

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.249 of 2015**

Arising Out of PS.Case No. -18 Year- 1995 Thana -DIHRINAGAR District- SASARAM
(ROHTAS)

=====

1. Bishwanath Dubey

2. Ram Nath Dubey, both are sons of Ramjag Dubey, both resident of village-
Sujanpur, P.S. Dehri (Indrapuri), District - Rohtas

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Surendra Kumar Mishra-Advocate
Mr. Rajani Kant Singh- Advocate

For the Respondent/s : Mr. Abhay Kumar-A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 13-02-2018

Both the appellants namely Bishwanath Dubey and Ram Nath Dubey have been found guilty for an offence punishable under Section 323 of the I.P.C. and each one has been sentenced to undergo S.I. for six months as well as to pay fine appertaining to Rs.1,000/- and in default thereof, to undergo S.I. for one month, additionally. Under Section 325 of the I.P.C. and each one has been sentenced to undergo R.I. for two years as well as to pay fine appertaining to Rs.40,000/- and in default thereof, to undergo S.I. for one year with a further direction to run the sentences concurrently vide judgment of conviction and order of sentence dated 17.04.2015 passed by the Additional Sessions Judge-V, Rohtas at Sasaram in Sessions Trial No.611 of 1997.



2. Sushila Devi (PW-4) gave her fard-bayan on 16.01.1995 at about 5.30 p.m. while was admitted at Bose Clinic Dihri (Female Ward) in an injured condition disclosing therein that on the same day at about 11.00 a.m. while her younger brother Kamlesh Sharma aged about 08 years was playing near straw heap belonging to Bishwanath Dubey, Bishwanath Dubey, Ram Nath Dubey came and began to assault with fists and slaps, whereupon her mother rushed in rescue. Then thereafter, Bishwanath Dubey and Ram Nath Dubey came at her darwaza, dragged her mother and then, assaulted her with fists, slaps and danda. She rushed in rescue, whereupon both of them also assaulted her with fists, slaps and danda. Her younger sisters also rushed in rescue, who were also assaulted in similar way by both of them. On hue and cry, Ram Briksh Mahto (PW-3), Raju Sharma (not examined), Lagan Devi (not examined) and others came seeing whom, accused persons ran away. Then thereafter, she along with her mother leaving his brother Kamlesh Sharma and younger sister Pushpa at her house, taken to hospital.

3. On the basis of the aforesaid fard-bayan, Dehri (Indarpuri) P.S. Case No.18 of 1995 was registered followed with an investigation as well as submission of chargesheet facilitating the trial, the subject matter of instant appeal.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the



Cr.P.C. is that of complete denial. It has also been pleaded that prosecution party were destroying straw belonging to the appellants, whereupon they demanded compensation and that being so, instant case has been filed in order to put pressure upon the appellants to give up their claim. However, nothing has been adduced in the defence.

5. In order to substantiate its case, prosecution had examined altogether six PWs, out of whom, PW-1 Jitendra Sharma, PW-2 Ramjee Mishra, PW-3 Ram Briksh Mahto, PW-4 Sushila Devi, PW-5 Budani Devi @ Manorma Devi and PW-6 Dr. Rameshwar Prasad Singh. Side by side, had also exhibited as Exhibit-1, signature of informant over fard-bayan, Exhibit-2 series, injury report of Sushila Devi as well as Budani Devi @ Manorma Devi, respectively. As stated above, nothing has been adduced in defence.

6. Learned counsel for the appellants while challenging the judgment of conviction and sentence impugned has submitted that learned lower Court had ignored the inherent infirmities persisting in the prosecution case. In order to substantiate the same, it has been submitted that I.O. has not been examined. On account of non-examination of the I.O., the interest of the appellants/ accused is found highly prejudiced. Magnifying this point, it has been submitted that from the nature of evidence as adduced on behalf of prosecution, it is apparent that PW-1, the brother of informant is not an eye witness to occurrence, PW-2 was declared hostile as he has not supported the



case of the prosecution, PW-3 had not supported the case of the prosecution rather he had stated that he came to know regarding dispute in between Jitendra Sharma and Bishwanath Dubey. So, the case rests upon evidence of both the alleged injured namely PW-4 and PW-5 and when their evidences are taken together, it is found that they are inconsistent to each other relating to genesis of the occurrence as well as manner of occurrence including that of P.O. For want of examination of the I.O., appellants/ accused could not get an opportunity to cross-examine at least concerning the place of occurrence which, if properly been availed the opportunity, would have demolished the case of the prosecution. On this score, it has also been submitted that as per initial version, the occurrence is found to have committed at the house of PW-4/ PW-5, which during course of evidence is found completely changed. In likewise manner, it has also been submitted that genesis of the occurrence as disclosed, has also been changed during course of evidence and so, non-examination of the I.O. in the facts and circumstances of the case, is found adverse to the interest of the appellants. Side by side, would cause dent to the prosecution case.

7. Furthermore, it has also been submitted that non-examination of the I.O. has deprived of an opportunity to the appellants to test the genuineness, authenticity of the injury report having exhibited under Exhibit-2 series through the evidence of PW-



6, Dr. Rameshwar Pd. Singh in the background of the fact that though it speaks regarding examination of the respective injured on 16.01.1995, the same was issued on 20.02.1995. In the aforesaid background, had there been examination of I.O., he would have in a position to expose the conduct of doctor (PW-6). So, the cumulative effect as it visualizing from the record did not justify the finding recorded by the learned lower Court. Consequent thereupon, is fit to be set aside.

8. On the other hand, learned Additional Public Prosecutor while supporting the finding recorded by the learned lower Court has submitted that appellants want to wrap their own fault which in the facts and circumstances of the case, is found non-permissible. To substantiate the same, it has been submitted that doctor was examined as PW-6 and so, the appellants had an opportunity to cross-examine the aforesaid PW-6 on the score of issuance of injury report after more than a month. Non-cross-examination at the end of the appellants is a circumstance which will deprive them to claim any kind of benefit on that very score. In likewise manner, has also been submitted that admittedly PW-4 and PW-5 are injured witnesses and so, there should have been proper cross-examination at the end of the appellants at least on the score of occurrence which they have not. In the background of aforesaid lapses having at the end of the appellants, will tantamount to an admission at



their end. That being so, the judgment of conviction and sentence recorded by the learned lower Court is fit to be confirmed.

9. PW-6 is the doctor. He had deposed that on 16.01.1995 while he was posted as Medical Officer at Bose Clinic had examined both the injured namely Sushila Devi as well as Budani Devi @ Manorma Devi and issued injury report respectively.

Manorma Devi

- I) *Tenderness left side of chest. X-ray showing fracture of 8th rib left side.*
 - II) *Tenderness upper abdomen.*
 - III) *Tenderness on face and chin.*
- caused by hard and blunt substance. Nature of injury no.I) grievous in nature while remaining two, simple in nature.*

Sushila Devi

- I) *Tender swelling on left leg. X-ray having abnormality has been detected.*
 - II) *Tenderness swelling on left hip.*
- Caused by hard and blunt object simple in nature.*

From the evidence of this PW (taking into account the examination-in-chief as well as cross-examination), it is evident that he had not mentioned the time within which injury has been caused and in likewise manner, he had not mentioned the time of his examination that means to say, in spite of examination of both the injured on 16.01.1995, whether the injury was caused on 16.01.1995



or earlier to that date is not at all found duly exposed. Though there happens to be no cross-examination at the end of the appellants, but the aforesaid deficiency persisting in the evidence of PW-6 would not exonerate the prosecution from its obligation, in a way so far present case is concerned, that both the injured namely PW-4 and PW-5 have sustained injury in an occurrence having been committed at the end of appellants on 16.01.1995 itself.

10. Now, coming to ocular evidence, it is evident from the record that PW-1 is not an eye witness to occurrence and that also happens to be the status PW-3. PW-2 have not supported the case of the prosecution and so, was declared hostile.

11. PW-4 is the informant. In the fard-bayan, she had stated that her younger brother Kamlesh Sharma was playing near the straw heap belonging to Bishwanath Dubey, but during course of evidence, she had not reiterated the same, however, during course of cross-examination at Para-4, she had stated that straw heap was in front of house of Ram Nath Dubey. It belonged to Ram Nath Dubey while PW-5 in Para-2 had stated in her examination-in-chief that her son Kamlesh Sharma was playing over straw heap, however, at Para-5 of her cross-examination, she had stated that quarrel took place on account of playing over straw, which was staked at her darwaza and belonged to her. That means to say, the genesis is found inconsistent with each other. That means to say, one of the injured, informant, had



claimed that the straw heap belonged to the appellants while PW-5 had claimed that straw heap was her. PW-4 had stated that it was stake in front of house of Ram Nath Dubey while PW-5 had stated that it was in front of her house. That means to say, the origin of the occurrence is found conflictive one and that has not been explained by the prosecution while such eventuality has surfaced.

12. Now, coming to the actual place of occurrence, there happens to be disclosure in the fard-bayan that the accused persons came at her house, dragged her mother (PW-5) and then, assaulted her with fists, slaps, danda and as informant intervened, she was also assaulted and in likewise manner, Pushpa Devi (not examined) was also assaulted. When the evidence of informant (PW-4) has been gone through, it is evident that while Bishwanath Dubey and Ram Nath Dubey had assaulted Kamlesh Sharma, her mother intervened, which during her entire evidence has not been properly identified. When the evidence of PW-5, Budani Devi @ Manorma Devi has been gone through (another injured), in Para-1, she had stated that at the time of alleged occurrence, she was at her darwaza. In Para-2, she had stated that her son Kamlesh Sharma was playing over straw heap and during course thereof, Ram Nath Dubey and Bishwanath Dubey began to assault. When she intervened, then she was assaulted by Ram Nath Dubey and Bishwanath Dubey with leg, fist, danda. They have also assaulted Sushila Devi and Pushpa Devi,



when they intervened into the matter and by this activity, she allowed the controversy to persist. If the evidence of these two witnesses are taken together inconsonance with the place where straw heap was, then in that circumstance, there happens to be inconsistency amongst both these two PWs as PW-4 under Para-4 had claimed the same to be in front of house of Ram Nath Dubey while PW-5 had disclosed under Para-5 of her cross-examination to be at her place. That means to say, exact P.O. has not been identified and disclosed by these two PWs. In the aforesaid facts and circumstances of the case, non-examination of the I.O. is found prejudicial to the interest of the appellants.

13. In ***Lahu Kamlakar Patil and another vs. State of Maharashtra reported in (2013) 6 SCC 417***, it has been held:-

“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.”

14. Considering the infirmity persisting in the prosecution evidence as discussed hereinabove, did not justify the finding having been recorded by the learned lower Court. Consequent thereupon, same is set aside. Appeal is allowed. Appellants are on bail, hence are discharged from its liabilities.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	17.02.2018
Transmission Date	17.02.2018

