

(2018) 03 JH CK 0114

In the Jharkhand High Court

Case No : Cr. Appeal (SJ) No. 62, 93 of 2006

NITAI PADDU GHOSH AND OTHERS

APPELLANT

Vs

THE STATE OF JHARKHAND

RESPONDENT

Date of Decision : 05-03-2018

Acts Referred:

Indian Penal Code, 1860 — Section 147, 148, 149, 307, 323, 324, 341, 379, 427, 448
Code of Criminal Procedure, 1973 — Section 161, 360

Citation : (2018) 03 JH CK 0114

Hon'ble Judges : ANIL KUMAR CHOUDHARY, J

Bench : Single Bench

Advocate : J. Mazumdar, Shekhar Sinha

Final Decision : Partly Allowed

Judgement

1. Heard learned counsel for the appellants and learned Addl. PP for the State.
2. Since both the appeals have been preferred against the judgment of conviction dated 05.01.2006 and order of sentence dated 06.01.2006 passed by learned 3rd Additional Sessions Judge (FTC), Dumka, in Sessions Case No. 186 of 1997, hence, both the appeals are disposed of by this common judgment.
3. By the aforesaid judgment, learned court below has held Nitai Paddu Ghosh and Gour Ghosh- the appellants in guilty for the offence punishable under Section 307 IPC and sentenced them to undergo imprisonment for seven years and held Ajay Chatterjee, Bijay Chatterjee @ Vijay Chatterjee, Sanatan Ghosh and Nirmal Kumar Chatterjee- the appellants in Cr. Appeal (SJ) No. 93 of 2006 guilty for the offence punishable under Section 323 IPC and sentenced them to undergo imprisonment for six months.

4. The prosecution case as unveiled in the fardbeyan, in brief is that on 25.02.1997, at about 9.00A.M., when the informant- Sukumar Ghosh was repairing his sugarcane machine in front of his husking-mill, the accused persons variously armed came there and surrounded the informant. The accusedappellants- Ajay Chatterjee, Bijay Chatterjee @ Vijay Chatterjee, and Nirmal Kumar Chatterjee exhorted the co-accused person to kill the informant. Nitai Paddu Ghosh assaulted on the head of the informant with a Dab (a heavy sharp cutting weapon) with intention to kill him, due to which, the informant sustained injury and fell down. When the brothers of the informant came to his rescue, then the accused persons also assaulted them with lathi and crowbar and injured them. The other accused persons also assaulted the informant and his two brothers with lathi and crowbar on their hand and back. The brother of the informant namely Prabhat Kumar Ghosh sustained injury near his eye and the other brother Uttam Kumar Ghosh sustained injury on his face, hand and back. When the informant was going to the police station to lodge the information on the way, in the village Sukhjora, he met officer-in-charge, who recorded his statement basing upon which, Rameshwar P.S. case No. 003 of 97 corresponding to G.R. No. 135 of 97 was registered and police took up the investigation of the case and after completion of the investigation, police submitted charge-sheet in the case.

5. Upon commitment of the case to the Court of Session, charges for the offence punishable under Sections 147, 148, 307, 149, 427, 379, 448, 341 IPC were framed against the appellants-accused persons as well as against the co-accused persons Kanailal Ghosh and Mahanand Ghosh, who died during pendency of the trial. Besides the above charges, charge for the offence punishable under Section 148 IPC was also framed only against Nitai Paddu Ghosh. Upon the accusedappellants' pleading not guilty, they were put to trial.

6. In support of its case, the prosecution examined altogether six witnesses besides proving the documents. No witness was examined nor was any document proved on behalf of the defence.

7. Out of the witnesses examined, Nitai Ghosh assaulted him with crowbar on his back. Sanatan Ghosh and Mahanand Ghosh (since deceased) assaulted him with lathi on his back. He sustained cut injury by blow of a

Dabâ???. PW6 raised alarm upon which, his brothers came to his rescue.

Gour Ghosh assaulted Uttam Kumar Ghosh with crowbar on his back portion of his head. Mahanand Ghosh (since deceased) and Sanatan assaulted

his other brother- Prabhat Kumar Ghosh near his eye and back. In his crossexamination, in paragraph 8, he has described the place of occurrence with boundary.

8. PW1- Uttam Kumar Ghosh has stated that Nitai Paddu Ghosh assaulted PW6 with â??Dabâ?? on his head and others assaulted with lathi. PW1

and his brother PW2 were also assaulted by the appellant-accused persons. In his crossexamination, he has stated that prior to the occurrence, they

were having land dispute with the accused persons and the case was decreed in their favour. In paragraph 9 of his deposition, he has stated that

neither Bijay Chatterjee nor Nirmal Kumar Chatterjee assaulted anyone but they were only exhorting the coaccused persons to kill the victims. In

paragraph 11 of the cross-examination, he has stated that Nitai Paddu Ghosh assaulted only once.

9. PW2- Prabaht Kumar Ghosh has stated that Ajay Chatterjee exhorted the co-accused persons to kill Sukumar Ghosh. Nitai Paddu Ghosh assaulted

Sukumar Ghosh on his head with â??Dabâ?? causing injury on his head and Sukumar Ghosh fell down. PW2 and others went to the rescue of PW6-

Sukumar Ghosh. The accused Gour Ghosh assaulted PW2 on his back with crowbar and hit him on his shoulder. Thereafter, Sanatan Ghosh assaulted

PW2 with lathi near his eyes. In paragraph 19, PW2 has stated that Sukumar Ghosh sustained only one injury on his head. In his cross-examination, he

has stated that there was land dispute between the informant and the accused persons and the case was decreed in favour of the informant party. In

paragraph 9 of his crossexamination, he has stated that he does not know whether after the decree, petition for final decree has been filed or not. In

paragraph 15, PW2 has stated that when Gaur Ghosh assaulted Uttam Kumar Ghosh, PW2 went to save Uttam then Sanatan Ghosh assaulted PW2.

10. PW4- Dr. Kamlesh Tiwari, medically examined PW2, PW6 and PW1. He has stated that on 25.02.1997, he examined the victim Prabhat Kumar

Ghosh (PW2) and found the following injuries on his person:-

1) Lacerated wound at right temporal region Rt. to Rt. Eyebrow ¾ X ¼ x ¼ deep, caused by hard and blunt substance.

2) Bruise- 6" x 1½" of posterior surface on the left forearm caused by hard and blunt substance.

Both the injuries were simple in nature caused by hard and blunt substance within six hours of examination.

PW4 found the following injuries on the person of PW6 -Sukumar Ghosh :-

1) Sharp cut injury on the right side of scalp 2 ½" x 1/4" deep to bone caused by sharp instrument.

2) Abrasion on posterior surface of right forearm with two parallel ecchymosis (a) 2 ½" x 1 ½", (b) 3" x 1 ½" caused by hard and blunt

substance. 3) Lacerated wound at root of Pinna, caused by hard and blunt weapon 1 ¼" x ½".

All the injuries were in simple in nature caused within six hours. Injury No. 1 was caused by sharp cut weapon and 2 and 3 were caused by hard and blunt substance.

He found the following injuries on the person of PW1- Uttam Kumar Ghosh:-

1) Ecchymosis 3" x 1/2" at posterior surface of left arm.

2) Abrasion 2" x ½" posterior surface of lower part of left arm.

3) Bruise 2 ½" x ½" posterior surface of left forearm.

4) Bruise 5" x ½" middle of back chest.

5) Abrasion 2 ¼" x 1/8" of left scapular region.

6) Sharp cut 1" x ½" touched occipital bone caused by hard and pointed weapon.

7) One lacerated wound at root of the nose caused by hard and blunt substance.

All the injuries were simple in nature and caused within six hours of examination. All injuries were caused by hard and blunt substance except injury

no. 6 which was caused by sharp and pointed weapon.

He further stated that injury reports were in his pen and signature and on being proved by him and they were marked as Exhibit 1, 1/1 and 1/2

respectively. In his cross examination, he has stated that injured had come to him by themselves through police station.

11. PW3-Ajay Bagti has stated that Gour Ghosh assaulted Sukumar Ghosh on his head with "Dab" and Nitai Paddu Ghosh assaulted Uttam

Kumar Ghosh (PW1) with crowbar and other accused persons also assaulted with lathi to PW1, PW 2 and PW 6. In his cross-examination, he has

stated that after being assaulted, PW1, PW2 and PW6 became senseless on sustaining injury. In paragraph 7, he has stated that the accused persons assaulted Sukumar Ghosh (PW 6) and his brothers. In his cross-examination he has not stated anything of importance.

12. PW5- Khepa Hembrom, has stated that accused persons assaulted Sukumar Ghosh (PW6) and his brothers. In his cross examination, he has not stated anything of importance.

13. After taking into consideration the evidence in the record, learned court below convicted and sentenced the appellants as already indicated above and acquitted them of the rest of the charges framed against them.

Â 14. Learned counsel for the appellants submitted that in this case the Investigating Officer has not been examined and the defence has been

prejudiced by non-examination of the Investigating Officer. It was further submitted that there is major contradiction of testimony between PW3 and

other witnesses regarding the manner of assault on Sukumar Ghosh. It was also submitted by learned counsel for the appellants that as PW1 has

categorically stated in paragraph 9 of his deposition that Bijay Chatterjee and Nirmal Chatterjee did not assault anybody, so learned court below erred

by convicting the appellants under Section 323 IPC more so because the learned court below held that prosecution could not prove the charge for the

offence punishable under Section 147 or 148 or 149 IPC. It was further submitted that all the injuries sustained by three appellants were simple in

nature and there is evidence in the record to suggest that accused Nitai Paddu Ghosh assaulted on the head of the PW6 only once and PW2 says that

Sukumar Ghosh sustained only one injury and the evidence against Gour Ghosh is that he assaulted PW2 on his back, which is not a vital organ of his

body, which ultimately hit him on his shoulder. It is submitted that no offence punishable under Section 307 IPC is made out against the appellants-

Nitai Paddu Ghosh and Gour Ghosh hence it is a fit case, where the appellants be acquitted of the charges by giving them the benefit of doubt.

15. Learned Addl. PP, on the other hand, defended the impugned judgment and submitted that the three injured witnesses have categorically stated

about Nitai Paddu Ghosh assaulting on the head of PW6 with â??Dabâ?? causing injury on his head and they have also stated that Gour Ghosh

assaulted PW 6 and PW 6 has also stated that Gour Ghosh assaulted him and the

testimony of the injured witness is corroborated by the testimony of

PW4- the doctor who examined them. It is further submitted that the PW3 appears not a truthful witness and as there is no discrepancy in testimony

of the three injured witnesses about the assault made upon them by the accused persons hence the testimony of PW3 contradicting the testimony of

the other prosecution witnesses certainly cannot damage the case of the prosecution. It is also submitted that learned court below has rightly convicted

and sentenced the accused persons hence the same be confirmed and these appeals being without any merit, be dismissed.

16. So far the contention of the appellants regarding non examination of the Investigating Officer is concerned, it is settled principle of law as reported

in Behari Prasad & Ors. vs. State of Bihar (1996) 2 SCC 317 that non-examination of Investigating Officer per se is not fatal to the prosecution case

unless there is prejudice caused by such non-examination of the Investigating Officer. In this case, as already mentioned above, PW3 in paragraph 10

of his deposition and PW6 in paragraph 8 of his deposition have described the place of occurrence in detail and their testimony in this respect has

remained unchallenged. The perusal of the deposition of the witnesses reveals that attention of none of the witnesses of the prosecution was drawn in

respect of their statement made before the Investigating Officer under Section 161 of Cr.P.C. The defence also could not show as to how they have

been prejudiced by the non-examination of the Investigating Officer. Hence, I am of the considered view that in this case, the defence has not been

prejudiced by non-examination of the Investigating Officer.

17. Having heard learned counsels for the parties and on perusal of the record, I find that there is no allegation of involvement in any assault against

the appellants Bijay Chatterjee @ Vijay Chatterjee and Nirmal Kumar Chatterjee as has been specifically stated by PW1 in paragraph 9 of his

deposition. Hence, I acquit the appellants Bijay Chatterjee @ Vijay Chatterjee and Nirmal Kumar Chatterjee of the charges for the offence

punishable under Section 323 IPC by giving them the benefit of doubt as the evidence in the record is insufficient to establish the said charge against

them beyond reasonable doubt. So far as the appellants Ajay Chatterjee and Sanatan Ghosh are concerned, the evidence on the record as discussed

above, is sufficient to establish the charge for the offence punishable under

Section 323 IPC against them. Hence, their conviction for offence punishable under Section 323 IPC is confirmed. Keeping in view the nature of evidence against them and the manner of their involvement in the offence the sentence of imprisonment for six months imposed upon them is modified to the period, for which they have remained in custody during the pendency of the trial.

18. So far as the appellants Nitai Paddu Ghosh and Gour Ghosh are concerned, they have been held guilty for the offence punishable under Section

307 of the Indian Penal Code. The essential ingredients of the offence under Section 307 of the Indian Penal Code are the following:

- a) That the death of human being was attempted;
- b) That such death was attempted to be caused by, or in consequence of, the act of the accused.
- c) That such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as
 - i) the accused knew to be likely to cause death; or
 - ii) was sufficient in the ordinary course of nature to cause death; or that the accused attempted to cause such death by doing an act known to him to be so imminently dangerous that it must in all probability cause (1) death, or (2) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

The word 'intent' is derived from the word archery or aim. The 'act' attempted to must be with 'intention' of killing a man. Intention,

which is a state of mind, can never be precisely proved by direct evidence as a fact; it can only be deduced or inferred from other facts which are

proved. The intention may be proved by res gestae, by acts or events previous or subsequent to the incident or occurrence, on admission. Intention of

a person cannot be proved by direct evidence but is to be deduced from the facts and circumstances of a case. There are various relevant

circumstances from which the intention can be gathered. Some relevant considerations are the following:-

- (i) Nature of weapon used
- (ii) The place where the injuries were inflicted
- (iii) Nature of injuries caused

(iv) Opportunity available to the accused. Of course these relevant considerations enumerated above are only illustrative and not exhaustive. The

accused having a dangerous weapon if inflicts a minor injury the same weakens the ingredients of Section 307 of the Indian Penal Code.

19. Considering the aforesaid facts and circumstances of the case, this Court is of the considered view that the evidence in the record is insufficient to

establish the charge for the offence punishable under Section 307 of the Indian Penal Code against Nitai Paddu Ghosh and Gour Ghosh. But the

evidence in record is sufficient to establish the charge for the offence punishable under Section 324 of the Indian Penal Code, which is a minor

offence of the offence punishable under Section 307 of the Indian Penal Code in the facts and circumstances of the case. Accordingly, the appellants

Nitai Paddu Ghosh and Gour Ghosh are convicted for the offence punishable under Section 324 of the Indian Penal Code even though no specific

charge for the same has been framed against the accused appellant instead of section 307 of the Indian Penal Code as made by the learned court

below. Keeping in view the nature and manner of assault made by the appellants Nitai Paddu Ghosh and Gour Ghosh, this Court is of the considered

view that this is not a fit case where the appellants be given the benefit under Section 360 Cr.P.C. or Probation of Offenders Act. Hence the

appellants Nitai Paddu Ghosh and Gour Ghosh are sentenced to undergo Rigors Imprisonment for two years. The appellants Nitai Paddu Ghosh and

Gour Ghosh are on bail. In view of their conviction and the sentence passed against them, their bails are cancelled. They are directed to surrender in

the court below to undergo remaining sentence and learned court below is also directed to take coercive steps for their apprehension/ production for

serving out the remaining part of the sentence.

20. These appeals are, accordingly, allowed in part.

21. Let the original Lower Court Records be sent back to the Court concerned forthwith, along with a copy this Judgment