

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 278 of 1986

Dhiren Mondal & Ors.

Vs.

The State of West Bengal.

For the Appellants : Ms. Pranati Goswamy.

For the State : Md. Kutubuddin.

Heard on : 17.08.2022

Judgment on : 15.11.2022

Shampa Dutt (Paul), J. :

This Appeal has been preferred against an order of conviction under Sections 148 and 323/149 Indian Penal Code directing the appellants to be released on probation on executing a bond of Rs. 1000/- each for one year with two sureties of like amount, one being local, passed by the Additional Session Judge, Midnapore by his judgment and order dated 25th June, 1986 in Session Trial Case No. XX of January, 1984.

Prosecution Case in short is that on 6.12.82 the accused persons along with others formed an unlawful assembly in village Abasberaia with a view to cut away paddy from plot 394 belonging to Soroshi Ranjan Bera and others. On that day, (06.12.1982), at about 2 P.M. Soroshi Ranjan Bera found the accused persons assembled on the suit plot, preparing for harvesting the paddy there. When Soroshi Ranjan Bera went near the plot and asked them not to cut away the paddy of his land, the accused persons started shouting to finish him and surrounded him. He raised alarm. On hearing the cries his other brothers Ajit Bera and Asit Bera came there, followed by two other female inmates of the house, Latika Bera and Patralekha Bera. In their presence accused Rajani hit Soroshi on his head with a 'Bhali'. Soroshi fell down with severe injury and while Rajani tried to give another blow on him Soroshi held it with his hand and tried to snatch the 'Bhali' away. Then Soroshi gradually fell unconscious. As Ajit and Asit approached and tried to stop the accused from assaulting and to leave the place, accused Dhiren gave a blow on the head of Ajit causing severe injury. Dhiren gave another blow

with the 'bhali' but Ajit was hit with its 'lathi' portion. Accused Dhananjay hit Asit Bera with Lathi several times. Ajit and Asit fell down being severely injured. As Latika and Patralekha came to their rescue they also were not spared by the accused persons and were assaulted. As all of them raised alarm, many villagers assembled and then the accused persons fled away. The villagers carried the unconscious Soroshi to his house. The other injured also were taken to the house where they were administered with first aid by a local doctor. All the persons including the doctor heard everything from the injured persons. They went to Bhagawanpur P.S. and told everything to the police who referred them to the local P.H.C. They got further treatment there and the female injureds were released after first aid being administered to them. But the three male injured persons were referred by Bhagwanpur P.H.C doctor to Midnapore Sadar Hospital where they were admitted as indoor patients and were kept there for more than a week. Manashi Ranjan Bera being another brother of the injured persons sent a written complaint the Police Station, on 06.12.1982, which was treated as F.I.R. and investigation was started. The accused persons were charge sheeted and thereafter were committed to the court of sessions where they were charged under sections 148, 307/149, 326/149 and 323/149 I.P.C.

The accused persons pleaded not guilty and faced the trial on completion of trial. On completion of trial, the appellants were sentenced as above.

Ms. Pranati Goswami, Learned Counsel for the petitioner has argued that the conviction is bad in law and not warranted by the facts and circumstances of the case.

The Learned Judge acted illegally in admitting and relying upon inadmissible evidence and failed to consider that the delay in lodging the F.I.R. of two days after the alleged occurrence makes the prosecution story unbelievable.

The Learned Judge acted illegally in not considering the question of Right of Private Defence of property and person and failed to consider the documents proved in this case on behalf of the defence, which supported the defence case.

That in spite of holding that:-

“by way of reading Ext. 8 series along with Ext. B series, we can hold that Nilkanta Mondal was the bargadar under the complainant Beras in plot No. 594”,

The Learned Judge was wrong in convicting the appellants. The trial Judge did not consider that the Medical Evidence was not proper. Though the names of the alleged assailants were stated at the time of lodging the General Diary the Learned Judge erroneously overlooked the said fact. The findings of the Learned Judge that “XVI” is wrong and without any logic. More so the findings that:-

“it is very much likely that the Police did not want to note the names of the alleged assailants at that point of time as the two warring parties approached the Police”.

“It would be worth mentioning that when the charge is under Section 149 Indian Penal Code it becomes immaterial to find out the actual persons amongst the unlawful crowd causing the injuries. ”

And the findings that:-

“No right of private defence either of property or of person was available to any of the accused persons. The only plea which they can take is the fraternity of the bargadars but that is no legal defence”. and “even accepting the extreme case of defence we find that the accused persons formed an unlawful assembly to harvest paddy from the land and to resist the protest coming from the side of the owners of the land by way of causing assault and hurt to them”.

Such findings are not in accordance with law and thus has caused serious miscarriage of justice. That though the evidence shows that there were more than five persons on the side of the complainant, the Learned Judge was wrong in holding that:-

“It is not available from the record that the complainant party was a group consisting of more than the statutory number of people to oust bargadars from that piece of land”.

The defence case is that the plot in question was under cultivation of accused Nilkanta Mondal as bargader. His name was duly recorded as bargadar in the settlement operation. While Nilkanta and other female

members of his family were busy harvesting the land the complainant party attacked them with various weapons including lathi, bhali etc. The party who was engaged in harvesting the produce of that land and the bargadars who were engaged in their works in the neighboring plots of land assembled there and tried to resist the attack on Nilkanta and his family. In course of that some of them also received injuries inflicted by the complainant party with their weapons.

Finally, on these grounds the judgment under appeal is liable to set aside and the accused/appellant be acquitted.

Md. Kutubuddin learned Advocate for the State submit that the Trial Judge in spite of the guilt of the accuseds/appellant being proved beyond reasonable doubt was very lenient toward the appellant and the appellants, in spite of the punishment of only execution of bond, is abusing the process of Court which is totally against the principal of natural justice and the appeal should be dismissed.

Thus the judgment under appeal is liable to be set aside.

Evidence of record

The Appellants were charged under Section 148,307/149, 326/149 and 323/149 of the Indian Penal Code in respect of the **incident dated 06.12.1982 (almost 40 years)**. During the pendency of this appeal Appellant

No. 6 Nilkanta Mondal and Appellant No. 8 Chitta Mondal, died (on 12.04.2021 and 20.06.2022 respectively).

The legal representatives of the said Appellants have not prayed for substitution. **Thus the Appeal in respect of Appellant no. 6 Nilkanta Mondal and Appellant no. 8 Chitta Mondal abates.**

The disputed plot is no. 594 in Mouja Abash beria.

The complainant (P.W.1) and Exhibit 1 (written compliant) proves that there was an altercation between the parties in which **P.W. 2 Soroshi Ranjan Bera, P.W. 3 Patralekha Bera, P.W.4 Latika Rani Bera, P.W. 5 Jit Kumar Bera** were injured. All these witnesses have clearly corroborated each other regarding the dispute, attack and assault and also the injuries sustained by them **P.W 1 Manashi Ranjan Bera, P.W. 7 Sarat Chandra Das P.W. 8 Satish Chandra Maity** have corroborated the incident as heard from the injured.

P.W. 6 Hare Krishna Giri holds a 'D' group pharmacist certificate. He administered first aid to the five injured persons and asked them to go to the hospital as he found that the injuries were grave.

P.W. 11 Dr. A.K. Mishra, was attached to Sadar Hospital, Midnapore as Surgeon. He has deposed that he examined and treated the injured persons referred to the hospital on 07.12.1982.

P.W 12 is Dr. Amitava Chatterjee. This doctor had examined the injured at Bhagwanpur P.H.C. on 06.12.1982 and referred them to sub divisional Hospital from where they were referred to P.W. – 9 Dr. A. K. Mishra of Midnapore Sadar Hospital.

This witness has stated that the **Injury Report (not Exhibited)** does not describe the lacerated injuries as cut injuries.

This doctor has deposed that all the five persons sustained injuries, which were simple in nature, but there is no injury report as evidence before the court to decide the nature of injuries.

As the injuries were seemingly vulnerable the patients/injured were referred to the Sadar Hospital.

Though these witnesses have elaborately given the description of the injuries, no injury report/medical documents have been proved or marked as exhibit. **Exhibit 8** series are certified copies of record of rights in support of their contention that P.W.2 Soroshi Ranjan Bera a member of the Complainant's family is the owner of the disputed plot no. 394 in this case. On the other hand **Ext B series** are the Barga certificates in support of the accuseds showing that accused Nilkanta Mondal, Chitta and Mintu as the recorded Bargadars in respect of the disputed plot.

Analysis of Evidence

Admittedly both the parties have right over the disputed plot, the complainants claiming right of ownership and the accuseds as Bargadars having right of possession for Cultivation. The dispute took place regarding the removal of paddy from the said plot during harvest.

The ownership and Bargadarship of the disputed plot is a long standing dispute between the parties and also subjudice as stated.

Being the Bargadars, the accuseds have the right of possession for cultivation, but the point to be decided here is whether the trial court rightly convicted and sentenced the accused /Appellants under Section 323/148 of the Indian Penal Code.

That there was a free fight and assault on the date of incident and the witnesses suffered injuries has been clearly proved by the injured themselves and corroborated by the doctors who examined them.

The findings of the Learned trial Judge that the names of the assailants in the unlawful assembly could be found after proper investigation and that the assailants had been named before the doctor (P.W.6) by the injured specifically immediately after the incident, is also a proper finding and in accordance with law.

Section 323 of the Indian Penal Code requires voluntarily causing, bodily pain and hurt.

‘Hurt’ has been defined under **Section 319** of the Indian Penal Code as causing bodily pain, disease or infirmity.

Though in this case no Injury report or medical papers have been proved before the Court, the evidence of the injured and the doctors clearly corroborate each other in detail. That there was an attack (thus causing bodily pain and hurt) upon the injured has been proved beyond reasonable doubt by the prosecution.

The accuseds/ Appellants have also been convicted under Section 149 of the Indian Penal Code.

Section 149 IPC lays down:-

“149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

Ingredients of offence. — The essential ingredients of the offence under Sec. 149 are as follows:

- (1) There was an unlawful assembly;*
- (2) The accused was a member of the said assembly;*
- (3) Accused joined intentionally or continued in the assembly knowingly;*
- (4) Accused had the knowledge of the common object;*

- (5) *The offence was committed by one of the members of the assembly;*
- (6) *Commission of offence was in pursuance of the common object; and*
- (7) *Accused knew, as a member of the unlawful assembly that such offence is likely to be committed – see, State of U.P. v Dau Singh (1997) 3 SCC 747.”*

“Unlawful assembly” has been defined in section 141 of IPC .

“141. Unlawful assembly – *An assembly of five or more persons is designated an ‘unlawful assembly’, if the common object of the persons composing that assembly is –*

First. – To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant ; or

Second. – To resist the execution of any law, or of any legal process; or

Third. - To commit any mischief or criminal trespass, or other offence; or

Fourth. – By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth. – By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation. - An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.”

The presence of more than five persons (11) accuseds in this case at the time of incident has been clearly proved by the prosecution based on the evidence of the injured, doctors and the witnesses who took the injured to the doctor. It has also been proved that ‘Criminal force’ was used to cause ‘hurt’ and take possession of the harvest on the disputed plot no. 394, by the accuseds/Appellants being members of the unlawful assembly, intentionally, with common object of taking possession of plot no. 394 and its harvest, caused hurt and bodily pain to the injured.

In **Lakshman Singh Vs State of Bihar (Now Jharkhand) on 23rd July, 2021, the Supreme Court – in Criminal Appeal no. 606 of 2021 with Criminal Appeal 630-631 of 2021** held in the appeals against conviction under sections 323 and 147 IPC as Follows:-

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6. In the case of **Mansingh (supra)**, it is observed and held by this Court that “the evidence of injured witnesses has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly”. It is further observed in the said decision that “minor discrepancies do not corrode the credibility of an otherwise acceptable evidence”. It is further observed that “mere non-mention of the name of an eyewitness does not render the prosecution version fragile”.

The court further observed :-

*“6.1 A similar view has been expressed by this Court in the subsequent decision in the case of **Abdul Sayeed (supra)**. It was the case of identification by witnesses in a crowd of assailants. It is held that “in cases where there are large number of assailants, it can be difficult for witnesses to identify each assailant and attribute specific role to him”. It is further observed that “when incident stood concluded within few minutes, it is natural that exact version of incident revealing every minute detail, i.e., meticulous exactitude of individual acts, cannot be given by eyewitnesses”. It is further observed that “where witness to occurrence was himself injured in the incident, testimony of such witness is generally considered to be very reliable, as he is a witness that comes with an inbuilt guarantee of his presence at the scene of crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone”. It is further observed that “thus, deposition of injured witness should be relied upon unless there are strong grounds for rejection of his evidence on basis of major contradictions and discrepancies therein”.*

*6.2 The aforesaid principle of law has been reiterated again by this Court in the case of **Ramvilas (supra)** and it is held that “evidence of injured witnesses is entitled to a great weight and very cogent and convincing grounds are required to discard their evidence”. It is further observed that “being injured witnesses, their presence at the time and place of occurrence cannot be doubted”.*

Applying the law as laid down by the court in the aforesaid decisions to the facts of the case before it, the Court found no reason to doubt the credibility and/or trust worthiness of the witnesses (as described), who were

the injured witnesses. The witnesses were consistent in their statements and fully supported the prosecution case.

Regarding the production of proof of injuries (report) the court held:-

*“Thus, he was attacked by the accused persons by lathis/sticks and he sustained injuries and was treated at Government Hospital, Paatan has been established and proved. It may be that there might not be any serious injuries and/or visible injuries, the hospital might not have issued the injury report. However, production of an injury report for the offence under **Section 323** IPC is not a sine qua non for establishing the case for the offence under **Section 323** IPC. **Section 323** IPC is a punishable section for voluntarily causing hurt. “Hurt” is defined under **Section 319** IPC. As per **Section 319** IPC, whoever causes bodily pain, disease or infirmity to any person is said to cause “hurt”. Therefore, even causing bodily pain can be said to be causing “hurt”. Therefore, in the facts and circumstances of the case, no error has been committed by the courts below for convicting the accused under **Section 323** IPC.*

*However, as observed hereinabove and as held by this Court in the case of **Abdul Sayeed (supra)**, where there are large number of assailants, it can be difficult for witnesses to identify each assailant and attribute specific role to him.*

*Even otherwise, as held by this Court in the case of **Mahadev Sharma (supra)**, every member of the unlawful assembly is guilty of the offence of rioting even though he may not have himself used force or violence.”*

“.....There is thus vicarious responsibility when force or violence is used in pursuance of common object of the unlawful assembly”.

Conclusion

In view of the discussion and analysis above, it is found by this Court that the Learned trial Judge rightly came to the findings that there was an unlawful assembly (11 accuseds) and they used force with the common object of taking possession of the disputed plot and the harvest on it by force and in the process caused hurt and bodily pain to the injured as proved by the injured and the doctors of the government hospitals with their consistent evidence beyond reasonable doubt.

The Supreme Court in ***State of Rajasthan Vs Banwari Lal and other on 8th April, 2022*** held:-

“Merely because a long period has lapsed by the time the appeal is decided cannot be a ground to award the punishment which is disproportionate and inadequate.”

The trial court considering the nature of the case took a very lenient view and by its order dated 25.6.1986 ordered the appellants to be released on probation on executing a bond of Rs.1000/- each for one year with two sureties, one being local. The appeal is against the said conviction and sentence.

This court thus considering the total material on record find no grounds or reason to interfere with the judgment under appeal.

The Appeal being **CRA 278 of 1986 is thus dismissed.**

Urgent Photostat Certified copy of this Judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Shampa Dutt (Paul), J.)