

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.660 of 2008

Arising Out of PS.Case No. 61 Year- 1993 Thana -Sherghati District- GAYA

1. JAI RAM SHARMA
2. SHREE RAM SHARMA
3. RAM EKBAL SHARMA
4. DHANANJAY SHARMA, ALL SONS OF LATE JHALAKDEO SHARMA,
ALL RESIDENTS OF VILLAGE-UCHIRMA, P.S. SHERGHATI, DISTT-
GAYA

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

with

Criminal Appeal (DB) No. 811 of 2008

Arising Out of PS.Case No. 61 Year- 1993 Thana -Sherghati District- GAYA

1. SURENDRA SHARMA SON OF LATE THAKUR SHARMA
2. SATYANAND SHARMA SON OF PYARCHAND SHARMA BOTH ARE
RESIDENTS OF VILLAGE UCHIRAMA, P.S. SHERGHATI, DISTT-GAYA.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

Appearance:

(In CR. APP (DB) No. 660 of 2008)

For the Appellant/s : Shri Sheikh Arkan Ahmad, Adv.

For the State : Sushri S.B. Verma, APP

(In CR. APP (DB) No. 811 of 2008)

For the Appellant/s : Shri Udit Narayan, Adv.

For the State : Sushri S.B. Verma, APP

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

(Per: HONOURABLE SHRI JUSTICE ADITYA KUMAR TRIVEDI)

Date: 04-08-2015

Cr. Appeal (DB) No. 660/2008 wherein Jai Ram

Sharma, Shree Ram Sharma, Ram Ekbal Sharma and Dhananjay

Sharma happen to be the appellants while Cr. Appeal (DB) No.

811/2008 wherein Surendra Sharma and Satyanand Sharma are the

appellants commonly originate against the judgment of conviction dated 12.06.2008 and order of sentence dated 19.06.2008 passed by Presiding Officer, Fast Track Court -III, Gaya in Sessions Trial No. 06 of 2007/291 of 1994, accordingly have been heard together and are being disposed of by a common judgment.

2. By the judgment and order impugned, the learned trial court had found all the appellants guilty for an offence punishable under Sections 302/149 IPC directed each one to undergo RI for life as well as fined of Rs. 10,000/- in default thereof, to undergo RI for one year, additionally, under Section 307/149 IPC whereunder each of them has been directed to undergo RI for seven years as well as fined of Rs. 2,000/- in default thereof, to undergo RI for six months, additionally, with a further direction to run the sentences concurrently.

3. Siyaram Sharma (PW-3) gave his *Fard-e-beyan* (Ext.2) on 13.06.1993 at about 2:00 P.M. at Referral Hospital, Sherghati, alleging *inter alia* that on the same day an altercation took place in between Surendra Sharma with his uncle Bhagwat Sharma near an orchard at the bank of a river lying north to his village. His uncle Bhagwat Sharma was demanding royalty on account of use of his land in facilitating running of brick kiln installed by Surendra Sharma. He (his uncle) had further stated that agreed amount

appertaining to Rs. 1800/-, in case, not paid, then he would not allow tractor to move through his land. On this, Surendra Sharma challenged as to how he would not allow the tractor to pass, would be seen by him. Saying so, he further said that he is just coming. Thereafter, he left for his house. He along with his brother, Pramod Sharma, nephew, Ashwani Kumar, Pramod Kumar, Vijay Kumar were returning to their house along with his uncle, Bhagwat Sharma and as soon as reached Dubba-Khatta-Sandha, he saw Jairam Sharma armed with lathi, Surendra Sharma armed with Garasa, Sriram Sharma armed with Lathi, Ram Ekbal Sharma armed with Lathi, Dhananjay Sharma armed with Lathi, Birendra Sharma armed with Lathi, Thakur Sharma armed with Lathi armed with Lathi, Shivrnanadan Sharma with Lathi, Satyanand Sharma armed with Lathi were coming from village side and no sooner than their arrival, Jairam Sharma caught hold of his uncle, Bhagwat Sharma and then Surendra Sharma gave Garasa blow over head of Bhagwat Sharma causing injury thereupon. He was assaulted with Lathi by Jairam Sharma. Pramod Sharma was assaulted with Garasa as well as Lathi by Sriram Sharma. Satyanand Sharma had assaulted Ashwani with Lathi. Dhananjay Sharma and Ram Ekbal Sharma assaulted Vinay with Lathi. Bhagwat Sharma was also assaulted by Lathi. Then thereafter, the accused persons ran away therefrom. Achutanand

Sharma and Saroj Sharma took his uncle to hospital, during midst thereof, he died and the same was confirmed by the doctor at Referral Hospital.

4. The aforesaid *Fard-e-beyan* led institution of Sherghati PS case No. 61/1993 whereupon investigation was taken up and after concluding the same, charge-sheet was submitted, consequent thereupon, the trial commenced and culminated in conviction and sentence, the subject matter of the instant appeals.

5. The defence case, as is evident from the mode of cross-examination as well as from the statement recorded under Section 313 Cr.P.C. is of complete denial as well as pleading innocence. It has further been pleaded that prosecution party illegally advanced demand which was refused, whereupon the prosecution party brutally assaulted Surendra Sharma at his brick kiln, who was removed to hospital. Subsequently thereof, the prosecution party indulged with labourers present at brick kiln and in course thereof, might have sustained injuries including death of Bhagwat Sharma. Furthermore, FIR of counter case, coupled with judgment have been exhibited in their defence.

6. In order to substantiate its case, the prosecution had examined altogether six PWs out of whom PW-1, Ashwani Kumar Kaushik, PW-2, Pramod Kumar Sharma, PW-3 Siya Ram Sharma,



PW-4 Dr. Arvind Kumar (who had proved postmortem report in the background of death of the doctor who had conducted postmortem), PW-5, Dr. Md. Rizwan (who had examined injured), PW-6, Birendra Singh (formal) side by side also exhibited Ext-1 series, signature of respective witness over respective documents, Ext-2, Fard-e-beyan, Ext-3, Postmortem Report, Ext-4 series, respective injury reports, Ext-5, Formal First Information Report Ext-6, inquest report. Though defence had not examined any witness, however, had exhibited-Ext-A, FIR of case instituted by Surendra Sharma, Ext-B, judgment of learned lower court passed with regard to aforesaid case, Ext-C, Judgment of appellate court, Ext-D, injury report of Surendra Sharma.

7. Manifold arguments have been made on behalf of the appellants while assailing the judgment of conviction and sentence impugned. The first and foremost ground has been raised with regard to propriety of the prosecution version. To support the same, it has been submitted that none of the independent witnesses has been examined in this case including that of Achutanand, Saroj and Sunil which could have flashed the real version of the occurrence. Furthermore, it has also been submitted that one of the so-called injured Vinay Kumar Sharma has also not been examined in this case and for that, no cogent as well as reliable explanation has been

offered on behalf of prosecution. That means to say, the prosecution rests its case upon the evidence of interested, partisan enamical witnesses and that being so, their evidences are fit to be discarded out rightly.

8. It has further been submitted that none of the prosecution witnesses who have been examined could be able to identify their land regarding which, as suggested, deceased Bhagwat Sharma had gone to demand royalty. Unless and until, prosecution could be able to substantiate presence of the land belonging to them and further having been used by the appellants to facilitate running of brick kiln, therefore, the motive so assigned by the prosecution is found completely demolished. At the present juncture, it has also been submitted that for want of examination of Investigating Officer apart from other kind of prejudice suffered by the defence, going to be discussed at an appropriate stage, also deprived of valuable right of the appellants at least, in order to discredit the prosecution witnesses on the score of motive bringing cogent and reliable evidence showing absence of land belonging to prosecution party as well as the aforesaid land if any having been used by the appellants to facilitate running of brick kiln. Furthermore, as is evident from the evidence, the prosecution party had categorically stated with regard to presence of boring having been sunk in the aforesaid land, huts



having been erected to provide shelter to the labourers as well as construction of passage to facilitate the transportation of bricks and other items, which could have exposed only on having the objective finding of the Investigating Officer with regard to place of occurrence in accordance with law. In likewise manner, it has also been submitted that as per prosecution version, the occurrence had taken place at Dubba-Khatta-Sandha which could have only been ascertained on examination of Investigating Officer. That means to say, on account of non examination of Investigating Officer, the place of occurrence remained explained inasmuch as, there happens to be counter version whereunder place of occurrence has been suggested at brick kiln of appellant, Surendra Sharma, and for that, had exhibited relevant documents apart from having admitted by the prosecution witnesses.

9. It has also been submitted that from the evidence of witnesses, it is evident that they have had materially developed their initial version and on account thereof, there happens to be abundant presence of contradiction which could have properly verified after examination of Investigating Officer only. So, it has been submitted that on account of non examination of Investigating Officer, the interest of defence is found completely blurred causing serious prejudice to their interest and that being so, the judgment impugned is

fit to be set aside on this score alone.

10. It has further been submitted that the doctor who had conducted postmortem has not been examined. The doctor (PW-4) who had come to depose on the score of death of the doctor who had conducted postmortem, dead and in the aforesaid background, simply exhibited the postmortem report. The aforesaid eventualities were not sufficient for proper appreciation of the postmortem report as well as the finding recorded by the doctor who held postmortem. That being so, the contents of the postmortem report cannot be taken into consideration. That being so, the cause of death of deceased, Bhagwat Sharma goes out of record and the prosecution, for want of the same is found deficient one as cause of death of Bhagwat is found unexplained.

11. It has also been submitted that so far ocular evidence is concerned, the prosecution had tried to substantiate its case by examining three PWs, i.e, PW-1 Ashwani Kumar Kaushik, PW-2 Pramod Kumar Sharma and PW-3 Siya Ram Sharma. To give additional weightage over their testimony, it has also been pleaded that all the aforesaid three witnesses happen to be injured, found corroborated by PW-5, is not going to remove the dent persisting in the prosecution case. Elaborating this issue, it has been submitted that their presence along with Bhagwat Sharma have become doubtful in

the background of inconsistency prevailing amongst them, more particularly, with regard to manner of occurrence as alleged by them occurred at Dubba-Khatta-Sandha. It is true that the evidence whatever deposed before the court happens to be substantial evidence but its reliability as well as truthfulness in the assertion of the witnesses is found guided by their previous statement and whenever, material development is found, it has been held by concurrent judicial pronouncement that such kind of testimony is fit to be rejected. Apart from this, it has also been submitted that although the defence has not pleaded the right of private defence but the facts remains that the prosecution party came at the brick kiln, demanded Rangdari and having been declined at the end of appellant, Surendra Sharma, they brutally assaulted Surendra Sharma. Because of the fact that prosecution party continued in their illegal activities even against the labourers, might have sustained such ordeal costing their life as well as injuries at their end and for that, instead of prosecuting the labourers, to avoid and conceal their illegal activities, concocted the present narration to implicate the appellants. Prosecution has tried to judge their case, but due to non-examination of other independent material evidence including one of the injured, sewed its truth worthiness in the background of probable defence version by way of counter case, which the prosecution witnesses accepted being an

accused therein and being so failed to discharge its legal obligation by explaining injury of Surendra although admitted his presence at PHC having bandage.

12. On account of inveracity in the prosecution case, coupled with status of the witnesses misanthrope attitude of prosecution is found completely exposed, hence appeals are fit to be allowed setting aside judgment of conviction and sentence.

13. The learned Additional Public Prosecutor controverted the submission raised on behalf of appellants and submitted that as per submission made on behalf of appellants, death of Bhagwat Sharma is an admitted fact. In likewise manner, injuries over the persons of witnesses. It has further been submitted that obligation rest upon the prosecution to prove its case beyond all reasonable doubt, but wherever defence admits prosecution version to some extent then in that event, it is found impeccable.

14. In order to explain, it has been submitted that as death of deceased as well as injuries over the person of respective witnesses gone out of controversy, hence dispute over admissibility of P.M. report loses its authenticity. Now the question survives regarding place of occurrence as well as manner of occurrence. On the score, save and except formal documentary evidence, nothing more has been brought up on record by the appellants.

Simultaneously by way of suggestion counter version has been pleaded. Contrary to it, the prosecution has proved its case by cogent reliable evidence deposited by material witnesses happens to be consistent on all material aspect relating to motive, genesis as well as manner of occurrence.

15. It has further been submitted that on account of due lapse of time, some sort of contradiction is bound to occur in the evidence and which, in the aforesaid facts and circumstances of case, happens to be natural one. Moreover, the evidence in its totality has to be seen. That means to say, gist of the evidence has to be perceived that too whatever been deposited in court, as the evidence brought up before the Court is substantial evidence.

16. From the evidence of each of the PWs, it is apparent that they are consistent in sum and substance and being so, there happens to be no material development as argued on behalf of the appellants. It has further been submitted that non examination of Investigating Officer has not caused prejudice to the appellants because of the fact that apart from absence of vital contradiction in the evidence of each of the PWs, it is also apparent that they are consistent over the place of occurrence as well as they have also properly identified the activity of each of the appellant during course of occurrence. Consequent thereupon, non examination of

Investigating Officer did not affect upon reliability of the witnesses.

17. It is not the rule that non-examination of particular witnesses will debilitate the prosecution case rather, the court has to see whether from the evidence available on record proves prosecution version. In case, it is found that case has been proved then, in that event, non-examination of other witnesses could not be an additional ground to disbelieve.

18. It has also been argued that each and every case, the prosecution is not under obligation to explain the injury sustained by the accused more so, where it has succeeded in proving its case as well as where there happens to be simple in nature.

19. It has also been submitted that in terms of Section 32 of the Evidence Act, the postmortem report has become admissible in the eye of law after having a disclosure with regard to death of the doctor who had conducted postmortem examination. So submitted that the prosecution has proved its case with credible, trustworthy and truthful witnesses whereupon, appeals are fit to be dismissed.

20. After going through the deposition of PW-4, it is evident that Dr. Kapildeo Prasad who had conducted postmortem is now dead and accordingly, exhibited report and its recording. That assertion is found unchallenged as defence did not cross-examine this witness. Non examination of doctor who held postmortem due to his

death, will nail the postmortem report is the moot question to answer.

As per Section 32 of the Evidence Act, the evidence is admissible as it has specifically been provided that in case of due discharge of duty, whenever a document is prepared and the maker of document is dead or could not be traced without undue delay, then the same is found to be 'admissible'. The Hon'ble Apex Court had occasion to perceive such kind of controversy and had decided the issue in the case of ***Prithi Chand v. State of Himachal Pradesh*** as reported in ***AIR 1989 SC 702*** wherein under paragraph-4 it has been held as follows:-

“.....Section 32 of the Evidence Act provides that when a statement, written or verbal, is made by a person in the discharge of professional duty whose attendance cannot be procured without an amount of delay, the same is relevant and admissible in evidence.....”

21. In the case of ***Ram Balak Singh v. State*** as reported in ***AIR 1964 Patna 62***, this Court had confronted with the aforesaid puzzle and decided under paragraph-9 in the following manner:-

“ Dr. Bhola Mahto, who had performed the autopsy over the dead body of Kedar at 2 P.M. on the 10th November, 1959, was, at the time of the trial, out abroad, and his post-mortem report (exhibit 3) was proved by Dr. K. N. Pathak (P.W. 6) by proving the handwriting and signature of Dr. Bhola Mahto on the post-mortem report. Since Dr. Bhola Mahto was not easily available the post-mortem report prepared by him would be admissible in evidence”.

22. Therefore, the postmortem report is found admissible in the eye of law and can be used very well. Ext-3, the postmortem

report speaks following ante-mortem injuries over the person of deceased:-

I. Lacerated wound of size 3" x 1" x bone deep was over right external ear and back of the ear.

II. Incised wound of size 1" x ¼". Bone deep was found over middle portion of sagittal surface on dissection, blood clots were found over right and left parietal region of skull frontal bone, right and left parietal bones were found fractured on removal of skull cap external and subdural blood clots and haemorrhage were over right and left side of the brain.

III. Bruise (Blackish coloured) of size 4" x 3" was found over lower portion of back of right upper arm situated and above the elbow joint. On dissection underlying lower portion of the shaft of humerus bone was found broken.

Cause of death:- Coma, compression and shock due to above mentioned injuries. Those injuries are sufficient to cause death.

23. Because of the fact that PW-4 has not been cross-examined at the end of appellants, consequent thereupon, nothing adverse is found with regard to Ext-3.

24. PW-5 had examined the respective injured on 13.06.1993 and found following injuries over their persons:-

Siya Ram Sharma

1. Lacerated wound on the vertex of scalp 3 ½" x ½" scalp deep.
2. Lacerated wound on occipital region of the scalp deep 3" x ½" scalp deep.
3. Bruises on left leg size 3" x ½"

Vinay Kumar

1. Swelling with tenderness on the lips (upper and lower) 2" x ½", 1 ½" x ½"
2. Abrasion on left ear ¼" x 1/6"
3. Bruise on the left arm 2 x ¼".

Pramod Sharma

1. Lacerated wound on the vertex of scalp 3" x ½" scalp deep.
2. Bruise on the right arm 3" x ¼"
3. Abrasion on the middle finger of the left hand ½"x1/4"

Ashwani Kumar Kaushik

1. Swelling with tenderness on the left arm 2" above the elbow size 2"x1/2".
2. Swelling with tenderness of the left thigh 1"x1/2".

25. During cross-examination, it is evident that save and except acceding to suggestion made on behalf of defence that these injuries could be caused on fall over hard surface or colliding with hard wall. Nothing more has been perceived. So, even if there happens to be suggestion at the end of defence, of which probative value would be taken up while appreciating the oral evidence, it has become crystal clear that defence also had not challenged presence of injuries as found over the persons of the injured.

26. PW-1 had stated that on the alleged date at 11:00 a.m. while he was at his house, rushed to the brick kiln of Surendra Sharma after hearing uproar. After reaching there, he found, altercation was going on in between Bhagwat Sharma and Surendra Sharma. Surendra Sharma was insisting not to pay amount. At the other end, Bhagwat Sharma was saying that without getting money, he would not allow the vehicle to pass through his land, over which

Surendra Sharma said that just after returning from his house, he would show. Thereafter, Surendra Sharma left the place. Bhagwat Sharma also returned therefrom and during course thereof, when he reached Dubba-Khatta-Sandha, Surendra Sharma, Jairam Sharma, Shri Ram Sharma, Dhananjay Sharma, Birendra Sharma, Shiv Nandan Sharma, Jainandan Sharma, Thakur Sharma encircled Bhagwat Sharma. At that very time, Surendra Sharma was armed with Garasa while rest were armed with Lathi. Jairam Sharma caught hold of Bhagwat, then Surendra Sharma gave a Garasa blow over the head of Bhagwat Sharma. Bhagwat Sharma fell down. He along with Siya Ram, Prabhat, Pramod and Ramashish ran in rescue, during midst thereof, Satyanand and Sri Ram assaulted him with Lathi. Surendra gave Garasa blow over head of Siya Ram Sharma. Surendra and Jairam assaulted Prabhat. Pramod was assaulted by Surendra and Jairam. Surendra had assaulted with Garasa over back of Pramod. Prabhat was assaulted with Lathi by Birendra and Dhananjay. Bhagwat was also assaulted with Lathi by Sri Ram, Satyanand and Shivanand. Thereafter, they lifted Bhagwat to Sherghati Referral Hospital where he was declared dead while other injured were treated. He had further exhibited his signature as well as also identified the accused. There happens to be detailed cross-examination with regard to *inter se* relationship under paragraphs 10,

11, 12, 13. In para-14, he had stated that brick kiln was installed by Surendra Sharma in partnership with Brijnandan Sharma in the land belonging to Muni Singh @ Muneshwar Singh which lies 400 Ft north to village- Uchirma in the year 1990. In para-17, cross-examination has been done relating to the location of brick kiln and its surroundings. In para-18, he had stated that he had proceeded from his house along with others during midst thereof, he had not met with any of co-villager. In para-19, he had stated that he met with Siyaram, Pramod, Prabhat, Ramashish near the *Jamun* tree lying north to his village. Siyaram, Prabhat and Pramod were proceeding ahead of him. Siyaram, Pramod and Prabhat reached at the brick kiln before his arrival as they were 50 yards distance of them. Ramashish had also reached earlier to him. In para-20, he had stated that at the time of altercation only two persons were present at the brick kiln. Those persons were Surendra and Brijnandan. None of the villagers were present. The altercation continued for five minutes even after his arrival. In para 21, he had stated that at that very time, one tractor was loaded with bricks which was stopped by Bhagwat Altercation was going on 10 yards away from brick kiln, in a mango orchard. In para-22, he had stated that all of them were returning from brick kiln and during course thereof, they had seen the accused at a distance of 150 feet. In para-23, he had stated that they did not become apprehensive

seeing the accused persons. At that very moment, they had not seen any other co-villager. Jairam Sharma had caught hold waist of Bhagwat Sharma from the right side. When Jairam Sharma caught hold waist of Bhagwat, he also caught hold of waist of Bhagwat in order to save him. Pramod also clung. He began to drag Jairam by catching his hand while Pramod began to pull Bhagwat and during course thereof, a Lathi blow was given to him followed with blow over Pramod. Then thereafter, Surendra inflicted Garasa blow over head of Bhagwat. Push and pull continued for two minutes. In para-24, he had stated that indiscriminate Lathi blows were given over Bhagwat. While Bhagwat was being assaulted, at that very time, he was lying in injured condition. Then he had stated that he had not seen Surendra in an injured condition. He had admitted that Surendra had instituted counter case which is pending before the court wherein Siyaram, Ramashish, Prabhat and Pramod are also accused. Para-26 to 38 are the contradictions. In para-40-41, he had stated that the labourers are always available at the brick kiln having 20-25 in numbers. At the time of occurrence 20-25 labourers were present. In para-42, he had further stated that he had seen Surendra Sharma at Sherghati Hospital where he had come earlier to him. He had seen bandage over the head of Surendra Sharma. He had not seen bandage over other parts of the body. Then there happens to be suggestion



regarding mode of occurrence in form of counter version as well as sustaining of injuries when they entered into scuffle with the labourers at brick kiln. At para-49, he had stated that blood did not come out from his injuries, however, from the injury of Bhagwat, blood had oozed out. Also fallen over the earth in an area of 2-3 steps. In para-52, he had stated that place of occurrence lies 150 Ft. away from the brick kiln. Residential area of the village happens to be 150 Ft. away from the place of occurrence.

27. PW-2 is Pramod Kumar Sharma who had deposed that deceased, Bhagwat Sharma was his uncle, who was murdered. The occurrence is of dated 13.06.1993 at about 11:00 a.m. At that very time he was at his house. After hearing clattering, he along with Siyaram, Ramashish, Prabhat, Ashwani and Vinay jointly came at the brick kiln of Surendra Sharma where he saw Bhagwat and Surendra indulged in an altercation. They were engaged over demand/refusal of money. He had stated that Surendra Sharma had excavated soil from his land as well as his plot was also used for ingrace and outgrace for which money was being demanded. Thereafter, Surendra Sharma said that he will give a lesson and left for his house. Thereafter, they also left the brick kiln. When they reached, Dubbabad-Khatta, they saw Surendra, Jairam, Sri Ram, Shivnandan, Dhananjay, Satyanand, Birendra, Thakur, Ram Ekbal armed with

Lathi and Garasa. Surendra was armed with Garasa while rest were armed with Lathi. Jairam caught hold Bhagwat and Surendra gave a Garasa blow over head of Bhagwat. Rest also assaulted Bhagwat with Lathi. Bhagwat fell down. They had tried to save Bhagwat and during course thereof, Surendra gave Garasa blow over his head as well as on hand. Jairam assaulted him with Lathi. Siyaram was also assaulted by Surendra with Garasa while Sri Ram had assaulted with Lathi. Dhananjay and Ram Ekbal assaulted Ashwani as well as Ramashish. Birendra, Satyanand, Shivnandan assaulted Prabhat. Then thereafter, accused persons escaped therefrom. They had lifted the injured to Sherghati and during course thereof, Bhagwat Sharma died. He had also exhibited his signature over relevant documents. He had further disclosed that Binay was not present in the village for the last 4-5 years. It has also been disclosed that Satyanand had got alias name as Jainandan. During cross-examination at para-13 he had stated that he was admitted at Sherghati Hospital in an unconscious condition. He had further stated that after regaining his sense, he gave statement to police official over which he had put his signature. He had also stated that the aforesaid signature has been exhibited by him (FIR attesting witness). In para-16, he had stated that Bhagwat Sharma had not disclosed anything to them before going to brick kiln. He had further stated that he was at his Darwaza at the time of hearing altercation



which was going on at the brick kiln. At that very moment, none other was present at his Darwaza. In para-17, he had stated that before proceeding towards brick kiln, he had informed to his brother, Siyaram, Prabhat, Ramashish, Ashwani and Binay. In para-18, he had stated that after hearing sound coming from brick kiln, he perceived that brawl was going on. He had not disclosed those things to any of his co-villagers. He had not taken club before proceeding towards brick kiln. His brothers also did not take club. He was not aware regarding demand of royalty. They reached near *Jamun* tree standing in the orchard of Raj Karan Sharma. His uncle had not disclosed anything but he perceived that altercation was going on over demand of royalty. In para-21, he had stated that they had supported the demand advanced by his uncle. At that very time, tractor was parked. His uncle had firmly stated that in case, royalty is not given, he would not allow the tractor to pass through his land. In para-24, he had stated that they proceeded from the brick kiln five minutes after departure of Surendra Sharma. In para-25, he had stated that he is unable to disclose the exact time of arrival of accused after their departure from brick kiln. In para-26, he had stated that for the first time, he had seen the accused persons at a distance of 50 yards. They were coming running. They have not directed his uncle to leave seeing the accused. In para-27, he had stated that they had not



thought that the accused persons would indulge in such kind of activity. In para-28, he had stated that Jairam caught hold Bhagwat from behind. Thereafter, push and pull begin in between them. At that very time, Jairam Sharma was not armed with Lathi. Seeing Jairam Sharma in getting waist of his uncle caught hold of, he along with Siyaram, Prabhat took effort to get Bhagwat released, till then others had encircled. Thereafter, the accused persons began to assault. In para-29, he had stated that after sustaining injury he fell down. Other injured had not fallen. There was blood stain over cloth. In para-31, he had stated that first of all, Bhagwat was assaulted followed by Siyaram and then others were assaulted. Bhagwat was taken to the hospital from the place of occurrence. In para-32, he had further stated that only Ram Dahin Singh had arrived after occurrence. In para-34, he had stated that he had not seen Surendra Sharma at Sherghati Hospital in injured condition as well as also denied subsequent suggestion. Paras-40 to 49 there happen to be contradiction and then from paras-50 to 56 there happen to be suggestion by way of counter case. In para-61, he had re-affirmed mode of assault. In para-62, he had disclosed Survey Plot Number of his land being 30-31.

28. PW-3 is Siya Ram Sharma, the informant. He had stated that occurrence is of dated 13.06.1993 at about 11:00 a.m.. His



land lies by the side of brick kiln installed by the accused Surendra Sharma in which accused Surendra Sharma had sunk boring, as well as was also using as road for to and fro. Some huts were also erected wherein labourers were residing. He had also excavated and took out soil for manufacturing the bricks. On the alleged date and time of occurrence they were at their house. Bhagwat Sharma had gone to brick kiln of Surendra Sharma and was demanding royalty from Surendra Sharma for which an altercation took place. The aforesaid event was going on in an orchard lying by the side of brick kiln. After hearing the aforesaid altercation, he along with Ashwani, Ramashish, Pramod, Vijay and Prabhat had gone to brick kiln. At that very moment, Surendra Sharma had declined to pay royalty over which his uncle had firmly asserted that he will not allow his tractor to pass through. Thereafter, Surendra Sharma left the place saying that after returning from his house, he will give a lesson. Then thereafter, they also proceeded therefrom and they reached at, Dubba-Khatta-Sandha, accused, Surendra, Jairam, Sri Ram, Dhananjay, Ram Ekbal, Shivnandan, Satyanand, Thakur, Birendra out of whom, Surendra was armed with Garasa and rest were armed with Lathi, encircled them. Jairam caught held waist of Bhagwat. Surendra gave Garasa blow over his head. Jairam, Sri Ram, Ram Ekbal assaulted Bhagwat with Lathi. They tried to save Bhagwat and during course thereof,

Jairam gave Lathi blow to him. Ashwani was assaulted by Satyanand and Sri Ram. Pramod was assaulted by Surendra with Garasa. Dhananjay assaulted Vinay. Then thereafter, he became unconscious and so he is unable to detail furthermore. About ten minutes, he regained sense and found all the accused persons absent. Thereafter, they were taken to Referral Hospital, Sherghati and during midst thereof, Bhagwat died.

29. He had further stated that Binay Kumar is absent. Further, he stated that police had come at the hospital where he had given Fard-e-beyan and exhibited the same. During cross-examination, at para-19, he had stated that they were not known to the fact that Bhagwat had gone to brick kiln. He had not heard sound of altercation going on in between Bhagwat and Surendra at brick kiln at his house rather had gone as directed by Arjun Sharma. In para-21 he had stated that Arjun Sharma happens to be son of his eldest uncle who had informed him. In para-21, he stated that when they reached at the brick kiln, they found Bhagwat and Surendra indulged in an altercation. He had pacified his uncle, Bhagwat. He had further stated in para-22 that Arjun had not accompanied. None of the villagers had accompanied. In para-24, he had further stated that altercation was going on in an orchard. He is unable to disclose Survey Plot Number. In para-25, he had stated that his land lies by



the side of brick kiln. In para-26, he had disclosed CSP Number 30-31 of his land. Further, he said that he is unable to disclose the RSP Number. The aforesaid land happens to be recorded in the name of Ram Balak Sharma, father of Arjun Sharma. He had further stated in para-27 that on account of oral agreement, Surendra Sharma began to use the land. In para-28, he had stated that seeing the accused persons, he understood that accused persons will assault. In para-29, he had stated that they all were assaulted in the same sequence after having been encircled by the accused. At that very moment, none of the villager came at the place of occurrence. Blood had oozed out from the injuries which also fallen over the earth. Arjun and Ramdahin had shown the blood to the I.O. Then, there happens to be detailed cross-examination over Survey Plot No.30-31. In para-44, he had stated that he had not seen Surendra in injured condition. However, he had admitted that Surendra had instituted a counter-case wherein he happens to be one of the accused. Paragraphs- 54, 55, 56, 57, 58, 59 and 61 happen to be contradiction. Then there happens to be suggestion under paragraphs-66 and 67 that they had assaulted Surendra Sharma as he declined to pay Rangdaari demanded by them, who was taken to hospital. They might have sustained injuries at the hands of labourers after departure of Surendra, deployed at the brick kiln.



30. It is an admitted fact that the I.O. has not been examined. Now the situation has to be perceived on account of non-examination of Investigating Officer. Though, witnesses have been confronted with their previous statement, regarding which genuineness could have been testified by looking into the case dairy, but on account of presence of Section 172(2) of the Cr.P.C. the aforesaid exercise is found completely forbidden. Moreover, giving a cue over contradiction, has been drawn on behalf of defence will be a futile attempt as the defence had itself admitted presence of witness at the P.O. at the relevant time as is evident from PW.1 para-44,45,46, P.W.-2 para-50,51,53,54,55, PW-3 par-66,67.

31. The non-examination of I.O. is an important event in the trial and times without number have come up for judicial consideration. In the case of *Lahu Kamlakar Patil v. State of Maharashtra* reported in (2013) 6 SCC 417, the same has been explained under para-18 in the following manner:-

“It is an accepted principle that non-examination of the Investigating Officer is not fatal to the prosecution case. In *Behari Prasad v. State of Bihar*[(1996)2 SCC 317], this Court has stated that non-examination of the Investigating Officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In *Bahadur Naik v. State of Bihar*[(2000)9 SCC 153], it has been opined that when no material contradictions have been brought out, then non-examination of the Investigating Officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial judge nor the High Court has delved into the issue of non-examination of the Investigating Officer. On a perusal of the entire material brought on record, we find that no



explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in *Arvind Singh v. State of Bihar*[(2001) 6 SCC 407], *Rattanlal v. State of Jammu and Kashmir*[(2007)13 SCC 18] and *Ravishwar Manjhi and others v. State of Jharkhand*[(2008)16 SCC 561], has explained certain circumstances where the examination of Investigating Officer becomes vital. We are disposed to think that the present case is one where the Investigating Officer should have been examined and his non-examination creates a lacuna in the case of the prosecution.”

32. As has been stressed on behalf of appellants that from the evidence of PWs, it is evident that material developments have purposely been introduced over which attention has been drawn, remained intangible for want of examination of Investigating Officer coupled with, deprived of, to cross-examine Investigating Officer over place of occurrence. Hence appellants’ interest has been seriously prejudiced.

33. After minute observation of evidence of PWs, it is manifest that they were consistent over manner as well as place of occurrence. Furthermore, it is also apparent from the evidence of PW-3 that his credibility has not been challenged over his *Fard-e-beyan*. Moreover, from the evidence PWs, it is crystal clear that they are injured witnesses which has not been controverted by the appellants.

34. Deficiency in the evidence of PWs in light of their

earlier statement recorded under Section 161 Cr.P.C. is a matter of consideration in *Ashok Debbarama v. State of Tripura* as reported in *2014 Cr.L.J. 1830* and properly been explained under para-18.

“18. The mere fact that the Appellant was not named in the statement made before the police under Section 161 CrPC and, due to this omission, the evidence of PW10 and PW13 tendered in the Court is unreliable, cannot be sustained. Statements made to the police during investigation were not substantive piece of evidence and the statements recorded under Section 161 CrPC can be used only for the purpose of contradiction and not for corroboration. In our view, if the evidence tendered by the witness in the witness box is creditworthy and reliable, that evidence cannot be rejected merely because a particular statement made by the witness before the Court does not find a place in the statement recorded under Section 161 CrPC. Police officer recorded statements of witnesses in an incident where 15 persons lost their lives, 23 houses were set ablaze and large number of persons were injured. PW10 lost his real brother and PW13 lost his daughter as well as his wife and in such a time of grief, they would not be in a normal state of mind to recollect who were all the miscreants and their names. The witnesses may be knowing the persons by face, not their names. Therefore, the mere fact that they had not named the accused persons in Section 161 statement, at that time, that would not be a reason for discarding the oral evidence if their evidence is found to be reliable and creditworthy.”

35. The status of the injured witnesses and their weightage during trial has been considered in *Balwan v. State of Haryana* Reported in *(2014) 13 SCC 560* and explained under paragraph-16 thereof which is as follows:-

“It is trite law that the evidence of injured witness, being a stamped witness, is accorded a special status in law. This is as a consequence of the fact that injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness would not want to let actual assailant go unpunished”.



36. So, under the guise of above referred settled principle of law, when the evidence of the three injured witnesses have been taken together, it is apparent that there happens to be consistency amongst them with regard to commission of an occurrence at the hands of accused persons at Dubba-Khatta-Sandha. It is also apparent from their evidence that they were consistent over manner of assault. Although, some sort of embellishment or development, the defence had tried to flash, however, on account of, evidence adduced in court happens to be substantive evidence, wherein no infirmities have been found coupled with the fact that appellants have not challenged those aspect, make the evidence reliable, credible as well as trustworthy.

37. Though the defence has not been able to dismantle the consistent version of the injured witnesses over place of occurrence, the manner of occurrence as well as motive, however, by way of suggestion as well as exhibit made on their behalf tried to flash a counter version that occurrence had taken place at the brick kiln where appellant, Surendra Sharma was assaulted at the hands of prosecution party who was shifted to the hospital and then, as the prosecution party remained at brick kiln indulged with the labourers present there and the subsequent event might have cost life of Bhagwat Sharma as well as injuries upon the persons of other

prosecution party. To support the same FIR and respective judgments, injury reports have been made an exhibit. After going through the same, it is apparent that learned lower court adopted wrong procedure while exhibiting FIR of counter case injury report without being exhibited by assistance of any of the DW in accordance with law. Furthermore, the conduct of the appellants has also to be taken in account. They have not taken such plea during course of statement recorded under Section 313 Cr.P.C. as well as no DW has been examined on that score. Moreover, it is also apparent that place of occurrence of both two incidents happen to be at two different places lying at some distance and furthermore, the defence could not succeeded in getting any positive material on that very score. And so, it could safely be said that appellants could not be able to give a dent in the prosecution case on that very score.

38. When there happens to be consistency in the prosecution case then, in that event, non explanation of injuries over person of accused is not found impalpable to prosecution. Moreover, on account of illegal procedure adopted by the lower court, injury report cannot be taken into consideration, even if, it suggests superficial injury.

39. In *Laxman v. State of Maharashtra* as reported in (2012) 11 SCC 158, it has been held under para-17:-

“Insofar as the injuries sustained by some of the

accused are concerned, it is seen from the evidence of Dr. D. Trimabak (PW-2) that those injuries are minor in nature. This Court on various occasions has held that in the case of minor injuries, merely because the prosecution has not furnished adequate reasons, their case cannot be rejected. Considering the fact that the injuries sustained by some of the accused were minor in nature, even in the absence of proper explanation by the prosecution, we hold that the prosecution story cannot be disbelieved”.

40. In *Mano Dutt v. State of Uttar Pradesh* as reported in (2012) 4 SCC 79, it has been held:-

“38. The question, raised before this Court for its consideration, is with respect to the effect of non-explanation of injuries sustained by the accused persons. In this regard, this Court has taken a consistent view that the normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail.

39. Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the existence of two conditions:

(i) that the injuries on the person of the accused were also of a serious nature; and

(ii) that such injuries must have been caused at the time of the occurrence in question.

40. Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be the sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. Reference in this regard can be made to *Rajender Singh v. State of Bihar*[(2000)4 SCC 298], *Ram Sunder Yadav v. State of Bihar*[(1998)7 SCC 365]and *Vijayee Singh v. State of U.P.*[(1990)3 SCC 190”

41. With regard to status of the witnesses, it has been submitted that they all happen to be interested witnesses and on account thereof, their evidence, even though are injured should not be



relied upon. The status of the witnesses are not interested witnesses rather they are own family members and further, from their evidences, more particularly, PW-3 (para-29), he specifically narrated that both the parties were not on inimical terms since before, but were on visiting terms before the occurrence, there was no occasion for them to falsely implicate the appellants exonerating the real culprits who was responsible for causing death of Bhagwat Sharma as well as inflicting injuries upon the rest of the witnesses.

42. It has also been submitted that other injured witnesses have not been examined, nor any explanation, save and except relating to Vinay has been offered. Hence non examination of those witnesses are bound to axe upon reliability of prosecution case.

43. In *Manjit Singh vs. State of Punjab* as reported in (2013)12 SCC 746, it has been held under para-24:-

“24. From the aforesaid exposition of law, it is quite clear that it is not the number and quantity, but the quality that is material. It is the duty of the Court to consider the trustworthiness of evidence on record which inspires confidence and the same has to be accepted and acted upon and in such a situation no adverse inference should be drawn from the fact of non-examination of other witnesses. That apart, it is also to be seen whether such non-examination of a witness would carry the matter further so as to affect the evidence of other witnesses and if the evidence of a witness is really not essential to the unfolding of the prosecution case, it cannot be considered a material witness (see: State of U.P. v. Iftikhar Khan and others[(1973) 1 SCC 512]).”

44. In *Nirpal Singh v. State of Haryana* reported in

(1977) 2 SCC 131 at para 16.

“16. ... The real question for determination is *not as to what is the effect of non-examination of certain witnesses as the question whether the witnesses examined in court on sworn testimony should be believed or not*. Once the witnesses examined by the prosecution are believed by the court and the court comes to the conclusion that their evidence is trustworthy, the non-examination of other witnesses will not affect the credibility of these witnesses”.

45. In *Deny Bora v. State of Assam* reported in 2015

Cr.L.J 68, this point has again come to consideration and the Apex

Court explained as:

“9. The question that arises for consideration is whether the prosecution has been able to establish the involvement of the appellant in the crime in question. As is manifest, neither the wife nor the daughter of the deceased has been examined. Submission of Mr Goswami is that they are natural witnesses and no explanation has been given for their non-examination and hence, adverse inference against the prosecution deserves to be drawn. He has drawn inspiration from the authority in *Surinder Kumar v. State of Haryana*¹ wherein it has been held, though in a different context, that a failure on the part of the prosecution in non-examining the two children, aged about six and four years respectively, when both of them were present at the site of the crime, amounted to failure on the part of the prosecution. In this context, reference to the decision in *State of H.P. v. Gian Chand*² would be profitable. The Court while dealing with non-examination of material witnesses has expressed that: (SCC p. 81, para 14)

“14. ... Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses were available for being examined in the court and were yet withheld by the prosecution.”

The three-Judge Bench² further proceeded to observe that the court is required first to assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined.

10. In *Takhaji Hiraji v. Thakore Kubersing Chamansing* the Court has ruled that: (SCC p. 155, para 19)

“19. ... It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court [should pose the question] whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court? If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses.”

11. In *Dahari v. State of U.P.*, while discussing about the non-examination of material witness, the Court expressed the view that when he was not the only competent witness who would have been fully capable of explaining the factual situation correctly and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution.

12. From the aforesaid authorities, it is quite vivid that non-examination of material witnesses would not always create a dent in the prosecution case. However, as has been held in *Gian Chand* the charge of withholding a material witness from the Court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find out whether the witnesses were available for being examined in the court and were yet withheld by the prosecution. That apart, the court has first to assess the trustworthiness of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could also have been examined but were not examined. Another aspect which is required to be seen whether such witness or witnesses are the only competent witnesses who could have been fully capable of explaining correctly the factual situation”.

46. Now coming to mode of appreciation of the evidence, the methodology has elaborately been delved into *Paulmeli v. State T.N as reported in (2014)13 SCC 90* under paras-24, 25, 26, 27:-

"24. In *Balka Singh & Ors. v. State of Punjab*, AIR 1975 SC 1962, this Court considered a similar issue, placing reliance upon its earlier judgment in *Zwinglee Ariel v. State of Madhya Pradesh*, AIR 1954 SC 15 and held as under:

"The Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."

25. In *Sukhdev Yadav & Ors. v. State of Bihar*, AIR 2001 SC 3678, this Court held as under:

"It is indeed necessary however to note that there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment, sometimes there would be a deliberate attempt to offer the same and sometimes the witnesses in their over anxiety to do better from the witness-box details out an exaggerated account."

26. A similar view has been reiterated in *Appabhai & Anr. v. State of Gujarat*, AIR 1988 SC 696, wherein this Court has cautioned the courts below not to give undue importance to minor discrepancies which do not shake the basic version of the prosecution case. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness for the reason that witnesses now a days go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. However, the courts should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

27. In *Sucha Singh v. State of Punjab*, AIR 2003 SC 3617, this Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim *falsus in uno falsus in omnibus* (false in one thing, false in everything) has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery

to a story, however, truth is the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well”.

47. Thus, after giving minute observation over the materials available on record adduced on behalf of respective parties, we are of the firm view that prosecution has succeeded in proving its case and that being so, we concur with the findings drawn by the learned trial court. Hence these appeals are dismissed.

48. The appellant, Surendra Sharma is in custody, accordingly, he will serve out the remaining part of sentence inflicted upon him. So far remaining appellants are concerned, they are on bail, hence, their bail bonds are cancelled with a direction to surrender before the learned trial court to serve out the remaining part of sentences.

(Aditya Kumar Trivedi, J)

Patna High Court
August 4th day of 2015
Perwez/AFR

(Dharnidhar Jha, J) I agree

(Dharnidhar Jha, J)

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