

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.24 of 2013

Arising Out of PS. Case No.-55 Year-2007 Thana- RAJAUN District- Banka

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1. Badri Choudhary S/o Late Budhu Choudhary Resident of Village- Dhouni, P.S- Rajoun, Distt- Banka.
 2. Rajendra Choudhary S/o Badri Choudhary Resident of Village- Dhouni, P.S- Rajoun, Distt- Banka.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Prabhakar Thakur (Amicus Curiae)
For the Respondent/s : Mr. Binod Bihari Singh (App)

CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date : 10-09-2018

Heard learned *Amicus Curiae* for the appellants
and learned APP for the State on this Criminal Appeal.

2. This criminal appeal has been preferred against the judgment and order of conviction and sentence dated 14.12.2012 passed by learned Adhoc Additional Sessions Judge-II, Banka in Sessions Trial no. 850 of 2008 arising out of Rajaun P.S. Case No. 55 of 2007 whereby the learned trial court convicted the accused persons namely, Rajendra Choudhary and Badri Choudhary for the offence punishable under Section 307/34 of the Indian Penal Code and sentenced them to undergo R.I. for two and half years and also



slapped them with a fine of Rs. 2000/- each and in default of payment of fine to further undergo S.I. for three months under the aforesaid Section.

3. The factual matrix of the case is that Rajaun P.S. Case No. 55 of 2007 was instituted under Sections 341, 323, 324, 307 and 504/34 of the Indian Penal Code against accused Shankar Kumar Choudhary, Rajendra Choudhary and Badri Choudhary on the basis of *fardbeyan* of Pritam Kumar S/o Kedar Prasad Modi recorded by A.S.I. R.P. Yadav of P.S. Rajaun on 23.03.2007 at 18:15 hrs. at PHC, Rajaun with the allegation, in succinct that on 23.03.2007 at around 06:15 PM, his father was vending betel sitting on his *gumti*, he was also standing there, in the meantime, Shankar Kumar Choudhary, Rajendra Choudhary and Badri Choudhary emerged there and Rajendra Choudhary made complain about not removal of the gumti by his father despite several requests and rapping expletives Rajendra Choudhary and Badri Choudhary gave order to Shankar Kumar Choudhary. In the meantime, Shankar Kumar Choudhary and Rajendra Choudhary dragged his father out of his gumti holding his hand, then Rajendra Choudhary gave order to Shankar Kumar Choudhary to assault, responding the same, abruptly, Shankar Kumar



Choudhary assaulted on the right chest and right jaw of his father by means of dagger inflicting bleeding injury there. Sustaining injury, his father fell senseless near the gumti. On making hulla by him, locals and villagers rushed there. Witnessing the arrival of locals there, Shankar Kumar Choudhary started escaping dumping the dagger there, who was apprehended by the aforesaid people along with dagger and handed over to the police, who had arrived at the place of occurrence. He rushed his father to the Rajaun hospital to accord him medical aid, where he is undergoing treatment.

4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet only against accused Shankar Kumar Choudhary.

5. On receiving the charge-sheet and the case diary and perusing the same, the learned Chief Judicial Magistrate took cognizance of the offence against the aforesaid three accused persons. As the accused Badri Choudhary and Rajendra Choudhary did not turn up before the court, hence, the case of the Shankar Kumar Choudhary was split-up and committed to the court of sessions. Subsequently, on appearance of the accused Badri Choudhari and Rajendra Choudhari, their case was also committed to the court of



sessions, and after commitment and on transfer finally the case came in *seisin* of the learned Adhoc Additional Sessions Judge-II, Banka for trial.

6. Charge against accused Rajendra Choudhary and Badri Choudhary was framed under Sections 341, 323, 324, 307/34 and 504 of the Indian Penal Code. Charge was read over and explained to the accused persons 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 nine prosecution witnesses namely, Subhash Mandal as PW-1, Dinesh Sharma as PW-2, Gautam Kumar Modi as PW-3, informant Pritam Kumar as PW-4, Shobha Devi as PW-5, victim Kedar Prasad Modi @ Kedar Modi as PW-6, Anandi Choudhary as PW-7 Khokha Chaudhary @ Khokha Prasad Chaudhary as PW-8 and Dr. Shatish Chandra Jha as PW-9. Out of the aforesaid witnesses, PWs-2, 7 and 8 turned hostile. In documentary evidence, the prosecution has filed and proved some documents in the case.

8. The 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. The accused persons have also filed and proved two documents in buttress of their case.

9. After hearing the parties and perusing the record, the learned trial court passed the impugned 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 the present Criminal Appeal.

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

12. It is submitted by learned *Amicus Curiae* for the appellants that there is no specific allegation against the appellants of assaulting the victim rather specific allegation of assaulting the victim by means of dagger is only against Shankar Kumar Choudhary. It is further submitted that there is vital contradiction between the prosecution case and the statement of the informant and the testimony of the witnesses regarding overt act allegedly committed by the appellants. It is further submitted that the fardbeyan of the informant was



recorded at PHC, Rajaun, but the informant has candidly and specifically stated that he has given statement at the Police Station and after giving statement he had rushed to the hospital. The aforesaid statement given by the informant at the Police Station happens to be his first information report, but the said first information report has not been brought on record by the prosecution which creates serious doubt about the prosecution case. It is further submitted that the I.O. of the case has not been examined by the prosecution and due to non-examination of the I.O., the contradiction between the statement of the victim as recorded before the police and before the I.O. under section 161 Cr.P.C. could not be corroborated causing great prejudice to the defence. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case against the appellants beyond all reasonable doubt by adducing trustworthy and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed against the appellants by the learned trial court is liable to be set aside and 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 the informant



has supported the prosecution case and the victim, who happens to be the injured witness has also supported the prosecution case. Besides them, the other witnesses have also supported the prosecution case and the ocular evidence stands corroborated by the medical evidence as well, and learned trial court correctly appreciating the facts and evidence on record has rightly passed the impugned judgment and order of conviction and sentence which is liable to be upheld and this appeal is shorn of merit and is liable to be dismissed.

14. From perusal of record, it appears that the aforesaid case was lodged on the basis of *fardbeyan* of the informant Pritam Kumar and the aforesaid *fardbeyan* of the informant was recorded on 23.03.2007 at 6:15 PM at PHC Rajaun i.e. barely 15 minutes later to the occurrence. But from perusal of the testimony of the informant PW-4 as given by him in paragraphs 5, 6 and 8 of his cross-examination, it appears that the informant has stated that he had met the police at the Police Station. He had given statement to the police at the Police Station. He had given statement only once. After giving statement, he had rushed to the hospital. Police had read over his statement to him which he had given at the Police Station. The aforesaid statement of the informant



eloquently indicates that his statement was recorded at the Police Station and after giving statement at the Police Station, he had rushed to the hospital. He has not stated about recording his statement at the hospital. Hence, the aforesaid statement of the informant recorded in the hospital is shrouded with the serious doubt. Moreover, the aforesaid statement of the informant which was recorded at the Police Station which happens to be the first information report has not been brought on record which creates serious doubt about the prosecution case. Moreover, as per account of the informant, he has given statement to the police only once at the police station and has not stated about giving statement at PHC Rajaun, then million dollar question arises as to from where alleged statement allegedly recorded at PHC Rajaun came. The aforesaid aspect of the case creates serious doubt about existence and sanctity of said statement and statement of witnesses and prosecution case based on said statement also comes under the periphery of grave doubt and does not appear to be reliable and worth credence.

15. PW-6 Kedar Prasad Modi @ Kedar Modi though has stated in his examination-in-chief that at the time of occurrence while he was sitting at his betel shop and his son



was also there, Shankar Kumar Choudhary, Badri Choudhary, and Rajendra Choudhari descended there and Shankar Kumar Choudhary made complain about not removal of the gumti, then Badri Choudhary and Rajendra Choudhary slating him gave order to assault. Responding the same, Shankar Kumar Choudhary assaulted on his right chest and right cheek inflicting bleeding injury, but in quite contradiction to the aforesaid statement as given by the said witness before the court, he has stated before the IO under Section 161 Cr.P.C. that at the time of occurrence Shankar Kumar Choudhary alone arrived at his betel shop and demanded betel from him. When he accorded betel to him and demanded Rs. 1.50/- from him as the cost of betel, Shankar Kumar Choudhary got infuriated and uttering how he could dare to demand money from him, he did not know that he had returned from the mental asylum one week back having certificate of insane and making hulla, he took out dagger from his waist and assaulted on his jaw and chest by means of dagger and then made good his escape. The aforesaid contradiction between his statement given before the court and that given before the I.O. under Section 161 Cr.P.C. has been taken by the defence in paragraph 9 of his cross-examination. But I.O. of the case has



not been examined by the prosecution to corroborate the aforesaid contradiction.

16. 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 & 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 & 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 statements of P.W-6, as recorded before the Court and that given before the I.O. under Section 161 Cr.P.C. regarding manner of occurrence, the testimonies of the said witness given before the Court do not inspire my confidence to hold the conviction of the appellants relying upon the same and said witness does not appear to be worth credence and reliable as he appears to have taken altogether different stands before the court.

17. Though PW-1 Subhash Mandal, who is having shop in mohalla Rajaun has made an abortive bid to support the prosecution case by giving statement before the court, but he does not happen to be eye witness of the occurrence. As in paragraph 2 of his cross-examination he has stated that he had arrived at the place of occurrence in 5 minutes responding the hulla and found Shankar Kumar



Choudhary there while others had decamped. The aforesaid statement of the PW-1 indicates that he had arrived at the place of occurrence after culmination of the occurrence and departure of the appellants from the place of occurrence and has not witnessed any overt act allegedly committed by the appellants in the occurrence.

18. PW-3 Gautam Kumar Modi, who happens to be son of the victim has stated in his examination-in-chief that at the time of occurrence, he was at his house and was cutting areca nut. He arrived at the shop responding hulla and witnessed Rajendra Choudhary and Badri Choudhary slating his father and asking him to remove the gumti from the place. Rajendra Choudhary dragged his father out of the gumti holding his hand and Badri Choudhary gave order to Shankar Kumar Choudhary to assault his father. Then Shankar Choudhary assaulted his father by means of dagger. The aforesaid statement of PW-3 happens to be in quite contradiction to the prosecution case. As as per the prosecution case, it is only Rajendra Choudhary, who asked the victim to remove the gumti from the aforesaid place and both Shankar Kumar Choudhary and Rajendra Choudhary dragged his father out of his gumti and it is only on the order



of Rajendra Choudhary, Shankar Kumar Choudhary assaulted his father by means of dagger. The aforesaid contradiction between the prosecution case and the statement of the witness indicates that the said witness had not witnessed the occurrence of rapping expletives by the appellants to his father, dragging his father out of his shop and giving order to Shankar Kumar Choudhary for assaulting his father.

19. PW-4 Pritam Kumar, who happens to be the informant of the case though has claimed himself to be present at the place of occurrence at the time of occurrence, but PW-1, PW-3 and PW-5 have not corroborated the presence of the PW-4 at the place of occurrence at the time of occurrence. In his examination-in-chief, he has also given statement in quite contradiction to the prosecution case. As as per the prosecution case, both Shankar Choudhary and Rajendra Choudhary dragged the victim out of his shop, but said witness has stated that it is Rajendra Choudhary, who dragged his father from his shop. His statement also appears to be shrouded with serious doubt in view of the recording his alleged *fardbeyan* at PHC, Rajaun while as per the account of said witness, he had given only one statement before the Police at the Police Station and after giving statement, he had



rushed to the hospital. He has not whispered about giving any statement to the police at PHC, Rajaun.

20. PW-5 Shobha Devi, who happens to be the wife of the victim also does not happen to be eye witness of the occurrence as though in her examination-in-chief she has made an abortive bid to support the prosecution case, but in paragraph 4 of her cross-examination, she has stated that when she stepped out her house responding the hulla, she witnessed her husband injured. The police had apprehended Shankar Kumar Choudhary along with dagger before her and by that time, Badri Choudhary and Rajendra Choudhary had made good their escape. The aforesaid statement of PW-5 indicates that she had arrived at the place of occurrence after culmination of the occurrence and had not witnessed about rapping expletives by the appellants, dragging the victim out of the shop by them and giving order to Shankar Kumar Choudhary for assault rather had simply seen her husband injured and apprehension of the accused Shankar Kumar Choudhary along with dagger before her. The appellants had left the scene by that time.

21. Though, the Doctor PW-9 has found incised wound on the right side of the upper chest on pectoral region



and incised wound on the right side of the face (cheek) of the victim and the aforesaid injury has been opined by the Doctor as simple in nature caused by sharp cutting weapon. But the allegation of assaulting the victim by means of dagger is not against the appellants rather against the accused Shankar Kumar Choudhary and in view of the aforesaid contradiction between the prosecution case and the statement of the witnesses and lack of reliable independent witness of the occurrence, not bringing on record the statement of informant recorded at the P.S. the aforesaid medical evidence has no potential to substantiate the prosecution case against the appellants.

22. In the aforesaid facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to bring home the charge levelled against the appellants and their complicity in the occurrence beyond all reasonable doubts by adducing convincing, cogent, consistent and worth credence ocular and documentary evidence. Hence, the impugned judgment and order of conviction and sentence passed by learned trial court is set aside and the appellants are acquitted of the charge levelled against them. As the appellants are on bail, they are discharged from the liability of



the bail bonds. Accordingly, this Criminal Appeal is allowed.

23. Let a copy of the first and last page of this judgment be handed over to the learned *amicus curiae* Mr. Prabhakr Thakur and learned *amicus curiae* be paid prescribed fee by the Patna High Court Legal Services Committee.

(Prakash Chandra Jaiswal, J)

rohit/-

AFR/NAFR	AFR
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