

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.45 of 2009

1. Bihari Kamkar son of late Suraj Kamkar
2. Manoj Kamkar
3. Surendra Kamkar
4. Rajendra Kamkar

All sons of Bihari Kamkar, resident of village Mahuar, P.S. Naini Jore
(Brahampur) Dist. Buxar.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Rohit Kumar, Mr. Tara Sinha and Mr. R.K. Choudhary, Advocates
For the Respondent/s	:	Dr. Rabindra Kumar APP

CORAM: HONOURABLE MR. JUSTICE SANJAY PRIYA
ORAL JUDGMENT

Date : 18-05-2018

Heard Mr. Rohit Kumar learned counsel for the
appellants and Mr. Rabindra Kumar, APP for the State.

By judgment of conviction and order of sentence
dated 22nd December, 2008 passed by learned Additional
Sessions Judge, Fast Track Court II, Buxar in Sessions Trial
No. 18 of 1994, corresponding to G. R. No. 1080 of 1993,
arising out of Brahampur P.S. case no. 76 of 1993, the
appellant nos. 2,3 and 4, namely, Manoj Kamkar, Surendra
Kamkar and Rajendra Kamkar have been convicted for
the offence under Section 323 of the Indian Penal code and
sentenced them to undergo rigorous imprisonment for eight



months, Appellant no.1, namely, Bihari Kamkar has been convicted for the offence under Section 307 of the Indian Penal Code and sentenced him to undergo R.I. for seven years and a fine of Rs. 6,000/- and in default of payment of fine, he is directed to undergo S.I. for six months. If fine is realized, then half of the fine will be paid to the informant on proper identification.

The prosecution case as per the *fardbeyan* of the informant is that on 17.6.1993 in the morning nephew of informant Rudal Kamkar along with Shatrughan Kamkar and Nagendra Kamkar have gone to village Karnamepur and on that place they have got some altercation with Bihari Kamkar. On this information, informant along with his brother Shiv Kumar Kamkar and Rudal Kamkar went at the door of accused Bihari Kamkar at about 10 A.M. and enquired about the altercation. Bihari Kamkar was armed with *Bhala* and other accused persons were armed with *lathi*. They came there and started assaulting the informant and others. In the meantime, accused Bihari Kamkar assaulted the informant by *Bhala* in his stomach with an intention to kill, as a result of which, intestine and other



parts of stomach protruded out of the abdominal cavity. The other appellants assaulted the informant's brother and nephew by *lathi*. The informant Dev Kumar Kamkar was sent to hospital for treatment.

The prosecution has, during trial, examined altogether nine prosecution witnesses in this case. The prosecution has also filed certified copy of the judgment of Trial no. 234 of 1998 which has been marked as Ext. 6. One defence witness, namely, Narendra Singh has also been examined. No paper has been filed on behalf of the defence.

The informant Dev Kumar Kamkar has been examined as PW-4. He has stated in his evidence that at about 10 A.M. he was at his door. His nephew Rudal and Nagendra came and told that Rajendra, Manoj, Surendra (sons of Bihari Kamkar) have assaulted them. The informant went to enquire from Bihari Kamkar. Thereafter, accused persons came armed with *lathi* and *Bhala* and Bihari Kamkar assaulted the informant with *Bhala* in his stomach with an intention to kill, as a result of which, inner parts of the stomach came out and informant fell on the ground. The other three accused persons assaulted Shiv



Kumar Kamkar and Rudal Kamkar by *lathi*. This witness has further stated that Ram Sagar Singh, Bharat Singh and others have seen the occurrence. Thereafter, they took the informant on a cot to the police station. The police recorded the statement of the informant and he put his signature on the said *fardbeyan*. Thereafter, he was taken to Shahpur hospital from where he was sent to Sadar hospital, Ara where he got his treatment.

PW-1 Shiv Narain Kamkar has stated in his evidence that accused Bihari Kamkar was armed with *Bhala* and other three accused persons were armed with *lathi*. He has further stated that accused Bihari Kamkar assaulted Dev Kumar(informant) by *Bhala* in his stomach by which inner parts of the stomach came out. Dev Kumar was taken to the police station. Thereafter, he was sent to the hospital for treatment.

Shiv Kumar Kamkar (PW-2), in his evidence, has stated that on the date of occurrence informant and others had gone to enquire regarding altercation. Then Bihari Kamkar armed with *Bhala* and other three accused persons started assaulting him and Rudal Kamkar. Bihari Kamkar



assaulted informant by *Bhala* in stomach, as a result of which, inner parts of the stomach came out. Thereafter they all took Dev Kumar to Shahpur hospital for treatment from where he was sent to Ara hospital.

Rudal Kamkar (PW3) has stated in his evidence that on the date of occurrence he was coming from Karnamepur Bazar and in the way accused persons started quarreling with him and Rajendra, Surendra and Manoj assaulted him. He gave information to his parents and Shiv Kumar. Informant and others went to enquire about the incident regarding the occurrence upon which Bihari Kamkar assaulted the informant by *Bhala* in his stomach by which inner parts of the stomach came out. It is further alleged that accused Rajendra, Surendra and Maonj assaulted him, Shiv Narain, Nagendra and others. They took Dev Kumar on a cot to Karnamepur and police recorded his statement. Thereafter he was sent to hospital for treatment.

Bharat Singh (PW6) has stated that on the date of occurrence he was at his door which is adjacent to the place of occurrence. He has further stated that Dev Kumar, Rudal were enquiring from Bihari and his sons. Bihari was



armed with *Bhala* in his hand and other accused persons were armed with *Lathi* and *Danda*. He has further stated that appellant Bihari Kamkar assaulted informant by *Bhala* in his stomach, as a result of which, inner parts of the stomach came out. Thereafter, they tied his stomach by *Gamachcha* and took informant to Karnamepur.

Madan Pandey (PW7) is a formal witness. He has proved the formal F.I.R. of this case which has been marked as Ext. 3.

Rajnath Ram (PW9) is a formal witness. This witness has proved the injury report of the informant which has been marked as Ext. 5.

Lal Bachan Singh (PW8) is A.S.I. He has stated in his evidence that he has visited the place of occurrence and has furnished the topograph of the place of occurrence in para 2 of his evidence. He has further stated that he recorded further statement of the informant and other witnesses. He has further stated that he saw the injury of *Bhala* on the stomach of the informant. He got the informant medically examined and after finding the case true submitted the charge sheet.



One Narendra Singh has been examined as defence witness. He has stated that on 17.6.1993 at about 10 A.M. he saw that Rudal Kamkar, Shiv Kumar Kamkar and others came at the door of the Rajendra Kamkar and they tried to take cow etc. and assault took place between both the parties. It is stated that Rajendra Kamkar has filed a case at Nainijore police station.

In this manner, from perusal of the evidence of the witnesses it appears that the informant, who is injured, has specifically stated that he was assaulted by Bihari Kamkar by *Bhala* causing injury in his stomach, as a result of which, inner parts of the stomach came out and he fell on the ground. The other witnesses, namely, PWs 1, 2, 3, 5 and 6 have also stated in their evidence that Bihari Kamkar assaulted the informant Dev Kumar with *Bhala*, as a result of which, inner parts of the stomach came out. The doctor has not been examined in this case. The original injury report has been produced during trial and the same has been proved by a formal witness and marked as Ext. 5.

From perusal of Annexure-5, which is available in the record, it appears that the doctor found incised wound



1"x 1/2" with protrusion of omentum on right side abdomen. The wound was penetrating the abdominal cavity. The omentum was injured and protruded out of the abdominal cavity. The injured portion of the omentum was cut and the rest of omentum was introduced into the abdominal cavity and the abdomen was closed in layers. The patient was in serious condition so he was referred to Sadar hospital, Arrah, for the observation and investigation for other internal abdominal injury. The doctor has opined the wound was penetrated. The abdominal cavity and omentum was injured and protruded out of abdominal cavity. The nature of wound was grievous.

Learned counsel for the appellants has submitted that in the instant case the doctor has not appeared to prove the injury report. The injury report has been proved by the formal witness PW-9. Therefore, no reliance can be placed on the aforesaid injury report. In support of the said submission, learned counsel for the appellants has relied upon an unreported judgment of our Hon'ble High Court in the case of **Sukhdeo Yadav and Ors. Vs. State of Bihar in Cr. Appeal (SJ) no. 316 of 2001**. He has also



relied upon a judgment of our Hon'ble High Court reported in **2002(1) PLJR 30 (Ram Khelawan Mistry vs. The State of Bihar).**

This Court, after looking into the evidence of the informant and also the evidence of PWs, 1, 2, 3, 5 and 6 finds that there is consistent evidence that appellant no.1 Bihari Kamkar assaulted the informant in stomach with *Bhala* causing serious injury on account of which his inner part of the stomach came out. There is consistent evidence of witness PWs 1, 2, 3, 5 and 6 that Bihari Kamkar caused *Bhala* injury to the informant in the stomach. The informant, who is injured, has also stated that he sustained injury with *Bhala* in stomach. The injury report of the informant marked as Ext. 5 corroborate the injury as found on the person of the informant alleged to be caused by appellant No.1 Bihari Kamkar. This Court is of the view that when there is consistent evidence of the witnesses with regard to the injury having been caused by the accused and aforesaid injury gets corroboration from the injury report which has been brought on record, then the same can be relied upon by the Court for the purpose of corroboration or



contradiction even if the same has been proved by formal witness. The injury report brought on record cannot be brushed aside merely on the ground that the same has not been proved by the doctor. The doctor has not appeared in this case for evidence. Learned counsel for the appellants has submitted that there was no intention of appellant No.1 Bihari Kamkar for causing the death of the informant. There was only a single blow and the same was caused in the spur of the moment.

This Court, after looking into the evidence of the witnesses and nature of the injuries sustained by the informant, finds that none of the witnesses has stated that appellant No.1 Bihari Kamkar has assaulted the informant with intention to cause his death. Therefore, the conviction of the appellant Bihari Kamkar is modified to the conviction for the offence under Section 326 of the Indian Penal Code.

From the impugned judgment itself it appears that on the date of judgment appellant No.1 was aged about 65 years. Therefore, by passage of time he has become 77 years of age. In such circumstances, the period already



undergone by the appellant No.1 in custody is suffice to serve the sentence under Section 326 of the I.P.C.

So far as the allegation against appellants no. 2, 3 and 4 are concerned, there is no consistent evidence against them of assaulting the other members of the prosecution party with *lathi* and causing injury to them. Therefore, the impugned judgment of conviction and order of sentence passed against appellant nos. 2, 3 and 4, namely, Manoj Kamkar, Surendra Kamkar and Rajendra Kamkar is set aside. They are acquitted of the charge levelled against them.

Accordingly, the Cr. Appeal is allowed in part as ordered above.

(Sanjay Priya, J)

shyambihari/-

AFR/AFR	AFR
CAV DATE	N/A
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