

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.306 of 2002

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

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1. Ramdeo Mahto @ Ram Deni Mahto,
2. Ram Birksh Mahto,
Both sons of Late Saryug Mahto, resident of village-Ram Nagara, P.S.
Majorganj, District Sitamarhi. Appellants.

Versus

The State of Bihar Respondent.

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Appearance :

For the Appellants : Mr. Prasoon Sinha, Advocate.

For the Respondent : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date: 08-08-2017

This criminal appeal has been filed against the judgment and order of conviction and sentence dated 04.06.2002 passed by the learned Additional Sessions Judge, Fast Track Court No.2, Sitamarhi in Sessions Trial No.308 of 1993/108 of 2002, arising out of Majorganj P.S. Case No.58/92, whereby convicting the appellants, namely, Ramdeo Mahto alias Ram Deni Mahto and Ram Birksh Mahto, for the offence punishable under Section 307/34 and 323 of the Indian Penal Code and sentencing them to undergo rigorous imprisonment for seven years under Section 307/34 of the Indian Penal Code and to pay a fine of Rs.2000 each and, in default of payment of fine, to further undergo simple imprisonment for six months. They were further sentenced to undergo rigorous imprisonment for six months under Section 323 of the Indian Penal Code. Both the sentences were directed to run



concurrently.

2. The factual matrix of the case is that Majorganj P.S. Case No.58 of 1992 was instituted under Sections 341, 323, 324 and 307/34 of the Indian Penal Code on the basis of fardbeyan of Sanjiv Kumar Singh, son of Ram Swarath Singh of village Gamhariya, P.S. Majorganj, District Sitamarhi recorded by A.S.I. R.H. Singh on 01.07.1992 on 8:45 PM at Dhang Shivar, with the allegation in succinct that while he along with other boys were playing in the field of Gamhariya Middle School, in the mean time, Surendra Mahto, Ram Birksh Mahto, Ramdeni Mahto, Anil Kumar Singh, Arun Kumar Singh and Nand Kishore Singh arrived at the road near the school and called him there. Responding the call when he went there Surendra Mahto uttered that he always abuses him in course of passing through the road. Thereafter, Anil Kumar Singh caught him hold and gave order of his elimination, whereupon all the accused persons started slapping him. In the mean time, Surendra Mahto took out a bottle from his pocket and at the instigation of Ramdeni Mahto poured acid on his face. Sustaining injury he fell senseless. At that time, some boys had rushed there in his rescue who had also received acid splashes. On hulla near by people rushed there and took him to the clinic of a doctor & from where his family members and the



villagers took him to the police outpost where his statement was recorded. He had sustained burn injury on his face, right eye and rest part of the body. The bone of contention is said to be that his brother, namely, Jitendra Singh and the accused, Surendra Mahto had quarreled about 20 days back during the course of proceeding to school due to that all the accused persons, in furtherance of common intention & in order to do away with his life poured acid on him.

3. The aforesaid case was investigated by the police and on conclusion of the investigation the Investigating Officer submitted chargesheet under Sections 341, 323, 324, 307/34 of the Indian Penal Code against the accused Surendra Mahto, Ram Briksha Mahto and Ramdeni Mahto, showing accused Anil Kumar Singh, Arun Kumar Singh and Nand Kumar Singh as not sent up.

4. During pendency of the case, one of the accused, namely, Surendra Mahto expired, hence the proceeding against him was dropped. Thus, there are two accused persons, namely, Ram Briksha Mahto and Ramdeo Matho who faced the trial.

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



committed the case to the Court of Sessions for trial. On transfer, finally the case came in the seisin of Additional District and Sessions Judge, Fast Track Court No.2, Sitamarhi for trial.

6. During course of trial, the prosecution examined altogether six prosecution witnesses to substantiate its case, namely, P.W.1-Jagannath Singh, P.W.2-Satish Kumar Singh, P.W.3-Amrendra Kumar Singh, P.W.4-Jitendra Kumar, P.W.5-Sanjeev Kumar Singh and P.W.6-Dr. Yogesh. The prosecution has also filed documents in course of the evidence. The statements of the accused were recorded under Section 313 Cr.P.C. The case of the defence is complete denial of the occurrence claiming themselves to be innocent.

7. After hearing the parties and perusing the record, the learned lower court convicted both the accused persons for the offence punishable under Section 307/34 and 323 of the Indian Penal Code and awarded sentence against them as detailed in earlier paragraph.

8. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence dated 04.06.2010 the convicts have filed this criminal appeal.

9. It has been submitted by learned counsel for the appellants that all the material witnesses are interested



witnesses being the informant and his family members. Their evidences are full of vital contradictions, hence it is not worth credence and reliable and conviction cannot be made basing upon the inconsistent evidence of such highly interested witnesses. It has further been submitted that P.Ws.1, 2, 3 & 4, in their respective statements before the I.O., have claimed themselves to be hearsay witnesses as they arrived at the place of occurrence after the occurrence but in their statements before the Court, they have claimed themselves to be eye witness of the occurrence. The contradiction between their statements recorded before the Court and that before the I.O. under Section 161 Cr.P.C. has been brought on record by the defence but as I.O. has not been examined by the prosecution, the said contradiction cannot be confirmed & corroborated. Thus, due to non-examination of I.O. great prejudice has been caused to the defence. It has further been submitted that as per the witnesses account number of independent witnesses were present at the place of occurrence but barring the aforesaid interested witnesses none of the independent witnesses has been examined by the prosecution to substantiate its case without assigning any plausible reason and non-examination of the said witnesses creates serious doubt about the prosecution case. The place of occurrence has also not been established by the



prosecution due to non-examination of the I.O. But the learned Court has failed to appreciate the aforesaid aspect of the case and relying on the contradictory and inconsistent statements of the interested witnesses has held conviction of the appellants. It has also been submitted that appellants are not assailants rather appellant-Ramdeo Mahto alias Ramdeni Mahto is said to be order giver and Ram Briksh Mahto was present at the place of occurrence at the time of occurrence & there is no evidence on record to indicate that there was premeditation of mind to do away with the life of the informant. Hence, no conviction under Section 307/34 of the Indian Penal Code can be made.

10. On the other hand, advocating the correctness and validity of the impugned judgment and order of conviction and sentence, the learned A.P.P. has submitted that witnesses examined by the prosecution including the victim have supported the prosecution case by giving their consistent evidence and also corroborated the finding of injury on the person of the informant. Thus, the prosecution has succeeded to establish the prosecution case beyond all reasonable doubt and learned lower court has passed the impugned judgment and order of conviction & sentence correctly appreciating the facts, evidence and law involved in the case and the same is correct, legal, valid and sustainable. Hence,



this appeal has no substance in it and is liable to be dismissed.

11. From perusal of the evidence of the prosecution witnesses, it appears that though P.W.1 & P.W.2 had made abortive bid to support the prosecution case in their respective examination-in-chief but from perusal of their cross-examination it appears that both the witnesses do not happen to be eye-witnesses of the occurrence. As P.W.1 in para-7 of his cross-examination has stated that when he arrived at the place of occurrence he witnessed the crowd of 20-25 persons congregated there, they were holding Sanjeev Kumar. While P.W.2 has stated in paragraph-5 of his cross-examination that when he arrived at the school accused persons had left the scene assaulting Sanjeev Kumar by that time. He had lifted him to his house. The aforesaid evidence of the said witnesses candidly indicates that they had not witnessed the occurrence of pouring acid on the person of the informant by the accused, rather they had arrived at the place of occurrence after the occurrence and after departure of accused persons from there. Moreover, the aforesaid two witnesses happen to be interested witnesses of the case. As as per their account P.W.1 happens to be uncle of the informant while P.W.2 own brother of the informant. P.Ws.3 & 4 also happens to be interested witness of the case being cousin brothers of the



informant.

12. As per the prosecution case and statement of P.Ws.4 & 5 the informant Sanjeev Kumar was taken to hospital after the occurrence from the place of occurrence. From there, he was rushed to O.P. but, in quite contradiction to the said prosecution case and statement of P.Ws. 4 & 5, P.W.1 & P.W.2 have stated in paragraph 2 of their respective examination in chief that after occurrence they lifted Sanjeev Kumar to his house and from there to the O.P. and from there police sent him to Hospital, while P.W.3 has stated in paragraph 2 of his examination in chief that after occurrence they lifted Sanjeev Kumar to O.P. and from there police sent him to hospital. As per the prosecution case, P.W.3-Amrendra Kumar Singh had also sustained acid burn injury in the attack but P.W.4 has not supported the occurrence of sustaining burn injury by P.W.3 in the said acid attack and the injury report of P.W.3 has also not been brought on record.

13. By inviting attention of P.W.5 (informant) at paragraph-6 of his cross-examination the defence has taken the plea that place of occurrence is not Gamhariya school rather the road located in the vicinity of the house of the informant but I.O. has not been examined by the prosecution to prove the place of occurrence. Thus, the place of occurrence also does not stand



established by the prosecution. As per statement of informant given before the I.O. under Section 161 Cr.P.C. place of occurrence is on the road located in the vicinity of the house of the informant, while P.Ws.1 to 4 have stated that they had witnessed the occurrence near Gamhariya school so the aforesaid statement of P.W.5 goes to rule out witnessing of the occurrence by P.Ws.1 to 4.

14. As per the case of the prosecution appellant-Ramdeo Mahto alias Ramdeni Mahto is said to have given order to Suraj Mahto to pour acid on the informant but P.W.1 has not supported the aforesaid case of the prosecution regarding giving order by Ramdeo Mahto @ Ramdeni Maho to Suraj Mahto for pouring acid on the informant. From perusal of cross-examination of P.Ws.3, 4 & 5, it appears that the defence has drawn attention of the aforesaid witnesses regarding statement given before the I.O., about not divulging the I.O. that on the order of the Ramdeni Mahto to hurl acid on the face of informant accused Suraj Mahto had thrown the same on him.

15. Thus, the aforesaid witnesses, namely, P.Ws.1, 2, 3, 4 & 5 appears to have given statement before the Court in quite contradiction to that given before the police under Section 161 Cr.P.C. regarding witnessing of occurrence as eye



witness, lifting the informant to O.P., witnessing accused Anil Kumar Singh, Arun Kumar Singh and Nand Kishore Singh in the occurrence, place of occurrence as evident from their attention drawn by the defence regarding contradiction between their statement given before the Court and that given before the police but to confirm and corroborate the said contradiction between the statement recorded before the Court and that before the I.O. under Section 161 Cr.P.C., the I.O. of the case has not been examined by the prosecution. When attention of the witnesses has already been drawn towards their earlier statements and the Investigating Officer could not be brought to give his evidence, then in my considered opinion, the Court can peruse the case diary and find out as to whether or not the attention of the witnesses towards their previous statements were correctly drawn and to satisfy itself as to whether or not they had given similar statement before police. There are two parts of the case diary. First part contains such portion of the diary in which the Police Officer has recorded statement of the witnesses, about the incident or about other relevant facts which to that Police Officer, would be hearsay. The second part of the case diary contains that portion in which the Police Officer has himself seen or heard a particular fact and has recorded a fact out of his own perception. To this category would



come recording about the inspection of place of occurrence making of seizure of certain incriminating articles or in some cases, when the Police Officer reaches the place of occurrence where the occurrence has not finished and he sees himself whole or part of the occurrence, recording of that. The latter part of the case diary cannot be used by the Court unless the Investigating Officer is examined because that would amount to using that portion of the case diary as evidence. Only the Investigating Officer can tell the Court in witness box as to what were his findings out of his own perception, so that he can be put to cross-examination over that. However the first part of the case diary consists, as already noted, the statement recorded by the witnesses. If the Investigating Officer comes to the Court for evidence and if he is asked to confirm those portion of the statement of the witnesses to which the attention of the witnesses was drawn, the Investigating Officer will say only what he has recorded as his statement in the case diary and cannot go beyond that. Now, the question is, whether that portion of the case diary can be looked into by the Court & used in the trial to aid the Court in reaching at a correct decision when the Investigating Officer is not brought before the Court. Sub-section (2) of Section 172 of Cr.P.C. provides that the Court cannot only call for the case diary



but may also use such diary to take aid in such trial. If the Court only has the power to look into the case diary & whatever it peruses to keep it only in mind and then to proceed to record the judgment keeping such impression only in mind that, in my opinion, cannot be the intention of the legislation. In my considered opinion if the Court peruses any such things and uses it to its aid in trial, this must go in black and white as part of the judgment. The only limitation is that the Court cannot use any portion of the case diary as evidence. In view of the aforesaid proposition of law and in view of the contradiction between the statements of P.Ws.1 to 5, as recorded before the Court and that given before the I.O. under Section 161 Cr.P.C., the testimonies of the witnesses given before the Court do not inspire my confidence to hold the conviction of the appellants relying upon the same.

16. As per the statement of P.W.3 recorded in paragraph-1 of his examination-in-chief other village boys were also playing with him and Sanjeev Kumar at the time of occurrence but none of the independent witnesses of the occurrence has been examined by the prosecution. The prosecution has also not assigned any convincing and plausible explanation for non examination of the aforesaid witnesses. Non-examination of the aforesaid independent witnesses creates serious



doubt about the prosecution case.

17. The doctor has supported the factum of finding five acid burn injuries on the person of the informant, all simple in nature but the defence, though has not adduced any evidence in this regard but by giving suggestion to the informant and other witnesses have taken the case that Surendra Mahto had not thrown acid on the informant rather it was the informant who was trying to throw the same on Surendra Mahto but due to pushing him by Surendra Mahto, the splashes of acid fell on the person of the informant.

18. As per the prosecution case, accused Surendra Mahto had arrived at the place of occurrence taking acid in the bottle kept in pocket of his paint and not in the open hand, to take revenge from informant Sanjeev Kumar Singh with whom he had some altercation preceding to the occurrence and other accused persons including the appellants had accompanied him to the place of occurrence and slapped the informant for the said altercation. It is not the case of the prosecution that other accused persons had knowledge of keeping the acid by accused Surendra Mahto in his pocket and all the accused persons had intended to do away with the life of the informant by throwing acid on him. For application of Section 34 of the Indian Penal Code there must



be premeditation of mind and planning by all the accused persons to commit an offence preceding to the occurrence but from considering the facts and circumstances of the case and the evidence adduced by the prosecution, I fail to find that there was premeditation of mind and intention of the accused persons to commit the offence of murder of informant preceding to the occurrence. Had the accused persons including the appellants had knowledge of keeping the acid by the Surendra Mahto in his pocket, the said intention would have been attributed to them but it is not the case of the prosecution. Hence, in my considered opinion, the offence under Section 34 of the Indian Penal Code is not made out in the case under hand. Accused Surendra Mahto who had allegedly hurled the acid on the person of the informant has died during pendency of the case.

19. As discussed by me hereinabove, all the material witnesses i.e. P.Ws.1 to 5 are the informant and family members of the informant and highly interested and partisan witnesses of the case. Their testimonies also appears to be incredible due to their inconsistency from the prosecution case, their testimonies inter se and the statement given before the police under Section 161 Cr.P.C. as brought on record by drawing their attention by the defence towards the said contradiction and in



view of the aforesaid vital contradiction the witnesses does not appears to be reliable, consistent and worth credence conviction cannot be made relying upon the aforesaid testimonies of the witnesses.

20. Under the aforesaid facts and circumstances, I find and hold that the prosecution has utterly and miserably failed to bring home the charges against the appellants beyond all shadow of doubt. The impugned judgment and order of conviction and sentence passed by the learned lower court suffers from illegality and impropriety and is set aside. Accordingly, this appeal is allowed and the appellants are acquitted from the charges levelled against them. As the appellants are on bail they are discharged from their liability of bail bond.

(Prakash Chandra Jaiswal, J.)

Trivedi/-

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