

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.52 of 2003

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

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1. Krishna Bhuiyan, son of Leela Bhuiyan, resident of village Manika Bigha, P.S. Madanpur, District Aurangabad
 2. Jugeshwar Bhuiyan, son of Tulsi Bhuiyan, resident of village Bahuara, P.S. Deo, District Aurangabad

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : M/S Yogendra Kumar Singh,
Ratneshwar Prasad, Advocates

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

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 10-01-2018

Both the appellants stand convicted under Sections 324 and 307/34 of the Indian Penal Code and they have been sentenced to undergo rigorous imprisonment for two years under Section 324 IPC and seven years for the offence under Sections 307/34 IPC and both the sentences were directed to run concurrently. Both the appellants have been charged under Sections 324/34 and 307/34 IPC.

2. Prosecution case, in short, as per statement of P.W.2, Bhuneshwar Bhuiyan (informant) recorded by Sri Ripu Sudan Pd. Singh, A.S.I., Madanpur P.S. on 18.6.1998 at 3 O'clock in the morning, is that at 12 O'clock in the night while he was sleeping he heard some sound and found the appellant Krishna Bhuiyan armed with axe and appellant Jugeshwar Bhuiyan armed with tangi. He has



also stated that in the moon light he identified them and thereafter appellant Krishna Bhuiyan came near him and assaulted by axe on him causing injury at the right side of his back. It further appears from the statement that appellant Krishna Bhuiyan again assaulted by axe on his neck causing injuries on his beard, lips and left hand, due to which he became unconscious. The motive of the occurrence as per P.W.2 is that earlier appellant Krishna Bhuiyan had enticed his niece, Motiraj Devi and had kept her for a week and thereafter he returned her and on protest by the informant and the villagers the alleged occurrence took place.

3. On the basis of aforesaid fardbeyan Madanpur P.S. Case No. 75 of 1998 was registered under Sections 307, 324 and 34 of the IPC and police after investigation submitted charge sheet against the appellants. Thereafter after cognizance the case has been committed to the court of sessions which ultimately came to the file of Sri Brinda Pathak, the then 6th Additional District and Sessions Judge, Aurangabad for trial.

4. During trial altogether seven witnesses have been examined on behalf of the prosecution, they are P.W.1, Ramdeo Bhuiyan, P.W.2, Bhuneshwar Bhuiyan (informant), P.W.3, Bhola Bhuiyan (father of informant), P.W.4, Hari Bhuiyan, P.W.5, Motiram, P.W.6, Vijay Ram and P.W.7 is Inderjit Kumar Singh, who is formal



witness and has proved the injury report as Ext.2 and the signature Hari Bhuiyan on the fardbeyan. Out of seven witnesses, P.Ws. 1, 5 and 6 have been declared hostile by the prosecution as they have not supported the prosecution case. So far P.W.4 is concerned, he is not an eye-witness to the occurrence, rather his evidence shows that on hulla he came to the place of occurrence and saw the informant (P.W.2) in injured condition and taken him to hospital. P.Ws. 2 and 3 are the informant (injured) and father of informant. Apart from that, Doctor and Investigating Officer have not been examined in this case.

5. So far P.W.2, who is informant as well as injured in this case, is concerned, his evidence in chief shows that on the day of occurrence appellant Krishna Bhuiyan and Jugeshwar Bhuiyan entered inside the house of informant and appellant Krishna Bhuiyan assaulted him by tangi on his neck causing injury on his back and thereafter appellant Jugeshwar Bhuiyan assaulted him by farsa causing injuries on his lips and left hand and he had showed the injuries to the court also. This witness has been cross examined at length but there is nothing in his evidence to doubt his credibility and also there is no major contradiction or inconsistency in his evidence, rather he has supported the evidence in his cross examination also and stated about assault by accused appellants. However, P.W.3 is the father of informant. It appears that though father of informant has



supported the prosecution case as stated by the informant but he has stated that appellant Jugeshwar Bhuiyan assaulted thrice to his son, which is not the prosecution case as per fardbeyan of informant. It seems that there is contradiction in his evidence. This witness has also stated about the presence of appellants Krishna Bhuiyan and Jugeshwar Bhuiyan and also stated about the injuries being received by the informant.

6. Learned trial court considering the evidence of P.Ws. 2 and 3 and also considering all aspects convicted the appellants under Sections 307, 324 and 34 IPC.

7. Submission of learned counsel Mr. Ratneshwar Prasad appearing for the appellants is that there is contradiction in the manner of occurrence in the evidence of P.Ws. 2 and 3 as P.W.2 has named both the appellants as assailants, whereas P.W.3 has stated that appellant Jugeshwar Bhuiyan has assaulted his son (P.W.2) and apart from that in this case there is no other witness, even Doctor and I.O. were not examined, in such a situation the conviction of the appellants under Sections 307 and 324/34 IPC appears to be not sustainable in the eye of law. Further submission is that injury report has not legally been brought on the record, which was proved by only a formal witness and as such on the basis of injury report the conviction of the appellants under Section 307 IPC is not sustainable as there is nothing



available on record to show that injuries were dangerous to life and defence has not been given any chance to cross examine the Doctor, which caused serious prejudice to the defence, learned trial court has not considered this aspect of the matter and convicted the appellants under Sections 307/34 IPC also.

8. On the other hand, learned counsel for the State has supported the impugned judgment on the ground that P.Ws. 2 and 3 have supported the prosecution case by stating the names of both the appellants. Further submission is that no doubt, the evidences of P.Ws. 2 and 3 are contradictory to each other, so far assault made by the appellants is concerned. P.W.2 is the informant in this case and he has received injury and he has categorically stated that appellant Krishna Bhuiyan assaulted him and thereafter Jugeshwar Bhuiyan assaulted him and that has been corroborated by their earlier version in evidence. No doubt, P.W.3 has stated that appellant Jugeshwar Bhuiyan has assaulted the informant thrice but at the same time it has come in his evidence that he was not sleeping in the same room, rather in the cowshed, the other place, and that may be the cause of such discrepancy. Further contention is that he has named the appellants and informant was found in injured condition. Apart from that, P.W.4 has stated that the informant was found in injured condition, as such, conviction of the appellants does not suffer from



infirmity.

9. On perusal of the record it appears that there are only two eye-witnesses, P.W.2 and P.W.3 and in the evidence P.W.2 has categorically stated that he was assaulted by appellant Krishna Bhuiyan and thereafter appellant Jugeshwar Bhuiyan assaulted on his neck as well as on the face and he received injuries on back and lips and left hand. The aforesaid evidence of P.W.2 found further corroboration in the fardbeyan which was his earlier version. No doubt, evidence of P.W.3, who claims to be an eye-witness and father of the informant, disclosed that it is appellant Jugeshwar Bhuiyan who has assaulted thrice to the informant but there is no such case of prosecution. Furthermore, P.W.3 in his evidence has stated that he was sleeping at some distance at cowshed and he named both the appellants and also found his son in injured condition. The aforesaid evidence of P.Ws. 2 and 3 has also been corroborated by evidence of P.W.4 who has found the informant in injured condition and has taken him to hospital.

10. In this case, learned trial court has convicted the appellants under Sections 307/34 IPC. However, considering the evidence of P.Ws. 2 and 3 and also considering the fact, the injury report has not been legally brought on record, and Doctor has not been examined and there is also nothing available on record to show that



Doctor was not easily available or he died, in such a situation the injury report is not admissible in the eye of law, which has been proved by a formal witness who does not know the handwriting and signature of the Doctor and he is also not an expert who can be cross examined by the defence. The aforesaid aspect of the matter has been considered by a Division Bench of this Court in an unreported decision in the case of Rajeev Singh @ Rajeev Kumar vs. State of Bihar [Cr.Appeal(DB) No. 1310 of 2010] wherein also the Doctor has not been examined as he died and the medical report has been formally proved by some other witness and the Hon'ble Court has discussed the same in paragraph-38 which is as follows :

“38. There are two situations:

- (i) One, where the prosecution has withheld the Doctor, and the post mortem report was exhibited formally by a person who is not acquainted with medical science; and
- (ii) If the Doctor is dead or cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without a prolonged delay or much expense, which to Court may appear to be unreasonable in the circumstances of the case and the post mortem report is exhibited by a person conversant with his signature and hand writing.”

And thereafter examined the matter and after considering the catena of decision of the Hon'ble Apex Court as well of High Court has come to the conclusion in paragraph-46 of the said judgment, which runs as follows :

“46. On consideration of provisions of law,



particularly section 32 of the Evidence Act and conspectus of the decisions on the issue, we hold (a) where the prosecution has withheld the doctor and the injury report or post mortem report was exhibited formally by a person who is not acquainted with the medical science, the same would be inadmissible in evidence as the contents of the report would not stand provided.....”

As such aforesaid question as to whether the injury report is admissible in absence of examination of Doctor and formally been proved by a person, not an expert and not worked with Doctor has been settled by Division Bench of this Court. Now question remains that when Doctor has not been examined and injury report has not been legally brought on record, in such view of the matter, in absence of the nature of injury available on the person of informant-injured only on the ground that he was assaulted by both the accused appellants by sharp cutting weapon on head, can conviction under Section 307 IPC be sustained?. In the present case, at hand, there is no finding or opinion of Doctor is available to show that injury was dangerous to life and further there is no evidence available on record to show that informant (P.W.2) was assaulted with such an intention to cause his death. In such a situation, it not safe to convict appellants under Section 307 IPC.

11. Considering the entire discussions made above, I find that so far conviction of the appellants under Section 307 IPC and the



sentence passed thereunder suffers from infirmities and the same does not sustainable in the eye of law. However, conviction of the appellants under Section 324 IPC is concerned, it appears to be free from any infirmity and, as such, the same is upheld. So far sentence under Section 324 IPC is concerned, the appellants were sentenced to undergo RI for two years and the case is of the year 1998 and it further appears from perusal of the record that appellant Krishna Bhuiyan has remained in custody for about 10 months and appellant Jugeshwar Bhuiyan has remained in custody for about one a half months and they suffered the ignominy for 15 years, hence, in such view of the matter, their sentence is reduced to the period already undergone by them.

12. With the aforesaid modification in the judgment of conviction and order of sentence, this appeal is disposed of.

(Vinod Kumar Sinha, J)

spa/-

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CAV DATE	
Uploading Date	16.1.2018
Transmission Date	16.1.2018

