

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.94 of 2014

Arising Out of PS.Case No. -150 Year- 2008 Thana -THAKRAHA District- WEST CHAMPARAN
(BETTIAH)

- 1. Rajan Tiwary,
- 2. Brijja Shankar Tiwary
- 3. Braj Kishore Tiwary,
- 4. Nand Kishore Tiwary

All are son of Late Kuer Tiwary, resident of Village and P.S. -Thakarha, P.S.-
Thakaraha, Dist.-West Champaran

.... Appellants

Versus

The State of Bihar

.... Respondent

With

Criminal Appeal (SJ) No. 150 of 2014

Arising Out of PS.Case No. -150 Year- 2008 Thana -THAKRAHA District- WEST CHAMPARAN
(BETTIAH)

Sandip Tiwari, Son of Jagdamba Tiwari, Resident of Village- Thakrahan, P.S.-
Thakrahan, District- West Champaran

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

(In Cr. Appeal (SJ) No. 94 of 2014)

For the Appellants : Mr. Shanti Kumar, Advocate
Mr. Dhananjay Kumar Tiwary, Advocate

For the Respondent : Mr. Z. Hoda, APP

(In Cr. Appeal (SJ) No. 150 of 2014)

For the Appellant : Ms. Sushmita Mishra, Advocate

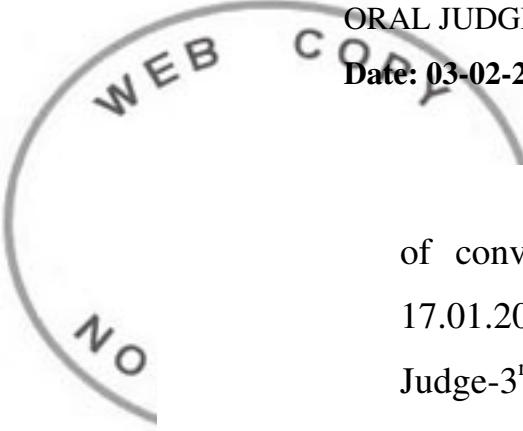
For the Respondent : Mr. S.A. Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 03-02-2015



These two appeals are directed against the judgment of conviction dated 16.01.2014 and order of sentence dated 17.01.2014 passed by the learned *Ad hoc* Additional Sessions Judge-3rd, Bagaha in Sessions Trial No. 98 of 2011/S.No. 112 of 2013 whereby various sentences have been passed against the accused appellants for their conviction under different sections of the Indian Penal Code. The concluding part of the impugned judgment of the trial court whereby the appellants have been convicted reads as under:-

“But, on the basis of aforesaid discussions, I find and hold that accused Sandip Tiwari and Rajan Tiwari are guilty for committing offences punishable u/s 148, 323, 324, 325, 304 Part Ist read with Section 34 of the I.P.C., whereas, accused Brija Shankar Tiwari, Brij Kishore Tiwari and Nand Kishore Tiwari are guilty for committing offences punishable u/s 147, 323, 325, 304 Part Ist read with section 149 of the I.P.C. Accused Sandip Tiwari is already in jail custody in this case. Accused Rajan Tiwari, Brija Shankar Tiwari, Brij Kishore Tiwari and Nand Kishore Tiwari are on bail. Their bail bonds stand cancelled. They are taken into judicial custody.”

2. The concluding part of the impugned order of the

trial Court whereby the appellants have been sentenced reads as under:-

“Having, thus, considered the facts and circumstances of this case, offenders Sandip Tiwari and Rajan Tiwari are ordered to undergo rigorous imprisonment of one year u/s 148 I.P.C., R.I. of six months u/s 323 I.P.C., R.I. of one year u/s 324 I.P.C., R.I. of three years and to pay fine of Rs. 2000/- and in default of payment of fine to further undergo R.I. of two months for offence u/s 325 I.P.C. and R.I. of ten years and to pay fine of Rs. 2000/- and in default of payment of fine to further undergo R.I. of two months for offence u/s 304 Part Ist of the I.P.C. Offenders Brija Shanker, Brij Kishore and Nand Kishore are ordered to undergo R.I. of six months u/s 147 I.P.C., R.I. of six months u/s 323 I.P.C., R.I. of three years and to pay fine Rs. 2000/- and in default of payment of fine to further undergo R.I. of three years and to pay fine of Rs. 2000/- and in default of payment of fine to further undergo R.I. of two months u/s 325 I.P.C. and R.I. of ten years and to pay fine Rs. 2000/- and in default of payment of fine to further undergo R.I. of two months u/s 304 Part Ist I.P.C. All sentences of the all offenders shall run concurrently and their period of detention in jail during trial of this case shall be set off from the above period of sentence.”

3. Since the judgment of conviction dated 16.1.2014 and order of sentence dated 17.1.2014 have been impugned in these two appeals they have been heard together for the purposes of final disposal and are being disposed of accordingly. The question that arises for consideration in these appeals is whether the trial Court was justified in convicting and sentencing the appellants of the present case.

4. In order to appreciate the issues involved in the present case, it is necessary to state the prosecution case in brief. One Binod Tiwari lodged a written report in Thakraha Police Station, West Champaran, stating that on 2.11.2008 at about 7 a.m. while his mother Kishnawati Devi was sweeping floors at her door, the appellants Brija Shankar Tiwari, Brij Kishore Tiwari, Rajan Tiwari, Nand Kishore Tiwari and Sandip Tiwari came there. They not only abused but pushed her too. In the meantime, the informant's youngest son informed him and his uncle Lalan Tiwari that her grand-mother Kishnawati Devi is being assaulted by the aforesaid persons. On receipt of such information, the informant and his uncle Lalan Tiwari immediately came and intervened in the matter. It has been alleged that first of all Brija Shankar Tiwari and Brij Kishore Tiwari caught hold of the informant's collar and pushed him down. They assaulted him with *lathi* and *danda*. Thereafter, the appellants Sandip Tiwari and Rajan Tiwari assaulted Lalan Tiwari with spear and *farsa* causing bleeding injury. When the informant's father Sharma Tiwari and his brother Sanjay Tiwari came in rescue, they were also assaulted. It has been stated that with the intervention of villagers, victims rescued themselves and came to the police station where the informant lodged a written report pursuant to which Thakraha P.S. Case No.

150 of 2008 was registered on 2.11.2008 at 8.10 a.m. initially for the offences punishable under Sections 147, 448, 341, 323, 324 and 504 of the Indian Penal Code but subsequently, Section 302 of the Indian Penal Code was also added in the FIR.

5. On completion of the investigation of the case, charge sheet was submitted under the aforesaid sections of the Indian Penal Code and the appellants were sent up for trial. The learned Chief Judicial Magistrate, West Champaran took cognizance of the offence and after complying with the mandatory provision as prescribed under Section 207 of the Code of Criminal Procedure, committed the case to the Court of Sessions on 4th February, 2011. The trial Court framed the following charges on 22.11.2011 against the appellants:-

(i) All the five appellants were charged for the offences punishable under Section 147, 148, 149, 323, 324, 325, 341, 448 and 504 of the Indian Penal Code.

(ii) The appellants Rajan Tiwari and Sandip Tiwari were separately charged for the offence punishable under Section 302 of the Indian Penal Code.

The appellants pleaded not guilty to the charges and claimed to be tried. Accordingly, the trial commenced.

6. In order to substantiate the prosecution case, altogether ten witnesses were examined on behalf of the prosecution. Out of them P.W. 8 Subodh Kumar Tiwari, P.W. 4 Sidhnath Jha and P.W. 9 Bijay Shankar Singh are formal witnesses whereas P.W. 1 Dhananjay Tiwari has been declared hostile by the prosecution. P.W. 6, namely, Munna Tiwari though claims to be



an eye-witness but his name does not find place in the charge sheet in the list of witnesses to be examined before the Court. P.W. 2 Sharma Tiwari, P.W. 3 Binod Tiwari and P.W. 5 Sanjay Kumar Tiwari are injured witnesses. P.W. 8 Subodh Tiwari is an independent witness. However, he is not an eye witness to the occurrence. He is a hearsay witness. P.W. 7 Dr. Sajjad Ahmad is a medical officer who had examined the injured persons initially at Primary Health Centre, Thakraha whereas P.W. 10 Dr. Ashok Kumar Singh is the doctor who had conducted postmortem examination on the dead body of the deceased. P.W. 4 Siddhnath Jha is the second investigating officer of the case who had simply submitted charge sheet after the investigation was completed. The first investigating officer of the case has not been examined in the present case due to his death.

7. Apart from the oral evidence led by the prosecution it has also proved written report of the aforesaid police case which has been marked as Ext. 1, injury reports of the injured persons which have been marked as Ext. 2 to 2/D, signature of P.W. 8 on inquest report which has been marked as Ext 3/C, formal FIR of Thakraha P.S. Case No. 150 of 2008 which has been marked as Ext. 4, endorsement on the written report which has been marked as Ext. 5 and inquest report which been marked as Ext. 8.

8. In order to substantiate innocence of the appellants, the defence has also examined two witnesses. They are D.W. 1 Bishwanath Prasad and D.W. 2 Pradumn Tiwari. The defence has also exhibited certain documents in course of trial.

9. After concluding the trial and hearing the arguments advanced on behalf of the parties, the trial court

acquitted the appellants of the charges under Sections 341, 448 and 504 of the Indian Penal Code but convicted and sentenced them in the manner described hereinabove.

10. I have heard Mr. Shanti Kumar, learned counsel for the appellants in Cr. Appeal (SJ) No. 94 of 2014, Ms. Susmita Mishra, learned counsel for the appellant in Cr. Appeal (SJ) No. 150 of 2014 and Mr. S.A. Ahmad, learned Additional Public Prosecutor for the State.

11. Mr. Shanti Kumar, learned counsel for the appellants in Cr. Appeal (SJ) No. 94 of 2014 while assailing the conviction and sentence contended that the trial court erred in law as well as on facts of the case. The charges framed and tried misled the appellants causing great prejudice to their defence. The trial Court framed a separate charge under Section 149 of the Indian Penal Code and misled itself in recording finding with respect to common object of the appellants for commission of the alleged offences. He urged that there is no evidence on record worth suggesting or proving the ingredients of Section 304 Part-I of the Indian Penal Code. He maintained that the trial Court had framed charge under Section 302 of the Indian Penal Code against the appellants Rajan Tiwari and Sandip Tiwari but without aid of sections 34 or 149 of the Indian Penal Code but it illegally convicted all the five appellants for the offence under Section 304 Part-I of the Indian Penal Code with aid of Section 149 or 34 of the Indian Penal Code.

12. He has further urged that the trial Court failed to appreciate that the genesis of occurrence starts from Kishnawati Devi with abuse and assault caused to her by the accused appellants but she has not been examined in the Court. Similarly,



Munni Devi and Usha Devi being daughter and wife respectively of Lalan Tiwari though named as witnesses in the charge sheet but were not examined by the prosecution in course of trial. The son of the informant who is stated to have initially informed the informant regarding the alleged incident has also not been examined. He has urged that one Binay who is stated to have scribed the written report has neither signed the same nor has been examined by the prosecution. The contention is that the Court below ought to have taken adverse inference in terms of Section 114(g) of the Indian Evidence Act against the prosecution for non-examination of important and vital witnesses.

13. Mr. Kumar has further submitted that the trial Court has given no consideration to the evidence of P.W. 10 Dr. Ashok Kumar Singh, the doctor who conducted autopsy. He has clearly stated that he did not find any penetrating injury on the dead body of the deceased. He has stated that the trial Court failed to appreciate the fact that P.Ws. 2, 3, 5 & 6 in their deposition gave a different story from the FIR as they gave a complete go-bye to the story of assault on the person of the deceased Lalan Tiwari by *farsa* as narrated in the FIR.

14. Mr. Kumar has further urged that the trial Court has committed a grave error in convicting the appellants for different charges with a finding that Ext. B and C proved by the defence i.e. the written report and formal FIR lodged by the appellant Rajan Tiwari is the admission of the facts of commission of the alleged offence. According to him, the trial Court failed to appreciate that Ext. B & C are the basis of defence against the prosecution party which is a subject matter of a separate trial in a counter case and if Ext. B & C as proved by the defence in course

of trial are taken as admission of the commission of crime by the appellants, great prejudice would be caused to the defence in the counter case which is already pending for trial in the Court below.

15. While adopting the arguments made by Sri Shanti Kumar, Ms. Susmita Mishra, learned counsel for the appellant Sandip Tiwari has submitted that the material exhibits i.e. blood stained clothes of the deceased and the informant and blood stained mud have not been collected by the police and, therefore, it has caused serious prejudice to the case of the defence. She submits that even the alleged weapons of crime like, *farsa* and spear were not seized by the police and they were never produced in the Court. She has maintained that the doctor who is stated to have treated the victim Lalan Tiwari at Gorakhpur Medical College Hospital has not been examined and even the medical report of Gorakhpur Medical College Hospital has not been proved by the prosecution in course of trial. She has submitted that the members of the prosecution party were made accused in the counter case vide Thakraha P.S. Case No. 151 of 2008 and on conclusion of investigation, the police had submitted charge sheet in that case too. According to her, both the cases ought to have been tried together side by side and since it has not been done, the defence of the case has been seriously prejudiced.

16. Lastly, she has submitted that witnesses examined on behalf of the prosecution were thoroughly inconsistent and unreliable and, hence, the Court below ought to have recorded a judgment of acquittal in favour of the appellant Sandip Tiwari.

17. Mr. S.A. Ahmad, learned counsel for the respondent-State has submitted that no case is made out to call for



any interference with the impugned judgment. He has submitted that the trial Court rightly appreciated the evidence on record, which was sufficient in ordinary course to sustain the finding of conviction. He has submitted that minor error or discrepancy in statement of prosecution witnesses would be of no consequence. The defect in framing of charge is also of no consequence as the defence was neither misled by such defect nor it has occasioned in failure of justice. The witnesses examined on behalf of the prosecution in course of trial have fully proved and corroborated the prosecution case. According to him, the doctor who conducted postmortem examination on the dead body of the deceased has also found corroborative injuries.

18. Before reaching to any conclusion in respect of findings of the trial Court, I think it proper to take note of the charges for which the appellants were tried by the Court below. I have carefully and critically examined the lower court records with assistance of respective counsel for the appellants and the State. I find that the trial Court has wrongly recorded in paragraph no. 1 of the impugned judgment that all the appellants were charged under Section 302 of the Indian Penal Code with aid of Section 149 of the Indian Penal Code. It is an error on the face of the record. As a matter of fact, the appellants Sandip Tiwari and Rajan Tiwari were the only two accused who were charged separately for the offence under Section 302 IPC. So far as the other three appellants are concerned, they were never ever charged for the offence punishable under Section 302 of the Indian Penal Code. Moreover, the appellants Sandip Tiwari and Rajan Tiwari were also not charged under Section 302 of the Indian Penal Code with aid of Section 149 of the Indian Penal Code. It is true that they were

separately charged for the offence punishable under Section 149 IPC. Section 149 of the Indian Penal Code creates a specific offence and deals with punishment of that offence alone. It postulates an assembly of five and more persons having a common object and then the doing of acts of commission by it in prosecution of that object. I shall deal with this aspect of the matter at a later stage.

19. From the written report on the basis of which the FIR has been instituted, it is apparent that the informant Binod Tiwari (P.W. 3) has alleged in his first information report that the appellants Rajan Tiwari and Sandip Tiwari assaulted with *Bhala* and *farsa* causing injuries to his uncle Lalan Tiwari as a result of which he fell down and became unconscious. He has also alleged that co-accused Brija Shankar Tiwari and Brij Kishore Tiwari assaulted him with *lathi* and *danda*. In the FIR, he has further alleged that all the accused persons indiscriminately assaulted his father Sharma Tiwari (P.W. 2) and brother Sanjay Tiwari (P.W. 5). However, while deposing in the Court, the informant has materially changed the story. He has stated that he was assaulted by the accused persons with *lathi* and *farsa* as a result of which he sustained injuries over his wrist of right hand and left leg. He has confined the story of assault on his uncle Lalan Tiwari against the accused appellant Sandip Tiwari with *Bhala* which caused injury on his right side of waist. He further states that others assaulted him with *lathi* causing injury on his right arm. He has given a complete go-bye to the story of assault with *farsa* caused to his uncle Lalan Tiwari by the appellant Rajan Tiwari. He has proved the written report marked as exhibit 1. He has submitted that the same was written by one Vinay (not examined). He has stated that

the injured persons were taken to Thakraha Government Hospital first from where they went to Gopalganj and were treated at Gopalganj District Hospital. However, his uncle Lalan Tiwari was referred to Gorakhpur Medical College Hospital for better treatment and in course of treatment, he died at Gorakhpur.

20. I further find that the informant has materially changed the prosecution case as narrated in the FIR. In his deposition, he has given a complete go-bye to the allegation of injury caused with *farsa* on the dead body of the deceased in his written statement. Though, in the written statement, he alleged that Rajan Tiwari had also assaulted upon Lalan Tiwari with *farsa* or *Bhala* but in his deposition in Court, he did not utter a word regarding use of *Bhala* or *farsa* by the appellant Rajan Tiwari.

21. The doctor of Thakraha Government Hospital Md. Sajjad has been examined by the prosecution as P.W. 7. He states that he had examined the informant at P.H.C. Thakraha at 12.15 p.m. on 2.11.2008 and found the following injuries on his person:-

- (i) Incised wound left leg (Middle part) of size 1 $\frac{1}{4}$ " x $\frac{1}{4}$ " x muscle deep. X-ray AP and lateral.
- (ii) Red bruise on left knee joint of size 1 $\frac{1}{2}$ " x 1".
- (iii) Abrasion over Shin of Tibia (left side) three in numbers $\frac{3}{4}$ " x $\frac{1}{4}$ " to $\frac{1}{2}$ " x $\frac{1}{4}$ ".
- (iv) Abrasion over right knee $\frac{3}{4}$ " x $\frac{1}{2}$ ".
- (v) Diffused swelling with bruise over right back of palm of size 1 $\frac{1}{2}$ " x 2". X-ray AP and lateral advised.

22. He kept his opinion reserved initially in respect of injury no. (i) and (v). So far as the other injuries are concerned,

he has opined that those were simple in nature caused by hard and blunt substances. He has proved injury report of the informant as Ext. 2. On receipt of the X-ray report, he has opined that injury no. (i) of the informant was simple whereas injury no. (v) was grievous in nature. He has proved the supplementary injury report of the informant which has been marked as Ext. 2/A. he has submitted that on the same day at about 11.30 a.m., he examined uncle of the informant Lalan Tiwari and found the following injuries on his person:-

- (i) Incised wound just above right side waist (back side) 1" x $\frac{1}{4}$ " x $\frac{1}{2}$ ".
- (ii) Abrasion over right arm (lateral side) $2\frac{1}{2}$ " x $\frac{1}{2}$ "
- (iii) Abrasion over right 4th toe of size $\frac{1}{2}$ " x $\frac{1}{4}$ ".

23. According to him, injury no. (i) was caused by sharp cutting object like, *Bhala*, dagger, etc. Injury nos. (ii) and (iii) were caused by hard and blunt object. He has opined that all the injuries found on the person of Lalan Tiwari were simple in nature. He has proved the injury report of the Lalan Tiwari which has been marked as Ext. 2/B.

24. He has further stated that on the same day at about 11.55 a.m., he examined Sharma Tiwari and found the following injuries on his person:-

- (i) Abrasion over right side forehead of size 1" x $\frac{1}{4}$ "
- (ii) Abrasion over left shoulder of size $1\frac{1}{2}$ " x $\frac{1}{2}$ ".

25. According to him, both the injuries found on the person of Sharma Tiwari were simple in nature and were caused by hard and blunt substance. He has proved the injury report of

Sharma Tiwari which has been marked as Ext. 2/C.

26. He has further submitted that on the same day he examined Sanjay Tiwari and found the following injuries on his person:-

- (i) Incised wound on right thigh front of upper part of size $\frac{1}{2}$ " x $\frac{1}{4}$ " x muscle deep
- (ii) Incised wound right side thigh (upper part lateral side) of size $\frac{1}{4}$ " x $\frac{1}{4}$ " x muscle deep
- (iii) Incised wound right side back from scapular to below of size 5" x $\frac{1}{8}$ " x muscle deep.

27. According to him, all the injuries found on the person of Sanjay Tiwari were caused by sharp object like, *Bhala* and *farsa* and were simple in nature. He has proved the injury report of Sanjay Tiwari which has been marked as Ext. 2/D.

28. In cross-examination, he has admitted that there is difference between incised wound and penetrating wound. He has also admitted that he did not see any bleeding injury on the person of injured Lalan Tiwari at the time of his examination. He has further admitted that he did not see any penetrating wound on the body of Lalan Tiwari.

29. P.W. 10, Dr. Ashok Kumar Singh, posted at Sub-Divisional Hospital, Bagaha had conducted the postmortem examination on the dead body of Lalan Tiwari on 6.11.2008 at about 2.30 p.m. He found the following injury on external examination of the dead body:-

One stitched wound on right side of abdomen on lateral aspect.

30. He has categorically stated in his examination-in-chief that no other injury was found on the dead body. In

examination-in-chief itself, he has stated that above injury was antemortem in nature caused by penetrating weapon such as *Bhala* (spear). According to him, cause of death was due to shock and haemorrhage with septicaemia caused by the above mentioned injury. He has further stated that the time elapsed since death was 24 hours. He has proved the post mortem report which has been marked as Ext-6.

31. In cross-examination, he has admitted that he did not find any injury on the right side of waist on back portion of the deceased Lalan Tiwari. He has also admitted that the abovementioned antemortem injury may be possible on fall of the body on sharp edged weapon. He has stated that in case of septicaemia, blood becomes poisonous due to infection. He has also admitted that septicaemia may develop due to lack of proper treatment and care.

32. Thus, from the evidence discussed above, I find that in the FIR, the informant has alleged that the accused appellants Rajan Tiwari and Sandip Tiwari assaulted with *farsa* and *Bhala* on deceased Lalan Tiwari as a result of which he sustained profused bleeding due to which he fell down and become unconscious but the doctor who examined him first could find only one incised wound just above right side waist (back side) measuring 1" x ¼" x ½" which was simple in nature. The two other injuries found on his person were abrasions. Though, P.W. 7 has stated in his examination-in-chief that the injury no. 1 found on the person of the deceased Lalan Tiwari was caused by sharp cutting object like, *Bhala*, dagger, etc. but in cross-examination, he has admitted that there is difference between incised wound and penetrating wound. He has also admitted that he did not see any



penetrating wound on the person of Lalan Tiwari at the time of his examination. He further admitted that he did not see any bleeding injury on the person of injured Lalan Tiwari. The doctor who treated the deceased at Gorakhpur Medical College Hospital has not been examined. No chit of paper of his treatment at Gorakhpur Medical College Hospital has been brought on record. Moreover, the doctor who conducted the postmortem examination on 6.11.2008 at 2.30 p.m. on the dead body of the deceased could find only one stitched wound on right side of abdomen on lateral aspect. He could not notice any other injury on the body pursuant to external examination. The most important aspect of the evidence of P.W. 10 Dr. Ashok Kumar Singh is that in cross-examination, he categorically admitted that he did not find any injury on the right side of waist on back portion of the deceased Lalan Tiwari. Thus, the injury report issued by P.W. 7 and the evidence of P.W. 7 as made in the Court is materially being contradicted by P.W. 10 Dr. Ashok Kumar Singh. Despite the contradictions in the medical report, one thing is common that the injury on the person of Lalan Tiwari was admittedly simple in nature. The cause of death of Lalan Tiwari was septicaemia. However, in absence of corroborative medical evidence of Gorakhpur Medical College Hospital, the actual cause of death could not be ascertained. The prosecution has certainly withheld vital evidence in this regard without any explanation. The non-examination of the treating doctor of Gorakhpur Medical College Hospital and non production of medical report of that hospital casts a serious doubt upon the veracity of the prosecution case. Moreover, the story narrated in the FIR is being contradicted by the medical evidence. It is well known that spear (bhala) causes

penetrating injury and the doctor who examined Lalan Tiwary first did not find any penetrating wound on his person.

33. It would further appear from the deposition of P.W. 2 namely, Sharma Tiwari that he had reached at the place of occurrence after P.W. 3 Binod Tiwari and the deceased Lalan Tiwari. It would further appear from his deposition that he had gone to save them after they had sustained injuries which would further show that he had not seen the actual assault caused by the accused persons upon P.W. 3 Binod Tiwari and the deceased Lalan Tiwari. Similarly, P.W. 5 Sanjay Tiwari who claims himself to be an eye-witness has admitted in course of cross-examination that he had come at the place of occurrence after Binod Tiwari and Lalan Tiwari in order to save them after they had sustained injuries which would also indicate that he had not seen the actual incident of assault upon Binod Tiwari and Lalan Tiwari.

34. I further find from the deposition of Sanjay Tiwari that he has admitted in cross-examination that on the date of occurrence, he had seen injuries on the person of the appellants Brij Kishore Tiwari and Nand Kishore Tiwari. The evidence of P.W. 5 Sanjay Tiwary coupled with Ext. B and C which are FIR and charge sheet of counter case which have duly been proved by the defence would show that the prosecution has not come out with true story.

35. Having regard to the quality of evidence led in the Court, I am of the considered opinion that the witnesses examined on behalf of the prosecution have failed to prove the prosecution case beyond reasonable doubts.

36. I also find force in the argument advanced by Mr. Shanti Kumar in respect of prejudice caused to the appellants



due to fundamental defects in charge. The charges framed certainly misled them. The mere omission to mention Section 149 may be considered as an irregularity but failure to mention the nature of offence committed by them cannot be said to be a mere irregularity. The three appellants who were not even charged under Section 302 of the Indian Penal Code were not told by the trial Court that they have to face charges of being members of an unlawful assembly and the common object of such assembly was to commit murder of the deceased and in furtherance of common object murder was committed and thereby they had a constructive liability. Since there was no charge against them under Section 302 of the Indian Penal Code, they could not have been convicted by the trial Court for the lesser offence under Section 304 Part-I of the Indian Penal Code.

37. So far as the other two appellants, namely, Sandip Tiwari and Rajan Tiwari are concerned, though they were charged under Section 302 simplicitor but have been convicted under Section 304 part I with aid of Section 34 of the Indian Penal Code. However, while sentencing them, the trial Court has noted down that they have been convicted under Section 304 Part 1 read with 149 of the Indian Penal Code. It appears that while passing the impugned judgment and order, the trial court was thoroughly confused. It has wrongly recorded that all the five appellants were charged under Section 302/149 of the Indian Penal Code. It has recorded conviction of two appellants under Section 304 Part-I read with 34 of the Indian Penal Code but sentenced them for the offence punishable under Section 304 Part-I with aid of Section 149 of the Indian Penal Code.

38. The trial Court failed to consider that Section



149 creates a specific offence but Section 34 does not, and they both are separate and distinguishable. Section 149 IPC creates an offence punishable, but it depends on the offence of which the offender is by that Section made guilty. Therefore, for the appropriate punishment section must be read with it. Section 34, on the other hand, does not create any specific offence and there is a clear distinction between the provisions of sections 34 and 149 IPC. The Principal element in Section 34 IPC is the common intention to commit a crime. Section 34 provides that each one of the offender having common intention would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone.

39. In **Willie (William) Stanely v. State of M.P.** reported in **AIR 1956 SC 116**, a constitution Bench of the Hon'ble Supreme Court has held that an omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, as prejudice to the accused may be taken for granted. I do find that in the present case the defects in framing of charges are grave one and has certainly caused prejudice to the accused.

40. In sum and substance, there is lots of improvement in the prosecution case at every stage of trial. The material exhibits were never produced before the Court. The medical report of Gorakhpur Medical College Hospital is not on record. The doctor who examined the deceased at Gorakhpur has also not been examined. The informant has made allegation in the FIR that all the five appellants being variously armed had assaulted Lalan Tiwari. He had alleged that Lalan Tiwari had

sustained *farsa* and *Bhala* injuries at the hands of Ranjan Tiwary and Sandip Tiwary. However, the doctor who examined Lalan Tiwary first could find only one sharp cutting injury on his person. Even according to the postmortem report there was only one incised injury on the person of the deceased. The medical report completely contradicts the ocular testimony. Under such circumstance, it would be highly unsafe to rely on the version of the witnesses examined on behalf of the prosecution. As noted above, the defects in framing of charges have occasioned in failure of justice. The prosecution seems to be interested more in hiding than revealing the truth as several important witnesses were withheld.

41. Having regard to the entirety of the facts, I am of the view the prosecution has failed to prove its case beyond reasonable doubts.

42. In that view of the matter, both appeals are allowed. The impugned judgment of conviction and order of sentence are set aside. The appellants Sandip Tiwari and Rajan Tiwary who are in custody are directed to be released forthwith unless they are required in connection with other case. The other three appellants, namely, Brija Shankar Tiwary, Braj Kishore Tiwary and Nand Kishore Tiwary are discharged from the liabilities of their bail bonds.

(Ashwani Kumar Singh, J.)

Sanjeet/NAFR

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