

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.236 of 2015

Arising Out of PS.Case No. -169 Year- 2002 Thana -JAMHORA District- AURANGABAD

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1. Braj Kishore Prasad S/o Late Surajdeo Ram
2. Anil Prasad S/o Braj Kishore Prasad Both are resident of village - Jamhore, P.S.
Jamhore, District - Aurangabad

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Aditya Narayan Singh, Adv.
Mr. Virendra Kumar Ray, Adv.

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

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 26-02-2018

Appellants, Braj Kishore Prasad and Anil Prasad have been found guilty for an offence punishable under Sections 148 IPC as well as 307/149 of the IPC vide judgment of conviction dated 20.04.2015 and sentenced to undergo RI for 10 years vide order of sentence dated 25.04.2015 passed by Additional Sessions Judge-3rd, Aurangabad, in Sessions Trial No. 59/04/85/2014.

2. Prabhat Kumar (PW 6) gave his Fard-e-beyan while he was admitted at Bose Clinic, Dehri in an injured condition on 10.04.2002 at 10.15 PM alleging inter alia that on the same day at about 5:00 PM, his uncle Braj Kishore aged about 62 years with an intention to grab his share was putting grill over verandah of the house whereupon he along with his father, Rajendra Prasad have gone there and inquired as to why he is affixing grill over their share. At



that very time, his grand-father, Suryadeo Ram, cousin Gopal Prasad, Anil Prasad, Sudhir Prasad and Shanti Devi armed with Lathi, Rod and Angle came and began to abuse them. His father protested. Then, on an order of his grand-father Surayadeo Ram, Braj Kishore Prasad gave a rod blow over head of his father, as a result of which, he sustained wound, blood oozen out. He fell down on the ground and became unconscious. Even thereafter, Gopal Prasad hurled rod blow over leg, hand of his father. He intervened whereupon Sudhir Prasad gave rod blow over his head causing injury thereupon. Blood oozen out. Seeing them being assaulted, his uncle, Kamla Prasad rushed in rescue who was assaulted by Sudhir, Anil, Gopal with rod over his head as a result of which, he sustained severe injury, fell down and became unconscious. Gopal also gave rod blow over right finger joint as a result of which, it got torn. Shanti Devi pelted brick particles. On account of assault, his father and uncle Kamla Prasad are still unconscious. First of all, villagers lifted them to Aurangabad Hospital but seeing precarious condition of his father and uncle, they were referred to specialized treatment whereupon, they have been taken to Dehri where they are being treated. The motive for occurrence has been shown as they (accused) attempt to illegally encroach upon their share which has been frustrated by them (prosecution party).

3. On the basis of the aforesaid Fard-e-beyan Town



(Jamhore) PS Case No. 169/2002 was registered followed with an investigation as well as submission of charge-sheet facilitating the trial which ultimately concluded in a manner, subject matter of instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial of the occurrence. It has also been pleaded that the prosecution party illegally tried to encroach upon their share by way of cutting grill having affixed since before and during course thereof, they had brutally assaulted them (accused persons) and for that, on the Fard-e-beyan of appellant/accused, Braj Kishore Prasad, Town (Jamhore) PS Case No. 168/2002 has been registered. Furthermore, it has also been pleaded that illegal activity of the members of the prosecution party is itself found finally exposed in a manner that an earlier partition suit which concluded under compromise decree dated 21.03.2011, subsequently been challenged by the prosecution party itself and in the aforesaid background, they indulged in criminal action. In order to substantiate the same, ocular evidence as well as documentary evidence Ext-A, B, C, D have been produced.

5. In order to substantiate its case, prosecution had examined altogether 10 PWs, those are, PW-1, Rajendra Prasad, PW-



2, Daya Devi, PW-3, Ranjit Prasad, PW-4, Kamla Prasad, PW-5, Jagarnath Sao, PW-6, Prabhat Kumar, PW-7, Kamra Prasad, PW-8, Santosh Prasad, PW-9, Dr. Raj Kumar Prasad, PW-10, Krit Narayan Sharma, Investigating Officer. Side by side had also exhibited Ext-1, Signature of informant over FIR, Ext-2 series, Ext-3 Series, injury reports of respective injured and Ext-4, Formal FIR. On the other hand, defence had examined DW-1, Umesh Tiwari (formal) and also exhibited Ext-A, Order dated 12.09.2011 passed in T.S. No. 123/01, Ext-B, Evidence of doctor in counter case bearing (Town) Jamhore PS Case No. 168/2002), Ext-C, Order of cognizance dated 12.06.2002 and Ext-D, Certified copy of final decree.

6. Manifold arguments have been raised on behalf of appellants while challenging the finding recorded by the learned lower court. Learned counsel for the appellants has argued that while considering the case of the prosecution, the learned lower court had acted in pre-determined manner to convict the appellants and on account thereof, ignored the severe flaws persisting in the prosecution case. Had there been proper appreciation, consideration thereof, the judgment of conviction and sentence would not have been passed. In order to substantiate the same, it has been submitted that neither manner of occurrence nor genesis of occurrence and in likewise manner, place of occurrence has been substantiated by the



prosecution. It has also been submitted that presence of counter case as well as exhibits, more particularly, evidence of doctor exposing injuries over the person of appellants having been not explained at the end of prosecution did not find favour at the end of learned lower court. On this score, elaborating in detail, it has been submitted that obligation lies upon the prosecution to substantiate its case. Defence may plead, may not plead. That being so, the evidence should be at the end of prosecution to such extent that it should not face tyranny of any sort of deficiency and in likewise manner, could not be allowed to take any advantage from the defence case.

7. In the aforesaid background, it has been submitted that first and foremost point happens to be to identify the aggressors in the background of presence of counter case coupled with injuries having over person of accused (appellants). From the evidence available on the record, it is apparent that both the parties are own brothers. As usual, for partition of ancestral property, partition suit was filed. By the grace of god, case was compromised and in the aforesaid background, compromise petition was filed which became, decree of the court. The aforesaid decree happens to be Ext-D of the record. From the aforesaid Ext-D, it is evident that Khesra No. 835-836/4397 is the Plot whereupon their ancestral house stood and the same was partitioned amongst three brothers in a way extreme



western side was allotted in favour of appellant, Braj Kishore Prasad, Middle, Santosh and eastern side, informant to the tune of 3 ½ decimals, respectively. When there happens to be presence of Santosh in between, then in that circumstance, there was no occasion to encroach share of informant as alleged by the prosecution unless and until share of Santosh is found swallowed. PW-10 is the Investigating Officer. When his evidence is gone through relating to place of occurrence, the objective finding goes adverse to the prosecution. That means to say, the story of the prosecution that when they protested illegal activity of the accused persons/appellants who were indulged in encroaching their shares by way of affixing grill is not at all found substantiated by way of objective finding of the Investigating Officer as, he had not found grill affixed at the place of occurrence nor holes having in the wall for affixing grill. That being so, the genesis of occurrence is not at all found duly substantiated.

8. Now, in continuity, it has been submitted that non substantiating the place of occurrence by PW-10, Investigating Officer, is indicative of the fact that the prosecution had suppressed the real, actual mode of genesis of occurrence. From the evidence of PW-10, it is evident that alleged occurrence took place over a road lying in front of verandah without having any explanation from any of the PWs, how they came up over the road.



That being so, it happens to be another deficiency at the end of the prosecution, which nullifies the finding. Furthermore, it has also been submitted that when status of the witnesses are to be seen, it is apparent that all the witnesses are from their side. The independent witnesses, that means to say, PW-5, PW-7 have not supported the case of the prosecution. So, case of the prosecution rests upon the testimonies of hostile, interested, related witnesses which, in the facts and circumstances of the case, require close scrutiny. During course of such exercise, it is apparent that their testimony suffers from inconsistency, exaggeration falsifying each other on each and every aspect and that being so, irrespective of their status, more particularly, PW-1, Rajendra Prasad, PW-4, Kamla Prasad and PW-6, Prabhat Kumar claiming themselves to be injured, they have not sustained injury, if any, in a manner as projected by them. Furthermore, in the background of admitted case of the prosecution that the case having been launched by appellant, Braj Kishore Prasad was earlier to the instant case, coupled with presence of injuries over them, as per evidence PW-2, being exhibit of defence as Ext-B, which has not been explained at the end of prosecution along with the fact that prosecution party themselves filed Miscellaneous Case to revoke the compromise decree and in the aforesaid facts and circumstances of the case, it has been pleaded that it was prosecution who were bent upon



to defy the compromise decree and the overall situation, inspires confidence that none other than the prosecution was aggressors and further, suppressed the manner and genesis of occurrence whereupon whole case is fit to be disbelieved.

9. Then it has been submitted that this case has been purposely filed in order to save their skin from the counter case and to substantiate the same, it has also been submitted that from the evidence of PW-9, doctor, it is evident that all the injured were examined at Sadar Hospital, Aurangabad. The injuries having over person of Prabhat Kumar was neither grievous nor dangerous to life and so, the time which was taken up by the doctor while examining the other injured as alleged would have been taken at his end in getting the FIR recorded. From the evidence of PW-10, it is apparent that there happens to be no discloser at his end that any positive effort was taken either at the end of PW-6, Prabhat to give his Fard-e-beyan, nor at the end of Prabhat to have his Fard-e-beyan recorded. That means to say, Fard-e-beyan was recorded at Dehri without having any justification and from Exhibit, it is evident that before recording of FIR of present case, same was recorded, and so, it happens to be out and out a collusive action whereupon could not be relied upon. It has also been submitted that from the evidence of PW-9, it is evident that whatever been recorded at his end, is the finding based upon his own



examination. The expert opinion has not been brought up on record although, PW-4, Kamla Prasad had deposed that he had undergone treatment for months together at different places. In the aforesaid background, nature of injuries is to be seen as per opinion having been expressed by PW-9 which did not justify application of Section 307 IPC and to substantiate the same, learned counsel for the appellant has relied upon **(2016) 13 SCC 280 (Ramesh Kumar @ Babla v. State of Punjab)**.

10. Apart from this, it has also been submitted that there happens to be flaw in the judgment itself as, the learned lower court had found the appellants guilty for an offence punishable under Sections 148 IPC, 307/149 IPC but had not recorded any kind of sentence independently, against the aforesaid two heads rather appellants have been conjointly sentenced to undergo RI for 10 years which happens to be against settled principle of law. So, in the facts and circumstances of the case, the judgment of conviction and sentence is fit to be set aside. As such, appeal be allowed.

11. Learned APP while refuting the submissions made on behalf of learned counsel for the appellants, has argued that in the facts and circumstances of the case, the judgment impugned needs no interference. To substantiate the same, it has been submitted that whatever suggestion has been given to the witnesses, it is



apparent that they have admitted commission of occurrence and for that, case and counter case have been instituted. It is settled principle of law that each case has to be adjudged independently, on the evidence whatever been adduced during course of trial. From the evidence, it is apparent that prosecution witnesses have not been tested on the score of occurrence and that being so, evidence of prosecution witnesses remained intact so far manner as well as genesis of occurrence is concerned. In the aforesaid background, prosecution is not under obligation to explain injuries even if present over accused, more particularly, taking into account the nature of injury have been shown by the doctor (Ext-B). When the evidence is taken together with the FIR of the counter case, Ext-C, it is crystal clear that genesis of the occurrence is found admitted at the end of defence. Not only this, their conduct suggest that they were bent upon to encroach the share of the prosecution party by way of affixing grill which was resisted, whereupon the accused persons shown their muscle power by way of assaulting respective injured with brutality. PW-9 sufficiently corroborated the same.

12. It has also been submitted that so far ingredients of Section 307 IPC is concerned, it neither requires nature of injuries to be grievous or dangerous to life, rather it needs causing of hurt as defined under Section 319 of the CrPC. It may be even to the extent of



superficial. The only event which the court is bound to perceive is the role played by the accused and the impact thereof. All the accused persons were armed with rod and angle by which they assaulted over delicate part of the body repeatedly and that is indicative of the fact that they indulged with an intention or knowledge that the aforesaid injuries, if not properly, cared will cost their lives and that being so, the learned lower court had rightly convicted and sentenced whereupon the judgment impugned needs no interference.

13. When there happens to be case and counter case, injuries are said to have sustained by both the parties, then in that event, how the court has to perceive and adjudicate, that has been taken into consideration in the case of ***Rajendra Singh v. State of Bihar*** as reported in ***2000 Cr.L.J. 2199***, it has been held by the three Hon'ble Judges of Hon'ble Apex Court which is as follows:-

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 probalalise 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 Singhs 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.

14. The aforesaid principle is still commanding the arena. That means to say, the case is to be seen independently on the basis of the evidence having been adduced during course of trial and unless and until there happens to be grievous injury or some sort of casualty is there, then in that event, the prosecution is under obligation to explain the injuries having at the end of the accused persons otherwise, would not. From Ext-B, the nature of injury has not been found to be grievous and that being so, goes out of purview of due consideration at least on the score that having non explained at the end of the prosecution will cast any kind of deformity over the prosecution version. The another defence, documents also need to be



taken into consideration at the present moment itself, in the background of their status as well as their admitted case which happens to be Ext-D, Compromise Decree. From the relevant schedule, it is evident that the houses of all the three brothers stood over Survey Plot No. 836/835/4297. Furthermore, partition has been effected in a manner that extreme western side has been allotted to the appellant, Braj Kishore Prasad, middle, Santosh and extremely eastern side to the prosecution party. So to that extent, there happens to be no controversy. It is also evident from Ext-A, that a Miscellaneous Case is pending for revocation of the same but it is not clear whether uptil now compromise decree has been revoked or not. That means to say, Ext-D still survives. Because of the fact that it happens to be a compromise decree having the status of the parties in tune thereof over the land under dispute and so, there happens to be no question of delivery of possession being effectuated by the court itself. That means to say, the parties are over their allotted shares. In the aforesaid background, now the case of the prosecution is to be seen. During course of consideration whether an offence punishable under Section 307 IPC is made out or not, the same has been thoroughly considered by the Apex Court in *Chhanga @ Manoj v. State of Madhya Pradesh reported in (2017) 11 SCC 115*, it has been held as follows:-

7. Neither of the points raised by Shri Garg appeal to us. First and foremost, it is not essential that bodily injury capable of causing death should have been



inflicted in order that the charge under [Section 307](#) be made out. It is enough if there is an intention coupled with some common act in execution thereof. This position has been repeatedly laid down by this Court in “[State of M.P. vs. Kashiram and Others](#)” (2009) 4 SCC 26 at paragraphs 12 to 16. In addition, in a recent Judgment in ‘[Jage Ram and Others vs. State of Haryana](#)’ (2015) 11 SCC 366, the law has been laid down as follows :-

“For the purpose of conviction under [Section 307](#) IPC, the prosecution has to establish (i) the intention to commit murder; and (ii) the act done by the accused. The burden is on the prosecution that the accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under [Section 307](#) IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given, etc.”

15. PW-9 is the doctor who on the alleged date and time of was posted at Sadar Hospital, Aurangabad and he examined the respective injured in following manner:-

Rajendra Prasad:

- (i) Lacerated wound on the scalp obliquely in direction from middle line measuring about 3” x ¼” x muscle deep.



(ii) Swelling on right shoulder size 1" x ½".

(iii) Swelling over left thigh above knee 1" x 1".

* Amputated thumb, leicivoral phalynx right hand. Time with 6 hours. Nature Simple. However, referred to higher institutions and any further opinion regarding nature of injury can be obtained from there.

* Injuries caused by hard blunt substance such as iron rod, iron angle.

Kamla Prasad:

(i) Lacerated wound on the scalp middle size 3" x ¼" x bone deep. Caused by hard blunt substance such as iron rod. Time within 6 hours. Type of injuries- Opinion reserved, patient developed vomiting so referred to higher institution for further investigation and better management.

Prabhat Kumar:

(i) Lacerated wound on the scalp middle measuring about 2" x ¼" x muscle deep.

(ii) Swelling over left shoulder size 1" x ½".



Cause- By hard blunt substance such as iron rod. Type- Simple in nature. Time within 6 hours.

Ranjeet Kumar:

- (i) Swelling size about 2" x 2" on right fore arm
- (ii) Swelling size about 2" x 2" on upper back right side.
- (iii) Swelling size about 2" x 2" on ankle left side with tenderness. Cause- By hard blunt substance such as iron rod. Type- Simple. Time within 12 hours.

Santosh Kumar:

- (i) Abrasion on left fore arm size about 1" x 1/6".
- (ii) Abrasion left fore arm posterior size about 2" x 1/6".
- (iii) Tenderness on left dorsum of hand.
- (iv) Swelling measuring about 1/2" x 1/2" on right lateral side of the scalp. Type- Simple in nature caused by hard blunt substance such as iron rod. Time within 12 hours.

16. In para-7 of his cross-examination, he had stated that at the time of examination injured were conscious. Wounds were



bleeding from the injuries of all the injured namely, Rajendra, Kamla, Prabhat though, he had not mentioned the same in his injury report. In para-8, he had stated that he had not mentioned the colour of the injuries. He had further stated that police did not record statement of injured in his presence. In para-9, he had stated that he had referred for better treatment. Then had stated that the injuries over person of Rajendra, Kamla and Prabhat would not be caused by fall while injuries over persons of Ranjit and Santosh could be by fall. The injuries over the persons of Kamla would not be self inflicted injury.

17. PW-1 is one of the injured. He had deposed that the occurrence is of dated 10.04.2002. Recently, there was partition in the family and during course thereof, extreme western side has been allotted to him whereunder he resides. There was commotion at the ground level whereupon his son Prabhat came downstairs and had seen Braj Kishore engaged in putting grill over the area having in his share with the help of mason. It was about 5 O'clock in the evening. He inquired from him as to why he is engaged in putting grill over the area having been allotted to his share over which, his father Suryadeo Ram ordered to kill. In the aforesaid background, his brother Braj Kishore and his sons armed with rod, angle attempted to assault. He resisted till then, Braj Kishore gave rod blow over his head causing injury thereupon. Blood oozed out. He fell down. Then thereafter,



Gopal began to assault with iron rod as a result of which he sustained injury over right hand, left leg. His son Prabhat tried to save him who was assaulted by Sudhir with rod over his head causing injury thereupon. His younger brother Kamla intervened and forbade the accused persons not to indulge in such kind of activity whereupon all the accused persons said that he is the root cause of dispute and that being so, Gopal, Anil and Sudhir assaulted him with rod causing injury over his head as well as different parts of body. He fell down and became unconscious. At that very time, Shanti Devi, wife of Braj Kishore was pelting bricks as a result of which Santosh became injured. People assembled whereupon they were taken to Jamhore PS and then to Aurangabad hospital. After primary treatment having provided at Aurangabad hospital, they were referred to and accordingly, taken to Bose Clinic, Dehri where they were treated. Police came and recorded his statement. Identified the accused.

18. During cross-examination at para-3, he had admitted that the prosecution, accused and witnesses happen to be sons of Suryadeo Ram. At an earlier occasion, there was dispute over partition of ancestral property for which partition suit was filed and during course thereof, the parties entered into compromise and on the basis thereof, the property was partitioned by metes and bounds. He had further admitted presence of 144 CrPC proceeding as well as 107



CrPC proceeding before the occurrence but he denied the suggestion that same was decided in favour of appellants. Para-8 also relates thereto. In para-9, he had stated that Gayatri Industry was not running over the place which has been allotted to his share rather it was running on extreme eastern side. He is residing in new building after partition. The place where Mar-peet took place has been identified by him by disclosing boundary North-their building with road, East-Government land and then their another building, West- Some portion of the building which has been allotted to him and some portion of Kachcha road. In para-10, he had disclosed that place where Mar-peet took place happens to be Kachcha land. Mar-peet took for 2-3 minutes. He had not stated that there was trampling mark over the place of occurrence but might be. Copious blood had fallen down over the ground as a result of which, his apparels were soaked with blood. In para-11, he had disclosed that blood had fallen over the earth. He had further stated that he became conscious after sustaining injuries. He had further stated that after sustaining injury, he firstly sat down and then lied. Blood had fallen. In para-12, he had further stated that he is not remembering at the present moment whether more than on blow was sustained by him. Prabhat had also sustained injury over his head. He had further said that he along with Kamla, Prabhat had sustained injury over their head respectively. In para-13, he had stated



that they were taken to Jamhore PS and then to Aurangabad Hospital. He had further stated that Santosh, Ranjit were not unconscious. In para-15, he had stated that place of occurrence was shown to police by him. At that very time, blood was not present. Police had seized his Kurta but had not seized his Dhoti as, had there been, he would have become naked. In para-16, he had stated that at the time when Braj Kishore gave rod blow, none came in between. His son who was standing by his side, came in rescue. None of his family members came in rescue at that very time. People have assembled. He had further disclosed that his father and accused Braj Kishore has filed Miscellaneous Case for getting the compromise decree set aside. Then had stated that there was no forgery during course of compromise. He had further stated that his petition for injunction is pending. In para-17, he has stated that he had not seen injury over person of Braj Kishore as well as his father during course of occurrence. He had further stated that counter case bearing Jamhore PS Case No. 168/2002 was registered only to save their skin. Then had stated that present case bears no. 169/2002 which was recorded on following day at Dehri. Then had denied the suggestion that only to save skin, this case has falsely been instituted. In para-19, there happens to be contradiction. In para-21, he had stated that in hospital he had talked with Prabhat but he had not talked with Kamla as he had lost his



voice. In para-22, he denied the suggestion that accused Sudhir was admitted at Heritage hospital, Banaras from 08.04.2002 to 20.04.2002. He had denied the suggestion that Gopal was on duty at Bokaro being employed at GPC. He had denied suggestion that they were not assaulted. He had denied suggestion that he along with his other family members gone over premises of Gayatri Industry, removed grill after cutting from gas cutter, threw it over road and during course thereof, they had assaulted Braj Kishore, Suryadeo and Anil as they protested. He had also denied suggestion that in order to save their skin, this case has been filed. In para-24, he had divulged the fact that as the case was compromised, hence they had not opted for possession through court.

19. PW-4 is injured, Kamla Prasad who happens to be another brother of PW-1 as well as appellant/accused Braj Kishore. During his examination-in-chief, he had stated that on the alleged date and time of occurrence, he was sitting in a shop adjacent to the place of occurrence. After hearing sound of uproar, he came at the house of his brother, Rajendra Prasad where he saw his elder brother Braj Kishore and his sons, Anil and Sudhir assaulting Rajendra with rod as well as lathi. He had further stated that property had already been partitioned and Braj Kishore, his sons Anil and Sudhir were putting grill over area having been allotted to the share of Rajendra which was



protested by Rajendra Prasad and on account thereof, he was assaulted. Anil, Sudhir, Braj Kishore and Gopal assaulted. His father was present there. His Bhabhi, Shanti Devi hurled bricks from upstairs. His brother, Rajendra had sustained injuries over his head as a result of which, fell down. Blood oozed out. Prabhat came in rescue who was also assaulted by the accused persons causing injury over his head as well as his hand. He also tried to intervene whereupon, he was also assaulted by Sunil, Sudhir with iron rod as a result of which, he sustained injuries. He became unconscious and fell down. He regained sense at Bose Clinic, Dehri. After regaining sense, he was disclosed that they were referred to Sadar Hospital, Aurangabad and from there they were referred to Bose Clinic. He had further stated that though he regained sense but on account of assault he lost his voice. Therefore, he had gone to Bokaro where, he continued under treatment. After 10-15 days, he regained voice but he continued with treatment for 1 ½ years. He undertook treatment at Ranchi as well as Vellore. He had further stated that with an intention to kill the accused persons had assaulted. Then had stated that after regaining voice, he made statement before the police. Identified the accused. In para-7, he had stated that on the basis of partition they all became separate. Now, they have got no concerned with each other affairs. Then had stated that he is not remembering since when they are separate. Then had



stated that he resides at Bokaro but frequently visits at his village. He had further admitted that he had not been allotted share in the house where occurrence took place. He had further admitted that at an earlier occasion mill of accused was running in some part of the disputed house. In para-8, he had stated that just 1-2 days prior to the occurrence, he had come from Bokaro. He was not called by Rajendra but he has on his own come. He had further stated that his house lies at a distance of ½ mile from the place of occurrence. He had further stated that there was no litigation with Braj Kishore or with his sons since before. In para-9, he had stated that partition suit was there but it was not disposed of on the basis of compromise rather partition had effected. He is not remembering whether any petition has been filed for revoking the same. He had further stated that railway line lies east to the place of occurrence. So far remaining direction is concerned, he has got no knowledge. But Mar-peet took place in between house as well as road. In para-10, he had stated that it happens to be Kachchi land. Mar-peet took place in front of the place where grill was being affixed. He was not present there before Mar-peet. He had further stated that Braj Kishore resides at upper floor while at ground floor, there happens to be shop just beneath his share. Road is at two sides, another side there is parti land and then thereafter, railway line. At another side, there happens to be parti land and covering 2-4



bamboos, houses of other persons stood. In para-11, he had stated that he was sitting at the shop of Kamta at the time of occurrence which happens to be at the distance of 5-6 bamboos from the place of occurrence. But is visible intervened by a building. Then had stated that when he reached at the place of occurrence on hulla, he had not found injured lying rather occurrence took place in his presence. When he had gone there, he had seen Braj Kishore and his sons engaged in affixing grill which was resisted by Rajendra. In para-12 he had denied the suggestion that it is not a fact that grill of Braj Kishore was cut away by them with gas cutter. He had denied the suggestion that they had assaulted Braj Kishore and other family members for that a case has been instituted. He had also denied suggestion that after occurrence in order to implicate his family members, Braj Kishore had instituted this case. He had further denied the suggestion that he is not knowing whether that case is still continuing or not. In para-13, he had stated that while Rajendra was being assaulted, people had assembled. He is unable to disclose the names of outsiders because of the fact that for the last 30 years he resides at Bokaro. After sustaining injury over his head, he became unconscious. Before sustaining his injury, Rajendra and his son have already sustained injury. He had not counted blows over person of Rajendra and his son. Sudhir was armed with rod while Anil was



armed with Lathi. Brick-batting was going on from the upstairs. Rajendra and his sons were conscious before sustaining injury but they have fallen over the ground. He is unable to disclose the distance in between. In para-15, he had stated that during course of rescuing them he was 1-2 steps away from them. Then there happens to be some sort of contradiction under paragraphs-16, 17. In para-18, he had admitted that the question of partition has amicably been sorted out but it is the accused persons who had put hurdle. Then had denied the suggestion that they were not at all assaulted. On the other hand, they had assaulted the accused persons. He had further denied the suggestion that since birth he is stammering.

20. PW-6 is informant as well an injured. He had deposed that on the alleged date and time of occurrence, he was at his house. At that very time, Braj Kishore was engaged in affixing grill over portion of the house having in his possession over which, they obstructed. Braj Kishore abused his father. His grand-father, Suryadeo Ram ordered to assault over which Braj Kishore gave rod blow over head of his father causing injury thereupon. Blood had oozen out. His father fell down on the ground. He rushed in rescue after falling of his father. Anil and Gopal assaulted him with rod. Then had stated that Sudhir had assaulted him with rod over his head causing injury thereupon. Blood had fallen from the wound. Kamla came in rescue



who was assaulted by Gopal, Sudhir and Anil with rod over his head and other parts of body as a result of which, he sustained injuries. He fell down and became unconscious. Blood had oozed out from wounds. At that very time, his elder mother, Shanti Devi was hurling brick particles. Ranjit and Santosh came whereupon they also sustained injury. A large number of people assembled there who have seen the occurrence. They were taken to police station and then Sadar hospital, Aurangabad and from there they were referred to specialized treatment and accordingly, shifted to Bose Clinic, Dehri. The cause of occurrence has been shown as accused persons wanted to grab the verandah after affixing grill. Police had come to Bose Clinic where he gave his Fard-e-beyan. Identified the accused. During cross-examination at para-6, there happens to be repetition of the genealogy of the family, has already been through PW-1. In para-7 he had further stated that his ancestral building also lies at village-Jamhore. Accused, Braj Kishore is engaged in manufacturing grill but he is unable to say whether the name of firm is "Gayatri Udyog". His grand-father happens to be associated with Gayatri Parivar. He had further stated that Braj Kishore had also instituted a case falsely against them but he is not remembering whether he happens to be one of the accused or not. He had further stated that accused persons got their case instituted prior to institution of this case. In para-8, he had



stated that after occurrence they were taken to Jamhore PS and then they were taken to Sadar Hospital, Aurangabad. He, his father and uncle were in injured condition out of whom his father and uncle were unconscious. He had denied suggestion that he on one side and Braj Kishore and others on other side fought while rest had gone to rescue. In para-9, he had stated that he had not recorded his statement at the police station. He had further stated that he is not remembering whether police had recorded Fard-e-beyan or not. He had further stated that at that very time he had not seen Braj Kishore, Anil and others. In para-10, he had further stated that he had not seen Braj Kishore, Anil and Sudhir in an injured condition. He had not seen his grand-father in an injured condition. He is not remembering whether police had come to hospital as he was not fully conscious. At para-11, he had stated that the place where mar-peat took place, the house happens to be facing southern front. Road lies south to building. That road proceeds towards Aurangabad station. Dalan of Braj Kishore lies south to the aforesaid house. Grill manufacturing was being carried out before partition. There was no dispute relating to Dalan. Actually, accused was affixing grill over the area having been allotted to his share and for that, this occurrence took place. His share happens to be western side. He is unable to disclose total length and breadth of Dalan. He had further stated that all the documents happen to be along



with his father. He had further admitted that for revoking the partition, case has been filed. In para-12, he had again said that at the time of occurrence accused persons were engaged in welding grill in iron pillar covering his share. Then had stated that three iron pillars have fallen in his share. Grill was being affixed in between two pillars. He is unable to disclose where welding machine as well as grill has gone. In para-13, he had stated that they are residing in the same building. At the time of affixing grill, his uncle, his sons and mechanic were there. He is unable to disclose the name of mechanic. Only one mechanic was there. Accused persons were themselves helping the mechanic. They had gone to the place one by one. First of all, his father was assaulted. When he rushed in rescue, he was assaulted and then, Kamla was assaulted. They had fallen down in between Dalan and Road. Accused persons have also assaulted even while they were lying. After assault, accused persons gone away. At that very time, they were at the mercy of the accused. His elder mother was pelting bricks from roof. Only his elder mother had pelted bricks. In para-15, he had denied the suggestion that they tried to take forceful possession of the building and during course thereof, they assaulted Suryadeo as well as Braj Kishore. He had denied the suggestion that none of them had sustained injuries. It has also been denied that by getting false injury report, this case has been instituted.



21. PW-10 is the Investigating Officer. He during course of his examination-in-chief, had stated that on 10.04.2002, he was ASI at Jamhore PS. On that day, Fard-e-beyan of Prabhat, son of Rajendra Prasad recorded at Bose Clinic, Dehri was received by him whereupon, O/C of Jamhore PS endorsed the same, whereupon case has been registered and accordingly, exhibited. On the basis of aforesaid Fard-e-beyan, Jamhore PS Case No. 169/2002 was registered and then, investigation was entrusted to him. He had further exhibited the injury report issued by the O/C as well as Vijay Kumar Paswan, another ASI (Ext-2). Exhibited the formal FIR. He had gone to inspect the place of occurrence and during course thereof, had examined the injured, Ranjit, witness, Daya Devi. Then has stated that the place of occurrence happens to be double storey pucca building lying south to Anugrah Narayan Road station. Verandah lies at southern side of the house. This building is jointly occupied by the informant as well as accused persons. Then had disclosed the width of verandah as 10 Ft, where accused persons were putting grill. Length of verandah happens to be 70 ft. Just after verandah, there happens to be parti land and thereafter, pitch road. Kachchi area of road happens to be the actual place of occurrence. In para-6, he had stated that he had found blood like spot at many places over the place of occurrence but, it was very difficult to take the same as material exhibit. Then had



detailed the event of compromise in a partition suit. In para-7, he had detailed the boundary of the place of occurrence as North-Barren land of informant as well as that of Santosh, South- Pitch road coming from Dehri to Anugrah Narayan Road, East- house of accused, West- Parti land of Matukdhari Singh. In para-8, he had stated that he had gone to Bose Clinic and recorded the statement of Rajendra, Prabhat. He had also recorded statement of Santosh, Jagarnath and Kamla, received injury report. He had approached Sadar Hospital, Aurangabad for getting opinion against reserved injuries but could not succeed. Then attention has been drawn towards statement of hostile witnesses. After completing investigation, submitted charge-sheet. During cross-examination at para-14, he had admitted that Braj Kishore had instituted a case against five accused persons who happens to be injured of this case, bearing Jamhore PS Case No. 168/2002. He had further admitted that Braj Kishore was injured and so, sent him to Obra hospital for treatment but he had shown his inability to disclose how many persons were injured from Braj Kishore side. In that case also, charge-sheet was submitted. In para-16, he had stated that place of occurrence happens to be over the flank of the road. Then had stated that so many shops are there at the southern side of the place of occurrence. He had not mentioned in the case diary whether shop keepers were examined or not. In para-17, he



had stated that he had received Kurta of Rajendra soaked with blood. The other injured had not produced blood stained clothes. In para-18, he had stated that first of all Braj Kishore had informed regarding occurrence. He had further stated that when Braj Kishore came to inform, he was arrested. He had further stated that injured were sent to Aurangabad Hospital for treatment. He had further stated that he is not remembering when Braj Kishore had come to institute the case and so he was not assertive to disclose that he came at 5.00 PM. Then had stated that informant of this case came to institute the case on 10.04.2002 at about 10.15 AM. Prabhat was not arrested as he was severely injured. Then had disclosed that injured were not arrested and so no escort party was provided to them. He had recorded further statement of the informant on the date of registration of case itself. That means to say, on 10.04.2002. He had examined Rajendra, Kamla and Prabhat. He had not seized blood stained clothes. He had visited only once at the place of occurrence. He had gone to place of occurrence on 11.04.2002. Informant had gone to place of occurrence and as per his discloser visited the place of occurrence. AT the place of occurrence, there was soil, some spot of blood, chips etc. He had not seized. He had not found other incriminating material. Injury report was received from Sadar hospital. He had not procured injury report from Bose Clinic as well as from Bokaro and Vellore. When



injured came to the police station, their wounds were not bandaged. He had further stated that accused persons were putting grill at the eastern side of the place of occurrence land and for that, occurrence took place. He is unable to disclose whether grill was new or an old one. Then had said that both the parties are litigating. Then had denied the suggestion that accused Suryadeo Ram had instituted a case and to put safeguard over their interest this case has been registered.

22. PW-2 wife of PW-1 and PW-3 as well as PW-8 have reiterated the version while PW-5 and PW-7 became volte face to the prosecution and so they were declared hostile. Although, PW-5 supported the case of the prosecution to some extent relating to occurrence.

23. Law requires that if the evidence of a witness is to be impeached then in that event, the witness has to be cross-examined on that very score otherwise, that part of evidence will remain intact. The Hon'ble Apex Court in the case of *Gian Chand & others v. State of Haryana* reported in *2013(4) PLJR 7 (SC)* has held:-

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in *Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.*, AIR 2013 SC 1204



observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

24. Furthermore, the evidence of injured witness lies on upper pedestal as, being an injured, it signifies his presence at the place of occurrence, unless and until there happens to be cogent, plausible, convincing material to discredit his testimony in normal phenomenon, his evidence would be acceptable in the eye of law. In the case of *Chandrasekar v. State of Tamil Nadu* as reported in 2017



(4) *PLJR 220 SC*, it has been held under para-10 as follows:-

“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."

25. Now coming to scrutinizing the evidences available on the record in the background of aforesaid settled principle, it is evident that the evidence of PW-9, doctor who had examined all the three injured being referred by the police under Ext-3 series is there. Though nature of injuries have not been disclosed, but the mode of weapon used for causing such injuries have already been disclosed. Furthermore, the doctor had ruled out possibility of injuries bearing manufactured one. In likewise manner, during course of cross-examination of PW-10, the Investigating Officer, presence of Ext-3 series which happens to be injury report relating to respective injured addressed to Sadar hospital, Aurangabad has not been challenged. If this evidence is taken minutely, then in that event, presence of injury happens to be prior to presence of Braj Kishore at Jamhore Police Station as is evident from the cross-examination itself.



26. PW-10 has admitted that when Braj Kishore had come to register a case, he was arrested. Appellants have not cross-examined on this score, whether case was registered till then or was arrested without FIR. If such situation is allowed, then in that circumstance, the defence version is found ante-timed. In the aforesaid facts and circumstances, the assertion of defence that they sustained injury during cause of same occurrence is found shaky. Moreover, the injury suggested to be simple whereupon, prosecution is not found obligatory to explain the same. Moreover, the evidences have to be seen whether prosecution has been able to prove irrespective of defence version. Now coming to the evidence of the prosecution witness, in the background of evidence, PW-9, PW-10 when the evidence of these three injured witnesses that means to say, PWs-1, 4 and 6 have been minutely gone through, it is apparent that they are consistent over manner of occurrence as well as proper identification of the accused involved during course of occurrence. Some sort of inconsistency in their evidence is found completely wiped out in the background of the fact that whatever contradiction has been put to these witness, attention of PW-10 had not been drawn at the end of accused/appellant. That being so, there happens to be no occasion to doubt over the genuineness over the prosecution version, more particularly, considering the evidence of PWs-1, 4 and 6



corroborated by PW-9, the doctor and PW-10, the Investigating Officer.

27. In the aforesaid background, the submissions having been raised on behalf of appellants that no offence under Section 307 IPC is made out, is to be seen. There happens to be no intervening circumstance to prevent the appellant/accused persons during course of their activity. Though the injury over the person of PW-1 has been found simple but, he has sustained three injuries out of which one injury happens to be over the head while Kamla Prasad had sustained one injury over the head though it happens to be bone deep but opinion has been reserved and upto now, the same has not been exposed while Prabhat had sustained two injuries, one of which being on scalp. So far injured (PW 3) and Santosh (PW 8) are concerned, their absence not only at the initial stage but subsequently, also could be seen. That means to say, their presence create doubt though Doctor-PW-9 had also examined them.

28. In the aforesaid facts and circumstances of the case, the identification of accused persons for committing an offence punishable under Section 307/149 IPC is not at all found duly substantiated whereupon, the same is modified as under Section 323/149 IPC as well as under Section 147 IPC as they have been identified to be armed with iron rod.



29. In the aforesaid facts and circumstances along with considering age of the appellants, pending of litigation, both the appellants, namely, Braj Kishore Prasad and Anil Prasad are accordingly, directed to undergo RI for 1 year as well as to pay fine of Rs. 500/- and in default thereof, to undergo RI for 3 months additionally, under Section 323/149 IPC, directing each of them to undergo RI for 1 year with a fine of Rs. 1,000/- and in default thereof, to undergo RI for 6 months additionally, under Section 147 IPC, with a further direction to run the sentences concurrently, with a further direction that the period having undergone during course of trial will be set off in terms of Section 428 CrPC, will meet ends of justice.

30. Accordingly, this appeal is partly allowed. Appellants are on bail, hence their bail bonds are, hereby cancelled directing them to surrender before the learned lower court within four weeks to serve out remaining part of sentence failing which, the learned lower court will be at liberty to proceed against the appellants in accordance with law.

(Aditya Kumar Trivedi, J)

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