

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.614 of 2002

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

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Kamesher Ram & Anr

.... Appellant/s

Versus

State of Bihar & Ors

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Animesh Kumar Mishra, *Amicus Curiae*

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

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 08-01-2018

By way of present appeal, appellants seek to challenge the Judgment of conviction and order of sentence dated 27.09.2002, passed by Shri Kamla Prasad Sinha, P.O. Additional Sessions Judge, Fast Track Court No. 1, Nawada, in Sessions Trial No. 329/2002/345/ 94, by which the appellants and one co-convict, namely, Indradeo Ram were held guilty under Section 323/34 of the Indian Penal Code (hereinafter referred to as "the IPC") and were sentenced to undergo R.I. for three months.

2. Prosecution case in short is that while informant – Chandrika Yadav (P.W. 7) was returning home from Market in the mid-way, he found accused persons along with one other sitting on the road side and on seeing the informant, they started abusing him. On protest by the informant, appellant Upendra Ram assaulted him with *Tangi* and



others by means of *lathi*, causing injuries to him on different parts of his body. On hulla, witnesses, namely, Girani Manjhi, Arun Pd. Ramsahai and others assembled and accused persons fled away. Thereafter they went to the police station, where fardbeyan of the informant (injured) was recorded and he was taken to hospital. On the basis of the statement of the informant, Gobindpur P.S. case No. 26/92 was registered against the appellants and others.

3. Police after investigation submitted charge-sheet against the appellants and other accused persons, namely, Indradeo Ram and one Bishundeo Ram. It appears that later on, case of co-accused Bishundeo Ram was separated from the case of appellants and Indradeo Ram vide order dated 25.09.1996.

4. Cognizance of the offence was taken and the case was committed to the court of sessions, which ultimately came to the file of Shri Shri Kamla Prasad Sinha, P.O. Additional Sessions Judge, Fast Track Court No. 1, Nawada, for trial and disposal.

5. To prove its case, prosecution has examined altogether seven witnesses. They are; P.W. 1- Vijay Kumar, a formal witness, who proved the signature of the police officer on the formal F.I.R, P.W. 2 – Deoki Pd. Yadav, P.W. 3- Ramsahai Mahto, P.W. 4- Arjun Pd. Yadav, P.W. 5- Girani Manjhi, P.W. 6 – Brijanandan Paswan and P.W. 7- Chandrika Yadav (informant). It further appears that in this



I.O. as well as the doctor has not been examined.

6. When examined under Section 313 Cr.P.C., appellants pleaded not guilty. Defence of the appellants is that no occurrence as alleged took place and the informant was in a drunken condition and he sustained injury due to quarrel.

7. Post trial, the learned trial court after considering the evidence available on record, convicted the appellants under Section 323/34 of the IPC and sentenced them in the manner as stated above.

8. Contention of the appellants is that no such occurrence had ever taken place and they have falsely been implicated in this case due to enmity. It has been submitted by Shri Animesh Kumar Mishra, learned *Amicus Curiae* that in this case neither I.O. nor Doctor has been examined and except P.W. -7, who is alleged to be the injured, there is no eye-witness to prove the case of prosecution as admittedly P.W. 2 to 6 has reached the place of occurrence after the alleged incident had taken place. It has further been submitted that no motive has been assigned by the prosecution behind such occurrence. Further contention of learned *Amicus Curiae* is that the trial court while passing the impugned judgment of conviction, has not given the benefit of Section 360 of Cr.P.C to the appellants. and even no reason was assigned for not giving the said benefit to the appellants as provided under Section 361 Cr.P.C. and it causes judgment and order



of sentence, hence is not sustainable in the eye of law.

9. On the other hand, learned counsel for the respondent – State has submitted that evidence P.W. 7, satisfactorily establishes the overt act of the appellants and P.W. 7, being the injured witness, the veracity of this witnesses cannot be questioned and he also withstood the test of cross – examination and there is nothing in his evidence to doubt his credibility and though other witnesses are not the eye – witness of the occurrence, however, they had reached the place of occurrence soon after the incident and found P.W. -7 in an injured condition, who took him to police station and, thereafter to the hospital. It has further been submitted that in this case F.I.R. was lodged within two hours of the incident and as such there is no chance of tampering in the F.I.R. and hence the conviction of appellants under Section 323/34 is just and proper and does not require any interference.

10. From perusal of the evidence, it appears that P.W. 7 is the informant and injured in this case and the only eye witness of this occurrence and he has stated about the injury inflicted to him by the appellants by *tangi* and *lathi*. He has also stated that he was taken to police station and then to hospital and his fardbeyan was recorded by the police within two hours of the incident. The aforesaid evidence of



P.W. 7 found support from P.W. 2 to 6, though they are not eye-witness of the occurrence but they had seen P.W. 7 in an injured condition just after the occurrence. No doubt in this case I.O. and Doctor has not been examined but the evidence of P.W. 7, who is injured in this case, is consistent and reliable and has also withstood the test of cross-examination and there is nothing in his evidence to discredit him. However, since the I.O. and I.O. has not been examined in this case, the trial court has rightly not found the case under Section 307 of the IPC and convicted the appellants under Section 323/34 of the IPC.

11. However, this Court finds force in submission of learned *Amicus Curiae* that the trial court ought to have given the benefit of Section 360 of Cr.P.C as there is no material available on record to show that the accused were previously convicted and there is nothing against them to show that they had ever misused the privilege of bail in spite of that the trial court did not consider the application of Section 360 of Cr.P.C. against them 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 such, it is the gross miscarriage of justice. In the present case, I find there is absolutely nothing on record to show that appellants were previously



convicted or they had ever misused the privilege of bail and had been of bad conduct during trial. 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 has observed 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 Cod 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.*

12. 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 22 and 32 years respectively and the case is of year 1992 and suffered the rigors of trial and ignominy for 25



long 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.

13. With the above direction, this appeal is disposed of.

(Vinod Kumar Sinha, J)

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