

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.58 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- NALANDA (BIHARSHARIFF)

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1. Sanjay Kumar, Son of Sri Nandlal Grain
2. Paro Kumar @ Paro Parsad, son of Sri Banaras Mahto
3. Santosh Kumar, son of Sri Banaras Mahto
4. Nandlal Grain, son of late Banke Grain
5. Banaras Mahto, son of late Gopal Mahto
All resident of village-Anadi, P.S. Asthawan, District- Nalanda

..... Appellants

Versus

The State of Bihar

..... Respondent

with

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Criminal Appeal (SJ) No. 70 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- NALANDA (BIHARSHARIFF)

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Arun Kumar, son of Nandlal Garain, resident of village-Andi, P.S. Asthawan,
District-Nalanda

..... Appellant

Versus

The State of Bihar

..... Respondent

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Appearance :

(In CR. APP (SJ) No.58 of 2003)

For the Appellant/s : Mr. Suraj Deo Singh, Adv. (Amicus Curiae)

For the State : Mr. A.P.P.

For the Informant Mr. Binoy Kumar, Adv.

(In CR. APP (SJ) No.70 of 2003)

For the Appellant/s : Mr. Suraj Deo Singh, Adv. (Amicus Curiae)

For the State : Mr. Sujit Kumar Singh, A.P.P.

For the Informant Mr. Binoy Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR

SRIVASTAVA

ORAL JUDGMENT

Date: 09-03-2018

1. Both the above stated criminal appeals have arisen out
of common judgment of conviction and sentence order dated
22.01.2003 and 28.01.2003 respectively, passed by learned 3rd



Additional Sessions Judge, Nalanda at Bihar Sharif in Sessions Trial No. 250 of 1987 and accordingly, a common judgment is being passed in both the above stated criminal appeals.

2. Heard learned amicus curiae appearing for the appellants, learned Additional Public Prosecutor for the State as well as learned counsel for the informant.

3. Asthawan P.S. Case No. 148 of 1986 was registered for the offences punishable under Sections 147, 148, 149, 324, 323, 448, 307 of the Indian Penal Code and 27 of the Arms Act on the basis of statement made by PW-9, Manoj Kumar, who stated that on 04.09.1986 at about 09:00 A.M., when he was going to Barbiga and reached near the Dalan of Dharamveer Mahto, convicts Paro Kumar and Sanjay Kumar came there and asked why he was taking water through a particular land upon which the informant (PW-9) made protest. Thereafter, both the above stated persons started assaulting him by *baint*. PW-9 ran towards his house but after sometime all the convicts being armed with rifle, pistol etc. came there and entered into his house. His brother, bhabhi and other inmates fled away from the house out of fear but convict Nandlal Garain ordered the others to shoot the PW-9 and thereafter, convicts Sanjay Kumar, Paro Kumar, Satish Kumar and Arun Kumar chased him and made indiscriminate firing as a result whereof, PW-9 sustained firearm injury from the rifle



of convict Arun Kumar. The villagers witnessed the occurrence and after the occurrence, he was taken to Asthawan Hospital where his statement was recorded by the PW-11 on the same day at about 01:00 P.M.

4. The case was investigated by PW-11 and after investigation, charge sheet for the offences punishable under Sections 147, 148, 149, 307, 324, 452 of the Indian Penal Code and 27 of the Arms Act was submitted. The cognizance of the offence was taken and the case was committed to the court of Sessions, in usual way.

5. All the appellants were put on trial before the learned trial court and accordingly, all the six appellants stood charged for the offences punishable under Sections 307/149 and 452 of the Indian Penal Code whereas appellant Nand Lal Mahto @ Nand Lal Garain and Arun Kumar stood charged, separately, for the offence punishable under Section 307 of the Indian Penal Code. No charge under Section 27 of the Arms Act was framed against any of the appellants.

6. In course of trial, altogether, 11 witnesses were examined by the prosecution and apart from the aforesaid prosecution witnesses, certain documents were also got exhibited as documentary evidence.

7. The statements of appellants were recorded under Section 313 of the Cr.P.C. in which they claimed their innocence. No



evidence was adduced by the appellants in support of their defence. However, from perusal of statements recorded under Section 313 of the Cr.P.C. as well as from the trends of cross examination of prosecution witnesses, I find that the appellants completely denied the prosecution story and claimed their false implication due to enmity and land dispute.

8. The learned court below having perused the evidences available on the record convicted all the appellants for the offences punishable under Sections 307/149 and 452 of the Indian Penal Code and accordingly, sentenced them to undergo rigorous imprisonment for ten years for the offence punishable under Section 307/149 of the Indian Penal Code and to undergo rigorous imprisonment for seven years for the offence punishable under Section 452 of the Indian Penal Code and also fined them of Rs. 5000/-(five thousand) each and in default of payment of fine, all the appellants were further sentenced to undergo rigorous imprisonment for one year. The learned trial court, separately, convicted the appellants Nand Lal Mahto @ Nand Lal Garain and Arun Kumar for the offence punishable under Section 307 of the Indian Penal Code and accordingly, sentenced them to undergo rigorous imprisonment for 10 years for the offence punishable under Section 307 of the Indian Penal Code. However, the learned court below ordered that all the sentences shall run concurrently and further



directed that fine realized from the appellants shall be paid to injured, Manoj Kumar (PW-9).

9. Learned amicus curiae appearing for the appellants assailed the impugned judgment of conviction and sentence order arguing that prosecution failed to bring the injury report of PW-9 on record in accordance with law. He submits that the doctor was not examined by the prosecution but even then, the learned trial court relied upon the so-called injury report of injured though the learned trial court has observed at para-25 of the judgment that injury report dated 30.10.1986 said to be issued by Dr. L.K. Mishra of P.M.C.H., Patna was not legally brought on record but the learned court below wrongly applied Section 172(2) of the Cr.P.C. for admitting the aforesaid injury report in evidence. He submits that learned court below based his finding upon a document which was not admissible in evidence and, therefore, the impugned judgment of conviction and sentence order is not sustainable in the eye of law. He further submits that prosecution witnesses have made contradictory statements and moreover, the learned trial court failed to take note of this fact that all the so-called prosecution witnesses are either related with the informant (PW-9) or interested witnesses and, therefore, no reliance could have safely been placed upon the testimonies of the prosecution witnesses.



10. On the other hand, learned Additional Public Prosecutor supported with learned counsel of the informant refuted the above stated submissions arguing that all the prosecution witnesses have supported the prosecution case in one voice and, specifically, stated that all the appellants having formed an unlawful assembly entered into the house of PW-9 and thereafter, appellant Arun Kumar as well as others made indiscriminate firing as a result whereof, PW-9 sustained firearm injury said to be fired by appellant Arun Kumar. Learned Additional Public Prosecutor as well as learned counsel of the informant also submitted that injury report of PW-9 was brought by the prosecution on record as the injury report was proved by the investigating officer who had received the injury report in course of his investigation and copied the same in the case diary and therefore, the learned court below rightly relied upon the entry made in the case diary.

11. Having heard the above stated contentions of both the parties, I went through the record. As I have already stated that altogether 11 prosecution witnesses were examined by the prosecution but it is obvious from the record that PW-1, PW-2 and PW-10 were declared hostile whereas PW-3 has also not supported the prosecution case rather he stated that he came to know from his mother that PW-9 had fallen down while he was repairing the tiles of his house as a



result whereof he sustained injury.

12. PW-9 is the informant and injured of the present case. He supported the prosecution case and the statement of PW-9 is corroborated by PW-4, PW-5, PW-6, PW-7 and PW-8. Apart from this, PW-11 is the investigating officer and this witness has proved the place of occurrence as well as other relevant documents.

13. Admittedly, the doctor, who had examined PW-9 after the alleged occurrence, was not examined by the prosecution and the injury report issued by him was brought on record through PW-11 but in my view, the learned amicus curiae rightly submitted that the aforesaid injury report was not brought on record in accordance with law and the court below committed error in relying upon the aforesaid injury report. Furthermore, I am of the view that non examination of the doctor was fatal to the prosecution case because the appellants could not get an opportunity to put question before the concerned doctor regarding the nature of injury as well as nature of weapon used in committing the alleged crime. Therefore, in my view, non examination of the concerned doctor has caused serious prejudice to the appellants.

14. However, it is obvious from the above stated discussions that prosecution, at least, succeeded to prove this fact that on the alleged date of occurrence, the appellants having formed an



unlawful assembly entered the house of PW-9 and assaulted him and, therefore, in my view, the appellants could have been convicted for the offence punishable under Section 323 and 452 of the Indian Penal Code. Furthermore, it is an admitted position that no charge under Section 27 of the Arms Act was framed nor the learned trial court passed judgment of conviction under Section 27 of the Arms Act and, therefore, it is obvious that learned court below himself came to conclusion that no firearm had been used in committing the alleged crime.

15. So far as order of sentence is concerned, the alleged occurrence had taken place in the year 1986 and from the materials available on the record it is obvious that prosecution failed to prove regarding the use of firearm in the alleged crime and, therefore, in my view, it would be proper to sentence all the appellants to the period already undergone by them and the said punishment shall meet the ends of justice.

16. So far as amount of fine is concerned, I do not think it proper to interfere into the above stated finding of trial court and the appellants are directed to deposit the fine before the court below within three months from today and if they fail to do so, the learned trial court shall take step for realization of fine from the appellants and after realization of fine, the same shall be paid to the informant (PW-



9) without any delay.

17. On the basis of aforesaid discussions, both the above stated criminal appeals stand dismissed with modification in judgment of conviction as well as sentence order in the manner as stated above.

18. Copy of first and last page of this judgment be handed over to learned amicus curiae for needful.

(Hemant Kumar Srivastava, J)

SHAHZAD/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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