

**Criminal Appeal (S.J.) No. 321 of 2012**

--Versus--

**With**

**Criminal Appeal (S.J.) No. 133 of 2012**

....      ....      ....      Appellants

--Versus--

For the Appellant : Mr. A.K. Sahani, Advocate  
Mr. Ajit Kumar, Advocate  
(In both cases)

For the State : Mr. Pankaj Kumar Mishra, A.P.P.  
(In Criminal Appeal (S.J.) No. 321 of 2012)  
Mr. Manoj Kumar Mishra, A.P.P.  
(In Criminal Appeal (S.J.) No. 133 of 2012)

**PRESENT : HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY**

1. Both these appeals arise out of common judgment of conviction and sentence, therefore, they have been heard together and will be disposed of by the common order.

2. As per the F.I.R. lodged by Sarita Devi, on 23.06.1994, she had on going land dispute with co-villager Shokhi Tiwari. About 10-12 days back on 23.06.1994, she had a squabble with Gendo Devi regarding which a case was also registered.

3. On account of this, Kapildeo Tiwari, Radhe Tiwari, Ashok Tiwari and Shokhi Tiwari, variously armed with axe, Farsa came to her house at 8'O Clock in the morning and charged on the informant and her husband. The informant took refuge in the house of Bhuneshwar Yadav, whereas her husband fled away from where she was dragged out by the accused persons, and was brutally assaulted by them. Sukhdeo Tiwari critically injured her by inflicting blow with Farsa. When villagers came to her rescue, the accused persons fled away.

4. On the statement of the informant, Giddi P.S. Case No.23/94 was registered against altogether four named accused persons under Sections 341, 342, 324, 326, 307/34 of the Indian Penal Code. On investigation, charge sheet was submitted and the appellants were jointly put on trial under these Sections.

5. Altogether seven witnesses were examined on behalf of prosecution and after prosecution evidence, statement of the accused persons was recorded under Section 313 of the Cr.P.C. wherein they pleaded complete innocence to the incidence, but no specific defence was taken. F.I.R. and injury reports have been adduced into evidence on behalf of the prosecution and marked as exhibits. The defence has also adduced into evidence the certified copy of F.I.R. and complaints with regard to the cases pending between them and marked as Exhibit.

6. The judgment of conviction has been assailed on the ground that there is delay of one day in institution of case which has not been explained although the police station was within five Kms. from the place of occurrence. Both parties belong to the same family and there was land dispute between both of them. None of the independent witness of village has been examined and only P.W. 2, who was examined, has been declared hostile.

7. It is argued on behalf of appellant that husband of the informant has been examined as P.W. 1. Prosecution version of the incidence is contradictory to the version as given by the victim. It has been stated by PW.1 that his wife was accosted initially by Shokhi Tiwari, Aruna Devi and one unknown person, whereas P.W. 3 (injured) has deposed that she was intercepted by all accused persons namely Aruna Devi, Kachhi Tiwari, Kapildeo, Radhe and Ashok Tiwari and on being chased, she took refuge in the house of Bhubneshwar Yadav. Mother of Bhuneshwar Mahto has been examined as P.W. 7 who has named accused Shokhi Tiwari, Kapildeo Tiwari, but has not named the other accused persons in the incidence. Further, manner of assault as stated above in the oral evidence is not corroborated by the medical evidence of Exhibit 5. Lastly, it is argued that offence under Section 307 of the IPC will not be made out as the injuries were not inflicted on the vital part of the body. All the injuries were on limb, hand and back side.

8. Learned A.P.P. has defended the judgment of conviction and sentence. It is submitted that the victim was critically injured with decapitation of right hand and she was sent for treatment therefore, on the same day of incidence, the F.I.R. was not lodged, but on the very next day, the case was registered.

9. Law on appreciation of evidence is settled that whenever the incidence is constructed on the basis of evidence, that is bound to be some variation and inconsistencies in the account of the witnesses. It is not that all such inconsistencies will erode the credibility of witnesses, so as to disbelieve the entire prosecution case. Only such inconsistencies that amounts to contradiction in the account of witnesses that go to the root and foundation of the case, can be considered for disbelieving the prosecution story. It is also a settled law that an

injured witness is entitled to a higher degree of credence, as it is unlikely that he will implicate any person other than the real assailant.

10. In the present case, the informant (PW-3) was examined by the Doctor (PW-5) on the very same date of incidence at 11.55 A.M. and found the following injuries:

- I. Almost total excision of lower part of right upper arm just above elbow joint leaving only about 1" of skin.*
- II. Incised wound just below left elbow joint size 3" x 1" x muscle deep x (1/3").*
- III. Incised wound over lower part of left tibial region just above ankle joint size 2" x 1" x 1/2" deep cutting tibia.*
- IV. The incised wound over right glutial region size 1½" x 1" x 1/3" (deep involving skin and muscles. Second wound size 2/3" x 1/2" x skin deep. There was no injury mark over back. The time of injury within six hours.*

In his opinion, injury no.1-was grievous and caused by sharp cutting weapon. Injury nos.2 and 4 were simple in nature and caused by sharp cutting weapon. Injury no.3 was grievous and also caused by sharp cutting weapon. This injury report was marked as Exhibit 1. Doctor opined that two Grievous and two simple injuries were found on the person of the victim P.W. 3, the informant Sarita Devi.

11. F.I.R. is lodged the very next day of the incidence, and the argument that there was delay in institution of the F.I.R. has no merit. It is but natural that an injured shall be 1<sup>st</sup> taken to the hospital for treatment, and not to the police station for institution of the case.

12. Coming back to the deposition of P.W. 3, she has consistently stated that she was intercepted by Aruna Devi, Kachhi Tiwari, Kapil Deo, Radhey and Ashok, while she was returning from the house of Bhunaeshwar Yadav (PW-6) along with her husband (PW-1). She was dragged from the house towards the back side of the house of Sukhdeo Tiwari, where she was assaulted by the accused persons who were variously armed with lathi, Farsa and axe. Kapildeo Tiwari inflicted Farsa blow resulting in decapitation of her hand. She was also attacked on her left hand and leg by Farsa. On her hulla, villagers gathered there.

13. This Court finds that there is no inconsistency, between her account and that of the medical evidence. Plea of contradiction between the two accounts is not factually correct, and is accordingly rejected.

14. Much has been said about the contradictions in her account. What is important to note that the witness was first examined on 28<sup>th</sup> July 2000, and on the said date, cross-examination was refused and consequently the witness was discharged. However, later she was re-summoned for cross-examination on 24.02.2006. On a plain reading of the cross-examination, it is evident that her

attention has not been drawn to the F.I.R., or her restatement to elicit any contradiction in her account. Unless and until attention of the witnesses drawn to any contradiction appearing in the previous statement made, and he is given an opportunity to explain the said contradictions, it cannot be discarded as being contradiction in terms of Section 145 of the Evidence Act. More so, there is no visible contradiction. She has consistently stated that she was intercepted by the Appellants while she was returning after fetching milk. The manner of assault has also been consistently stated that it was Kapildeo Tiwari who had inflicted Farsa blow, while others had also assaulted her.

15. Her account is duly corroborated by the deposition of P.W. 6 Bhuneshwar Mahto, who has stated in para 1 that when the accused persons chased Sarita Devi, she entered in his house, and there accused Kapildeo Tiwari and Shokhi Tiwari also followed her. Both of them started assaulting her by fists and slaps and dragged her out of his house and brought her towards the house of Sukhdeo Tiwari. In para 2, he stated that Kapildeo attacked by Farsa and cut the right hand of the informant and thereafter, he also attacked on leg by Farsa. Shokhi Tiwari was also involved in this occurrence and accused persons presuming that she is dead, fled away. In para 3, he identifies the accused persons. Husband of the informant escaped from there and went to the house of Mukhiya. In para 7, he said that accused persons entered in his house while chasing the informant. Huge quantity of blood was spread on the road about two feet in area. Hand was cut in the standing position from front side by the Farsa. This witness is an eye witness who has seen the informant entering into his house while being chased by the accused persons and he has also seen that her hand was cut by Farsa by Kapil Tiwari and blood also had come.

16. Testimony of the injured is further corroborated by P.W. 7 who is Gunjri Devi, mother of P.W. 6 Bhuneshwar Mahto. She is an old lady aged about 70 years. She stated in her examination in chief that on the date of occurrence, she was in the house. Sarita Devi entered into the house running, followed by Shokhi Tiwari and Kapil Tiwari. These two accused persons caught Sarita Devi and took her towards their house and hand of Sarita Devi was cut. She reached on the place of occurrence after cut of the hand of Sarita Devi. She cannot say who has cut her hand. There is a ring of truth in the account of this witness, which is not sullied by any exaggeration. In the cross-examination no contradiction has surfaced. She has admitted that she was a witness to the victim being dragged from a house by the 2 main accused persons, but has admitted that she was not an actual eyewitness to the gruesome act of decapitation that took place soon thereafter. Both these

witnesses are not family members of the informant so as to have any motive to falsely implicate the Appellants on account of the land dispute.

17. All the accounts suggests that husband fled away on being attacked by the armed accused persons. Therefore, minor inconsistencies appearing in his account cannot be attached much importance. The fact of the matter remains that injured has given consistent account which has been duly corroborated by the medical evidence as well as from other witnesses.

18. In view of the cogent and trustworthy account of the witnesses, I do not find the defence to have been prejudiced by the non-examination of the investigating officer. The question of prejudice would have a reason, had the attention of the witnesses drawn to their previous statement, to elicit any contradiction, in the absence of it, the non-examination will be of no consequence.

19. On combined reading of the testimony of witnesses, the picture that can be conjured is that on account of the past enmity, arising out of land dispute the informant was intercepted by the named accused persons in a concerted and in a pre-arranged manner, who laid an ambush when the informant/injured was returning from a neighboring house along with her husband, and attacked both of them. Husband fled away, whereas the informant took refuge in the house of Bhuneswar Yadav, from there she was dragged by the Shokhi Tiwari and Kapil Deo Tiwari. She was inflicted with sharp cut injury all over her body, which finally led to decapitation of her right hand by appellant Kapildeo Tiwari, but the other co-accused persons acted in furtherance of the common intention and collaborated with the principal accused. Trial against Shokhi Tiwari abated on account of his date.

20. I find force in the argument advanced on behalf of the Appellants that there was no intention to cause death, as the injuries were inflicted on none vital part of the body. Unless, there is an intention to cause death, offence under Section 307 will not be made out. As per the prosecution evidence, four persons armed with deadly weapon had attacked the informant. If they had been actuated by intention to cause death, the helpless lady could have been hacked to death. The injuries were inflicted on non-vital part which cannot be said to be sufficient in the ordinary course of nature to cause death. Under the circumstance, the judgement of conviction and sentence under section 307 is set aside and that under sections 342 and 326/34 of the IPC is affirmed against all the appellant accused persons. As Section 342 of the IPC is the aggravated form of the offence of Section 341 of the IPC therefore, the conviction and sentence of the appellants under Section 341 of the IPC, is set aside.

21. On the point of sentence, the matter involves brutally assaulting a lady with deadly weapons resulting in decapitation of a limb. Indiscrete clemency in sentencing in such cases will send wrong message to the society and erode the deterrent effect of the sentencing. However, considering the overall facts and circumstances of the case, Genesis of offence, the background of the accused persons, this court is of the view that the sentencing need to consider the specific role played by the accused persons in the incidence. Principal accused Kapildeo Tiwari who inflicted the Farsa blow is sentenced to R.I. of five year and fine of Rs 5000/- under Section 326 of the IPC. In the event of default he will undergo SI of one month. Other appellants are sentenced to R.I. of two years u/s 326/34 of the IPC and fine of Rs 3000/- In the event of default to undergo S.I. of one month. All the appellants are sentenced to One year SI under Section 342 of the IPC. All the sentences to run concurrently.

With this modification of finding and sentence, appeal stands dismissed. Bail earlier granted, is cancelled and the appellants are directed to surrender before the Court below within two weeks.

**(Gautam Kumar Choudhary, J.)**

Jharkhand High Court, Ranchi

Dated, 24<sup>th</sup> January, 2024

NAFR/Anit