

CASE NO.:
Appeal (crl.) 588 of 2005

PETITIONER:
Rabindra Mahto & Anr.

RESPONDENT:
State of Jharkhand

DATE OF JUDGMENT: 06/01/2006

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:
J U D G M E N T
WITH
CRIMINAL APPEAL NO. 589 OF 2005
Balram Mahto

-----Appellant

Versus

State of Jharkhand

-----Respondent

WITH
CRIMINAL APPEAL NO\00531\005\005\005.. \0050F 2006
(Arising out of S.L.P. (Crl.) NO. 2218 of 2005)

Girish Chandra Mahto @
Girish Mahto & Ors.

-----Appellants

Versus

State of Jharkhnd

-----Respondent

P.P. NAOLEKAR, J.

Leave granted in S.L.P. (Crl.) No. 2218 of 2005

The accused appellants were convicted and sentenced by the Additional Judicial Commissioner. The appellants Rabindra Mahto, Balram Mahto and Lemboo Mahto were found guilty under Section 302 IPC and were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- and in default to further undergo rigorous imprisonment for two years. The appellants Jag Mohan Mahto, Fagu Mahto, Dhananjay Mahto, Huna Mahto and Girish Mahto were found guilty under Section 302 read with Section 149 I.P.C. and were accordingly convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.500/- and in default to further undergo rigorous imprisonment for one month. Further appellants Jag Mohan Mahto and Lemboo were found guilty under Section 323 IPC and were convicted and sentenced to undergo rigorous imprisonment for five months. All the sentences were directed to run concurrently. The appeal preferred by the accused-appellants was dismissed by the High Court, aggrieved by the same, the present proceedings were taken up by the appellants.

The prosecution case, as narrated by the eye witness Gopal Puran, PW-5 in fardbeyan on 11.7.1989 at 8.30 P.M. before Sub-Inspector N.P. Singh of P.S. Jopno Puti Tola, is that at about 9.00

A.M. he had gone to his field lying in Jopno Puti Tola Kend Tand with Sohrai Puran, Ram Mohan Puran, Cheta Puran, and others. They sowed Gunja in the field and thereafter they were taking rest under the Kend Tree. They saw that from the side of Jopno Village Balram Mahto, Rabindra Nath Mahto, Girish Mahto, Fagu Mahto, Huna Mahto, Dhananjay Mahto, Lemboo Mahto, Laloo Mahto, Jagmohan Mahto along with five-six other persons, armed with tangi, lathi, farsa and sword came to the spot and enquired from them as to why they plowed the field, whereupon there was an exchange of hot words. All of a sudden Huna Mahto pelted stone on Sohrai Puran, the deceased, as a result of which Sohrai Puran fell down. Balram and Rabindra assaulted Sohrai Puran and also assaulted Ram Mohan Puran. Thereafter Jagmohan, Laloo, Lemboo, Fagu and others attacked Ram Mohan and Sohrai Puran with lathi, farsa and sword as a result of which Sohrai Puran and Ram Mohan Puran died. Gopal Puran, PW-5 and Cheta Puran, PW-9 were also assaulted by lathi. Thereafter they ran towards Village Puti Tola and raised alarm whereupon villagers came to the spot but before they could arrive, the accused fled away from the scene of occurrence. As mentioned above this fardbeyan was recorded on 11.7.1989 at 2030 Hrs. i.e. 8.30 P.M. and the FIR was registered at 10.00 A.M. on 12.7.1989. The copy of the FIR was sent to the concerned Magistrate on 13.7.1989.

The Additional Judicial Commissioner and the High Court, on the basis of the evidence placed on record by the prosecution, found that the prosecution proved beyond reasonable doubt that the accused Rabindra, Lemboo and Balram committed the offence of murder of Sohrai Puran and Ram Mohan Puran and other appellants committed crime in furtherance of their common object forming unlawful assembly, which was formed to commit murder of the deceased persons and attack on the members present with them. On the basis of evidence of eye-witness, as there was specific evidence of assault by accused Rabindra Mahto, Balram Mahto and Lemboo Mahto on the deceased with tangi, sword and farsa, which was corroborated by the medical evidence, they were found guilty of the offence under Section 302 IPC and other accused persons who assaulted the deceased with Lathi were held guilty of an offence under Section 302 read with Section 149 of Indian Penal Code.

The post mortem report prepared by PW-7, Dr. Niranjan Minz found the following injuries on deceased Sohrai Puran:

1. Incised wounds:-

(a) 8.3 cm x bone deep on the front part of the left side of the chest and adjoining left shoulder cutting the soft tissues, under bones partially and the first and the second ribs left side completely;

(b) 11x3 cm x cavity deep on the left tempro parietal region of the head cutting the left external on the head cutting the left external ear partially and cutting the left tempro parictal bone completely and the underlying brain partially;

(c) 4x1 = cm x soft tissue on the right arm medial side;

(d) 8x4 cm x soft tissue on right chest lateral side situated 3 cm below the right axilla;

(e) 6x2 cm x bone deep on the left bottom upper part cutting the soft tissues and the underlying bone partially.

2. Lacerated wounds:

2x1 cm x soft tissues on left leg front middle.

3. Internal:

There was presence of blood and blood clots in the chest and cranial cavity.

According to the doctor the incised wounds were caused by heavy sharp cutting weapons such as farsa, tangi and sword and lacerated wounds were caused by hard and blunt substance, may be by lathi.

On the same day at about 1330 Hrs. said doctor conducted postmortem examination on the dead body of Ram Mohan and found the following ante mortem injuries:

1. Abrasion:

(i) 2 x 2 cm on right leg front upper part

2. Bruise:

24 x 2 cm, and 16.2 cm on the back of the chest left side lateral part

3. Incised wounds:

1. 11 x 1/4 cm x soft tissues on the right scapular region.

2. 8 x 2 cm x cavity deep on the left occipital parietal region of the head cutting the underlying bone and the brain matter.

3. 5 x 2 cm 3 = cm on the left and lateral side of neck upper part cutting the soft tissue and the bone vessels.

4. 4 x 1/4 cm x soft tissues on left elbow lateral side.

4. Internal:-

There was contusion of soft tissues of the chest wall left side. There was fracture of third to 10 ribs with laceration of the left lung. There was presence of blood and blood clots in the chest and cranial cavity.

According to the doctor, the injuries were caused by hard and blunt substance, may be by lathi and stone and incised wounds were caused by heavy sharp cutting weapons such as farsa, tangi or sword.

It is urged by Shri D.N. Goburdhan, learned counsel for the appellants that the delay in lodging of the FIR and thereafter further delay in sending the same to the concerned Magistrate, clearly indicates that the accused-appellants have been falsely implicated and on this count alone the prosecution case fails and is required to be discarded. It is further urged by Shri Goburdhan that the accused-appellants could not have been convicted for the offence under Section 302 IPC with the aid of Section 149 of the Indian Penal Code when there is no evidence of a common object of the assembly to commit murder of Sohrai Puran and Ram Mohan Puran.

Shri Anil Kumar Jha, learned counsel appearing on behalf of the State, on the other hand, inter alia submitted that the common object of the assembly has to be gathered from the facts and circumstances of the case and that in this case there is enough evidence on record to indicate that all the accused-appellants have formed unlawful assembly to commit an offence of murder of two deceased persons, namely, Sohrai Puran and Ram Mohan Puran. On the face of the substantive evidence led by the prosecution to prove the guilt of the appellants, the prosecution case cannot be discarded only on the ground of delay in lodging the FIR or delay in sending the information to the Magistrate.

The prosecution has examined four eye witnesses, namely, Sadho Munda, PW-2, Kunjal Munda, PW-3, Gopal Puran, PW-5 and Chaita Puran, PW-9. PW-2 Sadho Munda in his evidence stated that he was grazing his cattle in the morning when he saw Sohrai Puran, Ram Mohan Puran (both deceased), Gopal Puran, PW-5, and Chaitan Puran, PW-9 were sowing Gujra in the field. He further stated that he saw the accused persons along with some unknown persons who came towards the field from the side of Jopno Village. Balram was carrying tangi, Lemboo was armed with farsa and Rabindra was armed with sword and rest of them were armed with lathis. They came and assaulted Sohrai Puran and Ram Mohan Puran and also assaulted Gopal and Chaita. Gopal and Chaita fled away from the field. After the accused ran away from the scene of incident, he came near the injured persons who were then breathing and they were taken to their houses but they died on the way. To the same effect is the statement of PW-3 Kunjal Munda, who was also grazing his cattle in the nearby field and saw the complaining party plowing the field for sowing Sarguja. He stated that after sowing they were taking rest under the tree when he saw from the eastern side of the village Jopno, the accused party proceeding towards the place of incident. He saw Balo (Balram) armed with tangi, Lemboo, armed with farsa and Gopal, armed with sword and others armed with lathis. He saw the accused party assaulting Sohrai Puran and Ram Mohan Puran. He also saw Gopal and Chaita were inflicted injuries. PW-5, Gopal Puran's evidence was to the effect that he went to the field for plowing it and for sowing Sarguja and when they were taking rest under the tree, he saw all the accused persons approaching them from the village Jopno, armed with sword, tangi and farsa. On reaching the spot, accused Huna Mahato threw stone at Sohrai Puran as a result of which he fell down. Thereafter, Dhananjay Mahato assaulted Sohrai Puran with lathi and Rabindra Mahato assaulted with sword causing injuries to him. Lemboo also assaulted Sohrai Puran with farsa. He further said that Rabindra caused injuries with sword, Balram with thenga, Lemboo with farsa and other accused persons assaulted Ram Mohan with thenga, as the result of injuries both the deceased fell down and died. He further deposed that Girish Mahato assaulted him with thenga on head and Fagu Mahato hit him on the right arm with lathi. Jag Mohan hit Chaita with Thenga. Thereafter, he along with Chaita fled away to Puti Tola. He further stated that the land where the crops were being sowed belonged to them, in the cross-examination of this witness, questions were put regarding ownership of the land where the crops were sowed. He was asked whether there was any case in respect of the land between the parties. From this line of cross-examination, it is apparent that the defence is claiming ownership over the land.

Another eye witness examined by the prosecution is Chaita Puran, PW-9. He supported the prosecution case and deposed that he along with others was taking rest under the tree after plowing and sowing sarguja seeds when accused appellants along

with 5-6 other unknown persons came there. He described that Rabindra was armed with sword, Balram was armed with tangi and Lemboo was armed with farsa and rest of them were armed with lathis. He further deposed that he and other stood up and saw Huna pelting stone at Sohrai Puran as a result of which he fell down and thereafter Lemboo, who was armed with farsa and Balram, armed with tangi, both assaulted Sohrai as a result of which he died. Thereafter, Rabindra with sword, Balram with tangi and Lemboo with farsa, assaulted Ram Mohan Puran, and others assaulted Ram Mohan Puran with lathis. He was also assaulted by Jag Mohan and Laloo with lathi. Thereafter, they fled from the spot. This witness stated that the occurrence took place due to the land in Kend Tad. He further deposed that it was not correct that the accused persons had at all told that they had purchased the Kenda Tad land in auction. For the first time the accused persons told on the day of occurrence that it was their land.

The main thrust of the argument of the learned counsel for the appellants is that evidence on record shows that only three accused-appellants, namely, Rabindra Mahato, Lemboo and Balram Mahato have assaulted the deceased persons with sharp edged weapons and in the absence of proof of common object of the assembly to cause death of two deceased persons the other accused persons could not have been convicted by taking aid of Section 149 of the Indian Penal Code. Section 149 of the Indian Penal Code postulates an assembly of 5 or more persons having a common object i.e. one of those named in Section 141 of Indian Penal Code and then doing of the act as by the members of it in prosecution of that object. The basis of constructive guilt under Section 149 is mere membership of an unlawful assembly. Under Section 149, if the accused is a member of an unlawful assembly, the common object of which is to commit a certain crime, and such a crime is committed by one or more of the members of that assembly, every person who happens to be a member of that assembly would be liable for the commission of the crime being a member of it irrespective of the fact whether he has actually committed the criminal act or not. There is a distinction between the common object and common intention. The common object need not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the assembly gathered before the commission of the crime at the spot itself. There need not be prior meeting of the mind. It would be enough that the members of the assembly which constitutes five or more persons, have common object and that they acted as an assembly to achieve that object. In substance, Section 149 makes every member of the common unlawful assembly responsible as a member for the act of each and all merely because he is a member of the unlawful assembly with common object to be achieved by such an unlawful assembly. At the same time, one has to keep in mind that mere presence in the unlawful assembly cannot render a person liable unless there was a common object and that is shared by that person. The common object has to be found and can be gathered from the facts and circumstances of each case. From the facts found in the present case it appears that the appellants claimed ownership of the land in question, when they came to know that the deceased and their men plowed the land which they claimed to be their, they armed with weapons came to the place of incident to vindicate their right to the land by show of force or use of force. The intention to assert the right by force is apparent from the fact that the appellants were armed with deadly weapons such as sword, tangi and farsa and some of them were carrying lathis. All the persons came together at the spot armed with weapons and immediately after reaching the spot, after short exchange of words, they started assault and caused

grievous injuries to two persons who died on the spot. It is alleged that the two eye witnesses namely PW-5 and PW-9 have also been assaulted. The nature of the injuries found on the deceased gives clear indication of a common intent of the assembly to go to the extent of causing death of the persons who have plowed their land. All the members reaching to the spot together armed with weapons and immediate attack on the persons present there, clearly exhibits the intention of the unlawful assembly. In the facts and circumstances of the case we can safely infer the common object of the unlawful assembly to do away with the deceased persons. We have been taken through the evidence and cross-examination of the witnesses by learned counsel for the appellants. We do not find any reason to disbelieve the version of these witnesses which found approval of two courts.

Learned counsel for the appellants has then urged that the delay in lodging the FIR and thereafter further delay in forwarding the same to the Magistrate concerned would lead to the conclusion that FIR had been recorded much later than one as shown in the document and as such the very genesis of the prosecution case belies and cannot be relied upon to convict the accused appellants. Learned counsel relied upon the decisions of this Court in the matters of Meharaj Singh vs. State of U.P. (1994) 5 S.C.C. 188, Arjun Marik and others vs. State of Bihar, 1994 Supp. (2) S.C.C. 372 and Suresh Chaudhary vs. State of Bihar (2003) 4 S.C.C. 128.

In the matter of Meharaj Singh (supra), this Court in Para 12 has stated as under:

"FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late, it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in dispatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr.P.C., is aimed at serving a statutory function, to lend credence to the prosecution case, the proceedings get reflected in the report. The absence of those details is indicative of the fact

that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW-8.

In the matter of Arjun Marik (supra), this Court in Para 24 has stated as follows:

"The matter does not stop here. There is yet another serious infirmity which further deepens the suspicion and casts cloud on the credibility of the entire prosecution story and which has also been lost sight of by the trial court as well as the High Court and it is with regard to the sending of occurrence report (FIR) TO THE magistrate concerned on 22-7-1985 i.e. on the 3rd day of the occurrence. Section 157 of the Code of Criminal Procedure mandates that if, from information received or otherwise, an officer in charge of police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to the Magistrate empowered to take cognizance of such offence upon a police report. Section 157 Cr. P.C. thus in other words directs the sending of the report forthwith i.e. without any delay and immediately. Further, Section 159 Cr. P.C. envisages that on receiving such report, the Magistrate may direct an investigation or, if he thinks fit, to proceed at once or depute any other Magistrate subordinate to him to proceed to hold a preliminary inquiry into the case in the manner provided in the Code of Criminal Procedure. The forwarding of the occurrence report is indispensable and absolute and it has to be forwarded with earliest dispatch which intention is implicit with the use of the word "forthwith" occurring in Section 157, which means promptly and without any undue delay. The purpose and object is so obvious which is spelt out from the combined reading of Sections 157 and 159 Cr. P.C. . It has the dual purpose, firstly to avoid the possibility of improvement in the prosecution story and introduction of any distorted version by deliberations and consultation and secondly to enable the Magistrate concerned to have a watch on the progress of the investigation"

In the matter of Suresh Chaudhary (supra) this Court in Para 9 (bottom) has held that:

"\005\005That apart, the express message which PW-13 sent to the Jurisdictional Magistrate reached the said Magistrate at his place only on 10.12.1992 nearly 1 = days after the said complaint was registered and we find no explanation from PW-13 as to this inordinate delay which only adds to the doubtful circumstances surrounding the prosecution case".

There cannot be any manner of doubt that Section 157 of Criminal Procedure Code requires sending of an FIR to the Magistrate forthwith which reaches promptly and without undue delay. The reason is obvious to avoid any possibility of improvement in the prosecution story and also to enable the Magistrate to have a watch on the progress of the investigation. At the same time, this lacuna on the part of the prosecution would not be the sole basis for throwing out the entire prosecution case being fabricated if the prosecution had produced the reliable evidence to prove the guilt of the accused persons. The provisions of Section 157, Cr. P.C. are for the purpose of having a fair trial without there being any chance of fabrication or introduction of the fact at subsequent stage of investigation. The cases cited by the learned counsel for the appellants do not lay down any law that simply because there is a delay in lodging the FIR or sending it to the Magistrate forthwith, the entire case of the prosecution has to be discarded. The decisions rendered by this Court and relied upon by the learned counsel for the appellant would only show that this will be a material circumstance which will be taken into consideration while appreciating the evidence on record.

After going through the material on record, we are of the view that the prosecution has led reliable evidence the veracity of which is not dislodged by delay in recording of the FIR and delay in sending the same to the Magistrate in the facts and circumstances of this case. At best it can be taken to be an infirmity in investigation.

For the aforesaid reasons, the appeals are dismissed.