

The judgment and order of conviction and sentence dated 18th May, 1987 passed by the learned Additional Sessions Judge, Birbhum at Rampurhat in Sessions Trial No.2 of March, 1987 arising out of Sessions Case No.65 of 1985 convicting the appellant No.1 for the offence under Section 147/148/324 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for three years for the offence punishable under Section 148 of the Indian Penal Code and to suffer rigorous imprisonment for three years for the offence under Section 324 of the Indian Penal Code and the accused/appellant No.2 Jiten Das under Section 147/323 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for two years respectively and also convicting the appellant No.4 Dhanapati Bagdi under Section 147/148/324 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for three years for the offence under Section 148 of the Indian Penal Code and also rigorous imprisonment for three years for conviction 324 of the Indian Penal Code and the remaining accused persons/appellants for the offence under Section 147 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for two years, is under challenge in the instant appeal.

It is pertinent to record at the outset that out of 23 (twenty three) appellants, four appellants namely Kishori Bagdi, Jharu Bhalla,

Chandra Gopal Bhalla and Kesto Bhalla passed away during pendency of the instant appeal. Therefore, this Court recorded an order of abatement of appeal as against the above named deceased appellants vide order dated 28th January, 2022.

The allegations as disclosed from the written complaint submitted by one Jitendra Nath Ghosh on 7th September, 1983 before the Officer-in-Charge of Mayureswar P.S. reveals that on 7th September, 1983 at about 5 P.M. some people led by one Shib Shankar Das and Jiten Das surrounded the house of one Bhubaneswar Pal, the then Upa-Prodhan of the Gram Panchayat at Marjatpur. The miscreants were supporters of a particular political party and they previously raised agitation against distribution of rations etc. the said persons being armed with 'lathi's', 'tangi's', 'bows' and 'arrows' surrounded the house of Bhubaneswar Pal and on the instigation of Shib Shankar attacked him to come out of the house. The elder brother of Bhubaneswar Pal namely Sarbeswar Pal and one Akshoy Kumar Ghosh and Hari Narayan Ghosh came out of the house and wanted to know as to why they altogether surrounded the house of Bhubaneswar Pal being armed with deadly weapons. But the accused persons attacked them with the weapons in their hands without giving any answer to them and assaulted them with the help of 'lathi' and 'tangi' on vital parts of their body like head, hand and other parts. As

a result, the said three persons received bleeding injuries on their head and hands. Middle finger of the left hand of Sarbeswar Pal was fractured. Akshoy Kumar Ghosh received bleeding injury on his head. He was assaulted by "lathi" all over his body. Hari Narayan Ghosh also received injury on his right hand. One Amulya Ratan Das was assaulted by the accused persons by "lathi" when he came to save the said three injured persons. His right hand was fractured on receiving assault. Seeing such incident Dilip Konai rushed to the spot crossing agricultural field. The accused persons caused injury on his left hand by throwing arrow. One Lakshman Chandra Bhalla was assaulted by the accused persons. They continued such incident of rioting with deadly weapons and assaulted for about one hour. When local people proceeded to the spot, they fled away. However, the accused persons were guarding the locality from a distance so that the injured persons might not go to the police station or the hospital for medical treatment. Subsequently, however, at dead hours of night the de facto complainant managed to reach the police station carrying the injured persons and lodged a complaint before the Officer-in-charge of Mayureswar Police Station. On the basis of the said complaint police registered a specific case under Sections 147/148/149/323/324/307 of the Indian Penal Code and took up the

case for investigation. Investigation ended in filing the charge sheet against the accused persons.

It appears from the record that charge under Section 147 was framed against 18 (eighteen) accused persons. Against Jiten Das charge was framed under Sections 147/323 of the Indian Penal Code. Separate charge was framed against Shib Shankar Das under Sections 147/148/307 of the Indian Penal Code and charge under Sections 147/148/324 of the Indian Penal Code was framed against the accused Kanai Bhalla. Separate charge under Sections 147/148/324 of the Indian Penal Code was framed against the accused Banshi Mudi. Separate charge under Sections 147/148/307 of the Indian Penal Code was framed against Dhanapati Bagdi. Separate charge was also framed against the accused Ganapati Bagdi under Sections 147/148/324 of the Indian Penal Code.

All the accused persons pleaded not guilty when the charge so framed was read over and explained to the accused persons. Therefore, trial of the case commenced.

During trial, prosecution examined as many as 17 (seventeen) witnesses. The accused persons were examined under Section 313 of the Code of Criminal Procedure. The defence case as disclosed from the trend of cross-examination of the witnesses on behalf of the prosecution and examination of the accused persons under Section

313 of the Code of Criminal Procedure appears to be complete denial of the prosecution case.

The learned trial Judge on due consideration of evidence on record held the accused persons guilty for committing offence as narrated above and convicted and sentenced them accordingly.

The said order of conviction and sentence is under challenge in the instant appeal.

During trial, the *de facto* complainant of this case deposed as P.W. 1. It is found from his evidence that one Bhubaneswar Pal, a resident of Village – Morjetpur was the Upa Prodhan of the local Gram Panchayat. Bhubaneswar was elected as a Member nominated by the Indian National Congress. Prior to Bhubaneswar, one Shib Shankar Das was the Anchal Prodhan. Said Shib Shankar is a Member of CPIM. It was stated by the *de facto* complainant on oath that on 7th September, 1983 at about 5.00 p.m. he was present at Village – Morjetpur. At that time about 50 persons being armed with 'lathi', 'tangi', 'bows' and 'arrows' came to the house of Bhubaneswar. They surrounded his house. They were shouting asking Bhubaneswar to come out of his house. Hearing such shouting the elder brother of Bhubaneswar, namely, Sarbeswar and his two relatives, Akshoy Kumar Ghosh and Hari Narayan Ghosh came outside the house. Sarbeswar asked the angry mob as to why they attacked their house being armed with deadly weapons. At this he was

assaulted by 'tangi' on his head and by a 'lathi' on other parts of her body. Akshoy Ghosh was also assaulted by the said mob by a 'tangi' and 'lathi'. The accused persons also assaulted Hari Narayan on his hand by a 'tangi' causing bleeding injury. One Amulya Das came running to save them but he was assaulted by a 'lathi' causing dislocation of bone on his hand. Thereafter, one Dilip Konai rushed towards the spot to save the injured persons but he was struck by an arrow on his left hand. Hearing the he and cry local people came to the spot and seeing them the miscreants went away. It is also stated by P.W. 1 that after a lapse of about five hours he and the injured persons went to the house of Kamakshya Pal and they were taken to Mayureswar Police Station by a vehicle. In the Police Station the *de facto* complainant lodged a written complaint.

Mr. Milan Mukherjee, Learned Senior Advocate on behalf of the appellants submits that P.W. 1 being the *de facto* complainant claimed himself to be the eyewitness of the occurrence. But surprisingly enough neither in the written complaint nor in course of his evidence he stated the names of the assailants who assaulted Sarbeswar, Akshoy, Hari Narayan, Amulya and Dilip Konai. The witness failed to state the specific role of each of the accused persons. Therefore, as a result of omnibus allegation no conviction can be sustained.

It is further submitted by Mr. Mukherjee that during cross-examination the *de facto* complainant stated the topography of the alleged place of occurrence. From his cross-examination it is ascertained that the house of one Bhupati Babu is situated on the west of the house of Bhubaneswar Pal. On the north of the house of Bhubaneswar there is a cow shade of Profullya Pal and thereafter the house of one Bhubaneswar Ghosh. To the east of the house of Bhubaneswar Pal there is a road and on the other side of the road one Kumarish Pal resides. Kumorepara of the village is situated on the northern side of the house of Kumarish Pal. The said persons were not examined by the prosecution during trial of the case.

P.W. 2, Sarbeswar Pal is one of the injured. According to him, he was assaulted by Shib Shankar Das with the help of a 'tangi' on the right side of his head causing bleeding injury when others assaulted him by 'lathi' on other parts of his body. As a result of assault, his left hand was fractured. Mr. Mukherjee draws my attention side by side to the evidence of the Medical Officer (P.W.17) with the deposition of P.W. 2, Sarbeswar Pal. It is found from the evidence of P.W. 17 that Sarbeswar was assaulted on his forehead above the right eyebrow and also sustained lacerated injury on his left forearm. He suspected fracture of left ulna on the medial part of the left hand. His clinical finding was found to be correct through x-ray report confirming fracture of left ulna.

According to Mr. Mukherjee if Shib Shankar was assaulted with the help of 'tangi' on his head, there cannot be any lacerated injury on the forehead of sarbeswar Pal as found by the Medical Officer. P.W. 2 did not tell the name of his assailant who assaulted him on his left hand with the help of 'lathi' causing fracture of left ulna medially.

It is also pointed out by Mr. Mukherjee that P.W. 3, Akshoy Kumar Ghosh who is one of the injured, did not support the prosecution case and was turned hostile. P.W. 4, Dilip Konai, another injured was also declared hostile by the prosecution and he did not support the prosecution case. P.W. 5, Biswambhar Ghosh and P.W. 7, Lakshman Chandra Bhalla were also declared hostile by the prosecution.

The evidence of P.W. 6, Profulla Kumar Pal who claimed himself to be an eyewitness of the occurrence is at variance with the evidence of P.W. 2, Sarbeswar Pal. In the evidence it is stated that accused Shib Shankar Das and his associates attacked Sarbeswar and his relatives. They also assaulted Akshoy, which Akshoy himself did not support. From his evidence it is also not clear as to who assaulted whom.

P.W. 8, Amulya Ratan Das claimed himself as an eyewitness of the occurrence. It is found from his evidence that on the date of occurrence at about 4.00 p.m. he saw a procession coming towards Village – Morjatpur and the people in the said procession were armed with different weapons. At that time, he was working in the cow shed of one

Bhupati Mondal. Suddenly, Kanai Bhalla came with a 'lathi' and assaulted him over his elbow on his right hand causing fracture injury. After receiving such assault he became senseless. Thus, he could not state anything further about the incident. Evidence of P.W. 9, Bhubaneswar Pal is also not free from doubt. It is the prosecution case that when a mob of about 50 persons attacked the house of Bhubaneswar he took shelter inside his house. His elder brother, Sarbeswar and two other relatives came to confront with the Members of the so-called unlawful Assembly. Therefore, it was not possible for Bhubaneswar to see the incident but from the evidence of Bhubaneswar it is ascertained that Sarbeswar was assaulted by accused Shib Shankar on his head by 'tangi' causing bleeding injury. Akshoy Kumar Ghosh was assaulted by Dhanapati Bagdi, Hari Narayan Ghosh was assaulted by Ganapati Bagdi, Amulya Ratan was assaulted by one of the Members of the said unlawful Assembly. Other persons, namely, Prabhat Kumar Ghosh, Bhupati Bhusan Ghosh, Dilip Konai also received injury on his person. I have already recorded that Akshoy Kumar Ghosh did not support the prosecution story. Therefore, evidence of Bhubaneswar cannot be taken into consideration to hold Dhanapati Bagdi guilty of committing offence under Sections 147/324 of the Indian Penal Code.

The evidence of P.W. 10, Smt. Santoshi Pal, P.W. 11, Smt. Dharam Pal, P.W. 12, Bhubaneswar Pal, P.W. 13, Nirapada Debangshu are not of

any importance because they did not support any part of the prosecution case.

P.W. 14, Provat Kumar Ghosh is a resident of Morjatpur. It appears from his evidence that when the accused persons allegedly attacked the house of Bhubaneswar Pal he fled away from the spot. After they left the place of occurrence he came to the spot and found Sarbeswar, Akshoy and Hari Narayan Ghosh lying on the ground sustaining injury.

The evidence of P.W. 15, Smt. Mungli Ghosh is also no importance as she failed to throw any light about the incident. P.W.16 is the Investigating Officer of the case. It is ascertained from his evidence that on 7th September, 1983 he took up the case for investigation on the basis of a written complaint submitted by P.W.1. After registering the case he brought all the injured persons to Rampurhat Hospital for their medical treatments.

He seized the arrow that was struck on the left hand of Dilip Konai. He also examined the witnesses and recorded their statements. It is also found from his evidence that he collected available injury reports of the patient including their bed head tickets. However, the said injury reports and bed head tickets were not exhibited during trial of the case. Mr. Mukherjee has raised a pertinent question as to why the injury

report was suppressed. It is submitted by him that the information is absolutely perfunctory because the Investigating Officer did not seize the wearing apparels of the injured persons, even no offending weapons were seized from the possession of the accused persons.

Moreover, admittedly there was political rivalry between the parties so false implication of the accused persons cannot be ruled out.

Besides the factual infirmities as narrated above, it is submitted by Mr. Mukherjee, learned Senior Counsel on behalf of the accused persons that in the heading of the charge framed by the learned Trial Judge, the time and place has not been mentioned while the charge is absolutely silent about the time. The place was mentioned as Marjatpur. However, the place of occurrence, according to Mr. Mukherjee ought to have been in front of the house of Bhubeneswar Pal at Village Marjatpur. As the time and place of occurrence has not been mentioned in the heading of charge, the charge is bad under Section 212 of the Code of Criminal Procedure.

However, I am not in a position to accept such submission regarding defect or error in charge in view of the provision under Section 464 of the Code of Criminal Procedure. Section 464 of the Code provides to be done in cases where a charge is not framed or there is any error, omission or irregularity in framing of the charge. From the terms of this section it can be stated that a finding, sentence or order

could be set aside only on those cases where the facts are such that no valid charge could be preferred against the accused in respect of the facts proved. Secondly, if the facts are such that a charge could be framed and yet it is not framed but no failure of justice had, in fact been occasioned thereby, the finding, sentence or order of the Code of competent jurisdiction is not to be set aside on that ground. Thirdly, if there is failure of justice occasioned by not framing of the charge or in case of an error, omission or irregularity in the charge, retrial of the case is to be directed in Sub-Section(2). Non framing charge would not vitiate the conviction, if no prejudice is caused thereby to the accused.

In the instant case, the accused persons did not face any prejudice for the omission to state the time of occurrence in the heading of charge. The accused persons took part in the trial, cross-examined the witnesses on behalf of the prosecution. Therefore, I am not in a position to hold that the accused persons were prejudiced for failure on the part of the learned Trial Judge to state the time of the occurrence in the heading of the charge.

It is needless to say that genesis of an offence of rioting is formation of unlawful assembly defined in Section 141 of the Indian Penal Code. Section 141 defines unlawful assembly as hereunder:-

"An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-

First.-To overawe by criminal force, or show of criminal force, [the Central or any State Government or Parliament or the Legislature of any State].or any public servant in the exercise of the lawful power of such public servant; or

Second.- To resist the execution of any law, or of any legal process; or

Third.-To commit any mischief or criminal trespass, or other offence; or

Fourth.- By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.- An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

Section 146 states that whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

Section 147 is the penal provision of rioting.

Section 148 is the penal provision of rioting with deadly weapon. If the evidence on record is carefully scanned, it is of course found that there was an unlawful assembly of about 50 persons on 7th September, 1983 but the common object of such unlawful assembly was not proved. What was the common object? Was it to attack the house of Bhubenewar Pal, commission of mischief in the house of Bhubenewar Pal or to manhandle the said Bhubenewar Pal. On the other hand, was it an assembly to get ration regularly distributed under the control of the Panchayat. Was it the allegation of the accused persons that they being the members of the rival political party did not get ration properly. Thus, the common object of the assembly was not established during trial of the case.

Last but not the least, the learned Trial Judge failed to examine the accused persons under Section 313 of the Code of Criminal Procedure in accordance with proper perspective as contained in Section 313(1) of the Code of Criminal Procedure. The purpose of examination of the accused under Section 313 Cr.P.C. is to enable the accused

personally to explain any circumstances appearing in the evidence against him. It is not only desirable but also a statutory requirement that incriminating material appearing in the evidence of each and every witnesses is required to be stated separately to the accused persons and jumble of questions to the effect that "it appears from the evidence on record....." is not the way or manner of examination of an accused under Section 313 of the Code of Criminal Procedure. In ***Narsingh Vs. State of Haryana*** reported in ***2015(1)SCC (Cri.) 699***, the Hon'ble Supreme Court observe – "undoubtedly the importance of a statement under Section 313 Cr.P.C., in so far as the accused is concerned, can hardly be minimized. The statutory provision is based on rules of natural justice for an accused, who must be made aware of the circumstances being put against him so that he can give proper explanation to meet that case."

In the instant case, the examination of the accused persons under Section 313 Cr.P.C. was not in accordance with the requirement of the statute and therefore, the entire trial vitiated because of the fact that the accused did not get the opportunity to explain the incriminating circumstances properly appearing against him. In view of such circumstances, it is submitted by Mr. Mukherjee that the instant appeal should be allowed.

Argument on behalf of the rest of the appellants by Mr. Arnab Saha is adopted.

For the reasons stated above, this Court is of the view that the learned Trial Judge committed error in law and fact in convicting the accused persons and the judgment and order of conviction and sentence is liable to be set aside.

Accordingly, the appeal is **allowed** on contest.

Appellants are discharged from their respective bail bonds.

Office is directed to supply the urgent certified copy of this order to the Learned Advocates for the parties on the usual undertakings.

(Bibek Chaudhuri, J.)