

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.83 of 2004

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1. Mukund Mahto son of Late Bhola Mahto.
 2. Sukhdeo Mahto son of Late Bhola Mahto.
 3. Mukhdeo Mahto son of Late Bhola Mahto.
 4. Deep Narain Mahto son of Late Bihari Mahto.
 5. Bhutti Mahto son of Shri Sukhdeo Mahto.
 6. Nagendra Mahto son of Shri Sukhdeo Mahto.
 7. Ramashray Mahto son of Jadu Mahto, all are residents of Village – Bajitpur, P.S. Basantpur, District Siwan.

... .. Appellant/s

Versus

State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Prince Kumar Mishra (Amicus Curiae)
For the Respondent/s	:	Mr. A.M.P. Mehta, APP
For the Informant	:	Mr. Raghav Prasad, Advocate
	:	Ms. Urmila Kumari, Advocate

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 31-01-2024

The present appeal has been preferred by the appellants/convicts under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as ‘the Code’) challenging the impugned judgment of conviction and order of sentence dated 05.02.2004 passed by learned 1st Additional Sessions Judge, Fast Track Court, Siwan in Sessions Trial No.621/428 of 1996/2002 arising out of Basantpur P.S. Case No. 36 of 1996 whereby the concerned Trial Court has convicted all seven appellants under Sections 323 and 147 of the Indian Penal Code (in short ‘IPC’) and sentenced them to



undergo rigorous imprisonment for one year for the offence punishable under Section 323 of the IPC and undergo rigorous imprisonment for one year for the offence punishable under Section 147 of the IPC. All sentences shall to run concurrently.

2. The case of the prosecution is based upon written information of the informant namely Md. Chand/P.W. 4 that on 07.04.1996 at about 10:30 AM appellants/convicts alongwith their family members came over disputed land, where bricks were stored and started to take it away, which was objected by his father namely Abdul Samad. On said objection, aforesaid appellants/convicts started assaulting him with *lathi*, *bhala*, *farsa* etc., resultantly an alarm was raised by his father Abdul Samad, hearing which, informant alongwith Md. Qyum, Tasruddin and Abada Khatoon came over there to save him from the hands of accused persons but they were also assaulted by accused persons, where they received several injuries. It is further stated that appellants/convicts Deep Narain Mahto snatched one wrist watch of HMT, Kohinoor made having cost of Rs. 7,150/- from his wrist. His father (P.W. 7) in injured condition was taken to nearby Government Hospital but as he became unconscious he was further referred to Siwan. It appears that informant/P.W. 4 claimed through his written information



that during aforesaid occurrence assault was made with the intention to cause death, which arises out of previous enmities.

3. On the basis of aforesaid written information police registered Basantpur P.S. Case No. 36 of 1996 under Sections 147, 148, 149, 341, 307, 323, 324, 337 & 379 of the Indian Penal Code.

4. On the basis of material available on record, as collected during the course of investigation, learned Jurisdictional Magistrate, took cognizance, and committed the case to the Sessions Court, under Section 209 of the Cr.P.C., after compliance of provision as available under Section 207 of the Cr.P.C, for its trial and disposal. Learned Trial Court registered this case as Sessions Trial No. 621 of 1996 and framed charges on 15.05.2001 under Sections 148 and 307/149 of the IPC against appellants/accused persons on the basis of material available on records, which were explained to accused persons separately, which they plead “not guilty” and claimed trial.

5. To substantiate its case, the prosecution has examined altogether eight witnesses. They are:-

P.W. No(s).	Name
P.W. 1	Tasruddin



P.W. 2	Md. Qyum
P.W. 3	Sahban Mian
P.W. 4	Md. Chand (informant)
P.W. 5	Noor Mohammad
P.W. 6	Abada Khatoon
P.W. 7	Abdul Samad
P.W. 8	Jai Prakash Srivastava (formal witness)

6. Apart from the oral evidence, the prosecution has also relied upon following documents/exhibits, in order to prove the charges :-

Exhibit No(s).	List of documents
Exhibit 1	Written Information of informant
Exhibit 2	Formal F.I.R
Exhibit 3	Copy of charge-sheet
Exhibit 4	Para No. 1-54 of the Case Diary
Exhibit 5	Injury Reports of injured.
Exhibit 5/1	
Exhibit 5/2	
Exhibit 5/8	
Exhibit 6	Letter written by the I.O. for injury report
Exhibit 6/1	
Exhibit 6/2	
Exhibit 7	Discharge ticket of Abdul Samad
Exhibit 8	Cash Memos of medicine
Exhibit 8/2	
Exhibit 8/9	



7. The statement of the appellants/accused were recorded under Section 313 of the Code after stating incriminating evidences/circumstances as surfaced during the course of trial, which they denied and shows their complete innocence.

8. No witness was examined in support of defence, whereas defence has relied upon following documents/exhibits in order to defend the charges:-

Exhibit No(s).	List of documents
Exhibit A (disputed plot)	Land bearing Khata No. 210, Plot No. 476 showing area 13 katha, 3 dhur, 10 dhurki Khatiyani land of appellants.
Exhibit A/A	Khatiyani in the name of Bhola Mahto, said land is allotted khasra 1055 yards (total area of 16 decimals).
Exhibit B	F.I.R. lodged by Sukhdeo Mahto as Basantpur P.S. Case No. 35 of 1996 dated 07.04.1996.
Exhibit B/1	Documents of Basantpur P.S. Case No. 139/91.
Exhibit C	Order dated 15.04.1996 passed in Basantpur P.S. Case No. 35 of 1996 by Chief Judicial Magistrate, Siwan.
Exhibit D	Forwarding letter of



	Basantpur P.S. Case No. 35 of 1996.
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9. On the basis of materials surfaced during the course of investigation and after perusal of documents as exhibited during the course of trial, learned Trial Court acquitted appellants/accused for the rest of the charges but convicted for the offence punishable under Section 323 & 147 of the IPC and sentenced them to undergo rigorous imprisonment for the period of one year, as discussed above, being aggrieved appellants/accused preferred the present appeal.

10. Hence, the present appeal.

11. Learned *amicus* appearing on behalf of the above named appellants/accused submitted that finding of learned Trial Court as to secure conviction under Section 323 & 147 of the IPC is completely perverse on its face. It is pointed out that the doctors who authored the injury reports were not examined during the course of trial and as such in want of their examination it cannot be said that injury report was proved and therefore, there is no occasion to read those injury reports as an evidence. It is also pointed out that I.O. was also not examined in this case as to establish the place of occurrence and to prove *fardbeyan*, FIR etc. Learned *amicus* also pointed out that non-



examination of I.O. also deprived appellants/convicts from their valuable right of defence as they could not contradict the attention drawn to prosecution witnesses regarding occurrence and such, failed to avail valuable rights as available under Section 145 of the Indian Evidence Act. In support of his submissions he relied upon the legal report of Hon'ble Supreme Court in the case of **Ravishwar Manjhi and Others Vs. State of Jharkhand** as reported in (2008) 16 SCC 561. There is no recovery of any weapons during the course of investigation. It is also submitted that this is not a case of prosecution, where no injury was caused to informant and others and therefore the conviction under Section 323 of the IPC even without proving the injury report cannot be said correct in terms of law. It is also submitted by learned *amicus* that regarding said occurrence Basantpur P.S. Case No. 35 of 1996 was also lodged by appellants/convicts where they also received injuries but said injuries were not explained by witnesses/informant during the course of trial. Non-explanation of injuries also appears fatal to the prosecution. In support of his submissions learned *amicus* relied upon the legal reports of Hon'ble Supreme Court in the matters of **State of Karnataka Vs. Bhaskar Kushali Kotharkar and Others** as reported in (2004) 7 SCC 487 &



Rajesh Patel Vs. State of Jharkhand as reported in (2013) 3 SCC 791.

12. Learned APP duly assisted by learned counsel for the informant, while opposing the appeal submitted that on perusal of injury report it appears that informant and other prosecution witnesses received serious injuries on their vital parts of body. It is submitted by learned counsel for the informant that appellants/accused were encroachers over the land, which belongs to informant and others.

13. I have perused the lower court records carefully and gone through the evidences available on record and also considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

14. As to re-appreciate the evidences while disposing the present appeal, it is apposite to discuss the evidences available on the record, which are as under:-

15. P.W. 4 Md. Chand (informant) deposed during the course of trial that all above named appellants/convicts trespassed to their plot and when his father Abdul Samad (P.W. 7) objected appellants/accused they assaulted him with sharp edged weapons like *farsa*, *bhala* etc., where instigation was made on the part of Mukund Mahto. It



also appears from his depositions that assault was made in general and omnibus manner. He could not explain the injury as received by appellants/convicts during the course of occurrence and in his examination-in-chief, he narrated the same version as he stated through his written information, which is exhibited as **Exhibit 1**, which dealt above as “brief case of prosecution” and as such, same not required to be repeated for the sake of brevity and convenience.

15.1. Upon cross-examination it was stated by him that present case is regarding land dispute between the parties. He also stated about previous enmities. It appears from his deposition that he alongwith other injured reached hospital somewhere between 11 to 12 Hrs. He also stated that appellants/accused were arrested but enlarged on bail on the same day. He specifically stated that his house is situated at a distance of 200 yards from the place of occurrence and he arrived at the place of occurrence in next one minute of the occurrence after hearing alarm. He did not notice any injury upon the body of appellants/convicts. His father (P.W. 7) was assaulted before him. He did not saw any blood oozing from his body immediately on his arrival at the place of occurrence, where he stayed for 1-2 minutes. He claimed to saw all seven



appellants/convicts together, firstly at the place of occurrence. He categorically stated that he did not saw any marks of injury on the body of his father (P.W. 7).

16. P.W. 1 Tasruddin stated in his cross-examination that there was land dispute between the parties for which proceeding was also initiated under Section 144 of the Code. He stated that he received assault from the backside of the *farsa* and thus appearing first time making a totally different story during the course of trial. He stated that no blood was fallen to the ground.

17. P.W. 2 Md. Qyum in his cross-examination stated mainly about land dispute and added that Abdul Samad (P.W. 7), did not met him at hospital rather he talked with him when he returned after his treatment from Patna. This material aspect regarding treatment of P.W. 7 in Patna was not disclosed in written information, authored by Md. Chand (P.W. 4).

18. Almost all injured prosecution witnesses i.e., P.W. 3, P.W. 5, P.W. 6 & P.W. 7 narrated same fact through their examination-in-chief and same not required to be repeated here.

18.1. Upon cross-examination P.W. 3 stated that land disputes are pending between the parties since last 10-12 years. He stated to arrive at the place of occurrence on alarm.



He went there alone and did not saw any mark of assault on the body of Abdul Samad (P.W. 7). It was stated that P.W. 7 was assaulted by Mukund Mahto, Deep Narain Mahto and Ramshray Mahto. He was also assaulted by *lathi*.

18.2. Upon cross-examination P.W. 5 also affirmed land dispute between the parties. It was stated that no person from Nagendra side (appellant/accused) received any injury. He stated that Abdul Samad (P.W. 7) was assaulted in general manner by appellant/accused during the course of occurrence by *lathi*.

18.3. Upon cross-examination P.W. 6 supported the factum of land dispute and stated that Samad (P.W. 7) became senseless during the course of occurrence out of assault caused by appellants/accused. He also stated to received injuries during the course of occurrence.

18.4. Upon cross-examination P.W. 7 injured father of informant supported land dispute between the parties and stated that he gained his sense at Patna in Tara Nursing Home. He received injury from the backside of *farsa*. He failed to disclose anything what happened after he became unconscious.

19. It appears that I.O. of this case was not examined during the course of investigation depriving



appellants/accused to avail their right as to contradict the attention, which was made contrary to the statement as recorded under Section 161 of the Code and as such they could not avail an opportunity to impeach the credibility of witnesses as per Section 145 of the Indian Evidence Act and as such, it appears that non-examination of I.O. deprived appellants from their valuable right of defence. There is no recovery of weapons and in want of examination of Investigating Officer, F.I.R. and place of occurrence also cannot be said proved.

20. It would be apposite at this stage to reproduce the legal reports of Hon'ble Supreme Court as reported in the matters of:-

(a). Bhaskar Kushali Kotharkar (supra), wherein Hon'ble Supreme Court in Para- 6 of the legal report observed as under:-

“6. It is true that as a part of fair trial the investigating officer should be examined in the trial cases especially when a serious sessions trial was being held against the accused. If any of the prosecution witnesses give any evidence contrary to their previous statement recorded under Section 161 Cr. P.C. or if there is any omission of certain material particulars, the previous statement of these witnesses could be proved only by



examining the investigating officer who must have recorded the statement of these witnesses under Section 161 Cr. P.C.”

(b). Ravishwar Manjhi (supra), wherein Hon’ble Supreme Court in Para- 27 of the legal report observed as under:-

“27. The investigating officer in a case of this nature should have been examined. His examination by the prosecution was necessary to show that there had been a fair investigation. Unfortunately, even no site plan was prepared. There is nothing on record to show as to the exact place where the occurrence had taken place. It is stated that the house of the parties is divided by a road. If that be so, it was all the more necessary to pinpoint the exact place of occurrence to ascertain who was the aggressor.”

(c). Rajesh Patel (supra), wherein Hon’ble Supreme Court in Para- 18 of the legal report observed as under:-

“18. Further, neither the doctor nor the IO has been examined before the trial court to prove the prosecution case. The appellant was right in bringing to the notice of the trial court as well as the



High Court that the non-examination of the aforesaid two important witnesses in the case has prejudiced the case of the appellant for the reason that if the doctor would have been examined he could have elicited evidence about any injury sustained by the prosecutrix on her private part or any other part of her body and also the nature of hymen layer, etc. so as to corroborate the story of the prosecution that the prosecutrix suffered unbearable pain while the appellant committed rape on her. The non-examination of the doctor who had examined her after 12 days of the occurrence has not prejudiced the case of the defence for the reason that the prosecutrix was examined after 12 days of the offence alleged to have been committed by the appellant because by that time the sign of rape must have disappeared. Even if it was presumed that the hymen of the victim was found ruptured and no injury was found on her private part or any other part of her body, finding of such rupture of hymen may be for several reasons in the present age when the prosecutrix was a working girl and that she was not leading an idle life inside the four walls of her home. The said reasoning assigned by the High Court is totally erroneous in law.”



21. From the perusal of record it also appears that Doctors Bhairon Prasad & Dr. Ravibhushan Sharma, were also not examined during the course of trial. They are author of the injury report and in want of their examination, it cannot be said that injury reports of the injured were proved during the course of trial so as to read it as an evidence. This fact was also believed by the learned Trial Court but in a very hypothetical and casual manner, learned Trial court convicted the appellants for the offence punishable under Section 147 and 323 of the IPC. This is not a case of prosecution, where injuries were not caused during the course of occurrence, rather it was not taken into consideration as it was “not proved” and in such background conviction under Section 323 of the IPC mere on the basis of presumption do not appears lawful.

22. At this juncture it would be appropriate to reproduce the provisions available under Section 146 & 147 of the IPC as to understand the meaning of unlawful assembly.

*146. **Rioting.-** Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly,*



*every member of such assembly is guilty
of the offence of rioting.*

*147. **Punishment for rioting.**- Whoever
is guilty of rioting, shall be punished with
imprisonment of either description for a
term which may extend to two years, or
with fine, or with both.*

23. From the plain reading of aforesaid legal provisions it is apparent that some force or violence must be used by an unlawful assembly or by any number of people thereof in prosecution of common object of such assembly. The common object as narrated through written information, which is exhibited as **Exhibit 1** and also from all the testimonies of different prosecution witnesses as it transpires that the assault was made with an object to cause death of the informant and other family members but learned Trial Court disbelieved the same. It is well settled position that mere presence in any unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object. It has been dealt by Hon'ble Supreme Court in the case of **Gangadhar Behera and Others Vs. State of Orissa** as reported in **(2002) 8 SCC 381**. In view of aforesaid, the



conviction under Section 147 of the IPC also appears non-convincing on its face.

24. It is well settled position that Section 323 of the IPC constitute a separate and distinct offence under the law for which separate legal ingredients are required to be established beyond reasonable doubt. It is not so, if injury report of any injured person “not proved” due to non-examination of doctors, Court will presume the fact that appellants were caused atleast “simple hurt” within meaning of Section 323 of the IPC, by taking a deviating note from the case of prosecution, what exactly happened in present case.

25. Accordingly, appeal is allowed. The impugned judgment of conviction and order of sentence dated 05.02.2004 passed by learned 1st Additional Sessions Judge, Fast Track Court, Siwan in Sessions Trial No.621/428 of 1996/2002 arising out of Basantpur P.S. Case No. 36 of 1996 are, hereby, set aside. All appellants are acquitted from the aforesaid charges levelled against them.

26. The Patna High Court, Legal Services Committee is, hereby, directed to pay Rs. 5,000/- (Rupees Five Thousand Only) to Mr. Prince Kumar Mishra, learned *Amicus Curiae* in Criminal Appeal (SJ) No. 83 of 2004 as consolidated



fee for rendering his valuable professional service for the disposal of present appeal.

27. Office is directed to sent down the Trial Court Records (TCR) along with a copy of this judgment to the Trial Court.

(Chandra Shekhar Jha, J.)

S.Tripathi/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	
Transmission Date	

