

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.104 of 2013

Arising Out of PS. Case No.-128 Year-2009 Thana- KAMTAUL District- Darbhanga

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1. Sukhal Rai, Son of Nokhey Lal Rai.
 2. Shyam Chaupal, Son of Dukhharan Choupal.
 3. Rohit Choupal, Son of Posu Choupal.
 4. Sobhit Choupal, Son of Posu Choupal

All are residents of village – Jahangir Tola, P.S.-Kamtaul, District -
Darbhanga

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s	:	Mr. Md. Helal Ahmad, Advocate.
		Mr. Bikas Kumar Shukla, Advocate.
For the Respondent/s	:	Mr. Binod Bihari Singh, APP.

**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL**

ORAL JUDGMENT

Date : 26-10-2018

Heard learned counsel for the appellants as well
as learned APP for the State on this criminal appeal.

2. This criminal appeal has been preferred against
the Judgment and Order of conviction dated 12.12.2012 and
order of sentence dated 14.12.2012 passed by 1st Additional
Sessions Judge, Darbhanga in Sessions Trial No. 224 of 2010
arising out of Kamtaul P.S. Case No. 128 of 2009, whereby the



learned trial court convicted the accused, namely, Sukhal Rai, Shyam Choupal, Rohit Choupal and Sobhit Choupal for the offence punishable under Section 304(II)/34 of the Indian Penal Code and sentenced them to undergo R.I. for five years and also slapped them with the fine of Rs. 2000/- each and in default of payment of fine to further undergo S.I. for six months under the aforesaid section.

3. Factual matrix of the case is that Kamtaul P.S. Case No.128 of 2009 was initially instituted under Sections 323, 337 and 307/34 of the Indian Penal Code and subsequently added with Section 302 of the Indian Penal Code against the accused persons, namely, Sukhal Rai and Shobhit Choupal on the basis of the fardbeyan of Jitu Choupal, S/o Late Jadu Choupal recorded by S.I. Shivajee Rai, O.P. Benta, P.S.- Kamtaul on 05.09.2009 at 05:30 PM at Unit ward of Dr. Laljee Choudhary of D.M.C.H., Darbhanga with the allegation in succinct that on 29.08.2009 at 07:30 PM, informant had gone to flour mill of Shivji Sah located in Mohalla Jahangir Tola for grinding wheat, in the meantime cash of Rs.300/- was fallen from the pocket of Sukhal Rai which was picked up by Shyam Choupal. But due to previous animosity, Sukhal Rai blaming the informant of taking his money started slating him. On protest made by him, Sukhal Rai with intention to do away



with his life twisted his neck inflicting fracture injury in his neck and also assaulted on his right hand by means of brick inflicting injury on his elbow. Sustaining injury, he fell down on the ground. Then Shobhit Choupal assaulted him by means of helm inflicting injury on his right knee. The owner of the flour mill namely Shivji Sah and others witnessed the occurrence.

4. Aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the aforesaid accused persons under Sections 323, 337, 307 and 302/34 of the Indian Penal Code.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions and after commitment and on transfer finally the case came in the *seisin* of 1st Additional Sessions Judge, Darbhanga for trial.

6. Charge against the accused Sukhal Rai, Shyam Choupal, Rohit Choupal and Sobhit Choupal was framed under Sections 307 and 302/34 of the Indian Penal Code. Charge was read over and explained to them by the Court to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the



prosecution has examined altogether twelve prosecution witnesses namely, Shivji Sah as PW-1, Dr. Ramanand Chaudhary who has conducted the autopsy of the cadaver of the deceased Jitu Choupal as PW-2, Firangi Yadav as PW-3, Raja Ram Shah as PW-4, Manka Chaupal as PW-5, Sita Devi as PW-6, Uchit Chaupal as PW-7, Doma Das as PW-8, Roop Lal Chaupal as PW-9, Bimla Devi as PW-10, Fuleshwar Chaupal as PW-11 and Ram Dayal Kumar as PW-12. Out of the aforesaid witnesses, PW-1, PW-4, PW-5 and PW-9 turned hostile. Prosecution has also filed and proved some documents by way of documentary evidence in the case.

8. Statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming themselves to be innocent. Accused persons neither adduced any ocular nor documentary evidence in buttress of their case.

9. After hearing the parties and perusing the record, the learned trial court passed the aforesaid Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid Judgment and Order of conviction and sentence, the convicts have preferred this Criminal Appeal.



11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charge levelled against the appellants beyond all reasonable doubts or not.

12. It is submitted by learned counsel for the appellants that the occurrence is said to be of 29.08.2009 but the alleged fardbeyan of the deceased Jitu Choupal was recorded on 05.09.2009 and the said fardbeyan was received in the P.S. on 15.09.2009 at 11 AM and F.I.R. was lodged on the same date i.e. after inordinate and abnormal delay of 7 days from the date of occurrence and no plausible and convincing explanation has been assigned by the prosecution to explain the aforesaid delay in lodging the F.I.R. on the basis of the alleged fardbeyan of the deceased. It is also submitted that the deceased was admitted in D.M.C.H., Darbhanga on the date of occurrence i.e. on 29.08.2009, but his fardbeyan was recorded on 05.09.2009 i.e. after 7 days and no explanation has been assigned by the prosecution regarding the aforesaid delay in recording the fardbeyan of the deceased by the police albeit the information of the arrival of the injured in D.M.C.H. in injured condition might have been given to the police on the date of his admission in the hospital or within the reasonable period by the hospital. Thus the aforesaid aspect of the case creates serious



doubt about the prosecution case and sanctity of the F.I.R. It is further submitted that as per the account of PW-11 Fuleshwar Chaupal, the deceased fell senseless sustaining injury and he did not regain sense till his death. So if the deceased fell senseless after sustaining injury and remained in the same condition till his death, then how his fardbeyan was recorded on 05.09.2009 which creates serious doubt about the sanctity of the aforesaid fardbeyan of the deceased and the prosecution case. It is further submitted that the deceased was the only eye witness of the occurrence and as per his fardbeyan, only two accused persons namely Sukhal Rai and Shobhit Choupal had assaulted him, but in quite contradiction to the aforesaid prosecution case, other witnesses examined by the prosecution have unanimously stated that all the appellants who were four, in number, assaulted the deceased which candidly rules out witnessing of the occurrence by the other witnesses. It is further submitted that as per the account of PW-11 Fuleshwar Chaupal the deceased was senseless but PW-10 Bimla Devi who happens to be wife of the deceased has stated that she learnt the occurrence from the deceased. Aforesaid aspect of the case also creates serious doubt about the sanctity of the testimony of the said witness. It is also submitted that I.O. has not been examined by the prosecution and due to non-



examination of the I.O., place of occurrence does not stand established by the prosecution and moreover no objective evidence could be brought on record causing great prejudice to the defence. It is further submitted that as a matter of fact the deceased was alcoholic and fell on the ground in inebriated condition and sustained injury. PW-2 Dr. Ramanand Chaudhary has also stated in his cross-examination that the injury sustained by the deceased may be caused by falling on the hard surface. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charge levelled against the appellants beyond all reasonable doubts by adducing consistent, trustworthy and reliable evidence. Hence, aforesaid judgment and order of conviction and sentence passed against the appellants is liable to be set aside and the appellants are entitled to be acquitted.

13. On the other hand, learned APP advocating the correctness and validity of the impugned Judgment and Order of conviction and sentence submitted that all the witnesses examined by the prosecution barring the hostile witnesses have supported the prosecution case. Doctor has also found 3rd and 4th cervical vertebrae of the deceased fractured and opined the cause of death as injuries to spinal cord inside the neck caused by hard and blunt force object. Thus the ocular



evidence also stands corroborated by the medical evidence and the learned trial court correctly appreciating the facts and evidence available on record has rightly passed the impugned Judgment and Order of conviction and sentence which is liable to be upheld and this criminal appeal is shorn of merit and is liable to be dismissed.

14. From perusal of the record, it appears that to substantiate its case prosecution has examined altogether 11 material witnesses of the case. Out of them, four witnesses namely PW-1, PW-4, PW-5 and PW-9 turned hostile. PW-3 Firangi Yadav does not happen to be eye witness of the occurrence as in Para-2 of his examination-in-chief he has stated that Jitu Chaupal arriving at his house sat there. He was injured. Rohit, Shobhit, Sukhal and Shyam arrived there and took Jitu Chaupal to his house. He asked them not to do anything with him at his house rather take him away. On the following morning he learnt that Jitu Chaupal has died. From perusal of the aforesaid testimony of the said witness, it appears that he has not witnessed the occurrence of assault upon the deceased Jitu Chaupal at the hand of the appellants. Moreover said witness also does not appear to be reliable and worth credence as as per the prosecution case, deceased Jitu Chaupal has died 22 days later to the occurrence but the said



witness has stated about listening of the death of the deceased on the following morning of his arrival at his house and taking him by the appellants from his house.

15. As per the fardbeyan of the informant, there were only two accused persons in the occurrence namely Sukhal Rai and Shobhit Chaupal. Sukhal twisted neck of the informant and assaulted on his right hand by means of brick while Shobhit Chaupal assaulted him by means of helm inflicting injury on his right knee. But in quite contradiction to the aforesaid prosecution case, PW-6, PW-7, PW-8, PW-10, PW-11 and PW-12 have stated that all the four appellants assaulted the deceased by means of brick. PW-6 Sita Devi though has made an abortive bid to support the prosecution case by stating in her examination-in-chief that all the accused persons assaulted Jitu Chaupal by means of brick while Sukhal assaulted on the neck of Jitu Chaupal by means of brick, but she does not happen to be eye witness of the occurrence. As in Para-12 of her cross-examination she has stated that she has two sons. She herself performs household work inside the house while her sons perform work out of the house. Aforesaid statement of PW-6 indicates that she does not do the work out of the house. But in her examination-in-chief she has claimed to have witnessed the occurrence while she had gone to the



flour mill of Shivji Sah for grinding her wheat. The aforesaid contradictory statement given by PW-6 creates serious doubt about sanctity and credibility and her aforesaid testimony. PW-7 Uchit Chaupal though has stated in his examination-in-chief that he has witnessed the occurrence of assault upon Jitu Chaupal by the accused persons while he had gone to the shop to fetch some articles after defecation. But in quite contradiction to the aforesaid statement, he has stated in para-4 of his cross-examination that he had not met anyone during the course of visiting and regressing to the shop and no one has divulged the occurrence to him. PW-8 appears to be dam lier as in Para-14 of his cross-examination, he has stated that he met Jitu on the following evening at 4 PM in the village. He was senseless at that time. While as per the account of PW-11 and PW-12, Jitu was rushed to DMCH, Darbhanga on the very date of the occurrence. Moreover, in para-10 of his cross-examination he has stated that at the time of occurrence he had gone to the road for defecation which is at 25-30 lagga i.e. 750-900 feet away from his house and 20 lagga (600 feet) from the place of occurrence i.e. from the flour mill. But in Para-12 of his cross-examination he has stated that he had proceeded for defecation from his house at 5-6 PM and arrived at the place of defecation at 7-7:30 PM which means that it took 2 to 2½ hours



to him to arrive at the place of defecation from his house which is located at barely 750-900 feet from his house. Aforesaid aspect of the case creates serious doubt about arriving of PW-8 at the place of occurrence and witnessing of the occurrence by him and indicates him to be a dam liar. Moreover, from perusal of the para-16 of cross-examination of said witness, it appears that he had not divulged to the I.O. about witnessing of the occurrence of assault upon Jitu Chaupal by the appellants. Thus he appears to have taken altogether different stand regarding witnessing of the occurrence in the Court. In Para-13 of his cross-examination, he has stated that when he witnessed Jitu for the first time at the place of occurrence he found him lying on the ground sustaining injury. Said statement of said witness completely rules him out to be eye witness of the occurrence.

16. PW-10 Bimla Devi has stated in Para-3 of her examination-in-chief that at the time of occurrence she was at her house. As there was late in regressing of her husband to the house, she stepped out of the house and arrived at the road. Rohit, Shobit, Shyam and Sukhal Rai brought the dead body of her husband and dumped it there and then left the place slating her. Aforesaid statement of PW-10 happens to be in quite contradiction to the prosecution case, as as per the prosecution case and account of PW-11 and PW-12, Jitu Chaupal had not



died at the place of occurrence on the date of occurrence as he was rushed to the hospital and has died 22 days later to the occurrence. Moreover, said witness does not happen to be eye witness of the occurrence as she has not witnessed the occurrence of assault upon her husband at the hand of the appellants. Moreover in para-3 of her examination-in-chief she has stated that her husband divulged her the factum of assault upon him by the accused persons which means that she happens to be hearsay witness of the occurrence. But aforesaid hearsay evidence of PW-10 does not appear to be reliable as as per the account of said witness itself the accused persons brought the dead body of her husband and dumped it before her and decamped and as per the account of PW-11 Fuleshwar Chaupal as given by him in para-8 of his cross-examination after sustaining injury Jitu Chaupal fell senseless and he remained senseless for 20 days and succumbed to his injury in the state of senseless. So as per the aforesaid account of PW-11, the deceased had fallen senseless sustaining injury and remained in the same state till his death, hence no question of divulgence of the occurrence by the deceased to his wife Bimla Devi (PW-10) arises. Moreover, PW-10 has stated in para-9 of her cross-examination that her husband regressed to house at 07:30 PM after getting the wheat grinded and stayed at the



house over night. Aforesaid statement of the said witness creates serious doubt about the occurrence. As as per the prosecution case, deceased was assaulted by the appellants near the flour mill of Shivji Sah at 07:30 PM when he had gone there for grinding wheat at the flour mill. But as per the statement of his wife (PW-10), deceased had regressed to his house after getting the wheat grinded from the flour mill at 07:30 PM and remained in the house overnight.

17. PW-11 Fuleshwar Chaupal also does not happen to be eye witness of the occurrence as the occurrence is said to be of 07:30 PM, but said witness has claimed the time of occurrence as 5 PM by stating in his examination-in-chief that at 5 PM he had gone to Jahangir Tola to take tea on the shop of Firangi Yadav. During the course of taking tea, there was hulla. Responding hulla, he also arrived at the place of occurrence and witnessed the occurrence. His statement recorded at Para-8 of his cross-examination also rules him out to be the eye witness of the occurrence as in the said para he has stated that when he arrived at the place of occurrence he found Jitu Chaupal lying on the ground senseless sustaining injury which means that he had arrived at the place of occurrence after culmination of the occurrence and had not witnessed the occurrence of assault upon Jitu Chaupal at the



hand of the appellants rather had found Jitu Chaupal lying on the ground senseless sustaining injury.

18. PW-12 Ram Dayal Kumar has claimed to have witnessed the occurrence in the course of regressing from his garage. The place of occurrence is located at Jahangir Tola. But in para-2 of his cross-examination, he has stated that his village Belwara is located at two kos west of Jahangir Tola. In Para-6 of his cross-examination he has further stated that between his shop located at Mohammadpur and his house, village Khetar, Kamtaul, Dariya and Milki falls which means that place of occurrence which is located at Jahangir Tola does not fall on the way from his shop to his village rather at 2 kos west of his village. So million dollar question arises as to how the said witness arrived at the place of occurrence during the course of regressing to his house from his shop. The said witness has stated in para-7 of his cross-examination that he had met the deceased Jitu Chaupal three days later to the occurrence and Jitu Chaupal had divulged the occurrence to him, but as per the account of PW-11 Fuleshwar Chaupal, Jitu Chaupal fell senseless sustaining injury and died in the state of senseless in the hospital after 20 days of the occurrence. So million dollar question arises as to how the said witness met with Jitu Chaupal three days later to the occurrence and Jitu



Chaupal divulged the occurrence to him. Aforesaid aspect of the case also goes to create serious doubt about the sanctity of testimony of the aforesaid witness and indicates him to be dam lier.

19. Attention of PW-11 Fuleshwar Chaupal at Para-12 and 13 of his cross-examination has been drawn by the defence regarding contradiction between his statement given before the court and that given before the I.O. under Section 161 Cr.P.C. regarding witnessing of the occurrence by the said witness, but I.O. of the case has not been examined by the prosecution. Hence due to non-examination of the I.O. in corroboration of the aforesaid contradiction between the statement of the said witness given before the court and that given before the I.O. under Section 161 Cr.P.C., I perused the case diary and on perusing the same, I find that the said witness has not claimed to have witnessed the occurrence before the I.O. under Section 161 Cr.P.C. Thus the aforesaid witness appears to have taken altogether different stand before the court regarding the aforesaid material aspect of the case and he does not appear to be worth credence and reliable and his testimony does not inspire my confidence to hold conviction of the appellants relying upon the same.

20. When the I.O. of the case is not examined by



the prosecution and the attention of the witnesses has already been drawn towards their earlier statements and the Investigating Officer could not be brought to give his evidence, then in my considered opinion, the Court can peruse the case diary and find out as to whether or not the attention of the witnesses towards their previous statements were correctly drawn and to satisfy itself as to whether or not they had given similar statement before police. There are two parts of the case diary. First part contains such portion of the diary in which the Police Officer has recorded statement of the witnesses, about the incident or about other relevant facts which to that Police Officer, would be hearsay. The Second part of the case diary contains that portion in which the Police Officer has himself seen or heard a particular fact and has recorded a fact out of his own perception. To this category would come recording about the inspection of place of occurrence, making of seizure of certain incriminating articles or in some cases, when the Police Officer reaches the place of occurrence where the occurrence has not finished and he sees himself whole or part of the occurrence, recording of that. The latter part of the case diary cannot be used by the Court unless the Investigating Officer is examined because that would amount to using that portion of the case diary as evidence. Only the Investigating Officer can



tell the Court in witness box as to what were his findings out of his own perception, so that he can be put to cross-examination over that. However the first part of the case diary consists, as already noted, the statement recorded by the witnesses. If the Investigating Officer comes to the Court for evidence and if he is asked to confirm those portion of the statement of the witnesses to which the attention of the witnesses was drawn, the Investigating Officer will say only what he has recorded as his statement in the case diary and cannot go beyond that. Now, the question is, whether that portion of the case diary can be looked into by the Court and used in the trial to aid the Court in reaching at a correct decision when the Investigating Officer is not brought before the Court. Sub-Section (2) of Section 172 of Cr.P.C. provides that the Court cannot only call for the case diary but may also use such diary to take aid in such trial. If the Court only has the power to look into the case diary and whatever it peruses to keep it only in mind and then to proceed to record the judgment keeping such impression only in mind that, in my opinion, cannot be the intention of the legislation. In my considered opinion, if the Court peruses any such things and uses it to its aid in trial, this must go in black and white as part of the judgment. The only limitation is that the court cannot use any portion of the case diary as evidence. In view of



the aforesaid proposition of law and in view of the contradiction between the statement of the said witness, as recorded before the court and that given before the I.O. under Section 161 Cr.P.C., the testimony of the said witness given before the court does not appear to be worth credence and reliable.

21. As per the prosecution case, the occurrence is said to be of 29.08.2009 at 07:30 PM and as per the account of PW-11 and PW-12, injured was rushed to the DMCH, Darbhanga on the same date of the occurrence and was got admitted there and underwent treatment there. But his fardbeyan was not recorded on the date of occurrence or on the following day or within the reasonable period of time rather after inordinate and abnormal delay of 7 days i.e. on 05.09.2009 albeit on arrival of the medico legal case in the hospital the matter is immediately informed by the authority of the hospital to the police station and no plausible and convincing reason has been assigned by the prosecution to explain the aforesaid inordinate and abnormal delay in recording the alleged fardbeyan of the deceased.

22. As per the account of PW-11 as given by him in Para-8 of his cross-examination, the deceased Jitu Chaupal fell senseless sustaining injury and remained in the same state



for 20 days till his death and the deceased has died on 21.09.2009 which means that the deceased remained senseless from the date of occurrence i.e. 29.08.2009 till his death i.e. 21.09.2009 i.e. for 22 days but his fardbeyan was recorded on 05.09.2009. So million dollar question arises that if the deceased was senseless for 22 days from the date of occurrence and died in the same state, then how he has given statement before the police and his statement was recorded by the police on 05.09.2009 which creates serious doubt about the prosecution case and the sanctity of the fardbeyan and the F.I.R.

23. PW-11 in Para-8 of his cross-examination has stated that there was profused bleeding from the injury of the deceased Jitu Chaupal and his attire was drenched with blood and blood was also fallen on the ground, but I.O. has not been examined by the prosecution and due to non-examination of the I.O., objective evidence could not be brought on record causing great prejudice to the defence and due to non-examination of the I.O., place of occurrence also does not stand established by the prosecution.

24. From perusal of the record, it appears that PW-6 Sita Devi happens to be aunt, PW-8 Doma Das and PW-11 Fuleshwar Chaupal uncle, PW-10 Bimla Devi wife and PW-



12 cousin of the deceased and they are highly interested witnesses of the case. It is settled principle of law that testimony of the interested witnesses should not be discarded outrightly rather it should be scanned and scrutinized carefully and cautiously, but on careful and cautious scanning and examination of the testimony of the aforesaid witnesses, I find vital contradiction between the prosecution case and testimony of the aforesaid witnesses and their testimony inter se regarding material aspect of the case and aforesaid witnesses do not appear to be worth credence and reliable.

25. From perusal of the post mortem report and the evidence of Dr. Ramanand Chaudhary (PW-2) who has conducted the autopsy of the cadaver of the deceased, it appears that 3rd and 4th cervical vertebrae of the deceased was fractured and the doctor has opined the cause of the death as injuries to spinal cord inside the neck caused by hard and blunt force object, but the said doctor in para-5 of his cross-examination has stated that the 3rd and 4th cervical vertebra may be fractured by falling on the hard surface. In Para-6 of his cross-examination he has further stated that injury in the spinal cord under neck may be caused by falling from the road while as per the prosecution case, Sukhal Rai twisted the neck of the deceased by means of hand and not assaulted the deceased by



means of hard and blunt substance, hence aforesaid evidence of the doctor and the aforesaid prosecution case also creates serious doubt about the occurrence and complicity of the appellants in the occurrence.

26. It is the admitted case of the prosecution that Sukhal Rai assaulted the deceased blaming him of taking his Rs.300/- due to old animosity and wife of the deceased namely Bimla Devi (PW-10) has stated in Para-12 of her cross-examination that he had no dispute with any persons barring the accused persons. Aforesaid prosecution case and account of the witness indicates that the appellants are on inimical terms with the prosecution party. Animosity cuts both the edge. But in view of the aforesaid vital contradiction between the prosecution case and testimony of the witnesses and between the testimony of the witnesses inter se regarding the manner of occurrence, weapon used in the assault, assailant, time of occurrence, non-examination of the I.O., abnormal delay in recording the alleged fardbeyan of the deceased and lodging the F.I.R., recording of the alleged fardbeyan of the deceased while the deceased was senseless, false implication of the appellants in the case by the prosecution due to aforesaid animosity cannot be ruled out.

27. In the facts and circumstances of the case, I



find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charge levelled against the appellants beyond all reasonable doubts by adducing consistent, trustworthy, reliable and worth credence evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned trial court against the appellants is set aside and the appellants are acquitted from the charges levelled against them. As the appellants are on bail, they are discharged from the liability of their bail bonds.

28. Accordingly, this criminal appeal stands allowed

(Prakash Chandra Jaiswal, J)

mantreshwar/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	31.10.2018
Transmission Date	31.10.2018

