

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.554 of 2002

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1. Nanhak Ram S/o Late Rajpati Ram R/o vill - Kushumbhara, P.O.- Kushumbhara, P.S.- Surajpura, Distt.- Rohtas. (case against the appellant was abated vide Honourable Court ordet dated 08-01-2025)
 2. Uma Shanker Ram S/o Late Lalit Ram R/o vill - Kushumbhara, P.O.- Kushumbhara, P.S.- Surajpura, Distt.- Rohtas. (case against the appellant was abated vide Honourable Court ordet dated 06-03-2025)
 3. Haridya Nand Ram S/o Late Rajpati Ram R/o vill - Kushumbhara, P.O.- Kushumbhara, P.S.- Surajpura, Distt.- Rohtas.
 4. Padarth Ram S/o Late Shiodat Ram R/o vill - Kushumbhara, P.O.- Kushumbhara, P.S.- Surajpura, Distt.- Rohtas. (case against the appellant was abated vide Honourable Court ordet dated 08-01-2025)
 5. Ram Ashish Ram S/o Late Pachakouri Ram R/o vill - Kushumbhara, P.O.- Kushumbhara, P.S.- Surajpura, Distt.- Rohtas.
 6. Rama Nand Ram S/o Late Mogal Ram R/o vill - Kushumbhara, P.O.- Kushumbhara, P.S.- Surajpura, Distt.- Rohtas. (case against the appellant was abated vide Honourable Court ordet dated 06-03-2025)
 7. Jawahar Ram S/o Late Bhikhari Ram R/o vill - Kushumbhara, P.O.- Kushumbhara, P.S.- Surajpura, Distt.- Rohtas. (case against the appellant was abated vide Honourable Court ordet dated 08-01-2025)
 8. Ramdeo Ram S/o Sri Bhuti Ram R/o vill - Kushumbhara, P.O.- Kushumbhara, P.S.- Surajpura, Distt.- Rohtas. (case against the appellant was abated vide Honourable Court ordet dated 06-03-2025)
 9. Ram Jiwan Ram S/o Shio Lochan Ram R/o vill - Kushumbhara, P.O.- Kushumbhara, P.S.- Surajpura, Distt.- Rohtas.
 10. Radha Krishna Ram S/o Late Pachkouri Ram R/o vill - Kushumbhara, P.O.- Kushumbhara, P.S.- Surajpura, Distt.- Rohtas. (case against the appellant was abated vide Honourable Court ordet dated 08-01-2025)
 11. Basawan Ram S/o Late Ramdhari Ram R/o vill - Kushumbhara, P.O.- Kushumbhara, P.S.- Surajpura, Distt.- Rohtas. (case against the appellant was abated vide Honourable Court ordet dated 08-01-2025)

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Arun Kumar Singh, *Amicus Curiae*
For the Respondent/s : Ms. Anita Kumari Singh, APP



CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY

ORAL JUDGMENT

Date : 10-04-2025

1. The criminal appeal is arising out of the judgment of conviction and sentence dated 06.09.2002 on the file of the Learned Sessions Judge, Rohtas at Sasaram, in Sessions Trial No. 336 of 1984, arising out of Bikramganj Surajpura P.S. Case No. 45 of 1983, wherein all the appellants (11 in number) were convicted for the offences punishable under Sections 307 r/w 149, and under Sections 436 r/w 149 of Indian Penal Code, and were sentenced to undergo rigorous imprisonment for a period of five years. Further, appellant No. 7, Jawahar Ram was convicted for the offence punishable under Section 307 of IPC and was sentenced to undergo rigorous imprisonment for a period of seven years. Further, appellant Nos. 4, 3, 11 and 2, namely, Padarath Ram, Hridyanand Ram, Baswan Ram and Umashankar Ram respectively, were convicted for the offence punishable under Section 436 of IPC and were sentenced to undergo rigorous imprisonment for a



period of five years. Further, appellant Nos. 6, 10 & 5 i.e., Rama Nand Ram, Radha Krishna Ram and Ram Ashish Ram were convicted under Section 27 of the Arms Act and were sentenced to undergo rigorous imprisonment for a period of three years. Lastly, appellant No. 9, Ram Jivan Ram was convicted under Section 323 of IPC in addition to other offences and was sentenced to undergo rigorous imprisonment for a period of six months.

2. This appeal was filed in the year 2002. During the pendency of the appeal, some of the appellants passed away. On 01.01.2019, this Court received a report from the Superintendent of Police, Rohtas, intimating that appellants Nos. 1, 4, 7, 10, and 11, i.e., Nanhak Ram s/o Late Rajputi Ram, Padarath Ram S/o late Shiodat Ram, Jawahar Ram s/o late Bhikhari Ram, Radha Krishna Ram s/o late Pachkowri Ram and Basawan Ram s/o late Ramadhari Ram had died, and the report was also accompanied by copies of their respective death certificates. Accordingly, vide order dated



08.01.2025, this Court abated the appeal as against appellant Nos. 1, 4, 7, 10 and 11.

3. Further, due to a lapse of five years in hearing the appeal, this Court again called for a report from Superintendent of Police, Rohtas as to the status of the remaining appellants. In compliance with the order of this Court, the Superintendent of Police, Rohtas, submitted a detailed report dated 20.02.2025, stating that appellant No. 2, Uma Shankar Ram s/o Late Laljit Ram, appellant No. 6 Rama Nand Ram s/o Late Mangal Ram, and appellant No. 8 Ramdeo Ram s/o Bhuti Ram had passed away. Accordingly, vide order dated 06.03.2025, this Court abated the criminal appeal as against appellant Nos. 2, 6, and 8. However, appellant No. 3, Hridya Nand Ram s/o Rajpati Ram, appellant No. 5, Ram Ashish Ram s/o Pachakouri Ram, and appellant No. 9, Ram Jivan Ram s/o Shio Lochan Ram are alive. Hence, this Court proceeded to hear the arguments only in respect of appellant Nos. 3, 5 and 9.

4. Initially, the case was registered against against 13 accused persons however, during



the course of trial, two of the accused, namely Bhikhari Ram and Mogal Ram passed away. Accordingly, the criminal case against Bhikhari Ram and Mogal Ram was abated by the trial Court vide order dated 12.02.2001 and 01.05.1983 respectively.

5. The case of the prosecution is that on 18.03.1983, at about 05:30 PM, Shri Nivas Dixit (P.W. 9), who was a teacher at Swami Bashudevacharya Sanskrit college, Kusumhara, gave his fardbeyan before Natwar's inspector contending that at about 10:30 AM, P.W. 1/ Jagarnath Pandey, asked him about the whereabouts of Janardan Pandey (P.W. 4). In response, P.W. 9 enquired about the reason for such a query. During the said conversation, P.W. 1 informed him that some *Harijans* were planing near a banyan tree, to set fire to the hut and kill the *Brahmins*. Upon hearing this, P.W. 9 decided to report the matter to the village head. Later, when the village head arrived, P.W. 9 informed him about the said incident. The village head then stated that he would go to Surajpura Police Station to inform the



police and subsequently left to the police station. Around 11:00 AM, P.W. 2/ Harendra Pandey, arrived to the hut and began conversing with P.W. 9 and others. At that particular point of time, P.W. 12, Sidhnath Sharma, was sleeping inside the hut. At around 11:30 AM, appellant No. 1, armed with a rifle and bombs, entered into the hut and ordered P.W. 9 and others to come out, for which P.W. 9 and others came out of the hut. At that moment, appellant No. 4, Padarath Ram, appellant No. 3, Hridya Nand Ram, and Bhikhari Ram (since deceased during the trial) shouted at them and ordered that they will be killed, and abused them in vulgar language. Thereafter, appellant No. 1, Nanhak Ram, exploded a bomb and appellant No. 7 Jawahar Ram, struck P.W. 2/ Harendra Pandey, on his head. Subsequently, Bhogal Ram (died) along with Ramjivan Ram assaulted him with sticks. Further, appellant Nos. 6, 10 and 5, holding country made guns and rifle and opened fire towards the village, in order to prevent any villager from reaching the place of incident. The fardbeyan further disclose that several other individuals, armed with



weapons were also present, but P.W. 9 was unable to identify them. P.W. 2/ Harendra Pandey, sustained a bleeding injury on his head and fell unconscious on the ground. When P.W. 9 confronted the accused and questioned them as to why they were committing such a crime, appellant No. 9/ Ramjivan Ram, and Bhogal Ram (died) assaulted P.W. 9 with sticks.

6. The fardbeyan further discloses that P.W. 9 left P.W. 2/ Harendra Pandey, who was in an unconscious state and attempted to flee from the place. However, appellant No. 1 surrounded the prosecution witnesses and threatened to shoot them if they tried to escape. Consequently, they remained at the spot out of fear. Appellant Nos. 4, 3, 2 and Bhikhari ram (died) again surrounded the witnesses and snatched a silver watch and sixty rupees. Appellant No. 9/ Ramjivan Ram, struck P.W. 2 on his back with a stick. All the accused also assaulted the school peon/ P.W. 13, and took away the belongings of the college, including clothes belonging to the prosecution witnesses. The principal of the college was also present at that time and witnessed the



incident. The fardbeyan further disclose that the motive behind the incident was to grab the land belonging to the college. it also contains a list of the articles that were snatched away by the appellants, totally 27 items. As P.W. 2/ Harendra Pandey, was unconscious, P.W. 9 was compelled to give the statement before the police.

7. Basing on the statement of P.W. 9, dated 18.03.1983 at 10:30 PM, FIR was lodged vide Criminal Case No. 45 of 1983 on the file of Bikramganj Surajpura Police Station, for the offences punishable under Sections 147, 148, 149, 307, 379, 324, 436, 437, 323 of Indian Penal Code and under Sections 3 and 5 of the Explosive Substances Act.

8. After completing of the investigation, a charge-sheet was filed against all the appellants for the aforesaid offences. The trial Court framed charges against 13 accused persons, for the offences punishable under sections 436 r/w 149, 307 and 379 of IPC on 06.08.1998. Further, appellant No. 6/ Rama Nand Ram, appellant No. 10/ Radha Krishna Ram and appellant No. 5/ Ram Ashish Ram were charged for



the offences under Section 27 of the Arms Act and charges were framed against appellant Nos. 1 to 11 for the offences punishable under Section 307 r/w 149 of IPC on 24.01.1984. Subsequently, on 19.06.1993, the trial Court framed an additional charge against appellant No. 7/ Jawahar Ram for the offence punishable under Section 307 of IPC and on the same day, appellant No. 4/ Padarth Ram, appellant No. 3/ Hridya Nand Ram, appellant No. 11/ Basawan Ram, appellant No. 2/ Uma Shanker Ram and Bhikari Ram (died) were also charged for the offence punishable under Section 436 of IPC, and the trial Court also framed a charge against appellant No. 9/ Ram Jivan Ram, for the offence punishable under Section 323 of IPC. The charges were read over and explained to the appellants, to which all the appellants pleaded not guilty and claimed to be tried.

9. During the course of trial, the prosecution has examined altogether fifteen witnesses i.e., P.W. 1 to 15. P.Ws. 5 and 13 were declared hostile. However, P.Ws. 3, 7, 8 and 15 were



formal witnesses through whom, exhibits were marked. On completion of the evidence of prosecution witnesses, the appellants were examined under Section 313 of Cr.P.C.

10. On appreciation of the entire oral and documentary evidence on record, the trial Court convicted all the appellants for the offences as aforesaid.

11. It is pertinent to mention that, in view of the death of the other appellants, the arguments were heard only with respect to appellant Nos. 3, 5 and 9 i.e., Hridya Nand Ram, Ram Ashish Ram and Ram Jiwan Ram respectively.

12. As there was no assistance from the Learned counsel for the appellants, this Court was constrained to appoint Shri Arun Kumar Singh as *Amicus Curiae*.

13. Heard Mr. Arun Kumar Singh, the Learned *Amicus Curiae* and Ms. Anita Kumari Singh, the Learned Additional Public Prosecutor.

14. The points for determination in this appeal are :-



(i) Whether the prosecution was able to prove the guilt of the appellants for the charges levelled against them beyond reasonable doubt?

(ii) Whether the trial Court was right in convicting the appellants for the charged offences?

15. It is not necessary to reiterate the entire oral and documentary evidence and the same shall be discussed to the extent required.

16. The evidence of prosecution witnesses, in brief, are that P.W. 1/ Jagarnath Pandey, is the person who informed the informant about the conspiracy allegedly hatched by members of *Harijans* to set fire to the hut of the college. P.W. 2/ Harendra Pandey, is the alleged eye witness and injured in the case. P.W. 3/ Kapildev Singh S/o Ram Sundar Singh, is a formal witness who identified the signature of the informant on the fardbeyan. The fardbeyan was marked as Exhibit-1. P.W. 4/ Janardan Pandey, is the Mukhiya of the village and his evidence is hearsay in nature as he did not witness the alleged incident. P.W. 5/ Madhusudhan Sharma is an eyewitness but turned hostile during the trial. P.W.



6/ Harihar Prasad Pandey is also a hearsay witness. P.W. 7/ Shiv Prasad Mishra, is the witness to the seizure list, which was marked as Exhibit 2. Exhibit-2 is a carbon copy of the original seizure list. The material objects seized through Exhibit-2 including one dhoti, one baniyan, and a pillow cover containing bloodstains, which were alleged to have been seized from P.W. 2 at Natwar Hospital. P.W. 8 is also a witness to the seizure list (Exhibit 2), and his signature was marked as Exhibit 2/1. P.W. 9/ Srinivas Dixit is the informant and also an injured witnesses, who was allegedly assaulted with a stick. P.W. 10/ Dr. Rajeshwar Thakur, examined P.W. 2, i.e., Harendra Pandey and found injuries. Exhibit-3 is the carbon copy of the original injury report. Exhibit-5 is the injury slip of Harendra Pandey (P.W. 2), which was alleged to have been issued by P.W. 11, the Investigating Officer.

17. Further, the record reveals that the statement of Harendra Pandey was recorded on 20.03.1983 which has been referred to as the second fardbeyan in the case, i.e., Exhibit-4. The injury



report of Harendra Pandey (PW 2) is Exhibit-6. The injury report of P.W. 9/ Srinivas Dixit, is Exhibit-6/1. The injury report of P.W. 12/ Sidhnath Sharma is Exhibit-6/2. The injury report of Heera Lal Singh is Exhibit-6/3. Exhibits 6, 6/1, 6/2, 6/3 were marked through P.W. 14 i.e. Dr. Diwakar Prasad Singh. Although the Injury report was marked, it is admitted by P.W. 13 that his statement was not recorded by the police during course of investigation. Therefore, as to how, P.W. 13 was referred to the hospital and how his injury report, i.e., Exhibit 6/3, come onto record was not at all appreciated by the trial Court. P.W. 15/ Kapildev Singh, is an advocate clerk. It is relevant to mention that P.Ws. 3 and 15 is the same person, i.e., Kapildev Singh s/o Ram Sundar Singh. As to why Kapildev Singh was examined twice; once as P.W. 3 and again P.W. 15, is best known to the prosecution and the trial Court. The said fact disclose that the trial Court deviated the procedure as contemplated by law. As per the law laid down by the Indian Evidence Act, a person can be examined as a witness only once; the same person cannot be



examined twice as a different witness. If at all, the prosecution intended to re-examine P.W. 3, it ought to have filed a petition under Section 311 of Code of Criminal Procedure, to recall the witness either to mark documents through him or to record additional oral evidence. The procedure, as adopted, by the trial Court is unknown to law.

18. It is also relevant to mention that the record reveals that for the same incident, there was a case and a counter case. The counter case was filed in the afternoon on the same day alleging that the prosecution witnesses have attacked them and they are the aggressors. Exhibit 8 is the certified copy of the order in case No. 1918 M/82, dated 22.08.1983, passed by the Learned Exclusive Magistrate. Exhibit 8/1 is the certified copy of the judgment in Sessions Trial No. 338 of 1986, which was preferred by the appellants against prosecution witnesses, for the offences punishable under Section 436 of IPC, wherein the trial Court held the prosecution witnesses were not guilty. However, the judgment disclose that the alleged incident occurred



on 18.03.1983, at about 06:30 PM, i.e., on the same day as the incident, in the present case. The said judgment was delivered by the trial Court on 05th May, 1992. It is also evident that the trial Court did not follow the procedure for disposing of a case and its corresponding a counter case.

19. In case of ***Nathi Lal v. State of Uttar Pradesh, reported in 1999 Cr.L.J 139*** of the Hon'be Apex Court, their Lordships have held as follows:-

We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both the cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the



evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other.

20. The ratio laid down by the Hon'ble Apex Court is binding on all the trial Courts. However, in this case, the trial Court erroneously deviated from the procedure and delivered the Judgment in the counter case on 5th May, 1992 which was preferred by the appellants, acquitting the prosecution witnesses. It is also pertinent to point out that the Investigating Officer was not examined in this case. Generally, the non-examination of the Investigating Officer is not fatal to the case of prosecution, but in a case and counter case, the evidence of Investigating Officer plays an important



role. It is for the prosecution to bring it on the record, the place of occurrence, the genesis of the incident and who were the aggressors. In the absence of such evidence, there is no material available on record to show the place, time and motive of the occurrence.

21. The Learned Amicus Curiae has rightly argued that in the absence of any proper evidence regarding the genesis of the occurrence or the connection between case and counter case, the trial Court could not have found the appellants guilty. On perusal of the fardbeyan, it is evident that several persons witnessed the occurrence, but they could not reach the place to protect the prosecution witnesses, as the appellants had opened fire in the air, in order to threatened them. Therefore, it could be construed that there is no corroboration of the independent witnesses.

22. It is argued by the Learned Additional Public Prosecutor that the evidence of P.W. 2 who was alleged to be injured, inspires confidence of the Court and that the trial Court did not commit any



error in convicting the appellants, therefore, she prayed to confirm the judgment of the trial Court.

23. On perusal of the entire record, it is also evident that the incident was reported by P.W. 1 and 9 to P.W. 4/ Janardan Pandey, the head of village, who subsequently went to the police station to inform the authorities about the conspiracy of the appellants. However, the evidence of the P.W. 4 also disclose that P.Ws. 9 and 5 informed him that an incident might take place, as the people had gathered under the banyan tree. Based on that information, he went to Surajpura Police station, to ensure that no incident occurs. The said information was received by him at about 10:30 AM, and he returned to village by 01:00 PM. By that time, the incident took place. As per the fardbeyan of P.W. 9, the information was received at 10:30 AM, and he intimated the same to P.W. 4 and the incident took place at 11:00 AM. Since, the investigating Officer was not examined, this Court cannot assess the distance between the police station and the place of occurrence to determine the time it would have



taken by P.W. 4 to report the incident. However, the FIR disclose that the distance between the place of occurrence and the police station was 8 KM. The evidence of P.W. 4 is very much silent as to the mode of transport used by him, to reach the police station. In the cross examination, it is specifically admitted by P.W. 4 that the accused had filed a counter case with respect to the same incident in which, he was also arrayed as an accused. He further testified that when he returned to the place of occurrence along with the police, but police did not record his statement, or inspect the place of occurrence. His evidence further disclose that his statement was never recorded by the police and despite the absence of his statement under Section 161 Cr.P.C., P.W. 4 was examined as a witness before the Court.

24. On perusal of the list of the witnesses appended to the charge-sheet, it is evident that only nine persons were listed as prosecution witnesses. However, the prosecution has examined 14 witnesses. The record does not reveal whether petition under Section 311 of the Cr.P.C. was filed, to



record the evidence of P.W. 4 as he was not arrayed as witness in the list of witnesses appended to the charge-sheet.

25. In Criminal Petition No. 3177 of 2024, the Karnatka High Court also relied on the judgment of the Hon'ble Apex Court, in the case of **Nathi Lal Vs. State of U.P** (supra) which is as follows:-

8. The Hon'ble Supreme Court in the case of NATHI LAL & OTHERS VS STATE OF U.P. - (1990) Supp. SCC 145, has laid down certain procedures to be followed by the Courts in a case and counter case. The judgment was followed in the subsequent judgment in the case of STATE OF M.P. Vs. MISHRILAL - (2003)9 SCC 426, and the Hon'ble Supreme Court has held that the case and counter case should be tried together by the same Court irrespective of the nature of offence involved. The rational behind this is to avoid conflicting judgment over the same incident because if cross cases are allowed to be tried by two Courts separately, there is likelihood of conflicting judgments.



26. It is also pertinent to mention that the Hon'ble Apex Court has also reiterated the procedure to be adopted in a case and counter case, in the case of ***Sudhir and others Vs. State of M.P.*** reported in **(2001) 2 SCC 688**, which is as follow:-

8. It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called "case and counter-case" by some High Courts and "cross-cases" by some other High Courts. Way back in the nineteen hundred and twenties a Division Bench of the Madras High Court (Waller and Cornish, JJ.) made a suggestion (Goriparthi Krishtamma, In re [1929 MWN 881] that "a case and counter-case arising out of the same affair should always, if practicable, be tried by the same court; and each party would represent themselves as having been the innocent victims of the aggression of the other".

9. Close to its heels Jackson, J., made an exhortation to the then



legislature to provide a mechanism as a statutory provision for trial of both cases by the same court (vide Krishna Pannadi v. Emperor [AIR 1930 Mad 190 : 31 Cri LJ 461]). The learned Judge said thus:

“There is no clear law as regards the procedure in counter-cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished.”

10. We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code. The practical reasons for adopting a procedure that such cross-cases shall be tried by the same court, can be summarised thus: (1) It staves off the danger of an accused being convicted before his whole case is before the court. (2) It deters conflicting judgments being delivered upon similar facts. (3) In reality the case and the counter-case are, to all intents and purposes, different or conflicting versions of one incident.

11. In fact, many High Courts have reiterated the need to follow the said practice as a necessary legal



requirement for preventing conflicting decisions regarding one incident. This Court has given its approval to the said practice in Nathi Lal v. State of U.P. [1990 Supp SCC 145 : 1990 SCC (Cri) 638] The procedure to be followed in such a situation has been succinctly delineated in the said decision and it can be extracted here: (SCC pp. 145-46, para 2)

“2. We think that the fair procedure to adopt in a matter like the present where there are cross-cases, is to direct that the same learned Judge must try both the cross-cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross-case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross-case cannot be looked into. Nor can the Judge be influenced by whatever is argued in the cross-case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any



manner by the evidence or arguments urged in the cross-case. But both the judgments must be pronounced by the same learned Judge one after the other."

12. How to implement the said scheme in a situation where one of the two cases (relating to the same incident) is charge-sheeted or complained of, involves offences or offence exclusively triable by a Court of Session, but none of the offences involved in the other case is exclusively triable by the Sessions Court. The Magistrate before whom the former case reaches has no escape from committing the case to the Sessions Court as provided in Section 209 of the Code. Once the said case is committed to the Sessions Court, thereafter it is governed by the provisions subsumed in Chapter XVIII of the Code. Though, the next case cannot be committed in accordance with Section 209 of the Code, the Magistrate has, nevertheless, power to commit the case to the Court of Session, albeit none of the offences involved therein is exclusively triable by the Sessions Court. Section 323 is incorporated in the Code to meet similar cases also. That section reads thus:



“323. If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that court under the provisions hereinbefore contained and thereupon the provisions of Chapter XVIII shall apply to the commitment so made.”

13. The above section does not make an inroad into Section 209 because the former is intended to cover cases to which Section 209 does not apply. When a Magistrate has committed a case on account of his legislative compulsion by Section 209, its cross-case, having no offence exclusively triable by the Sessions Court, must appear to the Magistrate as one which ought to be tried by the same Court of Session. We have already adverted to the sturdy reasons why it should be so. Hence the Magistrate can exercise the special power conferred on him by virtue of Section 323 of the Code when he commits the cross-case also to the Court of Session. Commitment under Sections 209 and 323 might be through two different channels, but once they are committed their subsequent flow



could only be through the stream channelised by the provisions contained in Chapter XVIII.

27. The above ratio laid down by the Hon'ble Apex Court has to be strictly followed by the trial Courts. In view of the aforementioned facts and circumstances and in light of the judgment discussed above, it is evident that the procedure adopted by the trial Court in present case was flawed.

28. The evidence of P.W. 2 disclose that he was in the hut of the Sanskrit College on the date of incident and was speaking with P.Ws. 9 and 12. Upon hearing a noise from outside, they came out, and appellant No. 1/ Nanhak Ram abused him, and asked to vacate the hut, and also exploded a bomb. Nanhak Ram was carrying a rifle and had a towel wrapped around his neck. Then, appellant nos. 3 and 9 along with others, were holding sticks in their hands; however, appellants- Jawahar Ram and Ramdeo Ram were holding axes and spears, and appellant No. 5/ Ramashish Ram was holding a rifle.



29. In the present case, three appellants were convicted for the offences punishable under Section 436 r/w 149 of IPC and appellant Nos. 3 and 5 were also convicted under Section 307 r/w 149. Appellant No. 9 was convicted solely under Section 323 of IPC, and appellant No. 5 was further convicted under Section 27 of Arms Act. The weapons or the arms alleged to have been used by the appellants, were not produced before the Court as material objects. The mode of investigation is also unknown to this Court as the investigating officer was not examined. Except for the oral evidence of the witnesses, regarding the overtacts of the appellants, there is no other material on record. The injuries sustained by the injured, were not caused by firearm. As per the evidence of the witnesses, the appellants were holding arms, at the time of the incident, but there is no other material available before the Court to corroborate their version. It is also admitted by the prosecution witnesses that a counter case was filed against them, for the alleged incident.



30. The evidence of P.W. 2 further disclose that his elder father had given the land, for establishing the Sanskrit college, and the appellants intended to grab the said land. None of the prosecution witnesses testified before the Court that the hut was set on fire. Even the seizure report does not disclose about the recovery of any burnt articles. But the charge-sheet submitted by the investigation officer disclose that the hut was set on fire. In the absence of any material on record, such as material objects of documentary evidence, the trial Court convicted the appellants for the offence punishable under Section 436 of Indian Penal Code.

31. Section 436 of Indian Penal Code reads as follows:-

436. Mischief by fire or explosive substance with intent to destroy house, etc.- *Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as*



a human dwelling or as a place for the custody of property, shall be punished with [imprisonment of life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

32. As per the above section, it is for the prosecution to prove that mischief was committed by fire or by any explosive substance for the destruction of a building, which is ordinarily used as a place of worship, a human dwelling, or a place for the custody of the property. In the present case, the building alleged to have been destroyed, is not place of worship. None of the witnesses have testified that it is a human dwelling. However, the evidence of the witnesses disclose that the appellants intended to grab the land, on which the hut was being run as a Sanskrit college. Such a hut does not fall under the category of a place of custody of property so as to attract the offence under Section 436 of the Indian Penal Code.

33. In a criminal trial, it is for the prosecution to prove the guilt of the accused beyond



the reasonable doubt, and until guilt is proven, the accused shall be presumed to be innocent. Further, it is for the prosecution to connect the crime with the appellants. As stated above, there is no material before the Court to show that the hut, was set on fire, except the fardbeyan. The contents of the fardbeyan are required to be proved by the prosecution. The evidence of Srinivas Dixit (P.W. 9) is also crucial to prove the contents of the fardbeyan.

34. The evidence of P.W. 9 disclose that he was a teacher at the Sanskrit college, and that the incident took place on 18.03.1983 at about 11:30 AM. The appellants came to the Sanskrit college, asked them to come out, and some of the appellants threatened to kill them. Jawahar Ram attacked Harendra Pandey with an axe, while Bhogal Ram and Ram Jivan Ram hit him with sticks. Thereafter, Rama Nand Ram and Radha Krishna started firing towards the village, with their country-made guns. When he tried to obstruct the appellants, Bhogal Ram and Ram Jivan Ram hit him with a stick, as a result P.W, 9 sustained an injury on his head. Further, Nanhak



Ram threatened to shoot him, and the other appellants surrounded him and snatched his watch and Rs. 60 from his kurta. The professor and peon of the college, namely Sidhhnath Sharma and Heeralal Singh, were also assaulted by Bhogal Ram and Ram Jivan Ram. Subsequently, Padarth Ram, Hridayanand Ram, Uma Shankar Ram, Basawan Ram, and Bhikhari Ram set the hut on fire. His evidence further disclose that all the appellants took away goods from the hut, totaling to 27 items. Later, they were taken to Natwar Hospital and the police recorded their statements. On the same day, at around 10:30 AM, he was informed by P.W. 1 that some Harijans were planning to set the hut on fire, upon which he informed P.W. 4/ Janardan Pandey (Mukhiya), who in turn, went to the police station. The signature of P.W. 1 on the fardbeyan (Exhibit-1) was marked as Exhibit 1/1.

35. Admittedly, P.W. 1 is the author of Exhibit 1. However, Ext. 1 marked through an advocate clerk, i.e., P.W. 3, who had no knowledge about the contents of the fardbeyan. This Court has



time and again reiterated the judgments relating to the marking of documents and the procedure to be adopted by the Courts. However, it is necessary to once again reiterate the same in this judgment, as the same error has been committed by the trial Court.

36. At this juncture, it is relevant to rely on the judgment of this Court in the case of **Noor Hassan Ansari & Ors. v. The State of Bihar** passed in **Cr. Appeal (SJ) No. 68 of 2004** which reads as follows:-

15. It is pertinent to mention that followings are criteria for marking a document:-

In order to have a documents marked by the Court as an Exhibit, a party must satisfy the Court that there is sufficient material in order for the Court to arrive at a prima facie view that:-

“It is evident that in order to have the documents marked by the Court as Exhibits, a party must satisfy the Court that there is sufficient material in order for the Court to arrive at a prima facie view that :



(a) *The "contents" of the document are proved (i.e. the document exists).*

(b) *The signature or handwriting on the document, if any, are proved (i.e. the document is genuine).*

(c) *In some cases, the witness who seeks to tender the document in evidence has personal knowledge of the document (i.e. that the witness is in a position to prove the accuracy or truth of the contents of the document);*

(d) *The document is not inherently or ab initio inadmissible on some other legal ground (e.g. irrelevance, privilege, non-registration) and*

(e) *The document has been appropriately stamped, if so required by law.*

16. (i). *In order to prove contents of a document, the witness through whom the document is sought to be tendered must produce the document in court. The Evidence Act provides, in essence, that the "contents" of documents must ordinarily be proved by "primary" evidence.*

(ii). *As the second step in getting a document marked, the witness who introduces the document must identify the signature or handwriting on the*



document, if there is any. 19 The mere production of a document is not sufficient for the document to be marked as an exhibit.

(iii). Thirdly, in order to lay a foundation for marking a document, if the document contains any statement(s) of fact, and the party propounding the document relies on the truth or accuracy of those statements, then the witness. who tenders the document must demonstrate personal knowledge and the familiarity of the document.

(iv). Fourthly, in some cases, irrespective of a party's ability to satisfy the criteria set out above, a law might prohibit some documents from being considered admissible in evidence. Such documents cannot be marked in evidence. Once a document is marked, it becomes the part of the record but has to be considered by the Court about its admissibility and relevancy of the such document. Marking of document alone will not give any right to read the contents of the documents or about the admissibility of the documents."

17. Furthermore, Rule 58 of the Criminal Rules Of Practice and Circular



Orders, 1990 envisages about marking of exhibits which reads as follows:-

“58 Marking of exhibits:-

(1) Exhibits admitted in evidence shall be marked as follows:-

(i) if filed by the prosecution with the capital letter ‘P’ followed by a numeral, P1, P2, P3 and the like;

(ii) if filed by defence with the capital letter ‘D’ followed by a numeral, D1, D2, D3 and the like;

(iii) in case of Court exhibits with the capital letter ‘C’ followed by a numeral C1, C2, C3 and the like;

(2) All the exhibits filed by the several accused shall be marked consecutively.

All material objects shall be marked in Arabic numbers in continuous series as M.O. 1, M.O.2 and M.O.3 and the like, whether exhibited by the prosecution or the defence or the Court.”

18. This Court is unable to understand as to why the trial Court has not followed the procedure, while marking the Exhibits as per Rule 58 of Criminal Rules of Practice. Admittedly, the documents was said to be marked in ‘X’ series through P.W.-4.



37. As per the above criteria, the document i.e., fardbeyan (Exhibit 1) ought to have been marked through P.W. 9. There is specific evidence of P.W. 9 is that his watch was snatched and amount of Rs. 60 was also snatched by the appellant. However, surprisingly, the trial Court did not frame any charge under Section 379 of the IPC for the offence of theft. As stated supra, the Investigating Officer was also not examined and whether any seizure of watch and amount from the appellants occurred or not is not discussed in the impugned order. The judgment of the trial Court is very much silent regarding conviction or acquittal for the offence punishable under Section 379 of IPC. The trial Court entirely relied on the evidences of P.Ws. 1, 2, 9, 12 and 6 and to convict the appellants for the charges framed under Section 307, 149, 436, 109 and 323 of IPC against the appellant No. 9 and under Section 27 of the Arms Act against appellant No. 5. However, the evidence of P.W. 9 contradicts that of other witnesses on the aspect of whether the incident was witnessed. The fardbeyan of P.W. 9



clearly disclose that many villagers witnessed the the incident, but in the cross examination, it is testified by the P.W. 9 that none of the villagers were present at the time of incident. There is no evidence on record to establish that the burnt hut was indeed a Sanskrit college. The evidence of P.Ws. 1, 2, 9 and 6 disclose that hut which was allegedly set on fire, was a Sanskrit college. The prosecution has not made any effort to produce any documentary evidence to prove that the hut burnt in the incident, was a Sanskrit college sanctioned by the Government.

38. Admittedly, it is a case and counter case. There is no evidence before the Court to establish who were the actual aggressors in the incident. The counter case resulted in acquittal without following the due procedure of the law. The incident occurred in the year 1983, and the appeal is being heard after 42 years of the incident. As stated supra, the appeal is heard only against three appellants i.e., appellant Nos. 3,, 5 and 9.



39. As per the criminal jurisprudence, there can be only one fardbeyan, which sets the criminal law into motion i.e., after registration of the FIR. Once an FIR has been registered, all statements recorded during the course of the investigation are to be treated as statements under Section 161 of Cr.P.C. Trial Court or the prosecution cannot change the nomenclature of a Section 161 Cr.P.C. statement and treat it as second fardbeyan. It is noticed from the impugned judgment, that the trial Court treated the 161 Cr.P.C. statement of witness as second fardbeyan (exhibit 4) in the case, which ought not to have been done, and the same is contrary to the procedure prescribed under the Code of Criminal Procedure.

40. In this regard, it is very much apt to rely on the judgment of the Hon'ble Apex Court in ***Surendra Singh v. State of Uttaranchal***, reported in **(2006) 9 SCC 531**. Their Lordship has held as follows:-

13. In view of the acquittal of Trilok Singh and Rajendra Singh, the genesis of the occurrence cannot be said to have been proved. The appellant,



according to the prosecution case itself, did not act on his own. He is said to have acted on impulse and that too upon being instigated by his brother. From the evidence of PW 1 and PW 2, it is evident that not only there had been hot exchange of words, but also a scuffle. The learned trial Judge did not fully rely upon the evidence of PW 2. Thus, there was no witness who can be said to have proved the actual genesis of the occurrence.

41. In the case of ***T.T. Antony v. State of Kerala***, reported in **(2001) 6 SCC 181**, their Lordships have held as follows:-

18. An information given under sub-section (1) of Section 154 CrPC is commonly known as first information report (FIR) though this term is not used in the Code. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 CrPC, as the case may be, and forwarding of a police



report under Section 173 CrPC. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 CrPC. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the first information report — FIR postulated by Section 154 CrPC. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 CrPC. No such information/statement can properly be treated as an FIR and entered in the station house diary again, as it would in



effect be a second FIR and the same cannot be in conformity with the scheme of CrPC. Take a case where an FIR mentions cognizable offence under Section 307 or 326 IPC and the investigating agency learns during the investigation or receives fresh information that the victim died, no fresh FIR under Section 302 IPC need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H — the real offender — who can be arraigned in the report under Section 173(2) or 173(8) CrPC, as the case may be. It is of course permissible for the investigating officer to send up a report to the Magistrate concerned even earlier that investigation is being directed against the person suspected to be the accused.



42. As per the above ratio, any document filed after the registration of the FIR, can only be treated as a statement falling under Section 161 of Cr.P.C. and cannot be treated as fardbeyan. Further, the signature of a subsequent informant, cannot be obtained on the said statement.

43. In the present case, the genesis of the occurrence was not proved by the prosecution. Admittedly, there was a fight as it appears, and both sides were armed with weapons. Then all the appellants could not have been convicted for the offences punishable under Section 307 r/w 149 of IPC. The entire case ought to have been viewed by the trial Court from that perspective. The trial Court erroneously concluded that the appellants with intention and knowledge, attempted to commit murder of the prosecution witnesses, i.e., P.Ws. 2, 9 and 12. The prosecution has miserably failed to prove that these appellants attacked P.W. 2, 9 and 12 with an intention of taking their life. Therefore, this Court is of the considered view that the benefit of doubt has to be extended to these appellants as the



trial Court itself has not followed the due procedure in conducting the trial of both the case and counter case.

44. At this juncture, this Court cannot remit back the case to the trial Court for retrial as stipulated in the case of ***Nathi Lal v. State of Uttar Pradesh*** (supra). More than 42 years have been elapsed since the incident hence, remanding the matter to the trial Court does not arise. There is no iota of evidence on record to show that any bullets or pellets were recovered from the place of occurrence.

45. Furthermore, the place of occurrence or the injuries sustained by the injured does not establish the offence under Section 27 of the Arms Act or Section 436 of the IPC. This Court is of the considered view that the trial Court ought not to have pronounced the judgment in the counter case, prior to pronouncing the judgment in the present case. The procedure adopted by the trial Court caused prejudice to the appellants. In view of the errors committed by the trial Court and the failure of



the prosecution to prove the guilt of the appellants for the charges levelled against them, the benefit of doubt shall be extended to the appellants.

46. In result, the criminal appeal is allowed setting aside the judgment of conviction and sentence dated 06.09.2002 on the file of the Learned Sessions Judge, Rohtas at Sasaram in Sessions Trial No. 336 of 1984, arising out of Bikramganj Surajpura P.S. Case No. 45 of 1983. The conviction and sentence against the appellant No. 3 for the offence punishable under Sections 307 r/w 149 and 436 r/w 149 of IPC, for the appellant No. 5 for the offence punishable under Section 307 r/w 149 and 436 r/w 149 of IPC, 27 of the Arms Act, and further for the appellant No. 9, for the offence punishable under Section 307 r/w 149 and 436 r/w 149 of IPC and section 323 of IPC are hereby set aside and the appellant Nos. 3, 5 and 9 are hereby acquitted of the aforesaid offences.

47. The record reveals that the appellant Nos. 3, 5 and 9 were released on bail by this Court



vide order dated 31.01.2003. Hence, the bail bonds
of the appellant shall stand cancelled.

(G. Anupama Chakravarthy, J)

AMANDEEP/-

AFR/NAFR	NAFR
CAV DATE	N/A
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