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HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 928 of 2012**

1. Ashok Nishad & Ors S/o Shiva Nishad Aged About 20 years R/o Satbahaniya Mandir, P.S. Sarswati Nagar, Raipur, Distt. - Raipur C.G.
2. Uday Nishad S/o Faguram Nishad Aged About 20 Years R/o Satbahina Temple, P.S. Sarswati Nagar, Raipur C.G.
3. Deepak Nishad S/o Kartik Nishad Aged About 27 Years R/o Satbahina Temple, P.S. Sarswati Nagar, Raipur C.G.

---- Appellants**Versus**

1. State Of C.G. Through : The Police Aarakshi Kendra Sarswati Nagar, Distt. - Raipur C.G.

---- Respondent**And****CRA No. 953 Of 2012**

1. Ratan Kumar Yadav & Ors S/o S/o Punu Ram Yadav Aged About 26 years R/o Near Satbahaniya Mandir Ramkund, P.S. Saraswatinagar, Raipur, distt. Raipur C.G.
2. Ketu Alias Srawan Yadav S/o S/o Damru Yadav Aged About 17 Years R/o Near Satbahaniya Mandir Ramkund, P.S. Saraswatinagar, Raipur, distt. Raipur C.G.
3. Kailash Alias Surku Dhruw S/o S/o Ramesh Dhruw Aged About 20 Years R/o Near Satbahaniya Mandir Ramkund, P.S. Saraswatinagar, Raipur, distt. Raipur C.G.

---- Appellants**Vs**

1. State Of C.G. S/o Through - District Magistrate Raipur C.G.

---- Respondent

For Appellants in Cr.A.No.953/12 : Mr. P. K. C. Tiwari, Senior Advocate with Mr. Shashi Bhushan, Advocates.

For Appellants in Cr.A.No. 928/12 : Mr. S. C. Verma with Ms. Priya Mishra, Advocate

For Respondent / State : Mr. Neeraj Jain, Government Advocate.

Hon'ble Shri Justice T. P. Sharma
Hon'ble Shri Justice Inder Singh Uboweja

Judgement on Board by T.P.Sharma, J.

10/03/2015

Criminal Appeals No.928 and 953 of 2012 filed against common judgment dated 21.09.2012 are being disposed of by a common judgment.

2. By filing Criminal Appeals No. 928 and 953 of 2012, the appellants have challenged the judgment of conviction and order of sentence dated 21.09.2012 passed by the 7th Additional Sessions Judge, Raipur, in Sessions Trial No. 169/11 whereby and whereunder after holding the appellants guilty for formation of unlawful assembly to commit murder and to cause simple injuries and in furtherance of unlawful assembly for committing murder of Bhupendra Kothley and caused injuries to Pramod Yadav and Avinash John, the Court below convicted and sentenced the appellants as below:

Sl. No.	Name of the appellant	Conviction under Section	Sentence
01. 02.	Ashok Nishad & Uday Nishad	148, 302/149 & 323/149 & 506-B I.P.C.	R.I. for one year with fine of Rs.200/-, Life imprisonment with fine of Rs.1000/-, sentence of fine of 500/- and RI for two years with fine of Rs.200/- each. In default of payment of fine, RI for one month, six months, one month and two months respectively on each count.
03. 04.	Deepak Nishad & Ratan Kumar Yadav	147, 302/149, & 323/149 & 506-B I.P.C.	RI for six months with fine of 100/-, Life imprisonment with fine of Rs.1000/-, sentence of fine of Rs.500/- and RI for two years each. In default of payment of fine. RI for one month, six months, one month and two months respectively on each count.
05. 06	Ketu @ Shrawan Yadav & Kailash @ Surku Dhruw	147, 302/149 & & 323/149 I.P.C.	RI for six months with fine of Rs.100/-, Life imprisonment with fine of Rs.1000/- and sentence of fine of Rs.500/- each. In default of payment of fine, RI for one month, six months and one month

			respectively on each count.
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3. Conviction of the appellants is impugned on the ground that without there being any iota of evidence against the appellants, the Court below convicted and sentenced the appellants as aforementioned and thereby committed illegality.

4. As per prosecution story, on fateful night of 17.4.2011 at about 09.30 pm, unfortunate deceased Bhupendra along with P.W.3 Pramod Yadav and P.W.6 Avinash John went towards a shop situated at Shakambari temple for purchasing cigarette. Appellants were present near Shakambari temple. Appellant – Kailash abused P.W.6 Avinash John and objected him while asking him that you being a member of Christian why did you visit temple. Thereafter, he assaulted Avinash John by slapping him whereupon P.W.3 Pramod Yadav and Bhupendra along with Avinash John went to the appellant for asking about the same. The appellants assaulted them by hands and fists. The appellants also brought hockey stick and sword from the roof of Satbahania temple and assaulted the victims. They caused death of Bhupendra and caused injuries to P.W.3 Pramod Yadav and P.W.6 Avinash John. As a result of injuries caused by the appellants to Bhupendra, he fell down and became unconscious. Then appellants fled from the spot. P.W.3 Pramod Yadav with the help of one Amit brought deceased to Life Berth Hospital where he was declared dead. Thereafter they brought deceased to Ambedkar Hospital. P.W.3 Pramod Yadav went to Police Station Saraswati Nagar and lodged F.I.R. vide Ex.P.17 and merg vide Ex.P.28.

5. Investigating Officer left for scene of occurrence and after summoning the witnesses vide Ex.P.1, inquest over the dead body was prepared vide Ex.P.2. Spot map was prepared vide Ex.P.3 & P.4. Bloodstained and plain soils were recovered from the spot along with broken pieces of brick vide Ex.P.6.

P.W.3 Pramod Yadav was examined by P.W.7 R. Sridhar Rao vide Ex.P.26A and found following injuries:

- i. Incised wound over finger of left hand of 2 cm x bone deep.
- ii. Incised wound over left middle finger of 4 cm x bone deep.
- iii. Incised wound over left ring finger.

He has also examined Avinash John vide Ex.27A and after examination, he found one abrasion of $\frac{1}{2}$ x $\frac{1}{2}$ cm over right thumb. Dr. Pramod Kumar has also noticed fracture of middle finger of right hand vide Ex.P.45.

6. Dead body was sent for autopsy to Dr. B.R.Ambedkar Hospital, Raipur, vide Ex.P.25. P.W.4 Dr. S.K.Bagh conducted autopsy vide Ex.P.18 and found following injuries:

- i. Incised wound over left frontal parietal region (Head) of 5 x .3 x 1 cm with huge haematomma.
- ii. Rail Patterned contusion over left side of lateral part of neck of 10 x 2.2 cm.
- iii. Rail Patterned over left shoulder of 5 x 2.5 cm.

Mode of death was shock. During course of investigation, Patwari prepared spot map vide Ex.P.5.

7. Appellant – Ratan Kumar was taken custody, who made disclosure statement of Hockey stick vide Ex.P.8 and the same was recovered at his instance vide Ex.P.14. Appellant – Deepak was taken custody, who made disclosure statement of Hockey stick vide Ex.P.9 and the same was recovered at his instance vide Ex.P.15. Appellant - Uday was taken into custody, who made disclosure statement of cloth and sword vide Ex.P.10 and the same were recovered at his instance vide Ex.P.13. Similarly, appellant - Ashok was also taken into custody, who made disclosure statement of shirt and sword vide Ex.P.11 and the same were seized at his instance vide Ex.P.12. Seized articles were sent for chemical examination to F.S.L. and blood stains were confirmed vide Ex.P.44 over the articles seized from the appellants.

8. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short 'the Code').

9. After completion of investigation, charge sheet was filed before the Court of J.M.F.C. Raipur, Dist. Raipur, who in turn committed the case to the Court of Sessions, Raipur. The learned Additional Sessions Judge received the case on transfer for trial.

10. In order to prove the guilt of the appellants, prosecution examined as many as 12 witnesses. Accused persons were examined under Section 313 of the Code, in which, they denied the circumstances appearing against them and pleaded false implication in crime in question. They have also examined one defence witness, namely, Ashok Gaikwad (D.W.1), who has deposed that injured witnesses P.W.3 Pramod Yadav and P.W.6 Avinash John as well as one Chhotu have killed Bhupendra.

11. After providing an opportunity of hearing to the parties, learned Additional Sessions Judge convicted and sentenced the appellants as aforementioned.

12. We have heard Mr. P.K.C.Tiwari, learned Senior Counsel with Mr. Shashi Bhushan, learned counsel for the appellants in Cr.A.No.953/2012, Mr. S.C.Verma with Mr. Priya Mishra, learned counsel for the appellants in Cr.A.No.928/12 and Mr. Neeraj Jain, learned counsel for the State.

13. Mr. P.K.C.Tiwari, learned Senior Counsel, vehemently argued that as per evidence prosecution witnesses and F.I.R., the appellants – Ketu and Kailash have caused injuries by hands and fists and have not used any weapon. Prosecution has failed to prove the formation of unlawful assembly and in absence of proof of formation of unlawful assembly they could be liable for their individual act and they shall not be vicariously liable. He further submits that in so far as the act attributed to the appellants is concerned, their act does not come under the purview of Section 302 of the I.P.C. The evidence adduced on behalf of the prosecution is specific and show that some person has caused injuries over the head upon the deceased. Even when deceased fell down, then the appellants, who are in 6 number, fled from the spot which

shows that they were not having any intention to kill the deceased. It was next contended that evidence of D.W.1 Ashok Gaikwad suffers from infirmity. His presence on the spot has not been disputed by the prosecution. His evidence by itself shows that it supports prosecution story and false implication of the appellants.

14. Mr. S.C. Verma, learned counsel vehemently argued that conviction is substantially based on the evidence of P.W.3 Pramod Yadav and P.W.6 Avinash John, but, as per their evidence they are injured witnesses. P.W.3 Pramod Yadav lodged the report and both the above witnesses have been confined by the Police for long time and only after signing upon F.I.R., they have been set free by the Police which shows that initially Investigating Agency was suspecting upon P.W.3 Pramod Yadav and P.W.6 Avinash John, but, anyhow they joined the hands with the Police and the present appellants, who are not having enmity with deceased, have been falsely implicated in crime in question. It was next argued by him that although conviction of the appellants is based on the evidence of P.W.3 Pramod Yadav and P.W.6 Avinash John, but, both the witnesses have not deposed anything against the present appellants. In absence of evidence against the present appellants, the appellants are entitled acquittal. Moreover, evidence of P.W.3 Pramod Yadav does not connect the appellants in crime in question. He placed reliance in the matter of ***Sarman and others vs. State of M.P., 1993 Supp (2) SCC 356***, in which, the Supreme Court held that lathi blows inflicted by several persons causing simple injuries on non-vital parts of the body and also causing a depressed fracture of parietal bone shows that they have not caused homicidal death with intent to cause death in furtherance of their act but the act attributed to them squarely falls within the purview of Section 304 Part II/149 of I.P.C. Reliance in the matter of ***Pandurang Chandrakant Mhatre and others vs. State of Maharashtra, (2009) 10 SCC 773*** was placed wherein the Supreme Court held that in absence of evidence of sharing of common object in furtherance of formation of unlawful assembly, mere presence of the appellants does not make them liable for conviction.

15. On the other hand, Mr. Neeraj Jain, learned counsel for the State, opposed the

appeal and submitted that the evidence adduced on behalf of the prosecution is sufficient for proving the guilt of the appellants. The evidence of P.W.3 Pramod Yadav and P.W.6 Avinash John is sufficient for proving the guilt of the appellants as both the witnesses are injured witnesses and have specifically deposed that the appellants have caused injuries in furtherance of common object. After appreciating the evidence available on record, the trial Court has rightly convicted and sentenced the appellants as aforementioned.

16. In order to appreciate the arguments advanced on behalf of the parties, we have to examine the evidence adduced on behalf of the prosecution minutely. In the present case, homicidal death as a result of fatal injuries found over the body of deceased – Bhupendra has not been substantially disputed on behalf of the appellants, on the other hand, also established by the evidence of P.W.1 Amit, P.W.3 Pramod Yadav, P.W.6 Avinash John, F.I.R. Ex.P.17, Merg Ex.P.28, P.W.4 Dr.S.K.Bagh and autopsy report Ex.P.18. Simple injuries found over the body of P.W.3 Pramod Yadav and P.W.6 Avinash John have also not been substantially disputed by the appellants, on the other hand also established by the evidence of P.W.3 Pramod Yadav and P.W.6 Avinash John, P.W.7 Dr. R. Sridhar Rao, Injury Reports Ex.P.26A and 27A.

17. As regards complicity of the appellants in crime in question, conviction of the appellants is substantially based on the evidence of P.W.3 Pramod Yadav and P.W.6 Avinash John. P.W.6 Avinash John deposed in his evidence that at the time of incident, Kailash Ketu and Ratan assaulted him near Shakambari Temple on the ground of him being a member of Christian why he visited the temple, thereupon, he informed the incident to deceased – Bhupendra and P.W.3 Pramod Yadav. They went towards the appellants, who were sitting together. Appellants took out the sword, which was already kept near the temple and assaulted them. During the course of incident some one assaulted Bhupendra upon his head, resulting in, he fell down. The appellants fled from the spot. One Ashish Thakur and Amit, brother of deceased, who came to the spot and this witness brought the deceased to Life Berth Hospital where

he was declared dead. Thereafter, the deceased was brought to Ambedkar Hospital. This witness received injuries over his thumb and back. P.W.3 Pramod Yadav has deposed that appellants were sitting together near the place of incident and as soon as they went towards the appellants, the appellants assaulted them. Defence has cross-examined these witnesses at length. P.W.6 Avinash John admitted that he has seen the appellants – Kailash, Ketu and Ratan, who assaulted Bhupendra and him, but on account of darkness, he could not see the other persons. He further deposed that other persons were seen by P.W.3 Pramod Yadav. P.W.3 Pramod Yadav has deposed against all the appellants while stating that all the appellants were present on the spot. When the appellants Ketu and Kailash assaulted them, then other appellants provoked them. Thereafter, they took out the sword and hockey stick from the roof of Satbahania Temple. This evidence clearly reveals that all the appellants were present on the spot at 10.30 pm., when this witness went near the temple, then firstly P.W.6 Avinash was beaten by appellants Ketu and Kailash. They informed the incident to Bhupendra and another, then all the appellants assaulted them. They also took out the weapon like sword and hockey stick. The facts that keeping weapons with them, taking out the weapons, causing injuries and sitting together show that all the appellants have formed an unlawful assembly and in furtherance of common object of unlawful assembly, they have caused injuries to P.W.3 Pramod Yadav and P.W.6 Avinash John and deceased Bhupendra.

One injury was found over the head of deceased. Doctor has not noticed fracture of any bone of deceased. When deceased fell down, then appellants, who were six in number, were having sword and hockey stick. They were having sufficient opportunity to kill the deceased but they have fled from the spot which shows that they have not caused further injuries on them. There has been sufficient opportunity to them to cause further injuries. Even otherwise, the incident took place on account of attending temple by P.W.6 Avinash John, who is Christian by cause. Injured witnesses themselves have gone to the appellants with the deceased and they were seen sitting together, which shows that appellants have not caused homicidal death of deceased

with intent to cause his death, but, at the time of using weapons they have caused injuries to deceased Bhupendra. This evidence clearly reveals that the appellants, after formation of unlawful assembly, have caused homicidal death not amounting to murder of deceased. Their act squarely falls within the ambit of Section 304 Part II / 149 of the I.P.C.

18. D.W.1 Ashok Gaikwad deposed that P.W.6 Avinash John and P.W.3 Pramod Yadav and one Chhotu caused injuries to deceased Bhupendra. He has also deposed that he informed the incident to the Police, but, they did not notice. As per his evidence, appellants were not present on the spot and prosecution evidence reveals that they have killed Bhupendra. D.W.1 Ashok Gaikwad is resident of Ramkund. As per his evidence, his house is adjoining to the place of incident. He has not admitted the presence of the appellants. He has not deposed that whether he has informed the Police about such facts, which he has stated in the Court. He has not deposed as to how the appellants came to know that he has witnessed the incident. But, as per prosecution witnesses appellants have caused injuries to deceased. In absence of such explanation, evidence of D.W.1 Ashok Gaikwad by itself is sufficient to discard his statement.

19. Appellants were having sword and hockey stick, but, they have not caused any further injuries upon the neck and other vital parts of the body. As held by the Supreme Court in the matter of **Sarman and others v. State of M.P.** (supra) that lathi blows inflicted by several persons causing simple injuries on non-vital parts of the body and also causing a depressed fracture of parietal bone shows that they have not caused homicidal death with intent to cause death in furtherance of their act but the act attributed to them squarely falls within the purview of Section 304 Part II/149 of I.P.C., but, in the present case, prosecution has proved the formation of unlawful assembly, and therefore, the above case is not distinguishable on facts. In the matter of **Pandurang Chandrakant Mhatre and others vs. State of Maharashtra** the Supreme Court held that in absence of evidence of sharing of common object in furtherance of

formation of unlawful assembly, mere presence of the appellants does not make them liable for conviction. In the present case, the evidence adduced on behalf of prosecution is sufficient to prove the fact that the appellants caused injuries to P.W.3 Pramod Yadav and P.W.6 Avinash John, in sharing common intention in furtherance of unlawful assembly.

20. Evidence of prosecution witnesses discloses that whether Deepak has beaten the deceased or not. Therefore, his conviction and sentence under Section 506 B of the I.P.C. being not sustainable under the law, are hereby set aside.

21. After appreciating the evidence available on record, learned trial Court has convicted and sentenced the appellants as aforementioned. While convicting the appellants under Section 302/149 of the I.P.C. the trial Court has not considered the aforesaid facts and thereby committed illegality.

22. Consequently, appeals are partly allowed. Conviction and sentence of appellants – Ratan Kumar Yadav, Ketu alias Srawan Yadav, Kailash alias Surku Dhruw, Ashok Nishad and Uday Nishad under Section 147, 148, 323/149, 506-B of the I.P.C. and the sentence imposed thereunder are hereby affirmed. Conviction of the appellant – Deepak under Section 147 and 323/149 of the I.P.C. and the sentence imposed thereunder are also affirmed. But, conviction of all the appellants under Section 302/149 of the I.P.C. is hereby altered to Section 304 Part II/149 of the I.P.C. and they are sentenced to RI for six years. They are in custody since 18.04.2011. They are entitled for the set off period already undergone.

JUDGE

JUDGE