

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.426 of 2015

Arising Out of PS.Case No. -34 Year- 2002 Thana -EKMA District- SARAN

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Mahesh Sah S/o - Late Thakur Sah Resident of village - Pucharikala P.S. - Ekma,
Dist - Saran at Chapra.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 441 of 2015

Arising Out of PS.Case No. -34 Year- 2002 Thana -EKMA District- SARAN

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Ugrim Mahto S/o- Gouri Mahto, Resident of village- Puchatikala, P.S.- Ekma,
District- Saran at Chapra

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance:

(In CR. APP (SJ) No.426 of 2015)

For the Appellant/s : Mr. Chandra Mohan Jha, Adv.

For the State : Mr. Z. Hoda, APP

(In CR. APP (SJ) No.441 of 2015)

For the Appellant/s : Mr. Chandra Mohan Jha, Adv.

For the State : Mr. Sujeet Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 13-03-2018

Criminal Appeal (SJ) No.426 of 2015 wherein Mahesh Sah is the appellant, Criminal Appeal (SJ) No. 441 of 2015 wherein Ugrim Mahto is the appellant are aggrieved by judgment of conviction dated 25.05.2015 and order of sentence dated 28.05.2015 passed by Additional Sessions Judge, Vth, Saran at Chapra relating to Sessions Trial No.508 of 2002 whereby and whereunder appellant Ugrim Mahto has been found guilty for an offence punishable under Section 307/34 IPC and sentenced to undergo R.I. for seven years as well as to pay fine of Rs.7000/- and in default thereof, to undergo S.I. for six months additionally while appellant Mahesh Sah has



been found guilty for an offence punishable under Section 307/34 of the IPC and sentenced to undergo R.I. for seven years as well as to pay fine appertaining to rupees seven thousand and in default thereof to undergo S.I. for six months additionally and both, under Section 347 IPC and sentenced to undergo S.I. for one month with a further direction to run the sentences concurrently with further direction that the period having undergone during course of trial be to set off in accordance with Section 428 of the Cr.P.C, with a further direction that on deposit of fine, half of the same be paid to the informant injured.

2. Injured Nand Kumar while was admitted at PHC, Ekma gave his fardbeyan on 09-05-2002 at about 11:05 PM disclosing therein that on the same day at about 09:00 PM while he was going to latrine, his co-villager Ugrim Mahto and Mahesh Sah inquired who is going and then said Fod Kumar whereupon he objected as a result of which Mahesh Sah caught hold him while Ugrim Mahto inflicted two Chhura blows over his buttock while one happens to be over his stomach.

3. After registration of Ekma P.S. Case No.34/2002. Investigation was taken up and after concluding the same, charge sheet was submitted, facilitating the trial, meeting with the ultimate result, 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 of complete denial. It has also been pleaded that informant having criminal background might have sustained injuries at different place in different manner by different person and getting an



opportunity, out of village politics the appellants have been implicated putting false and frivolous allegation against them. However, neither oral nor documentary evidence has been adduced in defence.

5. In order to substantiate its case, prosecution had examined altogether 12 PWs, who are PW.1-Keshav Mahto, PW.2-Bundi Lal Mahto, PW.3-Ram Balak Mahto, PW.4-Shankar Mahto, PW.5-Dr. Krishna Nand, PW.6-Rahmat Ali, PW.7-Phulena Mahto, PW.8-Madan Mahto, PW.9-Sunaina Devi, PW.10-Reena Devi, PW.11-Nand Kumar Prasad, PW.12-Sanjay Kumar Singh. Side by side had also exhibited Ext.1-Signature of the informant over fardbeyan, Ext.1/1-Signature of Keshav Mahto over fardbeyan, Injury Report-Ext.2, Formal FIR-Ext.3, Fardbeyan-Ext.4 and Injury report issued by G.M. Nursing Home as Ext.5. As stated above defence had not entered into defence.

6. Learned counsel for the appellant while challenging the finding having recorded by the learned lower court has submitted that during course of recording of judgment of conviction and sentence, the learned lower court failed to appreciate the flaws persisting in the prosecution case which, in case have been taken note of, would not have warranted such finding. In order to justify the same, it has been submitted that Investigating Officer has not been examined. On account of non-examination of Investigating Officer the interest of the appellant is found highly prejudiced as, apart from presence of material contradiction in the evidence of the PWs, there also happens to be inconsistency amongst the evidence of the PWs with regard to identification of the alleged place of



occurrence. That being so, the non-examination of the Investigating Officer, alone in the aforesaid facts and circumstances of the case, happens to be sufficient to undo the finding having been recorded by the learned lower court.

7. Furthermore, it has also been submitted that right from inception of the prosecution, it is apparent that there happens to be no motive for commission of the occurrence. That being so, it could not be perceived, unless and until accused happens to be insane to indulge in such kind of criminal activity. Prosecution during course of trial was very much conscious on that very score and so, PW.11, the informant during course of his evidence introduced the motive as some sort of dispute having during course of local election, which is found uncorroborated.

8. Apart from this, there happens to be disclosure at the end of the prosecution that at about 09:00 PM while the victim was going to meet nature's call, was inquired by the appellants, who is going and further, the subsequent activity of the appellant were found objectionable whereupon, protest was made leading to commission of the occurrence, is also found imaginary one in the background of the fact that none of the witnesses having their house in the vicinity of alleged P.O. had substantiated the allegation that query was made by the accused/appellants while they were on road so, presence of appellant at the alleged place of occurrence happens to be suspicious one and further, in absence of source of identification, there could not be proper identification.

9. Furthermore, it has also been submitted that improbability of the case is further visualizing from the version of the



prosecution itself, as narrated by the witnesses including informant PW.11, appellant Mahesh Sah had caught hold the informant from behind and that being so, there was no possibility or opportunity available to the appellant Ugrim Mahto to cause injury over the buttock of the informant that too repeatedly. That means to say, if the evidence is being considered in its totality then, in that circumstance, it is crystal clear that prosecution has not succeeded in substantiating its case, whereupon, the finding having been recorded by the learned lower court happens to be fit to be set aside.

10. On the other hand, while controverting the submission having been made on behalf of learned counsel for the appellant, the learned Additional Public Prosecutor has submitted that evidence of prosecution witnesses should not be read in piecemeal manner rather the same should be considered in its entirety. During course of such exercise, it is manifest that prosecution has succeeded in substantiating its case and is found duly corroborated by the evidence of the doctor. However, fairly submitted that Ext.5 is found non-admissible in the eye of law for the purpose of ascertaining as well as identification of the nature of the injuries due to non-examination of the doctor who had recorded the Ext.5. Furthermore, it has been submitted that non-examination of Investigating Officer has not caused prejudice to the interest of the appellants as, there happens to be no material contradiction in the evidence of the PW.8 and in likewise manner, P.O. is found duly substantiated.

11. Before coming to ocular evidence, first of all evidence of doctor, PW.5 is to be taken note of who had examined the victim/informant PW.11 on 09-05 -2002 at about 10:30 PM and



found the following:-

- I. Stab injury over upper abdomen 1½” x ¼” x peritoneal deep.
- II. Stab injury over right buttock 1 x ¼” x muscle deep.
- III. Stab injury on the back of right hand 1 x ¼” x muscle deep.

Injury no.2 and 3 were found to be simple in nature caused by sharp cutting weapon including that of injury no.1 but, nature of injury no.1 was reserved as, patient was referred to PMCH considering his physical condition. He had further shown the age of the injury to be within six hours. During cross-examination, save and except cross-examining him on the factum of OD slip, nothing has been suggested to him relating to his finding concerning the injuries having over the person of PW.11, that being so, presence of injuries over the person of informant could not be doubted.

12. At the present moment, the evidence of PW.11, the informant/injured is to be considered in its continuity.

13. PW.11 had deposed that he happens to be informant. His fardbeyan was recorded, while he was admitted at PHC, Ekma. Then had stated that on 09-05-2002 at about 09:00 PM while he was going to meet natures call, at that very moment Mahesh Sah and Ugrim Mahto were coming. They both, after abusing said that “Fod Kumar” is going whereupon, he objected as a result of which, Mahesh Sah caught hold him while Ugrim Mahto gave *Chura* blow, repeatedly causing injury over his stomach as well as buttock. So



many persons have witnessed the occurrence. During cross-examination at para-3, he had stated that the road meets with main road through his house. One side of the village there happens to be houses of the villagers while at other side there happens to be grave yard. In para-9 he had stated that accused persons were on strained relationship since before as, he flouting their advise not to contest Ward Commissioner Election. Ugrim Mahto and Mahesh Sah have also their candidature for the same. In para-5, he had stated that it was a moon light. Occurrence took place near the Bathan of Aliser Mian. 5-6 houses are contiguous to that place and then, named them, Aliser Mian, Makai Mahto, Dashrath Mahto, Fagu Mahto. Then had stated that at the time when accused persons were abusing him, so many villagers have assembled. They assembled hearing the alarm. In para-6 he had stated that none had tried to apprehended the accused persons. *Chhura* was inflicted through pointed part. At that very time, Mahesh Sah had caught hold him from behind. Knife was 6-9 inches long, two inches width. The blade having of iron had pierced. In para-7 he had stated that he had not talked with villagers regarding the occurrence. He had further stated that as there was strike at the PMCH, NMCH on account thereof, he was treated at GM Nursing Home where he was admitted for 20-25 hours. In para-8 he denied suggestion that no such type of occurrence had ever taken place rather getting a false injury report from a private doctor instituted this case.

14. From evidence of PW.4, it is apparent that the defence had not tested him on the score of occurrence. It is also evident that from the evidence of this PW that PO has been fixed near Bathan of Aliser Mian whose son has been examined as PW.6. Furthermore,



there happens to be no cross-examination over identification, which rightly been as both the appellants are co-villagers.

15. PW.6, though with regard to remaining part was declared hostile but, so far occurrence is concerned he had substantiated the place of occurrence as well as claiming to have been these two appellants fleeing from the place of occurrence. He had deposed that on the alleged date and time of occurrence he was at his palani. After hearing alarm he came out from the palani and found Mahesh Sah and Ugrim Mahto fleeing therefrom on the other hand, seen the Nand Kumar in an injured condition.

16. Because of the fact that he disowned to aver that he had seen the occurrence being committed by these two accused so he was declared hostile. Even during course of cross-examination, at para-3 he had substantiated his assertion by saying that it was dark night. At that very moment, accused persons had already covered 4-5 *laggi*. After fleeing of accused, none of the villagers came. So, from his evidence also, it is apparent that this witness, even though was declared hostile, not only fixed the place of occurrence rather also assault over the person of PW.11 as well as presence of appellants who were seen fleeing therefrom.

17. PW.9 who happens to be mother of the injured and PW.10 who happens to be wife of the informant have claimed to be an eyewitness to occurrence on the ground that while they were returning from meeting natures call, they have an opportunity to go at the place of occurrence hearing cry of the informant and had seen the accused Ugrim inflicting *Chhura* blow while Mahesh had apprehended him. However, there happens to be contradiction on



that very score in the evidence of PW.9 at para-9 but no contradiction has been found in the evidence of the PW.10, however, PW.11 had not shown their preence.

18. PW.1 is the father of the informant who had stated that informant who proceeded to meet natures call, returned back having injuries over his person and on query, he disclosed that Mahesh Sah has caught hold him while Ugrim Mahto has assaulted with Chura, corroborated by PW.2, PW.3. PW.4 who claimed to be an eye witness to occurrence but, para-3 and para-4 is the contradiction relating to his earlier statement and para-10 speaks inter se relationship being uncle of the informant. PW.7 was declared hostile while PW.8 also stood on pedestal of hearsay. PW.12 is the formal witness who had exhibited relevant documents including that of Ext.5 in absence of non-examination of the Investigating Officer as well as the doctor of the GM Nursing Home.

19. After giving anxious consideration to the evidences available on the record as referred herein above, it is apparent that on account of non-cross-examination of the informant over the manner of occurrence, the same is found invincible and when is taken together with the evidence of PW.6, it is found doubly secured. Even non-examination of the Investigating Officer on that very score is not at all found prejudicially to the interest of the appellants as, they on their own failed to cross-examine PW.11 on that very score and in likewise manner by cross-examining PW.6 whereupon the place of occurrence is properly identified as well as the manner of occurrence even, for the moment, discarding the evidence of other PWs though, the majority of whom have deposed over the status of



the victim as well as the name of assailant being disclosed by the victim duly substantiated the same. Section 134 of the Evidence Act did not require the quantity rather it happens to be quality which matters. Furthermore, the evidence of the injured, unless and until there happens to be cogent ground to discard his testimony, should be accepted as, being victim his presence at the place of occurrence is found duly established. The Hon'ble Apex Court in **Chandrasekar & Anr. vs. State of Tamil Nadu** reported in **2017 (4) PLJR (SC) 220**, has held:

“10. Criminal jurisprudence attaches great weightage to the evidence of a person injured in the same occurrence as it presumes that he was speaking the truth unless shown otherwise. Though the law is well settled and precedents abound, reference may usefully be made to **Brahm Swaroop vs. State of U.P.**, (2011) 6 SCC 288 observing as follows:

“28. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with an in-built guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.”

20. Now only question remains whether appellants are to be convicted and sentenced for as recorded by the learned lower court. Though, at an initial stage of the trial, the witnesses have not stated that the accused persons were carrying grudge against the appellant. PW.11 during course of cross-examination had divulged to some extent on that very score but is found not at all substantiated properly. Whatever been gathered from the circumstances visualizing from the record is that on account of some sort of filthy remark at the end of the appellants was resisted by the informant, which



provoked the appellants as a result of which, pierced the *Chhura* twice at buttock and once at lower abdominal part. Two injuries remained to be simple and so far injury no.1 is concerned, no opinion is on the record. The nature of injury for the purpose of attracting Section 307 of the IPC is not at all relevant save and except suggesting as well as exploring an opportunity to identify the activity of an accused during course of an occurrence. The only factor which the court has to see whether the activity of the accused during course of commission of the occurrence depict the intention of the accused to cause murder or, such activity was with a knowledge that the injury ultimately may cause cost of life. So far present scenario is concerned, admittedly only appellants as well as victim PW.11 were present at the place of occurrence, PW.11 was caught hold by the Mahesh Sah, there was no intervening circumstance to forbid the assailant that means to say had there been an intention at the end of the appellants to kill would have pierced *Chhura* over the vital part of the body instead of choosing the relevant part whereupon injuries were inflicted.

21. In the aforesaid facts and circumstances of the case, activity of the appellants did not justify the finding of the learned lower court relating to Section 307 of the IPC and on that very score, the judgment impugned is being intervened. Consequent thereupon, appellant Ugrim Mahto is found guilty for an offence punishable under Section 324 of the IPC and in likewise manner, Mahesh Sah to be under Section 324/34 IPC and, they both are directed to undergo SI for one year as well as to pay fine appertaining to Rs.2000/- in default thereof, to undergo SI for six months, additionally, maintaining the conviction and sentence under Section 341 of the



IPC. The period having undergone during course of trial or even at the present stage will be subject to set off in terms of 428 Cr.P.C. Both the sentences would run concurrently. Appellants are on bail hence their bail bonds are hereby cancelled directing them to surrender before the learned lower court within fortnight to serve out remaining part of sentence failing which the learned lower court will be at liberty to proceed against the appellants in accordance with law. Appeal is partly allowed.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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