

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.330 of 2002

Arising Out of PS.Case No. -55 Year- 1993 Thana - Matihani District- BEGUSARAI

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1. Hardeo Rai
2. Ram Shankar Rai @ Batoran Rai
Both sons of late Ram Autar Rai
3. Dashrath Rai
4. Bhagirath Rai
Both sons of Hardeo Rai
All R/o Village-Matihani P.S. Matihani, District-Begusarai.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur
Md. Imteyaz Ahmad
Mr. Ritwaj Raman
For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

ORAL JUDGMENT

Date: 27-11-2017

Heard learned counsel for the appellants and learned

APP for the State on this Criminal Appeal.

2. This appeal has been preferred against the judgment and order of conviction dated 29.06.2002 and order of sentence dated 02.07.2002 passed by the Additional Sessions Judge-VI, Begusarai in Sessions Trial no. 252 of 1994 arising out of Matihani P.S. Case No. 55 of 1993, whereby the learned trial court convicted the accused persons namely, Hardeo Rai, Bhagirath Rai, Ram Shankar Rai @ Batoran Rai and Dasrath Rai for the offence punishable under Section 307/34 of the Indian Penal Code and further convicted the accused Ram Shankar Rai @ Batoran Rai and



Bhagirath Rai for the offence punishable under Section 323 of the Indian Penal Code and sentenced the aforesaid convicts to undergo R.I. for seven years for the offence under Section 307/34 of the Indian Penal Code and also slapped the convicts namely, Ram Shankar Rai @ Batoran Rai and Bhagirath Rai with a fine of Rs. 500/- each and in default of payment of fine to undergo R.I. for 15 days each under Section 323 of the Indian Penal Code.

3. The factual matrix of the case is that Matihani P.S. Case No. 55 of 1993 was instituted under Sections 324, 323, 307/34 of the Indian Penal Code against accused Hardeo Rai, Dasrath Rai, Shankar Rai @ Batoran Rai and Bhagirath Rai on the basis of *fardbeyan* of Shakal Deo Rai S/o Late Bodhan Rai R/o Village & P.S. Matihani District-Begusarai recorded by S.I. N. Singh of P.S. Town Begusarai in the clinic of Dr. Shashi Bhusan Sharma on 24.10.1993 at 17:00 with the allegation, in succinct that on 23.10.1993 (Saturday) at 8:00 PM, he had gone to see his field located in Balha Bandh, he spotted Hardeo Rai, Dasrath Rai, Shankar Rai @ Batoran Rain, Bhagirath Rai standing in his field. Dasrath Rai cut the northern ridge of his filed and uprooted the bush. On protest made by him, Hardeo Rai gave order to eliminate him whereupon Dasrath Rai assaulted on his neck by means of spade inflicting cut injury on his neck which started bleeding profusely. When he rushed to escape, Shankar Rai @ Batoran Rain caught him hold and Bhagirath Rai indiscriminately assaulted him



by means of lathi. Sustaining injury he fell down, his villager Lalan Rai, Ram Padarath Rai, Ramasray Rai, Lutan Rai and others who were working in nearby field rushed to him and saved his life and took him to Matihani Dhala and from there to clinic of Dr. Sashi Bhusan Sharma. He was senseless since the occurrence.

4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the aforesaid accused persons under Sections 341, 323, 324, 307/34 of the Indian Penal Code.

5. On receiving the charge-sheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions and on transfer finally the case came in *seisin* of the Additional Sessions Judge-VI, Begusarai for trial.

6. Charges against accused Hardeo Rai, Shankar Rai @ Batoran Rai, Dasrath Rai and Bhagirath Rai were framed under Sections 341, 323, 324 and 307/34 of the Indian Penal Code Charges were read over and explained to them to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether six prosecution witnesses namely, Lutan Rai as PW-1, informant Ram Shakal Rai as PW-2, Ramasray Rai as PW-3, Ram Padarath Rai as PW-4, Dr. Shashi Bhushan Prasad Sharma as PW-5, Laddu Lal Paswan as PW-6. Out



of the aforesaid witnesses, PW-1 (Lutan Rai) turned hostile and PW-6 (Laddu Lal Paswan) happens to be formal witness. In documentary evidence, the prosecution has filed and proved some 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. In buttress of their case, the accused persons have 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 three material witnesses namely, PWs-2, 3 and 4 have given different place of occurrence. As per the PW-2 (Ram Shakal Rai), the place of occurrence is located in Balha Bandh while as per PW-3 (Ramasray Rai) the place of occurrence is located in Sinohi Bandh and I.O. has not been examined by the prosecution.



Thus, the place of occurrence does not stand established by the prosecution. It is further submitted that PW-3 (Ramasray Rai) does not happen to be eye witness of the occurrence and PW-2 (Ram Shakal Rai) and PW-4 (Ram Padarath Rai) are interested witnesses of the case being informant and his own brother respectively. As per the prosecution case, the accused Dasrath Rai assaulted on the neck of the informant by means of spade forcibly. But, doctor has found neck injury as muscle deep and simple in nature. Thus, the ocular evidence also does not stand corroborated by the medical evidence. It is further submitted that PWs-3 and 4 have taken altogether different stand before the court than taken before the I.O. under Section 161 of the Cr.P.C. regarding place of occurrence and manner of occurrence. Thus, the aforesaid witnesses do not appear reliable and worth credence. It is further submitted that due to non-examination of the I.O., great prejudice has been caused to the defence. It is also submitted that the occurrence is of 23.10.1993 at around 08:00 AM and fardbeyan of the informant was recorded on 24.10.1993 at around 05:00 PM, but the FIR was lodged after abnormal delay of two days on 26.10.1993 at around 02:30 PM, though the place of occurrence is located barely at around 2 Km. from the police station. The prosecution has also not assigned any plausible reason to explain the aforesaid delay in lodging the FIR. Hence, the aforesaid aspect of the case creates serious doubt about the prosecution case. It is further submitted that as per the account



of informant, his statement was recorded in the morning of 24.10.1993 within 2-3 hours of regaining sense by him. But, the aforesaid statement of the informant which must have been his First Information Report has not been brought on record rather concealed by the prosecution. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case against the appellants beyond all reasonable doubt by adducing trustworthy and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed against the appellants by the learned lower court is liable to be set aside.

13. On the other hand, learned APP advocating the correctness and validity of the impugned judgment and order of conviction and sentence, submitted that PWs-2, 3 and 4 have proved the place of occurrence, manner of occurrence, occurrence, etc. The ocular evidence also stand corroborated by the medical evidence and 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 upheld and this appeal has no substance in it and is liable to be dismissed.

14. From perusal of fardbeyan and statement of the informant, it appears that the place of occurrence is located in Balha Bandh, but PW-3 (Ramasray Rai) in paragraph 1 of his examination-in-chief has stated that at the time of occurrence, when



he was in his field located in Sinohi Bandh, he listened hulla from the field of Shakal Deo Rai, then he rushed there and witnessed the occurrence. In paragraph 6 of his cross-examination, he has stated that his land is located at 3 Km. from his house and in paragraph 8 of his cross-examination, he has stated that there are five bandhs in the village Matihani, closed to his house is Balha Bandh which is located at one and half km. from his house thereafter there is Sinohi Bandh. The aforesaid statement of PW-3 indicates that Balha Bandh and Sinohi Bandh are two different Bandhs and both are located at a distance of one and half km. Hence, the aforesaid statement of PW-3 rules him out to be the eye witness of the occurrence as it is not possible for a person to listen the hulla of a person from distance of one and half km. and responding the same rush at the place of occurrence and witness the occurrence.

15. As per account of informant towards north of the place of occurrence, there is a land of Sunil Rai towards South his own land, towards east land of Ram Batori Rai and towards West land of Brahmdeo Rai are located. But, PW-3 in paragraph 9 of his cross-examination and PW-4 in paragraph 8 of his cross-examination have given altogether different boundaries of alleged place of occurrence. I.O. of the case has not been examined by the prosecution. Thus, the place of occurrence does not stand established by the prosecution.

16. As per cross-examination of PW-2 (informant) as



given in paragraph 16, he regained sense on the following morning and he interacted with S.I. 2-3 hours later to regaining sense and there was none present at that time. The aforesaid statement of PW-2 indicates that he had given statement to the police on 24.10.1993 in the morning and no one was present there at that time, but from perusal of his fardbeyan, it appears that I.O. has recorded his fardbeyan on 24.10.1993 at 05:00 PM and there are two attesting witnesses of the fardbeyan namely, Ramasray Rai and Lalan Rai which means that the informant had given statement to the I.O. earlier to the aforesaid statement which must have been his First Information Report. But, the said statement of the informant has not been brought on record by the prosecution rather concealed by it which creates serious doubt about the prosecution case. Likewise, PW-4 has stated in paragraph 11 of his cross-examination that his statement was recorded on 23.10.1993 in the clinic of Dr. Shashi Bhusan Sharam i.e. on the very date of occurrence and preceding to the recording of fardbeyan of the informant on 24.10.1993 at around 05:00 PM, but the said statement of PW-4 regarding the occurrence has also not been brought on record by the prosecution.

17. As per statement of the informant given by him in paragraph 15 of his cross-examination Dasrath Rai assaulted on his neck by means of spade forcibly. So as per the aforesaid statement, the informant must have sustained grievous injury on his neck. But, from perusal of the injury report and the statement of the doctor who



has examined the informant, it appears that he has sustained sharp cut simple injury on his neck. As per the statement of the informant as given by him in paragraph 16 of his cross-examination his neck wound was given 8-9 stitches, but doctor treating the informant has not stated about stitching the wound of the informant. As per account of the informant, sustaining injury he fell senseless and regained sense on the following morning. But, from perusal of the injury report of the informant, it appears that the doctor has examined the informant on 23.10.1993 at around 10:00 AM i.e. on the very date of occurrence just after 2 hours later to the alleged occurrence, but he has not reported about finding the informant senseless at that time. Thus, the aforesaid ocular evidence of the prosecution does not stand corroborated by the medical evidence.

18. As per the prosecution case, the appellants had cut the ridge of the field of informant and uprooted the bush and as per statement of informant given by him in paragraph 15 of his cross-examination, the blood from his wound had fallen on his attire, cot and on the P.O. and gamacha by which his wound was covered was also stained with blood but I.O. has not been examined by the prosecution to substantiate the aforesaid aspects of the case.

19. Attention of the PWs-3 and 4 towards contradiction between their statement given before the court and that given before the I.O. under Section 161 Cr.P.C. was drawn by the defence in their respective cross-examination, but I.O. has not been examined by the



prosecution to corroborate and support the aforesaid contradictions and no explanation has been assigned by the prosecution for non-examination of the I.O.

20. When the I.O. of the case is not examined by the prosecution and the attention of the witness has already been drawn towards his earlier statement 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 witness towards his previous statement was correctly drawn and to satisfy itself as to whether or not he 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 part 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 & 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 & 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 statement of PW-3 and 4 as recorded



before the Court and that given before the I.O. under Section 161 Cr.P.C., the testimony of the aforesaid witnesses given before the Court do not inspire my confidence to hold the conviction of the appellants relying upon the same. As from perusal of the aforesaid testimony of PWs-3 and 4 and the case diary, I find that the aforesaid two witnesses have given altogether different statement before the court regarding the place of occurrence and manner of occurrence than given before the I.O. under Section 161 of the Cr.P.C. Thus, they have taken altogether different stand before the court. Hence, the aforesaid witnesses do not appear to be reliable and worth credence.

21. From perusal of record, it appears that the informant had regained sense on 24.10.1993 in the morning, but his fardbeyan was recorded on 24.10.1993 at 05:00 PM in the clinic of Dr. Shashi Bhushan Sharma and the FIR was lodged after two days on 26.10.1993 at around 02:30 PM though the place of occurrence is located barely at a distance of 2 km. from the police station. The prosecution has not assigned any plausible reason to explain the aforesaid delay in lodging the FIR which creates serious doubt about the prosecution case.

22. In the aforesaid facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to bring home the charges levelled against the appellants beyond all reasonable doubts by adducing convincing, cogent, consistent and



wroth credence ocular and documentary evidence. Hence, the impugned judgment and order of conviction and sentence passed by learned lower court is set aside and the appellants are acquitted of the charges levelled against them. As the appellants are on bail, they are discharged from the liability of the bail bonds. Accordingly, this Criminal Appeal is allowed.

(Prakash Chandra Jaiswal, J)

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AFR/NAFR	AFR
CAV DATE	N.A.
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