

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.395 of 2015

Arising Out of PS.Case No. -81 Year- 2000 Thana -KUCHAIKOTE District- GOPALGANJ

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1. Sohail Ali S/o Nurul Haque
2. Nurul Haque S/o Late Abdul Barkat Mian Both Resident of Village Amawa
Vijapur, P.S. Kachai Kote, District Gopalganj. Appellant/s
Versus

1. The State of Bihar Respondent/s

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Appearance :

For the Appellant/s : Mr. Animesh Kumar Mishra, Amicus Curiae

For the Respondent/s : Mr. Z. Hoda, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 23-06-2017

Because of the fact that the learned counsel for the appellants failed to turn up on call, on account thereof, Sri Animesh Kumar Singh, has been requested to assist the Court as an Amicus Curiae.

2. Appellants Sohail Ali and Nurul Haque have been found guilty for an offence punishable under Sections 323 IPC and each one has been directed to undergo RI for 6 months, under Section 324 IPC and each one has been directed to undergo RI for 2 years, 307/34 IPC, directing each one to undergo RI for 5 years as well as to pay a fine of Rs. 2000/- in default thereof, to undergo RI for two months, additionally. Sohail Ali has further been convicted for an offence punishable under Sections 27 of the Arms Act and sentenced to undergo RI for three years with a further direction to run the sentences concurrently by the Additional District and Sessions Judge-III, Gopalganj in Sessions Trial No. 420/2005/268/2014, vide judgment of conviction dated 30.06.2015 and order of sentence dated 06.07.2015



3. Prosecution case as is evident from the Fard-e-beyan of Umar Faruk (PW 6) (not exhibited) recorded on 26.06.2000 at about 8:30 A.M. at P.H.C, Kuchaikot where he along with his injured brother, Imam Hassan was admitted disclosing that they happen to be gardener. In the preceding day i.e. on 25.06.2000 in the evening hour they had cut ridge for sowing maize and in the aforesaid background, today at about 6:00 AM. while he along with his brother, Imam Hassan was sitting at his Darwaza, his pattidars, Sohail Ali, Rizwan Ali, Pervez Ali, Md. Moiz Ahmad, Fazlu Rahman, Nurul Haque armed with gun and *Lathi* came. Sohail Ali inquired from him as to why he to has cut the ridge over which both the parties entered into an altercation leading to brawl. During course thereof, Sohail fired causing injury over his neck. Nurul Haque assaulted him with *Lathi* over his head, as a result of which, he sustained injury of over his head and hand. Rizwan shot at his brother Imam Hassan causing injury over his face while Pervez assaulted him with Lathi, as a result of which he also sustained injury. All the accused were saying that both of them should be murdered, thereafter all of them left the scene.

4. On the basis of the aforesaid Fard-e-beyan, Kuchaikot PS Case No. 81/2000 was registered whereupon investigation commenced and after concluding the same, others were discharged while charge-sheet was submitted only against these two appellants/accused who, accordingly, faced trial with ultimate result, the matter under challenge.



5. The defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. Furthermore, it has been pleaded that no occurrence as alleged by the prosecution had ever taken place rather prosecution party themselves happen to be aggressor who brutally assaulted the members of the accused persons when they resisted cutting of ridge and on account thereof, on the Fard-e-beyan of appellant, Sohail Ali, Kuchaikot PS Case No. 82/2000 was registered while he was admitted at Sadar Hospital, Gopalganj in an injured condition and to substantiate the same Ext-A, FIR of Kuchaikot PS Case No. 82/2000, Ext-B, Charge-sheet relating thereto have been exhibited though no oral evidence has been adduced.

6. In order to substantiate its case, the prosecution had examined altogether 6 PWs out of whom PW-1, Munazir Hassan, PW-2, Rahimulla, PW-3, Noorul Hoda, PW-4, Md. Daud, PW-5, Dr. Janak Lal Sharma and PW-6, Umar Farook.

7. Prosecution had also exhibited signature of seizure list witnesses under Ext-1 Series, Signature of informant as Ext-2. As indicated above, defence had exhibited FIR as well as Charge-sheet of counter case as Ext-A and B, respectively.

8. Before scrutinizing the evidence having been adduced on behalf of prosecution, from the record it is evident that Investigating Officer has not been examined. It is also evident that one of the injured, namely, Imam Hassan has also not been examined.



From the evidence of PW-1, it is apparent that he had divulged the fact that Imam Hassan died but the same is not corroborated with the other witnesses including that of informant.

9. Furthermore, it is evident that PWs-2 and 3 are formal in nature who have had simply exhibited their signatures over seizure list without deposing over merit of the case, whereupon the prosecution case rests upon the oral evidences of PWs-1, 4 and 6 who are none else than own brothers, apart from PW-5, the doctor.

10. PW-5, Dr. Janak Lal Sharma had doubted over the authenticity of the injury report though deposed on that very basis in the background of the fact that no original injury report was available on the record. He deposed with the aid of photo copy, however, doubted regarding its genuineness. In the aforesaid background, two kinds of eventualities are perceived. The first one regarding admissibility of the photo copy of injury report, and the other, oral evidence of PW-5, Dr. Janak Lal Sharma based thereupon. Coming to oral evidence of PW-5, it is evident that he had deposed on the basis of photocopy of injury report. Side by side, also deposed that he is not sure whether photo copy happens to be that of original. He had not identified his signature having thereupon. That means to say, opinion of doctor is not affirmed on his score. No other material is available to supplement the same. Hence, oral evidence is found inadmissible in the eye of law. Now coming to the authenticity of photo copy, though, it could be said that it happens to be prepared by mechanical process,



but certificate regarding its preparation, truthfulness being copied from original, is lacking and, on account thereof, it loses its criteria for being admitted as secondary evidence. That being so, it has rightly been not admitted in evidence.

11. Before going to discuss the oral evidence it looks pertinent to perceive an event relating to admission by the witnesses over presence of counter case. Although PWs-5 and 6 have not admitted with regard to injuries over presence of accused but PW-4 in para-6 of his cross-examination has stated that he is unable to say whether the accused persons were treated. He had further deposed that he is unable to say as to how the accused persons had sustained injuries.

12. In the aforesaid background, learned counsel for the appellants has submitted that from the narration of the version and counter version, it is evident that for cutting of ridge scuffle took place and so, it was incumbent upon the prosecution to explain injuries of the accused. That being so, the non-examination of the Investigating Officer has caused prejudice to the interest of the accused in the background of the fact that had there been examination of the Investigating Officer, P.O. would have been properly identified along with the fact that in whose possession the land happens to be coupled with the fact that who were on wrong footing. Furthermore, the evidences of the prosecution witnesses, as started, suggest that they did not opt to properly identify the plot which ridge was cut a



way by the prosecution party, and in likewise manner, placing relevant document to justify ownership. It has also been submitted that due to non examination of Investigating Officer, the place of occurrence as claimed by the witnesses to be Darwaza of informant also not been properly established by way of positive, conclusive evidence. Because of the fact that for the same occurrence, there happens to be version and counter version, presence of injuries on both sides, admission over genesis of occurrence, then in that circumstance, it happens to be case of free-fight and on that score, one has to trace out who happens to be aggressor which, in absence of examination of Investigating Officer, remained under veil, hence, the appellants are entitled for acquittal.

13. It has also been submitted that by way of submission of charge-sheet only against appellants, Sohail and Nurul have completely changed the manner of occurrence, the genuineness of prosecution version in the background of the fact that there happens to be consistent evidence that Rizwan had shot at Imam Hassan causing injury over his face while Pervez had assaulted Imam Hassan. That means to say, the injury whatever been over the person of Imam Hassan as claimed by the prosecution, is found completely smashed and so, the prosecution version loses its sanctity. Again, the non-examination of Investigating Officer, defeated valuable right of accused.

14. On the other hand, learned APP controverted the



submission made on behalf of learned counsel for the appellants and submitted that prosecution happens to be consistent over the genesis as well as manner of occurrence as and further, pleading a fair play by disclosing the fact that on preceding day, they had cut the ridge to some extent for sowing maize and further that cutting happens to be motive of commission of occurrence, the evidence should not be believed. It has also been submitted that even if discarding the injury and considering the evidence of the doctor (PW 5) even then fire arms were used which happens to be fatal weapon and on account thereof, the conviction and sentence recorded against the appellants happen to be just, legal and is fit to be confirmed.

15. As indicated above, there happens to be admission at the end of the prosecution with regard to injuries having over person of appellants. It is true that no injury report has been exhibited on behalf of appellants and so the court is in dark to identify as to what kind of injury they have sustained. Moreover, presence of counter-case (Ext-A as well as B) and further having been admitted at the end of the prosecution party suggest its recording while the accused/appellants were admitted at Sadar Hospital, Gopalganj. In likewise manner, cutting of ridge by the prosecution party, has also been admitted. Whether that land belongs to prosecution party, for that evidence of PW-6, informant (para-2) is to be taken into consideration whereunder he had stated that accused persons have also instituted a case against them wherein motive has been shown on



account of protest having over cutting of ridge. However, he is unable to say its Khata and Khesra number. He is also unable to say, boundary thereof. Had this land belonged to the prosecution party, at least, the boundary would have definitely been disclosed as, presence of prosecution party is expected to be in day to day affair over the land under dispute. It has got an importance in the background of the fact that land has also been claimed by the appellants who are own pattidar of the informant.

16. In the aforesaid background, the non examination of the Investigating Officer had certainly caused prejudice to the appellants on the score that had there been examination of the Investigating Officer, the identity of the land would have properly been verified and further, in whose possession it happens to be, more particularly, in the background of ambiguous answer at the end of the prosecution party.

17. Now coming to the evidence of PW-1, who had deposed that on the alleged date and time of occurrence he was at his Darwaza. His land lies away from his house. He was at the field wherefrom he reached after hearing the sound. He had seen Sohail, Rizwan, Moiz, Nurul and others with whom quarrel was going on. Thereafter, Sohail came with gun and fired aiming at Imam. Rizwan also fired. Moiz also assaulted Imam. Farook sustained fire arm injury. Imam died during course of treatment. He had given statement before the police. During cross-examination, in para-3, there happens



to be contradiction with regard to carrying gun by the Sohail. At para-4, he had admitted that for the same occurrence accused persons had also instituted a case against them. Then had denied the suggestion that they were aggressors and assaulted the accused persons. Then had shown ignorance whether accused persons got their injuries examined. Then had stated that he is unable to say as to how the accused persons received injuries. Then had stated that ridge was not existing as it was dismantled during course of ploughing. Therefore, from his evidence, the cutting of ridge by the prosecution party is found completely smashed as this witness had admitted that the ridge was already dismantled during course of ploughing.

18. PW-4, Md. Daud is another brother, who had deposed that on the alleged date and time, he was at his Darwaza and saw that accused persons came to his Darwaza where Umar Faruk and Immam was sitting and there scuffle took place amongst them relating to dismantling of ridge. Then thereafter accused persons began to assault and during midst thereof, Sohail fired over Umar Faruk causing injury over his neck. Nurul assaulted him with lathi. Rizwan shot at Imam causing injury over his face. Pervez had assaulted with lathi. He had taken both the injured to hospital. During cross-examination at para-2, he had deposed that he happens to be full brother of informant. He further admitted presence of counter case. In para-3, he had deposed that he was not involved during course of scuffle. He had not sustained any kind of injury. Accused persons had not come to his



place rather they had gone to the place of Umar Faruk. In para-4, he had further deposed that occurrence took place at Darwaza of Umar Faruk. Presence of injury, countercase has been flashed under para-6 which had already taken note of. In para-7, he had disclosed that he is unable to say about Khata and Khesra number of the relevant land.

19. PW-6 is the informant, an injured, who had deposed that on the alleged date and time of occurrence while he was at his Darwaza, Sohail Ali, Rizwan Ali, Pervez Ali, Md. Moiz Ahmad, Fazlu Rahman, Nurul Haque armed with gun and *Lathi* came. There was an altercation and then they indulged in brawl. During midst thereof, Sohail fired from his gun causing injury over his neck and Rizwan shot at Imam causing injury over his face and rest assaulted them with Lathi. They were shifted to hospital where he recorded his Fard-e-beyan and exhibited his signature. He had further stated that on account of cutting of ridge, the occurrence took place. Para-2 of cross-examination has already been referred above. In para-3 he had stated that the land happens to be their Khatiani land. Accused happens to be his Pattidars. He is unable to say where the accused were treated. At para-4, he had stated that only two brothers were present there. Rest brothers came after the occurrence. In para-5 he had stated that first of all, there was quarrel. Then thereafter, firing was made. Seeing the accused persons coming with gun, they have not tried to escape therefrom. In para-6, he stated that he is unable to say whether the accused persons sustained injuries. They became unconscious and



were shifted to the hospital. On account thereof, he is unable to say the intermediary event. In para-8, he had stated that he regained his sense at the hospital where he gave his Fard-e-beyan. In para-10, he had stated that he is unable to say as to how the accused persons sustained injuries. As stated above, the evidence of PW-5, the doctor is found some sort of deficient as the same is found inadmissible on his own conduct doubting over genuineness of the photo copy. In case, the evidence of PW-5 is taken into consideration, then it would have changed the manner of occurrence completely because of the fact that Imam Hassan had not sustained fire arm injuries rather he had sustained so many incised injuries.

20. Be that as it may, being the evidence of PW-5 legally deficient one, on account thereof, could not be taken into consideration.

21. *In Lahu Kamlakar Patil v. State of Maharashtra* as reported in (2013) 6 SCC 417 under para-18, it has been held by the Hon'ble apex Court that non examination of the Investigating Officer is to be perceived in the background of nature of the case as well as evidence having adduced during course of trial in order to infer whether it has caused prejudice to the interest of the accused or not.

For better appreciation the same is quoted hereinbelow:-

18. Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the F.I.R. but has given the excuse that it was taken on a blank paper. The same could have been clarified by the Investigating Officer, but for some reason, the Investigating Officer has not been examined by



the prosecution. 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.

22. From the evidence as available on the record, it is evident that there happen to be case and counter case. It is evident that there happens to be allegation of assault as well as injuries having been sustained at the end of both the parties. On account of legal deficiency, the evidence of PW-5, could not be accepted and so there happens to be no injury report relating to prosecution party. That being so, both the parties are cipher on that very score. Furthermore,



as discussed above, the prosecution party failed to properly identify the land of which, the ridge was cut at their end. In the aforesaid background, the crucial aspect for consideration is who happens to be aggressor which, from the evidence is found missing.

23. Consequent thereupon, in totality of the events, it could be perceived that the prosecution has failed to reveal true version of genesis as well as manner of occurrence and by suppressing the same, with ulterior motive came up with twisted version and so, the oral evidence so adduced on behalf of prosecution is found duly tempered with.

24. Consequent thereupon, the judgment of conviction and sentence rendered by the learned lower court is set aside. Appeal is allowed.

25. Since both the appellants are on bail, they are discharged from its liability.

26. The first and the last pages of the instant judgment be handed over to the Amicus Curiae for the needful.

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(Aditya Kumar Trivedi, J)

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	30.06.2017
Transmission Date	30.06.2017

