

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.209 of 2003

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

- =====
1. Rajendra Yadav son of Late Saudagar Yadav, resident of village Hathiya Dhara, Police Station Belhar, District- Banka.
 2. Shambhu Yadav son of Jarman Yadav, resident of village Katahara Khanpur Police Station Sultanganj, District Bhagalpur.

.... Appellants

Versus

State of Bihar

.... Respondent

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Appearance :

For the Appellants : Mr. Harshwardhan Sahay, Adv.
Ms. Mina Kumari, Adv.

For the Respondent : Mr. Binod Bihari Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 22-03-2018

Both the appellants stand convicted under Section 326/34 of the Indian Penal Code and sentenced to undergo R.I. for seven years and a fine of Rs.1,000/- and in default to undergo S.I. for six months.

2. The prosecution case as stands from the fardbeyan of Sanjay Kumar Yadav (P.W.7) recorded at Sadar Hospital, Munger is that at about 8.30 A.M. Suresh Yadav was constructing wall it was protested by the informant and his father; upon which Suresh Yadav abused them and appellant no.1 Rajendra Yadav caught hold to the father of the informant and further allegation is that Suresh Yadav assaulted by spade on head causing him head injury and appellant no.2 Sambhu Yadav assaulted with *lathi* to him and his father. On *hulla*, Ashok Yadav, Mukhdeo Yadav, Bijay Yadav and Sachida



Yadav reached at the place of occurrence and the accused persons fled away. It is also stated that the intention behind that is to kill the father of the informant. The aforesaid fardbeyan led to registration of Kharagpur P.S.Case no.197 of 1996 and post investigation, cognizance of the case has been taken and the father of the informant died in hospital after some time and as Section 302 of the IPC was also added. Case had been committed to the court of sessions which ultimately came to the file of Sri Paras Nath Sinha, Presiding Officer, Addl. Court (Fast Track), Munger for trial and disposal.

3. During trial the appellants stand triable under Section 302/34 of the IPC along with Suresh Yadav and Suresh Yadav has further been charged under Section 379 of the IPC and Rajendra Yadav has been charged under Section 323 of the IPC.

4. To substantiate its case, the prosecution has examined following witnesses : P.W.1 Sachida Yadav claims to be eye witness of the occurrence, P.W.2 Mahesh Kumar Yadav declared hostile, P.W.3 Rabindra Yadav tendered for cross examination, P.W.4 Ashok Kumar Yadav declared hostile, P.W.5 Mukhdeo Yadav declared hostile, P.W.6 Dr. Pran Mohan Sahay who has examined the injured, P.W.7 Sanjay Kumar Yadav- informant and injured, P.W.8 Sulekha Devi, mother of the informant and wife of the deceased.

5. Apart from the above, the following documents have been brought on the record as exhibits : Ext.1 injury report, Ext.2



signature of Sanjay Kumar Yadav on the fardbeyan Ext. 2/1 signature of Sanjay Kumar Yadav on the inquest report and Ext. 2/2 signature of Ashok Kumar Yadav on the inquest report.

6. It appears that on behalf of the defence, no evidence either ocular or documentary has been adduced

7. It further appears that in this case neither the I.O. nor the Doctor who has conducted the postmortem has been examined.

8. The learned trial court on conclusion of the trial has not found the case under Section 302/34 of the IPC, however, convicted the appellants under Section 326/34 of the IPC even in absence of charge under Section 326/34 of the IPC stating that Section 326/34 is minor Section of Section 302/34 of the IPC.

9. Contention of the learned counsel for the appellants is that in this case all the witnesses except P.Ws.1, 7 and 8 have been declared hostile and the Doctor who has conducted the postmortem report has not been examined and the I.O. has also not been examined and in absence of that conviction of the appellants on solitary evidence of P.W.7 is not sustainable in the eye of law, hence, it is fit to be set aside.

10. On the other hand, the contention of the learned counsel for the State is that there is allegation of assault by spade by Suresh Yadav and there is allegation against appellant Rajendra Yadav that he caught hold the deceased i.e. father of the informant



and appellant Shambhu Yadav also assaulted and the evidence of Sanjay Kumar Yadav (informant) shows that his father died on 21.7.1996 i.e. after six days of the occurrence, as such conviction of the appellants under Section 326/34 of the IPC is just and proper and it does not require any interference by this Court.

11. The learned trial court has also not found the prosecution story true under Section 379 of the IPC true, however, convicted the appellant Shambhu Yadav under Section 323 of the IPC and Suresh Yadav under Section 379 of the IPC. It appears that Suresh Yadav has not preferred the Appeal.

12. Heard both sides and on perusal of the evidence as adduced on behalf of the parties, it appears that all the material witnesses have been declared hostile except P.Ws. 1, 7 and 8 in this case and from perusal of the evidence of P.W.1 in para 3 it appears that he saw his *bahnoi* Gajadhar in injured condition as such he does not appear to be eye witness on the point of assault to deceased Gangadhar Yadav. Evidence of P.W.8 also shows that she is eye witness of the occurrence and seen the manner of assault and in spite of cross examination, there is nothing in her evidence so far evidence on point of assault except that P.W.8 has that she has stated that Gajadhar was assaulted by Rajendra Yadav and Shambhu Yadav whereas the prosecution case as appears from the fardbeyan is that he was assaulted by Shambhu Yadav and Rajendra Yadav caught hold to



him.

13. P.W.7 is the injured and son of the deceased and his evidence shows that in the morning at 08 O'clock he along with his father had gone to his field and saw Suresh Yadav constructing a wall and when they objected to that, Suresh Yadav started abusing him . He has also stated that Rajendra Yadav caught hold his father and Suresh Yadav assaulted him with intention to kill him and Shambhu Yadav assaulted to his father from *lathi* and in spite of cross examination, there does not appear any contradiction in his evidence from the earlier statement before the police and the Doctor (P.W.6) who has examined Sanjay Kumar Yadav (P.W.7) has found following injuries :

No.I Bruise at right shoulder 1 ½" X ¾" at outer aspect.

No.II Bruise of size 1 ½" X ¾" on right shoulder on anterior aspect.

No.III Bruise of size 1 ½" with circular abrasion on centre of the bruise ½ in diameter on left shoulder on outer aspect."

No.4 Bruise of size 1 ½" X ½" on right buttock"

No doubt all the injuries were found to be simple in nature.

14. Considering the prosecution evidence, it appears that there is consistent evidence of P.W.7 and 8 as far time of occurrence, manner of occurrence and the place of occurrence is concerned. The defence has tried to show that no such occurrence has taken place in the manner as described by the prosecution rather the appellant Suresh Yadav was constructing wall on his own land and the accused persons



objected in construction of the wall, however, no suggestion has been given or any cross examination has been made to show that the deceased and P.W.7 have received injury in some other manner to create doubt about prosecution story.

15. The learned trial court has convicted the appellants under Section 326/34 of the IPC and also convicted accused Suresh Yadav and it appears that Suresh Yadav has not preferred the appeal and it also appears from the record that at the time of judgment itself he was in custody for six years and Shambhu Yadav has also been convicted under Section 323 of the IPC, however, from perusal of the record, it appears that neither the Doctor has been examined in this case nor the postmortem report or the injury report of the deceased has been brought on record though the Doctor who has examined informant Sanjay Kumar Yadav has found injuries and it has also been brought on record but those injuries were simple in nature and as such there is absolutely nothing available on the record to show that the injury on the person of was grievous or dangerous to life in ordinary course of nature or the injuries are sufficient to cause death. There is also no finding regarding the weapon used. As neither the Doctor has been examined nor the postmortem report or injury report has been brought on record for coming to a finding that injury was either grievous or sufficient to cause death in ordinary course.

16. For conviction under Section 326 IPC, prosecution



has to establish that the deceased/injured has received grievous injury and in absence of the evidence of the Doctor there is no such finding and even there was no finding regarding weapon used in this case and as such in absence of the medical evidence, nature of the injury could not be established in this case but the learned trial court has convicted the appellants under Section 326/34 of the IPC. There is also nothing available on the record to show that the deceased died due to injury caused to him in the occurrence as the postmortem report has also not been brought on record, however, the learned trial court though considered this aspect of the matter that the postmortem report has not been produced and the Doctor has not been examined but on the basis of the inquest report, he has convicted the appellants under Section 326/34 of the IPC which does not appear to be just and proper and as stated above, in absence of examination of the Doctor or in absence of injury report or the postmortem report, conviction of the appellants under Section 326/34 of the IPC appears to be perverse and bad in laws. However, evidence available on the record shows that the appellant Suresh Yadav assaulted by spade to the deceased and at that time, Rajendra Yadav caught hold of him and Shambhu Yadav assaulted the deceased and also to informant by *lathi* hence, evidence at best discloses a case under Section 324/34 of the IPC against the appellants and further under Section 323 of the IPC against the appellant No.2 (Shambhu Yaav).



17. Considering the discussions made above, conviction of the appellants under Section 326/34 of the IPC is modified to the conviction under Section 324/34 of the IPC and conviction of the appellant Shambhu Yadav under Section 323/34 of the IPC is affirmed.

18. Further submission of the learned counsel for the appellant is that as appellant no.1 has remained in custody for 07 months and 10 days and appellant no.2 has remained in custody for 20 months, and the occurrence is of the year, 1996, as such sentences be reduced the period already undergone by them in custody.

19. In view of the fact conviction is not under Section 326/34 of the IPC and under Section 324/34 of the IPC and the case is of the year, 1996, as such both the appellants are sentenced under Section 324/34 and Section 323 of the IPC for the period already undergone in custody.

20. With the aforesaid modification in conviction and sentence, This appeal is disposed of.

(Vinod Kumar Sinha, J)

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