

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.186 of 2015

Arising Out of PS.Case No. -70 Year- 1995 Thana -MUZAFFARPUR SADAR District-
MUZAFFARPUR

Dashrath Rai, son of Late Ram Baran Rai, resident of village- Shadha Dumber, Police Station- Motipur, District- Muzaffarpur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur-Advocate
Mr. Sanjay Kumar @ S.K.-Advocate

For the Respondent/s : Mr. Sujit Kumar Singh-A.P.P.

For the Informant : Mr. Jai Prakash Verma-Advocate

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 25-01-2018

Appellant Dashrath Rai has been found guilty for an offence punishable under Section 307 of the I.P.C. and sentenced to undergo R.I. for 10 years, under Section 27 of the Arms Act and sentenced to undergo R.I. for 03 years with a further direction to run the sentences concurrently vide judgment of conviction dated 09.03.2015 and order of sentence dated 13.03.2015 passed by the Sessions Judge, Muzaffarpur in Sessions Trial No.580 of 2009.

2. Before coming to merit of the case, it looks pertinent to have detailed elaboration of the facts relating to the appellant. Though appellant happens to be named in the fard-bayan, but after concluding investigation, he was not sent up for trial. The other co-accused, who were sent for trial, had faced Sessions Trial No.167 of 1998 and on the day of judgment, the appellant has been summoned to



face trial invoking privilege allowed under Section 319 of the Cr.P.C., whereupon, after appearance of the appellant, the trial commenced independently bearing S.T. No.580 of 2009, meeting with the ultimate result, the subject matter of instant appeal.

3. The case of the prosecution as is evident from the fard-bayan (Exhibit-2) of informant Hari Nandan Roy (PW-6) recorded on 26.05.1995 at 1.00 p.m. while he was admitted at emergency ward of Sadar Hospital, Muzaffarpur, disclosing therein that while he was on duty at Health Sub-centre, Khabra on the same day at about 12.15 p.m., Chandeshwar Sah, Durga Sah, Anil Kumar, Dashrath Rai (appellant), Harendra Rai and Vishwanath Rai came over two motorcycle. After getting down from the motorcycle, came near him. Chandeshwar Sah and Durga Sah told that you are causing hindrance relating to a land dispute on account thereof, he is to be murdered. Then thereafter, they ordered Dashrath Rai to kill whereupon, Dashrath Rai took out pistol and shot at causing injury over his chest. He fell down raising an alarm. Then Vishwanath Rai disclosed that now, he is dead, so they should leave the place and subsequently thereof, all of them left. His colleague Saraswati Devi came and raised alarm over which her son along with others came and lifted him to Sadar Hospital where he was undergoing treatment. The motive for the occurrence has been shown as land dispute with Chandeshwar Sah



and Durga Sah and for that, case is going on at the Munsif Court. There also happens to be land dispute with Dashrath Rai.

4. After registration of Muzaffarpur Sadar P.S. Case No.70 of 1995, investigation commenced and concluded in a manner as indicated hereinabove exonerating the appellant, who later on summoned to face trial as per Section 319 Cr.P.C.

5. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has also been pleaded that no such type of occurrence had ever taken place rather the informant taking advantageous position of being employed under Health Department, influenced and got a collusive injury report on the basis of which, launched this case with false and frivolous allegation. However, neither ocular nor documentary evidence has been adduced on his behalf.

6. In order to substantiate its case altogether six PWs have been examined, who are PW-1 Raj Kumar Mahto, PW-2 Pradeep Kumar Thakur, PW-3 Uma Lal Thakur, PW-4 Tiradas @ Hiradas, PW-5 Dr. Dhirendra Prasad Singh and PW-6 Harinandan Rai. Side by side, had also exhibited the documents viz. Exhibit-1, injury report, Exhibit-2, signature of informant over fard-bayan,



Exhibit-3, certified copy of formal F.I.R. of Muzaffarpur Rail P.S. Case No.76 of 1997, Exhibit-4, certified copy of chargesheet of Muzaffarpur Rail P.S. Case No.76 of 1997. As stated above, nothing has been adduced on behalf of defence.

7. The learned counsel for the appellant while challenging the judgment impugned has submitted that learned lower Court had not considered the deficiency persisting on the record and passed the impugned judgment in mechanical manner. To justify the same, it has been submitted that as rest witnesses have gone volte face to the prosecution, presence of two witnesses that means to say, PW-5, doctor as well as PW-6 the informant remained in support of prosecution case. If the evidences of these two witnesses are taken in its corollary, then in that circumstance, the judgment impugned would not survive.

8. To justify the same, it has been submitted that admittedly injury report has not been issued on the day on which, the informant was examined. PW-5 was cross-examined on that very score, but the evasive answer having at his end is found sufficient to expose his conduct inspiring a situation having been influenced at the end of the informant being the person of his Department. That being so, the injury report has become doubtful as well as unreliable. Apart



from this, it has also been submitted that when the evidence of the informant is properly scrutinized, then in that event, it is apparent that the same happens to be sufficient to undo the prosecution version, because of the fact that neither the manner of occurrence has been substantiated nor the place of occurrence. On the other hand, the prevailing animosity amongst the parties, which informant tried at an earlier occasion to wrap is found properly exposed suggesting the illegal activity of the informant itself and only to coerce the appellant to give up their rightful claim, this false case has been instituted. Apart from this, it has also been submitted that on account of non-examination of the I.O., appellant has been prejudiced, more particularly in the background of the fact that after concluding investigation, he was not put on trial. Therefore, considering the totality of the event, appellant is to be acquitted by way of setting aside the judgment impugned.

9. On the other hand, learned Additional Public Prosecutor controverting the submission having made on behalf of appellant has submitted that the evidence on the record is to be seen, because of the fact that same happens to be the substantial evidence. From the evidence of PW-6, it is evident that there happens to be absence of exaggeration or contradiction and in likewise manner, the P.O. has also not been challenged and that being so, non-examination



of the I.O. would not be prejudicial to the interest of the appellant. Now, coming to the evidence of PW-5, the doctor, it has been submitted that no cross-examination was made on behalf of appellant with regard to cause of delay in issuance of injury report rather he was cross-examined on different footing and for that, doctor had properly explained. Therefore, prosecution has succeeded in substantiating its case, whereupon the finding of the learned lower Court is fit to be confirmed.

10. It is evident from the L.C. Record that PW-2, PW-3 and PW-4 have not supported the case of the prosecution and that being so, they were declared hostile. So far PW-1 is concerned, though he was also declared hostile, but he had confirmed that Harinandan Rai was shot at in his village and during cross-examination on behalf of appellant itself, he had stated that his house lies 20-25 lagga away from the P.O. This part of cross-examination seems to be an admission at the end of the appellant regarding commission of the occurrence at the P.O. It is sound principle of law that the evidence of hostile witness supporting the case of the prosecution is to be accepted as has been held by the Supreme Court in *Bhajju alias Karan Singh v. State of M.P. reported in A.I.R. 2012 SC (Supp) 792*, it has been held:-



“19. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the appellant/accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under [Section 161](#) of the Cr.P.C., the prosecutor, with the permission of the Court, can pray to the Court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the Court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness in so far as it supports the case of the prosecution. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. [Section 154](#) of the Act enables the Court, in its discretion, to permit the



person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases :

- a. [Koli Lakhmanbhai Chanabhai v. State of Gujarat](#)
(1999) 8 SCC 624
- b. [Prithi v. State of Haryana](#)
(2010) 8 SCC 536
- c. [Sidhartha Vashisht @ Manu Sharma v. State \(NCT of Delhi\)](#)
(2010) 6 SCC 1
- d. [Ramkrushna v. State of Maharashtra](#)
(2007) 13 SCC 525.”

11. Now, coming to another evidence that is of the



informant (PW-6), who during course of examination-in-chief had deposed that on 26.05.1995 at about 12.15 p.m., he was present at Sub Public Health Centre at Khabra. While he was discharged his official duty, six persons on two motorcycle came whom he identified as Durga Sah, Chandeshwar Sah, Dashrath Rai, Vishwanath Rai, Harendra Rai and Anil Kumar. Out of them, Durga Sah, Chandeshwar Sah, Vishwanath Rai and Anil Kumar are resident of Motipur while Dashrath Rai and Harendra Rai are the resident of Sara Dambar Gurraha. Out of them, Chandeshwar disclosed that he has indulged in a dispute with him concerning land, so he will be murdered, thereafter Durga Sah and Chandeshwar Rai ordered to commit murder whereupon Dashrath Rai took out pistol and shot at him causing injury over her chest, right side. He fell down raising an alarm. Vishwanath Rai disclosed that now, he is dead, so we should leave the place. Thereafter, they all have gone. Soon after the occurrence Saraswati Devi, who happens to be his colleague and her son Pawan Kumar along with local people came and lifted him to Sadar Hospital on a rickshaw during midst thereof, at Kalambagh Chowk, they met with police, who took him to Sadar Hospital on police jeep. It has also been disclosed that in between his Fua (father's sister) and Durga Sah, Chandeshwar Sah, there happens to be land dispute since 1992. In 1995, Dashrath Rai had purchased the aforesaid land, because of the



fact that he used to support his Fua on account thereof, they have attempted upon to kill him. He had further stated that in the Hospital, police came recorded his fard-bayan, read over to him, whereupon he put his signature (Exhibited). He was then referred to P.M.C.H. for better treatment, identified the accused in dock. During cross-examination at Para-7, he had stated that his house lies 3-4 kilometer away from the house of Dashrath Rai. In Para-8, he had disclosed name of his Fua as Pauri Devi, who had instituted a Title Suit against Durga Sah and Chandeshwar Sah. He was supporting her. His Fua Pauri Devi is no more, his another Fua Ratia Devi is also dead. His grandfather had purchased the land in name of Pauri Devi. Then had denied the suggestion that these lands happen to be Khatiyani land of Chandeshwar Sah and Durga Sah. He had further stated that he had instituted a Bataidari case against Chandeshwar Sah and Durga Sah. He had disclosed the detail of disputed plot as Khata No.83, Khesra No.384, area one acre, eight decimals. He had further stated that during course of proceeding of Title Suit, Dashrath Rai had purchased the land from Chandeshwar Sah and Durga Sah about three months prior to the date of occurrence. In Para-9, he had stated that his house lies 30 kilometer away from the P.O. He used to travel by train. He had further stated that no attempt was ever made at an earliest at the end of accused. In Para-10, he had stated that doctor used to visit at



the Sub Centre twice in a week. He had further stated that the school lies at a distance of 30 feet from the Centre. There happens to be no boundary. The centre is running in two rooms and a verandah, which is properly grilled. It has got Western front. National Highway lies at Southern side, school lies in Eastern side and then, there happens to be house of Uma Thakur and others. In Para-11, he had stated that at the time of occurrence, he was at the verandah of the centre. He was alone. He had seen the accused persons coming. He became afraid of, but had not gone inside the room, even at the time when Durga Sah had directed to kill. He remained sitting. Even seeing taking out pistol, he had not tried to flee as where he could have. In Para-12, he had stated that he was shot at from a distance of 15 feet. He remained in sense for about five minutes only then thereafter, he became unconscious. For a while, he regained sense at Kalambagh Chowk. He was taken on rickshaw and thereafter, on police jeep. At that very time, police had not interrogated him. Just after arrival at the hospital, treatment begin and on the same day at about 4.00 p.m., he was referred to P.M.C.H. where he remained for 18 days. The slip issued by the Sadar Hospital, Muzaffarpur was the basis for admission at P.M.C.H. He is not knowing when injury report was issued by the doctor. Then had denied the suggestion as given under Para-13 that he had not sustained firearm injury and after getting a collusive injury



report, got this case filed on account of prevailing animosity.

12. PW-5 is the doctor, who had examined the injured/
PW-6 on 26.05.1995 and found the following:-

1) Charring over right side of chest 2 ½" in circle.

*Wound of entry over charred area ½" x ½". Type of
weapon-firearm injury.*

2) Nature of injury-grievous.

*3) Time of examination from causing of injury-
within six hours.*

During cross-examination at Para-5, he had stated that in 2003, he was transferred from Sadar Hospital, Muzaffarpur, but again been reposted there. In Para-6, he had admitted that the injured was examined on 26.05.1995 and injury report happens to be of 07.08.1996. He had further stated that there happens to be no mention of the fact that on what basis it was granted. Then the witnesses said at the time of examination of an injured if the injuries are noted down over bed head ticket as well as on the injury note book, then in that circumstance, it could be. In Para-7, he had stated that today there is no such bed head ticket before him. Then had said that he also happens to be Deputy Superintendent of Sadar Hospital and so, stated that if the Court sends any requisition for producing bed head ticket or



injury note book then by the order of the Civil Surgeon, it could be sent. In Para-8, he had stated that it is obvious that firearm was used from a close range, but exact distance can only be stated by the ballistic expert. Then had denied the suggestion that it happens to be a collusive injury report.

13. So, from cross-examination of this witness, it is evident that defence had not cross-examined this witness with regard to the cause of delay in issuing the injury report rather deflected itself and asked on what basis the injury report was prepared. So, he had disclosed the basis for injury report that means to say, on the basis of the injuries having incorporated under the bed head ticket as well as injury note book. The defence had not questioned with regard to proper maintenance of the bed head ticket or injury note book and further, had not questioned whether it was available at the time of recording of the aforesaid injury report and in likewise manner, as disclosed above had not questioned the cause for delay in issuance of the injury report. Having not been questioned, the delay could not be taken as a ground, because of the fact that PW-5, on account of absence of cross-examination, would not have an opportunity to explain the same.

14. In *Gian Chand & others vs. State of Haryana*



reported in 2013(4) P.L.J.R. 7 (S.C.), it has been 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. Bhagwanthuwa \(Dead\) 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.”

(Emphasis supplied)

(See also: [Ravinder Kumar Sharma v. State of Assam & Ors.](#), AIR 1999 SC 3571; [Ghasita Sahu v. State of Madhya Pradesh](#), AIR 2008 SC 1425; and [Rohtash Kumar v. State of Haryana](#), JT 2013 (8) SC 181).”

15. Now, before coming to the evidence of PW-6, informant, the factual aspect as discussed hereinabove, subject to repetition is taken up and that is after concluding investigation, appellant was not sent up for trial in spite of the fact that he was identified to be sole assailant and in likewise manner, he was properly held on the date of judgment of Sessions Trial No.167 of 1998, on which date, he was summoned invoking power under Section 319 of the Cr.P.C. Any kind of deficiency, laches, mistake be it out of ignorance or intentional at the end of the police officer/ I.O. would not cause dent to the prosecution case.

16. In ***Krishnegowda and others vs. State of Karnataka***



reported in 2017(3) P.L.J.R. 145 (SC), it has been held:-

“27. It is settled law that mere laches on the part of Investigating Officer itself cannot be a ground for acquitting the accused. If that is the basis, then every criminal case will depend upon the will and design of the Investigating Officer. The Courts have to independently deal with the case and should arrive at a just conclusion beyond reasonable doubt basing on the evidence on record.”

17. Therefore, whether the appellant was sent for trial or not is a circumstance which now has got no relevancy in the eye of law though may be a circumstance in favour of the appellant. Now, the evidence, which has been adduced during course of trial, being a substantive evidence is to be seen and the matter is to be adjudged thereupon. From the evidence available on the record, it is apparent that neither P.O. has been challenged nor the manner of occurrence, more particularly, when it is taken together with the evidence of PW-1, it is found duly substantiated. Moreover, evidence of injured witness is to be accepted unless there happens to be cogent reason to discard the same and for that, there should be ample material available on the record to justify the same. 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.”

18. In ***Kuna @ Sanjaya Behera vs. the State of Odisha*** reported 2018(1) P.L.J.R. 5 (SC), it has been held:-

“17. That conviction can be based on a testimony of a single eye witness if he or she passes the test of reliability and that it is not the number of witnesses but the quality of evidence that is important, have been propounded consistently in Anil Phukhan (1993)3 SCC 282, Ramji Surya (1983)3 SCC 629, Patnam Anandam (2005) 9 SCC 237 and Gulam Sarbar (2014) 3 SCC 401, with the apparent emphasis that evidence must be weighed and not counted, decisive test being whether it has a ring of truth



and it is cogent, credible, trustworthy or otherwise.”

19. In ***Lahu Kamlakar Patil and another vs. State of Maharashtra reported in (2013)6 SCC 417***, it has been held:-

“18. Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the F.I.R. but has given the excuse that it was taken on a blank paper. The same could have been clarified by the Investigating Officer, but for some reason, the Investigating Officer has not been examined by the prosecution. It is an accepted principle that non-examination of the Investigating Officer is not fatal to the prosecution case. [In Behari Prasad v. State of Bihar](#)[(2010) 6 SCC 1], this Court has stated that non-examination of the Investigating Officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. [In Bahadur Naik v. State of Bihar](#)[(1996) 2 SCC 317], it has been opined that when no material contradictions have been brought out, then non-examination of the Investigating Officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial judge nor the High Court has delved into the issue of non-examination of the Investigating Officer. On a perusal of the entire material brought on record, we find that no explanation has been



offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under [Section 161](#) of the Code. Thus, this Court in [Arvind Singh v. State of Bihar](#)[(2000) 9 SCC 153], [Rattanlal v. State of Jammu and Kashmir](#)[(2001)6 SCC 407] and [Ravishwar Manjhi and others v. State of Jharkhand](#)[(2007) 13 SCC 18], has explained certain circumstances where the examination of Investigating Officer becomes vital. We are disposed to think that the present case is one where the Investigating Officer should have been examined and his non-examination creates a lacuna in the case of the prosecution.

In each and every case, non-examination of I.O. would not be hazardous to the prosecution nor it could be considered deprivation of an opportunity to the accused causing prejudice to his interest. It depends upon facts of the each case. From the evidence as discussed hereinabove, it is apparent that they have themselves admitted and further, restraining themselves while cross-examining PW-6, more particularly, over manner as well as place of occurrence, absence of material contradiction, then in that event, non-examination of the I.O. is not at all found perverse to his interest.



20. After giving anxious consideration to the facts and circumstances of the case, there happens to be no occasion to interfere with the finding recorded by the learned lower Court and that being so, instant appeal is dismissed. Appellant is on bail, hence his bail bond is hereby cancelled with a direction to surrender before the learned lower Court within a fortnight to serve out remaining part of sentence, failing which the learned lower Court will be at liberty to proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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