

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.530 of 2015**

Arising Out of PS.Case No. -104 Year- 1994 Thana -SABOUR District- BHAGALPUR

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1. **Prem @ Prem Lal Mandal**, S/o Sonu Mandal.
 2. **Tribeni Mandal**, S/o- Tarini Mandal, Both resident of Village-Chaichak Mamalkha, P.S.- Sabour, District- Bhagalpur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Pramod Kumar Singh-Advocate
Mr. Mukul Prakash-Advocate

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

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 07-08-2018

Appellants Prem @ Prem Lal Mandal and Tribeni Mandal have been found guilty for an offence punishable under Section 341 I.P.C. and each one has been sentenced to undergo S.I. for one month, under Section 27 of the Arms Act and each one has been sentenced to undergo S.I. for three years as well as to pay fine appertaining to Rs.2,000/- and in default thereof, to undergo S.I. for three months, additionally, vide judgment of conviction and order of sentence dated 31.07.2015 passed by the 7th Additional Sessions Judge, Bhagalpur in Sessions Trial No.440 of 1995/ 31 of 2015.

2. Saheb Mandal, an injured (PW-4) gave his fard-bayan on 19.06.1994 at about 12.00 Noon while he was admitted at J.L.N.M.C.H., Bhagalpur alleging inter alia that on 18.06.1994, he



along with his co-villager Kailash Mandal was returning from Jangalwa Mamalkha Diyara to his house and about 6.00 p.m. while he reached near the maize field of Ramanand Mukhiya, his gotia Umeshwar Mandal, Manik Mandal, Mahendra Mandal, Anuj Mandal, Ramavtar Mandal, Suresh Mandal, Biran Mandal and neighbour Prem @ Prem Lal Mandal intercepted him and then, Prem Lal Mandal, who was armed with pistol in both of his hands shot at causing injury over upper part of back, left side, right side. Umeshwar Mandal also fired causing injury over right side of inter-coastal region. After sustaining injury, he fell down, whereupon Umeshwar Mandal said that now, he is dead and then thereafter, they all gone. Then thereafter, he got up and rushed. Coming near Kalali Ghat, he fell down. One person of village-Malalkha namely Ram Jatan Mandal lifted him and took him to Malalkha Out-Post wherefrom he was sent to hospital along with Chaukidar. It has also been disclosed that on account of land dispute his Pattidars have committed this occurrence.

3. After registration of Sabaur P. S. Case No.104 of 1994, investigation commenced and concluded by way of submission of chargesheet, whereby only Prem Lal Mandal and Tribeni Mandal (appellants) were sent up for trial while remaining namely Umeshwar Mandal, Manik Mandal, Mahendra Mandal, Anuj Mandal, Ramavtar Mandal, Suresh Mandal and Biran Mandal were not sent up. The trial commenced in terms thereof, meeting with the ultimate result, subject



matter of instant appeal.

4. 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 further been pleaded that prosecution party themselves are hardened criminals, who after hiring anti-social elements, kidnapped two sons of Manik Mandal (not sent up) for rangdari and during course thereof, there was dispute amongst the criminals and in course thereof, he sustained injury. Getting a golden opportunity, got his Pattidars implicated as T.S. remained pending amongst them. However, nothing has been adduced in defence.

5. In order to substantiate its case, prosecution had examined altogether six PWs, who are PW-1, Ajablal Mandal, PW-2, Charan Mandal, PW-3, Chaturi Mandal, PW-4, Saheb Mandal, PW-5, Kailash Mandal and PW-6, Urmila Devi. Side by side, had also exhibited signature of the informant over fard-bayan as Exhibit-1. Nothing has been adduced in defence.

6. Learned counsel for the appellant has submitted that the learned lower Court took cognizance of the deficiencies persisting on the record, more particularly on account of non-examination of the I.O. as well as doctor, but failed to construe its adverse impact over the prosecution case and that happens to be reason behind that



conviction has been recorded against the appellants for an offence punishable under Section 341 of I.P.C. as well as Section 27 of the Arms Act. Magnifying the issue, it has been submitted that as per initial prosecution version, there were presence of more persons than there two appellants party during course of commission of the occurrence and further, one of them namely Umeshwar Mandal had also been identified as one of the assailants then in that background, non-sending of those accused including Umeshwar Mandal certainly had cast doubt over the manner as well as genesis of occurrence, because of the fact that in absence thereof, not only manner of occurrence has challenged rather the alleged firearm injury found unexplained. On account of non-examination of doctor, the injury part has been disbelieved. In likewise manner, the whole prosecution case would have been disbelieved on account of infirmities found in the evidence of the witnesses coupled with non-examination of I.O., which caused prejudice to the interest of the appellants, more particularly, when the witnesses insisted upon presence of other co-accused as well as having severe contradiction over proper identification of the P.O. Furthermore, it has also been pleaded that appellants have been deprived of to cross-examine the I.O. over non-compliance of provision of Section 157 Cr.P.C. within time schedule.

7. Apart from this, it has also been submitted that when the evidence of all the witnesses are taken together, it is apparent that



they are inconsistent over the place of occurrence and so, taking into account the cumulative effect of the infirmities persisting on the record, the judgment of conviction and sentence recorded by the learned lower Court would not survive.

8. On the other hand, while supporting the finding recorded by the learned lower Court, it has been submitted by the learned Additional Public Prosecutor that informant has not been cross-examined, so the sole testimony of informant, who also happens to be an injured, is sufficient to justify the finding recorded by the learned lower Court even discarding the evidence of other PWs. Furthermore, it has also been submitted that on account of non-examination of I.O., no prejudice has been caused to the appellants, more particularly in the background of the fact that informant has not been cross-examined due to their own fault and so, presence of hugger-mugger in the evidence of other PWs would not affect upon his testimony. In the aforesaid facts and circumstances of the case, it has been submitted that judgment impugned is fit to be confirmed.

9. From perusal of the record as well as judgment impugned, it is evident that learned lower Court had taken notice of the fact that neither I.O. nor the doctor has been examined. Because of the fact that doctor has not been examined on account thereof, the learned lower Court had not taken into account the presence of injury



caused over his person. Furthermore, it is also evident that though the learned lower Court had taken into account the non-examination of the I.O., but had not considered its impact in the facts and circumstances of the case. It is needless to say that non-examination of the I.O. could not be considered fatal to the prosecution case nor it could be adverse to the interest of the accused rather it has to be taken into account considering the facts of the case. In ***Baldev Singh vs. State of Haryana reported in 2016 (1) CRI.L.J. 154***, it has been held:-

“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.”

10. In the aforesaid background, now the facts of the case is to be taken note of and further, to search out whether on account of non-examination of the I.O., the prospect of the appellants have been axed upon.

11. From the nature of the evidence having been deposed at the end of the witnesses, it is evident that PW-1 and PW-2 have not supported the case of the prosecution. PW-3, PW-4, PW-5 and PW-6 are the witnesses, who have supported the case of the prosecution. PW-3 is co-villager, PW-4 is the informant himself, PW-5 is his brother, PW-6 is wife of PW-5. Because of the fact that informant has not been cross-examined on account thereof, his evidence remained intact. On account of non-cross-examination of PW-4, whatever inconsistencies happen to be with regard to the fard-bayan that also remained idle as accused could not be able to confront the same. The fard-bayan is not an exhibit rather the only signature of PW-4 over the fard-bayan is there as an exhibit. It is needless to say, that F.I.R. does not happen to be the substantive piece of evidence rather its relevancy is for the purpose of corroboration or contradiction. However, it



happens to be initial version of the prosecution. It is also settled at rest that F.I.R. should not be encyclopedia of the occurrence rather its sole purpose happens to be to inform the law enforcing agency to proceed with the investigation at once in case it relates with commission of cognizable offence or to be known with regard to commission of an offence.

12. However, to rule out any opportunity to false implication on account of so many reasons including that of animosity, grudge, grievances, Section 157 of the Cr.P.C. happens to be like watch dog whereunder F.I.R. is to be forwarded to the Court of the Magistrate within 24 hours excluding the time of transportation. From the record, it transpires that fard-bayan was recorded on 19.06.1994, whereupon case was registered on 19.06.1994 itself, it was sent to the Court of Magistrate on 20.06.1994, but the same was received by the learned Chief Judicial Magistrate on 23.06.1994. Had there been an examination of the I.O., then in that circumstance, the accused would have an opportunity to cross-examine. Had there been examination of I.O., the accused/ appellants have an opportunity to test the outcome of investigation, more particularly testifying its veracity in consonance with the statement of witnesses, as same were completely found unreliable relating to co-accused, who though named, but not sent up for trial.



13. PW-4, informant as stated above, has not been cross-examined. Therefore, his evidence remained intact without facing litmus paper test. He had deposed that on the alleged date and time of occurrence, while he was returning from Jangalwa Bahiyar along with his brother Kailash Mandal, wife of Kailash Mandal and Chaturi Mandal and when they came near field of Rambali Mandal, all of a sudden, Umeshwar Mandal, Prem Mandal, Tribeni Mandal, Suresh Mandal, Biran Mandal, Manik Mandal, Anuj Mandal, Ramavtar Mandal and Mahendra Mandal appeared, out of whom, Umeshwar Mandal and Prem Mandal were armed with pistol, Manik Mandal armed with bhala, Mahinder Mandal armed with Garasa, Ramavtar was armed with farsa and rest were armed with lathi. All the accused encircled them, Umeshwar Mandal asked to give up the land, which was denied by him on the pretext that whatever judgment will be passed by the Court, they will accept, whereupon Umeshwar Mandal shot at causing injury over inter-coastal region (right side). Prem Lal Mandal had fired causing injury over his left side of back, upper portion. Informant had shown the sign in Court. After sustaining injury, he fell down, whereupon accused persons fled away. Then thereafter, Chaturi Mandal, Ram Jatan Mandal and Pairan Mandal lifted him to Mamalakha Police Out Post wherefrom Chaukidar took him to hospital after approaching to Sabour Police Station. Fard-bayan was recorded at the hospital, whereupon he had put his signature,



identified.

14. PW-3 had deposed that on the alleged date and time of occurrence, he along with Saheb Mandal, Kailash Mandal, wife of Kailash Mandal were returning to their houses in the midst of way, Prem Lal Mandal shot at Saheb Mandal causing injury as a result of which, he fell down. Then thereafter, he had gone to his house. He had further stated that he had not seen anybody else than Prem Lal Mandal. During cross-examination at Para-4, he had stated that Saheb Mandal, Kailash Mandal and his wife were coming from his Basa, they were returning after seeing striped guard (Parwal) crop. Then had said that Kailash Mandal was first in row while his wife was last one. He was 2-3 steps behind Saheb Mandal. In Para-5, he had stated that occurrence took place over ridge in between field of Rambali Mukhiya and Chandrika Yadav. When he had seen Prem Mandal, at that very time, he was two steps away from him. In Para-6, he had stated that as soon as Saheb Mandal sustained injury, he fled away. So, he is unable to say the location of the body where injury was caused. Kailash Mandal and his wife had not run away there from. At Para-7 and 8, there happens to be cross-examination relating to kidnapping of Manik Mandal' sons as well as murder of Indira Mandal. In Para-9, there happens to be admission at his end that informant happens to be his brother as per village custom. Then had denied the suggestion that no such type of occurrence had ever taken



place.

15. PW-5 is Kailash Mandal, own brother of the informant, who had deposed that on the alleged date and time of occurrence, he along with his brother were returning from Jangalwa Bahiyar Diyara. When they reached near the field of Ramanand Mandal, Umeshwar Mandal, Manik Mandal, Mahendra Mandal, Ramavtar Mandal, Anuj Mandal, Biran Mandal, Suresh Mandal, Tribeni Mandal and Prem Lal Mandal encircled them. Umeshwar Mandal was armed with pistol, Prem Lal Mandal was armed with pistol in both hands and rest were armed with lathi, bhala, garasi. On an order of Umeshwar Mandal, Prem Lal Mandal fired causing injury over right inter-coastal region of Saheb Mandal. Prem Mandal again fired causing over left inter-coastal region. Then Umeshwar Mandal fired causing injury of right hand of Saheb Mandal as a result of which, Saheb Mandal fell down, he ran away there from, identified. During cross-examination at Para-3, he had admitted that he happens to be an accused of Sabour P.S. Case No.11 of 1994 as well as 79 of 1994. Then at Para-4, 5, 6, there happens to be material contradictions. In Para-7, he had admitted that he along with Saheb Mandal happens to be an accused in connection with kidnapping of Manik Mandal as well as his sons, trial is going on. He had further admitted at Para-4 that Title Suit is going on in between Umeshwar Mandal and him. Then had shown ignorance with regard to other



criminal activity being adopted by them and during course thereof, as has been suggested that informant himself had sustained injury.

16. PW-6 is the wife of the PW-5. She had deposed that on the alleged date and time of occurrence, she along with her husband and Bhainsur were returning from Jangalwa Bahiyar Diyara. When they reached near the field of Ramanand Mukhiya, on an order of Umeshwar Mandal, Umeshwar Mandal, Prem Mandal and Tribeni Mandal shot at causing injury to her Bhainsur. Then thereafter, all the miscreants escaped there from. They have also escaped there from in order to save their lives, identified the accused. During cross-examination at Para-3, she had stated that accused had fired from a distance of twelve feet. He had further stated that Pairu, Chaturi came along with them and lifted her Bhainsur. In Para-5, she had shown the boundary of the P.O. as North-Basa of Rambali, South-her house as well as house of accused, East-village and West-village. At Para-7, she had accepted that they are on litigating term since before.

17. From the evidence as is evident, witnesses are not at all consistent. As per PW-3, the occurrence took place over a ridge lying in between field of Rambali Mukhiya and Chandrika Yadav (Para-5), which is found corroborated with the evidence of PW-4, informant (Para-2), but when the evidence of PW-5 is taken, he had stated during his examination-in-chief near the field of Ramanand



Mandal (Para-1) and PW-6 also reiterated in her examination-in-chief as Ramanand Mukhiya. The prosecution had not adduced/ explained relationship in between Rambali and Ramanand Mukhiya. When the aforesaid event is taken further, PW-3 had stated that it happens to be ridge in between field of Rambali and Chandrika Yadav that means to say, there should have been presence of Rambali and Chandrika Yadav in the boundary of the alleged P.O. When the evidence of PW-5 at Para-5 is taken, she had shown the boundary as North-Basa of Ramanand, South-her house as well as house of the accused, East-village, West-village. So, the P.O. disclosed by PW-6 speaks contrary to whatever been stated by PW-3 and PW-4.

18. From the evidence of PW-3, it is evident that he had deposed with regard to single shot having made at the end of accused/ appellant Prem Mandal. When the evidence of PW-4 has been considered, he had stated that Umeshwar Mandal had fired single round causing injury over right side of inter-coastal area while Prem Mandal had shot at left side of upper part of back. PW-5 had stated that Prem Mandal had fired two rounds causing injury over right side of inter-coastal area as well as left side of inter-coastal area while Umeshwar Mandal shot at causing injury over his right hand. PW-6 had stated that Umeshwar Mandal, Prem Mandal and Tribeni Mandal had fired one round each causing injury over the person of the injured. Moreover, there happens to be material contradiction visualizing from



the evidence of the PW-6.

19. Had there been examination of the I.O., then in that circumstance, appellants would have been in a position to locate the actual place of occurrence and in likewise manner, the activity having so assigned by the respective prosecution witnesses. Section 134 of the Evidence Act did not require any number of witnesses in order to prove facts in issue. That means to say, even having presence of single witness whose evidence is found creditworthy, would be sufficient to record the verdict of guilt. Furthermore, it is needless to say that the evidence of an injured has got primacy on account of at least showing his presence at the P.O. and further sustaining injury in a manner, as deposed by him, but the condition happens to be that his testimony should be creditworthy, trustworthy, reliable. Enmity is a double edged sword, it maybe a motive for commission of the occurrence, it may be a motive for false implication. It is also settled at rest that *falsus in uno falsus in omnibus* is not applicable. So, even some part of evidence being out sketchy, would not allow outrightly rejection of evidence, if the remaining part is found trustworthy.

20. It is true that PW-4 is the sole injured. It is also true that he has not been subjected to cross-examine. But when his evidence is taken together with the evidence of other witnesses, more particularly, he himself stick over the version that he along with PW-



3, PW-5 and PW-6 were coming and during course thereof, were cordoned by the accused persons and then, shot at, then in that circumstance, inconsistency amongst them over the manner of occurrence, over proper identification of the assailant and over the place of occurrence did not spare the PW-4, even being injured and in the aforesaid background, the cumulative effect of the infirmities so persisting as pointed hereinabove inconsonance with the non-examination of I.O. did not justify finding recorded by the learned lower Court, whereupon same is set aside. Appeal is allowed. Appellants are on bail, hence are discharged from its liability.

(Aditya Kumar Trivedi, J)

Vikash/-

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