

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.1 of 2002

(Against the judgment of conviction and order of sentence dated 12th of December, 2001 passed by the Presiding Officer, 1st Additional, Fast Track Court, Siwan in Sessions Trial Nos.24 of 1992/ 10 of 2001 arising out of M. H. Nagar P. S. Case no.50 of 1991.)

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1. Bakrid Mian @ Bakridan Dhobi
 2. **Hasnain Mian**, both sons of Charidan Mian, resident of Village-Ushari Khurd, Police Station-M. H. Nagar, District-Siwan.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Raghav Prasad-Advocate

For the Respondent/s : Mr. Bipin Kumar-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 04-08-2015

At an initial stage, both the convicts namely Bakrid Mian @ Bakridan Dhobi and Hasnain Mian were the appellants, out of whom, on account of death of Bakrid Mian @ Bakridan Dhobi, instant appeal has been perceived abated vide order dated 16.02.2015 with regard to Bakrid Mian @ Bakridan Dhobi and on account thereof, instant appeal remains alive relating to sole appellant Hasnain Mian, who has been found guilty for an offence punishable under Section 326 of the I.P.C. and sentenced to undergo R.I. for four years as well as to pay a fine appertaining to Rs.1,000/- and in default thereof, to undergo R.I. for six months under Section 341 I.P.C. and directed to undergo R.I. for six months with a further direction to run the sentences concurrently vide judgment of conviction and sentence

dated 12.12.2001 passed by the Presiding Officer, 1st Additional Sessions Judge, Fast Track Court, Siwan in connection with Sessions Trial No.24 of 1992/ 10 of 2001, hence this appeal.

2. Injured Ali Hussain (who has been examined as CW-1) gave his fard-beyan at Sadar Hospital, Siwan/ where he was admitted on 21.05.1991 at about 7.00 p.m. disclosing therein that he happens to be three brothers. Eldest is Bakrid Mian, youngest is Hasnain Mian while he happens to be in middle. He had further stated that all the three brothers had jointly purchased 11 dhoors of land about 15-20 years ago. Today, Panches were requisitioned for partition. His share has been carved out. Accordingly, he dug foundation and was putting brick particles therein. At about 4.00 p.m., Bakrid Mian and Hasnain Mian came at that very place and further, inquired from him why he had dug foundation without their permission, over which he replied as per verdict of the Panches, he has been engaged in such activity. During course thereof, his elder brother caught hold him and Hasnain pierced 'Chhura' in his stomach on account of which he became injured. Blood oozed out. He had fallen over ground. On hue and cry, Gutan Mian, Munna Mian came who have had seen the occurrence. Thereafter, Nemajuddin Mian as well as his wife Sahiba Khatoon lifted him to hospital where he was being treated.



3. The aforesaid fard-beyan was transmitted to the local police station and on account thereof, Aandar P. S. Case no.50 of 1991 was registered followed with investigation as well as submission of charge sheet. Cognizance was taken and on account of offences being exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions where trial held and concluded in a manner, subject matter of instant appeal.

4. Appellant/ accused had pleaded innocence as well as false implication in his defence as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C.

5. In order to substantiate its case, prosecution had examined altogether five PWs, out of whom PW-1 Sahiba Khatoon, wife of injured and who also deposed on material aspect while PW-2 Dinesh Kumar Singh is a formal witness, PW-3 Basiran Khatoon, PW-4 Gultan Mian, PW-5 Nemajuddin were declared hostile. After closure of the prosecution case, a prayer was made on behalf of prosecution and on account thereof, informant/ injured was examined as CW-1 while Dr. Anil Kumar, who had examined the injured, has been examined as CW-2. Raghav Singh formal in nature has been examined as CW-3. Prosecution had also exhibited the document as Exhibit-1, formal F.I.R., Exhibit-2 injury report, Exhibit-3 Fard-

beyan, Exhibit-4 chargesheet. Neither any DW nor any kind of document has been exhibited on behalf of accused.

6. While assailing the judgment of conviction and sentence, it has been submitted on behalf of appellant that all the material witnesses gone adverse to prosecution and on account thereof, PW-3, PW-4, PW-5 have been declared hostile. That being so, the evidence happens to be that of wife and husband. When the evidence of injured CW-1 along with fard-beyan is taken together, PW-1 could not stand as an eye witness to occurrence. Moreover, during course of cross-examination, she had shown herself to be not an eye witness and on account thereof, her evidence is fit to be discarded.

7. Now, coming to the evidence of CW-1, it has been submitted that his evidence should be taken into consideration in the background of surrounding circumstances, more particularly, on account of non-examination of the I.O. Elaborating the issue, learned counsel for the appellant submitted that dispute on account of share is coming out from his evidence right from the fard-bayan as well as the evidence whatsoever been deposed in the Court. According to PW-1 wife, no blood was found at the place of occurrence while the injured had stated that blood had oozen out and on account of inconsistent version of these two PWs, presence of I.O. was necessary so that the



actual place of occurrence could have been traced out whether it happens to be the place where foundation was dug or somewhere else and on account of animosity prevailing amongst the parties, appellant has been falsely implicated along with Bakrid Mian (since deceased). The allegation has further to be seen in the background of the fact that according to informant Nemajuddin was the person who was one of Panches. Nemajuddin, who has been examined as PW-5 had not corroborated the version of the informant. Therefore, the genesis of occurrence has completely been washed away and that being so, creates doubt over manner of occurrence as well as identifying the appellant to be author of the injury.

8. It has also been submitted that examination of doctor as CW-2 is not going to improve the case of the prosecution in the background of the fact that appellant has not challenged the injury rather the place and the manner whereunder occurrence has been alleged.

9. Furthermore, it has also been submitted that non-examination of I.O. has caused serious prejudice in the background of the fact that fard-beyan is said to have been recorded on 21.05.1991 at 7.00 p.m. at Sadar Hospital, Siwan whereupon case was instituted on 24.05.1991 and it was received at the office of Chief Judicial Magistrate on 27.05.1991. As column no.3 of formal F.I.R. divulges

the fact that F.I.R. was transmitted on 25.05.1991. Therefore, the delay, in case I.O. would have been examined, has given an opportunity to the appellant to cross-examine on that very score and further, to have explained as an ante-timed F.I.R. being filed to implicate the appellant.

10. At last, it has been submitted that without premeditation the occurrence, in case is accepted, has been committed in the background of dispute relating to share and so, at least application of Section 4 of Probation of Offenders Act would have been applied by the learned lower Court instead of inflicting substantial sentence. Further, stressing over the point, it has been submitted that the occurrence is of the year 1991 and more than 24 years have passed, would not justify the substantial sentence and instead thereof, appellant be allowed to avail the benefit, provided under Section 4 of Probation of Offenders Act.

11. The learned Additional Public Prosecutor counter-meeting with the argument raised on behalf of appellant submitted that as per Evidence Act, the counting of numbers of the witnesses are forbidden. It happens to be reliability of the witness which count. From the evidence of the injured/ informant, it is apparent that no embellishment or inconsistency has been found in his evidence on account thereof, his evidence happens to be reliable, trustworthy and



is further found corroborated with the evidence of CW-2, Dr. Anil Kumar. It has further been submitted that the suggestion given to the witnesses has not been reiterated by the appellant during course of his statement under Section 313 Cr.P.C. nor any DW has been examined on that very score as a result of which, suggestion now remains mere suggestion. So far occurrence is concerned, CW-1 categorically stated without atrophy.

12. Furthermore, it has been submitted that there happens to be no application of Probation of Offenders Act in the background of the fact that Section 326 of the I.P.C. prescribes sentence up to life imprisonment. It has also been submitted that learned lower Court had taken a lenient view at the initial stage itself by inflicting only four years sentence. So, prayed for dismissal of instant appeal.

13. As indicated above, the evidence of PW-2 and CW-3 being formal in nature are of no use. In likewise manner, the evidence of PW-3, PW-4 and PW-5 on account of having been declared hostile. Therefore, now remains the evidence of PW-1 and CW-1. PW-1 during her examination-in-chief had stated that while her husband was engaged in putting bricks in foundation, Bakrid Mian and Hasnain Mian came, they have not assaulted at that very moment. They enquired and then, Bakrid Mian caught hold whereupon Hasnain

Mian pierced 'Chhura'. During cross-examination, she had detailed that foundation was dug by her husband. Her husband was laying brick. She had further stated that her husband had fallen down over the brick portion. At Para-6, she had stated that her husband regained sense after two days. Police had come on the following day whom she had given her statement. In Para-5, at last line, she had stated that blood had not fallen down at the place where her husband was lying.

14. CW-1 informant/ injured had detailed the genesis by stating that all the brothers have had purchased 11 dhoores of land. Hasnain was allotted his share from North side. Bakrid Mian was in middle and he was allotted Southern side. Bakrid and Hasnain had already constructed their house while he was putting brick after digging foundation, when both the accused came and enquired, over which he stated that from Panchayati, the aforesaid portion has been allotted to his share. Therefore, he was engaged in such kind of activity. Then thereafter, an altercation took place. During course thereof, Bakrid caught hold his hand and Hasnain pierced 'chhura'. He had shown the scar mark of wound to the Court. He fell down and accordingly, was lifted to Hospital where police came and took his statement in presence of witnesses. During cross-examination, it is evident that he was not cross-examined on the factum of occurrence rather from Paragraph-8 of his cross-examination, it is evident that

cross-examination was held on the score whether second blow was given after he fell down sustaining injury. He had clearly stated that no second blow was given. He had further stated that after falling, he raised alarm attracting so many persons including his wife, Nejamuddin, Gultan, Washiran etc. who lifted to hospital. In Paragraph-9, he had stated that blood was oozing out. It is further evident from Paragraph-13 that he had shown the blood stained earth to the I.O.

15. CW-2 is the doctor, who had examined the injured on 21.05.1991 itself and found the following injuries:-

i) One incised wound on right flank of abdomen extending upto umbilical region, 7" x ½" x deep to peritoneal cavity. Part of omentum was peeping out near umbilical region from the wound.

(i) The doctor had found the nature of injury grievous caused by sharp cutting weapon. Age of injury has also been ascertained within six hours. During cross-examination, save and except attracting that injury might be caused by fall over edge of spade, nothing more has been attracted.

16. After analyzing the evidence of the witnesses in the background of presence of fard-beyan coupled with evidence of CW-1, it is apparent that presence of PW-1 at the place of occurrence at the time of occurrence happens to be doubtful and on account thereof,



the evidence of PW-1 is not found fit for acceptance as an eye witness to occurrence. Now, remains the evidence of CW-1 admittedly, he happens to be an injured witness and as has been held by the Hon'ble Apex Court repeatedly in *Brahm Swaroop and another versus State of Uttar Pradesh reported in (2011) 6 SCC 288* as well as in *Mano Dutt and another Versus State of Uttar Pradesh reported in (2012) 4 SCC 79*, the evidence of injured witness is to be accepted in the background of the fact that presence of injury suggest presence of injured at the place of occurrence unless and until it happens to be completely demolished. From the evidence of CW-1, it is apparent that defence could not dare to cross-examine him on the point of occurrence as well as on the place of occurrence and that being so, presence of this witness at the place of occurrence where foundation was dug and brick was being kept and during course thereof, was assaulted with 'Chhura' by the appellant is found out of controversy. The manner of occurrence and the weapon by which such injury was caused is found corroborated with the evidence of Doctor (CW-2). At the present moment, it is worthy enough to note that although CW-2 was suggested that this injury might be caused by falling over edge portion of spade, but no such suggestion was given to the CW-1 injured that he had sustained injury after having fallen over the edge of spade nor there happens to be cross-examination of this witness on that very line. The Court cannot make out a third case. Therefore, that

part of cross-examination of CW-2 is not going to give any sort of rescue.

17. Now, coming over non-examination of I.O., no adverse impact has been perceived. CW-1 was not at all cross-examined or even suggested that by taking the police in his collusion, he got the F.I.R. ante-dated and further, by such action has caused prejudiced to the accused. In likewise manner, there happens to be no cross-examination at the part of the accused that foundation was not dug, brick was not being put in the foundation and on account thereof, there happens to be no challenge regarding place of occurrence. In the aforesaid background, presence of blood at the place of occurrence or not is of no vital issue on account of non-challenging the place of occurrence. Furthermore, from the fard-beyan in consonance with the evidence of CW-1, it is apparent that there happens to be no material contradiction available and that being so, it could not be said that on account of non-examination of I.O., appellants have sustained some sort of prejudice. Moreover, the Hon'ble Apex Court has considered the aforesaid aspect in *Lahu Kamlakar Patil and another versus State of Maharashtra reported in (2013) 6 SCC 417* wherein it has been held that unless and until, there happens to be concrete and positive material on the record that due to non-examination of I.O., serious prejudice has been caused to the accused, it would not be

considered as a dent in prosecution case.

18. Furthermore, it is apparent from Section 134 of the Evidence Act that no particular number of witnesses are required for the proof of any fact and on account thereof, the prosecution case cannot be thrashed on account that only CW-1, the injured came forward to support its case without having corroboration by the other PWs. Furthermore, as the injury has been found grievous in nature, on account thereof, conviction for an offence under Section 326 of the I.P.C. is found proper. With regard to presence of Section 341 of the I.P.C., it is apparent from the evidence of CW-1, informant himself that appellant Hasnain Mian had not obstructed the informant. Therefore, the conviction and sentence recorded under Section 341 of the I.P.C. did not justify its application and is accordingly, erased.

19. Now, coming over question of sentence, it is settled principle of law that sentence should be in proportionate with the nature of offence. It is apparent from the record as discussed above, that both the parties are brothers, dispute arose in between on account of share, appellant has got no previous history, no complain at the end of informant regarding his misconduct at an earlier occasion and further, the occurrence took place after having an altercation in between and is further found to have remained in custody during course of trial as well as after conviction.

20. In the aforesaid facts and circumstances of the case, the sentence inflicted by the learned lower Court is modified as already undergone enhancing the amount of fine to Rs.25,000/-. In case of default at the end of the appellant to deposit the aforesaid amount within a month, then in that event, the substantial sentence inflicted by the learned lower Court will substitute the same. After depositing of the amount of Rs.25,000/-, Rs.20,000/- will be paid to the informant Ali Hussain on proper identification by the learned lower Court after noticing him in lieu of compensation in terms of Section 357 of the Cr.P.C.

21. Appeal is dismissed with the aforesaid modification.

22. Office to transmit the lower court record to the learned lower Court immediately for proper compliance of the order.

(Aditya Kumar Trivedi, J)

Patna High Court,
Dated-04.08.2015
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