

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.34 of 2015**

Arising Out of PS.Case No. -496 Year- 2006 Thana -ATHMALGOLA District- PATNA

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1. Kedar Prasad, S/O Late Mahadeo Mahto (wrongly mentioned Bhoju Mahto in F.I.R)
 2. Dilip Kumar @ Lallu, S/O Kedar Prasad, Both are resident of village-Naya Bigha, P.S.-Athmalgola, Distt.-Patna

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Birendra Kumar-Advocate

For the Respondent/s : Mr. S. A. Ahmad-A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**ORAL JUDGMENT****Date: 24-11-2017**

Vide judgment of conviction dated 16.12.2014 and order of sentence dated 20.12.2014 passed by the 3rd Additional Sessions Judge, Barh, Patna in Sessions Trial No.360 of 2009, appellant Kedar Prasad has been found guilty for an offence punishable under Section 323 I.P.C. and sentenced to undergo R.I. for six months, under Section 450 I.P.C. and sentenced to undergo R.I. for two years as well as slapped with fine appertaining to Rs.1,000/- and in default thereof, to undergo R.I. for three months, under Section 307 I.P.C. to undergo R.I. for four years as well as to pay fine appertaining to Rs.2,000/- and in default thereof, to undergo R.I. for six months with a further direction to run the sentences concurrently, while appellant Dilip Kumar @ Lallu has been found guilty for an offence punishable under



Section 324 of the I.P.C. and sentenced to undergo R.I. for one year, under Section 379 of the I.P.C. and sentenced to undergo R.I. for one year, under Section 450 I.P.C. and sentenced to undergo R.I. for two years as well as to pay fine appertaining to Rs.1,000/- and in default thereof, to undergo R.I. for three months, under Section 307 I.P.C. and sentenced to undergo R.I. for four years as well as to pay fine appertaining to Rs.2,000/-, in default thereof, to undergo R.I. for six months with a further direction to run the sentences concurrently.

2. PW-1 Bandana Rani filed written report on 22.12.2006 alleging inter alia that on the same day at about 11.00 a.m. while she along with her mother Fula Devi was present inside her house, her father and brother were working in a field near about her house, her co-villager Sonu Kumar @ Dipak, son of Raman Prasad, Dilip @ Lallu Kumar, son of Kedar Prasad and Kedar Prasad, son of Bhoju Mahto made house trespass, whereupon she inquired during course thereof, Sonu and Lallu came to her, out of whom Lallu caught hold her hand and Sonu gave Chhura blow over her left wrist, left shoulder as well as over left side of face. On hue and cry raised by her, all the three escaped and during course thereof, Lallu @ Dilip snatched away golden chain appertaining to Rs.5,000/-.

3. After registration of Barh (Athmalgola) P. S. Case No.496 of 2006, investigation was taken up and after concluding the



same, chargesheet was submitted facilitating the trial in a manner, the subject matter of 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. It has further been pleaded that both the parties happen to be own *Pattidar* having house in front of each other intervened by a lane and on account of dispute over mode of drainage of waste water, they have been falsely implicated. Two DWs have also been examined along with documentary evidence.

5. In order to substantiate its case, prosecution had examined altogether six PWs viz. PW-1 Bandana Rani, PW-2 Nutan Kumari, PW-3 Rajdeo Prasad, PW-4 Ram Chandra Prasad, PW-5 Rajesh Kumar and PW-6 Bachhu Prasad. Side by side, had also exhibited the documents viz. Exhibit-1 written report, Exhibit-1/1 signature of Ramchandra Prasad (PW-4), Exhibit-1/2 endorsement over the written report, Exhibit-2 requisition for injury report prepared by the police, Exhibit-3 injury report issued by the doctor. Side by side, defence had also examined two DWs viz. DW-1 Kapil Deo Prasad and DW-2 Naresh Prasad as well as had also exhibited two money receipts under Exhibit-A series, certified copy of order dated 28.01.1969 relating to Mutation Case No.47 of 1968-69 as Exhibit-B.

6. While assailing the judgment of conviction and



sentence, it has been submitted on behalf of learned counsel for the appellants that the finding recorded by the learned lower Court is non-sustainable in the eye of law. Further elaborating his submission, learned counsel for the appellants has submitted that no independent witness has been examined including the neighbours, which is apparent from examination of the I.O. (PW-3). Furthermore, from the initial version, it is apparent that father (PW-4) and brother (PW-5) of the informant were not at all an eye witness to occurrence, but during course of evidence, they posed themselves and on that very score, there happens to be material development in their evidences. As I.O. (PW-3) was examined before examination of those witnesses that being so, the interest of the appellant has been prejudiced as they failed to draw attention of the I.O. with regard to previous statement of PW-4 as well as PW-5. However, PW-5 had discredited himself to be an eye witness to occurrence as well as the status of PW-4 his father.

7. With regard to remaining material witnesses i.e. PW-2, it is apparent from the written report that PW-1 had not disclosed presence of PW-2 rather she had shown presence of her mother, who has not been examined. True it is that written report or F.I.R. whichever may be, could not be considered as an encyclopaedia having minute to minute detail, but when there happens to be ample



time available before the informant and when she files a written report, then in that event, at least the inmates of the house, whose presence subsequently been shown certainly would not have been given up. So, evidence of PW-2 is not at all reliable. Now, coming to evidence of PW-1, it is evident that prosecution though had tried to take undue advantage as nature of injury, which has been brought up on record by a formal witness PW-6 does not suggest it to have been caused by a Chhura and further, its nature suggest as self-inflicted injury sustained by PW-1 while doing household activity, being taken as a good ground to implicate the appellants as being *Pattidar*, they happen to be on strained relationship on account of land dispute and for that Exhibit-B has been exhibited as well as on account of flow of waste water in public lane.

8. It has also been submitted that from the written report, it is evident that appellant Kedar Prasad had not been assigned with any activity though during course of evidence the aforesaid theme has been made an exit by introducing that he had also slapped over which, attention of the witnesses has been drawn up. Furthermore, none of the appellants were shown to be assailant of the victim (PW-1) as per initial version. Furthermore, neither PW-2 nor any witness had deposed that Chhura blow, which was given by Sonu, happens to be under the garb of an intention to commit murder or having with a



knowledge that these injuries will ultimately lead to death of the victim. Apart from this, activity of the appellant being non-assailant also not been properly considered in the aforesaid background, whereupon, no offence under Section 307 of the I.P.C. is made out. As Section 307 of the I.P.C. is not made, therefore, no conviction would be under Section 450 of the I.P.C. In worst case, it should be under Section 448 of the I.P.C. Because of the fact that injury report is not on the record in accordance of law, so on account of non-examination of the doctor, no offence under Section 324 of the I.P.C. could be attracted. So far Section 323 I.P.C. against Kedar Prasad is concerned, the same would not apply on account of material development during course of trial. Furthermore, there should not be applicability of Section 379 of the I.P.C. as there happens to be no substantive evidence at the end of the prosecution on that very score. So, in the facts and circumstances of the case, the judgment impugned is fit to be set aside.

9. In an alternative, it has also been submitted that if appellants are found guilty for an offence punishable under Sections 448 and 379 of the I.P.C., then in that event, they be let off giving privilege of Probation of Offenders Act in the background of nature of controversy persisting amongst the parties, inter se relationship as well as status of the parties or, the appellants be let off on inflicting



fine only.

10. On the other hand, learned Additional Public Prosecutor opposed the submission and submitted that though Section 307 I.P.C. simpliciter would not apply against the appellants, rather Section 307/ 34 of the I.P.C. will be applicable in the background of the fact that they shared common intention with Sonu during course of commission of the crime, whereunder Sonu had inflicted repeated Chhura blow over the informant (PW-1). It has also been submitted that for the purpose of application of Section 307 of the I.P.C., nature of injury is immaterial that means to say, examination of doctor is not at all relevant. The action, the activity, part played, the intention or knowledge which the accused possessed during course of commission of crime is the sole criteria, which should be considered during course of appreciation of evidence and if such exercise is properly made, then in that event, the judgment of conviction and sentence recorded by the learned lower Court is found duly appreciated and should be confirmed.

11. Section 307 I.P.C. has got two parts, the first part deals with the action having played by the accused resultant with the hurt. Hurt is defined Section 319 of the I.P.C. and that being so, nature of injury is not at all sine qua non for adjudicating upon application of Section 307 of the I.P.C. The other part though speaks



about the action, but without any fruitful result that means to say, without having hurt caused to the victim and so, two kinds of punishment have been prescribed. The first one, extending to imprisonment for life, while later upto 10 years. So, to arrive at a conclusion whether the offence as alleged, intended to commit murder has to be minutely observed by way of proper analyzing the evidence. Under the aforesaid principle, when the evidences have been gone through, it is evident that the allegation speaks with regard to simple case of assault as none of the witnesses including the victim (PW-1) had asserted that injury was caused by means of Chhura with an intention to commit murder or injury inflicted by means of Chhura was with a knowledge that aforesaid injury will ultimately cause death of the victim. In absence thereof, the finding having been recorded by the learned lower Court with regard to application of Section 307 of the I.P.C. is found non-sustainable. In likewise manner, though none of the appellants have been found to be assailant of the victim (PW-1), even then, appellant Dilip Kumar has been found guilty for an offence punishable under Section 324 of the I.P.C., which could not survive much less, when doctor has not been examined. Bringing the injury report on record by means of formal evidence (PW-6) is not going to obliterate the prosecution from getting the aforesaid injury report duly substantiated, exhibited by way of examination of the doctor, who had examined the PW-1. So, on account of non-examination of doctor,



neither the nature of the injury, the weapon responsible for causing the injury could be brought up on record nor the accused has got an opportunity to question the same. Therefore, conviction and sentence relating to Dilip under Section 324 of the I.P.C. also goes away. So far Section 450 of the I.P.C. is concerned, it looks better to incorporate the same for better appreciation of the requirements to satisfy applicability of ***Section 450 of the I.P.C.***:-

“450. House-trespass in order to commit offence punishable with imprisonment for life.—Whoever commits house-trespass in order to the committing of any offence punishable with 1[imprisonment for life], shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.”

As no offence under Section 307 of the I.P.C. is made out, the other Sections would not attract punishment/ sentence up to imprisonment for life and that being so, Section 450 of the I.P.C. could not be attracted. Then comes application of Section 323 of the I.P.C. relating to appellant Kedar Prasad. It is evident from the written report that no allegation was attributed against him. However, during course of evidence, PW-1 had stated that Kedar Prasad had assaulted her with fists and slaps. During cross-examination at Para-20, she had stated that she was assaulted at three places only. Furthermore, at



Para-23, attention of this witness has been drawn and same is found corroborated with the evidence of PW-3, Para-16. PW-2 had stated that Kedar assaulted Bandana with fists and slaps, but her status as an eye witness is found doubtful in the background of her absence in the written report as well as from Para-19 of the evidence of PW-1, whereunder she had stated that during course of occurrence, she had raised alarm. Subsequently thereof, Nutan Devi, Late Fula Devi, Rajesh Prasad and Ramchandra Prasad arrived, whom she had shown her injury. On the other hand, PW-2 at Para-24 had stated that accused Kedar had given 5-6 slaps over cheek of Bandana. PW-4 had also stated like so during his examination-in-chief, but as per evidence of PW-3 (I.O.) at Para-11, it is evident that status of PW-4 as well as PW-5 happens to be that of hearsay witness.

12. So far Section 379 of the I.P.C. is concerned, on that very score, there happens to be consistency right from initial stage and further, the aforesaid event was materialized after making house trespass and that being so, both the appellants are found guilty for an offence punishable under Section 448 of the I.P.C. Furthermore, appellant Dilip Kumar @ Lallu is held guilty under Section 379 of the I.P.C.

13. Considering the nature of the dispute in consonance with inter se relationship visualizing from Exhibit-B as well as being next-door neighbour, which all the witnesses apart from topography



of P.O. detailed by PW-3 (I.O.) and further, proceeding with the trial since 2006, appellants deserve some sort of leniency and that being so, instead of inflicting substantial sentence, appellant Dilip Kumar @ Lallu is directed to pay fine appertaining to Rs.3,000/-, under Section 379 of the I.P.C. in default thereof, to undergo R.I. for three months as well as both the appellants namely Kedar Prasad as well as Dilip Kumar @ Lallu, each are being fined of Rs.3,000/- and in default thereof, to undergo S.I. for three months under Section 448 of the I.P.C. With the aforesaid modification, this appeal is partly allowed. The appellants are on bail and same is extended for six weeks, within which period, both the appellants will deposit the fine amount failing which, the privilege being availed by the appellants will cease to survive, whereupon the learned lower Court will be at liberty to proceed against the appellants in accordance with law.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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