

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.191 of 2015

Arising Out of PS.Case No. -11 Year- 1993 Thana -KANHAULI District- SITAMARHI

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1. Kameshwar Mahto son of late Ram Ashish Mahto
2. Sanjeev Mahto son of Deo Narayan Mahto
3. Ravindra Mahto son of Late Feku Mahto
4. Ram Swarath Mahto son of late Bilash Mahto All are resident of Village-
Basahiya, P.S.- Kanhauli, O.P. Pipra Dadari, District- Sitamarhi.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Alok Kumar Alok, Amicus Curiae

For the Respondent/s : Abha Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 08-01-2018

Sri Alok Kumar Alok, learned counsel has submitted that the conducting Advocate is not being available and so, adjournment be granted. In the aforesaid background, Mr. Alok Kumar Alok, Advocate has been requested to assist the court as an Amicus Curiae which he accepted and accordingly, heard learned Amicus Curiae as well as learned APP.

2. Appellants, Kameshwar Mahto, Sanjeev Mahto, Ravindra Mahto and Ram Swarath Mahto have been found guilty for an offence punishable under Section 323 of the IPC and sentenced to undergo SI for six months, under Section 342 of the IPC and sentenced to undergo SI for six months with a further direction to run the sentences concurrently vide judgment of conviction and sentence dated 24.08.2014 passed by Adhoc Additional Sessions Judge- 1st,



Sitamarhi in Sessions Trial No. 19/94/152/2009.

3. PW-5, Khublal Mahto gave his Fard-e-beyan on 19.03.1993 at about 12.15 PM at PHC, Sonbarsa disclosing therein that today at about 7.00 PM, there was an altercation in between Kameshwar Mahto son of Ramashish Mahto and Ram Parikshan Mahto son of late Dharkhan Mahto which was pacified by the villagers. Accordingly, both of them returned back to their house. At about 8.00 AM, he directed his son Manoj aged about 12 years to go to Parsa Mor to inform the labourers that today no work will be done. His son proceeded. As soon as he proceeded, some of the villagers came and disclosed that near house of Hira Khan, Kamleshwar along with others are waiting for his son having variously armed whereupon he rushed and after his arrival, he saw Kamleshwar armed with Garasa, Sanjiv armed with Farsa, Ravindra and Ram Swarath with Lathi and they have cornered his son Manoj Kumar, got him down from the bicycle and further directed that as his father has deposed against him on account thereof, he will be murdered. His son has replied, he happens to be a minor boy having no concern with the case but Kameshwar inflicted Garasa blow over his head which his son prevented as a result of which, he sustained cut injury over his left hand. Manoj fell down on the earth whereupon other accused persons also began to assault with respective weapons as a result of which, his



left hand became fractured. Blood came out. On his alarm, Nagendra, Suresh, Pukar Rai and others came and intervened into the matter. During course thereof, Sanjeev gave Farsa blow over neck of his son which his son prevented by his right hand as a result of which his right hand also became fractured. Kameshwar took away his bicycle along with other co-accused. The motive for occurrence has been shown as the informant had deposed against the accused Kameshwar and others.

4. The aforesaid written report led institution of Kanhauli PS Case No. 11/1993, followed with an investigation as well as submission of charge-sheet after completing the same, facilitating the trial in a manner, subject matter of instant appeal.

5. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of the Cr.PC is that of complete denial. It has also been submitted that victim Manoj sustained injuries during course of falling from bicycle over soiling road whereupon, getting a golden chance, got this case filed, putting false and frivolous allegations. However, no ocular evidence has been adduced however, documentary evidence has been adduced on behalf of the defence.

6. In order to substantiate its case, prosecution had examined altogether 5 PWs who are PW-1, Nagendra Mahto, PW-2,



Suresh Mahto, PW-3 Manoj Kumar, PW-4, Suresh Mahto, PW-5, Khublal Mahto as well as had also exhibited Ext-1, Injury report, Ext-2, signature of informant over Fard-e-beyan. In likewise manner, though no ocular evidence has been adduced but Ext-A series has been filed, deposition of witness relating to Sessions Trial No.16/94, Ext-B, certified copy of FIR of Kanhauli PS Case No. 9/93.

7. Learned Amicus Curiae while assailing the judgment of conviction and sentence impugned has submitted that same is unsustainable in the eye of law because of the fact that (1) neither Investigating Officer nor the doctor has been examined, (2) considering the inconsistency with regard to actual place of occurrence as well as exaggeration having in the evidence of the respective witnesses caused prejudice to the appellant, on account thereof non examination of Investigating Officer, appellants have been seriously prejudiced. In likewise manner, it has also been argued that due to non examination of doctor, their interest has again been prejudiced as there happens to be specific suggestion that while traveling with bicycle victim-PW-3 had fallen down as a result of which sustained injury and that being so, had there been examination of doctor, the nature of injuries would have been exposed, (3) there happens to be non examination of independent witnesses and for that no explanation has been furnished (4) whoever been examined are the



own family members (5) from Fard-e-beyan itself, it is evident that at an earlier occasion, there was an altercation in between Kameshwar as well as Parikshan, so, there was no motive for assaulting, that too a minor child of the informant and that being so, the cumulative effect did not justify the finding having been recorded by the learned lower court.

8. On the other hand, learned APP fairly submitted that, that happens to be the reason behind in spite of framing of charge under Section 307 IPC along with other allied section conviction and sentence has been recorded under Section 323, 342 of the IPC which is found duly substantiated from the evidence available on the record whereupon the finding recorded by the learned lower court is fit to be confirmed.

9. As stated neither the Investigating Officer nor the doctor has been examined. Because of the fact that there happens to be specific disclosure at the end of the prosecution witnesses including victim PW-3, he was assaulted by means of Farsa as well as Garasa including Lathi, and further he was treated at the PHC as well as at the clinic of Dr. Bharat Singh at Sitamarhi, on account thereof, the injury report/examination of doctor was must in order to explicit the nature of injury coupled with the weapon by which the aforesaid injuries were caused. In likewise manner, non examination of the



Investigating Officer, in routine manner, could not be found prejudicial to the interest of the accused unless and until there happens to be sufficient material regarding controversy relating to place of occurrence, presence of material contradiction in the evidence of the witnesses along with other circumstances visualizing from the record. In *Lahu Kamlakar Patil v. State of Maharashtra reported in (2013) 6 SCC 417*, it has been held by the Hon'ble apex Court that non examination of the Investigating Officer is to be perceived in the background of nature of the case as well as evidence having adduced during course of trial in order to infer whether it has caused prejudice to the interest of the accused or not. For better appreciation the same is quoted hereinbelow:-

18. Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the F.I.R. but has given the excuse that it was taken on a blank paper. The same could have been clarified by the Investigating Officer, but for some reason, the Investigating Officer has not been examined by the prosecution. 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 Jammu and Kashmir*[(2007)13 SCC 18] and *Ravishwar Manjhi and others 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.

10. So before perceiving the impact of the non examination of aforesaid two witnesses, first of all evidence is to be seen. Before that, the status of the witnesses is to be recognized as is evident from the evidence of PWs-5, informant, para-13, whereunder he had disclosed witness-Nagendra Mahto to be his nephew, Suresh Mahto son of Sarju is also his nephew while Suresh son of late Ram Naresh happens to be his brother. Witness Rajendra happens to be his full brother. So, inter se relationship is found duly exposed.

11. PW-3 is the injured who had deposed that on the alleged date and time of occurrence, he was at his house. On that date at about 7.00 AM, his father along with Kameshwar indulged in an altercation which was pacified by the intervention of the villagers.



After about an hour, his father instructed him to go to Parsa Mor in order to forbid the labourers that no work will be done today. While he was in a way and reached near Darwaza of Hira Khan, he saw, Kameshwar Mahto, Sanjeev Mahto, Ravindra Mahto and Ram Swarath Mahto out of whom Kameshwar armed with Garasa, Sanjeev armed with Farsa, Ravindra and Ram Swarath with Lathi, obstructed him and said that as his father had deposed against them relating to a case lodged by Ram Parikshan Mahto, he will be murdered. Then thereafter, Kameshwar gave Garasa blow which he protected as a result of which, caused cut injury over his left hand. Then thereafter, he fell down. Subsequently thereof, Sanjeev, Ravindra began to assault with Farsa and Lathi, as a result of which, his left hand sustained fracture. He became unconscious. Kameshwar took away his bicycle. Kamesh Suresh, Upkar and his father lifted him to hospital where he arrived at 12 Noon. Police came there and recorded Fard-e-beyan of his father. During cross-examination at para-4, he had stated that all the accused persons are his Pattidars having their house in the vicinity of his house. There happens to be land dispute with them. Then had said that Nagendra and Suresh, witnesses are his brothers. Then had said that Sessions Trial no. 16/94 has been lodged whereunder all the accused persons have been acquitted. Then had said at para-6 that there happens to be two ways in order to go to



village-Parsa Mor. One happens to be main road, other happens to be through ridge. In para-7, he had stated that accused had entered in an altercation with his father relating to deposition having in connection with Sessions Trial No. 16/94. At that very time, he was at his house. In para-8, he had said that labourers were of village-Bela which lies 2 Kms east to his house. He had further stated that cycle goes only up to the house of Hira Khan. He had identified the place of occurrence to road, North to South, East-field of Hira Khan, West-House of Hira Khan. Further had stated that there were so many houses in the vicinity. None of them are the witnesses in this case. In para-11, he had stated that when he reached at the place of occurrence, he had seen Suresh, Nagendra, Pukar Ram, Hira Khan, again clarified that when they came at the place of occurrence, he was already unconscious. After regaining sense, he disclosed with regard to occurrence. Then he denied the suggestion that on account of fall over soiling road, he sustained injury.

12. PW-5 is the informant who has stated that on the alleged date at about 7 to 8 AM, there was an altercation in between Kameshwar and Ram Parikshan. At that very time, he was at his house. He along with other co-villages intervened into the matter and during course thereof, there was an altercation in between him as well as Kameshwar. Then thereafter, he returned back. His son Manoj



while he was in way to Parsa Mor to instruct the labourers that today no work will be taken up, soon thereafter villagers came and disclosed that Kameshwar armed with Garasa, Sanjeev armed with Farsa, Ravindra and Ram Swarath with Lathi are waiting to assault his son near the house of Hira Khan whereupon he reached and seen the accused persons had encircled his son. Kameshwar forced to get down from the bicycle and then said that as his father had deposed against him relating to Ram Parikshan's case, he will be murdered which was resisted by Manoj saying that being a lad, he was unable to say anything even then, Kameshwar gave a Garasa blow over neck of Manoj which was prevented by him through his left hand as a result of which, he sustained cut injury. He fell down whereupon, Ram Swarath began to assault with Lathi as a result of which left hand of Manoj became fractured. Sanjeev gave Farsa blow which was prevented by Manoj by his right hand as a result of which, his right hand sustained fracture. Suresh, Nagendra, Pukar Ram and others came and intervened and rescued Manoj. Kameshwar took away his bicycle. Then thereafter, they have lifted Manoj to Hospital where police came and recorded his Fard-e-beyan. Thereafter, he was lifted to Sitamarhi for better treatment. During cross-examination at para-18 had deposed that Manoj had proceeded alone. After departure of Manoj some of the villagers came but he is not remembering their



names. He is also unable to disclose their numbers. Further he disclosed that he is not remembering whether persons who have informed had accompanied him to the place of occurrence or not. In para-19, he had stated that when he saw Manoj, for the first time, at the place of occurrence, he was in injured condition. At that very time, Kameshwar, Sanjeev, Ravindra and Ram Swarath, both of Suresh were present. He remained there for 10-15 minutes and then thereafter he lifted Manoj to Hospital. In para-22, he had stated that his clothes were not smeared with blood during course of lifting of Manoj. There was no blood over cot. In para-25, he had stated that Manoj was not struck from the edge side of Farsa. Then thereafter, at para-31, 32, 33, there happens to be material contradiction. In para-37, he had stated that he was not assaulted by the accused persons.

13. Now coming to the evidence of remaining witnesses, PW-1 is Nagendra Mahto who had stated that while he was staying at his Darwaza, he had seen Manoj going to Parsa Mor over bicycle who was prevented by Kameshwar, Ravindra, Sanjiv and Ram Swarath out of which Kameshwar was armed with Garasa, Sanjive armed with Farsa, Ravindra and Ram Swarath with Lathi. Then thereafter, Kameshwar assaulted him with Garasa. He sustained injury over his left hand as a result of which, he fell down and then thereafter, all of them began to assault and during course thereof, Farsa blow given by



Sanjiv, his right hand became fractured. Accused persons took away his bicycle. He had shown boundary of the place of occurrence, North-house of Hira Khan, South-House of Hira Khan, East-Pond, West-Road and then house of Mister Khan. Maarpeet took place at the bank of pond. House of only Muslims are there. His house lies after 25 houses. Then thereafter, the witness was deferred. On 2nd day none turned up to cross-examine and was accordingly, discharged.

14. PW-2 had stated that while Manoj was going over bicycle, Kameshwar, Sanjiv, Ravindra and Ram Swarath assaulted him. Kameshwar gave Garasa blow over his neck on account of which he sustained injury over his left hand. Rests have assaulted him with Lathi. Kameshwar took away bicycle. In para-5, he had stated that on the alleged date and time of occurrence, he was sitting inside his house. In para-7, he had further stated that at the time of occurrence shop of Harinarayan was at the place of occurrence.

15. PW-4 is another Suresh Mahto. He had stated that on the alleged date and time of occurrence, he was also going to Parsa Mor and during course thereof, when he reached near the house of Hira Khan, saw Kamleshwar armed with Garasa, Sanjiv with Farsa, Ram Swarath and Ravindra were armed with Lathi. At that very time, Manoj also arrived who was apprehended by these persons saying that your father had deposed against him, Kameshwar Mahto forced him



to get down from the bicycle and then gave Garasa blow causing injury over his left hand. Sanjiv gave Farsa blow causing injury over his right hand. Khublal, Nagendra, Suresh came and rescued him. In para-4, he had stated that he had proceeded to the Parsa Mor bare foot. He had further stated that he had gone to Parsa Mor and reached there at 12 O'clock. He had further stated that near house of Hira Khan house of so many persons of Hindu as well as Muslim lies. In para-6, he had stated that he had not seen anybody having their house in the vicinity at the place of occurrence. He had further stated that he is not knowing whether accused as well as informant is on litigating terms since before. In para-9, he had stated that when he saw Manoj for the first time, he was standing. At that very time, he had not talked with Manoj. He stayed for some time. How many person came at that very time, he is unable to say but again said that only four persons came. After occurrence so many persons assembled but he is unable to disclose their names. In para-10, he had again clarified that when he saw Manoj he was lying over ground in injured condition and was unconscious. He had seen sign of injury over his person. He had seen blood over his apparel. He is unable to say whether his bicycle was parked or was lying. He left for Parsa Mor leaving him.

16. After having analytical scrutiny of the evidence detailed hereinabove, it is evident that witnesses are inconsistent over



manner of occurrence. Although, informant had disclosed presence of PWs-1, 2 and 4, witnesses who came at the place of occurrence, lifted the injured to hospital but, from the evidence of PW-4, it is evident that on that very score, he had not corroborated the evidence of informant and in likewise manner PW-1 and 2 have not supported the manner of occurrence as deposed by PWs-3 and 5. Apart from this, PW-1, had identified the place of occurrence having different boundary which does not find tallied with the boundary of the place of occurrence disclosed by PWs-3 and 5. It is true that the evidence of the injured should be accepted in its entirety because of the fact that presence of injury over his person is indicative of the fact that he was present at the place of occurrence during course of commission of occurrence. In the present case, on account of non examination of the doctor, injury relating to PW-3 being caused on account of assault having over his person is found completely absent. Moreover, in the background of inconsistency amongst the evidence of PW-1, 2 and 4 with regard to nature of assault, evidence of PW-3 became doubtful, more particularly, when the evidence of PW-5 suffers from material exaggeration and on that very score, non examination of the Investigating Officer appears to be hazardous for the prosecution case.

17. That being so, the conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed.



18. Since all the appellants are on bail, they are discharged from the liability of bail bond.

19. The first and last pages of the instant judgment be handed over to the learned Amicus Curiae for the needful.

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(Aditya Kumar Trivedi, J)

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