

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.144 of 2021**

Arising Out of PS. Case No.-22 Year-2009 Thana- BAIRIYA District- West Champaran

Sharma Dubey S/o Late Kedarnath Dubey R/o Village- Bhitaha, P.S.- Bairiya,
District- West Champaran.

... .. Appellant/s

Versus

1. The State of Bihar
2. Barisrar Dwivedi S/o Late Ragho Dwivedi R/o Village- Bhitaha, P.S.-
Bairiya, District- West Champaran.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Bimlesh Kumar Pandey, Advocate
For the State : Mr. Dilip Kumar Sinha, APP

**CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE JUSTICE SMT. SONI SHRIVASTAVA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)**

Date : 12-03-2026

Heard learned counsel for the appellant and learned
Additional Public Prosecutor for the State.

2. The present appeal has been preferred by the victim invoking proviso to Section 372 of the Code of Criminal Procedure (since repealed). The victim/appellant is aggrieved by and dissatisfied with the judgment dated 13.12.2019 passed by learned District and Additional Sessions Judge-V-cum-Special Judge Excise, Bettiah, West Champaran in Sessions Trial No. 323 of 2011 arising out of Bairiya P.S. Case No. 22 of 2009, CIS- Session Case 2123 of 2013 whereby and whereunder the respondent no. 2 has been acquitted of the



charges under Sections 307, 448, 504 and 342/34 of the Indian Penal Code (in short 'IPC').

3. At the outset, learned counsel for the appellant submits that since the appeal has been preferred after the period of limitation, an application seeking condonation of delay has been filed and that has to be considered at this stage by virtue of the order dated 08.01.2026.

4. It appears from the records that on 08.01.2026 when this matter came up for consideration, we issued notice to respondent no. 2 in limitation as well as in admission matter. The office report shows that the notice sent through ordinary post has been validly served upon respondent no. 2 while process server's report kept at flag "S" and "A.D." (duly flagged). According to these reports, the notice has been received by respondent no. 2 himself which is at flag D.

5. Learned counsel submits that taking into consideration the date of the judgment impugned in the present appeal, the period of limitation would have come to an end on 12.03.2020. The appellant could not prefer this appeal within the prescribed period of three months as there was surge in the Covid cases which ultimately led to the unprecedented lockdown in the country. Referring to the judgment of the Hon'ble



Supreme Court in Civil Writ (Suo Moto) No. 03 of 2020, learned counsel submits that in terms of the said judgment, the period between 15.03.2020 and 28.02.2022 are required to be excluded while counting the delay. The delay of 324 days has been explained in the manner recorded above.

6. Mr. Dilip Kumar Sinha, the learned Additional Public Prosecutor of the State does not contest the submission of learned counsel for the appellant.

7. We are persuaded by the reasons shown in the application seeking condonation of delay. Accordingly, the delay is condoned and the I. A. No. 01 of 2025 is allowed.

Consideration on Merit

8. While challenging the impugned judgment of acquittal, learned counsel for the appellant has taken this Court through the order dated 13.12.2019 which is a one-page order passed under Section 232 of the Cr.P.C. We reproduce the said order hereunder for a ready reference:-

“ None for the state.

Accused Barristar Dwivedi is present.

That the brief fact of the case is that the accused Rajendra Dwivedi and Barristar Dwivedi were arrested for committing the offence u/s 307, 448, 504, 342/34 of the IPC. FIR was registered against the accused persons on 01.02.2019 and charge sheet was filed and cognizance was taken against



the accused persons on 10.06.2010 and charges were framed against the accused persons on 01.05.2012 and during course of trial one accused Rajendra Dwivedi got expired on 10.08.2018, hence trial is pending only against Barrister Dwivedi. As charge was framed on 01.05.2012 and the case is fixed for evidence but no prosecution witness has appeared before the court.

Several steps have been taken by the court to secure the presence of prosecution witnesses. Despite granting several opportunities prosecution has failed to examine single witness. On 06.12.2019 last opportunity was granted to the prosecution with the direction that if prosecution has failed to examine any witness prosecution evidence shall be closed, the said order was shown to the Ld. APP, but today also no witness has appeared before the court.

Considering above facts and circumstances, accused is facing the trial since 2012 and despite several opportunities prosecution has failed to examine any witness. In the interest of justice accused Barrister Dwivedi is acquitted from the charges of u/s 307, 448, 504, 342/34 of the IPC u/s 232 of the Cr.P.C. on the ground of no evidence.

Sureties of above said accused are discharged from all their liabilities.”

9. Learned counsel for the appellant submits that on perusal of the entire trial court records, it would appear that in this case, the prosecution case is based on the fardbeyan of Sharma Dubey (the appellant) recorded by S.I. Nagendra Paswan of Town Police Station Bettiah on 22.01.2009 at 18:15



hours in the Town P.S. Bettiah campus. The informant alleged that on 21.01.2009 at about 8-9 PM, his co-villager Rajendra Dwivedi was cutting the ridge (Aar) of the land of the informant by a spade, the informant asked him not to do so whereafter a quarrel begun but with the intervention of the people, the matter was pacified. It is stated that on 21.01.2009, at about 8 PM (night), when he was in his house, all of a sudden Rajendra Dwivedi, Amit Dwivedi, Sumit Dwivedi and Barristar Dwivedi (the respondent no. 2) armed with lathi, danda and a rope entered into his house and started hurling abuses. When the informant side asked them not to do so, then with an intention to kill, Rajendra Dwivedi and his two sons Amit Dwivedi and Sumit Dwivedi put the rope on the neck of the informant and started pulling it as a result of which, he started feeling suffocated and got shortness of breath.

It is then alleged that Barristar Dwivedi started assaulting the informant by lathi which caused injuries on the back side and other parts of his body. When his wife and daughter came to save him then co-villagers Rakesh Dwivedi son of Yogendra Dwivedi, Abhay Dwivedi son of Surendra Dwivedi, Tuntun Dwivedi son of late Keshwar Dwivedi, Basu Gaddi son of Ajij Gaddi came running and saved his life. He alleged that



Rajendra Dwivedi took out a sum of Rs. 1,500/- from his pocket and threatened him that if he would lodge a case then he would be killed. On the basis of the fardbeyan of the informant, Bairiya P.S. Case No. 22 of 2008 dated 01.02.2009 for the offences punishable under Sections 341, 323/307, 379, 427, 428, 504/34 of the IPC was registered.

10. Upon completion of investigation, the police submitted a charge-sheet. There are altogether seven charge-sheet witnesses namely, Sharma Dubey, Rakesh Dwivedi, Abhay Dwivedi, Tuntun Dwivedi, Dr. S.D. Jha, Medical Officer, M.J.K. Hospital, Bettiah, I.O., Sub Inspector of Police Jaglal Ram and Assistant Sub Inspector of Police, Rajeshwar Singh. The records of the trial court would show that on 10.06.2010, the learned CJM, Bettiah took cognizance of the offences under Sections 341, 323, 307, 379, 427, 448 and 504/34 of the IPC and summoned four accused persons to face trial. The two named accused Amit and Sumit were shown as not sent up for trial. Since, cognizance was taken under Sections 347 of the IPC as also, the learned CJM found that the said Section is exclusively triable by the Court of Sessions. Therefore, steps for commitments of the records were taken. Police papers were supplied and vide order dated 20.07.2011



the records were submitted to the Court of Sessions.

11. On 22.07.2011, Sessions Trial No. 323 of 2011 was registered in the Court of learned Sessions Judge. Thereafter, the records were pending for purpose of framing of charge. Over the period, the records were transferred to the Court of learned District and Additional Sessions Judge on 23.03.2012. The accused persons filed an application under Sections 227 and 228 Cr.P.C. seeking their discharge. One of the grounds was that it is a counter case of Bairiya P.S. Case No. 29 of 2009 and the case has been lodged on account of land dispute. The plea of the accused, however did not find favour with the learned Trial Court and vide order dated 18.04.2012, the application was rejected and the records were kept for framing of charge.

12. On 01.05.2012, the charges were explained to the accused who denied the charges and claimed to be tried. Accordingly, the charges were framed for the offences punishable under Sections 307/34, 448, 504 and 342 of the IPC.

13. It appears that with the framing of charge on 01.05.2012, the learned Trial Court directed for issuance of summons to the prosecution witnesses. The margin portion of the order sheet would show that there is an endorsement that



summon has been issued to witness nos. 1 to 4. We do not find any signature below the said endorsement in the margin portion. We also tried to search from the records the copy of the summons if served upon the accused persons but there is no copy of the summons showing service upon the witnesses. The learned Trial Court has thereafter proceeded to adjourn the matter from one date to another and it went on to couple of the years. We also tried to find out whether there is any satisfaction recorded by the learned Court with regard to the service of summons on the witnesses but could not find from the order sheets any order showing that the summons have been duly served upon the witnesses. In the margin portion in front of the order dated 04.03.2013, it is recorded "W.A.issued" but again there is no signature below this endorsement and there is nothing on the record to show that the warrant of arrest was executed.

14. We have found that on 07.08.2014, the learned Trial Court directed the office to write a letter to Superintendent of Police for witnesses, on the record a cyclostyled copy of the letter addressed to Superintendent of Police, Bettiah is available but there is no proof of dispatch of the said letter on the record. Whether the said letter reached the office of the Superintendent



of Police, Bettiah or not remains a question to be answered but we do not find any answer to the same from the records.

15. The records were kept for years together by way of adjournments without any significant steps. The Public Prosecutor was not appearing on most of the dates and his non-appearance has been duly recorded. The records were transferred from one court to another and lastly, it went to the Court of learned A.D.J.-IV on 11.05.2016. Several dates were given but the prosecution did not make any Hazari/Pairvi even on a single date. The records were again transferred to the Court of learned A.D.J.-V, Bettiah. In this Court, for the first time, on 03.04.2018, the attendance/Parivi of the prosecution has been recorded but finding that no witness was being produced, the learned Court directed for issuance ofailable warrant and in the margin portion, it is recorded that B.W. issued but again the service report of the execution of theailable warrant has not come on the record.

16. We find that on 05.12.2018, one witness, Rakesh Kumar Dwivedi had appeared on behalf of the prosecution but on that day, no parivi was done on behalf of the accused/respondent no. 2 as a result whereof, his bail bond was cancelled but the witness had to be returned without



examination. Ultimately, the accused-appellant surrendered on 23.02.2019 and his bail bond was restored subject to payment of cost of Rs. 1,000/- as witness cost with an undertaking that he would appear in the Court on every date. It appears the accused was allowed to remain on bail after he submitted the bail bond on the same date. The further orders show that no witness turned upon behalf of the prosecution and on most of the dates, the APP was not doing any Parivi. On 06.11.2019, NBW is said to have been issued but there is no execution report of the NBW against the witnesses.

17. Lastly, on 06.12.2019, when none appeared for the State but accused was present, the learned Trial Court recorded an order that despite several opportunities to the prosecution, the prosecution had failed to examine any witness. In the interest of justice, last opportunity was granted to the prosecution, otherwise the prosecution evidence shall be closed. This order was shown to the learned APP as we find an endorsement “ Seen Chandrashekhar Prasad, APP, 06.12.2019.”

(emphasis supplied)

We understand that Chandrashekhar Prasad, APP had seen the order of the learned Trial Court on 06.12.2019. Despite this, no action was taken by the learned APP and ultimately, on 13.12.2019, the learned Trial Court passed the impugned order.



18. From the aforementioned discussions, it is quite clear that even though the learned Trial Court, for sake of completion of the records, recorded at various stages about issuance of summons, bailable warrant and non-bailable warrant against the witnesses, but the Court never ensured that the service report of those summons, bailable warrant or non-bailable warrant be obtained. The Superintendent of Police, Bettiah was though said to have been communicated by a letter but it is not known whether the said letter reached the office of the Superintendent of Police, Bettiah.

19. We have also noticed that in this case the learned APP was acting in most casual manner, he was not doing Hazari/ Pairvi of the case on most of the dates and he was not understanding his responsibility as it appears from the record. This Court has reasons to believe so. Despite knowledge of the order dated 06.11.2019, by which last opportunity was granted to the prosecution to produce the witnesses, he did not take any step to protect the interest of the prosecution on 06.12.2019. We are fortified by the judgment of the Hon'ble Supreme Court in the case of **Shailendra Kumar vs. State of Bihar & Ors.** reported in **AIR 2002 SC 272** "para-9" which reads as under:-

"9. In our view, in a murder trial it is sordid and repulsive matter that without informing the police



station officer-in-charge, the matters are proceeded by the Court and by the APP and tried to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the learned Sessions Judge as well as the APP have not taken any interest in discharge of their duties. It was the duty of the Sessions Judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on part of any witness to remain present, it is the duty of the Court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in lurch.”

20. What would be the role of the Court and the Public Prosecutor in the Trial has been pointed out by the Hon’ble Supreme Court times and again. It is the duty of the Court to ensure that the truth is revealed and for that purpose, the Court has to ensure that all procedures available in law be duly exhausted to procure the evidences. In this regard, we rely upon the judgment of the Hon’ble Supreme Court in the case of **Harendra Rai vs. State of Bihar & Ors.** reported in (2023) 13 SCC 563. Paragraphs ‘66’ and ‘67’ of the said judgment are



quoted hereunder for a ready reference:-

“66. Before dealing and discussing the evidence led in the trial court, relevant facts relating to the manner in which the trial has been conducted, deliberate lapses on the part of the Public Prosecutor in leading the prosecution witness, lapses on the part of the trial court in not exercising the powers vested in it to ensure a fair and just trial, the facts mentioned in the reports of the Inspecting Judge and also the findings recorded by the High Court in the Division Bench, need to be mentioned.

Lapses on the part of the prosecution conducting the trial and that on the part of the investigating agency

67. Briefly the lapses are summarised as under:

67.1. No explanation was given for not producing the scribe of the FIR. In case the scribe was not available for some reason then someone else from the police station could have been produced to prove the hand writing and signature of the scribe.

67.2. The investigating officer not produced by the prosecution, is again a clear and deliberate lapse.

67.3. Non-production of other prosecution witnesses of preparing the recovery/seizure list, inquest report, carrying the dead body to the hospital, and absence of any effort to prove other formal aspects of the investigation clearly indicate malice and deliberate lapse on the part of the prosecution.

67.4. The conduct of the Public Prosecution in filing affidavits in evidence of the witnesses of fact despite directions of the High Court and further examining witnesses under Section 311 CrPC to strengthen the case of defence reflects the tainted role of the Public Prosecutor.”



21. In ultimate analysis, we find that the learned Trial Court has passed the impugned order without following the established procedure of law. If such order is allowed to remain in existence it would be in the nature of stumbling block in fair-play in action.

22. The concept of fair trial would require this Court to interfere with the impugned judgment and remit the matter to the learned Trial Court for fresh consideration by ensuring the attendance of the witnesses in accordance with law. The Superintendent of Police, Bettiah and the Public Prosecutor, Bettiah shall ensure that the witnesses are produced on the date in the matter.

23. The accused-respondent no. 2 has not appeared despite service of notice. Therefore, we issue a non-bailable warrant against him. The accused-respondent no. 2 shall surrender or be produced before the learned Trial Court where he may seek his release on bail on furnishing bail bonds and sureties to the satisfaction of the learned Trial Court.

24. If such an application will be filed by the accused-respondent no. 2, the same shall be considered by the trial Court on the same day and shall put such terms and conditions which will be necessary to secure the appearance of



the accused on the dates fixed.

25. Accordingly, this appeal is allowed.

26. We make it clear that the Superintendent of Police, Bettiah shall himself ensure the execution of the non-bailable warrant within two weeks from the date of receipt of the communication of this order and a report in this regard shall be sent to the learned Registrar General of this Court.

(Rajeev Ranjan Prasad, J)

(Soni Shrivastava, J)

Devendra/priyanka

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