

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.412 of 2011

1. Md. Sarfaraz S/O Sk. Sajirn.
2. Md. Ashfak Alias Riyazat S/O Late Manir.
Both R/O Village- Kishandaspur, P.S.- Budhuchak, District- Bhagalpur.
3. Md. Sikail S/O Sk. Sukar R/O Village- Ekdara, P.S.- Budhuchak, District- Bhagalpur.

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 462 of 2011

1. Md. Monazir S/O Late Md. Wazir.
2. Md. Murshid S/O (Sri) Md. Sheikh Ahmad.
3. Md. Sojjam S/O (Sri) Md. Sheikh Ishmat
4. Md. Sajid S/O (Sri) Md. Sheikh Taimuz @ Tamiz.
All R/O Village - Madarsa Tola, P.S. Buddhuchak, P.O. Krishnadaspur,
District – Bhagalpur.

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

Appearance:

(In CR. APP (SJ) No. 412 of 2011)

For the Appellant/s : Mr. Saket Tiwari, Adv.
Mr. Viranjay Singh, Adv.
For the State : Mr. Bipin Kumar, APP

(In CR. APP (SJ) No. 462 of 2011)

For the Appellant/s : Mr. Aaruni Singh, Adv.
For the State : Mr. S.N. Prasad, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 10-08-2015

1. Criminal Appeal (SJ) No.412 of 2011 wherein Md. Sarfaraz, Md. Ashfak Alias Riyazat, Md. Sikail are the appellants whereas in Criminal Appeal (SJ) No. 462 of 2011 Md. Monazir, Md. Murshid, Md. Sojjam and Md. Sajid are the appellants commonly originate out of judgment of conviction dated



16.03.2011 and sentence dated 24.03.2011 passed by Additional Sessions Judge, FTC, Vth, Bhagalpur in Sessions Trial No. 764 of 2002 whereunder each of the appellant has been found guilty for an offence punishable under Section 395 of the IPC and has been directed to undergo R.I. for ten years as well as also slapped with a fine appertaining to Rs.5000/- in default thereof, to undergo S.I. for six month, additionally, accordingly been heard analogously are being decided by a common judgment.

2. Md. Ziayul Haque (PW.7) filed written report (Ext.1) on 21.01.2002 disclosing therein that in usual way when he had gone to Kolwar (Sugar Crushing Machine was installed) at about 12 midnight in between 20/21-01-2002 and was sleeping along with his brother, some miscreants pounced upon them, assaulted them on account of which they both awaken. After pointing pistol towards them, the miscreants began to demand money. In lantern light he had seen the miscreants who were seven in number and claimed to have identified them who were his co-villager Ashfak Alias Riyazat, Md. Sojjam @ Aajam, Md. Murshid, Md. Monazir, Md. Sarfaraz, Md. Sajid, Md. Sikail. After having the disclosure at his end that he has no money, they assaulted both of brothers with a iron rod as well as butt of pistol. He handed over Rs.500/- out of fear. They also took away torch of two cells. Thereafter, all of them carried him to some distance and then let him free with a threatening that in case he would disclose the event, will have to face dire consequences.



Thereafter, both the brothers came to his village and disclosed the event to his father, other family members including the villagers, on account of which, large number of villagers assembled. He had seen Sarfaraz at the house of Fakruddin where people have assembled on account of marriage ceremony. He, in company of villagers, tried to apprehend Sarfaraz who took out pistol and threatened that in case they will proceed, they will be murdered. All the villagers tried to snatch pistol from his possession, however Sarfaraz threw the same towards his other family members. Then thereafter, Sarfaraz was apprehended, dragged to his house where was confined. The villagers have tried to intervene into the matter suggesting that it happens to be a matter of local level so it should be sorted out at their end only and on account thereof, some delay has been caused. On 21.01.2002 at about 02:00 PM the aforesaid written report along with accused Sarfaraz was produced before the police where upon Kahalgaon (Buddhuchak) P.S. Case No23 of 2002 was registered under Section 395 IPC and after having completion of the investigation as well as submission of charge sheet, the trial commenced and concluded in a manner as indicated above after having the case committed to the court of Session.

3. The defence as is evident from mode of cross-examination as well as from the statement recorded under Section 313 Cr.P.C. is that of complete denial of occurrence as well as false implication. In their support, defence had also

exhibited complaint filed by appellant Sarfaraz as Ext.A, S.A. Ext.B.

4. While assailing the judgment of conviction and sentence it has been submitted on behalf of learned counsel for the appellants that the judgment impugned happens to be perverse cryptic and on account thereof, did not justify its finding. It has also been submitted that learned lower court failed to appreciate the infirmities persisting in the prosecution case having an adverse impact upon the instant prosecution.

5. It has then been submitted that it is the prosecution who has to prove its case beyond reasonable doubt. The conduct of the accused, the deficiencies at his end while cross-examining the witnesses is not going to jeopardize the interest of the accused in the background of the fact that those events will come into play after having the prosecution case proved to hilt.

6. In order to support its case although the prosecution has examined altogether ten PWs, but due to non-examination of the Investigating Officer which has purposely been withheld by the prosecution to suppress as well as concealed the deficiencies having at their end, caused serious prejudice to the interest of the accused and on that score alone, the judgment of conviction and sentence is fit to be set aside. Further elaborating the point, it has been submitted that as per prosecution version itself as is coming out from written report, the written report was submitted on 21.01.2002 at about 02:00 PM while from column 2(Kha) of



the formal FIR, it is apparent that FIR was registered on 21.01.2002 at about 04:30 PM. When the written report was filed at two PM at the P.S. itself then, there was no justification to have it registered after two and half hour. Not only this, it has also been submitted that from the record, it is apparent that there happens to be some sort of conflicting version at the end of the Investigating Officer while producing accused Sarfaraz along with written report on 22.01.2002 before the learned Chief Judicial Magistrate. Had there been examination of the Investigating Officer the aforesaid event would have been exposed in legal manner and if so, would have exposed the malicious prosecution.

7. Then it has been submitted that so far material witnesses are concerned, the status of the witnesses are under two categories. PW.1, PW.2, PW.3 and PW.7 are the witnesses who happens to be own family member of the informant while remaining PW.4, PW.5, PW.6, PW.8, PW.9 and independent witness happen to be hostile. So far PW.10 is concerned he happens to be the doctor who had examined PW.7 as well as PW.1 and his finding did not match with the allegation.

8. Now coming to the evidence of PWs.1, 2, 3 & 7, it has been submitted that PW.2 and PW.3 are not an eyewitness to occurrence rather are hearsay. The victims as per narration happen to be PW.1 and PW.7. When their evidence are taken together, it is apparent that they are inconsistent with each other

on each and every count including that of manner of identification. That being so, the prosecution case suffers from inherent deficiencies whereupon these appeals are fit to be allowed.

9. Per contra the learned Additional Public Prosecutor while supporting the finding arrived at by the learned lower court has submitted that from mode of cross-examination, it is apparent that there was no occasion for the prosecution to falsely implicate these appellants. It has also been submitted that non-examination of Investigating Officer had not caused prejudice in the background of the fact that PW.1 and 7 have supported the manner of identification. Even non seizure of lantern would not caused prejudice because of the fact that status of appellants being a co-villager and further, having close proximity during course of occurrence would not provide any opportunity over wrong identification. So submitted that the learned lower court had rightly come to the conclusion and sentenced therefor.

10. As evident, prosecution had examined altogether ten PWs out of whom PW.1 Md. Mikail, PW.2 Shekh Ismail, PW.3 Lal Mohammad, PW.4 Sk. Fakruddin, P.W.5 Sk. Khalil, PW.6 Md. Mojahid, P.W.7 Md. Ziyaul Haque, PW.8 Sk. Bonga, PW.9 Abdul Gani and PW.10 Dr. Harendra Kumar Singh. Side by side prosecution had also exhibited Ext.1 the written report. Though defence had not examined any DW however had exhibited Complaint Petition No.96 of 2002 as Ext.8 and 8A, Ext. B. 2, 2/1

injuries report.

11. PW.10, Dr. Harendra Kumar Singh had examined Ziyaul Haque as well as Md. Mikai on 21.01.2002 and found following injuries:

(A) Ziyaul Haque

Lacerated wound $\frac{1}{4}$ " x $\frac{1}{4}$ " x $\frac{1}{8}$ " over lower lip.

Caused by hard and blunt substance within 48 hours. Simple in nature,

(B) Md. Mikai.

No obvious injury was found over his body.

During cross-examination the doctor acceded with a suggestion that aforesaid injury can be caused on fall over hard substance. Apart from the fact that the nature of injury suggest it superficial.

12. Now coming to the oral evidence, as stated above PW.4, PW.5, PW.6, PW.8 and PW.9, the villagers have not supported the case of the prosecution with regard to occurrence as well as identification, hence they were declared hostile.

13. PW.3 is the father who had stated that in the night of 20/21-01-2002 Mikai came running as well as crying and disclosed that all the accused persons so named assaulted him as well as Ziyaul and further, out of fear Ziyaul had handed over Rs.500/-. Accused persons had also taken away torch. Accused persons also accompanied Ziyaul however, they let off with a



threatening of dire consequence in case he would disclose the event to his family members or villagers. He had further disclosed that they have identified the accused in lantern. He had further disclosed that all of them gone in search of accused and during said course, they have gone to the place of Fakruddin where marriage was going on. He found Sarfaraz there whom they tried to apprehended and during said course, Sarfaraz took out pistol. He threw his pistol towards his family members as they tried to snatch. They caught hold Sarfaraz. As it was night therefore, they have not proceeded towards Police Station. On the following morning they have gone to Police Station where his son instituted the case. During cross-examination at para-4 he had admitted that there was no animosity amongst the parties since before. In para-5 he had further stated that he had not seen the occurrence himself.

14. PW.2 is the another family member who had disclosed that on the alleged date and time of occurrence Mikai and Ziyaul came running and disclosed that accused persons have assaulted them and took away Rs.500/- and a torch. They have also disclosed names of accused (all the seven). He had also seen injury over lip of Ziyaul. He had further stated that Lal Mohammad Gani, Khalil along with others have caught hold Sarfaraz at marriage procession of Fakruddin master. He had not gone there. Sarfaraz was armed with pistol which he threw. Sarfaraz was caught hold, taken to the house of Lal Mohammad

and confined. Subsequently thereof, he was produced at the Police Station. During cross-examination he had stated that he had not seen the occurrence.

15. Though defence had not cross-examined this PW.2 regarding his relationship with PW.1 and 7 along with location of his house even then, from his evidence as well as evidence of PW.3, it is apparent that there happens to be some sort of inconsistency as PW.2 had stated coming of Mikai as well as Jiauddin jointly while PW.3, father of Mikai and Jiauddin had not stated like so. Virtually PW.3 had confined presence of Mikai alone and on account thereof, some sort of suspicion has arisen regarding activity of PW.7 over his presence at his house along with Mikai after the occurrence. If it is so, the subsequent event has also to be seen in the background of aforesaid infirmity visualizing from the evidence of PW.3.

16. PW.1 had claimed one of the injured and had stated that on alleged date and time of occurrence, while he was at Kolwari along with Ziyaul, the miscreants came assaulted them and on account thereof, they both awoken. They also took Rs.500/- from Ziyaul. They also took, one torch. Thereafter, they carried away Ziyaul to some distance and then let him off. He claimed identification of all the accused (so named) in lantern. During cross-examination it is apparent that though he had disclosed during course of examination-in-chief regarding source however of identification at para-4 he had admitted that it was a

dark night. He had further disclosed that he had shown lantern to Investigating Officer which was burning at the time of occurrence. Then he denied the suggestion that it is not a fact that he had not identified any of the accused. In paragraph 5 he had admitted to be an accused in two cases, including that of dacoity.

17. PW.7 is the informant who had stated that on the alleged date and time of occurrence, he along with his brother Mikai was sleeping at Kolwari. Seven accused persons came whom he identified. They began to assault. All were possessing pistol. They have assaulted them with butt of pistol. They also demanded cash. On his refusal, they again assaulted with butt of pistol. They have assaulted over his lip. His brother was assaulted with rod over his back. Then, thereafter, he handed over Rs.500/-. They have also taken away a torch. Thereafter they all had carried him to some distance and then, let him off with a threatening. Thereafter he along with his brother came at his house and disclosed the event to their family members including villagers. They have gone to the place of master Fakruddin where Sarfaraz was standing since before. He along with others attempted to apprehended Sarfaraz who took out pistol, aimed at him and further directed to go. However, they succeeded in overpowering him. During course thereof, he threw his pistol which was taken away by his family members. Sarfaraz was taken to his house where villagers also assembled. They

began to put pressure to matrodine and on account thereof, delay was caused. He claimed identification of the accused in lantern.

18. During course of cross-examination, it is apparent that the accused persons had filed Complaint Case No.96 of 2002 against the prosecution party has been admitted in para-9. He had admitted that on 20.01.2002 there was marriage at the house of Fakruddin and Md. Sarfaraz was one of the participants. Then he had denied the suggestion that they have forcibly taken away Sarfaraz. Further he denied the suggestion that no such type of occurrence had ever taken place.

19. Admittedly all the appellants are co-villagers. There was dark night. The occurrence happens to be of the month at January. None of the witnesses have stated that any of the accused had tried to conceal their face. Furthermore, there also happens to be absence of criminal antecedent of any of the accused. In the aforesaid background, really a co-villager would dare that too exposing themselves to commit a crime and further, for such meager amount. The another aspect which credits some sort of doubt happens to be over manner of apprehension of one of the accused Sarfaraz who was present at the Darwaja of Fakruddin on the eve of marriage. PW.1 and PW>7 had stated that at that very moment Sarfaraz had taken out pistol however, no firing was made. Furthermore, other family members presence has also been shown, however their names have not been disclosed nor it has been alleged that they pur resistance during

course thereof. PW.1 and PW.7 have not disclosed names of villagers who had accompanied them. Moreover, Fakruddin, who has been examined as PW.4, did not support such events. Not only this, from the evidence of PWs, who were declared hostile, the prosecution has suggested regarding commission of dacoity in the house of Ziyaul.

20. That being so, the judgment of conviction and sentence recorded by the learned lower court is set aside. Both the appeals are allowed. Appellant Sarfaraz is under custody hence directed to be released forthwith, if not wanted in any other case. So far other appellants are concerned, they are on bail, hence are discharged from their liability.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated 10th day of Aug., 2015
Prakash Narayan

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