

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.400 of 2013**

Arising Out of PS. Case No.-8 Year-2007 Thana- NARAINPUR District- Bhojpur

Sipahi Tiwary Son Of Late Ram Dayal Tiwary Resident Of Village P.O.-
Madanpur, P.S.- Narayanpur, District- Bhojpur

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Ms. Sarandha Suman, Amicus Curiae

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

**CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND
MALVIYA**

ORAL JUDGMENT

Date: 17-04-2025

Heard Ms. Sarandha Suman, Amicus Curiae for
the appellants and Mr. Anand Mohan Mehta, learned APP for
the State.

2. The present appeal has been filed under
Section 374(2) of Code of Criminal Procedure, 1973
(hereinafter referred as 'Cr.P.C') challenging the judgment of
conviction dated 08.05.2013 and order of sentence dated
10.05.2013 passed in Sessions Trial No. 71 of 2008. in
connection with Narainpur P.S. Case No. 08 of 2007 dated
04.04.2007 passed by Adhoc Additional. Sessions Judge-II, Ara,
Bhojpur whereby and where-under the appellants have been
convicted for the offence under Sections 307 and 341 of Indian
Penal Code (hereinafter referred as 'IPC') and for the offence



punishable under Sections 307 and 341 of the IPC sentenced to rigorous imprisonment for 10 years and to pay fine of Rs. 5000/- and to undergo simple imprisonment for 3 months in default of payment of fine.

3. The prosecution case as alleged in written application of PW-6 Parmanand Upadhyay the informant to the SHO Narainpur P.S. on 04.04.2007 is that on the date of occurrence that is 04.04.2007 in the evening when son of the appellant Sipahi Tiwary namely, Deepak was uprooting the gram crops from the land of informant and after seeing this father of informant went to house of appellant, and complaint about the same on which the appellant abused him and threatened him how dare you to come to the door of his house to make complaint. Thereafter some verbal altercation ensued in between them and meanwhile Sipahi Tiwary brought *lathi* and assaulted the father of informant. It is alleged that the appellant with intention to kill the father of the informant hit on his head with a *lathi*. He fell on the ground after sustaining injury. On alarm, the informant reached to the aforesaid place of incident and tried to bring him to his place in between the appellant also assaulted him on his left hand as a result of which his hand was broken. The aforesaid occurrence was witnessed by many



villagers.

4. Further on the basis of written application of informant endorsed to SHO Narainpur P.S. FIR has been registered bearing Narainpur P.S. Case no.8 of 2007 dated 04.04.2007 under Sections 323, 325, 307 and 504 IPC against appellant and after completing investigation IO has submitted charge-sheet under Sections 341, 323, 307 and 504 IPC vide Charge-sheet no. 34 of 2007 on 30.06.2007. After that CJM, Bhojpur has taken cognizance on 17.07.2007 and case has been transferred to the JMFC, Ara for commitment. He committed the present case to the Court of Sessions on 20.02.2008 where this case has been registered as Sessions Trial No.71 of 2008 and charges under Sections 307 and 341 of IPC has been framed against appellant and after hearing on the point of charge, on 22.05.2008 case has been transferred to the Court of ADJ FTC IV, Ara for trial and disposal, then after in pursuance of Misc. Order no. 67 of 2009 on 04.05.2009 this case has been transferred to the Court ADJ V, Ara then after in pursuance of Misc. order no. 6 on 10.01.2011 this case has been transferred to the Court of Adhoc Additional Session Judge II, Ara and case has been received on 31.01.2011.

5. In order to prove his case prosecution has



examined altogether six witnesses out of which PW-1 Shyamlakant Upadhaya brother of informant, PW-2 Rajendra Sharma has been declared hostile by the prosecution, PW-3 Laldhari Upadhaya (Co-Villager) the chance witness, PW-4 Madan Upadhaya is hearsay witness, PW-5 Ram Bhagat Upadhaya is the victim person and father of informant, PW-6 Parmanand Upadhaya is informant and victim person himself whose signature and writing has been identified of his written application endorsed to the SHO Narainpur P.S. which has been marked as Ext.1.

6. PW-1 stated in his examination-in-chief that the alleged incident took place two years back and at the time of occurrence he was on his door and saw that son of accused/appellant, namely, Deepak was uprooting gram crops and fleeing from the land of informant. When informant, namely, Parmanend Upadhaya and when his father Ram Bhagat Upadhaya made protest for the act of the son of appellant. Appellant assaulted Ram Bhagat Upadhaya father of informant by means of *Lathi* on his head with the intention to kill him and after sustaining injury Ram Bhagat Upadhaya fell down on the ground, his forehead sustained grievous injury, blood was oozing from his head and he became unconscious and when



Parmanand Upadhaya (informant) came accused also assaulted him by Danta by which his right hand was broken. Thereafter, PW-6 was taken to police station and PW-1 did not accompanied him and police took his statement where he narrated the same.

6.i. In his cross-examination, PW-1 disclosed that he is brother of PW-6 Parmanand the injured person. Further he described the nearby place of occurrence, in the east there is field of Parmanand Upadhyay, the field in the west, north and south side belong to Dwarika Upadhyay.

7. PW-3 stated in his examination-in-chief that the alleged offence occurred in the month of April of 2007 and cannot recall the exact date of the incident. Further, he stated that younger son of accused/appellant whose name he does not remember had uprooted the gram crops from the land of informant then the father of informant came to the door of accused/appellant to make complaint then accused threatening him that how he dared to come here to make complaint not leave him alive and kill him then by saying this verbatim accused has given a *Lathi* blow upon the father of informant by which he sustained injury upon head to which previous injuries caused upon him. Blood was oozing and on his crying his son



the informant came there then accused person also gave him a *Lathi* blow by which he sustained injury upon left hand. Further, he stated that he was returning from washroom and in the meantime the quarrel stopped.

7.i In his cross-examination he stated that he had seen the occurrence and it continues for at least 20-25 minutes and he did not know whether other co-villagers saw the incident or not. Further, he stated that the son of accused/appellant namely Deepak aged about 10-11 years uprooted the gram from the field of PW-5 and while admonishing the same to the appellant, the appellant hit PW-5 with *lathi* on his head and injured him. He also described the nearby place of occurrence, the field in the south direction belong to the accused/appellant Shipahi Tiwari. Further he stated that accused/appellant gave 2-3 blow of *lathi* to the Ram Bhagat Upadhyay and thereafter he injured Parmanand by hitting on his head. He further stated that accused hit from the front to Ram Bhagat and from the back to Parmanand and blood came out on the place of occurrence. He further stated that Ram Bhagat was conscious.

8. PW-5 stated in his examination-in-chief that the alleged incident took place three years ago, time was 4 PM and at that time he was on his door. He saw that son of Sipahi



Tiwary the appellant, was up rooting gram crops from his land then he came to the appellant to make complaint. Accused person came out from his house and assaulted him by *Danta* upon his forehead as a result of which he sustained injuries upon his head and blood started to ooze out but he was conscious and when his son Parmanand came there to rescue him appellant also assaulted him, due to which his forearm forearm was broken.

8.i In his cross-examination he stated that he saw the son of appellant namely Deepak up rooting the gram from the field and approx one hand full gram was up rooted by him. He further stated that age of son of accused was approx about 7-8 years. Further at para 10, he stated that the cloth (kurta) was full of blood strain. At para 11 he has described the boundaries of nearby place of alleged occurrence, in the north and south there is field of Dwarika Upadhyay, and there is no field of appellant near the place of occurrence.

9. PW-6 stated in his examination-in-chief in the same way as submitted in his written application endorsed to SHO Narainpur P.S. vide Ext.1. He further stated that date of occurrence was 04.04.2007 at 4 PM and at that time son of appellant, namely, Deepak was uprooting gram crops from his



land then his father Ram Bhagat Upadhaya came to the house of appellant, namely, Sipahi Tiwari to make complaint then accused Sipahi Tiwari became angry and gave a *Lathi* blow upon his head as a result of which his head sustained grievous injury and blood was oozing. At that time appellant was crying that he will kill him. At that time when he came there appellant also assaulted him by means of *Danta*.

9.i In his cross- examination he stated that the when son of accused/appellant namely Deepak was up rooting the grams he was there and the aged of Deepak is about 14-15 years. There is no field of Deepak near the place of occurrence and along with him other villagers also saw Deppak up rooting the grams from his field. He further stated that when his father went to complaint accused then he was not having *lathi* in his hand and after complaint he bring *lathi* and hit on the head of his father PW-5 and many persons saw accused assaulting his father. Thereafter, accused also assaulted him due to which his left arm got fractured and blood oozed out. After sustaining the injury he was conscious. He further stated that due to oozing out of blood cloth of his father got covered in blood.

10. After closure of the prosecution evidence, the appellants were examined under Section 313 of the Cr.P.C



confronting them with incriminating circumstances which came in the prosecution evidence, so as to afford them opportunity to explain those circumstances. During this examination, they admitted that they had heard the evidence of prosecution witnesses against them. But they did not explain any circumstance, though they claimed that the prosecution evidence is false and they are innocent and have been falsely implicated.

11. The learned *amicus curiae* appearing on behalf of the appellant submitted that 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 the perusal of the evidences adduced on behalf of the prosecution it is crystal clear from the statement of all the prosecution witnesses that the injuries caused by *danta* which is considered as hard and blunt substance and no sharp weapon has been used by the accused/appellant which clear that there is no intention of causing such injury which led to death of the person. Learned counsel further contended that the injured persons i.e., the informant PW-6 and his father PW-5 were not medically examined and also no injury report is submitted on record.



Further as the prosecution has failed to produce any Injury Report which cast a serious doubt on the story that if any injury was inflicted to the informant and his father or not. If the injury report was exhibited it would have clearly stated the nature of the injury.

11.i. Learned counsel further contended that witnesses have deposed in their evidences that villagers have seen the incident but none of them have been examined as prosecution witness. All the witnesses who have been examined are either the relatives or the hostile witnesses. Further it is stated that there is absence of independent witness which weakened the prosecution case. Further it has been submitted that PW-1 deposed that informant sustained injuries by *Lathi* in his left hand whereas informant PW-6 has nothing said about his injuries caused upon his hand. On the other hand, PW-3 has stated that informant received injuries upon left hand. She further submitted that the real fact has not corroborated by any injury report of informant or examination of doctor who made conducted his treatment. Further, it is also submitted that injury report of PW-5 father of informant also has not been brought on record and doctor who has treated him also has not been examined by the prosecution. IO is other important witness who



has also not been examined. There is contradictory evidence itself on behalf of prosecution and all the witnesses are relatives of informant who said to be interested. No independent witnesses have been examined by the prosecution which shows that prosecution has Utterly failed to prove his case.

11.ii. For that in a case under Section 307 IPC, the prosecution ought to have examined the doctor but in the present case, the doctor was not examined and no any plausible explanation has been given for his non-examination. The prosecution suffers from grave lacuna as they have failed to dazzle objective finding relating to the place of occurrence and the manner of the occurrence. The IO would have stated about the nature of the weapon used and the severity of the injuries inflicted. It is highly improbable that the dispute has arose on such a petty issue, therefore the investigating officer would have brought the real cause for the altercation and the assault. Therefore, the IO's testimony was crucial for establishing the facts of the case, including the collection of the evidences, the credibility of the witness's statement and overall integrity of the investigation.

12. On the other hand, learned Additional Public Prosecutor has vehemently opposed these appeals and submits



that there is direct allegation against the present appellant, for committing an offence under Sections 307 and 341 of IPC. Further it is submitted that in view of the aforesaid statements and the evidence on record, learned trial Court has rightly convicted the appellant and the present appeals should not be entertained.

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

14. The Hon'ble Apex Court in the case of ***State of M. P. v. Saleem (2005) 5 SCC 554***, where Hon'ble Apex court has categorically held that whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case, Relevant portion of the judgment reads as under:

"16. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC. The determinative question is the intention or knowledge, as the case may be, and not the nature of the injury...."

15. The Hon'ble Apex Court in the case of ***Jage***



Ram v. State of Haryana reported in ***(2015) 11 SCC 366*** the paragraph No. 12 and 13 which are as under:

*“12. For the purpose of conviction under Section 307 IPC, the prosecution has to establish i. the intention to commit murder; and ii. the act done by the accused. The burden is on the prosecution that the accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under Section 307 IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. **The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given, etc.***

13. In State of M.P. v. Kashiram [State of M.P. v. Kashiram, (2009) 4 SCC 26: (2009) 2 SCC (Cri) 40: AIR 2009 SC 1642], the scope of intention for attracting conviction under Section 307 IPC was elaborated and it was held as under: (SCC pp. 29-30, paras 12-13)

“12...13. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt



act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.”

16. On deeply studied and scrutinized all evidences, it is evident to note that the instant case is a case of no evidence and is not sustainable in the eye of law. The prosecution version does not seem to be true in the background of the facts of the case as PW-3 in para 8 of his deposition has contradicted his statement by stating that he had not seen himself the son of accused/appellant namely Deepak to uproot the gram from the field of PW-5. He also described the nearby place of occurrence as the field in the south direction belong to the accused/appellant Shipahi Tiwari, which is contradicting with the description provided by the PW-1 in his deposition. Whereas all other prosecution witnesses have not described about accused field being near the place of occurrence. PW-1 in his deposition stated that PW-5 got unconscious but PW-5



himself stated in his deposition that he was conscious. Further, the contents of the FIR has also not been proved as the IO has not been examined during the course of trial and non-examination of Investigating Officer is fatal to the case of the prosecution as he can bring material facts on record as to stained cloths of PW-5 and have described about the place of occurrence. 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.”

17. 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 pm 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

18. Further, 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 appellant, 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. Further, there is no eyewitnesses to the said occurrence and PW-2 and 4 were declared hostile and have not seen the occurrence. There are many contradictions in the depositions made by prosecution witnesses in regard to place of occurrence and manner of occurrence as to how much blows of *lathi* was given to the injured persons.

19. 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 all reasonable doubt, therefore, in such circumstances, it may not be proper to convict the appellant/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 dated 08.05.2013 passed in Sessions Trial No. 71 of 2008 arising out of Narianpur P.S. Case No. 8 of 2007 dated 04.04.2007 passed by learned Adhoc Additional Sessions Judge-II, Ara 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 their liability of bail bonds.

21. 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* Ms. Sarandha Suman towards honorarium for assisting this Court in the present appeal.

22. Let a copy of the first and last page of this judgment be handed over to the Advocate Ms. Sarandha Suman, learned *Amicus-Curiae* and Office is directed to proceed further in granting honorarium to her which is to be paid by Patna High



Court legal services committee.

23. Accordingly, this appeal is allowed.

(Ramesh Chand Malviya, J)

Brajesh Kumar/-

AFR/NAFR	NAFR
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