

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.131 of 2009

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1. BALESHWAR SAH son of late Raghu Sah, R/O Village-Kochas Bazar, PS-Kochas, Distt- Rohtas.
 2. Kamta Prasad son of late Sudama Sah, R/O Village-Santsa PS-Kochas, Distt-Rohtas.

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Tuntun Kumar, Advocate
For the Respondent/s	:	Mr. Parmeshwar Mehta (APP)

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

27-11-2018

Appellants, Baleshwar Sah and Kamta Prasad have been found guilty for an offence punishable under Section 324 IPC and each one has been sentenced to undergo RI for one year vide judgment of conviction dated 21.09.2009 and order of sentence dated 22.01.2009 passed by Additional Sessions Judge-IV, Rohtas at Sasaram in Sessions Trial No. 548/1999/124/2004. Manoj Keshri @ Bhola (PW-3) while was admitted at State Dispensary, Kochas in an injured condition gave his Fard-e-beyan on 06.04.1999 at about 11.20 AM disclosing therein that on the same day at about 10:00 AM while he was standing outside his cloth shop, his brother Uma Shankar Keshri was present at his Fibre shop located adjacent to his shop, all of a sudden, Kamta Prasad armed with knife and Baleshwar armed with knife came at his shop and with an intention to kill Kamta



hurled knife blow over his head causing injury thereupon as a result of which, he fell down. His brother Uma Shankar Keshri rushed in rescue, during midst thereof, Bhola Sah armed with Lathi, Ramashish armed with rod, Tappu Sah armed with Lathi, Ashok Sah armed with Lathi came and began to assault him as well as his brother . His brother, who was carrying Rs. 10,300/- was deprived of the same by the accused persons. The neighbours came in rescue and then, lifted them to the hospital. Business rivalry has been shown to be motive for the commission of the occurrence.

2. Kochas PS Case No. 21/1999 was registered followed with investigation as well as submission of charge-sheet, facilitating the trial, meeting with ultimate result, the subject matter of instant appeal.

3. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that they are innocent and have been falsely implicated in this false and concocted case. Further it has been pleaded that actually prosecution party were the aggressors who, in the background of business rivalry, armed variously, raided the house-cum-shop of the accused persons and brutally assaulted for which, Kochas PS Case No. 22/1999 has been



registered which has also been charge-sheeted whereupon prosecution party were being prosecuted. Oral as well as documentary evidences have been adduced in order to substantiate the same.

4. The prosecution, in order to substantiate its case, has examined altogether six Pws who are PW-1, Rajendra Sah, PW-2, Satyendra Singh, PW-3, Manoj Kumar @ Bhola, PW-4, Teju Shekh, PW-5, Dr. Anil Kumar and PW-6, Uma Shankar Keshri as well as has also exhibited signature of informant over Fard-e-beyan as Ext-1, Ext-2 Series, injury report relating to injured, PW-6, Ext-3 Series, injury report relating to informant Manoj Kumar @ Bhola. In likewise manner, defence has also examined two Dws, DW-1, Shiv Prasanna Upadhyaya, DW-2, Bindeshwar Singh and also exhibited, Ext-A, compromise petition, Ext-B, Certified copy of FIR of Kochas PS Case No. 22/1999, Ext-C, Formal FIR, Ext-D, Certified Copy of compromise permission petition relating to Kochas PS Case No. 22/1999.

5. Heard learned counsel for the appellants as well as learned APP.

6. From perusal of the lower court records, it is evident that PW-1, PW-2 and PW-4 are independent witnesses



who have not supported the case of the prosecution and so, they were declared hostile. From the evidence of PW-1, it is evident that he had supported the case of the defence instead of prosecution. Its repurcussion will be seen at an appropriate stage of the judgment. Now the case rests upon the shoulder of PW-3, the informant, PW-6, brother of PW-3, both happen to be injured, along with evidence of doctor, PW-5. It is also evident from the lower court record that I.O. has not been examined. So, one has to see whether prosecution has succeeded in substantiating the allegation. For proving a case, the quality not the quantity is a relevant factor much less as laid down under Section 134 of the Evidence Act. In likewise manner, the evidence of injured witnesses has got priority in the background of the fact that presence of injury over his person affirms his presence at the place of occurrence.

7. 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.”*

8. As is evident from the evidence of PW-3, para-5 that counter case has been instituted at the end of Tappu Sah against him as well as his brother, PW-6 along with others for causing assault as well as theft coupled with PW-6, para-7, whereunder he has also reiterated the same. Furthermore, it is evident from the evidence of PW-3 (para-6) that he disowned to have compromised the case, he disowned to have filed compromise petition as well as permission petition. He has admitted the fact that they have been acquitted in counter case.



Then thereafter, he was confronted with the compromise petition, permission petition dated 16.03.2001 whereupon, he admitted his presence as well as presence of the brother, learned counsel on their behalf as well as presence of all the accused including their learned counsel and identified the same. PW-6 has also admitted that they were let off in counter case on the basis of compromise. They have also compromised this case and in token thereof, compromise petition has been filed but, from their conduct, it is evident that they resiled from their earlier path and contested the case, which they are entitled for but, suggests their conduct. However, on that very score it is now conclusively proved that an occurrence took place on 06.04.1999 and for that case and counter case was instituted. Both have been compromised, prosecution party got acquitted on the basis thereof while changed their colour during course of proceeding of instant trial. So, acquittal was not on merit.

9. Now coming to the evidence of PW-3, it is evident therefrom that Kamta Prasad and Baleshwar Sah, both armed with knife came near him and with an intention to kill, first blow was given by Kamta Prasad over his head as a result of which he became injured and fell down. While he was lying over the ground, Baleshwar gave knife blow over his chest



which he tried to prevent and during course thereof, he got injury over left palm. During midst thereof, Bhola Sah armed with Lathi, Ramashish Sah armed with lathi, Tappu armed with Lathi came and began to assault him as well as his brother Uma Shankar Keshri as a result of which, both of them sustained severe injuries. Tappu snatched away money from the pocket of his brother. Then thereafter, they were taken to hospital. Motive has been assigned on account of business rivalry. Police came at the hospital, recorded his Fard-e-beyan whereupon he put his signature (exhibited). Identified the accused. First of all, there happens to be material contradiction from his earlier statement (Fard-e-beyan as well as further statement) relating to allegation whatever been attributed against appellant, Baleshwar under para-12. Furthermore, from his examination-in-chief, it is apparent that though he had shown his brother Uma Shankar to have also sustained injury on account of assault having made by the accused persons but, he has not disclosed that Uma Shankar came to his shop seeing him being assaulted at the end of Kamta Prasad or Baleshwar or by any other accused persons and that happens to be reason behind that when he was cross-examined on that very score, at para-10, he had stated that his brother Uma Shankar was present at his shop. When his brother came till



then accused persons have already left the scene.

10. At the present juncture, the evidence of PW-6, brother of PW-3 appears to be relevant to be taken note of wherein he has stated that at the time of occurrence, he was at his shop. After hearing sound of commotion, he came out from his shop and had seen Kamta Prasad armed with knife, hurled the blow over head of his brother, Manoj Kumar. At that very time, Manoj was standing outside his shop. After sustaining injury, his brother fell down. Then has said that Kamta was accompanied by Baleshwar who had also hurled knife over chest of his brother which his brother tried to ward off, as a result of which, his brother sustained injury over his left palm. He rushed to his brother, during midst thereof, Ramashish armed with rod, Bhola, Tappu and Ashok armed with Lathi came near him and began to assault him as well as his brother. He also sustained rod blow over his head. Then has detailed the location of the body where he had sustained injury. They were lifted to hospital where they both were treated. Tappu had taken out Rs. 10,300/- from his pocket. Business rivalry is the root cause of the occurrence. During cross-examination, he has admitted presence of shop of accused Baleshwar and Bhola. All the shops were opened. In para-11, he has shown the P.O. to be



the road. In para-13, he has stated that both the parties have not sustained injury. Again clarified that the accused persons have not sustained injury but he has tried to wrap by stating that he is not remembering whether the accused persons were also admitted at hospital or not, though, they were admitted. In para-14, he has stated that his brother was assaulted till he was standing. Then has again clarified that the accused persons continued in assaulting for 5-7 minutes upon him as well as his brother. In para-16, he had stated that Kamta Prasad inflicted knife blow within 10 seconds. He has not repeated the blow. After inflicting knife blow, he remained standing. Thereafter, Baleshwar came who gave second blow. In para-17, he had stated that his brother had fallen down or not, he is not remembering. After sustaining rod blow by him, he was not assaulted. At para-20, he has again said that neither he nor his brother was admitted at the hospital. They were left from hospital after 4-5 hours. Then at para-24 and 25, there happens to be material contradiction relating to his previous statement. Then had denied the suggestion relating to defence case.

11. PW-5 is the doctor who examined the respective injured Uma Shankar Keshri (PW-6) as well as Manoj Keshri @ Bhola (PW-3) and found the following:-



Uma Shankar Keshri (PW-6)

- (1) One lacerated wound 1" x 1/2" x scalp deep
- (2) One abrasion 1" x 1/2" on nose anterior
- (3) One bruise 3" x 2" x over back of chest right side
- (4) One abrasion 1/2" x 1/2" over arm right side
- (5) One bruise 3" x 3" over left scapular region

12. The duration of injury was within six hours, caused by hard blunt substance such as Lathi and Iron rod. The doctor gave final opinion in respect of injury no.1 found on the person of Uma Shankar Keshri by stating that the said injury was simple which was confirmed by X-ray report.

Manoj Keshri @ Bhola (PW-3)

- (1). One sharp cutting wound 3" x 1/2" x Scalp deep over scalp.
- (2). One bruise 3" x 2" x over right leg.
- (3). Pain and tenderness with diffused swelling of size 2" x 2" over right forearm.
- (4) One bruise 1" x 1/2" over left forearm.
- (5) One sharp cutting of 1" x 1/4" x skin deep over palm of left hand.
- (6) One bruise 2" x 2" over left scapular region. Age of injury within six hours, caused by hard and blunt substance.



The doctor reserved his opinion in respect of injury no. 1, 3 and 4 and injury no. 2, 5, and 6 were simple in nature. The doctor has given his final opinion in respect of injury no. 1, 3 and 4 by X-ray examination that the said injuries were simple in nature.

13. After having analytical analysis of evidences available on the record, the case and counter case is there. From the evidence of PW-3 and PW-6, it is apparent that shop of both the parties are in front of each other and in the background of business rivalry the occurrence took place. From the evidence of PW-3, it is evident that he has shown the place of occurrence to be outside of his shop but, he has not shown the P.O. to be the road. While PW-6 has categorically stated that P.O. happens to be the road. It has got a bearing as the shop of appellant's side was jut in front of shop of prosecution, and therefore crossing the limit, is bound to affect over authenticity of the prosecution version, much less manner of occurrence. That means to say, the place of occurrence is found something otherwise than whatever been projected at the end of the prosecution. Apart from this, from the evidence of PW-3, it is evident that there happens to be material contradiction with regard to manner of occurrence, that means to say, relating to activity of Baleshwar in order to toe with the finding recorded by the doctor PW-5 and further from



para-23, 24, 25 of PW-6, it is apparent that there happens to be material contradiction relating to his previous statement.

14. There happens to be non examination of I.O.. Whether non examination of I.O. will cause prejudice to the interest of an accused is the crucial point to be considered because of the fact that times without number it has been held by the Hon'ble Apex Court that the impact of non examination of I.O. varies from case to case. Very recently, in **Baldev Singh v. State of Haryana** as reported in **2016 Cri. L.J. 154**, it has been as follows:-

“16. Contention at the hands of the learned Senior Counsel for the appellant is that non-examination of Chander Singh-SI who prepared rukka and who investigated the case raises serious doubts about the prosecution case. Material on record would show that Chander Singh-SI who investigated the case was not examined by the prosecution in spite of several opportunities. No doubt, it is always desirable that prosecution has to examine the investigating officer/police officer who prepared the rukka. Mere non-examination of investigating officer does not in every case cause prejudice to the accused or affects the credibility of the prosecution case. Whether or not any prejudice has been caused to the accused is a question of fact to be determined in each case. Since Ram Singh-PW-1 was a part of the police party and PW-1 has signed in all recovery memos, non- examination of Chander Singh-SI could not have caused any prejudice to the accused in this case nor does it affect the credibility of the prosecution version.”



15. From the evidence of PW-3 and PW-6, it is manifest that there happens to be material contradiction over manner of occurrence. Apart from this, shifting of P.O. in the background of presence of counter case, more particularly, when shops of both the parties lie in front of each other, is another circumstance which is found duly axed due to non examination of Investigating Officer.

16. Accordingly, the judgment of conviction and sentence recorded by the learned lower court, is hereby, set aside.

17. Appeal is allowed. Both the appellants are on bail, they are discharged from the liability of bail bonds.

(Aditya Kumar Trivedi, J)

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