

**IN THE HIGH COURT OF JUDICATURE AT PATNA
(CRIMINAL APPELLATE JURISDICTION)**

Criminal Appeal (SJ) No.743 of 2013

Against the judgment of conviction dated 11.9.2013 and the order of sentence dated 18.9.2013 passed by the learned 1st Additional District and Sessions Judge, Bhagalpur in S.T. No.518/11/T.R.no.49/12 arising out of Sultanganj P.S. Case No.121 of 2010 dated 16.7.2010.

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Nepali Yadav Son of Ranjeet Yadav @ Buchcha, resident of village-Nayi Sirihi Ghat, P.S.-Sultanganj, Distt-Bhagalpur

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : None

For the State : Mr. Binod Bihari Singh, Addl. P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 27-10-2015

Heard.

Appellant has been convicted under section 307 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.10,000/- and in default the payment of fine to further undergo simple imprisonment for two months. He has further been convicted under section 27 of the Arms Act and has sentenced to undergo rigorous imprisonment for two years. However, it has been ordered that both the sentences shall run concurrently.

Prosecution case has alleged in the first information report by the informant Santosh Kumar that while he was talking at his Bangla in front of his house along with his cousin brother Prakash



Yadav (P.W.3) and nephew Abhishek Anand (P.W.1) at about 9 p.m. In the meantime, two persons came on the road and stepforward three to four yards ahead of the Bangla and thereafter returned back, take out his pistol from his waist, and fired at him. By that time informant tried to sit down but in the meantime, the fire shot hit at the back of the informant and he fell down. The further case is that amongst two persons who fired one was named as Nepali Yadav son of Ranjeet Yadav @ Buchcha, resident of village Nayi Sirihi Ghat, P.S. Sultanganj in the district of Bhagalpur. The further case is that the said person is a veteran criminal and has committed several murders. The further case of the prosecution is that as soon as the informant fell down the person sitting with the informant making hulla on which both the accused persons flee away. It is further alleged that due to intervention hulla made by the two persons who were along with the informant the accused person flee away else the accused person may have fired again to kill the informant. It is further alleged that the neighbourers collected and took the victim to the Referral Hospital, Sultanganj where the informant was referred to Jawahar Lal Nehru Medical College Hospital, Bhagalpur. It is further alleged that the fire shot hit at the back but the bullet has not gone out but it was embedded in the back.

The ferdbeyan of the informant Santosh Kumar



(P.W.2) was recorded at Emergency ward of Jawahar Lal Nehru Medical College, Bhagalpur by S.I. R.K. Sharma (P.W.8), S.H.O. Sultanganj at 11.45 hours on 15.7.2010 and the ferdbeyan was forwarded for lodging of the F.I.R. and R.K. Sharma continued with the investigation. The F.I.R. lodged bearing Sultanganj P.S. Case No.121 of 2010 dated 16.7.2010. After lodging of the investigation he proceeded with the informant and inspected the P.O. is Gopal Road, Sultanganj to the south of Bishahani Asthan which is his Bangla adjoining his pucca building and informant of the said Bangla, there is vacant land and in the said vacant land, there was a hut where the informant talked with his person. The I.O. recorded the statement of the witnesses, obtained the injury report and thereafter, after completing the investigation, submitted the charge sheet on which the cognizance taken and the case was committed to the court of Sessions where charge was framed for the offence under sections 307 and 27 of the Arms Act and during the trial, eight witnesses were examined by the prosecution out of which P.W.1 is Abhishek Anand the nephew of the informant and who has deposed that while the informant was talking along with Prakash Yadav (P.W.2) and Abhishek (P.W.1) then at once Santosh Yadav came out of the said Bangla and thereafter, after some time they entered into the Bangla making at cry and running. On seeing him running, all the witnesses ran and in this



process, the P.W.1 Abhishek fell down and got unconscious and after some time when he got conscious then he learnt that some has shot at Santosh causing injury on his back. This witness P.W.1 has stated that he had not seen the person who fired at the informant. P.W.2 is Santosh Kumar and he has stated that while he was talking along with his brother Prakash and nephew Abhishek then at once Nepali came and fired and when the informant tried to flee away then the fire hit on his back bone and he was taken to Referral Hospital, Sultanganj where he was referred to Jawahar Lal Nehru Medical College Hospital, Bhagalpur and as per his evidence at the time of occurrence, he was sitting on the chair.

P.W.3 is Prakash Yadav. He is stated that he along with Santosh and the informant were talking and two persons came and his brother Santosh Yadav peeped from the gate then Nepali shot and while fleeing away Santosh sat down and received injury on his back. He claims to have seen Nepali Yadav with revolver in his hand. However, in his cross examination, he has stated that when Santosh Yadav went at the gate then at that time the firing was made and on receiving the injury he fell down. He has further stated that he identified the accused persons in the light of the torch that it was Nepali Yadav. However, in his further cross examination, he has stated that the said torch was thrown away. He has further stated that

the torch was not given to the police. He has further stated that the torch was not recovered up till now. However, though this witness claims to have identified the appellant in the light of the torch but the said torch was not produced before the police and hence the prove regarding the means of the identification is not proved.

However, P.W.4 is Dileep Yadav the another brother of the informant and victim but he has stated that a boy came to him and disclose that the brother of this witness sustained injury by firing of Nepali Yadav. However, in his cross examination, this witness has deposed that the boy who disclosed about the firing by Nepali, he did not remember his name and hence the source of the information from whom he learnt about the firing by person has not been disclosed and hence on this part of the evidence is hit by hearsay and as per evidence of P.W.4, he is not eye witness to the occurrence.

P.W.5 is Sandhya Devi, the wife of the informant and P.W.7 Swet Kumar the son of the informant and they have deposed that they saw Nepali Yadav fleeing just after the occurrence. However, the attention has been drawn and even suggested that he has not made such statement before the police that they saw Nepali Yadav fleeing away along with arms which has been though denied. The I.O. P.W.8 in his evidence has stated that Swet Kumar (P.W.7) and Sandhya Devi (P.W.5) have not stated before him that they saw

Nepali Yadav fleeing away along with arms and hence evidence of P.Ws.5 and 7 suffer from contradiction regarding the identification of the police at the time of occurrence.

However, the trial court taking into circumstances that the evidence of the witnesses specially the informant Prakash and further taking into circumstances the evidence of P.W.7, P.W.6 who found fire arm injury on the back of the victim as a lacerated wound over back mid thoracic spine 2"x1/2" depth not proved with vlackning of whole back and finding the nature of injury grievous caused by fire arm convicted the appellat as stated in the outset.

However, going through the entire record though none appears on behalf of the appellat but assisted by the learned counsel for the State. The learned counsel for the State further submits that the prosecution has not been able to charge in view of the clear evidence of the informant stating the name of the appellat in the first information report itself and the said evidence is being corroborated by the medical evidence to prove the charge.

However, coming to the facts and circumstances of the case and the evidence adduced by the prosecution it is true that the prosecution case in the first information report by the informant that while he was talking along with P.W.1 and P.W.3 at his Bangla in front of his house then Nepali came and fired at him while he was



sitting and then while he was trying to flee away the shot hit at the back causing injury to him. However, P.W.1 supported the prosecution case to the effect that the informant was talking with the P.Ws.1 and 3 but P.W.1 has not supported the prosecution case regarding the identification of the appellant. However, his evidence is somewhat in contradiction to the prosecution case in the first information report as well as in the evidence of P.w.2 the informant that the occurrence took place while the informant was sitting and talking along with P.W.1 and P.W.3. As per the evidence of P.W.2 that all the three were taking with their face toward the north and then the persons came and fired and while the informant tried to fleeing away the fire hit on his back. However, P.W.1 Abhishek who is non-else then the nephew of the informant has stated that while they were talking at the Darwaza of Sultanganj then Santosh Yadav at once went out from the Bangla and after some time he came running and making cry and entered into the Bangla and on seeing him fleeing away, this P.W.1 also tried to flee away but he fell down and unconscious and thereafter, he got consciousness. He learnt that someone had shot at Santosh (P.W.2) the uncle of this witness and hence as per the evidence sole witness is totally in variation to the prosecution in the first information report that the occurrence took place while the informant was sitting along with P.Ws.1 and 2 but as per the evidence



of all these witnesses the informant went out and then he came crying and running and then the P.W.1 learnt that someone has shot but the name of the appellant is not coming in the evidence of the witnesses. However, P.W.3 is another witness who was named in the first information report and who is also the brother of the informant. He has also stated that his brother Santosh peeped through gate then Nepali Yadav fired. However, as per his evidence also that the firing was made when the informant was peeping and he was not sitting. However, the evidence of this witness regarding identification also suffers from infirmity with this witness has produced torch as the means of the identification. However, the means of identification has not been true as he has stated that the torch was not produced before the police and where the torch was thrown is not known to him and hence from his evidence as well as the prosecution case in the first information report that the occurrence took place at 9 p.m. and the means of identification has not been mentioned that this witness has claimed to identify the accused by torch but the torch has not been established as the means of identification the evidence of P.W.4 is not an eye witness and though he claims that Nepali Yadav had fired but in his cross examination that he has stated that he does not know the name of the person who disclosed the name of Nepali Yadav as the person to have shot and hence the evidence of P.W.4 on the

identification of the accused is also hit by hearsay and further the evidence of P.Ws.5 and 7 regarding the identification of the appellant as stated above suffers from contravention. However, P.W.2 has not mentioned in the means of identification. However, his evidence suffers from contradiction with the evidence of P.Ws.1 and 3. As per P.W.2 the informant the occurrence took place while he was sitting when the appellant came and fired at him. However, P.Ws.1 and 3 have stated that they went at the gate and when peeped through and then as per P.W.1 he claims to have fleeing away making cry. Hence, in these facts and circumstances of the case it is not proper to rely the evidence of P.W.2 the informant and hence as the prosecution has not been able to prove the charge beyond all reasonable doubts and the judgment of conviction dated 11.9.2013 and order of sentence dated 18.9.2013 passed by 1st Additional District and Sessions Judge, Bhagalpur in connection with S.T. No.518/11/T.R. No.49/12 arising out of Sultanganj P.S. Case No.121 of 2010 are hereby set aside and the appeal is allowed. Appellant, namely, Nepali Yadav who is in custody, be released forthwith if not wanted in any other case.

(Gopal Prasad, J)

N.A.F.R./ N.H.

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