

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.292 of 2013

Arising Out of PS. Case No.-13 Year-2008 Thana- KHAJAULI District- Madhubani

1. Kundan Kunwar, S/o Gopal Kunwar Village - Tarapatti, P.S. - Khajauli, Dist. - Madhubani
2. Gopal Kunwar, S/o Bhola Kunwar Village - Tarapatti, P.S. - Khajauli, Dist. - Madhubani
3. Balmiki Kunwar, S/o Bhola Kunwar Village - Tarapatti, P.S. - Khajauli, Dist. - Madhubani

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ali Muqtadin Ahmad, Advocate
		Mr. Shahbaj Alam, Advocate
For the Respondent/s	:	Mr. Abhay Kumar, APP

CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA

ORAL JUDGMENT

Date : 14-11-2024

The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C.')

challenging the Judgment of conviction and order of sentence dated 19.03.2013 passed by the learned Adhoc Additional Sessions Judge-III, Madhubani in Sessions Trial No. 55 of 2009 arising out of Khajauli P.S. Case No. 13 of 2008, instituted for an offence punishable under Sections 341, 323, 504, 307, 427, 337, 354 and 379/34 of the Indian Penal Code whereby and where under all appellants have been sentenced to undergo rigorous imprisonment for one year for committing an offence punishable under Section 323 of the



Indian Penal Code and further for rigorous imprisonment for six months for offence punishable under Section 337 of the Indian Penal Code and also sentenced to undergo rigorous imprisonment for one month for offence punishable under Section 341 of the Indian Penal Code with a direction that all sentence shall concurrently.

2. Heard Mr. Ali Muqtadin Ahmad, learned counsel for the appellant assisted by Mr. Shahbaj Alam and Mr. Abhay Kumar, learned APP for the State.

3. The brief facts leading to the filing of the present appeal are that as per the *fardbeyan* of the informant, on 15.01.2008 at 8 A.M, Kundan Kunwar S/o Gopal Kunwar of Village- Tarapatti, P.S- Khajauli and Balmiki Kunwar came at informant's diesel shop for purchasing diesel. They purchased 5 Liters of diesel from her shop. After delivery of the diesel Kundan Kunwar asked the informant that diesel is less in quantity and started abusing her along with her son Uday Kumar. Thereafter when the informant protested the same, then both of them become furious and returned to their home. After some time, Gopal Kunwar on his Motorcycle along with Kundan Kunwar and Balmiki Kunwar came at her shop and started abusing her and Kundan Kunwar caught hold her hair



and pushed her on ground. It is further alleged that when the informant fell down on the ground, then Kundan Kunwar assaulted her with an intention to kill her, causing injuries on her forehead, lip and blood started oozing out. It is further alleged that at that time, Balmiki Kunwar started pressing her neck and Gopal Kunwar also assaulted her son with lathi and further cloths, diesel and cosmetics of the informant were thrown here and there by him. They also damaged the glass of almirah and Kundan Kunwar took away Rs. 3000/- from the box of her shop. Thereafter the husband of informant reached there and both of them were brought to the hospital for treatment and just thereafter, all the three appellants persons arrived at hospital by motorcycle and all of them assaulted the husband of the informant namely Ramashish Sah with lathi and bricks and thrown her blanket and pillows in the Hospital.

4. On the basis of the aforesaid *fardbeyan*, case was registered as Khajauli P.S. Case No. 13 of 2008 dated 15.01.2008 under Sections 341, 323, 504, 307, 447, 337, 354 and 379/34 of the Indian Penal Code and thereafter the investigation was taken up. On completion of investigation, the Investigating Officer submitted charge sheet under Sections 341, 323, 324, 307, 384, 506, 427, 337, 354, 379 and 504/34 of the



Indian Penal Code. It is further stated that on the basis of the charge sheet cognizance was taken and the case was committed to the Court of Sessions by the Judicial Magistrate, Madhubani for trial and disposal of the case.

5. The prosecution examined altogether 5 prosecution witnesses in this to substantiate the charges against the appellants persons, out of them PW-1 Parikshan Sah, PW-2 Amarnath Thakur, PW-3 Sanjeev Kumar Sah, PW-4 Bina Devi (informant), PW-5 Baleshwar Prasad. On the other hand, the defence has not produced any oral evidence rather the Certified copy of *fardbeyan* along with formal F.I.R. has been produced and marked as Ext.- A. It is necessary to mention here that the husband and son of the informant along with doctor has not been examined during the trial and no medical report has been submitted by the prosecution to substantiate that informant sustained any injury.

6. PW-1 Parikshan Sah, in his examination-in-chief stated that on the relevant day of occurrence he went to Khajauli with his tractor to the diesel shop of Ramashish Sah. He saw that appellant namely Kundan Kunwar was refuelling there and appellant asked that diesel was short and started abusing informant. Thereafter, Kundan Kunwar returned to his



home and he further stated that after some time 3 persons came namely, Kundan Kunwar, Gopal Kunwar and Balmiki Kunwar on motorcycle and caught hold hair of the informant and pushed her on ground. They took away 3000/- rupees from cash-box of the informant and threw articles kept in the shop. Ramashish brought his wife and son to Khajauli hospital and the appellants persons also went there and assaulted them. In his cross-examination at para- 5, PW-1 has stated that his house is situated at the distance of 18-20 km from the Khajauli P.S. and in the aforesaid para he further stated that he is the owner of the tractor. In para- 6 of cross-examination, PW-1 stated that he stayed at the shop for one hour. He also purchased 5 litre of diesel and at that place 15 to 20 persons came and he only knows Jitin who had gone there. At para- 7 of his cross-examination, PW-1 stated that before his statement in court he has not given statement anywhere else.

7. PW-2 Amarnath Thakur, has been declared hostile on the prayer of prosecution and in his single line cross-examination he has stated that Khajauli is situated at the distance of 3 km from his house.

8. PW-3 Sanjeev Kumar Sah, who is son-in-law of Bina Devi and he resides in *Sasural*. He further stated that at



the time of occurrence he was present in the shop and he possess the shop of General store and cosmetics items just adjacent to the shop of his mother-in-law. He further stated that Kundan Kunwar came to purchase diesel and hot altercation took place there. Thereafter Kundan Kunwar returned and after some time Kundan Kunwar, Balmiki Kunwar, Gopal Kunwar came and they had quarrelled with Bina Devi and assaulted Bina Devi with *lathi* and *danda* and further damaged the articles kept in the shop. He further stated that he brought the injured to hospital and appellants persons also committed quarrel in hospital and Balmiki assaulted Ramashish in hospital with *danda*. He also identified the signature on *fardbeyan*, marked as Ext. 1. In his cross-examination, PW-3 stated that he resides in *Sasural* for 5 years in the house of father-in-law and mother-in-law and his shop is situated at the distance of 4 yards from the shop of his mother-in-law. At para- 4 of his cross-examination, he stated that Kundan has also lodged case against him and his mother-in-law and father-in-law and he further stated in aforesaid para that road was busy. At para- 6 he stated that he has given his statement before the police on 15.01.2008 and lastly, he has denied that he has wrongly deposed.

9. PW-4 Bina Devi (informant), who stated that



at the time of occurrence she was present at the diesel shop and his son Uday gave 5 litre diesels to Kundan and thereafter Kundan and Balmiki asked them that diesel is short and they returned with diesel without paying money. After 20-25 minutes Kundan, Gopal and Balmiki came there with motorcycle having *lathi* and *danda* in their hands. Kundan caught hold her hairs and pushed her on the ground with intention to kill her. Balmiki started pressing her neck and when his son came to save him then they also assaulted him. She sustained injury on her head, lip and eye brow. Her left hand becomes injured. She was brought to hospital by her husband and in hospital appellants assaulted her husband with *lathi* and bricks. She had given statement before the police in hospital. In her cross-examination vide para- 3 she stated that she does not know the fact that Kundan has lodged case against her for the occurrence of same day. She stated that in absence of her husband, she along with her son used to sell diesel. At para-4 of cross-examination, PW-4 stated that she had seen Kundan in Hospital and she remained in hospital for 4-5 days but did not became senseless. At para- 5 of cross-examination, she stated that no sign of injury was caused on her neck and blood oozed from her head, lip and eye brow. She had fallen on the ground but blood-stained cloth of



her son was not given to police. His son raised *hulla*. Lastly, she had denied that to save her from the case lodged by Kundan this counter case has been lodged and no occurrence as alleged has ever taken place.

10. PW-5 Baleshwar Prasad who was posted on 15.01.2008 at Khajauli P.S. as J.A.S.I. The formal F.I.R. was written and signed by PW-5, marked as Ext. 2. After institution of the case, he took over the charge of investigation and recorded the re-statement of the informant, inspected the place and recorded the statement of witness Sanjeev Kumar, Amarnath Thakur, Parikshan Sah and other. After completion of investigation PW-5 finally submitted charge sheet under Sections 341, 323, 324, 307, 384, 506, 427, 337, 354, 379 and 504/34 Indian Penal Code. In his cross-examination, he stated that he received the information on the basis of O.D slip issued by the hospital where the injured were brought at hospital has not been mentioned in the case diary and what articles were kept in the shop is also not mentioned. At para- 5 of cross-examination, he stated that length, breadth and height of the shop has not been mentioned and what actual damage caused has not been mentioned and he has not seized any articles from the place of occurrence. He further stated that beside the shop



there is metaled road. He has also not mentioned the about the doctor who examined the injured and lastly, he has denied that he has submitted collusive charge sheet.

11. Learned counsel for the appellant submits that there is a contradiction between the statements given by PW-3 (Sanjay Kumar) and PW-4 (Beena Devi), wherein PW-3 stated that he had brought injured to the hospital and whereas PW-4 stated in her statement that she was brought to hospital by her husband. He next submits that it is not out of place to submit that there is neither medical examination of the informant and his family, nor any medical practitioner has been examined. Further, neither the prosecution has submitted any medical prescription nor any certificate, moreover there is no injury report which has caused prejudice to the defence. Such that no inference can be made under Sections 323 and 337 IPC. He next submits that essential ingredient of Section 341 IPC is not fulfilled as the appellant/accused person have by no means voluntarily obstructed any one of the victims so as to prevent them from proceeding in any direction, as it had been so the victims would not have gone for their medical treatment.

12. Learned counsel for the appellant mention that two most important witnesses of the case namely, Uday



Kumar Sah (son of the informant, PW4) and Ramashish Sah (husband of the informant, PW4) have not been examined, and the above two named person were also present at the place of the occurrence, and failure to examine these witnesses puts a reasonable doubt on the prosecution, which should go in the favour of the appellants. He next submits that the learned trial Court failed to appreciate that the alleged offences committed by the appellants are the first offences and as such benefit of Probation of Offenders Act should be given to the appellants taking lenient view as well as considering the offence to be minor in nature. He further submits that during course of trial, five witnesses have been examined by the prosecution, out of which PW-2 become hostile, whereas PW-1 is a chance witness who happens to be an independent witness has already connected with the informant being purchaser of diesel for his tractor and so far as PW-3 is concerned, he happens to be the son-in law of the informant herself and PW-5 is the Investigating Officer, who could not be able to bring evidence in support of the prosecution case and as such they failed to prove their case beyond reasonable doubt and in PW-1 deposition, it has come on record that at the alleged place of occurrence 15 to 20 persons came out of which he know only one Jitan, but not a



single person(s) were examined during course of trial to prove the prosecution case.

13. On the other hand, learned Additional Public Prosecutor Mr. Abhay Kumar has vehemently opposed the appeal and submits that there is direct allegation against the present appellants, for assaulting the informant and her family members. He next submits that the act committed by the appellants are not permissible and assaulted the informant in government premise also. In view of the aforesaid statements and the evidence on record, learned trial Court has rightly convicted the appellant and the present appeal should not be entertained

14. At this stage, I would like to appreciate the relevant extract of entire evidence led by the prosecution before the Trial Court.

15. On the basis of evidences available on record and after considering the submissions made by the learned counsel for the respective parties, it appears that during the course of trial, the Learned Trial Court pleased to absolve the appellants from criminal liability under Sections 307/34, 354, 504, 427 and 379 of the Indian Penal Code, but so far as Sections 323, 337 and 341 of the Indian Penal Code are



concerned, the learned trial Court failed to scrutinize the evidence brought on record regarding deficiencies, drawbacks and infirmities crept during course of trial and passed the impugned judgment in complete ignorance of criminal jurisprudence. Moreover, there are discrepancies regarding the sequence of events and the presence of individuals at the scene of the incident. Further, there is a contradiction between the statements given by PW-3 (Sanjay Kumar) and PW-4 (Beena Devi), wherein PW-3 stated that he had brought injured to the hospital and whereas PW-4 stated in her statement that she was brought to hospital by her husband and there is neither medical examination of the informant and his family, nor any medical practitioner has been examined. Neither the prosecution has submitted any medical prescription nor any certificate, moreover there is no injury report which has caused prejudice to the defence. Further essential ingredient of Section 341 Indian Penal Code is also not fulfilled as the appellant/accused person have by no means voluntarily obstructed any one of the victims so as to prevent them from proceeding in any direction, as it had been so the victims would not have gone for their medical treatment.

16. It is also evident to note that two most



important witnesses of the case namely, Uday Kumar Sah (son of the informant, PW4) and Ramashish Sah (husband of the informant, PW4) have not been examined, and the above two named person were also present at the place of the occurrence, and failure to examine these witnesses puts a reasonable doubt on the case of the prosecution and the charge-sheet can also be said to be defective as there are two different places of occurrence and they are not arising out in the course of the same transaction, despite that Investigating Officer has filed joint charge-sheet.

17. The provision of joint chargesheet is under Section 223 of Cr.P.C. and the same is as follows:

Section 223 – What persons may be charged jointly. The following persons may be charged and tried together, namely;

- a. persons accused of the same offence committed in the course of the same transaction;*
- b. persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;*
- c. persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;*
- d. persons accused of different offences committed in the course of the same transaction;*
- e. persons accused of an offence which includes theft,*



extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

f. persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those sections in respect of stolen property the possession of which has been transferred by one offence;

g. persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges;

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate or Court of Sessions may, if such persons by an application in writing, so desire, and if he is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together”.

18. Considering the above provision of the Code, the present case of the appellants is nowhere applicable for joint



trial and learned trial Court has convicted both the accused persons through a joint trial. For a joint trial to be conducted for two persons committing an offence at different place and at different time, the trial Court shall mention this on record or an application should be moved for conducting a joint trial, and the learned Trial Court shall apply a judicial mind while considering the matter, and the Judicial Officer while performing the duties shall make sure that the procedure prescribed in the Code is followed and no prejudice be caused to any person. But, in the present case, on perusal of the entire record, no such application or mention of conducting joint trial has been brought on record.

19. This is not such case and both the appellants must have been tried in separate trials and should be considered by laying down separate evidences for the accused persons, considering the provision of Section 223 of the Code.

20. As per the provision, if therefore, persons more than one are to be charged and tried together, their case must be brought within any of the clauses of Section 223 of the Code or any other provision of the Code and the burden is always on the prosecution to justify a joint trial. The Court, however, when several persons are tried together, must clearly and explicitly distinguish between them and point out as to how



the evidence affects them individually. When facts of two incidents occurring at different place and at different times, there is no similarity between the incident, we cannot take such position that both incidents took place as a result of same transaction and joint trial conducted against the accused persons/appellants could be ordered to be conducted jointly.

21. If, the provision is not followed properly, the charges framed against the accused persons is altogether defective and the trial is vitiated. The benefit is to be given to the appellants/accused persons.

22. Hence, the impugned judgment of conviction and order of sentence dated 19.03.2013 passed by the learned trial Court against the appellants are set aside and the appellants are acquitted from the charges levelled against them. As the appellants are on bail, they are discharged from the liability of bail bond.

22. Accordingly, this appeal is allowed.

(Ramesh Chand Malviya, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	19.11.2024
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