

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.218 of 2002

(Arising out of judgment dated 11.04.2002 passed by learned Additional District & Sessions Judge (F.T.C.), Chapra at Saran in Sessions Trial No. 388/92/166/2002).

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1. Suryadeo Rai @ Suraj Deo Rai, son of Late Adalat Rai
 2. Mokhtar Rai @ Mukhtar Rai, son of Late Adalat Rai
 3. Harendra Rai, son of Surya Deo Rai
 4. Nagendra Rai, son of Surya Deo Rai
- All resident of village Sherukahan, P.S. – Mashrakh, District – Saran.
5. Uttam Kumar, son of Shri Kapildeo Singh, village – Raini, P.S. – Maharajganj, District – Saran.

.... (Accused).....Appellants

Versus

The State of Bihar

.... Respondent.

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Appearance :

For the Appellants : Mr. Suraj Dev Singh, Amicus Curiae
For the State : Mr. Sujit Kumar Singh, Addl. P.P.

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
C.A.V. JUDGMENT

Date: 21-02-2018

Heard Sri Suraj Dev Singh, learned Amicus Curiae
and Sri Sujit Kumar Singh, learned Additional Public
Prosecutor for the State.

2. This Criminal Appeal arises out of the
judgment dated 11th day of April, 2002 in Sessions Trial No.
388/92/166/2002 passed by learned Additional District &
Sessions Judge (F.T.C.), Chapra at Saran. The trial court has
held all the accused persons guilty and convicted them for the
offences punishable under Sections 307/149 of the Indian



Penal Code. The trial court has awarded all the accused persons a sentence of rigorous imprisonment for 7 years for committing offence punishable under Section 307/149 I.P.C.

3. It appears from perusal of the trial court records that the prosecution case was that on 28.10.1990 at about 10.00 a.m. the informant (P.W.3) along with Kapildeo Rai (P.W.6), Fulena Rai (P.W.4), Rajdeo Rai (P.W.5) and Birendra Rai were all sitting in front of the door of Chandradeep Rai (P.W.2) at village Sherukhan, P.S. Mashrakh, District – Saran. The allegation was that the accused persons who were all pattidars of the informant namely, the accused Adalat Rai, Surajdeo Rai, Nagendra Rai, Uttam Kumar, Harendra Rai and Mukhtar Rai came there, the accused Adalat Rai told them that they were going to cut straw (*Khar*) in the field, on this, the informant allegedly protested and told them that the said land belonged to him therefore they should not cut the *Khar*.

4. Thereafter, it is alleged that the accused persons started abusing and the assault took place. It is stated that Surajdeo Rai was assaulted with Bhala, he assaulted the informant on the right Panjra and again repeated the assault,



as the informant tried to save himself, he suffered injury on the thumb and middle finger, blood had started oozing out and he fell down on the ground. Accused Harendra Rai armed with Bhala assaulted Kaplideo Rai (P.W.6) on the chest. Blood was oozing out of the said injury. Accused Mukhtar Rai also assaulted Fulena Rai (P.W.4) on the back, who also fell down. The allegation of assault on Fulena Rai is also there on the accused Nagendra Rai who was armed with Bhala. He assaulted Fulena Rai on his head. Accused Uttam Kumar is said to have given a Farsa blow to Rajdeo Rai who sustained injury on the right thumb. Fulmati Devi, who was armed with lathi, is said to have also assaulted Birendra Rai on his head.

5. It has also transpired from the record that the informant and other injured persons were taken to the dispensary, Mashrakh where the fardbeyan of the informant was recorded on 1.25 p.m. before Mashrakh Police. On the basis of the fardbeyan the present case was instituted and after investigation a charge-sheet under Sections 149, 323, 324, 325 and 307 of the Indian Penal Code was submitted.

6. The learned Chief Judicial Magistrate took cognizance of the offences and after commitment the records



were transferred to the court of sessions. Learned 1st Additional District & Sessions Judge framed the charge under Section 307/149 I.P.C. against the accused persons on 10.04.1995, thereafter, the records were transferred to the learned Additional District & Sessions Judge – (F.T.C.-II), Chapra at Saran.

7. The case of the defence was based on the counter case being Mashrakh P.S. Case No. 176/1990 lodged by appellant no. 1 against the informant and others. According to the counter case, the accused Surajdeo Rai along with his son and father Adalat Rai were cutting Khar in the field where Kapildeo Rai, Anil Rai, Fulena Rai, Daroga Rai, Vakil Rai, Rajdeo Rai, Bhola Rai, Surendra Rai and Birendra Rai variously armed with came and Kapildeo Rai assaulted with Farsa on the head and others started assaulting with Lathi. Thereafter, it is alleged that Nagendra Rai who was coming from the house for carrying *Khar* and his uncle Mukhtar Rai who was also coming from the house were surrounded on the way and the accused persons assaulted. Thereafter allegedly accused persons went to the house of the informant and assaulted grand-mother (*Aaji*) and took away ornaments



worth Rs. 5000/-. Contention of the prosecution that to save their neck informant filed the said counter case against the accused persons.

8. In course of evidence, the prosecution examined altogether 10 witnesses. Harihar Rai (P.W.8) who happened to be an advocate clerk and a formal witness proved the fardbeyan (Ext.2) and formal F.I.R.(Ext.3). Dr. Ayodhya Nath Pandey (P.W.7), who is a doctor and had examined the injured, has proved the injury reports, which are marked Exhibit – 1 to Exhibit – 1/D. Dr. Ramnath Choudhary (P.W.9) had given an opinion on the X-ray plats of Fulena Rai and has proved the X-ray plats which has been marked as Exhibit-4 and Exhibit-4/A and also proved his report, which is marked as Exhibit – 5. He also proved opinion of Dr. A.N. Pandey (P.W.7) on the basis of his report which is marked as Exhibits - 1/E to 1/G.

9. Chandradeep Rai (P.W.2) at whose front of the door the informant and other injured were allegedly sitting denied the place of occurrence, he was tendered by the prosecution. In course of his cross examination, he has stated that no occurrence took place at his residence. His



evidence has not been relied upon by the learned trial court.

10. Daroga Rai (P.W.3) who is the informant and Fulena Rai (P.W.4) have admitted in course of their evidence that a title suit was pending between the parties which they had lost. The defence has also admitted prior enmity with the informant and others, therefore, the trial court has come to a conclusion that the parties were inimical to each other.

11. In this connection, defence has proved a deed of gift (Ext.A) which shows that Janakdhari Rai had executed a deed of gift in favour of Kaushalya Devi, who is wife of accused Adalat Rai. Janakdhari Rai admittedly belongs to the family of the accused and the informant. Admittedly the accused, informant and Janakdhari Rai had share in the said Kharaul. The trial court held that on perusal of the said deed of gift, it would appear that at the time of registration Janakdhari Rai was dead and there is an endorsement of the Registrar on the back of the first page of the deed of gift on the basis of death certificate that Janakdhari Rai was dead at the time of registration, this was the bone of contention between the parties.

12. The attesting witness (D.W.1) however



stated at paragraph 4 & 5 that at the time of registration Janakdhari Rai was alive and he had given thumb impression before the Registrar. The trial court did not believe the evidence of the attesting witness on the face of the endorsement of the Registrar on the deed of gift.

13. The trial court noticed that an appeal is pending with regard to genuineness of the deed of gift which has been admitted by the prosecution witnesses and therefore it shows that there are disputes over the said Kharaul. The trial court was of the view that it looks probable that the informant objected while the accused persons were allegedly going to cut the said Kharaul which was still disputed. This led to believe on the part of the learned trial court that the prosecution has completely proved the genesis that there was dispute with regard to the said Kharaul at the time of alleged occurrence.

14. Since the place of occurrence was denied by P.W.2, trial court proceeded to consider the evidences on this point. The defence version was that the occurrence took place in the field of Kharaul, thereafter on the road and then in the house of the accused persons.



15. Prosecution had examined five witnesses on the point of occurrence. They were P.Ws. 1, 3, 4, 5 and 6. P.W.10 Bishwanath Rai claimed that he had driven out the injured on his cart just from the front of the house of Chandradeep Rai (P.W.2) to hospital. The learned trial court found that as per the prosecution story the occurrence took place in front of the house of P.W.2 just adjacent to Jamun tree which was nearer to road, whereas the case of the defence is that the occurrence took place in the Kharaul field secondly at road and lastly in the house of the accused persons. Therefore, according to the trial court, so far as the occurrence allegedly took place on road appears to be the same place as has been alleged by the prosecution, thus it appeared to the trial court that the occurrence took place at the place of Jamun tree which was situated near the house of P.W.2. The eye witnesses had supported this fact that the occurrence took place near the house of P.W.2.

16. The trial court found that Sri Bhagwan Rai who is a co-villager stated that the occurrence took place in front of the house of Chandradeep Rai (P.W.2), and the accused persons variously armed came there where the



informant and other persons were sitting. This witness was suggested by the defence that he had not seen the occurrence but the trial court has believed this witness because he was found equally related to the informant and the accused and there was no enmity with the accused persons. Fulena Rai (P.W.4) is the full brother of the informant whereas Rajdeo Rai (P.W.5) is the son of Fulena Rai (P.W.4). They have supported the prosecution case that the occurrence took place near the Jamun tree which is in front of the door of P.W.2. P.W.5 is the nephew of informant stated that the alleged occurrence took place at 'Chaumuhani'.

17. The learned trial court held that 'Chaumuhani' is also near the said place where the alleged occurrence took place. The next witness P.W.6 is son of Lakshman Rai, who is said to be related to the same degree to the accused and the informant. He has also supported that the accused persons assaulted the informant and others. The learned trial court came to a conclusion that the prosecution had been able to establish and prove that the alleged occurrence took place in front of the door of Chandradeep Rai (P.W.2) which was the case of the prosecution. In this



connection, he has also relied upon the evidence of Bishwanath Rai (P.W.10) who is said to be totally independent witness. He has stated that he had driven out the informant and other injured persons to hospital on his cart from the door of P.W.2 which is said to be the place of occurrence.

18. In this case the Investigating Officer was not examined, the defence raised a point that since there are two versions about the place of occurrence and the manner of occurrence, examination of the Investigating Officer was necessary and his non-examination has caused serious prejudice to the defence as the defence failed to test the objection in absence of the Investigating Officer.

19. The defence relied upon a decision of Division Bench of this Hon'ble Court in the case of ***Shiv Balak Rai and others vs. State of Bihar*** reported in ***1986 PLJR 604*** where in paragraph-9, the Hon'ble Court has held that:

"9. The correctness or otherwise of the two versions would have been easily ascertained by looking into the objective evidence found at the place of occurrence. The Police Officer, who made investigation to the case, was not examined in the trial court and in absence of his evidence it is difficult to hold as to which of the two versions is correct"



20. The defence has also referred another case of this Hon'ble Court in the case of **Arjun Yadav vs. State of Bihar** reported in **1998(2) PLJR 655**. In paragraph 13 & 14, the Hon'ble Court held that:

13. *The Investigating Officer not having been examined, the accused-appellant had no means to verify whether they had made such a claim before the Investigating Officer or whether they came to the court to make this statement for the first time. Similarly both the informant and her mother PW1 made several statements concerning the appellant the veracity of which remained untested in the absence of the Investigating Officer coming before the court. The failure of the prosecution to examine the Investigating Officer has further prejudiced the accused inasmuch as no independent objective findings regarding the alleged occurrence could be placed before the trial court.*

14. *For all the reasons I am of the view that the non-examination of the Investigating Officer in this case has proved fatal to the prosecution case and on the materials on record it would not be prudent and safe to sustain the appellant's conviction. To my mind it is a fit case in which the appellant is entitled to the benefit of a reasonable doubt. I accordingly extend that benefit to him and acquit him of the charge. The judgment and order passed by the trial court is set aside. Let the appellant be released from jail forthwith in case he is not wanted in any other case."*



21. The defence pleaded that non-examination of the I.O. would be fatal for the prosecution because P.W. 3 as well as P.W.5 and P.W.6 have stated that blood had fallen on the ground, therefore, the I.O. was the only fit person to say that whether there he had found any blood on the ground or not at the place of occurrence. The defence submitted that in absence of evidence of I.O., the benefit of doubt has to be given to the accused persons.

22. On the other hand, prosecution took a plea that non-examination of the I.O. in the present case would not be fatal to the case. They relied upon a decision of the Hon'ble Supreme Court in the case of **Ram Gulam Chaudhury vs. State of Bihar** reported in **2001 (4) PLJR (SC) 123**. The relevant part of the judgment relied upon by the learned trial court is being extracted hereinbelow:

"27. In the case of Behari Prasad vs. State of Bihar reported in (1996) 2 SCC 317 1996(2) PLJR (SC) 18, this Court has held that for non examination of the Investigating Officer the prosecution case need not fail. This Court has held that it would not be correct to contend that if the Investigating Officer is not examined the entire case would fail to the ground as the accused were deprived of the opportunity to effectively cross-examine the witnesses and bring out contradictions. It was held



that the case of prejudice likely to be suffered must depend upon facts of each case and no universal strait-jacket formula should be laid down that non-examination of Investigating Officer per se vitiate the criminal trial.”

23. The trial court has come to a conclusion that the I.O. was un-friendly to the prosecution because despite steps taken by them to procure the attendance of the I.O. he had not turned up in the court for giving his evidence. The trial court also took note of the fact that the I.O. had not examined Rajdeo Rai, Kapildeo Rai, Fulena Rai and Birendra Rai and they were not made charge-sheeted witnesses. According to the trial court the non-examination of the I.O. would not demolish the case of the prosecution.

24. The learned trial court also believed the manner of occurrence as alleged by the prosecution because in his opinion since the deed of gift (Ext.A) was under challenge, it appears more probable that the accused persons might have told them that they were going to cut away the *Khar*. Another story that the informant and others went to the field and assaulted without any rhyme and reason has not been held believable. The trial court therefore held that both



place of occurrence and manner of occurrence have been duly proved and therefore proceeded to examine whether the offence under Section 307/149 I.P.C. is proved against the accused persons or not. Considerations such as the nature of weapons used, the intention of the accused persons, the motive for the commission of the offence, the nature and size of injuries, parts of body of the victim selected for causing injuries and severity of the blow or place were taken as an important factors for the purpose and consideration and determination.

25. The learned trial court found that the doctor had found five injured including the informant. Three injuries were on the body of the informant. These injuries were of sharp cutting instrument one injury the laterals of the abdomen which appeared to be on fatal part and another on the thumb and a swelling was also found on the right shoulder. The injuries of thumb showed that the informant had struggled to save himself. Kapildeo Rai had an incised wound on the right axila. Fulena Rai had suffered five injuries on his person, out of which one injury was incised and the same was on the left back side, one injury was on the head



and some of the three injuries were on the fingers and thumb. This according to the learned trial court showed that he had also saved himself from further assault. Birendra Rai was also examined by the doctor who appeared to have sustained injuries on the back of his head which also appears on the fatal part. Rajdeo Rai suffered one incised and another aberration on his body. The incised wound was on the forearms and another injury was on the right middle finger. The learned trial court found that the sharp cutting instrument were also used in the occurrence. The X-ray plate proved by Dr. Ramnath (P.W.9) showed that the injury found on the head of Fulena Rai was grievous in nature. The learned trial court held that the nature of injuries on one of the injured was grievous, it may be said that the injuries were simple on other injured, but it appears that they had also saved themselves causing injury on the fingers.

26. The trial court, therefore, was of the view that from all these materials it is clearly shown that after forming unlawful assembly armed with deadly weapons, the accused persons had common object to commit attempt to murder, therefore, the offence under Section 307/149 I.P.C.



was proved beyond all reasonable doubts against the accused persons.

27. As regards statement under Section 313 Cr.P.C., the trial court held that the accused persons have not put any story in defence, moreover no witness was examined on the point of defence. This according to the trial court shows that the story of defence is completely un-believable, moreover, the fardbeyan (Exhibit-C), according to the trial court the story of the defence is also improbable and contradictory in itself, thus the defence adduced by the accused persons does not help them.

Submission

28. In course of argument, Sri Suraj Dev Singh, learned Advocate appearing as *Amicus curiae* submitted that the trial court judgment is not fit to sustain. According to him the trial court has erred in believing the place of occurrence as also the manner of occurrence. Learned counsel submitted that in the facts of the present case non-examination of the I.O. would prove fatal to the case of the prosecution. He further submits that the mandatory provision of Section 313 Cr.P.C. has not been complied with which has also prejudiced



the case of the prosecution.

29. Learned counsel submits that the genesis of entire dispute is a deed of gift executed by Janakdhari Rai in favour of Smt. Kaushalya Devi wife of Adalat Rai, whereunder he had gifted certain land in her favour out of love and affection. Janakdhari Rai was unmarried and Kaushalya Devi happened to be the daughter-in-law in relationship, because she was the daughter-in-law of the brother of Janakdhari Rai the gift deed was executed on 13.11.1989. It is contended that Janakdhari Rai died on 20.12.1989 and the deed of gift was presented for registration on 08.01.1990 which was duly registered by the registering officer. The stamp papers were purchased on 13.12.1989 itself in the name of Janakdhari Rai for the purpose of execution of deed of gift. It has been certified by the stamp vendor and his signature has been proved before the trial court as Exhibit-E. The enmity between the parties because of the land dispute has been admitted, therefore this aspect of the matter need no elaboration.

30. As regards the place of occurrence, both the parties have different versions while the informant and the



injured and their witnesses have stated that the occurrence took place in front of the house of P.W.2, Chandradeep Rai, the accused persons have stated that while they were cutting the straw in their field, the informant and others lashed with weapons reached there and assaulted the accused persons. On this point, the deposition of prosecution witnesses have been believed by the trial court, therefore, I will examine the deposition of the prosecution witnesses on this point.

31. P.W.1, Shankar Bhagwan Rai has stated that Fulena Rai, Daroga Rai, Kapildeo Rai, Birendra Rai and Rajesh Rai and one more person were sitting on the door of Chandradeep Rai (P.W.2), they were going to cut the straw, Fulena asked Adalat Rai not to cut the straw, on this, Adalat Rai told that straw will be cut and asked others to assault. Thereafter, the alleged occurrence took place. In his cross examination this witness has stated that his sister Champa Devi had given him 2 ½ bighas of land and for the last 20 - 22 years he is living in the village looking after the farming work.

32. This witness, in his cross examination, has claimed that the *Kharaul* is measuring about 6 - 8 Kathas. He has clearly stated that in the said *Kharaul*, Surajdeo Rai and



he had a share. He has stated that he has a share of 2 kathas in the said *Kharaul*. Thereafter, he has stated that the occurrence took place on the door of Chandradeep Rai (P.W.2) near the Jamun Tree. 4 to 5 persons had assembled there on *hulla* which had continued for 5 to 7 minutes. He has thereafter stated that as soon as he came out, he found that somebody had fallen down. In paragraph 18, he has stated that he had not seen any injury on the body of Surajdeo Rai, Mukhtar Rai, Adalat Rai and Harendra Rai. He has further stated that he had not gone to the police station. At Masrakh hospital, he had gone but the police officer had not come there. He thereafter went to Gopalganj to his sister's place and returned after 8 - 9 days. He has thereafter stated that when he went to hospital after his return, he found that persons from both the parties were in the hospital in injured condition.

33. In paragraph 20 of his cross examination this witness has stated that he had signed on his statement made before police. He had stated to the police that at the time of *hulla* he was in his house and only after hearing *hulla* he came out of his house. He has further stated that he had



never said to the police that he had been in the house of Chandradeep Rai and the occurrence had taken there.

34. In paragraph 21 of his cross examination, he has stated that in the hand of Mukhtar Rai, there was a *Bhala* and he assaulted Fulena Rai, but he did not say that there was a *Farsa* in the hand of Fulena Rai and that was snatched for assaulting Fulena Rai.

35. The trial court has treated this witness as an independent witness because he is related in the same degree with both the parties but here one thing is apparent that this witness is an interested witness inasmuch as he has admitted that in the said Kharaul he had also a share. If he has got a share and it is his claim, he cannot be said to be an independent witness.

36. P.W.2, Chandradeep Rai, at whose door the occurrence had allegedly taken place has been declared hostile, because in his examination-in-chief, he stated that no such occurrence had taken place in front of his door.

37. P.W.3, Daroga Rai is the informant. He has supported his case that on the alleged date of occurrence (28.10.1990) at about 10.00 A.M. he was on the door of P.W.2



and apart from him Fhuldeo Rai, Fulena Rai, Rajdeo Rai, Birendra Rai, Chandradeep Rai, Jhulan Rai were present. He has repeated his statement that the accused persons came there and informed the prosecution party that they were going to cut the straw but when the prosecution party told them not to do so, Adalat Rai ordered the other accused to assault. He has stated that Surajdeo Rai had assaulted him which caused injury in the right Panjra. The second blow caused injury on the thumb of the right hand. Thereafter, in paragraph 2, he has stated that all the injured had gone to the government hospital at Masrakh where police had come and recorded his statement. He had signed on the fardbeyan recorded by Daroga Jee.

38. In his cross examination, in paragraph 6, he has stated that for cancellation of the deed of gift, he had filed a Title Suit No. 188/1990 in the court of learned Munsif – IV. He had lost the said Suit but had preferred an appeal, which was going on in the court of learned District Judge. He has, however not proved any document showing pendency of appeal before the District Judge. This witness has also stated that for falsely getting the gift deed executed from Janakdhari



Rai, he had lodged a case in the court of learned C.J.M. against the accused persons under Sections 420/406 of the Indian Penal Code. Surajdeo Rai, Mukhtar Rai, Sudama Rai, Shiv Narayan Rai and Kaushalya Devi were the persons named in the said case but he had lost the said case also. In paragraph 6, he has stated that the straw was not cut that year, but in earlier years, the straw were being cut and there was no dispute on that.

39. In paragraph 13 of his cross examination this witness has stated that the accused persons were about five persons and from the side of the informant also there were five to six persons, the quarrel started with abuse. The first assault took place on him by Barchi, he fell down and when Kaplideo Rai tried to lift him, he also got a Barchi blow and fell down. In paragraph 14 though he has stated that Kapildeo Rai, Fulena Rai, Rajdeo Rai and Birendra Rai were also beaten. He claims that he was in conscious condition but has not named the assailant. In his cross examination he has stated that for the occurrence which had taken place on the same day Surajdeo had lodged a case giving rise to Session Case No. 533/1992 which was pending in the court of learned A.D.J. –



3rd. The informant (P.W.5) was one of the accused in the said case along with Kapildeo Rai, Fulena Rai, Sri Bhagwan Rai, Birendra Rai and Surendra Rai. Anil Rai, Rajdeo Rai, Vakil Rai were also accused in the said case. In paragraph 17, he has stated that in Masrakh Hospital he, Kapildeo Rai, Fulena Rai were admitted. Daroga Rai came about 10.00 A.M. but later on this witness stated that he came hospital on 1' O Clock. He claimed in paragraph 19 that blood had fallen at three places and his cloths were soaked with blood. He claimed that the blood stained cloths were handed over to the Daroga Jee in the hospital itself.

40. P.W. 4, Fulena Rai, one of the injured has supported the prosecution version. According to him, the alleged occurrence took place near the Jamum Tree. In paragraph 2 of his deposition he has stated that Daroga Rai (informant) is his own brother. This witness claimed that he was in unconscious condition in the hospital and after he regained his sense his statement was not recorded. This witness has stated that he along with Kapildeo Rai, Daroga Rai, Rajdeo Rai and Vakil Rai were sitting at the door of Chandradeep Rai. He has not taken name of Fulena Rai,



Birendra Rai, Chandradeep Rai, Jhulan Rai as was stated earlier by P.W.3. This witness has also accepted that he had lost the title suit. He has stated that a title appeal no. 47/1996 was pending. In his cross examination this witness has stated that in respect of the land of Janakdhari Rai a proceeding under Section 144 and 145 Cr.P.C. were also initiated but he had lost this proceeding. He has also stated in cross examination in paragraph 11 that only eight days before the alleged date of occurrence he had come to his village from Kolkata and had left to Kolkata after one month. In paragraph 14, this witness has stated that the accused persons had surrounded the victims under the Jamun tree and not at the door of Chandradeep Rai. He has stated that when he got assault, he fell down but cannot say whether blood had fallen on the earth or not. he was not aware of the blood stained cloths as to what happened to those cloths.

41. P.W.5, Rajdeo Rai, has stated that the alleged occurrence had taken place in front of the house of Chandradeep Rai at Choumuhani. In paragraph 11 of his cross examination, this witness has stated that he along with others were on the house of Chandradeep Rai for 1 - 1½ hour before



the alleged occurrence. In paragraph 20 of his cross examination this witness made a very important statement saying that the blood had fallen from the body of all the victims in an area of 1½ to 2 bighas of land at different places. He has thus giving the description of the place of occurrence somewhere in the field measuring area 1½ to 2 bighas of land. In paragraph 22, he has stated that he did not remember whether he had given any statement to police but he admits that he had seen the police in Masrakh hospital at about 1.00 P.M.

42. P.W.6, Kapildeo Rai, is the another witness who has also stated that he along with others were sitting on the door of Chandradeep Rai. He has admitted in his cross examination that earlier he had lodged a case under Section 420 & 406 I.P.C. against Surajdeo Rai, Adalat Rai, Mukhtar Rai, Kaushalya Devi, Ambika Thakur but they were acquitted in the said case. This case was relating to deed of gift executed by Janakdhari Rai in favour of Kaushalya Devi. He has admitted that an appeal against the said judgment is pending. This witness has stated that the injured were brought to the hospital by one Vishwanath Rai who was still alive. This



witness has admitted that he and Daroga Rai were not unconscious. According to him, Fulena Rai had remained in the hospital.

43. P.W. 7, Dr. Ayodhya Nath Pandey, who has examined the injuries on the body of Daroga Rai (informant), apart from that he has also proved injuries of Kapildeo Rai, Fulena Rai and Birendra Rai. This witness has stated in his cross examination that he did not remember if any X-ray report was produced before him as per his advice. He had not noted down in the above injury reports Exhibit 1 to Exhibit 1/d that any such X-ray report was ever produced before him. This witness was suggested that in absence of any X-ray report the injuries which he had proved and in respect of which he had reserved his opinion should be treated as simple injury, the Doctor said he cannot say. From the injury report of the informant it appears that the doctor had reserved the opinion as to nature and had advised for X-ray etc. but those reports were not proved. The same was the position with respect to the injury reports of other injured. He denied the suggestion that the injury report is the collusive documents.



44. P.W.8, Harihar Rai is the Advocate Clerk who has proved the fardbeyan and the formal F.I.R. which were marked as Exhibit 2 & 3.

45. P.W.9, is Dr. Ram Nath Choudhary, who has proved the two X-ray plates of Fulena Rai. On the basis of those X-ray plates he had submitted his report rendering his opinion which was proved by him as Exhibit 5. He has found that there was a hair-line crack in the middle part of the parietal bone on the left side. He has also proved the two further opinions which were in the handwriting of Dr. A.N. Pandey in respect of injury sustained by Daroga Rai and Kapildeo Rai marked by Exhibit 1/f and 1/g respectively. X-ray plates of Fulena Rai were marked as Exhibit 4 & 4/A.

46. P.W.10, Vishwanath Rai, has also sated that the alleged occurrence has taken place in front of the house of Chandradeep Rai near the Jamun tree. This witness has not seen the occurrence and has only stated that he was in his house when he heard hulla and when he reached near the Jamun tree he found that these prosecution party were present and three persons were lying down, he has named those persons as Kapildeo Rai, Daroga Rai and Fulena Rai. The



other two Birendra Rai and Rajdeo Rai were also bleeding. In his cross examination he has stated that he had not seen anybody assaulting the prosecution party.

47. On behalf of the defence, Sri Dinanath Rai has deposed as D.W.1. He has supported the defence version about the execution of deed of gift executed by Janakdhari Rai. D.W.2 is Dr. A.N. Pandey, who had also deposed on behalf of the prosecution. D.W.2 has proved the injuries found on the body of Adalat Rai, Mukhtar Rai, Harendra Rai and Kaushalya Devi. This witness has stated that injury no. 1 of Mukhtar Rai was caused by sharp weapon and injury no. 2 was caused by hard and blunt substance. This witness has stated that he had examined these persons on 28.10.1990 on the request of police.

48. In their statement under Section 313 Cr.P.C. the appellants have denied the allegations.

49. On perusal of the materials as discussed above, I find that the reliance placed by the trial court on the deposition of prosecution witnesses to hold that the place of occurrence was near the Jamun tree in front of the house of Chandradeep Rai is not corroborated by any independent



material particulars. In this case, the I.O. has not been examined. Even the case diary prepared under Section 161 Cr.P.C. by the I.O. has not been exhibited and therefore what was stated by the prosecution witnesses to the I.O. is not available on the record for examination. There is no hospital treatment certificate showing that the injured prosecution party and the witnesses were treated in the hospital for a long time. The Statement of Fulena Rai that he was in unconscious condition is not proved from any medical report of the hospital. Statement of Kapildeo Rai that he did not remember whether he had given statement before the I.O. gives an impression that in fact neither Fulena Rai nor Kapildeo Rai made themselves available to I.O. for recording of their statement. Fulena Rai went to Kolkata one month after the alleged occurrence which shows that he had not taken interest in course of investigation to make his statement before the I.O.

50. In these circumstances, Fulena Rai and Kapildeo Rai were not shown as charge-sheet witnesses. The trial court believed that the I.O. was unfriendly to the prosecution because he had failed to examine Rajdeo Rai,



Kapildeo Rai, Fulena Rai and Birendra Rai and they were not made charge-sheet witnesses. The trial court had not discussed as to what efforts were taken to bring the I.O. for examination in course of trial which was all the more necessary in the facts of the present case where both the parties were giving different place of occurrence and different manner of occurrences, there was a case and counter case. In this case there is no independent witness but the trial court has believed the place of occurrence and manner of occurrence by relying upon the evidences of Sri Bhagwan Rai whom the trial court has taken as an independent witness because he is related to the same degree to the accused persons, and according to the trial court, he has no enmity with the accused persons and there had no grudge to support the prosecution case on his part. In my opinion, the trial court has clearly erred on this point and failed to appreciate that Shankar Bhagwan Rai (P.W.1), was himself an interested person and was inimical to the accused. Shankar Bhagwan Rai (P.W.1), has in course of his cross examination claimed that he had a share of two Kathas in the said Kharaul. He has also stated in his cross examination that while on hearing hulla



when he came out, he found that somebody had fallen down. This witness has stated in paragraph 18 of his cross examination that he had not seen any injury on the body of Surajdeo Rai, Mukhtar Rai, Adalat Rai and Harendra Rai where as Dr. A.N. Pandey (D.W.2) in his deposition has proved injuries on the body of these persons. He is the same doctor who had examined the prosecution party and the appellant's party when all of them had gone to him in injured condition. This witness has further stated that he had not stated to police that he had been in the house of Chandradev Rai and the occurrence had taken place there. In my opinion, this witness had an interest in the matter and was apparently supporting the informant.

51. One more thing which appears very important to note is that in this case one of the injured namely Rajdeo Rai has stated in paragraph 20 of his cross examination that blood had fallen from the body of all those persons who were beaten and it was sprayed at different places in an area of 1½ to 2 bighas of land. This according to me is very important because this witness who is said to be an injured in the said occurrence clearly indicates that the



occurrence had taken place in an open field sprayed over 1½ to 2 bighas of land and it was a free fight between both the parties.

52. To me, it appears that in these circumstances it was not safe for the trial court to accept the version of the prosecution that the alleged occurrence had taken place near the Jamun tree or in front of the house of Chandradeep Rai (P.W.2), who had already denied this and was declared hostile.

53. As regards the manner of occurrence, to me, it appears from the records and the depositions that there was a dispute over the land covered under the deed of gift executed by Janakdhari Rai. The said deed of gift was in favour of present appellants who were claiming through the Kaushalya Devi. A title suit was filed by the prosecution party challenging the validity of the deed of gift but they lost in the civil suit. Kapildeo Rai one of the injured had also filed a criminal case against some of the members of the appellants party, but in that case also the appellants party were acquitted. Although, it has come in the deposition of some of the prosecution witnesses that a title appeal was pending



against the judgment of the trial court in the title suit but they did not claim that in the title appeal there was any order of restraint against the appellants in going on the land in question. If these appellants had succeeded in the title suit and were also acquitted in the criminal case, I find it just and proper to believe that they had gone to cut the straw in the field and expecting the possibility of an interference by the prosecution party, they seem to have gone lashed with some kind of weapon, may be hard and blunt substance, Bhala or Barchi. The prosecution party who had lost the suit might have gone to stop the appellants from cutting the straw, they were also lashed with weapon as it appears from the kind of injuries found on the body of the appellant's party. In the open field the fight broke out and both the parties were assaulting each other. It seems the reason why the injured Rajdeo Rai (P.W.5) has described the place of occurrence where the blood had fallen from the body of all the injured in an area of 1½ to 2 bighas of land. In such situation, the prosecution party was the aggressor. It is not believable that all the members of prosecution party were sitting on the door of Chandradeep Rai (P.W.2) where the accused persons came



to inform them that they were going to cut away the straw. The appellants party had succeeded in the suit and if there was no order restraining them from cutting away the straw it seems highly improbable that appellants party will go to inform the prosecution party. Another question which raises a reasonable doubt on the manner of occurrence is that whey all the members of prosecution party will assemble at the door of Chandradeep Rai (P.W.2) and shall remain there for 1 – 1 ½ hours.

54. In this case altogether 10 prosecution witnesses have been examined out of whom P.W.7 and P.W.9 are the doctors where as P.W. 10 who is a co-villager and had carried the injured to the hospital had denied to have seen the alleged occurrence. P.W. 8 a formal witness. In such circumstances, only six prosecution witnesses remained who have supported each other.

55. As discussed above, all these P.Ws. 1 to 6 are from the same and one family and they were claiming their share in the straw and the land in which the straw was grown and that was the genesis for the fight between the parties. All of them were interested. They had lost the civil



suit as also 144 and 145 Cr.P.C. proceeding. A criminal case lodged by Kapildeo against the appellants party had also failed. Non-examination of I.O. in this case has definitely proved fatal and it has caused prejudiced to the accused because right from beginning the place of occurrence and manner of occurrence were disputed and the prosecution witnesses were inconsistent on these issues. There is no independent witness at all in this case to support the version of the prosecution as regards the place of occurrence and manner of occurrence.

56. From the aforementioned discussions, I would come to a conclusion that conviction of the appellants under Section 307 I.P.C. is not sustainable.

57. Since from the evidences available on the record, it appears that these appellants had gone to the land where straw were to cut duly armed and in course of fight have indulged in causing hurt by dangerous weapons or means as envisaged under Section 324 I.P.C., the conviction of these appellants are altered from Section 307 I.P.C. to Section 324 I.P.C.

58. From the impugned judgment, it appears



that this case was lodged as back as on 28.10.1990, i.e., more than 27 years back and some of the accused namely Adalat Rai, Surajdeo Rai were aged about 79 years and 50 years respectively at the time of trial court’s judgment. The parties are own *gotias* residing in the same village as neighbours and the dispute among them arose because of conflict of interest over a piece of land. At this stage, it seems just and proper that while counting their conviction from Section 307/149 I.P.C. to Section 324/149 I.P.C., their sentence is further reduced to the period undergone.

59. The trial court’s judgment is, therefore, modified and this appeal is allowed to the extent indicated hereinabove. The accused-appellants are discharged from the liability of their respective bail bonds.

(Rajeev Ranjan Prasad, J.)

Rajeev/-

AFR/NAFR	NAFR
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