

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.270 of 2003

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1. Lakshman Yadav S/o Late Mukhi Yadav
 2. Butan Yadav, S/o Late Mukhi Yadav
 3. Sheo Pujan Yadav@ Sheo Pujan Singh Yadav, S/o Late Mukhi Yadav
 4. Godhan Yadav S/o Late Mukhi Yadav
 5. Shyam Bihari Yadav @ Shyam Bihari Singh Yadav, S/o Sheo Pujan Yadav
- All are residents of Village – Bhaluari, P.S. – Indrapuri, District – Rohtas at Sasaram.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. B.D. Pandey, Adv.
Mr. Jitendra Pandey, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 26-02-2018

By way of the present appeal, appellants seek to challenge the judgment of conviction and order of sentence dated 30.04.2003, passed by Sri Baleshwar Prasad Singh, the then Presiding Officer, Addl. Court No. 1, (Fast Track Court), Sasaram, by which the appellants were held guilty and convicted under Section 323 of the Indian Penal Code (hereinafter referred to as the “IPC”) and were sentenced to undergo R.I. for 06 months.

2. Prosecution case as per the fardbeyan of informant Ram Briksh Singh Yadav (not examined in this case as he died during pendency of the trial), in short is that on 27.09.1984 at about 10.30. A.M. when he went to irrigate his land, he found that accused Sheopujan of his village diverted the supply of water towards his field, on which the informant and his sons protested. Thereafter, the said accused



Sheopujan went to his house and after some time, he came back along with Butan Yadav @ Butan Singh Yadav, Lakshman Singh Yadav @ Lakshman Yadav, Godhan Singh Yadav, Shyam Behari Yadav and Arjun Singh Yadav armed with *lathi* and spade. Appellants Shyam Behari, Sheopujan, Lakshman and Butan assaulted the informant with *lathi* on his head and on both arms. Appellant Arjun Yadav gave a spade blow to the Bal Bachan Yadav (P.W. 2) on his head and appellant Godhan Yadav also assaulted Bal Bachan Yadav (P.W. 2) with *lathi* and when wife of the informant, namely, Kaliya Devi (P.W. 3) and his grand son Gorakh Yadav (P.W. 1) came to save them, they were also assaulted by the appellants Butan Yadav and Lakshman Yadav by *lathi* respectively. The above fardbeyan led to registration of Dehri (Indrapuri) P.S. Case No. 372/84.

3. Police after investigation submitted charge-sheet. Cognizance of the offence was taken and the case was committed to the court of sessions, which ultimately came to the file of Sri Baleshwar Prasad Singh, the then Presiding Officer, Addl. Court No. 1, (Fast Track Court), Sasaram for Trial and disposal.

4. Charges were framed under Section 307 of the IPC against appellant Shaym Behari Yadav @ Shyam Behari Singh Yadav and under Section 307/149 against all other appellants.

5. In order to prove its case, prosecution has examined altogether four witnesses, they are; P.W. 1 - Gorakh Yadav (grandson of the informant), P.W. 2 – Bal Bachan Yadav (son of informant), P.W. 3 –



Kaliya Devi (wife of informant), P.W. 4 – Doctor Birendra Kuma, who examined and treated the injured persons. In this case informant could not be examined as he died during the pendency of Trial and further the I.O. has also not been examined.

6. From the side of defence no witness has been examined and from the trend of cross-examination as well as for statement under Section 313 Cr.P.C., it appears that the defence of the appellants is of false implication and is of innocence.

7. Learned Trial Court after considering the evidence available on record, though not found the case true under Sections 307 and 307/149 of the IPC, however, he convicted all the appellants under Section 323 of the IPC and sentenced them in the manner as stated above.

8. Contention of learned counsel for the appellants is that there are vital intra contradictions amongst the evidence of witness and in this case neither informant nor I.O. has been examined and the initial statement of the informant before the police as well as the place of occurrence, remained to be established. It has further been submitted that the Trial Court did not give the benefit of Section 360 of Cr.P.C. to the appellants nor assigned any reason for not giving the benefit of Section 360 of Cr.P.C, as provided under Section 361 Cr.P.C. On the basis of the above submission, it has been submitted that conviction of the appellants under Section 323 of the IPC is not sustainable in the eye of law.



9. Learned counsel for the respondent – State, on the other hand, supported the finding of guilt recorded by the trial court and argued that though informant has not been examined in this case, however, reason for his non examination has properly been explained as he died during the pendency of case, he could not be examined. So far non examination of I.O. is concerned, it is well settled that non examination of I.O. is not fatal in all the cases unless some serious prejudice is caused to the defence side. It has also been submitted that P.W. 1, P.W. 2 and P.W. 3 have also sustained injuries and are consistent in their evidence with regard to assault on them and the informant by the appellants and they being the injured themselves, veracity of evidence of these witnesses cannot be question. Further the evidence of these witnesses also found corroboration from the evidence of Doctor (P.W. 4) and, therefore, there is no infirmity in the impugned judgment of Trial Court and conviction of appellants under Section 323 of the IPC is just and proper.

10. Considered the rival contentions of the parties. From perusal of the evidence, it appears that P.W. 1 and P.W. 2 are the sons of informant and P.W. 3 is the wife of informant and they have all supported the case of prosecution with regard to assault on them as well as on the informant by the appellants and they all being the injured, presence of these witnesses at the place of occurrence cannot be doubted and their evidence also found corroboration from the evidence of Doctor (P.W. 4), who found the injuries on the persons of



the witnesses. No doubt informant could not be examined as he died during pendency of the appeal and so far non examination of I.O. is concerned, no vital contradiction has been taken in the evidence of witnesses from their earlier statements before police and it also appears that non examination of I.O. has also not caused serious prejudice to the appellants and, therefore, the conviction of appellants under Section 323 of the IPC appears to be just and proper. However, I find force in submission of learned counsel for the appellant that the Trial Court did not consider the application of Section 360 of Cr.P.C. in the case of the appellants nor assigned any reason for not giving the benefit of Section 360 of Cr.P.C, specially when Section 361 Cr.P.C. provides that if the court decides not to exercise its jurisdiction under Section 360, it must record the reasons as held by Hon'ble Apex Court in the case of **Om Prakash and Others. v. State of Haryana** reported in (2001) 10 Supreme Court Cases 477 and 2003 Supreme Court Cases (Cri) 799 that *the provisions of Section 360 Cr.P.C are beneficial to the accused only when the accused is a first offender in case the accused is more than 21 years of age. Section 361 of the Code of Criminal Procedure indicates that if the Court decided not to exercise its jurisdiction under Section 360, then it must record its reasons as to why the benefit of Section 360 Cr.P.C. is being denied. In view of the peremptory nature of the language of provisions of Section 361, the Magistrate as well as the Court in appeal and revision not having indicated as to why the provisions of Section 360*



Cr.P.C have not been applied, there has been a gross miscarriage of justice and the legislative mandate engrafted in the aforesaid two Sections of the Code have not been complied with.

11. Considering the law laid down by the Hon’ble Apex Court in the above mentioned case as well as the facts of the present case, the appellants certainly deserves the benefit of Section 360 of Cr.P.C as it is also evident from the record that at the time of impugned judgment, appellants were aged about 30 years to 52 years and the occurrence is of year 1984 and appellants have suffered the rigors of trial and appeal for many years and there is nothing to show that they were previously convicted and had misused the privilege of bail. While, therefore, upholding the conviction of the appellants, instead of the sentence, they are directed to be released on probation for a period of six months on furnishing bonds of Rs. 5,000/- each with one surety,, during which period they shall maintain peace and harmony

12. With the aforesaid modification in sentence, this appeal is dismissed.

(Vinod Kumar Sinha, J)

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