

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.26 of 2003

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

- =====
1. Girish Upadhyay @ Girish Chandra Upadhyay S/O Sri Bijai Upadhyay, resident of village- Sinhauta Bangra, P.S. Maharajganj, District Siwan
 2. Sanjay Padhyay @ Sanjay Kumar Upadhyay S/O Sri Yongendra Upadhyay, resident of village Sinhauta Bangra, P.S. Maharajganj, District Siwan.

.... Appellants

Versus

State of Bihar

.... Respondent

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Appearance :

For the Appellants : Mrs. Rina Sinha, Amicus Curiae

For the Respondent : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 02-04-2018

Heard the parties.

2. On repeated calls, no one appears on behalf of the appellants, as such Mrs. Rina Sinha, Advocate is appointed as the *Amicus Curiae* to assist this Court.

3. Both the appellants have been convicted under Section 324 of the Indian Penal Code and sentenced to undergo R.I. for one year, vide judgment and order dated 17.12.2002 passed by Sri Anant Prasad Shrivastava, Presiding Officer Ist Additional Fast Track Court, Siwan in Sessions Trial No.459 of 1995/471 of 2002.

4. It further appears that two other accused persons Harendra Upadhyay and Jitendra Upadhyay were also convicted under Section 323 of the IPC by the same judgment but they were released on due admonition by the learned trial court itself and they



have not preferred any appeal.

5. During pendency of the appeal, a report has been submitted by the S.P., Siwan, from which it appears that the appellant Girish Upadhyay @ Girish Chandra Upadhyay died on 1.1.2018, as such the appeal as against Girish Upadhyay @ Girish Chandra Upadhyay stand abated.

6. The prosecution case as appears from the fardbeyan of P.W.6 Anirudh Upadhyay recorded by Sri B.N.Mishra, S.I. of Maharajganj Police Station at Primary Health Centre, Marajganj on 14.5.1994 at 22:30 hours is that after relieving from his duty he was going to his house and when he reached near the Transformer, accused Jitendra Upadhyay started abusing him and he went to the Market and came to his house and asked as to whether anything happened then he came to know that there was some quarrel between the children. Further case is that he went for milking cow, thereafter his son Guddu Upadhyay went to the house and Harendra Upadhyay, Jitendra Upadhyay, Girish Chandra Upadhyay and Sanjay Upadhyay started quarrelling with him and he raised *hulla*, on which he went along his son there and tried to pacify them, on which Harendra Upadhyay put *Bhala* on his chest and asked Girish Chandra Upadhyay and Sanjay Upadhyay to kill him and Girish Chandra Upadhyay and Sanjay Upadhyay assaulted him by sharp knife, causing injury to him on neck by Girish Chandra Upadhyay and



Sanjay Upadhyay near ear and when he tried to save from the second assault, he received injury in right hand and Jitendra Upadhyay assaulted him indiscriminately by *Lathi*, he fell down in injured condition and thereafter he was taken to the hospital. In the Fardbeyan he has admitted that there is land dispute between Girish Upadhyay and him and Girish Upadhyay is Night-guard in the Post Office.

7. On the basis of the aforesaid statement, Maharasganj P.S.Case No.73 of 1994 was registered and after the charge-sheet and cognizance, the case was committed to the court of Sessions, which ultimately came to the file of Anant Prasad Shrivastava, Presiding Officer Ist Additional Fast Track Court, for trial and disposal.

8. Charges were framed under Section 307/34 of the IPC against both the appellants and appellant accused Girish Chandra Upadhaya and Sanjay Upadhyay have been charged under Section 324 of the IPC whereas Jitendra Upadhyay has been charged under Section 323 of the IPC.

9. During the trial altogether 09 witnesses have been examined, they are P.W.1 Narmadeshwar Upadhyay, declared hostile, P.W.2 Sachidanand Singh, declared hostile, P.W.3 Guddu Upadhyay son of the informant and claims to be eye witness, P.W.4 Dinkar Upadhyay declared hostile, P.W.5 Rakesh Upadhyay claims to be eye witness and also injured, P.W.6 Anirudh Upadhyay,



informant and injured, P.W.7 Bashishth Singh declared hostile, P.W.8 Dr. Shailendra Kumar, who has examined informant and Guddu Upadhyay and P.W.5 and also proved Ext.2 and 2/A.

10. Apart from the above, following documents have been brought on record and these are Ext.1 signature of informant on fardbeyan, Ext.2 and 2/A injury report, Ext.3 formal FIR, Ext.4 fardbeyan, Ext.5 certified copy of judgment of G.R.No.1035 of 1994/Tr.921 of 1996, in which all the accused persons have been acquitted for want of evidence.

11. On behalf of the defence, D.W.1 Lalan Prasad has been examined, who has proved Ext.A.

12. On behalf of the defence, following documents have been brought on record Ext.A certificate issued by Post Master of Maharajganj Post Office in respect of Girish Upadhay, Ext. B certified copy of plaint of T.S.No.110 of 1993 in the court of 2nd Munsif in between appellant and the informant, Ext.C citified copy of FIR of Maharajganj P.S.Case no.72 of 1994 lodged by Jitendra Upadhayay, one of the accused, Ext.D certified copy of charge-sheet of Maharajganj P.S.Case No.72 of 1994 and Ext. E injury report of Jitendra Upadhayay.

13. The learned trial court on conclusion of the trial has convicted the appellants under Section 324 of the IPC.

14. Contention of the learned *Amicuc Curiae* is that in this



case there is case and counter case between the parties and place of occurrence and day and time of the occurrence is also same and that clearly disclose that a counter case has also been lodged with respect to the same occurrence and the occurrence took place with respect to plucking of the mango fruits (tikola). P.Ws. 1, 2, 4 and 7 are the independent witnesses and all the witnesses have been declared hostile by the prosecution and P.Ws. 3 and 5 are the sons of the informant and P.W.6 is the informant himself and the land dispute is admitted. In such a situation, conviction of the appellants under Section 324 of the IPC of the accused on the basis of related and inimical witness does not appear to be just and proper as possibility of false implication can not be ruled out. Further submission of the learned counsel for the appellants is that all the injuries are found to be simple in nature and the injuries have been received in the defence side also and as such at best it is a case of free fight between the parties and the appellants ought to have been released on probation of Offenders Act or under Section 360 of the Criminal Procedure Code as has been given to the other accused persons in this case but the same has been denied to the appellants without assigning any reason under Section 361 of the Cr.P.C., which amounts to miscarriage of justice.

15. On the other hand learned counsel for the State has submitted that the evidence of the witnesses are related on the point



of assault by Girish Chandra Upadhyay and Sanjay Upadhyay and they assaulted by knife and the same has been found corroborated by Doctor Shailendra Kumar (P.W.8) who has found sharp cutting injury on the person of the informant and Rakesh Upadhyay, as such manner of occurrence has found support from the evidence of the Doctor, hence, there is no infirmity in the impugned judgment and it appears to be just and proper and does not require any interference by this court.

16. Having heard both sides and on perusal of the evidence, it appears that P.W.6 is the informant in this case and in the court his evidence supports the prosecution case and stated about the assault by appellant Girish Chandra Upadhyay and Sanjay Upadhyay by knife and his evidence also shows that Rakesh Upadhyay has also received injury. Evidence of P.W.5 also corroborates the evidence of P.W.6 and both P.W.5 and P.W.6 are the injured witness in this case as such their evidence can not be doubted.

17. P.W.3 has also corroborated the evidence of P.Ws.5 and 6 and the same has found further corroboration from the evidence of P.W.8 who has found following injuries on the person of P.W.6 (Anirudh Upadhyay) :

- (i) *Incised wound measuring $\frac{1}{2}$ " X $\frac{1}{2}$ " X $\frac{1}{4}$ " on the left side of neck*
- (ii) *Incised wound measuring 3" on the posterior clavicular part of neck*
- (iii) *Abrasion on left palm $\frac{1}{2}$ " round*
- (iv) *Abrasion $\frac{1}{2}$ " round on the right arm*



(v) Abrasion ¼” round on the left shoulder

And further stated that the injuries are simple in nature and injury no.1 and 2 are caused by sharp pointed weapon whereas injury nos.3, 4, 5 are caused by hard and blunt substance. He has also examined Rakesh Upadhyay on the same day and found following injuries and injury were found to be simple in nature :-

- (i) Incised wound ½” X ¼” X ¼” on the left shoulder joint***
- (ii) One incised wound ¼” X ¼” on the side of injury no.(1).***
- (iii) Swelling and tenderness 2” round on the back.***

18. It further appears that there is case and counter case, the date of occurrence and place of occurrence is concerned, the occurrence has taken place and the counter case shows presence of the appellant also at the place of occurrence. No doubt Jitendra Upadhyay has received injuries and the certified copy of the FIR and charge-sheet have been brought as Ext. C and ‘D’, injury report has been brought as Ext. E. Apart from that there was dispute between the parties with respect of land dispute but considering the fact that there are consistent evidence of P.W.5 and 6 corroborated by P.W.8 Doctor which supports the manner of occurrence and the same can not be doubted only because of the fact that they were inimical and related rather on close scrutiny they appears to be credible.

19. Hence, I find no infirmity in the impugned judgment of conviction, as such the same is affirmed. However, so far question of



the sentence is concerned, submission of the learned counsel for the appellants is that in this case the other accused persons have been given benefit of doubt under Section 360 of the Cr.P.C. and has been released on admonition but in spite of the fact that the genesis of occurrence is for plucking the mango fruit, no benefit has been given to the appellant Sanjay Upadhyay under Section 360 of Cr.P.C. and even no reason has been assigned and as such this caused miscarriage of justice.

20. Considering the same, instead of affirming the order of sentence, the appellant Sanjay Upadhyay is directed to be released on executing bond of Rs.5,000/- with two sureties for the period of six months to maintain peace.

21. With the above modification in sentence, this Appeal is dismissed.

22. The office is directed to hand over the first page and the last page of the judgment to Mrs. Rina Sinha, *Amicus Curiae*.

(Vinod Kumar Sinha, J)

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AFR/NAFR	AFR
CAV DATE	N/A
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