

IN THE HIGH COURT OF JUDICATURE AT PATNA

Tuphail Mian

Vs.

The State of Bihar.

CRIMINAL APPEAL (SJ) No.68 of 2003

30 November 2023

(Hon'ble Mr. Justice Chandra Shekhar Jha)

Headnotes

The Code of Criminal Procedure, 1973 – Appeal Against Conviction – **The Indian Penal Code, 1860 – Sections 307/115 – Attempt to murder – Abetment – Requirements of mens rea** – Prosecution failed to establish the essential ingredients of abetment under Section 115 IPC. The evidence revealed that the alleged provocation or order by the appellant to co-accused was not consistently supported by the witnesses. The term “instigate” requires proof of intention or knowledge, and mere presence or verbal exchange without direct causation does not suffice. [Referred to: **Sanju @ Sanjay Singh Sengar v. State of Madhya Pradesh, (2002) 5 SCC 371**] (Para 32)

Indian Penal Code, 1860 – Section 307 – Attempt to murder – Applicability – Conviction under Section 307 IPC requires clear intent to cause death. The injuries caused to the informant were serious but inflicted by a co-accused who was a juvenile and not by the appellant. The prosecution failed to demonstrate that the appellant either directly inflicted the injuries or had a common intention shared with the actual assailant [Refer to: **Jage Ram v. State of Haryana, (2015) 11 SCC 366**] (Para 14)

Indian Penal Code, 1860 – Section 323 – Voluntarily causing hurt – Although there was some mention of lathi blow by the appellant on PW-4, the medical evidence only proved simple injuries. Given the inconsistencies and interested nature of the witnesses, and in the absence of independent corroboration, the charge under Section 323 IPC could not be sustained beyond reasonable doubt. (Para 27)

Criminal Procedure – Appreciation of Evidence – Interested and Related Witnesses – The injured witnesses (PW-2, PW-4, PW-5) were closely related to each other, and no independent witness was produced despite being named in the charge sheet. The Court noted material inconsistencies in the statements of prosecution witnesses, especially regarding the sequence of assault and role of the appellant. [Refer to: **Mano Dutt v. State of U.P., (2012) 4 SCC 79; State of U.P. v. Naresh, (2011) 4 SCC 324**] (Para 26, 28-29)

Criminal Trial – Counter-case and Injuries on Accused – The existence of a counter-case and medical report of injuries on the appellant, although not fully brought on record, was corroborated by PW-4. The failure of the prosecution to acknowledge or explain injuries on the appellant raised reasonable doubt about the prosecution’s version. (Para 30-31)

Criminal Procedure Code, 1973 – Benefit of Doubt – Where prosecution evidence is marred by serious inconsistencies, lack of independent corroboration, and contradictory witness accounts, the benefit of doubt must be extended to the accused. The Court concluded that the conviction was not sustainable under law. (Para 32-34)

Appeal allowed.

Appearances for Parties

For the Appellant/s : Mr. Anurag Kumar, Amicus Curiae

For the Respondent/s : Ms. Anita Kumari Singh, APP

Headnote prepared by Reporter : Akanksha Malviya, Advocate

Judgment/Order of the Hon’ble Patna High Court

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.68 of 2003

Arising Out of PS. Case No.-3 Year-1990 Thana- DIGHWARA District- Saran

Tuphail Mian, Son of Late Raj Balam Mian, Resident of Village - Kuraiya,
P.S. - Dighwara, District – Saran.

... .. Appellant/S

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Anurag Kumar, Amicus Curiae
For the Respondent/s : Ms. Anita Kumari Singh, APP

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT
Date : 30-11-2023

The present appeal preferred by appellants/convicts
Tuphail Mian and Hadis Mian @ Edis Mian against judgment of
conviction dated 11.12.2002 and order of sentence dated
13.12.2002 rendered by Additional District and Sessions Judge,
Fast Track Court No. III, Chapra, in Session Trial No. 418 of
1990, whereby and whereunder appellant/convict Tupahil Mian
has been convicted for the offence punishable under Section
307/115 of the Indian Penal Code and sentenced to undergo
rigorous imprisonment for 4 (four) years. He was also convicted
for the offence under Section 323 of the Indian Penal Code and
sentenced for six months. Both sentences were ordered to run
concurrently. Appellant/convict, namely, Hadis Mian @ Edis
Mian convicted only for the offence under Section 323 of the



Indian Penal Code and was ordered to undergo sentenced for six months rigorous imprisonment.

2. The present appeal is of year 2003 which was taken on board since 2018 for final hearing but no one turned appeared on behalf of appellants as to press present appeal and also vide order dated 28.04.2018 it was observed by the Court that:-

“However, in case, no one turns up on behalf of the appellants on the next date of hearing, the Court will consider appointing amicus curiae for assistance to the Court.”

3. Thereafter, matter was listed on several occasions but again no one turned up. During the course of hearing, a report was called for whether appellant/convict Hadis Mian @ Edis Mian is alive or not vide order dated 05.09.2023 of this Court, where it was reported that said appellant/convict died five years ago in Delhi and accordingly, vide order dated 10.10.2023, the appeal against appellant/convict Hadis Mian @ Edis Mian stands abated. Having no option left vide order dated 09.11.2023, this Court appointed, Mr. Anurag Kumar, learned Advocate as Amicus Curiae to assist in the matter.

4. Now the present appeal is limited only with the appellant/convict, namely, Tuphail Mian.

5. The case of prosecution as springs from the first



information report lodged by informant/PW-5, namely, Nizamuddin Mian that on 08.01.1990 at about 1.30 PM, while appellant/convict Tuphail Mian was digging earth from his field and was filling the drain near the well, by that time, he was coming with the bundle of grass keeping it on his head. On seeing the digging from his field, it was protested by informant/PW-5 and he said to appellant/convict that the soil is to be digged from the river bed as to fill up the drain, and, as such, asked appellant/convict Tuphail Mian to stop the digging process. Appellant/convict Tuphail Mian did not agree with said advice and said that he would fill up the drain with his soil only, causing hot exchanges of words between them. In the meantime, appellant/convict Hadis Mian and Akhtar Mian (not appellant in this case) came up with *gandasa* and started abusing the informant/PW-5. Said abusing was objected by informant and on so accused Akhtar Mian gave a *gandasa* blow to informant/PW-5 aiming to his neck, which was attempted to stop by left hand by informant, causing injury over there. Said injuries runs from left thumb to wrist. Informant also sustained injury on his neck. Informant/PW-5 further narrated that on provocation/instigation of Tuphail Mian (appellant/convict), Akhtar again repeated *gandasa* blow on him, which was caught



hold by Khalik Mian (PW-4), the nephew of informant. It was further narrated that Tuphail Mian (appellant/convict) assaulted Khalid Mian (PW-4) with lathi. In the meantime, Jarina Khatoon (PW-2) came to rescue her husband (PW-5) and she was also assaulted by Hadis Mian (appellant/accused – who died during pendency of present appeal) by lathi. On alarm, neighbours came over there and consequently, appellants/accused persons fled away from place of occurrence.

6. On the basis of aforesaid, *fard-e-beyan*/written information of informant/PW-5, police registered a case bearing Dighwara P.S. Case No. 3/90. After completion of investigation, police submitted charge-sheet against all above-named three accused persons, where learned C.J.M., Chapra took cognizance of the offence and committed this case to the Court of Session for trial under Section 209 of Code of Criminal Procedure (in short Cr.P.C.) after compliance of Section 207 of Cr.P.C.

7. The learned Trial Court on the basis of material collected during investigation framed charge under Sections 323, 307, 109 and 307 of the Indian Penal Code against appellants/convicts vide order dated 9th of September, 1993, which were read over and explained to appellants/accused but



they denied and claimed for trial.

8. To substantiate its case, prosecution before learned trial court examined altogether seven witnesses, who are PW-1 Md. Jabir Hussain, PW-2 Jarina Khatoon, PW-3 Md. Mustakim, PW-4 Md. Khalid, PW-5 Nizamuddin Mian, who is the informant of this case, PW-6 Jiwandan Ram, who is the I.O of the case and PW-7 Jayant Sekhar, who is the Medical Officer, examined injured.

9. Prosecution also exhibited following documents as to substantiate its case during the trial and same are as:-

1. Exhibit-1- Signature of Jabir Hussain on FIR.

2. Exhibit-2 to 2/2- Requisition for injury report.

3. Exhibit-3 to 3/3- injury report of Nizamuddin Mian (PW-5/informant), Jarina Khatoon (PW-2) and Md Khalid (PW-4).

4. Exhibit-4- Formal FIR.

5. Exhibit-5- Certified copy of judgment dated 25.02.1993 as passed in C-93 of 1990 passed by Judicial Magistrate 1st Class, Chapra.

10. Statement of appellants/accused were recorded under Section 313 of Cr.P.C. by placing incriminating evidences surfaced during the trial, which they denied and shows their



complete innocence.

11. No oral evidence was given by appellants/accused in their defence, whereas, photocopy of *fard-e-beyan* of appellant/convict, namely, Tuphail Mian, Son of Raj Balam Mian dated 09.01.90 and photocopy of his injury report dated 09.01.90, were exhibited as **Exhibits- A and B** respectively in defence.

12. On the basis of oral evidence and exhibited documents, learned trial court convicted appellant/convict, namely, Tuphail Mian under Section 307/115 of the Indian Penal Code and also under Section 323 of Indian Penal Code, where appellant/convict was ordered to undergo sentenced for four years rigorous imprisonment for the offence under Section 307/115 of the Indian Penal Code and for six months rigorous imprisonment for offence under Section 323 of the Indian Penal Code. There is no separate order as to fine. Being aggrieved with aforesaid order of conviction and sentence, the present appeal was preferred.

13. Hence, the present appeal.

14. Learned *Amicus Curiea* Mr. Anurag Kumar appearing on behalf of appellant/convict, while opening his argument submitted that all prosecution witnesses including



injured prosecution witnesses are appearing interested and having of inimical terms also, as such, their testimony are not appearing wholly reliable as to convict appellant/accused, namely, Tuphail Mian. It is submitted that PW-1 is Bhanja, PW-2 is wife, PW-3 is elder brother and PW-4 is nephew of the informant/injured Nizamuddin Mian, who examined as PW-5. It is submitted that from the testimony of PW-5, who is informant of this case and also injured, it appears that the role of appellant/convict Tuphail Mian is limited only to order accused Akhtar Mian as to assault him by *gandasa*, who made repeated blow of *gandasa*, causing multiple injuries upon him. Learned *amicus* further pointed out that from the available oral evidence, it appears that appellant/convict assaulted PW-4 with lathi, causing simple injury, as it also appears from the deposition of PW-7, who is a doctor and examined him. Learned *amicus* also pointed out that except PW-5 and PW-3, no other injured prosecution witnesses supported occurrence through their testimony that provocation/abetment was made by appellant/convict by giving order to accused Akhtar Hussain as to assault informant/PW-5 Nizamuddin Mian by means of *gandasa* and as such, there are lot of material contradictions. It is further submitted that even informant through his *fard-e-*



beyan stated that before giving order by appellant/convict to co-accused Akhtar Hussain to assault, he had already assaulted by him by *gandasa* and only for third assault order was given, which was hold from back by PW-4, Md. Khalid but his testimony appears improved on this score during trial, suggesting that all assaults caused by *gandasa* by co-accused Akhtar Hussain, under provocation, given by appellant/convict. Having all such contradictions in hand, learned *amicus* submitted that prosecution miserably failed to established its case beyond reasonable doubts. It is submitted that the prime consideration to bring charge home, under Section 307 of the Indian Penal Code is “intention to cause death” which can be gathered from the various circumstances like motive, words used by the accused at the time of doing the act, weapon used, at which body part injury caused, the nature of the injury and severity of blows etc. In support of his submission, learned *amicus* relied upon the legal report of ***Jage Ram and others Vs. State of Haryana*** reported in ***(2015)11 SCC 366***.

15. Learned *amicus* further submitted that though PW-2 and PW-4 are injured witnesses but there are major contradictions and discrepancies in their testimony, and, as such, same is not to be relied upon in view of legal reports of



Hon'ble Supreme Court as reported in the matter of *Mano Dutt and another Vs. State of Uttar Pradesh* reported in (2012) 4 SCC 79 and also in the matter of *State of Uttar Pradesh Vs. Naresh and Others* reported in (2011) 4 SCC 324.

16. Learned APP appearing on behalf of the State submitted that from the testimony of injured, it appears that the repeated assault by *gandasa* was made by co-accused Akhtar Hussain, who by that time was juvenile, as it appears from the impugned judgment itself vide page 59, para 18. It is submitted that instigation/abetment on the part of appellant/accused clearly shows that he was under intention to cause death of informant/injured, namely, Nizamuddin Mian, and as such, the learned trial court correctly convicted appellant/convict for the offence under Section 307/115 of the Indian Penal Code.

17. Heard the arguments as advanced by learned amicus on behalf of appellant/convict and learned APP on behalf of state. Record and proceedings of trial court was also perused. It would be appropriate to discuss the relevant evidences as available on record for the purpose of re-appreciation of evidences.

18. **PW-1** is Md. Jabir Hussain, who deposed through his examination-in-chief that accused Akhtar Mian had



given farsa blow to Nizamuddin (informant/PW-5) on his neck, which was stopped by his right hand, subsequently, he denied and deposed that same was stopped by left hand. It is further deposed that second assault was also caused by him, which hit on neck of informant/PW-5, and thereafter, appellant/convict, namely, Tughail ordered as to kill informant and when third blow was given, same was hold from back by Khalid (PW-4). It is deposed that third blow was also hold by Jarina Khatoon (PW-2). It was deposed that Hadis assaulted Jarina Khatoon (PW-2) by means of lathi, causing injury on her back. Tughail (appellant/convict) assaulted by lathi to Khalid (PW-4), causing injury on his right elbow and left leg. It was stated that occurrence was witnessed by several co-villagers. He identified the accused/appellant before the learned trial court.

18.1 On cross-examination, it was stated by him that he cannot say about plot number, from where soil was digging but near to same, there is house of informant Nizamuddin. He denied to depose falsely.

19. **PW-2** is Jarina Khatoon, who is the wife of informant/PW-5. She appears injured eye-witness of the occurrence. She deposed through her examination-in-chief that on the order of appellant/convict Akhtar assaulted her husband



(PW-5) by means of *gandasa*. It was deposed that second assault of *gandasa* was hit on head of her husband, whereas third blow of *gandasa* was hold by Khalid Mian (PW-4). It was deposed that accused/appellant Tuphail assaulted Khalid (PW-4) by lathi, which hit on his right elbow and left leg. She deposed to be assaulted by co-accused Hadis by lathi, which hit on her back. She deposed to go straightway to Dighwara police station after the occurrence and recorded their statements, where case was lodged by her husband (PW-5) and subsequently from police station they were sent to hospital, where they were treated. She identified accused persons before trial court.

19.1 On cross-examination, she stated and supported about digging of soil by appellant/convict near to her house. She deposed that informant and PW-4 etc. were not assaulted appellant/convict during the occurrence. She also denied that appellant/convict received head injury during the occurrence, caused by informant and others. She stated that she did not saw any injuries upon appellant/convict as received during the occurrence. She also denied regarding his admission in hospital for treatment and to made his statement to police thereof. It was stated that appellant/convict Tuphail not assaulted her. She also deposed that Khalid (PW-4) was not



assaulted by co-accused Hadis.

20. **PW-3** is Md. Mustkim Miya, who is elder brother of informant, supported the date and time of occurrence through his examination-in-chief and deposed that on the order of Tughail (appellant/convict), co-accused Akhtar given farsa blow on Nizamuddin (informant/PW-5), where in course of saving, he received injury on his left hand, whereas second blow of farsa was given on his neck but third blow was hold from back by Khalid (PW-4) and thereafter, Khalid (PW-4) was assaulted by Tughail (appellant/convict) by lathi, which hit on his right elbow and left leg. It was deposed that when PW-2 wife of Nizamuddin (informant/PW-5) came to rescue, she was assaulted by Hadis Mian. He stated on cross-examination as to deny that Tughail (appellant/convict) was not injured during the course of occurrence. He stated that he was not attended injured Nizamuddin in Dighwara hospital. He also stated Tughail lodged a false case regarding same occurrence, where they have been acquitted.

21. **PW-4** is Md. Khalid, who is the nephew of informant and also an injured witness. It was deposed by him that Akhtar assaulted by farsa to his uncle Nizamuddin, which was stopped by using hand, causing hand injury. Second assault



of farsa was caused on neck, whereas third blow of farsa was hold from back by him and thereafter, he was assaulted by Tughail (appellant/convict) by lathi, receiving injuries on hand and leg, when PW-2 came to rescue her, she was assaulted by co-accused Hadis by lathi on her back. It was deposed that all three injured were went to Dighwara hospital for treatment. It was stated that his uncle Nizamuddin was hospitalized for six days. He identified appellant/convict in court during trial.

21.1 On cross-examination, it was stated by him that appellant/convict, namely, Tughail Mian did not received any injuries during the course of occurrence. It was stated by him that he did not made statement before police as Tughail (appellant/convict) assaulted her aunty (PW-2). It is further stated by him that to guard from present occurrence, a case was lodged by appellant/convict making him accused alongwith other co-accused persons as informant Nizamuddin Mian, Mustakim Mian etc. where they have been acquitted. It was stated that in said case, statement of Tughail Mian (appellant/convict) was recorded in hospital.

22. **PW-5** is Nizamuddin Mian, who is the informant of this case and deposed through his cross-examination that he lodged this case against Hadis Mian,



Tuphail Mian (appellant/convict) and Akhtar Mian. He supported the date and time of occurrence and deposed that when he asked to stop digging of soil to Tuphail Mian (appellant/convict), he called his nephew Akhtar Mian and elder brother Hadis Mian, where on his order to kill, his nephew Akhtar assaulted him by *gandasa*. It is deposed that Akhtar Mian gave first blow of *gandasa* on his head, which was stopped by his left hand, causing injuries. Second blow was given on his neck and when third blow was attempted, it was hold from back by his nephew Khalid (PW-4), and, thereafter, Tuphail Mian (appellant/convict) assaulted his nephew Khalid (PW-4) by means of lathi, causing injury over his right hand elbow and left leg and when his wife Jarina Khatoon (PW-2) came to rescue, she was also assaulted by co-accused Hadis Mian by lathi on her back. He identified the signature over written information, which has been exhibited as **Exhibit- 1/1**. It is further deposed by him that witness Jogendra Rai, Ram Bachan Rai, Tafijul Mian and Rudal Rai are not willing to depose in his favour as they were win over by the appellant/convict.

22.1 On cross-examination, it was stated by him that he is a constable in Excise Department and posted in



Chapra. It was stated by him that the soil was digging from his darwaja (courtyard). He denied to assault Tuphail Mian. It was stated by him that he was not assaulted by Tuphail (appellant/convict) and Hadis. He denied that Tuphail (appellant/convict) was not admitted in hospital in injured condition on the day of occurrence and he did not saw any injuries upon him. He denied the suggestion that he alongwith other persons assaulted Tuphail while he was cleaning the drain but he was saved by co-villagers and in said course, he received injuries.

23. **PW-6** is Jiwandan Ram, who is Investigating Officer of this case. He supported the date and time of occurrence and deposed that he visited place of occurrence after lodging the case and recorded the statement of witnesses during the course of investigation. He stated that he did not mention that which way was under re-filling near to well. He did not find any marks of blood stained at place of occurrence. It was stated by him that Nizamuddin (informant/PW-5) stated before him during course of investigation that he received injury over head and neck by same farsa blow, caused by co-accused Akhtar.

24. **PW-7** is Dr. Jayant Shekhar, who examined PW-2, namely Jarina Khatoon, PW-4, namely, Md. Khalid and



PW-5 Nizamuddin Mian on 08.01.90 while he was posted at Dighwara Primary Health Centre at 3.40 PM, for the sake of convenience, it would be appropriate to re-produce his deposition and same is as under:-

(i) Sharp cut 10" x deep exposing the whole underlying bone cutting, periostium, underlying major artery veins, nerves, Extending from the medial margin of illegible of left thumb to do the more the mid of left pre-arm in the medial side. The cut has also the impression of cutting weapon beneath the prevostium on the bone at the Meta Carpo-phalanzes joint of thumb.

(ii) Sharp cut 3 1/2" x deep upto the skin on the mid of face of neck. The injury no. 1 was grievous injury, injury 2 was simple. Injury no. 1 can be caused by garasa.

2. On the same day at 4:00 PM he examined Md. Khalik aged about 19 years and found the following injuries on his person.

(i) Bruise 1" x 1" on the mid lateral side of left lower leg.

(ii) Swelling 1 1/2" x 1" x 1/2" on the lateral side of right elbow joint. Both the injuries were simple caused by hard blunt substance such as lathi.

3. On the same day at 4:10 PM, he examined Jarina Khatoon aged about 28 years and found the following injuries:-

i. Swelling 2" x 1 1/2" on the back joint below the mid of left clavicle.

ii. Bruise 1/2" x 1/2" on the left maxillary prominence of face. Injuries were simple inflicted by most probably fist hands or hard blunt



substance such as by round edge of lathi.

25. On perusal of aforesaid discussed oral evidence and exhibited documents, it appears that no independent witnesses turned to depose in favour of occurrence, though they were initially named as prosecution witnesses as per formal FIR/charge-sheet. It appears from the deposition of PW-5 that as they were won over by appellant/convict side, they failed to depose in favour of prosecution. No doubt PW-1 is nephew, PW-2 is wife of informant, PW-3 is elder brother, PW-4 is nephew of informant injured, PW-5, namely Nizamuddin Mian and they all are relatives.

26. At this juncture, it would be appropriate to reproduce the legal report of **Mano Dutt and another Vs. State of Uttar Pradesh** reported in **(2012) 4 SCC 79**, where it was observed in paras- 24 and 25 as under:-

“24. Another contention raised on behalf of the accused/appellants is that only family members of the deceased were examined as witnesses and they being interested witnesses cannot be relied upon. Furthermore, the prosecution did not examine any independent witnesses and, therefore, the prosecution has failed to establish its case beyond reasonable doubt. This argument is again without much substance. Firstly, there is no bar in law in examining family members, or any other person, as witnesses. More often than not, in such cases involving family members of both sides, it is a



member of the family or a friend who comes to rescue the injured. Those alone are the people who take the risk of sustaining injuries by jumping into such a quarrel and trying to defuse the crisis. Besides, when the statement of witnesses, who are relatives, or are parties known to the affected party, is credible, reliable, trustworthy, admissible in accordance with the law and corroborated by other witnesses or documentary evidence of the prosecution, there would hardly be any reason for the Court to reject such evidence merely on the ground that the witness was family member or interested witness or person known to the affected party.

*“25. There can be cases where it would be but inevitable to examine such witnesses, because, as the events occurred, they were the natural or the only eye witness available to give the complete version of the incident. In this regard, we may refer to the judgments of this Court, in the case of *Namdeo V. State of Maharashtra* [(2007) 14 SCC 150]. This Court drew a clear distinction between a chance witness and a natural witness. Both these witnesses have to be relied upon subject to their evidence being trustworthy and admissible in accordance with the law.”*

27. Out of five prosecution witnesses including informant, three are injured, they are PW-2, PW-4 and PW-5 himself. Normally injured witness is to be accepted as Star witnesses of the occurrence but if there is material contradictions in their deposition, they cannot be relied upon.

28. In this context, it would be appropriate to reproduce the legal report of *State of Uttar Pradesh Vs. Naresh*



and others reported in **(2011) 4 SCC 324**, where it was observed in para-27 as under:-

“27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. [Vide: Jarnail Singh V. State of Punjab, (2009) 9 SCC 719; Balraje @ Trimbak V. State of Maharashtra (2010) 6 SCC 673; and Abdul Sayed V. State of Madhya Pradesh.”

29. It appears from the deposition of PW-1, who is the eye-witness of the occurrence that no order was given to co-accused Akhtar Mian by this appellant/convict, namely, Tuphail Mian to give farsa blow to injured informant/PW-5, namely, Nizamuddin as to kill him. He stated that third blow was hold from back by Khalid (PW-4) and Jarina Khatoon (PW-2) both, whereas PW-2, who is the wife of PW-5/informant



stated that on the order of appellant/convict, co-accused Akhtar made farsa blow to her husband. She stated that third blow of farsa was hold from back by PW-4 Khalid Mian only and not by her. She also denied to receive any injury by appellant/accused during course of occurrence. PW-3 also supported that co-accused Akhtar made farsa blow on informant under order of appellant/convict, whereas PW-4, who is injured eye-witness and nephew of informant did not depose that the farsa blow by co-accused Akhtar was made under order of appellant/convict, whereas PW-5 informant/injured stated during trial that farsa blow was made under order of appellant/convict, therefore, out of five prosecution witnesses, PW-1 and PW-4 (injured witnesses) did not support the fact during the trial that farsa blow was made under the provocation/abetment of appellant/convict.

30. It appears from the deposition of PW-4, namely, Md. Khalid that for the same date of occurrence, appellant/convict also lodged a case making him accused alongwith Nizamuddin (informant/PW-5), Najam Mian, Mustakim Mian (PW-3), where they have been acquitted. He specifically stated that the statement of appellant/convict Tughail Mian regarding said case was made in hospital, whereas



PW-3 also supported during the trial that Tughail also lodged a case regarding same day occurrence, where they have been acquitted, whereas PW-2 denied that Tughail (appellant/convict) received any injuries during the course of occurrence caused by informant and Khalid Mian etc. She also did not saw any injuries upon appellant/convict. PW-5/informant also stated during trial that the Tughail (appellant/convict) did not come to hospital in injured condition on same day and he also did not saw any injury upon him.

31. In this context, it would be appropriate to travel over Exhibits A and B of defence. It appears admitted in view of deposition of PW-4 that the cross case was lodged regarding same occurrence by appellant/convict and his statement was made in hospital itself. **Exhibit-B** is the injury report, though same was not brought on record during the trial of C-93/1990 but as far hospitalization is concerned, same appears supported by PW-4, who is also an injured witness of the occurrence. Thus, it appears that the prosecution witnesses of this case including informant were in inimical term and as such be said interested witness, to secure conviction, which makes their testimony, not reliable, as to act upon.

32. In view of above factual and legal



discussions, it appears that prosecution failed to prove conviction under Section 307/115 of the Indian Penal Code. Abetement as the word 'instigate' means to goad or urge or forward or to provoke, incite, or encourage to doing an untoward act which that persons would have otherwise not done, there must be *mens rea* in order to settle for abetement and therefore, without knowledge or intention, there cannot be abetement as held in the matter of *Sanju @ Sanjay Singh @ Sanjay Singh Sengar V. State of Madhya Pradesh*, reported in *(2002) 5 SCC 371*.

33. Accordingly, appeal stands allowed under benefit of doubts.

34. The impugned judgment of conviction dated 11.12.2002 and order of sentence dated 13.12.2002 rendered by Additional District and Sessions Judge, Fast Track Court No. III, Chapra, in Session Trial No. 418 of 1990 is set aside. The accused/appellant is acquitted of the charges levelled against him. Appellant is on bail as submitted, On acquittal, their bailors and sureties stand discharged.

35. The Patna High Court, Legal Services Committee is, hereby, directed to pay Rs. 5,000/- (Rupees Five Thousand) to Mr. Anurag Kumar, learned Amicus Curiae for



rendering his valuable professional service for the disposal of present appeal.

36. LCR, if any, be sent back to learned trial court along with the copy of this judgment. Fine, if any, paid by accused/appellant in furtherance of order of sentence, be refunded to him immediately.

(Chandra Shekhar Jha, J)

veena/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	06.12.2023
Transmission Date	06.12.2023

