

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.614 of 2015**

Arising Out of PS. Case No.-303 Year-2005 Thana- MADHEPURA District- Madhepura

1. Rekha Devi, Wife of Mukesh Sah,
2. Saro Devi, Wife of Parmeshwari Swarnkar,
3. Munni Devi, Wife of Bharat Swarnkar,
All resident of Mohalla - Halwai Tola, Ward No. 06 Madhepura, P.S.
and District - Madhepura.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Jitendra Kumar Giri, Adv.
For the Respondent/s : Mr. Binod Bihari Singh, App

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

Date : 13-11-2019

The appellants, namely, Rekha Devi, Saro Devi and Munni Devi have been found guilty for an offence punishable under Section 307/34 of the IPC and each one has been directed to undergo R.I. for six years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for six months, additionally, vide judgment of conviction dated 16.09.2015 and order of sentence dated 21.09.2015 passed by the 2nd Additional District and Sessions Judge, Madhepura in Sessions Trial No.34A of 2007 arising out of Madhepura P.S. Case No.303 of 2005.

2. Balram Sah (PW-5) gave his fardbeyan on 19.11.2005 while he was admitted at Sadar Hospital, Madhepura at about 6.00 PM disclosing therein that on the same day at about 3.00 PM, while he was screening T.V. in his room, he heard utterance of his elder



son who was saying that construction work is going on over his wall. Whereupon Parmeshwari Swarnkar was scolding him and was also saying that construction work could not be stopped. Hearing the same, he came out and then seen 4-5 unknown persons including son of Parmeshwari Swarnkar and Parmeshwari Swarnkar were present who were instructing his son to leave the place otherwise, he will have to face dire consequences. During midst thereof, his son insisted to stop the construction work. They tried to catch hold of his son which he saved by having his intervention. At that very moment, he (Parmeshwari) took out *Chhura* from his pocket and, attacked upon his son as a result of which he sustained injury and fell down. He rushed in rescue. At that very moment Bharat Swarnkar attempted to strike with iron rod (pipe) which he ward off. Then thereafter, Parmeshwari tried to pull him. His son rushed towards him carrying *Chhura*. During the intervening period, wife of Parmeshwari Swarnkar, daughter-in-law of Parmeshwari Swarnkar and daughter of Parmeshwari Swarnkar came out from their house and caught hold of his legs, hands and then, Bharat Swarnkar pushed him on a drain. As soon as he fell down, Parmeshwari Swarnkar gave *Chhura* blow repeatedly over his stomach. His nephew, seeing the alarming situation, rushed to rescue who was assaulted by Bharat Swankar. He, seeing the blood rushed towards the road. He also got up seeing an opportunity.



Then, thereafter, his younger son Ramesh Kumar Sah came and assisted him in leaving the place, during course thereof, Parmeshwari Swarnkar came at the road and then, assaulted with *Chhura*. It has further been disclosed that seeing the condition of his nephew, sons, he anyhow managed to send them to police station and then, on the direction of some of the police officials or the Inspector of police to go to hospital they pave to sadar hospital.

3. After registration of Madhepura P.S. Case No.303 of 2005, investigation commenced and after concluding the same, as is evident firstly Parmeshwari and Bharat were sent up for trial by way of submission of charge-sheet keeping the investigation pending against these appellants facilitating the trial against them under Sessions Trial No.34 of 2007. Subsequently thereof, supplementary charge-sheet has been submitted against the appellants. Whereupon Sessions Trial No.34A of 2007 has been registered, though proceeded separately but on the same day, judgments of both the sessions trials have been delivered. On account thereof, two appeals have simultaneously been heard and are being decided.

4. Defence case, as is evident from the 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 they have falsely been implicated in this case out of malice and



grudge in order to teach a lesson only to humiliate the appellants who are female, their presence have purposely been introduced without having any kind of specific allegation. It has further been pleaded that the prosecution party were aggressors, they assaulted the family members of the appellants. Whereupon case has also been instituted against them which, the prosecution witnesses have fairly admitted, though nothing has been adduced on behalf of defence.

5. In order to substantiate its case, prosecution has examined altogether 5 PWs who are PW-1, Manoj Kumar, PW2, Ramesh Kumar, PW-3, Santosh Kumar, PW-4, Umesh Prasad Sah and PW-5 Balram Sah. Dr. J.B. Singh has been examined as CW-1. Side by side prosecution has also exhibited, Exhibit-1, signature of Dr. J.B. Singh on the injury report.

6. As stated above, nothing has been adduced in defence though, from the deposition of the respective witnesses it is crystal clear that there happens to be an admission at the end of the prosecution witnesses over institution of the counter case having at the end of Bharat Swarnkar, son of Parmeshwari Swarnkar but with an explanation that the same has been filed two days after the occurrence.

7. PW-1 is Manoj Kumar. He has stated that the occurrence is of dated 19.11.2005 at about 3.00 PM. At that very



time he was at his house. At that very time, Parmeshwari Swarnkar and Bharat Swarnkar, by way of engaging labourers were engaged in making construction over his wall and at the relevant moment were engaged in leaving space for affixing ventilator. Whereupon, he forbed. They conceded. After sometime, they again indulged in construction. Whereupon, he protested followed with altercation as well as *Mar Pit*. Parmeshwari Swankar gave *Chhura* blow over his stomach, hand and finger (shown scar mark). He became injured. His father rushed in his rescue who was caught hold of by the female members of Parmeshwari Swankar, namely Saro Devi, Munni Devi and Rekha Devi, who caught hold of his leg, hand and pulled him, as a result of which he fell down over the drainage. Bharat Swarnkar came and gage a blow over the head of his father with iron rod (tube-well part) but the same was ward off. Thereafter Parmeshwari Swarnkar repeatedly gave *Chhura* blow over his stomach, inter-coastal region, and hands. His father became injured. Anil Sah was caught hold of by Parmeshwari Swankar and, Bharat Swarnkar pierced *Chhura* over his stomarch, as a result of which he became injured. His younger brother Ramesh Kumar came in rescue who was also assaulted by means of *Chhura* over his chest. Mohalla people intervened and rescued them. Then thereafter, they all were taken to police station and then to hospital. They were treated at the clinic of Dr. J.B. Singh and was operated upon.



Identified. During cross-examination at paragraphs 5, 6 and 7 there happens to be specific disclosure with regard to having houses of both the parties contiguous to each other. They have not fought since before. They were on visiting term. The female folk never indulged in any kind of criminal activity. In paragraphs 9, 10 and 11 there happens to be cross-examination relating to the nature of land. Whereupon he has clearly stated that he has got no knowledge with regard to nature of the land whether the same happens to be ancestral or self acquired. He has further stated that altogether 9 persons were present at the time of occurrence. He has further stated that the house of his own uncle Sadanand Sah lies west to his house. He has further stated that the occurrence had taken place over the Government land. He has further stated that the land of Parmeshwari Swarnkar is duly fenced at front side by *Jafari*. In paragraphs 12 and 13 there happens to be cross-examination relating to construction activity and further he has admitted that since before the occurrence, he had not put any kind of obstruction. He has further stated that at that very moment, nothing was in the hands of Parmeshwari and Bharat. First of all an altercation took place and then, he was assaulted. The first blow of *Chhura* was given over his hand. He is unable to disclose about the location of Bharat at that very moment. He fell down. Then, the second blow of *Chhura* was given over his stomach. Again he fell down. Even after



sustaining third blow, he did not become unconscious rather, he came over the road where he saw 20-25 people assembled. In paragraph 15 he has stated that he remained at the hospital for nine consecutive days. His statement was not recorded at the hospital rather was recorded at his house. At paragraphs 17, 18, 19, 20 and 21 there happens to be cross-examination relating to his previous statement wherein the involvement of these three appellants is also found exaggerated but on account of non-examination of the I.O. the same has not properly been brought up on record in accordance with Section 154 of the Evidence Act.

8. PW-2 (Ramesh Kumar) is younger brother of PW-1. He during his examination-in-chief has stated that on the alleged date of occurrence he was at his house. After hearing raucous coming from outside, he came over the road where he had seen Parmeshwari indulged in directing his brother to leave otherwise he will be murdered. Thereafter, Parmeshwari Swarnkar took out *Chhura* and gave repeated blow over his brother, at his stomach and hand. His father came in rescue who was caught hold of by the wife, daughter-in-law and daughter of Parmeshwari who pushed him over the drainage and then, Parmeshwari Swarnkar gave 4-5 *Chhura* blow causing injury over his stomach, hand and chest. His cousin brother Anil also came in rescue who was caught hold of by Parmeshwari and Bharat gave *Chhura* blow over his stomach (left



side), as a result of which he became unconscious. When he came in rescue, he was assaulted by Parmeshwari with *Chhura* causing injury over his chest (shown the scar mark). He along with Anil was taken to Sadar Hospital where they were treated. Then thereafter, Anil was taken to Dr. J.B. Singh. Dispute originated on account of construction of a wall. During cross-examination at paragraph 4 he has stated that his house as well as Parmeshwari has got common wall and in likewise manner, there happens to be roof. The house of Parmeshwari Swankar is double storied construction and upper floor was in accordance with the existing ground floor. His family has got no complain concerning the construction of remaining portion of double storied building belonging to Parmeshwari. At paragraph 5 he has stated that on the date of occurrence 9-10 persons of his family were present, while from the family of Parmeshwari only 4 persons were there. Again said that he is unable to say. In Paragraph 6 he has stated that occurrence took place over his land. Nothing had happened over upper floor. Occurrence took place over the Government land lying near the land of Parmeshwari which is fenced with *Jafari*. When he came out from his house he saw 15-20 persons, all were known to him. In paragraph 7 he has stated that he had seen his brother being assaulted. Blood was oozing out from the injury sustained by his brother. His father was lying. All were taken to hospital. When his father fell down, there



was alarm of murder attracting his cousin brother Anil, Santosh as well as some persons of market. In paragraph 8 he has stated that there was rumour of murder. Whereupon accused persons began to flee. On the other hand, his father and brother have been taken to hospital. At paragraphs 10, 11, 12, 13 and 14 there happens to be contradiction but on account of non-examination of the I.O. that remained stalled.

9. PW-5 is the informant who during his examination-in-chief has stated that on 19.11.2005 at about 3.00 PM while he was screening T.V. in a room, he heard some sort of noise having from the outside. He came out and then saw his son Manoj Kumar standing in front of house of Parmeshwari Swarnkar by the side of the road. Parmeshwari Swarnkar was also there having *Chhura* in his hand, joined by 4-5 unknown persons including Bharat Sah, Saro Devi, Munni Devi and Rekha Kumari. At that very time, his son was insisting upon to stop construction work. Whereupon, Parmeshwari threatened him to leave the place otherwise he will have to face dire consequences and then, Parmeshwari gave *Chhura* blow over Manoj causing injury over his hand and stomach. He came in rescue. Whereupon Bharat Sah tried to assault him with pipe but he ward off the blow. Then he took out *Chhura* from his pocket. All the three female members of the family came out and caught hold of him. Parmeshwari repeatedly gave two



Chhura blow over his stomach, third one over inter-coastal region and fourth over his hand (shown scar mark). Anil came in rescue whose hand was caught hold of by Parmeshwari and Bharat gave *Chhura* blow over his stomach (left side). Whereupon he fell down and became unconscious. They were taken to hospital. Ramesh came in rescue who was assaulted by Parmeshwari with *Chhura* over his chest. They were taken on rickshaw while Anil was taken on scooter to hospital. They had gone to police station and therefrom to hospital. They were referred to hospital but he was admitted at the clinic of Dr. J.B. Singh where he was treated. Identified the accused. He has also stated that his *Fardbeyan* was recorded at the hospital. During course of cross-examination at paragraph 7 he has admitted presence of counter case. He has also admitted that a proceeding under Section 107 of the Cr.P.C. was also drawn up. At paragraphs 8, 9 and 10 there happens to be cross-examination with regard to the nature of land. In paragraph 12 he has stated that his house as well as the house of accused happens to be contiguous to each other but he has further disclosed that the wall is not joint. Roof is also not joint. At paragraph 14 there happens to be cross-examination with regard to physical feature of the building. Paragraph 15 is the repetition with regard to presence of counter case. In paragraph 11 (wrongly numbered) *Mar Pit* did not sued just after coming. First of all there was an altercation.



They have not tried to flee therefrom. First of all Manoj was assaulted with *Chhura*. He has not tried to save him. He tried to caught hold of Parmeshwari and during course thereof son of Parmeshwari tried to assault with pipe. Son of Parmeshwari had not tried to catch hold of him. In paragraph 12 he has stated that Parmeshwari and Bharat had not conjointly assaulted. After pushing him on the ground he was assaulted. He fell down in a drainage lying by the side of the road. Saro Devi and Munni Devi had caught hold of him. Hands were caught hold of by Saro Devi. In order to rescue himself he had not used his legs and hands. *Chhura* was directly used. He himself stood up after 5-7 minutes. They were taken to hospital by Shankar and Janardan. Then at paragraph 13 there happens to be contradiction. Then has denied the suggestion that no such kind of occurrence had ever taken place rather they have had assaulted the accused persons and during course of fleeing, they had fallen over *Jafari* as a result of which they sustained injury.

10. PW-3 is Santosh Kumar who during his examination-in-chief has reiterated the prosecution version and further, shown only presence of wife, and daughter-in-law of Parmeshwari who caught hold of the leg of Balram. During cross-examination at paragraph 14 his attention has been drawn up towards the previous



statement wherein he had not named the female members but due to non-examination of I.O. remained knaggy.

11. PW-4 is Umesh Prasad Sah who is hearsay witness.

12. CW-1 is Dr. G.B. Singh who had examined Anil Kumar Sah and operated upon Anil after blood transfusion. He had found stab injury. He had further stated that small intestine was having a cut. Blood was found in the cavity but he had not mentioned the same in his injury report that the injury was grievous.

13. Anil has not been examined and so, the potentiality of evidence of CW-1 is found due inert. The doctor who had examined PW-1, PW-2 and PW-3 has not been examined and so their injury report is not on record.

14. I.O. has not been examined. In routine manner non-examination of I.O. will not cast ingrain prospect of the prosecution case as has consistently been propagated by the Apex Court. However, when there happens to be material development/exaggeration in the evidence then, in that circumstance, on account of non-examination of the I.O. the accused found to be deprived of an opportunity to shake the testimony of the witness on that very score and by such activity the interest of accused is found duly prejudiced. Then on that score alone, the non-examination of I.O. have an adverse impact upon the prosecution case. When the



evidence of the witnesses, that means to say PW-1 and PW-2 have gone through, irrespective of the fact that both have claimed to be injured but, so far the status of these appellants are concerned it is apparent that there happens to be material of development in their evidences with regard to these appellants and their attention has been drawn up relating to their previous statement but on account of non-examination of the I.O., the appellants could not be able to avail of an opportunity as provided under Section 157 of the Evidence Act in order to discredit the testimony. Had there been examination of the I.O. then, in that circumstance, the aforesaid material would have been legally brought up on the record in order to shake the testimony so far the appellants are concerned. So far PW-5 is concerned, his testimony so far implication of these three appellants are concerned, is also found inconsistent as the daughter of Parmeshwari has not been named by him.

15. Now coming to classification of witness is concerned, it has been categorized as, wholly reliable, wholly unreliable, partly reliable, partly unreliable. So far the complicity of these appellants are concerned, considering the nature of the evidence in consonance with the non-examination of the I.O., do not justify the finding so recorded by the learned lower court. Consequent thereupon the judgment of conviction dated 16.09.2015 and the order of sentence



dated 21.09.2015 so recorded by the learned lower court is hereby
set aside.

16. The appeal is allowed. The appellants are on bail,
hence they are discharged from the liability of bail bonds.

(Aditya Kumar Trivedi, J)

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AFR/NAFR	NAFR
CAV DATE	NA
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