

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.351 of 2015

Arising Out of PS.Case No. -70 Year- 2009 Thana -BHAGWANPUR District- BHABHUA
(KAIMUR)

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Dilip Kumar Gupta Son of Late Ramchandra Sah, resident of village - Jaitpur
Khurd, P.S. - Bhagwanpur, District - Kaimur (Bhabhua).

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. Ajay Kumar thakur, Adv.
Mr. Imteyaz Ahmad, Adv.

For the State : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 08-03-2018

Appellant, Dilip Kumar Gupta has been found guilty for an offence punishable under Section 341 IPC and sentenced to undergo R.I. for one month, under Section 504 IPC and sentenced to undergo R.I. for one year, under Section 307 IPC and sentenced to undergo R.I. for six years as well as to pay fine appertaining to Rs.2000/- and in default thereof, to undergo R.I. for three months vide judgment of conviction dated 01.06.2015 and order of sentence dated 06.06.2015 passed by Addl. District & Sessions Judge, Illrd, Kaimur at Bhabhua in Sessions Trial No.163/2010.

2. PW.6, Ram Kali Kunwar mother of injured, Chitranjan Sharma (PW.5) submitted written report on 19.07.2009 alleging inter alia that on the same day at about 03:00 PM Dilip Kumar Gupta whose cowshed lies adjacent north to her house, came and closed the drain whereupon her son Chitranjan Sharma protested as, the sewerage of the village pass through the same. More particularly, it happens to be a rainy season and during such season flow is not obstructed so, you should not close the drain. On account thereof, both of them entered into an altercation. During midst thereof, Dilip Kumar Gupta gone to his cowshed and returned back with *farsa*



(Fahura) and then, after abusing her son gave blow from back side of *farsa* (Fahura) striking over left temporal region as a result of which, blood oozed out from his ear as well as nose. During course of assault, he also sustained hurt over his forehead as a result of which, there happens to be swelling. He became unconscious, fell down. On hue and cry Pappu Bind (name examined) Radheshyam Kushwaha (PW.3), Ramesh Sharma (PW.1), Munir Sharma (not examined) others came, intervened as a result of which life of her son could be saved. After coming to know about the occurrence, her another son Tulsi Sharma returned back from Badhar along with his family members who lifted Chitranjan Sharma for treatment.

3. After registration of Bhagwanpur P.S. Case No.70/2009 investigation commenced and concluded by way of submission of charge sheet, facilitating the trial meeting with the ultimate result, subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial. It has also been pleaded that prosecution party was forcibly flowing water towards land of the accused whereupon, there was protest as a result of which, this false case has been registered levelling false and frivolous allegation. However, neither ocular nor documentary evidence has been adduced in defence.

5. Prosecution, in order to substantiate its case had examined altogether twelve PWs those are PW.1 Ramesh Sharma, PW.2 Indrasan Sharma, PW.3 Radheshyam Kushwaha, PW.4 Surendra Sharma, PW.5 Chitranjan Sharma, PW.6 Ram Kali Kunwar, PW.7 Tulsi Sharma, PW.8 Sri Ram Bind, PW.9 Jagarnath Bind, PW.10 Pappu Bind, PW.11 Dr. Arun Pratap Singh and PW.12



Ram Sahan Singh. Side by side had also exhibited Ext.I-Written report, Ext.2-original injury report, Ext.3 supplementary injury report, discharged slip issued by BHU Ext.4, Formal FIR, Ext.5 Police Requisition, Ext.6. As stated above neither ocular nor documentary evidence has been adduced on behalf of defence.

6. While challenging the finding having been recorded by the learned lower court, it has been submitted on behalf of appellant that from the evidence available on the record, it is evident that irrespective of having a sharp cut weapon in his hand, appellant had not inflicted the blow from its edge side rather whatever been alleged is that blow was given by back side of the weapon and that depicts that appellant was not at all carrying intention or knowledge to commit murder, rather it was simple assault, and that being so, no offence under Section 307 IPC is made out whereupon the conviction recorded against the appellant for an offence punishable under Section 307 of the IPC is not at all maintainable. It has also been submitted that there happens to be specific disclosure at the end of the victim. PW.5 that they both indulged in an altercation on account of blockage of flow of water through a drain, then in that circumstance, neither an offence under Section 341 IPC is made out nor under Section 504 of the IPC, though such event is found suspicious one as the witnesses have disclosed that it was done about more than a month ago. So, motive is found duly falsified.

7. It has also been submitted that when the evidence of PW.5, injured is taken together with the evidence of PW.12, the Investigating Officer, it is evident that genesis of occurrence that means to say on account of blockage of flow of water through a drain is not at all found substantiated as drain was flowing and that being so, it could be held that the prosecution had suppressed the



real genesis of occurrence. Furthermore, it has also been submitted that there happens to be an admission at the end of the prosecution witness along with objective finding of the Investigating Officer that the cowshed of appellant is adjacent to the house of the prosecution and on account thereof, they were carrying grudge against the appellant as, domestic animals were kept there causing some annoyance to them and so, sustaining of injury at different place in different manner at different hands informant got an opportunity to implicate the appellant to satisfying their grievances.

8. Lastly it has been submitted that the evidence of doctor PW.11 happens to be worthless. He had examined the victim on the date of occurrence itself that means to say on 19.07.2009 at about 04:30 PM. At that very time, he had found only two injuries. The first one happens to be swelling left temporal region, bleeding from left ear caused by hard and blunt substance and for that, he referred the injured for proper treatment to higher medical institute /centre and the supplementary injury report having (Ext.3) suggest that the same happens to be based upon the finding having been recorded by the BHU. Had there been examination of the treating doctor disclosing connectivity then in that circumstance, the opinion whatever been expressed at the end of PW.11 would have been duly acknowledgeable in the eye of law otherwise it goes out of consideration as, did not justify the same being in accordance with law. That means to say, whatever been found by the doctor PW.11 as per Ext.2 is only to be taken into consideration and for that, in worst case, prima facie case under Section 323 IPC is made out. In the facts and circumstances of the case, as well as considering that appellant has got no criminal antecedent had no grudge with the prosecution party, and whatever been alleged, resultant of spur of



moment, would justify treatment of the appellant in accordance with Probation of Offenders Act. So submission is that in worst case, the judgment of conviction and sentence recorded by the learned lower court is fit for modification in terms of submission having been made at his end.

9. The learned Additional Public Prosecutor refuting the submission has submitted that presence of injury over left temporal region of PW.5, Chitranjan Sharma is found duly substantiated. The part having chosen by the appellant happens to be delicate part of body having severe impact over PW.5 injured and that being so, such exercise exposes the intention if not, at least knowledge that injuries, having over such delicate part of body might have cost life of the victim and on account thereof, the finding recorded by the learned lower court did not attract interference.

10. Times without number the status reliability of evidence of injured witness has been duly acknowledged and more recently in a case **Chandrasekar & Anr. vs. State of Tamil Nadu** reported in **2017 (4) PLJR (SC) 220**, it has been held by the Hon'ble Apex Court, as follows:-

“10. Criminal jurisprudence attaches great weightage to the evidence of a person injured in the same occurrence as it presumes that he was speaking the truth unless shown otherwise. Though the law is well settled and precedents abound, reference may usefully be made to **Brahm Swaroop vs. State of U.P.**, (2011) 6 SCC 288 observing as follows:

“28. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with an in-built guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.”

11. That being so, first of all evidence of PW.5 injured is to be taken note of. He had deposed that on the alleged date and time



of occurrence, while sewerage was flowing through a drain, Dilip Kumar Gupta blocked which was resisted by him as a result of which, there was an altercation and during midst thereof, Dilip Kumar Gupta had gone to his cowshed and returned back with farsa (Fowra) and then assaulted him with its back, at his left temporal region, causing injury thereupon. He fell down and became unconscious. Radhey Shayam Singh, Jagarnath Bind, Pappu Bind, Sribind, Ramesh Sharma, Indradas Sharma, Surendra Sharma have arrived at the time of altercation and accordingly seen the occurrence. He regained sense at BHU where he was under going treatment and on account thereof, his statement was recorded by the police twelve days after the occurrence. Identified the accused. During course of examination at para-5 he had stated that accused was not carrying animosity since before. In para-6, he had stated that he is not remembering Khata, Khesra of the land through which sewerage flow. The cowshed of Dilip Kumar lies just north to the aforesaid drain. Water passing through aforesaid drain go beyond the cowshed though he was saying that his cowshed is being damaged on account of flow of water so, he will close the same. Then had asserted that it is not a public drain. Then had said that the rain water from his house was passing through the same. Then had said that his house is just west to the cowshed of the accused. Then had said that drain happens to be pukka. Then had said that there happens to be a case on account of closure of drain. Then had said that one case has also been instituted with regard to his assault. Then had said that now drain has been opened. About one and half months the drain remained closed. on an intervention of villagers drain has been opened. Drain is passing north to south again he said that cowshed of accused lies north to aforesaid drain. In para-17 he had stated that after sustaining blow he fell down south to the



drain. He fell down one bitta away from cowshed. In para-8 he had further stated that he was given only one blow from the back side of the farsa and he fell down and became unconscious. In para-9 he had stated that drain was closed prior to the occurrence. He had not complained to any authority. He had not tried to open on his own. Even on the date of occurrence he had not requested the accused to open the drain. In para-10 he had stated that blood oozen out and spread over the ground where he had fallen. Blood had also fallen over his cloth. In para-11 he had stated that he had not disclosed anybody regarding the occurrence. He was admitted at BHU for a month. He is unable to say whether X-ray was scanned. In para-12 he had stated that accused had assaulted him from front side. Firstly there was an altercation. Then thereafter, accused rushed to his cowshed and returned back with farsa. Then had denied the suggestion that no such type of occurrence had ever taken place. Because of the fact that they tried forcibly to flow water in the land of the accused which was objected and on account thereof, this false case has been instituted.

12. PW.11 is the doctor who had examined the victim on 19.07.2009 itself and found the following:

1. Soft tissue swelling of left temporal region
2. Bleeding from left ear.

Opinion of injury is reserved since. Patient has been referred to higher Medical Center for further investigation and medical management.

Injuries are caused by hard and blunt substance. Duration of injuries within six



hours.

13. Subsequent thereof, supplementary injury report has been exhibited showing injury no.1 to be grievous in nature on the terms of opinion so given by the treating doctor of BHU (Ext.), but said doctor has not been examined whereupon primary evidence relating to expert evidence is found lacking whereupon connectivity is found missing which the doctor had admitted during course of cross-examination. However, the injury having over the person of PW.5 is not under controversy as, neither doctor was cross-examined on that very score nay there happens to be suggestion to the doctor that he had not found any injury/wound over the person of PW.5.

14. When the evidence of PW.5, injured is properly considered on close scrutiny, it is apparent that he had not been tested on the score of assault specifically and whatever been taken cared of at the end of the appellant, that has properly been answered under para-7, 8 as well as 12 of his cross-examination wherein he had stated that he was given a blow from front side at his left temporal region, only once from backside of farsa and that is found duly corroborated with the evidence of PW.11, the doctor.

15. The aforesaid truthfulness of the testimony of PW.5 with regard to activity of the appellant in the background of blocking the flow of drain is concerned, though is found suspicious, as he had disclosed during cross-examination that it was blocked since before is found inconsistent with the objective finding of the I.O., PW.12, during inspection of the place of occurrence as negating the same, but presence of drain has been found through which water was flowing, under para-8 of his cross-examination.

16. Now coming to status of remaining witnesses, though,



as the evidence of victim PW.5 is found reliable being corroborated by the evidence of PW.11, PW.12 even then their status have to be seen. PW.8 is hearsay witness while PW.9 and PW.10 were declared hostile. PW.6 is the informant while PW.1,2,3,4 and 7 have reiterated the same.

17. PW.7 is the writer of the written report who had simply stated that as per dictation he had recorded written report, so happens to be formal in nature.

18. Now proceeding ahead one has to see whether the finding recorded by the learned lower court happens to be justifiable. It is needless to say, in the background of evidence of victim PW.5 itself that both the parties were not carrying animosity amongst themselves since before and further perceiving that whatever been, that took place in a spur of moment during course of an altercation which was relating to opening /blocking of the drain that too was instantaneous, coming with farsa thereupon and used from its back that too only once that too having no intervening circumstance to prevent the appellant in having repetition of blow, is indicative of the fact that there was no intention at his end to commit murder nor assault was made with a knowledge that such injury would ultimately result in death of the victim. Furthermore, it is evident from the evidence of PW.11 that whatever his finding relating to nature of the injury being grievous is concerned that happens to be un-acceptance in the eye of law.

19. In ***Dinesh Yadav v. State of Jharkhand reported in (2017) 5 SCC 764***, it has been held:

“13. However, having regard to the totality of the facts and circumstances of the matter and the material on record, it is clear that the appellant-accused did not make any attempt to commit murder of the informant. The incident



has taken place on the spur of the moment as the informant had objected the appellant from cultivating the land which is adjoining his house. Hence the offence, committed by the appellant would come under Section 326 IPC. The learned counsel for the appellant submitted that the appellant is more than 72 years of age and leniency may be shown in his favour by way of imposing lesser sentence. The injured had sustained the compound fracture of forearm. Keeping in mind the aggravating and mitigating circumstances and in the interest of justice, the appellant should be sentenced to undergo simple imprisonment for one year and to pay fine of Rs 50,000.”

20. That being so, not only Section 307 IPC rather 325 IPC is also found out of application and that being so, the appellant is found guilty for an offence punishable under Section 341 IPC, 504 of the IPC as well as 323 of the IPC. Considering the nature of the allegation, the submission having made on behalf of appellant that period undergone will be sufficient to meet the ends of justice. Considering the nature of the evidence, maintaining the sentence having inflicted by the appellate court relating to Section 341 of the IPC, the sentences relating to Section 504 IPC as well as Section 323 IPC is also modified to that extent that means to say R.I. for one month, respectively.

21. Now coming to other aspect. Irrespective of the fact that appellant has been found guilty under section 323 IPC along with other allied sections on account of some sort of legal flaw that would not forbidden the court to exercise its power as vested under Section 357(3) of the Cr.P.C. In order to grant compensation to the victim against the illegal activity having at the end of the accused. For better appreciation the same is quoted below:

“357. Order to pay compensation.

(1) xxx

(2) xxx

(3) When a Court imposes a sentence, of which



fine does not form a part, the Court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.”

22. From the perusal of the evidences, as referred hereinabove, the appellant had not been able to put question mark over rushing of the victim PW.11 for treatment of his injury which he sustained at the end of the appellant rather there happens to be documentary evidence available on the record though through PW.11, the discharge slip issued by the BHU (Ext.4) apart from oral evidence then rejected for other purposes being inadmissible in law and that being so, victim PW.5 had faced the tremor of the misdeeds at the end of the appellant. Consequent thereupon, appellant is directed to pay Rs.50,000/- to the victim PW.5 as compensation within eight weeks, failing which the learned lower court will be at liberty to proceed in accordance with law. In terms thereof, this appeal is partly allowed. Appellant is on bail, hence is discharged from its liability. If the amount is deposited then, thereafter, the lower court will pay the same to the PW.5 on due identification after his appearance on notice issued by the court concerned.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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