

Sakaldeo Sharma Vs. the State of Bihar

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Court : Patna

Decided On : Apr-23-2014

Judge : Aditya Kumar Trivedi

Appeal No. : Criminal Appeal (SJ) No. 705 of 2012

Appellant : Sakaldeo Sharma

Respondent : The State of Bihar

Judgement :

1. Challenged in this Appeal is judgment of conviction dated 09.08.2012, whereby and whereunder appellant Sakaldeo Sharma has been found guilty for an offence punishable under Section 307 of the I.P.C. and sentence dated 14.08.2012 directing him to undergo rigorous imprisonment for ten years as well as fine of Rs. Two thousand in default thereof, to undergo rigorous imprisonment for three months additionally by the Ad hoc Additional Sessions Judge-3rd, Khagaria in Sessions Trial No.16 of 2003/ 137 of 2012.

2. Bijo Devi (PW-4) gave her fardbeyan on 06.08.2002 alleging inter alia that on 04.08.2002 at about 9.00 p.m. her husband Bhutal Sharma had gone to sleep at his Bathan lying North-West to Beldaur village after taking meal and during course thereof, had directed her to come along with one Lota of water. At about 10.00 p.m., she came at her Bathan along with water as well as food for her cousin mother in-law Budhia Devi. At that very time her husband was sleeping over a

Bench while her cousin mother in-law was awoken. At about 10.40 p.m., three persons came at her Bathan whereupon, she flashed torch. Two persons got themselves hidden behind bush while remaining one Sakaldeo Sharma came and inflicted Chhura blow over neck of her husband. Her husband raised alarm, on account of which Tilo Sah, Rajendra Sharma, Sanichar Sharma, Ramavtar Sharma, Chhathu Sharma came seeing whom Sakaldeo Sharma along with two others escaped there from.

Then thereafter with the help of villagers, she took her husband to Beldaur Hospital where her husband was treated and then thereafter, he was referred.

The motive for occurrence has been shown over dispute cropped up on account of cutting of grass by Sakaldeo Sharma from his field.

3. On the basis thereof, Beldaur P.S. Case no.35 of 2002 was registered under Section 307, 324 of the I.P.C. followed with investigation whereupon, charge sheet was submitted. The appellant faced trial and met with ultimate result, the subject matter of instant appeal.

4. The defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial of occurrence. However, neither any DW nor any document has been adduced on behalf of defence.

5. In order to substantiate its case, prosecution had examined altogether sixteen PWs. Out of whom, PW-1 Chhathu Sharma, PW-2 Bhutal Sharma, PW-3 Budhia Devi, PW-4 Bijo Devi, PW-5 Dinesh Sharma, PW-6 Amrit Sharma, PW-7 Ram Vilas Sharma, PW-8 Jaldhari Sharma, PW-9 Vakil Sharma, PW-10 Tilo Sao, PW-11 Vinay Kumar Sharma, PW-12 Pramod Sao, PW-13 Rajo Sharma, PW-14 Sikandar Kumar, PW-15 Ram Avtar Sharma and PW-16 Dr. Uday Prakash Narayan Singh. Side by side had also exhibited fardbeyan as exhibit-1, injury report as exhibit-2.

6. It has been submitted on behalf of appellant that the judgment impugned has been passed in mechanical way without appreciating the infirmities persisting on

the record. The first and foremost argument happens to be with regard to conduct of prosecution. It has been submitted that prosecution has not come with clean hand. In this regard, it has been submitted that all the witnesses have stated that injured was taken to Police Station where he had given his statement and then thereafter, on a police requisition, he was examined by the doctor and then was referred to Medical College, Bhagalpur. Apart from oral evidence, the injury report prepared by police having on record dated 04.08.2002 has been referred. In the aforesaid eventuality, it has been submitted that prosecution had not brought the aforesaid statement and exhibit of the record which happens to be earliest version of occurrence. For want of examination of I.O., the aforesaid mysterious circumstance could not found exposed in legal way, caused serious prejudice to the appellant.

7. It has further been submitted that present F.I.R. happens to be collusive one wherein, purposely and intentionally appellant has been dragged in the background of dispute prevailing amongst the parties. For that, it has been submitted that there was no occasion for the prosecution to have F.I.R. recorded on 06.08.2002 along with the fact that the aforesaid delay of at least 48 hours have not been explained. Moreover, there happens to be utter violation of Section 157 of the Cr.P.C., because of the fact that the F.I.R. was not transmitted or received at the office of the Chief Judicial Magistrate within 24 hours. From the record, it is evident that the aforesaid F.I.R. was kept by the police with ulterior motive and then began to hunt the appellant and then after apprehending him as he failed to oblige the I.O., produced the appellant along with F.I.R. on 12.08.2002 without having any sort of explanation for the aforesaid violation. So, it has been submitted that F.I.R. happens to be ante dated as well as is collusive one. At this score, again it has been pleaded that on account of non-examination of I.O., the appellant has sustained serious prejudice.

8. It has further been submitted that save and except, PW-2, PW-3, PW-4, none had claimed to be an eye witness to the occurrence. So far PWs-2, 3 and 4 are concerned, they have not claimed to have identified the appellant on account of his voice, fait appearance rather they claimed to have identified by way of flashing of torch. Whether the torch was ever seen by the I.O. or seized by the I.O. during

course of investigation is a matter of concern. Again the interest of appellant is found prejudiced on account of non-examination of I.O. with regard to source of identification.

9. Now, coming to the material evidence, it has been submitted that inconsistency persisting amongst the evidence of PWs-2, 3 and 4 is bound to demolish the prosecution version at its threshold. With regard to presence of other PWs are concerned, it has been submitted that they did not support the case of the prosecution any manner even on hearsay basis.

10. So submitted that presence of injury over the person of injured Bhutal Sharma (PW-2) on account of examination of Dr. Uday Prakash Narayan Singh (PW-16) is no way going to improve the case of the prosecution. Hence, instant appeal is fit to be allowed.

11. At the other hand, the learned Additional Public Prosecutor while opposing the submission raised on behalf of appellant has submitted that there is no universal rule that on account of non-compliance of Section 157 of the Cr.P.C., the case of the prosecution should be thrown. The delay has to be seen independently with the facts and circumstances of the case which the prosecution properly explained.

12. It has further been submitted that presence of other witnesses are corroborative in nature as they, immediately after the occurrence, came at the place of occurrence found Bhutal Sharma (PW-2) in an injured condition and got him removed immediately to hospital in a way to save his life. Now, coming to evidence of PWs-2, 3 and 4, it has been submitted that from their evidences, it is evident that they are consistent over manner of occurrence as well as identification of appellant to be author of the injury. So, it has been submitted that the learned lower Court had rightly concluded the sentence.

13. From the record, it transpires that I.O. has not been examined. It does not happen to be an universal rule that the case of the prosecution should be disbelieved merely on account of non-examination of I.O. rather it varies from case to case. Unless and until, the non-examination of I.O. kept the mysterious circumstance to persist which could have on account of examination of I.O.,

exposed then in that circumstance the non-examination of I.O. would certainly be deemed fatal to the prosecution, because of the fact that by non-examination of I.O., interest of accused is found prejudiced.

14. The Honble Apex Court has occasion to deal with the same in Lahu Kamlakar Patil and Another v. State of Maharashtra reported in (2013) 6 Supreme Court Cases 417 relevant paragraph-18.

œ18. Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the FIR but has given the excuse that it was taken on a blank paper. The same could have been clarified by the investigating officer, but for some reason, the investigating officer has not been examined by the prosecution. 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, 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, 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, Rattanlal v. State of JandK and Ravishwar Manjhi v. State of Jharkhand, 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?.

15. Now, the effect of non-examination of I.O. is to be seen in the present case. As per exhibit-1 the fardbeyan was recorded on 06.08.2002. In terms of Section 157 of the Cr.P.C., it was to be produced before the learned Chief Judicial Magistrate upto 08.08.2002 while the order sheet suggest that on 12.08.2002 the F.I.R. along with appellant was produced before the learned lower Court which happens to be the first order sheet.

16. In Manga alias Man Singh v. State of Uttrakhand reported in 2013 CRI.L.J. 3332, the same has been dealt with under paras-17, 18 and 19.

œ17. In the first place, it is not shown as to how such a delay caused any prejudice to the accused. Except merely stating that the three days delay in forwarding the express report belies the case of the prosecution as alleged, nothing else was shown in support of the said submission. In fact the trial Court dealt with this very submission. The trial Court has noted that the investigating officer was not questioned at all about the reasons for not sending the report prior to 24.11.2001. It has further noted that in the 'Panchnama' of the deceased Mehroof, the crime was clearly mentioned along with the relevant sequence of crime. The trial Court has therefore, found that without recording the First Information Report on that very day, namely, 21.11.2001, the crime number could not have been mentioned in the 'Panchnama'.

18. In this context, when we refer to the decision relied upon by the learned counsel for the appellants, namely, Jang Singh (2001 AIR SCW 2322)(supra), we find that this Court has noted the vitiating factors in the entire case of the prosecution, including the delay in sending the First Information Report to the Magistrate for which there was no explanation. By merely referring to the said factor along with the other serious defects noted by this Court, it was concluded that the case of the prosecution was not made out. We, therefore, do not find any scope to apply the said decision as a proposition of law in order to apply the same to the case on hand.

19. Per Contra, it will be appropriate to refer to a reasoned decision of this Court reported in Sandeep v. State of Uttar Pradesh, 2012 (6) SCC 107, wherein this very Bench dealt with the implication of Section 157, CR.P.C. and held as under in

paragraphs 62 and 63:

62. It was also feebly contended on behalf of the appellants that the express report was not forwarded to the Magistrate as stipulated under Section 157, Cr.P.C. instantaneously. According to the learned counsel FIR which was initially registered on 17-11-2004 was given a number on 19-11-2004 as FIR No.116 of 2004 and it was altered on 20-11-2004 and was forwarded only on 25-11-2004 to the Magistrate. As far as the said contention is concerned, we only wish to refer to the reported decision of this Court in *Pala Singh v. State of Punjab* (AIR 1972 SC 2679) wherein this Court has clearly held that (SCC p. 645, para 8) (Page 2681, 2682 Para 7 of AIR) where the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned be, in the absence of any prejudice to the accused it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable.

63. Applying the above ratio in *Pala Singh* to the case on hand, while pointing out the delay in the forwarding of the FIR to the Magistrate, no prejudice was said to have been caused to the appellants by virtue of the said delay. As far as the commencement of the investigation is concerned, our earlier detailed discussion discloses that there was no dearth in that aspect. In such circumstances we do not find any infirmity in the case of the prosecution on that score. In fact the above decision was subsequently followed in *Ishwar Singh v. State of U.P.* (AIR 1976 SC 2423) and *Subash Chander v. Krishan Lal*? (AIR 2001 SC 1903)

We can also refer to a recent decision of this Court in *Bhajan Singh alias Harbhajansingh and Ors. v. State of Haryana*, (2011) 7 SCC 421 : (AIR 2011 SC 2552). Relevant paras 29 and 31 (Para 15 and 16 of AIR) are as under:-

29. It is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante-timed or ante-dated or investigation is not fair and forthright. Every such delay is not fatal unless prejudice to the accused is shown. The expression 'forthwith' mentioned therein does not mean that the

prosecution is required to explain delay of every hour in sending the FIR to the Magistrate. In a given case, if number of dead and injured persons is very high, delay in dispatching the report is natural. Of course, the same is to be sent within reasonable time in the prevalent circumstances.

31. In view of the above, we are in agreement with the High Court that there was no delay either in lodging the FIR or in sending the copy of the FIR to the Magistrate. It may be pertinent to point out that the defence did not put any question on these issues while cross-examining the investigating officer, providing him an opportunity to explain the delay, if any. Thus, we do not find any force in the submissions made by the learned counsel for the appellants in this regard.?

Again in *Shivlal and another v. State of Chhattisgarh*, AIR 2012 SC 280, the significance and relevance relating to sending a copy of FIR to the Illaqa Magistrate has been explained as under in paragraph 9:

œ9The Magistrate must be immediately informed of every serious offence so that he may be in a position to act under Section 159, Cr.P.C., if so required. The object of the statutory provision is to keep the Magistrate informed of the investigation so as to enable him to control investigation and, if necessary, to give appropriate direction. However, it is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante-timed or ante-dated or investigation is not fair and forthright. In a given case there may be an explanation for delay. An unexplained inordinate delay in sending the copy of the FIR to Illaka Magistrate may affect the prosecution case adversely. However, such an adverse inference may be drawn on the basis of attending circumstances involved in a case.?

In the case on hand nothing was put to PW-13 (Investigating Officer) as regards the alleged delay in sending the FIR to the Magistrate and or to any prejudice was caused to the appellants on that account. It would have enabled the Investigating Officer to explain the reason for the delay. In any event nothing has been shown as to any prejudice caused to the appellants on the ground of alleged delay in sending a copy of FIR to the Magistrate?.

17. After going through the aforesaid pronouncement, it is apparent that mere violation of mandate of Section 157 of the Cr.P.C. is not going to cast doubt upon the prosecution case unless and until serious prejudiced has been demonstrated to have been suffered by an accused on account thereof. Apart from the fact that due to non-examination of I.O., the delay as is apparent could not found properly questioned. However, its relevance has to be seen from the other circumstances also.

18. From the fardbeyan exhibit-1, it is evident that the same was recorded on 06.08.2002. In the aforesaid fard-bayan, the prosecution had completely kept silence with regard to presence of injured at P.S. at first instance before his examination at the hospital. However, PW-16, the doctor at para-7 had disclosed that he had scribed the injury report on the back of requisition furnished by Officer-in-charge of Beldaur P.S. on 04.08.2002. From aforesaid disclosure, it is apparent that injured was before the police on 04.08.2002 that means to say before institution of present F.I.R. The aforesaid disclosure is not an incidental one rather bears truthfulness as PW-1 during his examination-in-chief had stated that they have lifted the injured to Beldaur P.S. and from there he was sent to hospital. In para-6 of his cross-examination, he had stated that he had lifted the Bhutal Sharma to Police Station. They have instructed Bhutal Sharma to institute a case. He had also spoken to launch criminal case against Sakaldeo Sharma and then thereafter case was registered. PW-2 in para-3 of his examination-in-chief had stated that he was lifted to P.S. and then thereafter to Beldaur Hospital. However, PW-3 as well as PW-4 have not corroborated although PW-4 during course of examination in para-1 had stated that her husband was not unconscious. He was taken to P.S., at that very time, her husband was not speaking. The evidence of other witnesses are not relevant on this very score. As such, from the evidence of injured as well as wife of injured along with PW-1 presence of injured along with informant and others at the police station is an admitted one and in likewise manner, as is evident from evidence of PW-1, fardbeyan was recorded. Again, on account of non-examination of I.O., the presence of first fardbeyan having at the hand of injured (PW-2) had remained wrapped and thus snatched an opportunity to the appellant whereunder the present version could have been exposed.

19. The third circumstance, which is itself visualising from the above referred evidence that there was presence of PW-4 along with others at the police station. The present F.I.R. happens to be on 06.08.2002, but the same arrived at 12.08.2002. Again, due to non-examination of I.O., the non-recording of fardbeyan at the police station could not be ventilated. In likewise manner, the delay in getting the first information report recorded on 06.08.2002, have also gone untouched and the last, the conduct of police officer from 06.08.2002 to 12.08.2002 that means to say, the delay as is visualising, is found completely unexplained due to non-examination of I.O. causing serious prejudice to the interest of the appellant couple with the fact regarding utter violation of mandate of Section 157 of the Cr.P.C. also remained unresolved.

20. Now, coming to other evidence, PW-16 the doctor had found one incised wound front of the neck above the hyoid bone extending from right sternomasoid to left sternomasoid identifying the same grievous in nature. Because of the fact that the appellant have not challenged the injuries sustained by the injured rather his complicity, therefore, the material witnesses have to be seen.

21. The victim (PW-3), the cousin aunt PW-2 and PW-4 (informant), Chhathu Sharma (PW-1) none are an eye witness to the occurrence. They have come up at the place of occurrence after the occurrence. PW-1 in paragraph-4 of his cross-examination had stated that he had talked with injured Bhutal Sharma at his bathan who disclosed that Sakaldeo Sharma had cut away his neck. PW-5, save and except, being F.I.R. attesting witness did not say anything. PW-6 has stated that he came to know that Sakaldeo Sharma had cut away neck of Bhutal Sharma. PW-7 had stated that in the night of alleged occurrence, Sakaldeo Sharma had gone to his bathan and slept there. PW-8 had said that Sakaldeo Sharma had come to his bathan at 11.00p.m. PW-9 had said that on the following morning, he came to know that Sakaldeo Sharma cut away neck of Bhutal Sharma. PW-10 had said that on the alleged date and time of occurrence while he was sleeping at his house, Bhutal Sharma had come and awaken, there was vibration in his tone. He had tied towel around his neck and was declared hostile. PW-11 Vinay Kumar Sharma also declared hostile and in similar way PW-12, PW-13. Sikandar Kumar (PW-14) happens to be nephew of Bhutal Sharma, who had claimed that after

hearing alarm, he rushed to the Bathan of Bhutal Sharma and found his neck cut, blood was oozing out. Bhutal Sharma disclosed that Sakaldeo Sharma had cut away his neck. PW-15 had simply said that he had gone to place of occurrence after hearing alarm and found Bhutal Sharma in an injured condition.

22. Now, coming to the evidence of PW-2, injured, it is evident there from that on the alleged date and time of occurrence while he was sleeping over bench at his bathan, his Fua was also sleeping there. Sakaldeo Sharma, during midst thereof came and stroked upon his neck on account of which, his neck had cut, blood began to ooze out till then his wife arrived who also seen the occurrence. On hue and cry, so many persons came who lifted him to police station and from there to hospital. Then thereafter, he got himself examined privately. Then had disclosed the motive. At paragraph-8, he had disclosed that he was sleeping on a road outside bathan. He was sleeping 15-16 hands South to bathan. He was sleeping alone while his wife and Fua were sleeping at bathan as is evident from paragraph-9 of his cross-examination. In para-11, he had said that when Sakaldeo Sharma arrived, he was under deep slumber. He gave chhura blow and escaped there from. He after flashing torch had identified till then Sakaldeo Sharma had already covered a distance of ten hands. In para-12, he had stated that he was conscious even after sustaining injury. Simply, he was feeling some hardship in speaking. He had gone to places of others and got them awaken and then disclosed the event. Then thereafter, he was lifted to police station.

23. PW-3 is the Fua of PW-2. She had stated that at the relevant time, she was at bathan along with her grand daughter aged about two years. She was sleeping along with grand daughter. Bhutal Sharma was also sleeping over bench. At that very time, Bijo Devi came with food, she had torch. At that very time, three persons came out of whom, she identified Sakaldeo Sharma. Sakaldeo Sharma had given Chhura blow over neck of Bhutal Sharma. Then fled away. She identified in torch light. Blood began to ooze out from the injury. On alarm villagers came and took the injured to the hospital. During cross-examination at para-1, she had disclosed that Bhutal Sharma had disclosed that Sakaldeo Sharma had cut away his neck. He had disclosed on the following morning. At that very time her daughter in-law was there. Bhutal Sharma was assaulted while he was sleeping.

24. PW-4 Bijo Devi happens to be the informant, she had stated that on the alleged date and time of occurrence, she had gone to bathan after taking meal for her cousin mother in-law. Her husband was lying over bench at bathan. Her mother in-law was also sleeping. Three persons came, out of whom, she identified Sakaldeo Sharma, who inflicted Chhura blow over neck of her husband. She had identified Sakaldeo Sharma in torch light. On hue and cry, so many persons assembled. Thereafter, Sakaldeo Sharma escaped. She took her husband along with others to hospital and from there he was referred for better treatment. Police had taken her statement three days after the occurrence in presence of Dinesh Sharma. During cross-examination at para-1, she had stated that when she had gone to bathan, she found Sakaldeo Sharma returning after inflicting Chhura blow. Blood was coming from neck of her husband. At that very time, her husband was conscious. The persons who assembled there had taken away her husband to hospital. She had further stated that her husband was sleeping over bench while her cousin mother in-law was sleeping over mat beneath the bench, she also awoken her.

25. So from the evidence of injured, it is apparent that he had claimed identification from behind, while the inconsistency prevailing amongst informant as well as her cousin mother-in-law, did not inspire confidence over being an eye witness

26. Status of injured eye witness has been accepted at pivotal one, as well as subject to acceptability even without corroboration unless and until is found smudged. In the aforesaid background, evidence of PW-2 being primacy should have been accepted but when taken with his cross-examination, is found purloined with its authenticity and in the aforesaid circumstances, tested with other factual as well as legal aspect, it is found subversive and on account thereof, it looks unsafe to accede with the finding arrived at by the learned trial Court. Consequent thereupon, judgment of conviction and sentence recorded by the trial Court is set aside. Appeal is allowed. Appellant is under custody, hence is directed to be released forthwith if not wanted in any other case.