

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.398 of 2001

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1. RAM NARAIN NONIYA.
2. RADHEY SHYAM NONIA.
BOTH SONS OF RAM KAILASH NONIYA.
BOTH RESIDENTS OF VILLAGE-KHERAI, P.S.-ANDAR, DISTRICT-SIWAN.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

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Appearance:

For the Appellant/s : Mr. Rakesh Kumar, Adv.
Mr. Rakesh Kumar Srivastava, Adv.
For the State : Mr. Bipin Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT
Date: 03-08-2015

Appellant Ram Narain Noniya has been found guilty for an offence punishable under section 325 IPC and sentenced to undergo R.I. for a year as well as also fined Rs.1,000/-(one thousand) in default thereof, to undergo R.I. for three months, appellant Radhey Shyam Nonia has been found guilty for an offence punishable under section 323 IPC and sentenced to undergo S.I. for three months by Presiding Officer, First Additional Fast Track Court, Siwan vide judgment of conviction and sentence dated 29.09.2001 passed in connection with Sessions Trial No.30 of 1989 / 167 of 2001, have challenged the same under instant appeal.

2. Shorn of unnecessary details, PW.4, Ram Rekha Nonia while was admitted at Sadar Hospital, Siwan gave his fardbeyan on 15.01.1987 disclosing therein that yesterday

(14.01.1987) at about 04:00 P.M. he had gone to see his field wherein maize crop was standing. Land of Ram Kailash Nonia his co-villager lies adjacent to this plot who also planted maize. He was putting earth over the maize and during course thereof, he had cut standing maize crop from his field over which he had inquired with regard to such activity whereupon he began to abuse. On his protest, Ram Narain Noniya gave spade blow over his forehead causing injury. He fell down. On his cry other co-accused also came who assaulted with *lathi* at the instigation of one Tukar Kampar. Maheshwar Singh, Ram Suresh Nonia, Brahamdeo Gorh, Ram Shankar came in his rescue seeing whom the accused persons escaped therefrom. He was lifted to Sadar Hospital where treatment was going on.

3. On the basis of the aforesaid fardbeyan, Ander P.S. Case No.5 of 1987 was registered under Section 324, 307, 323, 34 of the IPC followed with investigation and after concluding the same, charge sheet was submitted under the aforesaid sections and on account thereof, after taking of cognizance thereunder the case was committed to the court of session where, after concluding trial ultimately met with the result, subject matter of instant appeal.

4. Defence as comes out from the mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial of occurrence. Furthermore, on account of land dispute instant false case has been instituted.

However, neither any DW nor any kind of document has been exhibited on behalf of defence.

5. In order to substantiate its case prosecution had examined altogether eight PWs out of whom PW.1 is Ram Suresh Nonia, PW.2 is Maheshwar Singh, Pw.3 is Krishna Pratap Singh, PW.4 is Ram Rekha Nonia, PW.5 is Parmanik Nonia, PW.6 is Brahamdeo Gond, P.W.7 is Ram Shankar Pathak and PW.8 is Rajendra Prasad out of whom PW.1, PW.2, PW.4 and PW.5 are over material aspect while PW.3, PW.6 and PW.7 have been declared hostile. PW.8 is formal witness who had exhibited the documents for want of examination of Investigating Officer as well as doctor.

6. While assailing the judgment of conviction and sentence it has been submitted on behalf of learned counsel for the appellant that the impugned judgment of conviction and sentence happens to be against the settled principle of law and on account thereof, could not survive. It has also been submitted that non-examination of Investigating Officer and doctor is found another deficiency persisting in the prosecution case. Side by side their non-examination had caused serious prejudice to the defence.

7. On this score, it has been submitted that FIR was registered on 15.01.1987 and from column-3 of the formal FIR, it is evident that it was discharged from P.S. on 16.01.1987 however, the same was received at the CJM Office beyond 24



hours. On account of non-examination of Investigating Officer, the delay in transmission of the FIR along with delay in having the FIR at the office of CJM could not properly been exposed which could have, in case Investigating Officer would have been examined would have enable the defence to find out, a vital clue which could have adverse impact upon the prosecution version. It has also been submitted that from the evidence of PW.4, the informant along with his son PW.5 it is apparent that, same piece of land has been purchased by the respective parties and for that a ceiling proceeding was pending since before. That being so, the examination of Investigating Officer would have disclosed the actual place of occurrence as well as the disputed land, as claimed under the possession of prosecution or the defence. Not only this, the genesis of occurrence that means to say cutting of maize would have also been surfaced.

8. Apart from this, from the evidence having been deposed by the witnesses before the court, is found full of contradiction on account of presence of material development regarding which attention had already been drawn up. Again, the defence found precipiced as, due to non-examination of Investigating Officer could not be able to bring those contradictions on record legally.

9. In likewise manner, the evidence of doctor which is admissible in terms of Section 45 of the Evidence Act was necessary to corroborate the prosecution version regarding



manner of occurrence because of the fact that there happens to be specific disclosure in the fardbeyan as well as in the evidence of PW.4, the informant that appellant Ram Narain Noniya had inflicted spade blow over head of informant which could have supporting link with the evidence of the doctor. Further, on account of non-examination of doctor, the medical report which has been exhibited through PW.8 a formal witness would not be found admissible in the eye of law because of the fact that it was the doctor who happens to be maker of the document based upon his opinion after examining the injured. Therefore, the status of formal witness save and except identifying the pen and handwriting nothing more remains and that being so, considering the injury report under para-17 of the judgment was not in accordance with law.

10. In the background of aforesaid legally deficiencies persisting on the record, it has also been submitted that from the evidence of PW.5 son of informant along with informant (PW.4) himself have stated that earlier to the present case, a criminal case was instituted wherein same set of witness that means to say PW.1, Ram Suresh Nonia, PW.2 Maheshwar Singh deposed against the accused persons which ultimately ended in acquittal. So under the garb of land dispute, it has been submitted that same set of witnesses are there to rescue the persecution party who is bent upon to file case after case just to coerce the appellant to give up their claim over the land. Furthermore, it has been

submitted both the parties are common agnate as is evident from the evidence of PW.4 paragraph-3. Therefore, the nature of the evidence, the status of the witnesses coupled with the persisting land dispute amongst the parties, would not justify the judgment impugned.

11. It has then been submitted that presence of PW.5 has purposely been introduced as he neither named in the FIR nor his presence happens to be. In likewise manner PW.4 had deposed before the court. Then in that event, presence of PW.5 as an eyewitness became doubtful. Therefore, having the cumulative effect of the materials available on the record did not justify the judgment of conviction and sentence recorded by the learned trial court.

12. On the other hand, the learned Additional Public Prosecutor supported the finding recorded by the learned lower court and submitted that learned lower court had already taken into account the deficiency persisting on the record and that happens to be reason behind that not only other co-accused were acquitted by the learned lower court rather appellants have been found guilty for the lesser offence which, in the facts and circumstances of the case did not justify its interference.

13. Admittedly, the doctor and Investigating Officer has not been examined. There happens to be no explanation at the end of the prosecution with regard to their non-examination. Now the case has to be adjudged in the background of deficiency



persisting on the record due to their non-examination. It is not prudent to accept the submission made on behalf of appellant that in each and every eventualities wherein Investigating Officer as well as doctor is not examined, case should end in acquittal. But where prejudice has been caused on account of non-examination of Investigating Officer and doctor, certainly the prosecution case is bound to fail.

14. Learned counsel for the appellant happens to be right in his submission that from column-3 of the formal FIR the date of dispatch of FIR to the CJM Office happens to be on 16.01.1987 while it was registered on 15.01.1987. From the fardbeyan it is apparent that same was received at the office of Chief Judicial Magistrate on 19.01.1987. That being so, it happens to be in utter violation of mandate of Section 157 of the Cr.P.C. whereunder FIR is to be dispatched forthwith to the cognizance taking court . Certainly, on account of non-examination of Investigating Officer the aforesaid controversy remained under mystery. Furthermore, from the evidence of PW.5 para-43 he had categorically stated that there was no dispute amongst the parties relating to land while PW.4, informant, at para-8 had stated that a ceiling proceeding is going on in between the parties with regard to the land which has been purchased by the informant from Prabha Sharan Kunwar on 26.06.1980 while the accused persons have also purchase half of the area of aforesaid survey plot. He had further stated that he felt aggrieved

on account of aforesaid sale deed having in favour of accused. In the aforesaid background the non-examination of Investigating Officer, the actual place of occurrence remained unexplained because of the fact that neither PW.1, PW.2 nor PW.4, PW.5 identified the same with proper, positive evidence.

15. Now coming to the score of non-examination of the doctor, it is relevant to note that Section 307 IPC is bifurcated in two parts. The first one where there happens to be presence of hurt and the second part absence thereof and in likewise manner, there happens to be infliction of sentence. Therefore, mere non-examination of doctor would not have considered deficiency in the prosecution case but, once the doctor has not been examined then in that event, presence of injury in consonance with the assault more particularly the weapon as well as its corresponding result could not come up on the record. Examination of formal witness is not going to give any lifeline save and except where the evidence happens to be in terms of Section 32 of the Evidence Act suggesting as well as fulfilling the ingredients prescribed therein that means to say without undue delay presence of witness was impossible or on account of death or having abroad, there was no prospect of the witness. That being so the evidence of PW.8 could not be found as a legal evidence to be used in favour of the prosecution and that being so, the injury report cannot be taken into consideration more particularly regarding its nature as well as inferring the corresponding result.

16. In the background of admission at the part of PW.5 paragraph 13 wherein he had admitted that PW.1 and PW.2 were witnesses at an earlier occasion in a case launched by him wherein the accused persons were acquitted and in the aforesaid background when the evidence of PW.1 & PW.2 have gone through, it did not inspire confidence.

17. From perusal of judgment impugned, it is evident that major part of prosecution evidence had already been disbelieved. Furthermore, on account of legal impediment, the injury report, so relied upon by the learned lower court, could not be admitted in evidence. Apart from this, presence of PW.5, has also become doubtful. Now, remains the evidence of PW.4, informant. Although he had not deposed that strike was given from blunt side of spade, the learned lower court inferred on its own in order to interconnect with the injury report. Moreover, he had admitted that assault had taken place in maize field, and in the background of absence of Investigating Officer, and as PW.4 did not properly identify the land, having under his exclusive possession, it looks unsafe to accede with the finding recorded by the learned lower court. Hence the judgment impugned is set aside. Appeal is allowed. Appellants are discharged from liability of bail bond.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated 3rd day of Aug., 2015
Prakash Narayan

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