

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.126 of 2009**

Arising Out of PS.Case No. -0 Year- null Thana -null District- BUXAR

- =====
1. Shiv Nath Yadav, son of Moti Yadav
  2. Ayodhya Yadav, son of Shiv Nath Yadav
  3. Gaya Yadav, son of Shiv Nath Yadav
  4. Prayag Yadav, son of Shiv Nath Yadav
- All residents of Raghunathpur, police station-Brahmpur, District-Buxar.  
.... .... Appellant/s

Versus

State of Bihar  
..... Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Sanjay Kumar, Adv.  
Mr. Surendra Kumar Choubey

For the Respondent/s : Mr. Parmeshwar Mehta, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

ORAL JUDGMENT

**Date: 06-11-2018**

1. Appellants, Shiv Nath Yadav, Ayodhya Yadav, Gaya Yadav and Prayag Yadav, have been found guilty for the offences punishable under Section 323, 324 and 325 read with Section 34 of the IPC and each one has been directed to undergo rigorous imprisonment for one year under Section 323/34 of the IPC, to undergo rigorous imprisonment for three years under Section 324 / 34 of the IPC and sentenced to undergo rigorous imprisonment for three years under Section 325/34 IPC with a further direction to run the sentences currently vide Judgment of conviction and order of sentence dated 06.02.2009 passed by Additional Sessions Judge, F.T.C. 3,



Buxar in Sessions Trial No.110 of 2002 / 61 of 2003.

2. Nand Lal Yadav (P.W.-7) gave his fardbeyan on 22.11.1995 at about 11 A.M. while he was admitted at State dispensary, Raghunathpur disclosing therein that on the same day at about 6 A.M. Shiv Nath Yadav came from outside and began to abuse on account of finding presence of urine at door. The aforesaid activity was taken up on account of having common house and sahan. It has further been disclosed that his father is an old infirm on account thereof, his father has thrown the urine. In the aforesaid background, he forbidden to abuse and during course thereof, altercation took place amongst them then Shiv Nath Yadav and his three sons, namely, Ayodhaya Yadav, Gaya Gaya Yadav and Prayag Yadav came and began to assault by means of lathi as a result of which, he sustained injury over his head, finger of the left hand. He fell down and during course thereof, sustained injury over his buttock, as a result of which blood ozen out. His father also sustained injury over his head as well as waist. His wife Duleshwari Devi sustained injury over her head, left hand. His daughter Sita Devi sustained injury over his left hand, right leg, his son Narayan and neighbour Nikhi Yadav were also assaulted causing injury over their hand. It has further been disclosed that since before land dispute was coming amongst the parry. Sarju Yadav, Udhari Yadav, Baurakh Khani and others have witnessed of



the occurrence.

3. After registration of Brahmpur P.S. Case No.255 of 1995 case was investigated upon followed with submission of charge-sheet, facilitating the trial meeting with ultimate result, subject matter of instant appeal.

4. Defence as is evident from the mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of complete denial. It has further been pleaded that no such kind of occurrence had either taken place rather on account of land dispute, the prosecution party armed variously raided the house, assaulted the accused persons and for that Brahmpur P.S. No.2541 of 1995 has been instituted.

5. In order to countermeet the allegation, this case has been instituted fully false and frivolous allegation blast. In order to substantiate the same, documentary evidences have been adduced.

6. Altogether, Nine P.W.s have been examined on behalf of the prosecution in order to substantiate their case who are P.W.-1 Keshar Chaudhary, P.W.-2-Rikhi Yadav, P.W.3-Ram Dayal Dubey, P.W.4-Nagendra Tiwary, P.W.-5-Dileshwari Devi, P.W.-6, Sita Devi, P.W.-Nand Lal Yadav, P.W.-8-Narayan Yadav, P.W.-9- Ram Dayal Dubey. Side by side had also exhibited, ext.-1 formal FIR, ext.-2



charge-sheet, ext.-3 fardbeyan, ext.3/A signature of informant over fardbeyan, ext. 4 series injury report.

7. On the other hand, though no oral evidence has been adduced, ext.A Judgment of Brahmpur P.S. Case No.254 of 1995, ext.B certified copy of FIR have been made an exhibit.

8. From the evidence available on the record, it is evident that Doctor has not been examined. As Doctor has not been examined, on account thereof, whatever been found by him during course of examination of respective injured on the basis of which respective injury report has been issued, should not be taken into consideration. Irrespective of the fact that those injury reports have been made an exhibit by examining P.W.9 a formal witness.

9. In the case of ***Vijender v. State of Delhi with Devinder alias Bhinder v. State of Delhi with Mukesh Kumar v. State of Delhi reported in (1997) 6 SCC 171***, it has been held :-

*“18. However, the most glaring infirmity appearing on the record relates to the evidence led by the prosecution to prove the homicidal death of Khurshid. The only witness examined by the prosecution in this regard was Satish Kumar (P.W. 21), a record clerk of the District Hospital, Ghaziabad. His testimony reads as follows :*

*"I have brought the post mortem report of an*



*unknown male sent by PS Loni Ghaziabad on 28.6.1992. Post mortem was conducted on 28.6.92 by Dr. U.C, Gupta. The dale of sending is not known to me and is not given on record. Dr. U.C. Gupta was transferred from Distt. Hospital earlier. He has been now transferred back. I identify his signature and handwriting, at Post Mortem Report. The copy of P/M report is Ex.21/A (objected to). I have seen Dr. U.C. Gupta writing and signing.*

*Cross Examination:*

*Original copy is not on record. The original copy is sent to SSP Ghaziabad. Second copy is sent to PS and third copy is maintained in the record."*

*19. It passes our comprehension how the trial Judge entertained the post mortem report as a piece of documentary evidence on the basis of the above testimony of a clerk in spite of legitimate objection raised by the defence. In view of [Section 60](#) of the Evidence Act, referred to earlier, the prosecution is bound to lead the best evidence available to prove a certain fact; and in the instant case, needless to say, it was that of Dr. U.C. Gupta, who held the post mortem examination. It is of course true that in an exceptional case where any of the pre-requisites of [Section 32](#) of the Evidence Act is fulfilled a post mortem report can be admitted in evidence as a relevant fact under sub- section(2) thereof by proving the same through some*



*other competent witness but this Section had no manner of application here for the evidence of P.W.21 clearly reveals that on the day he was deposing Dr. Gupta was in that hospital. The other reason for which the trial Judge ought not to have allowed the prosecution to prove the post-mortem report is that it was not the original report but only a carbon copy thereof, and that too not certified. Under [Section 64](#) of the Evidence Act document must be proved by primary evidence, that is to say, by producing the document itself except in the cases mentioned in [Section 65](#) thereof Since the copy of the post mortem report did not come within the purview of any of the clauses of [Section 65](#) it was not admissible on this score also.”*

**10.** In likewise manner, from the record, it transpires that I.O. has also not been examined. Non-examination of I.O. would not be treated as a dent in the prosecution case in its universal application rather it varies from case to case as has been held by the Hon’ble Apex Court in case of ***Lahu Kamlakar Patil and another vs. State of Maharashtra reported in (2013)6 SCC 417***, as follows :-

*“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[(2010) 6 SCC 1], 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[(1996) 2 SCC 317], 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[(2000) 9 SCC 153], Rattanlal v. State of Jammu and Kashmir[(2001)6 SCC 407] and Ravishwar Manjhi and others v. State of Jharkhand[(2007) 13 SCC 18], 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”*

**11.** So, the finding having been recorded by the learned lower Court while identifying the appellants guilty for the offences under Section 324/34 as well as 325/34 of the IPC on the basis of the injury report having been proved by a formal witness, P.W.9, being inadmissible in the eye of law whereupon could not survive. Accordingly, the findings recorded by the learned lower Court to that extent is hereby set aside whereupon this appeal to that extent is allowed.

**12.** Now, coming to appreciate with regard to finding recorded by the Lower Court for an offence punishable under Section 323/34



IPC, now the evidences of P.W.s should be scrutinized taken into account, non-examination of the I.O. When the evidence of P.W.2, one of the injured has been gone through it is evident that novel method of cross-examination has been invented whereunder contents of affidavit having seen by the P.W.2 during course of investigation, though has not been made an exhibit of the record but the same has been drawn up and during course thereof, he has simply stated that he has sworn an affidavit wherein he has stated that he has got no knowledge with regard to the present occurrence. Moreover, he happens to be one of the injured and during his examination-in-chief, he has alleged that he was assaulted by Shiv Nath with lathi. Nand Lal was assaulted by Gaya Yadav with Bhala. Duleshwari Devi was assaulted by Ayodhaya with lathi and Sita Devi was assaulted by Prayag Yadav with Bhala. Shiv Nath has also assaulted Maina, (father of the informant) having injury over his head as well as waist. That means to say, instead of cross-examined the P.W.-2 over his examination-in-chief, he has been cross-examined relating to the affidavit which has got no legal identity and further, whatever being deposed by the witness on solemn information before the Court happens to be the substantive evidence. Apart from this, the evidence of other injured, P.W.5 and P.W.6, P.W.7 and P.W.8 after properly minutely been scrutinized and found sufficient to support the finding



having recorded at the end of the learned lower Court regarding offence punishable under Section 323/34 of the IPC and to that extent, the judgment impugned is confirmed.

**13.** Then, coming over sentence, it is evident that learned lower Court has inflicted rigorous imprisonment for one year against each of the appellant which, in the facts and circumstances of the case is not at all attracted because of the fact that the occurrence is of the year 1995 and in the aforesaid background spending 23 years facing rigor, mental agony, harassment did not justify, more particularly in the background of the fact that accused / appellants, Shiv Nath, was not present at his house since before rather after returning from outside had seen urine having spread over at the door which caused annoyance followed with an altercation, followed with the occurrence, so it was on account of spur of the moment did not justify the sentence part having inflicted by the learned lower Court.

**14.** Consequent thereupon, it appears to be a fit case wherein appellants should be given benefit of Section 4 of the Probation of Offender Act. Accordingly, they are directed to be present before the Court for due admonition. As such, all the appellants are directed to be physically present before the learned lower Court on 28.11.2018 on which date the learned lower Court will admonish all the appellants.



Till then, the privilege of bail is extended, failing which the learned lower Court will be at liberty to proceed against the appellants in accordance with law.

**15.** In terms thereof, the instant appeal is partly dismissed.

**(Aditya Kumar Trivedi, J)**

Sanjeev/-

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