

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.847 of 2016

Arising Out of PS. Case No.-127 Year-2008 Thana- NAANPUR District- Sitamarhi

1. AMAR RAI son of Shri Narayan Rai
2. Shivjee Rai, son of Late Sital Rai
3. Shailendra Rai, son of Late Jinish Rai All are resident of village- Barmaul, P.S.- Nanpur, District- Sitamarhi.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Amrit Abhijat, Adv.
For the Respondent/s : Mr. Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

20-09-2019

Appellant, Amar Rai has been found guilty for an offence punishable under Section 307 IPC and sentenced to undergo RI for 10 years as well as to pay fine appertaining to Rs. 10,000/- in default thereof, to undergo SI for one year, additionally, while appellants, Shivjee Rai and Shailendra Rai have been found guilty for an offence punishable under Section 307/149 IPC and each one has been sentenced to undergo RI for 10 years as well as to pay fine appertaining to Rs. 10,000/- in default thereof, to undergo SI for one year, under Section 324 IPC and each one has been sentenced to undergo RI for three years, under Section 323 IPC, each one has been sentenced to undergo RI for one year with a direction to run the sentences



concurrently, with a further direction to set off against the period having undergone during course of trial vide judgment of conviction dated 09.09.2016 and order of sentence dated 17.09.2016 passed by Sessions Judge, Sitamarhi in Sessions Trial No. 590/2009 arising out of Nanpur PS Case No. 127/2008.

2. Mahadev Rai (PW 4) filed a written report on 19.11.2008 to the effect that on the same day at about 10:00 AM, while he was sitting at his Darwaza, Shailendra Rai, Amar Rai, Shivjee Rai, Ranjit Rai armed with Garasa, Tangari and rod came and began to assault him. Amar Rai gave Garasa blow with an intention to cause murder over his head, whereupon, he sustained injury. Blood began to ooze out. His wife, Malti Devi, son, Lalu Rai and daughter, Ram Somari Devi came in rescue and during course thereof, Shailendra gave Tangari blow over head of his wife causing injury thereupon. Shivjee gave rod blow over his son, Lalu Rai, as a result of which, he also sustained injury over his head. During course thereof, they were joined by Uday Rai, Mangal Rai, Vijay Rai, Manohar Rai, Sri Narayan Rai (since acquitted) armed with Lathi, Danda who also assaulted and then, they all made house trespass and took away a box containing ornaments, clothes and cash.



Kusheshwar Sah, Ramjatan Paswan, Phulo Sah, Bahadur Sah and others have witnessed the occurrence. It has also been disclosed that on account of dispute over partition relating to fodder cutting machine as well as Tangari which are conjointly being used by all the concerned, this occurrence has been committed.

3. After registration of Nanpur PS Case No. 127/2008, investigation commenced and completed by way of submission of charge-sheet, facilitating the trial, meeting with the ultimate result, subject matter of the instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. It has further been pleaded as well as admitted at the end of the prosecution that for the same date and time of occurrence, they were victimized at the end of the prosecution and for that, on the statement of Shivjee Rai, a case has been instituted against the members of the prosecution party and, only to save their skin, got this case filed taking the doctor as well as police in their collusion. However, nothing has been adduced in defence.

5. In order to substantiate its case, the prosecution has examined altogether six PWs who are PW-1, Lalu Kumar,



PW-2, Malti Devi, PW-3, Ram Somari Deiv, PW-4, Mahadeo Rai, PW-5, Hare Krishna Mishra and PW-6, Pramod Kumar Sinha. Side by side, has also exhibited Ext-1 series, respective injury reports. As stated above, nothing has been adduced in defence.

6. Learned counsel for the appellants urged that the evidence of the prosecution has not been considered in its right perspective and that happens to be the reason behind presence of erroneous finding recorded by the learned lower court. To justify such plea, it has been submitted that in the written report itself, there happens to be presence of so many witnesses claiming them to be an eyewitness to occurrence but, none of them has been examined. Furthermore, it has also been submitted that the main I.O. has not been examined and on account thereof, the defence has not only sustained prejudice rather also failed to draw attention of the I.O. toward the material exaggeration having amongst the evidence of the witnesses over which, attention of individual witness has been drawn up. In likewise manner, it has also been submitted that had there been examination of the I.O., the defence would have been in a position to draw attention of the I.O. regarding place of occurrence of the counter case, the genuineness of the counter



version and the deficiency persisting in the prosecution case, more particularly, without having OD slip at the end of PHC, Nanpur, the written report was placed and that is indicative of the fact that prosecution party had not sustained any injury rather, after having the doctor in their collusion, got the injury report manufactured.

7. Apart from this, it has also been submitted that whosoever been examined during course of trial, all are own family members, that means to say, father, mother, son and daughter. In the aforesaid background, it has been submitted that save and except daughter, PW-3, the son, PW-1, mother, PW-2 and the informant, PW-4 claimed themselves to be injured. When their evidence is taken together, it is apparent that on account of inconsistency over the manner of occurrence, their testimony irrespective of their status, fit to be rejected.

8. Lastly, it has been submitted that on trivial issue, the dispute arose without any premeditation and so, the finding so rendered by the learned lower court would not justify its application. In worst case, it would be a case under Section 324, 325 of the IPC and for that, period of sentence as already undergone will serve the purpose.

9. Learned APP while supporting the finding



recorded by the learned lower court has submitted that from the cross-examination of the doctor itself, it is evident that injuries were dangerous to life which the defence themselves borrowed during cross-examination and so, the finding so recorded by the learned lower court happens to be just, legal and proper.

10. Admittedly, none of the independent witness has been examined in this case. PW-4 is the father, PW-2 is mother, PW-1 is son and PW-3 is the daughter. All have claimed to be assaulted save and except PW-3. From the evidence of doctor, PW-6, injuries over their persons have been corroborative. It is further evident that main I.O. has not been examined. PW-5 is the part I.O. who had simply submitted the charge-sheet. Non examination of I.O. in its routine manner would not cause dent to the prosecution case unless and until there happens to be positive plea at the end of the accused suggesting their right has been infringed on account of non examination of the I.O.. After going through the evidence of relevant witnesses, it is evident that save and except deposition of PW-2 at para-12 and PW-3 at para-3, 4, 5, 6 and 7, PW-4 at para-8, there happens to be no inconsistency over the place of occurrence. Furthermore, the aforesaid paragraphs of the respective witnesses is only to the effect that during course of statement having under Section 161



CrPC, the status of the accused has been found omnibus in nature. Be that as it may, its impact will be seen on proper adjudication.

11. PW-1 has stated that on the alleged date and time of occurrence, while he was taking meal, accused persons, Shailendra Rai, Amar Rai, Shivjee Rai, Ranjit Rai armed with Garasa, Tangari and rod came and began to assault his father. At that very moment, Shailendra was armed with Tangari and gave blow over head of his father. Amar had given rod blow over head of his mother. Shivjee Rai had assaulted him with rod over his head. His sister came in rescue who was also assaulted with Lathi and rod. Then thereafter, other persons came, joined with others, assaulted and then intruded inside the house and took away a box containing ornaments, clothes and cash. He was treated at Nanpur Hopital. Identified the accused. During cross-examination at para-3, he has stated that when he reached at the P.O., he had seen injury over the person of his father. He was not conscious rather, was lying over the ground. There was copious blood over the ground. His father was taken to hospital by Bahadur Sah, Bisheshwar Sah and Ram Balak. He had also accompanied. In para-4, he has stated that none of the injured has become unconscious after sustaining injury. Again at para-5



has stated that when he had seen his mother, she was unconscious. She regained her sense after treatment. I.O. had seen the place of occurrence and blood stained cloth.

12. PW-2 has stated that on the alleged date and time of occurrence, nine persons armed with sword, farsa came at her Darwaza who were Shailendra Rai, Amar Rai, Shivjee Rai, Ranjit Rai, Vijay Rai, Uday Rai and Sri Narain Rai. They all began to assault her husband whereupon, she along with her daughter rushed in rescue. Her son had also gone who were assaulted by Farsa by Amar Rai over his head. Her daughter was also assaulted. Her husband, son, daughter, all were assaulted. They have snatched away Hasuli, Pahuncha of her daughter, took away cash appertaining to Rs. 10,000/-. All the ornaments which were of silver was taken away. All the injured were treated at Nanpur Hospital. Identified. In para-3, there happens to be genealogical table wherefrom it is apparent that appellant Shivjee Rai happens to be her own Dewar while Amar and Shailendra are her close agnates. She has also admitted presence of counter case. She has also admitted that her father-in-law, Shital Rai had executed two documents in favour of respective sons i.e. Mahadeo, her husband and Shivjee, her Dewar. She has also disclosed that there happens to be one



orchard which is jointly possessed but, on account of having counter claim, the parties are on strained relationship. At para-8, she has stated that at the time of occurrence, she was at Darwaza since before arrival of the accused persons. After seeing accused persons armed variously, she became afraid of but, they have not begun to assault no sooner than, their arrival rather they indulged in an altercation. The whole occurrence took an hour to complete. She along with her son, husband were assaulted during midst thereof. She raised alarm but none came. In para-9, she has stated that blood had not fallen over the ground. Again disclosed that blood had fallen over the ground, over the clothe which were shown to the I.O. Then has stated at para-9 that all the injured became unconscious. They regained sense at the hospital where they were admitted for three days. Then has said that she had seen wound of her son after three days while she had not seen wound over her husband. Then has denied the suggestion that on account of land dispute, this false case has been instituted. At para-12, there happens to be contradiction.

13. PW-3 is the daughter. She has stated that on the alleged date and time of the occurrence, when she came out from her house, she had seen Maar-peet. At one side, she had seen Shivjee, Amar, Shailendra out of whom, Amar was armed



with Garasa said that, 'today, Mahadev, be eliminated', whereupon, Amar gave Garasa blow over the head of her father, Mahadev causing injury thereupon. She along with her brother rushed in rescue whereupon, Amar, Shailendra assaulted with Tangari over the head. They were joined by other accused persons and then, they were again ruthlessly, assaulted. They had taken away ornaments, clothes and cash from the house. The aforesaid occurrence has been committed in the background of dispute over partition of the of Garasa, Kulahari. Identified. During cross-examination at para-2, there happens to be family history. During course thereof, she admitted presence of counter case having instituted by her uncle Shivjee Rai. She has further stated that her father, mother and brother are accused in that case but, as she was not present, so, she has not been made an accused. In the aforesaid background, she has admitted herself not to be present at the P.O. on the alleged date of occurrence. Furthermore, the aforesaid theme is found more probable as she was not at all examined by the doctor. She has not claimed to be assaulted and in likewise manner, there happens to be divergent evidence amongst the PWs regarding assault over her.

14. PW-4 is the informant. During course of his evidence, he has stated that on the alleged date and time of



occurrence, while he was sitting at his Darwaza, Shailendra Rai, Amar Rai, Shivjee Rai, Ranjit Rai armed with Garasa, Tangari and rod came and began to assault. During course thereof, Amar said that he be murdered. Thereafter, Amar gave Garasa blow over his head as a result of which, he sustained injury. He has shown the scar mark. Shailendra had given Tengari blow. His wife, son and daughter came in rescue who were also assaulted by the accused persons. Shailendra had given Tengari blow over his head and rest assaulted with lathi. Thereafter, they were joined by other co-accused (since acquitted) who assaulted with stick. Then, they have taken away the articles after making house trespass. Motive for the occurrence has been disclosed in the background of land dispute. Then, it has been stated that he had gone to the police station where he tendered written report, the basis of the institution of the case subsequently thereof, he was referred to hospital. In para-2, 3, 4, there happens to be cross-examination with regard to family status, partition, orchard, admittedly, claimed and counter claimed at his end as well as at the end of Shivjee Rai. Execution of two different deeds by his father, one in his favour, another in favour of Shivjee and on that very score, persistence got grievance. All have been admitted. In para-5, he has stated that that after



apprehending him, accused persons assaulted. He has further stated that he sustained bruises on account of having dashed against tyre-gari. He was apprehended by Shivjee Rai. He raised alarm but none of the co-villager came. Accused persons remained at his Darwaza for 3-4 hours and during midst thereof, none came. In para-6, he has stated that houses of all the persons are contiguous to each other. When the police came, save and except one, remaining escaped. Then there happens to be contradiction at para-8 and 9. Then he denied the suggestion that on account of land dispute, they have assaulted the accused persons and only to save their skin, this case has been instituted.

15. PW-5 is the witness who is formal in nature. He had filed only charge-sheet.

16. PW-6 is the doctor who had examined the respective injured that means to say, Lalu Rai, Malti Devi and Mahadev Rai on 19.11.2008 and found the following:-

Lalu Rai

(i) Lacerated cut approx 2 ½” x ¼” x 1/8” over the left parietal, occipital part of scalp.

(ii) Pain and tenderness, a soft tissue pain over the right scapular region.

Time within six hours. Simple in nature, might be caused by blunt and hard substance.

Malti Devi

(i) Lacerated cut approx 1 ½” x ¼” x 1/8” above the left eyebrow.

(ii) Pain and tenderness, a soft tissue injury over the right fore-arm and hand.



(iii) Lacerated cut approx 1 ½” x ¼” x 1/8” over the right parietal part of scalp.

Time within six hours. Simple in nature, might be caused by blunt and hard substance, such as Lathi, rod.

Mahadev Rai

(i) A sharp cut approx 3 x ¼” x 1/8” over the frontal part of scalp on right side bleeding profusely.

(ii) A sharp cut approx 3 ½” x ¼” x 1/8” over the occipital part of scalp over right side bleeding profusely.

(iii) A lacerated cut approx 2” x ¼” x 1/8” over the occipital part of scalp right side.

(iv) A swelling with pain and tenderness over the upper part of dorsum of right hand. X-ray shows fracture of metacarpal bone.

(v) A bruise size 8” x 1” over the back middle region with tender and soft tissue injury.

(vi) Pain and tenderness over the left forearm and left cuff.

Time within six hours. Opinion-Patient is suffering from multiple injury and is in serious condition. Injury no. (i) and (ii) are simple in nature, caused by sharp weapon like Garasa, Kulhari. Injury No. (iii) simple in nature, might be caused by hard and blunt substance. Injury No.(iv) is grievous in nature, caused by hard and blunt substance, as Lathi or rod. Injury No. (v) and (vi) are simple in nature, caused by hard and blunt substance, like Lathi and rod.

During cross-examination, apart from others, at para-4 has deposed that although injuries were superficial but might have caused death to the patient.

17. After going through the evidence as discussed hereinabove, it is evidently clear that an occurrence took place and for that, there happens to be version and counter version.



Because of the fact that defence has not adduced any kind of document nor in order to substantiate their plea took any step whereupon, irrespective of the fact that there happens to be admission at the end of the prosecution witnesses regarding institution of the counter case, the version remained behind the curtain and in likewise manner, injury if any.

18. It is settled principle of law that irrespective of presence of counter version in consonance presence of injury and deficiency having at the end of the prosecution in getting injury of the accused explained, or the narration of the counter case, that will not cause dent in the prosecution case unless the injury is serious, grievous. So far, facts of the present case is concerned, it is evident that defence has not cared to prove injury report at least to divulge nature of injury.

19. In ***Gurwinder Singh and Ors. vs. State of Punjab and Ors.*** reported in ***(2018) 16 SCC 525***, it has been held as follows:-

11. It cannot be held as an invariable proposition that as soon as the Accused received the injuries in the same transaction, the complainant party were the aggressors-it cannot be held as a Rule that the prosecution is obliged to explain the injuries and on failure of the same, the prosecution case should be disbelieved. It is well settled that before placing the burden on the prosecution to explain the injuries on the person of the accused, two conditions are to be satisfied: (i) the injuries were sustained by the



Accused in the same transaction; and (ii) the injuries sustained by the Accused are serious in nature.

12. This Court considered the effect of non-explanation of injuries sustained by the Accused person in *Takhaji Hiraji v. Thakore Kubersing Chamansing and Ors.* (2001) 6 SCC 145 and held as under:

17. The first question which arises for consideration is what is the effect of non-explanation of injuries sustained by the Accused persons. In *Rajender Singh v. State of Bihar* (2000) 4 SCC 298, *Ram Sunder Yadav v. State of Bihar* : (1998) 7 SCC 365 and *Vijayee Singh v. State of U.P.* (1990) 3 SCC 190, all three-Judge Bench decisions, the view taken consistently is that it cannot be held as a matter of law or invariably a Rule that whenever the Accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the persons of the Accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (i) that the injury on the person of the Accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where

the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries on the side of the Accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case.

20. It is evident from the evidence of informant that he had identified Amar Rai to be his assailant by means of



Garasa, Shailendra with Tangari, Shailendra to be assailant of others but when the evidence of others are taken together, PW-1 has stated Shailendra to be assailant over the person of his father while Amar to be assailant of his mother by rod while Shivjee to be his assailant by rod. His sister was also assaulted by Lathi and rod. Furthermore, PW-1 corroborated the testimony of PW-4 over persons of only four persons at first stage of the occurrence. PW-2 the wife of PW-4 who had shown presence of all the nine accused conjointly and then, she had not identified any individual to be assailant of her husband rather when she along with her daughter, son came in rescue, then, she alleged that Amar assaulted her with Farsa. Her daughter was also assaulted. PW-3 simply stated that when she came out, she had seen Maar-peet and then specified that Amar gave Garasa blow over head of her father, Amar had also assaulted her brother, Shailendra had assaulted with Tangari, her mother. She, her brother were also assaulted, but during cross-examination at para-2, her presence is found suspicious.

21. At the present stage, it looks desirable to incorporate para-4 of the cross-examination of informant, PW-4 whereunder he has stated that : *“MUQADMA KA MAJMOON AMAR BABU WAKIL TAIYAR KIYE THE. AMAR BABU JO*



*LIHKAR DIYE USE DAROGA JI KO KAHAN DIYA GAYA,
HAMEIN NAHI PATA. BIMAL SAH KO DIYA GAYA THA”.*

22. It is needless to say that written report was filed on 19.11.2008 at about 4.30 PM while occurrence is of about 10.00 AM. Furthermore, it is evident that injured Lalu was examined on 19.11.2008 at about 4:00 PM while Mahadev was examined on 19.11.2008 at about 5.30 PM, while no timing has been given over the injury report of Malti Devi.

23. In *Hari Kishan and State of Haryana v. Sukhbir Singh & Ors. reported in AIR 1988 SC 2127*, it has been held as follows:-

“7..... Under Section 307 IPC what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under Section 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention. In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused though armed with ballam never used the sharp edge of it. They used only the blunt side of it



despite they being attacked by the other side. They suffered injuries but not provoked or tempted to use the cutting edge of the weapon. It is very significant. It seems to us that they had no intention to commit murder. They had no motive either. The fight as the High Court has observed, might have been a sudden flare up. Where the fight is accidental owing to a sudden quarrel, the conviction under Section 307 is generally not called for. We, therefore, see no reason to disturb the acquittal of accused under Section 307 IPC.

24. Giving analytical thought to the facts and circumstances of the case, it is evident that the finding so recorded by the learned lower court convicting Amar Rai for an offence punishable under Section 307 IPC exclusively as well as Shivjee Rai and Shailendra Rai under Section 307/149 IPC is found non sustainable and so, is hereby, set aside. In likewise manner, the conviction and sentence recorded against Shivjee Rai and Shailendra Rai under Section 323 IPC is also annulled. Furthermore, all the three, namely, Amar Rai, Shivjee Rai and Shailendra Rai are found and held guilty for offence punishable under Section 324/34 of the IPC in the background of the fact that the learned lower court had not accepted the theory of unlawful assembly on account of having been joined by other co-accused (since acquitted) and, in the background of the evidences, circumstance so prevailing, sentence is reduced as already undergone.



25. Appellant, Shivjee Rai and Shailendra Rai are on bail, they are discharged from the liability of their bail bonds. Amar Rai is under custody and so, he is directed to be set at liberty forthwith, in not wanted in any other case.

(Aditya Kumar Trivedi, J)

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