

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.179 of 2015**

Arising Out of PS.Case No. -371 Year- 2010 Thana -BANKA District- BANKA

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Nirmal Das, son of Brihaspati Das, resident of Village - Simariya, P.S. - Panjwara,
District - Banka.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Sanjay Kumar Jha-Advocate
Mr. Rana Pratap Singh-Advocate
Mr. Satyaveer-Advocate
For the Respondent/s : Mr. S. A. Ahmad-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 18-09-2017

Appellant, Nirmal Das has been convicted for an offence punishable under Section 307 of the I.P.C. and sentenced to undergo R.I. for six years as well as fined of Rs.1,000/- and in default thereof, to undergo S.I. for one and half year by the 5th Additional Sessions Judge, Banka vide judgment of conviction and sentence dated 03.02.2015 passed in connection with Sessions Trial No.158 of 2011.

2. PW-3, Kiran Devi (informant) filed written report on 12.10.2010 alleging inter alia that land dispute is persisting with her Gotia Nirmal Das as they are demanding passage after dismantling her house. In the aforesaid background, Panchayati had also been taken place, but they were not adamant to accept the verdict



of the Panchayati and in the aforesaid background, today i.e. 12.10.2010 at about 7.00 a.m., Nirmal Das made house trespass having armed with farsa and began to abuse. He had also said that as she has not provided passage, on account thereof, she will be murdered. She resisted whereupon Nirmal Das gave farsa blow over her forehead as well as head as a result of which, she became injured. She began to cry. During midst thereof, the co-accused Ajay Das and Congress Das armed with danda came and began to assault. Her husband, who has gone to a shop situated nearby, rushed after hearing her cry along with others, intervened. Then thereafter, all the accused persons fled therefrom. She along with her husband came to P.S. and submitted written report.

3. After registration of the case, investigation was taken up and after completing the same, chargesheet was submitted followed with order of cognizance and then, trial commenced and concluded in a manner, the subject matter of instant appeal.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, neither oral nor documentary evidence adduced on behalf of defence.

5. Learned counsel for the appellant raised manifold argument while assailing the judgment of conviction and sentence impugned. It has been submitted that on account of non-examination



of I.O., the interest of the accused is found prejudiced as the defence is found deprived of an opportunity to take contradiction as well as also been impaired as could not get an opportunity to challenge motive by way of demolishing the evidence with regard to location of his land, as well as instance at their end to provide land of ingress and outgress after dismantling the house.

6. Furthermore, it has also been submitted that witnesses are liar. Their credibility is found completely smashed when is taken together. To support the same, it has been submitted that there happens to be complete absence in the written report regarding assault over husband of the victim (PW-3), but during course of evidence, a new story has been introduced with regard to assault having over the person of PW-1, Rajendra Das. It has also been submitted that when the evidence of all the witnesses are taken together, it is evident that whole prosecution case suffers from improbability. PW-3, the injured, had not spoken that she had filed written report while PW-1, her husband had stated that she was senseless and regained her sense after two days and subsequently thereof, became able to speak. Though PW-1 also happens to be attesting witness, but intentionally he withheld to disclose his identity as an attesting witness in the background of the fact that had there been, then in that circumstance, he was under compulsion to explain, which would have exposed the falsity of the prosecution version. That being so, in spite of the fact



that PW-3 as claimed by the prosecution happens to be an injured one, her testimony appears to be uncreditworthy and so, irrespective of examination of the doctor, the conviction and sentence recorded against the appellant for an offence punishable under Section 307 of the I.P.C. did not justify. Consequent thereupon, instant appeal is fit to be allowed.

7. On the other hand, learned Additional Public Prosecutor refuting the submission having made on behalf of appellant has submitted that witnesses are not at all expected to speak like parrot, because of the fact that it happens to be own perception of the witnesses, which is to be expressed in their own language and so, variance amongst PWs happen to be natural one. Furthermore, it has further been submitted that while appreciating the evidence, the Court has to perform the duty like separating grain from chaff that means to say, separating the truth from falsehood and during course of such exercise, it is apparent that PW-3, the injured has stood the litmus test corroborated by the evidence of doctor (PW-8). So, the conviction and sentence recorded by the learned lower Court is fit to be confirmed.

8. Non-examination of I.O. in each and every case should not be considered fatal to the prosecution case. It varies from case to case and for that, the Court has to perceive whether due to non-examination of I.O., certain vital clue remained unresolved or the interest of accused is found prejudiced. So far this particular case is



concerned, it is apparent that defence had not been able to challenge the alleged place of occurrence and in likewise manner, the injuries having over the person of PW-3. It is evident that during course of deposition, PW-3 had expanded the ambit of prosecution case by introducing the family members (female) also to be her assailant, but those parts have already been disbelieved by the learned lower Court while acquitting them. So far assault by means to farsa is concerned, she, during course of her examination-in-chief, had deposed that Nirmal Das, who was armed with farsa came and then, Nirmal gave farsa blow over her head. Then thereafter, second blow was also given by Nirmal Das, which was also over her head. Then thereafter, others have also assaulted with lathi. Her husband was at shop, who came after hearing her cry along with others. They have also brick-batted as a result of which, she became unconscious. She had also deposed that while she was taken to P.S., she remained unconscious wherefrom she was shifted to doctor, who treated her and then, regained sense. Police had recorded her statement at that very place whereupon, she had put her signature as well as her husband also put her signature (exhibited). During course of cross-examination, it is evident that defence had not cross-examined and the reason best known to the accused, they have not questioned over her version relating to assault. Though during course of argument, as stated above, this point has been raised, but unless and until a witness has got an opportunity to explain and for



that, witness is to be cross-examined on that particular point then and then only, same would be considered. That being so, the inconsistency with regard to oral statement or written report the basis of registration of instant case remained as it is. Had there been, then in that circumstance, the witness was in a position to explain whether it was police official himself or by somebody else or by she herself or by her husband, whoever may be got the written report scribed and placed. So far P.O. is concerned, that happens to be also consistent as from Para-6 of cross-examination, she had stated that the occurrence took place inside her courtyard, which is open. Though no cross-examination has been made at the end of the defence with regard to assault by means of farsa by the appellant Nirmal Das, but at Para-7, she had stated that copious blood had fallen in the courtyard where she was assaulted. In Para-8, she had stated that blouse, Sari, Petticoat soaked with blood. She had further stated that at the time of occurrence, she was alone. Her husband was at shop. Accused persons assaulted her as a result of which, she became unconscious and then, thereafter, her husband came. Thereafter, she was lifted to hospital.

9. PW-8 is the doctor, who had examined the victim on 12.10.2010 at about 9.30 a.m. and found following injuries:-

I) Incised wound at forehead left side 1

½" x ¼" x bone deep with bleeding.

II) Incised wound 2" above forehead



right side 1" x ¼" x bone deep with bleeding.

Both the above injuries caused by sharp cut weapon, simple in nature.

III) Bruish with swelling on right elbow joint measuring 2" x 1" red in colour.

IV) bruise with swelling at right back side of scapular region, red in colour.

Both the above injuries caused by hard and blunt substance, simple in nature.

10. With regard to status of other witnesses, it is apparent from the evidence of PW-3 that at the time of occurrence, she was alone and so, they are corroborative in nature, more particularly her husband, PW-1 as well as PW-2. So far other witnesses are concerned that means to say PW-4 to PW-7, they all have gone volte-face to the prosecution whereupon they were declared hostile.

11. Considering the evidence in its totality, it is apparent that while victim (PW-3) was being assaulted, there was no intervening circumstance and that being so, irrespective of the fact that Nirmal Das (Appellant) was armed with farsa, had there been an intention to commit murder, then in that circumstance, the blow would not have been like the present one causing simple injury and further, the nature of injury also suggest that the assailant was not at all carrying a knowledge that by such activity, victim would meet



with death. Consequent thereupon, the conviction recorded for an offence punishable under Section 307 of the I.P.C. is not at all found justifiable and is accordingly, set aside and is modified holding the appellant guilty for an offence punishable under Section 324 of the I.P.C. Considering the nature of the dispute prevailing amongst the parties, the sentence being inflicted as already undergone with a fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for one and half year. In terms of aforesaid modification, instant appeal is partly allowed. Six weeks time is granted to the appellant to deposit the fine. In case of deposit of fine, half of the amount will be paid to the informant (PW-3) on proper identification, for that appellant is allowed to remain on bail and in default thereof, the learned lower Court will be at liberty to proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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