

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.556 of 2002

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Bharat Baitha @ Bhairo Baitha & Ors

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Abimanyu, *Amicus Curiae*

For the Respondent/s : Mr. Sujit Kumar Singh, APP.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 02-01-2018

Assail is of judgment of conviction dated 12.09.2002 and order of sentence dated 16.09.2002, passed by Smt. Vidyut Prabha Singh, 1st Additional Sessions Judge, Vaishali at Hajipur in Sessions Trial No. 322 of 1990, by which the appellants were held guilty under Section 307/34 of the Indian Penal Code (hereinafter referred to as "the IPC") Appellant Bharat Baitha @ Bhairo Baitha was sentenced to undergo R.I. for seven years, whereas, appellants, namely, Dinesh Choudhary @ Chhote Choudhary and Mahesh Choudhary @ Upendra Choudhary were sentenced to undergo R.I. for ten years with a fine of Rs. 2,000/- each and in default of payment of fine further R.I. for three years. Further appellant Bharat Baitha @ Bhairo Baitha was also convicted under Section 323 of the IPC, however, no separate sentence was awarded.

2. Prosecution case emerging from materials on records, in short is that on 29.09.1988, when the informant had come to Rajakhand



Village, he saw appellant – Mahesh Choudhary @ Upendra Choudhary was having some altercation with a fish seller on which the informant asked his associate, namely, Shiv Lal to go and pacify the dispute, on which, appellant Bharat Baitha @ Bhairo Baitha came near to the informant and started abusing him, which was objected by the son of the informant. Thereafter, appellant Bharat Baitha @ Bhairo Baitha started assaulting him and ordered his sons to kill them, upon which, appellants Dinesh Choudhary @ Chhote Choudhary and Mahesh Choudhary @ Upendra Choudhary took out two bamboo clamps and started assaulting the informant on his head. It is further alleged that appellant -Bharat Baitha @ Bhairo Baitha took son of the informant to a nearby ditch and tried to drown him. Thereafter, people assembled and accused persons fled away and the injured was taken to hospital, where statement of informant was recorded, on the basis of which, FIR was registered against the appellants and after investigation charge-sheet was submitted. Cognizance of the offence was taken and, thereafter, the case was committed to the court of sessions, which ultimately came to the file of Smt. Vidyut Prabha Sinha, 1st Additional Sessions Judge, Vaishali at Hajipur, for trial and disposal.

3. Charges were framed against all the appellants under Sections 307/34 of IPC and under Section 323 against the appellant Bharat Baitha @ Bhairo Baitha.



4. During the trial, altogether eight witnesses have been examined from the side or prosecution. They are: P.W. 1- Sambhu Ram, P.W. 2 – Shiv Lal, P.W. 3- Ashwani Kumar (son of the informant) P.W.4- Sambhu Prasad Verma (informant), P.W. 5 – Rajesh Kumar Singh, the doctor, who examined the injured. P.W. 6 – Hari Shankar Pandey, (I.O.), P.W. 7 – Ram Nath Sahni and P.W. 8 – Sunil Kumar Mishra.

5. Apart from that following documents have been brought on record and marked as: Ext. 1- Signature of informant on production list, Ext. 2- Injury report of Shambhu Prasad Verma (informant), Ext. 2/1- Injury report of Ashwani Kumar, Ext. 3 – Fardbeyan, Ext. 4 – Formal F.I.R, Ext. 5 – Seizure list, Ext. 6 – Police report and Ext. 6/1 – forwarding report on police report (Ext. 6.)

6. From the side of defence also, five witness have been examined. They are; D.W. 1- Yogendra Baitha, D.W. 2- Nandan Paswan, D.W. 3- Surendra Prasad Singh, D.W. 4- Ramiji Singh and D.W. -5 is Pramod Kumar Singh.

7. From perusal of the evidence of defence witnesses as well as the statement of appellants recorded under Section 313 Cr.P.C., it appears that the defence of the appellants is of false implication and denial of occurrence.

8. Post trial, the learned trial court convicted all the appellants under Section 307/34 of the IPC and also convicted appellant Bharat Baitha @ Bhairo Baitha under Section 323 IPC and sentenced them in



the manner as stated above.

9. Learned *Amicus Curiae*, appearing on behalf of the appellants has argued that evidence of witnesses suffers from material discrepancy and is self contradictory. Further the evidence of witnesses; itself show that there was no intention of appellants to kill anyone rather the occurrence took place on the spur of moment, which will appear from the fact that the appellants were not armed with any kind of weapon and the medical report clearly suggests that the injuries caused to the informant and his son was found to be simple in nature and, therefore, there is no application of Section 307/34 of IPC, when intention or *mens rea* is not proved coupled with the fact that the injuries found on the person of the injured were simple in nature. Further contention of learned *Amicus Curiae* is that trial court has failed to appreciate the contention of appellants that the present case is a counter blast of Goraul P.S. Case No. 118/88 and also rejected the plea of *alibi* without assigning the sufficient reason. On the basis of the above submission, learned *Amicus Curiae* has submitted that conviction of appellants under Section 307/34 and 323 of IPC is bad in law and suffers from serious infirmities.

10. Per contra, learned counsel appearing for the respondent – State has contended that the evidence of all the witnesses satisfactorily establishes the overt act of the accused persons and informant and his son being the injured witness, the veracity of these witnesses cannot



be doubted. It has also been argued that there are sufficient consistent and reliable evidence available on record to show that the appellants – Dinesh Choudhary @ Chhote Choudhary and Mahesh Choudhary @ Upendra Choudhary assaulted the informant on his head by bamboo clamps, whereas, the appellant Bharat Baitha @ Bhairo Baitha tried to kill the son of the informant by drowning him into near by ditch and as such there is no infirmity in the impugned Judgment and conviction of appellant under Section 307/34 and 323 of IPC is just and proper.

11. P.W. 4 is the informant in this case and his evidence disclosed that on the date of occurrence, he along with his son had come to village Rajakhand at about 5.00 P.M. to take part in *pethia*, which was used to be held on every Sunday and Thursday on his land. His evidence shows that he saw appellant Mahesh Choudhary @ Upendra Choudhary, quarreling with a fish seller and when his associate Shiv Lal Ram went to intervene in the matter, they assaulted him and abused him. Thereafter, appellant Bharat Baitha @ Bhairo Baitha came near to the informant and started abusing him, which was objected by his son, on which appellant Bharat Baitha @ Bhairo Baitha assaulted his son by means of fists and slaps and called his two sons and ordered them to kill the informant and his son, then appellant Dinesh Choudhary @ Chhote Choudhary and Mahesh Choudhary @ Upendra Choudhary assaulted on the head of the informant, causing injuries to him. Meanwhile, the appellant Bharat Baitha @ Bhairo



Baitha forcibly took the son of informant to near by ditch and tried to kill him by drowning him. His evidence further disclosed that on hulla people assembled there and appellants succeeded in fleeing away. This witness has also been cross-examined on the point that a large number of cases are going on between him and appellant Bharat Baitha @ Bhairo Baitha and a suggestion in this regard was also given to him that all the cases was decided in favour of appellant Bharat Baitha @ Bhairo Baitha and further a proceeding under Section 107 of Cr.P.C was going on and a title suit was also pending between the parties in the court of Munsif –II, Hajipur.

12. P.W. 3 is the son of informant, who had also received injuries. He has supported the prosecution story as stated by P.W. -4 and has stated about the assault to his father by appellant Dinesh Choudhary @ Chhote Choudhary and Mahesh Choudhary @ Upendra Choudhary. His evidence further disclosed that he was dragged by the appellant Bharat Baitha @ Bhairo Baitha to near by ditch with a view to kill him by drowning in the said ditch. Thereafter, they had been taken to the hospital.

13. P.W. 2 is the Shivilal Ram, as per F.I.R, he was also present at the time of occurrence and has supported the prosecution story with regard to assault to informant and his son. However, his evidence in chief shows that the ditch was only 2 to 2 ½ ft. water in the ditch and there was a scuffle between appellant Bharat Baitha @ Bhairo Baitha



and the son of informant in the said ditch.

14. P.W. 5 is the doctor in this case, who had examined the injured –informant (P.W. 4) and found following injuries on the person of informant.

1. Cut injury above mid portion of skull size 3" x $\frac{1}{4}$ x $\frac{1}{4}$ "
2. Tenderness over chest.
3. Lacerated wound over them middle ring finger of right hand thumb 1" x $\frac{1}{4}$ X $\frac{1}{4}$ " with regular finger with 1"x $\frac{1}{4}$ x $\frac{1}{4}$ " with regular margin.

15. His evidence also disclosed that on the same day he examined another injured, namely, Ashwani Kumar (P.W. 3) and found following injuries.

1. Tenderness and def sed defused swelling over the right side of chest.
2. Tenderness over leg near the knee joint.
3. Tenderness over left side of shoulder.

16. He further opined that all the injuries found on the person of injured were simple in nature caused by hard and blunt substance.

17. P.W. 6 is the Investigating Officer in this case. He has inspected the place of occurrence, which was a pitch road and also found about three ft. water in the ditch.

18. Other witnesses have also been examined in this case and they have supported the case of prosecution, so far manner of occurrence is concerned. No doubt, there are some contradictions in their evidence



but the said contradiction does not go into the root of the case.

19. On behalf of defence as stated above five witnesses have been examined. D.W. 1 was the then P.A to Collector Vaishali and is a formal witness in this case, who has proved the order dated 13.04.1994, signature of District Magistrate, Vaishali. D.W. 2 is also a formal witness in this case, who has proved the signature of appellants as Ext. D and E. D.W. 3 has proved Ext. E/1. D.W. 4 has proved the signature of accused Ext. E/II and similarly D.W. 5 is also a formal witness, who proved Ext. G.

20. On perusal of the evidence of the prosecution witnesses, it appears that they are consistent on the point of altercation between the parties, in which appellant Bharat Baitha @ Bhairo Baitha started abusing the informant, which was objected by the son of the informant, upon which the appellant Bharat Baitha @ Bhairo Baitha assaulted the son of informant and called out his two other sons, who took out bamboo clamps and assaulted the informant causing injuries on his head. Appellant Bharat Baitha @ Bhairo Baitha further went on to drag the son of informant to nearby ditch and tried to drown him in the said ditch. However, the evidence of P.W. 2 and evidence of P.W. 6 (I.O.) clearly show that only two to three feet water was available in the said ditch and evidence of P.W. 2 also disclosed that there was scuffle between Bharat Baitha @ Bhairo Baitha and P.W. 3 in the ditch. No doubt, appellants have come with an *alibi* as well as the



fact that the present case lodged by the informant is actually a counter blast of earlier case filed by the appellants' side against the informant, however, the said claim of appellants have been disbelieved by learned trial court on the ground that except first information report and fardbeyan, which are Exts. A and B, no other evidence has been brought on record in support of the said claim and further the claim of *alibi* was also rejected as the defence could not prove the same beyond all reasonable doubts. However, the trial court has not taken into consideration the fact that the determinative facts to decide the nature of the offence are the intention or the knowledge to commit a crime. In the instant case, the facts and circumstances speak for themselves that the accused had no such intention or requisite knowledge that by causing such injury, if death is caused, they would be guilty of murder. The appellants never knew that informant and his son would arrive at the village on the relevant day. This court finds force in submission of learned *Amicus Curiae* that when the intention is not proved and the injuries caused to the informant was found to be simple in nature, there is no application of section 307/34 of the IPC.

21. Allahabad High Court in the case of **Kaloo & Another v. State** [1993 (1) Crimes 397] has observed that when the gun shot injuries on the person of injured were simple in nature, though were on the vital part of the body, but the doctor opined them neither grievous nor dangerous, the offence falls under Section 324 and not



under Section 307 IPC. Similar view was taken by the Hon'ble Apex Court in the case of **Tukaram Gundu Naik vs. State of Maharashtra** [1994 Cri. L.J. 224]. However, the Hon'ble Apex Court in the case of **Parsuram Pandey and others v. State of Bihar** reported in (2004) 13 SCC 189 has held that for the purpose of Section 307 what is material is intention or knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. The Section clearly contemplates an act which is done with intention of causing death but which fails to bring about the intended consequence on account of intervening circumstances. The intention of knowledge of the accused must be such as is necessary to constitute murder. In the absence of intention or knowledge which is the necessary ingredient of Section 307, there can be no offence of attempt to murder. In the case in hand, it is clearly manifest from the materials on record, that the injuries caused to the persons were found to be simple in nature and the prosecution has also failed to prove the intention of the appellants.

22. Considering the above discussions, it appears that the appellants could more appropriately be convicted under Section 323/34 of IPC. Hence the conviction of appellants under Section 307/34 IPC is altered to conviction under Section 323/34 of IPC and so far sentence is concerned, it appears that appellant Dinesh Choudhary @ Chhote Choudhary has remained in custody for more than seven months,



appellant Mahesh Choudhary @ Upendra Choudhary remained in custody for more than one month and appellant Bharat Baitha @ Bhairo Baitha has remained in custody for twenty two days during appeal and is aged about 67 years, as such, their sentences are modified to one which has already been undergone by them in judicial custody.

23. With the above modification in conviction and sentence, this appeal is dismissed.

(Vinod Kumar Sinha, J)

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