

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.649 of 2002

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

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Borhan Yadav, Son of Banbari Yadav, Resident of Village – Arba, Police Station –
Bachwara, District – Begusarai.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Amrit Anunay, *Amicus Curiae*

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

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 21-08-2018

Sole appellant stood convicted under Sections 436 and 429 of the Indian Penal Code (hereinafter referred to as the “IPC”) and was sentenced to undergo rigorous imprisonment of five years by the judgment of conviction dated 23.11.2002 and order of sentence dated 25.09.2002 passed by Shri Subhash Kumar Singh, 5th Additional Sessions Judge, Begusarai, in Sessions Trial No. 446/91. By the said Judgment other accused of this case were also convicted under Section 147 and 323 of the IPC but they were released on probation bond and they have not preferred the appeal.

2. Case of the prosecution as per fardbeyan of Jageshwar Das informant (PW4) in short is that on 09.12.1990 at about 10. A.M., his villager Suresh Yadav came near his hut situated by the side of plot of Suresh Yadav, in which, the said Suresh Yadav had grown



mustard crops. It is alleged that he started abusing the informant with allegation that due to shade of his hut, his mustard crops were damaged, which was objected by the informant, then, Suresh Yadav assaulted him with by fists and slaps. Further case is that persons, namely, Ghuran Das and Birendra Das tried to intervene in the matter and separated the informant and Suresh Yadav, on which, Suresh Yadav called his men and on his call, other co-accused of this case arrived at the place of occurrence and assaulted the informant by means of fists and slaps and also by *lathi* and *danda*. In the meanwhile, appellant Borhan Yadav set the hut of the informant on fire due to which the articles kept there, such as paddy bundles were burnt into ashes and one goat tethered there also got burnt.

3. On the basis of the aforesaid *fardbeyan* Bachwara P.S. Case No. 140/90 was registered against the appellant and other co-accused persons of this case under Sections 147, 149, 341, 323, 436, 429/34 of the IPC.

4. Police after investigation submitted chargesheet. Cognizance of the offence was taken and the case was committed to the court of Sessions, which ultimately came to the file of Shri Subhash Kumar Singh, 5th Additional Sessions Judge, Begusarai for trial and disposal.

5. Charges were framed under Sections 436 and 429 of the



IPC against the appellant and charges against other co-accused were framed under Section 147 and 323 of IPC and to prove the charges, prosecution has examined altogether five witnesses. They are; P.W. 1 – Rajendra Paswan, P.W. 2 – Baleshwar Das, P.W. 3 – Balde Das, , P.W. 4 – Jageshwar Das (informant) and P.W. 5 – Ram Bali Das, out of which PW 1, PW2 and PW3 have been declared hostile. Apart from that in this case neither Investigating Officer nor the Doctor was examined.

6. On behalf of the defence no specific defence has been taken and their defence as per cross examination and the statement of recorded under Section 313 Cr.P.C is of false implication and of innocence.

7. Learned trial court on conclusion of trial convicted the appellant under Section 436 and 429 of the IPC and sentenced him in the manner aforesaid.

8. Learned *Amicus Curiae* has assailed the judgment of trial court on the ground that in this case, admittedly, there was land dispute between the parties and the Investigating Officer has not been examined and though five witnesses have been examined, out of which, PW1 to PW3 have been declared hostile and PW4 is the informant himself and PW5 appears to be the chance witness and as such, the learned Trial Court has convicted the appellant only on the



basis of sole testimony of PW4 Jageshwar Das. It has further been submitted that in this case, there is no material finding about the burning of hut and as to what were the materials, which got burnt in the fire, as the Investigating Officer has not been examined in this case and the non examination of Investigating Officer has certainly caused prejudice to the appellant as had he been examined, he would have been cross – examined on the point of material finding at the place of occurrence especially the hut as to whether the hut was a dwelling hut or whether anything was kept there in the hut. It has further been submitted that none of the independent witnesses have come forward to support the case of prosecution. However, the learned trial court without considering the aforesaid infirmities convicted the appellant under Section 436 and 429 of the IPC, which is not sustainable in the eye of law.

9. On the other hand, learned counsel for the State has supported the finding of guilt recorded by learned Trial Court and submitted that the evidence of PW4, who is the informant in this case, has been consistent throughout and he has categorically stated that appellant Borhan Das set his hut on fire causing damage of bundles of paddy and also a goat tethered there got burnt. The aforesaid evidence of PW 4 found corroboration from the evidence of PW5, who, although appears to be chance witness but he has supported the



case of prosecution about the setting the hut of informant on fire, which further found corroboration from the *fardbeyan* and even in spite of cross-examination, there nothing to doubt the aforesaid prosecution evidence of setting the hut of informant on fire and, therefore, there is no infirmity in the judgment of conviction and order of sentence passed by the learned Trial Court and the same is just and proper.

10. In the background of the rival contentions of the parties and on perusal of the evidence, it appears that PW1 to PW3 has been declared hostile in this case. However, PW2 although has been declared hostile in this case but in his evidence, he has stated that he saw the house of Jageshwar Das burning, though he has stated that he did not see as to who set the hut on fire and, thereafter, this witness has been declared hostile. PW3 has also been declared hostile but his evidence also supports the case of prosecution with regard to burning of the hut but he has also not named specifically as to who set the hut on fire. PW1 has also been declared hostile and there is nothing in his evidence to support the case of prosecution.

11. PW4 Jageshwar Das is the informant of this case and he has supported the case of prosecution so far manner and genesis of occurrence is concerned and his evidence disclosed that Borhan Yadav set his hut on fire due to which, paddy bundles kept in the hut



and one goat tethered there got burnt. This witness has stated in his evidence that occurrence had also been seen by Parwati Devi, wife of informant and one Birendra and they are attesting witnesses in the F.I.R but they did not come forward to depose in support of case of prosecution.

12. PW5 is Ram Bali Das and his evidence disclosed that while he was coming after easing out himself, he saw the occurrence and also saw the appellant Borhan Yadav setting the hut on fire and one goat and paddy bundles got burnt. According to him, the occurrence was also witnessed by the wife and daughter in law of the informant Jageshwar Das.

13. Learned *Amicus Curiae* has also submitted that none of the witnesses named by PW4 and PW5 have been examined and Investigating Officer has also not been examined in this case.

14. No doubt, Investigating Officer has not been examined in this case and there is no material finding or any material has been brought on record to show as to what were the materials, which were burnt in the firing in the hut to show as to whether the hut was a dwelling hut or the hut was used for keeping property and absence of examination of Investigating Officer has certainly caused prejudice to the defence as had he been examined, he would have been cross-examined with regard to material finding at the place of occurrence.



15. However, so far genesis and factum of occurrence is concerned, the evidence of PW4 and PW5 with regard to setting the house on fire by the appellant Borhan Yadav, are consistent and has also been corroborated by the evidence of PW2 and PW3, though, they have not specifically stated as to who set the hut on fire. However, it is also a fact that Investigating Officer has not been examined in this case, which has caused prejudice to the appellant as had he been examined he would have been confronted with the material finding of the place of occurrence and also as to what were the material, which got burnt in order to show that whether the said hut was a dwelling hut or was used to keep the property. However, the trial court appears to have not considered these aspects of the matter. As such, in my opinion, the appellant could have more appropriately been convicted under Section 435 of the IPC instead of Section 436 of the IPC and accordingly, the conviction of the appellant is modified to a conviction under Section 435 and 429 of the IPC.

16. So far sentence of the appellant is concerned, it has been submitted by learned *Amicus Curiae* that the occurrence is of the year 1990 and at the time of judgment i.e. in the year 2002, the appellant was aged about 55 years, and he must be now aged about 70 years and further he has remained in custody for twenty five days during pendency of the trial, as such, his sentence may be modified to the



period already undergone by him in judicial custody.

17. Considering the age of the appellant and also the fact that the case is very old and since then more than twenty seven years have passed and appellant has suffered the agony and pain of trial and appeal for twenty seven long years, as such, I deem it appropriate to reduce the period of sentence to the period already undergone by him. Accordingly, the sentence of appellant of rigorous imprisonment of five years is modified to the period already undergone by him in judicial custody under Section 435 and 429 of the IPC.

18. With the above modification in conviction and sentence, this appeal is dismissed.

(Vinod Kumar Sinha, J)

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