

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.165 of 1994

(Against the judgment of conviction and order of sentence dated 31.03.1994 passed by Shri Braj Kishore Thakur, Sessions Judge, Bhagalpur, in S.T. No. 80 of 1988, arising out of Katoria P.S. Case No. 45 of 1982)

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1. Raghu Mahto @ Raghu Nath Mahto, son of Biro Mahto
 2. Chano @ Chandeshwari Mahto son of Raghu Nath Mahto
 3. Maheshwari Mahto son of Amrit Mahto
 4. Bageshwari Mahto son of Amrit Mahto
 5. Subhit Mahto son of Amrit Mahto
 6. Jugal Mahto son of Saukhi Mahto
 7. Pochu @ Panchu Mahto, son of Biranchi Mahto adopted son of Jito Mahto
 8. Parmeshwar @ Parmeshwari Mahto son of Balo Mahto
 9. Ranjan @ Rajeshwar Mahto son of Amrit Mahto
 10. Rama Mahto son of Bishu Mahto
 11. Nageshwar Mahto son of Raghu @ Raghu Nath Mahto, all residents of village- Kathara, P.O.-Tetariya, P.S.-Katoriya, District-Banka
 12. Shib Lal Rai @ Shibal Rai, son of Anchha Rai, resident of village- Maltaria, P.O.- Tetariya, P.S.-Katoriya, District-Banka

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ranjan Kumar Jha, Advocate
Mr. Shyama Kant Singh, Advocate (A.C.)
For the State : Mr. Abhimanyu Sharma, A.P.P.

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

Date: 09-01-2018

The present Cr. Appeal is against the judgment of conviction and order of sentence dated 31.3.1994 passed by the Sessions Judge, Bhagalpur in Sessions Trial No. 80 of 1988 in Katoriya P.S. Case No. 45 of 1982 whereby the appellants have been convicted under section 302/149 of the Indian Penal Code and



sentenced to undergo R.I. for life vide order dated 31.3.1994 itself.

2. The prosecution case in brief is that on 2.4.82 the religious function of flag hosting ceremony of Lord Mahabir was being performed at the house of the informant's Sala Bengali Rai in village Nish Maltariya. On that occasion, Ranjit @ Jhura Manjhi of village Bela Bathan had also come. The said Bengali Rai have dispute and litigation with accused Nageshwar Mahto, Mukhiya of village Katahara with respect to a few Mahuwa tress situated in village Nich Maltariya. As such accused Nageshwar Mahto misunderstood that people have gathered at the house of Bengali Rai for forcibly plucking Mahuwa flowers from the disputed Mahuwa tress. And so the Nageshwar Mahto alongwith aforementioned accused persons (except Shiblal Mahto alias Shibal Rai) and their unidentified associates, attacked on the house of Bengali Rai with Farsa, Bijjal etc. The accused persons began to throw stones and brick pieces. The accused persons caught hold of Jura Manjhi and dragged him near the disputed Mahura trees situated near the house of Bengali Rai and killed him with lathi blows as well as with stones. Out of fear, Bengali Rai fled away from his house and had not returned till the lodging of the case by the informant Chano Rai, who is his brother-in-law. The accused persons took away the dead body of Jura Manjhi with them. But in the following morning (3.4.82), they again dropped the dead body of Jura



Manjhi at the place of occurrence.

3. After investigation, the police submitted charge-sheet against the accused persons. The case was committed to the court of sessions and on framing of charge, the accused persons pleaded not guilty and alleged that they have been falsely implicated in this case as a counter blast of Katoriya P.S. Case No. 46 of 1982 in which Raghu Nath Yadav has sustained grievous injury.

4. After commencement of trial, the trial court summoned Nageshwar Mahto and Jitan Mahto under section 319 of the Cr.P.C. to face trial. However, Jitan Mahto died during the pendency of the trial.

5. On behalf of the prosecution, 7 witnesses were examined. Out of which, P.W.6 is a formal witness, P.W.7 is the doctor who conducted post-mortem. The other five witnesses are on the point of occurrence.

6. In this case, on behalf of defence, Dr. S.P. Singh was examined as witness who examined the injury of Chandeshwari Yadav and others, in the counter case. In fact, between the parties, there are land disputes. The trial court after scrutiny of evidence held out that accused persons are guilty of the offence under sections 302/149 of the Indian Penal Code.

7. Learned Amicus Curiae, Shri Sayama Kant Singh



appearing on behalf of the appellant submitted that the conviction of the appellants in the present case is contrary to the record. He firstly submitted that admittedly there was land dispute and case and counter case between the parties and both sides have sustained injuries. The injuries sustained by the accused persons are also grievous in nature and as such the conviction of the appellants in the present case is totally misplaced.

8. In the present case, the witnesses are highly interested family members and from their depositions it would be evident that their version is most artificial and unrealistic. He submitted that in the present case there was inordinate delay in lodging of FIR. The incident took place on 2.4.1982 whereas Fard-beyan was lodged on 3.4.82 i.e. after inordinate delay of approximately 20 hours.

9. The FIR was drawn on 3.4.82, however, it was seen by the A.C.J.M. only on 7.4.82. There is neither any explanation in the matter of inordinate delay in lodging of Fard-beyan nor there is any explanation for inordinate delay in reaching the FIR in the court of A.C.J.M., Banka as the FIR reached the court of A.C.J.M., Banka only after three days of the lodging of formal FIR.

10. Learned counsel with reference to material on record submits that admittedly there was some dispute between the Bengali Rai and family of the appellants with regard to certain Mahuwa trees



situated in the village and there was case and counter case. The witnesses of the prosecution as per the counsel for the appellants are highly interested. Bengali Rai with whom the appellants have enmity and wife of Bengali Rai and brother-in-law and sister of Bengali Rai are very close friend of Bengali Rai and as such their version cannot be accepted as they are highly interested witnesses. He referred to the grievous injury sustained by the four appellants, Chandeshwari Mahto and others. He next submitted that in the instant case charge-sheet witness namely, Nageshwar Mahto was not examined by the prosecution. There is no reason explained by the prosecution for withholding the charge-sheet witness and as such the prosecution has to suffer on account of withholding of the material witnesses and pick and choose in the examination of charge-sheet witnesses. He next submitted that in case where the accused persons have sustained injuries, the prosecution is required to explain injuries particularly in a case where there is land dispute and case and counter case.

11. Learned counsel submitted that in view of the land dispute the injuries sustained by the appellants, the trial court was required to examine the prosecution witnesses with utmost care and caution and in the absence of explanation of the injuries sustained by four appellants which strengthened the case of the appellants of right of private defence was not examined by the trial court in proper



perspective. The trial court has committed error in appreciating prejudiced caused to the appellants on account of non-examination of the I.O. of the case. There is no allegation of any overt act against the accused persons and on the person of deceased, seven injuries were found whereas prosecution has suggested assault by 12 persons and only one injury was found to be fatal and other injuries were found to be simple in nature.

12. Mr. Abhimanyu Sharma, learned A.P.P. appearing on behalf of the State submitted that the trial court has rightly convicted the appellants on appreciation of the entire materials on record.

13. We have examined the record of the case and on a deeper scrutiny of the evidence, we find that there is case and counter case and both sides have sustained injuries. The incident took place on 2.4.82 at 2 p.m. however, the Fard-beyan was registered after nearly 20 hours on the next day at 10 a.m. There is no reasonable explanation for such delay. In addition thereto, we find that the formal FIR was registered on 3.4.82 but it reached the court of A.C.J.M., Banka only on 7. 4.82 and such delay in the matter of sending FIR is fatal.

14. The Apex Court has considered the effect of delay in sending the FIR in the case of Tarlok Singh Vs. State of Punjab reported in (1972) 3 SCC) 869 at para-5 and AIR 1976 S.C. 2423 at para 5 and 9 which is quoted below for ready reference:-



First, the High Court noticed the suspicion created by the circumstance that the copy of the First Information Report purported to have been lodged at 3.45 p.m. did not reach the Magistrate at Dasuya till 8 a.m. the next date, even though it was seen through a special messenger. The distance between the scene of occurrence and Dasuya was only 15 or 16 miles. The inference sought to be drawn is that, in fact, the report was not lodged at 3.45 p.m., but at a much later, after the police arrived at the scene of occurrence and there was consultation to decide what version should be put forward and who should be implicated for the murder. The prosecution, in fact, made no attempt to explain this delay. Such delay, thus casts doubt on the prosecution version that the report was lodged at 3.45 p.m. without lapse of unnecessary time.

Mr. Frank Anthony appearing for appellant Ishwar Singh submitted that in affirming the Judgment of the trial Court, the High Court also overlooked certain important aspects of the case that the Sessions Judge had failed to consider. He pointed out that the F.I.R. which is stated to have been lodged at 9.05 A. M. on February 14, 1973 was sent out from the police station the next day, February 15; the time when it was despatched is not stated, but it appears from the record that the Magistrate received it on the morning of February 16. The Court of the Magistrate was nearby, which makes it difficult to understand



why the report was sent to him about two days after its stated hour of receipt at the police station. [Section 157](#) of the CrPC, 1898 as well as of 1973 both require the first information report to be sent "forthwith" to the Magistrate competent to take cognizance of the offence. No explanation is offered for this extraordinary delay in sending the report to the Magistrate. This is a circumstance which provides a legitimate basis for suspecting, as Mr. Anthony suggested, that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In this case the suspicion hardens into a definite possibility when one finds that the case made in Court differs at least in two very important particulars from that narrated in the F.I.R. Mahabir Singh, who lodged the first information report, stated in-Court that he had invited some people to his house to effect a settlement between him and Ishwar Singh, and that he had also sent Ghanshyam to call Ishwar Singh there. The F.I.R. does not mention anything like this. From the F.I.R. it appears as if the accused persons came uninvited to his house, demanded why he had demolished the drain, and started assaulting him and the other persons who were present there. It is also difficult to understand why Mahabir should invite anyone to his house for a settlement, if really Ishwar



Singh had permitted him to demolish the drain as he claimed. Further, the F.I.R. does not mention that Mahabir and Satyapal wielded lathis in their defence when attacked and that this resulted in some of the accused getting injured; but that is what both Mahabir (P.W. 1) and Satyapai (P.W. 2) stated in their evidence in Court. These variations relate to vital parts of the prosecution case, and cannot be dismissed as minor discrepancies. In such a case, the evidence of the eye-witnesses "cannot be accepted at its face value", as observed by this Court in Mitter Sain v. State of U.P. .

9. We have pointed out that the trial Court in convicting the appellants overlooked certain significant features of the case, namely, the inordinate and unexplained delay in despatching the first information report to the Magistrate; the difference in the account given by the prosecution witnesses and as appearing from the first information report of the occurrence; the absence of any statement in the first information report as to the injuries received by some of accused, and the non-examination of material witnesses. The High Court in affirming the Judgment of the trial Court also failed to advert to these circumstances. We do not therefore think that the case against the appellants has been proved beyond reasonable doubt. The appeals are accordingly allowed and the Order of conviction and the sentences passed on the



appellants are set aside We direct that the appellants be set at liberty forthwith.

15. In view of the law laid down by the Apex Court as discussed hereinabove there is possibility of false implication and the prosecution case has to suffer on account of such unexplained delay in lodging of Fard-beyan and delay in sending the FIR in the present case. In addition thereto, there is no explanation on behalf of the prosecution for non-examination of charge-sheet witnesses namely, Nageshwar Mahto and Ramdeo.

16. We also find that in the instant case the prosecution has miserably failed to explain the injury sustained by the four appellants and the deposition of the Dr. Surendera Prasad Singh who has deposed before the trial court about the seriousness of the injury sustained by the appellants. In addition thereto, we also find in the present case that the witnesses are close relatives of Bengali Rai with whom the appellants are in inimical terms on account of land dispute and in view of the settled principle of law, the court is required to consider the case of highly interested witnesses like in the instant case with utmost care and caution.

17. On scrutiny, we find that the trial court has disbelieved the case of prosecution to the extent that the dead body was taken away by the appellants and it was dropped in the next



morning. Here such story of taking away the dead body of the deceased and dropping the same on the next day is most unnatural and artificial.

18. In the present case, we also find serious lapses in the trial of the appellants as during the examination of the accused under section 313 of the Cr.P.C. the trial court has not confronted them with the adverse materials surfaced during the trial and on which the trial court has based conviction.

19. The law in this regard is well settled that the examination of the accused under section 313 of the Cr.P.C. is not empty formality but it is mandatory requirement of law to ensure fair trial.

20. The judgment of the Apex Court in the case of Anup Lal Yadav and another Vs. State of Bihar reported in (2014) 10 SCC 270 at para 11 to 14 which is quoted below:-

“11. In this context, we may profitably refer to a four-Judge Bench decision in Tara Singh v. State SCC (Cr) 92 wherein, Bose, J. explaining the significance of the faithful and fair compliance with Section 342 of the Code as it stood then, opined thus: (AIR pp.445-46,para 30)

“30. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section 342 of the Criminal Procedure



Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not significant compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the sanction is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would



necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342 of the Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice.”

12. In *Hate Singh Bhagat Singh v. State of Madhya Bharat* AIR 1953 SC 468 Bose, J. speaking for a three-Judge Bench highlighting the importance of recording of the statement of the accused under the Code expressed thus: (AIR pp.469-70, para8)

“8. Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal Procedure Code are among the most important matters to be considered at the trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he



would be free to state in his own way in the witness box.”

13. The aforesaid principle has been reiterated in *Ajay Singh v. State of Maharashtra* (2007) 12 SCC 341 in following terms: (SCC pp. 347-48 para 14)

“14 The word ‘generally’ in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused’s failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to



give such explanation as he desires to give”

21. In addition thereto, we also find substance in the submission of the appellants’ counsel that the prosecution has made a pick and choose in the examination of the witnesses and withholding of the material witnesses, goes against the prosecution. The judgment of the Apex Court in this regard is well settled. Reference may be made to the judgment of the Apex Court in the case of **Takhaji Hiraji vs Thakore Kubersing Chamansing & Ors.** reported in (2001) 6 SCC 408, in para 19 it has been held as follows:-

“So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses, it is true that if a material witness, which Patna High Court CR. APP (DB) No.358 of 1994 dt.25-11-2017 would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been



examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinize the worth of the evidence adduced. The court of facts must ask itself whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous



enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of Thakores was hurt leading into a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not premeditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed the mind opened the assault near the house of the accused persons then it could probably be held to be a case of self-defence of the accused persons in which case non-explanation of the injuries sustained by the accused persons would have assumed significance.

The learned Sessions Judge has on appreciation of oral and circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village people or the party of tight rope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tight rope



danceperformers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinized the statements of all the eye-witnesses and found them consistent and reliable. The High Court made no effort at scrutinizing and analyzing the ocular testimony so as to doubt, if at all, the correctness of the several findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eye-witnesses consistent and reliable in their narration of the incident. In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case.”

22. The cumulative effect of the lapses namely, delay in lodging of Fard-beyan, delay in reaching formal FIR after three days in the backdrop of the previous enmity and case and counter case creates serious doubt about the case of the prosecution. In addition thereto, the pick and choose in the matter of examination of charge-sheet witnesses and non-explanation of grievous injury sustained by the appellants creates serious doubt about the manner of occurrence and participation of the appellants in the commission of crime.

23. Accordingly, we are of the view that the appellants deserve benefit of doubt on account of serious lapses in the conduct of investigation and also in the conduct of the trial.



24. Accordingly, we allow the appeal and set aside the judgment of conviction and order of sentence passed by Sessions Judge, Bhagalpur in Sessions Trial No. 80 of 1988 in Katoriya P.S. Case No. 45 of 1982.

25. Since, the appellants are on bail they are discharged from the liability of bail bonds.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Ravi/-

AFR/NAFR	NAFR
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