

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.173 of 2009

PRABHU CHAUDHARY son of Late Ram Das Chaudhary, R/O Village-
Chausa Bazar(Mallah Toli), PS-Buxar (M), Distt-Buxar. Appellant/s
Versus

THE STATE OF BIHAR Respondent/s

with
Criminal Appeal (SJ) No. 196 of 2009

1. DURGA CHOUDHARY son of Jakhu Choudhary,
2. Ramayan Chaudhary son of Sri Kishun Choudhary,
3. Baban Choudhary son of Tulsi Choudhary, all residents of Village-Chausa
Bazar, PS-Buxar (M) Distt-Buxar. Appellant/s

Versus

STATE OF BIHAR Respondent/s

Appearance :

(In Criminal Appeal (SJ) No. 173 of 2009)

For the Appellant/s : Mr. Yogendra Kumar,
Mr. Ram Naresh Roy,
Dr. M.K. Gautam, Advocates

For the Respondent/s : Mr. Binod Kr.(APP)

(In Criminal Appeal (SJ) No. 196 of 2009)

For the Appellant/s : Mr. Baban Roy, Amicus Curiae

For the Respondent/s : Mr. Parmeshwar Mehta. (APP)

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

07-12-2018

Cr. Appeal No. 173/2009 wherein Prabhu Chaudhary

is the appellant and Cr. Appeal No. 196/2009 wherein Durga Choudhary, Ramayan Chaudhary, Baban Choudhary are the appellants, as arise out from common judgment of conviction dated 06.02.2009, order of sentence dated 10.02.2009 passed by Additional Sessions Judge-FTC-1st, Buxar in Sessions Trial No. 63/2007 whereby and whereunder, appellant, Baban Choudhary has been found guilty for an offence punishable under Section 307 IPC and sentenced to undergo RI for 7 years, remaining



under Section 307/34 IPC and sentenced to undergo RI for 7 years, appellants, Durga Choudhary and Ramayan Choudhary have further been found guilty for an offence punishable under Section 379 IPC and sentenced to undergo RI for one year with a further direction to run the sentences concurrently, on account thereof, have been heard together and are being decided by a common judgment.

2. In Cr. Appeal No. 173/2009, learned counsel for the appellant is present but due to non appearance of counsel on behalf of appellants of Cr. Appeal No. 196/2009, Sri Baban Roy, learned Advocate, who is present in the Court, has been requested to assist as an Amicus Curiae.

3. On 22.09.2006 while informant/injured, Subhash Choudhary (PW-4) was admitted at Sub-Divisional Hospital, Buxar, gave his Fardbeyan at about 2.35 AM disclosing therein that today i.e. on 20.09.2006 (wrongly mentioned), after sale of fish at Nayi Bazar, Buxar returned to Chausa by DMU train and from there he proceeded towards his house and as soon as reached near a culvert over a canal having torch in his hand, has seen in torch light, his co-villagers, Prabhu Chaudhary son of Late Ram Das Chaudhary, Durga Choudhary son of Jakhu Choudhary, Ramayan Chaudhary son of Sri Kishun Choudhary



and Baban Choudhary son of Tulsi Choudhary having been armed with Katta who besieged him. Thereafter, Prabhu Choudhary assaulted him with fist. Durga snatched away torch and on the order of Ramayan, Baban shot at causing injury over his right thigh. During midst thereof, Ramayan Choudhary took away Rs. 940/-. On hearing sound of alarm, Ram Narayan Pal, Jagdish Singh and Ram Kripal Yadav came and lifted him to Dera of Ram Kripal Yadav and from there, to Chausa Bazar and then, he was taken to Buxar Sadar Hospital where he was undergoing treatment.

4. Buxar (M) PS Case No. 125/2006 was registered followed with an investigation as well as submission of charge-sheet, facilitating the trial, meeting with ultimate result, the subject matter of these appeals.

5. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC if of complete denial. It has further been pleaded that informant might have sustained injuries in different manner by different persons but on account of prevailing animosity, got the appellants involved with false and frivolous allegations. Furthermore, documentary evidences have also been adduced in support thereto.



6. The prosecution, in order to substantiate its case, has examined altogether eleven PWs who are PW-1, Ram Kripal Yadav, PW-2, Ram Narayan Pal, PW-3, Munna Choudhary, PW-4, Subhash Choudhary, PW-5, Achchhe Lal Choudhary, PW-6, Kanhaiya Choudhary, PW-7, Kali Charan Yadav, PW-8, Rajdeo Ram, PW-9, Dr. Bhupendra Nath, PW-10, Jagdish Yadav and PW-11, Ashok Kumar Singh, as well as has also exhibited Ext-1, signature over Fard-e-beyan of attesting witnesses, Ext-2, injury report, Ext-2/A, X-ray, Ext-3, order dated 29.10.2007 passed in connection with Complaining Case No. 736C/1999, Ext-4, order dated 31.07.1995 passed in connection with G.R. No. 1529/1991. Though no oral evidence has been adduced at the end of defence but, Ext-A, Judgment of Sessions Trial No. 267/2005/50/2005, Ext-A/1, Sessions Trial No. 242/2008, Ext-B, Certified copy of complaint case no. 642C/2006, Ext-B/1, certified of complaint case no. 330C/2001, have been exhibited.

7. Learned Amicus Curiae as well as learned counsel for the appellants have submitted that case of the prosecution suffers from inherent defect in the background of the fact that in the Fard-beyan, the date of occurrence has been disclosed as 20.09.2006 while in the formal FIR at column no.3, it has been shown as 21.09.2006. The matter got worsen when initially



charge was framed with regard to an occurrence having been committed on 22.09.2006 but, the same was amended vide order dated 15.09.2008 and it has been shown as 20.09.2006. The aforesaid controversy has rightly been persisting in the present litigation as, the informant had sustained injuries at some other place in different manner by different person but, in the background of persisting animosity which the informant PW-4 along with his brother Munna Choudhary PW-3, have categorically admitted, maneuvered the same by concealing the truth and in the aforesaid background, it was incumbent upon the prosecution to have properly explained the same by cogent, reliable evidence. Had there been fairness at the end of prosecution, at least bedhead ticket relating to the informant would have been exhibited to show on which date he was admitted at Sadar Hospital, Buxar. In its continuity, it has also been submitted that for want of examination of main I.O. though, PW-8 and PW-11, the part I.O. have been examined, the controversy remained wrapped and that being so, their evidences became worthless, side by side, due to non examination of main I.O. has caused serious prejudice to the appellants. It has also been pleaded that as the witnesses are found inconsistent over proper identification of real place of



occurrence, as well as material presence of real development in their evidence, which are found duly good on account of non examination of main I.O causing severe prejudic, whereupon whole case is liable to be brushed aside.

8. Now coming to other aspect, it has been submitted that informant was knowing since before that appellants/accused were inimical. He had admitted that when he flashed torch, seen the accused at considerable distance having been armed with pistol. That being so, natural conduct would have been to save his life and for that, he would have escaped therefrom or to have raised voice for his safety. Then it has been submitted that when his evidence is taken after proper filtration, it is apparent that it is full of improbability and that being so, irrespective of nature of injury, did not implicate these appellants as an author thereof, and that being so, the judgment of conviction and sentence recorded by the learned lower court could not sustain.

9. On the other hand, learned APP while supporting the findings recorded by the learned lower court has submitted that from the evidence of PW-4, informant, it is apparent that he stood the test firmly, fairly, confidently and happens to be consistent identifying the appellants to be the culprits who were



responsible for causing fire arm injury as well as snatching away cash and is found duly corroborated by the doctor, PW-9. Consequent thereupon, the finding recorded by the learned lower court is fit to be affirmed.

10. Before coming to deal with the evidence available on the record so produced on behalf of both the parties, it is manifest that Pws-1, 6, 7 have gone *volte face* to the prosecution whereupon, were declared hostile. PW-5 is the FIR attesting witness, would be posed to that extent only whereupon could be stamped as formal witness. Pws-8 and 11 are the part I.Os. Who have not done any major part of investigation and so, they could also be said to be formal in nature.

11. PW-10 had stated that on the alleged date and time of occurrence, he was irrigating field and during course thereof, he heard sound of alarm whereupon rushed and found Subhash in an injured condition who was lifted therefrom without having discloser with regard to proper identification of the accused and so, he simply corroborated the incidence. That being so, the evidence rests upon the evidences of Pws-2, 3 and 4 along with PW-9.

12. PW-9 had examined the informant, Subhash on 22.09.2006 at about 12.45 AM and found the following:-



1. Lacerated bleeding wound with margin inverted and blackening over margin present, size oval shaped about 1/2" x 1/2" over medial aspect of right thigh in middle.

2. Lacerated bleeding wound with everted margin over lateral aspect of right thigh in middle about 3" x 1".

Both the injuries were communicating to each other, caused by fire arms, age of injury within 6 hours. As per X-ray report, both the injuries have been found to be simple in nature.

13. During cross-examination, it is evident that on the score of blackening around the margin of the injury, he was questioned regarding the distance from which assailant might have fired which he declined to explain but, as per Modi when there happens to be small fire arm, it could be within 2 Ft to 4 Ft.

14. Now coming to the oral evidence, first of all the evidence of PW-4, informant/injured has to be seen. The fundamental rule applicable over appreciation of evidences of an injured is concerned, it has consistently been held that presence of injury suggests presence of the witness at the place of occurrence so alleged and that being so, happens to be a natural witness who could be relied upon unless and until there happens to be other circumstances in between. In *Chandrasekar*



and another vs. State of Tamil Nadu reported in 2017(4)

P.L.J.R. 220 (SC), it has been held:-

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

15. Reverting back to the evidence of PW-4, he in his examination-in-chief has stated that on the alleged date and time of occurrence, he was going to his house after getting down at Chousa Station from DMU train after sale of fish. When he reached near culvert over canal, he had seen four persons in torch light whom he identified as Ramayan, Prabhu, Durga, Baban out of whom Baban was armed with Katta. When he reached near them, they encircled him. First of all, Prabhu assaulted him with fist over his head. As a result of which, his bucket fell down. Durga snatched away his torch. Ramayan induced to kill whereupon Baban fired from Katta causing injury over his right thigh. Ramayan took out Rs. 940/-. He fell down. Ram Naryan Pal who was following him raised alarm



attracting Jagdish Paswan, Ram Kripal and his son who lifted him over cot to Chausa Bazar where his brother Munna met and then Achchhelal, Kanhaiya along with his brother took him to Sadar Hospital Buxar on a tempo. Police came and recorded his Fard-beyan(exhibited), identified the accused. During cross-examination at para-3, he has stated that while returning from market, he was carrying bucket, weighing tools, torch. He got down at Chausa Station and then proceeded alone. It was winter season. He was not carrying blanket. He had not instructed any of his family member to be present at Chausa Station as, he will return at 10:00 PM. At para-4, he had stated that his village lies 2 KM away from Chause at the bank of river Ganges. In para-5, he had stated that he used to come at that very time after sale of fish. He had further stated that when he flashed torch, he had seen the accused persons at a distance of 20 hands. He had also seen Katta. Even then, he had not tried to flee therefrom nor raised alarm. He raised alarm after sustaining of fire arm injury. Firing was made from a distance of five hands. After sustaining injury he fell down. At that very time, he was conscious. Accused persons took out money and then proceeded towards eastern side. In para-6, he had shown boundary of the P.O., North-road, South-road, East-West- Canal. On hue and cry, Ram



Narayan Pal came. On alarm raised by Ram Narayan Pal, Jagdish Paswan and Ram Kripal and son of Ram Kripal came. Then others came. In para-8, he has been cross-examined over his parentage. Then has disclosed that his father had got alias name as Nagina Choudhary as well as Raghunath Choudhary. Then at para-9, he has stated that when he was shot at, at that very time, he was having western front while assailant had northern front. At para-10, he has admitted that Ramayan Choudhary happens to be brother of Lal Choudhary who had instituted a criminal case resulting Sessions Trial No. 242/2001 wherein they were found guilty but let off on bond. Jokhu Choudhary who happens to be father of Durga Choudhary had instituted a case against his sons, Dadan and Murli resulting Sessions Trial No. 267/2005 wherein Tulsi Choudhary, father of Baban had deposed against him. He denied the suggestion that in the aforesaid background, he got all of them implicated in this case levelling false and frivolous allegation.

16. PW-3 is his brother who has stated that on the alleged date and time of occurrence, he was at Chausa Bazar. He had seen Ram Narayan Pal, Ram Kripal, Jagdish and Israr Nat and son of Ram Kripal carrying his brother in an injured condition having fire arm injury over his thigh whereupon, he



along with Kanhaiya, Achchhelal, took Subhash to Sadar Hospital, Buxar where he was treated. He has further stated that upto Chausa Bazar, his brother was conscious and then thereafter, he became unconscious. Then has stated that he regained sense at Miswalia temple and then disclosed that while he was proceeding ahead towards his house coming after selling fish at the market, after getting down from the train, he was shot at by Ramayan, Prabhu, Baban and Durga near culvert, as well as they also snatched away Rs. 940/-. He has not claimed identification of the accused during course of examination-in-chief. In para-4, he had stated that at that very time, he was going towards his house after screening Ramleela. He met with his brother in the market itself. In para-5, he has stated that he had not talked with his brother at the market. They took him to hospital over a tempo. In para-6, he has stated that he had seen the injured. He has further stated that his brother was conscious at the hospital. At para-8, there happens to be material contradiction. In para-9 and 10, he has admitted presence of a case at the instance of family members of the accused persons.

17. PW-2 is Ram Narayan Pal who has stated that on the alleged date and time of occurrence, he had gone to Buxar to the place of his relative and was returning therefrom by DMU.



He got down at Chausa and then proceeded towards his house. During course thereof, he heard sound of firing coming from culvert of the canal. He became afraid of. Then he saw Ramayan, Prabhu, Durga and Baban running. After proceeding ahead, he saw Subhash lying in an injured condition. Blood was oozing out from his injury. He raised alarm attracting Jagdish and Ram Kripal and then they all lifted Subhash over a cot to his house. Identified the accused. During cross-examination at para-2, he has admitted that Subhash and accused persons are on strained relationship. In para-3, he has stated that it was a winter season. From station, he had not joined Subhash rather he was following him. At the time of hearing of firing sound, he was nearly 1 and a ½ bamboo away from him (south). At that very time, they were alone. In para-4, he has stated that after hearing firing sound, he became afraid of. But he had not run therefrom. When he reached near Subhash, at that very time, accused persons were ½ bamboo (East) to him and were running. On his alarm within 10-15 minutes, people arrived. Then they lifted Subhash. In para-6, he has stated that Subhash was taken to his house where his brother Munna and Achchhelal came. At that very time, Subhash was unconscious. In para-7, there happens to be material contradiction. He has further admitted that he was a



witness on behalf of Subhash in another case having been instituted against Bharat Choudhary and Mohan Chaudhary. Then has denied the suggestion that he happens to be one of the members of coterie of the prosecution party whereupon, has falsely deposed.

18. Furthermore, apart from admission at the end of the witnesses as stated hereinabove, in order to substantiate the same, relevant judgments along with certified copy of relevant complaint petition have also been exhibited over which, the prosecution party has not raised objection. From the evidence available on the record, it is crystal clear that both the parties are co-villagers. It is also an admitted fact that since before they are litigating. There happens to be also an admission at the end of the prosecution that in case of having been launched at the end appellant/accused, they have been punished. In the aforesaid background, one has to see who would be the aggrieved party.

19. Be that as it may, when both the parties were co-villagers then, even in absence of torch light, there would not have been any kind of difficulty in having proper identification of each other, more particularly, when they both grappled, as informant claimed that he was assaulted with fists and further, having blackening margin also suggests that firing was made



from close range, but once it has been introduced, its reliability has to be tested.

20. PW-2, Ram Narayan Pal who claimed to have followed PW-4, injured Subhash and was following him at a distance of one and half bamboo had not stated that informant had flashed torch light during midst of way nor he said that on account of fog, he was unable to see. He had also not claimed to be in possession of torch light and further, there happens to be discloser at his end that when he reached near Subhash, accused persons were fleeing towards eastern side and the distance in between them was of $\frac{1}{2}$ bamboo. He had seen them from behind. So, proper identification was possible. Then coming to next stage, PW-3 had not stated that Ram Narayan Pal, PW-2 along with others have disclosed regarding assailant but at Chausa Bazar had disclosed with regard to assailant. He had stated that his brother Subhash who was unconscious at that very moment disclosed at Misrauli Temple after regaining sense that all the four besieged him out of whom Prabhu assaulted him with fists and on an order of Ramayan, Baban shot at while Durga took away Rs. 940/- is not at all found corroborated at the end of PW-4, the informant.

21. As has been referred, there happens to be



material contraction in the evidences of Pws-2, 3 and 4 and due to non examination of the I.O. the same has not legally been brought up on record and in likewise manner, the objective finding regarding place of occurrence, the actual place of occurrence could not properly be surfaced.

22. Enmity is a double edged sword. It could be a cause of false implication, it may be a motive of commission of an offence. As required under Section 134 of the Evidence Act, the evidence of a single witness, if found trustworthy could be the basis for conviction. From the evidence available on the record, as discussed above, it is evident that PW-4 had sustained fire arm injury as found by the doctor, PW-9 but, circumstances whereunder all the Pws projected themselves coupled with the deficiency persisting in the prosecution case which on account of non examination of I.O., the appellants have been deprived of an opportunity to cross-examine and further, as is evident from the record, there happens to be controversy with regard to actual date of occurrence, more particularly, when after examination of the witnesses, charge has been amended relating to the date of occurrence to be of 20th September 2006, did not justify the judgment impugned whereupon, the same is set aside. Appeal is allowed.



23. Since appellants are on bail, they are discharged from the liabilities of bail bond.

24. The first and last pages of the instant judgment be handed over to the learned Amicus Curiae.

(Aditya Kumar Trivedi, J)

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