

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.615 of 2013

Against the judgment of conviction, dated 26.07.2013, and order of sentenced dated 29.07.2013, passed by Mr. Hasan Nawaz, Ad Hoc Additional Sessions Judge, V, Purnia, in Sessions Trial No. 133 of 2011 arising out of Sadar P.S. Case No. 202 of 2010

1. Md. Sirman S/O Late Md. Zalil Resident Of Village- Basantpur, P.S- Sadar, District- Purnia Appellant
Versus
1. The State Of Bihar Respondent
With

Criminal Appeal (SJ) No. 594 of 2013

1. Md. Samad S/O Late Md. Zalil Resident of Village Basantpur, P.S. Sadar, District Purnia
2. Md. Salam S/O Late Md. Zalil Resident of Village Basantpur, P.S. Sadar, District Purnia Appellants
Versus
1. The State Of Bihar Respondent
With

Criminal Appeal (SJ) No. 619 of 2013

1. Md. Isrile Son Of Late Maidel Resident Of Basantpur, Ps.-Sadar, Dist.-Purnea
2. Md. Rayees Son Of Md. Israile Resident Of Basantpur, Ps.-Sadar, Dist.-Purnea
3. Md. Kasim, Son Of Late Maidel Resident Of Basantpur, Ps.-Sadar, Dist.-Purnea Appellants
Versus
1. The State Of Bihar Respondent

Appearance :

(In all the cases)

For the Appellants : M/S Sashi S. Kishore & Radha Mohan Singh, Adv.
For the Respondent : M/S Sujit Kumar Singh, Bipin Kumar & Z. Hoda, APPs
For the informant : Mr. Bishwanath Prasad Singh, Adv.

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 13-10-2015

Heard the learned counsel for the petitioners, the State and the informant.

2. These three appeals have been heard together and are being disposed off by this common judgment as they arise out of same judgment and order, dated 26.07.2013, passed by Mr. Hasan Nawaz, Ad Hoc Additional Sessions Judge, V, Purnia, convicting the appellants for offences under Sections 307/34, 341 and 342 of the Penal Code and

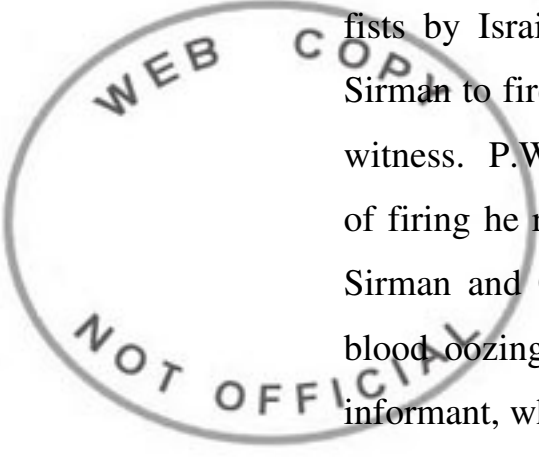
sentenced to undergo rigorous imprisonment for ten years and fine of Rs.5,000/- each for offence under Section 307/34 of the Penal Code and in default of payment of fine to undergo simple imprisonment for one year each. He has, further, convicted the appellants under Section 341 of the Penal Code and to undergo simple imprisonment for one year each. The appellants have further been convicted under Section 342 of the Penal Code and sentenced to undergo rigorous imprisonment for one year each. The appellant, Md. Sirman (in Cr. Appeals (SJ) No. 615 of 2013) has, further, been convicted under Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for three years and a fine of Rs.5,000/- and in default of payment of fine to undergo simple imprisonment for one year. However, it has been ordered that the sentences shall run concurrently.

2. The prosecution case, as alleged in the first information report by the informant, Md. Mojib alleging therein that about one and half months back of the occurrence Rs.1,20,000/- of his elder brother, Md. Yahya, was theft away by some one. However, subsequently, it came to light in the village that the said money was taken dishonestly by theft by Md. Sirman and Md. Irfan out of enmity. In this connection a Panchayati was held in the morning of the date of occurrence, i.e., 13.06.2010 and during the Panchayati there was verbal altercation between the informant Md. Mojib and the appellant Md. Samad. Thereafter, subsequently, the informant went at his job for the labourer. While the informant was returning after his service as labourer at about 10.00 P.M., then, prior to reaching his house at a place where the soling of the bricks were done, he was caught hold by Md. Israil, Md. Samad, Md. Sirman, Md. Salam, Md. Rais, Md. Irfan and Md. Quasim. All of them jointly caught hold of the informant and have started yelling to kill him as he (the informant) was taking the lead in Panchayati and was making comments. Hence, all of them started assaulting him with intention to kill. However, in the meantime, Md. Sirman, armed with pistol in his hand, fired on his chest and then the informant fell down on

the ground, then, the accused persons flee away. On the sound of firing the villagers rushed and took the informant to Hospital.

3. The fardbeyan of the informant was recorded by Assistant Sub Inspector of Police, Md. Zainuddin, Station House Officer, Sadar Hospital, Purnia. The first information report was lodged on endorsement of the Station House Officer on the fardbeyan to register the case on which Sadar Police P.S. Case No. 202 of 2010, dated 14.06.2010, has been registered under Sections 341, 342 and 307/34 of the Penal Code and 27 of the Arms Act. The investigation was handed over to Arun Singh, P.W. 10. The investigating officer inspected the place of occurrence. He has given the description of place of occurrence a brick soling road passing east to west. The accused persons are to the east and south of the brick soling road. He found the blood scattered on the brick soling road. The villagers disclosed that they heard the sound of firing and Md. Mojib got injury, who is in Hospital. The police after investigation submitted the charge sheet. After submission of the charge sheet cognizance taken, case committed to the Court of sessions. The charges were framed under Section 307/34 of the Penal Code read with Sections 341, 342 of the Penal Code as well as 27 of the Arms Act against Md. Sirman.

4. During the trial ten witnesses were examined by the prosecution. They are P.W. 1 Md. Yahya, P.W. 2 Md. Mobin, P.W. 3 Md. Najmul Hoda, P.W. 4 Md. Mahfooz, P.W. 5 Dr. Brahmdeo Raman, who examined the informant and has proved the injury report and found three injuries on his person, i.e., (i) lacerated wound on the chest anteriorly $\frac{1}{4}$ " x $\frac{1}{4}$ " x deep to the bone, wound of entry, (ii) lacerated wound 4" lateral to the first wound $\frac{1}{6}$ " x $\frac{1}{6}$ " x deep to the muscle (wound of exit) and (iii) multiple black spot on right and left side of chest and abdomen and has found that the time of injury is within 24 hours, nature of injury as x-ray of chest and abdomen shows that there is no foreign body noted. P.W. 6 is Maqbool who has deposed that when he returned from the house of his east at that time Md. Maqbool



was being taken to Hospital by his brother. P.W. 7 is Md. Mazhar Alam who has deposed that on the sound of firing he came to the place of occurrence and then Md. Mojib disclosed about assault by slaps and fists by Israil, Rais and others on the abdomen and Israil said Md. Sirman to fire upon the informant. However, this witness is a hear-say witness. P.W. 8 is Md. Shahabuddin who has stated that on the sound of firing he rushed to the place of occurrence and saw Salam, Samad, Sirman and Quasim and he also found Md. Mojib felling down and blood oozing out from left side of chest. P.W. 9 is Md. Mojib, the informant, who had stated that when he reached on the darwaza of Israil on the brick soling road, then, Israil, Sirman, Samad, Salam, Rais, Quasim surrounded him, caught hold of him, assaulted him slaps and fists and disclosed that he tried to save himself. Thereafter, Israil and Rais caught hold of him and at the instance of Israil, Sirman fired, which hit his chest. However, in his cross-examination he has stated that there was no mark of assault on his body. He does not remember how long they have assaulted him by slaps and fists. The bullet/cartridges have appeared on the body and one firing has been there. He was not unconscious. He has, further, stated that the bullet/pellet has passed by his chest. He has, further, stated that none has seen him being assaulted except himself and the place of occurrence is at a distance of 50-60 feet. P.W. 10 is Ramdheen Singh, a retired Assistant Sub Inspector of Police, who has come to depose that he took the charge of investigation of this case on 14.06.2000 and has proved Exhibits 2, 3, 3/A and 3/B. the documentary evidence prove and Exhibit 1 is the injury report, Exhibit 2 is the formal first information report, Exhibit 3 is the fardbeyan, Exhibit 3/A is the signature of the investigating officer, Exhibit 3/B is the endorsement on the first information report.

5. The defence has not adduced any evidence. However, they have adduced same documentary evidence, which is Exhibit 'A' the first information report filed by Md. Israil against Md. Mojib on

14.05.2006, Exhibit 'B' is the charge sheet, Exhibit 'C' is the first information report of Purnia Sadar P.S. Case No. 374, dated 23.11.2010, and Exhibit 'D' is the order sheet of Sadar P.S. Case No. 375 of 2010.

6. The learned counsel for the appellants, however, challenged order of conviction and sentence, recorded by the trial Court. It is submitted that the witnesses are not eye witnesses to the occurrence as they reached the place of occurrence on hearing the sound of firing. The only witness of the occurrence is the informant. It has, further, been contended that there is admitted enmity between the parties and the false implication can not be ruled out. It has, further, been contended on behalf of Md. Sirman the appellant of Criminal Appeal (S.J.) No. 615 of 2013 that the appellant has already remained in jail for about five years. The learned counsel for the appellants of Criminal Appeal (S.J.) No. 619 of 2013 stated that the appellants have falsely been implicated in this case.

7. Going into the evidence, it appears that P.W. 1 Md. Yahya who is the brother of the informant and the victim has stated that on hulla he rushed to the house of his rival on the brick soling road and saw accused persons Israil, Rais, Quasim, Md. Salam are fleeing away and saw his brother Md. Mojib felling on the ground and he took the victim to Hospital. He supported the prosecution case in the first information report about the theft of rupees one lakh and Panchayati.

8. However, the prosecution case in the first information report is that the occurrence took place in view of the fact that the money of his brother, Md. Yahya P.W. 1, has been theft away about one and half months back and later it was learnt that the said money has been theft by Md. Sirman and Irfan and in this regard there was some Panchayati in the village and in the Panchayati there was some verbal altercation between the informant and Mr. Sirman and while returning in the night the occurrence took place in which it is alleged that 6-7 accused persons who are appellants surrounded and assaulted him and

in the meantime Md. Sirman fired upon him. However, P.W. 2 has also supported the prosecution case and though P.W. 2 claimed to be the eye witness and deposed that on hearing hulla he went to the house of his rival. This witness stated that the injury was on the right side of the chest, but, as per the evidence of the Doctor, the injury was found in the left side of the chest in the anterior. P.W. 1, however, stated that when he reached at the place of occurrence, he saw Md. Mojib in injured state and on inquiry Md. Mojib disclosed that Md. Sirman, Samad, Salam, Rais and Quasim caught hold of him and Md. Sirman fired. P.W. 4 is Mahfooz who stated that he heard the sound of firing when he was going on hearing hulla and saw the accused persons fleeing away. His right hand caught by Md. Mojib and Md. Mojib got injury in chest. However, the Doctor found two injuries on the person of the victim, the informant, Md. Mojib and two injuries are wounds of entry and the other is exit and the third one is multiple black spot on right and left side of chest and abdomen showing the injury by fire arm. However, P.W. 6 is not an eye witness and P.W. 7 has stated that Md. Mojib disclosed that he has been assaulted by slaps and fists by Israil, Rais and others and at the instance of Israil, Md. Sirman fired upon him. However, P.W. 8 has stated that when he reached the place of occurrence Md. Mojib having fallen down with injury in his chest and P.W. 9 is the informant himself. He has supported the prosecution case in the first information report that while he was returning at 10.00 P.M. on 13.06.2010 and reached at the door of Israil on the brick soling road, then, Israil, Md. Sirman, Samad, Salam, Rais, Quasim surrounded him and caught hold of him and assaulted by slaps and fists and when he started to save himself and then Israil and Rais caught hold of him and Israil commanded Md. Sirman to kill and then Md. Sirman took out the pistol and fired upon him which hit in the chest causing injury.

8. However, this witness P.W. 9 in his evidence has stated that there was no injury on his body of assault though he claimed to have been assaulted by slaps and fists, but, he is unable to say the time

during which he was being assaulted by slaps and fists and though has stated that though he received a fire arm injury, but, he was not conscious and the firing has taken from the side. He has, further, stated that none has seen the firing and assault on his person.

9. Hence, taking into consideration the entire evidence from the evidence of P.W. 9 that he was assaulted and, thereafter, a firing was made causing injury on his chest by the side. The Doctor has also found injury wounds of entry and exit on the left side anteriority, which is wound of exit and simultaneously the wound of exit though as per the evidence of P.W. 9 none has seen him being assaulted or having receiving the injury. The witness though have claimed in their evidences that they heard the hulla and, thereafter, they rushed and the case of the prosecution that while the informant was coming he was apprehended, thereafter, he was assaulted and then at the command of Israil, the firing was made by Md. Sirman causing injury on the chest. However, there is specific evidence regarding firing by Md. Sirman causing injury on the chest and the corresponding injury has been found by the Doctor on the person of the informant, Md. Mojib, however, with respect to other accused persons it has only been alleged that they have assaulted. Taking into consideration the sequence of events the informant was first apprehended and then he was assaulted and, thereafter, on the command the firing made. However, taking into consideration the topography of the place of occurrence, it is apparent that the place of occurrence is only the house of the accused persons, as per the evidence of P.W. 10 and the house of the witnesses are at about 50-60 yards. However, the claim that witnesses P.Ws. 1, 2, 3 and 4 though have claimed that they rushed to the place of occurrence either on hulla or on the sound of firing, P.W. 1 though have stated that he saw the accused persons fleeing away, hence, it is apparent that he is neither a witnesses of assault nor of firing and similarly P.W. 2 though claimed to be the eye witness to the occurrence of assault and firing and even apprehending the informant. However, as per the evidence of

P.W. 9, in paragraph 6 of his evidence, that there was none to see the occurrence. P.W. 3 though have not claimed to be the eye witness and has stated that he only learnt, but, there is nothing in the evidence of P.W. 9, the informant, to suggest that he was apprehended, assaulted and then a firing was made on him and injury of fire arm received. However, in his evidence though he has stated about the apprehension of the informant and assault by fists and slaps by the other accused persons. However, the medical evidence does not corroborate regarding the assault on his person by the accused as no injury has been found on his person and he in his evidence has specifically stated in paragraph 6 that there was no sign of assault on his body. He has, further, stated that he does not remember that now long he was assaulted by slaps and fists and he can not say the period of assault even by anticipation. Hence, as per the evidence of P.W. 9 that none seen the occurrence of assault and though he has deposed that he was assaulted by other accused persons, but, there is no medical evidence to corroborate, hence, the participation of other accused, except Md. Sirman is doubtful. More over, all the appellants have been charged under Section 307/34 of the Penal Code, however, Section 34 of the Penal Code requires to be proved that the accused persons must have been sharing common intention. There must be evidence that there was a plan or meeting of mind of all the accused persons to commit the offence for which the charge has been framed. It must have to be established that there is pre planned intention. It is true that common intention may be shared should arise at the spur of the moment also, but, there must be some evidence either participation or circumstantial to indicate that the accused persons were sharing the common intention. However, taking into consideration the facts and circumstances of this case, there is allegation that there was some altercation in the morning in Panchayati and then in the evening while the informant was coming, he was apprehended by 6-7 persons, who were the appellants and it is alleged that he was assaulted after apprehending, but, the assault has

been made by slaps and fists. It is true that there is participation of all the accused persons in apprehending and assaulted as alleged, however, the role of firing has been attributed to Md. Sirman. The other accused persons were not armed with any lethal weapon as apparent from the allegation made in the first information report as well as in the evidence adduced by the witnesses and the witnesses have also not stated that except Md. Sirman any one was armed with any other weapon, hence, the act of appellant, except, Md. Sirman has not been suggested either participation or circumstantial indicates that there was any intention to kill as the allegation of assault is by slaps and fists. Had there been intention to kill the other accused persons might have also been armed with lethal weapon. More over, having regard to the fact the evidence of P.W. 9 the informant, itself, that he has stated that he was assaulted by other accused persons, except Md. Sirman by slaps and fists, but, in his cross-examination he is unable to say that how long he was being assaulted by slaps and fists and the medical evidence is also not corroborating the evidence. He himself has stated in his statement that he did not get any assault or sign of assault on his person, hence, the evidence regarding the assault by other appellants, except Md. Sirman is not corroborated and the witnesses who have come to depose their evidences does not inspire confidence as they are also not the witnesses to the occurrence as in view of the evidence of P.W. 9 it is the informant himself that none has seen the occurrence, hence, the participation as well as the sharing of common intention is found missing. It is pertinent to mention that Section 34 of the Penal Code is enacted on the principle of joint liability in doing the criminal act and this joint liability has to be established by cogent, reliable and unimpeachable evidence as well as regarding the participation in crime. It has to be established that there was common intention and there was a well arranged plan or there was meeting of mind of all the accused persons and the accused persons were aware of the fact on account of the permeation of the crime in the manner. However, hearing the fact

that there is no evidence that the other accused persons were aware of the fact that Md. Sirman will fire on the informant, however, if there was no common intention to fire on the victim and if there was intention by the common intention to assault to teach a lesson to a person and if in consequence any person took out a pistol and fire at then the other accused persons can not be held liable for such act of single person unless there is prior meeting of mind and there is common intention of the accused persons to kill. However, going to the entire evidence, I do not find any common intention that the other appellants knowing the fact that Md. Sirman has been given the role of firing with intention to kill, hence, having regard to the facts and circumstance the ingredient for offence under Section 34 of the Penal Code is missing and the appellants can not be held guilty in view of the fact that the prosecution has not only failed to the extent that it has not been able to prove by cogent and reliable evidence the participation of the appellants other than Md. Sirman and, further, they have also failed to prove the common intention or the meeting of mind and/or the appellants were aware of the plan to kill by attempt to fire by Md. Sirman, hence, the prosecution has not been able to prove the offence under Section 34 of the Penal Code and the participation of the appellants, other than Md. Sirman has not been proved beyond reasonable doubt.

10. However, charge has been framed against Md. Sirman under Section 307/34 of the Penal Code no charge has been framed under Section 307 of the Penal Code and the technical difficulty in convicting the appellant under Section 307 when the charge has been framed under Section 307/34 of the Penal Code and not under Section 307 of the Penal Code against Md. Sirman.

11. However, the learned counsel for the appellants have also contended that the appellant, Md. Sirman, is in jail since 14.09.2010 and has remained in jail for about five years, hence, it is submitted that though there is allegation of firing causing injury though stated to be on the chest, but, the Doctor has found the injury on the chest left side, i.e.,

interiorly ¼” x ¼” x deep to the bone as wound of entry. The evidence of P.W. 5 that the fire passed through his side though it has stated that goli has entered the body, but, he was not unconscious. Hence, in view of these evidences and the evidence of the Doctor, P.W. 5, has opined that under either diaphragm x-ray A.P. lateral view ruptured. There is multiple injury radio opaque shadow is noted at left lower chest region so it seems to be simple in nature caused by fire arm and having regard to the fact the ends of justice will be made by convicting for the period already undergone for offence under Section 307 of the Penal Code.

12. Hence, taking into consideration the entire facts the appellants, other than Md. Sirman is ordered to be acquitted of the charge under Sections 307/34, 341 and 342 of the Penal Code. However, Md. Sirman has been convicted for ten years under Section 307/34 of the Penal Code as well as three years for offence under Section 27 of the Arms Act is ordered to be sentenced for the period already undergone.

13 The order of conviction and sentence of Criminal Appeals (S.J.) No. 594 and 619 of 2013 recorded by the trial Court, is set aside and the appeals are allowed. Since, the appellants of both the appeals are already on bail, they are discharged from the liabilities of their bail bonds.

14. Cr. Appeal (SJ) No.615/13 is allowed in part and the appellant, who is in jail since 14.09.2010, is directed to be released from jail forthwith, if not wanted in any other case.

(Gopal Prasad, J)

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