

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.118 of 2002

Arising Out of PS. Case No. -75 Year- 1989 Thana -Rafiganj District- AURANGABAD

- =====
1. NANHKU SAO SON OF LATE RADHE SAO.
 2. RAMESHWAR SAO.
 3. PERMESHWAR SAO.
 4. JANESHWAR SAO.

ALL SONS OF NANHKU SAO, RESIDENT OF VILLAGE-CHAUBRA,
BADHGAON, P.S.-RAFIGANJ, DISTRICT-AURANGABAD.

.... **APPELLANT/S**

VERSUS

THE STATE OF BIHAR

.... **RESPONDENT/S**

=====

Appearance:

For the Appellant/s	:	Mr. Krishna Prasad Singh, Sr. Adv. Mr. Jharkhandi Upadhyay, Adv. Mrs. Meena Singh, Adv.
For the State	:	Mr. Sujit Kumar Singh, APP

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 23-01-2017

Appellants, Nanhku Sao, Rameshwar Sao, Permishwar Sao, Janeshwar Sao have been found guilty for an offence punishable under Section 324/34 of the IPC and each one has been sentenced to undergo R.I. for three years, under Section 307/34 of the IPC and each one has been directed to undergo R.I. for seven years, appellant Nanhku Sao and Rameshwar Sao further been found guilty under Section 326 of the IPC and each one has been directed to undergo R.I. for three years, with a further direction to run the sentences concurrently by Sixth Additional Sessions Judge, Aurangabad vide judgment of conviction and sentence dated 26.02.2002 passed in connection with Sessions Trial No.49 of 1990 /248 of 2001.

2. Prosecution case, as is evident from the fardbeyan



(Ext.1) of Bindeshwari Sah (PW.2) having recorded at Rafiganj State Dispensary on 20.05.1989 at about 09:45 P.M. is to the effect that on the same day at about 06:30 P.M. his son Kalut Sao had gone to call his uncle Nanhku Sao for having a talk over ridge and at that very occasion, Nanhku Sao and his sons Janeshwar Sao, Parmeshwar Sao and Rameshwar Sao badly abused as well as also threatened whereupon he returned back. After half an hour, Nanhku Sao armed with *Garasa*, Janeshwar Sao armed with *Bhala*, Rameshwar Sao armed with *sword* and Parmeshwar Sao armed with *Garasa* came at his *Darwaja* where he along with his younger brother Badri Sao were lying over cot and were engaged in gossiping. Just after arrival, Nanhku Sao abused and then Nanhku and Rameshwar began to assault him, at the other end Parmeshwarl Sao and Janeshwar Sao began to assault his younger brother Badri. On an alarm raised by them, his sons Kalut Sao and Jattu Sao came out from house who were also assaulted by all the four accused persons. At the time of assault, Nanhku and Janeshwar Sao had stated that today they are going to be murdered. On account of assault, he had sustained injuries over his left leg, right thumb and other parts of body while Badri had sustained injury over head, cheek, leg. Kalut had sustained injury over his back while Jattu had sutained injury over his left hand. On hue and cry having raised by them attracted large number of villagers, seeing whom the accused persons escaped therefrom.

3. On the basis of the aforesaid fardbeyan, Rafiganj P.S.



Case No.75 of 1989 was registered under Sections 324, 326, 307, 34 of the IPC against the accused persons whereupon investigation was taken up and after concluding the same, charge sheet was submitted consequent thereupon, after taking of cognizance of offences the case was committed and further, having the trial commenced and concluded in a manner as indicated above, have been challenged under the instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial of the occurrence and further, plea of false implication. Furthermore, it has also been pleaded that on the alleged date and time of occurrence actually, the prosecution parties were an aggressor who brutally assaulted appellants and on account thereof, Complaint Case No.269 of 1989 (Ext.A) was filed on account of denial by the police officials to register a case and to screen themselves, instant case has been registered. To substantiate the same, apart from documentary evidence as stated above, two witnesses have also been examined.

5. While assailing the judgment of conviction and sentence, it has been submitted at the end of the learned counsel for the appellants that learned lower court without having any kind of positive, concrete, conclusive evidence recorded the finding of guilt and sentence which happens to be non-permissible in the eye of law. To substantiate such plea, it has been submitted that on account of non-examination of Investigating Officer and further,



having a counter case, the prosecution could not succeed in substantiating the place of occurrence as well as manner of occurrence. Side-by-side, having material development in their evidences for which attention had already been drawn up towards the same from the respective PWs could not legally brought up on record for want of examination of Investigating Officer and so, the interest of the appellants are found highly prejudiced. Consequent thereupon, the learned lower court should have acquitted the appellants.

6. Furthermore, it has also been submitted that neither injury report has been exhibited nor doctor has been examined. That being so, there happens to be no evidence on that very score at the end of the prosecution whereupon neither the finding so recorded by the learned trial court relating to 326 as well as 324 IPC is found duly substantiated. Coming to the score of 307/34 of the IPC, it has been submitted that cumulative effect of non-examination of Investigating Officer as well as doctor certainly did not permit the same to survive in the background of the fact that nature of injury would have indicated whether the same were caused with an intention or knowledge to cause death of the respective injured.

7. Apart from this, it has also been submitted that on account of inconsistency having amongst the evidence of the PWs, it is evident that they are not at all inconformity over motive, manner of assault, mode of assault and so, their evidences are fit to be



rejected. It has also been submitted that though prosecution had claimed that all the injured have been examined and so, prosecution case should be accepted as a gospel truth happens to be meaningless in the background of the fact that their evidence are not at all corroborated by the independent witnesses including the persons having their houses in the boundary of the P.O. coupled with the fact that whoever been examined as an independent witness, have not supported the case of the prosecution.

8. Lastly, it has been submitted that from the evidences of the PWs, it is apparent that both the party are own brothers, nephew and further considering the occurrence of the year 1989, the judgment impugned of the year 2002 and the appeal being heard after fifteen years so in the background of deficiency persisting on the record would not be a prudent one to direct the appellant to suffer imprisonment and in lieu thereof, the sentence of imprisonment may be converted by imposition of fine/compensation in order to allow the congenial atmosphere which is found restored amongst the parties in the background of their relationship as well as by efflux of time.

9. While refuting the prayer, the learned Additional Public Prosecutor submitted that none of the argument having been made on behalf of appellant are appreciable. In order to substantiate the same it has been submitted that for the purpose of attracting the conviction for an offence punishable under Section 307 of the IPC, from bare perusal of the Section itself it is evident that the nature of



injury is not at all relevant to classify the same rather it happens to be the manner whereunder occurrence is being committed and the same would speak with regard to nature of activity which, the accused persons have adopted during course of commission of crime duly coloured with an intention or knowledge to commit murder.

10. Now coming to the facts of the case, it is apparent that prosecution party were empty hand unaware with the activity of the appellant which they shown during course of commission of the crime, being armed with deadly weapon and making assault while prosecution party were helpless clearly suggest that at that very moment appellants were carrying an intention to commit murder of the prosecution party and so, the non-examination of doctor and Investigating Officer will not cause any kind of deficiency or deformity in the judgment impugned. So submitted that even if discarding the finding relating to Section 324 IPC as well as 326 IPC, conviction and sentence relating to 307/34 of the IPC would survive and to that extent in this appeal happens to be non-maintainable.

11. In order to substantiate its case prosecution had examined altogether seven PWs out of whom PW.1 is Jattu Sao, PW.2 is Dineshwar Sao, PW.3 is Badri Sao, PW.4 is Kalut Sao, PW.5 is Lalan Prasad, PW.6 is Ram Balak Sao, PW.7 is Kailash Mahto, as well as had also exhibited Ext.1-Fardbeyan, Ext..2- Formal FIR. In likewise manner defence had also examined two



DWs out of whom DW.1 is Raj nath Bhagat and DW.2 is Suresh Singh as well as also exhibited complaint petition as Ext.8.

12. Now coming to the nature of the evidence, it is evident that none of the independent witness had supported the case of the prosecution and that being so, PW.5 Lalan Prasad and PW.7 Kailash Mahto were declared hostile while PW.6 Ram Balak Sao appears to be hearsay witness. so the evidence of PW.1 to 4 who are an injured, and member of same family is to be seen. At the present moment, it is to be noted down that neither doctor nor Investigating Officer have been examined. Therefore, the prosecution case is to be seen in the background of aforesaid deficiency and further its impact over the fate of the instant appeal.

13. PW.1 had stated that on the alleged date and time of occurrence, he and his brother were inside his house for taking meal. At that very moment they heard sound coming from *Darwaja*. He came out and then saw Nanhku Sao assaulting his father with *Garasa*. Manjhil Sao @ Rameshwar Sao was assaulting him with sword. Jineshwar Sao at that very moment gave *Garasa* blow over his left hand. His another brother Kalut Sao was also assaulted by Parmeshwar Sao with *Bhala* over his back. They were taken to hospital for treatment. All the accused have come to his *Darwaja* with an intention to commit murder. During cross-examination he had shown *inter se* relationship as well as dispute relating to ridge coming since long. In para-5 he had further stated that his village consist of 400 houses. Further he disclosed that house of accused



persons lies three houses away from his house intervened by Durga Sao, Bhuj Sao and Ram Balak Sao. In para-6, he had given boundary of the P.O. North-Durga Sao, South-Kailash Sao, East-Bhuj Sao and West-Sheonand Mali. In para-7, he had stated that while he along with Kalut was taking meal, heard sound of uproar coming from western side. Villagers were not raising their voices rather it was of his father who was saying 'come-come' and on account thereof, they rushed. In para-9, he had stated that as soon as they came at the Darwaja, accused persons began to assault. Accused persons forced them to go inside house and were chased even then thereafter by Parmeshwar and Janeshwar. Blood had fallen in the house also. In para-11, he had specifically asserted that after assaulting the two brothers, then thereafter accused left the scene. In para-12, on court question he had deposed that he had not seen assault over his father. When he saw his father, he was in an injured condition. In para-14 and 15 there happens to be contradictions and the effect thereof will be considered at the appropriate stage of the judgment.

14. PW.2 is the informant who had stated that on the alleged date and time of occurrence on account of dispute relating to ridge he had directed his son Kalut to call Nanhku Sao. When his son had gone, Nanhku abused whereupon he returned back. At about 07:00 P.M. while he along with his brother Badri Sao were relaxing themselves lying over cot at their *Darwaja*, Nanhku Sao, Rameshwar Sao, Parmeshwar Sao and Janeshwar Sao came and



abused and then, thereafter, Nanhku Sao gave *Garasa* blow causing injury over left knee. He made repeated blow on account of which he sustained injury near about knee (witness shown the spot). Janeshwar Sao gave one *Bhala* blow which caused injury over his right thumb. His younger brother Badri Sao was assaulted with sword over his head as well as cheek. Parmeshwar Sao and Janeshwar Sao assaulted over left leg. Parmeshwar Sao had assaulted with *Garasi* and Janeshwar Sao assaulted with *Bhala*. They raised alarm over which Kalut and Jattu, his sons came in his rescue. Janeshwar Sao had assaulted his younger son Kalut with *Bhala* over his back and Parmeshwar Sao assaulted with *Garasi* over left hand of Jattu. On hue and cry, villagers came who took all the injured to Rafiganj Hospital where fardbeyan was recorded by the Officer-in-charge (Rafiganj), (exhibited). He also exhibited formal FIR. He further stated that he remained at hospital for eight consecutive days. During cross-examination he had stated that he along with his brother Badri Sao is conjoint. Both have got common place of residence. He had further disclosed that he happens to be five brothers and the residential building happens to be joined. In para-8 he had stated that at that very time it was dusk and so, was clearly visible. In para-9 he had stated that they have seen accused persons when they arrived. As soon as accused came, they began to assault. He along with his brother were assaulted while they were lying over cot. He was assaulted thrice while her brother was assaulted twice. He is unable to say how much time consume



during course of occurrence. After sustaining injury, both of them became unconscious and regained the same at hospital. He had further stated that he became unconscious on account of assault having made by Nanhku Sao. At para-11, he had stated that blood had fallen over Sujani, Dhoti. The accused escaped towards northern direction. At para-21, 22 there happens to be contradiction. In para-24-27, 29-30, he denied the suggestion that they have assaulted accused persons.

15. PW.3 is Badri Sao, he had stated that on the alleged date and time of occurrence Kalut Sao, his nephew had gone to the house of Nanhku Sao to call him on account of dispute having arisen due to ridge where Nanhku, Janeshwar, Parmeshwar and Rameshwar abused and threatened over which, Kaltu returned back. On the same day, at about 07:00 P.M. while he along with his brother were lying over cot and gossiping, Nanhku Sao, Janeshwar Sao, Rameshwar Sao, Parmeshwar Sao armed with *Bhala*, *Garasa*, *Sword* respectively came. Nanhku abused and then began to assault. He was assaulted by Parmeshwar Sao with Garasi over his head as well as cheek. Jineshwar Sao had given *Bhala* blow below left knee. His brother was assaulted by Rameshwar @ Manjhil with sword and Nanhku Sao with Garasa. On hue and cry raised by them his nephew Jattu and Kaltu came out from house. Janeshwar had given *Bhala* blow over back of Kaltu while Parmeshwar Sao had given *Garasa* blow over left hand of Jattu. They were taken to hospital. During cross-examination he had stated that Kalut Sao



was sent by his brother to the place of Nanhku. He was not aware with the fact regarding cutting of ridge. In para-8 he had stated that after arrival of Kalut, the accused persons armed variously followed. At that very time he along with his brother was lying over cot. In para-9 he had stated that accused, after arrival, did not permit them to escape. At the other end they began to assault. The accused persons encircled them in group of confine. They were assaulted while lying over cot itself. In para-10, he had stated that blow were given repeatedly. After fleeing of accused, he became unconscious. He was assaulted by Parmeshwar Sao, who gave blow over him followed by Janeshwar Sao. He had also raised alarm "Bachao-Bachao". In para-11 had stated that blood had oozed out from the wound. In para-13 there happens to be contradiction and in para-14,15 he denied the suggestion having at the end of accused that on the same date and time of occurrence they had assaulted the accused persons for which criminal case was instituted.

16. PW.4 is Kalut Sao who had stated that on the alleged date at about 06:30 PM, he had gone to the place of Nanhku to call him as directed by his father whereupon Nanhku, Janeshwar, Rameshwar and Parmeshwar abused him as well as threatened him, over which he returned back. Then thereafter he along with his brother Jattu had gone to take meal. While they were taking meal they heard sound "Bachao" over which both the brothers came out from their house and saw, Nanhku Sao armed with Garasa, Rameshwar Sao armed with sword, Janeshwar Sao armed with



Bhala and Parmeshwar Sao armed with Garasa who were inflicting blow over his father as well as uncle. They have tried to save them and during course thereof, Janeshwar Sao gave Bhala blow over his back and Parmeshwar assaulted his brother Jattu with Garasi. Hearing the alarm, villagers assembled whereupon accused persons fled away. Then, thereafter villagers took all the injured to hospital where they were treated. Police came and took their statement. During cross-examination at para-8 he stated that as per direction of his father he had gone to call Nanhku Sao who was at that very time, at his field lying two plots away from the village. Nanhku along with other three accused were working in the village. At that very time the accused persons only abused him. They were abusing and in likewise manner, were doing their farm work. He returned back and disclosed the event to his father. In para-10 he had stated that ridge was cut by the accused persons much before but he is unable to disclose the relevant survey plot number. At para-14 he had stated that while they were taking meal, they rushed after hearing the sound of alarm. As soon as they came out from their house, accused persons began to assault them. Then thereafter accused persons escaped therefrom. Police had recorded his statement on the same date at about 12-01 P.M. In para-19 he had stated that there was *Bhala* marked over his cloth which was shown to the police. Investigating Officer had not taken aforesaid cloth. In para-20 he had stated that he was assaulted outside his house and then thereafter, he slipped inside house. Blood had fallen



inside the house also. In para-23, he had stated that first of all Jattu came out followed by him. He had seen Parmeshwar Sao while he was engaged in to assault his brother. His brother fell down after sustaining injury. Then had denied the suggestion.

17. Now coming to score of contradiction which, on account of absence of Investigating Officer could not brought up in legal way, is to be considered for the purpose of appreciating the evidence of respective witnesses being material one or minor one, PW.1 had admitted in para-14 that he had not stated before police that Jineshwar Sao had assaulted with *Garasa*. In likewise manner his attention has been drawn up that he had not stated before the police regarding assault over Kaltu Sao over back by Bhala. In para-15, he had denied to be silent before the police during course of statement over assault relating to Kalut Sao.

18. PW.2 under para-21 as well as 22 have denied to have not stated before the police with regard to the statement, in fardbeyan as well as further statement that Nanhku Sao had assaulted over his leg by *Garasa* repeatedly. Furthermore, with regard to *Bhala* blow having given by Janeshwar Sao causing injury over his right hand. In likewise manner assault by Rameshwar Sah with sword over head as well as cheek of his brother. Furthermore, assault by Parmeshwar Sao and Janeshwar Sao with *Garasi* as well as *Bhala* over Badri Sao. In likewise manner assault by Janeshwar Sao with *Bhala* over back of Kalut and Parmeshwar by means of *Garasi* over Jattu.



19. PW.3 attention has been drawn under para-13 relating to assault by Parmeshwar over head as well as cheek. Janeshwar gave Bhala blow below knee over left leg. Further Parmeshwar had given Bhala blow over back of Kalut Sao and Parmeshwar Sao by means of Garasi over hand of Jattu Sao.

20. PW.4 attention has been drawn up under para-23 relating to assault over his brother Jattu Sao by his brother Parmeshwar by Garasi.

21. Considering the evidence in its entirety, it is apparent that prosecution, though at initial stage had not justified individual status of each of the appellant but identified them to be culprit who, during course of commission of the occurrence conjointly assaulted all the members of the prosecution party and the contradiction, having visualizing therefrom could not duly substantiated on account of non-production of the Investigating Officer certainly had axed upon interest of the appellant to that extent. In the aforesaid background conjoint liability of all the appellant are to be perceived. During course of aforesaid exercise, though it appears that there happens to be no contradiction amongst the witnesses relating to the place of occurrence, manner of occurrence but, non-examination of doctor has certainly posed deformity in the prosecution case in the background of the fact that though there happens to be version of the prosecution witnesses that weapon were used causing injuries over the person of respective injured but for want of injury report as well as medical evidence, it is difficult to



infer that the respective injured have sustained the injuries inconsonance with the weapon having been used at the end of the appellant and in likewise manner whether the injuries found thereupon were simple or grievous. That being so, neither an offence punishable under Section 326 of the IPC nor Section 324 of the IPC could be found substantiated though, learned lower court had opined so.

22. It is needless to say that the appellants were armed with deadly weapon which they used during commission of the occurrence. Had there been injury report on record, then in that event, its nature, location would have sufficiently be shown to infer intention or knowledge having at the part of each of the appellant during course of commission of the occurrence. True it is that for the purpose of attracting Section 307 of the IPC the nature of injury is not at all relevant rather action of the accused is to be perceived and in case hurt is caused to the victim during course of commission of crime, then in that event, there would be applicability of second part of Section 307 of the IPC. In the background of contradiction having on the score of manner of assault and further non-examination of doctor did not inspire confidence to acknowledge the activity of the appellant punishable under Section 307/34 of the IPC also. Therefore, their activity as alleged and found is to be perceived to be punishable under Section 323 of the IPC and for that, in the background of *inter se* relationship coupled with the fact that the appeal has been taken up after duration of fifteen



years, did not look wise to direct each of the appellant to suffer substantially and instead thereof, each of the appellant are directed to pay rupees one thousand in lieu of fine. In case of payment fine of having at the end of appellant, half of the amount should be given to the victims which the lower court will disburse after noticing them on proper identification. The fine must be deposited within four weeks. In case of default, each of the appellant will have to suffer simple imprisonment of six months. This appeal is partly allowed with the aforesaid modification.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

