

(Non Reportable)

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.494 OF 2017
(Arising out of SLP(Crl.) No.2082/2017 (Crl. M.P. 16556 of 2016))**

Dinesh Yadav

.....Appellant

Versus

State of Jharkhand

....Respondent

J U D G M E N T

MOHAN M. SHANTANAGUDAR, J.

1. The judgment dated 18th April, 2016 in Criminal Appeal No. 820 of 2004 passed by the High Court of Jharkhand confirming the judgment of conviction and sentence imposed on Dinesh Yadav, accused No.1 in Sessions Case No. 221 of 93/78 of 2002 for offence punishable under Section 307 of the Indian Penal Code, is questioned in this petition by convicted accused No.1.

2. The case of the prosecution is that on the date of occurrence the appellant as well as two other accused namely Badri Yadav (since

deceased) and Deven Yadav while were planting chilli on the land adjoining the house of the informant, the informant protested for the same; accused Deven Yadav allegedly instigated the appellant to assault the informant; Badri Yadav gave lathi blow on his head whereas the appellant caused injury on the forearm of the informant by wielding gandasa, consequent upon which the informant sustained following injuries:

“(i) Lacerated wound on anterior surface of right forearm through which part of bone is protruding, size 2”x1”x. resulting in compound fracture of forearm.

(ii) Lacerated wound on left arm (lower posterior surface) size 1/2”x1/4”x1/4”.

(iii) Lacerated wound on the left parietal region, size about 1”x1/4”x1/4”.”

3. In support of its case, the prosecution had examined four witnesses including Dr. Pravesh Paswan-PW 3 who examined and treated the informant. Nepal Mandal (PW-1), Manohar Yadav (PW-2) and Dilip Kumar Yadav (PW-4) were the eye-witnesses. PW-2 Manohar Yadav did not support the case of the prosecution and was declared hostile.
4. The Trial Court convicted the appellant herein and Deven Yadav for the offences punishable under Section 307 of the Indian Penal Code read with Section 34 and sentenced them to undergo R.I. for five years and to

pay a fine of Rs.1,000/- each and in default of payment of fine, the convicted accused had to undergo simple imprisonment for a further period of six months.

Accused Deven Yadav had filed Criminal Appeal No.114 of 2004 whereas accused Dinesh Yadav-Appellant had filed Criminal Appeal No.820 of 2004 before the High Court of Jharkhand. The High Court allowed Criminal Appeal No.114 of 2004 filed by Deven Yadav and dismissed the Criminal Appeal No. 820 of 2004 filed by Dinesh Yadav. Another accused namely Badri Yadav had not faced trial inasmuch as he had expired by the time the trial commenced. The informant/injured also had expired in the meanwhile. Aggrieved by the judgment of the courts below, the convicted accused No.1 has approached this Court.

5. Learned counsel for the appellant submitted that major inconsistencies found in the evidence of the eye witnesses are not considered by the courts below in proper perspective. The informant as well as the Investigating Officer are not examined before the trial court, consequently the benefit of doubt ought to have been given in favour of the appellant; since the High Court has acquitted the accused No.2, namely Deven Yadav, who also faced trial for the same offence with

similar allegations, the appellant ought to have been acquitted on the ground of parity.

6. Learned counsel for the respondent State argued in support of the judgment of the High Court. The judgment and order acquitting Deven Yadav in Criminal Appeal No.114 of 2004 is not questioned by the State and therefore the said judgment has attained finality.
7. Both the courts below after assessing the evidence on record rightly concluded that the evidence of PW-1 and PW-4 eye-witnesses is consistent, cogent and reliable. PW-1 Nepal Mandal had deposed that while he was going to Sukhari Village he saw the informant and the appellant quarreling; the appellant held "Gandasa" in hand and assaulted the informant with Gandasa; however, the informant escaped from further assault by the appellant; accused Deven Yadav did not have any weapon in his hand but was instigating the appellant. He is stated to have witnessed the incident from a distance of five yards. PW-4 has deposed that while he was on the way to attend religious rituals in Sukhari Village, he saw the appellant assaulting the informant with Gandasa whereas the accused Deven Yadav was standing unarmed. He did not depose about instigation by Deven Yadav.

8. We find that the evidence of PW-1 and PW-4 is consistent with the case of the prosecution, as against the appellant. We find the evidence of these witnesses wholly reliable and there is no reason as to why these witnesses, regarding overt act of the appellant, should be disbelieved particularly when they are independent eye witnesses.
9. The evidence deposited by PW-1 and PW-4 is supported by the evidence of the Doctor, PW-3 who examined the informant immediately after the incident and opined that the injury No.1 was grievous in nature and all other injuries are simple in nature. According to the Doctor the injuries were caused by hard substance.

Injury No.1 (grievous injury) corresponds to the overt act of the appellant. Since the evidence of eye-witnesses coupled with the evidence of the Doctor proves the case of the prosecution against the appellant and as nothing was brought out in the cross examination of these witnesses so as to discard their evidence, the trial court as well as the High Court are justified in relying upon the evidence of these witnesses for coming to the conclusion. Since the evidence of these witnesses has remained unimpeached, and as there are no major contradictions or omissions in the evidence of these witnesses, the non-examination of the Investigating Officer by the prosecution may not tilt the balance in favour

of the defence. It has not been shown what prejudice has been caused to the appellant by such non-examination. Similar view is taken by this Court as back as in the year 2000 in the case of **Bahadur Naik vs. State of Bihar AIR 2000 SC 1582** wherein it is observed thus:

“The appellant has not been able to shake the credibility of the eye-witness. No material contradiction in the case of the prosecution has been shown to us. Under facts and circumstances, the non-examination of the Investigating Officer as a witness is of no consequence. It has not been shown what prejudice has been caused to the appellant by such non-examination.”

As mentioned supra, the injured had expired prior to commencement of the trial of Sessions Case. Hence, he could not be examined.

10. We are unable to accept the contentions of the counsel for the appellant that the evidence against the appellant is similar to the evidence against acquitted accused. We have already noted that the acquitted accused did not assault the informant but has allegedly instigated. The evidence of PW-1 & PW-4 as inconsistent in that regard, inasmuch as PW-4 has not deposed about instigation. Hence the appellant cannot be given the benefit of acquittal as was given to Deven Yadav.

11. However, having regard to the totality of the facts and circumstances of the matter and the material on record, it is clear that the accused-appellant did not make any attempt to commit murder of the informant. The incident has taken place on the spur of the moment as the informant had objected the appellant from cultivating the land which is adjoining his house. Hence the offence, committed by the appellant would come under Section 326 of the IPC. Learned counsel for the appellant submitted that the appellant is more than 72 years of age and leniency may be shown in his favour by way of imposing lesser sentence. The injured had sustained the compound fracture of forearm. Keeping in mind the aggravating and mitigating circumstances and in the interest of justice, the appellant should be sentenced to undergo simple imprisonment for one year and to pay fine of Rs.50,000/-.
12. Accordingly, the Appeal is disposed of with conclusion that the appellant is convicted for the offence under Section 326 of the Indian Penal Code and is sentenced to undergo R.I. for one year and to pay fine of Rs.50,000/-. In default of payment of fine the appellant shall undergo further imprisonment of six months. The appellant is entitled to the benefit of set off under Section 428 CrI.P.C.

The appellant shall surrender before the concerned authorities to serve the remaining sentence within four weeks and fine shall be deposited within four weeks from the date of this judgment. If the fine is deposited, an amount of Rs. 45,000/- shall be paid as compensation to the legal representatives of the injured- informant (since deceased).

.....J.
[DIPAK MISRA]

.....J.
[MOHAN M. SHANTANAGOUDAR]

New Delhi.
Dated: March 09, 2017

JUDGMENT