

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.132 of 2002

Arising Out of PS.Case No. -88 Year- 1994 Thana -Nabinagar District- Aurangabad

- =====
1. Awadhesh Tiwary, Son of Late Vyas Tiwary
 2. Ajay Tiwary, Son of Awadhesh Tiwary, both are residents of village – Tetarhat,
P.S.-Nabinagar, District-Aurangabad.

.... Appellants

Versus

State of Bihar

.... Respondent

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Appearance:

For the Appellants : Mr. Neeraj Kumar Saneedh, Amicus Curiae.

For the State : Mr. Sujit Kumar Singh, APP.

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**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL**

ORAL JUDGMENT

Date: 24-11-2017

Heard learned Amicus Curiae for the appellants as well
as learned APP for the State on this criminal appeal.

2. This criminal appeal has been preferred against the
Judgment and Order of conviction dated 13.03.2002 and order of
sentence dated 15.03.2002 passed by 1st Additional Sessions Judge,
Aurangabad in Sessions Trial No. 56 of 1995 / 69 of 1996 arising out
of Nabinagar P.S. Case No. 88 of 1994 whereby the learned trial court
convicted the appellants for the offence punishable under Section
307/34 of the Indian Penal Code and sentenced them to undergo R.I.



for five years for the said offence.

3. Factual matrix of the case is that Nabinagar P.S. Case No. 88 of 1994 was instituted under Sections 448, 341, 325, 323 and 307 of the Indian Penal Code against the accused, namely, Awadhesh Tiwary and Ajay Tiwary on the basis of the fardbeyan of Janeshwar Ram, Son of Bhanu Ram, Resident of Village-Tetarhat, P.S.-Nabinagar, District- Aurangabad recorded by A.S.I. C. P. Singh of P.S. Nabinagar at State Dispensary Nabinagar on 05.08.1994 at 9 PM with the allegation in succinct that on 05.08.1994 at around 7 AM, Awadhesh Tiwary approached him and asked him to uproot his paddy seedling, but he refused to do his work on the said date due to his pre-occupation. On the same date at around 5 PM, said Awadhesh Tiwary and his son Ajay Tiwary arrived at his door and Awadhesh Tiwary shoved his son Suryabansh Ram and gave order to his son to eliminate him. Responding the same, Ajay Tiwary assaulted on his face by means of back portion of the spade breaking his teeth and his mouth started bleeding. Seeing his son bleeding and responding halla made by him, his daughter-in-law and villagers Ram Karan Ram, Param Ram and Dhaneshwar Ram rushed there and then the accused persons left the scene.

4. Aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against



the aforesaid accused under Sections 341, 323, 325 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 offence against the aforesaid accused persons and committed the case to the court of sessions and on transfer finally the case came in the *seisin* of 1st Additional Sessions Judge, Aurangabad for trial.

6. Charge against the accused persons was framed under Section 307/34 of the Indian Penal Code. Charge was read over and explained to them to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether nine prosecution witnesses, namely, injured Suryabansh Ram as PW-1, Param Ram as PW-2, Ram Karan Ram as PW-3, Santosh Sao as PW-4, informant Janeshwar Ram as PW-5, Dhaneshwar Ram as PW-6, Dr. Mithilesh Kumar Singh as PW-7, Basudeo Prasad as PW-8 and Indrajeet Kumar Singh as PW-9. Out of the aforesaid witnesses, PW-8 and PW-9 happens to be formal witnesses. In documentary evidence, the prosecution has also filed and proved several documents.

8. 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 claiming themselves to be innocent. In buttress of their case, in ocular evidence, the accused persons examined one witness, namely, Birendra Prasad Singh as DW-1. In documentary evidence, they filed and proved attendance register.

9. After hearing the parties and perusing the record, the learned trial court passed the aforesaid 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 this Criminal Appeal.

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

12. It is submitted by learned Amicus Curiae for the appellants that the informant, injured and all the witnesses examined by the prosecution happen to be on inimical terms with the appellants as previous criminal case was pending between the prosecution party and the appellants and the witnesses of this case were also the witness of the informant in the said case. As per the statement of the injured, there was injury in his lower lip as the teeth was dipped in it due to assault made by the accused but the doctor has not found any



injury on the lower lip of the injured. Thus, the ocular evidence of the prosecution does not stand corroborated by the medical evidence. It is further submitted that as per the prosecution case, the appellant Awadhesh Tiwary approached the informant to take work from him and asked him to uproot his paddy seedling, but as there was previous animosity between them, so question arises as to why the appellant no.1 approached the informant to take work from him. The aforesaid aspect of the case belies the genesis of occurrence as alleged by the prosecution. As per the prosecution case and witnesses' account, mouth of the injured was bleeding and blood was fallen from his mouth on the ground and also on his attire, but I.O. of the case has not been examined by the prosecution in substantiation of finding of any blood on the place of occurrence and also on the attire of the injured. Due to non-examination of the I.O., place of occurrence also does not stand established by the prosecution. It is further submitted that PW-6 has stated altogether different manner of occurrence as alleged in the fardbeyan. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case and charge levelled against the appellants beyond all reasonable doubt. Hence, appellants are entitled to be acquitted.

13. On the other hand, learned APP advocating the correctness and validity of the impugned Judgment and Order of



conviction and sentence submitted that the informant, injured and other witnesses of the occurrence who had arrived at the place of occurrence and witnessed the occurrence have supported the prosecution case *in toto*. The ocular evidence of the prosecution also stands corroborated by the medical evidence and learned lower court correctly appreciating the facts and evidence available on record has rightly passed the aforesaid Judgment and Order of conviction and sentence which is liable to be upheld and this appeal has no substance in it and is liable to be dismissed.

14. From perusal of the record, it appears that the informant (PW-5), injured (PW-1) and other witnesses, namely, Param Ram (PW-2), Ram Karan Ram (PW-3) and Santosh Sao (PW-4) have made an abortive bid to support the prosecution case by stating in their respective examination-in-chief that at the time of occurrence, Awadhesh Tiwary and Ajay Tiwary arrived at the door of informant and Awadhesh Tiwary shoved his son Suryabansh Ram (PW-1) on the ground and then on the order of Awadhesh Tiwary, his son Ajay Tiwary assaulted on the face of Suryabansh Ram by means of back portion of the spade breaking his teeth and his mouth started bleeding. On halla made by Suryabansh Ram, the informant and other witnesses rushed there and Suryabansh Ram fell senseless. But from perusal of Para-4 of the examination-in-chief of the



informant, it appears that there is previous animosity between him and the appellant as in the said Para he has stated that in 1985, the appellant had also assaulted him regarding which a case is pending between them. In para-5 of his cross-examination, he has stated that in the said case he was also an injured. In Para10 of his cross-examination in reply to the court question, he has further stated that the appellant had animosity with him. The injured (PW-1) who happens to be the son of the informant, Ram Karan Ram (PW-3), Param Ram (PW-2) and Santosh Sao (PW-4) also happen to be on inimical terms with the appellants as as per the statement of PW-3 made in Para-6 of his cross-examination, he had given evidence against the appellant in Nabinagar P.S. Case No. 61 of 1985. The said case was filed by PW-2 Param Ram and PW-4 Santosh Sao has stated in Para-2 of his cross-examination that Param Ram (PW-2) and Ram Karan Ram (PW-3) are his uncles.

15. PW-3 Ram Karan Ram has stated in para-11 of his cross-examination that he had divulged to the police that responding halla, he rushed at the place of occurrence and found the teeth of Suryabansh Ram broken and his mouth bleeding. The aforesaid statement of PW-3 eloquently indicates that he had arrived at the place of occurrence after sustaining injury by the injured allegedly at the hand of the appellants and had not witnessed the occurrence of



assaulting him by the appellants.

16. PW-6 Dhaneshwar Ram has stated altogether different manner of occurrence than stated in fardbeyan as as per the prosecution case, the appellant Awadhesh Tiwary shoved his son Suryabansh Ram on the ground and gave order to his son to assault him, whereupon Ajay Tiwary assaulted on his face by means of back portion of the spade while PW-6 has stated in para-4 of his cross-examination that on the order given by Awadhesh Tiwary, both the appellants Awadhesh Tiwary and Ajay Tiwary assaulted his son Suryabansh Ram. The aforesaid contradictory statement given by PW-6 goes to suggest that he does not happen to be eye witness of the occurrence and has not seen the occurrence.

17. From perusal of fardbeyan of the informant, it appears that the informant has not taken the name of the witness Santosh Sao as the person arriving at the place of occurrence seeing his son bleeding and responding hulla made by him rather has specifically taken the name of his daughter-in-law, Ram Karan Ram, Param Ram and Dhaneshwar Ram as persons who had rushed there seeing his son bleeding and responding hulla made by him, hence Santosh Sao (PW-4) does not happen to be eye witness of the occurrence.

18. Injured (PW-1) has stated in Para-7 of his cross-



examination that his teeth were dipped in his lower lip and his entire face sustained injury. Santosh Sao (PW-4) has stated in Para-6 of his cross-examination that entire face of Suryabansh Ram was bleeding sustaining injury by means of back portion of the spade. But from perusal of the injury report and testimony of the doctor (PW-7) who has examined the injured, it appears that the doctor has found only one molar and both premolar (upper jaw) broken and he has not found any external injury on the upper lip. The doctor has also not found any injury on lower lip and face of the injured. Thus, the ocular evidence does not stand corroborated by the medical evidence.

19. As per the prosecution case, after sustaining injury mouth of the injured was bleeding. The injured (PW-1) has also stated that his mouth was bleeding sustaining injury. In para-9 of his cross-examination, he has stated that his attire was stained with blood. In para-11 of his cross-examination, he has further stated that blood was fallen on 3 feet at the place of occurrence, but I.O. of the case has not been examined by the prosecution to substantiate the factum of falling of the blood from the wound of the injured on the place of occurrence and also on the attire and no plausible explanation has been assigned by the prosecution for non-examination of the I.O. which creates serious doubt about the prosecution case and adverse inference is drawn against the



prosecution. In absence of the I.O., place of occurrence also does not stand established by the prosecution.

20. Animosity cuts both the edges. But in view of the aforesaid contradiction between the ocular evidence and documentary evidence, not establishing the finding of blood at the place of occurrence and also on the attire of the injured, contradictions between the manner of occurrence and not establishing the place of occurrence by the prosecution, false implication of the appellants in the case at the hand of the prosecution party due to animosity cannot be ruled out.

21. As per the account of informant, the criminal case was fought between the informant and the appellant since 1985 which indicates that there was old animosity between the parties, then million dollar question arises as to why the appellant approached the informant to take work from him and asked him to uproot his paddy seedling. The aforesaid aspect of the case goes to belie the genesis of occurrence.

22. 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 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 charge levelled against them. As the appellants are on bail, they are discharged from the liability of their bail bonds. Accordingly, this appeal is allowed.

23. Let a copy of first and last page of the judgment be furnished to the Amicus Curiae free of cost and the prescribed fee of the Amicus Curiae be paid by the Patna High Court Legal Services Committee.

(Prakash Chandra Jaiswal, J)

Mishra/-

AFR/NAFR	N.A.F.R.
CAV DATE	N.A.
Uploading Date	01.12.2017
Transmission Date	01.12.2017

