

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.133 of 2013

Arising Out of PS. Case No.-253 Year-2000 Thana- ARARIA District- Araria

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1. Akbar @ Md. Akbar S/o Late Kalim @ Kalimuddin Resident of Village- Gaiyari, P.S.- Araria, District- Araria
 2. Nasimuddin @ Md. Nasim S/o Samidur Rahman Resident of Village- Gaiyari, P.S.- Araria, District- Araria
 3. Muzahi @ Md. Mazhar S/o Samidur Rahman Resident of Village- Gaiyari, P.S.- Araria, District- Araria

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with
Criminal Appeal (SJ) No. 138 of 2013

Arising Out of PS. Case No.-253 Year-2000 Thana- ARARIA District- Araria

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1. Md. Nayeem Son of Late Samidur Rahman Resident of Village- Gaiyari, P.S.- Araria, District- Araria
 2. Md.Samimakhtar @ Md. Samim Son of Late Samidur Rahman Resident of Village- Gaiyari, P.S.- Araria, District- Araria

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (SJ) No. 133 of 2013)

For the Appellant/s : Mr. Prabhakar Thakur (Amicus Vurie)

For the State : Mr. Binod Bihari Singh(App)

Ms. Abha Singh, (APP)

For the Informant : Mr. Saranghdhar Jha, Adv.

(In Criminal Appeal (SJ) No. 138 of 2013)

For the Appellant/s : Mr. Prabhakar Thakur (Amicus Vurie)

For the State : Mr. Binod Bihari Singh(App)

Ms. Abha Singh, (APP)

For the Informant : Mr. Saranghdhar Jha, Adv.

CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT



Date : 04-12-2018

As both the aforesaid criminal appeals have cropped up from the same judgment and order of conviction and sentence, hence, they are taken up together for consideration and disposed of by this common judgment.

2. Heard Mr. Prabhakar Thakur, learned amicus curiae for the appellants, learned APP for the State and learned counsel for the informant on the aforesaid two Criminal Appeals.

3. The aforesaid two criminal appeals have been preferred against the judgment and order of conviction dated 24.01.2013 and order of sentence dated 05.02.2013 passed by learned 1st Addl. Sessions Judge, Araria in Sessions Trial no. 533 of 2002 Trial No. 55 of 2005 arising out of Araria P.S. Case No.253 of 2000 whereby the learned trial court convicted the accused Md. Nayeem for the offence punishable under Sections 307, 324, 452, 148 and 323 of the I.P.C., Md. Samim for the offence punishable under Sections 307, 452, 148 and 323 IPC and accused Md. Akbar, Md. Nasimuddin and Muzahid for the offence punishable under Sections 452, 148 and 323 of the Indian Penal Code and sentenced each of five accused persons to undergo R.I. for one year under Section



148 IPC, R.I. for six months under Section 323 of the IPC, R.I. for five years and also slapped them with a fine of Rs. 2000/- and in default of payment of fine to further undergo S.I. for six months under Section 452 IPC, further sentenced convict Md. Nayeem to undergo R.I. for two years under Section 324 of the IPC and R.I. for 10 years and also slapped him with a fine of Rs. 5,000/- and in default of payment of fine, to further undergo S.I. for one year under Section 307 of the I.P.C. and further sentenced convict Samim Akhtar to undergo R.I. for 10 years and also slapped him with a fine of Rs. 5,000/- and in default of payment of fine to further undergo S.I. for one year under Section 307 IPC. All the sentences were directed to run concurrently.

4. The factual matrix of the case is that Araria P.S. Case No. 253 of 2000 was instituted under Sections 341, 323, 324, 337, 448, 307/34 of the Indian Penal Code against accused Md. Nayeem, Md. Mazhar, Md. Shamim, Md. Naseem and Md. Akbar on the basis of written report of Hefazuddin son of Hazi Kaffiluddin dated 11.06.2000 with the allegation, in succinct that on 11.06.2000 at around 7.30 A.M. he was sitting at his door near his ailing father, in the meantime, his villagers Hazi Md. Aarif and Hazi Md. Abu



Sakib arrived there to meet his ailing father. Witnessing their arrival there Md. Nayeem started wrangling with them arriving at his door over the land dispute. On chiding by him to Md. Nayeem over his aforesaid conduct, Md. Nayeem went to his house slating him and again regressed along with his brother namely, Md. Mazhar, Md. Samim, Md. Nasim, Md. Akbar armed with Lathi, Dabiya and Farsa at his door and encircled him. He rushed to his courtyard scaringly, then all the accused persons intruded into his courtyard and assaulting him started dragging out of courtyard. In the meantime, his old and ailing mother namely, Bibi Serunisha arrived there then, Md. Nayeem assaulted on her head by means of Dabiya inflicting bleeding injury on her head, eye and face. Sustaining injury she fell senseless. When Md. Daud rushed in their rescue, Md. Samim assaulted on his head by means of stone inflicting bleeding injury to him. Sustaining injury he also fell down on the ground. Responding hulla, villagers Md. Firoz, Md. Israil, Md. Aasiq, Md. Khalik and Bibi Nasima Khatoon and others arrived there and witnessed the occurrence and saved their lives. Witnessing the congregation of the villagers, accused persons started pelting stone and brick inflicting injuries to several persons.



5. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against the aforesaid five accused persons.

6. On receiving the charge-sheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions, and after commitment and on transfer finally the case came in *seisin* of the learned 1st Addl. Sessions Judge, Araria for trial.

7. Charge against the accused Md. Nayeem, Md. Shamim, Md. Nasim, Md. Akbar and Md. Mazhar was framed under Sections 323, 452 and 148 of the Indian Penal Code and further charge against accused Md. Nayeem and Md. Shamim was framed under Sections 307 and 324 IPC. Charge was read over and explained to them by the court to which they pleaded not guilty and claimed to be tried.

8. To substantiate its case, in ocular evidence, the prosecution has examined altogether eleven prosecution witnesses namely, Md. Khalid as PW-1, Md. Asiq as PW-2, Md. Firoz Alam as PW-3, Jamshed Alam as PW-4, Md. Arif as PW-5, Md. Abu Sakib as PW-6, Daud as PW-7, informant Md. Hefazuddin as PW-8, Kantu Paswan as PW-9, Dr. Arun Kumar



Chaudhary as PW 10 and Afroj Alam as PW-11. Out of the aforesaid witnesses, PW-9 and PW-11 happens to be formal witness. The prosecution has also filed and proved some documents by way of documentary evidence in the case.

9. The statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming themselves to be innocent. The accused persons filed and proved some documents by way of documentary evidence in buttress of their case.

10. After hearing the parties and perusing the record, the learned trial court passed the impugned judgment and order of conviction and sentence as detailed in the earlier paragraph.

11. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convicts have preferred the present Criminal Appeals.

12. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellants beyond all reasonable doubts or not.

13. It is submitted by learned *amicus curiae* for



the appellants that all the witnesses examined by the prosecution are relatives of the informant and are interested witnesses of the case. It is further submitted that there is animosity between the prosecution party and the accused as the land dispute and litigation is pending between them and due to aforesaid animosity, the prosecution has falsely implicated the appellants in the case. It is further submitted that P.W.-4 and P.W.-6 are not the eye witnesses of the occurrence while P.W.-5 are inimical to the accused persons. It is further submitted that Dr. Arun Kumar Chaudhary examined in the case as P.W. 10 has only proved the injury report of Md. Aasiq and Daud, who had sustained simple injury, caused by hard and blunt substance on their person while the injury report of Sairunisha has not been proved by its author rather ward attendant Afroj Alam P.W. 11. Hence, the injury report of the Sairunisha has not been legally brought on record and cannot be considered. It is further submitted that as per the witnesses account, the occurrence took place for 10-15 minutes. P.W.-3 has stated in his examination-in-chief that Nayeem gave single Dabiya blow on the head of Sairunisha and she had sustained only single sharp cut injury on her head, simple in nature besides an another injury on the eye caused



by hard and blunt substance opined by doctor as grievous in nature and the aforesaid injury of Sairunisha has not been proved by its author. Hence, no offence under Section 307 IPC is made out against the appellants. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case against the appellants beyond all reasonable doubt by adducing trustworthy, convincing and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed against the appellants by the learned trial court is liable to be set aside and the appellants are entitled to be acquitted.

14. On the other hand, learned APP and learned counsel for the informant advocating the correctness and validity of the impugned judgment and order of conviction and sentence submitted that the informant has supported the prosecution case in toto and the injured of the case namely, Daud and other witnesses, who happen to be eye witness of the case have also corroborated the prosecution case. The ocular evidence also stand corroborated by the medical evidence and learned trial court correctly appreciating the facts and evidence on record has rightly passed the impugned judgment and order of conviction and sentence which is liable



to be upheld and these appeals are shorn of merit and are liable to be dismissed.

15. From perusal of record, it appears that to substantiate its case, the prosecution has examined eight material witnesses in the case. Out of them, PW-8 Md. Hifazuddin happens to be the informant of the case and PW-2 Md. Asiq and PW-7 Daud are injured of the case.

16. From perusal of testimony of PW-4 Jamshed Alam and PW-6 Md. Abu Sakib, it appears that though the aforesaid two witnesses have made an abortive bid to support the prosecution case by stating in their respective examination-in-chief in consonance to the prosecution case, but they do not happen to be eye witness of the occurrence. As PW-4 Jamshed Alam has stated in paragraph 6 of his cross-examination that due to assault two persons, namely, Sairunisha and Daud had fallen senseless. They had fallen senseless before his arrival at the place of occurrence. The aforesaid account of the said witness candidly indicates that he had arrived at the place of occurrence after falling aforesaid two victims senseless sustaining injury, which means that he had not witnessed the occurrence of assault upon them at the hand of the appellant rather had arrived at the place of occurrence after culmination of the occurrence and found the victims senseless.



PW-6 Md. Abu Sakib has stated in paragraph 5 of his cross-examination that the assault was being made inside the crowd while he was standing outside the crowd. He could not disclose as to who was doing what in the said crowd. The aforesaid testimony of the said witness eloquently indicates that he had not seen the appellants assaulting the victims in the occurrence due to crowd as he was standing outside the crowd.

17. From perusal of the testimony of PW-1 Md. Khalid, PW-2 Md. Asiq, PW-3 Md. Firoz Alam, PW-5 Md. Arif, PW-7 Daud and informant PW-8, it appears that the aforesaid witnesses have unanimously and consistently stated in their respective examination-in-chief that on the date and time of occurrence, when Md. Aarif and Md. Abu Sakib arrived at the door of the informant to see his ailing father, Md. Nayeem arrived there and indulged in wrangle with them over land dispute and on chiding by the informant, Md. Nayeem slating him went to his house and regressed at the place of occurrence with lathi, dabiya, farsa and stone alongwith other accused persons and encircled the informant. The informant scaringly rushed in his courtyard. The aforesaid accused persons also intruded into his courtyard



chasing him and assaulted him and dragged him at his Dehariya and when the mother of the informant, namely, Bibi Sairunisha arrived at the aforesaid place, Md. Nayeem assaulted on her head by means of dabiya inflicting bleeding injury on her head and eye. When Daud rushed in their rescue, Md. Samim assaulted on his head by means of stone inflicting bleeding injury on his head and Md. Akbar assaulted Md. Asiq by means of lathi and Md. Nasim assaulted him by means of stone inflicting injury on his face and thigh. The aforesaid witnesses were subjected to lengthy cross-examination, but from perusal of the cross-examination of the aforesaid witnesses, nothing cogent and convincing barring some minor contradiction has been elicited in their cross-examination having potential to rule out the testimony of the aforesaid witnesses. Moreover, out of the aforesaid witnesses, PW-8 happens to be informant and injured and PW-7 Daud and PW-2 Md. Asiq are also injured of the case and being injured of the case, they happen to be natural witnesses of the occurrence and their presence at the place of occurrence and witnessing of the occurrence cannot be ruled out. Though there happens to be some minor contradiction between the testimony of the aforesaid witnesses, but such contradiction



in the testimony of natural witnesses are bound to happen as the occurrence is of 11.06.2000 and the aforesaid witnesses have been examined after long span of 4-5 years of the occurrence and power of perceiving, retention and reproduction of certain facts differs from man to man and is also dampened by the passage of time.

18. PW-5 Md. Arif has stated in paragraph 3 of his cross-examination, that the ancestor of the accused persons have filed the case against them regarding the land and he is also defendant in Title Suit no. 159 of 2000 filed by the accused Nasim & ors., which means that PW-5 is inimical to the accused persons and PW-1 Md. Khalid has stated in paragraph 2 & 3 of his cross-examination that Civil Suit was fought between the parties regarding the land dispute which was dismissed. Son of the accused Nasim, namely, Anwar has lodged G.R. Case no. 858/2000 against the son of the informant, namely, Tansir, Tanwir and others. PW-4 Jamshed Alam has stated in paragraph 8 of his cross-examination that the dispute is pending between the parties over land and several cases are pending between them. Informant PW-8 has stated in paragraph 5 of his cross-examination that Civil Suit No. 276 of 2002 is pending



between him and the accused persons in the court of Sub-Judge, Araria in which the accused Nasim is the plaintiff while he and his father are the defendants and G.R. No. 388/99 is also pending in the court of A.K. Mishra, J.M. 1st Class, Araria in which he and his sons Tansir, Tanwir and others are accused persons. From perusal of the testimony of aforesaid witnesses, it appears that PW-5 and informant are inimical to the appellants, but the animosity cuts both the edges and mere animosity between the parties, in my considered opinion, is not sufficient to rule out the prosecution case in view of the consistent and convincing ocular evidence of the prosecution.

20. From perusal of the injury report of Daud and Md. Asiq and the testimony of Dr. Arun Kumar Chaudhary PW-10, who has examined the aforesaid two victims, it appears that Md. Asiq had sustained one muscle deep injury on his right face and another tender swelling on his right thigh both caused by hard and blunt substance and simple in nature and Daud had sustained one lacerated wound over his forehead caused by hard and blunt substance and simple in nature. The aforesaid injuries as found and proved by PW-10 are in consonance to the prosecution case. Thus, the ocular evidence regarding sustaining injury by the aforesaid two



victims also stands corroborated by the medical evidence. So far as the injury of the mother of the informant, namely, Bibi Sairunisha is concerned, as per prosecution case and witnesses account she had sustained bleeding injury on her head and eye inflicted by means of dabiya, but the injury report of Sairunisha has not been proved by its author i.e. doctor, who has examined the said victim rather by PW-11 Afroz Alam, who happens to be ward attendant of the Araria Hospital. He has also stated in paragraphs 3 and 4 of his cross-examination that the aforesaid injury report was not prepared before him and said victim Bibi Sairunisha was also not examined before him. Hence, for want of prove of the injury report of the said victim by its author, in my considered opinion, the said injury report has not been legally brought on record and cannot be taken into consideration. Thus, ocular evidence regarding injury of Sairunisha does not stand corroborated by medical evidence.

20. From perusal of the prosecution case and testimony of the witnesses, it appears that the accused persons were five in numbers and they were armed with dabiya, farsa, lathi and stone at the time of occurrence and the victims were four in numbers, but were un-armed and there was no



intervening circumstance and the occurrence took place for 15 minutes as PW-1 in paragraph 5 of his cross-examination has stated that the occurrence took place for ten minutes. PW-3 has stated in paragraph 2 of his cross-examination that the entire occurrence took place for 10-12 minutes. PW-4 has stated in paragraph 6 of his cross-examination that the occurrence of assault lasted for 10-15 minutes and PW-8 has stated in paragraph 12 of his cross-examination that entire occurrence took place for 15-20 minutes but P.W.3 has stated in para-6 of his cross-examination that Sairunisha had sustained only one dabiya blow. So had the accused persons intended to eliminate the victims during the occurrence of 15 minutes, they would have executed their intention as there was no any intervening circumstances at the place of occurrence impeding them from executing their intention but they did not do so rather gave only single dabiya blow to Sairunisha and only two simple injuries to Md. Ashiq and one simple injury to Daud all caused by the hard and blunt substance. Hence, considering the aforesaid aspect of the case and injury sustained by the victims, in my considered opinion, no offence under Section 307 is made out. Hence, the appellants Md. Nayeem and Md. Samim are acquitted from the offence



punishable under Section 307 IPC while the allegation levelled under other Sections against the appellants under which they have also been convicted and sentenced appears to have been sufficiently and satisfactorily substantiated by the prosecution by adducing convincing, cogent, consistent, worth credence evidence. Hence, the conviction and sentence of the appellants under the rest Sections remains intact.

21. In the fact and circumstances of the case, the aforesaid two appeals are dismissed with the aforesaid modification in the judgment and order of conviction and sentence *in-re* to the appellants Md. Nayeem and Md. Samim. As the appellants are on bail, their bail bonds are cancelled and they are directed to surrender before the learned lower court forthwith.

22. Let a copy of the first and last page of this judgment be handed over to the learned *amicus curiae*, Mr. Prabhakar Thakur, learned *amicus curiae* be paid prescribed fee by the Patna High Court Legal Services Committee.

(Prakash Chandra Jaiswal, J)

sushma/-

AFR/NAFR	AFR
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