

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.109 of 2009

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

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1. Dinesh Singh.

2. Bijli Singh.

3. Ashok Singh.

All are sons of Late Chhote Singh @ Ramasarai Pd. Singh, resident of village-
Sadanandpur, P.S.-Balua, District-Begusarai.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. Rajeshwar Prasad, Adv.

For the State : Mr. Parmeshwar Mehta, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 29-10-2018

Appellants, Dinesh Singh, has been found guilty for an offence punishable under Section 307 IPC and has been sentenced to undergo R.I. for five years, under Section 447 IPC and sentenced to undergo R.I. for a month, under Section 27 of the Arms Act and has been sentenced to undergo R.I. for three years, with a further direction to run the sentences concurrently, appellants Bijli Singh, Ashok Singh have been found guilty for an offence punishable under Section 307/34 IPC and sentenced to undergo R.I. for five years, under Section 447 IPC and sentenced to undergo R.I. for one month with a further direction to run the sentences concurrently while Bijli Singh has been found guilty for an offence punishable under Section 27 of the Arms Act and sentenced to undergo R.I. for three years, vide judgment of conviction dated 29.01.2009 order of sentence dated 02.02.2009 passed by Addl. Sessions Judge, FTC-IV, Begusarai in Sessions



Trial No.466/1999.

2. Kamal Nayan Singh (PW.5) while was admitted at Kalpana Nursing Home, Begusarai gave his fardbeyan on 28.04.1999 at 04:00 PM before the police officials of Begusarai Town P.S. alleging inter alia that on the same day he has gone to village-Fatehpur in order to engage the labourers. During course of return, he came to know that his Pattidar Dinesh Singh got ridge of a plot broken while ploughing whereupon he has gone to his place and asked for repairing of the same. Thereafter, he returned back to his house. At about 08:00 AM while he was taking bath over a hand pipe in front of his Darwaja, his pattidar Dinesh Singh, Bijli Singh and Ashok Singh came out of them, Dinesh Singh and Bijli Singh were armed with three nut, Ashok Singh with Pagharia. Just after coming they shot at causing injury over his left leg. He fell down as a result of which, he also sustained injury over his left leg. On hue and cry, his co-villager Akildeo Rai, Ram Uday Rai, Prabhakar Singh and others came who witnessed the occurrence and have also rescued him.

3. The aforesaid fardbeyan was transmitted to Balia P.S. as, P.O. lies under the jurisdiction of Balia P.S., whereupon, Balia P.S. Case No.76/1999 was registered on 30.04.1999 with an investigation as well as submission of charge sheet, basis for trial meeting with 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 submitted



that on the alleged date and time of occurrence, the brother of informant, namely, Futan @ Mukesh Singh shot at the appellant Bijli Singh and for that, Balia P.S. Case No.74/1999 was registered. After coming to know about the same, got this false case filed on the basis of forged and fabricated injury report. In order to substantiate the same, ocular as well as documentary evidences have been adduced.

5. In order to substantiate its case prosecution had examined altogether nine PWs who are PW.1-Akhil Deo Roy, PW.2-Lalan Singh, PW.3-Prabhakar Singh, PW.4-Anil Singh, PW.5-Kamal Nayan @ Ghooter Singh, PW.6-Vivekanand Singh @ Vivek Kumar, PW.7-Dr. Ashok Kumar Sharma, PW.8-Dilip Malakar, PW.9-Bachneshwar Mishra. Side by side had also exhibited, Ext.1-Signature on fardbeyan of informant, Ext.1/1-Fardbeyan, Ext.2 Series-Injury report/Supplementary Report, Ext.3-X-ray plate, Ext.4-Formal FIR, Ext.5-Case diary.

6. In likewise manner two DWs have been examined namely, DW.1-Chandra Shekhar Pd. Singh, DW.2-Rama Shankar Singh. Side by side had also exhibited Ext.A-Compromise petition, Ext.B-C.C. of FIR of Balia P.S. Case No.74/1999, Ext.B/1-C.C. of FIR of Balia P.S. Case No.85/2007, Ext.C-C.C. of charge sheet of Balia P.S. Case No.74 of 1999, Ext.C/1-C.C. of charge sheet of Balia P.S. Case No.85/2007, Ext.D-C.C. of order sheet of Balia P.S. Case No.85/2007.

7. Learned counsel for the appellants is very emphatic in his submission that prosecution case could not be accepted in



the facts and circumstances of the case whereupon, the finding recorded by the learned lower court is fit to be set aside. In order to justify the same, it has been submitted that all the materials witnesses counting PW.1 to 4 have not supported the case of the prosecution whereupon declared hostile as their evidences have not found at all congenial to the prosecution. It has also been submitted that PW.6 is one Viveka whose evidences also could not be accepted as, at an earlier occasion he had supported the case of the defence but, during course of trial he has supported the case of the prosecution giving a twist whereupon, suffers from material exaggeration. I.O. has not been examined and so, the prosecution has completed the paraphernalia by means of examining two formal witnesses PW.8 and 9, which could not found competent enough to replace the Investigating Officer.

8. In the aforesaid background, it has been submitted that prosecution case rest upon PW.5, informant as well as PW.7, the doctor. In order to discredit the testimony of the PW.5, informant the learned counsel for the appellant drew attention towards his testimony whereunder he admitted institution of Balia P.S. Case No.74 of 1999 at the end of appellant, Bijli Singh prior to the institution of this case. From the Ext.B, it is evident that appellant Bijli Singh was shot at with rifle by Mukesh Singh, brother of the informant. Accordingly, this case has been manufactured in order to make out a defence case in order to meet with the allegation having been attributed at the end of the appellant Bijli Singh.



9. It has further been submitted that I.O. has not been examined. On account of non-examination of I.O. appellants have faced severe prejudice as (a) there happens to be an admission at the end of the PW.5 that he had not gone to the field to see whether ridge was broken or not so, had there been examination of the Investigating Officer, it could have been exposed regarding alleged motive. That being so, motive is not at all found substantiated. Furthermore, had there been examination of the Investigating Officer, the probability of defence version would have properly been surfaced which the defence has been deprived of more particularly relating to objective finding relating to P.O. of the counter case, (b) the improbability, as X-ray plate did not divulge presence of foreign body inside the body of the injured. So, the cumulative effect, irrespective of examination of PW.5, informant supported by the evidence of PW.7, the doctor would not justify, finding recorded by the learned lower court in the facts and circumstances of the case.

10. On the other hand, the learned Addl. P.P. opposed the submission and submitted that by way of counter version, an occurrence is admitted. Now, it has to be seen whether the same happens to be in accordance with prosecution version or defence version. Though, all the material witnesses have turned hostile. There happens to be compromise petition and for that, the informant had already explained that it was forcibly drawn up, presence of injury is found duly corroborated by the doctor, P.O. has duly been substantiated and that being so, the judgment of



conviction and sentence recorded by the learned lower court did not require interference.

11. Gone through the record. From perusal of the same, it is evident that virtually PW.5 and PW.7 are only two witnesses who came forward to support the case of the prosecution. PW.1 to 4 have not said anything over the occurrence and so, they were declared hostile. On account of non-examination of the I.O., the paraphernalia has been completed by way of examination of PW.8 and 9. The non-examination of I.O. could not be said to be a dent in the prosecution case, unless and until there happens to be positive evidence on the record that due to non-examination of the I.O. the right of the accused has been prejudiced. As, held by the Apex Court in ***Lahu Kamlakar Patil v. State of Maharashtra*** reported in **(2013) 6 SCC 417**. For better appreciation, the same is quoted below:-

“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.”

12. Now coming to the evidence of PW.5, it is evident that during course of examination-in-chief, he had encircled only appellant Dinesh Singh to have shot at single round causing injury over his right leg while he was taking bath at hand pipe. Then had stated that during course of running from the hand pipe, he fallen down and sustained injury over his left leg also. Though he had shown presence of other two appellants Bijli Singh armed with pistol and Ashok Singh with Garasa. Also disclosed motive for the same on account of protest having at his end on account of dismantling the ridge. During course of cross-examination at para-6 he had admitted his presence over compromise petition but, with an explanation that the same has been obtained forcibly. In para-7, 8 he had admitted institution of counter case at the end of appellant Bijli Singh prior to institution of this case. He had denied the suggestion that this case has falsely been filed in order to make out a defence case. In para-9 he had said that he came to know regarding dismantling of the ridge at the tea shop of Upendra Singh by Rudal Paswan. In para-10 he had stated that he had not shown the aforesaid ridge to the I.O. He had not disclosed the Khata and Khesra number of the aforesaid plot. In para-14 he had stated that he had specifically



mentioned in the fardbeyan that Dinesh Singh had shot at. In para-15 he had stated that accused had shot at from a distance of 7-8 hands. After firing, he fell down. When the accused fired they were at a distance of 5-6 hands. At that very time 5-7 villagers assembled including Ranjan Kumar, Bipin Singh. Again clarified that Ranjan and Bipin came five minutes after firing. Then had said that accused persons fired twice. Whether empty cartridges were traced out or not he is unable to say. In para-16 he had admitted that his brother remained under custody for twenty days in connection with counter case. In para-17 he had stated that blood had fallen down over the place of occurrence. He is unaware with the fact whether Investigating Officer had found the blood stain or not at the place of occurrence. Occurrence took place in front of his house. In para-18 he had stated that house of the accused lies just adjacent to his house but, having separate Sahan. Then had denied the suggestion that his brother assaulted appellant Bijli Singh with rifle and in order to make out the defence case, this case has been instituted having a false and frivolous allegation.

13. PW.6 the witnesses who, at an initial stage had supported the defence version but, during course of trial he shifted his stand by way of supporting the prosecution case whereupon, his attention has been drawn up towards his earlier occasion. On account of non-examination of Investigating Officer that remained away from the legal recognition.

14. PW.7 is the doctor who had examined the informant



on 28.04.1999 at about 10 AM and found the following:-

- (i) Entry wound 1 “ on medical side of right leg with fracture tibia and fibula bone with inverted margin.
- (ii) Ext wound 1 ½” over on lateral side of right leg.

Age within six hours caused by firearm. Nature grievous.

He had also exhibited the X-ray plate showing fracture of Tibnea and Fabilua whereupon had issued supplementary injury report and exhibited the same. During course of examination he had stated that X-ray was conducted at Munni X-ray Centre. No separte report has been prepared /issued by the Munni X-ray centre. X-ray was conducted on 28.04.1999 itself. In para-10 he had stated that he had not found any injury on the left leg. In para-11 he had stated that injury on leg was not to dangerous to life. He had denied the suggestion that under the influence of the prosecution had issued collusive report.

15. It is evident from the lower court record that charge was framed against the accused persons /appellants on 24.09.2003. During course thereof, the format of the charge does contain only Section 307/34, 447 IPC. Though the contents of charge under Section 27 of the Arms Act was scribe but, Section 27 of the Arms was not mentioned which has been corrected vide order dated 30.12.2008. It is further evident from the order sheet



dated 18.11.2008 that document having been filed on behalf of defence case has been admitted at the end of the prosecution in accordance with Section 294 of the Cr.P.C.

16. In the background of having the document exhibited at the end of the defence under Section 294 of the Cr.P.C., the genuineness of the documents has been admitted at the end of the prosecution. That means to say, apart from admission at the end of the PW.5 that his brother had gone to custody relating to counter case bearing Balia P.S. Case No.74/1999 wherein he remained under custody for twenty days. Its authenticity goes out of question. In the fardbeyan Ext.B there happens to be specific disclosure with regard to firing having injury, injury report has not been exhibited. Nothing has been said at the end of the PW.5 in order to challenge authenticity of the Ext.B. In the aforesaid background, and considering the fact that occurrence so alleged has been shown over a hand pipe in front of Darwaja, has not been found conclusively as the P.O. of counter case also lies adjacent thereof, none of the family members of the informant came forward to support the same and further, on account of non-examination of the I.O., the status of PW.6 could not be legally exposed, coupled with the development in the evidence of informant specifically identifying Dinesh to be his assailant, P.O. could also not been properly identified gives a clear cut impression that the prosecution has suppressed the real genesis of occurrence, whereupon the finding recorded by the learned lower court would not survive.



17. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court is hereby set aside. Appeal is allowed. All the 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.
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