

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.205 of 2015**

Arising Out of PS.Case No. -35 Year- 1989 Thana -DIGHWARA District- SARAN

1. Bharat Ray

2. Shatrughan Ray Both are son of Late Gurucharan Ray Resident of village - Basti Jalal, P.S. - Dighwara, District - Saran.

.... Appellant/s

Versus

1. The State of Bihar.

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.
Smt. Babita Kumari, Adv.
Mr. Ritwaj Raman, Adv.

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

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**ORAL JUDGMENT****Date: 29-01-2018**

Appellants Bharat Ray and Shatrughan Ray have been found guilty for an offence punishable under Section 307/34 IPC and each one has been sentenced to undergo RI for 7 years as well as to pay fine appertaining to Rs. 5,000/- in default thereof, to undergo SI for 3 months additionally, under Section 324/34 IPC, each one has been sentenced to undergo RI for 3 years with a further direction to run the sentences concurrently with a further direction that in case of deposit of fine, half of the same should be paid to the informant by way of compensation by the Additional Sessions Judge-8th, Saran at Chapra in Sessions Trial No. 17/1991 vide judgment of conviction dated 28.03.2015 and order of sentence dated 31.03.2015.

2. PW-1, Indrajit Prasad gave his Fard-e-beyan on 11.04.89 at about 12.15 PM while he was admitted at Primary Health



Centre, Naya Gaon along with other injured, Jitendra Kumar (brother) and Kedar Ray (uncle) alleging inter alia that on the same day at about 10.30 AM, his father has informed that Shatrughan Ray, Bharat Ray and Birendra Ray has put “Khop” over his land in spite of protest made by his father whereupon, he along with his brother, father and uncle gone there and forbade them. All the three began to abuse and then, went to their house. Shatrughan and Birendra returned back with pistol and began to fire. Firing having been made by Shatrughan caused injury over the person of his father over his mouth as well as jaw. Birendra had fired causing injury over him. After sustaining injury, his father fell down as a result of which, they began to lift whereupon, Bharat Rai gave repeated Farsa blow causing injuries over brother of informant. He had also assaulted informant with Farsa over his head. When Kedar Ray intervened, he was also assaulted causing injury over his temporal region. On hue and cry raised by them, co-villagers, Ramdhari Rai, Jugeshwar Rai, Rajendra Rai and others came, seeing whom the accused persons fled away. Then thereafter, injured were taken to the hospital wherefrom Ramdeo, father of the informant, considering his precarious condition, referred to PMCH.

3. After registration of Sadar Chapra PS Case No. 35/89, investigation commenced and concluded by way of submission



of charge-sheet whereupon trial commenced and concluded in a manner subject matter of instant appeal.

4. Defence case as is evidence from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. It has been pleaded that prosecution party taking assistance of anti-social elements tried to grab the land of the accused forcibly which was resisted and during course thereof, Birendra was done to death while Kajal, Sunaina and others were brutally assaulted and for that, Sadar PS Case No. 34/89 has been registered against them. However, neither ocular nor documentary evidence has been adduced on behalf of defence.

5. In order to substantiate its case, the prosecution had examined altogether 4 witnesses who are PW-1, Indrajit Prasad, informant, PW-2, Raghunath Rai, PW-3, Kedar Rai and PW-4, Jitendra Rai out of whom PW-4 has been tendered while remaining three are injured. Prosecution had also exhibited Ext-1, Signature of informant over Fard-e-beyan, Ext-1/1, Signature of Kedar Rai over Fard-e-beyan, Ext-1/2, Signature of Jitendra Rai over Fard-e-beyan, Ext-2, Fard-e-beyan, Ext-3 Series, injury report of respective injured.

6. It has been submitted on behalf of appellants that while recording finding of guilt, the learned lower court considered the materials which were not at all recognizable in the eye of law and



in likewise manner, misconstrued the mandatory provisions of law and that being so, finding recording by the learned lower court is fit to be set aside. In order to substantiate the same, it has been submitted that when PW-1, informant, came up for evidence, a prayer was made on behalf of appellant to defer his cross-examination, which the learned lower court had allowed in terms of Section 231(2) of the CrPC. At that very time, when the prayer was allowed, the learned lower court should have incorporated/directed that after examination of all the material witnesses or after examination of any particular witness, cross-examination of that witness would commence but, the learned lower court instead of identifying its own fault which happens to in contravention of Section 231(2) of the CrPC put the burden upon the appellants and further observing that appellants have failed in due exercise of their prayer in terms of Section 321(2) of the CrPC, even in absence of PW-1, for further cross-examination, admitted his evidence which ought not to be even considering the provision as prescribed under Section 33 of the Evidence Act.

7. In likewise manner, it has also been submitted that doctor has not been examined. Due to non examination of doctor, the injury report could not be taken into consideration, more particularly, regarding its finding but, without having exhibited even through formal evidence, the learned lower court admitted the same under Ext-



3 Series and based its finding while convicting the appellant. It has also been submitted that it is a settled principle of law that evidence of case and counter case is to be dealt with independently, separately but, when there happens to be evidence on record that in same transaction, the accused persons have also sustained grievous injury then in that circumstance, the prosecution is under obligation to explain the same. Non explanation at the end of the prosecution will cause dent over manner as well as genesis of occurrence. Apart from this, it has also been submitted that in the aforesaid background, non examination of Investigating Officer, doctor has caused serious prejudice to the appellants as, had there been examination of the Investigating Officer, the examination of the Doctor then in that event, irrespective of the fact that there happens to be admission at the end of prosecution witnesses that accused persons have also sustained injury and were admitted at the hospital, the nature of injury would have been and in likewise manner, the place of occurrence which, during course of scrutiny of the evidence of the witnesses would have played an important role to identify who happens to be the aggressor. Consequent thereupon, the cumulative effect of the persisting deformity in the prosecution case found sufficient to annul the finding recorded by the learned lower court and that being so, the judgment of conviction and order of sentence is fit to be set aside.



8. On the other hand, learned APP while refuting the submission made on behalf of appellants submitted that PW-1, 2 and 3 are injured witnesses. Because of the fact that they happen to be injured, their presence at the place of occurrence is found duly affixed. Then in that circumstance, there happens to be no occasion to discard their evidence. After going through the same, it is apparent that they have duly substantiated the case whereupon the finding recorded by the learned lower court is fit to be confirmed.

9. First of all, the ambit and scope of Section 231(2) of the CrPC is taken note of which reads as follows:-

“Section 231(2) CrPC. The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.”

10. From plain reading of the Section, it is evident that this extraordinary power has been vested to the court to rescue the accused on account of presence of any particular witness whose cross-examination, they found, would be desirable after examination of particular witness or after examination of all the material witnesses as the case may be and the court, in the aforesaid background would consider the prayer inconsonance with the exigencies and will pass appropriate, reasoned order as the same happens to be an exception to



the general rule. That means to say, it is not an unguided discretion depending upon sweet will of the court, rather happens to be judicial discretion and the order, therefore, will explicit the same.

11. PW-1 was produced on 06.02.2004. From the order-sheet dated 06.02.2004, it is evident that neither it happens to be reasoned one, nor the court below properly dealt with the situation, to such extent that it failed to give any kind of direction with regard to presence of PW-1 for further cross-examination rather it speaks that on an application filed on behalf of accused that cross-examination of this witness is to be taken after examination of some witnesses, heard and allowed. From the lower court records, it is evident that no such kind of petition is found though other *pairvis* are there. Then in that circumstance, the finding of the learned lower court that the appellants would have prayed for recalling of PW-1 for cross-examination happens to be contrary to law as the witness was not discharged however, the appellant took advantage of lapses of the Court, as the Court was expected to specifically enumerate in order dated 06.02.2004 that after examination of particular witness (so named) PW-1 would have his presence for cross-examination, that too with certain cost and in the tyranny presence of witness would not have, and further, in the aforesaid backdrop, the evidence of PW-1 would also not be admissible as provided under Section 33 of the Evidence



Act. Now remains the evidence of PW-2 as well as PW-3, and before going to discuss their evidence the infirmities having on the record is to be looked into.

12. The injury report has been placed on record which happens to be the photo copy of the original without any certification and that being so, neither it could be accepted as primary evidence nor as a secondary evidence. Therefore, in spite of having been made an exhibit under Ext-3 series, the same is found de-recognizable in the eye of law.

13. Now coming to the evidence of PW-2, it is evident that during his examination-in-chief, he had stated that on account of putting “Khop” there was protest at the end of Ramdeo Rai whereupon Shatrugan, Birendra and Bharat began to abuse. When there was protest at the end of Ramdeo, Indrajit, Jitendra and he himself who was present nearby as was engaged in weeding, Shatrugan fired causing injury over mouth of Ramdeo. Bharat gave Farsa blow causing injury over Jitendra, Indrajit. Then thereafter, they were lifted to hospital where police had recorded Fard-e-beyan of Indrajit having his signature. Identified the accused. During course of cross-examination, there happens to be an admission at his end with regard to presence of counter case bearing no. 34/89 relating to assault of others as well as murder of Birendra Rai. In para-10, he had stated



that no blood had fallen in the land where Banana plants were standing rather blood had fallen over place of occurrence. He had further stated that firing was made by Shatrughan Rai causing injury over face and that happens to be wound of entry and from backside there was exit wound. In para-11, he had stated that Shatrughan made two firing. The second firing caused injury to the son of the deceased. He had further stated that Bharat assaulted with Farsa over the person of Indrajit as well as Jitendra. Then had stated that he was assaulted from back of Farsa. He had further admitted that Birendra (deceased) was assaulted as a result of which, he died. At para-13, he had further stated that all were engaged in Marpeet, so he is unable to say who assaulted whom. He had seen injury over persons of Shatrughan, Bharat and Birendra. Kajal and Sunaina were also assaulted. Then hand denied the suggestion that they were aggressors and assaulted the accused persons.

14. PW-4 is another injured who during course of examination-in-chief had reiterated the prosecution version identifying Shatrughan as well as Birendra to be assailants by means of fire arm and Bharat to be assailant by means of Farsa causing injury over his father, brother, he himself and his uncle. During cross-examination at para-3, he had admitted presence of counter case. He had further admitted presence of Birendra, Bharat and



Shatrughan at Hospital but, he shown ignorance how they had sustained injuries. In para-4, he had stated that accused persons had encroached upon his land bearing Khesra No. 3190 which the appellants have denied and suggested by way of counter version that they had tried to grab illegally their land bearing Plot No. 3182. In para-6, he had stated that how Birendra died, he is unable to say. They have not brandished weapon in their defence. He had sustained injury by means of Farsa. In para-8, he had identified P.O. as East-River, North-House of Shatrughan, West- House of Shakaldeo, South-His Gairmazarua Zameen. He had further stated that the I.O. had not found such kind of P.O. Then had denied the suggestion.

15. After analyzing the evidence of witnesses including that of PW-1, though with some reservations it is abundantly clear that a Mar-peat took place during course of which one of the accused (Birendra) was murdered while rest of the accused were severely injured on account of which they were admitted to hospital, due to land dispute which as per appellants bearing Khesra No. 3182 while prosecution party flashed Khesra No. 3190 and in the aforesaid background being version and counter-version, the non examination of the I.O. has certainly caused prejudice to the appellants as had there been examination of the Investigating Officer, then in that circumstance, the actual place of occurrence would have



been revealed, coupled with the fact that in absence thereof, no evidence is found available to properly identify who happens to be aggressor. In likewise manner, due to legal deficiency, the injury report marked as exhibit 3 series would not be, and that being so, the nature of injury as well as weapon used therefor is found completely sealed.

16. In the case of *Rajendra Singh v. State of Bihar* as reported in *2000 Cr.L.J. 2199*, it has been held by the three Hon'ble Judges of Hon'ble Apex Court as follows:-

3. So far as the question whether non-explanation of the injuries on accused Rajender ipso facto can be held to be fatal to the prosecution case, it is too well settled that ordinarily the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in course of the occurrence, if the injuries are minor in nature, but at the same time if the prosecution fails to explain a grievous injury on one of the accused person which is established to have been caused in course of the same occurrence then certainly the Court looks at the prosecution case with little suspicion on the ground that the prosecution has suppressed the true version of the incident. In the case in hand accused appellant Rajender had one penetrating wound, three incised wound and one lacerated wound and of these injuries the penetrating wound on the left axillary area in the 5th inter costal space $\frac{1}{2} \times \frac{1}{3} \times \frac{3}{4}$ was grievous in nature as per the evidence of doctor PW-3 who had examined him. On the basis of the evidence of PW-3 as well as PW-11 the Courts have come to the conclusion that there is no room for doubt that the appellants and their men had injuries on their person on the date of occurrence. The question, therefore, remains to be considered is whether non-explanation of said injuries on accused appellant Rajender can



form the basis of a conclusion that the prosecution version is untrue. [In Mohar Rai and Bharath Rai vs. State of Bihar](#) (1968) 3 SUPREME COURT REPORTS - 525, this Court had held that the failure of the prosecution to offer any explanation regarding the injuries found on the accused shows that the evidence of the prosecution witness relating to the incident is not true or at any rate not wholly true and further those injuries probalilise plea taken by the accused persons. But in [Lakshmi Singh vs. State of Bihar](#) (1976) 4 Supreme Court Cases (Crl.) 671, this Court considered Mohar Rai (Supra) and came to hold that non-explanation of the injuries on the accused by the prosecution may affect the prosecution case and such non-explanation may assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. The question was considered by a three Judge Bench of this Court in the case of [Vijayee Singh vs. State of U.P.](#) (1990) 3 Supreme Court Cases 190, and this Court held that if the prosecution evidence is clear, cogent and creditworthy and the Court can distinguish the truth from the falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence and consequently the whole case and much depends on the facts and circumstances of each case. In Vijayee Singhs case (supra) the Court held that non-explanation of injury on the accused person does not affect the prosecution case as a whole. This question again came up before a three Judge Bench recently in case of [Ram Sunder Yadav and Others vs. State of Bihar](#) (1998) 7 Supreme Court Case 365, where this Court re-affirmed the statement of law made by the earlier three Judge Bench in Vijayee Singhs case(supra) and also relied upon another three Judge Bench decision of the Court in [Bhaba Nanda Sarma and Others vs. State of Assam](#) (1977) 4 Supreme Court Cases 396, and as such accepted the principle that if the evidence is clear, cogent and creditworthy then non-explanation of the injury on the accused ipso facto cannot be a basis to discard the entire prosecution



case. The High Court in the impugned judgment has relied upon the aforesaid principle and examined the evidence of the four eye witnesses and agreeing with the learned Sessions Judge came to the conclusion that the prosecution witnesses are trustworthy and, therefore, non- explanation of injury in question cannot be held to be fatal, and we see no infirmity with the said conclusion in view of the law laid down by this Court, as held earlier. We, therefore, are not persuaded to accept the first submission of Mr. Mishra, learned senior counsel appearing for the accused appellants.

17. The cumulative effect of the aforesaid banality did not justify the judgment impugned. Consequent thereupon, the same is set aside.

18. Since both the appellants are on bail, they are discharged from the liabilities of bail bonds.

(Aditya Kumar Trivedi, J)

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