

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.243 of 2013

Arising Out of PS. Case No.-48 Year-2002 Thana- BIRPUR District- Supaul

1. Islam Khan and Ors S/O Late Abid Khan Resident Of Village- Kushhar Mal, Police Station- Balua Bazar, District- Supaul
2. Soaib Khan S/O Islam Khan Resident Of Village- Kushhar Mal, Police Station- Balua Bazar, District- Supaul
3. Masum Khan S/O Late Abul Khan Resident Of Village- Kushhar Mal, Police Station- Balua Bazar, District- Supaul
4. Muslim Khan S/O Late Abul Khan Resident Of Village- Kushhar Mal, Police Station- Balua Bazar, District- Supaul
5. Hussain Khan S/O Late Abul Khan Resident Of Village- Kushhar Mal, Police Station- Balua Bazar, District- Supaul
6. Sheikh Imamul @ Niyamul S/O Sheikh Abid Resident Of Village- Kushhar Mal, Police Station- Balua Bazar, District- Supaul

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Kumar Gautam, Advocate
	:	Mr. G.C. Jha, Advocate
	:	Mr. Ashish, Advocate
For the Respondent/s	:	Mr. Sujit Kr.Singh, APP

CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA

ORAL JUDGMENT

Date: 19-12-2024

Heard Mr. D.K. Sinha, learned Senior Counsel along with Mr. Kumar Gautam, Mr. G.C. Jha and Mr. Ashish, learned advocates for the appellants and Mr. A.M.P. Mehta, learned APP for the State.

2. The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C.) challenging the judgment of conviction



and order of sentence dated 18.03.2013 passed in Sessions Trial No. 24 of 2004 arising out of Balua Bazar P.S. Case No. 48 of 2002 by the learned Additional Sessions Judge-III, Supaul convicting the appellants for the offence under Sections 147, 323, 324, 341, 504 and 307/149 of the Indian Penal Code and one appellant namely Islam Khan has been convicted under Section 148 of the Indian Penal Code also. The appellants have been awarded punishment to undergo imprisonment for one year under Section 147 of the Indian Penal Code, one year imprisonment under Section 323 of the Indian Penal Code, two years imprisonment under Section 324 of the Indian Penal Code, one month imprisonment under Section 341 of the Indian Penal Code, one year imprisonment under Section 504 of the Indian Penal Code, five years rigorous imprisonment under Sections 307/149 of the Indian Penal Code and fine of Rs. 2000/- has been imposed on each of them. Appellant Islam Khan has been awarded punishment to undergo imprisonment for two years under Section 148 of the Indian Penal Code. All the awards have been directed to run concurrently and in default of payment of fine, the appellants are to undergo one-year simple imprisonment.

3. The brief facts of the case as stated by the



informant Quddush Khan in his written application are that Islam Khan and his family members had a piece of land in Mauja Kushhar within a Khata Khasra. His nephew Kamil also has a land adjacent to the former mentioned land. Islam Khan had repeatedly encroached the boundary between the two pieces of land by cutting into his nephew's land. The land was measured several times and each time it turned out to be Kamil's land. Whenever the Amin was brought to measure the land, Islam Khan would erase the marks behind his back. Islam Khan kept doing this for three to four years following which Kamil had to approach the local Mukhiya. The Mukhiya appointed ward member Javi Ullah Khan to investigate the matter. Kamil brought the Amin, but neither Islam Khan nor any member of his family come despite being informed. The date was fixed again but Islam Khan made an excuse and got away. Finally, the Mukhiya fixed the time of Jumerat on 13.06.2002 when all the people gathered together and sat with the Amin. But neither Islam Khan nor any member of his family came till 1:30 PM than everyone left the place. Thereafter, Kamil went to Islam Khan's house and expressed his concern that everyone had been waiting for him and they left when he did not come. On hearing this, Islam Khan in anger said "*catch him and kill him and then*



he can keep taking the land.” Hearing this, Shoaib Khan, Hashim Khan, Masoom Khan, Muslim Khan, Sheikh Niamul and all the co-appellants in the instant case came with *lathis* and *farsas*. Islam Khan asked his son to hand him the *farsa* so that he would not let Kamil escape. Seeing this, Kamil ran on the road and all of them gathered around him while Islam Khan started hitting him with the *farsa*. This resulted in several cuts on Kamil’s head at different places which led to bleeding from his head. Other people also started hitting him with lathis following which Kamil fell on the ground. By that time, people from all sides came running which saved Kamil's life. Niamul took away the HMT gold watch worth Rs. 1500 from Kamil's hand. Hasim took away a heavy gold chain worth Rs. 6000 from his neck. Maqil picked him up and brought him to the police station. He was bleeding and become unconscious. This incident happened around 2 PM in the afternoon.

4. On the basis of the written application of the informant, the police station in-charge of Balua Bazar lodged a formal FIR, and thereafter, the investigation officer investigated the case and submitted a chargesheet against the accused. On the basis of the charge-sheet, the sub-divisional Judicial Magistrate, Birpur took cognizance of the case and transferred the case to



the court of Judicial Magistrate Birpur for commitment and from there the case was committed to the Court of the Sessions Judge, Supaul. Thereafter, Sessions Judge Saharsa transferred it to the court of Additional Sessions Judge, Supaul for trial and disposal.

5. The prosecution examined altogether 7 witnesses in this to substantiate the charges against the accused persons, out of them PW-1 Mahendra Rai, PW-2 Baldeo Rai, PW-3 Samsul Khan, PW-4 (Injured) Md. Kamil Khan, PW-5 Abul Kalam, PW-6 Hazi Abul Kalam, PW-7 (Informant) Quddush Khan. Further, it is pertinent to note that the Doctor and Investigating Officer of the case was not examined during the trial of the case.

6. PW-1 Mahendra Rai stated in his examination-in-chief that the incident took place around four years prior at around 1-1:30 PM. He was at his home when the incident took place. When he reached the place of occurrence after hearing noises, he saw that the injured Kamil Khan was being taken to the hospital situated in Birpur on bike by Quddush Khan, Hira and Nazim and he had a towel wrapped around his head. When he asked what had happened, he was informed that Islam Khan and his family members had beaten him with *lathi* in connection



with a land dispute. PW-1 identified Islam Khan.

6.1 In his cross-examination, PW-1 stated that the place of occurrence was 5-10 minutes away from his house and that when he reached the place of occurrence, the incident had already taken place. He stated that he did not know when the incident was over and that he got to know about the incident from the people present at the place of occurrence. He did not know the names of the people who told him about the incident. He was informed of the land dispute between the appellant and the injured on that day itself, when he reached the place of occurrence.

7. PW-2 Baldeo Rai stated in his examination-in-chief that he was at his home at the time of the incident. He reached the place of incident on hearing the noise and when he reached near Islam Khan's house, he saw that Kamil Khan was lying down on the ground with his head bruised. On asking the people nearby, he got to know that Islam Khan had beaten Kamil in connection with a land dispute. Samsul was speaking as Imamul Khan. Apart from this, he did not tell anything. The police had recorded his statement. PW-2 was declared hostile because he told police that he had seen that scuffling had taken place.



7.1 In Paras 3 and 4 of the cross-examination PW-2 said that his house is 1-1.5 bigha away from the place of occurrence. He had heard about the incident from the people there. There were about fifty people at the place of incident. He was there at the place of occurrence for about an hour.

8. PW- 3 Samsul Khan stated in his examination-in-chief that the incident took place on 13.6.2002. He was returning after offering Namaaz when he saw Kamil running from Islam Khan's door. Islam Khan, Shoaib Khan, Hashim Khan, Masamu Khan were chasing him and that Islam Khan had a *farsa* in his hand from which he hit Kamil. Kamil fell down after receiving a *farsa* blow on his head. The other accused then beat him up which resulted in bleeding from all over his body. Following this the villagers came and then Hira, Nazim took Kamil to the Balua Bazar hospital on a motor-cycle. From there they took him to Birpur hospital. He said that he was told by the people that the date for measuring the land had been fixed and Kamil had gone to inform Islam about the same, following which the incident occurred.

8.1 In his cross-examination, he clearly stated in paragraph 2 that his evidence was given to the police earlier and he accepted that the statement given here was also given to the



police and told that Islam took an *axe* from Shoaib and hit Kamil with *axe* and hit the others with a stick. He became covered in blood. In Para 3 of the cross-examination he also stated that Kamil's father is his cousin. At the time of the incident at around 1:30 in the afternoon he was returning after offering *namaaz*. He saw Kamil running towards him from the west side from a distance of 100 feet. Kamil was alone at that time. He did not get *farsa* blow while he was running rather, he got *farsa* blow when everyone gathered around him to beat him. He further stated that there was no one at the place when Kamil was injured. Immediately after the incident, people came to rescue him. He further stated that he saw the *farsa* blow from a distance of two to three feet. Islam hit PW-4 with the *farsa* from a distance of two steps. At that time there was no one to save PW-4. The rest of the people had *lathi* in their hands and they had beaten him with *lathi* after he had fallen on the ground. He also stated that when he reached at the place of incident, Kamil was unconscious.

9. PW-4 Kamil Khan is the injured in the instant case. He has stated in his examination-in-chief that the alleged incident took place on 13.02.2002 i.e. on Thursday at about 1:30 PM. There was a land dispute between him and the Islam



Khan's family. On the day of the incident, he had gone to Islam Khan's house to inform him that the Amin and other people were waiting for him so that they could do the measurement of the land. In a fit of anger, Islam Khan called his son Shoaib Khan to bring his *farsa* and ordered other family members to beat him. He then stepped behind hearing Islam Khan's words and began running towards the road. Islam Khan, Shoaib Khan, Hasim, Masoom chased him on the road. Hasim hit him with a stick, which hurt his left hand. Those people surrounded him. He said that he was hit by a *farsa* on his head because of which he got a cut on the left side of his head. He then became unconscious and regained consciousness in Birpur Government Hospital. He did not see anyone else being hit. He claimed to have identified the accused.

10. PW-4 stated in his cross-examination paragraphs 2 and 5 that he does not know the *Khasra* of the disputed land. The land was measured many times and a Panchayat was also held. His land is adjacent to the disputed land to the north-east. There is a road to the east which goes to Parsa and there is a road to the west as well. To the north of the road going to Parsa is the house and land of accused Islam. And to the south, the witness stated that he has his own land and to



the east is the land of Mehndi and his four brothers and in paragraph 6, he stated that adjacent to his house is a vacant land.

11. PW- 5 Abul Kalam in his examination-in-chief stated that the incident happened on Thursday at 1:30 PM when he was at his uncle's door. He stated that he saw Kamil coming from Islam's door. At that time, the Amin had come for measuring the land. Kamil had gone to call Islam so that the land could be measured. He further stated that he saw Kamil running away and Islam, Shoaib, Hasim surrounded him. Islam snatched the *farsa* from Shoaib's hand and hit Kamil on the head because of which Kamil fell down and he started bleeding.

11.i. PW- 5 stated in his cross-examination that he has no relation with Quddush Khan (informant) and Kamil (injured). He further stated that he did not saw how many wounds were there on Kamil's body. He further stated that on the same date of incident, accused Islam Khan has filed a case against Hira, Quddush, Matin, Salam in which there is an allegation of injuring one Bibi Safaka.

12. PW-6 Haji Abul Kalam in his examination-in-chief stated that at the time of the incident, he was going to his house after offering Namaaz. He went to the place of incident after hearing the noise. He saw Kamil lying injured



next to the mosque. Hira and Nazim were taking him to the hospital on a motorcycle. PW-6 has been declared hostile because he had told the police about the alleged incident and that he has not saw the incident with his own eyes. PW-6 in his cross examination stated that when he reached the place of incidence, the incident had already happened. There was blood on Kamil's body and shoulder. In paragraph 7, he stated that he is related to Quddush Khan and visited his house sometimes.

13. PW-7 Quddush Khan informant in the present case, stated in his examination-in-chief that the incident occurred on Thursday at approximately 1:30 PM when the Mukhiya had ordered for measuring the land and for this, Amin had arrived for this purpose. There was an ongoing land dispute between Islam Khan and the PW-4, and members of the community were present with the Amin. After the *Panch* and the Amin departed, Kamil (the informant's nephew) went to inform Islam Khan that the Amin had visited to measure the land. Islam Khan allegedly responded angrily, stating that the Amin was measuring too much land, and instructed his son, Shoaib, to bring a *farsa*, saying that they would kill Kamil. He further stated that Islam Khan, along with Shoaib, Hashim, Masoom, Sheikh Niamul, and Muslim Islam, surrounded Kamil and



assaulted him. Islam Khan struck Kamil twice on the head with a *farsa*, while the other accused attacked him with lathis. Kamil had fallen on the ground and blood was oozing out from his head. He further stated that bystanders intervened, drenched Kamil in water, and rescued him. Nazir and Hira took him to the Balua Bazar hospital on a motorcycle but due to the unavailability of doctors, they took him to the Birpur hospital. They later visited the Balua Bazar police station and filed a pending application, which had been written by an unknown individual. The informant affixed a thumb impression on the application.

13.I. In paragraph 5 of his cross-examination, that the Mukhiya had issued a written order for the measurement of the land, however, the written order was not served to the accused. Further, in paragraph 9, he described the layout of the disputed land, mentioning that Kamil's house is located south of it, followed by Salam's house. To the north of Salam's house is the Kharanja road, and east of the road lies land belonging to different individuals, forming a settlement of 70-80 houses. The distance between the land and the houses of Islam Khan and Salam is about 20-25 feet. He further stated in paragraph 12, that approximately 15 people had gathered for the land



measurement, who arrived at around 8:00 AM and dispersed by 1:00 PM. On that day, the witness did not go to offer namaz. Para 13 reveals the names of some individuals present during the measurement including Anisul Khan, Samusul Khan, Kalam, Salam, Yunus, and Haji Abul Qasim, along with the witness. Further, in Para 14, it was stated that Kamil went to inform the accused Islam Khan that he had not attended the land measurement despite being called. The *Panch* had been present from 8:00 AM to 1:00 PM, and one of them, Jamiullah Khan, went to call the ward member Islam Khan. At around 9:10 AM, Jamiullah returned and stated that Islam Khan claimed his Amin had not arrived and that he would participate in the measurement once his Amin arrives. After the *Panch* left, Kamil went to inform Islam Khan of the same. He further stated in paragraph 15, that Islam Khan had filed a counter-case against Ira Sakshi and her family members regarding the incident, registered as Balua Police Station Case No. 49/2002. He further stated in paragraph 18, that upon arrival at the place of occurrence, Kamil was found lying on his stomach, bleeding from the head. Kalam and Samsul were present at the scene for two to four minutes before the witness arrived. Approximately 10-15 people had gathered, and Samsul had tied a cloth around



Kamil's head. Kamil was unconscious at the time.

14. Learned counsel for the appellants at the outset, submits that the trial Court erred in convicting the appellants for the charges levelled against them, in spite of having no materials available on record, except for the oral evidence of the prosecution witnesses. He further submits that no independent witness has been examined in this case and the doctor who prepared the injury report of the injured PW-4 Kamil Khan and the Investigating Officer who investigated the case have not been examined by the prosecution. He has also submitted that PW-1 and PW-2 have stated in their deposition that they reached the place of incidence after the incident had taken place. They did not see the incidence with their own eyes rather they were told about it by the villagers present there. He also submits that PW-3 is not an independent witness and that PW-3 has admitted to the long-standing land dispute between the injured and the appellant. Hence, the prosecution has failed to prove their case beyond all reasonable doubts despite that the trial Court has convicted them, therefore, prayed to set aside the conviction and sentence of the trial Court and to acquit the accused extending benefit of doubt.

15. Learned counsel for the appellant has relied



upon the judgment of the Hon'ble Apex Court in the case of ***Munna Lal Vs. State of Uttar Pradesh***, reported in **2023 SCC OnLine SC 80**, whose relevant paragraph Nos.- 28 and 39 of the said judgment are reproduced here-in-below:

“28. Before embarking on the exercise of deciding the fate of these appellants, it would be apt to take note of certain principles relevant for a decision on these two appeals. Needless to observe, such principles have evolved over the years and crystallized into ‘settled principles of law.’ These are:

(a).

(b).....

(c). A defective investigation is not always fatal to the prosecution where ocular testimony is found credible and cogent. While in such a case the court has to be circumspect in evaluating the evidence, a faulty investigation cannot in all cases be a determinative factor to throw out a credible prosecution version.

(d). Non-examination of the Investigating Officer must result in prejudice to the accused; if no prejudice is caused, mere non-examination would not render the prosecution case fatal.

(e).....

“39. Secondly, though PW-4 is said to have reached the place of occurrence at 1.30 p.m. on 5th September, 1985 and recovered a bullet in the blood oozing out from the injury at the hip of the dead body, no effort worthy of consideration appears to have been made to seize the weapons by which the murderous



attack was launched. It is true that mere failure/neglect to effect seizure of the weapon(s) cannot be the sole reason for discarding the prosecution case but the same assumes importance on the face of the oral testimony of the so-called eye- witnesses, i.e., PW-2 and PW-3, not being found by this Court to be wholly reliable. The missing links could have been provided by the Investigating Officer who, again, did not enter the witness box. Whether or not non-examination of a witness has caused prejudice to the defence is essentially a question of fact and an inference is required to be drawn having regard to the facts and circumstances obtaining in each case. The reason why the Investigating Officer could not depose as a witness, as told by PW-4, is that he had been sent for training. It was not shown that the Investigating Officer under no circumstances could have left the course for recording of his deposition in the trial court. 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.

emphasis applied



16. On the other hand, learned Additional Public Prosecutor has vehemently opposed this appeal and submits that there is direct allegation against the present appellants, for assaulting the informant. In view of the aforesaid statements and the evidence on record, learned trial Court has rightly convicted the appellants and the present appeal should not be entertained.

17. At this stage, I would like to appreciate the relevant extract of entire evidence led by the prosecution and defence before the Trial Court.

18. Having deeply studied and scrutinized the facts of the case and the materials on record, it is noted that there are material inconsistencies in the deposition of the witnesses. The informant in the instant case has failed to reveal in the FIR the fact that the informant was present at the place of occurrence when injured was being beaten up. The injured PW-4 also stated that the informant was not present at the place of occurrence when the incident took place. The Informant therefore was not an eye-witness in the present case and he has also not disclosed the source of information. Hence, PWs-1, 2 and 7 are hearsay witnesses in the present case. PW-6 has been declared hostile by the prosecution. However, in Para 18 of his cross-examination PW-6 stated that he was with the injured at



the time of incident alone. The informant who registered the instant case on the date of occurrence after he got to know about the incident but the injured, PW-4 Kamil Khan stated in Para 11 of his deposition that he was unconscious after receiving one blow of lathi and that he regained consciousness a day after the date of occurrence. The trial court erred in its judgment as it failed to ascertain the injury of PW-4 the injured. It has also been observed that the other accused Imamul, Shoaib, Maasum have not been mentioned by the informant in his deposition and no overt act has been attributed to any of them other than Islam Khan. Hence it shows the ongoing enmity between the parties. Further, the contents of the FIR have also not been proved as the evidence of the doctor as well as the Investigating Officer have not been examined during the course of trial and non-examination of I/O concerned and doctor concerned is fatal to the case of the prosecution. The Supreme Court in ***Habeeb Mohammad vs The State of Hyderabad 1954 AIR 51, 1954 SCR 475*** pointed out that-

“It was the duty of the prosecution to examine all material witnesses who could give an account of the narrative of the events on which the prosecution



is essentially based and that the question depended on the circumstances of each case. In our opinion, the appellant was considerably prejudiced by the omission on the part of the prosecution to examine Biabani and the other officers in the circumstances of this case and his conviction merely based on the testimony of the police jamedar, in the absence of Biabani and other witnesses admittedly present on the scene, cannot be said to have been arrived at after a fair trial, particularly when no satisfactory explanation has been given or even attempted for this omission.”a police Jamedar, in the absence of Biabani and other witnesses admittedly present on the scene, cannot be said to have been arrived at after a fair trial, particularly when no satisfactory



explanation has been given or even attempted for this omission.”

19. Further prosecution has failed to prove the injury sustained by the victim as neither any medical report has been exhibited nor any medical practitioner has been examined during the course of the trial. Investigating Officer has also not been examined during the course of trial as it was fatal since he could have adduced the expected evidence and 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 and the learned trial Court failed to scrutinize the evidence brought on record regarding deficiencies, drawbacks and infirmities crept during course of trial and passed the impugned judgment in complete ignorance of criminal jurisprudence. Moreover, there are discrepancies regarding the sequence of events and the presence of individuals at the place of occurrence. Further, there is no eyewitnesses to the said occurrence and all the PWs are hearsay witnesses and have not seen the occurrence. Considering this fact, prosecution has failed to establish this case beyond all reasonable doubt, therefore, in such circumstances, it may not be proper to convict the appellants/accused on the materials available on record.



Hence, the judgment of conviction and order of sentence in this present matter is fit to be set aside.

20. Hence, the judgment of conviction and order of sentence dated 18.03.2013 passed in Sessions Trial No. 24 of 2004, arising out of Balua Bazar P.S. Case No. 48 of 2002 by the learned Additional Sessions Judge-III, Supaul, is set aside and the appellants are acquitted from all the charges levelled against them. As the appellants are on bail, they are discharged from their liability of bail bonds.

21. Accordingly, this appeal is allowed.

(Ramesh Chand Malviya, J)

Sunnykr/-

AFR/NAFR	NAFR
CAV DATE	NA
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