

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.585 of 2002

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1. Mallick Kalan, Son of Late Sattar
 2. Mallick Faruq, Son of Late Karim
 3. Mallick Chanda, Son of Late Reyaz
 4. Mallick Dhanuk @ Dhanku, Son of Late Ali Hasan
 5. Mallick Salam, Son of Late Ali Hasan
 6. Mallick Kalam, Son of Late Ali Hasan
 7. Mallick Manjar, Son of Md. Manzar
 8. Mallick Suhain, Son of Late Anzar Mian
 9. Mallick Kara @ Saghir, Son of Late Anzar Mian
 10. Mallick Qayum, Son of Late Rahman.
 11. Mallick Idris, Son of Late Rahman.
 12. Mallick Nasim, Son of Late Abbas
 13. Mallick Sabir, Son of Late S. Zaffar
 14. Mallick Raji @ Razziq, Son of Late Ali Hasan.

All residents of Village – Jirui, P.S. – Pakaribarawan, District – Nawadah.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Abul Kalam, Adv.

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 12-03-2018

Earlier a report was called for from the Superintendent of Police, Nawada, with regard to death/alive status of all the appellants, from which it appears that appellant no. 6, namely, Mallick Kalam and appellant no. 2, namely, Mallick Faruq has died during pendency of the appeal, as such, this appeal with regard to appellant nos. 2 and 6 stands abated.

2. This appeal is directed against the judgment of conviction and order of sentence dated 08.10.2002, passed by Shri Shiva Shankar Sharma, the then learned 1st Additional District & Sessions Judge – cum- Special Judge, Nawadah in Spl (H) Case No. 59 of 1995, by



which the appellants, above named, stood convicted under Section 436/149 of the Indian Penal Code (hereinafter referred to as the “IPC”) and were sentenced to undergo R.I. for 3 years and under Section 380 of the IPC and were sentenced to undergo R.I. for 1 year. Appellant No. 1, namely, Mallick Kalan was also convicted under Section 324 of IPC and was sentenced to undergo R.I. for 01 year. Appellant Nos. 2, 3 and 8 were further convicted under Section 148 of the IPC and were sentenced to undergo R.I. for 1 year. All the sentences were directed to run concurrently.

3. Prosecution case as per the fardbeyan of Rameshwar Mahto (P.W. 18) recorded by the police, in short is that on 14.05.1992 at 2.00 P.M., he was present at his house and he heard *hulla* and found that there was a quarrel between appellant Mallick Chanda and Jairam Sao and both were coming to blows after taking toddy. Further prosecution case is that, thereafter, supporters of appellant Mallick Chanda including other appellants and 20 to 25 unknown persons assembled and attacked his house and set his house on fire as a result of which his double storied house burnt to ashes. Prosecution case further disclosed that one Prasadi Mahto, who was coming along with his sister Shibia Devi from Gobalraji was assaulted brutally by the accused persons and accused persons taken away his dead body. It is further alleged that rioters wandered in the village and several houses including the dwelling house of Ganauri Paswan Suda Paswan, Hari Paswan, Bishun Paswan, Kishun Paswan, Dukhan Paswan and others



were set on fire and the articles of the houses were looted away by the accused persons. Bombs were exploded and fire arms were used indiscriminately. It is alleged that the communal riot had flared up due to wordy exchange of words between appellant Mallick Chand and Jairam Sao and on invitation of appellant Mallick Chand, other appellants/accused resorted to arson. Thereafter, injured were taken to hospital for their treatments and statement of informant was recorded.

On the basis of the aforesaid statement, Pakaribarawan P.S. Case No. 30/92 for the offences punishable under Sections 148,149,323,324,307,380 and 436 of the IPC as well as under Section 3(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (hereinafter referred to 'SC/ST Act') was registered.

4. After completion of investigation, police submitted charge-sheet. Conginzance of the offence was taken and the case was committed to the court of sessions, which ultimately came to the file of Shri Shiva Shankar Sharma, the then learned 1st Additional District & Sessions Judge –cum- Special Judge, Nawadah for trial and disposal.

5. Charges were framed under Sections 148, 149, 324, 380, 307 and 436 of IPC against the accused-appellants.

6. In order to substantiate the charges, prosecution has examined altogether twenty witnesses, they are; P.W. 1 – Ram Dev Paswan, P.W. 2 – Dukhan Paswan, P.W. 3 – Rambriksh Mistri, P.W. 4 – Chando Yadav, P.W. 5 – Natho Mahto, P.W. 6 – Sudha Paswan, P.W.



7 – Bishun Paswan, P.W. 8 –Jairam Sao, P.W. 9 – Ganauri Paswan, P.W. 10 – Upendra Mahto (tendered for cross examination), P.W. 11- Shibia Devi, P.W. 12 - Shivbalak Pandit (tendered for cross examination), P.W. 13 – Bal Kishun Pandit, P.W. 14- Ashok Mahto (tendered for cross examination), P.W. 15- Aniya Devi @ Ganiya Devi (tendered for cross examination), P.W. 16- Rukmani Devi, P.W. 17 – Gaitri Devi, P.W. 18 – Rameshwar Mahto (informant), P.W. 19 – Dr. Md. Zubair (the doctor, who treated the injured and gave the injury reports) and P.W. 20 – Baswa Devi. In this case, Investigating Officer has not been examined.

7. Defence of the appellants is that it was the prosecution party, who formed unlawful assembly and set the houses of minority community on fire and inflicted injuries to several persons, in which more than one person was done to death. Defence has also brought on record, two cases viz. Pakaribarawan P.S. Case No. 29/92 and Pakaribarawan P.S. Case No 113/93. and further defence is that the prosecution in order to save their skin from the case filed by the appellants' side, has filed this present false and concocted case.

8. Post trial, learned Trial Court, convicted the appellants under Sections 436/149 and 380 of the IPC and also convicted appellant Mallick Kalan under Section 324 of the IPC and were sentenced in the manner as stated above. However, the trial court has not convicted the appellants under Section 3(x) of SC/ST Act and also not convicted under Section 364 of IPC as no case of abduction could be established



and no charge was framed under Section 302 IPC. No appeal was preferred against the acquittal of appellants from the charge of abduction of Prasadi Mahto and also against acquittal from the charge under Section SC/ST Act.

9. Being aggrieved, the appellants preferred the present appeal.

10. Impugned judgment has been assailed by learned counsel for the appellants on the ground that in this case I.O. has not been examined and there is also counter case lodged by the appellants' side against P.W. 3, 8 and 18 and informant himself was accused in those cases and there was arson and *marpit* from both sides and learned Trial Court had also come to the conclusion that there was a riot between the members of two communities on the alleged date of occurrence. In such a situation non – examination of I.O. has caused serious prejudice to the defence. It has also been submitted that there are several contradictions in between the evidence of prosecution witnesses and when there is arson from both sides, it is very difficult for any witness to identify and assign a specific role to any person in the said riot and the trial court without considering all these infirmities has convicted the appellants, which is out and out perverse and not sustainable in the eye of law.

11. On the other hand, learned counsel for the respondent- State contended that large number of witnesses have been examined and they have named the appellants as the persons, who set the several houses on fire and looted away the articles and also assaulted



Rambriksh Mahto (P.W. 3) and other injured Gulabi Devi and Jilebiya devi, though not examined in this case and there are consistent evidences of witnesses with regard to involvement of these appellants in the offence and, therefore, there is no infirmity in the impugned judgment and conviction of appellants are just and proper.

12. Considered the rival contention of the parties. On perusal of judgment, it appears that it is case of arson, loot and assault by the accused – appellant of this case. Learned Trial Court has not found the case true under Section 364 on the ground that the case for abduction is not made out and not charge has been framed under Section 302 of IPC and also not convicted the appellant under Section 3(x) of SC/ST Act. No appeal has been preferred against said finding of learned Trial Court, as such, this Court is not going to look into the merit of case so far the case of abduction of Prasadi Mahto and so far allegation under Section 3(x) of SC/ST Act, is concerned. Further from perusal of the impugned judgment of trial court, it appears that the trial court has based his judgment on the principle of identification by more than two witnesses as held by Hon'ble Apex Court in the case **Masalti v. State of U.P.** reported in **1965 AIR 202** and has laid down the principle for identification of accused in such case where there is large number of unlawful assembly. Thereafter, the said principle was followed in the case of **Binay Kumar Singh and ors. v. State of Bihar** Reported in **AIR 1997 (SC) 322**, wherein, it was held that when the size of unlawful assembly is quite large (as in this case)



and many persons would have witnessed the incident, it would be pertinent exercise to insist at least two reliable witnesses to vouch safe the identification of an accused and others in the rioting. The said principle was also reiterated by the Hon'ble Apex Court in the case of **Chandra Shekhar Bind and others. State of Bihar** reported in **AIR 2001 (SC) 4024** and as stated above, in the present case also, learned Trial Court based the conviction on identification by at least two witnesses, finding their evidences reliable and trustworthy and free from any inconsistency.

13. In the present case so far occurrence of setting ablaze the houses, arson and 'loot paat' is concerned, evidence appears to be consistent. P.W. 18, who is informant has supported the prosecution case and identified appellant nos. 1, 3, 4, 6 and also appellant no. 2 (since died), who set his house on fire. P.W. 1 has named appellant nos. 4, 9, 7 and 10 as the persons, who set his house on fire. P.W. 2 has named appellant nos. 3, 6, 10, 11, 12 and 13 as the persons, who set his house on fire and looted away the articles. P.W. 3 Rambriksh Mistri is an injured in this case and he has named appellant nos. 1 and 13 as the persons, who along with others assaulted him by *garasa* due to which, he sustained injuries on his eye as well as at four other parts of the body and Doctor P.W. 19 had also found the injury on the person of this witness, which was assaulted by means of *garasa* and other weapons. P.W. 4 has identified appellant nos. 1,3, 8, 12 and 13 as the person, who set the of Ganauri Paswan Suda Paswan, Hari



Paswan, Bishun Paswan, Kishn Paswan, Dukhan Paswan and the houses of others on fire. His evidence also disclosed that when Prasadi Mahto along with his sister Shibia Devi was coming, appellant no. 1 and others had assaulted him brutally by *garasa* and, thereafter, they had taken away the dead body of the said Prasadi Mahto.

14. P.W. 5 has named appellant nos. 1,3,8 and 12 as the person, who has assaulted Prasadi Mahto. P.W. 6 has named appellant no. 1 as the person, who set his house on fire and appellant no. 8 and others looted away the articles of the house. This witness has identified other appellants also. P.W. 7 has identified appellant no. 9 and others as the persons, who set his house on fire and also looted away the articles. P.W. 8 Jairam Sao is the person, who was involved in scuffle with appellant Mallick Chand and due to which the entire occurrence took place, has identified appellant nos. 3 and 8 and stated that they were in the intoxicated condition and were making abuses when he objected them from abusing, appellant Mallick Chand assaulted him and *marpit* took place.

15. P.W. 9 has named appellant nos. 1, 3, 8, and 12 as the person, who set the house of 'Harijans' on fire and looted away the articles and given the details and assign the role of each accused person as to whose house, they set on fire, however, it appears that he has stated specifically as to who set on fire whose houses, it looks improbable that when there is arson and riot and large number of persons involved



in the said riot, it is not possible for any person to identify each of the accused and mentioning individual acts of every accused, as such, the evidence of this witness does not inspire confidence.

16. P.W. 10, P.W. 12, P.W. 14 and P.W. 15 have been tendered for cross-examination and, therefore, there is nothing relevant in their evidence for just decision of this case.

17. P.W. 11 has named appellant nos. 2, 3, 8 and 12 as the persons, who assaulted Prasadi Mahto. P.W. 13 has named appellant nos. 1, 3, 4 and 13 as the persons, who set the houses in '*Harijan Tola*' on fire. P.W. 16 has named appellant nos. 3, 4, 5, 6 and 11 as the persons, who set his house on fire. P.W. 17 has named appellant nos. 1, and 3, whereas P.W. 18 has named appellant No. 7.

18. On perusal of the entire evidence, it appears that there is nothing in the evidence of prosecution witnesses to discredit their evidence and it appears that on the date of occurrence, there was violence between the members of two community, in which some muslim were killed and Prasadi Mahto was also killed and from the defence side also, they have lodged two cases viz. Pakaribarawan P.S. Case No. 29/92 and Pakaribarawan P.S. Case No 113/93 and the present case has been lodged against the muslim accused persons as they had set the houses on fire and also looted away the articles and appellant no. 1 has also assaulted one Rambriksh Mistri (P.W. 3).

19. In this case, it appears that I.O. has not been examined and as such, there is nothing available on record to show as to what were the



articles burnt and what were the articles seized in the investigation. No doubt, oral evidences of witnesses are available that houses were set on fire and articles were looted away but as the I.O. has not been examined, who is an independent witness in this case and in absence of his examination and in absence of seizure list, it does not appear to be safe to hold that those were the place of worship or place for custody of property or human. As such it appears that prosecution has failed to establish the charge under Section 436/149 of IPC.

20. In view of the above, so far conviction of appellants under Section 436/149 of IPC is concerned, the same does not appear to be sustainable rather in the facts and circumstances of the case, the appellants at best could more appropriately be convicted under Section 435/149 of the IPC and accordingly, the conviction of appellants under Section 436/149 is modified to a conviction under Section 435/149 of the IPC. So far conviction under Section 380 of IPC is concerned and conviction under Section 324 against appellant no. 1, is concerned, there appears that there are sufficient cogent materials available on record to uphold the conviction of all appellants under Section 380 of the IPC and conviction of appellant no. 1 under Section 324 IPC, hence, the same are accordingly upheld.

21. So far sentence of the appellants are concerned, learned counsel for the appellants has submitted that occurrence is of year 1992 and now good sense has prevailed in the society and all appellants have also remained in custody for two and half months and as such, their



sentences may be reduced to period already undergone by them in judicial custody.

22. Considering the submission of learned counsel for the appellants as well as the fact that the occurrence is of year 1992 and 26 long years have passed since then and no fruitful purpose will be served to send the appellants behind the bars to serve the remaining sentences and accordingly, the sentences of the appellants under Section 435/149 IPC as well as under Section 380 of IPC and sentence of appellant no. 1 under Section 324 IPC is reduced to the period already undergone by them in judicial custody.

22. With the above modification in conviction and sentence, this appeal is dismissed.

(Vinod Kumar Sinha, J)

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