

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.194 of 2003

=====

Kishori Sah, Son of Hira Sah, Resident of Village – Kaurihar, P.S. –
Raxaul, District – East Champaran,

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Shakti Suman Kumar, Adv.
: Mr. Rajesh Ranjan, Adv.

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

=====

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 08-02-2018

Challenge in this appeal is of judgment of conviction and order of sentence dated 24.02.2003, passed by Shri Bimal Kumar, the then Presiding Officer, Fast Track Court No. 3, Additional District & Sessions Judge, East Champaran, Motihari, in Sessions Trial No. 367/86 / 1989/02, by which appellant Kishori Sah stood convicted under Sections 148 and 324 of the Indian Penal Code (hereinafter referred to as the "IPC") and was sentenced to undergo R.I. for one year under each Section. By the said order, the trial court also convicted other accused persons of this case, however, they were released on probation for a period of one year on execution of bond of Rs. 2,000.

2. Prosecution case as per the written report of



informant – Arjun Rai (P.W. 5), in short is that on 06.08.1988 that after taking meal in the night, they were sleeping and at about 12.30, about 15 to 20 persons came on the verandah of his house and started using filthy words and when he and others came out, they found that accused persons were armed with various weapons. Thereafter, accused Kapildeo Rai assaulted Rajdeo Rai by means of *garasa* and snatched his wrist watch, accused, Indradeo Rai assaulted Dasai Rai with *lathi* and snatched away his wrist watch, accused Gudar Rai assaulted with *Garasa* and other accused persons also assaulted informant and others by their respective arms and it is alleged that appellant assaulted Narain Rai by means of *farsa* and further all the accused persons looted away articles and ornaments from the house, on the basis of the said written report Raxaul P.S. Case No. 86/1988 was registered against the accused persons.

3. Post investigation, charge sheet was submitted. Cognizance of the offence was taken and the case was committed to the court of sessions, which ultimately came to the file of Shri Bimal Kumar, the then Presiding Officer, Fast Track Court No. 3, Additional District & Sessions Judge, East Champaran, Motihari, for trial and disposal. Charge under Section 379 of the IPC was framed against accused



Kapildeo Rai under Section 147 and 325 of the IPC was framed against Indradeo Rai, Awat Rai, Shiwnath Rai, Bhuteli Rai, Yogendra Rai, Binda Sah, Jagarnath Sah, Hardeo Sah, Prahlad Rai, Nathu Rai, Chandrika Rai, Binda Rai, Shivnath Sah, Kapildeo Rajendra Rai and Raman Rai under Section 448 and 380 of the IPC., against Binda Sah, Jagarnath Sah, Hardeo Sah, Prahlad Rai, Nathu Rai, Chandrika Rai, Rabindar Rai, Jagendar Rai and Raman Rai. Under Section 148 and 324 of the IPC., against Kapildeo Rai, Gudar Rai, Gagandeo Rai, Kishori Sah and Sukhram Mahto and under Section 307/149 of the IPC., against Kapildeo Rai, Gudar Rai, Indradeo Rai, Gagandeo Rai, Anwat Rai, Sheonath Rai, Kishori Sah, Bhuteli Rai, Yogendra Rai, Binda Sah, Jagarnath Rai, Hardeo Sah, Prahlad Rai and Nathu Rai, Chandrika Rai, Rabindar Rai, Sukhram Mahto, Shivnath Sah, Vakil Rai, Rajendar Rai and Raman Rai.

4. in order to prove its case, prosecution has examined altogether 07 witnesses. They are:-P.W. 1 – Ganga Rai, claimed to be the eye – witness of the occurrence, P.W. 2 – Narain Rai, injured, P.W. 3 - Rajdeo Rai, injured, P.W. 4 – Dasai Rai, injured, P.W. 5 – Arjun Rai, injured, P.W. 6 – Anil Kumar Singh, I.O. of this case and P.W. 7 – Rajeswar Prasad is the doctor, who examined the injured persons.



5. Apart from that, following documents have been brought on record and marked as Ext. 1 – Fardbeyan, Ext. 2 – Formal F.I.R., Ext. 3 to 3/3 – injury slips of Dasai Rai, Narain Rai, Arjun Rai and Rajdeo Rai, Ext. 4 to 4/3 injury reports of Dasai Rai, Narain Rai, Arjun Rai and Rajdeo Rai, Ext. 5 to 5/1 – Signature of P.W. 7 (Doctor) on the photostate copies of X-ray reports and Ext. 6- Certified copy of judgment of Cr. Appeal No. 120/98 / 1991/97.

6. On behalf of defence also one witness has been examined i.e. D.W. 1- Ragho Prasad, a formal witness of this case and following documents have also been brought on record and marked as; Ext. A to A/4 – photocopy of injury report, Ext. B to B/4 injury slips and Ext. C – Certified copy of judgment in Trial No. 552/91.

7. Defence of the accused persons as per statement under Section 313 Cr.P.C as well as from the ocular and documentary evidence is that there is case and counter case and in counter case informant and others stood convicted and only to save their skin, they have filed this false and concocted case against the appellant and other accused persons.

8. Learned Trial Court after considering the evidence available on record, convicted the appellant under Section 148 and 324 of the IPC and sentenced him in the manner



as stated above. Vide the said order, the trial court also convicted other accused persons, however, they were released on execution of a bond of Rs. 2,000.

9. Submission of learned counsel for the appellant that the trial court has failed to consider that there was case and counter case between the parties and in the counter case, informant and others stood convicted in Trial No. 552/91 and further there were injuries also sustained by the appellants in the said counter case and it appears to be a case of free fight between the parties on the alleged date of occurrence and in these circumstances conviction of appellant under Section 148 of the IPC does not appear to be probable. Further submission of learned counsel for the appellant is that even according to F.I.R, appellant is said to have caused injury to Narain Rai (P.W. 2) and the said Narain Rai (P.W. 2) has stated in his evidence that appellant assaulted him by means of *farsa* in the right side of the head, however, the doctor (P.W. 7) found the injury caused by sharp cutting weapon on the left side of head, which clearly falsify the prosecution story especially when there was free fight between the parties and it was not possible to ascertain as to who assaulted whom on which part of the body and the Trial Court without considering all these facts and infirmities in the prosecution story has



convicted the appellant under Section 148 and 324 of the IPC, which is out and out perverse and not sustainable in the eye of law.

10. On the other hand, learned counsel for the State supported the finding of guilt recorded by learned Trial Court and submitted that there are consistent evidence of witnesses with regard to genesis and manner of occurrence and though there is contradiction in the evidence of Narain Rai (P.W. 2), however, the doctor has also found the injury on right side of the head of the injured, which was caused by hard and blunt substance and, therefore, there is no infirmity in the judgment of Trial Court and conviction of appellant under Section 148 and 323 of the IPC is just and proper.

11. Heard the rival contention of the parties. It appears that P.W. 1 has claimed himself to be the eye-witness of the case and P.W. 2 to P.W. 5 are injured in this case and they have supported the prosecution case in *toto* in their evidence, which has been corroborated by the earliest version, the F.I.R and also corroborated by the evidence of doctor. In this case I.O. has also been examined and there is nothing in his evidence to cast doubt on the manner and genesis of occurrence.

12. However, what appears from perusal of records that



the appellant has brought on record Ext. C, which shows that there was a counter case also, in which appellants' side had also received injuries, which is B to B/4 and it further appears that in the said counter case, informant and others stood convicted by the Judgment passed in Trial No. 552/91 and, therefore, the probability of free fight between the parties, cannot be ruled out. Considering the fact that there was case and counter case between the parties and injury sustained by both the parties and there was free fight between the parties, It can not be said that the appellant was member of any unlawful assembly and has come to create violence in unlawful manner. Hon'ble Apex Court has also considered aforesaid aspect of the matter in the case of **Mariadasan And Ors. vs State Of Tamil Nadu** reported in **1980 SCC 573** and further the Hon'ble Apex Court in the case of **Ananta Kathod Pawar and Others. v. State of Maharashtra** reported in **(1997) 11 SCC 564** relying on the Judgment of Hon'ble Apex Court in the case of **Lakshmi Singh v. State of Bihar** reported in **(1976) 4 SCC 394** held that “ *In our considered view, with the above observations and findings, the trial court was not at all justified in convicting the appellants for rioting or for the other offences with the aid of Section 149 IPC. Equally untenable is the High Court's affirmation of the above convictions for the evidence on record* ”



clearly establishes the findings recorded by the trial court. Once the trial Court found that there was a sudden and free fight between the two groups in which members of both the groups sustained injuries, the trial Court should have held that there was no scope for convicting members of one of those groups under [Sections 147](#) or 148 [I.P.C.](#) and for that matter for substantive offences with the aid of [Section 149](#) [I.P.C.](#) In such a case, the accused persons would be liable for their individual acts and would not be liable vicariously. In the instant case, we are unable to convict the appellants for their individual acts also as no specific evidence was led by the prosecution in that regard.

13. In view of the above settled principle, it appears that there is no applicability of Section 148 of the IPC in the facts and circumstances of the case and, therefore, the same is not sustainable in the eye of law.

14. Appellant has also been convicted under Section 324 of the IPC and it was alleged that appellant assaulted P.W. 2 on his right side of head by means of *farsa*, however, evidence of doctor (P.W. 7) negates the said allegation as the evidence of doctor (P.W. 7) discloses that injury which was found on the right side of the head of Narain Rai (P.W. 2) was caused by a hard and blunt substance and since it appears to be a case of free fight between the parties, it cannot be said with certainty as to who assaulted whom and on what part of the body and in such a situation,



appellant certainly deserve the benefit of doubt.

14. Accordingly, this appeal is allowed. Judgment of conviction and order of sentence dated 24.02.2003, passed by Shri Bimal Kumar, in Sessions Trial No. 367/86 / 1989/02, is set aside.

15. As the appellant is on bail, he is discharged from liability of bail bond.

(Vinod Kumar Sinha, J)

sunil/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	13.01.2018
Transmission Date	13.01.2018

