

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1923 of 2017**

Arising Out of PS. Case No.-52 Year-2014 Thana- AGIAON District- Bhojpur

Mintu @ Tulsi Rai Son of Late Birendra Rai, resident of Village- Agiaun,
P.S.- Agiaun, District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Manoj Kumar, Adv.
For the State : Mr. Sujit Kumar Singh, APP
For the Informant : Mr. Praveen Kumar, Adv.

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

Date : 10-04-2019

1. Sole appellant Mintu @ Tulsi Rai has been found guilty for an offence punishable under Section 307 IPC and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.5000/- and in default thereof, to undergo S.I. for two months, additionally, under Section 27 of the Arms Act and sentenced to undergo R.I. for three years as well as to pay fine appertaining to Rs.2000/- in default thereof to undergo S.I. for one month, additionally, with a further direction to run the sentences concurrently vide judgment of conviction dated 16.05.2017 and order of sentence dated 20.05.2017 passed by Sixth Additional Sessions Judge, Bhojpur at Arrah in Sessions Trial No.247/2014 .

2. Banaras Rai (PW.4) while was admitted at P.M.C.H. gave his fardbeyan on 25.05.2014 at about 08.05 AM at ICU Ward disclosing therein that on the preceding evening that



means to say on 24.05.2014 at about 08.30 P.M., being invited on the eve of the marriage of grand daughter of Sheo Pujan Rai his co-villager he was there sitting over the chair. There was sufficient light. At that very moment, Mintu @ Tulsi aged about 28 years, son of Late Birendra Rai, his co-villager came near him, took out pistol and fired causing injury below his chest (left side). He rolled. There was ruckus and during course thereof, Mintu @ Tulsi managed to escape. His brother Satyendra Rai along with co-villager lifted him to Sadar Hospital, Ara on a vehicle where he was examined and then, referred to PMCH where he is being treated. Shashi Ranjan (not examined), Dhananjay Kumar (not examined) and Arvind Kumar (not examined) stood as an FIR attesting witness.

3. After registration of Agiaun P.S. Case No.52/2014, investigation followed and completing the same, charge sheet has been submitted facilitating the trial meeting with the ultimate result, subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has further been pleaded that during course of procession of Barat coming towards the place of bride, there was firing at the both end and during course



thereof, victim has sustained injury accidentally by unknown but in the background of land dispute, getting an opportunity, falsely implicated the appellant/accused. However, nothing has been adduced to substantiate the same.

5. Altogether eight PWs have been examined at the end of the prosecution in order to substantiate its case who are PW.1-Pankaj Kumar, PW.2-Jitendra Rai, PW.3-Satyendra Rai, PW.4-Banaras Rai, PW.5-Shiv Pujan Rai, PW.6-Nagdev, PW.7-Dr. Dharmendra Kumar, PW.8-Dr. Sanjay Kumar. Side by side also exhibited Ext.1-FIR, Ext.2-Injury Report, Ext.3-Application of Injury, Ext.3/1-Supplementary application.

6. While assailing the judgment of conviction and sentence, manifold argument has been advanced at the end of the appellant. The first and foremost is that there happens to be consistent evidence at the end of the prosecution that on account of arrival of Barat Party there was presence of more than hundred people but the witnesses who came, are the son, brother of the informant/injured save and except PW.5 who did not claim to be an eye witness to occurrence. That means to say, whoever been examined are the interested, partisan, hostile to the appellant and that being so, in the facts and circumstances of the case, their version could not be accepted.



7. It has further been submitted that there happens to be no disclosure at the end of the prosecution that any effort was to apprehend the appellant. Had there been presence of appellant as an assailant at the spot he would not have an opportunity to escape therefrom in the background of presence of more than hundred people. He would have been apprehended at the spot but, having no an explanation at the end of the prosecution is another circumstance beling the prosecution case.

8. It has further been submitted that irrespective of suggestion given at the end of the appellant, it happens to be obligation on the part of the prosecution to substantiate its case. Though, material witnesses have stated that PW.4, informant had sustained firearm injury but, the doctor PW.7 and PW.8 have not opined that the injury having over the person of PW.4 Banaras Rai was caused by a firearm. That being so, there happens to be inconsistency amongst ocular as well as medical evidence resultantly complete demolition of the prosecution case.

9. Doubting over the authority of the prosecution case, it has been submitted that there happens to be allegation of the informant that firing was made by the appellant from close range, then in that circumstance, there would have been presence of charring injury which, the medical report nullifies. Apart from



this, from the evidence of the I.O. PW.6, it is evident that neither bloodstain was found at the place of occurrence nor, bloodstain cloth were given to him during course of investigation nay, he had not found cap of the cartridge there.

10. From the evidence of the witnesses, it is evident that they have categorically stated that firing was made from eastern side while from the evidence of PW.4, injured it has been from southern side. That being so, the cumulative effect did not justify the conviction so recorded by the learned lower court rather, it speaks a self oriented injury and in the background of strain relationship amongst the parties, got this case filed putting false and frivolous allegation.

11. On the other hand, the learned APP while supporting the judgment impugned has submitted that whatever points have been argued at the end of learned counsel for the appellant, are only for argument sake because of the fact that, there happens to be no controversy with regard to sustaining of firearm injury by the injured, at the place as narrated by the prosecution as the same has already been admitted at the end of the appellant. The only controversy which now remains to be resolved is whether appellant happens to be author of the injury or



not and for that, the evidence of the informant is sufficient whereunder appellant has been identified to be the assailant.

12. It has also been submitted that for the deficiency having at the end of the I.O. on account of lapses having during course of investigation prosecution would not suffer more particularly, when the same happens to be properly substantiated by other witnesses. It was incumbent upon the I.O. to have asked for the cloth having works by the victim at the time of occurrence but in the peculiar facts and circumstances of the case, appears to be immaterial.

13. Apart from this, it has also been submitted that during cross-examination, the defence failed to cross-examine the PW.4 or any of the witness with regard to merit of the case, proper identification of the appellant to be an assailant at the injured. That being so, the prosecution case is found duly proved whereupon this appeal is fit to be dismissed.

14. PW.8 is the doctor who had examined the injured on 24.05.2014 at about 09:45 PM at Sadar Hospital, Arrah and found the following:

- (i) An entry point of 1" x 1/2" over left side of upper abdomen.
- (ii) Margin is lacerated.



(iii) Cloth over the wound is burned.

(iv) Mark of injury within 6 hours.

Nature reserved till radiological report received.

15. After having report from the PMCH, PW.8 had issued supplementary injury report as, the report status that emergency laprotomy was done, resection and anastomons was done. Transverse colon was also injured and that being so, injury no.1 was diagonized as grievance in nature. The age of injury as per first injury report was within six hours. Marked Ext.3, 3/1. During cross-examination, it is evident that he was confined only with regard to non mentioning of the weapon used for commission of the occurrence but, no cross-examination has been made with regard to blackening found over margin of the apparel nor, with regard to cause of the weapon by which injury could have been used. However, its propriety will be considered at later appropriate stage.

16. The evidence of PW.7 another doctor is of no much importance save and expert after having the patient admitted at his ward, he was operated upon and during course thereof, he had found two liters of blood inside the cavity along with other injuries, on account of impact along with main injury damaging



the colon. After operation, he issued the injury report and the same is as follows:-

I made surgery of under General Anesthesia either Abdomen roge opened by milling incisier there were about 2 litre of blood such out. There were multiple rents Ext.2 present over the gojoneon and mesertry and illem which was primarily repaired, 2 rents 20 mid ilian and jugerm were completely anulsed. Where dissection anastonosis done. Left third of transverse colon was found to have senesal injury which was exterioed.

During cross-examination at para-6, he had admitted that he had not mentioned the kind of injury and in likewise manner, type of injury so caused under para-7 of his injury report.

17. That means to say though, the blackening was there over the apparel of the victim, regarding which the PW.8 was not tested, it is also evident from the evidence of PW.8 that two liters of blood was found inside the cavity and on that very score, the defence also failed to cross-examine whether the injury would have pro-fused bleeding.



18. Now coming to the oral evidence, it is evident that PW.5 had not claimed to be an eye witness of occurrence. He had simply corroborated the narration by way of at the time he was inside the house. After hearing sound of firing, he came out and then, he came to know that Banaras Rai was shot at by the appellants. The witness is the person whose grand daughter was to be married and on the eve thereof, all the persons including Banaras Rai, injured, was at his place. He had not been cross-examined whether at the time of Barati coming to his Darwaja there was firing at the end of the Barati party in order to celebrate the joyous moment, nor suggested so.

19. PW.1 is the son of the informant/injured. He had stated that on the alleged date and time of occurrence he was at the Darwaja of Sheopujan Rai on the eve of marriage along with Jitendra Rai. Banaras Rai was also there. Accused Mintu Rai came and shot at Banaras Rai as a result of which Banaras Rai sustained injury below his chest (left side). At that very time, Banaras Rai was sitting over the chair. After sustaining injury, he rolled down. Mintu ran away. At that very time, there was light. Lifted Banaras Rai to Sadar Hospital, Ara wherefrom he was referred to Patna. Identified the accused. During cross-examination at para-4 he had stated that he was at the place of occurrence. He was there and one



hour since before the occurrence. In para-5 he had stated that he reached at the place of occurrence at about 07:30 PM. At that very time, Barati already present at the Darwaja. In para-6 he had stated that he along with his father, Jitendra Rai, Gopal Rai, Satyendra Rai have gone to participate. At that very time, Barati has come. There were 150-200 Barati. He along with Jitendra Rai remained at the Darwaja of Sheo Pujan Rai while his father was 10-12 steps ahead of them. In para-7 he had stated that at the time of occurrence his father was sitting over Chair. One chair was lying by his side over which one person of village-Belaur was sitting having western front. That person had not sustained hurt. In para-8 he had stated that there was ruckus just after sound of firing. He was unable to say which people flee in which direction. He fled towards eastern direction. His father was 1-1 ½ steps from the place wherefrom firing was made. At that very time 3-4 persons were near about his father. None was behind his father. All those persons were by the side of his father. In para-9 he had stated that those persons even after hearing sound of firing remained static. He reached within 2-3 minutes after sound of firing. At that very time his father was conscious. Blood was coming out from the wound. He tried to left his father but could not succeed. In para-10 he had stated that he had touched with the



body of his father but, is not remembering whether his cloth also were sustained blood stained. In para-11 he had stated that the accused had of the P.O. not licensee/unlicensed gun but at that very time he was possessing small weapon. In para-12 he had shown the boundary, North-Sheo Pujan Rai, South-Kabindra Rai, East-Gali. Then had stated that his father had sustained firearm injury from eastern side. He had not cared to see whether blood fallen at the spot or not. In para-14 he had stated that he informed the police with mobile while they were in a way to Arrah. In para-15 he had stated that at the time of recording of FIR, he was not present. Then had admitted persisting land dispute amongst the parties. Then had denied the suggestion that on account of land dispute the accused has been falsely implicated.

20. PW.2 is the Jitendra Rai who, during course of examination-in-chief had admitted that he had gone there along with Pankaj and others. In para-2 he had stated that when Barati was returning, at that very time Mintu @ Tulsi Rai came from eastern side and fired over Banaras Rai on account thereof, Banaras Rai became injured. He sustained injury below left chest. He fell down from the chair. Mintu escape therefrom. They lifted Banaras Rai to Sadar Hospital and from there, after first aid, he was referred to PMCH. Identified the accused. During cross-



examination at para-7 he had stated that he was at the place of occurrence about an hour since before the occurrence. He had further stated that he reached at the place within a minute from the place where he was standing. He further stated that about 100-250 people were there. In para-10 he had stated that Banaras Rai was sitting on the second chair in the first row. Relative of Sheo Pujan Rai was sitting at the first chair and another chair was occupied by his co-villager but at that very time, he was not remembering his name. In para-13 he had stated that at the time of coming of Barati there was no firing either from the Barati side or from the Sarati side. Till his presence there was no firing. Then had stated that sometime after having presence of Barati party, there was firing. In para-14 he had stated that Banaras Rai was shot at from eastern side. He was shot from a distance of 1-1/2 steps there was ruckus after firing. He rushed towards eastern direction. That means to say the place wherefrom firing was made and then, reached near Banaras Rai. In para-15 he had stated that he had tried to left Banaras Rai. Blood was oozing out from the injury. He is not remembering whether he had also got blood stained over his body. Altogether 3-4 persons conjointly lifted him. He is not remembering whether any of them had sustained blood stain or not. Then there happens to be cross-examination with regard to



taking away the injured by them to sadar hospital and during midst thereof, police being informed by the Pankaj over mobile. He had further stated at para-18 that he was not present at the time of recording of fardbeyan then had denied the suggestion that at the time of arrival of Barati there was firing and Banaras Rai sustained gun shot injury on account thereof. He denied the suggestion that accused was not present at the place of occurrence nor he had shot. He had further denied the suggestion that being brother of the injured he has deposed falsely.

21. PW.3 is Satyendra Rai. During examination-in-chief he had stated that while he was at the Darwaja of Sheopujan Rai in order to participate in a marriage ceremony of grand daughter of Sheo Pujan Rai, large numbers of persons were there. At that very time, Mintu shot at Banaras Rai who was sitting over a chair. Banaras Rai sustained injury below the chest and rolled down from the chair. Mintu @ Tulsi managed to escape. Banaras Rai was taken to Ara and then thereafter, he returned back so, he is unable to say what had happened subsequently thereof. Then had stated that Banaras was treated at Patna. During cross-examination at para-7 he had stated that when he arrived at the place of occurrence, Barati was returning. 30-40 persons were present since before. Out of whom, 7-8 were sitting rest were standing. He



remained there for an hour. Firing was made after an hour after his arrival. In para-8 he had stated that at the time of firing, about 30-40 persons were there. After firing there was ruckus. In para-9 he had stated that firing was made from eastern side. Firing was made from close range. He was also standing towards western direction. About 7-8 persons were in between him as well as Banaras Rai. In para-10 he had stated that when he reached at the place of occurrence, Banaras Rai was sitting over a chair. Large number of chairs were there but, they were not in a row. Then again said that in one row chairs were. about 10-15 chairs were there. On second chair of that row Banaras was sitting. He was standing ten feet away from that place. He was not remembering the names of persons sitting at the right, left side of Banaras Rai. On remaining chairs, relative of Sheo Pujan Rai were sitting. In para-12 he disclosed the boundary of the P.O. North-Sheo Pujan Rai, South-Kabindra Rai, East-Arvind Rai and West-Sheopujan Rai. In para-13 he had stated that he had tried to lift the Banaras Rai. Blood was coming out from the wound. His cloth also soaked with blood but he had not shown to the police. In para-14 he had stated that he is unable to say who had informed police and at how much hour after the occurrence police came. Then at para-18 he had denied the suggestion that at the time of assemblage of Barati



at the Darwaza of Sheo Pujan Rai, there was firing at the end of the Barati and during course thereof, accidentally Banaras Rai sustained gun shot injury and in the background of land dispute, accused has been falsely implicated.

22. PW.4 is the inforamnt/injured. He had deposed that the occurrence is dated 24.05.2014 at about 08:15 PM. At that very time he was at the Darwaja of Sheo Pujan Rai and was sitting over a chair. At that verty time, accused Mintu @ Tulsi Rai came and shot at him by small pistol on account of which, he sustained injury below the left chest. He fell down from the chair. There was sufficient light. He was lifted to sadar hospital and then was referred to Patna. He remained there for 25 days. Police had come, recorded his fardbeyan whereupon he put his signature (identified). Identified the accused. During cross-examination at para-5 he had stated that he had arrived at the place of Sheo Pujan Rai at about 07:30 PM when Barati came to his place. Barati remained for half an hour. At that very time he was siting at the Darwaja of Sheo Pujan Rai having southern front. Some persons were also sitting by his side. Some persons were standing hither and thither. None was sitting at his right side. None was standing at his left side, right side of the Rabindra. Accused Mintu Yadav was standing infront of him. There was wall behind him. He had



not talked with Mintu @ Tulsi. He remained there for 5-10 minutes. Mintu had arrived at about 08.10 PM. Then he disclosed the boundary of the P.O. at para-6. North-Sheo Pujan Rai, South-Kabindra Rai, East-Gali, West-Gali. He had further stated that at the time of coming of Barati to Darwaza there was no firing. In para-5 he had stated that just after firing, there was ruckus and so, he was unable to see who fled which side. He had further stated that firing was made from southern side. At the time of sustaining gun shot injury, he was about 3-3 ½ feet above the ground. After sustaining injury, he fell down. He had not fainted soon thereafter. He tried to stand but in vein. In para-8 he had stated that Akhilesh Rai and others lifted him who were standing nearby. In para-9 he had stated that there was profused bleeding from the injury. In para-10,11,12 there happens to be cross-examination with regard to his transportation to Ara Sadar Hospital, persons who have accompanied him, to the PMCH and further, becoming unconscious during midst thereof. In para-17 he had stated that on the following day, he regained sense. He remained at the ICU for about 16-17 days. Police had come and recorded his fardbeyan. At para-18 had stated that he is not remembering how many days after the fardbeyan, his further statement was recorded. In para-19 he had stated that police had not seized his cloth. In para-20 he



had admitted to be on strain relationship with the accused since before. Then had denied suggestion that at the time of assemblage of Barati at the Darwaza of Sheo Pujan Rai, there was firing at the end of Barati as well as Sarati and during course thereof, accidentally, he sustained injury. He further denied the suggestion that accused was not at all present at the place of occurrence.

23. PW.6 is the I.O. who had deposed that after having been entrusted when the investigation of the case, he had gone to the place of occurrence lying at village Agiaon. He had inspected the place of occurrence which happens to be in front of Darwaja of the informant, in front of Darwaja of Lalan Rai and having boundary North-Lalan Rai, South-Kapindra Rai, East-Road and Gupteshwar Rai @ Mannu, West-Road and then Kapindra Rai. Recorded statement of the witnesses. Took accused on remand and recorded his statement. Also recorded further statement of the injured Banaras Rai, procure injury report and then, after completing the investigation, submitted charge sheet. During cross-examination at para-7 he had admitted that the place of occurrence has been shown by the nephew of the injured, when he reached at the place of occurrence, had recorded statement of Pankaj Kumar, Jitendra Rai, Satyendra Rai, Lalan Rai and Kameshwar Rai etc. He had not recorded statement of any other



witness. He was not knowing the witnesses since before personally. He had not found cloth of the injured, blood, empty cartridge at the place of occurrence. He had tried to take the same but, he had not mentioned the same in the case diary. In para-8 he had stated that he reached at the place of occurrence within an hour of the occurrence. Then clarified he reached at the place of occurrence on 25.04.2014 at about 23.15 hours and remained there for 4-4 and half hours. During midst thereof he had recorded statement of the witnesses. Second time hee visited the place of occurrence after eight days. He met with injured on 18.06.2014 and then his further statement was recorded. At that very time Sheo Pujan Rai's statement was also taken. In para-10 he had stated that after recording further statement of the injured, he had not recorded statement of anybody. At that very time he was not at all equipped with injury report. Then had denied the suggestion that his investigation happens to be partial, collusive.

24. Enmity is a double edged sword. It may be a cause of false implication simultaneously it may be a motive for commission of the occurrence. That means to say, presence of motive inspires not only the cause of false implication rather, for commission of the occurrence. So, it is the evidence after proper scrutiny of which one could arrive at a right conclusion.



25. While appreciating the evidence, some sort of privilege has been given to the evidence of the injured more particularly presence of injury speaks with regard to presence of the injured, at the place of occurrence and further, the subsequent part that means to say with regard to author of the injury and the manner whereunder he sustained injury is to be properly perceived from his testimony.

26. In **Smt. Shamim vs. State (GNCT of Delhi)** reported in **2018 (4) PLJR 160 (SC)**, it has been observed:

“11. PW2 is an injured witness whose throat was slit in the occurrence causing loss of voice requiring hospitalization for two months. The evidence of an injured witness carries great weight as it is presumed that having been a victim of the same occurrence the witness was speaking the truth. She has deposed that the appellant came upstairs after the deceased persons had been shot dead by the other accused. On the exhortation of the appellant accused Naushad, brother of PW4, again assaulted the witness on her throat with the razor. While the accused were leaving the appellant tripped over the witness. The blood stained 'Chunni' of the appellant discovered the next day on her confession, therefore stands explained.”

27. Apart from this, the evidence of single witness if found duly acknowledge, is permissible in the eye of law as provided under Section 134 of the Evidence Act. Furthermore, the Apex Court has also reiterated the same and observed in **Kuna @ Sanjaya Behera vs. The State of Odisha** reported in **2018 (1) PLJR 5 (SC)**, it has been held:



“17. That conviction can be based on a testimony of a single eye witness if he or she passes the test of reliability and that it is not the number of witnesses but the quality of evidence that is important, have been propounded consistently in Anil Phukhan (1993) 3 SCC 282, Ramji Surya (1983) 3 SCC 629, Patnam Anandam (2005) 9 SCC 237 and Gulam Sarbar (2014) 3 SCC 401 with the apparent emphasis that evidence must be weighed and not counted, decisive test being whether it has a ring of truth and it is cogent, credible, trustworthy or otherwise.”

28. What about evidence of related witness, whether it should be outrightly rejected on that score or would be subject to appreciation. In **Motiram Padu Joshi and Ors. vs. The State of Maharashtra** reported in **2018 (3) PLJR 349 (SC)**, it has been held:

“12. Likewise, the relationship of PW-2 with the deceased cannot be the reason for doubting the testimony of PW-2. It is fairly well-settled that relationship is not a ground affecting the credibility of a witness. [In Mohabbat v. State of M.P.](#), (2009) 13 SCC 630, this Court held as under:-

“11. Learned counsel for the respondent State on the other hand supported the judgment of the High Court.

“12. Merely because the eyewitnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering the prosecution version.

13. ‘5. ... Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not



conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

.....

To the same effect are the decisions in [State of Punjab v. Jagir Singh](#) (1974) 3 SCC 277, [Lehna v. State of Haryana](#) (2002) 3 SCC 76 (SCC pp. 81-82, paras 5-9) and [Gangadhar Behera v. State of Orissa](#) (2002) 8 SCC 381.” The above position was also highlighted in [Babulal Bhagwan Khandare v. State of Maharashtra](#) (2005) 10 SCC 404, [Salim Sahab v. State of M.P.](#) (2007) 1 SCC 699 and [Sonelal v. State of M.P.](#) (2008) 14 SCC 692 (SCC pp. 695-97, paras 12-13).”

As held in various decisions, judicial approach has to be cautious in dealing with such evidence. It is unreasonable to contend that evidence given by related witness should be discarded only on the ground that such witness is related.”

29. The mode of appreciation, scrutiny of the evidence of a witness, is to be made in its entirety and during such exercise, it could be seen whether the evidence happens to be subject of confidence. In **Smt. Shamim vs. State (GNCT of Delhi)** reported in **2018 (4) PLJR 160 (SC)**, it has been held:

“12. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole inspires confidence. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching



importance to some technical error without going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/Trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it.”

30. Whether on account of lapses having at the end of investigating officer would adversely affect upon prospect of prosecution case. In *Lahu Kamlakar Patil v. State of Maharashtra* reported in (2013) 6 SCC 417, it has been held:

“18.It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In *Behari Prasad v. State of Bihar (1996) 2 SCC 317*, this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In *Bahadur Naik v. State of Bihar(2000) 9 SCC 153*, it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge nor the High Court has delved into the issue of non-examination of the investigating officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in *Arvind Singh v. State of Bihar(2001) 6 SCC 407*, *Rattanlal v. State of J&K(2007) 13 SCC 18* and



Ravishwar Manjhi v. State of Jharkhand(2008) 16 SCC 561, has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should have been examined and his non-examination creates a lacuna in the case of the prosecution.”

31. True it is that while examining the injured by PW.8, he had found blackening at the margin of the apparel which the informant was wearing at that very moment. Although, there happens to be silence at the end of PW.7 as well as PW.8 with regard to having the injuries caused by means of firearm but, from the suggestion having at the end of the accused/appellant, it goes out of controversy as, it has been a suggestion at his end that while Barati has come up, there was firing at the end of Barati as well as Sarati and during course thereof, the informant sustained firearm injury, accidentally which, has been converted as an occurrence pinpointing towards the appellant to be the author of the same in the background of animosity, prevailing since before. That means to say, neither the firearm injury has been denied nor the place of occurrence.

32. As stated above, the learned counsel drew emphasis on two score, the first one there happens to be inconsistency amongst the witnesses in comparison to the testimony of the informant PW.4. The informant had stated that he was shot at from southern side while from the witnesses it has



come up that firing was made from eastern side. So, this discrepancy is bound to affect upon the prospect of the prosecution case. As, from the evidence of the respective witnesses it is clearly evident that none had claimed to be within the periphery of Banarash Rai, none claimed that he was standing or sitting near about Banaras Rai, none had claimed that they have seen the appellant Mintu @ Tulsi Rai since before the occurrence standing near Banaras Rai and further locating his position, on account thereof, stating like so would not be a deficiency at the end of the prosecution. The only proper evidence on that very score, would be the evidence of PW.4, informant and from his evidence, it is evident that he had shown presence of Mintu @ Tulsi just in front of him and on that very score, there happens to be no cross-examination. Although not pleaded, but one more circumstance, that is delay in institution of case has been found. From the evidence of PW.4, informant it is crystal clear that while in a way to Arrah he became unconscious, and regained on the following morning while was at PMCH. On that very score, none of the doctor has been cross-examined, nor the I.O. other witnesses have also not been cross-examined.

33. In *Gian Chand & others v. State of Haryana* reported in *2013(4) PLJR 7 (SC)*, it has been held:



“10. So far as the condition of the property is concerned, the court observed that “as the witnesses have been examined after four years from the date of recovery. The case property remained lying in the malkhana. On account of shortage of space, in the malkhanas, the case properties cannot be stacked properly and the bags, containing poppy husk, underwent the process of decay, however, did not mean that the case property produced in the court, did not relate to the instant case.” There was nothing on record to show that the said case property had been tampered with.

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in ***Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204*** observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him



with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

(Emphasis supplied)”

34. So far sentence is concerned, it is evident that in the facts and circumstances of the case, whereunder without any provocation in the background of land dispute, going to the Darwaza of another person, where Barati was on auspicious occasion and then shooting, did not attract interference. Because of the fact that instant appeal sans merit hence, is dismissed. Appellant is under custody which he will remain till saturation of the period of the sentence.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	18.04.2019
Transmission Date	18.04.2019

