

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.25 of 2004**

1. Arun Kumar S/o Vishwanath Prasad
2. Dinesh Prasad S/o Vishwanath Prasad
3. Nandlal Prasad S/o Vishwanath Prasad
4. Ravindra Prasad S/o Vishwanath Prasad
5. Birendra Mahto S/o Late Prayag Mahto
6. Bindd Mahto S/o Barho Mahto

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr.Abhas Chandra, Amicus Curiae
For the Respondent/s	:	Mr.Mukeshwar Dayal, A.P.P.

CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY

ORAL JUDGMENT

Date : 24-10-2024

1. The appeal is arising out of Sessions Trial No. 02 of 2002/52 of 1998 on the file of First Addl. Court of Sessions Fast Track Court, Nawadah dated 19.12.2003. It is important to note that initially the charges were framed against 13 accused persons for the offences punishable under Section 307 read with Section 149 of the Indian Penal Code. After full-fledged trial, the trial Court has convicted all the accused persons for the offences punishable under Section 323 read with Section 149 of the Indian Penal Code, but only sentenced six of the accused



i.e. the appellants herein for rigorous imprisonment for a period of three months and rest of the accused were directed to be released on probation of good conduct on executing a bond of Rs. 2,000/- with two sureties, to the like some amount to maintain peace to be of good behaviour for a period of two years.

2. Being aggrieved by the sentence and judgment dated 19.12.2003, Sessions Trial No. 02 of 2002/52 of 1998, on the file of First Addl. Court of Sessions Fast Track Court, Nawadah the present appeal is preferred by six of the appellants. P.W. 2, Kailash Prasad, is the informant in this case. The Fardbeyan of the informant disclose that on 17.04.1997, at around 09:00 AM, P.W. 2 (informant) and his brother-Indradeo Prasad (P.W. 5) were returning from their fields and when they reached the house of co-villager i.e. Mahendra Mahto, all the accused persons armed with weapons, formed an unlawful assembly surrounded them, started abusing them and stated that since they had filed a case, they would be taken to task. In order to save themselves P.W. 2 and P.W. 5



entered into the house of Mahendra Mahto, however the accused persons forced Mahendra Mahto to throw them out of the house or else they would damage his house. On that Mahendra Mahto requested P.W. 2 and P.W. 5 to leave the house. When P.W. 2 and P.W. 5 came out of the house of Mahendra Mahto, the accused persons assaulted them with Lathi over the head and body and on intervention of the villagers they all fled away.

3. The Fardbeyan of P.W. 2 was recorded at 10:00 AM in Damaul Police Station and was later forwarded to Pakariverma Police Station. Basing on the Fardbeyan, a case was registered against all the accused in Crime No. 41 of 1997 for offences punishable under Section 147, 148, 149, 323, 341 and 307 of the Indian Penal Code.

4. The Criminal Law was set in motion based on the Fardbeyan of P.W. 2. The Investigating Officer took up the investigation and later submitted a charge-sheet against all the accused persons for the offences punishable under Section 307 read with Section 149 of the Indian Penal Code.



5. During the course of trial charges were framed against all the accused, who were 13 in number for the offences punishable under Section 307 read with Section 149 of the Indian Penal Code. The charges were read over and explained to them. All the accused denied the charges and claimed to be tried.

6. During the course of trial, on behalf of the prosecution, P.Ws. 1 to 8 were examined. However, P.W. 1, 3, 6 and 7 turned hostile and did not support the case of the prosecution. P.W. 1, 3, 6 and 7 are said to be the eye witnesses to the incident. They all stated in unison that they had no knowledge of the incident and they did not witness the incident. P.W. 2 and 5 are brothers and injured in the case. P.W. 4 is co-villager who corroborated the evidence of P.W. 2 and 5. P.W. 8 is the doctor who examined P.W. 5, Indradeo Prasad, and found following injuries:-

1. Transverse bruise on back left side
near scapula 4" X 1"



2. Bruise on left arm lateral side in
middle 3" X 1"

P.W. 8 also examined Kailash Prasad/informant
and found the following injuries:-

1. Lacerated wound on skull in
occipital region – 1½"

2. Bruise on right arm 4.5" X 1"

3. Oblique bruise on right scapular
region 3" X 1"

4. Bruise on right shoulder 1.5 X 1"

5. Vertical bruise on left scapular
region, medical border – 6" X 1"

It is specifically testified by the doctor that the
injuries were caused by a hard and blunt object, which
were simple in nature, and that the age of the injuries was
within six hours.

7. P.W. 2 and 5 testified that on the date of
occurrence, at about 09:00 AM while they were returning
home from their fields, they reached the house of
Mahendra Mahto where all the accused surrounded them



and started abusing them. On that they entered into the house of Mahendra Mahto to save their lives, but all the accused persons forced Mahendra Mahto to send them out. As soon as they came out the accused persons assaulted them with Lathi resulting in injuries that caused them to fall down. Both the witnesses i.e. P.W. 2 and 5, stated that they were taken to police station, where the statement of P.W. 2 was recorded, in which they put their signatures (Exhibit 1 and 1/1). The evidence of P.W. 2 disclose that he named ten persons, out of thirteen accused but did not named Anil Kumar, Bijul Mahto and Suresh Kumar. P.W. 5 testified and identified all 13 accused persons.

8. On perusal of the record, it is evident that there are many contradictions in the evidence of P.W. 2 and 5 that do not go to the root of the case of the prosecution. The evidence of the doctor clearly disclose that both the injured sustained simple injuries.

9. The Learned *Amicus Curiae*, Mr. Abhash Chandra, contended that no specific overt-act were made



by the injured against each of the appellants, and the trial court sentenced only six of the accused for imprisonment while the rest of the them were released on probation. Therefore, the same benefit has to be extended to the present appellants as well. It is further contended that the Fardbeyan disclose that all the accused assaulted P.W. 2 and 5 with an intention to kill them. If at all, all the accused had assaulted them, they would have sustained more than 13 injuries each, however, injury report reveals that P.W. 2 sustained five injuries and P.W. 5 sustained only two injuries since there were no specific overt-acts against each of the accused, the trial court cannot convict six of the appellants while leaving the rest unconvicted/unsentenced. Therefore, it is prayed to set aside the conviction and sentence imposed by the trial court.

10. On the other hand, the Learned Additional Public Prosecutor contended that there is no error or irregularity in the order passed by the trial court and further, contended that charges were framed under Section



307 read with Section 149 of the Indian Penal Code but the trial court found all the accused persons guilty of the offences punishable under Section 323 read with Section 149 of the Indian Penal Code. Further contended that as the evidence of P.W. 2 and 5 disclose the names of the accused, the trial court took a lenient view in convicting them for the offences punishable under Section 323 r/w Section 149 of the Indian Penal Code, while directing the rest of the accused to be released on probation of good conduct upon executing bond of Rs. 2,000/- of two sureties, therefore, prayed to confirm the judgment.

11. It is specific contention of the Learned *Amicus Curiae* that if for the same set of facts, benefit of doubt are extended and probation has been granted to some of the accused, the same should also be extended to the appellants.

12.In this context, it is necessary to rely upon the judgment of the Apex Court in *Ashok alias Dangra Jaiswal Vs. State of Madhya Pradesh* reported in (2011)5



SCC 123 wherein their Lordships have held in para 15 as under:-

“15. At this stage, it may be noted that though the other two accused, namely, Kanki alias Vishnu and Guddu Maharaj are not before us, we see no reason why the benefit of this judgment may not be extended to them as well. From the possession of Kanki alias Vishnu, the recovered quantity was 100 gm and from Guddu Maharaj 35 gm. All the three accused including the appellant were tried together and the other two accused Kanki alias Vishnu and Guddu Maharaj have also been given the same sentence as the appellant. The lapses in the prosecution and the facts and circumstances that have been noted above and that have weighed with us for setting aside the conviction of the



appellant apply equally to the case of Kanki alias Vishnu and Guddu Maharaj. It will be unjust, therefore, to let them rot in jail even while allowing the appeal preferred by the appellant. (See Raja Ram v. State of M.P. [(1994) 2 SCC 568 : 1994 SCC (Cri) 573] , Dandu Lakshmi Reddy v. State of A.P. [(1999) 7 SCC 69 : 1999 SCC (Cri) 1176] , State of Haryana v. Sumitra Devi [(2004) 12 SCC 322 : 2005 SCC (L&S) 346] , Mangoo v. State of M.P. [(2008) 8 SCC 283 : (2008) 3 SCC (Cri) 487] , Bachan Singh v. State of Bihar [(2008) 12 SCC 23 : (2009) 1 SCC (Cri) 307] .) We, accordingly, direct that their conviction and sentence be also set aside and they too along with the appellant be released forthwith unless anyone of them is required in connection with any other case.”



13. In the case of *Yogesh alias Sachin Jagdish Joshi Vs. State of Maharashtra* reported in *(2008)10 SCC 394*, their lordships have held at Para 28 as under:-

“28. We are, therefore, of the view that in the light of the subsequent events, namely, the orders of the High Court dated 7-7-2006 in Criminal Writ Petitions Nos. 1283-84 of 2006, discharging the appellant's mother, sister and two close associates, Accused 2, 4, 11 and 12 respectively; order dated 30-4-2007 passed by this Court dismissing the special leave petition preferred by the State against order dated 7-7-2006 and order dated 14-5-2007 passed by the Sessions Judge, Satara, discharging the father (A-1) of the appellant, stated to be the mastermind behind the entire conspiracy, for offences under Sections 120-B and 302 IPC, on same set of



circumstances and accusations, no sufficient ground survives to proceed against the appellant for the aforementioned offences.”

The judgments relied by the Learned Amicus Curiae squarely applies to the facts and circumstances of the present case.

14. On perusal of the entire record, it is evident that P.W. 2 and 5 did not make any specific overt-act against each of the accused. They have testified that all the accused have attacked them with long sticks/lathi, for which they sustained injuries. The evidence of P.W. 4, Dayanand Prasad, also disclose that all the accused committed assault against the injured persons and later fled away from the place of occurrence.

15. Admittedly, the evidence of Mahendra Mahto would be the best evidence for the prosecution, where the injured had hidden themselves in the house, prior to assault, but Mahendra Mahto (P.W. 6) turned hostile and did not support the case of the prosecution. It is pertinent



to note that the Investigating Officer was not examined in this case. As per the evidence of P.W. 4 Mahendra Mahto blood spilled over the place of occurrence. The evidence of P.W. 4 do not disclose which of the accused hit which of the injured persons. Except for the bald allegation that all the accused assaulted the injured P.W. 2 and 5, there is no other corroborating evidence before the Court to prove the offence under Section 323 of Indian Penal Code.

16. Admittedly, there is no separate sentence or punishment for Section 149 of the Indian Penal Code.

17. Section 149 of the Indian Penal Code envisages that 'every member of the unlawful assembly is guilty of the offence committed in prosecution with the common object'. If the conviction is granted for Section 323 of Indian Penal Code, the same punishment would be applicable to every member of the unlawful assembly who has formed part of the unlawful assembly.

18. Section 323 of Indian Penal Code envisages that 'whoever, except in the case provided for under Section 334, voluntarily causes hurt, shall be punished



with imprisonment of either description for a term which may extended to one year, or with fine which may extend to one thousand rupees, or with both'. The offence for which punishment has been granted is a bailable offence and the punishment can be either by way of imprisonment or by way of fine or with both.

19. On perusal of the record, it is evident that appellants surrendered before the Court and were released on bail on the same day, the details are as follows:-

1. Appellant No. 1 Arun Kumar surrendered on 26.04.1997 and got released on bail on the same day.

2. Appellant No. 2 Dinesh Prasad surrendered on 30.04.1997 and got released on the same day.

3. Appellant No. 3 Nandlal Prasad surrendered before the Court on 03.05.1997 and got released on bail on the same day.



4. Appellant No. 4 Ravindra Prasad surrendered before the Court on 03.05.1997 and got released on bail on the same day.

5. Appellant No. 5 Birendra Mahto surrendered before the Court on 25.04.1997 and got released on bail on the same day.

6. Appellant No. 6 Binod Mahto surrendered before the Court on 05.05.1997 and got released on the same day.

20. The date of conviction is 19.12.2003 and all the appellants were taken to custody and they have sent to undergo the sentence. The record reveals that the bail was granted by this Court to the appellants on 13.01.2004 directing them to furnish personal bonds of Rs. 10,000/- with two sureties to the like sum of each in the Sessions Trial No. 02 of 2002/52 of 1998 on the file of First Additional Court of Sessions Fast Track Court, Nawadah dated 19.12.2003. Therefore, the record reveals that all the appellants have undergone rigorous imprisonment for a period of 26 days. As there were no specific overt-act



against each of the accused and the trial court extended the benefit of probation the other accused. This Court is of the considered view that the benefit extended to the other accused has also to be extended to the appellants. Further, the imprisonment undergone by the appellants is more than sufficient.

21. With the above observation the judgment of the Trial Court is modified extending the benefit given to the other accused to that of the appellant and the imprisonment undergone by the appellants is more than sufficient.

22. With the above observation the appeal is here by disposed of.

23. The bail bond of the appellants shall stand cancelled.

(G. Anupama Chakravarthy, J)

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