

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.115 of 2004**

=====

Akhauri Abhay Kumar, son of Akhauri Vijay Kumar, resident of Jail Quarter
Campus, PS-Rampur, District-Gaya

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

Appearance :

For the Appellant/s : Mr.Ajit Kumar 5, Advocate

For the Respondent/s : Ms.Anita Kumari Singh, APP

=====

**CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA
CHAKRAVARTHY
ORAL JUDGMENT**

Date : 26-09-2024

1. The Criminal Appeal is arising out of the judgment in Sessions Trial No. 458 of 1998 on the file of Sessions Judge, Gaya dated 30.01.2004 wherein the appellant was convicted and sentenced for the offence punishable under Section 307 of Indian Penal Code for Rigorous imprisonment of five years and to pay a fine of Rs. 2000/- and in default of payment of the said fine to undergo simple imprisonment for a period of three months.

2. The case of the prosecution as per the Fardbeyan of Ranjit Kumar/PW-6 is that on 08.07.1998



at about 14.30 hours the injured Dilip Kumar/PW-5 was taking his buffaloes towards Saryu talab and when he reached near the Jamun tree, New Jail gate the appellant who was coming on his bicycle, had altercation with PW-5/Dilip Kumar, contending that the buffaloes of PW-5 blocked the road. The appellant abused the injured PW-5 and further the appellant went to his house, brought a knife and stabbed PW-5/the injured on his abdomen. The injured tried to catch hold of the appellant by screaming, but fell unconscious. Later, the injured shifted to Verma Nursing Home for treatment and that the said incident was witnessed by Vishwajit Yadav (PW-2) (not examined), Birendra Pandey (not examined), Raja Yadav (PW-4) and Nankuri Yadav (not examined). Basing on the Fardbeyan of Ranjit Kumar i.e. PW-6, a case was registered against the appellant vide GR Case No. 1432 of 1998 of Rampur PS (Case No. 73 of 1998) for the offence punishable under Section 307 of the Indian Penal Code.



3. The Investigating Officer i.e. PW-7 recorded the Fardbeyan, at Verma Nursing Home where the injured PW-5 was initially admitted for treatment. After registering the FIR, the Investigating Officer made a requisition to the Medical Officer in Verma Nursing Home to examine the injured and to give necessary medical assistance. Further, the injured was referred to Patna Medical College and Hospital (PMCH) where he underwent treatment in the said hospital upto 18.07.1998.

4. During the course of investigation, the Investigating Officer/PW-7 recorded the statement of all the witnesses, apprehended the accused, seized a knife and after receiving the injury report and on completion of the investigation laid a chargesheet against the appellant. Later charges were framed against the appellant for the offences punishable under Section 307 of Indian Penal Code. During course of trial, PWs 1 to 9 were examined. Exhibits 1 to 8 were marked. On behalf



of appellant, DWs 1 to 3 were examined and exhibits X, Y, A and B were marked. On appreciation of entire evidence, the trial Court convicted the appellant.

5. It is relevant to mention that the Investigating Officer recorded the statement of injured/victim on 08.08.1998 at Rampur Police Station and the same was also mentioned in the Fardbeyan.

6. As per Criminal Jurisprudence there can be only one Fardbeyan which initiates the Criminal Law in motion i.e. after registration of the FIR. Once a criminal case has been registered all the statement which was recorded during course of investigation can be treated as Section 161 Cr.P.C statement of witnesses and the trial Court or the prosecution cannot change the Section 161 Cr.P.C statement nomenclature such as Fardbeyan. Surprisingly, in this case the trial Court have made a note that there are two Fardbeyans, one Fardbeyan dated 07.07.1998 which is the statement of PW-6/Ranjit Kumar and another Fardbeyan of PW-5/Dilip Kumar the



injured dated 08.08.1998. The second statement which is alleged to have been recorded from the injured/PW-5 cannot be treated as Fardbeyan and it has to be treated as Section 161 statement of PW-5. It is pertinent to note that the statement of injured/PW-5 also contains his signature. This Court is unable to understand as to how the trial Court has taken both the statement of informant as well as statement of the injured as Fardbeyans. Furthermore, the Investigating Officer has not taken the signature of the injured on the statement which was recorded by him, during course of investigation. On perusal of the Fardbeyan of PW-6, it is evident that there is no mention that the Fardbeyan that Ranjit Kumar has witnessed the incident, but the narration of the Fardbeyan signify that as if PW-6 witnessed the incident. The statement of Dilip Kumar (the injured)/PW-5 dated 08.08.1998 also do not disclose about the presence of Ranjit Kumar i.e. PW-6 at the place of occurrence. His statement only disclose that after making noise, Ranjit/Kumar PW-6, Vishwajit



Yadav/PW-2, Laltu Yadav, Birendra Pandey (not examined), Raja Yadav/PW-4 and Nankuri Yadav (not examined) came to the place of occurrence, and by that time PW-5/injured fell unconscious.

7. It is specifically mentioned in the statement of PW-5 that he took treatment in the hospital till 18.07.1998 and the alleged incident took place on 07.07.1998 and he was under treatment for a period of eleven days. The statement of PW-5 also do not disclose as on which date he has regained consciousness. Admittedly, the statement of PW-5 was recorded on 08.08.1998 i.e. after one month of the incident, that too at Rampur Police Station.

8. It is relevant to note that as there is no representation for the counsel for the appellant, this Court appointed Ms. Ankita Kumari as Amicus Curiae to assist the Court.

9. Heard arguments of Learned Amicus Curiae as well as Smt. Anita Kumari Singh, Learned Additional



Public Prosecutor for the State.

10. It is urged by the Amicus Curiae that the prosecution has miserably failed to prove the guilt of the appellant for the offence punishable under Section 307 of Indian Penal Code. Further, the versions of PW-5 and others are contradicting each other, as to the manner of incident which is alleged to have been taken place of 07.07.1998.

11. It is brought to the notice of this court by the Learned Amicus Curiae that as per the statement of injured, at the first instance the appellant beat the injured/Dilip Kumar and also slapped him and later went on by bicycle to his house and came with a knife and stabbed the injured.

12. On the other hand, the statement of informant i.e. the Fardbeyan do not disclose about the fisting or slapping and it only suggest that there was an altercation and later, the appellant went to his house, brought a knife and stabbed the injured in his abdomen.



It is important to note that “throwing down of the bicycle” is not stated by Ranjit Kumar in the Fardbeyan. It is further urged by the Learned Amicus Curiae that the statement of Dilip Kumar i.e. the injured do not disclose that the informant Ranjit Kumar PW-6, PW-2, PW-4, Laltu Yadav, Birendra Pandey and Nankuri Yadav witnessed the incident, whereas it is mentioned in the Fardbeyan that PW-2, PW-4 Laltu Yadav and Birendra Pandey and Nankuri Yadav witnessed the incident which is corroborating the versions of PWs 5 and 6. It is further urged by the Learned Amicus Curiae that the accused have never confessed, but the Investigating Officer deposed that at the instance of Laltu Yadav, the police officer have seized the knife from the house of the accused, at the time of arresting the accused and same cannot have much importance, as it do not fall under Section 27 of the Indian Evidence Act.

13. On the other hand, Learned Additional



Public Prosecutor contended that there are minor discrepancies in the evidence of the prosecution witnesses which do not go to the root of the cause of the case and therefore, the prosecution proved the guilt of the appellant for the said offence and prayed to confirm the judgment of the trial court.

14. During the course of trial, the prosecution has examined total nine witnesses i.e., PWs-1 to PW-9.

Sarju Ram (PW-1), Vishwajit Yadav (PW-2), Mula Devi wife of Sarju Ram (PW-3), Raja Yadav (PW-4), Dilip Kumar/victim injured (PW-5), Ranjit Kumar/informant (PW-6), Chaudhary Mehra, the IO (PW-7), Dr. Jainendra Kumar, PMCH, Patna (PW-8) and Dr. Rudra Kumar Verma, private Nursing Home (PW-9).

Accused has also examined three witnesses in his defence, namely, Ram Kishore Prasad (DW-1), Akhauri Abhay Kumar (DW-2) and Birendra Singh (DW-3). Besides, documents have also been exhibited on behalf of State and defence.

15. The documents exhibited in evidence on behalf of the prosecution are as follows:-



(a.)Exhibit-1 is the signature of one Sarju Saran on the carbon copy of requisition sent by the IO.

(b.)Exhibit-2 is the signature of Vishwajit Kumar on the seizure list with respect to seizure of dagger.

(c.)Exhibit-3 is the signature of Dilip Kumar on his statement so recorded.

(d.)Exhibit-4 is the signature of informant Ranjit Kumar on the fardbeyan.

(e.)Exhibit 4/1 is the fardbeyan itself.

(f.)Exhibits 2/1 and 2/2 are the signature of Ranjit Kumar on the carbon copy of seizure list and seizure list itself.

(g.)Exhibit-5 is the formal FIR

(h.)Exhibit-6 is the Injury Report prepared by the police officer Chaudhary Mehra who is Investigating Officer of the case.

16. The documents exhibited on behalf of defence are as follows:-

(a)Exhibit-Y is the complaint letter registered in Rampur PS Case No. 121/98

(b.)Exhibit-A is the Complaint Case No. 458/98 registered in Rampur PS Case No. 121/98

(c.)Exhibit-B is the Formal FIR of the Rampur PS Case No. 121/98

17. On perusal of the entire evidence, it is evi-



dent that the alleged incident took place on 07.07.1998 at 2.30 pm and at 3.30 pm. PW-6 preferred a report to the police, at Verma Nursing Home, basing on which, a case was registered against the appellant for the offence punishable under Section 307 of Indian Penal Code. The evidence of Investigating Officer i.e. PW-7 Chaudhary Mehta clearly disclose that they received information from the private Hospital as to the stab injuries sustained by PW-6 and that PW-6 was unconscious. After receiving the said information, PW-7 went to the Verma Nursing Home and recorded statement of PW-5. Later the Investigating Officer made a requisition for giving treatment to the injured at the said Hospital. However, Verma Nursing Home has referred the injured PW-5 to the PMCH wherein PW-8 medical officer has treated the injured/PW-5 and Exhibit P-8 is the injury report.

18. The evidence of PW-8 clearly disclose that on 07.07.1998 at about 7.00 pm, the injured was



referred to PMCH by Verma Nursing Home, Jail Road, Gaya and he made the following X-ray findings and operation note:-

19. X-ray abdomen and Pelvis A.P. view in erect posture (Plate No. 4589) shows no abnormality.

O.T. Note (As per B.H.T) dated 08.07.1998.

“Under general anesthesia and with antiseptic aseptic precautions, abdomen was opened through Right Paramedian incision. There was hemoperitoneum (blood in the abdominal cavity). Toileting of peritoneum was done with normal saline. There was a vent in the liver on anterior and inferior surface of about 1/ ½” size. Rent was repaired with intestinal 2-0 catgut. Other viscera and omentum was normal. Drain given and abdomen closed in layers.”

20. PW 8 further testified that injury could be caused by sharp pointed weapon like Chhura, but on the aforesaid finding he cannot be sure. That can be said by Mr. Verma who attended the case first.



21. In the cross-examination, it is specifically testified by PW-8 that Exhibit P-8 is not a complete injury report and he does not remember, when he saw the patient and whether injury was stitched or unstitched? He also admitted that if a person falls on his own dagger, in course of scuffle such injury may occur.

22. PW-9 Dr. Rudra Kumar Verma is the medical officer of Verma Nursing Home. His evidence disclose that the Nursing Home did not maintain any register or record as to the admission, treatment or referring of any patient to any other hospital. He stated that he cannot state the name of the patient who was referred by him to PMCH and that he was not examined by the police in this case. In his Cross-examination, PW-9 deposed that many person come to his Nursing Home with a request to refer the injured persons to some other doctors and Hospitals and under pressure he does it accordingly.

23. PW-1 and PW-3 are the parents of the injured i.e. PW-5. Their evidence disclose that PW-6



Ranjit Kumar (informant) stated to them that the appellant stabbed PW-5 near Jamun tree, near Jail gate and the same was confirmed by other witnesses and on that they went to Verma Nursing Home and found the injured in an unconscious state. The place of occurrence as per these two witnesses was the Jail compound.

24. PW-2 Vishwajit Yadav testified that he saw the scuffle which took place between the injured PW-5 and the appellant, near Jamun tree near the Jail Gate. Later, appellant went to his house and returned with a knife and stabbed the injured/PW-5. Later, the injured screamed and fell unconscious and they took the injured to Verma Nursing Home. In cross-examination, it is specifically deposed by PW-2 that he witnessed the incident.

25. The evidence of PW-4 Raja Yadav who alleged to have witnessed the incident, disclose that he was sitting at Rashtriya Janta Dal office and saw PW-5 taking buffaloes toward Saryu pond. There was a scuffle and verbal abuse between the appellant and the injured.



Later, the appellant took a knife and stabbed in the abdomen of the injured/PW-5 and started running towards his house. Later, they wrapped the injured with a Lungi and took him to the hospital.

26. The evidence of PW-2 and PW-4 are also contradicting with each other as to the witnessing the incident. PW-4 admitted that he was sitting at Rashtriya Janta Dal office and witnessed the scuffle between the appellant and the injured. On the other hand the evidence of PW-2 do not disclose about witnessing the incident from Rashtriya Janta Dal office. Furthermore, the evidence of PW-2 is not in consonance with PW-4. PW-4 has specifically testified that the appellant ran away from the place of occurrence immediately after stabbing the injured. However, in the cross-examination, PW-4 further improved his version stating that the blade of the knife was about 6 inches and the knife of the accused caused injury to PW-5.

27. As discussed supra, there are contradictions in the two Fardbeyans. The evidence of PW-5 disclose



that the appellant came on bicycle and asked him to clear the pathway, for which an altercation took place and later, the appellant took the knife from his pocket, stabbed in the stomach of the injured, due to which the injured fell unconscious and later his statement was recorded at Rampur police station. In the cross-examination, it was admitted by PW-5 that he was alone at the time of fight. On the other hand, the evidence of PW-6 disclose that after the incident, he rushed to the house of Dilip Kumar (injured), where the injured's parents were informed about the fight between the appellant and the injured. Later the appellant ran towards his house came back with a knife and stabbed the injured. His evidence further disclose that PW-5 chased the appellant and later fell unconscious, which was witnessed by Laltu Yadav, Nankuri Yadav, Birendra Pandey, Laltu Yadav who had colluded with the accused and refused to be the witness. This part of the evidence is nothing, but an improvement from Section 161 statement of PW-6.



28. PW-7 Chaudhary Mehra is the Investigating Officer in this case. His evidence disclose that he recorded the Fardbeyan of Ranjit Kumar/PW-6 as well as the Fardbeyan of Dilip Kumar/PW-5. The case diary was marked as Exhibit-7. The case diary contains the details of the investigation done by the Investigating Officer. It commences from registration of the FIR till the date of filing of the chargesheet. The case diary can never be marked as an exhibit. It is surprising, as to how case diary was marked as an exhibit.

29. Hon'ble Division Bench of this Court in the case of **Sukhi Yadav v. The State of Bihar** reported in **2014 SCC OnLine Pat 5721** have held:-

“9. We fail to appreciate as to which law permits such a thing and how a Judge of standing of Additional Sessions Judge could do such a thing. First thing we must notice that P.W.9 is an Assistant to an Advocate Clerk, who has nothing to do with the case, yet the Court permits him to step in as a prosecution



witness. Moreover we have coined such witness as “Sankat Mochan witness”. What more scandalized us is the trial court, which permits a person, who was nobody, to pick up the entire case diary from paragraphs 1 to 121 and prove it and make it a part of evidence. The court then proceeds further to mark it as Ext. 3 and then the court sits down to read entire case-diary in order to appreciate evidence. Nothing can be more scandalous. No such step is permissible in law. The trial court forgot the true import of section 172(2) of the Code of Criminal Procedure (for short ‘Cr.P.C.’), which clearly states that any criminal Court may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. What the trial court has done is using it as evidence, making it as evidence and appreciating it as evidence, which is wholly impermissible in law. The diary can never be proved in a Court, for it cannot be used as evidence. No part of diary can be proved because if any one is proving it for the purposes of making it an evidence, such act is



prohibited by law. The law contemplates a reference to the diary only for the purposes of refreshing memory or contradicting the statements of witnesses in the Court with the statements made during the course of investigation. Only when it is used for refreshing memory, the procedure as envisaged under section 145 of the Evidence Act is to apply but that does not mean that diary can become evidence. Law prohibits such thing. We have found in cases after cases that in the State of Bihar, the Sessions Courts do not know or understand this distinction in law and in cases after cases the statements of witnesses recorded under section 161 of the Cr.P.C. are proved as evidences or other materials in the case-diary are proved as evidence and marked as exhibits. This is a practice that should end, the sooner the better. The other thing is that as to who is permitted to prove a document. It appears that in this State every Tom, Dick and Harry, the expression we have formed now "Sankat Mochan Witness", could come and prove any official document. In this case, an



Assistant to Clerk of an Advocate, who has nothing to do in the case, has been permitted by the trial court to prove the entire case-diary and mark it as exhibit. This practice is deprecated and it must come to an end. A person, who is author of a document or in absence of author, which absence has to be explained, a person familiar with the handwriting of the author can only prove the document. The procedure adopted by the trial court is unknown to law. No sooner this practice ends than better it would be.”

30. Their Lordships have also categorically held that case-diary is the part of the investigation which cannot be read in evidence and therefore, above case squarely applies to the facts and circumstances of the present case.

31. The evidence of PW-7 further disclose that at the instance of Laltu Yadav, he along with police constables and driver went to the house of accused and arrested him. PW-7 also recorded the statement of accused, his parents and sister. Later PW-7, seized the



knife from the house of the accused. PW-6 and PW-2 are the signatory of the seizure report.

32. Neither PW-2 nor PW-6 testified about the seizure of knife. In the absence of any confession, the seizure of knife by the Investigating Officer cannot be proved by the prosecution. Furthermore, Investigating Officer has not specified about blood stains on the knife or not?

33. It is pertinent to mention that PW-6, PW-2 and PW-4 in one tone stated that the injury of PW-5 was covered with a *Lungi* which had the blood stains. The prosecution has failed to produce the material objects ie. blood stained *Lungi* and also even failed to collect the physical evidence from the place of occurrence to prove that the place of occurrence was at the *Jamun* Tree or nearby the Jail Gate. It is the specific case of PW-2, PW-4 and PW-6 that blood fell over the place of occurrence, but the evidence of PW-1 and PW-3 contradicts the evidence of PW-2, PW-4 and PW-6. PW-1 and PW-3 came to know about the incident through



PW-6 and they rushed to the place of occurrence, but did not find the injured or any blood stains at the place of occurrence. Later, they went to Verma Nursing Home and found the injured in the Hospital in an unconscious state. The blood stained clothes were also not sent to forensic laboratory to connect the crime with that of the accused. The prosecution has failed to prove to whom the Lungi belongs. On one hand, it is the evidence of PW-6 that the *Lungi* belongs to one police constable. But there is no evidence before the Court, to prove the relevant fact.

34. On perusal of the entire evidence on record, it is evident that except the version of PW-5 the injured, there is no other evidence to corroborate that the other prosecution witnesses have witnessed the incident. Admittedly, their evidence further disclose that there is a rivalry between the injured and the appellant. In the defence the appellant has brought on record, the complaint petition which is Exhibit 'Y'. It was a private complaint filed by the complainant against the injured,



referred to the police under Section 156 of the Cr.P.C for further investigation and for registering of the FIR. It is also pertinent to note that the appellant himself was examined as DW-2 wherein, he testified that he was arrested and remanded to judicial custody on 08.07.1998. Though the alleged incident took place on 07.07.1998 and the injured was in the hospital till 18.07.1998,. There is no material before the court to show on which date the injured regained to consciousness. Admittedly, the statement of injured was recorded on 08.08.1998. As per the evidence of injured none of the prosecution witnesses have witnessed the appellant stabbing him. If it so, as to how PW-6 has preferred *Fardbeyan* against the appellant is not established by the prosecution.

35. The record reveals that appellant was remanded to judicial custody on 08.07.1998 and continued to be in judicial custody till 25.02.1999. Again, he had undergone sentence from 30.01.2004 to 14.10.2004 which means the appellant remained in



custody approximately for 17 months. Except for the evidence of PW-6 there is no other evidence on record to corroborate the incident. There is no corroborating evidence on record to prove that the appellant had stabbed the injured PW-5. The contents of Fardbeyan of the injured are contradicting to his evidence. Moreover, there is a rivalry between the appellant and the injured and there is every possibility to implicate the appellant. However, the appellant has already undergone sentence for a period of seventeen months. Therefore, this Court is of the considerable opinion that the sentence undergone by the appellant is more than sufficient, and the sentence and conviction are modified to that affect.

36. In result, the appeal is disposed of and the bail bond of the appellant shall stand cancelled.

(G. Anupama Chakravarthy, J)

vinita/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	25.10.2024
Transmission Date	25.10.2024

