

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.248 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- BHOJPUR

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1. Raj Bali Ojha son of late Ram Prasad Ojha
 2. Anjani Ojha son of Raj Bali Ojha
 3. Abhay Ojha son of Sachidanand Ojha
 4. Kunj Bihari Ojha son of late Bishwanath Ojha
- All residents of village Paharpur, Post Officer Umraoganj, Police Station Behia,
District Bhojpur

.... Appellants

Versus

State of Bihar

.... Respondent

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Appearance :

For the Appellants : Mr. Akhileshwar Prasad Singh, Sr. Adv.
Mr. A.K. Ojha, Adv.
Mr. A.K. Karn, Adv.

For the Respondent : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 26-02-2018

All the appellants stand convicted under Section 435 of the Indian Penal Code and sentenced to undergo R.I. for two years and fine of Rs.1,000/- in default clause, vide judgment and order dated 24.4.2003 passed by Sri Amlendu Kumar Sinha, Additional Sessions Judge-cum-Presiding Officer (Fast Track Court) IVth, Ara, Bhojpur in Sessions Trial Court 201 of 1989.

2. It has been informed by the learned counsel for the appellants that during the pendency of the appeal, appellant no.1 (Raj Bali Ojha) died, as such a report was called for from the S.P., Bhojpur, Ara and the report is available at flag 'C', which shows that



appellant no.1 died on 24.11.2015, as such the Appeal against appellant no.1 stands abated.

3. The prosecution case as stands from the fardbeyan of informant Ram Darash Sah (P.W.5) in short is that while he was sleeping along with his wife and son in his *Dhaba* at about 2 O'clock, he heard sound of some persons at his door and he identified them as the appellants, thereafter, he was threatened by them that he has lodged a case so he would be taught lesson and thereafter Rajbali Ojha took out a matchbox and set on fire his *Dhaba* causing damage of Rs.1,000/-.

4. The aforesaid Fardbeyan led to registration of Bihia P.S.Case No.18 of 1987 and the police after investigation submitted charge-sheet, cognizance of the case has been taken and after commitment, the case traveled to the file of Sri Amlendu Kumar Sinha, Additional Sessions Judge-cum-Presiding Officer (Fast Track Court) IVth, Ara, Bhojpur.

5. Charges were framed against Rajbali Ojha under Section 436 of the IPC and rest of the accused-appellant under Section 435/34 of the IPC.

6. In course of the trial, altogether five witnesses have been examined by the prosecution, they are P.W.1 Triveni Sah



(son of informant), P.W.2 Jawahar Pd. Gupta (declared hostile), P.W.3 Triyogi Pandey, (declared hostile), P.W.4 Gangeya Devi (wife of the informant) and P.W.5 Ram Darash Sah (informant).

7. Apart from the above, following documents have been brought on record as exhibits, they are Ext.1 signature of Ram Darash Sah on Fardbeyan and on behalf of the defence, no oral evidence has been adduced, however certified copy of the deposition of witnesses no.2 has been brought on record as Ext. 'A'.

8. The learned trial court on conclusion of the trial has not found guilty appellant Rajbali Ojha and other appellants guilty under Section 436 of the IPC, however, convicted appellant Rajbali Ojha under Section 435 of the IPC and rest of the accused-appellants under Section 435/34 of the IPC and sentenced them as stated above.

9. Contention of the learned counsel for the appellant is that in this case, non-examination of the I.O. is vital to the prosecution as due to non-examination of the I.O., place of occurrence has not been established and there is no material available to find out as to what articles were burnt and what was the condition of the burnt *Dhaba*. It has also been submitted that P.Ws. 2 and 3 have been declared hostile and other witnesses are family members, who are son



and wife of the informant and there are vital contradictions in their evidence, which will appear from the evidence of P.W.6 at para 6 and 7 and evidence of P.W.4 at para 7 and P.W.5 (informant) at para 15 as such the defence has been prejudiced by non-examination of the I.O. but in spite of that the learned trial court has not considered the aforesaid facts and convicted the appellants under Section 435/34 of the IPC. In support of his contention and non-examination of the I.O., the learned trial court has cited a decision of the Hon'ble Apex court in the case of ***Raj Kishore Jha – Vrs. – State of Bihar*** reported in ***2003 (4) PLJR 202*** at para 11 and also decision of the Hon'ble Apex Court in the case of ***Ravishwar Manjhi Vrs. State of Jharkhand*** reported in ***2009 (3) PLJR 1*** at para 21.

10. The learned counsel for the appellants has also cited unreported decision of the ***Hon'ble Division Bench of this Court in Criminal appeal No.592 of 2005*** and analogous cases in para 44.

11. On the other hand, learned counsel for the State has defended the judgment on the ground that the evidence of P.Ws.1, 4 and 5, though they are family members, are consistent on the point of setting the Dhaba on fire, as such there is no infirmities in the impugned judgment and it is sustainable in the eye of law.



12. On perusal of the evidence, it appears that P.W.5 has supported the prosecution case so far allegation of setting the *Dhaba* on fire by the appellants and his evidence has also found corroboration from the evidence of P.W.4 but on close scrutiny of the evidence of P.W.5 it appears that his attention has been drawn towards the statement made before the police to test the credibility of those witnesses and in para 16, this witness has stated that it is not true that he has not stated before the Darogaji that he had not seen any one setting the hut on fire and he has stated before the Darogaji that when he came out of the house he saw setting the hut on fire. Similarly statement of P.W.4 has also been drawn towards the statement made before the police in para 7 and she has also stated that on *hulla* her husband came out of the house and saw the *Dhaba* setting on fire. She has also not stated before the police that the accused persons came and started abusing and on the order of Kunj Bihari Ojha and Anjani Ojha, Raj Bali Ojha set his house on fire and he identified the appellants and attention of P.W.4 has also been drawn towards para no.6 and 7 as well as her earlier statement. Her evidence also shows that it is not true that she has stated before the police that Raj Bali Ojha took out match box and set the *Dhaba* on fire and she has not stated before the police that she had not seen the accused persons setting the hut on fire and the aforesaid contradiction



appears to be vital and in such a situation non-examination of the I.O. also appears to be fatal as had he been examined he would have confronted with the aforesaid evidence of P.Ws to test the credibility of witnesses as to whether he reliable or not as cited by the learned counsel for the appellants. The Hon'ble Apex Court in the case of Raj Kishore Jha- Vrs. State of Bihar (supra) has considered this question of non-examination of I.O. in para 11 of this judgment, which is as follows :-

“11. Mere non-examination of Investigating Officer does not in every case cause prejudice to the accused or affects the creditability of the prosecution version. In Ram Dev and Anr. v. State of U.P., [1995] Supp. 1 SCC 547, it was noted that non-examination of the Investigating Officer does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of the eye witnesses. It was, however, indicated that it is always desirable for the prosecution to examine the Investigating Officer. In the present case after examination- in-chief and partial cross-examination, the Investigating Officer had died. Therefore, this cannot be a case which can be stated to have caused by prejudice to the accused on account of Investigating Officer's non-examination. The prosecution cannot be attributed with any lapse of ulterior motives in such circumstances. In Behari Prasad and Ors. v. State of Bihar, [1996] (2) SCC 317, it was held that case of prejudice likely to be suffered mostly depends upon facts of each case and no universal straight Jacket formula should be laid down that non-examination of Investigating Officer per se vitiates the criminal trial. The said view has been found echoed in Ambika Prasad and Anr. v. State (Delhi administration, [2000] (2) SCC



646], Bahadur Naik v. State of Bihar, [2000] (9) SCC 153] and, Ram Gulam Chaudhury and Ors. v. State of Bihar, JT (2001) (8) SC 110].”

13. The aforesaid question has also been considered by the Hon’ble Apex court in the case of **Ravishwar Manjhi- Vrs. State of Jharkhand at para 21** as follows :

21. The Investigating Officer in a case of this nature should have been examined. His examination by the prosecution was necessary to show that there had been a fair investigation. Unfortunately, even no site plan was prepared. There is nothing on record to show as to the exact place where the occurrence had taken place. It is stated that the house of the parties is divided by a road. If that be so, it was all the more necessary to pin-point the exact place of occurrence to ascertain who was the aggressor.”

14. The Hon’ble Division Bench of this court in **Criminal Appeal No.592 of 2005** as cited by the learned counsel for the appellants has also held at para 44 of the judgment as follows :

“44. Admittedly, the Investigating Officer has not been examined. It is settled law that non-examination of the Investigating Officer ipso facto does not discredit the prosecution version. It is needless to point out that the right of bringing on record, the contradictions in the statement of witnesses made before the Investigating Officer, is a very valuable right of the accused and by showing that, the witness has made improvements or has given evidence, which contradicts his earlier statement, the accused is able to satisfy the court that the witness is not a reliable witness. The non-examination of Investigating Officer is a serious infirmity in the prosecution case which results in prejudice to the accused. It is clear that the examination of the Investigating Officer is



necessary in order to bring on record the contradictions in the evidence of the witnesses, hence it is a valuable right of the accused. Further it is clear that non-examination of the Investigating Officer is a serious infirmity in the prosecution case, in so far as it deprives the accused of the opportunity to show to the court, that the witnesses were not reliable witnesses, by proving contradictions in the earlier statement. In the present case, non-examination of the Investigating Officer has definitely prejudiced the accused since the place of occurrence has not been proved nor the claim of the eye witnesses that they had seen the occurrence through hole or gap of the window of the room has been proved, due to non-examination of the Investigating Officer. Thus, in our opinion, non-examination of the Investigating Officer in the present case is a serious infirmity resulting in prejudice being caused to the accused. Hence, on this score also conviction of the accused persons also cannot be sustained.”

15. Considering the principle as already settled by the Hon’ble Apex Court it appears that non-examination of the I.O. in the present case is fatal to the prosecution and cause serious prejudice to the defence.

16. Apart from that due to non-examination of the I.O., the prosecution has also failed to establish the place of occurrence and detail about the place of occurrence as to whether the occurrence has taken place in the manner as alleged by the prosecution. The learned trial court has failed to consider the above infirmities and



inconsistencies and convicted the appellants.

17. In view of the discussions made above, conviction of the appellants does not appear to be sustainable in the eye of law, hence, this appeal is allowed and the impugned judgment and order are set aside. As the appellants are on bail, they are discharged from the liabilities of their bail bonds.

(Vinod Kumar Sinha, J)

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CAV DATE	NA
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