

# IN THE HIGH COURT OF JUDICATURE AT PATNA

## Criminal Appeal (SJ) No.170 of 2015

Arising Out of PS. Case No. -132 Year- 2008 Thana -CHANDI District- NALANDA (BIHARSHARIFF)

Hari Kishun Jamadar @ Hari Kishun Beldar (Jamadar) Son of Ganga Bishun Beldar resident of Village - Tara Par, P.S. Harnaut, District - Nalanda.

.... .... Appellant/s

Versus

The State of Bihar

.... .... Respondent/s

With

## Criminal Appeal (SJ) No. 235 of 2015

Arising Out of PS. Case No. -132 Year- 2008 Thana -CHANDI District- NALANDA (BIHARSHARIFF)

Ram Jatan Prasad S/o Late Ragho Prasad Resident of Village Patasiya, P.S. Harnaut, District Nalanda.

.... .... Appellant/s

Versus

The State of Bihar

.... .... Respondent/s

### Appearance:

(In CR. APP (SJ) No.170 of 2015)

For the Appellant/s : Mr. Anil Chandra, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

(In CR. APP (SJ) No.235 of 2015)

For the Appellant/s : Mr. Anil Chandra, Adv.

For the Respondent/s : Smt. Abha Singh, APP

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

**ORAL JUDGMENT**

**Date: 20-02-2018**

Vide judgment of conviction dated 20.01.2015 appellants Ram Jatan Prasad and Hari Kishun Jamadar @ Hari Kishun Beldar have been found guilty for an offence punishable under Section 307/34 IPC, 324/34 IPC, 27 Arms Act but, as Ram Jatan Prasad failed to appear before the learned lower court on the date of judgment on account thereof, his bail bond was cancelled and trial was separated. Subsequently thereof, appellant Hari Kishun Jamadar @ Hari Kishun Beldar was directed to undergo R.I. for ten years as well as to pay fine amounting to Rs.10,000/- (Ten thousand) and in default thereof, to undergo R.I. for six years under



Section 307/34 of the IPC and sentence to undergo R.I. for three years as well as to pay fine appertaining to rupees two thousand and in default thereof, to undergo R.I. for two months additionally under Section 324/34 IPC, to undergo R.I. for five years as well as to pay fine of Rs.5000/- and in default thereof to undergo R.I. for six month additionally with a further direction to run the sentence concurrently vide order of sentence dated 21.01.2015 by the Third Additional District & Sessions Judge, Hilsa, Nalanda in Sessions Trial No.7 of 2010.

Subsequently, presence of appellant Ram Jatan Prasad was procured relating to Sessions Trial No. 7A of 2010 which, on account of transfer of P.O. of Third Additional Sessions Judge, transferred to First Additional Sessions Judge, Hilsa, Nalanda who heard the parties on sentence on 10.04.2015 and directed to undergo R.I. for seven years as well as to pay fine appertaining to rupees five thousand in default thereof to undergo S.I. for three months under Section 307/34 IPC, to undergo R.I. for two years as well as to pay fine appertaining to rupees one thousand and in default thereof to undergo S.I. for two months under Section 324/34 of the IPC, to undergo R.I. for 5 years as well as to pay fine appertaining to rupees five thousand and in default thereof to undergo S.I. for three months under Section 27 of the Arms Act, with a further direction to run the sentences concurrently.

**2.** Because of the fact that the trial separated after having the judgment the conviction due to absence of appellant Ram Jatan Prasad whereupon, the matter has been heard conjointly and are



being decided by a common judgment.

**3.** PW.10, Ramnandan Prasad while was admitted at Sri Ram Hospital, Kankarbagh in an injured condition gave his fardbeyan on 13.08.2008 at about 05:30 PM in presence of Sunita Devi an acquainted one before police inspector of Noorsarai Anchal, Nalanda, alleging inter alia that on 12.08.2008 he proceeded from his Sasural Indrapuri at about 07:30 AM on his maruti van bearing registration no.BR14J-9645 alone and thought to proceed Biharsharif after meeting with his sister Saroj Kumari at village-Jalalpur Noorsarai, and in this way as soon as reached at Gainda Puliya at about 10:00 AM, seen a motorcycle being ridden by three persons coming from eastern side which parked in front of his vehicle. The driver of the vehicle was aged about 30 years wearing shirt and pant. In the middle Ram Jatan of village-Patasia having his clinic at Harnaut Gonawa Road and the third one was also wearing fullpant and shirt aged about 20-25 years. The last one got down from the motorcycle, came near his vehicle and then, with an intention to kill shot at causing injury over his left hand. In order to save his life, he opened the door and ran therefrom being chased by them and during course thereof, they also fired. In order to save himself, he jumped into a ditch full of rain water where, he was shot at. They disclosed that this happens to be the ultimate result on account thereof carrying an animosity with Ram Jatan. The motive for occurrence has been shown as Sunita who happens to be his acquainted was working as a Nurse at the clinic of Ramjatan where case was instituted on account of death of a child wherein, the aforesaid Sunita was bailed out by the High Court. It has also been



Motihari disclosed that Ramjatan had threatened while he was posted at since before. It has further been disclosed that though, he was not knowing the names of other two but claimed identification against them.

**4.** On the basis of the aforesaid fardbeyan Chandi P.S. Case No.132/2008 was registered followed with an investigation as well as submission of charge sheet, facilitating the trial, subject matter of instant appeal.

**5.** Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has also been pleaded that on account of animosity since before with the Sunita Kumari this case has falsely been instituted against the appellants bearing false and frivolous allegation. However, neither ocular nor documentary evidence has been adduced.

**6.** In order to substantiated its case, prosecution had examined altogether ten PWs those are PW.1-Sunita Kumari, PW.2-Shashi Bhushan Kumar, PW.3-Shankar Yadav, PW.4-Rama Yadav, PW.5-Naresh Yadav, PW.6-Dr. Kaushal Kishore Sinha, PW.7-Dr. Laxman Prasad Singh, PW.8-Satish Kumar, PW.9-Mritunjay Mohan and PW.10-Ramanandan Prasad. Side-by-side had also exhibited Ext.1 Series-Injury Report relating to informant/injured Ramanandan Prasad, Ext.2-Fardbeyan. As stated, neither ocular nor documentary evidence has been adduced on behalf of defence.

**7.** Learned counsel for the appellant has submitted that from the record, it is evident that Sunita happens to be at centre



point and on assault thereof, the parties were carrying animosity amongst them. Manner whereunder informant had protected Sunita suggests otherwise than the normal relationship and on account thereof, the allegation whatsoever been attributed at the end of the informant PW.10 is to be seen whether there happens to be probability for the appellants to be present at the place of occurrence in order to commit such kind of occurrence. Because of the fact that enmity is a double edged sword on account thereof, the evidences are to be scrutinized cautiously, intelligently in order to sort out whether appellants could be held responsible for commission of the alleged offence.

**8.** In order to justify the aforesaid submission, it has been submitted that from the version of the informant it is apparent that his programme was not at all known to the accused persons/appellants. In the aforesaid background proceeding ahead from his Sasural in a way to Biharsharif and in midst away to visit at the place of sister would not have been known to the appellant and in the aforesaid background, perceiving their presence at the end Gendapul Bridge on a motorcycle occupied by three persons including the appellant Ramjanam happens to be nothing but well planned story which has been introduced at the end of the appellants in the background of the aforesaid theme which could have properly exposed had there been examination of the Investigating Officer. In its continuity, it has also been submitted that apart from failure at the end of the informant to give his earliest version at the Chandi Police Station where he was, and being referred to local PHC who then, escaping therefrom came to Patna



and instead of going to PMCH, gone Shri Ram Nursing Hospital in a way that local police should not come to the informant as, he was to implicate the appellants, managed the affair, informed the police inspector of Noorsarai Anchal and after his arrival, this case has been registered.

**9.** Had there been examination of the Investigating Officer the aforesaid eventuality would have been exposed the activity of the police inspector, Noorsarai Anchal who was not at all competent to record fardbeyan of the informant PW.10 in the background of the fact that the place where informant was going for treatment was not within his jurisdiction while his statement was recorded. It is not the case of the prosecution that Chandi Police Station lies within Noorsarai Police Anchal as well as police inspector can not be treated as a Officer-in-charge of a Police Station unless and until would have claimed like so. So, appearance of inspector of Noorsarai Police Anchal is a circumstance which could have properly been explained at the end of the prosecution at least to the extent that after obtaining permission from the Superintendent of Police he left his jurisdiction instead of officer of Chandi Police Station to record fardbeyan of informant. Further, it has also been submitted that in the background of aforesaid collusive conduct of a police officer, the whole prosecution is found influenced with collusiveness.

**10.** In its continuity, it has also been submitted that although endorsement over the fardbeyan is not an exhibit of the record but, from perusal thereof, it is apparent that certainly Chandi Police Station was not within the jurisdiction of Noorsarai Anchal.



**11.** Further, it has also been submitted that had there been examination of the Investigating Officer then, in that circumstance, the defence would have been in a position to properly place the materials on the record relating to the distance having been covered from the place where informant left the vehicle to the place where he jumped in a ditch, the surrounding situation, probability, presence of the witnesses if any. Furthermore, the examination of the Investigating Officer would have divulged the exact location of the vehicle by which the informant was travelling, whether there was trailing mark right from the place where informant had sustained firearm injury while he was driving vehicle to the place, where he jumped in a ditch. That being so, the aforesaid eventuality on account of non-examination of the Investigating Officer could not be procured and placed before the court and by such activity, the interest of the appellants is found duly eclipsed and so, on this score alone, the judgment impugned is fit to be set aside.

**12.** Furthermore, it has also been submitted that although, at an initial stage only appellant Ram Jatan found place in the fardbeyan. How and in what manner, names of other co-accused transpired more particularly Bijendra Beldar (since acquitted) and Hari Kishun Jamadar, when there was no TIP and so, by non-examination of the Investigating Officer the aforesaid controversy remained duly wrapped prejudicing the interest of the appellant Hari Kishun Jamadar. It has settled at rest by catena of decisions that non-examination of Investigating Officer if found to have caused prejudiced to the interest of the accused will be a major set back to



the prosecution.

**13.** Now coming to merit of the case, it has been submitted that so far Hari Kishun Jamadar is concerned, there happens to be no disclosure at the end of the prosecution that he was arrested, put on TI parade and during course thereof, was identified. That means to say, for the first time appellant Hari Kishun Jamadar has been identified in dock that too on an interval of approximately four years. It is not that, identification in dock for the first time would not be legally permissible but, after such long gap and that too when a witness has got no occasion to see the assailant at an earlier occasion before commission of the occurrence or even after commission of the occurrence having no animosity, no criminal antecedent and so the identification against the appellant Hari Kishun Jamadar lost its credibility and could not be accepted.

**14.** Now coming to appellant Ram Jatan Prasad, it has been submitted that manner whereunder his address has been disclosed in the fardbeyan is indicative of the fact that informant was carrying deep rooted grievances against the appellant. That being so, the evidences have to be seen in the aforesaid background. Altogether ten PWs have been examined out of whom PW.2, PW.3, PW.4, PW.5 independent witnesses have not supported the case of the prosecution whereupon, they were declared hostile. Even thereafter, prosecution could not succeeded in getting anything in their favour. So far PW.1, PW.8 and PW.9 are concerned they are not an eyewitness to occurrence. So, the only eyewitness happens to be the victim and after having proper scrutiny of his evidence, it is found that he happens to be a liar, lost his credibility, irrespective of



the fact that by the evidence of PW.6, PW.7 doctors firearm injuries have been found over his person. In order to buttress such plea, it has been submitted that sister of PW.10/informant namely Saroj Kumar has not been examined in order to substantiate that appellant was passing through the aforesaid road. It has also to be kept in mind that appellant Ram Jatan has been shown to be resident of village-Patasiya. PS.-Harnaut, then in that circumstance, how he came to know that victim was passing through the road whereupon he managed firearms, motorcycle, two associates, came at particularly junction where, one of his associate with firearm assaulted. The most surprising feature which belie the whole prosecution case is that from the place wherefrom informant rushed after getting down from vehicle being chased by the miscreant and admittedly, they were on motorcycle and so they simply continued with chase, even with the motorcycle without aiming at the informant. Had there been presence of the appellant then in that circumstance, either appellant would have been murdered in the car itself or, in a way while he was being followed during course of running therefrom. These circumstances are sufficient to annul the finding recorded by the learned lower court and that being so, appeal be allowed after setting aside the judgment impugned.

**15.** On the other hand the learned Additional Public Prosecutor while supporting the finding has submitted that trial should not be expected in a mathematical way. Circumstances which was prevailing at the relevant moment is to be perceived and that has to be considered in its right perspective wherefrom it is evident that presence of informant in an injured condition at Chandi, PHC is



found sufficiently proved. During cross-examination of PW.7, the appellant could not be able to shake his testimony who had found three wound of entry, had different location over the body of informant caused by firearm and so, referred the informant to PMCH who, in order to have proper treatment as well as hospitality gone to Shri Ram Nursing Home where was examined by PW.6 who had also supported the finding recorded by PW.7 and that being so, presence of firearm injury over the person of victim is duly substantiated. It has also been submitted that informant was not at all cross-examined on that score and so, he was not in a position to explain and on that very score, the appellant would not found benefited to challenge the intermediary circumstances whereunder the circle inspector of Noorsarai Police Station has rushed to Patna and got recorded farbeyan of the PW.10. Then it has been submitted that in terms of Section 134 of the Evidence Act, it is the quality nor the quantity which requires to prove facts in issue. PW.10 is an injured and when his evidence is considered with the finding of the PW.6 and 7, it is evident that he had substantiated the case. Furthermore, it has also been submitted that during course of cross-examination of PW.10 nothing has been suggested on the score of Hari Kishun Jamadar to discredit the manner of identification at the end of PW.10. In the aforesaid background non-examination of Investigating Officer of is not at all found prejudicial to the interest of appellant and that being so, judgment of conviction and sentence recorded by the learned lower court is fit to be confirmed.

**16.** From the record, it is evident that PW.2,3,4,5 who happens to be independent witnesses have not supported case of the



prosecution and that being so, they were stamped as hostile.

**17.** PW.1 Sunita Devi is the witness who happens to be centre point of this case. She had stated that on 12.08.2008 at about 02:00 PM she came to know with regard to assault having over the person of Shri Ramanand. On the following day, she came to Shri Ram Nursing Home and met with Ramanand. Then she had shown the source whereunder she was maintaining intimacy with Ramakant as well as made disclosure relating to her presence under appellant Ram Jatan Prasad as a Nurse and during course thereof, a case cropped of on account of death of a child wherein she got bail from the High Court. There was dispute on account of sharing of expenses relating to that very case and during course thereof, Ram Jatan had threatened to see. She had identified Ram Jatan, also named Bijendra and Hari Kishun Jamadar, but did not claim identification against Bijendra. Paragraphs 2,3 happen to be cross-examination relating to her relationship with the victim/informant, & para-5 there happens to be contradiction, which remained stayed for want of examination of Investigating Officer.

**18.** PW.8 is Satish Kumar who happens to be co-villager of informant. He had simply stated that on getting confidential information he rushed to Chandi hospital where he had found victim in an injured condition. Blood was oozing out. Then thereafter, he was referred to Patna for better treatment. He proceeded therefrom on ambulance. He also accompanied. He was treated at Shri Ram Nursing Home. Then had disclosed that BDO Saheb disclosed that on account of dispute with Ram Jatan, this occurrence has been committed. During cross-examination nothing substantial has been



procured. But the fact remains that neither he identified/claimed identification of the accused nor there was disclosure with regard to name of the assailant by the informant.

**19.** PW.9 is Mritunjay Mohan Mehta who happens to be an advocate as well as brother-in-law of victim Ram Nandan Prasad, He had deposed that he received information with regard to assault of his brother-in-law Ram Nandan at Gauraha Bridge whereupon, he rushed to Chandi Hospital where he met with him. At that very time, he was being treated. Then thereafter, he was referred to PMCH. They got him admitted at Shri Ram Nursing Home, Kankarbagh where he was treated from 12.08.2008 to 28.08.2008. He had found the injury over his chest as well as left shoulder. Informant had disclosed to him that he was assaulted by Ram Jatan along with three associates. During cross-examination at para-5 he had stated that when he reached at Chandi hospital, his brother-in-law (Sala) was conscious. He remained conscious up to Patna. In para-6 he had stated that when he reached at the chandi Hospital, one police was present. At that very time fardbeyan of informant was not recorded. Then had stated that informant had disclosed that Ram Jatan and his associates have shot at. He had also disclosed that they came on motorcycle and after forcing him to stop, shot at. He had not specifically disclosed who assaulted.

**20.** PW.10 is the informant. He had deposed that the occurrence is of dated 12.08.2008 at about 10 AM. At that very time when he reached at a bridge over Narhawa river coming towards Biharsharif and reached over bridge, a motorcycle being retained by three persons came from Gonahawar village. The persons who was



behind got down from motorcycle, halted him to stop, came from southern side and shot at causing injury over his left hand as a result of which, he opened gate of the vehicle and began to flee towards village. The miscreant began to chase with motorcycle. During course thereof, one of the miscreant came from front side in order to grab him and on account thereof, he jumped in a channel. Then thereafter, Ram Jatan fired causing injury over his left hand. Shown the scar mark of the injuries. Another firing was made at their end causing injury over his chest, left side. On hue and cry people began to assemble whereupon all the miscreant escaped therefrom over motorcycle. Then had identified the accused in dock and further disclosed that he had shot first round. He had further disclosed that subsequently, he came to know his name as Hari Kishun, on court question, accused had disclosed his name as Hari Kishun Jamadar. The third accused was Birendra. Then all the accused were identified in dock. At that very moment, one person was passing over motorcycle who was singled to stop and then, he rushed to Chandi Police Station wherefrom he was referred to PHC, Chandi and after primary treatment, he was referred to PMCH but, for better treatment he had admitted himself to Shri Ram Nursing Home where he was treated. He had further disclosed that in the year 2001 he was posted at Areraj as BDO where Sunita was employed as Nurse. She happens to be close to him. Case was instituted against Ram Jatan and Sunita relating to death of a child while Sunita was working as a nurse at the clinic of Ram Jatan and for that, Ram Jatan had demanded rupees as well as also demanded an affidavit from the Sunita over which, there was an altercation



whereupon he intervened and in the aforesaid background, this occurrence has been committed. He had further stated that his statement was recorded by the Inspector, S.K. Sharma of Noorsarai and exhibited the same. During cross-examination, paragraph 7, 8, 9, 10, 11 there happens to be cross-examination relating to affair of Sunita, he himself as well as Ram Jatan. In para-12 he had stated that his statement was recorded on 16.08.2008 before the police at Shri Ram Nursing Home, Patna by the Officer-in-charge Chandi. At that very time his attendant were also present including his brother-in-law and his sister. In para-13 he had stated that first of all he had gone to Chandi Police Station after the occurrence. He had gone there on motorcycle. He had left his vehicle at the place of occurrence. He had further stated that he had disclosed before the police that he has been shot at whereupon, he was sent to hospital. He remained at police station at about 10-15 minutes. He had not become unconscious at the Police Station. He remanded at Chandi Hospital for half an hour 45 minutes and then thereafter, he rushed to Patna. He was referred to PMCH but on his own had gone to Shri Ram Nursing Hospital. In para-14 he had stated that first of all Inspector, Noorsarai had recorded his fardbeyan and then Officer-in-charge of Chandi Police Station recorded his further statement at Shri Ram Nursing Hospital. Then there happens to be contradiction. In para-15, he had stated that after going through inculpatory extra judicial confessional statement of Ram Jatan, he became known to names of other two assailant. He had further stated that he was knowing Ram Jatan since before the occurrence. Then at para-20 he had stated that there was speed breaker , road was conjusted and on



account thereof, he had slow down speed of the vehicle as 5 KM. He had further stated that accused persons parked their motorcycle in front of the vehicle as a result of which he was forced to stop the vehicle and then, coming through railing of the bridge, he was shot at. He was assaulted from a distance of 4-5 feet. At that very time, none was passing through. There was no attempt at the end of the accused persons to drag him from the vehicle. At that very time, none was present on the road to save him. Then thereafter, he after opening gate, ran therefrom. At that very time two accused persons who were on motorcycle were just in front of him. Even after getting down from the vehicle, none of the accused attempted to prevent him. None of the accused had tried to shot at him. Then, he escaped towards Gonaha. When he was fleeing, he found being chased. At that very time none was present. During course thereof, he found one person who came out from a field left side of the road on account thereof, he jumped in a ditch having water up to waist. He remained and during course thereof, he was shot at. He was shot at by Ram Jatan over hand while another round of firing was made causing injury over his back. Then thereafter, no attempt was made at the end of the accused. When he came out from ditch then he had seen persons. He himself came out from the ditch. None had helped him. Then thereafter, he came at the main road and then signaled motorcyclist to stop. Whereupon he had gone to Chandi Police Station. He had stated that while he was fleeing towards village, accused were chasing over motorcycle. As he had not moved his head backward so, he is unable to say the gap in between. There was no firing in the midst of way. He heard sound of shoe whereupon



conceived that he was being chased. At para-19 he stated that he was knowing someone by name since before the occurrence and so he has been named. Then had denied the suggestion.

**21.** PW.7 had examined informant Rama Nandan Prasad on 12.08.2008 at 10:15 AM at PHC, Chandi found the following:

- I. Lacerated wound 3 ½" x 1 ½" x bone deep with charring and blackening. In surrounding area on left forearm wound was bleeding.
- II. Lacerated wound 2 ½" x 1" x much deep with charring and blackening of surrounding area of upper part of left arm wound was bleeding.
- III. Lacerated wound 1" x 1" muscle deep with blackening of surrounding area on upper part of left side of chest near nipple.

Black 'Til' on side of forehead.

Nature of weapon – All wound by firearm.

Nature of injuries – Opinion of all injuries reserved till X-ray report comes.

Time of injury-within 6 hours.

**22.** PW.6 had examined informant on 12.08.2008 and found the following:

- i. Lacerated wound 3 1/2 " x 1 ½" x Bone deep with charring and blackening of the surrounding area on left forearm (Bleeding)



ii. Lacerated wound- 2 ½" x 1" x Muscle deep with charring and blackening of surrounding area on upper part of left arm (Bleeding)

iii. Lacerated wound - 1"x1" Muscle with blackening of surrounding area on upper part of left side of chest near nipple.

**23.** From the evidence available on the record, more particularly PW.6 and 7, it is apparent that informant had sustained gun shot injuries. From their evidence it is apparent that injured had sustained gun shot injuries having blackening, on account thereof, there happens to be firing from close range. Now the subsequent activity of the prosecution is to be perceived. From Ext.1/1, it is apparent that same has been scribed on the back of police requisition which was issued by the S.I., Chandi P.S. dated 12.08.2008. That being so, victim had approached Chandi Police Station and to that extent the version of the informant PW.10 is found reliable in consonance with the evidence of PW.9 who had stated that when he reached at Chandi PHC, one police officer was present. Now the question revolves whether injury report was issued by the police without registering the fardbeyan and if so, there happens to be evidence of PW that victim remained at PHC for substantial time and was conscious then in that circumstance, why not he had recorded fardbeyan. Had there been, it would have been earliest version of the occurrence, whether injured was assaulted by unknown miscreants or by the appellants. Fardbeyan was recorded on the next day only after appearance of PW.1 Sunita Kumari that too by the inspector of Noorsarain Anchal who was not at all Officer-



in-charge of Chandi Police Station. Section 465 of the Cr.P.c. barricade at the present moment the plea of the appellant as, same has not been raised at an earlier occasion but is a circumstance which cast doubt over genuineness of prosecution version, as even after sustaining gun shot injury he was not eager to record his fardbeyan till presence of Sunita and that has got a bearing in the background of motive so arraign by the informant. In the aforesaid background, the non-examination of the Investigating Officer is found fatal to the prosecution. Furthermore, due to non-examination of Investigating Officer, the conduct of police inspector also remained wrapped.

**24.** In *Lahu Kamlakar Patil v. State of Maharashtra* reported in **(2013) 6 SCC 417**, it has been held:

**“18.** .....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 J&K*(2007) 13 SCC 18 and *Ravishwar Manjhi 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.”

**25.** Now coming to another circumstance, the unusual conduct of informant itself exposed as in chief he had stated that three motorcycle borne criminals came, stopped motorcycle signalled him to stop and then, one of them came through railing of the bridge and shot at from his left side as a result of which he sustained injury. Thereafter, after opening gate from right side, ran therefrom. He had further disclosed that though accused including appellant Ram Janam was present but they have not tried to shoot him instead thereof, continued with following the informant and during midst thereof, one another person appeared from a field whereupon he jumped in a ditch and then, thereafter, he was shot at. Apart from improbability on that very score as, had there been intention at the end of the appellant, the informant would have been eliminated in the vehicle itself without giving any opportunity to the informant



to open the gate, rushed therefrom, being chased by the appellants being bare foot as well as over motorcycle to ultimate destination where informant jumped in a ditch and further, sustained injuries subsequently. In the aforesaid facts and circumstances of the case, giving anxious consideration, improbability visualizing in the prosecution case is found duly exposed coupled with non-examination of the Investigating Officer gave another jolt to prosecution case adversely affecting interest of appellants whereupon it looks unsafe to concur with the finding having recorded by the learned lower court. Consequent thereupon same is set aside. Both the appeals are allowed. Appellants are on bail, hence are discharged from its liability.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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