

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.590 of 2015

Arising Out of PS.Case No. -70 Year- 2003 Thana -ROSERA District- Samastipur

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Mukesh Kumar Rai son of Dhaneshwar Rai, resident of village- Ram Nagar, P.S.- Rosera, District- Samastipur

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. Durgesh Kumar Singh, Adv.

Mr. Sanjay Kumar Singh, Adv.

For the State : Mr. S.A. Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 12-07-2018

Appellant, Mukesh Kumar Rai has been found guilty for an offence punishable under Section 307 of the IPC and sentenced to undergo R.I. for five years as well as to pay fine appertaining to Rs.5000/- and in default thereof, to undergo R.I. for six months, additionally, under Section 324 of the IPC and sentenced to undergo R.I. for two years as well as to pay fine appertaining to Rs.1000/- and in default thereof to undergo R.I. for three months, additionally with a further direction to run the sentences concurrently vide judgment of conviction dated 11.06.2015 and order of sentence dated 16.06.2015 passed by Additional Sessions Judge, Rosera, Samastipur in Sessions Trial no.634/2006.

2. Ravindra Kumar Rai (PW.6) gave his fardbeyan while he was admitted at Sub-divisional Hospital, Rosera on 22.07.2003 in presence of his cousin brother (name not disclosed) divulging the fact that on 18.07.2003 Mukesh Kumar Rai borrowed rupees two hundred on the pretext of visiting to *Mela* with an assurance that the



same will be repaid within two days. On 21.07.2003 at about 11:00 AM he had demanded his money from Mukesh Kumar whereupon he assured that at evening hour the same will be repaid. At about 08:00 PM Mukesh Kumar called him at Ramnagri Chowk on the pretext of returning of the money whereupon he came at the grocery shop of the Mukesh Kumar lying at Ramnagri Chowk where he directed to accompany to latrine with an assurance that during midst thereof, he will pay his money. When they reached near the field of Ram Ujiyar Rai, all on a sudden Mukesh Kumar took out *Garasa* and gave a blow over his neck causing injury thereupon. He tried to apprehend the Mukesh Kumar however, he succeeded in giving second blow over his head as a result of which, he fell down. He began to raise alarm in order to save himself attracting his villagers including Ram Sogarath Rai (PW.3) and Arun Rai (PW.2) seeing whom, Mukesh left the scene. As, he was unable to move in the night on account thereof, today he has been taken to hospital where, his treatment is going on.

3. After registration of Rosera P.S. Case No.70/2003 investigation commenced and after concluding the same, charge sheet was submitted whereupon trial commenced and concluded in a manner, 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. Further been pleaded that the shopkeepers having their shops in the surrounding of the appellant shop were hostile to the appellant due to business rivalry and, those persons are responsible to implicate the appellant jealously.



However, nothing has been adduced in defence.

5. In order to substantiate its case, prosecution had examined altogether eight PWs who are PW.1-Sunil Rai, PW.2-Arun Kumar Rai, PW.3-Ram Sogarath Rai, PW.4-Ram Prakash Rai, PW.5-Amar Kumar Rai, PW.6-Ravindra Kumar Rai, PW.7-Md. Abu Laish and PW.8-Jai Kant Mahto. Side by side had also exhibited formal FIR-Ext.1, Injury report-Ext.2. As stated above, nothing has been adduced on behalf of defence.

6. While assailing the judgment of conviction and sentence, it has been submitted on behalf of learned counsel for the appellant that falsity of the case is itself evident from the conduct of the prosecution. It is an admitted fact that accused has got grocery shop at the chowk where other shops are also present and that happens to be reason behind on the basis of which witnesses have shown their presence at the place of occurrence on an alarm raised by the informant. Really those witnesses were an eyewitness. They have claimed that they were along with torch. They flashed, seen the occurrence and some of them, even satisfying that during course of fleeing of the appellant they have perceived. This kind of evidence having at their end is to be perceived in the background of the fact that some of the witnesses have stated that appellant fled away from the place of occurrence leaving behind the Garasa at the place of occurrence itself. There happens to be no disclosure at the end of any of the prosecution witnesses whether aforesaid Garasa was taken up by them, produced before the Investigating Officer. Had there been such exercise, then in that circumstance the, Goda, the weapon of assault would have been seized, production cum seizure



list would have been prepared showing the edge of the Garasa containing the blood, and further, whether any of the witness has been in a position to suggest that at the place of occurrence blood was found. In likewise manner, none of the witnesses have disclosed that police had visited at the place of occurrence in their presence, they have shown the place of occurrence, blood was there confirming that the place of occurrence happens to be the same as alleged by the prosecution. It has also been submitted that when the evidence of the witnesses is scrutinized in proper way, then in that event, it is crystal clear that none of the witnesses could be an eyewitness to occurrence in the background of the fact that none had said that they have been seen the other at the place of occurrence or during midst of way and, whether they have jointly or individually lifted the injured from the place of occurrence to his house or the place where injured was kept whole night. Also submitted that none of the family members have come forward to say that the informant remained at house whole night and on the following day, he was taken to hospital. That has got relevancy in the background of suggestion having given at the end of the appellant that informant happens to be a characterless person and on account thereof, he might have sustained injury at different place in different manner by different persons but, on account of prevailing politics appellant has been victimized.

7. It has also been submitted that save and except certain offences whereunder obligation has been cast upon accused to explain, ordinarily it is upon the prosecution to support its case beyond all reasonable doubt and any kind of deficiency persisting therein bound to have an adverse impact and the ultimate



beneficiary would be the accused. So submitted that in the facts and circumstances of the case, the prosecution case could not be said to be duly substantiated whereupon, the judgment of conviction and sentence is fit to be set aside.

8. While controverting the submission made on behalf of learned counsel for the appellant, it has been submitted by the learned Additional Public Prosecutor that the finding recorded by the learned lower court needs some sort of modification in the background of the fact that doctor has not been examined. Injury report has been exhibited by a formal witness without complying the requirement of Section 32(1) of the Evidence Act whereupon, the conviction and sentence to the extent of Section 324 of the IPC could not survive. So far Section 307 of the IPC is concerned, as there happens to be no embellishment, contradiction in the evidence of the witnesses who succeeded in proving the place of occurrence and the manner, whereunder two repeated Garasa blow have been implicated by the appellant, would attract Section 307 first part as, even in absence of evidence of doctor, there was two Gadasa blow. Gadasa being sharp cut weapon even cause death of victim, speaks about intention as well as knowledge that by such activity death might occur and so, the conviction relating to Section 307 is fit to be retained.

9. In order to appreciate the rival submission, first of all the deficiency persisting on the record is to be seen. From the record it is evident that Investigating Officer has not been examined. What repercussion it will have, will be taken up in the background of the circumstances persisting on the record as, held by the Hon'ble Apex



Court in *Lahu Kamlakar Patil v. State of Maharashtra* reported in (2013) 6 SCC 417.

“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.”

10. It is also apparent from the record that doctor has not been examined. There happens to be no evidence on the record that doctor is dead or his presence could not be procured. That means to say the injury having exhibited through PW.8, a formal witness would not give any supportive link to the prosecution and so, the contents of the document would not be taken into consideration.

11. Now coming to the categories of the witnesses having been examined on behalf of the prosecution, it is evident that the prosecution had examined the witnesses falling under the three categories (a) the informant victim himself, PW.6 (b) the witnesses claiming to be an eye witness to occurrence and on that very score PW.1, PW.2, PW.4 and the third category (c) who had seen the appellant fleeing from the place of occurrence, PW.3 and PW.5.

12. PW.3 had stated that while he was at flour mill on the alleged date and time of occurrence, he heard alarm to save whereupon he rushed with torch and then, had seen cut injury over the head, neck of Rabindra Rai. He had also seen in torch light Mukesh Kumar Rai fleeing therefrom with Garasa. He had further stated that Mukesh Rai had borrowed Rs.200/- from Ravindra Rai and for that, Ravindra Rai had repeatedly demanded over which, Mukesh had directed him to come at 08:00 PM at night and when he came Mukesh took him to the place on an assurance to give money and during course thereof, he had assaulted. During cross-



examination at para-2, he had stated that informant Ravindra Kumar Rai had not given money in his presence. In para-3 he had stated that it was dark night he had gone along with torch. During course of statement before the police he had stated that he had gone with torch (contradiction). He had seen Ravindra Kumar Rai lying on the ground. He had taken him to hospital during midst thereof he met with large number of person but is unable to disclose their names. Then had admitted that father of Ravindra Kumar Rai had accompanied him.

13. PW.5 had stated that on the alleged date and time of occurrence he was at Kuku chowk. After hearing sound of alarm he rushed and in torch light he had seen Mukesh fleeing along with Garasa. He had seen Narendra Kumar in pool of blood. He was conscious. There was injury over his neck. On questioned Ravindra had disclosed that Mukesh had borrowed rupees four hundred from him and when he demanded, he directed him to accompany and during midst thereof, caused injury. During cross-examination at para-2 he had stated that in the night of 17.07.2002 he met with Ravindra and Mukesh. On that day he had taken him to hospital for treatment. In para-3, he had stated that he had seen informant in an injured condition at the place of occurrence. He had conversation with him and during course thereof, he had disclosed regarding the occurrence.

14. PW.1 had deposed that on the alleged date and time of occurrence while he was going to meet natures call heard alarm of informant whereupon he reached at Dhawati chowk where he saw Mukesh armed with Garasa and had inflicted upon the Ravindra



causing injury over back of his neck. He had further disclosed that this occurrence has been committed on account of demand of Rs.200/- by the Ravindra Kumar which he had given to Mukesh. During cross-examination, he was not at all tested on that very score.

15. PW.2 had stated that on the alleged date and time of occurrence he was shipping tea at Ram Nagar Chowk and during course thereof, he heard alarm whereupon he rushed with torch. Then had seen Mukesh inflicting Garasa blow over Ravindra causing injury over his head as well as neck. Then, he left the place after throwing *garasa*. Then had said that Mukesh had borrowed rupees two hundred from Ravindra and as Ravindra had demanded, in the aforesaid background this occurrence has been committed. During cross-examination at para-3 he had stated that P.O. is lonely place and is a field. Money was not handed over in his presence but he came to know about the same. Then had stated that it was disclosed by the Ravindra. In para-4 he had stated that only Ravindra was in an injured condition the place of occurrence he had talked with him. He had talked with 4-5 persons who are witness of this Court.

16. PW.4 have stated that on the alleged date and time of occurrence while he was taking meal at his house he heard alarm of Ravindra whereupon he rushed with torch. After 10-12 leg from his house when he reached near Ravindra Kumar seen Mukesh engaged in inflicted Garasa blow over Ravindra causing injury over his neck. Another blow was also given over his head. After seeing him Mukesh threw *garsa* and fled away. Then had disclosed that aforesaid occurrence has been committed in the background of demand made



by the Ravindra from Mukesh of rupees two hundred which he had borrowed. In para-2 of his cross-examination he had stated that money was paid in his presence. He is not remembering the date but it was paid at about 04:30 PM. At para-3 he had stated that he reached at the place of occurrence with torch. At that very time Ravindra was standing. He had gone alone. At that very time 40-50 persons were present at the place of occurrence including Arun, Swarath, Arun, Sunil. He talked with informant. Informant had disclosed that such kind of activity has been committed with him and then thereafter he took the informant to hospital. Then he had stated that he had not seen any incident and had deposed falsely.

17. PW.6 is the informant/injured. He had deposed that on the alleged date and time of occurrence he was at Ramnagar Chowk. Mukesh Rai had taken rupees two hundred from him since before which he had demanded. Then he (Mukesh) had said to accompany while going to meet natures call and accordingly, both of them proceeded. When they reached at the field of Ram Ujiyar Rai where he demanded money. Then thereafter Mukesh took out Garasa and then gave blow over his neck as well as over his head repeatedly. Shown the scar mark in the court. He fell down and raised alarm whereupon Arun, Swarath Rai, Ram Pravesh Rai came out of them two lifted him while three chased the Mukesh but, Mukesh succeeded in his escape he was taken to government hospital, Rosera where he was treated. Police came and recorded his statement. During cross-examination at para-4 he had stated that Ram Pravesh happens to be the witness of handing over the money to accused. He was assaulted on 21.07.2003. At para-5 he had stated that he was admitted on 22.07.2003 at Rosera Hospital. At



para-7 he had stated that there happens to be 3-4 shop at Ram Nagar chowk and named those as Arun Kumar Rai (PW.2), Tej Narain, Kameshwar Rai and Mukesh Rai. In para-8 he had stated that it was a dark night he was empty hand. Then had describe the physical feature of Garasa. In para-9 he had stated that he was given repeated blow from back side at a distance of five hands. He had further disclosed that he had got no animosity with the accused. Then had denied the suggestion.

18. From the evidence available on the record, it is evident that there happens to be no embellishment or contradiction in the evidence of the witnesses with regard to their previous statement, and so, their status have to be seen in the background of whatever they deposed. From the evidence, it is evident that some of them have claimed to be an eyewitness to occurrence while some had claimed to have seen the accused during course of fleeing from the place of occurrence. To appreciate reliability of their evidences, when the evidence of PW.6 has been gone through, it is apparent that he had not raised alarm till he was assaulted. That means to say there was no occasion left for the witnesses to arrive at the P.O. before occurrence. There happens to be specific disclosure at the end of PW.6 that on his alarm when the witnesses appeared, the accused fled away seeing them. This happens to be the one circumstance. The second circumstance as is visualizing that some of the witnesses more particularly PW.2, PW.4, have stated that after throwing garasa, accused fled away but, they have not stated what steps they have taken with regard to aforesaid garasa while others not. PW.2 and PW.4 claimed themselves to be an eyewitness. The third instance as is evident from the evidences of the PWs is that none of



the witnesses have stated that after lifting therefrom where informant PW.6 was kept nor PW.6 himself had stated that after lifting therefrom where he was taken as, there happens to be specific disclosure at the end of PW.6 that on account of night he could not rushed therefrom to hospital or police station rather on the following day, he was admitted at Sub-divisional Hospital, Rosera. In the aforesaid background due non-examination of the Investigating Officer has caused prejudice to the appellant as it could not be brought up on record whether any of the prosecution witnesses had handed over garasa to him and for that production cum seizure list was prepared, whether the field of Ram Ujiyar Rai happens to be the place of occurrence in the background of the fact that none of the witnesses have stated including the PW.6 that copious blood had fallen at the place of occurrence or not and thirdly, whether the informant PW.6, as he failed to disclose was kept during intermediary period and for that, whether family members of the informant was ever examined.

19. It is settled principle of law that ordinarily the evidence of injured lies on pivotal higher and it is to be accepted on account of inspiring confidence, being present at the place of occurrence but, if his evidence appears to be shaky, then in that circumstance, his evidence should also be seen with suspicion and on account thereof, corroboration is required. As stated above, PW.1 to PW.5 have not stood the test and further, on account of deficiency at the end of the prosecution by way of non-examination of the Investigating Officer in the facts and circumstances of the case, cast a serious doubt over the authenticity of the prosecution version.



20. Consequent thereupon, the judgment impugned is set aside. Appeal is allowed. Appellant is on bail, hence is discharged from its liability.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAER	A.F.R.
CAV DATE	N.A.
Uploading Date	17.07.2018
Transmission Date	17.07.2018

