

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.586 of 2002

Arising Out of PS.Case No. -null Year- null Thana -null District- GOPALGANJ

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1. Vajir Sain, son of Sobrati Sain
 2. Sagir Sain, son of Sobrati Sain
 3. Ishqaue Sain, son of Hafiz Sain (since died as per report of S.P., Gopalganj dated 16.1.2018)
 4. Allauddin Sain, son of Ishaque Sain, all residents of village Harpur Gosharie, P.S. Manjhagarh, District Gopalganj
 5. Anwarul, son of Mustakim Sain
 6. Nakul Sain, son of Mustakim Sain, both residents of village Soouan, P.S. Barhariya, District Siwan

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Anjani Parnshar with Mr. Vishwajeet
Kumar Mishra, Advocates

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 30-01-2018

Appellant No.6 Nakul Sain stands convicted under Section 307 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years. Besides that all the appellants have been convicted under Sections 323/34 IPC and sentenced to undergo rigorous imprisonment for one year and they have further been convicted and sentenced under Section 341 IPC for simple imprisonment for one month and under Section 447 IPC for three months simple imprisonment and also they have been convicted under Sections 307/34 IPC and sentenced to undergo rigorous imprisonment for five years and the sentences were directed to run concurrently vide judgment and order dated 26.9.2002 and 30.9.2002 passed by Sri



Lakshman Sinha, Additional Sessions Judge, F.T.C. III, Gopalganj in Sessions Trial No. 98/98/174/02.

2. Record further shows that name of appellant No.6 has wrongly been mentioned as 'Nakul Sain' instead of 'Hakul Sain', which is evident from the order dated 27.11.2002 of this Court. Record further disclosed that in this case learned counsel for the appellants has pointed out that appellant No.3 Ishqaue Sain has died and thereafter a report was called for from the Superintendent of Police, Gopalganj and from the report at Flag 'X' it appears that appellant No.3 Ishqaue Sain has already died. In such view of the matter, the appeal stands abated as against appellant No.3 Ishqaue Sain is concerned.

3. Prosecution case, in short, is that one Mangaru Sain (since died) was negotiating to sell his land and thereafter all the accused appellants came with variously armed and appellant Hakul Sain assaulted him with Farsa on head and thereafter appellants Anawarul Sain, Vajir Sain and Sagir Sain started assaulting him by Musar. Further case is that when wife of informant Sabrun Nisa came to rescue him she was also assaulted by Anwarul Sain by Musar. Further case is that neighbour Babujan came to rescue the informant and then appellant Hakul Sain assaulted him with farsa and appellant Allahuddin again assaulted the informant by Gugari and Musar.

4. On the basis of the said fardbeyan Manjhagarh P.S.case



No. 96/96 was registered and on post investigation charge sheet has been submitted, cognizance has been taken and case has been committed to the court of sessions, which ultimately came to the file of Sri Lakshman Sinha, Additional Sessions Judge, F.T.C. III, Gopalganj for trial and disposal.

5. During trial six witnesses have been examined on behalf of prosecution, they are P.W.1 Babujan, one of the eye-witnesses and injured, P.W.2 Sabrun Nesa, wife of informant as well as injured, P.W.3 Bachandeo Yadav is independent witness, P.W.4 Aajad Sain has been declared hostile, P.W.5 Kapil Singh has been declared hostile and P.W.6 is Brahma Prasad, who is a formal witness and has proved the formal F.I.R. and Fardbeyan, marked as Ext.1 and Ext.2 respectively.

6. It further appears that in this case neither I.O. nor the Doctor has been examined and the injury report has formally been brought on record.

7. Defence of the accused persons is of false implication due to previous enmity and land dispute between the parties and also of case and counter case between them.

8. On discussions made above it appears that prosecution case stands only on evidence of P.Ws. 1 to 3 as P.Ws. 1 and 2 are injured witnesses and P.W.3 appears to be a chance witness. Record further shows that informant Mangaru Sai has not been examined by



prosecution as he died during pendency of the trial. It further appears from perusal of the record that P.W.1 Babujan has not been cross examined in this case as at the time of cross examination no body appeared and he has been discharged and later on a petition has been filed on behalf of defence and the same has been allowed on payment of cost, however he could not be cross examined as cost has not been deposited.

9. Learned trial court considering the evidence of P.Ws. 2 and 3 and also considering the fardbeyan admissible under Section 33 of the Evidence Act has come to the conclusion that prosecution has established its case. Learned trial court has tried to explain the non-examination of Doctor, stating that evidence of Doctor is not substantive piece of evidence and moreover the witness has stated about the assault and on the basis of the same learned trial court has convicted and sentenced the appellants, as stated in paragraph-1 of this judgment.

10. Contention of learned counsel for the appellants is many fold, firstly on the ground that in this case the evidence of P.W.1 is not admissible as he has not appeared for cross examination and secondly the evidence of P.W.3 itself shows that there was dispute between the parties from before and a case was earlier lodged by one Ashma Khatoon, sister of informant against him, his wife and son. His evidence also shows that there was blow and counter blow from both



sides and if the above evidence is considered along with Ext. D which is FIR of counter case lodged by Mostt. Arfaque Khatoon, it will appear that there was scuffle took place between the parties with respect to land dispute and due to non-examination of I.O. the conviction of appellants under Sections 323 and 307/34 IPC is not sustainable in the eye of law. Appellant Hakul Sain has also been charged under Section 325 IPC but in absence of examination of doctor learned trial court has rightly not found him guilty under Section 325 IPC.

11. On the other hand, learned counsel for the State has supported the impugned judgment and order on the ground that evidence of P.W.2, wife of informant, shows that she has supported the prosecution case in her evidence and also has stated about the manner of assault and though informant has not been examined in this case but his fardbeyan is admissible under Section 33 of the Evidence Act and evidence of P.W.2 is found corroboration by evidence of P.W.1 and P.W.3 both and, as such, the conviction is just and proper which does not require any interference.

12. Considering the evidence on the background of rival submissions it appears that though appellants have also been convicted under Section 307/34 IPC but neither I.O. nor Doctor has not been examined in this case to show the severity and nature of blows on the person of informant and further considering the fact that



there is enmity between the parties and evidence of P.W.3 shows that there was blow and counter blow from both sides, as such, the conviction of appellants does not inspire confidence. The essential ingredients of conviction under Section 307 IPC is intention or knowledge of the accused persons with which assault was made and that can be gathered from the circumstances available on record, like the weapons used, part of the body on which assault was made, severity of blows as well as motive behind the occurrence and other circumstances but in the present case evidence itself shows that there is land dispute between the parties and evidence of P.W.3 shows that there is blow and counter blow between the parties and no doubt blow is by Farsa on the head but in the absence of evidence of Doctor there is nothing on record to show that severity of blow, nature of injury and injury caused is dangerous to life. Learned trial court has relied upon the injury report and also observed that the evidence of Doctor is not substantive piece of evidence. Learned trial court has erred in law as the injury report is not a substantive piece of evidence rather evidence of Doctor is a substantive piece of evidence, as has been held in a unreported Division Bench judgment of this Court in the case of Rajeev Kumar vs. State of Bihar and it has been held in the said judgment that in absence of examination of Doctor and even the injury report has not been proved by any competent witness, the injury report is not admissible. In the present case it further appears on



perusal of the judgment of learned trial court that learned trial court has not considered the documents produced by the defence as Exts. A and D and Ext.D shows that the prosecution side has been convicted in a case filed by Arfaque Khatoon, mother of appellant Hakul Sain and Ext.B shows counter case has been filed by mother of Hakul Sain and the aforesaid fact also finds support from the evidence of P.W.3 and the fact of blow and counter blow between the parties and learned trial court has not considered the aforesaid fact in right perspective.

13. Considering the circumstances in totality it appears that prosecution has not been able to establish its case and conviction under Section 307 or 307/34 IPC is beyond shadow of reasonable doubt and in such a situation benefit of doubt must be given to the appellants.

14. It further appears that appellants have been convicted under Sections 323/34 IPC as well as 341 and 447 IPC and the materials available on record categorically show that the appellants have assaulted the informant, his wife and one Babujan while coming to his house and, in such a situation, so far conviction under Sections 323/34, 341 and 447 IPC is concerned, that appears to be free from infirmities and discrepancies.

15. It appears that all the appellants have been sentenced to undergo R.I. for one year under Sections 323/34 IPC and S.I. for one month under Section 341 IPC and S.I. for three months under Section



447 IPC. This case is of the year 1996, as such, 21 years have passed and the appellants have suffered rigor and mental agony for trial and appeal for 21 years. Learned counsel for the appellants has pointed out that appellants remained in custody for about one month and appellant Hakul Sain has remained in custody for more than one month and considering the land dispute between the parties from before and considering their age and long delay in trial the sentence should be reduced to the period already undergone by them and in the facts and circumstances the sentences under Sections 323/34 as well as 341 and 447 IPC are reduced to the period already undergone by them.

16. With the aforesaid modification in conviction and sentence, this appeal is disposed of.

(Vinod Kumar Sinha, J)

spa/-

AFR/NAFR	
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