

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.170 of 2004

1.	Binod Kumar Jha son of Hari Shekhar Jha
2.	Uma Kant Jha son of Luti Jha
3.	Manoj Kumar Jha son of Prem Nath Jha
4.	Ashok Kumar Jha son of Prem Nath Jha
5.	Raj Narayan Jha son of Jiv Nath Jha
6.	Prem Nath Jha son of Babu Lal Jha
7.	Parma Nand Jha son of Jiv Nath Jha. All are resident of village- Thadhi, P.S. Andhrathadhi, District, Madhubani

STATE OF BIHAR

Versus

... .. Appellant/s

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Akash Kumar, *Amicus Curiae*

For the State : Mrs. Anita Kumari Singh, APP

CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA
CHAKRAVARTHY

ORAL JUDGMENT

Date : 26-10-2024

1. The appeal is arising out of the judgment and sentence dated 18.03.2004 passed by the Fast Track Court No. 1, Madhubani in Sessions Trial No. 30/155 of 1992/2002. Wherein the appellants were convicted for the offence punishable under Section 147 of IPC to undergo rigorous imprisonment for a period of one year and under Section 326 r/w 149 of IPC to undergo imprisonment for a period of five years.



2. The case of the prosecution, as disclosed from the Fardbeyan is that Shivnath Jha/ (injured./ P.W. 9) disclose that on 19.10.1989 at about 05:00 P.M. he was at his doorstep/*Darwaja*, his elder brother Raman Jha/ P.W. 8 was talking about some land related matters with the accused Jivnath Jha (dead) and suddenly verbal altercation took place between them and they started abusing each other. Meanwhile Jivnath Jha shouted that he will do away the life of Ramnath Jha and saying so, he went towards his house, came back with Farsa and with other accused namely, Uma Kant Jha, Prem Nath Jha, Parmanand Jha, Raj Narayan Jha, Ashok Kumar Jha and Manoj Kumar Jha and they all were holding Lathis in their hands. Accused Jivnath Jha with an intention to kill Ramnath Jha gave Farsa blow on both of his legs below the knee for which Ramnath Jha sustained cut injuries, fell down and became unconscious. The informant/ P.W. 9 tried to protect his brother but accused Jivnath Jha gave Farsa blow on his head and accused Umaknat Jha assaulted him with Lathi on his head.



3. In the meantime, the family members of P.W. 7 i.e. Brahamdeo Jha, Amarnath Jha (P.W. 3) and Govind Jha came to protect them but the other co-accused person assaulted them with Lathi, for which they sustained injuries. The incident was witnessed by P.W. 1/ Ishnath Jha, P.W. 5/ Sohan Mishra and P.W. 4/ Kishori Jha.

4. Basing on the Fardbeyan, Andhratharhi Police Station registered a formal FIR against all the accused persons for the offences punishable under Section 147, 148, 149, 324, 323 and 307 of IPC. After concluding the investigation a detailed charge-sheet was submitted against all the persons. The Learned Additional Chief Judicial Magistrate, Jhanjharpur, Madhubani took cognizance of the offence and later committed the case to the Court of Sessions. The trial Court framed charges against all the accused person for the offences punishable under Section 147 of IPC and under Section 307 r/w 149 of IPC, read over and explain to accused person, for which they denied the charges and claim to be tried.



5. During the course of trial, P.Ws. 1 to 9 were examined. P.W. 1/ Ishnath Jha is the neighbour of the appellant and eye-witness of the incident, P.W. 2 is an advocate clerk. P.W. 3/ Amarnath Jha is one of the injured, who turned hostile. Apart from Amarnath Jha, the other persons injured in this case were P.W. 7, Brahamdev Jha, P.W. 8/ Ram Nath Jha @ Ramanjee Jha, P.W. 9, Shivnath Jha and Govind Jha, however, Govind Jha was not examined before the trial Court for the reasons best known to the prosecution. P.W. 4 & P.W. 5 are the villagers of the informant. The documentary evidence on record are as follows:-

<u>Sl.No</u>	<u>Exhibits</u>	<u>Details</u>
1.	Exhibit 1	Formal FIR
2.	Exhibit 2	Fardbeyan
3.	Exhibit 3 & 3/1	Injury Report of Ramnath Jha
4.	Exhibit 4	O.D. Slip of Govind Jha
5.	Exhibit 4/1	O.D. Slip of Amarnath Jha
6.	Exhibit 4/2	O.D. Slip of Bhramadeo Jha
7.	Exhibit 4/3	O.D. Slip of Shivnath Jha

6. Apart from that, the prosecution also examined C.W.-1/ Dr. Anil Kumar Jaiswal and C.W. 2/ Sanjay Kumar Jha son of Ram Nath @ Ramanjee Jha and further Exhibit



3/1 is marked through him who allege to identify the writings of the doctor.

7. On behalf of the defence, the followed documents were brought on record:-

<u>Sl.No.</u>	<u>Exhibits</u>	<u>Details</u>
1.	Exhibit A	Certified copy of FIR in G.R. No. 698 of 89 dated 19.10.1989
2.	Exhibit B	Certified copy of order in M.R. Case No. 190 of 90 dated 08.12.1998
3.	Exhibit C	Notice of (584 of 1989) in M.R. Case No. 94/84 of 1989
4.	Exhibit D &D/1	Certified copy of the judgment of the trial Court No. 101 of 1998 and 75 of 2001 respectively

8. On considering the entire oral and documentary evidence available on record, the trial Court has convicted the appellants as stated supra. It is pertinent to mention that during the course of trial, accused/ Jivnath Jha died and the criminal case against Jivnath Jha was abated.

9. Being aggrieved by the judgment and order sentence, the present appeal was preferred by the appellants.

10. I.A. No. 01 of 2018 is filed in this criminal appeal under Section 394(2) of CrPC, bringing to the notice



of the Court that Appellant No. 2 i.e. Uma Kant Jha died during the pendency of the appeal on 15.05.2014 and the death certificate issued by Mukhiya of Gram Panchayat Raj, Anharathari (South) Block of Madhubani District was also filed as Annexure-1.

11. On perusal of the death certificate, it is evident that appellant No. 2 Uma Kant Jha died on 15.05.2014, therefore, the criminal appeal against him stands abated.

12. As there is no representation for the appellants, this Court appointed Shri Akash Kumar as *Amicus Curiae* to assist the Court.

13. Heard Shri Akash Kumar the Learned *Amicus Curiae* and Smt. Anita Kumari Singh the Additional Public Prosecutor for the State.

14. It is urged by the *Amicus Curiae* that the primary allegations were against Jivnath Jha who alleged to have attacked P.W. 8 and 9 with Farsa for which they sustained grievous injuries. Further allegation was that Umakant Jha i.e. appellant No. 2 hit Shivnath Jha/ P.W. 9, when he tried to protect Ramnath Jha both the accused i.e.



Jivnath Jha and Umakant Jha are no more and the case against them stood abated. It is further contended by the *Amicus Curiae* that except for the vague allegation i.e. all other accused assaulted the injured i.e. P.Ws. 3, 7, 8 and 9 and one Govind Jha, no specific overt-act were stated against them. Furthermore, the Injury Reports of the O.P.D Slips of alleged Injury Report, do not disclose that these injuries were sustained with blunt object and, therefore, the benefit of doubt has to be extended to the appellants.

15. It is further contended by the *Amicus Curiae* that as per the case of the prosecution, Jivnath Jha and Ramnath Jha started abusing each other and there was a scuffle between both the parties. For which case and counter case were filed, but the trial Court ignored the counter case preferred by the appellants. However, Fardbeyans of each parties disclose that the time of occurrence as 05:00 P.M. for the same incident. Exhibit-A is the FIR which disclose that appellants have preferred a report against P.Ws. 8 and 9.



16. It is further contended by the Learned *Amicus Curiae* that a false case was instituted because of previous enmity of the land dispute and prayed to set aside the judgment of trial Court by acquitting the appellants.

17. On the other hand, the Learned Additional Public Prosecutor contended that the medical evidence corroborates with the oral evidence of P.Ws. 7 to 9 and therefore, prayed to confirm the judgment of the trial Court.

18. The point for determination in the appeal is that:-

(I). Whether the trial court is right in convicting the appellants for the charges levelled against them?

(II). Whether the prosecution is able to prove the guilt of the appellants beyond reasonable doubts?

19. The cardinal principles of criminal jurisprudence are:-

It is for the prosecution to prove the guilt of the accused beyond all reasonable doubt and the accused shall be presumed to be innocent till the guilt is proven. Further the burden is always on the prosecution to prove the



guilt of the accused and it is for the prosecution to connect the crime with the accused. It is necessary to re-appreciate the oral and documentary evidence of the trial Court, in order to determine the points of appeal.

20. Admittedly, P.Ws. 1 and 3 were declared hostile as they did not support the case of the prosecution.

21. Exhibit-1, Formal FIR was marked through P.W. 2/ Chandeshwar Chaudhary, an advocate clerk. It is quite surprising to note as to how the formal FIR was marked through an advocate clerk. How does an advocate clerk is competent to identify the contents of FIR. Documents can only be marked by a person, who has knowledge/ acquaintance with the contents of the document or if he is one of the counterpart to the document or if he is one of the author of the document. In the present case, the advocate clerk recognizes the writing of Shri I.K. Thakur the Station House Officer and the trial Court has accepted the evidence of an advocate clerk and marked the document as Exhibit-1.



22. At this juncture, it is relevant to rely on the judgments of Hon'ble Division Bench of this Court in the case of **Sukhi Yadav v. The State of Bihar** reported in **2014 SCC OnLine Pat 5721** wherein their Lordships have held as follows:-

“9. We fail to appreciate as to which law permits such a thing and how a Judge of standing of Additional Sessions Judge could do such a thing. First thing we must notice that P.W.9 is an Assistant to an Advocate Clerk, who has nothing to do with the case, yet the Court permits him to step in as a prosecution witness. Moreover we have coined such witness as “Sankat Mochan witness”. What more scandalized us is the trial court, which permits a person, who was nobody, to pick up the entire case diary from paragraphs 1 to 121 and prove it and make it a part of evidence. The court then proceeds further to mark it as Ext. 3 and then the court sits down to read entire case-diary in order to appreciate evidence. Nothing can be more scandalous. No such step is permissible in law. The trial court forgot the true import of



section 172(2) of the Code of Criminal Procedure (for short 'Cr.P.C. '), which clearly states that any criminal Court may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. What the trial court has done is using it as evidence, making it as evidence and appreciating it as evidence, which is wholly impermissible in law. The diary can never be proved in a Court, for it cannot be used as evidence. No part of diary can be proved because if any one is proving it for the purposes of making it an evidence, such act is prohibited by law. The law contemplates a reference to the diary only for the purposes of refreshing memory or contradicting the statements of witnesses in the Court with the statements made during the course of investigation. Only when it is used for refreshing memory, the procedure as envisaged under section 145 of the Evidence Act is to apply but that does not mean that diary can become evidence. Law prohibits such thing. We have found in cases after cases that in the State of Bihar, the Sessions Courts do not know or understand this distinction in law and in



cases after cases the statements of witnesses recorded under section 161 of the Cr.P.C. are proved as evidences or other materials in the case-diary are proved as evidence and marked as exhibits. This is a practice that should end, the sooner the better. The other thing is that as to who is permitted to prove a document. It appears that in this State every Tom, Dick and Harry, the expression we have formed now “Sankat Mochan Witness”, could come and prove any official document. In this case, an Assistant to Clerk of an Advocate, who has nothing to do in the case, has been permitted by the trial court to prove the entire case-diary and mark it as exhibit. This practice is deprecated and it must come to an end. A person, who is author of a document or in absence of author, which absence has to be explained, a person familiar with the handwriting of the author can only prove the document. The procedure adopted by the trial court is unknown to law. No sooner this practice ends than better it would be.”



23. The above citations squarely applied to the facts of the case. Their Lordships have held that a person who is author of the document or in absence of the author, whose absence has to be explained, a person familiar with the hand-writing of author can only prove the documents. Their Lordships have further held that the procedures adopted by the trial Court is unknown to law and such practices have to be ended.

24. Further, in the case of **Ajay Kumar Yadav Vs. State of Bihar** reported in **2016 SCC OnLine Patna** in Para-8, their Lordships have held that:-

“8. The Learned trial Court has dealt with the evidence adduced, at the trial, threadbare. The most important witness, the driver, namely, Rajesh Ram (PW-3), said to be present, at the place of occurrence, was crucial in determining the facts so that the case of the prosecution could have been proved beyond reasonable doubt, but he has become hostile to the extent that he has denied to have any knowledge about the incident. The evidence of PW-4, PW-5 and PW-6, being the three



sisters with a double barrel gun. PW-2 is a hearsay witness and PW-1 is the father of the informant, who has stated that his brother, Ramesh Yadav fired shot by his gun at the rear wheel of the tractor; whereas, accused Vijai Yadav fired from the gun belonging to Adalat Yadav, whereupon children sustained injuries on their leg. He has deposed that his father had partitioned the land which was not proper. It has also been deposed by this witness that though the police had seized the tractor and pellets, the same were released later on. He has further deposed that his son, Ajay, had sustained injuries on his leg. The informant (PW-7) has deposed that the driver was sitting on the seat and he, along with his minor sisters, was pushing the tractor. His uncle, accused Ramesh Yadav, fired on the wheel of the Tractor and uncle Vijai Yadav has fired upon him and his sister, as a result thereof, they sustained injuries. PW-8 is the doctor, who has examined the injured persons and found the injuries to be simple in nature and has not found fire-arm injury on the persons of the injured sisters of the informant. PW-9 is an Advocate



clerk, who has been described, as Sankat Mochan witness, and, therefore, his statement has no evidentiary value.”

25. Their Lordships have held that an Advocate Clerk, who has been described as Sankat Mochan witness, and, therefore, his statement has no evidentiary value.

26. P.W. 4 Kishor Jha, his evidence disclose that on the date of occurrence at about 05:00 P.M., he heard an uproar and reached the house of P.W. 8, and saw P.W. 8 lying in unconscious state and also found P.W. 9 with injuries on his head. At the first instance he tried to take Shivnath Jha/ P.W. 9 on his bicycle for treatment but after hearing screams he left Shivnath Jha/ P.W. 9, returned back and saw Ramnath Jha with severe cut injuries on his leg and also saw Jivnath Jha attacking Ramnath Jha. The evidence of P.W. 4 is far from the contents of the Fardbeyan. As per the fardbeyan of P.W. 9 i.e. Jivnath Jha attacked Ramnath Jha and when Shivnath Jha tried to interfere in order to protect his brother Ramnath Jha, Shivnath Jha was also assaulted by Jivnath Jha. The evidence of P.W. 4 narrates a different story and this Court finds it quite contradicting



with the contents of the evidence of the fardbeyan. Therefore, the evidence of P.W. 4 cannot be relied upon.

27. The evidence of P.W. 5 i.e. Sohan Mishra also disclose that the occurrence took place at around 5.00 P.M. and on hearing the uproar, he reached the house of Ramnath Jha/ P.W. 8 and saw Ramnath Jha and Jivnath Jha abusing each other. Further Jivnath Jha hit Ramnath Jha on his leg with sharp edged weapon. Later he hit Shivnath Jha on his hit with farsa/ sharp edged weapon, who was trying to protect Ramnath Jha. His evidence further disclose that the other accused persons attacked Amarnath Jha, Shivnath Jha, Govind Jha and one more person with Lathi and that blood spilled over the place of occurrence and also he saw 22-25 persons witnessing the incident. In his cross-examination, it is specifically admitted by P.W. 5 that by the time he reached the spot, he saw Ramnath Jha and Shivnath Jha in injured state. The evidence of this witness can only be accepted to a certain extent as he did not witness the entire incident. P.W. 5 also did not speak about any specific overt act by the appellants against the injured.



28. Ramkripal Yadav/ P.W. 6 also testified that the Fardbeyan is in the handwriting of one I.K. Thakur, the then S.I. of Andharathadi P.S. which is Exhibit-2. P.W. 6 is also an advocate clerk. The principle which applies to P.W. 2 is also applicable to P.W. 6. His evidence cannot be taken on record, as he is not the author of the Fardbeyan and he is not a competent person to identify the handwriting of the S.I. of Andhrathadi PS. Therefore, the evidences of P.W. 2 and P.W. 6 are nowhere helpful for the prosecution.

29. P.W. 7 is Brahmdeo Jha, one of the injured in this case. It is relevant to note that the place of occurrence, as per the Fardbeyan is narrated as front of the house of Shivnath Jha. But as per the evidence of P.W.-7 the place of occurrence is at a tri-junction road where he allege to witness Jivnath Jha assaulting Ramnath Jha by means of Farsa. This witness has changed the place of occurrence from “in front of the house of Ramnath Jha” to “a tri-junction road.” His evidence do not disclose about Jivnath Jha assaulting Shivnath Jha/ P.W. 9 who alleged to come to protect his brother Ramnath Jha. His examination-in-chief



only disclose that he along with Amarnath Jha/ P.W. 3 and Govind Jha went to rescue Ramnath Jha on that the appellants Premnath Jha and Vinod Jha assaulted them with stick. The presence of Shivnath Jha at the place of occurrence is not at all found the evidence of P.W. 7. In his cross-examination, he admits about the counter case filed against Shivnath Jha by the appellants, also stated that blood was spilled over on the land at many places.

30. The evidence of P.W. 8/ Ramnath Jha disclose that Shivnath Jha/ P.W. 9 is his younger brother. At 05:00 P.M. on the date of incident Jivnath Jha stopped him at his house and they had a conversation about the land, further the conversation escalated and Jivnath Jha stated that he will take away with his life, came with a farsa, and other accused also arrived with farsa and sticks and Jivnath assaulted him, on his left knee and Umakant Jha assaulted him on his neck by farsa and other persons attacked him with sticks, when Shivnath Jha came to rescue P.W. 8/ Jivnath also assaulted him with farsa and other accused persons assaulted him with sticks. It is further testified that



when they were going to hospital, then Jivnath Jha threw cot in the river and assaulted them with farsa. The motive of the incident was the land dispute. In his cross-examination, it was specifically admitted by P.W. 8 that on being assaulted, he fell unconscious and regained conscious after 3-4 days. Therefore, P.W. 8 can only testify to the extent of his assault as he become unconscious he cannot testify about the subsequent events, which took place. P.W. 8 once again admitted in his cross-examination that he cannot state as to what has happened about other persons, because he became unconscious. Further, he admitted that he along with his family members were arrayed as accused in the counter case.

31. As per the evidence of P.W. 8 there are two place of occurrence:-

The one where he was attacked at Andhrathadi and the other was at the side of the river. It is pertinent to mention that the fardbeyan only disclose about the incident which was alleged to have taken place in front of the house of Shivnath Jha i.e. the house of P.W. 9. The Fardbeyan is



very much silent about the 2nd incident which was alleged to have occurred beside the river.

32. The evidence of P.W. 9 i.e. Shivnath Jha/ informant disclose that he witnessed the conversation between Ramnath Jha and Jivnath Jha from the west side of the road adjacent to his house. As per the evidence of P.W. 9, the place of occurrence is west side of the road adjacent to his house and not his house. He testified that the accused Jivnath Jha abused his brother, stating that (I will kill you) and after that Jivnath Jha went to his house, returned back with farsa along with 7 other accused, all holding Lathis in their hands. Jivnath Jha hit Ramnath Jha with farsa and attacked below the knee of both his legs for which Ram Nath Jha fell down. When he went to protect Ramnath Jha, the accused also assaulted him with Farsa and further the accused person also hit Amarnath Jha, Brahmadeo Jha and Govind Jha with Lathis. In his cross-examination, it was admitted that other witnesses were his cousins and five cases were registered against each of the parties under



Section 144, 145 of Cr.P.C. and prior to this case there were no dispute between them.

33. As per P.W. 9, the place of occurrence was in the field of one Shobha Kant Mishra. The evidence of P.W. 9 further disclose that there were blood stains on cloths of Ramnath Jha and Shivnath Jha, but they were not seized by the police and blood was spilled at the place of the occurrence. It is pertinent to note that the place of occurrence was shifted from the house of Shivnath Jha to tri-road junction and from there to the field of one Shobha Kant Mishra by each of the prosecution witnesses as discussed supra. The prosecution has miserably failed to prove the place of occurrence.

34. It is also relevant to mention that C.W. 1 and 2 were examined before the Court as Court witnesses. The record reveals that Doctors who treated P.Ws. 8 and 9 listed in the memo of evidence but they were not examined as prosecution witnesses. After closure of the prosecution witnesses, a petition was filed by the Additional Public Prosecutor to examine Doctor, as Court witness and the trial



Court has examined Doctor, Anil Kumar Jaiswal as C.W. 1 (Court Witness) and Sanjay Kumar Jha, son of Ram Nath Jha as Court Witness No. 2. The procedure of examining prosecution witnesses as Court witnesses is unknown to law. As to why these witnesses were examined as Court witnesses, there is no proper explanation either in the docket orders of the trial Court or in the judgment.

35. The evidence of Doctor Anil Kumar Jaiswal, C.W. 1 disclose that he found the following injuries on P.W. 8:-

(I). Cut wound with sharp margin up to the bone with fracture of bone of the left leg with oozing blood, size 20 cm x 3 cm and patient was periphosal circulating failure shocks and was semi-conscious.

(II). Cut wound with sharp margin on the right leg above ankle joint of 4 cm x 2 cm.

(III). Cut wound on right leg near knee joint of 6 cm. X 3 cm.

36. According to the Injury Report, Injury No. is grievous which may be caused by a sharp cutting weapon



may be by farsa and rest of the injuries are simple, caused by sharp cutting weapon may be by Pharsa.

37. The Injury Report of P.W. 8 marked was not marked rather the carbon copy of the Injury Report was marked as Exhibit 3/1 through C.W. 2. who is son of Ramnath Jha. Admittedly, it is for the Court to mark the document through the author of the document or of that of the persons i.e. either by C.W. 1 or by P.W. 8. As to how the Exhibit was 3/1 marked through C.W. 2 was not at all explained by the prosecution or by the trial Court.

38. However, the Out Patient Department slips are marked as follows:-

Exhibit 3 is the O.D. Slip of Ramnath Jha.

Exhibit 4 is the O.D. Slip of Govind Jha.

Exhibit 4/1 is the O.D. Slip of Amarnath Jha.

Exhibit 4/2 is the O.D. Slip of Brhamdeo Jha and

Exhibit 4/3 is the O.D. Slip of Shivnath Jha.

39. It is pertinent to note that the injuries of other witnesses i.e. P.Ws. 3, 9 and Govind Jha were not testified by C.W. 1, except marking the O.P.D. Slips.



40. Marking of documents is quite different from heading the contents of the document, therefore, marking of the document alone cannot be said to prove the contents of the documents. Therefore, Exhibit 4, 4/1, 4/2, 4/3 cannot be considered to be taken onto the record.

41. It is relevant to mention that the appellants have also marked documents on behalf of the defence were marked i.e. Exhibit A, the certified copy of the FIR in GIR No. 698 of 1989 of Jhanjharpur, Police Station in Crime Case No. 58 of 1989 dated 19.10.1989 which disclose about the same incident received by the police station at 08:00 P.M. Exhibit-P is certified copy of M.R. 190 of 1990 dated 08.12.1998, Exhibit-C is the notice of M.R. Case No. 584 of 1989 which disclose that there was enmity between both the parties and for the same incident two FIRs were got registered, on behalf of the accused/ appellants as well as by the prosecution i.e. P.Ws. 8 and 9.

42. Admittedly, for the same set of incident there is a case and a counter case. Two different versions of the same incident resulting into two criminal cases generally



describe as case and counter case. The trial procedure of a case and cross cases is that both the cases either are to be taken up together or one after the other i.e. immediately after recording the evidence in one case, the other case has to be recorded and it is to be dealt with, by the same Court. The mandated procedures requires that once the entire evidence is completed in one case, evidence should be recorded in the other case and then after hearing the arguments in both the cases, the case are to be decided by the same judge on the same day by two different judgments. But the present judgment is very much silent, about the counter case. There is no material on record to show that, in the counter case, evidence was recorded and different judgments were pronounced by the trial Court on the same day.

43. The entire evidence of P.Ws. 8 and 9 who are said to be injured in this case disclose that accused Jivnath Jha has hacked them with the sharp edge weapon. Further, the evidence of P.W. 9 disclose that Umakant Jha have also assaulted them. Specific overt-acts were stated by the



prosecution witnesses against Jivnath Jha and Umakant Jha. None of the witnesses have stated specific overt-acts against the appellants. The Injury Reports also do not disclose that injuries that were sustained by the injured were with blunt objects. Therefore, this Court is of the considerable opinion that the prosecution version is under cloud and the place of occurrence was also not established. The prosecution has also failed to explain as to why the First Information Report/ Formal FIR and the Fardbeyan were got marked through advocate clerks i.e. P.Ws. 2 and 4, and why the Investigating Officer could not be examined. The non-examination of the Investigating Officer is fatal to the case of the prosecution.

44. The Learned trial Court has come to a conclusion that the testimonies of P.Ws. 8 and 9 coupled with the evidence of C.W. 1 and 2 is sufficient to prove the unlawful assembly and also of offence under Section 326 of IPC.

45. Such findings of the trial Court are liable to be set aside, as there is no medical evidence before the Court



to show that these appellants used Lathis for which the injured sustained blunt injuries. There is no material against these appellants to prove the offence either under Section 147 of IPC or of Section 326 read with 149 of IPC. The evidence of prosecution witnesses further disclose that there were more than 20-25 persons who witnessed the incident. But none of the independent witnesses were examined before the Court to establish that the appellants formed unlawful assembly and pursuant to that they assaulted the injured. In the absence of sufficient evidence, the trial Court ought not have convicted the appellants.

46. The Hon'ble Apex Court in **Indrakunwar Vs. State of Chhattishgarh reported in 2023 SCC OnLine SC 1364**, their Lordships evolved principles to be followed while framing questions under Section 313 examination which reads as follows:-

35. On perusal of various judgments rendered by this Court reveals the following principles, as evolved over time when construing such statements.

35.1. The object, evident from the Section itself, is to enable the accused to themselves explain any



circumstances appearing in the evidence against them.

35.2- *The intent is to establish a dialogue between the Court and the accused. The process benefits of the accused and aids the Court in arriving at a final verdict.*

35.3- *The process enshrined is not a matter of procedural formality but is based on the cardinal principles of natural justice i.e. audi alterum partem.*

35.4- *The ultimate test when concern with the complaints of the section is to inquire and ensure whether the accused got the opportunity to say his piece.*

35.5- *In such a statement, the accused may or may not admit involvement or any incriminating circumstance or may even offer an alternative version of events or interpretations. The accused may not be put to prejudice to any omission or inadequate questioning.*

35.6- *The right to remain silent or any answer to question which may be false shall not be used to his detriment being the sole reason.*

35.7- *This statement cannot found the sole basis of conviction and is neither a substance to or a substitute piece of evidence. It does not discharge but reduces the prosecution burden of leading evidence to prove its case.*



They are to be used to examine the veracity of the prosecution's case.

35.8- *This statement is to be read as a whole. One part cannot be read in isolation.*

35.9- *Such a statement, as not on oath, does not qualify as a piece of evidence under Section 3 of Indian Evidence Act, 1872, however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution.*

35.10- *The circumstances not put to the accused while rendering his statement under Section R to be excluded from consideration as no opportunity has been offered to him to explain them.*

35.11- *The Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defense. The defense so articulated must be carefully scrutinized and considered.*

35.12- *Non-compliance with the section may cause to the prejudice to the accused and may impede the process of arriving at a fair consideration.*

47. In Prem Chand Vs. State of Maharashtra reported in 2023 5 SCC 522 their Lordships also evolved



the guidelines for examination of the accused under Section 313 of Cr.P.C. which held as follows:-

15. What follows from these authorities may briefly be summarized thus:

15.1. Section 313CrPC [clause (b) of sub-section (1)] is a valuable safeguard in the trial process for the accused to establish his innocence.

15.2. Section 313, which is intended to ensure a direct dialogue between the court and the accused, casts a mandatory duty on the court to question the accused generally on the case for the purpose of enabling him to personally explain any circumstances appearing in the evidence against him.

15.3. When questioned, the accused may not admit his involvement at all and choose to flatly deny or out-rightly repudiate whatever is put to him by the court.

15.4. The accused may even admit or own incriminating circumstances adduced against him to adopt legally recognized defences.

15.5. An accused can make a statement without fear of being cross-examined by the prosecution or the latter having any right to cross-examine him.

15.6. The explanations that an accused may furnish cannot be considered in isolation but have to be considered in conjunction with the evidence adduced by the prosecution and, therefore, no conviction can be premised solely on the basis of the Section 313 statement(s).



15.7. Statements of the accused in course of examination under Section 313, since not on oath, do not constitute evidence under Section 3 of the Evidence Act, yet, the answers given are relevant for finding the truth and examining the veracity of the prosecution case.

15.8. Statement(s) of the accused cannot be dissected to rely on the inculpatory part and ignore the exculpatory part and has/have to be read in the whole, inter alia, to test the authenticity of the exculpatory nature of admission.

15.9. If the accused takes a defense and proffers any alternative version of events or interpretation, the court has to carefully analyse and consider his statements.

15.10. Any failure takes a defense the accused's explanation of incriminating circumstances, in a case, may vitiate the trial and/or endanger the conviction.

48. Bearing the well settled principles in mind, every criminal Court proceedings under Clause (b) of Sub-section (1) of Section 313 of Cr.P.C. has to shoulder the onerous responsibility of scanning the evidence after the prosecution closes its case, to trace the incriminating circumstances in the evidence against the accused and have to prepare relevant questions to extend opportunity to the accused to explain any such circumstances in the evidence



that could be used against him and for the facts that are in the special knowledge of the accused. If the accused has not satisfactorily explained then also it cannot be a conclusive guilt against him but it become relevant, while considering the totality of the circumstances. The criminal justice system ensures a fair and speedy trial and the facts within the domain of the Court are to be explained to the accused and opportunity has to be given to them to explain about the incriminating evidence.

49. In the present case, it does not appear from the records that the incriminating evidence was put to the appellants. Taking into consideration the entire material on record it can be constrained that there is no sufficient corroborating evidence i.e. either oral and documentary to convict the appellants.

50. Having perused the entire record and having considered the entire material, facts and circumstances of the case, this Court find that the trial Court has committed an error in convicting the appellants, without their being any proper evidence against them. The prosecution has



miserably failed to prove the guilt of the appellants beyond reasonable doubt and, therefore, conviction and sentence of the trial Court in Sessions Trial No. 30/155 of 1992/2002 dated 18.03.2024 on the file of Fast Track Court No. 1, Madhubani is hereby set aside. The record reveals that all the appellants were enlarged on bail as per the order dated 10.05.2004.

51. In result, the Criminal appeal is allowed and the bail bonds of the appellants shall stand cancelled.

(G. Anupama Chakravarthy, J)

Manish/-

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