
(2016) 01 JH CK 0135
In the Jharkhand High Court
Case No : Cr. Appeal (DB) No. 890 of 2004

Badri Yadav and Others

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision : 28-01-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, Section 148, Section 149, Section 302, Section 304, Section 323, Section 324, Section 34, Section 447

Citation : (2016) 2 AIRJharR 699 : (2016) 2 ECrC 7 : (2016) 3 JBCJ 418 :
(2016) 2 JBCJ 42 : (2016) 2 JLJR 101

Hon'ble Judges : Dhruv Narayan Upadhyay and Ratnaker Bhengra, JJ.

Bench : Division Bench

Advocate : B.M. Tripathi, Sr. Advocate, for the Appellant; Pankaj Kumar, A.P.P., for the Respondent

Final Decision : Allowed

Judgement

Dhruv Narayan Upadhyay, J.—1. This criminal appeal has been directed against the judgment of conviction and order of sentence dated 18th May, 2004 and 22nd May, 2004, respectively, passed by Additional Sessions Judge, F.T.C., Koderma, in connection with S.T. No. 259 of 1987, corresponding to G.R. No. 380 of 1986, arising out of Jainagar P.S. Case No. 40 of 1986, whereby the appellants have been held guilty for the offence punishable under Sections 302/149, 323, 324 and 447/149 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and also to pay a fine of Rs. 10,000/-, each, and in default of making payment of fine simple imprisonment for one year. They have further been sentenced to undergo rigorous imprisonment for six months under Section 323 IPC, rigorous imprisonment for one year under Section 324 IPC and rigorous imprisonment for three months under Section 447/149 IPC. All the sentences so passed shall run concurrently.

2. The prosecution case, as it appears from the Fardbeyan of Deonandan Yadav, recorded on 12th July, 1986, at 8:30 hours, at Sub Divisional Hospital, Koderma,

in brief, is that on 12th July, 1986, at about 6:00 a.m., while the informant was going to answer call of nature, he saw the appellants ploughing in his field, bearing Plot No. 14, Khata No. 21, Area 52 decimals. In that field Gondali crop was grown by the informant, but the appellants were destroying the crops by ploughing the field. When the informant made protest, Bhuneshwar Yadav took out a Lathi and Prasadi Yadav brought a sword, which were concealed near the place of occurrence and they caused assault to informant. After receiving injury, the informant raised alarm, which attracted witnesses and family members and they rushed for rescue, but they were also assaulted. It is disclosed that Wajir Yadav, Choudhary Yadav, Mathura Yadav and Janardan Yadav had sustained injuries caused to them by the appellants by means of Lathi, spear, sword etc. Injured Mathura Yadav succumbed to his injury.

On the basis of Fardbeyan of Deonandan Yadav, Koderma, Jainagar P.S. Case No. 40 of 1986 dated 12th July, 1986, corresponding to G.R. No. 380 of 1986, under Sections 147, 148, 149, 323, 324 and 302 of the Indian Penal Code was registered.

The investigation was carried out and charge sheet at the conclusion of investigation was submitted against all the appellants and, accordingly, cognizance was taken and case was committed to the court of sessions and registered as S.T. No. 259 of 1987.

Initially, Bhuneshwar Yadav and Prasadi Yadav were charged for the offence punishable under Section 302 of the Indian Penal Code and remaining accused were charged for the offence punishable under Sections 147, 148, 149 and 324 of the Indian Penal Code on 4th April, 1998. Charges were amended on 6th June, 2001. Thereafter, the appellants-Prasadi Yadav and Ishwar Yadav stood charged for the offence punishable under Sections 148 and 324 of the Indian Penal Code, whereas all the appellants, including Prasadi and Ishwar, stood charged under Sections 147, 447/149, 323/149 and 302/149 of the Indian Penal Code.

The charges so framed were explained to the appellants to which they pleaded not guilty and claimed to be tried.

To bring home the charges, the prosecution has examined altogether ten witnesses, whereas the appellants have examined one witness in their defence. Learned Additional Sessions Judge, placing reliance on the evidences and documents, available on record, held the appellants guilty and sentenced them, as indicated above.

3. Since Appellant No. 6-Ganpat Yadav died, the appeal as against him stands abated.

Before commencement of trial, one of the accused, namely, Sarju Yadav died in a road accident, whereas the appellant-Ganpat Yadav died during pendency of this criminal appeal.

4. The appellants have assailed the impugned judgment mainly on the ground

that ingredients of offence punishable under Section 302/149 of the Indian Penal Code are not attracted. The assemblage of the appellants was neither unlawful nor common object of the aforesaid assembly was to commit murder. The dispute prevailing between the parties from before is admitted. The documents exhibited by the appellants and the statements of the witnesses obtained during their cross-examination clearly indicate that the land on which the appellants had been ploughing belongs to them. They had been ploughing their field in course of which the informant party reached to the place and caused assault to Sarju Yadav. The informant party also caused assault to brother of Sarju Yadav. On the basis of Fardbeyan lodged by Sarju Yadav, Jainagar, Koderma P.S. Case No. 41 of 1986, corresponding to G.R. No. 385 of 1986, under Sections 323, 324 and 34 of the Indian Penal Code was registered. The aforesaid Fardbeyan has been marked as Ext. B, whereas formal first information report has been marked as Ext.-A, that goes to show that the informant party were the aggressor and they had come to the place of occurrence armed with sword, spear, Lathi etc. Learned Trial Court should have relied on Exts.A and B and other documents relating to title and possession of the appellants over the land in question. The finding of the Trial Court is correct to the extent that in a case of murder title of the land could not be decided, but the fact remains, it was ought to be decided as to who was the aggressor and who committed criminal trespass on whose land.

From perusal of Ext. B it would transpire that the appellants had been ploughing field after obtaining a decree from the competent court of law, which was challenged by the informant and his companions. It would also reveal from the Fardbeyan of the present case that the informant and his companions went to the place of occurrence, but to save themselves they did not speak about the weapon with which they had been to the place. The prosecution did not explain the injury caused to Sarju Yadav, inflicted in the same incident. The finding of the Trial Court is highly erroneous when the Court held the appellants guilty for the offence punishable under Section 447 read with Section 149 of the Indian Penal Code. It were the informant party who had committed criminal trespass and that could well be inferred from the documents relating to the property proved by the appellants.

5. The facts, which the appellants have brought on record, suggest that the informant and his companion had made an attack on Sarju Yadav and his brother. The informant and his companions had provoked and initiated the commission of offence. The appellants, to protect their life and property, made protest in which the companions of the informant have sustained injury. Therefore, the appellants were not formed any unlawful assembly nor common object of the assembly was to commit murder. All the members of said assemblage were not knowing that any such offence is likely to be committed. In such situation, individual overt act committed by each and every person was required to be judged by the Trial Court.

6. The prosecution witnesses are not consistent in their statements regarding

manner of assault and weapon allegedly held and used by individual appellant. The informant has been examined as P.W.7 and he has given a different story in his deposition in Court. He says that accused-Prakash Yadav, Badri Yadav, Sobran Yadav and Sarju Yadav had been ploughing the field, whereas the appellants-Ishwar Yadav, Prasadi Yadav, Ganpat Yadav (dead), Kishundhari Yadav and Bhuneshwar Yadav were present with Lathi, sword, axe in the field. According to Fardbeyan, when he made protest against ploughing of the field, the appellants took out their respective weapons from the place where the same were concealed and caused assault. Had there been intention to commit murder, they could have killed Deonandan Yadav (informant) as soon as he had raised objection. The injuries explained by the informant in his deposition do not find support from the injury report. There are vital contradictions in the statements of witnesses regarding manner of assault and place where they were subjected to assault. The Investigating Officer has not come forward either to prove the Fardbeyan or the investigation done by him. Due to non-examination of Investigating Officer, contradictions appearing in the statements of witnesses could not be referred and place of occurrence has also not been proved. Non-examination of Investigating Officer has caused prejudice to the appellants and that is fatal to the prosecution. Therefore, the impugned judgment is liable to be set aside.

7. Learned counsel for the appellants has relied upon the judgment of the Hon'ble Supreme Court, reported in , AIR 2012 SC 1030 [Roy Fernandes v. State of Goa & Ors.] and submitted that the occurrence took place under grave and sudden provocation given by the informant and his companions. The presence of the appellants in the field was not to commit an offence, rather they had been ploughing their field. They did not have intention to kill Mathura Yadav. Relying on the judgment, referred to above, it is submitted that if this Hon'ble Court finds the appellants' guilty for the death of Mathura Yadav, the conviction can be altered to that under Section 304, Part-II, of the Indian Penal Code, because Mathura Yadav had sustained only one injury on his head and that too caused by hard and blunt substance.

8. Learned APP has opposed the argument and submitted that as many as five witnesses, including the informant, had sustained injuries in the incident and the injuries were caused by sword, axe (Tangi), Lathi etc. It is submitted that the appellants have not pleaded the right of private defence. By examining defence witnesses and proving Ext. B i.e. Fardbeyan of Jainagar, Koderma P.S. Case No. 41 of 1986, the appellants have admitted their presence at the place of occurrence at the relevant point of time. In that very case, all the accused, who were charge sheeted, stood acquitted and they were not found guilty. That further goes to show that accused-Sarju Yadav (now dead), in order to save the skin of the appellant, had lodged that case. Ramu Yadav-P.W.1, Shankar Yadav-P.W.2, Choudhary Yadav-P.W.3, Mahadev Yadav-P.W.6, Deonandan Yadav-P.W.7 (informant) had sustained injuries in the incident and they have fully supported the prosecution case. The injuries sustained by them find support from the injury

reports, marked Exts.4 to 4/7. Dr. Digambar Jha-P.W.10 had conducted postmortem examination on the dead body of Mathura Yadav. Postmortem report has also been proved as Ext. 3. The prosecution has succeeded to prove the charges framed against the appellants and each and every member of that unlawful assembly has rightly been held guilty for committing murder of Mathura Yadav with the aid of Section 149 of the Indian Penal Code. The facts and circumstances indicated in the judgment rendered in the case of Roy Fernandes (Supra) did not tally with the facts appearing in the case at hand.

9. We have carefully examined the case record, impugned judgment, evidences and documents available on record. The informant-P.W.7 has made out a case that he had seen the appellants ploughing the field, pertaining to Plot No. 14 and Khata No. 21, while he was going to answer the call of nature. In the aforesaid field, Gondali and Urad crops were grown to which the appellants were destroying by ploughing the field. The informant made protest after which the appellants took out the weapons which they had concealed near the place of occurrence and started inflicting blows upon the informant by means of their respective weapons. The informant raised alarm which attracted the villagers, relatives and other witnesses, who ran to rescue him, but they were not spared and subjected to assault by the appellants. In the incident, Mathura Yadav sustained grievous injury on his head and he was removed to hospital, but could not survive. The Fardbeyan of the informant was recorded in the hospital and a case, as indicated above, was registered.

10. Learned counsel has raised a point that the informant and his companions were the aggressor and they had been to the place of occurrence with weapons like sword, spear, Lathi etc. and they also caused assault to accused Sarju Yadav (now dead) and his brother. On the basis of Fardbeyan of Sarju Yadav, Jainagar, Koderma P.S. Case No. 41 of 1986 was registered. Learned counsel has further tried to impress upon the Court that the appellants had not formed any unlawful assembly for committing offence of murder and they did not have such common object. The occurrence took place at the spur of the moment when provocation was given by the informant and his companions.

11. To meet out the point raised above, we have carefully gone through the Fardbeyan, statements of witnesses, who had sustained injuries in the incident. We have also gone through Ext. B-Fardbeyan of one of the accused-Sarju Yadav, relating to Jainagar Koderma P.S. Case No. 41 of 1986. The evidence of informant and other injured witnesses gives a picture that the appellants had been ploughing field in which Gondali crop was grown by the informant party. Thus, it is clear that they had not been ploughing field for the purpose of cultivation, rather they had been ploughing the field to commit mischief and to have forcible possession over the land, in question. Since the assembly was for unlawful purpose, it could never be considered as lawful assembly.

Now the next question arises whether that unlawful assembly was only for committing mischief or the assemblage was for meeting out a common object to

commit further offence, if any, objection is raised from any corner against plough of the field. It is settled law that inference could be drawn from the facts and circumstances of each and every case for deciding the issue whether assemblage of five or more accused at the place of occurrence was unlawful and whether they were having intention to commit offence in prosecution of their common object. To consider such issue, the motive, the weapon used for commission of the offence and the nature of injuries inflicted are to be viewed. In the case at hand, the appellants had concealed weapons like sword, axe (Tangi), spear, Lathi etc. and that indicate that each and every member of unlawful assembly was knowing that offence is likely to be committed in prosecution of their common object.

12. While going through the evidence on record, we find that the informant was assaulted when he made protest against mischief committed by the appellants. No sooner other witnesses and villagers ran to the place to rescue the informant, most of them were subjected to assault and numbers of injured are about six. All the injured witnesses have supported the prosecution case without any exaggeration or vital contradictions. Minor contradictions are always expected, if number of accused increases and here in the case they were about nine and they were bent upon to commit assault to everyone who would dare to restrain them i.e. what happened in the case at hand. The appellants were not only having pre-meeting of mind, which is apparent from the fact that weapons were concealed by them near the place of occurrence and those weapons were used when protest was made by the informant and his companions. Whosoever reached to the place to make protest or to support the informant was subjected to assault by the appellants. The injury reports of injured eye-witnesses have been proved by Dr. Digambar Jha-P.W.10.

13. We have gone through the judgment referred by learned counsel for the appellants and the facts appearing in that very case are quite distinguishable from the facts appearing in the case at hand. In that very case, the convicts had used fist and slaps after they got down from the vehicle. It was only one convict who inflicted blow to the deceased by means of knife. It was not that all the accused after getting down from the vehicle started inflicting blows by means of lethal weapon to the deceased or his companion. But in the case at hand not only the informant, all the witnesses, who reached to the place of occurrence, were subjected to assault and out of them one of the injured-Mathura Yadav succumbed to his injury. The judgments of the Hon"ble Supreme Court, reported in , (2012) 11 SCC 237 [Krishnappa v. State of Karnataka] and , (2015) 1 SCC 737 [Dilawar Singh & Ors. v. State of Haryana], decided with other criminal appeals, appear more applicable. It is held by the Hon"ble Supreme Court in the case of Krishnappa (Supra) that "Whenever any offence is committed by any member of an unlawful assembly in prosecution of common object of that assembly, every person who at the time of committing of that offence is a member of such assembly, reiterated, will be also vicariously held liable and guilty of that offence-Factum of causing injury or not causing injury is not

relevant where accused is sought to be roped in with aid of S. 149-Furthermore, any member of that assembly who knew that offence is likely to be committed in prosecution of that object is also liable under S. 149 Pt.II-Relevant question to be examined by court is whether accused was a member of an unlawful assembly and not whether he actually took active part in crime or not."

14. We have already held that consistent evidence, available on record, indicates that the appellants had assembled and they were destroying Gondali crops by ploughing the field and they concealed the weapons near the place of occurrence for its use as and when required. No sooner the informant raised objection against commission of mischief, they immediately took out their weapons and started assaulting the informant. Alarm raised by the informant attracted the witnesses, who tried to rescue, but they all were subjected to assault by the appellants and the deceased was also one among them. Thus, it is clear that the appellants had formed an unlawful assembly to commit offence in prosecution of their common object and each and every member of that assembly was knowing fully well that offence is likely to be committed because they had concealed the weapons from before. The story advanced by learned counsel for the defence that the appellants were the aggressor and they had provoked and instigated the appellants to commit offence has no leg to stand because the prosecution has successfully proved that the appellants had subjected to assault as many as six persons, including the informant, and they had concealed the weapons from before to fulfill their evil design. The appellants have not taken the plea of right of private defence.

15. In the result, we do not find any merit in this appeal and the same stands dismissed. Bail bonds of the appellants, namely, Badri Yadav, Prakash Yadav, Sobran Yadav, Prasadi Yadav and Ishwar Yadav, who are on bail, are hereby cancelled. They are directed to surrender before the convicting/successor court within six weeks from today, failing compliance their bail bonds" amount shall stand forfeited and the convicting/successor court shall issue process to secure their attendance to serve out the punishment.

Ratnaker Bhengra, J.—I agree.