

Gupteshwar Nath Ojha and Another

Vs

State of Bihar

Criminal Appeal No. 5 of 1978

(G. L. Oza, V. B. Eradi JJ)

17.03.1986

JUDGMENT

OZA, J. -

1. This appeal has been filed on behalf of two appellants Gupteshwar Nath Ojha and Bishwanath Ojha as the leave was granted in respect of these two from a judgment passed by a Division Bench of Patna High Court in Criminal Appeal No. 57 of 1971 dated July 27, 1977 wherein the learned Judges altered the conviction of these two appellants and some others and convicted them for an offence under Section 304 Part II read with Section 149 IPC and sentenced to four years rigorous imprisonment. They are also convicted for offences like those under Sections 323 and 324 for causing injuries to other prosecution witnesses and also under Sections 147 and 148 IPC.
2. The learned Judges of the High Court acquitted the appellant Bishwanath Ojha from an offence under Section 304 read with Section 144 IPC.
3. Before the High Court 12 persons filed their appeal out of whom three were convicted by the Sessions Judge under Section 302 IPC and the rest under Section 302 read with Section 149 IPC all of them being sentenced to imprisonment for life. They were also convicted some under Section 148 and some under Section 147 and for also minor offences under Sections 323 and 324 for causing injuries to other prosecution witnesses than the deceased. Bishwanath Ojha who was appellant 12 before the High Court was also convicted for an offence under Sections 302/114 IPC.
4. The prosecution case was that at about 8 a.m. on December 10, 1967, Kedar Ahir (deceased) was taking his four bullocks in his field for ploughing in village Kheksi, Police Station Itarhi in the District of Shahbad. When Kedar Ahir reached near the khalihan of one Badri Narain Ojha, all the 12 appellants armed with various weapons surrounded him. Appellant 12, Bishwanath Ojha was armed with a gun, appellant 5, Hardeo Ahir was armed with a bhala and appellant 1, Ramsundar Ahir was armed with a farsa while the rest of the appellants were armed with lathis. It is alleged that Bishwanath Ojha, appellant 12 in the High Court and appellant 2 before us ordered to kill Kedar and on this Ramsundar Ahir inflicted a farsa blow on the head by the blunt side of the farsa and then others followed. It is also alleged that others who were carrying lathis also assaulted the deceased and he fell down on the ground. Ramjagi Ahir, PW 2, Muniram Chaukidar, PW 4, Mossamat Rashmi, PW 7, Mossamat Mangni, PW 8 and one Kalika wanted to save Kedar, but the miscreants assaulted them also due to which they too sustained injuries on their persons. It is alleged that thereafter they made good their escape as constable Brij Bihari arrived on the scene (not examined in the case). Kedar, the injured was taken to Buxar Hospital and died in the hospital at about 2 p.m.

Tribhuwan Nath Singh, ASI of Police, Buxar, went to Buxar Hospital and he recorded the statement of Ramjagi, PW 2 who told him the whole story and on this basis, an FIR was drawn up and investigation was taken up. It is alleged that Khedu Ahir, one of the accused persons, also lodged a report on the same day at 7 p.m. in which he asserted that when he was washing his mouth in the morning at his door, Kedar, the deceased came there armed with a lathi and started abusing him and that he has made him to run from court to court and Kedar assaulted him with lathis on his head due to which he sustained injuries. He also alleged that PW 2 Ramjagi also rushed to assault him with a bhala but he was saved by Badri Ojha and in this trouble he and also Kedar and Ramjagi sustained injuries and all of them have been removed to the Buxar Hospital. This report was also entered into the General Diary by Davendra Singh, PW 13. After investigation a prosecution was launched against these persons and after the trial, the appeal was preferred before the Hon'ble High Court. The High Court by its judgment acquitted all the appellants from charges under Sections 302, 302 read with Section 149 IPC and came to the conclusion that there was no common intention to kill but the intention which could be inferred was only to give a thorough beating and on this basis it was concluded that knowledge that the deceased may die of these injuries could be attributed to the accused persons and therefore High Court convicted them under Sections 304 Part II and 304 Part II read with Section 149 IPC.

5. So far as this appeal is concerned, we are only concerned with the two appellants mentioned above. So far as appellant Bishwanath Ojha is concerned, it is not in dispute that the only allegation against him was that he was present on the occasion with a gun but he did not participate in the incident. The only allegation against him was that he directed the other persons to attack the deceased. It appears that it was because of this that he was charged originally with an offence under Section 302 read with Section 114 IPC and the learned Judges of the High Court while deciding the appeal, came to the conclusion that Section 302 could not be attracted, therefore considered his case in respect of the offence under Section 302 read with Section 114 IPC.

6. Learned counsel appearing for the appellants contended that the High Court came to a positive finding that so far as this appellant is concerned he did not participate in the incident at all, and therefore he was acquitted by the High Court for other offences of causing injuries to any one of the prosecution witnesses. It was also contended that so far as the story of his directing or shouting others to kill the deceased is also not believed by the High Court as specifically he has been acquitted from the charge under section 304 Part II read with Section 114 IPC. It was therefore contended that he has been convicted for an offence under Section 304 Part II read with Section 149 IPC probably because the court came to the conclusion that although he did not participate nor he said or shout anything but he was present therefore he has been convicted with aid of Section 149 IPC. Similarly according to the learned counsel, the other appellant i.e. Gupteshwar Nath Ojha is convicted with the aid of Section 149 IPC as it is alleged that he also attacked the deceased and other prosecution witnesses with lathis.

7. It was contended by the learned counsel that there is no evidence to establish the common object and an unlawful assembly. It was contended that the learned Judges of the High Court also only considered the question of common intention and came to the conclusion that common intention to kill the deceased could not be attributed to these appellants and therefore chose to alter the conviction from Section 302 read with Section 149 IPC to Section 304 read with Section 149 IPC. But there is no material at all to come to a conclusion that they were the members of an unlawful assembly with some unlawful common object and in pursuance of that common object of their unlawful assembly, they inflicted injuries which ultimately resulted in death of one and injuries to others and on this basis it was contended by learned counsel that at best one could be convicted only

for his individual act and in this view, according to the learned counsel, Gupteshwar Nath Ojha at best could not be convicted for any offence except one under Section 323 as according to the prosecution itself, the fatal blow on the deceased was inflicted by the accused persons who were carrying a farsa and a bhala. Although according to the prosecution story itself, they did not use the sharp side to inflict the injuries but only used the blunt side.

8. After going through the judgment of the High Court it is no doubt true that so far as the shouting or direction given by Bishwanath Ojha is concerned, the court has not found that he is responsible for this as there is no positive finding about his having either shouted or said anything or given any direction. On the contrary for this direction or shouting, he was charged with the aid of Section 114 IPC and the High Court acquitted him of that charge. It is also clear from the judgment of the High Court that it came to a positive finding that so far as this appellant Bishwanath Ojha is concerned, he did not participate in the trouble as it is observed in the judgment that "here I may mention that there is no evidence that appellant 12 Bishwanath Ojha had also taken part in the assault" and it was on the basis of this finding that he was acquitted from the charge of an offence under Section 323 for having inflicted injuries on the prosecution witnesses. With these findings arrived at by the High Court it is clear that neither Bishwanath Ojha took any part in the trouble nor he said or directed others to act in the manner alleged.

9. From the judgment of the High Court, it appears that the question of common intention was considered but there is no finding to reach a conclusion that there was an unlawful assembly with a common object and there is also no finding that in pursuance of the common object of the unlawful assembly, the acts were committed by the members of that assembly. Learned counsel appearing for the State in view of this contended that even if the appellants could not be convicted with the aid of Section 149 IPC they can safely be convicted with the aid of Section 34 as the common intention can even be inferred from the circumstances that all these persons assaulted the deceased and other prosecution witnesses simultaneously and on this basis the conviction of the appellants could be justified under Section 304 Part II read with Section 34. It is no doubt true that in a case like this, if the facts are not sufficient for a conviction with the aid of Section 149, the conviction can be maintained with the aid of Section 34 and therefore the case of the appellants can be considered in that light as well. It is clear that so far as those who participated in the incident it could not be doubted that they shared the common intention to beat the deceased and other prosecution witnesses and in this view of the matter so far as Gupteshwar Nath Ojha is concerned, whose participation in the incident is clearly found by the High Court and also by the Sessions Court, his conviction under Section 304 read with Section 34 IPC can be justified.

10. So far as Bishwanath Ojha is concerned, Section 34 IPC could be used against him to make him liable for an offence under Section 304 Part II read with Section 34 only if his participation was established. It is clear that so far as participation is concerned there is a clear finding that he did not participate in the incident. The only act alleged against him was that he by shouting directed the other accused persons to beat the deceased and other prosecution witnesses. And it is for this positive act that he was independently charged with aid of Section 114 IPC. This charge has been held not to be proved as he has been acquitted from this charge by the High Court and in view of this the only conclusion could be that he did not either shout or direct the other accused persons to attack the deceased or other prosecution witnesses. In absence of any overt act or even a shout or an oral statement, he could not be convicted even with the aid of Section 34. As regards his conviction under Section 148 and the conviction of the other appellant under Section 147 is concerned, as discussed above, there is no material to come to a conclusion that they were members of an unlawful assembly and therefore conviction under Section 148 or 147 could not be sustained.

11. In the light of the discussions above therefore the appeal of Gupteshwar Nath Ojha is dismissed. His conviction and sentence except under Section 147 is maintained. He is on bail. He shall surrender to custody to serve out the remaining part of the sentence. The appeal of the other appellant Bishwanath Ojha is allowed and conviction and sentence passed against him are set aside.

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