

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.321 of 2014

Against the judgment of conviction 02.06.2014 and order of sentence dated 06.06. 2014 passed by Shri Housila Pd. Tripathi, learned Additional Sessions Judge, Ad-hoc II, Madhepura in Sessions Trial No. 175 of 2012 (arising out of Madhepura P.S.Case No. 271 of 2012 (G.R. No. 1011 of 2012)

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Dinesh Paswan son of Late Nageshwar Paswan resident of village - Bhirkhi Ward No.24, Police Station / District - Madhepura

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Bikramdeo Singh, Advocate.

Mr. Nafisuzzoha, Advocate.

For the State : Mr. Z. Hoda, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 24-11-2015

Heard learned counsel for the appellant and learned counsel for the State.

2. This appeal arises out of the judgment of conviction 02.06.2014 and order of sentence dated 06.06. 2014 passed by Shri Housila Pd. Tripathi, learned Additional Sessions Judge, Ad-hoc II, Madhepura, by which the sole appellant 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. 5,000/- and on non-payment of fine further imprisonment for six months. The appellant had further been convicted for offence under

Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for five years and payment of fine of Rs. 3000/- and on non-payment of fine further imprisonment three months All the sentences were directed to run concurrently.

3. The prosecution case as alleged in the First Information Report by Manish Kumar that on 01.05.2012 after taking his dinner, the informant was sleeping in Verandah of the house towards southern side at 12.00 A.m. in the mid night the appellant Dinesh Paswan and Bipin Rai entered into the house through the courtyard and removed mosquito net of the informant and said this is Manishwa, shot him. On hearing hullah the informant got up and identified both the accused and he asked as to why they wanted to kill him as what he has done. The further case of informant that he along with the accused persons are living together since long. Further case is that on hearing such utterance of the informant the accused Bipin Rai told Dinesh Paswan what he is seeing since the informant has identified them so shot him then Dinesh Paswan fired causing injury on left side chest of the informant. On hearing the sound of firing the mother of the informant got up along with the sister of the informant and his cousin sister Rinku Devi as well as his Bhabhi Rita Devi and saw the occurrence. After the occurrence, mother of the informant came out of the house making hullah and saw 3-4 unknown persons

going towards her house. The motive of the occurrence alleged is that on 19.01.2012 the Thella of the informant was theft and even after serious effort no information was gathered who theft the Thella. It was doubted that said Thella had been theft by Dinesh Paswan. So the appellant threatened the informant to kill him. Since the informant got injury, the family members of the informant took him to Madhepura hospital where the doctor referred him to P.M.C.H. taking into consideration the seriousness of the informant and the informant was treated at P.M.C.H.

4. On written report of the informant Manish Kumar, P.W.4 F.I.R. was lodged and investigation proceeded. Though, occurrence as alleged on 01.05.2012, but written report was submitted on 08.06.2010 and F.I.R. was lodged on 08.06.2012. However, explanation has been given that after the occurrence the informant was referred to P.M.C.H. by the doctor who examined the informant on 02.05.2012 and referred to P.M.C.H. Thereafter, the informant gave written report on 11.05.2012, but police recorded Fardbeyan on 08.06.2012. The police after investigation submitted charge sheet. Cognizance was taken and case was committed to the Court of Sessions.

5. During trial, after framing of the charge for offence under Section 307 of Indian Penal Code and Section 27 of the Arms act

altogether seven witnesses were examined on behalf of the prosecution. P.W. 1 is Kavita Devi, the sister of the informant, she has deposed that she got information at 12.00 A.M. in mid night from his Mausi Karina Devi on telephone that some one had shot Manish, but the name of the assailant was not disclosed. On receiving the information she went on motorcycle to her Naihar, but none was found there then she went to hospital and saw Manish in injured state by fire arm. This witness has not been declared hostile. In cross-examination this witness denied the suggestion that she was sleeping inside the house of the mother at the time of occurrence. Attention has been drawn for such statement. Hence as per evidence of P.W.1 she being the sister of the informant has not supported the prosecution case regarding the disclosure of the name of the appellant at the earliest point of time. P.W. 2 Bina Devi, the mother of the informant has stated that she was sleeping in the Verandah of house and on hearing cry of her son Manish she got up and saw Dinesh Paswan assaulting her son, but she did not identify another person and Dinesh Paswan shot fire. She has further stated that she took her son to Madhepura hospital where her son was referred to P.M.C.H. and when her son returned back then she instituted the case at the police station. Further she had stated that she did not give information regarding the occurrence to the police station, though, she admits that

police station situated adjacent to the hospital, but they had not went to the police station. However, in her cross-examination she had stated that at the time of occurrence she was sleeping in the room passing through North and her daughter was sleeping in another room. She has further stated that she had not heard sound of firing. but heard sound weeping of her son and she got up and immediately rushed and saw her son was in injured state having injury on his chest. However, from the evidence of this witness, though, she has stated that there was scuffle between her son and Dinesh Paswan, but she did not saw about any such firing. However, in her cross-examination-in-chief, she stated that she was sleeping in the Verandah. Further, in her cross-examination she stated that she was sleeping in the room. P.W.3, Kajal Devi has stated that she heard sound of firing and cry of her mother and saw her brother in injured state and mother disclosed that Dinesh had shot her brother. Her evidence shows that she learnt from her mother about shot of firing. P.W.4 Manish Kumar, the informant however stated that while he was sleeping at Verandah then two persons came and removed mosquito net and they stated that this is Mahishwa and then they fired. Further he claimed that he was caught by Dinesh Paswan then her mother and sister came and he became fallen unconscious and admitted to hospital. On return back on 12.05.2012 gave written report on 14.05.2012 after going to police

station, but his case was not lodged then again on 07.06.2012 attempt was made then Fardbeyan recorded on 08.06.2012. However, the motive of the alleged that occurrence that Thella of the informant was theft and he learnt that Dinesh Paswan had theft his Thella and for that motive the appellant had committed such occurrence. Further, this witness had stated that in the night of the occurrence, her mother, sister and cousin sister were sleeping in another room. P.W. 5 Binod Kumar in his evidence stated that he received information on telephone then he came on motorcycle and went to Sadar hospital and hence he is not eye witness to the occurrence. P.W. 6 Ram Krishna Paswan, I.O. and stated that he recorded written report on 08.06.2012 and after lodging the F.I.R. he took the investigation and after investigation, submitted charge sheet. Further he has stated that occurrence was on 01.05.2012 at 12.00 A.M. in the mid night, but F.I.R. was lodged on 08.06.2012. In his cross-examination he has stated that police station is located at the distance of 1 K.M. from the place of occurrence. P.W. 7 Dr. Bipin Kumar who was posted at Sadar Hospital Madhepura, examined the victim on 02.05.2012 at 1.20 A.M. and found injury on the person of the victim; 1/2" circular wound on front of chest right side upper region deep to chest cavity. Margin inverted and surrounding skin charred and bleeding and patient was referred to P.M.C.H., Patna. Further doctor had given



report on the basis of photo copies of Discharge Ticket, chest x-ray report of P.M.C.H., Patna and CT scan report submitted by the Investigating Officer on 11.02.2013 and on the basis of photo copies opined that according to C.T. Scan report Metallic foreign body suggesting bullet in retrosternal space abutting pericardium and lying another anterior and right lateral aspect of root or aorta mild pericardial collection in seen and x-ray report shows bullet injury with bilateral pleural effusion and inter lobular effusion of right side and nature of injuries shown dangerous to life. Further in his cross-examination he stated that x-ray report, C.T. Scan report were not placed before him but only photo copy of x-ray report C.T. scan report submitted and original report was not sent by 12.02.2013 by Officer-in-Charge, Madhepura, police station and he did not know whether original report is attached with the case record or not and x-ray plate and C.T. scan plate were not produced before him. There is no mention in the photo copies of reports of P.M.C.H. that the injury was dangerous to life or it was grievous in nature and doctor who examined the victim at Madhepura has given report on the basis of photo copies of x-ray report and C.T. scan report without any original report or x-ray plate or C.T. scan plate.

6. The learned trial court had been convicted the appellant and sentenced as mentioned at the outset.



7. Learned counsel for the appellant however challenged the order of conviction and sentence mainly on the ground that there is delay in lodging the F.I.R. and delay had not well been explained. It has further been contended that occurrence is dated 11.05.2012, but F.I.R. was lodged on 08.06.2012 after much delay about one month. It has further been contended that doctor who examined the victim at P.M.C.H. had not been examined and doctor who examined the victim at Madhepura had given report on the basis of photo copies of x-ray report, C.T. Scan report without any original report or original x-ray report and C.T. Scan plate had not been produced before him. Hence contended that this evidence of this witness was not worthy of credence or reliable regarding injury on the person of the victim. It has further been contended that evidence of the mother of the informant she had stated that she caught hold the appellant and appellant anyhow manage to escape but this apprehension has not been mentioned in the First Information Report and hence this is development of prosecution story and prosecution story regarding the identification of the accused is doubtful.

8. Learned counsel for the State however contends that witnesses have deposed and had named the appellant and delay has also been explained by the informant that after getting his recovery he came and lodged the F.I.R.

9. However, taking into consideration the respective submissions by both the parties, I proceed to consider. However, the prosecution case as alleged that while the informant was sleeping in the verandah at about 12.00 A.M. to 1.00 A.M. two persons entered into his house and removed mosquito net and disclosed that this is Manishwa and on hearing, the informant got up and stated that he identified both the accused persons and asked as to why they want to kill him. Then it is alleged that firing has been made by the appellant. The occurrence alleged to have taken in the mid night at 12.00 A.M. However, there is no mentioned any means of identification. However, this witness has stated that on hearing the sound of firing, his mother came from the room along with her sisters. The mother of the informant claimed to have seen the occurrence, though, she claimed that she came out on hullah and claimed to have there was scuffle between her son and the appellant and also claimed she caught hold the appellant for sometime. However, there is no averment in the Fardbeyan which was instituted after about a month of the occurrence. P.W. 3 is sister of the informant and had stated that her mother disclosed about identity of the appellant P.W. 2 mother of the informant, though, claimed to have identified have different story that she herself was sleeping in the verandah. However, case of the prosecution in the written report on the basis of which F.I.R. lodged



that mother was sleeping in the room and on hearing the sound of firing she came out from her house. The mother of the informant however stated that she came on hullah and catch hold of the appellant and appellant managed to escape, hence, two versions are quite contradictory. However, as per prosecution case two persons who were known to informant case as per the prosecution case to say that this is Manishwa. However, P.W.1 Kavita Devi the sister of the informant and in her evidence has stated that she received information at 12.00 hours on the date of occurrence from her Mausi Karina Devi on telephone that Manish had been shot, but the name of the person who shot fire had not been disclosed and this witness has been declared hostile but she denied suggestion of prosecution that in her statement before police she had stated that at that time of occurrence she was sleeping inside the house of her mother. Hence her evidence is contradictory to the prosecution story. However, doctor who examined the victim stated that he referred the patient to P.M.C.H. and injury report given on the basis of photo copy of x-ray report and C.T. Scan report neither acceptable nor admissible in evidence. However, on the basis of material injury caused to danger to life not accepted. However, his evidence may be relied to that extent that he examined the victim and reported that injury was on the chest.

10. However, going to the entire evidence, it is apparent that

occurrence took place on 01.05.2010, but the matter was not reported to the police, though, the victim was examined at Madhepura Hospital, thereafter, he was examined at P.M.C.H. but no report was lodged at the police station either at Madhepura hospital nor at P.M.C.H. when the case was of firing on chest of the victim. However, it has been stated that Fardbeyan was recorded on 11.05.2012, but the police had not recorded the aforesaid Fardbeyan, but subsequently recorded on 07.06.2012.

11. Hence having regard to the fact that occurrence took place on 11.05.2012 and F.I.R. lodged on 08.06.2012, but the entire evidence there is not mentioned any means of identification and prosecution has developed the prosecution story that at the time of occurrence there was scuffle without any mentioned in the F.I.R. regarding any scuffle and mother of the informant caught hold the appellant for 2-3 minutes but not neighbourers reached indicates that prosecution has developed the prosecution story. Hence, prosecution has not been able to prove the charge beyond reasonable doubt as there is contradiction in the evidences of the witnesses and witnesses had developed the prosecution story and hence prosecution has not been established beyond reasonable doubt and trial court misdirected itself in convicting the appellant.

12. Accordingly, order of conviction and sentence recorded

by the trial court is set aside and **appeal is allowed.** The appellant is in jail custody be set at liberty forthwith if not required in any other case.

(Gopal Prasad, J)

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