

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.323 of 2003

1. Sanjay Singh, son of Rameshwar Singh, resident of village Simridih, P.S. Barsaliganj, District Nawada
2. Binod Singh, son of late Ramswarup Singh, resident of village Simridih, P.S. Barsaliganj, District Nawada

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Maria Nazir, Advocate
	:	Mr. Arun Kumar, Advocate
	:	Mr. Md. Anwar, Advocate
	:	Ms. Tooba Hera, Advocate
For the Respondent/s	:	Ms. Anita Kumari Singh, A.P.P.

CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT

Date : 05-02-2025

1. The appeal has been preferred by two of the appellants, namely Sanjay Singh and Binod Singh, against the judgment and order passed by the Ist Additional Sessions Judge, Nawada, in Sessions Trial No. 72 of 1992/59 of 1998, dated 03.05.2003. By this judgment, the trial court convicted appellant Sanjay Singh for the offence punishable under Section 307 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for a period of five years. Similarly, appellant Binod Singh was



convicted for the offence punishable under Section 324 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of one year.

2. Admittedly, there were four accused before the trial court. Although Accused Nos. 1 and 4 were also convicted for the aforementioned offences, the trial court, considering that there was no prior conviction against them and taking into account the fact that the trial had continued for twelve years, concluded that the prolonged pendency of the case had been a sufficient deterrent. Therefore, they were warned to be law-abiding citizens and subsequently released.

3. On perusal of the judgment, it is evident that these two appellants also endured the trauma of a twelve-year-long trial, just like Accused No. 1, Baleshwar Singh, and Accused No. 4, Shambhu Singh. However, the trial court did not provide any reasoning as to why Accused Nos. 1 and 4 were merely warned and released and while these appellants were sentenced for the charged offences.



4. Heard the Learned counsel, Ms. Mariya Nazir, representing the appellants, and the Learned Additional Public Prosecutor, Ms. Anita Kumari Singh, representing the State. Perused the records.

5. The Learned counsel for the appellants contended that if any benefit was given to the other two convicts, the same should have been extended to the appellants. She further argued that the Investigating Officer was not examined to establish the nature of the investigation conducted by him as to the place of occurrence, or the manner of the incident. Additionally, she contended that Exhibits 3 to 6 were marked through formal witnesses who had no connection with the facts of the case or known to the Investigating Officer, and the trial court ought not to have marked those exhibits, as the witnesses had no knowledge about the documents. She also argued that there were major discrepancies in the testimonies of the prosecution witnesses regarding the manner of the incident. Furthermore, none of the witnesses spoke about any intention or knowledge to commit the murder of the informant, i.e., P.W. 4, or of



P.W. 3/the injured. It is further contended that in the absence of proper evidence, the trial court ought not to have convicted appellant No. 1 for the offence punishable under Section 307 of the Indian Penal Code. She further contended that the punishment for the offence under Section 324 of the Indian Penal Code could be imprisonment of a fine, or both. The trial court, while releasing the other two accused, should have imposed a fine on these appellants, considering that they also endured an inordinately delayed trial for twelve years. Additionally, she contended that there was a contradiction between the ocular and medical evidence and, on this basis, prayed for the judgment to be set aside. Therefore, she prayed for the appeal to be allowed by setting aside the sentence.

6. In order to support her contentions she has relied on the following propositions of the Hon'ble Apex Court:-

i. Yoga Rani Vs. State by the Inspector of Police reported in 2024 SCC OnLine 2609



ii. Javed Shaukat Ali Qureshi Vs. State of Gujarat reported in (2023) 9 SCC 164

iii. Sivamani and Another Vs. State represented by Inspector of Police reported in 2023 SCC OnLine SC 1581

iv. Munna Lal Vs. State of UP reported in 2023 SCC OnLine SC 80

v. Abdul Sayeed Vs. State of Madhya Pradesh reported in (2010) 10 SCC 259

vi. Bhajan Singh alias Harbhajan Singh Vs. State of Haryana reported in (2011) 7 SCC 421

7. On the other hand, the Learned Additional Public Prosecutor, Ms. Anita Kumari Singh, contended that the injury report of the injured P.W. 4 and 3 i.e. Exhibit 2, 2/1 and 2/2 clearly disclose that the injured suffered grievous injuries which corroborates the oral evidence of doctor (PW 4) and therefore, she prayed to confirm the judgment of the trial Court.

8. The point for determination in this appeal is that (I) whether the prosecution has rightly proved the charges against these appellants beyond reasonable doubt ? (II) Whether the trial Court has



rightly convicted these appellants for the charged offences ?

9. In order to determine the above said points, it is just necessary to re-appreciate the evidences on record. The entire evidence need not be disclosed except to the extent required.

10. The criminal law was set into motion based on the fardbeyan of the injured, i.e., the injured/informant P.W. 4. The contents of fardbeyan disclose that on 05.01.1991, at about 8:00 AM, he came out of the house and saw his grandfather/Ram Krishan Singh (P.W. 3), sitting on a Chauki at the eastern door. He also saw Accused No. 1/Baleshwar Singh, armed with a Saif, Accused No. 2/Sanjay Singh, armed with a Garasa, Binod Singh armed with a Saif and Shambhu Singh armed with a Lathi, altercating with his grandfather. When P.W. 3 protested and asked them not to abuse him, Accused No. 1, Baleshwar Singh, instigated the others to kill Ram Krishan Singh (P.W. 3). Following this, Sanjay Singh (Appellant No. 2) assaulted P.W. 3 with a Garasa on his head for which, he fell down from the



Chauki. Further, Shambhu Singh assaulted Ram Krishan Singh with a Lathi on his hand. When P.W. 4 tried to protect his grandfather from the hands of the four accused, Binod Singh (Accused No. 3) assaulted the informant on the head with a Saif, with the intention to kill him and, Accused No. 1, Baleshwar Singh, assaulted the injured P.W. 4 using the Lathi portion of the Saif. The Fardbeyan further disclose that the incident was witnessed by one Pramod Kumar, Ramswarup Singh, Kapil Singh, and Avinash Shankar, who attempted to save the injured P.W. 3 and P.W. 4 from the hands of the accused. The motive for the occurrence was an old enmity between the families.

11. The fardbeyan of P.W. 4 was recorded at the State Dispensary, Warsaliganj, by ASI Harendra Singh of Warsaliganj Police Station at about 09:30 AM on 05.01.1991. Based on this, a case was registered as Crime No. 002 of 1991, dated 05.01.1991, on the file of Warsaliganj Police Station for offences punishable under Sections 341, 323, 324, 326, 452, 307, and 34 of the Indian Penal Code. ASI Harendra



Singh was the Investigating Officer in this case and, upon completion of the investigation, he filed a charge sheet against all the accused persons. Subsequently, cognizance was taken by the concerned Magistrate, and the case was committed to the Court of Sessions. The Learned District and Sessions Judge assigned the case to the IInd Additional Sessions Judge, Nawada, for trial. On 14.05.1998, charges were framed against all the accused solely for the offence punishable under Section 307 of the Indian Penal Code. The charges were read over and explained to all the accused persons, to which they pleaded not guilty and claimed to be tried.

12. During the course of trial on behalf of the prosecution, P.Ws. 1 to 7 were examined and Exhibits 1, 1/1, 2, 2/1, 2/2, 3, 4, 5 and 6 were marked. Later all the accused were examined under Section 313 of the Code of Criminal Procedure for the incriminating evidence found from the evidence of prosecution witnesses. All the accused denied the incriminating evidence and reported defence



evidence. On behalf of the defence D.W. 1 and 2 were examined and Exhibit A and B were marked. The details of the witnesses and the exhibits are as follows:-

Prosecution Witness No.	Prosecution Witness Name
P.W. 1	Avinash Shankar
P.W. 2	Kapildeo Singh
P.W. 3	Ram Kishun Singh
P.W. 4	Navneet Kumar
P.W. 5	Dr. Kiran Kumar Lal
P.W. 6	Raja Ram Singh
P.W. 7	Mithilesh Prasad

Sl. No	Exhibit	Exhibit Details
1.	Exhibit-1 to 1/1	Signature of Nawneet Kumar and Bipin Kumar on Fardbeyan
2.	Exhibit-2, 2/1 and 2/2	Injury Report
3.	Exhibit-3	Formal F.I.R.
4.	Exhibit-4	Affidavit
5.	Exhibit-5	Fardbeyan
6.	Exhibit-6	Case Diary Para No. 1 to 50
7.	Exhibit-A	Photo copy of Injury report of Ram Kishun Singh
8.	Exhibit-B	Report of Medical Board

Defence Witness No.	Defence Witness Name
D.W. 1	Anuj Singh
D.W. 2	Dr. Amrendra Kumar



13. It is important to note that the trial Court has released Accused No. 1 and 4 namely Baleshwar Singh and Shambhu Singh by admonishing them, though they were found guilty for the offences punishable under Section 307 of the Indian Penal Code. Therefore, it is just necessary to discuss the ingredients of Section 360 of the Code of Criminal Procedure in order to release any person on probation of good conduct or after admonition. Section 360 of the Code of Criminal Procedure reads as follows:-

“360. Order to release on probation of good conduct or after admonition.

1. *When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous*



conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour :

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his



opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

2. Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

3. In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two



years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

4. An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

5. When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu



thereof pass sentence on such offender according to law :

Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

6. The provisions of Sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

7. The Court, before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Courts acts or in which the offender is likely to live during the period named for the observance of the conditions.

8. If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original



offence, is satisfied that the offender has failed to observe any of the conditions of his recognisance, it may issue a warrant for his apprehension.

9. An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

10. Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders."

14. Section 361 of the Code of Criminal Procedure envisages that **special reasons to be recorded in certain cases** which reads as follows:-



“Where in any case the Court could have dealt with, -

(a) an accused person under section 360 or under provisions of the Probation of Offenders Act, 1958 (20 of 1958); or

(b) a youthful offender under the Children Act, 1960 (60 of 1960) or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

but has not done so, it shall record in its judgment the special reasons for not having done so.”

15. In order to release any person on probation, the first and foremost ingredient is that any person convicted should be below the age of 21 years. The second ingredient is that the offence punishable should be with fine only, or with imprisonment for a terms of seven years or less. The third ingredient is that a person under the age of 21 years or any woman convicted for an offence, not



punishable with death or life imprisonment. The last ingredient is that the convict must not have undergone any previous conviction. The court may having regard to age, character or antecedents of the offender, may release him on probation of good conduct. Further, the trial court instead of sentencing him at once to any punishment may direct him to be released on entering into a bond with or without sureties, to appear and receive sentence when called upon. During such period (not exceeding three years) and court may direct him to keep peace and good behaviour.

16. As per the provisions of Section 360 of the Code of Criminal Procedure, a person can be released after admonition if the punishment for the offence is a fine or if the punishment is imprisonment for a term of up to seven years or less. In the present case, the accused persons were charged with offences punishable under Section 307 of the Indian Penal Code and were found guilty of the said offences. The punishment under Section 307 of the Indian Penal Code includes imprisonment of either



description for a term that may extend to ten years, along with a fine. Moreover, if hurt is caused by such an act, the offender shall be liable to imprisonment for life. Despite the conviction for offences punishable under Section 307 of the Indian Penal Code, the trial Court released two of the accused, Baleshwar Singh and Shambhu Singh, after admonition. This Court finds that it is a grave error on the part of the trial Court for releasing accused 1 to 4 as the law does not permit the trial Court to do so.

17. P.W. 1, Avinash Shankar, is the grandson of P.W. 3 and the cousin brother of P.W. 4. His evidence disclose that on the date of occurrence, at 8:00 AM, while he was returning home, he witnessed Baleshwar Singh armed with a Saif, Sanjay Singh (Appellant No. 1) armed with a Garasa, Binod Singh (Appellant No. 2) armed with a Garasa, and Shambhu Singh armed with a Lathi entering the house of P.W. 3. On the instigation of Baleshwar Singh, Sanjay Singh (Appellant No. 1) assaulted P.W. 3 on his head with a Garasa, for which P.W. 3 to fell down from the



cot. Furthermore, Shambhu Singh (Accused No. 4) assaulted P.W. 3 on his right hand with a Lathi. When P.W. 4 attempted to protect P.W. 3 from the accused, Appellant No. 2, Binod Singh, assaulted him with a Saif, causing a severe head injury. Later, Baleshwar Singh assaulted P.W. 4 with the wooden part of the Saif. In cross-examination, P.W. 1 stated that during the incident, only one person, Pramod Singh, arrived to the place of occurrence. Blood was spilled at the place of occurrence as well as on the clothes of the injured persons. Furthermore, his evidence disclose that the injured persons were attacked only once, and no second injury was inflicted on any of the victims.

18. The evidence of P.W. 2, Kapildeo Singh, who is the brother-in-law of P.W. 3, disclose that on 05.01.1991, between 07:30 AM and 08:00 AM, while returning from nature's call, he reached the house of P.W. 3 and noticed an altercation and heard abuses from inside the house. Upon entering, he found the accused armed with weapons, and on the instigation of Baleshwar Singh (Accused No. 1), Appellant No. 1



gave a blow to P.W. 3 on the head. When P.W. 4 attempted to protect P.W. 3, Appellant No. 2, Binod Singh, hit P.W. 4 on the head. Furthermore, Baleshwar Singh (Accused No. 1) hit P.W. 3 on the right hand, with the wooden part of the Saif. His evidence further disclose that P.W. 3 fell unconscious and was taken to the police station and, from there, to the hospital.

19. A scrutiny of the evidence of P.W. 1 and P.W. 2 makes it evident that the incident took place inside the house of P.W. 3 and that P.W. 3 was initially taken to the police station and then to the hospital. However, their evidence contradicts the documentary evidence, i.e., the *fardbeyan* (Exhibit-5). According to the *fardbeyan*, the incident occurred outside the house, on the eastern side near the eastern door, and P.W. 4 also came out of the house and witnessed the occurrence. Thus, the place of occurrence, as stated in the evidence of P.W. 1 and P.W. 2, contradicts the contents of the *fardbeyan*. Furthermore, the motive stated by P.W. 2 was that a quarrel had taken place two days, before the incident



with respect to irrigation of wheat. However, the injured himself mentioned in the *fardbeyan* that the incident occurred due to an old enmity, but did not specify that a quarrel had taken place between Baleshwar Singh and the injured persons, two days before the incident.

20. P.W. 3, Ramkrishna Singh, sustained injuries. His evidence reveals that on 05.01.1991, at about 08:00 AM, while he was sitting at his gate, all the accused entered with weapons and started abusing him. When he tried to stop them, accused No. 1, Baleshwar Singh, instigated the others to kill him. Following this, Appellant No. 1 hit him on the head with a Garasa, for which he fell down from the cot. Furthermore, Shambhu Singh assaulted him with a Lathi on his left hand. When his grandson, P.W. 4, tried to protect him, Baleshwar Singh and Binod Singh attacked P.W. 4 with a Saif on his head. During the course of the incident, Avinash Shankar, P.W. 2, and Pramod Singh arrived to the place of occurrence and rescued him from the hands of the accused. Later, he lost consciousness and regained it, at



Nawada Hospital. His evidence further reveals that he was referred to PMCH, Patna, where he underwent treatment, and his left hand was not functioning properly. However, in cross-examination, P.W. 3 admitted that he lost consciousness immediately after the injury and regained it at 01:00 PM at Nawada Hospital. He specifically stated that "Daroga Ji" took him to Nawada Hospital, but he could not recall his name. Later, he was transferred to Patna Hospital. He also testified that P.W. 4 sustained only one injury on his head and that Baleshwar Singh assaulted P.W. 4 on his right hand.

21. The ocular evidence of P.W. 3 further disclose that he sustained an injury on the left side of his head. However, the injury report of P.W. 3 (Exhibits 2/1 and 2/2) states that a fracture was found on the right parietal bone. This contradiction between the ocular and medical evidence suggests that if there was indeed a blow on the left side of the head, the injury report should have indicated a fracture on the same side rather than the right side.



22. Furthermore, the evidence of P.W. 2 discloses that at the time of the scuffle, none of the villagers witnessed the incident, which contradicts the contents of the *fardbeyan*, as the names of villagers who allegedly witnessed the incident were mentioned in it. Additionally, the evidence of P.W. 1 disclose that only Pramod Kumar witnessed the incident, which also contradicts the contents of the *fardbeyan*.

23. On perusal of P.W. 3's evidence, it is clear that P.W. 3 became unconscious immediately after sustaining the injury. If he indeed became unconscious, he could not have stated the facts that took place after losing his consciousness. P.W. 3 testified about the incident as if he witnessed it with his own eyes. Therefore, the evidence of P.W. 3 can be considered only up to the point of sustaining the head injury and not for events that occurred afterward.

24. P.W. 4, Nawneet Kumar, is the injured and the informant, who gave his *fardbeyan* to ASI Harendra Singh at the State Dispensary, Warsaliganj.



His evidence reveal that all four accused entered their house, abused his grandfather/Ramkrishna Singh for which he protested. His evidence further discloses that all the accused were armed with weapons. Appellant No. 1 hit Ramkrishna Singh with a Garasa, hitting his arm, while Shambhu Singh assaulted him with a Lathi. When P.W. 4 rushed to protect his grandfather, Binod Singh assaulted him with a Saif, and Baleshwar Singh hit him on his right hand. Later, they all went to Warsaliganj Hospital for treatment. His signature on the fardbeyan is Exhibit 1, and the signature of one Bipin Singh is Exhibit 1/1. In cross-examination, P.W. 4 admitted that an F.I.R. was filed against him, for allegedly stealing a motorbike, in which the accused were the informants. He also stated that, one day before the incident, an oral altercation took place between the accused and them regarding the irrigation of wheat in the fields. He further testified that the Garasa and Saif were used only once and that he was assaulted, because he intervened to protect his grandfather. He also stated that blood was spilled on his clothes,



which were recovered by Daroga Ji, and that blood was also spilled on the walls of the house and that his statement was recorded at the hospital. His evidence further disclose that he sustained an injury on his right arm and received treatment for it.

25. P.W. 5, Dr. Kiran Kumar Lal, testified that on 05.01.1991, while he was at Warsaliganj Hospital, he examined P.W. 4 at 09:00 AM and found the following injuries:

(I) An incised wound on the left side of the occipital bone of the scalp, measuring $1\frac{1}{4}" \times \frac{1}{2}" \times \frac{1}{4}"$.

(II) Complaint of pain in the right hand.

26. Injury No. 1 was caused by a sharp-edge weapon, possibly a Saif, while Injury No. 2 was caused by a hard blunt object, possibly a Lathi. Both injuries were simple in nature, and their age was within six hours. The injury report of P.W. 4 is Exhibit 2.

27. Further the evidence of P.W. 5, the doctor, disclose that around 08:30 AM he examined



P.W. 3 and found the following injuries (I) Incised wound on the right parietal bone of scalp 3" X 1" x $\frac{3}{4}$ ", - opinion reserved till x-ray report. The injury sustained by P.W. 3 was caused by a sharp edged weapon such as Garasa and the age of the injury was within six hours. The injury report of P.W. 3 is exhibit 2/1. He further testified that the x-ray report of Ramkrishna Singh was received from Sadar Hospital, Nawada and it was found that there was a fracture of the right parietal bone in A/P and the lateral view. As such, he opined that the nature of injury sustained by Ramkrishan Singh is grievous and he identified his signature on the supplementary injury report i.e. Exhibit-2/2. In the cross-examination, he admitted that the depth of injury no. 1 of P.W. 4 is superficial and also admitted that the complaint of pain recorded was based on the version of the patient.

28. The evidence of P.W. 5 clearly discloses that P.W. 4, Nawneet Kumar, sustained two injuries, whereas the evidence of P.W. 4 indicates that he received an injury on his right hand only. The ocular evidence of P.W. 4 contradicts the documentary



evidence, i.e., Exhibit-2, regarding the number of injuries sustained by P.W. 4. Furthermore, the oral evidence of P.W. 2 and P.W. 3 also contradicts each other regarding the hospital. P.W. 3 testified that he was shifted to Nawada Hospital, whereas P.W. 4 stated that he was taken to Warsaliganj Hospital, which aligns with the fardbeyan. It can also be construed from the evidence of P.W. 4 that he was arrayed as an accused in the theft of a motorcycle, based on a report of by the accused persons, indicating enmity between the parties. Additionally, it is relevant to note that P.W. 4, for the first time, mentioned the scuffle that took place one day before the incident, which was not mentioned in the fardbeyan, despite P.W. 4 being its author. Moreover, the place of occurrence is not clearly established in this case. According to the fardbeyan, the incident took place outside the house, whereas the evidence of P.W. 1, P.W. 2, P.W. 3, and P.W. 4 suggests that the incident occurred inside the house, clearly indicating a discrepancy with regard to the place of occurrence.



29. It is relevant to note that the fardbeyan was recorded at 09:30 AM on 05.01.1991 at the State Dispensary, Warsaliganj, by ASI Harendra Singh. The evidence of P.W. 5 clearly discloses that he examined P.W. 3 at 08:30 AM and P.W. 4 at 09:00 AM, i.e., before recording of the fardbeyan, and issued Exhibits 2, 2/1, and 2/2. The evidence of P.W. 3 reveals that he was taken to Nawada Hospital immediately after the incident. However, the evidence of P.W. 4 remains silent on whether he was examined before or after the fardbeyan, as he did not mention the time. According to the injury report, P.W. 4 sustained two injuries, but his oral evidence states that he was hit on his right hand, when Baleshwar Singh assaulted him. Therefore, it can be inferred that the medical evidence contradicts the ocular evidence regarding the manner of the incident and also about the injuries sustained by P.W. 3 and P.W. 4.

30. P.W. 6 and P.W. 7, Rajaram Singh and Mithlesh Prasad, are advocate clerks through whom Exhibit-3 (Formal F.I.R.), Exhibit-4 (Affidavit of one



Pramod Kumar), and Exhibit 5, the fardbeyan and Exhibit – 6, the case diary of the investigating officer, were got marked. Admittedly, these two witnesses have no personal knowledge of either the witnesses or the documents..

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

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.

*19. 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."

20. The above citation squarely applies to the facts of the present 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 prove the documents. Their Lordships have further held that the procedures adopted by the trial Court are unknown to law, and such practices have to be ended.

32. On the other hand, on behalf of the defence, D.Ws. 1, 2, and 3 were examined. The evidence of D.W. 1 clearly disclose that on 05.01.1991, at 08:00 AM, he saw Ramkrishna Singh (P.W. 3) climbing the stairs. He was ahead of him, when P.W. 3 fell down from the stairs and sustained a head injury. One Tunuk Singh took P.W. 3 to Warsaliganj Hospital for treatment and later he informed his family members.



33. D.W. 2, Dr. Amrendra Kumar, testified that on 05.01.1991, while he was at PMCH, Patna, he received a photocopy of the injury report of P.W. 3. On 15.04.1991, he examined the patient, who had been referred from Nawada Hospital, and found a lacerated wound approximately 2½” in length and 1” in breadth, with a depressed bone fracture leading to the exposure of the dural layer, which was grievous in nature. The injury was caused by a hard blunt weapon. He further stated that such an injury could have been caused by a fall on the edge of the stairs. In the photocopy, he identified his signature, which was marked as Exhibit-A (with objection). In cross-examination, D.W. 2 testified that the wound was not stitched but was bandaged and that it was a lacerated wound. However, the record reveals that Exhibit-B is the report of the Medical Board, but it was not marked through any of the witnesses. Based on the evidence of D.W. 2, it can be inferred that the injuries sustained by P.W. 3 could have been caused by a fall from the staircase, which corroborates the evidence of D.W. 1.



34. It is necessary to go through the citations of the Apex Court which are relied by the Learned counsel for the appellants.

(I) ***Yogarani Vs. State by the Inspector of Police*** reported in **2024 SCC Online SC 2609** wherein the Lordships have held at paragraph 10:-

“10. *The Court cannot convict one accused and acquit the other when there is similar or identical evidence pitted against two accused persons. In the case of Javed Shaukat Ali Qureshi v. State of Gujarat reported in 2023 INSC 829, this Court has held that:*

“15. *When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the Court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This principle means that the Criminal Court should decide like cases alike, and in such cases, the Court cannot make a distinction between the two accused, which will amount to discrimination.”*



In the case on hand, allegations against the appellant being the same as made against Accused No. 3 & 4, the Courts below could not have convicted the Appellant while acquitting the other two.”

35. The above citation squarely applies to the facts and circumstances of the present case. However, in this case, the trial court found all four accused guilty but released Accused No. 1 and Accused No. 4 by admonishing them under Section 360 of the Code of Criminal Procedure. Meanwhile, the Appellants Sanjay Singh and Binod Singh were convicted and sentenced for offences punishable under Sections 307 r/w 34 of the Indian Penal Code.

36. As stated Supra, Section 360 of the Code of Criminal Procedure can be applied, if the offence charged, is punishable only upto seven years, and not for the offences punishable with imprisonment exceeding seven years. The trial Court has grossly erred in releasing the Accused No. 1 and 4 on admonition. However, the prosecution has not preferred any appeal against the release of the said accused and this Court cannot punish those accused who were already released on admonition. But the



same benefit cannot be extended to these appellants, as the punishment prescribed is above seven years. Therefore, this Court has scrutinized the entire evidence of the prosecution witnesses to arrive to a conclusion as to whether the prosecution was able to prove the guilt of the appellants for the charged offences. As discussed supra, the prosecution has miserably failed to prove that there was an intention and knowledge on the part of the appellants to kill P.W. 3. The person who instigated the commission of the offence was let off by the trial Court. None of the witnesses i.e. P.Ws. 1 to 4 testified regarding the knowledge and intention of these appellants to attempt to commit murder of P.W. 3 and 4.

37. It is relevant to discuss the citation of **Shivmani and Another Vs. State represented Inspector of Police** wherein their Lordships have analyzed and discussed the narration and reasoning under Section 307 of the Indian Penal Code at paragraph 7, 8 and 9 which reads as follows:-



“7. Learned counsel for the State submitted that the appellants being armed with knives (one each) clearly indicates that they intended to kill and it was only due to providence that their lives were saved.

ANALYSIS, REASONING AND CONCLUSION:

8. Section 307, IPC reads as under:

‘307. Attempt to murder.—

Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.



Attempts by life convicts.—

When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.

Illustrations

(a) A shoots at Z with intention to kill him, under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(b) A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such



firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(d) A, intending to murder Z, by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.'

9. *In State of Madhya Pradesh v. Saleem, (2005) 5 SCC 554, the Court held that to sustain a conviction under Section 307,IPC, it was not necessary that a bodily injury capable of resulting in death should have been inflicted. As such, non-conviction under Section 307,IPC, on the premise only that simple injury was inflicted does not follow as a matter of course. In the same judgment, it was pointed out that '...The*



court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section.’ The position that because a fatal injury was not sustained alone does not dislodge Section 307,IPC, conviction has been reiterated in Jage Ram v. State of Haryana, (2015) 11 SCC 366 and State of Madhya Pradesh v. Kanha, (2019) 3 SCC 605. Yet, in Jage Ram (supra) and Kanha (supra), it was observed that while grievous or life-threatening injury was not necessary to maintain a conviction under Section 307,IPC, ‘The intention of the accused can be ascertained from the actual injury, if any, as well as from surrounding circumstances. Among other things, the nature of the weapon used and the severity of the blows inflicted can be considered to infer intent.”

38. In the present case also P.W. 2 categorically stated that the injured were attacked only once. P.W. 3 himself is an injured party,



admitted that he was hit only on his right hand. However, the injuries mentioned by P.W. 5, the doctor, indicate that each of the injured sustained two injuries. The injury sustained by P.W. 4 was simple in nature, whereas the injury sustained by P.W. 3 was grievous. It is for the Court to determine whether the act, considering its result, was committed with intention or knowledge, thereby attracting the provisions of Section 307 of the Indian Penal Code. The prosecution has miserably failed to establish the guilt of the accused under Section 307 of the Indian Penal Code. The trial court, however, has made out an offence under Section 324 of the Indian Penal Code concerning the 2nd appellant, Binod Singh.

39. Admittedly, no charges were framed under Section 324 of the Indian Penal Code. However, the trial court is empowered to impose a sentence for a lesser offence, even if charges were not framed. As regards to the injury sustained by P.W. 3, his evidence indicates that he suffered an injury on the left side of his head, whereas the injury



report states that the injury was on the right parietal bone. Additionally, the ocular and oral evidence of the witnesses contradicts both the oral evidence of P.W. 5 and the documentary evidence/injury report.

40. On the other hand, the evidence of D.Ws. 1 and 2 corroborates as to fall of P.W. 3 from the staircase which completely discredits the story of the prosecution.

41. Furthermore, the Learned counsel for the appellants relied on the judgment of **Munna Lal Vs. State of UP** reported in **2023 SCC OnLine SC 80** which discusses about the non-examination of I.O. Their Lordships while deciding the case at paragraph 28, 39 and 40 have held as follows:-

“28. *Before embarking on the exercise of deciding the fate of these appellants, it would be apt to take note of certain principles relevant for a decision on these two appeals. Needless to observe, such principles have evolved over the years and crystallized into ‘settled principles of law’. These are:-*

(a). Section 134 of Indian Evidence Act, 1872, enshrines the well-recognized maxim that evidence has to



be weighed and not counted. In other words, it is the quality of evidence that matters and not the quantity. As a sequitur, even in a case of murder, it is not necessary to insist upon a plurality of witnesses and the oral evidence of a single witness, if found to be reliable and trustworthy, could lead to a conviction.

(b). Generally speaking, oral testimony may be classified into three categories, viz.:

- (i) Wholly reliable;*
- (ii) Wholly unreliable;*
- (iii) Neither wholly reliable nor wholly unreliable.*

The first two category of cases may not pose serious difficulty for the court in arriving at its conclusion(s). However, in the third category of cases, the court has to be circumspect and look for corroboration of any material particulars by reliable testimony, direct or circumstantial, as a requirement of the rule of prudence.

(c). A defective investigation is not always fatal to the prosecution where ocular testimony is found credible and cogent. While in such a



case the court has to be circumspect in evaluating the evidence, a faulty investigation cannot in all cases be a determinative factor to throw out a credible prosecution version.

(d). Non-examination of the Investigating Officer must result in prejudice to the accused; if no prejudice is caused, mere non-examination would not render the prosecution case fatal.

(e). Discrepancies do creep in, when a witness deposes in a natural manner after lapse of some time, and if such discrepancies are comparatively of a minor nature and do not go to the root of the prosecution story, then the same may not be given undue importance."

"39. Secondly, though P.W. - 4 is said to have reached the place of occurrence at 1:30 p.m. on 5th September, 1985 and recovered a bullet in the blood oozing out from the injury at the hip of the dead body, no effort worthy of consideration appears to have been made to seize the weapons by which the murderous attack was launched. It is true that mere failure/neglect to effect seizure of the weapon(s) cannot be the sole



reason for discarding the prosecution case but the same assumes importance on the face of the oral testimony of the so-called eye-witnesses, i.e., PW-2 and PW-3, not being found by this Court to be wholly reliable. The missing links could have been provided by the Investigating Officer who, again, did not enter the witness box. Whether or not non-examination of a witness has caused prejudice to the defence is essentially a question of fact and an inference is required to be drawn having regard to the facts and circumstances obtaining in each case. The reason why the Investigating Officer could not depose as a witness, as told by PW-4, is that he had been sent for training. It was not shown that the Investigating Officer under no circumstances could have left the course for recording of his deposition in the trial court. It is worthy of being noted that neither the trial court nor the High Court considered the issue of non-examination of the Investigating officer. In the facts of the present case, particularly conspicuous gaps in the prosecution case and the evidence of PW-2 and PW-3 not being wholly reliable, this Court holds the present case as one where examination of the Investigating Officer was vital since he could have adduced the



expected evidence. His non-examination creates a material lacuna in the effort of the prosecution to nail the appellants, thereby creating reasonable doubt in the prosecution case.

40. *As far as non-obtaining of ballistic report is concerned, it is no doubt true that its essentiality would depend upon the circumstances of each case. Here, since no weapon of offence was seized, no ballistic report was called for and obtained. Although Mr. Giri contended that Munna Lal had a licensed gun, this Court has not been able to trace any evidence in the records in regard thereto. However, nothing turns on it. The failure/neglect to seize the weapons of offence, on facts and in the circumstances of the present case, has the effect of denting the prosecution story so much so that the same, together with non-examination of material witnesses constitutes a vital circumstance amongst others for granting the appellants the benefit of doubt".*

42. In ***Banshidhar Singh @ Banshi Singh Vs. The State of Bihar*** passed in ***Cr. Appeal (SJ) No. 38 of 2013***, the co-ordinate Bench of this Court again relied on the settled principles in the case of *Munna Lal Vs. State of UP (supra)*.



43. In the Case of ***Abdul Sayeed Vs. State of Madhya Pradesh and others reported in (2010) 10 SCC 259***, their Lordships have held at Paragraph Nos. 32 and 38 which reads as follows:-

32. *In Ram Narain Singh v. State of Punjab 19 this Court held that where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case.*

38. *In State of U.P. v. Hari Chand this Court reiterated the aforementioned position of law and stated that: (SCC p. 545, para 13)*

"13.... In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy."

The above judgments squarely applies to the facts and circumstances of the case.

44. Admittedly, there are contradictions between the medical evidence and the ocular evidence. The oral evidence of witnesses holds greater evidentiary value. When medical evidence



renders the ocular testimony improbable, it becomes a relevant factor in the evaluation of the evidence.

45. As discussed above, the ocular evidence only discloses a single attack on each witness. However, the documentary evidence, i.e., the injury reports (Exhibits 2, 2/1, and 2/2), along with the oral evidence of P.W. 5/the doctor, and the evidence of D.W. 2 clearly indicate one injury sustained by each of the injured witnesses.

46. At this juncture, it is relevant to rely upon the judgment of the Hon'ble Supreme Court in ***Bhajan Singh alias Harbhajan Singh and Others Vs. State of Haryana*** reported in **(2011) 7 SCC 421**, wherein the Lordships have held at paragraph 32 and 38 as follows:-

“32. *It has further been submitted on behalf of the appellants that there is contradiction in medical evidence and ocular evidence. The trial court has examined this issue and in para 22 of the impugned judgment, observed as under:*



“22. ... that accused Joga Singh and accused Mukhtiar Singh had attacked the victims with swords whereas accused Nishabar Singh had used ‘gandasa’ for the purpose, resulting in the deaths of Gian Singh and Nishan Singh and brutal attempt on the life of PW Ajaib Singh. The trial court had further observed that the skull injury attributed to accused Gurdeep Singh does not receive corroboration from the medical evidence on record because such forceful blow was bound to leave some external mark of injury at the site of the impact but no such mark was seen there by the doctor.”

The trial court reached the conclusion that it seems that accused Puran Singh was also implicated in this case along with his father Bhajan Singh alias Harbhajan Singh because he is a brother of prime accused



Joga Singh. Thus, the involvement of accused Puran Singh in the incident is also doubtful.

38. *Thus, the position of law in such a case of contradiction between medical and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. (Vide Abdul Sayeed)."*

47. After considering the entire oral and documentary evidence, along with all the reported citations of the Hon'ble Apex Court that are squarely applicable to this case, it can be concluded that the



prosecution has miserably failed to prove the guilt of the appellants beyond a reasonable doubt. The trial court erred in convicting the appellants for offences punishable under Section 307 of the Indian Penal Code, and under Section 324 of the Indian Penal Code respectively.

48. Therefore, there is every necessity to interfere with the judgment of the trial Court, and accordingly, the appeal is allowed setting aside the impugned judgment and sentence dated 03.05.2003 on the file of Ist Additional Sessions Judge, Nawada, in Sessions Trial No. 72 of 1992/59 of 1998.

49. The appellants no. 1 and 2 are hereby acquitted of the charges levelled against them. The conviction and sentence imposed under Section 307 of the Indian Penal Code against the 1st appellant and the conviction and sentence imposed under



Section 324 of the Indian Penal Code against the 2nd appellant are hereby set aside.

50. In result the appeal is allowed.

51. The record reveals that these appellants were released on bail on 18.07.2023, therefore, the bail bond of the appellants shall stand cancelled.

(G. Anupama Chakravarthy, J)

amitkr/-

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