

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.70 of 2015

Arising Out of PS.Case No. -209 Year- 2010 Thana -KHAIRA District- JAMUI

- =====
1. Pramod Malakar Son of Anil Malakar.
 2. Sunil Malakar Son of Guletan Malakar. Both Resident of Village+P.S Khaira, District- Jamui.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Vikramdeo Singh,
Mr. S.P. Parasar, Advocates.

For the Respondent/s : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 31-08-2017

Altogether seven persons were arrayed as accused who faced trial and were convicted and sentenced under different heads out of whom instant appeal survives filed by these appellants namely, Pramod Malakar and Sunil Malakar as the appeal preferred by remaining dismissed as disclosed by the learned counsel for the appellants due to non surrender even after expiry of provisional bail in terms of Chapter XII Rule-8 of the Patna High Court Rules against the judgment impugned who have been found guilty for an offence punishable under Section 323 of the IPC and have been sentenced to undergo SI for three months. It is not known whether the aforesaid convicts have surrendered before the learned lower court to serve out the sentence inflicted against them. Accordingly, the learned lower court is directed to take proper steps against remaining convicts



namely, Ram Malakar, Anil Malakar, Sudhir Malakar, Guletan Malakar and Jaya Devi.

2. So far these two appellants namely, Pramod Malakar and Sunil Malakar are concerned, it is evident that they both have been found guilty for an offence punishable under Section 307 IPC and each one has been sentenced to undergo RI for 7 years as well as to pay fine of Rs. 3000/- in default thereof, to undergo SI for 3 months additionally by 4th Additional Sessions Judge, Jamui in Sessions Trial No. 412/2011/31/2014 vide judgment of conviction and sentence dated 19.01.2012.

3. Meena Devi (PW 6) gave her Fard-e-beyan on 29.08.2010 at about 3:00 PM while she was admitted at Primary Health Centre, Khaira alleging inter alia that on the same day, she had put Bari (an edible item) in front of her house to wither. She-goat of Anil Malakar repeatedly came and ate the Bari whereupon, she had gone to the place of Anil Malakar to make complaint whereupon, Anil Malakar indulged in duel. She returned back soon followed by Pramod Malakar armed with an axe, Anil Malakar armed with Bhujali, Sunil Malakar armed with axe, Ram Malakar armed with Lathi, Sudhir armed with Lathi who began to abuse and then, Pramod gave blow by backside of the axe over her head as a result of which she sustained injury. Her Gotni, Indu Devi came in her rescue who



was also given blow from the backside of the axe by Sunil Malakar as a result of which, she also sustained injury. During course thereof, Priyanka, Priti, Jaya began to hurl brick particles, Guletan came with Lathi and then all of them assaulted her along with Gotni, as a result of which they both became injured. On the basis of the aforesaid Fard-e-beyan, Khaira PS Case No. 209/2010 was registered which concluded by way of submission of charge-sheet facilitating the trial in a manner, the subject matter of instant appeal.

4. The defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of the CrPC is of complete denial. It has also been pleaded that members of the prosecution party have committed an occurrence for which complain case No. 1334C/2010 was filed on 30.08.2010 for an occurrence committed on 28.08.2010 and the same was sent to the local police for registration and investigation on the basis of which Khaira PS Case No. 122/2011 was registered and only to save their skin, the instant case has been filed. In order to substantiate the same exhibited the counter case and the relevant order-sheets connected therewith.

5. In order to substantiate its case, prosecution had examined altogether 8 PWs out of whom PW-1, Pankaj Malakar, PW-2, Urmila Devi, PW-3, Arun Malakar, PW-4, Narsingh Malakar, PW-



5, Smt. Indu Devi, PW-6, Smt. Meena Devi, PW-7, Dr. Amit Anand, and PW-8, Gauri Prasad, Investigating Officer. Side by side, had also exhibited Ext-1 series, injury report relating to PWs-5 and 6, Ext-2 Series, X-ray report, Ext-3, case diary of Khaira PS Case no. 209/2010, Ext-4, Charge-sheet of Khaira PS Case No. 209/2010, Ext-5, FIR, Ext-6, CC of FIR of Khaira PS Case No.122/2011, Ext-7, CC of final form of Khaira PS case No. 122/2011, Ext-8, petition filed by I.O. of Khaira PS Case No. 122/2011 for drawing a proceeding under Section 182, 211 IPC, Ext-9, CC of order dated 21.05.2012 passed in connection with Khaira PS Case No. 122/2011.

6. On the other hand the defence had also exhibited Ext-A, CC of FIR of Khaira PS Case No. 122/2011, Ext-A/1 CC of Complaint Petition of case no. 1334C/10, Ext-B CC of order dated 11.12.2012 of case no. 701C/12, Ext-C, the complaint case no. 701C/2012, Ext-D, CC of Protest Petition filed in connection with Khaira PS Case No. 122/2011. However, no DW has been examined.

7. While assailing the judgment of conviction and sentence, learned counsel for the appellants has submitted that the judgment impugned happens to be cryptic, perverse and in likewise manner, the sentence so inflicted against the appellants happens to be arbitrary. Further, proceeding ahead with his argument, learned



counsel for the appellants has submitted that at an initial stage the informant Meena Devi had specifically stated in the Fard-e-beyan that she along with Indu Devi were assaulted by back of the axe over their heads but, during course of evidence, she had not deposed nor Indu Devi that they were assaulted by back of the axe. Injury found over heads of both the injured, namely, Meena Devi and Indu Devi found to be caused by hard and blunt substance and on account thereof, there happens to be inconsistency in between medical evidence as well as ocular evidence whereupon, the prosecution case could not be relied upon. Accordingly, it has been submitted that the prosecution case suffers from inherent defect whereupon, fit to be disbelieved.

8. It has also been submitted that not even a single independent witness has been examined in this case. From cross-examination of respective witnesses, it is apparent that they all are inter related with Meena Devi and Indu Devi and so, their interestedness happen to be along with Meena Devi as well as Indu Devi and on account thereof, have deposed collusively that aforesaid Meena Devi and Indu Devi were assaulted but the injuries found, inconsistent with the finding recorded by the doctor. Therefore, their evidences are also fit to be rejected.

9. Apart from this, it has also been submitted that



witnesses have consistently deposed including that of injured, PWs-5 and 6 that blood was oozen out from the injuries which spread over the ground but, during course of inspection of the place of occurrence, the Investigating Officer, PW 8, had not found neither blood stain nor the trampling mark. So submitted that the objective finding of the Investigating Officer also did not support the case of the prosecution. So, the cumulative effect nullify the finding recorded by the learned lower court. As such, the appeal is fit to be allowed.

10. On the other hand, learned APP refuting the submissions made by the learned counsel for the appellants, has submitted that the evidence in its totality is to be seen. Furthermore, where the witnesses are rustic, simpleton, illiterate, then in that event, the appreciation of evidence is to be carried out with some relaxation. There cannot be same yardstick for appreciation of evidence attached with while scrutinizing the evidence of a person of intellect with a witness being illiterate residing at a remote area without having any kind of access. After following the aforesaid principle, when the evidence on record is perceived in its totality, it is apparent that all the witnesses have substantiated the case of the prosecution and that being so, the judgment of conviction and sentence needs no interference.



11. PW-7 is the doctor who had examined both the injured namely, Indu Devi (PW 5) and Meena Devi (PW 6) on 29.08.2010. So far Meena Devi is concerned, he had found following injuries over her person:-

- (i) Semi conscious and dizziness.
- (ii) Lacerated wound over vertex of skull measuring 1 ½" x 8" x bone deep. She was advised X-ray and in X-ray plate No.1 ® 30.08.2010 (Two pieces) of 30.08.2010 (Ext 2 and 2/1) found hair line fracture.
- (iii) Swelling over right chest 3" x 2".
- (iv) Swelling over right thigh 2.5" x 3". Caused by hard and blunt substance injury no.2 has been found to be grievous while remaining injuries simple in nature

12. The doctor had also examined Indu Devi on the same day at about 1.50 PM and found the following injuries:-

- 1. Semi conscious and low blood pressure, low pulse and having vomiting and dizziness.
- 2. Multiple swelling over back side of skull over occipital bone 3" x 3" and 3"x 2.5".
- 3. Lacerated wound over vertex of skull 1.5" x 8" x bone deep- X-ray received A.P.T lateral. In X-ray-hair line fracture was found of vertex of skull.



4. Swelling over right arm measuring 3" x 2.5. Age of injury within 6 hours and caused by hard and blunt substance. Injury No.1, 2 and 4 are simple in nature and injury no.3 is grievous in nature, but injury no.1, 2 may be dangerous to life having vomiting, dizziness and low blood pressure.

13. During cross-examination, he had admitted that he had not put his signature with date and time over injury report as well as over X-ray plate. He had further admitted that he had not mentioned B.P. or pulse rate of the injured. He also admitted that he had not mentioned the colour of the injuries. He had also admitted that on fall over hard substance, these injuries could be possible.

14. PW-5, Indu Devi, an injured had deposed that on the alleged date and time of occurrence she was at her house. Her Gotni Meena Devi had put Bari in sun for wither. She-goat of Anil Malakar repeatedly came and ate Bari whereupon Meena Devi had gone to Anil Malakar to make complaint. After some time, she came back followed by Pramod, Sunil, Anil, Guletan, Ram Malakar, Sudhir, Jaya Devi, Priti, and others. Pramod was armed with axe. Sunil was armed with axe, Anil with Farsa, Guletan and Ram Malakar were armed with Lathi while Jaya, Priti were armed with brick particles. They, after arrival began to assault Meena and during course thereof,



Pramod gave an axe blow over her head causing injury thereupon. When she rushed, Sunil had given axe blow over her head causing injury thereupon. Then thereafter, she along with Meena were subjected to assault by others with Lathi, brick particles. After assaulting, the accused persons left the scene. Then thereafter, they were taken to hospital where she remained for eight days. Police had recorded her statement. Claimed identification of the accused. During cross-examination at para-2, she had admitted that Meena Devi happens to be her own Gotni. She had further stated that Meena Devi had not fallen down on the ground after sustaining injury. She further had stated that she is unable to say as to how many persons were present at the place of occurrence. She is also unable to disclose the names of all the persons who witnessed the occurrence. Then had named Pankaj, Urmila, Dashrath, Arun. Then also named, Prakash, Arun, Jogendra and others. In para-3, she had stated that she along with Meena Devi were assaulted as a result of which became injured. They both sustained injury over their head. People, who were present there at the place of occurrence were raising hue and cry. They were treated at Khaira Hospital. Police had taken her statement at Khaira hospital. In para-4, had stated that she had got no knowledge with regard to institution of a case by the accused persons for the same occurrence.



15. PW-6 is the informant, Meena Devi, another injured. She had deposed that on the alleged date and time of occurrence she was making Bari (edible item) in the sun for withering. She-goat of Anil Malakar repeatedly came and ate Bari whereupon she had gone to Anil Malakar to make complaint. Wife of Anil Malakar entered into duel as well as also threatened whereupon, she returned back. Soon thereafter, Pramod, Sunil, Anil, Guletan, Ram Malakar, Sudhir, Jaya Devi, Priti, and others came out of whom Pramod was armed with axe. Sunil was armed with axe, Anil with Farsa, Guletan and Ram Malakar were armed with Lathi while Jaya, Priti were armed with brick particles. Pramod gave an axe blow over her head with an intention to kill as a result of which, she sustained injury over head. Blood oozen out. Indu Devi rushed to rescue her and during course thereof, Sunil gave axe blow over her head as a result of which she also sustained injury. Blood oozen out. Others have also assaulted with lathi as well as brick particles. Then thereafter, the accused persons left the place. They were taken to hospital where they were treated. Police came, recorded her Fard-e-beyan whereupon, she had given her RTI, identified the accused. In her cross-examination at para-2, she had admitted that Shobha had instituted a case against her as well as her family members. Shobha had instituted a case of maar-peet. As she happens to be illiterate so, she is unable to say on which



dated she had instituted a case. She had further stated that she does not know English calendar. She has got no idea to see watch. She had further stated in para-3 that Investigating Officer had visited place of occurrence while she was at the hospital. Her husband had shown the place of occurrence. The Bari was kept over a cot at the Darwaza. She had shown the boundary of Sahan as East-House of Umar Malakar, West-She herself, North-Barren land, South- House of Devki Malakar. She had further stated that after sustaining injury over her head, she is suffering from some sort of deficiency. In para-4, she had stated that all the persons belonging to Gardener (Mali) community and are Gotia to each other. All are blood relation and are living peacefully save and except, these accused who happens to be terrorist and are involved in anti-social activity. In para-5, she had stated that blood was oozing out from the injury. Blood had not fallen on earth rather over clothe. At the time of occurrence, there were 4-5 persons whom she named, Dashrath, Urmila, Arun, Naro and she herself along with injured Indu Devi. They have seen each other. All were standing nearby. There was uproar during course of assault. Arun and others shouted whereupon other persons also came. At the time of occurrence, she was standing. In para-7, she had stated that only two persons had sustained injuries. Both of them had not fallen down. Shobha Devi is wife of Anil Malakar. She had been confronted with



counter case. She had further stated that her husband as well as her son had managed their treatment. She had also shown the clothe to the Investigating Officer which was soaked with blood. She was treated at the hospital. She had not become unconscious. After the occurrence she vomited thrice at the hospital. She was treated at Khaira Hospital only. She along with Indu Devi remained at the hospital for eight days. Then had denied the suggestion that she was not assaulted. Further denied the suggestion that as Shobha Devi had instituted the case against them, so this case has been filed. Then she was suggested that she had sustained injury on account of falling and Indu Devi came in her rescue who also fell down and sustained injury. Again she has been suggested that there was quarrel amongst the spouse and during course thereof, she as well as Indu Devi had sustained injury.

16. PW-1 had stated that while Meena Devi had kept Bari in the sunlight for basking, she-goat of Anil Malakar repeatedly came and ate Bari whereupon she had gone to Anil Malakar to make complaint. She returned back and then thereafter, Pramod, Sunil, Anil, Guletan, Ram Malakar, Sudhir, Jaya Devi, Priti, and others came to the place of Meena Devi and abused her. Pramod was armed with axe. Sunil was armed with axe, Anil with Farsa, Guletan and Ram Malakar were armed with Lathi while Jaya, Priti were armed with brick particles. Pramod had given Tangi blow over the head of Meena Devi



as a result of which, she sustained injury. Blood oozed out. Indu Devi rushed to rescue her and during course thereof, Sunil gave axe blow over her head as a result of which she also sustained injury. Rest of the accused have also assaulted both of them with lathi as well as brick particles. Then thereafter, the accused person left the place. Identified the accused. During cross-examination, he had stated at para-2, that Meena Devi happens to be his aunt. She also happens to be his neighbour. At the time of occurrence, 4-5 persons were present at the place of occurrence who were Anil, Arun, Narsingh and Dashrath. When he reached at the place of occurrence, Dashrath, Anil, Narsingh, Arun were present since before. Then had denied the suggestion that he had not stated before the police that Priya, Jaya and Priti were not armed with brick particles. He had further stated that his statement was recorded by the police on the same day at about 7.00 PM.

17. PW-2, during her examination-in-chief, had reiterated the same version. During cross-examination at para-3, she had stated that she happens to be illiterate and on account thereof, she is unable to perceive English calendar and in likewise manner unable to see watch. She had shown inter se relationship with the informant family. In para-4, she had stated that the Bari was kept at the cot. There were two cots. Investigating Officer had recorded her



statement. She had not shown cot to the Darogaji. At the place of occurrence, 10-15 persons came at the place of occurrence. None of the injured had fallen over the ground. Naro, Arun, Dashrath were identified who along with others came. Rest persons were not identified by her. She had not talked with those persons. In para-5, she had stated that she had not seen anybody in an injured condition as well as fallen over the ground on the alleged date of occurrence. Then had denied the suggestion that she had not seen the occurrence.

18. PW-3 is Arun Malakar. During examination-in-chief, he had reiterated the version. During cross-examination at para-3, he had stated that informant Meena Devi happens to be his Bhaujaee but they both are residing separately. In para-4, he had stated that Investigating Officer had recorded his statement. He had further denied that during course of his statement before the Investigating Officer, he had not named Jaya, Priti and Priyanka. Then had stated that he had seen two persons in an injured condition who became injured after having been assaulted. Meena Devi and Indu Devi were in injured condition. They both were standing even after assault. There was uproar. 2-4 to 10 persons were present at the place of occurrence since before his arrival. Out of whom he had identified Pankaj, Urmila, Naro, Dashrath. In para-7, he had given the topography of the land. He had denied the suggestion that no



occurrence had taken place.

19. PW-4 also reiterated the prosecution versions identifying Pramod to be assailant of Meena Devi with an axe over her head. Indu Devi who came in rescue was assaulted by the Sunil Malakar with an axe over her head having injuries thereupon. During cross-examination at para-2, he had stated that Meena Devi happens to be his daughter-in-law and in likewise manner, Indu Devi. He had seen injuries over the person of Meena and Indu at the place of occurrence itself over their heads. Blood had oozed out. There was blood stain over the clothes. Both the injured were unconscious. They both sat after sustaining injuries. There was uproar in the village with regard to Maar-peet.

20. PW-8 is the Investigating Officer, he had stated that after registration of case, he was entrusted with the investigation. He had gone to hospital where he took further statement of the informant as well as statement of another injured Indu Devi. Then proceeded towards place of occurrence which happens to be Gali in front of house of informant where Maar-peet took place. He further identified the same having boundary South- house of Devi Malakar, North-house of informant, East- house of Tilak Malakar, West-Narsingh Malakar. He had recorded statement of other witnesses.



Conducted raid at the house of accused who were found absconding. Received injury report issued by the doctor relating to both the injured and then thereafter, he submitted charge-sheet. Also exhibited the case diary. During cross-examination, at para-3, he has been confronted with non mentioning of the dates against each of the paragraphs-, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and in likewise manner relating to subsequent paragraphs. In para-4, he had admitted that he had not mentioned the exact time when he arrived at the place of occurrence. He had not mentioned the fact that who had shown the place of occurrence. He had not mentioned length and breadth of place of occurrence. He had not seen the cot at the place of occurrence. He had not mentioned the length and breadth of the Gali. He had not found blood over the place of occurrence. He had not mentioned height of the building standing at the boundary of the place of occurrence. In para-5, he had stated that Darwaza of Meena Devi happens to be east front. He had not mentioned measurement of the aforesaid Darwaza. Then there happens to be contradiction relating to the statement of Pankaj Malakar. In para-6, he had stated that he had not seized the apparel nor he had mentioned the fact that as to why the same was not seized.

21. After going through the evidence available on the record, more particularly, PWs-5 and 6, the respective injured, it is



evident that they both are consistent over the manner of occurrence as well as with regard to their assailants coupled with the presence of other co-accused who also participated during court of occurrence and is found corroborated by the other PWs. It is apparent that at an initial stage the prosecution had specifically mentioned the fact that assault was made from the backside of axe which, during course of trial, none of the witnesses specified rather they blatantly deposed that appellant, Pramod Malakar as well as Sunil Malakar stuck by axe. The learned counsel for the appellants, on that very score, stressed that having such kind of assertion at the end of the prosecution is found inconsistent with the finding by the doctor, PW-7 and on account thereof, their versions would not be accepted.

22. So far status of injured is concerned, apart from other, witnesses happen to be illiterate, rustic, simpleton, lazy and that being so, the Hon'ble Apex Court in *Ramesh Kumar v. State of Himachal Pradesh* reported in (2013) 14 SCC 110 has observed that while perceiving the evidence of such kind of witnesses would not lie the same yardstick which is being applied with regard to witnesses having intellectual status. For better appreciation the same is quoted hereinbelow.

“11. There may be some discrepancies in the timing and distance between the place of occurrence and residential houses. Material witnesses had been



the rustic villagers/labourers earning their livelihood by difficult means. So the case is to be examined keeping these aspects in mind. ”

23. That being so, such lapse having at the end of the witnesses is not at all found adverse to prosecution. Furthermore, it is apparent from the evidence that there was no repetition. Even if accepting the initial version that backside of the axe was used and so, there was neither an intention nor knowledge nay the same could be gathered from their activity. The presence of counter case is not going to shield the appellants on account of consistent evidence as well as perceiving the conduct whereunder complaint was filed two days after institution of present case without any cogent explanation. That being so, the conviction and sentence recorded by the learned lower court against both the appellants for an offence punishable under Section 307 IPC is not at all found justified. However, both the appellants are assailants and further from the evidence of PW-7, it is evident that hairline fracture was found over the vertex of both the victims and that being so, both the appellants are found and held to be guilty for an offence punishable under Section 325 of the IPC.

24. Manner whereunder the occurrence has been committed at their end, did not deserve any sort of leniency. That being so, both the appellants are independently directed to undergo RI



for 1 year as well as to pay fine of Rs. 3,000/- and in default thereof, to undergo RI for two months.

25. With the aforesaid findings, the appeal is partly allowed. Both the appellants are on bail. Hence their bail bonds are cancelled with a direction to surrender before the learned lower court to serve out the remaining part of the sentence. The period having undergone during course of trial will be set off in terms of Section 428 of the CrPC. In case there happens to be absence of appellants, then in that event, the learned lower court will proceed against them in accordance with law.

(Aditya Kumar Trivedi, J)

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