbeyan of P.W.5 or his deposition in court. It is quite natural, it has been

argued, for P.Ws.1 and 2 to have arrived at the place of occurrence. Every cry of distress is in the nature of summons to relief. If the cry is of a

relative, it is all but natural to arrive at the place from where the cry has come.

20. The advocate for the State has also argued that even though P.W.3 has been declared hostile but on major particulars of the prosecution version,

he has not departed from the main story line and, therefore, his deposition cannot be completely effaced from the record. He may have stated that the

appellant/Md. Ashab has a good record in the village but that does not take away his guilt of killing the deceased. With respect to the motive, the State

has argued that motive is not relevant as an occurrence can take place with slightest of the motives. The prosecution, it has been urged, has been able

to prove the genesis of the occurrence viz. lighting of the torch on the face of the accused persons who were also travelling in opposite direction

which blinded them momentarily causing annoyance to them. Howsoever weak this motive is, but it was the trigger point which started the fight

between the accused persons and the deceased.

21. As opposed to the aforenoted contention of the State, Ms. Surya Nilambri, the learned amicus curiae for the appellant/Md. Tauhid, has stated that

it is rather surprising that without any premeditation, in the dead of the night, the appellants would be armed with dagger. She has further submitted

that a holistic reading of the deposition would clearly spell out that the deceased died in some occurrence about which nothing is known and for some

reason or the other, the appellants have been made accused or else even the appellant/Md. Ashab would have been nabbed by the villagers and the

P.W.s who came in support of the prosecution version. If the appellant Md. Tauhid who was armed with a knife could be detained by the villagers,

there was no reason why the appellant/Md. Ashab would have been left to go. She has further submitted that the suggestions given to the prosecution

witnesses, though only in the nature of suggestions, was completely brushed aside. There could have been a possibility of the deceased having been

assaulted by family members of his wife with whom the deceased had eloped, to the chagrin of her family members. This aspect was never

investigated. The wife of the deceased not coming to the dock to depose further adds to the confusion, especially when, according to the P.W.6, she

was present at the place of occurrence. Who called her; how far is the house of the deceased and the informant from the place of occurrence, also

remains unknown.

22. After having heard the learned counsel for the parties, we find that though PW5 has tried to support the prosecution version but the wedges and

chinks in his evidence is too wide to be believed. The distance of the shop and home of PW1 is 1 Km. It is really doubtful whether the cry raised by

PW5 would have reached the ears of PWs.1 and 2 who were sitting in the kirana shop without any customer. Their arrival at the place of occurrence

within one minute and that also when the mode of travel is not know, is rather difficult to digest. In any view of the matter, if at all the deceased at

that time had been surviving, there should have been some effort of rendering medical aid to him, more so, when many persons of the neighbourhood

had arrived. It does not appear to be logical that those villagers, most of whom are relatives of the informant and the deceased, would allow the

deceased to pass-off because of the injuries suffered by him. The injuries are not in the nature of a complete slit of the throat or of the jugular so as to

accept the fait accompli.

23. How was the appellant/Md. Ashab arrested or when did he come back on the radar is not known. No enmity appears to have been demonstrated

in the entire records of the case between the deceased and the informant and the appellants. What is rather striking is that the appellant/Md. Tauhid

was arrested by the villagers and was handed over to the police. However, his weapon of assault, a blood stained dagger and an apparel viz. yellow T-

shirt was found at a distance, which is claimed to have been discovered to be admissible under Section 27 of the Evidence Act only on the showing of

the appellant/Md. Tauhid. When did he get time to leave all that at a distance for the purposes of concealing the same. The I.O. not having taken care

of sending the weapon and the apparel as well as the blood stained soil for forensic examination completely demolishes the correctness of the

prosecution version.

24. A suggestion has come during the course of trial that the appellant/Md. Tauhid was handed over to the police after the Mukhiya of the village had

arrived.

25. What was the reason for not holding the inquest after recording the FIR, which was done only on the next day before the autopsy.

26. It is difficult to accept the statement of PW5 when he gives a graphic description of appellant/Md. Tauhid having assaulted the deceased four

times and appellant/Md. Ashab having inflicted knife blow thrice on the deceased, when the only source of identification which has been explained

was the torch carried by the deceased. Was it kept lighting or was used by the PW5 to identify and witness the occurrence? The informant not having

named PWs 1 and 2 in the FIR also assumes significance.

27. Thus, we find that the prosecution has not been able to prove the case beyond all reasonable doubts.

28. There are many missing links. Only because PW1, who is the father of the deceased claims that he saw the occurrence, that by itself would not

absolve the prosecution from discharging its burden of proving the case beyond all reasonable doubt.

29. The cause of the injuries on the deceased which ultimately led to his death thus remains a mystery.

30. The appellants are required to be given the benefit of doubt and we do give them such benefit.

31. For the reasons noted above, the appeals are allowed.

32. The impugned judgment of conviction dated 14.07.2015 and the consequent order of sentence dated 16.07.2015 passed by the learned 1st

Additional Sessions Judge, Araria are, accordingly, set aside.

33. The appellants, namely, Md. Ashab @ Md. Asahab (Cr. Appeal (DB) No. 793 of 2015) and Md. Tauhid (Cr. Appeal (DB) No. 782 of 2015) are

acquitted of the charges levelled against them. They shall be released from the jail forthwith unless they are required in any other case.

34. The Patna High Court, Legal Services Committee is, hereby, directed to pay Rs. 5000/-each to Ms. Archana Palkar Khopde and Ms. Surya

Nilambari, learned amicus curaie, as a consolidated fee for the services rendered by them.