

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.663 of 2015

Arising Out of P.S. Case No. -82 Year- 1994 Thana -DIHRINAGAR District- SASARAM (ROHTAS)

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1. Naval Kishore Singh @ Naval Kishor Singh, Son of Lalmuni Singh,
 2. Rajendra Singh, S/o Indradeo Singh,
 3. Surendra Singh, S/o Lalmuni Singh,
 4. Krishna Singh, S/o Rampati Singh,
 5. Rampati Singh, S/o Raushan Singh.

All are resident of village-Tendua Dusadhi, P.S.-Dehri, District - Rohtas.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s	:	Mr. Krishna Pd. Singh, Sr. Adv. Mrs. Meena Singh, Adv. Mr. Rakesh Singh, Adv. Mr. Bhaskar Shankar, Adv.
For the State	:	Mr. Parmeshwar Mehta, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 20-08-2018

Appellants, Naval Kishore Singh @ Naval Kishor Singh, Rajendra Singh, Surendra Singh, Krishna Singh, Rampati Singh have been found guilty for an offence punishable under Section 308/149 IPC and each one has been sentenced to undergo R.I. for three years as well as to pay fine appertaining to Rs.5000/- in default thereof to undergo S.I. for one month additionally vide judgment of conviction dated 09.09.2015 and order of sentence dated 17.09.2015 passed by Additional Sessions Judge, Vth, Rohtas at Sasaram in connection with Sessions Trial no.703/1994.

2. Bhrigun Pal (PW.4) gave his fardbeyan on 08.03.1994 while he along with other injured Suresh, Hira were admitted in an



injured condition at PHC, Dehri disclosing therein that a temple was being constructed in his village wherein, on 10.03.1994 “Pran-Pratishatha” was going to be held. Construction work was going on in the background of aforesaid eventuality. On the same day, at about 02:00 PM Lal Muni Singh, Nawal Kishore Singh, Charitar Singh armed with lathi, Indradeo Singh armed with Balua, Rajendra Singh armed with Balua, Surendra Singh armed with Balua, Rampati Singh armed with lathi, Krishna Singh armed with Bhala, after forming an unlawful assembly sharing common object came and began to uproot the bamboo which was erected for the construction purpose. They protested and in the aforesaid background, Surendra Singh gave bamboo blow over his head as a result of which he sustained injury and fell down. Then, Rampati Singh gave *lathi* blow over left hand. With the *lathi* portion of Ballam, Nawal had assaulted Suresh Pal, Rajendra assaulted Hira Pal as well as Suresh Pal. They also fell down. Thereafter, Rajendra assaulted Hari with Ballam over his forehead. Wife and daughter of Lalmuni pelted stone. Others have also assaulted. On account thereof, all of them became unconscious. On hue and cry villagers came who witnessed the occurrence and then, lifted them to hospital. It has also been alleged that on account of construction of temple, the accused persons raided forming an unlawful assembly armed with deadly weapon and assaulted with an intention to kill. It has further been disclosed that at an earlier occasion also both parties have indulged in such kind of activity.



3. After registration of Dehri P.S. Case No.82/1994, investigation commenced and after concluding the same accused persons have been sent up for trial by way of submission of charge sheet which happens to be the basis of 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 further been submitted that whatever allegation has been attributed at the end of the prosecution party are palpably false, frivolous and same has been levelled with an ill-motive in order to make out a counter case to confront the allegation levelled against them with regard to murder of Lalmuni Singh as well as assaulting others and for that, Dehri P.S. Case No.83/1994 has been drawn up. Furthermore, large numbers of documents have been made an exhibit in order substantiate the same.

5. Prosecution, in order to prove its case had examined altogether eight PWs who are PW.1-Suresh Pal, PW.2-Ramani Devi, PW.3-Lalita Devi, PW.4-Bhrigun Pal, PW.5-Krishna Mahto, PW.6-Hari Narayan Pal @ Hari Pal, PW.7-Girja Nandan Sharma, PW.8-Badari Narain Singh. Prosecution had also exhibited, Signature of informant over fardbeyan-Ext.1, Fardbeyan-Ext.1/1, Ext.2 Series is the injury report of respective injured Hari Narayan Singh, Suresh Pal, Bhrigun Pal, Jagdish Pal respectively, Formal FIR-Ext.3. Defence had also exhibited, formal FIR of Dehri P.S. Case



No.83/1994 Ext.A, C.C. of fardbeyan of Dehri P.S. Case No.83/1994 Ext.B, Charge sheet Ext.C, Injury report of Suresh Singh Ext.D, Injury report of Bhagmani Devi Ext.D/1. Photocopy of postmortem report relating to Lalmuni Singh (deceased) marked 'X' for identification.

6. The learned counsel for the appellants while assailing the judgment of conviction and sentence has raised manifold arguments. While submitting, the learned counsel for the appellant referred the opinion so formed at the end of the learned lower court recorded under para-14 of the judgment and said that the finding recorded by the learned lower court that appellants have crossed the barrier so prescribed during course of exercising the right of private defence whereupon, convicted the appellants for an offence punishable under Section 308/149 of the IPC happens to be wrong, illegal and contrary to the spirit of law. In order to substantiate the same, it has been submitted that there was no question of right of private defence nor, the appellants claimed their right under the aforesaid legal umbrella. There happens to be an admission at the end of the prosecution that at eastern side of the temple land of the appellant lies. Temple was not being constructed rather it was being repaired and during course thereof, the bamboos were affixed in the land of the appellant in order to construct caves to encroach upon the land of the appellant which was resisted whereupon, the prosecution party brutally assaulted causing severe injuries over the person of Surendra as well as Bhagwati as well as, caused murder of



Lalmuni. So it was not a case of right of private defence, rather prosecution party after forming an unlawful assembly assaulted, caused murder, and to counter meet the allegation this false case has been filed. Be that it may, for the same occurrence there happens to be case and counter case, it was incumbent upon the prosecution to have explained the grievous injuries as well as death of Lalmuni which they admitted but, failed to explain. During cross-examination all the witnesses have stated that they came to know that Lalmuni has died but, they have not seen injuries nor they assaulted Lalmuni, Surendra and Bhagmati. There was blatantly refusal at the end of the prosecution and that being so, the real genesis of occurrence has been knowingly intentionally suppressed.

7. Furthermore, it has also been submitted that when the evidence of witnesses are minutely gone through, it is apparent that there happens to be material exaggeration. For want of examination of Investigating Officer, those evidences could not be brought up on record as well as, also been deprived of in getting the P.O. properly established coupled with establishment of the defence version.

8. It has further been submitted that none of the independent witness has been examined in this case. On the other hand, whoever been examined are own kith and kin, interested, partisan inimical and so, considering the material development persisting in their evidence in consonance with their status completely eclipse over their reliability.



9. It has also been pleaded that because of the fact that real genesis of occurrence has intentionally been suppressed on behalf of prosecution, on account thereof, the injuries as found by doctor PW.7 over the person of the prosecution party became worthless apart from the fact that all the injuries happens to be superficial in nature suggesting could be self-inflicted. So, in the facts and circumstances of the case, the finding recorded by the learned lower court is not at all found legal, sound whereupon, is fit to be set aside.

10. The learned Additional Public Prosecutor while supporting the finding recorded by the learned lower court has submitted that because of the fact that injuries or death of adversary has not been explained by the prosecution, on account thereof, evidence would not be brushed aside rather, the veracity of the evidences is to be seen in a manner as placed during course of trial. After proper scrutiny thereof, it is evident that witnesses have properly identified the appellants who, after forming an unlawful assembly, carrying common object, indulged in murderous attack though in the background of counter case rightly been convicted for an offence punishable under Section under Section 308/149 of the IPC. That being so, instant appeal is fit to be dismissed.

11. Non-examination of the Investigating Officer is often taken at the end of the defence to be a severe flaw in the prosecution case. Status of the Investigating Officer happens to be corroborative in nature. The objective finding relating to the P.O. fulfills the same.



The other circumstances having taken up at his end during course of investigation is a matter of corroboration or contradiction. So, in routine manner it could not be seen as a deficiency in a prosecution case, whenever there happens to be non-examination of the Investigating Officer. It varies facts of case to case. Whenever there happens to be material exaggeration, P.O. is shifting, presence of legal deformity or deficiency found non-explainable due to non-examination of Investigating Officer then, in that circumstance, certainly the non-examination of the Investigating Officer will be adverse to the interest to the prosecution case.

12. In **Baldev Singh v. State of Haryana** reported in **2016 Cr.L.J. 154**, it has been held:-

“16. Contention at the hands of the learned Senior Counsel for the appellant is that non-examination of Chander Singh-SI who prepared rukka and who investigated the case raises serious doubts about the prosecution case. Material on record would show that Chander Singh-SI who investigated the case was not examined by the prosecution in spite of several opportunities. No doubt, it is always desirable that prosecution has to examine the investigating officer/police officer who prepared the rukka. Mere non-examination of investigating officer does not in every case cause prejudice to the accused or affects the credibility of the prosecution case. Whether or not any prejudice has been caused to the accused is a question of fact to be determined in each case.”

13. Evidence of injured witnesses even being interested, partisan, inimical should not be brushed aside. Presence of injury is indicative of the fact with regard to presence of the witnesses at the



spot and further, sustained the injuries in a manner as stated by them. As such, their evidences are to be accepted unless and until there happens to be cogent reason to discredit.

14. In ***Chandrasekar and another vs. State of Tamil Nadu*** reported in **2017(4) P.L.J.R. 220 (SC)**, it has been held:

“10. Criminal jurisprudence attaches great weightage to the evidence of a person injured in the same occurrence as it presumes that he was speaking the truth unless shown otherwise. Though the law is well settled and precedents abound, reference may usefully be made to *Brahm Swaroop v. State of U.P.*, (2011) 6 SCC 288 observing as follows: “28. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with an in-built guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.”

15. Whenever there happens to be version and counter version with regard to an occurrence and further, where the accused side also sustained injury, then in that circumstance in what manner, there should be appreciation of evidence in order to come to just conclusion has been the subject matter of debate since long. In ***Rajendra Singh vs. State of Bihar*** reported in **2000 Cr.L.J. 2199** the three Judges Bench laid down the following principle on that very score:-

“3. So far as the question whether non-explanation of the injuries on accused Rajender ipso facto can be held to be fatal to the prosecution case, it is too well settled that ordinarily the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in course of the occurrence, if the injuries are minor in nature, but at the same time



if the prosecution fails to explain a grievous injury on one of the accused person which is established to have been caused in course of the same occurrence then certainly the Court looks at the prosecution case with little suspicion on the ground that the prosecution has suppressed the true version of the incident. In the case in hand accused appellant Rajender had one penetrating wound, three incised wound and one lacerated wound and of these injuries the penetrating wound on the left axillary area in the 5th inter costal space $\frac{1}{2} \times \frac{1}{3} \times \frac{3}{4}$ was grievous in nature as per the evidence of doctor PW-3 who had examined him. On the basis of the evidence of PW-3 as well as PW-11 the Courts have come to the conclusion that there is no room for doubt that the appellants and their men had injuries on their person on the date of occurrence. The question, therefore, remains to be considered is whether non-explanation of said injuries on accused appellant Rajender can form the basis of a conclusion that the prosecution version is untrue. In Mohar Rai and Bharath Rai vs. State of Bihar (1968) 3 SUPREME COURT REPORTS - 525, this Court had held that the failure of the prosecution to offer any explanation regarding the injuries found on the accused shows that the evidence of the prosecution witness relating to the incident is not true or at any rate not wholly true and further those injuries probabilise plea taken by the accused persons. But in Lakshmi Singh vs. State of Bihar (1976) 4 Supreme Court Cases (Crl.) 671, this Court considered Mohar Rai (Supra) and came to hold that non-explanation of the injuries on the accused by the prosecution may affect the prosecution case and such non-explanation may assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. The question was considered by a three Judge Bench of this Court in the case of Vijayee Singh vs. State of U.P. (1990) 3 Supreme Court Cases 190, and this Court held that if the prosecution evidence is clear, cogent and creditworthy and the Court can distinguish the truth from the falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence and consequently the whole case and much depends on the facts and circumstances of each case. In Vijayee Singh's case (supra) the Court held that non-explanation of



injury on the accused person does not affect the prosecution case as a whole. This question again came up before a three Judge Bench recently in case of Ram Sunder Yadav and Others vs. State of Bihar (1998) 7 Supreme Court Case 365, where this Court re-affirmed the statement of law made by the earlier three Judge Bench in Vijayee Singhs case(supra) and also relied upon another three Judge Bench decision of the Court in Bhaba Nanda Sarma and Others vs. State of Assam (1977) 4 Supreme Court Cases 396, and as such accepted the principle that if the evidence is clear, cogent and creditworthy then non-explanation of the injury on the accused ipso facto cannot be a basis to discard the entire prosecution case. The High Court in the impugned judgment has relied upon the aforesaid principle and examined the evidence of the four eye witnesses and agreeing with the learned Sessions Judge came to the conclusion that the prosecution witnesses are trustworthy and, therefore, non- explanation of injury in question cannot be held to be fatal, and we see no infirmity with the said conclusion in view of the law laid down by this Court, as held earlier. We, therefore, are not persuaded to accept the first submission of Mr. Mishra, learned senior counsel appearing for the accused appellants.”

16. More recently the same view has been reiterated by the Apex Court in **2018 AIR SCW 1133**, it has been held:

“9. The next contention urged by learned counsel is that the prosecution has not chosen to explain the injuries on the person of the appellants and this is fatal to case of prosecution. It cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so, the prosecution case should be disbelieved. Before holding that non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question...[vide Takhaji Hiraji v. Thakore



Kubersing Chamansing, (2001) 6 SCC 1454]”

17. After scrutiny of the principles as referred herein above, it is apparent that prosecution is not under obligation to explain injuries found upon the accused whenever it happens to be simple or the evidence so adduced are consistent, trustworthy but, if the injuries having sustained at the end of the accused happen to be grievous or dangerous to life or death has been caused then in that circumstance, the prosecution is under obligation to explain the injuries failing which, it will cast an adverse impact upon the reliability of the prosecution, and the variance in the evidence of witnesses happens to be addition factor.

18. Now coming to the facts of the case, attention of the PW.4 informant has been drawn up towards the fardbeyan, on account thereof, the facts enumerated therein is to be taken note of. As per fardbeyan, the temple was being constructed. It was a new construction and so “Pran-Pratishatha” was to be performed on 10.03.1994, while all the witnesses including the PW.4 during course of evidence have stated that it happens to be an old temple which was being repaired and for that, bamboos were erected around it. It has further been disclosed that plaster from all side (externally) save and except eastern side have completed. On eastern side, for the purpose of repairing, bamboo was sunk in the land of accused Surendra and for the same, his father Lal Muni was already requested. Furthermore, it is evident that witnesses had stated that projection was already persisting since before and so, there was no



occasion for its construction. None of the witnesses save and except PW.4 during course of cross-examination i.e. PW.1 para-13, PW.2 para-5, PW.3 para-9, PW.5 para-10, PW.6 para-20 and 21 have stated with regard to death of Lalmuni as well as severe assault over the person of Surendra as well as Bhagmati. However, informant PW.4 at para-23 had not accepted with regard to assault over Surendra and Bhagmati but, admitted in following words that “accused Lalmuni has died. He is not knowing when he died. On the following day of occurrence he came to know regarding his death. He came to know that Ballam of Indradeo accidentally pierced on account thereof, he died. He had not seen Lalmuni Singh, Surendra Singh, Nawal Kishore Singh and Bhagwati Devi in an injured condition.” Apart from exhibit of counter case under Ext.A, B, C, D to D/1 the postmortem report is also there which the learned lower court also took notice along with the fact that the trial had also proceeded on before the same court and on the same day, judgment was to be pronounced.

19. From the evidences of the PWs, as is evident PW.1 para-12, PW.2 para-6, PW.3 para 8 & 9, PW.4 para-18, para-29, PW.5 para-7, para-9 and para-10, PW.6 para-17, 18, it is apparent that there happens to be material development in their evidence in comparison to their previous statement recorded under Section 161 of the Cr.P.C. and on account of non-examination of the Investigating Officer the same could not been brought up on record, legally.



20. Now coming to the place of occurrence, admittedly all the witnesses have accepted that the land of accused persons lies at the eastern side of the temple wherein bamboos were sunk in order to facilitate repairing. The witnesses have also stated that projection up to 1.5 feet was subsisting since before while it happens to be the counter version as aforesaid projection was being constructed which was resisted and on account thereof, the accused persons were assaulted. On account of non-examination of the Investigating Officer, it could not come up before the court whether projection was subsisting since before or it was being newly constructed and that being so, it again caused prejudice to the interest of the accused.

21. Now coming to the injury, PW.7 had examined the respective injured on 08-03-1994 and found the following:

Hari Narayan Pal

- (i) Swelling 3" x 2½" with contusion 2" x 1" with obviously deformity of left forearm.
- (ii) Incised wound 1¼" x 1/5" x ¼" on the scalp of left parietal occipital region.
- (iii) Abrasion 2" x ¼" on the right upper arm.
- (iv) Contusion 3" x 2" on the back of left shoulder.

Suresh Pal

- (i) Swelling 4" x 3 ½" with contusion 2 ½" x 2" with obvious deformity of right upper arm.
- (ii) Abrasion 1 ½" x ¼" on the left shoulder.
- (iii) Abrasion 1 ½" x ¼" on the left forearm posterior.



- (iv) Abrasion 1" x ¼" on the upper part of right lower leg near knee joint.

Bhrigun Pal

- (i) Incised wound 1 ½" x ¼" x scalp deep on the front of parietal region of scalp..
- (ii) Contusion 1" x ½" on the face of left upper arm.
- (iii) Contusion 3 ½" x 1 ½" on the left side of back of chest with tender hurt.
- (iv) Abrasion 3" x 1/5" on the lower part of front or right side of chest.
- (v) Abrasion 2" x ¼" on the left shoulder.

Jagdish Pal

Lacerated wound 1½" x ¼" up to skin deep on the ventral surface on left thumb and nature of injury was said to be simple and caused by hard and blunt substance.

From the injury report it is evident that none of the injuries were found bleeding injury nor time was disclosed which was relevant to be in the background of the fact that occurrence is said to have committed at 02:00 PM while respective injured were examined right from 04:00 PM.

22. Furthermore, from the evidence of the PWs, it is evident that they are not consistent over the place of occurrence where the actual scuffle (marpit) took place and that being so, again on account of non-examination of the Investigating Officer, the actual P.O. did not properly found identified.



23. Giving cumulative effect to the aforesaid deficiencies persisting on the record, coupled with non examination of Investigating Officer causing prejudice to the accused did not justify the finding having recorded by the learned lower court consequent thereupon, is set aside. Appeal is allowed. Appellants are on bail hence are discharged from their liabilities.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAFR	A.F.R.
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