

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.404 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- SIWAN

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1. Vijay Kumar Sharma
2. Om Prakash Sharma
3. Ghan Shyam Sharma
Sons of Dharmanath Sharma
4. Dharmanath Sharma son of Moti Tiwary
All are residents of village- Bishunpura, P.S. Duraunda, District Siwan

..... Appellants

Versus

State of Bihar

..... Respondent

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Appearance :

For the Appellants : Mr. Bashishtha Narayan Mishra, Adv.
Mr. Sachida Nand Rai, Adv.

For the Respondent : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
ORAL JUDGMENT
Date: 13-07-2018

Appellant no.1 (Vijay Kumar Sharma) and 2 (Om Prakash Sharma) have been convicted under Section 325 of the Indian Penal Code and sentenced to undergo R.I. for one year and a fine of Rs.500/- in default or imprisonment for six months, appellant nos. 3 and 4 have been convicted under Section 323 of the IPC and released on bail on furnishing bail bond of Rs.2,000/- for a period of one year each, appellant no.3 (Ghan Shyam Sharma) and other accused persons have been acquitted from the charges leveled under Section 307/149 of the IPC and appellant Vijay Kumar Sharma and Om Prakash Sharma have been convicted under Section 148 of the IPC, vide judgment dated 6.8.2003 passed by Sri Ashok



Kumar Pathak, Addl. FTC No.IV, Siwan in Sessions Trial No.340 of 1995/698 of 2002.

2. The prosecution case as per fardbeyan of P.W.8 (Dhananjay Kumar Tiwary) recorded by the police on 28.3.1993 at 3.30 P.M. at the Government Hospital, Duraunda is that on the same day at 10.30 A.M. in the morning he along with his brother Sanjay Kumar Tiwary and other 4-5 boys of the village including Sanjay Kumar Tiwary son of Yogendra Nath Tiwary, Yogendra Nath Tiwary, Nirbhai Kumar Tiwary were going towards the place of *Holika Dahan* and when they reached near the house of Dharmnath Tiwary, he came with *lathi*, Vijay Kumar Sharma with sword, Om Prakash Sharma with *Belcha* and they charged to the informant and they started assaulting him, meanwhile Prem Shankar Sharma, Bijay Kumar Sharma, Ghan Shyam Sharma also came there and assaulted with *lathi*, *Bhala* and *farsa* and started assaulting them. It is further alleged that in the fardbeyan it is alleged that Dharmnath Sharma assaulted with *Hura* of *Lathi* causing injury on the back and chest of the informant while Vijay Sharma assaulted with sword on the left hand elbow of the informant and caused injury to Om Prakash Sharma with intention to death to the Sanjay Kumar Tiwary who is brother of the informant, assaulted with *Belcha* on the head, while Ghan Shyam Sharma assaulted at the brother of Sanjay



Kumar and Ajay Kumar, who had come there on *hulla* causing injury. Thereafter the villagers assembled and the accused persons fled away and they took the injured to the hospital.

3. On the basis of the aforesaid fardbeyan, Duraunda P.S.Case no.49 of 1994 was instituted and post investigation, the charge-sheet has been submitted, accordingly cognizance was taken and the case has been committed to the court of sessions which ultimately came to the file of Sri Ashok Kumar Pathak, Addl. FTC No.IV, Siwan for trial and disposal.

4. During the charge Vijay Kumar Sharma stands charged under Section 307 of the IPC for assaulting Dhananjay Tiwary, Om Prakash Sharma stands charged under Section 307 of the IPC, Sanjay Kumar Tiwary stands charged under Section 148 of the IPC and Ghanshyam Sharma stands charged under Section 147 of the IPC. All the accused persons have been charged under Section 307/149 of the IPC.

5. In order to prove the charges, the prosecution has examined altogether nine witnesses. They are P.W.1 Sanjay Kumar Tiwary, P.W.2 Sunil Kumar Tiwary, P.W.3 Nirbhay Kumar Tiwary, P.W.5. Sanjay Kumar Tiwary (injured), P.W.6 Dr. Banwarilal Medical Officer, who has examined Ajay Kumar Tiwary, Dhananjay Kumar Tiwary, Sanjay Kumar Tiwary, P.W.7 Dr.



Ramjee Choudhary, who has submitted report of Sanjay Kumar Tiwary and Dhananjay Kumar Tiwary, P.W.8 Dhananjay Kumar Tiwary (informant/injured) and P.W.9 Prabhat Bhushan Shrivastava. I.O. Apart from the above, following documents have been brought on the record as exhibits and they are Ext.1 to 1/2 Injury report of Ajay Tiwary, Dhananjay Tiwary and Sanjay Tiwary, Ext. 1/3 to 1/4 Injury report of Sanjay Kumar Tiwary and Dhananjay Kumar Tiwary, Ext. 2 and 2/1 Discharge slip, Ext. 3 to 3/1 Signature of witness on fardbeyan, Ext.4 Fardbeyan, Ext. 5 FIR, Ext. 6 to 6/2 certified copy of judgment of Tr. No.1465 of 1984.

6. On behalf of the defence, no oral evidence has been adduced but following documents have been brought on record - Ext. A certified copy of Case No. M 599 of 1996, Ext. B copy of Duraunda P.S. Non-FIR under section 144 Cr.P.C. and Ext. C certified copy of judgment of Case No.145 of 1984.

7. The defence of the appellants is of false implication due to land dispute and in support of that they have filed a case under Section 144 Cr.P.C. which are Exts. A and 'B' of false implication.

8. P.W.8 is the informant in this case and he has supported the prosecution case as stated in the FIR and stated that while P.W.8 was going along with Ajay Kumar Tiwary (P.W.4) and Sanjay Kumar Tiwary (P.W.5) and villager Nirbhay Kumar Tiwary and



Sanjay Kumar Tiwary (P.Ws. 3 and 1 respectively) towards the *Holika Dahan* place the accused Dharma Nath Sharma, Vijay Kumar Sharma came with sword and Om Prakash Sharma with *Belcha* and charged to assault. Dharma Nath Sharma assaulted with lathi, accused Vijay Kumar Sharma gave a *farsa* blow aiming at head but he saved it from his left hand elbow. It is further said that then Ghan Shyam Sharma assaulted with *lathi*, Vinay Sharma assaulted with *Farsa* and Prem Shankar Sharma assaulted with *Bhala*. It is also stated that Sanjay Kumar Tewary P.W.5 came to rescue then Ghan Shyam Sharma gave *lathi* blow and Om Prakash Sharma with intention to kill gave a *Belcha* blow on the head. Vijay Sharma and Prem Shankar Sharma surrounded and shouted *maro maro* and when Ajay Kumar Tiwary (P.W.4) came to rescue, Ghanshyam Sharma assaulted with *lathi* and they were taken for treatment. There is nothing in his cross examination to doubt his testimony. The aforesaid evidence has been found corroboration from the evidence of P.W.5, who is injured and evidence of P.W.4 who are also injured and further been supported by the P.W.1 to 3 who claim to be eye witness of the occurrence. P.W.2 came after the occurrence but he has also seen them in the injured condition, there is nothing in his cross examination to doubt his testimony.

9. The learned trial court on conclusion of the trial has



acquitted the appellant nos.1 and 2 from the charges levelled under Section 307 and 148 of the IPC and also acquitted all the appellants under Section 307 /149 of the IPC, however, sentenced the appellant no.1 and 2 under Section 325 of the IPC and sentenced them accordingly and also convicted the appellant no.2 an, 3 and 4 under Section 323 of the IPC and sentenced them as stated above.

10. The aforesaid judgment has been assailed by the learned counsel for the appellants on the ground that the Doctor has been examined in this case and he has found injuries grivous in nature but there is nothing available on the record to show on the basis of which materials, he has come to the conclusion that the injuries are grievous in nature and as such conviction of the appellant no.1 and 2 under Section 325 of the IPC is not just and proper and further submitted that other accused persons have been convicted under Section 323 of the IPC and released on furnishing bond and there is nothing in the evidence to show that the injuries are grievous in nature, as such the appellant nos.1 and 2 at best may be convicted under Section 323 of the IPC and that is their first conviction as such they may also be entitled for release on furnishing bond.

11. Learned counsel for the State has supported the judgment of guilt stating that the injury was found grievous and as



such conviction of the appellant no.1 and 2 under Section 325 of the IPC is just and proper and it does not require any interference by this Court.

12. On perusal of the evidence it appears that the evidences of P.W.4, 5, and 8 are consistent about the assault and evidence of P.Ws. 1 and 3 have also been corroborated and they also claim to be eye witness, though P.W.2 is not eye witness but he has also supported the prosecution case, however, so far Doctor Banbari Lal (P.W.6) is concerned, he has stated that he has found following injuries on the person of Ajay Kumar Tiwary (P.W.4) :

- a. Bruise 3 “ x 1/2” on left forearm**
- b. Bruise 4” X ½” on left forearm**
- c. Swelling 2” X 2” on Posto lateral aspect of left forearm**
- d. Abrasion 1” X ½” on left arm.**

The Doctor has also advised X-ray and found except all the injuries except injury no.3 are simple in nature.

13. The Doctor has also examined Dhananjay Tiwary and found following injuries :

- i. Incised wound 3” X ½” X 1/2” on Posto lateral of left elbow. Caused by sharp cutting weapon and opinion reserved.*
- ii. Swelling 1” X 1” on the left side of back. It is simple and by hard blunt substance.*
- iii. Swelling ½” X ½” on the left side of lower chest. It is simple, caused by hard and blunt substance.*

The Doctor has opined that the injury no.1 is possible



by sword.

14. He has also examined Sanjay Kumar Tiwary and found following injuries :

- i. Lacerated wound 3 ½" X ½" scalp deep on mid line of vertex, Opinion reserved.*
- ii. Swelling 2" X 2" on right shoulder. Simple and by hard blunt substance.*
- iii. Abrasion 1'2" X ½" on left elbow. Simple caused by hard and blunt substance.*
- iv. Complaint of pain in abdomen.*

15. As such though the evidence of the Doctor has corroborated the evidence of P.W. nos. 5 and 6 who are injured in this case.

16. P.W.7 is the Doctor Ramjee Choudhary has stated in his evidence that on 29.3.1994 one Sanjay Kumar Tiwary was referred to him by Dr. Banwari Lal, Medical Officer for medical examination, he examined him and X-ray was advised and on the basis of the x-ray report, he has given his opinion regarding the injury that there was linear fracture on skull bone of Sanjay Kumar and he found injury grievous. His evidence also shows that he admitted that Sanjay Kumar on 29.3.1994 went to the hospital and he was discharged on 21.4.1994 and discharge slip was prepared. His evidence further discloses that he examined Dhananay Kumar Tiwary on the same day on being referred by Dr. Banwari Lal and he advised him X-ray and he found fracture in his elbow and injury



is grievous in his opinion. He has marked the discharge slip as Ext. 2/1, however, his evidence in cross examination shows that ext. 1/3, 1/4 and 2 and 2/1 which are his report and discharge slip, does not bear the seal of the hospital. His evidence also shows that he had perused the X-ray report and had given the opinion. He has also admitted that he is not Radiologist. There is X-ray Centre in the Sadar Hospital Siwan but diagnosis centre is private one.

17. P.W.9 is the I.O. in this case who has proved Ext.4.

18. On perusal of the evidence of the Doctor, it appears that opinion of Dr. Ramjee Choudhary is based on the report of x-ray plate but that was not brought on the record and he has admitted that he is not a radiologist.

19. In such a situation, it appears that finding of the Doctor that the injury on the person of Dhananjay Kumar Tiwary and Sanjay Kumar Tiwary were grievous does not inspire confidence and in that view of the matter, conviction of the appellant no.1 and 2 under Section 325 of the IPC does not appear to be sustainable.

20. The learned trial court has failed to appreciate the same and convicted the appellant no.1 and 2 under Section 325 of the IPC and sentenced them accordingly and also acquitted the appellant no.3 and 4 under Section 323 of the IPC, however, on the



material available on the record clearly shows that the evidence are consistent so far appeal of appellant no.3 and 4 are concerned.

21. However, so far conviction of the appellant no.1 and 2 is concerned, the discussions as made above, conviction of the appellants is modified to the conviction under Section 323 of the IPC and conviction of the appellant no.3 and 4 is affirmed under Section 21. 323 of the IPC.

22. As the appellant no.3 and 4 have been released on executing bail bond of Rs.2,000/- for a period of one year, as such the same is affirmed.

23. However, appellant no.1 and 2 whose conviction is modified is sentenced under Section 323 of the IPC and sentence of appellant no.1 and 2 for R.I. for one year and fine of Rs.500/- is modified to the extent that instead of passing any sentence of imprisonment they shall be released on executing bail bond of Rs.2,000/- for a period of six months for maintaining peace.

24. With the aforesaid modification in conviction and sentence, this appeal is disposed of.

(Vinod Kumar Sinha, J)

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