

(2011) 09 PAT CK 0107

In the Patna High Court

Case No : Criminal Appeal (SJ) No. 360 of 1998

Brahmdeo Thakur, Kumod Thakur @ Kumud Thakur and Ajay
Thakur @ Ajay Kr. Thakur

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 14-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 360
Penal Code, 1860 (IPC) — Section 307, 324, 326
Probation of Offenders Act, 1958 — Section 3, 4

Citation : (2011) 09 PAT CK 0107

Hon'ble Judges : Gopal Prasad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Gopal Prasad, J.—Heard learned Counsel for the Appellants and learned Counsel for the State.

2. Two appeals i.e. Cr. Appeal No. 360 of 1998 and Cr. Appeal No. 375 of 1998 have heard together and being disposed by the common judgment as the two appeals arising out of same judgment and order dated 17. 09. 1998, passed by Shri Sarju Prasad, Ist Additional Sessions Judge, Saharsa, in Sessions Case No. 228 of 1989, by which he has been convicted the Appellants in Cr. Appeal No. 360 of 1998 for offence u/s 326/149 I.P.C. and sentenced to undergo rigorous imprisonment for three years and further convicted for offence u/s 147 I.P.C. and sentenced to undergo rigorous imprisonment for six months and Cr. Appeal No. 375 of 1998, Appellant Nos. 2 and 6 have been convicted for offence u/s 326 I.P.C. and sentenced to undergo rigorous imprisonment for three years and further convicted for offence u/s 148 I.P.C. and sentenced to undergo rigorous imprisonment for one year and Appellant Nos. 3, 4 and 5 have been convicted for offence u/s 326/149 I.P.C. and sentenced to undergo rigorous imprisonment for three years and further convicted u/s 148 I.P.C. and sentenced to undergo rigorous imprisonment for one year and Appellant No. 1 and 3 further convicted

for offence u/s 324 I.P.C. and sentenced to undergo rigorous imprisonment for one and further convicted for offence u/s 148 I.P.C. and sentenced to undergo rigorous imprisonment for one year. Further convicted for offence u/s 348 and 341 I.P.C. but not sentence.

3. The prosecution case as alleged that all the accused persons came with lathi and danda while the informant was going to the north of the village to west of the pond and assaulted the informant on the command of Annadeo Thakur as he obstructed their claim for "Rasta". It is stated that prosecution party were claimed "Rasta" for which a Panchayat was convened, but their claim for "Rasta" was objected by the informant in view of the fact that by giving of "Rasta" of 6 hand, there is possibility of breaking houses of some of the persons and so occurrence has taken place.

4. On the Fardbeyan, F.I.R. was lodged and after investigation charge sheet submitted and charge was framed for offence under Sections 307/324, 148 and 147 I.P.C. During trial seven witnesses were examined. Out of them, P.W. 5 is doctor and P.W. 6 and 7 are formal witnesses. P.W. 4 has proved the x-ray which has been marked as Ext. 8 to 8/B is a person of medical shop has come to court to depose that x-ray of Parsuram Jha was conducted by doctor B.N. Jha. P.W. 1, 2 and 3 are material witnesses in this case.

5. However, the trial court taking into consideration the evidence of witnesses as well as evidence of the doctor found that injuries on the person of the informant are simple. However, two injuries which were found to be fractured was not on vital part of the body i.e. ring finger and hand and hence held that injuries were as such to have been inflicted with intention to kill and hence convicted the Appellants for offence u/s 326 and other allied Sections of I.P.C., but acquitted the Appellants for offence u/s 307 I.P.C.

6. Learned Counsel for the Appellants however contended that order of conviction recorded u/s 326 I.P.C. is not maintainable on the ground that no charge was framed u/s 326 I.P.C. but charge was framed u/s 307 I.P.C. hence the conviction cannot be maintained u/s 326 I.P.C. as Section 326 I.P.C. is not minor offence in relation to offence u/s 307 I.P.C. as neither punishment is less nor the ingredient of offence as simple and reliance has been placed upon decision reported in 1972 Cri LJ 941 (Ramchandra Bahiru Shingati v. State). It has further been contended that x-ray has not been proved in the case and the evidence of the doctor as P.W. 5 is not based on x-ray report and further contended that occurrence is of the year 1987 and occurrence took place only with respect to claim of "Rasta" in Panchayati which was opposed by the informant on the ground that it may lead to breaking of the house of some persons.

7. However, learned Counsel for the State opposed the submissions of the learned Counsel for the Appellants and submitted that witnesses have supported the prosecution case and even x-ray report has been brought in evidence.

8. Having regard to the submissions, ingredient has been maintained u/s 326 I.P.C. However, to maintain the conviction u/s 326 I.P.C., it has to be established that injury comes under one of the clause of Section 320 of Penal Code. However, P.W.5, the doctor in his evidence has found five injuries and stated that injury No. 1, 2 and 5 are found to be simple and injury No. 3 and 4 stated to have been grievous which are fracture on the ring finger and fracture on hand. However, opinion of the doctor is not based on x-ray report or x-ray plate. Though, doctor has stated in his evidence he referred for x-ray and he has also mentioned for x-ray, but the opinion is not based on either any x-ray report or x-ray plate and nor any x-ray report or x-ray plate has been proved with regard to the injury No. 3 and 4. Hence opinion of the doctor is based on his own estimation without any report of x-ray or by seeing the x-ray plate and hence finding of the fact that injury was fracture or come under definition of grievous in nature is without any basis and hence it cannot be relied upon and hence order of conviction and sentence for offence u/s 326 I.P.C. is not maintainable but the case falls u/s 324 I.P.C. as the witness proved the assault and the conviction can well be maintained u/s 324 I.P.C.

9. However, having regard to the facts and circumstance of the case, the occurrence took place only with regard to claim for "Rasta in Panchayat and occurrence is of the year 1987 and the Appellants suffer a lot due to protracted litigation.

10. However, having regard to the fact since the Appellants liable to be given benefit u/s 360 Code of Criminal Procedure and 3 and 4 of Probation of Offender Act, hence Appellants are ordered to be released on furnishing bond of Rs. 10,000/- (Ten thousand) each with two sureties of like amount to the satisfaction of the lower court for a period of one year for keeping peace and good behaviour and shall appear to face sentence as and when call upon by the court. Hence both the appeals are allowed in part.