

CRIMINAL APPEAL(SJ) NO. 368 of 2003

Against the judgment of conviction and order of sentence dated 06.03.2003 passed in Sessions Case No. 21 of 1996 by the learned Additional Sessions Judge, Fast Track Court No. 2, Deoghar.

1. Nand Kishore Jha, Son of late Dubraj Jha,
2. Vijay Kumar Rajhans, Son of Paras @ Parameshwar
3. Tarun Kumar Rajhans, Son of Paras @ Parameshwar Rajhans.

All resident of Village Kanshidih, P.S.- Kunda, Sub-Division & District- DeogharAppellants

Vs.

The State of JharkhandRespondent

For the Appellant :Mr. A.K. Kashyap, Sr. Advocate
Mr. Pramod Kumar Jha, Advocate
For the Respondent : Mrs. Vandana Bharti, APP

PRESENT

HON'BLE MR. JUSTICE RATNAKER BHENGRA

C.A.V. ON 08.05.2019

DELIVERED ON 26 /06 /2020

Ratnaker Bhengra,J: This appeal is directed against the judgment of conviction and order of sentence dated 06.03.2003 passed in Sessions Case No. 21 of 1996 by learned Additional Sessions Judge, Fast Track Court No. 2, Deoghar, by which the learned court below has convicted the appellants under sections 436/34 of the Indian Penal Code and sentenced them to undergo R.I. for five years and fine of Rs. 2,000/- each and in default of payment of fine simple imprisonment of six months under section 436/34 IPC. It was further ordered that 60 per cent of the fine deposited shall go to the informant of the case. The sentence was ordered to run concurrently.

2. The case of the prosecution, in brief, as per the fardbeyan dated 04.05.1995 of the informant Sukh Deo Jha PW-4 is that on 03.05.1995 at about 10.00 O'clock night the informant after taking dinner was sleeping outside his door due to the heat. At about 01.30 O' Clock night all of sudden when he awoke he saw fire in the house of his villagers Avinash Jha and Girdhari Jha. Informant raised hulla and saw the accused persons Nand Kishore Jha, Vijay Rajhans, Tarun

Rajhans alongwith his two unknown associates coming out of the house of said Avinash Jha and Girdhari Jha and running towards the river. The informant and his son Vijay Kumar Jha chased the accused persons raising alarm up to river but the accused fled towards their house through river. On hulla other witnesses also saw the accused persons fleeing away. It is further stated that due to the fire flames the house of the informant, Bam Deo Jha, Kam Deo Jha and Brahma Deo Jha was also damaged. Informant further stated that due to old enmity between the parties incident of fire burning occurred.

3. On the basis of this fardbeyan of the informant Jasidih (Kunda) P.S. Case No. 69 of 1995 dated 04.05.1995 under section 436/427/34 IPC was registered. After the investigation charge sheet was submitted and accordingly cognizance of the offence was taken and the case was committed to the court of sessions. The accused persons were charged under section 436/34 of IPC and trial was held. At the conclusion of the trial accused persons or the appellants herein were convicted and sentenced as aforesaid. Hence, this appeal.

4. Prosecution examined altogether five witnesses in support of its case. PW-4 Sukh Deo Jha is the informant of the case. PW-1 Girdhari Jha is the nephew and PW-2 Kamdev Jha and PW-3 Bramha Deo Jha are the brothers of the informant. PW-5 is an advocate clerk, a formal witness. On behalf of the defense one defense witness D.W.-1 was examined and land documents have been marked exhibit from Ext.-'B' to Ext.-'N' on behalf of the defense.

5. P.W.-4 Sukh Deo Jha is the informant of the case. He has stated in his evidence that on 03.05.1995 at about 01.30 O' Clock in the night he was sleeping outside of his house. He woke up on barking of dog and saw fire flames. He ran there and raised hulla. He saw five persons standing there and then they fled away. In fire flames from the house of Avinash Jha, informant identified accused persons Nand Kishore Jha, Vijay Rajhans and Tarun Rajhans. Informant, has proved his signature and signature of Girdhari Jha on the fardbeyan which was marked Ext.-1 and Ext.-1/1 respectively. In his cross-examination informant stated he alongwith Girdhari, Kamdeo Jha,

Avinash Jha and Bramha Deo Jha chased the accused person.

6. P.W. 1 Girdhari Jha is the nephew of the informant. He has stated in his evidence that occurrence is of 03.05.1995 at about 01:30 to 02:00 O' Clock night. He was sleeping in his courtyard. On alarm of his uncle Sukh Deo Jha he woke up and came out of his house. He saw the five accused persons fleeing away out of which he recognised accused Nand Kishore Jha, Vijay Rajhans and Tarun Rajhans. He along with his uncle chased the accused persons but they fled away. P.W-1 further stated that due to fire his house and house of Avinash Jha was burnt and articles of his house was also burnt. Avinash Jha had land dispute with accused Nand Kishore Jha.

7. P.W. 2 Kam Deo Jha has stated in his evidence that incident occurred about 5-6 years ago at about 01:30 to 02:00 O' Clock in the night. He was sleeping at his courtyard and woke up on barking of dog. On alarm of Sukh Deo Jha he came out of his house and saw fire and accused persons Nand Kishore Jha, Vijay Rajhans and Tarun Rajhans and unknown accused persons were fleeing away. PW-2 further stated houses of five persons Bam Deo Jha, Girdhari Jha, Sukh Deo Jha, Avinash Jha alongwith his house were completely burnt. P.W-2 further stated that he identified the accused persons in the light of fire and he chased them but accused persons fled away.

8. P.W. 3 Bramha Deo Jha has stated in his evidence that that on 03.05.1995 at about 01:30 to 02:00 O'Clock night he was sleeping in his house. On alarm of his brother Sukh Deo Jha, he came out of his house and saw five persons fleeing away in the north towards the river out of whom he recognised Nand Kishore Jha, Vijay Rajhans and Tarun Rajhans. P.W-3 further stated that they chased the accused persons but to extinguish the fire he returned.

ARGUMENTS OF THE APPELLANTS

9. Learned counsel for the appellants submitted that it has come in the evidence of the prosecution witnesses that there was existing land dispute between the parties. It has come on the record that the litigation was ongoing and therefore the entire case or appeal has to be seen in this background. Learned counsel further submitted that

both the parties are also *gotias* or *agantes*. Counsel for the appellants also submitted that on going through the entire evidences, it seems that no one has actually seen anyone burning the house, even if, the allegations are taken to be true. From the fardbeyan of the informant Sukh Deo Jha P.W-4 it may be inferred that only he would have been able to see the burning of the house by the accused because on getting up he claims to have seen them. It is only on his alarm that the other persons or witnesses awoke and then chasing of the accused persons by the informant side is merely a development and manufactured story as the prosecution witnesses, who are nephew and brothers, are interested witnesses. Hence, the claim of recognition of accused persons is doubtful and raises doubt about the prosecution case. No other persons from nearby vicinity have come forward to give evidence in court.

10. Learned Counsel has also argued that no evidence such as match boxes, container of Kerosene oil etc. from the site of the occurrence has been seized and exhibited to prove the case of the prosecution and this also raises doubt about the prosecution case.

11. Learned counsel for the appellants also submitted that as per the fardbeyan informant's son Vijay Kumar Jha had also chased the accused persons along with the informant but the said Vijay Kumar Jha has was not examined as witness.

12. Learned Counsel also submitted that the offence under section 436 of the Indian Penal Code mentions “whoever commits mischief by fire or -----” would be the accused but in this case no one has seen the burning or the arson initiating by the accused persons or the appellants and therefore the offence cannot be made out against the appellants. Learned counsel for the appellant has also relied on judgment of Hon'ble Patna High Court delivered in case of **Brahmdeo Hazra V. State of Bihar** reported in **1987 BBCJ 340** on the point of non-examination of Investigating Officer and submitted that investigation officer has not been examined and his non-examination has greatly prejudices the appellants' case as appellant did not get opportunity to cross-examine the investigating officer.

ARGUMENTS OF THE APP

13. Learned counsel for the State, learned APP Mrs. Vandana Bharti has argued that the offence under section 436/34 of the IPC has to be read with along with section 425 of the Indian Penal Code. The mischief involved and destruction of the property by setting of fire have been seen by the eye witnesses. First and foremost there are evidences of PW- 1 to PW-4 who are all related including the informant have corroborated the fardbeyan in their evidence and deposed that they had seen the accused or the appellants setting fire and fleeing away and they had also chased them. Learned counsel has also argued that the conduct of the accused persons is also relevant because it has come in the evidence that they have said “*bhago aag lag gaya*” which means that after the accused had set ablaze the houses of the informant party and then they wanted to escape. The offence against the appellants are fully made out because the accused intended to cause the setting of fire, they knew it was likely to cause destruction and the building was used as a source of residence or dwelling and they had also set the building on fire. Learned counsel for the State has relied on the judgment of Hon'ble Apex Court delivered in the case of **Busi Koteswara Rao V. State of Andhra Pradesh** reported in **(2012) 12 SCC 711** Therefore all the ingredients of the offences are fully made out. Lastly, learned counsel for the State submitted that on the basis of evidence of the eye witnesses, the impugned judgment passed by the learned court below be sustained and upheld by this court.

CONCLUSION

14. Having heard both counsels; having gone through the records of the case and the evidences, I find that that this is a case in which the enmity is written in all over the evidence. It seems that prior to the occurrence parties were engaged in land dispute from long before and were in litigating terms. It is said that enmity cuts both ways so this case has to be seen in the light of other evidences that are brought on record.

15. From the evidence, I find that the seizure list of the remnants

of burnt articles has been proved by a formal witness PW-5, who is an advocate clerk and the said seizure list has been marked as Ext.-4. On perusal of seizure list, I find that there are two seizure list witness namely Raju Mahto and Nand Lal Mahto. But, these two seizure list witness have not been examined by the prosecution which makes the prosecution case doubtful. Further due to non-examination of the investigating officer appellants did not get opportunity to cross-examine the prosecution witnesses on several issues and point out the contradiction on various points hence, appellants were greatly prejudiced. So, in absence of non-examination of investigating officer and non-examination of seizure list witness the prosecution case becomes doubtful. Hence, the prosecution has failed to prove the charges under section 436/34 of IPC against the appellants.

16. Therefore, on the aforesaid reasonings, I am unable to sustain the judgment of conviction and order of sentence dated 06.03.2003 passed in Sessions Case No. 21 of 1996 by the learned Additional Sessions Judge, F.T.C. N0. 2, Deoghar and is set aside. The appellants are acquitted of the charges under section 436/34 of IPC and are discharged from the liabilities of the bail bonds.

17. Accordingly, this appeal is allowed.

(Ratnaker Bhengra,J.)

Jharkhand High Court, Ranchi
Dated 26 /06 /2020
Sharda/NAFR