

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.457 of 2015

Arising Out of PS. Case No. -31 Year- 2000 Thana -ROH District- NAWADA

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1. Balak Mahto Son of Ramroop Mahto
 2. Alakhdeo Yadav Son of Sukhdeo Yadav
 3. Kuldip Yadav Son of Ramroop Yadav
 4. Sukhdeo Yadav Son of Ramroop Yadav

All are residents of village - Marara, P.S. Roh, District – Nawada.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. Sheo Kumar Prasad, Adv.
Mr. Amrendra Kumar, Adv.

For the Respondent/s : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 27-07-2018

All the appellants, namely, Balak Mahto, Alakhdeo Yadav, Kuldip Yadav and Sukhdeo Yadav have been found guilty for an offence punishable under Section 323/34 of the IPC and each one has been sentenced to undergo S.I. for one year, under Section 324/34 of the IPC and each one has been sentenced to undergo S.I. for two years, appellant Kuldip Yadav has further been found guilty for an offence punishable under Section 325 IPC and sentenced to undergo S.I. for three years with a further direction to run the sentences concurrently, vide judgment of conviction and order of sentence dated 13.07.2015 passed by Ad-hoc Additional Sessions Judge, IInd, Nawada in Sessions Trial No.120 of 2005 / 106 of 2014.

2. Birjan Yadav (PW.5) filed written report on 09.10.2000 alleging inter alia that on the same day at about 5:00 AM while he had gone to Lohra Bhaghi Badhar in order to ease himself, his co-villager Balak Mahto, Sukhdeo Yadav, Kuldip Yadav and Alakdeo



Yadav encircled him and then, began to abuse. They also said that why you without informing them has purchased the land from a person belonging to village-Ratoyee whereupon he said that after paying the consideration amount he has purchased the same. Then thereafter, Balak Mahto gave Khanti blow over his head causing injury thereupon while Kuldeep Mahto hurled indiscriminate lathi blow causing injury over his left hand. On hue and cry, his father-in-law Ganesh Yadav and his wife Jaso Devi came in rescue who were also assaulted by Sukhdeo Yadav and Alakhdeo Yadav by means of lathi. Awadhesh Kumar, Munna Pasi and others have seen the occurrence.

3. After registration of Roh P.S. Case No.31/2000 investigation commenced and concluded by way of submission of charge sheet, facilitating the trial, meeting with the ultimate result, 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 it is an admitted fact that the land belonging to Meena Devi was taken by the accused on Batai wherein paddy crop was standing. The prosecution party forcibly encroached upon the same and filled up the land damaging the crop for which, the accused persons asked for compensation and in the aforesaid background, instant case has been registered putting false and frivolous allegation. Oral evidence has been adduced on that very score.

5. In order to substantiate its case prosecution had examined altogether six PWs who are PW.1-Jaso Devi, PW.2-



Awadhesh Kumar, PW.3-Munna Choudhary, PW.4-Kishore Paswan, PW.5-Birjan Yadav and PW.6- Dr. Vidiya Bhushan. Side by side, had also exhibited Ext.1-Written report, Ext.2 Series-Injury report relating to informant, Ganesh Yadav, Yaso Devi, respectively, Ext.3- Additional injury report relating to injured Birjan Yadav. As stated above, though no documentary evidence has been adduced at the end of the defence however, one DW, DW.1-Sheo Shankar Prasad has been examined.

6. While assailing the judgment of conviction and sentence, it has been submitted at the end of learned counsel for the appellant that Investigating Officer has not been examined. Due to non-examination of the Investigating Officer, the interest of the appellant has been found severely prejudiced. In the background of the fact that prosecution has not been able to substantiate the actual place of occurrence. Apart from this, it has also been submitted that on account of non-examination of the Investigating Officer, the defence could not be able to show that the land which has been purchased by the informant and which was under Batai of the appellants wherein paddy crop was standing, was damaged due to illegal activity of the prosecution. Furthermore, it has also been submitted that had there been examination of the Investigating Officer, then in that event, the non-examination of the independent witnesses would have been exposed more particularly, in the background of the fact that there happens to be divulgence at the end of the informant that at the time of so alleged occurrence so many villagers have assembled.

7. Then, it has submitted that out of six witnesses PW.3



and PW.4 have not identified the appellant to be assailant of the informant as well as his father-in-law, wife whereupon, they were declared hostile. PW.2 is the witness, a relative of the informant and further, his conduct suggest that he was not at all present at the place of occurrence. Now remains the evidence of PW.1 wife and PW.5 the informant himself. Both have claimed to have sustained injury at the end of the appellants. However, from their evidence it is crystal clear that irrespective of examination of doctor PW.6 who had found injuries over the person of these two witnesses but, the conflicting inconsistency having in their deposition did not inspire confidence with regard to sustaining of injury in a manner as advanced at the end of the prosecution. Moreover, it has also been submitted that father-in-law Ganesh Yadav has not been examined and for that, there happens to be no explanation at the end of the prosecution. So the cumulative effect did not justify the finding recorded by the learned lower court.

8. On the other hand, the learned Additional Public Prosecutor while controverting the submission made on behalf of learned counsel for the appellants has submitted that from the evidence of PW.6 it is crystal clear that PW.5, informant has sustained the sharp cut injury as well as injuries caused by hard and blunt substance including that of fracture and in likewise manner, also found injury over the person of PW.1 Jaso Devi. Apart from this, it has also been submitted that when the evidence of PW.1 as well as PW.5 is being gone through, it is apparent that they have substantiated the occurrence. Furthermore, it has also been submitted that motive is found admitted at the end of the defence



itself and so the judgment of conviction and sentence recorded by the learned lower court is fit to be confirmed.

9. Before coming to deal with the evidence having available on the record, it is apparent from the record that Investigating Officer has not been examined. Due to non-examination of the Investigating Officer whether interest of the accused /appellant is found highly prejudiced is to be seen after scrutinizing the evidence available on the record. In usual phenomena, it could not be said that on account of non-examination of the Investigating Officer, the prosecution case should be brushed aside. In ***Lahu Kamlakar Patil v. State of Maharashtra*** reported in **(2013) 6 SCC 417** the Hon'ble Court has observed:-

“18.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 J&K*(2007) 13 SCC 18 and *Ravishwar Manjhi 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. Furthermore, it is also evident that during course of examination of PW.6, doctor he was not at all examined. That means to say whatever he had found after examination of the PW.5, informant, PW.1 Jaso wife of the informant and Ganesh, father-in-law of the informant is found unshaken. PW.6 had found following injuries over the person of the respective injured:-

(A) Birjan Yadav

- (i)** Incised wound on Rt. Side of Back of head
1" x 1"x 1/4" x 1/6"

Injured caused by sharp weapon may be by khanti.

- (ii)** Swelling on left upper arm 3" x 3" X-ray advised

Injury caused by hard and blunt substance may be by lathi.



- (iii) Lacerated wound on left side of Back. 1" x ½" 1/6".

Injury caused by hard and blunt substance may be by lathi.

Age within 24 hours.

All the injuries have been opined to be simple in nature save and except injury no.2, which as per para-10, has been found grievous on account of fracture.

(B) Ganesh Yadav.

- (i) Swelling on left leg 2" x 2".

Injury caused by hard and blunt substance may be by lathi.

- (ii) Swelling on left thigh 3" x 2"

Injury caused by hard and blunt substance may be by lathi.

Age within 24 hours.

(C) Jaso Devi

- (i) Lacerated wound on head 1" x 1/6" x 1/6", caused by hard and blunt substance may be by lathi.

Age within 24 hours.

11. Though, PW.6 has not been cross-examined but, from perusal of his evidence it is apparent that while recording injury no.2 over the person of PW.5 to be grievous in nature. He had seen the X-ray plate but, neither X-ray plate is on the record nor the X-ray report. That means to say, the connectivity with regard to injury no.2 of the informant is found lacking. So the nature of the injury having been recorded by the doctor with regard to injury no.2 of the



informant as grievous, in the background of aforesaid deficiency, could not be accepted.

12. Now coming to ocular evidence, PW.3 had stated that he had seen the Birjan Yadav, PW.5 in an injured condition having injuries over his hand, head but he had not claimed to be the an eyewitness to the occurrence and in likewise manner he had not disclosed with regard to injuries/assault having over the person of Jaso Devi as well as Ganesh. PW.4 also stood on similar plank who had simply stated that while PW.5 Birjan Yadav was being carried to hospital on a rickshaw by his wife and other family members, he had seen him in an injured condition. Again, he had not spoken with regard to Jaso Devi as well as Ganesh. However, these two witnesses were declared hostile. Be that as it may, their evidences appear to be corroborative in nature irrespective of their status. Confirming presence of injury over the person of informant.

13. PW.2 is a resident of village-Sambe, and from his cross-examination para-3 his house lies ten miles away from the P.O. land. Furthermore, he had also admitted to be relative of the informant. During his examination-in-chief he had stated that while he was going to meet nature's call from his house and after that, reached at village near Lohbari, he had seen Birjan Yadav since before who had indulged in an altercation with Balaji. Bala had inquired from him why he had purchased land and then, Bala gave khanti blow over head of the Birjan causing injury thereupon. When Birjan fell down then, thereafter, Sukhdeo, Kuldeep and Rangdeo came with *lathi* and then all of them began to assault Birjan. He along with father-in-law of Birjan and wife of Birjan tried to rescue,



during course thereof, father-in-law of Birjan as well as wife of Birjan were assaulted by them. Identified the accused. In para-3 he had disclosed the boundary of the P.O. as North -paddy field, West-field, East-village Lohbari and South-Road. Occurrence completed within 5-6 minutes. After occurrence so many villagers came. In para-4 he had stated that he along with Kishori and Munna (PW.3 and PW.4) have tried to rescue. In para-5 he had stated that Birjan happens to be his uncle. First of all, he was taken to Police Station and then to hospital. In para-6 he had stated that there happens to be land dispute amongst Birjan and accused persons. Then had stated that Bala had given 2-3 blows over Birjan. He was not assaulted by any of the accused and then, there happens to be suggestion that on account of land dispute, this case has been instituted.

14. PW.1 is the one of the injured as well as wife of PW.5. She had deposed that on the alleged date and time of occurrence while her husband was going to ease himself, interrupted by Balak Yadav, Sukhdeo Yadav, Kuldeep Yadav and Alakhdeo Yadav and further was assaulted by all of them. After hearing hue and cry, she along with her father rushed. Then had asserted that Balak had assaulted over head of her husband with *khanti* causing injury thereupon Sukhdeo and Kuldip assaulted with lathi as a result of which, hand of her husband became fractured. When she along with her father intervened, accused persons assaulted both of them. She also sustained injury over her head. Her father had sustained injury over her leg. Then thereafter, they have gone to police station and from there to hospital. Identified the accused. During cross-



examination at para-5 she had stated that when she reached at the place of occurrence after hearing hue and cry, she had seen her husband lying. Blood was oozing from his injury. So many persons were present at the place of occurrence but she is unable to disclose their numbers. The whole occurrence took place within an hour. In para-6 she had stated that her husband was unconscious. Blood had spread over the ground. Investigating Officer had gone to P.O. and had seized the blood stain soil. In para-7 she had disclosed the boundary of the P.O. North-Road, South-Ditch, East-her own plot and West-Land of a person of village Ratoyee. In para-8 she had admitted that there happens to be land dispute with the accused persons which is still going on. In para-10 she had stated that accused persons have encircled her husband at a gap of one hand and then, all of them assaulted with the lathi as well as Khanti forcefully. None of the persons who were present there intervened in order to save her husband. Then had denied the suggestion that on account of land dispute, this false case has been instituted.

15. PW.5 is the informant himself. He had deposed that on the alleged date and time of occurrence he had gone to meet nature's call. He had purchased land from Meena Devi of village Ratoyee whereupon, Balam Yadav scolded him how he had purchased the land. He answered that after paying the consideration amount he had purchased the land. Whereupon Balam Yadav gave khanti blow causing injury over his head. Blood oozen out. Then gave *lathi* blow over his hand as a result of which, sustained fracture. Kuldeep, Alakhdeo and Sukhdeo were along with him. His wife Jaso Devi and father-in-law Ganesh Yadav came in rescue who were also assaulted



by all of them. Then at para-2 he had stated that he was assaulted by Bala Yadav, as well as Kuldeep Yadav only. Then thereafter, he was taken to police station by his father-in-law as well as wife and from there, he was taken to hospital. He had filed written report before the police (exhibited). He was also privately treated. Then again said that the written report was read over by the police and then he had put his LTI. Identified the accused. During cross-examination at para-5 he had admitted that the land which he purchased from Meena Devi was under possession of the accused wherein, paddy crop was there. Accused persons were cultivating the land since before. In para-6 he had stated that as paddy crop was harvested so, he took possession. Then he denied the suggestion that it is wrong to say that he forcibly fill up the land causing damage to the standing paddy crop and for that, accused persons protested. Then he denied the suggestion that accused persons had said that after harvesting of the land, the same be filled up but he declined to accept. Then at para-9, 10 he had shown the status of the accused persons coming from same family but separate in mess and business as well as having separate houses. In para-11 he had shown the boundary of the P.O. as East-channel and then road, West-his own field (purchased), North-field of gotiya of Meena Devi and West- field of Gotiya of Meena Devi. In para-12 he had stated that after occurrence his wife and father-in-law came. Again clarified that after having been assaulted then thereafter his wife and father-in-law came. In para-13 he had stated that Balam Mahto was hurling indiscriminate khanti blow. After sustaining injury at the end of Balam Mahto he fell down. Then thereafter he was assaulted by Kuldeep Yadav. During midst thereof, his wife and father-in-law



came who were assaulted by other accused persons. Furthermore, in para-14 he had stated that as he became unconscious so he is unable to say anything. In para-16 he had stated that his wife came 5-10 minutes after the occurrence. In para-18 he had stated that after harvesting of the land he began to fill up the land. Then he denied the suggestion that due to filling of land paddy crop grown by accused persons damaged. In para-20 he had stated that blood had oozed out from the injuries spread over on the ground wherefrom Investigating Officer had taken away. Then had denied the suggestion that as the accused persons protested and further demanded compensation due to damage of standing paddy crop grown by them due to filling of the earth this false case has been instituted.

16. After going through the evidences available on the record, it is apparent that injuries have been found over the person of PW.5, PW.1 as well as Ganesh, the father-in-law more particularly in the background of non cross-examination of the PW.6, the doctor. So far finding relating to injury no.2 of PW.5 as grievous, on account of non-exhibit of X-ray plate as well as X-ray report, there happens to be missing link and on that very score, it could not be conclusively held so.

17. In the aforesaid background, now it has to be seen whether the prosecution has succeeded in arraying these appellants to be the author of the injuries. From the evidence of PW.1 as well as PW.5, it is evident that land dispute is admitted. It is also an admitted fact that land belonging to Meena Devi which later on been purchased by the informant PW.5 was under Batai of accused



persons. There also happens to be an admission at the end of PW.5 that paddy crop was standing. There happens to be denial at the end of the informant that he began to fill up earth while paddy crop was standing rather he had stated that after harvesting of the paddy crop he began to fill up his land. So filling of earth in the land is also admitted. Had there been examination of the Investigating Officer, the aforesaid event would have been exposed whether after harvesting of the paddy crop the land was being filled up or while paddy crop was standing, the land was being filled up. The aforesaid crucial point was to be properly expounded in the background of admission at the end of the PW.5, informant himself that land was under possession of the accused persons/appellant since before. The second aspect happens to be that informant had gone to meet nature's call near about the plot which he had purchased from Meena Devi. His presence at that very place suggest otherwise. Presence of all the accused since before as well as presence of PW.5, informant at that very place indicate the other facet of the incident and that happens to be reason behind that there happens to be inconsistency in properly identifying the actual place of occurrence as the boundary having shown by the PW.1 para-7 and PW.5 para-11 happens to be quite contrary to each other. When the evidence of these two witnesses is taken together with PW.2 an interested witness, he spoke otherwise with regard to the place of occurrence Para-3. That means to say, irrespective of presence of injuries having over the person of the PW.5 as well as PW.1 Ganesh due to non-examination of the Investigating Officer, the sustaining of injuries at particular place remained under mystery more particularly in the background of inconsistency over the place of occurrence and that



happens to be sufficient to suggest that the prosecution party might have sustained injuries in different manner at different place. The aforesaid theme is found more probablized in the background of the fact that PW.5 himself happens to be an illiterate. Neither PW.1 nor PW.2 nay PW.5 had stated that by whom written report was scribe. Furthermore, when there happens to be injuries over person of the PW.5 more particularly over the left hand then how he had put LTI over the same is another circumstance.

18. The cumulative effect did not justify the finding having recorded by the learned lower court. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed. Appellants are on bail hence are discharged from its liability.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	31.07.2018
Transmission Date	31.07.2018

