

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.207 of 2015

Arising Out of PS. Case No. -111 Year- 2004 Thana -SINGHESHWARASHTHAN District- MADHEPURA

1. Md. Rajjaq Mian S/o Md. Oli Mian.
2. Md. Suleman Mian, S/o Babuji Mian,
3. Md. Nabi Mian @ Navin Mian, S/o Ilahi Mian,
4. Md. Jabbar Mian, S/o Salamat Mian,
5. Md. Zakir Mian, S/o Ghuran Mian,
6. Md. Usman @ Md. Usman Mian, S/o Keshwar Mian,
7. Md. Oli Mian, S/o Ilahi Mian,
8. Md. Mansoor Mian, S/o Ilahi Mian,
9. Md. Lalbudi Mian @ Lalmuddin Mian, S/o Kari Mian.

All resident of village - Rampatti, P.S. - Singheshwar, District - Madhepura.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 234 of 2015

Arising Out of PS.Case No. -111 Year- 2004 Thana -SINGHESHWARASHTHAN District-
MADHEPURA

1. Md. Ilahi Mian S/o Akbar Mian
2. Md. Ghuran Mian S/o Akbar Mian
3. Md. Sanjir Mian S/o Moshlim Mian
4. Md. Alimuddin Mian @ Almuddin S/o Md. Ilahi Mian.

All Resident of Village Rampatti, P.S. Singheshwar, District Madhepura.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance:

(In CR. APP (SJ) No.207 of 2015)

For the Appellant/s : Mr. Krishna Prasad Singh, Sr. Adv.
Mrs. Meena Singh, Adv.

For the State : Mr. Abhay Kumar, APP

(In CR. APP (SJ) No.234 of 2015)

For the Appellant/s : Mr. Krishna Prasad Singh, Sr. Adv.
Mrs. Meena Singh, Adv.

For the State : Mrs. Abha Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 30-01-2018

Criminal Appeal (SJ) No.207 of 2015 wherein Md.

Rajjaq Mian, Md. Suleman Mian, Md. Nabi Mian @ Navin Mian,

Md. Jabbar Mian, Md. Zakir Mian, Md. Usman @ Md. Usman



Mian, Md. Oli Mian, Md. Mansoor Mian, Md. Lalbudi Mian @ Lalmuddin Mian, Criminal Appeal (SJ) No. 234 of 2015 wherein Md. Ilahi Mian, Md. Ghuran Mian, Md. Sanjir Mian, Md. Alimuddin Mian @ Almuddin are the appellants rise out commonly against the judgment of conviction dated 30.03.2015 and order of sentence dated 31.03.2015 passed by Sessions Judge, Madhepura in Sessions Trial No.92/2010 whereby and whereunder all the appellants have been found guilty for an offence punishable under Section 147 of the IPC and sentenced to undergo R.I. for six months, under Section 447 IPC and sentenced to undergo R.I. for three months, Md. Ghuran Mian, Md. Sanjir Mian, Md. Alimuddin Mian @ Almuddin have been found guilty for an offence punishable under Section 380 IPC and sentenced to undergo R.I. for four years as well as to pay fine appertaining to Rs.1000/- and in default thereof, to undergo R.I. for one month, Md. Ghuran Mian and Md. Ilahi Mian have further been convicted for an offence punishable under Section 436 IPC and sentenced to undergo R.I. for seven years as well as to pay fine appertaining to Rs.10,000/- in default thereof to undergo R.I. for one year with a further direction to run the sentences concurrently, whereupon, have been heard together and are being decided by a common judgment.

2. Sukhdeo Yadav (PW.4) filed written report on 16.12.2014 disclosing therein that on the same day at about 6-7 AM Ilahi Mian, Ghuran Mian, Mansoor Mian, Alimuddin Mian, Navin Mian, Oli Mian, Rajjaq Mian, Jabbar Mian, Sanjir Mian, Zakir Mian, Usman Mian, Suleman Mian co-villager came enticing



provocative words, house be looted, be put on fire and then, all of them made house trespass. Sanjir Mian and Ghuran Mian took away one quintal of wheat, Alimuddin Mian took away one box containing cloth, ornaments. Ilahi Mian, Ghuran Mian, Mansoor Mian, Jabbar Mian, Navin Mian, Suleman Mian and others lit fire whereupon, he raised alarm attracting villagers who extinguished fire, out of them named Arjun Yadav (not examined), Anil Yadav (PW.1) Santosh Kumar (not examined) Mukesh Yadav (not examined).

3. After registration of Singheshwar P.S. Case No.111 of 2004 investigation was taken up and concluded by way of submission of charge sheet under Sections 447, 448, 504, 380, 435, 34 of the IPC whereunder cognizance was also taken and during course of trial, as is evident from the lower court record the case was committed in accordance with Section 323 of the Cr.P.C. as a result of which, the trial commenced and concluded before the court of Session 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 is that of complete denial. It has also been pleaded that on account of land dispute relating to the same piece of land over which occurrence has been alleged at the end of the prosecution, this case has purposely been filed in order to claim possession as, accused have already filed title suit relating thereto.

5. In order to substantiate its case, prosecution had examined altogether six PWs who are PW.1-Anil Kumar, PW.2-Kameshwar Yadav, PW.3-Ramdeo Yadav, PW.4-Sukhdeo Yadav,



PW.5-Kameshwar Yadav, PW.6-Lalita Devi as well as had also exhibited Signature of the informant as Ext.1 over fardbeyan. Neither ocular nor documentary evidence has been adduced on behalf of defence.

6. While challenging the judgment of conviction and sentence impugned, it has been submitted on behalf of learned counsel for the appellant that as the prosecution miserably failed to substantiate its case beyond all reasonable doubt, on account thereof, the finding recorded by the learned lower court is fit to be set aside. To substantiate such plea, it has been submitted that Investigating Officer has not been examined. On account thereof, the interest of the appellants are found highly prejudiced in the background of the fact that from the evidence of the respective PWs it is apparent that there happens to be material exaggeration/development which on account of non-examination of the Investigating Officer could not be legally brought up on record which, in case so placed, would have completely shattered the evidence of the respective PWs. No objective finding of the Investigating Officer relating to the place of occurrence came up on the record which could have substantiated the plea of the appellants with regard to their presence since before at the place of occurrence. Had there been, then in that circumstance the occurrence as alleged by the prosecution would not have survived on account of presence of appellants over the alleged place of occurrence since before and in the aforesaid background, the story of forming an unlawful assembly, making house trespass, commission of theft as well as commission of arson would not be



expected, accepted.

7. Furthermore, it has also been submitted that non of the neighbour having their presence in the vicinity/boundary have been examined and whoever been examined, are own kith and kin. From unnatural conduct including that of informant, cast doubt over the genesis as well as manner of occurrence. It has also been submitted that though, there happens to be disclosure in the written report with regard to utterances of words at the end of the appellants to assault but, neither any of the PW had spoken with regard to nature of arms having been possessed by any of the member of the mob nor there happens to be an allegation that any member of the mob had ever assaulted either informant or his family members though, he had admitted that at the time of commission of house trespass by the appellants his wife married daughter as well as minor daughter were present inside the house out of whom only PW.6 has turn up.

8. Apart from this, it has also been submitted that proper identification of the accused with specific role having been played by them during course of occurrence is also found shaky in the background of the fact that in the written report six persons have been named to have set a blaze in the house of the informant. Side by side also identified Ghuran Mian, Sanjir Mian to have stolen away the wheat while Alimuddin Mian to have stealthily taken away a tin box but during course of trial PW.1 had not specified any of the appellant with regard to commission of theft of granary or tin box containing ornaments, cloth and in likewise manner had asserted that on an order of Md. Ilahi Mian,



Md. Mansoor Mian lit fire. While PW.2 also following the same way had alleged that on an order of Ilahi Mian, Ghuran Mian and Jabbar Mian lit fire. PW.3 had identified Ghuran Mian and Sanjir Mian to have taken away wheat while Almuddin took away a box, he had also deposed that on an order of Ilahi Mian, Ghuran Mian had lit fire. Informant, PW.4 had identified Ghuran Mian and Sanjir Mian to have taken away one quintal of wheat while Almuddin took away box containing ornaments, cloth. He had also deposed that on an order of Ilahi Mian, Ghuran Mian had lit fire. PW.5 had identified Ghuran Mian and Jabbar Mian to have taken away wheat while Almuddin took away box. He had also identified Ghuran Mian to have set a blaze the house of the informant. While PW.6, daughter of the informant had identified Ghuran Mian and Siddiqui to have taken away one quintal of wheat while Almuddin took away a box. Further on an order of Ilahi Mian, Ghuran Mian set a blaze her house.

9. In the aforesaid background it has been submitted that when first part the witnesses have stated that after lifting wheat as well as box the accused persons gone from the place of occurrence then, in that circumstance, without having narration at the end of the witnesses with regard to reappearance of Ghuran Mian, the allegation against him to have lit fire on an order of Ilahi Mian is found unreliable. That being so, in consonance with the infirmity persisting in the evidence of the witnesses over proper identification of the appellants in consonance with the part having been played at their end, it is a fit case wherein the judgment of conviction and sentence should be erased by way of allowing these



appeals.

10. On the other hand the learned Additional Public Prosecutor while supporting the finding recorded by the learned lower court has submitted that evidence should not be read in piecemeal manner rather it should be in its totality and when such exercise is being taken up, it is apparent that witnesses have substantiated the prosecution case with regard to taking away of box, the wheat as well as lighting fire in the house of the informant. Mob was there and so, it happens to be perception of each of the witness, which he formed having his presence at particular location and that being so, it should not be, rejected only on the plea of some sort of discrepancy in identifying the accused during course of commission of the crime though, their presence happens to be sharing common object and that being so, with an aid of Section 149, the discrepancy what is persisting is found duly rectifiable, that being so, the judgment of conviction and sentence recorded by the learned lower court is fit to be confirmed.

11. The first and foremost point happens to be with regard to non-examination of the Investigating Officer. By catena of decisions, the Hon'ble Apex Court had conclusively held that invariably the case of the prosecution should not be rejected for want of examination of the Investigating Officer. It depends upon facts of the each case and further, to what extent the non-examination of the Investigating Officer has deprived of an opportunity to the accused in getting, substantiating his plea. If the courts comes to a conclusion that the fate of the accused is found shattered on account of non-examination of the



Investigating Officer then, in that circumstance, the non-examination of the Investigating Officer would cause prejudice to the interest of the accused whereupon, would be a good legal ground to acquit the accused. More recently, 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.”

12. In the background of the aforesaid legal proposition



now the evidences is to be taken note of whether on the score of non-examination of the Investigating Officer, the interest of the appellants is found prejudiced. PW.1 in paras-6, 7, 8, 9, 10, 11, PW.2 in para-17, 18, PW.4 in para-13, PW.5 in paras-3,4,5, it is apparent that there happens to be material exaggeration/development which these witnesses have during course of their evidence been exposed and had there been examination of the Investigating Officer then, in that circumstance, those material exaggeration/development would have been legally brought up on record over which, the appellant would have an opportunity to suggest the evidences of those witnesses to be unreliable.

13. The second aspect, though at the initial stage that means to say during course of filing of written report the prosecution had concealed is with regard to land dispute more particularly claiming the land over which, according to prosecution, occurrence took place. During course of examination-in-chief PW.1 had not disclosed the motive for commission of the occurrence that means to say persisting land dispute amongst the parties nor during course of cross-examination he was confronted on that very score. PW.2 who happens to be son of the informant has not disclosed the motive/to be land dispute but at para-51 of his cross-examination he had admitted that the accused persons are claiming the P.O. land. PW.3 neither during examination-in-chief nor cross-examination testified on that very score while, PW.4 informant, during his examination-in-chief at para-2 had disclosed that the land dispute happens to be the motive for



commission of the instant occurrence. During cross-examination at para-83 had admitted that accused persons had filed Title Suit No.325 of 2003 against him. PW.5 at para-38,39,40,41,42,43 had admitted that on account of keeping of firewood over the land by the accused persons, a dispute arose. He had further admitted that accused persons are claiming the P.O. land. He had further stated in para-55 that he is not remembering on which successive dates parties quarreled relating to the P.O. land save and except of dated 16.12.2004. While PW.6, daughter of the informant had stated in para-7 that there happens to be dispute in between her father as well as accused persons relating to the P.O. land. Accused persons are claiming this land. She had also admitted that her father had given the land to the accused persons for the purpose of residence and now they are claiming the same. In para-8 she had further stated that the house of accused persons lies surrendering to the P.O. land. At para-10 she had stated that on the alleged date of occurrence accused persons, after keeping their articles were compelling to give land. That being so, the crucial question remained unresolved due to non-examination of the Investigating Officer, whether the land under dispute was in possession of the prosecution party or was in possession of the accused persons, any hut was there and if so, whose as, from the evidence of the PW.6, para-10 it suggest otherwise than whatever been asserted and claimed by the prosecution.

14. Now coming to the evidence of record, the infirmities whatever been perceived during course of examination-in-chief had already been pointed out by the learned counsel for the



appellants during course of submission and is found duly proved after going through the evidence of respective witnesses although, presence of Ghuran Mian is found by PW.3, PW.4, PW.5 and PW.6 to have taken away the wheat but so far other co-accused is concerned, it happens to be shifting by having presence of Sanjir Mian, Zakir Mian as well as Siddique. Almuddin has been identified to have taken away the box while Ghuran Mian being the person who lit fire is found properly identified by PW.2 who shown Jabbar Mian but PW.3, PW.4, PW.5, PW.6 have categorically stated so though PW.1 had identified Mansoor Mian to have lit fire.

15. Because of the fact that the witnesses are not consistent with regard to physical possession of the prosecution over the P.O. land and further considering the evidence of the PW.4, informant PW.2, his son and PW.6, his daughter wherefrom it has been gathered that they simply allowed the accused persons to indulge in such kind of activity without any protest in spite of the fact that none of the witnesses have stated that any of the accused were armed with deadly weapon and further, PW.4 informant at para-48 had stated that accused persons gone inside courtyard through his Darwaja had also stated at para-7 that all of the accused came out from Aagan jointly, controverted the same under para-71 stating that only three accused persons gone inside Aagan. First of all it was Ghuran Mian who had gone inside the house and it was Ghuran Mian who came out as first amongst the accused from the house having a bag over his head and lathi, bow and arrow and fattha in one hand. In para-74 he had stated that



after coming out of Ghuran Mian all the accused persons came out within fifteen minutes and then at para-75 he had stated that all the accused persons gone to their houses makes the story of arson more particularly having been at the end of appellant Ghuran Mian became suspicious and when, the same is taken together with the fact that PW.6 had admitted presence of appellants over the land, which happens to be the place of occurrence, then in that circumstance, it cast doubt over the genuineness of the prosecution version. That being so, the judgment of conviction and sentence recorded by the learned lower court is hereby set aside. Both the appeals are allowed. All the appellants are on bail hence they are discharged from their liabilities.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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