

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.626 of 2015

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

1. Parmeshwari Swarnakar, Son of Late Santi Sah
2. Bharat Swarnakar Son of Parmeshwari Swarnakar, 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. Sujit Kumar Singh, App

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 08-11-2019

Before coming to main issue, salient features as is evident from the lower court record, is to be taken note of, at the first instance;

(A) For an occurrence dated 19.11.2005, on the *Fardbeyan* of informant, Balram Sah, Madhepura P.S. Case No. 303/2005 has been registered against accused Parmeshwari Swarnakar, Bharat Swarnakar, Rekha Devi, Saro Devi, Munni Devi.

(B) It is evident that after completion of investigation, charge-sheet has been submitted against Parmeshwari Swarnakar and Bharat Swarnakar, keeping investigation pending against Rekha Devi, Saro Devi, Munni Devi.



(C) On the basis thereof, cognizance of an offence was taken and the matter proceeded against Parmeshwari Swarnakar and Bharat Swarnakar only, whose case was committed whereupon, Sessions Trial No. 34/2007 has been registered, trial commenced and concluded by way of recording conviction and sentence, arising out of Cr. Appeal (SJ) No. 626/2015.

(D) Supplementary Charge-sheet has been submitted against Rekha Devi, Saro Devi, Munni Devi, who have also been summoned and, after appearance they were also committed whereupon Sessions Trial No. 34A/2007 has been registered, trial commenced and concluded by way of recording conviction and sentence arising out of Cr. Appeal (SJ) No. 614/2015. It is further evident that both the Sessions Trials were tried by the same court, judgment was delivered on the same day but, separately.

Appellants, Parmeshwari Swarnakar and Bharat Swarnkar have been found guilty for an offence punishable under Section 341 of the Indian Penal Code and sentenced to undergo S.I. for one month, under Section 323 of the Indian Penal Code and sentenced to undergo S.I. for six months, under Section 324 of the Indian Penal Code and sentenced to undergo S.I. for one year, under Section 504 of the Indian Penal Code and sentenced to undergo S.I. for one year, Section 307/34 of the Indian Penal Code



and sentenced to undergo R.I. for six years as well as to pay fine appertaining to Rs. 10,000/-, in default thereof, to undergo S.I. for six months, additionally, with a further direction to run the sentences concurrently, by the Addl. Sessions Judge IInd, Madhepura, vide judgment of conviction dated 16.09.2015 and order of sentence dated 21.09.2015 relating to Sessions Trial No. 34/2007, arising out of Madhepura P.S. Case No. 303/2005.

Balram Sah (PW-8) while was admitted at emergency ward, Sadar Hospital, Madhepura, gave his *Fardbeyan* on 19.11.2005 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 “*work is going on over his wall so, be stopped*”. Over this, Parmeshwari Swarnakar scolded him and further, said that work would not be stopped. After hearing the same, he came out from his room and then, saw 4-5 persons along with Parmeshwari and his son were directing his son to leave the place immediately. His son did access to their dictum, on the other hand, gave stress over forbidding the work. Parmeshwari Swarnakar said that in any circumstance, he will not stop the work. They tried to apprehend his son. During midst thereof, he intervened and, in order to protect him, pushed. At that very moment, Parmeshwari Swarnakar took out *Chhura* and gave



blow over his son. He fell down over the road. He (informant) ran towards him in order to save him but, Bharat Swarnakar gave an iron pipe blow aiming at his head which he ward off. During midst thereof, son of Parmeshwari Swarnakar rushed with *Chhura*. Meanwhile, wife, daughter-in-law, daughter of Parmeshwari Swarnakar came out from their house and then, they caught hold his leg and hand. Thereafter, Bharat Swarnakar pushed him over the drain. As soon as he fell down, Parmeshwari Swarnakar gave 3-4 *Chhura* blow over his stomach. His nephew rushed in rescue, who was assaulted by Bharat Swarnakar with *Chhura*. He, getting an opportunity, got up. His younger son, Ramesh Kumar Sah, came and gave support to him while he was carrying him from that place, during midst thereof, Parmeshwari Swarnakar came at the road and gave *Chhura* blow. Then thereafter, all of them fled away. He then managed to send his elder son, his nephew (Anil Kumar Sah) towards police station. He also rushed over rickshaw. At police station, Officer-in-charge was not present. There were staff of inspector's office, who directed them to go to hospital, firstly, in order to save their life. Accordingly, he along with his son and nephew came to hospital where they were being treated.

As stated above, after registration of Madhepura P.S. Case No. 303/2005, investigation commenced and concluded by



way of submitting charge-sheet against Parmeshwari Swarnakar and Bharat Swarnakar at first instance keeping investigation pending against Rekha Devi, Saro Devi and Munni Devi, whereupon faced trial and convicted, sentenced in the manner as indicated above, subject-matter of instant appeal.

Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of complete denial. Furthermore, there happens to be specific plea that no such kind of occurrence has ever taken place, rather prosecution party are the aggressors, who assaulted the accused persons for which Complaint Case No. 717/2006 has been filed and only to save their skin, got this case filed. Also adduced oral as well as documentary evidence in support thereof.

In order to substantiate its case, prosecution has examined altogether 9 PWs, who are PW1- Praduman Kumar, PW2- Manoj Kumar Sah, PW3-Umesh Sah, PW4- Santosh Kumar, PW5- Ramesh Kumar, PW6- Anil Kumar Sah, PW7-Arun Kumar, PW8- Balram Sah and PW9- Dr. Dinesh Kumar Gupta. Subsequently thereto, Dr. J.B. Singh has been examined as CW-1. The prosecution has also exhibited Ext. 1- Formal F.I.R., Ext. 2 series- injury report, Ext.3- Injury report issued by CW-1. In likewise manner, defence has also examined altogether five Dws,



who are DW1- Parmeshwari Swarnkar (accused himself), DW 2- Sikandar @ Chandra Kishore Rai, DW3- Lalan Ram, DW 4- Umeshwar Kamati, DW5-Amrendra Kumar as well as also exhibited Ext. A- letter with regard to building construction sent by Executive Officer (Town), Nagar Parishad, Madhepura under RTI Act, Ext. B- Raiyati Khatiyani of Khatiyani No. 886, 2414 in favour of Saro Devi, Ext. C- Complaint Case No. 717/2006 filed against Balram Sah, Rajesh Kumar and Anil Kumar.

Learned counsel for the appellants, while assailing the judgment of conviction and order of sentence has submitted that the judgment impugned suffer, from inherent lacuna and that being so, the same is fit to be set aside. In order to justify such plea, it has been submitted that presence of case and counter case is suggestive of the facts that occurrence took place for which there is version and counter version.

In the aforesaid background, it was incumbent upon the prosecution to have examination of the I.O. in order to have proper appreciation of the evidence on the basis of objective finding of the I.O. relating to the place of occurrence. In its continuity, it has been submitted that it is an admitted case of the prosecution as well as defence that houses of both the parties are contiguous to each other having no gap. The motive for occurrence



as disclosed by the prosecution relates with fixing of ventilator at the upper floor. So, had there been examination of the I.O., then and then only, the motive so assigned would have been tested muchless, presence of any space left for affixing ventilator, encroachment over the wall of the prosecution party. On account of non-examination of the I.O., all those things remained under cover and so, it could safely be inferred that prosecution failed to substantiate the motive. In likewise manner, it has also been submitted that due to non-examination of the I.O., the right of the appellants has been prejudiced. Proceeding ahead, it has been submitted that from perusal of the evidence of PWs, it is apparent that there happens to be material exaggeration in their evidences and with regard thereto, attention has been drawn, which the defence has been deprived of, to bring on record in accordance with law and so, on this score alone, the judgment impugned is fit to be set aside.

Now coming to merit of the case, it has been submitted that informant, Balram Sah, is a local leader having influence upon the doctor as well as police and in the aforesaid background, got every stage of the case aposteriori in his favour by exerting his influence, which is duly exposed from the examination of the relevant so alleged injured persons. Consequent thereupon,



irrespective of the fact that so many injured are there but, their injuries are self-inflicted, which they met during course of fleeing after raiding the house of the appellants as well as assaulted them for which, a case has been instituted explaining the same. That being so, appellants could not be convicted therefor. So, in sum and substance, it has been submitted that the judgment impugned is not at all substantiated with the materials available on the record, hence, is fit to be set aside.

Learned Addl. P.P. while controverting the submission made on behalf of learned counsel for the appellants, has submitted that from the judgment impugned it is evident, that the learned lower court while inferring that the prosecution succeeded in substantiating its case, meticulously examined the materials available on record whereupon, did not require interference. Consequent thereupon, the judgment of conviction and order of sentence recorded by the learned lower court is fit to be affirmed.

This happens to be uncommon case to some extent because of the fact that by invoking provision under Section 315 of the Cr.P.C., one of the appellants, namely, Parmeshwari Swarnakar has come up as DW1 apart from others and, in the aforesaid background, irrespective of the fact that prosecution is under obligation to substantiate its case beyond all reasonable



doubt, the evidence of DW1 has got primacy, more particularly, when there happens to be some sort of admission at his end. From the evidence of DW1, it is evident that there happens to be admission with regard to houses of both the parties, contiguous to each other. Then, it has been deposed that Balram Sah had not taken permission from the Municipality to construct the house which, he had obtained from an information furnished by the Municipality on an application filed at his end under RTI Act. Then has submitted that he has filed Khatian of his land. He has also deposed that he has constructed his house after taking permission from the Municipality. In para 5, he has stated that he has filed copy of the counter case wherein Balram Sah and his family members are accused. The case has been instituted by Bharat (his son). He has further deposed that while he was affixing ventilator, Balram protested and during course thereof, tried to assault whereupon, he came at his *Darwaja*, chased by Balram, his son and nephew, who assaulted him, committed loot. During course of returning from the place of occurrence, they fell down over Jafri (a bamboo lattice) whereupon, they sustained injuries. Then has stated that the case instituted by Balram against him, his son, wife, daughter, happens to be false. During cross-examination, at para 7, he has stated that on the date of occurrence



he was constructing his house. *Mar-pit* took place when Balram came to stop the construction of his house. In para 8, he has stated that he has got no concern with the land of Balram Sah. Then has stated that whatsoever information he has collected with regard to the land of Balram Sah, that was under the RTI Act. He has further stated that the house of Balram Sah is over the land for the last more than twenty five years. His house also stands over his land for the last twenty five years. In para 9, he has stated that his land as well as land of Balram Sah is not at all fenced. There happens to be no gap left in between. Both the walls are contiguous. There happens to be no projection in his house. So, from his evidence, it is clearly manifest that he has admitted location of the houses of both the parties contiguous to each other having no space left in between as well as has also admitted with regard to affixing ventilator at the outer wall of his house. Apart from this, there also, happens to be admission with regard to presence of injury over the person of the prosecution party but, for that an explanation has been given that they have sustained when they fell down over the Jafri (bamboo lattice). From the certified copy of the complaint petition No. 1011-C/2005, it is evident that complaint petition was filed on 21.11.2005, two days after the alleged occurrence, which was sent to the concerned police station for registration and



investigation whereupon, Madhepura P.S. Case No. 308/2005 has been registered. It is further evident that only sketch map has been filed without having order-sheet to disclose whether the said map has been passed or not. Moreover, aforesaid map is not an exhibit on the record. In the aforesaid background, now the prosecution case is to be scrutinized.

PW9 is Dr. Dinesh Prasad Gupta, who had examined the respective injured on 19.11.2005, while he was deputed at Sadar Hospital, Madhepura as medical officer and found the following:

- (A) Balram Sah:- (i) Sharp margin wound left side mid line of abdomen 3cm x .5cm x .5cm in continuation 7 cm x .3cm x skin deep in mid line of abdomen.
- (ii) Sharp margin wound on left hand wrist dorsal aspect 2.5 cm x .5 cm x skin deep.
- (iii) Sharp margin wound on right forearm near elbow lateral aspect 3.5 cm x .5 cm x skin deep,
- (iv) Sharp margin wound on right side lateral aspect of chest 3cm x .5cm x muscle deep.

All injuries caused by sharp margin instrument may be *Chhura*.; simple in nature. Time of injuries-less than 6 hrs.

- (B) Ramesh Kumar:- Sharp margin wound over left side chest 5 cm away lateral to the nipple 2 cm x .5cm x muscle deep caused by sharp margin instrument like *chhura*; simple in nature. Time- less than 6 hrs.



(C) Manoj Kumar:- (i) Sharp margin wound on right hand dorsal aspect 9cm x 1.5cm x skin deep

(ii) Sharp margin wound left side of the neck 2cm above in inguinal area 3cm x .3cm x skin deep

(iii) Sharp margin wound on left hand between the wave of little and ring finger . 5cm x .3cm x skin deep.

All injuries caused by sharp margin instrument, may be *Chhura*; injuries are simple in nature; age of injury-less than 6 hrs.

(D) Anil Kumar :- (i) Sharp margin injury on left side abdomen later to (mammary) nipple line below coastal margin 2cm x .5cm x 3cm/ downward caused by sharp margin instrument; time-less than 6 hrs. Opinion kept reserved.

Subsequently, supplementary injury report of Anil Kumar was prepared. According to submitted papers injury was to the mesentry stomach and small intestine with collection of blood in the abdominal cavity. Nature of injury, which was kept reserved, is dangerous to life.

During cross-examination, he has stated that *Chhura* and *Chaku* are two distinct weapons but, from both weapons piercing injury is possible. He has not mentioned any injury to be piercing injury. He has further stated that at the time of examination of Anil, he was not unconscious. At the time of referring him to Saharsa, his condition was not so serious to presume that the injury was dangerous to life. He has further stated



that sharp cut injury may be caused by *Farsa* or, on fall over sharp pointed object but having difference of margin. Then has said that injury no. (i) of Balram Sah could not be caused by stabbing.

CW1 is Dr. J.B. Singh. He has deposed to the effect that on 01.12.2005, he was at his clinic. Anil Kumar Sah was referred to him by Sadar Hospital, Madhepura on 20.11.2005. The condition of patient was very serious. There were injuries over his person, including over the stomach. After blood transfusion, he was operated upon on 20.11.2005. There was huge accumulation of blood inside the stomach. There was also cut over front wall of stomach which was repaired. There was also cut of small intestine membrane, whereupon the portion of small intestine was cut, removed and then it was stitched. The patient was discharged on 01.12.2005. He had issued the injury report with regard thereto (injury). During course of cross-examination, he has stated that he had examined the patient privately. The patient was not referred to him by Sadar Hospital. He has further stated that there happens to be difference of nature of injury caused by knife as well as *Chhura*. Then had said that no such kind of injury is possible from pointed portion of a bamboo. In para 6, he has stated that the patient was admitted on 20.11.2005 and was discharged on 01.12.2005. Then at para 7 has stated that he has not mentioned in



his injury report that the aforesaid injury was dangerous to life. Though has been opined by PW9 as dangerous. However, from Ext.-3, injury report granted by CW-1, it is evident that the same happens to be dated 01.12.2005. No prescription dated 20.11.2005 has been at his end.

PW 1 is a stranger. He has deposed that while he was going to his house from bus stand and, during course thereof reached in front of house of Balram Sah, he had seen Parmeshwari Swarnakar as well as Manoj Kumar having been indulged in an altercation. During course thereof, Parmeshwari Swarnakar gave knife blow upon Manoj Kumar, as a result of which, he became injured. Balram Sah came in rescue, who was also given knife blow by Parmeshwari Swarnakar, as a result of which, Balram also became injured. Bharat, son of Parmeshwari gave lathi blow over Manoj Kumar. Anil, nephew of Balram, came in rescue, who was assaulted with knife by Parmeshwari and Bharat by rod. Till then so many persons of the Mohalla assembled whereupon, they took the injured to hospital. Ramesh Kumar was also assaulted by Parmeshwari with knife and Bharat by rod. Identified the accused.

During cross-examination at para 4, he has stated that his house lies half kilometer east to the house of Balram. Bus Stand lies half kilometer east to his house. At para 6, he has stated



that he had heard uproar for the last twenty minutes coming out from the place of occurrence. Then at para 7, he has disclosed that he arrived at his house at about 4:30 PM from the bus stand. At that very time, his parents were present at his house. At para 9, he has stated that when he reached at his house, at that very time, he heard shouting coming towards the house of Balram Sah "*Mar Diya Phar Diya*". Then thereafter, he had gone to the house of Balram Sah where he had seen blood coming out from the injuries sustained by Balram Sah, Manoj Sah, Anil Sah and Ramesh Sah. They were lying on the ground and, were unconscious. At para 10, he has stated that family members of Balram Sah along with others were there. In para 11, he has stated that they took injured to hospital. In para 12, he has stated that he came to know that on third day, the injured have regained sense. At para 13, he has stated that the house of Balram Sah as well as Parmeshwari Swarnakar are contiguous to each other. In para 14, he has stated that while he was near the house of Balram Sah, there was uproar on account of the fact that Parmeshwari Swarnkar was constructing wall over the wall of Balram Sah. Then has stated at para 16 that he was not knowing whether counter case has been instituted at the end of Bharat. At para 18, 19, 20, 21, 22, 23, there happens to be contradiction which could not been brought up on record for want



of examination of the I.O. Then has denied the suggestion that at the instance of Balram Sah, he has deposed following.

PW2 is one of the injured, namely, Manoj Kumar Sah. He, during his examination-in-chief, has deposed that on 19.11.2005 at about 3:00 PM while he was at his house, accused Parmeshwari Swarnakar was engaged in putting wall over his wall and, during course thereof, has left space for affixing ventilator whereupon, he (PW2) protested. On protest, Parmeshwari Swarnakar, Bharat Swarnakar along with 4-5 unknown persons began to abuse and during course thereof, they also began to assault. Parmeshwari Swarnakar and Bharat Swarnakar gave *Chhura* blow causing injury over his stomach (left side), on left hand, right hand (shown the scar mark). His father came in rescue, who was assaulted by Bharat Swarnakar with pipe. Then thereafter, members of the family of accused pushed him over drain and then, Parmeshwari gave *Chhura* blow over his chest, stomach and other parts of body with an intention to kill. His cousin brother came in rescue, who was caught hold by Parmeshwari and then, Bharat gave *Chhura* blow. His younger brother, Ramesh, came in rescue, who was assaulted by Parmeshwari with *Chhura* over his chest. Then all the injured were taken to police station wherefrom they were sent to hospital. From



hospital, Anil Kumar was referred to Sadar Hospital, Saharsa. Considering the seriousness, he was admitted at private clinic of Dr. J.B. Singh where he was treated. Identified the accused.

During cross-examination, he has stated at para 8 that Sadanand Sah is his uncle and his son is Anil, an injured. In para 9, he has stated that his building happens to be *Pucca* and has been constructed after taking permission from the Municipality. At para 10, he has stated that the house of the accused lies adjacent east to his house. Then has stated that first of all his house was constructed. Then thereafter, house of accused was constructed. In para 11, he has stated that he has covered his whole land towards eastern side while erecting the wall but, he is unable to disclose whether map is accordingly prepared or not. Then has stated that roof of Parmeshwari is parallel to his house. In para 12, he has stated that over half portion of the house of Parmeshwari, he had constructed double storey wherein he resides with his family. At that very time, there was no dispute. In para 13, he has stated that the dispute arose when he was constructing the wall towards road side and during course thereof, space was being left for ventilator and, the same was resisted by him. He has stated that the cause for his resistance is that roof of Parmeshwari is over his eastern wall. He has further stated that the same could be seen by the Court on



inspection. In para 14, he has denied the suggestion that he had encroached 5” over the wall of Parmeshwari. At para 15, he has stated that at the time of occurrence, he along with his father and brother Ramesh Kumar were present at his house. He has further stated that there was no altercation with regard to ventilator over the roof. In para 16, he has stated that his house has been constructed 6-7 feet away from the road. The brawl took place by the side of the pitch road. Altercation with Parmeshwari took place, for one/two minutes, then he had gone over roof. At that very time, he had not informed his father. About 1-2 minute thereafter, they again indulged in squabble. At that very time, there was nothing in the hand of Bharat. At that very time, there was nothing in the hand of Parmeshwari. When altercation was going on, they took out *Chhura*. It was about 5” long. He had not seen how they had taken out *Chhura* but, just after taking out *Chhura*, they began to assault. In para 17, he has stated that three blows of *Chhura* was given over him. After sustaining *Chhura* injury, he fell down. He did not become unconscious. There was no repetition of blow after falling. At para 18, he has stated that he is unable to say the distance at which accused persons were standing. At that very time, 20-25 persons were present. He was also lifted to hospital. Out of 20-25, he was remembering the name of



Praduman, Umesh, Santosh only. They were taken on rickshaw. At the time of going to police station, he was conscious. At that very time, no statement was recorded by the police. At para 19, he has stated that his statement was not recorded at the hospital, though he was conscious. He was not referred to Saharsa. His statement was recorded by the police after ten days of the occurrence. He had shown his injury to the police. In para 20, he has stated that Ranjita Kumari, D/o Sachindra Mahto had instituted a case against him for an offence punishable under Sections 420, 409 of the Indian Penal Code, $\frac{3}{4}$ DP Act wherein he has been found guilty. He has further admitted presence of Vimal Kumar, who had instituted a case against him under Section 307 of the Indian Penal Code wherein he is on bail. In para 21, he has stated that counter case has also been instituted at the end of the accused persons. Then at para 22, there happens to be contradiction on the score that he had stated before the police that Parmeshwari had inflicted *Chhura* blow with intention to kill. He has also stated that his younger brother came in rescue, he was also assaulted by *Chhura* (on account of non-examination of I.O., same has not been properly brought up on record). Then has denied the suggestion that on the alleged date and time of occurrence, they had assaulted



Parmeshwari and family members and only to save themselves, got this case filed with false and frivolous allegations.

Umesh Sah (PW3), is stranger. He, during his examination-in-chief, has stated that the occurrence is of dated 19.11.2005 at about 2:45 PM. At that very time, he was going to work shop after taking meal from his house. When he came in front of house of Manoj Sah, he had seen an altercation going on amongst Manoj Sah and Parmeshwari. While he was going ahead a cyclist disclosed that murder has been committed near the house of Manoj. When he came to his house, he was informed that Manoj Sah, Anil Sah, Balram Sah and Pintu have been knifed by Parmeshwari Sah and Bharat Sah. The injured have already been taken to Madhepura Sadar Hospital. He had also gone to see where he found all of them in an injured condition. They also disclosed that Parmeshwari and Bharat have assaulted them with knife. Balram had sustained injury over his stomach, Manoj at hand, Anil over stomach, Pintu over hand. At para 5, he has stated that house of Balram and Parmeshwari are contiguous to each other. In para 6, he has stated that Balram has got no animosity with the Mohallah people. In para 7 and 8 there happens to be cross-examination with regard to location of his work shop. In para 9, he has admitted that he happens to be on visiting term. Then has



stated that the wall of house of Balram Sah is east to the road. The house of Parmeshwari Swarnakar is double storeyed but, upper floor is constructed in half portion. The house of both persons are contiguous to each other but he is unable to say whether they have got common roof or not. At para 12, he has stated that he had not seen injury over person of Bharat and Parmeshwari on that day. At para 13, there happens to be contradiction. Then has denied the suggestion that no such kind of occurrence, as deposed by him, had ever taken place. As he happens to be interested witness, hence deposed falsely at the instance of prosecution.

PW 4, Santosh Kumar, again stranger. He has deposed to the effect that on 19.11.2005 at about 3:00 PM while he was coming to his house from bus stand and as soon as reached near the house of Manoj Sah, he had seen Manoj Sah, Parmeshwari Swarnakar having indulged in an altercation and during course thereof, Parmeshwari Swarnakar gave knife blow over Manoj Sah causing injury over his chest, as a result of which, he fell down. Balram came in rescue of Manoj, who was also assaulted by Parmeshwari with knife over his stomach, chest. Anil Sah came in rescue whereupon, Parmeshwari caught hold Anil and Bharat gave him *Chhura* blow over his chest (left side). Ramesh came in rescue, who was also assaulted by Parmeshwari with knife.



Thereafter, all the injured were taken to Sadar Hospital. Considering the condition of Anil Sah to be serious, was referred to Saharsa. So many persons have seen the occurrence. Identified the accused.

During cross-examination, para 5, 6 relate to his Mamhar side in order to connect Vijay, his maternal uncle, being cousin brother of Balram, which he denied. At para 7 to 8, there happen to be cross-examination relating to his family as well as reason to go to bus stand. In para 9, he has stated that when he, for the first time, saw Balram, Manoj, Anil and Ramesh, he had seen them in pool of blood. Anil and Balram were lying over the ground. He had seen blood having been spread over the ground. In para 10, he has stated that the persons who were lying were unconscious. Manoj was unconscious. Ramesh was conscious. All the injured were taken to hospital on rickshaw as well as scooter. He is unable to say when Balram and Manoj regained sense. In para 11, he has stated that knife and *Chhura* are two distinct weapons. The knife, which was used have got 5" length. In para 12, he has stated that counter case has also been instituted at the end of Bharat. Then has stated that there was *mar-pit* amongst both the parties. Dispute arose over wall. At para 13, there happens to be contradiction. At para 14, he has stated that Balram Sah is a



local leader. Then there happens to be disclosure with regard to Baiju and Gajendra, to be *Pattidar* and they are on litigating term. He denied the suggestion that Parmeshwari happens to be at the side of Baiju and Gajendra. At para 16, he has stated that during course of occurrence, he was doing business in Delhi. Then has denied the suggestion that he had not seen any occurrence.

PW5, Ramesh Kumar is one of the injured. He, during course of his examination-in-chief, has stated that the occurrence is of 19.11.2005 at about 3:00 PM. At that very time, he was at his house. After hearing the sound of uproar, he came out from his house whereupon, he saw Parmeshwari was saying his brother Manoj to leave otherwise he will be murdered. No sooner than, Parmeshwari began to give *Chhura* blow over his brother causing injury over his stomach as well as hand. His brother became injured. His father came in rescue. First of all, Parmeshwari tried to assault him with pipe but, he escaped. Then, three female members came out from the house of Parmeshwari, caught hold his father and then pushed, as a result of which, he fell down over drain. Thereafter, Parmeshwari began to give *Chhura* blow repeatedly over his stomach, as a result of which, he became unconscious and fell down. Anil Sah also came in rescue. His both hands were caught hold by Parmeshwari and then Bharat gave



Chhura blow over his stomach (left side). He also became unconscious. He became afraid of but in order to save his father, he rushed whereupon, Parmeshwari gave *Chhura* blow over his chest (shown the scar mark). So many persons have assembled there. Then thereafter, after tying the injury of Anil with *Gamchha*, they lifted all the injured to Sadar Hospital where they were treated. Seeing the condition of Anil, he was referred to Saharsa. However, he was not in condition to be carried to Saharsa and so, he was admitted at the clinic of Dr. J.B. Singh, Madhepura. Identified the accused.

During cross-examination, at para 8, he has stated that his house lies contiguous west to the house of Parmeshwari. Houses of both happen to be *Pucca*. Then has disclosed presence of boundary wall at Northern Southern side. Boundary wall up to 7 ft. high. There happens to be no boundary wall towards road side. In para 9, he has stated that front portion of the house of Parmeshwari is fenced with "*Tati*". There happens to be 2 to 3ft. open land. Then thereafter, there happens to be *Tatti* (wooden barricade) and thereafter road lies. On the date of occurrence, Parmeshwari had came out through the aforesaid wooden gate. In para 10, he has stated that after coming out from his house, he will come over road and then he will go to the road of Parmeshwari.



Then has stated that his house as well as house of Parmeshwari are contiguous to each other. Then has stated that the roof of both the houses are over common wall and then explained, that means to say, over his eastern wall as well as western wall of Parmeshwari. In para 11, he has stated that he had got no knowledge that dispute arose on account of erection of wall by the accused persons. Accused was constructing wall over the roof, for that, there was no Panchayati. On the day of occurrence, 5 - 6 persons were present in his house including his mother, sister. At that very time, he was engaged in reading. He had not heard utterance of Manoj but he had heard tone of Parmeshwari whereupon he came out. Then, he saw his brother. He had seen blood oozing out from the body of Manoj. Then has stated that 10 minutes after coming out from his house, the occurrence took place. At that very time, whether his father was standing or lying, he is unable to say. At para 12, he has stated that Laxmi Swarnkar was at the distance of 3 ft. from his father. At that very time, Anil was in a field lying at a distance of 10 ft. from his house. He had not seen any injury over the person of Bharat. 5 - 6 unknown persons were along with forced the accused. Unknown persons were carrying small *Danda* but they had not assaulted his father nor brother. Parmeshwari was carrying *Chhura* having 4" length. In para 13, he has stated that he had seen



Anil in unconscious position. He had taken him over scooter to hospital where he was treated. At that very time his father was lying over drain while his brother was lying by his side. He was given only one *chhura* blow. Even after sustaining *chhura* blow, he had not escaped therefrom. In para 14, he has stated that after giving *chhura* blow to him, the accused persons rushed towards their houses. At that very time, gate was opened. After the occurrence, his father had not talked with anybody. Anil Sah was admitted in hospital. He is not knowing whether counter case has been instituted at the end of Bharat Sah. In para 15, he has stated that he is not knowing how many cases are pending amongst him and Parmeshwari. In para 16, there happens to be contradiction. In para 17, he has stated that his cousin brother was referred to Saharsa but was admitted at the clinic of Dr. J.B. Singh. He has further stated that his father is a social worker but not affiliated to any political party. Then has denied the suggestion that they have assaulted the accused persons and then, taking their influence got this case filed with false and frivolous allegation.

PW7, Anil Sah, another injured. He, during his examination-in-chief, has stated that on the alleged date and time of occurrence, altercation was going on amongst Manoj and Parmeshwari over construction of ventilator. During course



thereof, Parmeshwari gave *chhura* blow over Manoj Sah causing injury over his chest. Balram Sah came in rescue, who was also assaulted by Parmeshwari with *Chhura*. Balram Sah was given 4 to 5 blows. He came in rescue whereupon, Bharat Swarnkar gave *Chhura* blow over his stomach. He fell down (shown scar mark). He became unconscious. After regaining sense, he found himself admitted at the clinic of Dr. J.B. Singh. All the injured were treated at the hospital. He remained admitted at the clinic of Dr. J.B. Singh for 14 days. Identified the accused. In para 5, he in his cross-examination, has stated that his father and Balram Sah both are full brothers. He is not knowing whether they inherited ancestral property or not? In likewise manner, he is unable to say whether his uncle is residing over self-acquired property or ancestral? In para 6, he has stated that there happens to be no boundary wall along with house of Balram. Houses of Balram and Parmeshwari are contiguous. Parmeshwari's house is from eastern side while Balram's house is western side. Plinth of the house is same. Roof of both the houses are contiguous. Ventilator was being put at upper floor. Before affixing the ventilator, there was no dispute amongst both of them. Dispute arose only during course of affixing ventilaor at the front side. The house of Parmeshwari Swarnkar is double storeyed from the back side wherein ventilator



is there. Just contiguous west to the house of Parmeshwari, roof of Balram Sah lies. His house lies 3 rassi away from the house of Balram. At the time of occurrence, he along with his father were in the chilly field, which they had taken on *Batai*. When they had gone to that field, at that very time, labours were engaged in constructing wall of Parmeshwari. At that very time, he had also seen the son of Balram. In para 9, he has stated that first of all he heard utterance of Manoj. Manoj had shouted, “*Daura Ho Mar Del*” whereupon, he along with his father rushed. He had seen blood coming out from the body of Manoj, Ramesh, Balram. He had seen all the three lying over the ground. All the three were unconscious. He had not taken any recourse to bring them in sense. He is unable to say whether his father had taken any effort or not. He is unable to say who had carried them to hospital. Then at para 11, he has stated that occurrence took place over the road in front of the house of both the parties. At the time of occurrence, front portion of houses of both the parties were duly fenced by *Tati* having 2 ½ ft. height. In para 12, he has stated that at that very time, about ten persons were sitting at the *Verandah* of the accused but he had not seen they were in possession of arms or not but, all had concealed their face. In para 14, he has stated that knife and *Chhura* are same weapon. He has further stated that the length of



weapon was 6". Then he denied the suggestion that *Chhura* and knife are two distinct weapons. In para 15, he has stated that he was given *Chhura* blow. As soon as he fell down, accused persons fled away. He is not knowing whether he was admitted at Sadar Hospital or not. In para 16, he has stated that Bharat had also instituted a case against them for the same occurrence. In para 17, he has stated that police had taken his statement after 13 to 14 days of the occurrence. Then there happens to be contradiction. Then has denied the suggestion that on account of falling on bamboo lattice, he had sustained said injury.

PW7 is formal witness, who had simply exhibited the relevant documents on account of examination of I.O.

PW8, Balram Sah, is informant. He, in examination-in-chief, has stated that on the alleged date and time of occurrence, he was screening T.V. in a room. After hearing commotion being outside, he came out whereupon, had seen Praduman Kumar, Santosh Kumar, Parmeshwari, Bharat along with 4 to 5 unknown persons, who were attempting to apprehend his son. During course thereof, Parmeshwari gave *Chhura* blow over his son causing injury over his stomach as well as both hands. He tried to apprehend Parmeshwari whereupon, Bharat attempted to give pipe blow, which he waived. Thereafter, he (Bharat) took out *Chhura*.



During midst thereof, wife, daughter-in-law of Parmeshwari caught hold his leg and hands and then Bharat Swarnkar pushed him, as a result of which, he fell down over platform of drain and then, Parmeshwari began to give *Chhura* blow, repeatedly, as a result of which, he sustained injury over his stomach, intercoastal region, hands (shown the scar marks). His nephew, Anil Sah, came in rescue, who was caught hold by Parmeshwari and then Bharat gave *Chhura* blow causing injury over left side of stomach. Santosh Kumar after tying the stomach of Anil Sah, took him to hospital. His younger son, Ramesh Sah, was assaulted by Parmeshwari with *Chhura* over his chest. They were taken to hospital by the Mohallah peope. Anil Sah was referred to Saharsa but, seeing the severity, he was admitted in the clinic of Dr. J.B. Singh. Police came and recorded his statement over which he had put his signature. Identified the accused. Also disclosed that his nephew remained at hospital for 17 days while he was admitted for 13 days. During cross-examination at para 9, he has stated that he is not a political man but, he is engaged in social service. He had contested election of Nagar Panchayat. In para 11, he has stated that a road lies at the distance of 10 ft. from his house. Dispute arose relating to wall. House of Parmeshwari lies contiguous to his house. The wall and plinth of his house as well as house of



Parmeshwari are independent as well as distinct. He has further stated that his western wall is only 5" breadth while the eastern wall of Parmeshwari is also 5" breadth. Roof of both the houses are contiguous to each other. There happens to be no document with regard to construction of both the walls. In para 12, he has stated that prior to the occurrence, from the northern side of his house, Parmeshwari had constructed double storeyed. Then has voluntarily stated that in his absence Parmeshwari had encroached upon his 5" wall. He has further admitted that there happens to be ventilator in the upper floor of the house. In para 13, he has stated that he had not taken any legal recourse relating to the ventilator having affixed by Parmeshwari. In para 14, he has stated that one month after the construction of double storey in the eastern side, the accused began to construct double storey from the front side. He has further stated that accused was engaged in construction of ventilator at the height of 6 to 7 ft. He could not get an opportunity to take legal action and so, he had not taken legal recourse to remove encroachment. He has further stated that his roof lies west of that encroachment and, his family resides beneath the aforesaid roof. In para 15, he has stated that construction of 7 ft. wall was made in a day. He is unable to say how many labours, mason were engaged. In para 16, he has stated that police had seen the roof.



Then has stated that he is unable to say whether the land over his house is standing is ancestral property or purchased property. In para 17, he has stated that he is not knowing whether his construction has been made after taking permission from the Municipality. In para 20, he has stated that Ranjita Kumari had instituted a case against his son Manoj. Now that case is closed. In para 21, he has stated that the government land, which lies in front of his house, has been encroached by Parmeshwari Swarnkar and, by affixing bamboo, it has been fenced. He has constructed latrine as well as has also planted some plants over it. Then at para 22, 23, there happens to be disclosure that he came out from his room after hearing the tone of strangers, who were saying to leave. In para 24, he has stated that at that very time they were seven numbers. In para 25, he has stated that when he came out from his room, he had seen his son, Manoj, was saying to the accused to stop the work, while accused were saying to leave the place, otherwise it will be bad for him. At that very time, unknown persons were armed with *Danda*, while Parmeshwari was brandishing *Chhura*. He tried to pull his son till then he was assaulted by *Chhura*. He had seen his son over road. At that very time, he had not indulged in altercation with the accused. At that very time, accused persons were standing at the corner of their



campus. At the time when Manoj was assaulted with *Chhura*, he had not caught hold him. *Chhura* blow was given after lifting hands. After sustaining *Chhura* blow, Manoj fell down. In para 27, he has stated that Manoj fell down the place where *Chhura* was pierced. At the time when Parmeshwari given blow of *Chhura*, 6 to 7 persons were standing there. Those persons had not assaulted his son. In para 28, he has stated that blood spread over the ground where Manoj fell down. Just after receiving *Chhura* blow, Manoj began to wriggle. He had not become unconscious. He had tried to save Manoj. At that very moment, son of Parmeshwari attempted to assault him with pipe. He had not run therefrom. He waived blow by means of his hand, as a result of which, pipe fell down within the campus of accused. In para 29, he has stated that at that very time, he was at the distance of 6 ft. south to the wall having been encroached by the accused, on the corner of the road. At that very moment, Bharat pushed him, as a result of which, he fell down over the drain and Parmeshwari gave repeated *Chhura* blow. As soon as he fell down, he was assaulted. Blood had oozen out. There was mark over the cloth also. Then at para 30, he has stated that neither he had shown the blood stained cloth to the police nor police had seized the same. At that very moment, they had not raised alarm because he was not in a condition to raise alarm. In



para 31, 32, there happens to be disclosure with regard to presence of local inhabitants. At para 34, he has stated that people had taken them to police station and then, to the hospital. At para 37, it is evident that he has admitted presence of counter case having instituted at the end of Bharat. He has further admitted that against the order of cognizance, he had filed revision, which had been dismissed. Then there happens to be cross-examination with regard to Dr. J.B. Singh. In para 38, 39 and 40, there happens to be contradiction with regard to further statement. In para 41, he has denied the suggestion that they had assaulted the accused persons and during course of grappling, they had fallen over bamboo lattice whereupon, they sustained aforesaid injuries. In para 42, there happens to be difference between *Chhura* and knife. Then has denied the suggestion that being politically active, he had got influenced over the doctor and on account thereof, got the false and frivolous injury report.

DW 2, DW3, DW 4 had seen the occurrence and deposed over the same showing the prosecution party as aggressor. However, DW2, during course of cross-examination disclosed at para 5 that who assaulted, he is unable to say. DW3 at para 4 has stated that ventilator was being fixed towards Balram. DW4 at



para 8 has deposed that when he got down, seen *mar-pit*. DW 5 is a formal witness, who exhibited the complaint case.

From the evidence having adduced at the end of rival parties, it is crystal clear that irrespective of the fact that PW8 (informant) has been suggested that having politically affiliated, he influenced the doctor but, by way of examining DW1 (one of the appellant himself), DW2, DW3 and DW4 in consonance with the suggestion given to the respective witnesses, including the injured, it is abundantly clear that presence of injury over the person of respective injured is not at all denied. It is further evident that a complaint case was filed two days after the occurrence at the end of Bharat which was sent to local police under Section 156(3) of the Cr.P.C. and on the basis thereof, Madhepura P.S. Case No. 308/2005 was registered and as per evidence of PW8, informant, it is evident that cognizance had already been taken, which has been put under challenge by way of filing revision and that had also been dismissed. So, it will be futile attempt if an exercise is taken to search out whether injury is there or not.

Now, the only question remains whether the injury over the respective injured is in tune of prosecution version or defence version. In order to trace out the same, it is evident that respective injured even, during course of cross-examination, have



substantiated and the same is also found duly corroborated at the end of DW 1, one of the appellants himself, who during course of cross-examination at para 7, has stated that when Balram Sah came and protested, *mar-pit* took place and in similar fashion, DW2, DW3 and DW4 also deposed. That being so, the explanation whatever been at the defence is not at all found substantiated. Only question now remains to be seen whether the finding of the learned lower court with regard to Section 307 of the IPC is tenable or not?

It is needless to say that for an offence punishable under Section 307 of the IPC, nature of the injury is immaterial. The material aspect is whether action whatever been alleged at the end of the accused was with an intention to commit murder or, accused was knowing that the injury inflicted over person of the injured was such in nature that in ordinary course of nature will cause death. The aforesaid thing is also to be taken into consideration in the background of surrounding circumstances and these surrounding circumstances vary case to case.

From the evidence available on record, it is crystal clear that prosecution party was very much aggrieved. Although, other witnesses did not dare to speak the truth, however, informant has admitted that roof of Parmeshwari is over his western wall and for



that, no action has been taken at his end. In the aforesaid circumstance, the evidence has to be seen. The wall was being constructed and space was left for the purpose of ventilator, which was resisted and that led commission of the occurrence. It is evident that there happens to be an allegation against Parmeshwari that he had given repeated blow over the person of informant (Balram Sah). The witnesses had disclosed length of *Chhura* to be 5 to 6", then in that circumstance, presence of skin deep injury over the person of informant (Balram Sah) and in likewise manner single muscle deep injury over the person of Manoj would be taken into account. Now coming to injury of Anil Kumar Sah, he had also sustained single injury having margin 2cmx5cmx3cm. Although PW9, during course of evidence, has stated that on account of report submitted by Dr. J.B. Singh, there was collection of blood in the abdominal cavity and so, injury was shown as dangerous to life but CW1, Dr. J.B. Singh, during his evidence had not corroborated, more particularly, over classification of the injury, dangerous to life or even grievous. So, considering the materials in its totality, it is crystal clear that the same is not at all found substantiating the finding recorded by the learned lower court with regard to Section 307/34 of the IPC. Accordingly, to that extent, the finding so recorded by the learned lower court is



hereby rescind concurring with the finding of the learned lower court so far offences punishable u/s 341, 323, 324, 504 of the Indian Penal Code are concerned. Now coming to sentence, it is evident that both the parties never fought previously. The nature of construction of house also suggest their proximity. Manner whereunder allegation has been attributed in consonance with the dimension of the injury, need reconsideration. It is further evident that appellant, Bharat Swarnkar has been bailed out on 03.11.2015, while appellant Parmeshwari Swarnkar happens to be under custody since 16.09.2015 and so in the fact and circumstance of case as well as considering the finding so recorded hereinabove, the sentences is reduced as period having already undergone. Appellant, Bharat Swarnkar is on bail, hence is discharged from its liability, while appellant Parmeshwari Swarnkar is under custody, so, is directed to be released forthwith, if not wanted in any other case. In terms thereof, the appeal is partly allowed.

(Aditya Kumar Trivedi, J)

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