

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No. 95 of 2004

1. Deo Narain Yadav S/o Harsahai Yadav Resident of Village- Mai Maner, P.S.- Dhanarua, Distt.- Patna (case against the appellant was abated vide Hon'ble Court order dt. 28-08-2024)
2. Suresh Yadav S/o Mahabal Yadav Resident of Village- Mai Maner, P.S.- Dhanarua, Distt.- Patna
3. Hardeo Yadav S/o Mahabal Yadav Resident of Village- Mai Maner, P.S.- Dhanarua, Distt.- Patna
4. Sachita Yadav @ Sita Ram Yadav S/o Mahabal Yadav Resident of Village- Mai Maner, P.S.- Dhanarua, Distt.- Patna (case was abated vide Hon'ble Court order dt. 11-12-2024)
5. Krishna Yadav S/o Deo Narain Yadav Resident of Village- Mai Maner, P.S.- Dhanarua, Distt.- Patna
6. Badri Yadav S/o Khelaban Yadav Resident of Village- Mai Maner, P.S.- Dhanarua, Distt.- Patna (Case against the appellant was abated vide Hon'ble Court order dt. 28-08-2024)
7. Yogendra Yadav S/o Deo Narain Yadav Resident of Village- Mai Maner, P.S.- Dhanarua, Distt.- Patna (case against the appellant was abated vide Hon'ble Court order dt. 11-12-2024)
8. Preman Yadav S/o Ramdeo Yadav R/o vill - Rohilchak, P.S. - Dhanarua, Distt.- Patna

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Sachchidanand Choudhary, Advocate
	:	Mr. Lav Kush Kumar, Advocate
For the State	:	Mrs. Anita Kumari Singh, APP

CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT

Date : 12-12-2024

1. The criminal appeal No. 95 of 2004 is preferred by eight appellants against the judgment and order of conviction and sentence dated 07.02.2004 on the file of



Additional Court No. 1, Adhoc Sessions Judge, Fast Track Court, Patna in Sessions Trial No. 312/ 1985 of 1991/2001, wherein all the appellants were convicted and sentenced for the offence punishable u/s 307 r/w 149 and u/s 379 of IPC and they were sentenced to undergo rigorous imprisonment for a period of five years and three years respectively.

2. The appeal was preferred in the year 2004, and during its pendency of the appeal, appellant Nos. 1, 4, 6 and 7 passed away consequently the criminal appeal against them was abated by this Court vide orders dated 28.08.2005 and 11.12.2004.

3. The appellants still on record are Appellant No. 2 Suresh Yadav, Appellant No. 3- Hardeo Yadav, Appellant No. 5- Krishna Yadav, Appellant No. 8- Preman Yadav. Further the Appellant No. 2, 3 and 8 were convicted and sentenced to undergo rigorous imprisonment for a period of three years u/s 27 of the Arms Act.



4. As per the fardbeyan of P.W. 2, Brijnandan Singh, the brief facts of the case is that on 10.03.1989, at about 08:00 A.M., the informant, along with his brothers, i.e. P.Ws. 1 and 4 were harvesting Khesari crop in Milykhandha. At about 10:00 A.M., P.W. 2 saw 10-12 persons coming the village Mai, all of them were armed with rifle, gun, *garasa* and *lathi*. After reaching the field the accused Dwarika Yadav questioned the informant/ P.W. 2, as to why he was harvesting Khesari crop while proceedings under Section 145 of Cr.P.C. were pending before the Sub-Divisional Magistrate, for which a verbal altercation ensued. Upon hearing the altercation, several individuals namely, Pujan Singh, Baleshwar Singh, Sitaram Singh, Kaushal Singh, Chandeshwar Singh, Bhageran Sing and Ramchandra Singh arrived at field and at the instigation of Dwarika Yadav, accused Baleshwar Yadav fired his rifle, causing injury to Pujan Singh. It is also alleged that the informant, along with others, took Pujan Singh back to the village and while doing so they saw the accused persons taking away the harvested crop.



It is also the case of the prosecution that the accused persons chased the informant and his family members with rifles and guns and later the injured was shifted to Patna Medical College and Hospital (PMCH) for treatment.

5. Basing on the fardbeyan of P.W. 2, a case was initially registered against eleven persons vide trial No. 31 of 1989, on the file of Dhanarua Police Station and an FIR was issued, including the appellants. On completion of the investigation, the police submitted a charge-sheet against twelve persons, including the appellant No. 7- Yogendra Yadav (who was not arrayed as accused in the fardbeyan). The trial Court framed charges against the appellants and others for the offences punishable u/s 148, 307, 379 of the IPC and u/s 27 of the Arms Act.

6. During the pendency of the trial, the accused Dwarika Yadav, Baleshwar Yadav, and Chandeshwar Mushar passed away and the criminal case against them was abated by the trial Court on different dates. Further accused/ Saket Yadav absconded, during the course of



trial, leading the trial Court to split up the case against Saket Yadav and the appellants alone faced the trial.

7. During the course of trial, P.Ws. 1 to 6 were examined and Exhibit-1 was marked on behalf of the prosecution.

8. P.Ws. 1 to 4 belong to the same family, whereas P.Ws. 5 and 6 are co-villager. The trial Court after considering the entire material on record, convicted the appellants and sentenced them as aforesaid.

9. Heard the Learned counsel for the appellants as well as the Learned Additional Public Prosecutor Ms. Anita Kumari Singh for the State.

10. It is contended by the Learned counsel for the appellant that under Section 145 of Cr.P.C. proceedings were pending concerning the disputed land. However, the informant and others attempted to harvest the standing crop, claiming title over the land. The entire allegations in the fardbeyan relates to the main accused i.e. Baleshwar Yadav who allegedly attacked Pujan Singh/ Injured at the instigation of accused Dwarika Yadav. It was further



contended that the only allegation against the appellants is that they were the part of the unlawful assembly with no specific overacts attributed to these appellants. It is also contended by the Learned counsel for the appellants that the injured person was not examined, the Injury Report was not brought on record and the doctor who examined the injured was also not examined. In spite of no evidence on record, the trial Court erred in convicting the appellants for the offence punishable u/s 307 r/w 149 of IPC. Furthermore, it is urged by the Learned counsel for the appellant that the prosecution miserably failed to prove the intention to murder the informant's family members and that Pujan Singh the injured, was not the family members of the informant.

11. It is also urged by the Learned counsel for the appellants that the prosecution has miserably failed to establish the place of occurrence and failed to prove the offence u/s 379 of IPC, which was alleged to be the part of the offence and it was also pointed out that the Investigating Officer was not examined and therefore



prayed to set aside the judgment and order of sentence passed by the trial Court.

12. The Learned counsel for the appellant relied on the judgment of the Hon'ble Apex Court reported in the case of **Ram Ekbal Rai and others Vs. Jaldhari Pandey AIR 1972 SC (949), Rajkishor Tiwari and 5 others Vs. the State of Bihar, 2015 (1) BBCJ 199, Manikant Yadav vs. State of Bihar 1979 SCC OnLine Patna 153, and Rabin Mahtha Vs. State of Bihar 2013 (2) BBCJ 560** to support his contentions.

13. On the other hand the Learned Additional Public Prosecutor Mrs. Anita Kumari Singh contended that there is no error or irregularity in the orders passed by the trial Court as the evidence of P.Ws. 1 to 6 categorically disclose that, at the instance of the appellants the incident occurred on 10.03.1989 at about 08:00 A.M. in their presence during which Pujan Singh sustained injuries and, therefore, prayed to confirm the judgment of the trial Court.



14. Record reveals that the offence took place in the year 1989, and the charges were framed on 26.11.1992 i.e. after a span of three years.

15. The point for determination in this case is

(1). Whether the prosecution was able to prove the guilt of the accused beyond reasonable doubt for the offences punishable u/s 148, 307, 379 and u/s 27 of the Arms Act and

(2). Whether the trial Court rightly convicted the appellants for the aforesaid offences?

16. It is necessary to re-appreciate the evidence of witnesses in order to determine the above said points. Since, the appeal pertains to appellant Nos. 2, 3, 5 and 8, only the incriminating evidence or material against these appellants is discussed in this appeal

17. The evidence of P.W. 1/ Arjun Singh disclose that the incident took place on 10.03.1989 at around 10:00 A.M., while he was harvesting Khesari crop in the field. At that point of time his brother Brijnandan Singh/ P.W. 2 and Jitendra Singh were also harvesting the crop. His



evidence further disclose that all the accused persons, including the appellants were armed with weapons came to the place of occurrence.

18. The evidence of P.W. 1 disclose that appellant No. 2, 3, and 5 were holding gun while appellant No. 6- Krishna Yadav was holding a Garasa, a sharp edge weapon, at the time of the incident. He further testified that a verbal altercation took place between the parties and during the the heated conversation, Dwarika Yadav instigated Baleshwar Yadav to fire on that a bullet was released from the rifle of Baleshwar Yadav hitting Pujan Singh in the stomach. Further Sudama Singh tied the wound of of Pujan Singh with his Lungi and carried him to the village. Later they shifted Pujan Singh to Nawada Railway Station and from there to PMCH, Patna for treatment. In the cross-examination P.W. 1, admitted that the proceedings under Section 145 Cr.P.C. had been pending since 1986, which included the disputed crop at the place of occurrence. He further testified that the accused persons did not assault him or his family



members and only Pujan Singh was shot with a bullet fired by Baleshwar Singh.

19. The evidence of the informant/ P.W. 2 aligns with that of P.W. 1. He also testified about the weapons held by the appellants and confirmed that Baleshwar Yadav fired the bullet from his rifle hitting Pujan Singh. In the cross-examination, P.W. 2 admitted that section 145 Cr.P.C. proceedings between parties were pending. Exhibit-1 is the signature of P.W. 2 on the fardbeyan,

20. P.W. 3 Jitendra Singh is the neighbour of the P.W. 2. also provided provided testimony similar to that of P.W. 1 and P.W. 2. He categorically stated that there was a land dispute between the appellants and his family since 1986, and that the 145 proceedings were pending u/s 145 of Cr.P.C..

21. P.W. 4/ Bindeshwar Singh is the brother of P.W. 1 and 2 was alleged to be the person who was harvesting the crop, on the date of incident i.e. 10.03.1989. He too admitted about the rivalry between the



parties and confirmed that Pujan Singh was injured by Baleshwar Yadav.

22. P.W. 5/ Sitaram Singh and P.W./ 6 Kaushal Kishore Singh both co-villagers claimed to have reached the place of occurrence, immediately after the occurrence. They alleged themselves to be eye-witnesses of the incident. However, P.W. 5 in his cross-examination testified that he did not give any statement to the police. However, he confirmed the proceedings u/s 145 Cr.P.C. were pending between the parties.

23. P.W. 6/ Kaushal Kishor Singh also claims to have witnessed the altercation. In cross-examination he admitted that Pujan Singh had no reason to be in the field where Khesari crop was grown and that the dispute was only between the informant's family members and the accused. He further testified that the appellants had not fought with the informant or his family members and also admitted that he did not state to the police that Pujan Singh, Sudama Singh, and Shiv Kumar Singh had arrived at the place of occurrence, after hearing the altercation and



also did not inform the police that Baleshwar Yadav fired at them with his rifle.

24. On behalf of the defense, one Shailesh Prasad was examined as D.W. 1 and his statement was brought on record as Exhibit-A. In the affidavit, Pujan Singh himself stated that he was not injured by the bullet allegedly fired by Baleshwar Yadav.

25. On perusal of the entire record, it is evident that the injured, doctor and the Investigating Officer were not examined. The fardbeyan, the FIR, the Injury Report were also not brought on record.

26. On perusal of the judgment of the trial Court, it is evident that the trial Court observed that the prosecution could not procure the attendance of Pujan Singh, however, defense produced Exhibit-A, dated 05.05.1989, which disclose that he did not sustain any injury from the firearm alleged fired by Baleshwar Yadav.

27. It is further observed by the trial Court that in the cross-examination of P.W. 1, it was brought on record that Pujan Singh had received 16,000/- rupees for



submitting a false affidavit and as a result he did not appear before the Court to depose evidence, the trial Court inferred that the injured witness Pujan Singh influenced by the accused persons rendering the evidentiary value of Exhibit-A nugatory.

28. Assuming for a moment that Exhibit-A is nugatory, in criminal trial, the burden is always on the prosecution to prove the guilt of the accused beyond reasonable doubt. The duty is casted upon the prosecution to prove that the injured sustained injuries in the incident in the hands of the appellants till then the accused to be treated as innocent until the guilt is proven.

29. **Section 307 of the IPC** defines "**Attempt to Murder**" as follows:-

Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such



act, the offender shall be liable either to [imprisonment for life] or to such punishment as is hereinbefore mentioned.

:- Attempts by life-convicts. [When any person offending under this section is under sentence of [imprisonment for life], he may, if hurt is caused, be punished with death.

30. As per the definition, the prosecution has to prove the existence of intention or the knowledge on the point of the appellants the appellants under circumstances where their act could have caused the death of the injured person. There is no evidence on record to establish that the appellants intended to kill Pujan Singh. The evidence on record reveal that there was long standing enmity between the informant's family members and the appellants for which proceedings u/s 145 of Cr.P.C. were pending before the Sub-Divisional Magistrate, for four years prior to the alleged incident. The prosecution miserably failed to prove any enmity or rivalry between the appellant and Pujan Singh and pursuant to the said intention or



knowledge, the alleged act was committed by the appellants. No specific overt-acts have been attributed against any of these appellants. Further the case of the prosecution itself states that one Baleshwar Yadav fired from the rifle, for which Pujan Singh sustained injuries. If at all, the appellants were armed with deadly weapons, the overt-act by each of the appellants against the informant has to be stated either in the fardbeyan or to be testified by P.Ws. 1 to 4. In the absence of oral evidence of the doctor, injured and the Investigating Officer, and the Exhibits and documents such as the fardbeyan, FIR or the Injury Report, the trial Court ought not to have convicted the appellants guilty for the offences punishable u/s 307 r/w 149, 148 and u/s 27 of the Arms Act.

31. Section 141 of the IPC deals with unlawful assembly as follows :- *An assembly of five or more persons is designated as “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.



32. As per the definition the essential ingredients of an unlawful assembly are that it must consist of five or more persons and they must share a common object. In the present case, the common object alleged by the prosecution witnesses was that of objecting the informant and carrying away the harvested crop by the appellants. However, nothing has come on record about the theft committed by the appellants and, therefore, the trial Court has convicted and sentenced the appellants for the offence punishable u/s 379 of the IPC. The common object of an unlawful assembly could even be formed at the spur of the moment. Merely carrying of weapons does not constitute a common object and there is no evidence of the weapons to prove that the appellants are holding weapons. Further, Section 149 of the IPC envisages that every member of an unlawful assembly is false for the offence committed in furtherance of a common object.

33. It is for the prosecution to prove that there was an unlawful assembly formed for a common object and that as the member of the unlawful assembly, the



accused can be punished even if they did not individually acted upon. In the present case, there is no evidence on record to establish that these accused persons had a common object to attack the informant and his family members. The prosecution has miserably failed to prove the fact, therefore, this Court is of the considerable view that the trial Court erred in convicting the appellants for the offences punishable u/s 307, 379, 149, and u/s 148 of the IPC. Furthermore, there is nothing on record from the Investigating Officer to prove that crop was stolen from place of occurrence and the same was recovered by the Investigating Officer. No material objects either the crop or the weapons were seized or produced before the Court. Furthermore, there is no evidence on record to prove the offence against the appellants Nos. 2, 3 and 8 u/s 27 of the Arms act.

34. On perusal of the entire record, it has been brought to the notice of this Court by the Learned Additional Public Prosecutor that summons were not served on the injured, doctor and the Investigating Officer.



The duty is casted upon the trial Court, to issue summons to each of the witnesses and to ensure their presence before the Court for examination during the course of trial.

35. In the absence of proper service of summons, the Court cannot procure the presence of the witnesses. If summons were served on witnesses and they failed to appear before the Court, the trial Court had ample power to issue bailable warrant. By executing such warrant the witnesses presence could have been procured before the Court. In the present case, there is no service report on record to prove that summons were served on the official witnesses i.e. the doctor, and the Investigating Officer. In the absence of testimony from the doctor, the Investigating Officer and the injured, the conviction against these appellants cannot not be sustained.

36. In the case of **Ram Ekbal Rai and others Vs. Jaldhari Pandey AIR 1972 (949)**, their Lordships have held in Para No. 9 which reads as follows:-



9. In 1963, the respondent appears to have taken out proceedings u/s 144 and 145 of the Code of Criminal Procedure against Mst. Sita Devi and certain other persons. On September 19, 1966, the Magistrate, who heard those proceedings, passed the following order:-

“In view of the foregoing discussion I am fully convinced that Mst. Sita Devi along with her Sikmidars are in possession of the land in dispute.”
He, therefore, directed that she should be allowed to remain in possession and forbade any interference with such possession until an order of eviction title in favour of the respondent.

37. It is an admitted fact by both the parties that proceedings under Section 145 of Cr.P.C. were pending before the Sub-Divisional Magistrate at the time of the incident. However, nothing was brought on record as to establish who was in possession of the property, i.e. field in which the Khesari crop was grown. The proceedings



under Section 145 of Cr.P.C. were not brought on record by the prosecution. Though, it is the case of the prosecution that the appellants have entered into the fields of the informant and family members who were harvesting the crops.

38. In the case of **Rajkishor Tiwari and 5 others Vs. the State of Bihar, 2015 (1) BBCJ 199** their Lordships have held at Para No. 119 which reads as follows:-

In view of the matter since there was a dispute over the possession and ownership of the property in question, where the petitioners are said to have encroached upon and are also alleged to had reaped standing crops worth Rs. 26,000/-, it can safely be presumed that such allegations have been conjured of for a particular purpose.

39. Construing the fact that there is a serious dispute with respect to the title of the property in question, along with the attendant fact that possession has remained



clouded for all such years, no offence under Sections 374 or 504 of IPC can be made out against the petitioners. A civil dispute has unnecessarily given rise to a criminal case. Allowing these criminal proceedings to continue would undoubtedly prejudice the case of either party in the title suit.

40. In the case of **Manikant Yadav vs. State of Bihar 1979 SCC OnLine Patna 153**, their Lordships have held at Para Nos. 4 and 5 which reads as follows:-

4. The short point urged by learned counsel on behalf of the petitioner was that in the circumstances of the case no dishonest intention can be imputed to the petitioner while removing the bullock and as such the ingredients of Section 379 I.P.C. were not attracted and he deserved acquittal. Two other points were urged by him. It was submitted that the petitioner being 21 years of age of the date of commission of the offence, he was entitled to the benefits of Sections 360 and 361 of the Code of Criminal Procedure and the same having been



denied to him his conviction was illegal. Lastly it was submitted that the petitioner being in jail custody for one month, the period already undergone by him be deemed sufficient.

5. The first contention raised by the learned counsel for the petitioner has force and it must prevail. It is in evidence of the informant himself that when the petitioner went to his Darwaja and began untying the bullock, he prevented him from doing so. But the reply that came from the petitioner was that he was taking the bullock as he owed him money. As submitted, the first information report also stated about the petitioner removing the bullock forcibly (Jabardasti). A question was asked from the informant (P.W. 5) regarding the intention behind the forcible taking of the bullock. But the reply that came from him was that he could not say as to what was the intention of the petitioner in taking the bullock forcibly vide deposition of P.W. 5 paragraph 1. The subsequent conduct of



the petitioner has also to be borne in mind. As stated above, his house is only one Rassi away from the house of the informant. After the bullock was removed by him, he kept it openly at his Bathan along with his other bullocks. Undisputedly when the I.O. came he also found the bullock present in the said Bathan. The petitioner too was present and it is the admission of P.W. 5 in paragraph 6 that the petitioner did not flee away even when the police came. In his examination under Section 364 Cr. P.C. the petitioner stated, inter alia, that he would file written statement. Written statement was accordingly filed by him wherein he denied the existence of dishonest intention on his part by stating that Sabir Mian, the full brother of the informant owed him money and he had given the bullock to him in Bharna prior to the alleged date of occurrence, According to the prosecution case it was a clear case of high handedness but as stated above, there was delay in the lodging of the F.I.R. The witnesses too,



who are said to be present appeared to be silent spectators. All these probabilities the defence version regarding the bullock being given in Bharna before the date of occurrence. Even assuming that this was not so, a question arises whether in the facts and circumstances of the case, any dishonest intention can be imputed to the petitioner. The reply will be in the negative. When a person takes another man's property believing under a mistake of fact and in ignorance of law that he has right to take it committing an offence and to retain it until compensated, he may not be held guilty of theft inasmuch as there is no dishonest intention even though he may cause wrongful loss within the meaning of the Penal Code. This view finds support from a decision of the Bombay High Court in Queen Empress v. Nagappa, which has been referred to in a decision of this Court in Jay Mahto v. Empror, 2, The facts of this case might be slightly different from the facts of the instant case but the principle laid down therein can appropriately be



applied to the instant case. I have gone through the evidence adduced in this case and have noticed the circumstances appearing therefrom and I am of the view that it would be unsafe to convict the petitioner under Section 379 I.P.C. The petitioner is, therefore, allowed the benefit of doubt and is acquitted of this charge also. The conviction and sentence imposed on him under Section 379 I.P.C. is set aside.

41. In the case of **Rabin Mahtha Vs. State of Bihar 2013 (2) BBCJ 560**, their Lordships have held at Para- 11 which reads as follows:-

11. Admittedly, both parties are claiming their right, title and possession on the above-said disputed lands and, therefore, it is apparent from the aforesaid fact that there is bona fide land dispute between the parties. So far as petitioners are concerned, it is stated that they had purchased the trees from one of the parties and the aforesaid fact clearly goes to show that petitioners are



bona fide purchasers and, therefore, application of Section-379 of the Indian Penal Code is completely lacking in this case. Furthermore, it is an admitted position that civil dispute between the aforesaid persons, is pending before the learned Commissioner, Darbhanga. So, I am of the opinion that continuance of the prosecution of the petitioners, in the present case, is nothing but only an abuse of process of the court and this court must exercise its power vested u/s 482 of the Cr.P.C.

42. The above citations squarely apply to the facts and circumstances of this case, where there is a dispute with regard to the title of the property, the criminal court cannot convict one of the parties for the offence punishable u/s 379 of the IPC, therefore, the sentence imposed by the trial Court for the offence punishable u/s 379 is not at all sustainable.

43. In view of the above discussion, this Court is of the considerable view that the conviction of appellant



Nos. 2, 3, 5 and 8 for the offence punishable u/s 307 r/w 149, 379, 148 and also u/s 27 of the Arms Act for the appellant Nos. 2, 3 and 8 is not sustainable. Accordingly, the judgment of conviction and sentence of Additional Court No. 1 Ad-hoc Sessions Judge, Fast Track Court, Patna in S.T. No. 312/85 of 1991/2001 dated 07.02.2004, is hereby set-aside and the appellants are acquitted of the aforesaid offences.

44. The record reveal that the appellants were enlarged on bail by the Court vide order dated 23.02.2004. Hence, the bail bonds of the appellants shall stands cancelled.

45. In result the appeal is allowed.

(G. Anupama Chakravarthy, J)

Manish/-

AFR/NAFR	NAFR
CAV DATE	N/A
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