

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.551 of 2002**

Arising Out of PS.Case No. -null Year- null Thana -null District- SITAMARHI

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1. Badri Rai
  2. Ashok Rai, Both sons of Panchu Rai
  3. Baidyanath Rai, Son of Nathuni Rai.
  4. Shiv Ji Rai, Son of Satahu Rai.
  5. Hargen Rai, Son of Panchu Rai, All residents of Village – Kamrauli, Police Station-Piprarhi, District-Sheohar.

.... .... Appellants

Versus

State of Bihar

.... .... Respondent/s

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**Appearance:**

For the Appellant/s : Mr. Prasoon Kumar Sinha, Advocate.

For the Respondent/s : Mr. Bipin Kumar, APP.

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**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL**

**ORAL JUDGMENT**

**Date: 11-09-2017**

Heard learned counsel for the appellants as well as learned APP for the State.

2. This appeal has been preferred against the Judgment and Order of conviction and sentence dated 06.09.2002 passed by the Additional Sessions Judge, Fast Track Court-2, Sitamarhi in Sessions Trial No. 423 of 1989 / 87 of 2002 arising out of Piprarhi P.S. Case No. 27 of 1989, whereby the learned trial court convicted Ashok Rai and Badri Rai for the offence punishable under Section 307 of the Indian Penal Code and Hargen Rai, Baidyanath Rai and Shivjee Rai for the offence punishable under Section 307/149 of the Indian Penal Code and sentenced Ashok Rai and Badri Rai to undergo R.I. for seven years each and also slapped them with a fine of Rs. 1,000/- each



and in default of payment of fine to undergo S.I. for 3 months under Section 307 of the Indian Penal Code and sentenced Hargen Rai, Baidyanath Rai and Shivjee Rai to undergo R.I. for seven years each and also slapped them with a fine of Rs. 1,000/- each and in default of payment of fine to undergo S.I. for three 3 months under Section 307/149 of the Indian Penal Code.

**3.** The factual matrix of the case is that Piprarhi P.S. Case no. 27 of 1989 was instituted under Sections 147, 148, 149, 323, 324 and 307 of the Indian Penal Code against the accused persons, namely, Ashok Rai, Badri Rai, Hargen Rai, Nagina Rai, Shail Rai, Baidyanath Rai and Shivjee Rai on the basis of the statement of Munsai Rai S/o late Jagdish Rai, R/o Village-Kamrauli P.S. Piprarhi, District- Sitamarhi recorded by S.H.O. in Piprarhi Police Station with the allegation in succinct that on 10.06.1989 at about 07:30 AM, his uncle Polish Rai was erecting brick-wall on his land and he was standing there, in the meantime, his co-villagers namely, Badri Rai armed with farsa, Ashok Rai armed with bhala, Hargen Rai, Nagina Rai, Shail Rai, Baidyanath Rai, Shivjee Rai all armed with lathi and 7-8 unknown miscreants abruptly descended there and cordoned off his uncle and intervened him from erecting the wall. On protest made by his uncle, Badri Rai gave order to eliminate him whereupon Ashok Rai assaulted on the head of his uncle Sunder Rai by means of bhala with intention to do away with



his life inflicting bleeding injury to him while Badri Rai assaulted on the head of his brother Kameshwar Rai by means of *farsa* with intention to eliminate him and other accused persons assaulted Polish Rai and the informant by means of *lathi*. When his mother Rajo Devi and aunt Ram Kali Devi rushed in their rescue, they also assaulted them. Jimdar Rai and Shashi Bhushan Rai have witnessed the occurrence.

4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the accused persons, namely, Badri Rai, Ashok Rai, Hargen Rai, Nagina Rai, Shail Rai, Baidyanath Rai and Shivjee Rai under Sections 147, 148, 149, 323, 324, 325 and 307 of the Indian Penal Code.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence against the accused persons and committed the case to the court of sessions and on transfer finally the case came in *seisin* of the Additional Sessions Judge, Fast Track Court-2, Sitamarhi for trial.

6. Charge against accused Ashok Rai and Badri Rai was framed under Section 307 of the Indian Penal Code while against Nagina Rai, Shail Rai, Hargen Rai, Baidyanath Rai and Shivjee Rai charge was framed under Sections 307/149 of the Indian Penal Code. Charge was read over and explained to the accused



persons to which they pleaded not guilty and claimed to be tried. During the pendency of the trial, accused Nagina Rai and Shail Rai passed away, so the rest five accused persons faced the trial.

7. To substantiate its case, in ocular evidence, the prosecution has been able to examine altogether nine prosecution witnesses namely, Kashi Nath as PW-1, Shashi Bhushan Rai as PW-2, Jimdar Rai as PW-3, Polish Rai as PW-4, Kameshwar Rai as PW-5, Ram Kali Devi as PW-6, Ram Dulari Devi as PW-7, Rajo Devi as PW-8 and the informant Munshi Rai as PW-9. Out of the aforesaid witnesses, PW-1 happens to be the formal witness. One witness namely, Jitendra Jha was also examined as court witness who happens to be the formal witness. In documentary evidence, the prosecution has filed and proved certain documents.

8. The statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming themselves to be innocent. In buttress of its case, the defence has neither adduced any ocular nor documentary evidence.

9. After hearing the parties and perusing the record, the learned trial court passed the impugned Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid Judgment and Order of conviction and sentence, the convicts have



preferred the present Criminal Appeal.

**11.** The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellants beyond all reasonable doubts or not.

**12.** It is submitted by the learned counsel for the appellants that all the witnesses examined by the prosecution happen to be the family members and they are highly interested witnesses of the case. As per the witnesses' account, there were large number of people present at the place of occurrence and time of occurrence, but none of the aforesaid independent witnesses has been examined by the prosecution rather withheld without assigning any plausible reason creating serious doubt about the prosecution case. It is further submitted that the injury reports of the victims have not been proved by the doctor who happens to be the author thereof rather by the formal witness who happens to be the advocate clerk of the P.P. Hence, for want of examination of the doctor, the said injury reports have not been legally brought on record and cannot be considered. Thus, the ocular evidence does not stand corroborated by the medical evidence. I.O. has also not been examined by the prosecution and due to non-examination of the I.O. in the case, the place of occurrence does not stand established. The contradiction drawn in the cross-examination of the witnesses regarding the statement given by the witnesses before the court and that given before the I.O. under



Section 161 of the Cr.P.C. does not stand confirmed and corroborated for non-examination of the I.O. causing great prejudice to the defence. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case by adducing consistent, trustworthy, reliable ocular and documentary evidence. It is further submitted that seven accused persons armed with *farsa*, *bhala* and *lathi* are said to have assaulted the prosecution party for half an hour and no one intervened the occurrence and all the victims barring Polish Rai have sustained simple injuries, though injury no.1 sustained by Polish Rai has been opined by the doctor as grievous in nature but that too on non-vital part i.e. on forearm. Hence, no offence under Section 307 of the Indian Penal Code is made out against the appellants. Hence, the appellants are entitled to get the benefit of doubt.

**13.** On the other hand, learned APP advocating the correctness and validity of the impugned Judgment and Order of conviction and sentence, submitted that the witnesses namely, PW-4 (Polish Rai), PW-5 (Kameshwar Rai), PW-6 (Ram Kali Devi), PW-7 (Ram Dulari Devi), PW-8 (Rajo Devi) and PW-9 (Munshi Rai) happen to be injured of the case and they have consistently supported the prosecution case. PW-2 (Shashi Bhushan Rai) and PW-3 (Jimdar Rai) happen to be eye witnesses of the case and they have also corroborated the prosecution case. Though I.O. and doctor has not



been examined by the prosecution. But in view of the consistent ocular testimony of the witnesses, non-examination of I.O. and doctor is not going to shatter the prosecution case and the learned lower court correctly appreciating the facts and evidence on record has rightly passed the impugned Judgment and Order of conviction and sentence, and the same is liable to be sustained and this appeal has no substance in it and is liable to be dismissed.

**14.** As per the prosecution case as mentioned in the statement of the informant, over the row of erection of wall, the accused persons armed with weapons arrived at the place of occurrence and on order given by Badri Rai to eliminate the Polish Rai, first of all, Ashok Rai assaulted on the head of Sunder Rai by means of *bhala* inflicting bleeding injury to him, then Badri Rai assaulted on the head of his brother Kameshwar Rai by means of *farsa* and other accused persons assaulted Polish Rai and the informant by means of *lathi*. When his mother Rajo Devi and aunt Ram Kali Devi rushed in their rescue, the accused persons also assaulted them by means of *lathi*. But in quite contradiction to the aforesaid prosecution case, PW-2, PW-3, PW-4, PW-5, PW-7 and PW-9 in their respective examination-in-chief have unanimously stated that on the order given by Badri Rai to assault, first of all, accused Hargen Rai assaulted on the hand of Polish Rai by means of *lathi* and other accused persons assaulted him by means of *lathi*.



When Ram Sunder Rai rushed in his rescue, Ashok Rai assaulted on his head by means of *bhala* and when Kameshwar Rai rushed in his rescue, Badri Rai assaulted on his head by means of *farsa*. As per the prosecution case, besides the named accused persons, 7-8 unknown miscreants also descended the house of Polish Rai and assaulted the victim, but PW-2 to PW-8 have not stated so. There is no case of prosecution that other accused persons assaulted Ram Sunder Rai and Kameshwar Rai by means of *lathi*, but PW-2 in Para-1, PW-3 in Para-1 and PW-4 in Para-1 of their respective examination-in-chief have stated that other accused persons also assaulted Ram Sunder Rai and Kameshwar Rai by means of *lathi*. It is the case of the prosecution that all the accused persons assaulted two ladies, namely, Rajo Devi and Ram Kali Devi by means of *lathi*, but in quite contradiction to the aforesaid case of the prosecution, PW-2 in Para-1, PW-3 in Para-1 and PW-4 in Para-1 of their respective examination-in-chief have stated that the accused persons assaulted three ladies by means of *lathi*. PW-3 in Para-5 of his cross-examination has stated that all the victims fell semi senseless on assault but PW-4 (Polish Rai) in Para-2 of his cross-examination has stated that he was in sense. PW-5 in Para-6 and PW-7 in Para-5 of their respective cross-examination have stated that after sustaining injury, they were in sense. Thus, there appears to be vital contradiction between the prosecution case and testimonies of the



aforesaid witnesses & in the testimonies of witnesses *inter se* regarding the manner of occurrence, assailants, injured and condition of the injured post assault etc.

**15.** Shashi Bhushan Rai (PW-2), Jimdar Rai (PW-3) and Polish Rai (PW-4) happen to be uncle of the informant, Kameshwar Rai (PW-5) happens to be own brother of the informant, Ram Kali Devi (PW-6) happens to be the aunt of the informant, Ram Dulari Devi (PW-7) happens to be the aunt of the informant, Rajo Devi (PW-8) happens to be the mother of the informant and Munshi Rai (PW-9) happens to be the informant himself. Thus, the aforesaid witnesses happen to be the highly interested witnesses of the case. It is the settled principle of law that the evidence of interested witness should not be discarded outrightly rather it should be scrutinized and scanned cautiously and carefully. On cautious and careful scanning of the testimonies of the aforesaid witnesses, I find that the testimonies of the said witnesses are full of material contradictions with the prosecution case and their testimonies *inter se* regarding the manner of occurrence, assault, assailant, injured and condition of the victim post assault. In view of the aforesaid contradictions, the testimonies of the aforesaid witnesses do not appear to be worth credence, trustworthy and reliable.

**16.** PW-2 has stated in Para-4 of his cross-examination that 100 of people including the Sarpanch and Mukhiya were present



at the place of occurrence. Jimdar Rai (PW-3) has stated in Para-5 of his cross-examination that there were several persons present at the place of occurrence. Polish Rai (PW-4) has stated in Para-2 of his cross-examination that 250 persons had arrived at the place of occurrence. Mukhiya and Sarpanch have also arrived there. Kameshwar Rai (PW-5) has stated in Para-5 of his cross-examination that 400-500 people were present at the place of occurrence. Ram Dulari Devi (PW-7) has stated in Para-5 of his cross-examination that about 50 persons were present at the place of occurrence. Rajo Devi (PW-8) has stated in Para-2 of cross-examination that 20-40 persons were present at the place of occurrence. The aforesaid statement of the said witnesses indicates that there were several persons present at the place of occurrence at the time of occurrence including the Sarpanch and Mukhiya of the village. But none of the independent witnesses has been examined by the prosecution and the prosecution has also failed to assign any plausible and convincing reason for their non-examination. So, adverse inference is drawn against the prosecution.

**17.** Shashi Bhushan Rai (PW-2) has stated in Para-2 of his cross-examination that Badri Rai has filed a case against him and others on the said date. PW-3 in Para-3 of his cross-examination has stated that Badri Rai has also filed a case against Polish Rai, Shashi Bhushan Rai and another. PW-4 in Para-2 of his cross-examination



stated that Bardri Rai has filed a counter case against them. PW-5 in Para-2 of cross-examination has stated that Badri Rai has filed a case against him and others regarding the same occurrence. PW-6 has stated in Para-2 of his cross-examination that Badri Rai has also filed a case. PW-8 in Para-2 of his cross-examination has stated that Badri Rai has also filed a case and PW-9 in Para-8 of his cross-examination has stated that regarding the same date, time and place of occurrence, accused Badri Rai has filed a criminal case against him, Polish Rai and others. The aforesaid statement of the said witnesses indicates that there was a case and counter case between the parties and the informant and the witnesses are accused in the said case. Thus the prosecution party also appears to be on inimical terms with the accused persons.

**18.** From perusal of the testimony of Ram Kali Devi (PW-6), it appears that she has not specifically stated that who assaulted her and by which weapon rather she has given vague statement that all the accused persons assaulted them. She has even not disclosed the weapon used by the accused persons in the assault.

**19.** From perusal of testimonies of the witnesses, it appears that attention of the PW-2 in Para-6 of his cross-examination, of PW-3 in Para-5 of his cross-examination, of PW-4 in Para-3 of his cross-examination, of PW-7 in Para-9 of her cross-examination, of PW-8 in Para-2 of her cross-examination and PW-9



in Para-28 of his cross-examination was drawn by the defence towards the contradiction between the statement given before the court and that given before the I.O. under Section 161 of the Code of Criminal Procedure, but the I.O. has not been examined by the prosecution to confirm or corroborate the aforesaid contradiction. In the absence of the I.O., I perused the relevant Paras of the case diary and from perusal, it appears that the aforesaid witnesses have divulged to the I.O. under Section 161 of the Code of Criminal Procedure quite contradictory to their statement given before the court regarding manner of occurrence, assault, injured, assailant, etc. and they appear to have taken different stand in the Court.

**20.** When attention of the witnesses has already been drawn towards their earlier statements and the Investigating Officer could not be brought to give his evidence, then in my considered opinion, the Court can peruse the case diary and find out as to whether or not the attention of the witnesses towards their previous statements were correctly drawn and to satisfy itself as to whether or not they had given similar statement before police. There are two parts of the case diary. First part contains such portion of the diary in which the Police Officer has recorded statement of the witnesses, about the incident or about other relevant facts which to that Police Officer, would be hearsay. The Second party of the case diary contains that portion in which the Police Officer has himself seen or



heard a particular fact and has recorded a fact out of his own perception. To this category would come recording about the inspection of place of occurrence making of seizure of certain incriminating articles or in some cases, when the Police Officer reaches the place of occurrence where the occurrence has not finished and he sees himself whole or part of the occurrence, recording of that. The latter part of the case diary cannot be used by the Court unless the Investigating Officer is examined because that would amount to using that portion of the case diary as evidence. Only the Investigating Officer can tell the Court in witness box as to what were his findings out of his own perception, so that he can be put to cross-examination over that. However the first part of the case diary consists, as already noted, the statement recorded by the witnesses. If the Investigating Officer comes to the Court for evidence and if he is asked to confirm those portion of the statement of the witnesses to which the attention of the witnesses was drawn, the Investigating Officer will say only what he has recorded as his statement in the case diary and cannot go beyond that. Now, the question is, whether that portion of the case diary can be looked into by the Court and used in the trial to aid the Court in reaching at a correct decision when the Investigating Officer is not brought before the Court. Sub-Section (2) of Section 172 of Cr.P.C. provides that the Court cannot only call for the case diary but may also use such diary



to take aid in such trial. If the Court only has the power to look into the case diary and whatever it peruses to keep it only in mind and then to proceed to record the judgment keeping such impression only in mind that, in my opinion, cannot be the intention of the legislation. In my considered opinion, if the Court peruses any such things and uses it to its aid in trial, this must go in black and white as part of the judgment. The only limitation is that the court cannot use any portion of the case diary as evidence. In view of the aforesaid proposition of law and in view of the contradiction between the statements of the witnesses, as recorded before the court and that given before the I.O. under Section 161 Cr.P.C., the testimonies of the aforesaid witnesses given before the court do not inspire my confidence to hold the conviction of the appellants relying upon the same.

**21.** The injury reports of the victims have not been proved by the doctor who has examined the victims rather by the advocate clerk (court witness no.1) of the PP. The said witness in Para-3 of his cross-examination has stated that he has not got an opportunity to work with the doctor and the said injury report was not prepared before him. The doctor who examined the victims has not been examined by the prosecution. The prosecution has also not assigned any plausible reason for non-examination of the said doctor. Due to non-examination of the doctor, the injury reports have not been legally brought on record and it cannot be considered. Thus,



inconsistent ocular evidence regarding the injury also does not stand corroborated by the medical evidence.

**22.** From perusal of the record and witnesses' account, it appears that seven accused persons arrived at the place of occurrence armed with *farsa*, *bhala* and *lathi* and assaulted the victims for half an hour and none has intervened the occurrence. So had the accused persons intended to do away with their lives they would have executed their intention as they had ample opportunity and time to execute their intention. But from perusal of the injury report of the victims, it appears that all the victims have sustained simple injuries barring that of Polish Rai and that too on the non-vital part of his person i.e. forearm. PW-3 in Para-3 of his cross-examination has stated that on forbidding Polish Rai to construct house by Badri Rai, there was free fighting from both the sides. The aforesaid aspects of the case go to rule out the intention of the accused persons to eliminate the victims in the occurrence and hence in my considered opinion, no offence under Section 307 of the Indian Penal Code is made out against them.

**23.** In view of the aforesaid facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to substantiate its case by adducing trustworthy, reliable, convincing and cogent ocular and documentary evidence beyond all reasonable doubts. Accordingly, the impugned judgment



and order of conviction and sentence passed by the learned lower court is set aside and the appellants are acquitted from the charge levelled against them. As the appellants are on bail, they are discharged from the liability of their bail bonds. Accordingly, this appeal is allowed.

Mishra/-

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**(Prakash Chandra Jaiswal, J)**

