

(2018) 01 PAT CK 0051
In the Patna High Court
Case No : 598 of 2002

Bharat Sharma & Ors

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 13-01-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused

[Indian Penal Code, 1860](#), [Section 34](#), [Section 324](#), [Section 379](#)

Citation : (2018) 01 PAT CK 0051

Hon'ble Judges : Rajeev Ranjan Prasad

Bench : Single Bench

Advocate : Ranbir Singh, Rashmi Bharti, Sujeet Kumar Singh

Final Decision : Disposed Off

Judgement

1. Heard Mr. Ranbir Singh, learned Advocate, who has argued this matter as Amicus Curiae at length and Miss Rashmi Bharti, learned counsel representing the informant as also Mr. Sujit Kumar Singh, learned Additional Public Prosecutor for the State.

2. This criminal appeal is arising out of the judgment dated 10.10.2002 passed by the learned Additional District & Sessions Judge, Fast Track Court No.4, Samastipur in Sessions Trial No.207 of 1997/142 of 2002 by which the appellant no.1 has been convicted for the offence under Sections 323, 341, 379 and 324 of the Indian Penal Code and he has been ordered to undergo rigorous imprisonment for one month, 15 days simple imprisonment, three months rigorous imprisonment and six months rigorous imprisonment respectively. All these sentences shall run concurrently. All the appellants have been held guilty under Sections 323 and 341 IPC, accused Bharat Sharma (appellant no.1) and Bishun Sharma (appellant no.2) have also been held guilty under Section 379 IPC whereas accused Bharat Sharma (appellant no.1) alone has been found

guilty under Section 324 IPC as well but except appellant no.1 the other appellants have not been awarded any substantive punishment and they have been released on probation of good conduct and on keeping peace for a period of two years after executing a probation bond of Rs.5000/- with two sureties of the like amount each.

3. The facts as reveal from the records are as under:- It is alleged that on 02.01.1996 at about 8.00 pm the calf of the informant's own brother Shankar Mahto pull down the cow of the informant. It is alleged that for this reason when the wife of the informant asked him to stop this, his brother Shankar Mahto started beating the informant's wife. On hulla raised, accused Ram Prakash Mahto, Bharat Sharma and Bishun Sharma reached there. Ram Prakash Mahto allegedly caught hold of the informant whereas Bharat Sharma and Bishun Sharma assaulted the informant by butt of farsa, because of this the informant fell down and suffered head injury in the left side of his head. It is alleged that farsa was in the hand of Bharat Sharma (appellant no.1). It is further alleged that Bharat Sharma and Bishun Sharma took out the Hasuli which was silver made from the neck of the wife of the informant. It is alleged that Bharat Sharma had attacked on the informant with his farsa but by chance the said portion did not hit the informant and only butt of the farsa hit him on his head. Cause of dispute has been again said to be the same which has been stated at the top of the fardbeyan.

4. On the basis of the fardbeyan Rosera P.S. Case No.3 of 1996 under Sections 341, 323, 307 and 379/34 of the IPC was registered. The police conducted investigation and a charge-sheet was filed against the accused persons under Sections 323, 341 and 307/34 of the Indian Penal Code for causing voluntarily hurt to Rajendra Mahto, the informant, (PW-9) and his wife Gangia Devi (PW-8), for wrongful restraint for assaulting PW-9 with common intention in such a manner as it may cause death to PW-9. After taking cognizance of the offences, the order of commitment was passed and the records were transferred to the court of learned Additional Sessions Judge, Fast Track Court No.-IV. All the accused persons were charged under Sections 323, 341 and 307/34 IPC. In addition accused Bharat Sharma (appellant no.1) was charged under Sections 324 and 307 and accused Bharat Sharma and Bishunu Sharma were charged under Section 379 IPC. The accused pleaded not guilty and in their statement under Section 313 Cr.P.C. their main defence was a total denial of the whole occurrence.

5. In course of trial, the prosecution examined 10 witnesses. PW-1 Gango Mahto, PW-2 Hari Charan Mahto, PW-3 Suresh Mahto, PW-4 Kesho Mahto and PW-7 Bishun Deo Mahto were declared hostile witnesses. PW-5 and PW-6 are said to be the independent witnesses. PW-8 is the wife of the informant, PW-9 is the informant himself and PW-10 is the doctor who examined the injured.

6. In course of deposition of the prosecution witnesses it was found that the parties are close agnates, there is no land dispute between the parties and they

have their houses in the vicinity of the place of occurrence, therefore, there is no question of suspicion about the proper identification of accused at the time of occurrence. The learned trial court believed the evidence of PWs-5, 6, 8, 9 and 10. The trial court held that the ocular evidence is consistent and fully corroborated with the medical evidence. The trial court believed the evidence of PW-8 who stated that Shankar Mahto assaulted her with lathi on wrist and on her back and Bharat Sharma tried to inflict farsa on her person but she narrowly escaped. The doctor (PW-10) found swelling with bruise 1" X 1" on dorsum of right hand. Two swelling with bruise 2" X 2" on right scapular region of back on the person of the PW-8 and he has opined that both injuries are possible by hard and blunt substance. However, PW-10 has found one incised wound of 1 1/2" X 1/8" X skin deep on the right side of frontal part of head of PW-9 which according to him is possible by farsa and abrasion is possible by blunt portion of farsa. The learned trial court held that there was an assault by the accused persons and out of anger two accused persons snatched Silver Hasuli from the neck of PW-8. In absence of specific evidence on the intention, the trial court held the accused are not guilty under Section 307 IPC. The learned trial court however held all the accused guilty under Sections 323 and 341 IPC. Accused Bharat Sharma and Bishun Sharma were held guilty under Section 379 IPC and Bharat Sharma has also been held guilty under Section 324 IPC. Thus, all these accused have been convicted for the offences alleged.

7. On the point of sentence, regard being had to the entire circumstances and nature of the case, the trial court awarded sentence to Bharat Sharma (appellant no.1) to undergo rigorous imprisonment for a period of one month under Section 323 IPC, to undergo simple imprisonment for a period of 15 days under Section 341 IPC, to undergo rigorous imprisonment for a period of three months under Section 379 IPC and further he has been awarded sentence of six months under Section 324 IPC. All the sentences passed by the learned trial court are to run concurrently. So far as the other accused persons are concerned, regard being had to their act done in this case and that they had no criminal antecedent, the trial court did not award them any substantive punishment rather released the three other accused Shankar Mahto, Ram Prakash Mahto and Bishun Sharma on probation of good conduct and for keeping peace for a period of two years after executing a probation bond of Rs.5000/- with two sureties of the like amount each. In the aforesaid circumstances, all the accused have preferred the present appeal before this Court.

8. In course of argument Sri Ranvir Singh, learned counsel representing the appellants as Amicus Curiae would submit that the learned trial court has failed to examine the deposition of the prosecution witness nos. 5, 6, 8, 9 and 10 appropriately. He submits that the fardbeyan (Ext.-1) itself shows that Rajendra Mahto, the informant, (PW-9) and Shankar Mahto (appellant no.3) are full brothers. It is the case of the informant that the appellant no.3 had beaten PW-8 (wife of PW-9). As regards this allegation there is no eye witness. PW-5 in his deposition has stated that while he was going to a shop at about 8.00 pm to

bring Biri he saw that calf of Shankar Mahto pull down the cow of Rajendra Mahto and thereupon the wife of Rajendra Mahto asked Shankar Mahto to keep away his calf. In paragraph 2 he says that when he returned from the shop then a fight took place between the wife of Rajendra Mahto (PW-8) and Shankar Mahto (appellant no.3). He further stated that Shankar Mahto was lashed with lathi and assaulted the PW-8, but thereafter he did not see anything. In paragraph 3, he further stated that he had lifted the PW-8 and left her at some distance she was in conscious condition. This witness left thereafter. In paragraph 4, he has categorically stated that he had not seen any of the accused assaulting Rajendra Mahto. His attention was drawn towards the statement made before the police that he had stated that Shankar Mahto had assaulted Rajendra Mahto with lathi. Learned counsel therefore submits that first of all this witness (PW-5) has not even whispered the name of the appellant no.1, 2 and 4 and his statement that he has seen Shankar Mahto assaulting PW-8 by lathi when he returned from the shop is not believable because it is the case of PW-8 that the whole occurrence had taken place at the spur of the moment. The manner of occurrence as alleged by the informant (PW-9) is not corroborated from the deposition of PW-5. Learned counsel further submits that PW-6 in his deposition has stated that on Hulla raised he reached to the house of Rajendra Mahto (informant) where he saw that four accused persons were already present there. He has stated that Bharat Sharma had assaulted by butt of farsa. Rajendra Mahto was also beaten, but this witness has not named the persons who had beaten Rajendra Mahto (PW-9). In course of his cross-examination this witness has stated the boundary of the house of the informant but this witness is not residing in the boundary of the house of the informant. He has clearly stated that he had gone there after the alleged occurrence. He has only stated that when he reached 5-7 persons were present on the place of occurrence. He has not stated that he had seen the accused Shankar Mahto, Bishun Sharma and Ram Prakash Mahto committing any assault or theft. Learned counsel submits that none of these witnesses have supported the case of theft. The informant only reiterated his stand in course of his deposition and the informant tried to improve upon his fardbeyan by making statement that Bharat Sharma had attacked by his farsa on his head, but he was consistent to this effect that Bharat Sharma and Bishun Sharma assaulted him by butt of the farsa due to which he fell down.

9. Learned counsel submits that PW-8 has supported the version of PW-9, but the evidence of PW-8 and PW-9 alone cannot be relied upon to convict the accused because as both wife and husband respectively are related and partisan witnesses. PW-9 changed his statement in course of trial and he alleged that he was assaulted by farsa and not by butt of farsa. He also stated that he had not stated before the police that he was beaten by butt of farsa and the injury suffered by him was due to felling down.

10. Dr. Nirmal Kumar Chaudhary (PW-10) has proved the injury report. He stated that all injuries were simple in nature. As regards the first injury PW-10 stated that the injury no.1 found on the body of the informant is not possible by hard

blunt substance. He stated that if this injury is inflicted by blunt portion of farsa, it would be a lacerated wound. He further stated that injury no.1 cannot be caused due to accidental fall. In his cross-examination PW-10 has stated that he had not mentioned the column of injuries in his report. The two injury reports were marked as Ext. 2 and 3.

11. Learned counsel for the appellants submits that in fact the trial court could not appreciate that very case of the informant was that he was hit by butt of farsa. He had narrated this to the investigating officer, but in course of his deposition he improved upon his fardbeyan. The I.O. was not examined in this case and therefore, the veracity of the statement made by PW-9 changing his stand could not be tested by the evidence which has caused prejudice to the accused. Learned counsel submits that two independent witnesses on whom the learned trial court has relied i.e. PW-5 and PW-6 are not corroborating the case of PW-9. In fact the PW-5 and PW-6 are not consistent on the point of assault. PW-5 has not seen anybody except Shankar Mahto on the place of occurrence, whereas PW-6 reached on the place of occurrence after the alleged occurrence had already taken place. He has stated in his cross-examination that on Hulla he had gone there, but nobody told him about the alleged occurrence. This witness is, therefore, not corroborating the statement of PW-8 and PW-9. There is no evidence at all on the point of theft. Learned counsel for the appellants submits that the trial court has not followed the provisions of Section 313 Cr.P.C.

12. On the other hand, learned APP representing the State duly assisted by learned counsel for the informant submits that the judgment under appeal is legal and correct and no interference is required. Learned counsel submits that the accused persons were neighbours and therefore they were identified by the informant and his wife. It is further submitted that non-examination of the I.O. in the present case has not prejudiced the accused.

13. I have heard learned counsel for the parties and perused the records. It appears that the informant in his fardbeyan (Ext.-1) has clearly stated that he got injuries because of the felling down. He has also stated that he was hit by the butt of farsa in the left side of his head. In course of trial, the informant improved upon his statement and stated that he was hit by farsa. When his attention was drawn towards statements made by him before the police, he stated that he had not made that statement before the police, therefore, in these circumstances, examination of the investigating officer was must and non-examination of the investigating officer shall be fatal to the prosecution.

14. PW-8, the wife of the informant, has also stated in course of trial that the informant was hit by butt of farsa due to which he fell down. PW-5 has not seen the occurrence inasmuch as he has clearly stated that he had not seen the accused persons. PW-6 has stated that he reached on the place of occurrence only after hearing Hulla and when he reached there accused persons were present, but he has nowhere stated that in his presence these accused persons had assaulted the informant. PW-10 has proved the injury reports.

15. Ext.-2 is the injury report of the informant. As regards the injury no.1 PW-10 had opined that it has been caused by sharp cutting substance. PW-10 has stated that injury no.1 cannot be caused by hard blunt substance. According to me, at the same time it cannot be held that injury no.1 was caused by farsa because the informant has clearly stated that he fell down after getting assault by butt of farsa which caused injury. He has stated that because of his felling down injury was caused in the left side of his head. Thus, what was there at the place of occurrence which caused injury after felling down of the informant would be a question in issue and I.O. of the case could have been the best witness to say this. In absence of any independent witness and due to non-examination of the I.O., the finding of the trial court based on the statements of PW-9 and PW-10 does not inspire confidence. From the evidences placed on the record, it is clear that there is no evidence at all on the point of theft, none of the witnesses have seen the two accused taking out the silver Hasuli from the neck of PW-8. PW-6 says that when he reached there accused were present but he has not stated to have seen the accused either taking out the silver Hasuli or keeping it in hand with anyone of them, therefore, I am of the opinion that conviction of Bharat Sharma (appellant no.1) under Sections 324 and 379 of the Indian Penal Code cannot sustain and the same is liable to be set aside.

16. From the entire materials and the deposition of the witnesses on record, this much is proved that an occurrence has taken place in which at the spur of the moment, the wife of the informant was assaulted by Shankar Mahto and thereafter these accused persons assembled and got involved in the occurrence where due to the hit received by butt of farsa the informant fell down and suffered injuries in the left part of his head which was simple in nature. I am therefore of the opinion that all the accused persons have been rightly convicted under Sections 323 and 341 of the Indian Penal Code. The appellant nos.2, 3 and 4 were released on probation of good conduct under the provisions of the Probation of Offenders Act, 1958. In my opinion conviction of accused Bharat Sharma (appellant no.1) under Sections 324 and 379 IPC and Bishun Sharma (appellant no.2) under Section 379 IPC are fit to be set aside and are accordingly set aside. Conviction of appellants under Section 323 and Section 341 IPC is upheld. Since appellant nos. 2, 3 and 4 have got release on execution of bond of Rs.5,000/- under Probation of Offenders Act, 1958, the appellant no.1 shall also be released on execution of bond of Rs.5,000/- with two sureties of the like amount to keep peace and good behaviour for a period of two years.

17. This appeal is disposed of in terms stated hereinabove.