

Jai Narain Mishra and Others

Vs

State of Bihar

Criminal Appeal No. 17 of 1969

(A.N. Ray, D.G. Palekar JJ)

03.11.1971

JUDGMENT

PALEKAR, J. -

1. This is an appeal by special leave from the Judgment, dated September 27, 1965, of the Patna High Court setting aside an order of acquittal passed by the learned Assistant Sessions Judge, Chapra and convicting the six accused and sentencing them to different terms of imprisonment.
2. Ten persons were put up before the learned Sessions Judge on charges under Sections 147, 148, 323, 324, 326, 307 and last two also read with Section 109, I.P.C. The offences were committed in two incidents one following the other and arising out of it. Plot No. 1187 of village Bareja, a garden land, was in the possession of Shyamdutta Tiwari P.W. 11 and his co-sharers who were all Tiwaris. The plot originally belonged to the family of Mishras - a widow in which, one Charbharna Kaur, had alienated the same in favour of one of the Tiwaris. The appellants are Mishras. The Mishras filed a suit against the alienees for a declaration that the widow was not entitled to alienate the land and in that suit, which was filed in 1944, it was declared that the alienation was not binding on the Mishras, after the death of Charbharna Kaur. Since Charbharna Kaur was living, the possession of the land continued with the Tiwaris and it was in that right that Shyamdutt Tiwari and his co-sharers were in possession of the land.
3. On March 31, 1965, Shyamdutt Tiwari cut an old and dry tree in that garden for the purpose of fuel. The idea was to cut up the tree into small logs and to take them home for being used as fuel. Next day, i.e. on April 1, 1965, at about 6.00 a.m. Shyamdutt received information that the Mishras, namely, the appellants and others were likely to remove the wood of the tree and so he, in the company, of some other co-sharers went to the garden. There he was the six appellants plucking and collecting fuel from the tree. Shyamdutt objected, whereupon there was an altercation between him and the appellants which resulted in appellant Jainarain ordering his companions to kill Shyamdutt. On that signal the appellants took out weapons hidden by them in the bushes and started an assault on Shyamdutt. Appellant Kashi Naresh who had a bhala in his hand threw it aiming at the stomach of Shyamdutt but it did not hit him as Shyamdutt leaped up and the bhala passed through the gap between the legs. Appellant Balram thereupon struck Shyamdutt with his bhala on the upper portion of the leg. Appellant Mandeo who wielded a farsa, struck it on the head of Shyamdutt. As a result of that blow Shyamdutt fell down and thereupon appellant Suraj struck Shyamdutt within his bhala on the right side of his chest. Shyamdutt then turn over, whereupon appellants Satya Narain hit him with a bhala on the lip. The others who were with Shyamdutt picked him up and took him to the Chapra hospital.

4. In the meantime Shyamdutt's nephew Girdhar who learnt about the assault came to the place of occurrence. By this time some of the Mishras had departed but other Mishras had taken their place and according to the prosecution there was an assault on Girdhar.

5. After his arrival at Chapra hospital, Shyamdutt was examined by Dr. Mishra P.W. 10 who found that Shyamdutt's condition was serious and there was danger to his life. Steps were, therefore, taken for recording his dying declaration. It was recorded by a Magistrate on the same afternoon at about 2.25 p.m. (Ext. 7). In the evening the sub-inspector of the local police station at Chapra came there and recorded the statement of Shyamdutt and the first information report was drawn up at Manjhi Police Station which had jurisdiction over village Bareja where the assault had taken place. In the meantime the injured Girdhar was also brought to the hospital and on the information given by him investigations started simultaneously with regard to both the incidents. After completing the investigations, the appellants and four others were put up before the Magistrate on charges of rioting and assault.

6. The accused denied the incident. They suggested that there must have been a fight between Shyamdutt and his nephew Girdhar as a result of which they received injuries. The learned Assistant Sessions Judge acquitted all the ten accused persons before him as he was not satisfied with the evidence. The State, therefore, went in appeal to the High Court.

7. The counsel for the State informed the High Court at the outset that he was not pressing the appeal so far as the second occurrence relating to the assault on Girdhar was concerned. Hence three of the accused Raghunath Mishra, Rampujan Mishra and Bishwanath Mishra who were not present at the time of the first occurrence, had to be acquitted. The High Court also acquitted another accused named Rajendra Mishra because the evidence about his participation was not satisfactory. Thus out of the ten accuse, four were acquitted. The High Court, however, held that the remaining six, i.e. the six appellants were members of a unlawful assembly which had assaulted Shyamdutt in the first incident, and since they were armed with deadly weapons at the time of the occurrence they were all liable to be convicted under Section 148, I.P.C. The High Court further held that they were also liable to be convicted and sentenced for their individual sets. Accordingly appellants Suraj and Mandeo were convicted under Section 307, I.P.C. and appellant Jainarain Mishra under Section 307 read with Section 109, I.P.C. The High Court accepted the evidence against appellant Satyanarain that he assaulted Shyamdutt with a bhala on his hip but since no specific charge for assault had been framed against him in the Trial Court, no conviction conviction was recorded with regard to his individual act. Similarly Kashi Naresh was not convicted for his act of throwing the bhala aiming at Shayamdutt because the blow having been avoided by Shyamdutt, there was no actual injury. However, as already stated both the appellants Satya Narain and Kashi Naresh were convicted under Section 148, I.P.C.

8. Mr. Nuruddin Ahmed on behalf of the appellants submitted that the High Court should not have interfered with the acquittal as in the opinion, of the learned Assistant Sessions Judge the evidence was unsatisfactory. The High Court has, however, given reasons why it had to interfere. Undoubtedly evidence had been led of some persons who, though not present at all at the time of occurrence, claimed to be eye-witnesses. Then again the evidence with regard to the second occurrence relating to the assault on Girdhar was untrustworthy, and the learned counsel for the State had to admit in the High Court that he was not in a position to press the appeal with regard to that assault. That being the character of a part of the evidence led in the case, the learned Assistant Sessions Judge thought that the whole evidence both with regard to the first occurrence as well as the second occurrence was unsatisfactory, ignoring some salient features of the case namely that

Shyamdutt had received no less than four injuries - one of them being very serious, and secondly that immediately after his admission in the hospital, Shyamdutt's statement had been recorded as per Ext. 7 in which a clear case had been made out against the present six appellants. In our opinion the High Court was justified in properly sifting the evidence which the learned Assistant Sessions Judge had failed to do. The need for doing so was the greater since, according to the defence, no such occurrence at all had taken place and an absurd suggestion had been made that there might have been a fight between Shyamdutt, on the one hand, and his nephew Girdhar, on the other.

9. The High Court on a proper reading of the evidence has held that the evidence of Shyamdutt Tiwari P.W. 11 supported, as it is, by Ext. 7 and the evidence of Keshav Prasad, P.W. 8 was entitled to be accepted as true. Shyamdutt was the victim of that assault and was best qualified to give an account of the same. Keshav Prasad P.W. 8 must have been also present at the time of occurrence because he was a co-sharer in the garden and had accompanied Shyamdutt when he went to the garden to see that the wood was not taken away by the Mishras. Ext. 7 was initially recorded by the Magistrate as a dying declaration but since Shyamdutt survived that has been proved as corroborating Shyamdutt's evidence. It substantially corroborates the testimony of Shyamdutt in court. Apart from this, as pointed out by the High Court, there was sufficient motive for the assault not only because the Mishras had resented the cutting of the tree by Shyamdutt but also because Shyamdutt was a witness in a criminal case filed against some of the appellants only a few days earlier. On the evidence which the High Court believed, it held that the appellants committed riot armed with deadly weapons. The conviction under Section 148 I.P.C. was justified.

10. Since the High Court came to the conclusion that there was an unlawful assembly formed with the common object of assaulting Shyamdutt, and, in pursuance of the common object, some of the members who were all armed with deadly weapons had committed an offence under Section 307, I.P.C., it would have been open to the High Court, by the application of Section 149, I.P.C., to convict them all under Section 307, I.P.C. Similarly, Section 34, I.P.C., also could have been pressed into service, as the evidence is that the assault was simultaneously made with deadly weapons on the instigation of appellant Jainarain Mishra. But the fact remains that this has not been done. The High Court has convicted the appellants for their individual sets and we are to see whether those convictions are proper.

11. Taking the case of appellant Suraj Mishra, we find that he has been convicted under Section 307 I.P.C. and sentenced to five years rigorous imprisonment. According to the evidence Suraj was responsible for the chest injury which is described by Dr. Mishra P.W. 6 as a penetrating wound 1 1/2" x 1/2" x chest wall deep (would not probed) on the side of the right side of the chest. Margins were clean cut. Suraj, according to the evidence, had thrust a bhala into the chest when Shyamdutt had fallen as a result of the blow given by Mandeo with the farsa on his head. According to the Doctor the wound in the chest was of a grievous nature as the patient developed surgical emphysema on the right side of the chest. There was profuse bleeding and, according to the Medical Officer the condition of the patient at the time of the admission was low and serious and the injury was dangerous to life. Out of the four injuries which the Medical Officer noted, this injury was of a grievous nature while the other three injuries were simple in nature. Where four or five persons attack a man with deadly weapons it may well be presumed that the intention is to cause death. In the present case, however, three injuries are of a simple nature though deadly weapons were used and the fourth injury caused by Suraj, though endangering life could not be deemed to be an injury which would have necessarily caused death but for timely medical aid. The benefit of doubt must, therefore, be given to Suraj with regard to the injury intended to be caused and, in our opinion, the offence is not one under Section 307, I.P.C., but Section 326 I.P.C. His conviction, therefore, under

Section 307, I.P.C. is set aside and we convict him under Section 326, I.P.C. his sentence of five years rigorous imprisonment will have to be reduced accordingly to three years rigorous imprisonment.

12. Appellant Mandeo is also convicted under Section 307, I.P.C. and he was sentenced to suffer rigorous imprisonment for five years. The evidence shows that he was responsible for the injury on the head which he had given with a farsa. That injury is described by Dr. Mishra as a lacerated wound 2 1/2" x 1/2" scalp deep on the left side of the head on the parietal region. It is also described as a simple injury. It is obvious that though a farsa had been used, the sharp edge of the farsa may not have been used. But since this injury was caused by an instrument which, used as a weapon of offence, is likely to cause death, the offence would be one under Section 324 I.P.C. The conviction, therefore, of Mandeo is changed to one under Section 384 I. P.C. and his sentence is reduced to two years rigorous imprisonment.

13. The appellant Jainarain is convicted for the abetment of the offence of Section 307, I.P.C. In his evidence Shyamdutt had stated that the instigation given by Jainarain was to kill him but in Ext. 7, the so-called dying declaration, in instigation was to "assault the rascal". Since the instigation was to assault with deadly weapons the proper conviction would be under Section 324, I.P.C., read with Section 109, I.P.C. Therefore, his conviction under Section 307, read with Section 109, I.P. C., is converted into one under Section 324, read with Section 109, I.P.C. The sentence imposed upon him was two years rigorous imprisonment and we don't think that requires to be modified. The appellant Balram has been convicted under Section 323, I.P.C., and sentenced to undergo rigorous imprisonment for one year. No modification is necessary in his case.

14. As appellants Satyanarain and Kashi Naresh have not been convicted for their individual acts, it is not necessary for us to say anything about them.

15. Mr. Nuruddin Ahmed referred to one more feature of the case and faintly argued that there was a misjoinder of charges since some persons who were not present at the time of the first incident, had been conjointly tried with the appellants. Those who were tried along with the appellants have been acquitted and there has been no prejudice so far as the appellants are concerned. Secondly it cannot be said that there were two isolated incidents. The incident with regard to Girdhar was an off-shot of the incident with regard to Shyamdutt and being consequence of the latter incident in which some of the accused were common, it could be legitimately held that the offences had been committed in the course of one transaction. Hence the trial was not vitiated.

16. In the result, subject to the modifications in the convictions and sentence of the appellants Suraj, Mandeo and Jainarain as stated above, the appeal is dismissed.

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