

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.13 of 2015

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**BIRENDRA CHAUDHARY, S/O LATE RAM CHANDRA CHAUDHARY R/O
VILLAGE- MOKARIMCHAK, P.S.- TEKARI, DIST.- GAYA.**

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

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Appearance:

For the Appellant/s : Mr. Dinu Kumar, Adv.
Mr. Arvind Kumar Sharma, Adv.
Ms. Ritika Rani, Adv.
Ms. Kumari neha, Adv.
Mr. Vijay Kumar Bimal, Adv.
For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

Date: 02-01-2018

Appellant, Birendra Chaudhary has been found guilty for an offence punishable under Section 504 IPC and sentenced to undergo R.I. for one year, under Section 32 4 IPC and sentenced to undergo R.I. for one year, under Section 307 IPC and sentenced to undergo R.I. for five years as well as to pay fine appertaining to Rs.2000/- in default thereof, to undergo S.I. for one month, additionally with a further direction to run the sentences concurrently, with a further direction to set off the period having undergone during course of trial under Section 428 Cr.P.C. by the Additional Sessions Judge, IInd, Gaya vide judgment of conviction dated 25.11.2014 and order of sentence dated 29.11.2014 passed in connection with Sessions Trial No.456 of 2006 /46 of 2014.

2. Sheo Kumar Chaudhary, PW.9 filed written report on 17.05.2006 alleging inter alia that on the same day at about



08:30 PM while he along with his family members was at his house, his neighbour Birendra Chaudhary who is a toddy seller was engaged in offering toddy to customers at the roof of his house and during course thereof, was abusing him as well as his family members whereupon, they resisted as a result of which, he became enraged and then, came at his Darwaja carrying sickle (*Pasuli*) and began to assault them at his Darwaja. During course thereof, Birendra Chaudhary inflicted *Pasuli* blow over his neck with an intention to kill which he ward of by his hand as a result of which, there was cut near left elbow. He gave another blow causing injury over right arm. When his brother Raj Kumar Chaudhary came in rescue, Birendra Chaudhary again gave *Pasuli* blow over his neck as a result of which, he sustained severe injury thereupon (left side). Birendra Chaudhary also inflicted repeated blow over his chest. He had inflicted *Pasuli* blow over Ramjee Chaudhary causing injury at his left intercostal region, fingers of right hand, below right eye. He had also assaulted his wife Chinta Devi. When villagers assembled on an alarm, he succeeded in his escape. Then, thereafter, they were lifted to hospital.

3. After registration of Tekari P.S. Case No.68/2006 on the basis of the aforesaid written report, investigation commenced and after concluding the same, charge sheet was submitted facilitating the trial which ultimately concluded in a manner, subject matter of instant appeal.

4. 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 suggested that prosecution party brutally assaulted them for which a case was registered. Only to make out a defence case in order to save their skin, this false case has filed as counter blast. However, neither oral nor documentary evidence has been adduced on his behalf.

5. In order to substantiate its case prosecution had examined altogether nine PWs those are PW.1-Ramjee Chaudhary, PW.2-Raj Kumar Chaudhary, PW.3-Chinta Devi, PW.4-Md. Javed Alam, PW.5-Phul Kumari, PW.6-Nishar Ahmad, PW.7-Ram Bikash Chaudhary, PW.8-Subedar Chaudhary, PW.9-Shiv Kumar Chaudhary. Side by side had also exhibited Ext.1 Series-Respective Injury Report and Ext.2-Written Report. As stated above, neither ocular nor documentary evidence has been adduced at the end of the accused/appellant.

6. While assailing the judgment of conviction and sentence, it has been submitted on behalf of learned counsel for the appellant that from the evidences available on the record it is crystal clear that none of the independent witnesses have supported the case of the prosecution. Whoever been, are the family members, and being an interested, inimical witness their evidences are liable to be rejected. Furthermore, it has also been submitted that there happens to be inconsistency amongst their evidence over genesis of occurrence as well as manner of occurrence coupled with place of occurrence and so, apart from their evidences being unreliable, unacceptable, unworthy of



credence, due to non-examination of Investigating Officer, apart from causing prejudice to the interest of the appellant, as the exaggeration and inconsistency persisting in their evidence could not be brought up on record and in likewise manner, the objective finding relating to the place of occurrence also remained aberrant from the record and that being so, the finding recorded by the learned lower court did not justify its prevalence and is accordingly fit to be set aside.

7. On the other hand, the learned Additional Public Prosecutor vehemently supported the finding and submitted that minor variance in the evidence of the PWs are but natural whereupon, the genuineness of the prosecution version could not be doubted. The evidence in its totality is to be seen and on due exercise, it is crystal clear that prosecution has succeeded in substantiating its case whereupon, this appeal is fit to be dismissed.

8. After going through the record, it is apparent that PW.5 Ful Kumari Devi, PW.6-Nisar Ahmad though have supported the factum of assault did not incline to support furthermore and so, were declared hostile and in likewise manner, as PW.7 and PW.8 have not supported the case of the prosecution in any manner, on account thereof, they have also been declared hostile. That means to say, PW.1, PW.2, PW.3, PW.4 and PW.9 are the witness who supported the case of the prosecution out of whom, PW.4 is the doctor and the remaining witnesses are family members as well as injured.



9. PW.4 had examined the respective injured on 17.05.2006 and found the following:

(a) Ramjee Chaudhary was examined at 11:00 PM on 17.05.2006 itself and found the following injuries:

- (i)** *Incised wound on back left side 2" x muscle depth.*
- (ii)** *Incised wound on chest 2" x skin depth.*
- (iii)** *Incised wound on right arm upper part central side 3" x muscle depth.*
- (iv)** *Incised wound on right ring finger and middle finger anterior aspect each ½" x muscle depth.*
- (v)** *Incised wound on left little finger and ring finger anterior aspect each ½" x muscle depth.*
- (vi)** *Lacerated wound on head posterior side ¼" muscle depth.*

*Age of injury was within five hours.
Opinion reserved.*

(b) Shiv Kumar examined at 12:00 night.

- (i)** *Incised wound on left forearm upper lateral part 2" x muscle deep.*
- (ii)** *Incised wound on right arm lateral side 7" x skin deep.*

All above injuries were caused by sharp cutting object and simple in nature.

Age of injury was within six hours, simple in nature.



(c) Raju Kumar Chaudhary examined at 10:30 PM.

- (i) *Incised wound on chest 8" x muscle depth.*
- (ii) *Incised wound on neck left side 3" x muscle depth.*

All above injuries were caused by sharp cutting object. Opinion reserved till X-ray report.

Age of injury was within five hours.

(d) Chinta Devi examined at 12:30 AM on 18.05.2006.

- (i) *Swelling right hand posterior side and abrasion on caused by hard and blunt object.*

Opinion reserved till x-ray report.

Age of injury within six hours.

10. During cross-examination he had stated that for want of X-ray report he was unable to identify the injuries whether it happens to be simple or grievous or dangerous to life. He had further stated that he was unable to say what kind of sharp cut weapon would be responsible for causing such kind of injury. But, with regard to presence of the injuries, neither it was suggested nor cross-examined that respective injured have not sustained the aforesaid injuries and that, his injury report was collusive.

11. PW.9 had deposed that he is the informant of the case. Occurrence is of dated 17.05.2006 at about 08:30 PM. At that very time he was at his house. Birendra Chaudhary along



with other unknown persons were taking toddy at his roof and was abusing him as well as his family members whereupon they protested. Then thereafter, Birendra Chaudhary got down from his roof and being armed with *Pasuli* he inflicted blow over his neck which he prevented by his left hand causing injury thereupon. He had inflicted another blow as a result of which there was injury over his right hand. When his brother Raj Kumar Chaudhary came in rescue he was assaulted over his neck and then, extended it from neck to his chest. His cousin brother Ramjee Chaudhary came in rescue who was also assaulted with *Pasuli* as a result of which his all the five fingers of left hand were amputated. Another blow was given over his waist. Chinta Devi was also assaulted with lathi. Then thereafter, they rushed to the police station where, Officer-in-charge had written down as per his disclosure whereupon he put his signature (exhibited). Thereafter, they were sent to Tekari Hospital wherefrom, Gaya Medical College. They were treated for twenty-two days. Claimed identification of the accused. During cross-examination at para-5, he had stated that the house of Birendra Chaudhary lies at a distance of one step from his house. In para-6, he had stated that wife of Birendra Chaudhary, namely, Kanti Devi had instituted a counter case. In both the cases compromise petition as well as permission petition were filed and on the basis thereof, they were acquitted from the counter case. After acquittal, they began to give their evidences contrary thereto. In para-7, he had further stated that one could go from his roof to the roof of accused. At that very time he along with his family members were at their roof. In para-9 he had



stated that while they were over the roof, his father, mother were at ground floor. In para-10, he had stated that they were not on strain relationship since before. He began to abuse without any cause whereupon they forbade. Accused has not come to his roof rather directed that come down and then, will give a lesson. He had instructed his mother to close the door but, Birendra Chaudhary came inside the house. Rests were outside the house. In para-11, he had stated that he had not assaulted his mother. He, after pushing his mother, was in a way to roof while, they were getting down from the roof and during course thereof, first of all he was assaulted. Twice *Pasuli* blow were given upon him. Even after sustaining injury, he had not fallen over the ground. Then thereafter, other persons were assaulted. In para-12, he had stated that Raj Kumar Chaudhary was assaulted at two places, Ramjee Chaudhary was assaulted at two places, Chinta Devi was also assaulted. There was blood over body of each of the injured. No blood had fallen down over the ground. In para-13, he had stated that Marpit took place for half an hour. He is unable to say how many villagers assembled. In para-15, he had stated that they were examined at Magadh Medical College Hospital and to substantiate the same, he will file relevant documents. In para-17 there happens to be contradiction relating to assault over Ramjee Chaudhary. In para-19 he had denied the suggestion that no such type of occurrence had ever taken place.

12. PW.1 is the Ramjee Chaudhary. He had deposed that on the alleged date and time of occurrence, he was over roof



of his house along with his family members. At that very time, Birendra Chaudhary, Raju Chaudhary, Laxman Chaudhary, Ramchandra Chaudhary, Gangajali Devi, Kanti Devi were at their roof and were taking toddy. They began to abuse whereupon, they protested as a result of which they became enraged. Then thereafter, they armed with *Pasuli* came at his Darwaja. Birendra Chaudhary gave *Pasuli* blow over Sheo Kumar which he tried to ward off as a result of which, he sustained injury over his hand. Birendra Chaudhary gave another blow causing injury over his another hand. Raj Kumar Chaudhary came in rescue who was assaulted by Ramchandra with *Pasuli* over his neck while Raju had inflicted *Pasuli* blow over his chest as a result of which, he sustained severe injury. When he intervened, he was assaulted by Birendra Chaudhary with *Pasuli* as a result of which he sustained injury over his finger. Raju Chaudhary assaulted with *Pasuli* over upper part of waist. Laxman Chaudhary assaulted with *Pasuli* over right hand. Chinta Devi was assaulted with lathi by Kanti Devi and Gangajali Devi. On hue and cry, villagers came and lifted them to Tekari Hospital wherefrom he along with Raj Kumar Chaudhary was referred to Medical College where they have gone treatment of 15-16 days. During cross-examination at para-7, he had stated that informant Sheo Kumar Chaudhary happens to be his cousin brother. In para-8, he had stated that house of Birendra Chaudhary lies two feet away from the house of Sheo Kumar. He had further stated at para-9, that at that very time all the family members were at the roof. Main door was open. In para-10 he had stated that both the parties were on strain relationship.



Cases were pending since before. After hearing abusive language at the end of accused persons, they got down from the roof and came at Darwaja. In para-10 there happens to be contradiction relating to the main occurrence. In para-13, he had stated that they sustained injuries in a lane away from his house. This lane happens to be east to his house. He had further disclosed that pond lies east to the lane. In para-14, he had stated that copious blood had fallen over their cloth as well as ground. Blood was spread over the ground. In para-15 he had stated that so many villagers have come hearing commission of the occurrence. Furthermore, he has been suggested that his statement had not been recorded by the police during course of investigation.

13. PW.2 had stated that on the alleged date and time of occurrence he along with family members were over the roof of his house. Birendra Chaudhary, Raju Chaudhary, Ramchandra Chaudhary, Laxman Chaudhary, Gangajali and Kanti Devi were on the roof of their own house. There happens to be gap of two feet in between. They were taking toddy and during course thereof, they began to abuse which was protested by them. Then thereafter they got down from the roof and came at his *Darwaja*. At that very time, Raju, Birendra, Ramchandra, Laxman, Kanti and Gangajali Devi armed with *Pasuli* and lathi came. They inflicted *Pasuli* blow over Sheo Kumar repeatedly with an intention to kill which Sheo Kumar tried to ward off as a result of which he sustained injury over his both hands. When he rushed in rescue, he was assaulted by Ramchandra with *Pasuli*, Raju Kumar Chaudhary also inflicted



Pasuli blow. When Ramjee Chaudhary came in rescue he was assaulted by Birendra Chaudhary. Laxman Chaudhary had given another blow. Gangajali and Kanti assaulted Chinta with lathi. On hue and cry, villagers came and lifted them to police station wherefrom they were sent to hospital and then, he along with Ramjee Chaudhary were sent to Medical College. In para-7 there happens to be contradiction over the major portion of occurrence. In para-9, he had stated that occurrence took place at the Darwaja of Sheo Kumar Chaudhary. Sheo Kumar Chaudhary was assaulted by *Pasuli* twice. Sheo Kumar Chaudhary was not assaulted by *lathi*. He was also assaulted by *Pasuli*. He was not assaulted by *lathi*. In para-10, he had stated that copious blood spread over the ground, outside the building. He had further stated that Sheo Kumar Chaudhary happens to be his brother.

14. PW.3 is the Chinta Devi. She had deposed that on the alleged date and time of occurrence she was at the roof of her house along with Raj Kumar, Shiv Kumar, Ramjee as well as other female members. Birendra, Raju, Laxman Chandeshwar Prasad, Gangajali and Shanti Devi were at their roof. Both houses are adjacent. Then thereafter, they began to abuse whereupon they got down. Subsequently, they also got down. When they were to close the *Darwaja* (Door), at that very time Bijendra Chaudhary gave *Pasuli* blow over Ramjee and Sheo Kumar. Ramjee sustained injury over his hand as well as shoulder. Raju had also inflicted *Pasuli* blow over Raj Kumar. She was assaulted by Gangajali and Kanti with *Baletha*. Then, thereafter, they were taken to Police



Station and therefrom, to hospital. During cross-examination at para-3 she had stated that she had not made statement before the police and on account thereof, there happens to be contradiction. In para-4 she had stated that they were on strain relationship with Birendra Chaudhary. In para-5 she had stated that they have gone to roof to sleep. Main door was opened. At that very time none was present at the ground floor. First of all, Sheo Kumar got down from the roof and then, all of them. When they were about to close the main door, at that very time *marpit* took place. Then at para-7 had disclosed *marpit* took place at *Darwaja*. Blood had fallen down at twelve places. Cloths were soaked with blood.

15. Although there happens to be an admission at the end of the informant that for the same occurrence case and counter case were instituted, compromise was effected and on the basis of compromise, they got acquitted and then thereafter, they indulged in contesting the case and virtually, that happens to be reason behind that neither FIR or complaint petition whichever may be, of the counter case nor injury report if any, has been exhibited on behalf of defence. Furthermore, it is evident from the evidence of PW.4, doctor that three persons have sustained sharp cut injury while one Chinta Devi by means of hard and blunt substance though, nature of the injuries have not been disclosed and so, there happens to be no dispute over sustaining of injury of PW.1, PW.2, PW.3 and PW.9. It has been settled at rest that evidence of injured witnesses would not be subject to rejection unless and until there happens to be cogent reason and in



likewise manner, the status of the family members which could not be stamped as interested witness, rather natural witness.

16. So far facts of the present case is concerned, it is apparent that PW.9 shown place of occurrence inside his house near stair case while they were getting down from the roof. Furthermore, he had shown presence of appellant Birendra Chaudhary alone to have intruded inside the house and caused injury to all the injured that means to say PW.1, PW.2, PW.3 and PW.9 while PW.1 had shown presence of so many accused persons who had inflicted *Pasuli* blow over different injured and further, shown the place of occurrence to be *Gali* (lane) lying east to their house. So far PW.2 and PW.3 are concerned, though they have shown presence of all the accused persons but, they have shifted the place of occurrence to be their Darwaja. That means to say, in spite of the fact that they all are injured witness, having corroborated by the doctor PW.4 but, manner whereunder they deposed attracting presence of so many persons as an accused who actively participated during course of commission of occurrence, inflicted repeated blows over different injured and in likewise manner, shifting place of occurrence right from inside house to a *Gali* east to their house, and further having material exaggeration in the evidence of PW.1 para-11, PW.2 para-7, PW.3 para-3 along with informant PW.9, the non-examination of I.O. has caused severe prejudice to the appellant. In ***Lahu Kamlakar Patil v. State of Maharashtra*** reported in **(2013) 6 SCC 417** the Hon'ble Apex Court has occasion to deal with the situation arisen



on account of non-examination of I.O. in following way.

“..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.....”

17. Giving cumulative effect of the facts of the case, it is crystal clear that on account of inconsistency amongst the evidence of the PWs, coupled with non-examination of the Investigating Officer coupled with presence of counter case which suggest different mode of occurrence whereupon, it is difficult to concur with the finding recorded by the learned lower court. Consequent thereupon, same is set aside. Appeal is allowed. Appellant is on bail, hence discharged from its liability.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
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