

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.28 of 2017

Arising Out of PS. Case No.-55 Year-1998 Thana- ROUH District- Nawada

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1. Baso Yadav
 2. Bhim Yadav
 3. Pradeep Yadav
 4. Nakul Yadav, all sons of Balkishun Yadav, all are resident of
Village-Harsitpur, P.S. Roh, District-Nawadah
... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Viveka Nand Singh-Advocate

Mr. Ravi Prakash-Advocate

For the Respondent/s : Mr. Parmeshwar Mehta-A.P.P.

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

Date : 27-11-2018

Appellants Baso Yadav, Bhim Yadav, Pradeep Yadav

and Nakul Yadav have been found guilty for an offence punishable under Section 326/ 149 of the I.P.C. and each one has been sentenced to undergo S.I. for seven years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for three months, additionally, under Section 148 of the I.P.C. and sentenced to undergo S.I. for three years, under Section 147 of the I.P.C. and sentenced to undergo S.I. for two years with a further direction to run the sentences concurrently vide judgment of conviction and order of sentence dated 30.11.2016 passed by the 1st Additional Sessions Judge, Nawada in Sessions Trial No.220 of 2000/ 164 of 2006.



2. Lakhan Yadav (PW-4) filed written report on 25.11.1998 disclosing therein that on the same day at about 6.30 A.M. while his father has gone towards Izra Aahar to meet nature's call, he along with others were going towards his field in order to harvest paddy crop and during course thereof, when they reached near Aahar field, seen Baso Yadav armed with Garasa as well as gun, Bhim Yadav armed with lathi, Pradeep Yadav armed with lathi and Nakul Yadav armed with Khanti, were sitting since before. During midst thereof, their father Balkishun Yadav (his cousin uncle) came and incited, whereupon Baso Yadav gave Garasa blow over neck of his father, which he tried to ward off, as a result of which, struck over his ear, cutting away, Bhim Yadav assaulted him with lathi. Suresh Yadav rushed in rescue, who was caught hold by Pradeep Yadav and Nakul Yadav. He along with his elder brother also rushed, but due to firing made by Baso Yadav, they ran there from in order to save their life. Then thereafter, all of them, took away Suresh Yadav towards jungle. It has further been disclosed that both the parties are Gotia and on account of prevailing land dispute, cases have been drawn up in between and are pending before the competent Court and that happens to be reason behind the occurrence.



3. After registration of Roh P.S. Case No.55 of 1998, investigation commenced and concluded by way of submission of chargesheet facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial as well as false implication in the background of land dispute. However, nothing has been adduced in defence.

5. Prosecution has examined altogether six Pws in order to substantiate its case, who are PW-1, Vijay Kumar, PW-2, Bablu Kumar, PW-3, Sarju Yadav, PW-4, Lakhan Yadav, PW-5, Suresh Yadav and PW-6, Dr. Bidya Bhushan. Side by side, has also exhibited, Exhibit-1 series, injury report of respective injured namely Ramlal Yadav and Suresh Yadav. As stated above, nothing has been adduced in defence.

6. While assailing the judgment of conviction and sentence, it has been submitted at the end of the learned counsel for the appellants that the finding recorded by the learned lower court is not at all substantiated from the materials available on the record. In order to substantiate the same, it has been submitted that I.O. has not been examined. That being so, in the background of



inconsistency amongst the witnesses with regard to actual place of occurrence as well as prevailing contradiction in the evidence of PWs, the non-examination of the I.O. has caused prejudice to their interest. Side by side, dent in the prosecution case on that very score. It has also been submitted that though Ram Lal Yadav, the alleged injured has not been examined on account of his death and that being so, the defect in the aforesaid background is found sufficient to jolt the prosecution version even, having examination of PW-6, the doctor. Furthermore, it has also been submitted that Suresh Yadav has also been alleged to have sustained assault at the end of the appellants, but for that, no charge was framed against them nor they have been found guilty with regard thereto and in the aforesaid background, when the evidence of the Pws is taken together in its totality, it adversely affect upon the prospect of the prosecution case and that being so, it could safely be inferred that prosecution could not succeed in substantiating in its case beyond all reasonable doubt, whereupon the finding recorded by the learned lower Court is fit to be set aside.

7. Controverting the submission made on behalf of learned counsel for the appellants, it has been submitted by the learned Additional Public Prosecutor that with regard to assault of Suresh Yadav (PW-5), there happens to be specific disclosure in



the written report, PW-6 had examined Suresh Yadav and found injuries over his person and that being so, he happens to be one of the injured during course of occurrence, whereupon his evidence has got priority. After going through the evidence of PW-5, it is evident that neither there happens to be any kind of infirmity nor suffers from exaggeration, contradiction and that being so, fully corroborates the finding of the doctor (PW-6) with regard to assault having over injured Ram Lal Yadav (since deceased) as well as he himself. PW-3 and PW-4 have corroborated the same. It has also been submitted that there happens to be no infirmity, inconsistency amongst the evidence of the PWs with regard to manner of occurrence, place of occurrence and that being so, non-examination of I.O. could not be said to be a lacuna at the end of the prosecution. Therefore, the judgment impugned is fit to be confirmed.

8. PW-6 is the doctor, who had examined Ram Lal Yadav on 25.11.1998 at about 3.30 P.M. and found the following:-

(A) Ram Lal Yadav

i) Incised wound on right ear (upper and lateral part of external pinna detached from other mother tissue). Size of incised wound 1.1/4" x 1/4" x 1/8". Injury caused by sharp weapon.

ii) Lacerated wound above right ear on lateral aspect of head. Size 2" x 1/4" x 1/6". Injury caused by HBS.



Iii) Swelling on right scapular region. Size 2" x 1". Injury caused by HBS.

Nature of injury

Injury Nos.2 and 3 are simple in nature and No.1 is grievous in nature. Duration within 24 hours. M.2- on forehead near upper part nose. The injuries caused are not dangerous for life.

(B) He had also examined abovenamed Suresh Yadav on 26.11.1998 at about 3.10 P.M. and found the following:-

Suresh Yadav

i) Abrasion on left side of leg. Size 1" x 1/4" caused by HBS.

ii) Swelling on left lower leg. Size 3" x 2" caused by HBS.

Iii) Swelling on left hand near elbow joint. Size 2" x 2" caused by HBS.

Nature of injuries

All injuries are simple in nature. Duration-within 48 hours.

M.2- Mark of wound scar on right cheek.

From the cross-examination of the doctor, it is evident that he was not at all cross-examined with regard to nature of the injury, more particularly, with regard to injury no.I as well as the weapon by which aforesaid injury was caused to Ram Lal. However, examination of Suresh on 26.11.1998, is a circumstance, which has to be subject of scrutiny after oral evidence so adduced on behalf of prosecution.

9. PW-5 is Suresh Yadav. He has deposed that on the alleged date and time of occurrence, he was going to his field in



order to have some agricultural work. His father was proceeding ahead in order to meet nature's call. When his father reached at the Izra Aahar, Baso Yadav armed with Garasa having a gun hanging from his shoulder also. He saw Bhim Yadav and Pradeep Yadav armed with lathi and Nakul Yadav armed with Khanti, Balkishun Yadav empty hand sitting since before. On an order of Balkishun Yadav, Baso Yadav gave Garasa blow causing injury over ear of his father as a result of which, it was cut. Rest accused began to assault with lathi. He rushed in rescue, whereupon Pradeep Yadav and Nakul Yadav caught hold him and assaulted with lathi. Then thereafter, they all dragged him towards jungle, but after covering some distance, they released, whereupon he returned back to his house. Then thereafter, he has gone to police station along with his brother where his brother Lakhan Yadav filed written report. He was sent to hospital where he was treated, identified the accused. During cross-examination at Para-4, he has stated that he was going to field along with Lakhan Yadav, Sarju Yadav, Bablu Kumar, Suresh Yadav. His father was 2-3 bamboo ahead of them. Then has stated that accused persons were sitting over the Aahar. In Para-5, he has stated that when his father reached there, all the accused persons came down from Aahar. At Para-6, he has stated that Baso Yadav had given Garasa blow by both hands. Only one



blow was given. He has further stated that left pinna was cut. In Paras-7 and 8, there happens to be contradiction (minor in nature). In Para-9, he has stated that after apprehending him, he was assaulted, but he is unable to disclose, who assaulted at which part of his body. In Para-11, he has stated that both the parties are close agnate. At an earlier occasion, they were residing in common house. Now, they are residing in separate houses. Then there happens to be admission at his end with regard to pendency of murder case against him. Then has denied the suggestion that no such type of occurrence had ever taken place rather during course of cutting of paddy crop from the field of the accused persons in haphazard manner, his father got self-inflicted Hasua blow over his ear as a result of which, he sustained injury, but on account of prevailing animosity, got this case filed with false and frivolous allegation.

10. PW-4 is the informant Lakhan Yadav. He has stated that on the alleged date and time of occurrence, he along with his brothers Sarju Yadav, Suresh Yadav was going to harvest paddy crop. At that very time, his father was going ahead of them in order to meet nature's call. When they reached near Izra Aahar, they saw Baso Yadav, Bhim Yadav, Pradeep Yadav, Nakul Yadav and Balkishun Yadav sitting since before. Baso Yadav was



carrying Garasa in his hand and gun was also hanging from his shoulder. Bhim Yadav, Pradeep Yadav were armed with lathi. Nakul Yadav was armed with Khanti. Seeing his father Balkishun Yadav provoked to kill, whereupon Baso Yadav gave Garasa blow causing injury over ear of his father. Rest accused assaulted him with lathi. They rushed in rescue and during course thereof, Nakul Yadav and Pradeep Yadav caught hold his brother Suresh Yadav and dragged him towards jungle. He along with his brother Sarju Yadav rushed in rescue over which, Baso fired. Then thereafter, accused persons took Suresh Yadav to jungle. After sometime, when they have gone at jungle, they have seen Suresh in an injured condition. Thereafter, they have gone to police station where he had filed written report scribed by his co-villager Vijay Yadav. Ram Lal Yadav and Suresh Yadav were sent to hospital where they were treated. Identified the accused. In Para-8, he has stated that his father was 7-8 bamboo ahead of them. Accused persons were sitting since before. In Para-9, he has stated that accused Baso Yadav had inflicted Garasa blow aiming the neck of his father, but as his father escaped the blow, caused injury over his left ear. In Para-10, there happens to be contradiction (minor in nature). In Para-11, he has stated that Bhim Yadav and Pradeep Yadav have assaulted with lathi from a distance of two hands. When his father



fell down, then thereafter, he was assaulted by lathi. In Para-12, he has stated that Nakul Yadav was armed with Khanti. He had not seen whether Nakul Yadav had hurled Khanti blow or not, but he along with Pradeep Yadav had caught hold Suresh Yadav and took him away towards jungle. In Para-14, his attention has been drawn up towards earlier statement. In Para-15, he has stated that occurrence took place within 2-3 minutes. Then thereafter, he had gone towards jungle to see his brother, whom, he found in an injured condition. In Para-16, he has stated that after 2-3 hours, he had gone to police station. In Para-17, he has admitted inter se relationship. In Para-18, 19, 20, 21, there happens to be suggestion that during course of cutting of paddy crop from the field of Baso Yadav, his father sustained self-inflicted injury, whereupon this false case has been instituted putting false and frivolous allegation.

11. PW-3 is Sarju Yadav, another brother, who has deposed that he along with Lakhan Yadav and Suresh Yadav were going to harvest paddy crop from Izra Khandha. His father was going to meet nature's call. As soon as he reached near the field of Dwarik Singh, Baso Yadav, who was armed with Garasa as well as gun, Pradeep Yadav and Bhim Yadav armed with lathi, Nakul Yadav armed with Khanti and Balkishun empty hand encircled his father and then, Baso Yadav gave Garasa blow aiming at neck of



his father as a result of which, right ear of his father was cut away. Rest accused assaulted his father with lathi. His brother Suresh Yadav gone to rescue his father, whereupon Nakul Yadav and Pradeep Yadav caught hold him and assaulted. They also took him away towards jungle. They rushed in rescue of his brother, whereupon Baso Yadav began to fire. Thereafter, they ran there from in order to save themselves. His father and brother were treated at hospital, identified the accused. In Para-5, there happens to be contradiction. In Para-6, he has stated that it was winter season. At the time of occurrence, sunrise has already been effected. There was sufficient light. All the accused persons were sitting over Aahar since before. Other co-villagers were also present. He has seen from considerable distance. In Para-7, he has stated that Baso Yadav was carrying Garasa in his right hand. Lakhan Yadav was along with him, Suresh Yadav was present at the place where his father was being assaulted. Suresh Yadav was given four lathi blows. He was assaulted by Pradeep Yadav, Nakul Yadav and Bhim Yadav. At Para-8, he has stated that Baso Yadav had given garasa blow by both hands, it was hurled from right side. There was sumptuous blood at the P.O., he is unable to say, whether police had seen the blood as well as seized the same. In Para-11, he has stated that accused persons are his cousin brother



while Balkishun is his uncle. The occurrence took place in the background of land dispute as partition suit is going on. In Paras- 12, 13, there happens to be suggestion that no such type of occurrence had ever taken place rather while they were engaged in forcibly harvesting of paddy crop belonging to the accused persons. Ram Lal Yadav sustained self-inflicted injury and then thereafter, in the background of land dispute, they got this case instituted levelled false and frivolous allegation.

12. PW-1 and PW-2 are hearsay witnesses, who themselves admitted their absence during course of occurrence. After their arrival, they were disclosed with regard to commission of the occurrence wherein their grandfather Ram Lal Yadav sustained injury and was taken to hospital along with Suresh Yadav their uncle.

13. After scrutinizing the evidence available on the record, it is apparent that detachment of pinna (external ear) of Ram Lal Yadav is found duly established from the evidence of PW-6 and further, is found duly corroborated by the witnesses, though PW-4 and PW-5 have disclosed that left ear was cut, while PW-3 had disclosed as right ear. Doctor had found detachment of right ear. It is further evident that PW-5, Suresh Yadav was examined on 26.11.1998, though there happens to be consistent



evidence at their end that he along with his father Ram Lal Yadav have gone to hospital on the same day. Neither doctor (PW-6) nor PW-5, Suresh Yadav has been cross-examined on that very score. PW-3 had narrated that when his father reached near the field of Dwarik Singh, his father was assaulted, but he has not been cross-examined nor PW-4 and PW-5, whether the field of Dwarik Singh lies away from the Aahar. Although, from the evidence of PW-3, it could be gathered that the field of Dwarik Singh lies adjacent to the Aahar. That being so, there happens to be no inconsistency amongst the evidence of PWs with regard to place of occurrence as well as assault having made over the person of Ram Lal Yadav by Baso Yadav with garasa a sharp cut weapon. From the evidence of PWs, it is also evident that the attention has been drawn up towards their earlier statement, but those are on trivial issue without affecting upon credibility as well as truthfulness of the witnesses. The only flaw persisting on the record is over non-examination of the I.O. Non-examination of I.O. has been subject to consideration by the Apex Court and recently in **Baldev Singh v. State of Haryana** as reported in **2016 Cri. L.J. 154**, it has been as follows:-

“16. Contention at the hands of the learned Senior Counsel for the appellant is that non-examination of Chander Singh-SI who prepared rukka and who investigated the case raises serious doubts about the



prosecution case. Material on record would show that Chander Singh-SI who investigated the case was not examined by the prosecution in spite of several opportunities. No doubt, it is always desirable that prosecution has to examine the investigating officer/police officer who prepared the rukka. Mere non-examination of investigating officer does not in every case cause prejudice to the accused or affects the credibility of the prosecution case. Whether or not any prejudice has been caused to the accused is a question of fact to be determined in each case. Since Ram Singh-PW-1 was a part of the police party and PW-1 has signed in all recovery memos, non- examination of Chander Singh-SI could not have caused any prejudice to the accused in this case nor does it affect the credibility of the prosecution version.”

14. Thus, after analyzing the evidence as discussed hereinabove, it is apparent that prosecution has succeeded in substantiating the case. However, so far applicability of Section 148 I.P.C. is concerned, it is evident that only Baso Yadav has been found to be armed with Garasa, while Nakul has been shown to be armed with Khanti, the prosecution failed to disclose its nature as, he has also been alleged to have assaulted with lathi, so, he along with Bhim Yadav and Pradeep Yadav would be liable for Section 147 I.P.C. and that being so, the finding of the learned lower Court is concerned, affirming it so far Section 326/ 149 I.P.C. is concerned.

15. Now, coming to sentence, it is evident that blow was not repeated. It is also evident that appellants have got no criminal



antecedent. It is also evident that occurrence took place in the background of land dispute persisting amongst them. It is also evident that appellant Baso Yadav on the date of judgment was found aged about 65 years, while Bhim Yadav was 62 years, Pradeep Yadav was 59 years and Nakul Yadav was 56 years. The occurrence is of the Year 1998, victim Ram Lal Yadav died of natural death, though not spoken by the witnesses, but from the deposition form of PW-3, PW-4 and PW-5 divulged the name of their parent as Late Ram Lal Yadav. It is also evident that appellant Baso Yadav happens to be under custody from the date of judgment i.e. from 30.11.2016, while remaining appellants were granted bail on 28.04.2017, that means to say, remained under custody for five months. Baso Yadav was apprehended during course of investigation on 27.05.1999 and was released on 01.09.1999 while appellants Bhim Yadav and Pradeep Yadav surrendered on 08.03.1999 and were released on 23.03.1999, while Balkishun Yadav and Nakul Yadav surrendered on 20.04.1999 and were released on 23.04.1999, occurrence is of the Year 1998. Thus, giving an analytical thought, the sentence so inflicted by the learned lower Court needs to be interfered with, whereupon is modified as period already undergone retaining the imposition of fine and the default clause against the same, which could be paid



at the end of each of the appellants within four weeks from today, failing which, the learned lower Court will be at liberty to proceed against them in accordance with law. The appellants Nakul Yadav, Pradeep Yadav, Bhim Yadav are on bail, hence are discharged from its liability while appellant Baso Yadav is under custody, which the learned lower Court will consider in the background of confirmation of fine with default clause. This appeal is dismissed modifying the sentence as indicated hereinabove.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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