

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.591 of 2009

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1. Chandeshwar Sah.	
2. Durga Sah.	
Both sons of late Badri Sah.	
Both residents of village+P.O.+P.S.-Motipur, District-Muzaffarpur.	 Appellant/s
	Versus
The State of Bihar	 Respondent/s

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Appearance:

For the Appellant/s	:	Mr. Aaruni Singh, Adv.
For the Informant	:	Mr. Jai Prakash Verma, Adv.
For the State	:	Mr. Z. Hoda, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 25-01-2018

Appellants Chandeshwar Sah and Durga Sah have been found guilty for an offence punishable under Section 307/149 of the IPC and each one has been sentenced to undergo R.I. for five years vide judgment of conviction dated 21.07.2009 and order of sentence dated 24.07.2009 passed by sessions Judge, Muzaffarpur in Session trial No.167 of 1998.

2. Prosecution case in brief as per fardbeyan of Hari Nandan Roy (PW.1) recorded on 26.05.1995 at 01:00 PM at Sadar Hospital, Muzaffarpur where he was admitted in emergency ward is to the effect that on the same day he was on his duty at Sub-Centre PHC, Khabra where, at about 12:15 PM Chandeshwar Sah, Durga Sah, Anil Kumar, Dashrath Rai, Harendra Rai, Vishwanath Rai came over two motorcycle. Chandeshwar Sah and Durga Sah said to him that as you are creating dispute relating to a land so he will be eliminated today. They ordered Dasrath Rai to shoot whereupon, Dashrath Rai took out pistol and shot at him causing injury over his chest. He, after raising alarm fell down. Then,



Vishwanath Rai disclosed that he has died whereupon, all of them left over motorcycle. Then, his colleague Sarswati Devi came and raised alarm whereupon her son along with others came and lifted him to Sadar Hospital. The motive for the occurrence has been shown as there happens to be title suit pending in between Chandeshwar Sah and Durga Sah with him relating to a land and in likewise manner, there also happens to be land dispute with Dashrath Rai.

3. As is evident from the record, after registration of Sadar P.S. Case No.70/1995, the investigation commenced and concluded by way of submission of charge sheet only against these two appellants/accused namely Chandeshwar Sah and Durga Sah on the other hand, had not found complicity of the other co-accused accordingly, they were not sent up. On the basis thereof, the learned lower court proceeded with the trial and at the time of dictating judgment, found expedient in the interest of justice to summon Dasrath Rai, only being an assailant as provided under Section 319 of the Cr.P.C. which the learned lower court recorded vide order dated 21.07.2009. That being so, there happens to be registration of new session trial relating to accused Dasrath Rai bearing Session Trial No.580 of 2009 and fortunately, appeal having been filed on his behalf bearing Cr. Appeal (SJ) No.186 of 2015 is also pending which is also going to be decided today.

4. Defence case as is evident from the statement of the appellants /accused under Section 313 Cr.P.C. as well as from the cross-examination of the witnesses is that of complete denial. However, neither ocular nor documentary evidence has been



adduced in support thereof.

5. In order to substantiate its case, prosecution had adduced altogether seven PWs, PW.1-Hari Nandan, informant/victim, PW.2-Sudhir Kumar, PW.3-Uma Lal Thakur, PW.4-Raj Kumar Mahto, PW.5-Pradip Kumar Thakur, PW.6-Jai Mangal Thakur, PW.7-Dr. Dharendra Prasad Singh. Side by side also exhibited Ext.1-Signature of informant over fardbeyan, Ext.2 is the injury report. As stated above, nothing has been adduced on behalf of defence.

6. Before coming to main stream, an ancillary event is to be acknowledged and that is with regard to Sarswati Devi who was summoned for evidence but found dead and for that the court examined Sudhir Kumar Mukhiya, as CW.1 vide order dated 26.04.2005. Though serial no. of witnesses has been corrected subsequently vide order dated 09-07-2009 which, should not have been. Be that as it may, the chapter is found finally closed, hence no further effort is being taken. Furthermore, it is evident that on a prayer of prosecution on 16.05.2006 summon was issued against Pawan Kumar son of Chandeshwar Ojha along with the magistrate Shri Anand Singh but, their presence could not be procured during course of trial. Now sailing ahead, it is apparent from the record that Investigating Officer has also not been examined. So far occurrence is concerned, only PW.1, informant/injured had substantiated his case along with PW.7, the doctor. Remaining witnesses, excluding PW.2 (CW.1) had not supported the case of the prosecution whereupon declared hostile and that being so, the finding recorded by the learned lower court is to be seen in the background of aforesaid existing status.



7. It has been submitted on behalf of learned counsel for the appellant that enmity is a double edged sword. It happens to be reason /motive for commission of an occurrence simultaneously, it happens to be motive for false implication. The court is to adjudge in the facts and circumstances of the case which of two is more probable. So far present case is concerned, it has been submitted that the version of informant happens to be unreliable with regard to the involvement of the appellants and that being so, appellants are entitled for acquittal. To substantiate such plea, it has been submitted that from the evidence of PW.1, it is apparent that the aforesaid PHC happens to be adjacent to the school premises. Had there been such kind of occurrence then, in that event, at least the students, the teachers must have stood as a witness or their presence would have been. Non-presence of teacher or the student whoever may be, as the charge sheet witness is a circumstance which cast doubt over the authenticity of the version of the informant that he sustained injury at the PHC, Sub Centre, Khabra. Because of the fact that Investigating Officer has not been examined, on that very score the interest of the appellants is found highly prejudiced because of the fact that due to non-examination of the Investigating Officer, the actual affair could not found exposed. It has also been submitted that on account of non-examination of Investigating Officer, the other infirmities persisting in the case remained under veil. Had there been examination of the Investigating Officer, those deficiencies would have been surfaced sufficient to axe upon the prosecution case.

8. Furthermore, it has also been submitted that though, during cross-examination there happens to be some sort



of deficiency at the end of the appellant but, as the documents are an exhibit of the record on account thereof, the discrepancy visualizing therefrom could be taken into account irrespective of the fact that no cross-examination has been made on that very score. In this context, it has been submitted that there happens to be obligation on the part of the prosecution to support its case beyond all reasonable doubt and that being so, it happens to be bounded duty of the prosecution to place before the court its case beyond the flaw irrespective of the fact that whether in terms of Section 145 of the Evidence Act attention of the witness has been drawn or not to that extent. To justify the same, it has been submitted that victim had claimed to be examined on 26.05.1995 itself which the doctor PW.7 also deposed but, from Ext.2, injury report it is apparent that same happens to be dated 07.08.1996 and that being so, the delay in issuance of the aforesaid injury report should have been properly explained more particularly when the informant is attached therewith. In likewise manner, it has also been submitted that in the fardbeyan there happens to be specific disclosure that PW.1 was lifted from the alleged place of occurrence by Sarswati Devi, her son along with others but, during course of evidence, he had given a goby keeping presence of Sarswati Devi since deceased only. It has further been submitted that in the fardbeyan there happens to be no disclosure with regard to meeting with the police personnel at Kalambagh Chowk in a way to hospital but, during course of evidence the aforesaid theme has been introduced. The cumulative effect of the aforesaid exaggeration coupled with the deficiency persisting in the prosecution case as well as considering the interest of the appellants being prejudiced on account of non-examination of the



Investigating Officer, this appeal is fit to be allowed after setting aside the judgment of conviction and sentence.

9. On the other hand, the learned Additional Public Prosecutor refuted the submission made on behalf of appellant and has submitted that in terms of Section 134 of the Evidence Act, it is quality not the quantity which matters. That means to say the reliable evidence of a single witness is found sufficient to record conviction. To substantiate the same, it has been submitted that though, during course of argument many flaws or infirmities which ever may be, have been counted but, during course of trial no cross-examination on that very score was done on behalf of appellant on account thereof, no opportunity was before the witness to explain the same and that being so, on account of absence of cross-examination at the end of the appellants, the evidence to that extent is found un-shattered. That being so, the evidence of the doctor PW.7 which identified the PW.1, informant to be injured on account of gun shot injury duly corroborates the allegation having levelled by the PW.1 and that being so, the judgment of conviction and sentence recorded by the learned lower court happens to be just, legal and proper and is fit to be confirmed.

10. It is needless to say that the evidence of an injured lies on upper pedestal and that being so, unless and until there happens to be sufficient material in order to discredit his testimony, the version of the injured is to be accepted and taken into consideration. In **Mukesh Vs. State of NCT of Delhi** reported in **2017 Cr.L.J. 4365** it has been held:

“79. The injuries found on the person of PW-1 and the fact that PW-1 was injured in the



same occurrence lends assurance to his testimony that he was present at the time of the occurrence along with the prosecutrix. The evidence of an injured witness is entitled to a greater weight and the testimony of such a witness is considered to be beyond reproach and reliable. Firm, cogent and convincing ground is required to discard the evidence of an injured witness. It is to be kept in mind that the evidentiary value of an injured witness carries great weight. In ***Mano Dutt and another v. State of Uttar Pradesh (2012) 4 SCC 79***, it was held as under:

“31. We may merely refer to *Abdul Sayeed v. State of M.P. (2010) 10 SCC 259* where this Court held as under:

“28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. 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 a built-in 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. ‘Convincing evidence is required to discredit an injured witness.’ [Vide *Ramlagan Singh v. State of Bihar (1973) 3 SCC 881*, *Malkhan Singh v. State of U.P. (1975) 3 SCC 311*, *Machhi Singh v. State of Punjab (1983) 3 SCC 470*, *Appabhai v. State of Gujarat 1988 Supp SCC 241*, *Bonkya v. State of Maharashtra (1995) 6 SCC 447*, *Bhag Singh v. State of Punjab (1997) 7 SCC 712*, *Mohar v. State of U.P. (2002) 7 SCC 606*, *Dinesh Kumar v. State of Rajasthan (2008) 8 SCC 270*, *Vishnu v. State of Rajasthan (2009) 10 SCC 477*, *Annareddy Sambasiva Reddy v. State of A.P. (2009) 12 SCC 546* and *Balraje v. State of Maharashtra (2010) 6 SCC 673*.]

29. While deciding this issue, a similar view was taken in *Jarnail Singh v. State of Punjab (2009) 9 SCC 719* where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under:

“28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa v. State of Karnataka 1994 Suupp (3) SCC 235* this Court has held that the deposition of the injured witness should be relied upon unless there are



strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In *State of U.P. v. Kishan Chand* (2004) 7 SCC 629 a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan v. State of Haryana* (2006) 12 SCC 459). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.'

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

To the similar effect is the judgment of this Court in *Balraje* (supra)."

11. Section 134 of the Evidence Act reads as follows:

"134. Number of witnesses.— No particular number of witnesses shall in any case be required for the proof of any fact."

12. From plain reading of the Section itself it is apparent it is the quality not the quantity which matters in deciding the facts duly proved. In *S.P.S. Rathore v. C.B.I. & Anr.* reported in **2017 CR.L.J. 537**, it has been held:

"33) No particular number of witnesses is required for proving a certain fact. It is the quality and not the quantity of the witnesses that matters. Evidence is weighed and not counted. Evidence of even a single eye witness, truthful, consistent and inspiring



confidence is sufficient for maintaining conviction. It is not necessary that all those persons who were present at the spot must be examined by the prosecution in order to prove the guilt of the accused. Having examined all the witnesses, even if other persons present nearby not examined, the evidence of eye-witness cannot be discarded.”

13. In *Lahu Kamlakar Patil v. State of Maharashtra* reported in **(2013) 6 SCC 417** it has been held:

“**18.**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* (1996) 2 SCC 317, 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*(2000) 9 SCC 153, 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*(2001) 6 SCC 407, *Rattanlal v. State of J&K*(2007) 13 SCC 18 and *Ravishwar Manjhi v. State of Jharkhand*(2008) 16 SCC 561, 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.”

14. That means to say the non-examination of Investigating Officer would not be a ground to reject the case of the prosecution outrightly rather one has to see what kind of



prejudice it has caused to the interest of the accused side by side, the accused has also to disclose that on account of non-examination of Investigating Officer, they suffered a lot.

15. Under the garb of aforesaid legal proposition, now the facts of the case is to be taken note of. It is needless to say that PW.3, PW.4, PW.5 and PW.6 have not supported the case of the prosecution. That means to say there happens to be non-presence of the person from the P.O. village to substantiate the case of the prosecution. However, it has to be borne in mind that P.O. is not the village of the informant rather P.O. happens to be the place where he was deputed. That means to say place of posting. So, he was stranger to the P.O. village and in likewise manner, as is evident accused happens to be.

16. PW.7 is the doctor who had examined the victim on 26.05.1995 itself and found the following:

“There was charring over right side of chest 2 ½ in circle wound of entry over right side of chest over charred area ½”x ½”. Type of weapon firearm. Time of injury within six hours. Nature of injury-grievous.”

17. During cross-examination nothing substantial has been explicit from his mouth save and except that being a charred injury it might be from close range and the distance, as he disclosed was unable to say. Nothing has been suggested to this witness that the injury report happens to be fake one issued in collusion with the informant who belongs to his department nor with regard to difference of date having on the score of issuance of the injury report. Therefore, presence of firearm injury over the person of informant is found duly substantiated.

18. PW.1 is the informant himself. He had deposed that



on 26.05.1995 at about 12:15 PM he was on duty at Health Sub Centre, Khabra where six persons over two motorcycle arrived who were Durga Sah, Chandeshwar Sah, Dashrath Rai, Vishwanath Rai, Harendra Rai, Anil Kumar Rai out of whom, Durga Sah and Chandeshwar Sah said that he used to quarrel with him on account of land dispute so he will be murdered. Then thereafter, they ordered Dashrath Rai to kill. Dashrath Rai took out pistol and shot at causing injury over his chest, right side. He fell down raising an alarm. Then Vishwanath Rai disclosed that he is now dead whereupon they all escaped. The persons, who came lifted him to Sadar Hospital on rickshaw. In midst of way, near Kalambagh chowk police jeep was found whereupon he was taken to Sadar Hospital where police came and recorded his statement then read over and finding it correct, he put his signature (exhibited). Land dispute happens to be the motive of commission of the occurrence. Then thereafter he was shifted to PMCH. Claimed identification of the accused. During cross-examination at para-5 he had stated that house of the accused lies at Motipur which happens to be 2 KM away from his house. Then had disclosed at para-6 that all the accused persons are resident of adjacent village. He had further disclosed that he took land of accused on Batai. At para-7, he had disclosed the Khata number and Khesra number of the aforesaid land bearing Khata No.83, Khesra No.384 area one acre and with regard thereto, Batai case is going on. In para-8 he had also stated that Pauri Devi who happens to be his Fua had filed Title Suit No.60/1992 against the accused persons for the same piece of land, as the accused persons had sold away the aforesaid land in favour of Dashrath Rai. In para-9 he had stated that P.O. lies 30 KM away from his



house. He used to perform his duty, coming from his village Dehri. Bataidari dispute is going on for the last two years. Sub centre is opened from all side. There happens to be no boundary. One school is also lying in the compound. Then had disclosed in para-10 that there are two rooms and Varendah wherein sub centre is running. Varanda is grilled. Highway lies ten laggi south to the sub centre. House of Uma lies 200 yards east to the centre. At the time of occurrence he was discharging his duty sitting at Varendah of the centre. None other was present there. Accused persons came through highway. He does not become apprehensive. In para-11 he had stated that he had not responded over the direction given by the Durga Sah and Chandeshwar Sah. He remained over chair. Pistol was fired from a distance of five yards. He had not tried to flee after seeing Dashrath Rai taking out pistol. Then volunteered where he could. After sustaining firearm injury, he raised alarm. In para-12 he had stated that after sustaining injury, he remained conscious for five minutes till then he was there. Then had said that he became unconscious again volunteered that for a short while he regained sense near Kalambagh Chowk. At para-14 he had denied the suggestion that he had not sustained gun shot injury. He had prepared wrong injury report. He had further stated that doctor had examined him on 26.05.1995. In para-15 he had stated that he had got no information with regard to issuance of injury report by the doctor one and half year after the occurrence. Then had denied the suggestion that his case is false, all the evidence happens to be wrong, incorrect and on account of animosity, he got the accused persons involved in this false case.

19. From the evidence available on the record, it is



apparent that there happens to be no question at the end of the appellant with regard to finding of PW.7 doctor relating to sustenance of firearm injury by the PW.1, informant. Though there happens to be discrepancy over date of issuance of injury report but he (PW.7) has not been tested on that very score. The only infirmity persisting in the evidence of PW.1 inconsonance with the evidence of PW.7 is, PW.1 had shown distance of firing from five yards, while doctor had found charred injury. Moreover, the manner of occurrence as suggested did not support the distance, which the PW.1, had spoken in a fluke. However, the fact remains regarding presence of firearm injury which has not been controverted but, the appellants themselves allowed to survive as PW.7 was not cross-examined. That being so, even though PW.1 was suggested that the injury report was issued one and half year after the occurrence, but due non cross-examination of PW.7, who happens to be maker of the document has allowed the genuinity of the document without any legal impediment. In the aforesaid facts and circumstances of the case, there could not be any kind of doubt with regard to presence of firearm injury over person of PW.1. Now coming to the evidence of the PW.1, it is apparent that it is not tested in a manner wherein he could be. No cross-examination was made whether there was copious blood. No cross-examination was made whether school was open, Teachers, students were present no cross-examination was made whether rooms were opened or not, there was happens to be no cross-examination that who were persons who lifted him to the Sadar hospital, no cross-examination was made whether these accused persons had their presence at the P.O. an earlier occasion also, no cross-examination has been made with regard to place of



occurrence, whatever been is in stereo type whereunder he had categorically stated and substantiated the allegation which he attributed during course of his examination-in-chief that is visualizing from para-11 of the cross-examination.

20. In **Gian Chand & others v. State of Haryana** reported in **2013(4) PLJR 7 (SC)** 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. 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.”

(Emphasis supplied)”

21. Because of the fact that there happens to be no



cross-examination challenging the place of occurrence, there happens to be no cross-examination with regard to contradiction or exaggeration whatever may be, there happens to be no cross-examination with regard to other kind of activity which could have properly exposed only through cross-examination of the Investigating Officer then in that circumstance, really the non-examination of the Investigating Officer has caused prejudice to the appellants, and the answer is no. The court has to form its opinion on the evidence adduced during course of trial in order to record finding. As stated above, there happens to be no cross-examination in order to demolish or discredit the version of the PW.1 and that being so, the non-examination of the Investigating Officer could not be found to be adverse to the interest of the prosecution as well as to have caused prejudice to the appellant.

22. The learned counsel for the appellant has submitted that no conviction could be recorded under Section 307/149 of the IPC in the background of the fact that though there happens to be allegation at the end of the informant with regard to presence of appellants at the place of occurrence during course of occurrence along with others but, police after investigation submitted charge sheet only against these two appellants exonerating the others that being so, it could not be said that there was an unlawful assembly carrying common object to have murderous attack upon the informant. Furthermore it has also been submitted that even after summoning of co-accused Dashrath Rai, there could not be possibility of an unlawful assembly for which, at least there should be presence of five or more than five persons and so, the conviction of the appellants



would not legally permissible under Section 307/149 of the IPC.

23. Prosecution is another circumstance than the evidence. Prosecution is to be carried out to adjudge the culpability of accused in order to ascertain whether he is guilty or not on the material as recognized under the law. Mere exoneration of an accused during course of investigation, though be a circumstance but did not dent in the prosecution case, if found otherwise duly substantiated whether his presence, subsequently been procured or not is another circumstance. Furthermore, it was not the recording of acquittal by the court regarding other co-accused, nor there happens to be any adverse finding at the end of lower court while summoning the Dasrath Rai, and in the aforesaid facts and circumstance of the case, the submission raised on behalf of appellant is found untenable.

24. That being so, this appeal sans merit and is accordingly dismissed. Appellants are on bail hence their bail bonds are cancelled with a direction to surrender before the learned lower court within fortnight to serve out remaining part of sentence failing which, the learned lower court will be at liberty to proceed against them in accordance with law.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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