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IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.307 of 2012

Against judgment of conviction and order of sentence dated 28.02.2012 and 02.03.2012 passed by Shri Subhash Chandra Chaurasiya, Additional Sessions Judge, F.T.C. No. 5, Bhagalpur, in Sessions Trial No. 555 of 1995.

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1. Shyam Harijan
2. Lakhan Harijan

Son of Late Hari Prasad @ Jhangu Harijan, Resident of Village-Govindpur, P.S- Nath Nagar, District- Bhagalpur.

.... Appellants

Versus

The State of Bihar

.... Respondent.

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Appearance :
For the Appellants : Mr. Animesh Kumar Mishra, Amicus Curiae.
For the State : Mr. Binod Bihari Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 07-09-2015

Heard learned amicus curiae for the appellants and learned counsel for the State.

2. This appeal arises out of the judgment of conviction and order of sentence dated 28.02.2012 and 02.03.2012 passed by Shri Subhash Chandra Chaurasiya, Additional Sessions Judge, F.T.C. No. 5, Bhagalpur, in Sessions Trial No. 555 of 1995, by which the appellant no. 1 had been convicted for offence under Section 307 of Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and payment of fine of Rs. 10,000/- and in default of payment of fine further sentenced to additional imprisonment six

months. Further the appellant no. 1 had been convicted for offence under Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for three years and payment of fine of Rs.5,000/- and in default of payment of fine further sentenced to simple imprisonment for three years. All the sentences were run concurrently. The appellant no. 2 had been convicted for offence under Section 307/109 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and payment of fine of Rs.10,000/- and in default of payment of fine further sentenced to simple imprisonment for six months.

3. The prosecution case as alleged in the First Information Report by the informant Vimla Devi that while she was sitting in verandah along with her husband at 7.00-7.15 P.M., then Shyam Harijan and Lakhan Harijan appeared from north side and Lakhan Harijan told that both were sitting and commanded to kill and in the meantime, Shyam Harijan shot fired on her husband but it did not hit the husband of the informant rather hit the abdomen of the informant by which she fell down and both accused persons had fled away. On hullah several persons of the neighbourhood collected there. Thereafter, the victim was taken to hospital and treated there. The motive of the occurrence as alleged that the husband of the informant was witness of a registered sale deed in which Madhu Harijan had

sold his land to Jhangu Harijan, father of the accused persons and her husband signed on that document. Jhangu Harijan had got registered document some few area of land but he wants to grab more area of land then mentioned in the deed. The husband of the informant had disclosed the correct fact before the Sarpanch and for that reason occurrence took place. However, Fardbeyan of the informant said to have been recorded at Jawahar Lal Medical College, Bhagalpur and Fardbeyan was recorded by J.S.I. Sheoratan Singh (not examined). On the basis of Fardbeyan of informant recorded by Sheoratan Singh, Officer-in-Charge of Barari P.S. on 05.02.1995 at 10.00 P.M. F.I.R. was lodged for offence under Sections 307/34 and 109 of the Indian Penal Code and Section 27 of the Arms Act.

4. After investigation, charge sheet submitted. Cognizance taken, and case was committed to the Court of Sessions. Charges were framed for offence under Section 307 of Indian Penal Code and Section 27 of the Arms Act against Shyam Harijan and Section 307/109 of Indian Penal Code against Lakhan Harijan and trial proceeded.

5. During trial ten witnesses were examined on behalf of the prosecution. P.W. 1 Sunita Devi, the daughter of the informant who had deposed that she along with her father, mother and sister were sitting in verandah when the occurrence took place and her

brother Barun was sitting in the shop then two appellants came and fired. P.W. 2 Sangita Devi, daughter of the informant had also come to support the prosecution case. P.W. 3 Babu Lal Thakur, who had stated that on hearing of sound of firing, he went to the house of Sitaram Harijan and found Vimla Devi in injured state and he learnt subsequently that Shyam Harijan and Lakhan Harijan had fired upon Vimla Devi. However, this witness had been declared hostile by the prosecution. P.W. 4 Rajendra Das had deposed that he heard sound of firing and then he came to the house of the informant and saw informant in injured state and he heard from the family members about firing by Shyam Harijan and Lakhan Harijan. Further in his cross-examination he has stated that he did not saw any person who shot fire nor he saw any person fled away. P.W.5 Chulahi Das who had also deposed that after hearing the sound of firing he came and saw that accused persons fleeing away towards north-east and he identified the accused persons in the light of the torch. Further he has stated that his house is at a distance of about 30-40 hands south from the house of Sitaram Harijan. Further he has stated in paragraph 11 of his evidence that accused persons were fleeing away towards east and his face was towards west and his evidence about identification appears to be doubtful. P.W. 6 Barun Kumar Das, son of the informant and had supported the prosecution case, though, he has

stated that on that day he had not gone outside the house and denied the suggestion that he was not present at the P.O. but he stated that he was in the shop when accused persons were fleeing away and he saw the accused persons. Hence he was not eye witness to the shot of firing and only saw accused persons while fleeing away. P.W. 7, Brihaspati Das, has deposed that on hullah, he came to the house of Sitaram Harijan and saw Vimla Devi in injured state and learnt from Vimla Devi that Shyam Harijan had shot. P.W. 8 Manmohan Das, is a labourer who had supported the prosecution case in the First Information Report and stated that at the time of occurrence he was at the courtyard. P.W. 9 Sitaram Harijan who had stated in his evidence that accused persons came and fired and fled away and accused persons had remained there for one minute and fled away towards north and villagers came after 3-4 minutes of the occurrence. However, he has stated in paragraph 9 that about 7.00 P.M. he cannot see without light. He had stated that lamp was burning in the verandah. However, he had stated that in verandah he along with his wife, two daughters were also sitting there. P.W. 10 is the informant and injured and has stated that after receiving injury she was taken to hospital. However, the I.O. and doctor who examined the victim have not been examined in this case nor injury report had been proved. Even there is no document that victim was ever treated in the hospital

nor the Police Officer who recorded the statement of the victim in hospital has been examined.

5. Defence had also adduced three witnesses, D.W.1 Garvu Das, D.W. 2 Mahesh Pd. Das and D.W.3 Umesh Das. However, D.W.2 Mahesh Das stated that there was hullah about happening of dacoity and appellants had been falsely implicated in this case as no occurrence as alleged had been occurred. Further they had also stated that they also rushed on hullah and appellants had been falsely implicated in this case.

6. The trial court taking into consideration both oral and documentary evidence convicted and sentenced the appellants as mentioned above taking into consideration the evidence of witnesses that they have supported the prosecution case.

7. Learned counsel for the appellants however contends that informant in her Fardbeyan had specifically stated that she was sitting along with her husband in verandah and there was mentioned that her husband was also present in verandah. P.Ws. 1 and 2 are daughters of the informant and they have claimed to be eye witnesses, but their names does not find place in the First Information Report, though, informant in the Fardbeyan has mentioned about presence of her husband, but does not mention about presence of her two daughters and hence their presence at the site of the occurrence is doubtful. It

has further been contended that P.W. 6 Barun Kumar Das had also claimed to be eye witness of the occurrence and stated to be present in the shop, but P.W. 1 in her evidence had stated that her elder brother had gone to visit immersion of Goddess of Saraswati and hence contends that evidence of this witness is doubtful and they were mostly interested witnesses. It has further been contended that I.O. had not been examined in this case which had caused prejudiced to the accused persons. Further Doctor had also not been examined and injury on the person of the informant had not been established nor had injury been formally proved. Hence prosecution has not been able to prove the charges.

8. Learned counsel for the State however submits that, though, I.O. and Doctor have not been examined in this case, but witnesses have supported the prosecution case and their evidences are reliable and worthy of confidence to be relied upon for conviction.

9. However, taking into consideration the prosecution case in the First Information Report that the victim along with her husband were sitting on Oshera when the occurrence took place in 7 O'clock in the month of February, though, in the First Information Report there was not mentioned about light of lamp. Further P.Ws. 1 and 2 were daughters of the informant have come to support the prosecution case and mentioned identification of two accused persons who shot fire

upon Sitaram Harijan. However, the names of P.Ws 1 and 2 does not find place in the First Information Report and their presence at the site of the occurrence is doubtful. P.W. 3 had also not eye witness to the occurrence and he stated that he learnt name of Shyam Harijan subsequently. P.W. 4 in paragraph 5 in his cross-examination had stated that he had not seen either firing or accused persons fleeing away, whereas P.W. 5 Chullahi Das,though,claimed to have identified the accused persons when he came out from the house after hearing hullah and claimed to have seen the accused persons fleeing away towards west in the light of the torch and he identified Shyam Harijan. Further he has stated that his house is at a distance of about 30-40 hands south from the house of Sitaram Harijan. Further he has stated in paragraph 11 of his evidence that accused persons were fleeing away towards east and his face towards west and his evidence about identification appears to be doubtful. P.W.9 had stated that he was sitting on the Oshera and there was lamp was burning. Further P.W. 1 in her evidence stated that her elder brother had gone to see immersion of goddess Saraswati. Further evidence of P.W. 6 is also doubtful. P.W. 7 Brihaspati Das also had not claimed to be identified the accused persons. P.W. 8 Manmohan Das in his evidence stated that at the time of occurrence he was at the courtyard. P.W. 9 is the husband of the informant and he stated in his evidence that accused persons came and

flee away within one minute and villagers came there after 3-4 minutes of the occurrence, though, he claimed to be seen the accused persons in the light, though have stated that there a lamp was burning on the Oshera and claimed to have seen from a distance about 7 to 8 hands. However, witnesses claimed to be identified the accused persons but means of identification is doubtful and some says that they seen the occurrence in the torch light some says in lamp However, neither I.O. nor Doctor have been examined in this case nor blood stain was found there nor doctor had also been examined, nor injury report has been proved to indicate that injury was grievous or simple in nature nor injury had been proved to establish the nature of injury. No documentary evidence had been produced by the prosecution about treatment in hospital, though, Fardbeyan had been recorded in the hospital, but neither police officer who recorded the statement of the victim had been examined nor the record of the hospital had been proved whether the victim was treated at hospital. Hence, neither injury report had been proved nor there is any evidence about the fact that statement of victim was recorded in the hospital nor the police officer who recorded statement of the victim had been examined and this had caused great prejudiced to the appellants. Even non-examination of the I.O. and non-production of torch and lamp at the P.O. has caused prejudiced to the appellants.

10. Hence having regard to the facts and circumstances of the case, appellants are entitled for benefit of doubt and conviction of the appellants recorded by the trial court without consideration that Doctor and I.O. having not been examined nor injury has been proved to show that injury was simple or serious in danger to life. Hence order of conviction and sentence recorded by the trial court is hereby set aside and appeal is allowed. The appellant, namely, Shyam Harijan who is in jail custody be set at liberty forthwith if not required to any other cases.

11. Let the Amicus Curiae who has been appointed to assist the Court be paid his fee.

(Gopal Prasad, J)

m.p.
N.A.F.R.

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