

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.530 of 2002

Arising Out of PS.Case No. -null Year- null Thana -null District- SASARAM (ROHTAS)

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1. Nav Rang Ram, son of Late Bagedan Ram.

2. Shiv Kumar Ram, son of Nav Rang Ram.

Both resident of village Karoandi, P.S. Natwar, District Rohtas.

.... Appellants.

Versus

The State of Bihar.

.... Respondent.

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Appearance :

For the Appellants : Mr. Animesh Kumar Mishra, Amicus Curiae

Mr. Sunil Kumar, Adv.

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

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date: 23-08-2017

This appeal has been filed against the judgment and order of conviction and sentence dated 23.08.2002 passed by the learned Additional Sessions Judge-cum-Fast Track Court No.III, Rohtas at Sasaram in Sessions Trial No.360 of 1989/83 of 2002, arising out Natwar P.S. Case No.42 of 1988, whereby the learned lower Court has convicted the appellants for the offence punishable under Section 307/34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for 5 years each.

2. The factual matrix of the case is that Natwar P.S. Case No.42 of 1988 was instituted against the appellants, Nav Rang Ram and Shiv Kumar Ram on the basis of fardbeyan of Yamuna Prasad, son of Jagdeo Prasad, resident of village Karoandi, P.S.



Natwar, District Rohtas recorded by A.S.I., R.B. Roy of P.S. Natwar on 22.10.1988 at 9 AM in the State Dispensary, Natwar, with the allegation in succinct that his co-villager Nav Rang Ram had dug the plinth leaving little space for passage. On imploring him to leave the place for the passage he did not agree. The further allegation is that on 22.10.1988 at 7 AM when his brother Rajbalam Ram approached to Nav Rang Ram to implore him to leave some place for passage, on the order of Nav Rang Ram his son Shiv Kumar Ram pounced upon his brother to assault. When he rushed in his rescue Shiv Kumar Ram assaulted him by means of 'farsa' inflicting injury in his left hand, left wrist, right hand, wrist & finger and left temple. His co-villager Anurudh Ram, Jagnarayan Ram and Parma Ram had witnessed the occurrence. The aforesaid case was investigated by the police and on conclusion of the investigation and finding the case true, the Investigating Officer submitted chargesheet under Sections 323, 324, 326 and 307/34 of the Indian Penal Code against Nav Rang Ram and Shiv Kumar Ram. On receiving the chargesheet and perusing the case diary, the learned Magistrate took cognizance of the offence against the appellants and committed the case to the Court of Sessions. After transfer, the case finally came in seisin of learned Additional Sessions Judge-cum-F.T.C.-III, Rohtas at Sasaram for trial. The charge against the accused persons was



framed under Section 307/34 of the Indian Penal Code. The charge was read over to the accused persons, to which they pleaded not guilty and claimed to be tried.

3. To substantiate its case in ocular evidence the prosecution has examined altogether five witnesses, namely, Parma Ram as P.W.1, Anirudha Ram as P.W.2, Balam Ram as P.W.3, informant Yamuna Prasad as P.W.4 and Kameshwar Ram as P.W.5. In documentary evidence, the prosecution has filed & proved certain documents. The statements of the accused persons was recorded under Section 313 Cr.P.C. The case of the defence is complete denial of the occurrence claiming themselves to be innocent.

4. After hearing the parties and perusing the records, the learned Trial Court convicted the accused Nav Rang Ram and Shiv Kumar Ram for the offences punishable under Section 307/34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for five years each in the aforesaid section.

5. Being aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence, the aforesaid convicts have preferred this appeal.

6. 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.



7. It is submitted by learned Amicus Curiae appearing on behalf of the appellants that P.Ws. 1 to 4 are informant and his relatives and are interested witnesses. P.W. 5 happens to be hearsay witness. The testimonies of P.Ws.1 to 4 happens to be contradictory to prosecution case & their testimonies inter se. No independent witness of the occurrence has been examined by the prosecution without assigning any plausible reason for their non-examination creating serious doubt about the prosecution. The statement of P.Ws.1 & 2 given before the Court happens to be in quite contradiction to that given before the I.O. under Section 161 Cr.P.C. regarding bringing 'farsa' by appellant-Shiv Kumar Ram from his house and receiving of the injury on his back by means of 'farsa' by Rajbalam Ram, giving order by the Nav Rang Ram to Shiv Kumar Ram to bring 'farsa' and sustaining six cut injuries in the left hand by the informant by means of 'farsa'. In corroboration of the aforesaid contradiction, the I.O. of the case has not been examined by the prosecution causing great prejudice to the appellants and in view of the aforesaid contradiction and inconsistent statement of P.Ws.1 to 4, their evidence is not credible, reliable and worth credence and conviction cannot be made on the basis of such statements. It is further submitted by learned Amicus Curiae that P.Ws.1, 3 & 4 have given different boundary of the place of



occurrence in their respective cross-examination and I.O. has also not been examined by the prosecution, so the place of occurrence does not stand established by the prosecution. The injury report regarding the injuries sustained by the informant and Rajbalam Ram have not been brought on record and doctor has also not been examined by the prosecution, but, despite aforesaid contradictions and laches on the part of the prosecution, the learned trial Court has wrongly convicted the appellants and passed the sentence against them hence the impugned judgment and order of conviction & sentence passed by the learned trial Court is liable to be set aside.

8. On the other hand, learned Additional Public Prosecutor appearing on behalf of the State, advocating the correctness and validity of the impugned judgment and order of conviction and sentence, has submitted that the prosecution has substantiated its case by adducing trustworthy and reliable ocular evidence and in view of consistent ocular testimony of the witnesses non-examination of the I.O. and the doctor has no adverse effect on the prosecution case. The learned trial Court correctly appreciating the facts & evidence has convicted the appellants and passed the impugned 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.



9. As per the prosecution case, first of all on the order of Nav Rang Ram his son, Shiv Kumar Ram pounced upon Rajbalam Ram to assault him and when the informant rushed in his rescue Shiv Kumar Ram assaulted him by means of 'farsa'. As per fardbeyan there is no case of prosecution that after assaulting the informant, Shiv Kumar Ram again assaulted Rajbalam Ram & Rajbalam had sustained any injury. But in quite contradiction to the aforesaid case of the prosecution the said Rajbalam Ram in para-1 of his examination-in-chief has stated that after assaulting the informant Yamuna Prasad, Shiv Kumar Ram assaulted on his back by stick of 'farsa' and P.W.2-Anirudha Ram in paragraph-7 of his cross-examination has stated that Shiv Kumar Ram assaulted Rajbalam Ram after Yamuna Prasad. From perusal of the prosecution case, as alleged in the fardbeyan, it appears that Navrang Ram had simply given order to his son Shiv Kumar Ram to assault, he had not assaulted anyone. But in quite contradiction to the aforesaid case of the prosecution P.W.2 (Anirudha Ram) has stated in paragraph-1 of his examination-in-chief that Nav Rang Ram assaulted his father (Rajbalam Ram) by means of 'lathi'. In paragraph-3 of his examination-in-chief he has further stated that both Yamuna Prasad (informant) & Rajbalam Ram were rushed to the hospital for treatment. P.W.3 Rajbalam Ram in paragraph-7 of his cross-



examination has stated that he had sustained two injuries on his back by means of 'danda'. P.W.4 (informant) in paragraph-1 of his examination-in-chief has stated that Shiv Kumar Ram assaulted Rajbalam Ram by means of 'farsa' but it was broken and its stick hit on the back of Rajbalam Ram and P.W.1 has stated in paragraph-6 in his cross-examination that besides Yamuna Prasad, Rajbalam Ram also fell senseless in the occurrence. Thus, the aforesaid statement of said witness happens to be in quite contradiction to the prosecution case as alleged in the fardbeyan. As as per the prosecution case when the Shiv Kumar Ram pounced upon Rajbalam Ram with 'farsa' informant rushed in his rescue then Shiv Kumar Ram assaulted him by means of 'farsa' inflicting sharp cut injury to him, while as per account of the informant the 'farsa' was broken in the assault on the Rajbalam Ram and its stick hit on the back of Rajbalam Ram so had the 'farsa' broken in the assault on Rajbalam Ram how he would have given blow to the informant by means of said 'farsa' subsequently. The said account of informant completely rules out the prosecution case of assaulting the informant by Shiv Kumar Ram by means of 'farsa' inflicting him sharp cut injuries.

10. As per statement of P.W.2 in paragraph-10 of his cross-examination, the occurrence took place for five minutes and



P.W.3 has stated in paragraph-8 of his cross-examination that the occurrence took place for one minute, but, in quite contradiction to the aforesaid evidence of P.Ws.2 & 3, P.W.1 has stated in paragraph-6 of his cross-examination that the occurrence of assault had taken place for half an hour. As per the prosecution case, informant sustained injury on his left hand, left wrist, right wrist and its finger and the left temple in the occurrence but in paragraph-6 of his cross-examination, he has stated that he had sustained only three injuries and that too on one hand. In paragraph-6 he has also stated that he had not fallen sustaining first injury rather three injuries. He had sustained all the three injuries on one hand then he fell senseless. He has not stated that accused assaulted him even after falling on the ground. Which means that he had sustained only three injuries on his person and all the injuries on one hand but in quite contradiction to the aforesaid statement in paragraph-7 of his cross-examination he has stated that he had sustained 8-9 injuries. As per the prosecution case and statement of informant in his examination-in-chief, he had sustained injuries on left hand and its wrist, right wrist and its finger and left temple but in quite contradiction to the aforesaid case in paragraph-6 of his cross-examination he has stated that he had sustained all the three injuries on one hand. Thus there is vital contradiction between the prosecution case and testimonies of



witnesses & the testimonies of the witnesses *inter se* and testimonies of the informant *intra se* regarding manner of occurrence, assailant, injured, number of injuries and site of the injuries.

11. P.W.1-Parma Ram happens to be the cousin of the informant. P.W.2 nephew of the informant, P.W.3 is the brother of the informant and P.W.4 is the informant himself. The aforesaid witnesses happens to be highly interested and partisan witnesses of the case, though the proposition of law is that the testimony of the interested and partisan witnesses should not be discarded out rightly rather it should be scanned and scrutinized carefully and cautiously and on careful and cautious scrutiny and scanning of the testimonies of the aforesaid witnesses it appears that the testimony of the aforesaid witnesses are in quite contradiction to the prosecution case and their testimonies *inter se* & witnesses happens to be on inimical term to accused person so in view of the aforesaid contradictions between the prosecution case and testimonies of the said interested witnesses & their testimonies *inter se* said testimonies do not appears to be convincing, reliable and trustworthy and do not inspire my confidence to hold the conviction of the appellants relying upon the same.

12. As per the prosecution case, as alleged in the fardbeyan, besides Anirudha Ram (P.W.2) & Parma Ram (P.W.1),



Jaynarain Ram and other villagers had witnessed the occurrence and P.W.3 in paragraph-3 of his examination-in-chief has stated that Ramashrya and Kameshwar were present on the place of occurrence and witnessed the occurrence. But the said Jaynarain Ram, Ramshrya, who happen to be independent witnesses of the occurrence have not been examined by the prosecution. Prosecution has not assigned any plausible reason for non-examination of the aforesaid independent witnesses, which creates serious doubt about the prosecution case. Though Kameshwar Ram has been examined as P.W.5 but he has not supported the occurrence as eye witness of the occurrence rather has claimed himself to be hearsay witness. The aforesaid statement of P.W.3 also rules out the presence of P.Ws.1 & 2 at the place of occurrence & witnessing of the occurrence by them.

13. From perusal of the testimony of P.W.1 and informan-P.W.4, it appears that accused persons are on inimical terms with the prosecution parties. As P.W.1 in paragraph-11 of his cross-examination has stated that Nav Rang Ram had filed case against him, Rajbalam Ram and Yamuna Prasad in order to save his skin which was tried in the Court of Shri M.C. Shukla and they were acquitted in the said case and informant has also stated in paragraph-11 of his cross-examination that Nav Rang Ram had filed a case



against them which was dismissed. It is the settled principle of law that animosity cuts both the edge but, in view of the aforesaid contradiction and inconsistent testimony of the interested witnesses, non-examination of any independent witness in the occurrence, false implication of the accused at the instance of prosecution party cannot be ruled out.

14. I.O. has not been examined to prove the place of occurrence. P.Ws.1, 3 & 4 have divulged different place of occurrence by giving different boundaries of the place of occurrence. As P.W.1 has stated in paragraph-5 of his cross-examination that place of occurrence is a lane running from east to west. Towards north of the lane house of Yamuna Prasad and towards south house of Rajbalam Ram is located, while P.W.3 has stated in paragraph-5 of his cross-examination that towards north of place of occurrence there is barren land, towards south barren land and lane, towards east house of Yamuna Prasad and towards west field of Rangnath is located. Informant (P.W.4) has stated in paragraph-5 of his cross-examination that towards north of place of occurrence there is a house of Nav Rang Ram, towards south his barren land, towards east disputed land and towards west of field of Rangnath is located. Thus, in view of the aforesaid contradictory statements of the aforesaid witnesses regarding place of occurrence, due to non-examination of



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

15. On drawing attention by the defence regarding statement given before the I.O. and that given before the Court P.W.1 in paragraph-9 of his cross-examination has stated that he had divulged to the I.O. that Rajbalam Ram had received injury on his back by means of 'farsa' and P.W.2 has stated in paragraph-14 of his cross-examination that he had divulged the police that there was a dispute over digging the land for foundation, Nav Rang Ram gave call to Shiv Kumar Ram to bring 'farsa'. His uncle (informant-Yamuna Prasad) had sustained six cut injuries in his left hand by means of 'farsa' but from the perusal of the statement of the aforesaid witnesses given by them before the I.O. under Section 161 Cr.P.C. as recorded by the I.O. in the case diary, it appears that the aforesaid witnesses have not given such statement before the I.O. Thus, the aforesaid statement of the interested witnesses happens to be in quite contradiction to the statement given before the I.O. under Section 161 Cr.P.C. and in view of the aforesaid contradictions the statement of the said witnesses appears to be doubtful.

16. 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 and 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 and 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 statement of P.W.-1 & P.W.2 as recorded before the



Court and that given before the I.O. under Section 161 Cr.P.C., the testimony of the witnesses given before the Court does not inspire my confidence to hold the conviction of the appellant relying upon the same.

17. Neither the injury report of the informant nor of Rajbalam Ram was brought on record and the doctor has also not been examined by the prosecution. Hence, for not bringing on record the injury report of the victims and by not examining the doctor and in view of the aforesaid contradictions between the prosecution case and ocular testimonies of the witnesses & their testimonies *inter se* regarding injuries, prosecution has failed to prove sustaining of injury by the victims in the occurrence.

18. In view of the aforesaid facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to substantiate its case by adducing consistent, reliable, trustworthy and worth credence ocular and documentary evidence. Hence, the appellants are entitled to get the benefit of doubt. Accordingly, this appeal is allowed and the appellants are acquitted from the charge levelled against them. As the appellants are on bail they are discharged from the liabilities of bail bonds. Let Sri Animesh Kumar Mishra, learned counsel appearing on behalf of



the appellants as Amicus Curiae be accorded prescribed fee by Patna High Court Legal Services Committee.

(Prakash Chandra Jaiswal, J.)

Trivedi/-

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