REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.244 OF 2009

Susanta Das & Ors. …Appellants

VERSUS

State of Orissa …Respondent

With

CRIMINAL APPEAL NO.1523 of 2015

Ashok Das alias Gopal Das …Appellant

VERSUS

State of Orissa …Respondent

J U D G M E N T

FAKKIR MOHAMED IBRAHIM KALIFULLA

1. These two appeals arise out of a common judgment dated 15.10.2008, passed in Criminal Appeal No.251 of 1997 preferred by the accused-Ashok Das alias Gopal Das and Government Appeal No.20 of 1999 as against the acquittal of accused Nos.1 to 4.

2. As per the case of the prosecution on 03.04.1996, at about 04.00 p.m. when P.Ws.8, 11 and the deceased Padma Lochan Jena were proceeding from Bhadrak to Agarapada in a Rajdoot Motorcycle, about half a kilometer before Kadabaranga Chhaka, the accused

numbering five, each one of them armed with deadly weapons obstructed them and when the three persons tried to escape, the accused chased them and assaulted them with the aid of the weapons held by them. At that point of time, a trekker passed through the road and on seeing the same, the accused persons fled away. The trekker however did not stop, but P.W.7 along with one Debendra Padhi who were also proceeding on that road in a motorcycle stopped at the place of occurrence, helped the deceased as well as P.Ws.8 and 11 who were also injured by shifting them to a hospital in a mini bus called Santoshi coming on that road and that before they could reach the hospital the deceased Padma Lochan succumbed to the injuries.

3. At the hospital P.W.1, the uncle of the deceased, who rushed to the hospital on hearing the news of the death of the deceased, after gathering the information from P.Ws.8 and 11 as to how the deceased along with the injured eye witnesses were assaulted by the accused, lodged the F.I.R. (Ex.1) by around 5.45 p.m. The injured were attended by P.W.12 Doctor who issued the injury reports (Exs.7 & 8). P.W.9, Dr. S. N. Panda conducted autopsy on the body of the deceased and issued Ex.6, the post mortem report. Though P.W.10, the passenger in the Trekker was cited and examined as an eye witness to the occurrence, did not support the case of the

prosecution. P.Ws.13 and 14 were the investigating officers and the major portion of the investigation was conducted by P.W.13. P.W.13 recovered a Bhujali and the cover of the Bhujali (M.Os.II & III) and the wearing apparels of the injured and the deceased (M.Os.IX & XI). M.O.I is a pair of chappal, which was also recovered along with other articles viz., plastic comb, plastic glass, whisky and rum bottles. Ex.2 was the inquest report and Ex.10 was the dead body challan. Exs.3 to 5 and 12 were the different seizure lists. Ex.9 was the crime detailed form while Exs.14 to 18 are the documents in support of sending M.Os. to the State Forensic Science Laboratory and the report received therefrom.

4. On behalf of the prosecution, P.Ws.1 to 14 were examined and on the side of the defence, D.W.1 was examined and Exs.D & D/1 were marked. The accused were arrested on different dates. The first accused was arrested on 06.04.1996, the second accused was arrested on 11.04.1996, the third and fourth accused surrendered before Court on 12.07.1996 and 19.07.1996 respectively. Accused-Ashok Das alias Gopal Das was arrested on 19.03.1997. The wearing apparels of the first accused was recovered which was stained with blood, but the same was not sent for chemical analysis.

5. The appellants were charged for the offences under Sections 147, 148, 341, 326, 307, 302 r/w Section 149 I.P.C. The accused de-

nied the charges and were tried by the Sessions Court. Though the accused were charged for the offence under Section 149, the Trial Court while analyzing the evidence, both the eye witnesses account, medical evidence, as well as the other evidence, took the view that there was no clinching evidence to support the individual role played by each of the accused except accused-Ashok Das alias Gopal Das and consequently while acquitting A1 to A4, ultimately convicted the accused-Ashok Das alias Gopal Das for the offence under Section 302 I.P.C. for the killing of the deceased Padma Lochan Jena and for causing grievous hurt on P.W.8, convicted him for the offence under Section 326 I.P.C. He was acquitted of the offence under the other Sections by granting the benefit of doubt. Ultimately, he was imposed with the punishment of imprisonment for life for the offence under Section 302 I.P.C and three years R.I for the offence under Section 326 I.P.C. and directed the punishment to run concurrently.

6. As against the said conviction and sentence imposed, accused-Ashok Das alias Gopal Das preferred Criminal Appeal No.251 of 1997 while the State of Orissa preferred Government Appeal No.20 of 1999 against the acquittal of A1 to A4. As stated earlier, the High Court by the impugned judgment while reversing the acquittal of A1 to A4 found them guilty of the offences under Section 302

r/w 149 I.P.C., Sections 148, 326 r/w 149, 307 r/w 149 of I.P.C. and imposed them with the sentence of imprisonment for life for the offence under Section 302 r/w 149 I.P.C. and they were acquitted of offence under Section 307 r/w 149 of I.P.C. Thus, convicting them for offence under Section 302 r/w 149 did not impose a separate sentence for the offence under Section 326 r/w 149 and 148 I.P.C. The appeal preferred by accused-Ashok Das alias Gopal Das was dismissed. It is as against the above common judgment of the Division Bench of the High Court, the appellants are before us.

7. We heard Mr. Ratnakar Dash, learned Senior Counsel for the appellants in Crl.A.No.244 of 2009, Mr.Anup Kumar, learned Amicus Curiae for the appellant in Crl.A.No.1523 of 2015 and we also heard Mr. Ashok Panigrahi, learned counsel for the respondent State.

8. Mr. Ratnakar Dash, learned Senior Counsel for the appellants, after taking us through the evidence of P.Ws.1, 7, 8, 9, 11 and 13 as well as Ex.7/1 and 8/2 and certain other documents and also the conclusions drawn by the learned Trial Judge and the analysis made by the Division Bench of the High Court, submitted that the offence under Section 302 as well as 326 r/w 149 was not made out in as much as though P.Ws.8 and 9 claim to be injured eye witnesses, their evidence did not support the case of the prosecution for invoking Section 149 of I.P.C.

9. According to the learned Senior Counsel, though Ex.1, F.I.R came to be lodged at 5.45 p.m. at the instance of P.W.1, who lodged his complaint based on the information furnished by P.Ws.8 and 11, significantly, the names of all the accused were not mentioned in the F.I.R and even in the Section 161 statement of P.W.8 and 11, the names of all the accused were not mentioned. The learned Senior Counsel also submitted that in none of the contemporaneous documents either prepared by P.W.13 or the medical reports, there was any specific reference to the names of all the accused, in particular, the appellants for whom he appeared, in a consistent manner in order to implicate them either for the offence of killing of the deceased or for causing any injury on P.Ws.8 and 11. The learned Senior Counsel therefore contended that in the light of the said fact viz., lack of necessary evidence to show the participation of all the accused together, the invocation of Section 149 I.P.C to rope in the appellants for whom he appeared was not made out and consequently, the reversal of the judgment of the Trial Court by the High Court was not justified and the appellants in Criminal Appeal No.244 of 2009 viz., A1 to A4 were rightly acquitted by the Trial Court giving them the benefit of doubt.

10. Mr. Anup Kumar, learned Amicus Curiae for the appellant in Crl.A.No.1523 of 2015 in his submissions contended that he was al-

leged to have used a sword in the occurrence, which was neither seized nor recovered; there was no blood stained cloth of the said accused recovered of him; that there was delay in forwarding the F.I.R to the learned Magistrate; that the non-examination of the person who accompanied P.W.7 was fatal to the case of the prosecution; that the so called eye witness P.W.10 who claimed to know two of the accused viz., A1 and A2 did not support the case of the prosecution and therefore on that ground as well, the conviction is liable to be set aside. The learned counsel also submitted that no reliance can be placed upon the version of P.W.11 against whom a criminal case was pending.

11. As against the above submissions of the learned counsel for the accused, the learned standing counsel for the respondent State argued that there was specific reference about each of the accused in the evidence which came into existence at the earliest point of time. According to the learned counsel, the reference to involvement of A1 to A4 and accused-Ashok Das alias Gopal Das along with two others was specifically mentioned by P.W.1 in his complaint, which came to be noted in the F.I.R (Ex.1) and that in the Section 161 statement of P.W.8 the names of A1 and A3 along with accused-Ashok Das alias Gopal Das was specifically referred. Though the learned standing counsel fairly submitted that there

was no reference to the role played by A2 in any of the reports or statements, which came into existence at the earliest point of time, the learned standing counsel contended that the statement of P.Ws.1, 8 and the F.I.R amply disclose the involvement of A1, A3, A4 and accused-Ashok Das alias Gopal Das apart from the fact that the medical evidence fully supported the case of the prosecution. The learned standing counsel placed reliance upon the decisions reported in ***Rotash Vs. State of Rajasthan - (2006) 12 SCC 64***, ***Mritunjoy Biswas Vs. Pranab alias Kuti Biswas and another - (2013) 12 SCC 796*** and ***Bishna alias Bhiswadeb Mahato and others Vs. State of W.B. - (2005) 12 SCC 657***. On behalf of the appellants reliance was placed upon the decision reported in ***Ajit Savant Majagvai Vs. State of Karnataka - (1997) 7 SCC 110***.

12. Having heard the learned counsel for the appellants and the learned counsel for the respondent State and having bestowed our serious consideration to the materials placed before us and the judgments of the Trial Court and that of the High Court, we are convinced that no interference is called for with the impugned judgment.

13. While discussing about the various contentions raised on behalf of the appellants, since we are concerned with the conviction imposed on the appellants, for the offence under Section 302 I.P.C.

with the aid of Section 149 I.P.C., it will be necessary to clearly set out the nature of offence detailed in Section 149 I.P.C. Section 149 reads as under :

> "**149. Every member of unlawful assembly guilty of offence committed in prosecution of common object:** If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence".

14. When we read Section 149, since at the very outset it refers to participation of each member of an unlawful assembly, it has to be necessarily shown that there was an assembly of five or more persons, which is designated as unlawful assembly under Section 149 I.P.C. When once, such a participation of five or more persons is shown, who indulge in an offence as a member of such an unlawful assembly, for the purpose of invoking Section 149, it is not necessary that there must be specific overt act played by each of the member of such an unlawful assembly in the commission of an offence. What is required to be shown is the participation as a member in pursuance of a common object of the assembly or being a member of that assembly, such person knew as to what is likely to be committed in prosecution of any such common object. In the event of the proof of showing of either of the above conduct of a

member of an unlawful assembly, the offence, as stipulated in Section 149, will stand proved. In fact, the said prescription contained in Section 149 has been duly understood by the Division Bench by making reference to some of the earlier decisions of this Court. In this context, the Division Bench chose to follow the decisions of this Court reported in ***Rajendran and another Vs. State of T.N. – (2004) 10 SCC 689*** and ***Bishna (supra)***, wherein, the description contained in Section 149 I.P.C and in what cases, and against whom, the said provision can be applied has been clearly set out.

15. Keeping the above legal position pertaining to application of Section 149, when we examine the case on hand, the motive for the alleged assault is the grudge of the accused-Ashok Das alias Gopal Das who contested in the college student election in which P.W.8 also contested, who stated to have ultimately won the elections. According to the case of the prosecution, all the appellants gathered under a mango tree and the recoveries made at that spot disclose, whisky bottles etc., to show that they were waiting at the place of occurrence. The recovery of bhujali and the cover at the place of occurrence as disclosed in the inquest report supported by the version of P.W.13, investigating officer, clearly proved that the assailants while waiting at the spot, shared their common object. The common object shared by them resulted in the assault on

P.W.8. We can deduce from the evidence of P.W.8 that at the spot, he could notice the accused making their appearance from behind a mango tree with each one of them holding a deadly weapon. According to P.W.8, accused-Ashok Das alias Gopal Das was holding a sword; A1 was holding a Bhujali and rest of the accused were holding cycle chains. On seeing their sudden appearance, while riding the motor cycle, P.W.11 apparently lost control and in that process, it is narrated by P.W.8 and 11 that accused-Ashok Das alias Gopal Das gave a sword blow to P.W.8 on his face and when P.W.11 fell down from the motorcycle along with P.W.8, A3 and A4 stated to have held the deceased while accused-Ashok Das alias Gopal Das dealt a sword blow on the backside of the head of the deceased, who cried for help. A1, stated to have inflicted Bhujali blow on the left scapula of the deceased and when A1 attempted to inflict another blow with the bhujali, the deceased stated to have attempted to catch hold of the bhujali and sustained injuries on his left hand.

16. While the accused were thus inflicting injuries on P.W.11, P.W.8 they made an attempt to flee, when accused-Ashok Das alias Gopal Das dealt a sword blow on the left chest of P.W.8. When P.W.11, attempted to run away, A2 Pitambar kicked more than thrice and on seeking a Trekker moving in that direction, the appellants stated to have ran away, which was noticed by P.W.7 who was

crossing that side along with one Debendra Padhi who was not examined. In the evidence of P.W.7, 8 and 11, it is clearly noted that the appellants participated in the crime and all five of them ran away from the place of occurrence after causing severe injuries on the deceased as well as P.Ws.8 and 11. Having regard to the said evidence, as spoken to by P.Ws.7, 8 and 11, there can be no room for doubt about the presence of all the five appellants at the place of occurrence.

17. It must be stated that P.Ws.8 and 11 while undergoing treatment at the hospital, immediately after the occurrence viz., between 04.00 p.m. and 05.45 p.m. informed P.W.1, the uncle of the deceased, who reached the hospital. P.W.1 who gathered the information from P.Ws.8 and 11 as to how and in what manner and by whom the injuries came to be inflicted, in his complaint which he lodged at 5.45 p.m. made a specific reference to the names of A1, A4 and accused-Ashok Das alias Gopal Das along with two others who were armed with bhujalis, swords and cycle chain caused the injuries on the deceased and P.Ws.8 and 11. Similarly, the immediate statement of P.W.8, disclose the specific mention of A1, A3 and accused-Ashok Das alias Gopal Das and the serious injuries inflicted by accused-Ashok Das alias Gopal Das on the deceased as well as P.Ws.8 & 11. Similarly, in the immediate statement of

P.W.11, he specifically referred to the names of A1, A3 and accused-Ashok Das alias Gopal Das and the manner in which the injuries were inflicted upon them.

18. A cumulative consideration of the evidence of P.Ws.1, 7, 8 and 11 amply disclose that there were five who were involved in the occurrence, viz., accused 1 to 4 and accused-Ashok Das alias Gopal Das, apart from the specific role played by each one of them. Having regard to the motive related to which the appellants stated to have nurtured a grievance which resulted in the assault on the deceased and P.Ws.8 and 11 and all of whom being known to the injured eye witnesses and accused-Ashok Das alias Gopal Das being known to P.W.7, there is no reason to disbelieve their version. Therefore, the involvement and the extent of participation by the appellants has been sufficiently established by the prosecution with the required evidence.

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19. As far as the injuries sustained by the deceased as well as P.Ws.8 and 11, the High Court has noted specifically about the injuries as was noted by P.W.9 in the Post Mortem report, which was inflicted on the deceased at the time of the occurrence which when compared with the oral evidence spoken to by P.W.8, the High Court has found that the same fully tallied with the oral evidence of

P.W.8. In paragraph 14, the High Court has noted the various injuries and the evidence of P.W.8 in support of the said injuries.

20. Similarly in paragraphs 15 and 16, the High Court has referred to the injuries sustained by P.Ws.8 and 11, which were spoken to by P.W.12, who attended on them and has found that the evidence of P.Ws.8 and 11 was fully corroborated by the medical evidence and thus there was no scope to doubt their version as to the manner in which the injuries were inflicted on the deceased as well as the injured P.Ws.8 and 11. Thus, we find that the appreciation of evidence of the eye witnesses account, the supporting version of the other witnesses read along with the expert medical opinion, again supported by the Post Mortem report and the injury report, there is no reason to take a different view than what has been taken by the Division Bench in the impugned judgment.

21. When we consider the submission of the appellants, in the first place, it was contended that the participation of the five accused was not duly made out. As far as the said contention is concerned, we have noted extensively the evidence both oral as well as documentary to show as to how all the five accused were duly present at the place of occurrence, in order to attract Section 149 I.P.C. We have also found that based on the medical evidence as well as the injured eye witnesses account to show how the appellants revealed

their common object in the course of their participation when the deceased and the injured witnesses were inflicted with serious injuries with the aid of deadly weapons and consequently none of the accused could escape from the invocation of Section 149 I.P.C. in the murder of the deceased falling under Section 302 I.P.C. as well as the grievous injuries caused on P.Ws.8 and 11.

22. The attempt of the learned Senior Counsel for the appellants by making reference to Exs.7, 1, 8 and 2 wherein, there was some omission to refer the names of some of the appellants, are so trivial as compared to the overwhelming evidence both oral as well as documentary to reject the said contention. Though the learned senior counsel attempted to show some contradiction in the evidence of P.Ws.1, 7, 8 and 11, having gone through the evidence in detail and the appreciation made by the Division Bench of the High Court, we find no serious dent in the evidence of those witnesses which was otherwise supported by the expert medical evidence in the form of oral version of P.Ws.9 and 12 supported by injury report and post mortem report. We are not therefore persuaded to take a different view than what has been taken by the High Court. Since the Trial Court doubted the presence of all the accused and had proceeded to hold only as against the accused-Ashok Das alias Gopal Das by relying upon the specific overt act alleged against

him, while the evidence rendered on behalf of the prosecution fully establish the participation of all the accused in the offence, we are convinced that the principles laid down in the decisions referred to and relied upon by the learned counsel for the appellants in such situations did show that the conclusions drawn by the Division Bench in the impugned judgments was fully justified and it has duly applied the principles set out in the decision reported in ***Ajit Savant Majagvai (supra)***. In paragraph 16 of the said judgment this Court has spelt out the principles while hearing an appeal by the High Court against the order of acquittal passed by the trial Court, as to in what manner the appreciation of evidence could be made and the conclusions can be drawn.

23. That apart, we find the decisions relied upon by the learned standing counsel for the State as reported in ***Rotash (supra)*** and ***Mritunjoy Biswas (supra)*** duly supported the submissions. In the decision reported in ***Rotash (supra),*** *in paragraph 14*, this Court has held as under:

> *"**14.** The first information report, as is well known, is not an encyclopedia of the entire case. It need not contain all the details. We, however, although did not intend to ignore the importance of naming of an accused in the first information report, but herein we have seen that he had been named in the earliest possible opportunity. Even assuming that P.W.1 did not name him in the first information report, we do not find any reason to disbelieve the statement of Mooli Dev, P.W.6. The question is as to*

whether a person was implicated by way of an after-thought or not must be judged having regard to the entire factual scenario obtaining in the case……" (Emphasis added)

24. In the decision reported in ***Mritunjoy Biswas (supra)*** in paragraphs 22 and 23, this Court by referring to the earlier decisions has noted the legal principles as to how a person not named in the F.I.R when proceeded against can be considered. Paragraphs 22 and 23 can be usefully referred, which are as under:-

*"**22**. In Mulla v. State of U.P. the accused persons were not named in the FIR. Taking into consideration the material brought on record, the Court observed that though none was named in the FIR, yet subsequently the names of the appellants had come into light during investigation and, hence, non-mentioning the names of the accused persons would not be fatal to the prosecution case.*

***23**. In Ranjit Singh v. State of M.P. , after referring to the authorities Rotash, Rattan Singh v. State of H.P., Pedda Narayana v. State of A.P., Sone Lal v. State of U.P., Gurnam Kaur v. Bakshish Singh and Kirender Sarkar v. State of Assam, the Court opined that: (Ranjit Singh case, SCC p.344, para 14)*

> *"14….in case the informant fails to name a particular accused in the FIR, and the said accused is named at the earliest opportunity, when the statements of witnesses are recorded, it cannot tilt the balance in favour of the accused."*
>
> *(Emphasis added)*

25. When we apply the above principles to the facts of this case, we are convinced that the implication of all the five accused was per-

fectly justified and was supported by legal evidence as was spoken to by the relevant witnesses which was duly corroborated by the medical evidence. Therefore, mere non mentioning of two of the names in the F.I.R cannot be fatal to the case of the prosecution.

26. As far as the submission made on the ground that some of the weapons were not recovered, expert opinion relating to blood stain and the delay involved in forwarding the F.I.R to the Magistrate, non examination of the person who accompanied P.W.7, the hostility displayed by P.W.10, where all though sought to be relied upon heavily on behalf of the accused, we find that those facts do not materially affect the case of the prosecution.

27. In so far as the alleged delay in forwarding the F.I.R to the Magistrate, we find that the High Court was conscious of the said fact and has made a specific reference to the said fact in paragraph 24 of the impugned judgment wherein, it ultimately held that there was no material on record to show or suggest that the F.I.R was tampered or it was fabricated at a later date by antedating it or the delay in sending the F.I.R by P.W.3 or the delay in placing it before SDJM by the Sub Inspector of Police or the delay in signing the F.I.R by SDJM on 06.04.1996 was so very vital to doubt the case of the prosecution. We fully concur with the said view expressed by the Division Bench.

28. Having regard to our above conclusion, we do not find any merit in the appeals, the appeals fail and the same are dismissed.

29. Having regard to the able assistance rendered by the learned Amicus Curiae Mr. Anup Kumar, we recommend a fee of Rs.10,000/- to be paid to him.

.....J.

[**Fakkir Mohamed Ibrahim Kalifulla**]

.....J.

[**Uday Umesh Lalit**]

New Delhi

January 06, 2016

SUPREME COURT OF INDIA
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