

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.64 of 2003

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

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1. Md. Moin, Son of Md. Ismail
 2. Md. Jashim, Son of Nasim
 3. Md. Nayeem, Son of Md. Ismail
 4. Md. Shamshad, Son of Md. Nayeem
 5. Md. Tauhid, Son of Md. Ishaque

All residents of village – Khatopur, P.S. Muffasil, District – Begusarai.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.
Mr. Nilesh Kumar, Adv.

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

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 27-02-2018

By way of the present appeal, appellants seek to challenge the judgment of conviction and order of sentence dated 31.03.2003, passed by Sri J.P. Sinha, the then Additional District & Sessions Judge, F.T.C –II, Begusarai, in Sessions Trial No. 416/93, by which all the appellants stood convicted under Section 323, 147, 148, 341, and 448 of the Indian Penal Code (hereinafter referred to as the “IPC”) and further accused Md. Shamshad was also convicted under Section 379 of the IPC and they were sentenced to undergo R.I. for one year under Section 323 of the IPC and no separate sentence was passed under other sections.



2. Prosecution case as per the fardbeyan of informant (P.W. 2) in short is that on 22.09.92 at about 7.30 A.M., he was sitting at his *darwaza* when appellants came variously armed and stated as to why he has stopped the supply of water to his field causing loss to his chilli plants. Thereafter appellant Md. Jashim order to kill the informant and Md. Jashim assaulted the informant by means of a knife, however, some how, he managed to escape the said assault. Tehreafter, Md. Safiq assaulted him by iron rod on his head due to which he sustained injury and fell down and all other accused persons started assaulted him with *lathi* and *danda* and when his father came for his rescue, he was also assaulted by Tohid with the butt portion of the pistol. It is further alleged that appellant Md. Shamsad snatched an H.M.T. watch from the hand of the informant. On the basis of the said *fardbeyan* Begusarai Muffasil P.S. Case No. 253/92 was registered against the accused persons.

3. Police after investigation submitted charge-sheet. Cognizance of the offence was taken and the case was committed to the court of sessions, which ultimately came to the file of Sri J.P. Sinha, the then Additional District & Sessions Judge, F.T.C –II, Begusarai for Trial and disposal.

4. Charges were framed under Sections 147, 148, 149, 341, 326, 307 of the IPC and Section 27 of the Arms Act.



5. In order to prove its case, prosecution has examined altogether eight witnesses, they are; P.W. 1 - Md. Baiju, P.W. 2 – Md. Nakki Imam (informant and injured), P.W. 3 – Md. Akhtar (injured), P.W. 4 – Md. Bholu, P.W. 5 - Md. Shamim, P.W. 6 – Dr. B. Mishra, who examined and treated the injured persons, P.W. 7 - Md. Maqbool Ahmad, a formal witness, who proved F.I.R (Ext. 4) and P.W. 8 – Sita Ram Sharma, a formal witness, who proved case diary (Ext. 5).

6. Defence of the accused person as per the trend of cross-examination as well as from the statement under Section 313 Cr.P.C. and from the evidence adduced by them is that there is counter version of the case and as a matter of fact occurrence took place with regard to damage of chilli field of appellants and for that scuffle took place and one counter case has been lodged by the appellants' side and prosecution case is false and concocted, which will appear from the fact that no such occurrence had taken place on the *darwaza* of the informant.

7. Learned Trial Court after considering the evidence available on record, though not found the case true under Sections 307, however, he convicted all the appellants under Sections 323, 147, 148, 341, and 448 of the IPC and further convicted appellant Md. Shamshad under Section 379 of the IPC and sentenced them in the manner as stated above.



8. Being aggrieved, the appellant preferred the present appeal.

9. During course of argument, it has been informed by learned counsel for the appellants that appellant Md. Moin and appellant Md. Jashin have died during pendency of appeal and as such a report was called for from which, it appears they have died during pendency of appeal and accordingly, this appeal with regard to appellant, namely, Md. Moin and appellant, namely, Md. Jashin stands abated.

10. Contention of learned counsel for the appellants is that no occurrence as alleged has taken at the *darwaza* of the informant on 22.09.92 rather the occurrence took place in chilli field of the informant due to construction of drainage and this is the defence case in which defence has also received injuries and the aforesaid fact will appear from the evidence of P.W. 2 himself, which discloses that first place of occurrence is one mile away from his house and further stated in para -25 that on the place of occurrence, there was newly constructed drainage and the chilli plant were found uprooted and in para -28 he has stated that for the occurrence of 21.09.92, he has not informed either police or the Chief Judicial Magistrate. P.W. 3, who is father of informant has stated in his evidence that occurrence is of 21.09.92. So, far other witnesses are concerned, P.W. 4 has been declared hostile and P.W. 1 and 5 does not appear to be the eye-witness of the occurrence as their evidence shows that they reached at



the place of occurrence after the incident. Further submission of learned counsel for the appellants that non examination of I.O. in this case has caused great prejudice to the defence as the defence could not get the opportunity to cross-examine the I.O. on the point of actual place of occurrence, and the trial court without considering all these infirmities have convicted the appellants under Sections 323, 147, 148, 341, and 448 of the IPC and further convicted appellant Md. Shamshad under Section 379 of the IPC, which is out and out perverse and not sustainable in the eye of law.

11. Learned counsel for the respondent – State, on the other hand, supported the finding of guilt recorded by the trial court and submitted that there are consistent evidence of P.W. 2(informant) and his father P.W. 3, with regard to assault by the appellants and they being the injured themselves, veracity of evidence of these witnesses cannot be doubted. So far the question of date of occurrence is concerned, P.W. 2, informant has clearly stated in para -2 of his evidence that the main date of occurrence is 22.09.92, which took place at his and it cannot be said that the occurrence took place on 21.09.92 and, therefore, there is no infirmity in the impugned judgment of trial and conviction of appellants are just and proper and does not require any interference.

12. Considered the rival contentions of the parties. From perusal of the evidence, it appears that out of the 8 witnesses, P.W. 4 has been



declared hostile and P.W. 1 and 5 though claims to be eye witness of the occurrence but P.W. 1 has stated in para -16 of his evidence that he reached at the place of occurrence after hearing the *hulla* and found the informant and his father in an injured condition and in para 13 of his evidence, this witness has stated that there was a scuffle between appellant Md. Moin and the informant due to construction of drainage. Similarly, evidence of P.W. 5 in para -4 also shows that he reached the place of occurrence and found the informant in unconscious condition and also saw P.W. 3 in an injured condition and, therefore, they do not appear to be the eye witness of the occurrence. So far evidence of P.W. 2 informant and injured and evidence of P.W. 3 also injured is concerned, from perusal of Ext. A, which has been brought by the defence, the defence case is that the occurrence is of 21.09.92 in the chilli field with respect to construction of drainage, whereas, as per prosecution, occurrence is of dated 22.02.92, which took place on *darwaza* of the informant. However, it appears that the informant himself has stated in his evidence that the occurrence took place on 21.09.92 and evidence of P.W. 2 in para -4 also shows that the place of occurrence is one mile away from his house. Further his evidence in para – 25 shows that at the place of occurrence, chilli plants were found uprooted and drainage was found constructed and in para -28, this witness has



stated that for the occurrence of 21.09.92, he did not inform the police or Chief Judicial Magistrate. If the evidence of this witness is taken into consideration then defence case appears to be more probable that occurrence took place in the chilli field of informant with respect to construction of drainage and for ascertaining actual place of occurrence, examination of I.O. is very crucial. In this case I.O. has not been examined, however, non examination of I.O. is not fatal in every case but where there is dispute with regard to actual place of occurrence and there is case and counter case between parties, non examination of I.O. certainly appears to be fatal. So far evidence of P.W. 2 and P.W. 3 injured are concerned, doctor P.W. 6, doctor has found the following simple injuries on the person of the informant and P.W. 3.

(i) Abrasion on right side of forehead just above right eye brow 1/2" x 1/4".

(ii) Swelling on right side of his face in zygomatic region 1"x 1".

Following injuries were found on the person of P.W. 3 Md. Akhtar

(i) Swelling on right side of forehead.

13. Further the doctor P.W. 6 has stated in his evidence that injuries were superficial in nature and may be manufactured.



14. In such a situation, non examination of I.O in respect of contradiction with regard to place of occurrence, certainly casts a reasonable doubt about the manner of occurrence as alleged by the prosecution, however, the trial court has not appreciated all these inconsistencies while convicting the appellants Sections 323, 147, 148, 341, and 448 of the IPC and also appellant Md. Shamshad under Section 379 of the IPC.

15. In view of the entire discussions made above, it appears that the prosecution has failed to establish its case beyond all reasonable doubts. Accordingly, this appeal is allowed. judgment of conviction and order of sentence dated 31.03.2003, passed by Sri J.P. Sinha, the then Additional District & Sessions Judge, F.T.C –II, Begusarai, in Sessions Trial No. 416/93, is set aside.

16. As the appellant nos 3 to 5, namely Md. Nayeem, Md. Shamshad and Md. Tauhid respectively, are on bail, they are discharged from libailtiy of bail bonds.

(Vinod Kumar Sinha, J)

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AFR/NAFR	AFR
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