

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.59 of 2006

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1. Gupteshwar Sharma.
 2. Gokhul Sharma.
 3. Dinesh Sharma.
 4. Shayam Sunder Sharma.

All the sons of Late Ghura Sharma and Residence of Village- Malhipur,
P.S. Chenari, District- Rohtas at Sasaram.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Abhas Chandra, Advocate (<i>Amicus Curiae</i>)
For the State	:	Mr. A. M. P. Mehta, APP

CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT

Date: 14-07-2025

Heard Mr. Abhas Chandra learned *Amicus Curiae* for the appellants and Mr. A. M. P Mehta learned APP for the State.

2. This appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C') against the Judgment of conviction and Order of sentence dated 17.11.2005 in Sessions Trial No. 231 of 1994 / 85 of 2003, arising out of Chenari P.S. Case No. 25 of 1993 corresponding to G.R. No. 486 of 1993 passed by the learned Additional Sessions Judge (Fast Track Court) No.- IIIrd, Rohats at Sasaram whereby and where-under the appellants have been convicted for the offence punishable under Sections 341 and 323/34 of the Indian Penal Code (hereinafter referred to



as the 'IPC') and sentenced to under go rigorous imprisonment for four months and fine of Rs. 250/- for the offence punishable under Section 323 of the IPC and in default of payment of fine they have to undergo one month simple imprisonment and further sentenced to under one month simple imprisonment for the offence punishable under Section 341 of the IPC. Both the sentences shall run concurrently.

3. The prosecution case is based on the *Fardbeyan* of the informant is that on 09.04.1993 at 9 pm the informant Ram Chela Mistri was lying on the cot after returning from forest. Accused Maharajia Devi wife of Ghura Mistri started abusing Basmati Devi wife of the informant and in the meantime accused Gupteshwar Mistri, Gokhul Mistri, Shyam Sundar Mistri, Madhura Mistri, Dinesh Mistri all sons of Ghura Mistri came there and assaulted Basmati devi with slaps and fists. Informant fled towards lane out of fear, but his brother Ghura Mistri assaulted him with axe of his back and accused Gupteshwar Sharma assaulted him with lathi. The informant fell down and become unconscious. On hearing halla the witnesses Bachu Sharma, Mukha Sharma came there and brought him Chenari Hospital. The whole occurrence took place due to urinate on cow-dung.



4. On the basis of Fardbeyan of the informant, Chenari P. S. case no. 25 of 1993 was registered against above named accused persons along with one accused Ghura Mistri under Sections 341, 323, 324, 326 and 504/34 of the IPC. The Investigating Officer after completing the investigation submitted charge-sheet against above named accused persons under Sections 341, 323, 324, 307 and 504/34 of the IPC. The cognizance of the offence was accordingly taken and was committed to the Court of Sessions by the CJM Rohtas at Sasaram.

5. During the trial the prosecution has examined six witnesses to substantiate this case. Out of them, PW-1 Bachu Sharma, PW-2 Mukha Sharma, PW-3 Dr. Prem Narayan Singh, PW-4 Ramchela Sharma (informant), PW-5 Basmati Devi and PW-6 Raj Bhansh Sharma (Formal witness). Investigating Officer of the present case has not been examined in the present case.

6. PW-1 Bachu Sharma in his examination-in-chief stated that the incident was about six and a quarter years back and at that time he came back from barn to his house and Ghura Sharma was lying down. He took him to hospital and doctor checked him in the hospital. In his cross-examination, he



stated that police came in the hospital and he was not declare hostile.

7. PW-2 Mukha Sharma in his examination-in-chief stated that at the time of occurrence he was at its barn and S.I came there. He further stated that occurrence was about six years back at around 9 pm. He took Ghura Sharma to the Hospital who was in injured condition. He further stated that fardbeyan was recorded in the hospital and he along with PW-1 signed the same. In his cross-examination, he stated that when he reached there Ghura Sharma was lying there and Ram Chela was standing there with *axe* in his hand. At that time when he signed the fardbeyan of Ram Chela it was blank paper meaning thereby that nothing was written on it. He further stated that Ghura Sharma and Ram Chela are brothers and the alleged occurrence took place due to land dispute.

8. PW-3 Dr. Prem Narayan Singh in his examination-in-chief stated that on 09.04.1993 he was posted as M.O. P.H.C Chenari, Distt- Rohtas and on that very day he examined Ram Chela Mistri and found following injuries on him:

- i. Incised wound on the left side of the backl of size 3" x 1/2" x muscle deep*
- ii. Incise wound n the right scapular region of size 1" x 1/2" x muscle deep*



iii. Swelling with tenderness on the upper part of left forearm 2" x 2"

A mole on the left side of the back of the neck

Age of injuries- within 6 hrs

Nature of injuries- Injury no. i and ii are caused by sharp cutting weapon and simple in nature. Injury no. iii caused by hard and blunt substance and simple in nature

He prepared the injury report and this is the photo-copy of his injury report which is marked as ext. X for identification.

8.i. On the same day he examined Basmati devi

and found following injuries:

i. swelling with tenderness on the left upper arm size about 2" x 1"

ii. bruise on the right side of the back 2" x 1"

iii. Bruise on the left side of the back 2" x 1"

iv. bruise on the left side of the back 2" below the injury no. ii of size 2" x 1"

v. bruise on the left scapular region 1" x 1"

vi. abrasion on left knee 1/2" x 1/2"

vii. abrasion on right knee 1/4" x 1/4"

viii. Swelling with tenderness one left arm 1" x 1"

A mole on the left side of the back

Age of the injury- 6 hrs

Nature of injury- All the injuries are caused by hard blunt substance and simple in nature

He prepared the injury report and this is photocopy of my injury report which is marked as ext. X/1 for identification

9. PW-4 Ramchela Sharma (informant) in his



examination-in-chief stated that occurrence took place 11 years ago and it was 9 pm. He was in his cattle shed at that timewhen Ghura Sharma, Gupteshwar Sharma, Mathura Sharma, Gokul Sharma, Dinesh Sharma and Shyam Sundar Sharma came. Gupteshwar Sharma was carrying a *lathi*, Ghura was carrying an *axe*. The aforesaid persons started beating his wife. By the time he heard, Gupteshwar Sharma hit him with *lathi* on his arm and Ghura Sharma hit him with *axe* on his back after which he fell down and became unconscious. His co-villagers lifted him and took him to the Police Station and then he was admitted in the Chenari Hospital there itself. The Sub-Inspector recorded his statement in the Hospital and read it over to him after which he put his thumb impression on it.

9.i. In his cross-examination, he stated that on the day of the occurrence, he came back to his home from forest at 9 pm after cutting wood and he slept for 10 minutes. He don't know how to see time in a clock. He woke up after hearing the sound of hurling of abuses taking place between his wife and the accused person's wife. It was happening in his cattle shed. The accused persons are his cognates. He have put a brick fence. The accused persons did not urinate on cow dung cakes in front of him. A counter case to this case is going on in which



we are the accused persons. Only Ghura Sharma had hit him with an *axe* after which he fell down and he regained consciousness in the Hospital. He did not see whether Ghura Sharma had come to the Hospital or not. He can not say who all lifted him and took him to the Hospital. He can not say whether he had gone to the Police Station before going to the Hospital or not.

10. PW-5 Basmati Devi in her examination-in-chief stated that occurrence took place more than 11 years ago around 8-9 pm. She was in her cattle shed at that time. At that time, her husband was lying on a cot in the cattle shed after having dinner. Before that, her husband had returned from the forest after cutting wood. She was also lying there. Mahraji Devi started hurling abuses at her at that time. By then, Gupteshwar Sharma (Mistri) came and held her by her hair-lock and started slapping her. At the same time, Mathura, Gokul, Dineshwar, Shyam Sundar and Ghura Sharma came there. Ghura Sharma was carrying an *axe*. Gupteshwar was carrying a *lathi*. When they came, her husband tried to save his life and escape, then Ghura Sharma hit her husband with the *axe* which hit on the back. The back got injured and started bleeding. Her husband fell down and became unconscious, then Gupteshwar



Sharma also started beating her husband with the *lathi*.

10.i. She further stated that other accused persons hit her with kicks & fists. Villagers gathered there, then the accused persons ran away. The accused persons hit her husband with the intention to kill him. After the occurrence, the villagers took her and her husband to the Chenari Hospital (Government). The Sub-Inspector came to the Government Hospital and recorded the statement of her husband. The accused persons assaulted us because the son of Ghura Sharma was urinating on the heap of my cow dung cakes, and she tried to stop him because that cake was for the combustion purpose. Then, the wife of Ghura Sharma had abused her in the morning on the day of the occurrence and told that when his husband would return in the evening then he would teach her a lesson.

10.ii. In her cross-examination, she stated that she can not tell the day, date, month and year of the incident. It was Thursday on the day of the incident. The accused persons also have filed a case for the same occurrence which is under trial and she is also an accused in that case. It is not a fact that we had assaulted the accused persons and for the same reason, the S.T. 475 of 1993 by the accused persons is pending in which she is also an accused. And this false case has been filed only to



save us from that case. They are cognates of the accused persons and there is a land dispute among us. The incident occurred at about 9-10 in the night. She is an illiterate and do not wear a watch. Her husband was taken to the Hospital at about 11 o'clock. We did not go to the Police Station earlier, but went first to the Hospital. We had gone to the Government Hospital.

11. PW-6 Raj Bhansh Sharma (Formal witness) in his examination-in-chief stated that the formal FIR of the Chenari PS case no. 25 of 1993 is in the handwriting and signature of Nand Ji Singh, the then PS I/c Chenari, which he identify it was marked as Exhibit -2. This fardbeyan is in the handwriting and signature of Chandra Shekhar Jha (C. S. Jha), the then ASI of the Chenari P.S., which he identify. The fardbeyan was marked as Exhibit-3. This is the original case diary of the Chenari PS case no. 25 of 1993 which is in the handwriting and signature of the then A.S.I. of the Chenaari PS, Chandra Shekhar Jha, which he identify. It was marked as Exhibit- 4.

11.i. In his cross-examination, he stated that he do not know where were Nand Ji Singh and A.S.I. Chandra Shekhar Jha posted before the Chenaari PS. He can not say that Nand Ji Singh and Chandra Shekhar Jha were posted in the



Chenaari PS from when and till when. C. S. Jha did not record the fardbeyan in front of him. Nand Ji Singh also did not register the formal FIR in front of him. He have no documentary proof to show to identify the handwriting of the aforesaid Nand Ji Singh and Chandra Shekhar Jha. It is not a fact that he can not identify the handwriting and signature of Nand Ji Singh and Chandra Shekhar Jha but after reading the clear signature of Nand Ji Singh and Chandra Shekhar Jha on the fardbeyan and formal FIR. He have given a wrong deposition that these are in their handwriting and signature.

12. Learned *Amicus curiae* for the appellants submits that appellants have falsely been implicated in this case and the impugned judgment of conviction and order of sentence are not sustainable in the eye of law or on facts. Learned trial Court has not applied its judicial mind and erroneously passed the judgment of conviction and order of sentence. From perusal of the evidences adduced on behalf of the prosecution, it is crystal clear that there are huge discrepancies in the statement of PW-1 and PW-2 regarding the injured person. According to them Ghura Sharma was the injured person and they took him to the hospital for treatment. According to PW-2 informant assaulted Ghura Sharma with *axe* and Ram Chela Sharma was



standing with *axe* near the injured Ghura Sharma.

12.i. He further submitted that it is settled principle of law that all evidence taken in a trial or other proceeding is recorded in the presence of the accused. This principle is fundamental to a fair trial as it allows the accused to hear the evidence, observe the demeanor of witnesses, and instruct their legal counsel accordingly. Essentially, it guarantees the accused's right to cross-examine witnesses and it ensures transparency and allows the accused to understand the case against them and present their defense effectively. He further submitted that original injury reports were not exhibited by the prosecution to prove its case and neither the investigating officer has been examined in the present case which can cause prejudice to the accused/appellants.

12.ii. Learned counsel further relied upon the judgments rendered by the Hon'ble Supreme Court in the cases of:

a. In the case of *Rai Sandeep @ Deepu vs State (NCT of Delhi)* reported in *(2012) 8 SCC 21*, the Hon'ble Supreme Court has observed that:

“The evidence of the eye-witness (Sterling Witness) should be of very sterling quality and caliber: and it should not only be instill



confidence in the Court to accept the same but it should also be a version of such nature that can be accepted at its face value."

b. In the case of ***Kali Ram vs State of Himachal Pradesh*** reported in ***(1973) 2 SCC 808 : AIR 1973 SC 2773***, the Hon'ble Supreme Court has observed in paragraph 25 as;

"...Another Golden thread which runs through the web of the administration of justice in Criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused; and the other to his innocence, the view which is favorable to the accused should be adopted..."

c. In the case of ***Babu vs. State of Kerala (2010) 9 SCC 189***, The Hon'ble Supreme Court observed that prosecution evidence must be trustworthy and consistent. When witnesses contradict themselves materially the benefit must go to the accused. Doubt arose due to discrepancies in the time and sequence of events, leading to acquittal.

d. In the case of ***Vikas vs. State of Maharashtra (2008) 2 SCC 516*** the Hon'ble Supreme Court observed that



Contradictions between FIR and deposition, and between witnesses, were central to acquittal. The benefit of doubt was extended due to failure of prosecution to prove guilt beyond reasonable doubt.

e. In the case of *State of U.P. vs. M.K. Anthony AIR 1985 SC 48* the Hon'ble Supreme Court observed that some contradictions are natural due to passage of time and stress. But serious contradictions affecting core facts may render prosecution unreliable. The Court acquitted the accused due to material contradictions in eyewitness testimony.

f. In the case of *Tahsildar Singh & Anr. v. State of Uttar Pradesh AIR 1959 SC 1012* Hon'ble Supreme Court observed/explained that differentiated between minor contradictions (which do not affect credibility) and major contradictions (which go to the root of the prosecution case). Minor discrepancies are inevitable in human testimony and should not be given undue importance. However, contradictions on material particulars can be fatal.

12.iii. Learned counsel for the appellants lastly contended that in view of the aforesaid facts and circumstances, the prosecution has failed to prove beyond shadow of all reasonable doubts. Hence, the prosecution case against the



appellants fails on the above mentioned grounds. So, the appellants should have been acquitted from the conviction as sentenced against them.

13. However, learned APP for the State defends the impugned judgment of conviction and the order of sentence submitting that there is no illegality or infirmity in the impugned judgment and order of sentence, because prosecution has proved its case against the appellants beyond shadow of all reasonable doubts. 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.

14. At this stage, I would like to appreciate the relevant extract of entire evidence led by the prosecution and defence before the Trial Court and have thoroughly perused the materials on record as well as given thoughtful consideration to the submissions advanced by both the parties.

15. On deeply studied and scrutinized all the facts and materials available on record, it is evident to note from the order of the leaned Trial Court dated 20.02.2004 which is as follows:-

“Out of 5 accused, one accused Dinesh Sharma files his hajiri. Rest four accused have been represented through a petition under Section 317



of the Cr.P.C., which is allowed for today only. Additional P.P. files hajiri of a witness. Case called out. Accused is present in the Court. Additional P.P. is also present with his witness. PW-3, Dr. Prem Narain Singh is examined and photo copy of injury report of the injured Ram Chela Mistri is marked on Ext-X and photo copy of injury report of the injured Baramatiya Devi is marked as Ext. X/1 for identification. On repeated call, the lawyer of the accused did not appear before the Court for cross-examination. Hence the witness is discharged.”

As the doctor (PW-3) has been examined in the absence of accused persons and learned counsel for the accused was also not present at the time of his examination to cross-examine the said prosecution witness. Further, the learned Trial Court did not give any chance to the accused persons to cross-examine PW-3 nor took his deposition in front of accused persons and relied upon his deposition to render the impugned judgment which is not in accordance with law as per Section 273 of the Cr.P.C. which states as;

“Section 273– Evidence to be taken in presence of accused

Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader.

Provided *that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual*



offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.

Explanation— *In this section “accused” includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.”*

16. At this point, it is imperative to bring attention Section 273 of the Cr.P.C. Provisions of Section 273 are mandatory in nature to the extent that the evidence taken in the course of the trial ought to be in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader. The basic principle for conduction of criminal trial is, it should always be in presence of an accused as provided under Section 273 of the Cr.P.C. However, presence of accused should not be physical and for that, two relevant provisions are there which guides the issue, the first one Section 205 of the Cr.P.C and second one is Section 317 of the Cr.P.C, one another Section i.e. Section 299 of the Cr.P.C also gives such endurance but with a condition, that the same should be exercised only after declaration of an accused as an absconder. It could fairly be held that there happens to be utter violation of Section 273 of the Cr.P.C. as accused have not been given the opportunity of being heard as the evidence is to be recorded in



presence of the accused (physical presence or presence through advocate as allowed under law through advocate (a) in accordance with Section 205 of the Cr.P.C. (b) Section 317 of the Cr.P.C.

17. Further, the Investigating Officer has not been examined during the course of trial and non-examination of Investigating Officer 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.”

18. 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.”

19. Further the Investigating Officer has also not been examined who has investigated the case 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.

20. 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 and passed absurd judgment. Moreover, there are discrepancies regarding the sequence of events and the presence of individuals at the place of occurrence. Considering this fact, prosecution has failed to establish this case beyond shadow of 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.

21. So, the Judgment of conviction and Order of sentence dated 17.11.2005 in Sessions Trial No. 231 of 1994 / 85 of 2003, arising out of Chenari P.S. Case No. 25 of 1993 corresponding to G.R. No. 486 of 1993 passed by the learned Additional Sessions Judge (F.T.C.) No.- IIIrd, Rohats at Sasaram is set aside and the accused/appellants are acquitted from the charges leveled against them. As the appellants are on bail, they are discharged from liability of their bail bonds.

22. Accordingly, this appeal stands allowed.

23. Before parting with this appeal, Secretary, Patna High Court Legal Services Committee is directed to pay Rs. 5,000/- (five thousand) to the learned Amicus Curiae, namely, Mr. Abhas Chandra towards honorarium for assisting this Court in the present appeal.

24. Let a copy of first and last page of this judgment be handed over to the advocate Mr. Abhas Chandra, learned Amicus Curiae and Office is directed to proceed further in granting honorarium to him which is to be paid by Patna High Court Legal Services Committee.



25. Office is directed to send back the trial Court records and proceedings along with a copy of this judgment to the trial Court, forthwith, for necessary compliance, if any.

(Ramesh Chand Malviya, J)

Anand Kr.

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	18.07.2025
Transmission Date	18.07.2025

