

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.162 of 2003

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

- =====
1. Subhash Yadav son of Late Baleshwar Yadav
 2. Sarvanand Yadav, son of Late Raktu Yadav
 3. Sindhu Yadav alias Sidhu Nath Yadav son of Sarvanand Yadav
 4. Kashi Nath Yadav son of Sarvanand Yadav
 5. Madan Yadav son of Late Balrup Singh
 6. Dudh Nath Yadav son of Late Balrup Yadav
 7. Raj Nath Yadav son of Late Balrup Yadav
 8. Mahendra Yadav son of Late Dasarath Yadav
 9. Jag Mohan Yadav @ Jag Narayan Yadav son of Late Brij Yadav
 10. Sri Bhagwan Yadav son of Sheo Lochan Yadav
- All resident of village Khairhi, P.s. Agian Bazar, District Bhojpur.

.... Appellants

Versus

State of Bihar

.... Respondent

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Appearance :

For the Appellants : Mr. Anil Kumar Dwivedi, Adv.

For the Respondent : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 25-01-2018

All the appellants stand convicted under Sections 325/149 of the Indian Penal Code (hereinafter to be referred as 'the IPC') and sentenced to undergo RI for two years and fine of Rs.2,000/- with default clause.

2. It further appears that the appellants have been acquitted from the charges levelled under Sections 307/149 and charges under Section 379 of the IPC.

3. The prosecution case as per narration given by P.W.2 Hari Narayan Upadhyay is that while he was going to village Semaria



from his home for purchasing bullock and crossing the Badhar, the accused appellants surrounded him and assaulted him by *lathi* as there was previous enmity between them. It is also alleged that Sarvanand Yadav took Rs.1510/- cash from him and Kashi Nath Yadav snatched H.M.T. wrist watch of the informant. The Fardbeyan led to registration of Agiaon Bazar P.S.Case No.42 of 1989 under Sections 307/149, 379 and other Sections of the IPC. Post investigation, the charge sheet has been submitted and the cognizance of the offence has been taken. The case was committed to the court of Sessions, which ultimately came to the file of Sri Manoranjan Prasad Srivastava, Addl. Sessions Judge-cum-Presiding Officer, 5th FTC, Ara. The charges were framed against the appellants under Sections 307/149 as well as under Section 379 of the IPC.

4. During the trial, six witnesses have been examined on behalf of the prosecution, their details are as follows : -P.W.1 Jai Ram Singh claims to be eye witness of the occurrence, P.W.2 Paras Upadhyay declared hostile by the prosecution, P.W.3. Ram Nagina Singh declared hostile by the prosecution, P.W.4, Tej Narayan Singh declared hostile by the prosecution, P.W.5 Hari Narayan Upadhyay (informant-cum-injured), P.W.6 Dr. Dinesh Mishra, who has examined the injured.

5. On behalf of the defence, no specific defence has been taken, however, from the trend of the cross examination as well as the



statement under Section 313 of the Cr.P.C., it appears that their defence is of false implication and of innocence and no such occurrence has taken place as alleged by them.

6. After conclusion of the trial, the learned trial court has not found the appellants guilty under Sections 307/149 of the IPC, however, he has sentenced them under Sections 325/149 of the IPC on the ground that this is minor Section of 307/149 of the IPC.

7. The learned trial court has also disbelieved the story of theft of wrist watch and cash and also not found the appellant Sarvanand Yadav and Kashi Nath Yadav guilty under Section 379 of the IPC.

8. The contention of the learned counsel for the appellants is that the whole case is based only on the evidence of the informant (P.W.5) and P.W.1 Jai Ram Singh and they are related to each other and no independent witness has been examined in this case and though some other witnesses have been examined but they have been declared hostile and there is no corroboration of this evidence by P.Ws. 5 and 1 by independent witnesses.

9. Further submission of the learned counsel for the appellants is that no motive has been assigned for causing injury to the informant and furthermore though 10 appellants were named in the FIR but no overt act has been alleged. So far appellant nos.5 to 10 is concerned simply it is stated that they were also member of the mob



chasing the informant and there is no allegation of assault against them whereas the Doctor has found only four injuries on the person of Hari Narayan Upadhyay (P.W.5) and Paras Upadhyay (P.W.2) and no specific allegation has been attributed to appellant Subhash Yadav and Sindhu Yadav, in such a situation, convicting of the appellants under Section 149 of the IPC is not sustainable in the eye of law. Further submission of the learned counsel for the appellants is that conviction of the appellants is under Section 325 of the IPC with aid of Section 149 of the IPC is also not sustainable in the eye of law as X-ray plate number has not been mentioned in the evidence of the Doctor and the Doctor who has taken X-ray has also not been examined in this case.

10. Submission of the learned counsel for the appellant is that considering the above discrepancies and inconsistencies in the prosecution case, the impugned judgment suffers from infirmities and is not sustainable in the eye of law.

11. Heard learned counsel for the State, who has supported the judgment on the ground that the injured P.W.2 has stated about the injury received to him by the appellant Subhash Yadav by *lathi* on leg and by Sindhu Yadav on head and the other accused appellants also assaulted him indiscriminately by *lathi* and the Doctor has also found four injuries, out of which one injury was found grievous in nature, hence there is no infirmity in the impugned order.

12. In the above background while considering the



evidence, it appears that all the witnesses have turned hostile except P.W.5 who is informant and P.W.1.

13. Evidence of P.W.5 shows that while he was going for purchase of bullock and crossing the paddy field, the appellants surrounded him and seeing them he started fleeing but he was chased and he fell down in the paddy field and thereafter on the order of Sarvanand Yadav, he was assaulted by *lathi* and Sarvanand Yadav took Rs.1510/- from his pocket and Sindhu Yadav assaulted on head and Kashi Nath Yadav snatched one HMT watch from him and thereafter he has stated that all the other accused persons were armed and *lathi* and they have also assaulted him. From the evidence of P.W.6 it appears that the occurrence took place in the field of Sarvanand Yadav. This witness has been cross examined which also shows that he has received only one injury on his head and the doctor has also been examined in this case as P.W.6 and he has stated in his evidence that he has found following injuries :-

“i. Swelling of whole of left forearm after xray shows fracture of lower third of ulna.

ii. Lacerated wound on scalp left side nearly 3”X 4” X ½”.

iii. Swelling post tenderness of right thigh on lower part, there is circumference.

iv. Abrasion on left fore arm lateral aspect upper part ¼” arm fence.

Identification- mode on right flex.

Age of injuries- Within 12 hours.

Injury no.(i) is grievous , caused by hard and blunt substance. X-ray plate and X-ray report is attached with report. Rest injuries simple in nature caused by hard and blunt substance may be iron rod. This



report is in my pen and bear my signature.”

14. That shows that he has altogether four injuries on his person of hard and blunt substance. His evidence further discloses that xray shows fracture of lower third of ulna and he has found nature of injury number - one grievous in nature but this witness has admitted that he could not say who has done X-ray and his report is based on X-ray report. He has proved the injury report as Ext.2 and it further appears that thereafter the X-ray plate has also been brought on record as Ext. 3, however, it appears that no X-ray plate number is mentioned in Ext.3 and even the Doctor who has conducted X-ray has not been examined in this case.

15. Apart from the evidence of P.W.6, P.W.1 has also supported the manner of occurrence and also stated that Subhash Yadav assaulted by *lathi* on leg and he has further stated that Sindhu Yadav assaulted by *lathi* on head and also stated about the theft of cash and watch by Sarvanand Yadav and Kashi Nath respectively.

16. From the discussions made above, it appears that though there is consistent evidence of P.W.5 and P.W.1 about the manner of assault but there is no specific allegation, so far appellant no.5 to 10 are concerned and so far appellant nos.2 and 4 are concerned, the story of theft of cash against Sarvanand Yadav and snatching of watch against the appellant no.4 has been disbelieved by the learned trial court itself. It further appears that except a vague statement that



he was assaulted by the accused persons due to previous enmity, no motive has been assigned. It further appears from the evidence of P.W.5 that the place of occurrence was paddy field of the appellant Sarvanand Yadav.

17. The Hon'ble Apex Court in a decision of **Kuldip Yadav & Ors. – Vrs.- State of Bihar**, reported in **2011 (5) SCC 324** has held in Para 39 as follows :-

It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC.

18. In the present case also there is nothing available on the record to show that incriminating act was done to accomplish the common object of the unlawful assembly and it was within the knowledge of other members as one likely to be committed in prosecution of the common object rather the evidence available on the record shows that there was land dispute between the parties and the land was purchased by the appellants' side also and the I.O. has not been examined in the present case to come to a finding about the place of occurrence as well as to find out with certainty that the appellants



were aggressor in the case.

19. Further it appears that though the appellants have been held guilty under Section 325 of the IPC with the aid of Section 149 of the IPC, however, the Doctor who has conducted X-ray has not been examined in this case and though X-ray plate has been brought on record but number Of x-ray plate has not been mentioned.

20. P.W.6 has categorically stated that his opinion about the fracture injury is on the basis of X-ray report, however, the learned trial court has failed to consider that nor x-ray plate number nor Doctor has been examined in this case and in absence of that finding of grievous injury can not be sustained.

21. From the discussions made above, it appears that the convictions of all the appellants with aid of Section 149 of the IPC in absence of any overtact is not sustainable in the eye of law rather the appellants against whom there are overtact they can not be found guilty under Section 325 of the IPC rather under Section 323 of the IPC.

22. Considering the entire discussions made above, appellant no.1 Subhash Yadav and appellant No.3 Sindhu Yadav alias Sindhu Nath Yadav is modified to sentence under Section 323 of the IPC. So far other appellants are concerned, their conviction under Sections 325/149 of the IPC does not appear to be sustainable in the eye of law, hence their conviction and sentence are set aside.



23. Appellants Subhash Yadav and Sindhu Yadav alias Sindhu Nath Yadav have been sentenced to undergo RI for two years under Sections 323/149 of the IPC by the learned trial court but considering the fact and circumstances of the case it is modified under Section 323 of the IPC and further the case is of the year, 1989 as such 28 years yeas has passed, the appellants have suffered ignominy and mental agony for such long period and there is absolutely nothing available on the record to show that there was any previous conviction against them or they misuses of the privilege of bail or provisional bail granted to them in that view of the matter, they are directed to be released on due admonition as provided under Section 360 of the Cr.P.C.

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

(Vinod Kumar Sinha, J)

chn/-

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