

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.369 of 2003

Arising Out of PS. Case No.-165 Year-1981 Thana- DANAPUR District- Patna

Binay Kumar, son of Late Parmanand Sharma, R/o- Danapur P.S.- Danapur
Dist- Patna. Appellant/s

Versus

The State of Bihar. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 429 of 2003

Ajay Kumar @ Ajay Sharma, Son of Late Gorakh Prasad, resident of
Danapur, P.S. Danapur, District- Patna. Appellant/s

Versus

State of Bihar. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 369 of 2003)

For the Appellant/s : Mr. Sabal Kumar Jha, Advocate

For the Respondent/s : Mr. A.M.P. Mehta, APP

(In CRIMINAL APPEAL (SJ) No. 429 of 2003)

For the Appellant/s : Mr. Sabal Kumar Jha, Advocate

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

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 23-01-2024

Cr. Appeal (SJ) No.369 of 2003

1. The present appeal preferred by appellant/convict

Binay Kumar against judgment of conviction and order of sentence dated 23.07.2003 rendered by learned Presiding Officer, Additional Court no. 1, Patna, Adhoc Sessions Judge, Fast Track Court no. 1, Patna, in Session Trial Case No. 176/517 of 1982/2002, whereby and whereunder appellant/convict Binay Kumar has been convicted for the offence punishable under Sections 307/149 and 148 of the Indian Penal Code and against conviction for the offence under Section 307 of the Indian Penal



Code, appellant/convict was ordered to undergo rigorous imprisonment of seven years, whereas for the offence under Section 148 of the Indian Penal Code, appellant/convict was sentenced for two years rigorous imprisonment, where both sentences were ordered to run concurrently.

2. The crux of prosecution case as springs through *fardbeyan* of informant namely, Tipan Rai (not examined) that on 24.04.81 at about 5.30 AM, 40-50 persons came on five Tamtam. Out of them, he identified Gorakh, Kripanand and Parmanand, both were cousin of Gorakh and Ajay Sharma. They, immediately after arriving place of occurrence, started uproot the hut and after breaking the lock of the room, took away bedding, buckets etc. and Rs. 600/- and fled away. Thereafter, informant, Balbir Rai, Anandi Rai, Mathura Rai, Gobardhan Mahto, Jagu Paswan, Samta Rai, Chandgovind Thakur and Yogendra Rai, who were also residing as tenant in the house of Gorakh, surrounded them, on which Gorakh, Parmanand Sharma, Kripanand Sharma and Ajay Sharma fired by their pistol, four to five rounds upon them, as a result of which, informant received injuries by firing caused by Ajay Sharma. They also assaulted Anandi Rai with fists. Thereafter, informant and others fled away towards west and went to Ordali



Bazar Police out-post but in the meantime, accused persons fled away alongwith aforesaid articles worth Rs. 2000/-. One of the accused, who was son of Parmanand was apprehended during course of occurrence.

3. On the basis of aforesaid written information, police registered a formal FIR on 24.04.81 at 8.35 AM, which has registered as Danapur P.S. Case No. 165/81 for the offences under Sections 147, 148, 149, 379, 307 and 426 of the Indian Penal Code and also under Section 27 of the Arms act. After completion of investigation, investigating officer submitted charge sheet against accused persons, where after taking cognizance and complying Section 207 of the Code of Criminal Procedure, the case was committed to the Sessions for trial under Section 209 of the Cr.P.C. for its trial and disposal.

4. After commitment, learned trial court explained charges to appellant/accused, separately on the basis of materials collected during investigation, which they pleaded “not guilty” and claimed trial.

5. To establish its case before the learned trial court, the prosecution altogether examined total of four witnesses, namely, **PW-1 Santa Rai, PW-2 Anandi Rai, PW-3 Mathura Rai and PW-4 Dr. S.N. Barnwal**, who had examined



injured Tipan Rai/informant/injured of this case.

6. After examination of prosecution witnesses and by taking note of evidence and incriminating circumstances as surfaced during trial, statement of accused persons including appellant/accused were recorded under Section 313 of the Cr.P.C. which was denied in totality by showing complete innocence.

7. No witness was examined in defence.

8. On the basis of aforesaid evidence as surfaced during the trial, the learned trial court convicted and sentenced appellant/convict as discussed above. Being aggrieved of which present appeal was preferred.

9. Hence the present appeal.

10. Learned counsel appearing on behalf of appellant/accused submitted that with the available set of prosecution evidence, it cannot be said that prosecution established its case beyond all reasonable doubt during the trial as injured/informant failed to examine by the learned trial court and in want of examination of injured, who also appears to be informant of this case, FIR cannot be said proved during the trial. It is further submitted that investigating officer of this case also failed to examine during the trial as to establish the place of



occurrence and other material things which are required to be established in any criminal case to established the case of prosecution beyond reasonable doubt. It is also pointed out that no arms as alleged was recovered during the course of investigation or was produced before the court during the trial and as such, merely on the basis of deposition of other witnesses who were not injured and on the basis of deposition of doctor, who examined the injured Tipan Rai, the conviction of appellant/accused is bad in eyes of law and as such, the present judgment convicting appellant/accused is liable to be set aside. In support of his submission learned counsel relied upon the legal reports of ***Munna Lal Vs State of Uttar Pradesh with Sheo Lal Vs. State of Uttar Pradesh*** reported in **2023 SCC OnLine SC 80**, where it was observed in paragraph nos. 38 and 39 as under:-

“38. First, statement of PW-3 under section 161, Cr. P.C. was recorded nearly 24 days after the incident. Since the Investigating Officer did not enter the witness box, the appellants did not have the occasion to cross-examine him and thereby elicit the reason for such delay. Consequently, the delay in recording the statement of PW- 3 in course of investigation, is not referred to and, therefore, remains unjustified. The possibility of PW-3, being fixed up as an eye-witness later during the process of investigation, cannot be totally ruled out.

39. It is worthy of being noted that neither the trial court nor the High Court considered the issue of non-examination of the Investigating Officer. In the facts of the present case,



particularly conspicuous gaps in the prosecution case and the evidence of PW-2 and PW-3 not being wholly reliable, this Court holds the present case as one where examination of the Investigating Officer was vital since he could have adduced the expected evidence. His non- examination creates a material lacuna in the effort of the prosecution to nail the appellants, thereby creating reasonable doubt in the prosecution case.”

11. The learned APP while supporting the conviction as recorded by the learned trial court submitted that the doctor who was examined as PW-4 proved injury report and stated that he examined Tipan Rai on 24.04.81 at about 9.20 AM in Danapur hospital and found pellet injuries and, therefore, conviction with the aid of Section 149 of the Indian Penal Code of appellant/accused is not appearing bad in eyes of law.

12. **PW-1, Samta Rai**, while supporting the occurrence through his examination-in-chief stated that occurrence is of 24.04.81 at about 5:00 AM and by that time he was working in his Khatal, when 40-50 persons suddenly came over there on four different Tamtam and started to assault Anandi Rai (PW-2) and Mahangu Rai. On said assault both of them fled away and, thereafter, accused persons came towards him, whom he identified as Gorakh, Parmanand, Ajay Kumar and Binay Kumar. He found them armed with pistol and Kirpan and several other unknown persons were equipped with lathi. It



was stated that appellant/accused, namely Ajay started to open fire out of which, Tipan Rai received bullet injuries on his chest, arm and shoulders, subsequently, several persons came over there and thereafter, injured Tipan Rai was taken to hospital. It was stated that police arrested Ajay (abated), Binay (appellant/accused), Gorakh (not appellant), Kirpan (not appellant) and Parma (not appellant) whereas others fled away.

12.1. On cross-examination, it was stated by him that Tipan Rai was in hospital for about two hours, where he regained his self. It is stated that he was examined by police prior to recording the statement of Tipan Rai. On further cross-examination, it was stated that he does not know as to who is the owner of the land on which this 'Khatal' was constructed. He also stated that he has no paper in support of title of the disputed land. It is also stated that Gorakh has instituted a suit in the court of S.D.O., Danapur for the aforesaid land in which he was also a party. It was also stated by him that assault on Anandi (PW-2) and Mahmu were made inside the room, though they had no bleeding injuries but they have received injuries on their body. He denied suggestion that he lodged the present case as to grab the disputed land of "Khatal".

13. **PW-2, Anandi Rai**, who supported the



occurrence and stated that on 24.04.81 at about 5:00 AM, while he was sleeping in his Khatal, accused Gorakh, Ajay, Binay (appellant/accused), Parma, alongwith 30-35 persons came over there on Tamtam and started to assault them. It is further stated that accused persons forcibly entered into the room and took out buckets, dram and clothes etc. and by that time Tipan Rai (injured/informant) came over there, upon whom accused Ajay fired by pistol, causing firearm injuries, thereafter, accused persons began to flee away but by that time police came over there and arrested Gorakh, Ajay, Binay, Parma and Kripa, who were involved in the occurrence of assault. It is stated that accused persons also took away his articles worth of Rs. 200-300 and they broke also the *Nad* of Khatal. He categorically stated that he did not received any injuries. He also denied having knowledge, that he was accused in a case filed by accused Gorakh. It was also stated by him that accused persons untied the cows and she-buffaloes and took out articles from the house. It was also stated that he did not assault accused persons. This witness further stated that after receiving the gunshot injuries informant/injured Tipan Rai became unconscious and regained to his self in hospital. He also went hospital alongwith injured/informant but he failed to met with police.



14. **PW-3 is Mathura Rai**, who supported the date, time and manner of the occurrence as stated by PW-1 and PW-2 and same not requires to be repeated here for the sake of brevity as far his examination-in-chief is concerned.

14.1. Upon cross- examination, it was stated by him that his Khatal was not constructed over land of Gorakh and he is not the tenant of Gorakh, rather said house belongs to him. He denied to have made his statement before the investigating officer that he was tenant in the house of Gorakh and he was paying rent of Rs. 10/- month. It was stated by him that counter case of the said occurrence was also lodged against accused persons. It was stated that there were 50 cows and she-buffalo in four Khatals but except Tipan Rai, none received any injuries. He denied to lodge false case to grab the Khatal/cattle house.

15. **PW-4 is Dr. S.N. Barnwal**, who stated that on 24.04.81, while he was posted as Civil Assistant Surgeon in Danapur Hospital, where he examined Tipan Rai at 9.20 AM and found the following:-

- I. One pellet injury on the upper part of the front of right forearm.
- II. One pellet injury front of the right side chest.
- III. Pellet injury just below the left nipple.
- IV. One pellet injury on the upper part of back of left forearm.
- V. One pellet injury on the medical aspect of the right thigh.
- VI. One pellet injury near right shoulder.



CONCLUSION

16. From aforesaid discussed evidence, it transpires that the present occurrence arises out of the land dispute, where informant/injured etc. were in possession. The statement of PW-1 appears contradictory to PW-2 on the point of assault as PW-1 specifically stated that PW-2 was assaulted during the course of occurrence but PW-2 specifically stated during the trial that he did not received any injuries. From the depositions of PW-1 and PW-2 it transpires that informant/injured, namely Tipan Rai became unconscious at the place of occurrence and he regained to self at Danapur hospital but court presuming itself that the depositions as made by PW-1 and PW-2 after long gap of time, therefore, out of fade memory, they are giving this type of statement and therefore, learned trial court believed the fact that FIR was lodged at the place of occurrence itself by the informant/injured, namely, Tipan Rai, as Tipan Rai not examined in this case, therefore, this disputed issue was not established as to whether he made his statement at the place of occurrence itself or in course of hospitalization at Danapur hospital.

17. In this case, during trial, investigating officer was also not examined and in want of his non-examination, the



several materials attentions regarding the statement which was made first time before the learned trial court was not contradicted which deprived the accused/appellant from his valuable right of defence as he could not contradict the version of prosecution witnesses as to impeach his credibility in terms of Section 145 of the Indian Evidence Act. There is no recovery of any firearm or empty cartridges. Non-examination of I.O. also failed to established the place of occurrence.

18. It is the established principle of law that prosecution must established on its own leg and therefore, in want of non-examination of investigating officer and injured/informant, it cannot be said that the prosecution established its case beyond reasonable doubt.

19. Accordingly appeal stands allowed.

20. The impugned judgment of conviction and order of sentence dated 23.07.2003 rendered by learned Presiding Officer, Additional Court no. 1, Patna adhoc Sessions Judge, Fast Track Court no. 1, Patna, in Session Trial Case No. 176/517 of 1982/2002 is hereby quashed and set aside. The accused/appellant is acquitted of the charges levelled against him. Appellant is on bail as submitted, On acquittal, his bailor and sureties stand discharged from his respective liabilities.



21. LCR, if any, be sent back to learned trial court along with the copy of this judgment. Fine, if any, paid by accused/appellants in furtherance of order of sentence, be refunded to them immediately.

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22. In terms of order dated 11.01.2024 a report was called for from the S.S.P., Patna whether, the appellant namely, Ajay Kumar @ Ajay Sharma is alive or dead, report of said effect was also called for from the court concerned.

23. The said reports are now available, from where it appears that appellant Ajay Kumar @ Ajay Sharma is now no more and is dead.

24. In view of aforesaid report, the present appeal stands abated in view of Section 394 of the Code of Criminal Procedure (in short ‘Cr.P.C.’) and disposed of accordingly.

(Chandra Shekhar Jha, J.)

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AFR/NAFR	NAFR
CAV DATE	NA
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