

PETITIONER:
SMT. LAKHIYA DEVI, GIRJA YADAV & ORS.

Vs.

RESPONDENT:
GIRJA YADAV & ORS., THE STATE OF BIHAR

DATE OF JUDGMENT: 14/07/1998

BENCH:
G.T. NANAVALI, V.N. KHARE

ACT:

HEADNOTE:

JUDGMENT:

WITH
CRIMINAL APPEAL NO.407 OF 1987
J U D G M E N T

NANAVALI J.

Both these appeals arise out of the judgment and order passed by the Patna High Court in Criminal Appeal No.43 of 1982. Lakhiya Devi, mother of deceased Chander and the informant in this case. has filed Criminal Appeal No.109 of 1689. as the High Court partly allowed the appeal filed by the accused and set aside the conviction of the accused. other than accused Budhai under Section 326 read with Section 149 IPC and that of Budhai under Section 325 read with 149 IPC and also because the High Court discharged the noticed issued by it whereby the accused were called upon to answer why their conviction should not be altered to one under Section 302 read with Section 149 IPC and why the sentence imposed upon them should not be enhanced. Criminal Appeal No.407 of 1989 has been filed by the accused as the conviction by the trial court under Section 201 IPC and the sentence imposed for that offence have been confirmed.

The prosecution case was that during the night between 6th and 7th April, 1976 Chander Yadav was at his 'Khalihan' situated at a little distance from the village. At about 6 O'clock in the morning, he came running to his house and after getting the main entrance door opened, he went into a small room where foodgrains used to be stored and closed its door from inside. By that time, about 20 persons including the 16 accused came there running. The assailants were either armed with sticks and sharp weapons. As they saw Chander taking shelter in that small room and closing the door. some of them climbed over the roof to make a hole therein and to get inside that room. Others tried to break open the door of that room. The assailants who had gone over the roof were able to make a hole therein and jump inside that room. By that time the remaining assailants were also able to break open the door. All of them then assaulted Chander and committed his murder. Then they started carrying away the dead body by dragging it. Lakhiya Devi tried to prevent them from carrying away the dead body by catching hold of it but accused Saudagar pushed her away by giving a

kick on her chest. When her daughter-in-law Shanti Devi tried to prevent them from taking away the dead body she was also pushed aside and threatened. The assailants then carried the dead body of Chander with them by scaling over the western boundary wall of his house and were proceeding towards the west of the village. At that time two police constables, Shanker Dayal and Kapil Kumar, on being informed about what had happened, ran after the assailants. On seeing the two policemen the assailants started running away but the policemen were able to apprehend four of them. They were Doman, Brahmadeo, Puna, (since deceased) and Jai Nath. After some time a Sub-Inspector of Police of Akbarpur Police Station happened to arrive in the village and on hearing the commotion went near the house of Chander and came to know about the incident. He recorded Fard beyan of Lakhiya Devi in the village at about 9.30 A.M. and on the basis thereof an offence was registered against 19 persons. During the pendency of the trial two accused Jagdish and Puna died and, therefore, the trial proceeded against the remaining 17 accused. It was alleged against all of them that they had committed the murder of Chander in prosecution of their common object and because of the previous enmity.

In order to prove its case the prosecution had mainly relied upon the evidence of 6 eye-witnesses and the two police constables who had apprehended the above-named 4 accused. The accused also examined 7 eye-witnesses in defence and that was mainly for the purpose of establishing the plea of alibi.

The trial court believed the evidence of the eye-witnesses and the two police constables, as it stood corroborated by the find of broken door, broken roof and a trail of blood from the said room upto the Western boundary wall of the house of Chander. At the same time it also held that the eye-witnesses have exaggerated the manner in which the deceased was assaulted and it was likely that all the accused had not taken part in beating Chander. It also held that in all probability the accused Doman who was 80 years old was falsely implicated as one of the persons who had participated in the assault on Chander. Taking this view of the evidence the trial court further held that all the accused except Doman were members of an unlawful assembly, the common object of which was to beat Chander and not cause his death. Accordingly it convicted all the accused under Section 326 read with Section 149 IPC and sentenced them to suffer rigorous imprisonment for a period of 8 years. Budhai was convicted under Section 325 read with Section 149 IPC as he was armed with a stick and was sentenced to suffer R.I. for 4 years.

Aggrieved by the conviction the accused preferred an appeal to the High Court. As stated earlier, the High Court while admitting their appeal had issued a notice for alteration of the conviction for the higher offence of murder and also for enhancement of sentence. The High Court, on re-appreciation of the evidence, found that the version given by the eye-witnesses was not supported by the medical evidence. The eye-witnesses have stated that all the 20 assailants had assaulted Chander but the number of injuries found on his person were only eight. Six of them were incised wounds and 2 were abrasions. The reasoning of the High Court was that if all the 20 assailants had participated in the assault then the number of injuries on the person of Chander would have been more. The High Court also held that the eye-witnesses had exaggerated the manner in which Chander was assaulted and killed. It observed that as the room in which Chander was killed was small all the 20

assailants would not have entered that room and everyone of them would not have been able to beat Chander. If all the 20 assailants had entered that room and wielded their weapons that would have left some marks of violence on the walls and the Kothis (big earthen jars) which were kept in that room. The heap of potatoes lying in that room would have been disturbed. If the roof was cut and a whole was made therein then the cut portion of the roof and broken tiles would have been found inside that room but no such articles were attached by the investigating officer from that room. For all these reasons the High Court held that though it believed that Chander was done to death inside that room, the evidence of the eye-witness as regards the manner in which Chander was killed could not be relied upon. The High Court, however, believed their evidence as it was corroborated by the evidence of the two police constables and the trail of blood starting from that room and going upto the western boundary of that house and held that the accused had then carried away the dead body of Chander from that room. It, therefore, confirmed their conviction under Section 201 IPC and giving benefit of doubt to them on the ground that Chander was not beaten in the manner stated by the eye-witnesses, set aside the conviction of all the accused except Budhai under Section 326 read with Section 149 IPC and that of Budhai under Section 325 read with Section 149 IPC and acquitted them of all other charges. Consequently the notice issued for alteration of their conviction for the higher offence and enhancement of sentence was also discharged.

Mr. Raju Ramchandran, learned senior advocate appearing for Lakhiya Devi contended that the High Court committed a grave error in acquitting the accused as stated above and that has also led to failure of justice. He submitted that the High Court having believed that murder of Chander was committed inside his house in that small room, that the door of that room was broken open and that the accused had then carried away the dead body by dragging it, ought to have believed that the accused were also the murders and should have convicted all of them under Section 302 read with Section 149 IPC. On the other hand it was contended by Mr. U.R. Lalit, learned senior advocate appearing for the accused, that even though it is possible to take a different view on re-appreciation of the evidence, this Court should not interfere with the order of acquittal, as it cannot be said that the view taken by the High Court is perverse or so unreasonable as to justify interference by this Court.

As stated earlier the prosecution had examined 6 eye-witnesses including Lakhiya (PW10) to prove that they had committed murder of Chander. The trial court believed the presence of all these eye-witnesses. The High Court did not disbelieve it. The reason given by the High Court for not convicting the accused for the murder of Chander on the basis of their evidence was that they had exaggerated the manner in which injuries were caused to Chander. We have already set out earlier the reasons given by the High Court for taking that view. In our opinion, the High Court was wrong in rejecting the evidence of the eye-witnesses on this ground. Moreover, the findings recorded by it are inconsistent inasmuch as it has believed the prosecution evidence that after Chander was killed the accused had carried away the dead body from the house. The High Court has confirmed the conviction of the accused under Section 201 IPC. If accused were the persons who had carried away the dead body of Chander from that small room of his house then surely they were the persons who had entered the house

of Chander and in all probability they were the persons who killed him. If they were not the persons who had killed Chander then why should they have gone to his house and dragged the dead body from that room right upto the western boundary of the wall upto the pipal tree situated in the west of that village. It was nobody's case that one set of persons had killed Chander and another set of persons had carried away his dead body. The High Court has completely failed to consider this aspect.

Though all the eye-witnesses have stated that all the accused had participated in the assault of Chander what the High Court should have appreciated was that the eye-witnesses had seen the incident from outside that small room. All the accused had come running to the house of Chander. They were armed with weapons. All of them had tried to get inside that room and all had participated thereafter in carrying away the dead body of Chander. It was in that sense that the witnesses had stated that all the accused had participated in the assault on the deceased. The eye-witnesses had not stated that each of the accused had given a blow to Chander and that his blow had caused an injury to him. The High Court was, therefore, wrong in holding that the evidence of the eye-witnesses stood contradicted by the medical evidence on record.

The second reason given by the High Court for disbelieving the evidence of the eye-witnesses was that looking to the smallness of that room it was not at all likely that all the 20 assailants were able to enter into that room and assault Chander. The size of that room was about 11' x 8'. It was, therefore, not impossible, as believed by the High Court, for all the accused to have entered that room. As deposed by the investigating officer there were only two earthen jars in that room. Not only the two flaps of the door of that room but the southern wall inside that room had marks caused by sharp edged articles. He had also noticed that the door was broken open. Blood had also fallen on the small heap of potatoes. The High Court failed to take into consideration this evidence and erroneously proceeded on the basis that no marks of violence were found on the inner walls of that room and that in all probability all the accused could not have entered that room as it was too small.

One more reason given by the High Court for not placing reliance upon the evidence of the eye-witness was that all of them had stated that 6 accused had climbed over the roof of that room and had cut a hole therein whereas no cut portion of that room nor the broken tiles were found inside that room. Regarding cutting of the roof also the High Court had not correctly appreciated the evidence of the eye-witnesses and the investigating officer. All the witnesses have stated that it was a thatched roof with tiles. The height of that roof was about 6' 5". The investigating officer had deposed that he had noticed a small opening having been made in the south western portion of that roof and that some pieces of broken tiles were lying near that room. That clearly indicated that the accused had removed some tiles and thrown them on the ground outside the room. Therefore, not finding any cut portion of that roof or the broken tiles inside that room was not a circumstance justifying raising of any doubt regarding truthfulness of their evidence. The fact that a hole was made in the roof and broken pieces of tiles were lying near that room was recorded by the investigating officer. Merely because of the omission of the investigating officer to seize the broken pieces of those tiles it was not proper for the High Court

to draw an inference that the version of the eye-witnesses regarding some of the accused having gone over the roof and made a hole therein was not believable.

Thus the reasons given by the High Court for not placing reliance upon the evidence of the eye-witnesses were not proper and sufficient. We have already stated earlier that the High Court did not disbelieved the presence of all the accused inside the house of Chander. In fact the High Court has believed the prosecution evidence that they were the persons who had carried away the dead body of Chander from that small room. The two police constables who had arrived at the scene of the offence immediately after the offence was committed were informed about the manner in which the murder was committed and by whom it was committed. Out of those named assailants 4 were actually caught by the two constables who had chased them. Thus the evidence of the eye-witnesses, who can be regarded as interested witnesses because of their enmity with the accused, stood corroborated by the evidence of the police constables and also the circumstances referred to by us earlier. The High Court was, therefore, not right in discarding their evidence regarding participation of the accused in the assault on Chander.

From the evidence of the eye-witnesses it stands established that the accused had chased Chander right upto his house, that at that time they were armed with weapons, that they had entered the house of Chander and forcibly entered into the room in which Chander had taken shelter and that they had assaulted him. Thus they were all members of an unlawful assembly. Their subsequent conduct also indicates that they were members of an unlawful assembly and that whatever they had done was done in prosecution of their common object. As the trial court held that the common object of that unlawful assembly was only to beat Chander and not to cause his death and the order of acquittal under Section 302 read with Section 149 IPC was not challenged before the High Court either by the State or the information we do not consider it proper to interfere with that finding.

We, therefore, allow Criminal Appeal No.109 of 1989 filed by Lakhiya Devi, set aside the order of acquittal passed by the High Court of all those accused who were convicted by the trial court under Section 326 read with Section 149 IPC and restore the order of their conviction passed by the trial court. We also set aside the acquittal of Budhai under Section 325 read with Section 149 IPC and restore the order of his conviction and sentence passed by the trial court. As the incident had taken place long time back we are of the opinion that ends of justice would be met if the sentence of rigorous imprisonment of 8 years imposed upon the accuse (except Budhai) is reduced from 8 years to 5 years. We dismiss Criminal Appeal No.407 of 1987 filed by the accused against their conviction under Section 201 IPC. As accused Baudhu (Respondent No.9A in Criminal Appeal No.109 of 1989 and Appellant No.10 in Criminal Appeal No.407 of 1987) died during the pendency of these appeals, they had abated qua him.