

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.429 of 2015

Arising Out of PS.Case No. -26 Year- 2007 Thana -KURSELA District- KATIHAR

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1. Nago Sah Son of Chhaguri Sah,
2. Sulo Yadav, Son of Bhagwan Yadav, Both are resident of village - Tinghariya,
P.S. - Kursela, District - Katihar.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Mukesh Kr. Jha, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 20-04-2018

Appellants, Nago Sah and Sulo Yadav have been found guilty for an offence punishable under Section 323 IPC and each one has been directed to undergo RI for six months, under Section 341 IPC and sentenced to undergo SI for one month, under Section 307/34 IPC and sentenced to undergo RI for five years as well as to pay fine of Rs. 3,000/- in default thereof to undergo RI for six months, additionally with a further direction to run the sentences concurrently vide judgment of conviction dated 09.07.2015 and order of sentence dated 13.07.2015 passed by 3rd Additional District & Sessions Judge, Katihar in Sessions Trial No. 543/2007.

2. On 06.05.2007, informant Yogendra Prasad Mandal (PW 5) filed written report before O/C, Kursela PS disclosing therein that he after closing his tea stall was in a way to his house on



05.05.2007 and reached near State Bank, saw Nago Sah and Sulo Yadav sitting in a tempo along with their four associates parked over station road. Just after seeing him, the other four unknown persons caught hold of him and on the pretext of going to Majithia (his native village) forcibly got him inside the tempo. When tempo proceeded towards station road, he objected whereupon, they gagged his mouth and then, covering some distance, took him out over culvert near Sampat Raj Kanya Ucchya Vidyalaya and then all of them began to assault him with butt of pistol, more particularly, over his head, mouth as a result of which he fell down. Then thereafter, they repeatedly assaulted, on account thereof, his condition deteriorated. He became unconscious. Treating him to be dead, they kept him by the side of the railway line and left the scene. Somebody else informed his family members whereupon, his son, Abhay, Niraj, wife, Krishna Devi and other family members, Chandan, Suresh came and took him to Dr. S.K. Sinha where he was treated. At about 11 PM, he regained sense. He returned back to his house. On the following morning, the written report is being placed. Motive for occurrence has been shown as money dispute.

3. After registration of Kursela PS Case No. 26/2007 investigation commenced and after concluding the same, charge-sheet was submitted which happens to be the basis for trial which ultimately



concluded adverse to the appellants, subject matter of instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. It has also been pleaded that on account of dispute over money transaction, this case has falsely been instituted. However, neither ocular nor documentary evidence has been adduced in defence.

5. In order to substantiate its case, prosecution had examined altogether 9 PWs out of whom PW-1, Ramashish Pd, PW-2, Chandan Pd. Gupta, PW-3 Binod Mahto, PW-4, Arvind Sah, PW-5, Yogendra Pd. Mandal, PW-6, Abhay Kumar, PW-7, Sudesh Kumar Mandal, PW-8, Dr. S.K. Sinha, PW-9, Krishna Devi, as well as had also exhibited Ext-1, Endorsement over written report, Ext-1/1, Written report, Ext-2, Injury report. As stated above neither ocular nor documentary evidence has been adduced in defence.

6. Coming to the status of the witnesses, it is apparent that PW-1 happens to be formal in nature while PWs-2, 3, 4, 7 have not supported the case of the prosecution and so, they were declared hostile. Although PW-6, son of the informant and PW-9, wife of the informant did not claim themselves to be an eyewitness to the occurrence but the manner whereunder they deposed, is to be considered while adjudging the evidence of PW-5, informant. Before



that, deficiency persisting on the record is to be seen. As is evident, that Investigating Officer has not been examined. Non examination of Investigating Officer could not be considered to be adverse to the prosecution case in routine manner but, it has got bearing when on account of non examination of the Investigating Officer, the accused is found deprived of an opportunity to unravel the truth which, in case Investigating Officer would have been examined found properly surfaced.

7. In the present case, the aforesaid theme happens to be relevant when the evidence has been gone through. As per Ext-2, the injury report, the doctor (PW 8) had found following injuries while examining the victim, PW-5 on 05.05.2007 at about 11.30 PM.

- (A) Abrasion with acchymosis two in numbers-(i) Over scalp dimension 1" x ¼", 3" above globella bleeding. (ii) Over scalp right temporal region dimension ½" x ¼" bleeding
- (B) Bruise 1" diameter circling in abrasion of ½" diameter over right side of zygoma.
- (C) Abrasion ½" x ½" over right upper lip.
- (D) Bruise lower part of right leg 3" in



diameter.

Nature:- All injuries simple in nature caused by hard and blunt object.

Age of injury:- Within six hours.

8. During cross-examination at para-2, he had categorically stated that he had examined the injured on police requisition. He had issued report on the back page of the police requisition. When Ext-2 has been gone through it is apparent that the same is scribed over the back of the injury report issued by the police official and the same happens to be of dated 05.05.2007. That means to say, on 05.05.2007 informant had met with police official who forwarded him to be examined by the doctor. In the aforesaid background, it was incumbent upon the informant to have in case, having been victimized at the end of appellants to have lodged Fard-e-beyan relating to the occurrence. Furthermore, from the evidence of PW-8, it is apparent that he had not found the injured, PW-5 to be unconscious at the time of his examination nor any injury has been found attracting extra care in order to save life. That being so, the activity of prosecution in differing recording of Fard-e-beyan remained unresolved due to non examination of Investigating Officer.

9. Another circumstance as is evident is apparent from the evidence of PW-6, son of the informant, PW-5. He had deposed that



on 05.05.2007 at about 9.00 PM, he along with his father was coming to their house after closing their shop. When they came near Durga Mandir, they seen Nago Sah and Sumo Yadav who called his father and then indulged in gossiping. He requested his father to proceed whereupon, his father had instructed him to go. He will follow later on. He proceeded and in midst of way, he had seen one Tempo going towards station road whereupon, his father, Nago and some unknown persons were there. Considering that his father might have gone to some place, did not say anything. When he came to his house, after some time, he got information through Sailesh Mandal (not examined) that his father is lying in an injured condition whereupon they came, took his father to the place of doctor. As per instruction of the doctor, he had reported to the police. He made statement before the police. Then his father was referred to Bhagalpur where he was treated for 15 days. When his father regained sense, disclosed that Nago Sah and others assaulted him. During cross-examination at para-3, he had stated that he had recorded his statement before the police. Whether the same was written down or not, he is unable to say. Then under para-4, 5, and 6 there happens to be contradiction over statement. In para-10, he had stated that he was not knowing Nago and others since before. He had not seen the occurrence.

10. When the evidence of PW-9, wife of informant has



been gone through, it is evident that she had deposed that on the alleged date and time of occurrence she was at her house. Sushil Mandal (not examined) informed that her husband has been assaulted whereupon she along with her son came near culvert where found her husband in pool of blood. Then thereafter, they took him to the police station where statement of her husband was recorded and then he was sent to doctor where he was treated. Thereafter, she brought her husband to her house. Then again he became unconscious in the morning whereupon, she took him to Bhagalpur where he was treated for 15 days by Dr. Arun Singh. Her husband remained unconscious for 10 days. Her husband had disclosed that Nago, Sulo had assaulted him. In para-2, she had categorically stated that her husband did not become unconscious on assault. Then again said that during course of treatment at Bhagalpur, after ten days, he regained sense. Sushil Mandal is her cousin son-in-law. In para-5, she had stated that she had not seen the occurrence.

11. PW-5 is the injured. He had deposed that on the alleged date and time of occurrence while he was going to his house and reached near State Bank, had seen one tempo parked. When he reached near Tempo, he saw four persons inside the tempo out of whom, he identified Nago and Sumo. They all caught hold of him and took inside the tempo. Driver started the tempo. Tempo did not



proceed towards his village rather diverted towards station whereupon, he protested as a result of which, the accused persons gagged his mouth. When the tempo reached near culvert, accused persons took him out and then, assaulted with butt of pistol over back, head, mouth and other parts of the body. Then thereafter, they repeatedly threw him over the ground as a result of which, he became senseless. Seeing the same, the accused persons escaped therefrom after putting him by the side of railway line. Somebody informed his family whereupon, his family members came and took him to Dr. S.K. Sinha. He had further stated that accused persons while he was inside the tempo had said that as to why he is not returning back the money. Then exhibited his written report. Then had said that he was taken to Bhagalpur where he was also treated. Identified the accused.

12. During cross-examination at para-2, he had admitted that he is knowing Nago Sah and Sulo Yadav since before the occurrence but had denied with regard to money transaction having amongst them. He had also stated that neither he tried to locate the driver nor he met with him after the occurrence. In para-7, there happens to be admission at his end that he had not claimed identification with regard to other accused before the police.

13. When the evidence in its entirety has been gone through, it is apparent that PW-9, wife while had disclosed that first of



all PW-5 was taken to police station where his statement was recorded and then he was sent to doctor for treatment, PW-6 had stated that first of all PW-5 was taken to hospital and as per instruction of the doctor, he had gone to police station where his statement was recorded, is found completely controverted by the victim, PW-5 himself that he became unconscious, he was taken to doctor where he was treated and then, after regaining sense on the following day, he had filed written report.

14. If the evidence of PW-9 is considered, on that very score, she had stated that on the following morning, PW-5 had become unconscious, that means to say, if the evidence of PW-9 is accepted, statement of PW-5 was recorded on the same night which is not on the record and if the evidence of PW-6 is considered, it should have been his statement, the basis for institution of the case which is also not on the record. As per PW-9, on the following morning, PW-5 became unconscious and for that he was taken to Bhagalpur while PW-5 has stated that on the following morning he had submitted written report which ought not to be.

15. Now, in the background of aforesaid persisting controversy, when the Ext-2 has been gone through inconsonance with the evidence of PW-8, doctor it is evident that police had issued requisitin on the same day i.e. on 05.05.2007 and on the basis thereof,



he had treated PW-5 and had issued the injury report on the back of the police requisition. If the aforesaid eventualities are taken together, it is evident that prosecution has not come with the clean hand on that very score. Non examination of Investigating Officer is found prejudicial to the interest of the appellants. Consequent thereupon, the judgment of conviction and order of sentence passed by learned lower court is set aside. Appeal is allowed.

16. Since appellants are on bail, they are discharged from the liability of bail bonds.

(Aditya Kumar Trivedi, J)

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