IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.545 of 2002

Arising Out of PS.Case No. -null Year- null Thana -null District- SAMASTIPUR

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1. Ful Mohammad, son of Late Abdul Hakim.
2. Md. Yunus, son of Late Abdul Hasan.

Both resident of village-Harishankarpur, Baghauni, P.S. Tajpur, District Samastipur. .... Appellants.

Versus

The State of Bihar. .... Respondent.

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Appearance :
For the Appellants : Mr. Arun Kumar Tripathi, Amicus Curiae
For the State : Mr. Parmeshwar Mehta, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date: 30-11-2017

Heard learned amicus curiae for the appellants as well as learned Additional Public Prosecutor for the State.

2. This appeal has been preferred against the judgment and order of conviction and sentence dated 27.08.2002 passed by the Additional District & Sessions Judge, Fast Track Court No.4, Samastipur in Sessions Trial No. 113 of 1993/ 47 of 2002, arising out of Tajpur P.S. Case No.147 of 1991, whereby the learned trial court convicted the accused Ful Mohammad under Section 323 of the Indian Penal Code and accused Md. Yunush under Section 323 and 341 of the Indian Penal Code and sentenced accused Ful Mohammad to undergo R.I. for one year u/s 323 IPC and sentenced Md. Yunush to undergo R.I. for six months u/s 323 IPC and further sentenced him to undergo S.I. for a period of one month under Section 341 of the Indian Penal Code. Both the sentences passed against Md. Yunush were directed to run concurrently.

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3. The factual matrix of the case is that Tajpur P.S. Case No. 147 of 1991 was instituted under Section ¾ of the Explosive Substance Act and u/s 307 IPC against Ful Mohammad on the basis of fardbeyan of Abda Khatton, daughter of Abdul Majid, resident of Murgiachak, P.S. Bangra, District Samastipur recorded on 06.06.1991 at 1:30 PM by A.S.I. Ramsharnagat Singh of P.S.-Tajpur, District Samastipur with the allegation in succinct that on 05.06.1991 at around 8 PM while she was sitting on the door of his maternal uncle along with Jamaluddin and Ful Jahan, Ful Mohammad started abusing Jamaluddin from his terrace. On raising protest, he hurled bomb, resultantly she and Ful Jaha sustained splinter injury while muscles of the leg of her brother, namely, Jamaluddin was blown and a cavity was created in his leg. She sustained simple injury on her both legs and left hand. On hulla Md. Jabbar, Sahid Hussain and others rushed there and rushed them to Tajpur Hospital to accord them medical aid and from there Jamaluddin was referred to Samastipur Hospital.

4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the accused Ful Mohammad and Md. Yunush under Section ¾ of the Explosive Substance Act and u/s 341, 323, 324 and 307 of the Indian Penal Code.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the

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offence against the accused persons and committed the case to the court of sessions and on transfer finally the case came in seisin of the Additional Sessions Judge, Fast Track Court No.4, Samastipur for trial.

6. Charge against the accused Ful Mohammad was framed u/s ¾ of the Explosive Substance Act and Section 307 IPC and Charge against Md. Yunush was framed under Sections 307, 341, 323, and 324 of the Indian Penal Code. Charges were read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether ten prosecution witnesses namely, Ramakant Chowdhary as P.W.1, Manoj Kumar as P.W.2, Satya Narayan Tiwary as P.W.3, Md. Jabbar as P.W.4, Md. Nizam as P.W.5, Ful Jahan as P.W.6, Md. Sahid as P.W.7, Md. Dilsher as P.W.8, Abda Khatton (informant) as P.W.9 and Md. Jamaluddin as P.W.10. Out of the aforesaid witnesses, PW-1, P.W.2 and P.W.3 happen to be the formal witness. In documentary evidence, the prosecution has filed and proved some documents.

8. The statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence. In buttress of their case, the accused persons filed and proved some documents

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marked as Exts. A, B & C.

9. After hearing the parties and perusing the record, the learned trial court passed the impugned Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid Judgment and Order of conviction and sentence, the convicts have preferred the present Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellants beyond all reasonable doubts or not.

12. It is submitted by the learned amicus curiae that P.Ws. 6, 9 & 10 happens to be the brothers and sisters while P.W.7-Md. Sahid is the cousin brother of P.W.10-Md. Jamaluddin and P.W.8-Md. Dilsher is also own brother of the informant. Rests are not eye witnesses of the occurrence rather they had arrived at the place of occurrence after culmination of the occurrence. It is further submitted that as per the prosecution case the informant (P.W.9) and P.W.10 were treated in the hospital but no injury report has been filed by the prosecution to substantiate the aforesaid case. The doctor has also not been examined by the prosecution. In the F.I.R. there is not even a whisper about sustaining injury by Md. Nizam at the hands of Md. Yunush. There is animosity between the appellant and the prosecution party, as evident from Exts.A, B & C, and due to the aforesaid

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animosity, the appellants have been falsely implicated in this case. It is further submitted that as per the prosecution case from the wound of Md. Jamaluddin flesh and blood were strewn on the ground and on the cot on which he was rushed to the hospital. I.O. has also seized the blood stained towel and blood stained earth from the place of occurrence but the I.O. has not been examined by the prosecution in substantiation of the aforesaid case and due to non-examination of I.O. the place of occurrence also does not stand established by the prosecution. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case by adducing consistent, trustworthy, reliable ocular and documentary evidence. Hence, the appellants are entitled to get the benefit of doubt.

13. On the other hand, learned APP advocating the correctness and validity of the impugned judgment and order of conviction and sentence, submitted that though the injury report has not been brought on record and not proved by the doctor but all the prosecution witnesses examined by the prosecution have consistently corroborated the prosecution case and the learned lower court correctly appreciating the facts and evidence on record has rightly passed the impugned judgment and order of conviction and sentence, and the same is liable to be sustained and this appeal has no substance in it and is liable to be dismissed.

14. From perusal of the record, it appears that

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there are two appellants in this case, namely, Ful Mohammad and Md. Yunush. Out of them Md. Yunush has been implicated in this case for giving *'Chhura'* blow to Md. Nizam at the time of rushing by him to the place of occurrence listening the sound of bomb explosion by him but there is no such case of the prosecution in the F.I.R. marked as Ext.2.

15. From perusal of the testimony of P.W.4-Md. Jabbar it appears that his eye sight is weak. He could not see the occurrence and hurling of bomb by the accused Ful Mohammad from his terrace. Thus, he does not happen to be eye witness of the occurrence. As in para-2 of his cross-examination he has stated that his eye sight is weak. He does not venture out in the night and goes to the bed in the evening. In para-9 of his cross-examination, he has further stated that the house of Ful Mohammad is located at about 9-10 lagi i.e. around 100 ft. from his house and the house of Jamaluddin and of his own are adjacent to each other. The aforesaid statement of P.W.4 indicates that having eye sight weak, he could not see the occurrence of hurling bomb from the distance of 100 ft. and that too in the night and moreover he takes shelter of the bed in the evening and as the occurrence is of night at 8 PM so he must not be out of his house to see the occurrence at that time. Moreover, in para-12 of his cross-examination, he has stated that he cannot say as from whose terrace the bomb was flung.

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16. P.W.5-Md. Nizam also does not happens to be the eye witness of the occurrence as in para-2 of his examination-in-chief he has stated that responding the explosion sound he was rushing to the house of Abdul Kalam and on the way Md. Yunus assaulted him by means of dagger. After sustaining injury, he arrived at the door of Abdul Kalam and witnessed Abda Khatoon, Ful Jahan and Jamaluddin injured. The aforesaid statement of the said witness candidly rule him out to be eye witness of the occurrence of assaulting the aforesaid injured by the Ful Mohammad by hurling bomb as he had not witnessed the aforesaid occurrence rather had seen the victim injured on his arrival at the place of occurrence which means that he had arrived at the place of occurrence after culmination of the occurrence. Moreover, said witness also happens to be on inimical terms with the appellants as in para-3 of his cross-examination he has stated that Ful Mohammad has filed a case bearing no.15/90-91 against him in the Labour Court for his outstanding wages. Ext.C filed by the appellants indicates that Labour Court has passed order against the said witness in the aforesaid case filed by Ful Mohammad. P.W.-7 has stated in his examination-in-chief that he arrived at the place of occurrence responding the hulla from the house of Ful Mohammad and found Jamaluddin injured with the bomb. Meaning thereby that the said witness had also not witnessed the occurrence rather arrived at the place of occurrence after culmination of the

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occurrence, P.W.7-Md. Sahid, in his examination in chief has also denied to have witnessed the assault on Nizam. He also happens to be the interested witness of the case as in para-2 of his cross-examination he has stated that injured Jamaluddin happens to be his cousin brother. Moreover, the said witness in para-9 of his cross-examination has stated that whatever he has stated in the court has not been stated by him before the police. Meaning thereby that the said witness has taken different stand in the court than taken before the I.O. under Section 161 Cr.P.C. In view of the aforesaid aspect of the matter, the said witness does not appear to be reliable and worth credence.

17. P.W.8-Md. Dilsher happens to be own brother of the informant and cousin of Abda Khatton and Ful Jahan. He also does not happens to be eye witness of the occurrence as in his cross-examination he has stated that the bomb was exploded at 15 yards east of the place of sitting of Abda Khatton and Ful Jahan and splinter of bomb was spread up to 15 yards. He was at 10 yards from that place. As per the prosecution case Ful Jahan and Abda Khatton sustained splinter injury who were at a distance of 15 yards from the place of explosion of the bomb while the said witness was 10 yards from the said place, but he had not sustained any injury. Had he been at such place, as divulged by him, he had also sustained splinter injury. In his cross-examination, he has also stated that he had not seen as to who gave the dagger blow to Md. Nizam. Thus, there appears to be no

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independent witness of the occurrence. P.W.6-Ful Jahan, P.W.9-Abda Khatton (informant) and P.W.10-Md. Jamaluddin happen to be brother and sisters.

18. As per the prosecution case, Ful Jahan and Abda Khatton were also injured by the bomb but in quite contradiction to the aforesaid case Ful Jahan P.W.6 has stated in para-5 of her cross-examination that she and Abda Khatton had not sustained any injury in the said assault rather they had escaped to the verandah of the house. P.W.10-Md. Jamalauddin has also stated in his examination-in-chief that barring him no one had sustained any injury in the occurrence.

19. As per the prosecution case, the injured were rushed to the Tajpur Hospital and from where Jamaluddin was rushed to the Samastipur hospital but no injury report has been brought on record by the prosecution and the doctor, who has treated the injured, has also not been examined by the prosecution. Likewise no injury report of Md. Nizam allegedly stabbed by Md. Yunus in course of rushing by him to the place of occurrence hearing the explosion sound has been brought on record and the doctor has also not been examined. Thus, the aforesaid prosecution case of sustaining injury by the aforesaid injured does not stand corroborated by the medical evidence.

20. As per the statement of P.W.6 as given by her in

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para-5 of her cross-examination, the blood on P.O. and pieces of muscle and bloodstained cot etc. were shown to the I.O. but he did not seize the same. I.O. has not been examined by the prosecution in substantiation of the aforesaid case. Due to non-examination of I.O. place of occurrence also does not stand established by the prosecution.

21. From perusal of the documents filed by the appellants, it appears that a title suit was fought between the parties. Thus both the parties happen to be on inimical terms. Though enmity cuts both the edges but in view of the aforesaid aspects of the case false implication of the appellants at the hands of the prosecution party cannot be ruled out.

22. As per the prosecution case, the occurrence is of 05.06.1991 at around 8.30 PM and the fardbeyan of the informant was recorded on 06.06.1991 at 1:30 AM and F.I.R. was lodged on 06.06.1991 at 6:30 AM but the said F.I.R. was sent to the Magistrate after a long and abnormal delay on 10.06.1991 and no explanation has been assigned by the prosecution regarding the said delay in sending the F.I.R. to the court, which creates serious doubt about the prosecution case as it has given sufficient time and hiatus to the prosecution for concoction of the case against the appellants.

23. In the facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case beyond all reasonable doubts by

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adducing consistent, trustworthy and reliable ocular and documentary evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned lower court is set aside and the appellants are acquitted from the charges levelled against them giving them benefit of doubt. As the appellants are on bail, they are discharged from the liability of their bail bonds. Accordingly, this appeal is allowed.

24. Let a copy of the first and the last page of this judgment be handed over to the learned amicus curiae. Learned amicus curiae be paid prescribed fee by the Patna High Court Legal Services Committee.

(Prakash Chandra Jaiswal, J.)

Trivedi/-

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CAV DATE	NA
Uploading Date	08.12.2017
Transmission Date	08.12.2017

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