

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.717 of 2013

Against the judgment of conviction, dated 30.09.2013, and order of sentence, dated 03.10.2013, passed by Mr. Suniti Kumar Singh, Additional District and Sessions Judge, VI, Patna City, in Sessions Trial No. 189 of 2003 arising out of Sultanganj P.S. Case No. 103 of 2002

1. Binay Kumar @ Binay Mohan Lal S/O Late Shiv Narayan Mahto R/O Mohalla Nala Road, P.S. Kadamkuan, District Patna Appellant

Versus

1. The State Of Bihar Respondent

Appearance :

For the Appellant : Mr. Ajay Kumar Thakur, Sr. Adv. with
M/S Kiran Thakur & Ravi Ranjan, Advs.

For the State : Mr. S.A. Ahmad, APP

For the informant : M/S Arvind Kumar Mouar, Harish Kumar & Raj
Krishna Jha, Advs.

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 05-07-2016

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

2. The appellant has been convicted under Sections 307 of the Penal Code and 27 of the Arms Act and sentenced to undergo rigorous imprisonment for ten years and a fine of Representative sample.10,000/- for offence under Section 307 of the Penal Code and in default of payment of fine shall undergo rigorous imprisonment for six months. He has, further, been sentenced to undergo rigorous imprisonment for two years for offence under Section 27 of the Arms Act and it has been ordered that all the sentences shall run concurrently.

3. The prosecution case as alleged in the first information report instituted on the basis if fardbeyan of Ramanand Prasad alleging therein that on 11.05.2002 at about 09.15 P.M. he came to attend the sataisa of the grand son of Sukhdeo Prasad at his house at village Sandalpur, P.S. Sultanganj, district Patna, then, he saw that the dinner had started and on reaching there he also sat for dinner, all arrangement for the dinner has been arranged in a field in front of the house of Sukhdeo Prasad. The tables were arranged there. As soon as he sat on

the chair, in the meantime, one Binay Kumar, the appellant, started talking about election on which he said that he has not come for election, but, for taking food in sataisa, on which Binay Kumar became furious and started abusing and even assaulted by fists and slaps. The people separated them, thereafter, one Surajdeo Prasad took the informant, Ramanand Prasad, to his house and there the informant had his dinner and after taking the dinner he came out, he saw Binay Kumar standing near the field and seeing the informant, Binay Kumar shot at the informant with intention to kill him, which hit on the left side of the abdomen and the informant got unconscious and, thereafter, Sakaldeo Prasad and Saryug Prasad and others took him to Patna Medical College Hospital for treatment where he has been treated. The motive for the occurrence is the discussion regarding election.

4. The said fardbeyan of Ramanand Prasad was recorded on 13.05.2002 at about 12.10 P.M. before the daroga of Sultanganj Police Station and consequently Sultanganj P.S. Case No. 103 of 2002, dated 13.05.2002, was lodged at about 02.00 P.M. on 13.05.2002 with regard to the occurrence, dated 11.05.2002 at about 09.15 A.M. On the fardbeyan, the first information report lodged and investigation proceeded. However, the investigating officer of the case has not been examined and after completion of the investigation charge sheet submitted on which the cognizance taken, case committed to the Court of sessions and after commitment the charge framed against the appellant for offence under Sections 307 of the Penal Code and 27 of the Arms Act.

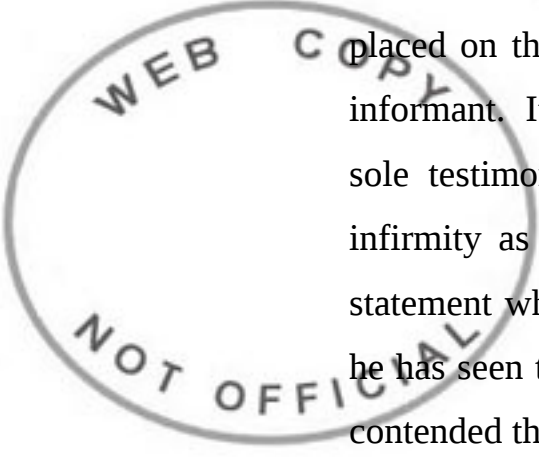
5. During the trial four witnesses have been examined. P.W. 1 is Sukhdeo Prasad, P.W. 2 is Ramanand Prasad, P.W. 3 is Ravindra Prasad, the doctor who examined the victim and P.W. 4 is the Advocate's Clerk. One witness, Mohan Prasad, the brother of the informant, is examined as Court witness.

6. The defence has also adduced one witness as D.W. 1 Arun Kumar, Sub Inspector of Police, Sasaram.

7. The case of the defence, as apparent from the suggestion that no occurrence, as alleged, occurred and, further, the appellant on the date of occurrence was closed in the Hajat of Chausa Police Station and he could only be released on PR bound on the same day, as per the evidence of P.W. 1, but, as per the suggestion given by P.W. 2, the appellant was released on the next day on PR bound and remained in the Hajat and, in this regard, the papers of Chausa Police Station is before the Additional Chief Judicial Magistrate, Patna, and in the Police Station, the Station Diary No. 170, dated 11.05.2002, is recorded, hence, a plea of alibi has been taken by the defence that he was not present at the time of occurrence at about the place of occurrence.

8. The trial Court, taking into consideration the evidence of the witnesses, convicted and sentenced the appellant, as mentioned above.

9. The learned counsel for the appellant has challenged the order of conviction and sentence, recorded by the trial Court on the ground that there is delay in lodging the first information report and the prosecution has not explained the delay. It has, further, been contended that there is further delay in sending the first information report from the Police Station to the Magistrate as that the first information report has been received by the In-Charge Additional Chief Judicial Magistrate on 17.05.2002 though the first information report has been lodged on 13.05.2002. It has, further, been contended that the informant has stated that he reported the matter to the police and C.W. 1, the brother of the informant, has also stated that he has reported the matter to the police, but, the police did not respond to. The personnel of Peerbahore Police Station was camping at Patna Medical College Hospital, but, the version which was reported to the police has not been brought on record and so earliest version has been suppressed. It has, further, been contended that there is further delay in sending the fardbeyan recorded on 13.05.2002 which was received by the Magistrate on 17.05.2002, there is no



explanation for further delay in sending the first information report, hence, it has been contended that the first information report lodged after due deliberation implicating the appellant, hence, no reliance can be placed on the first information report as well as on the evidence of the informant. It has, further, been contended that there is no evidence of the sole testimony of the informant as evidence of P.W. 1 suffers from infirmity as P.W. 1 in his cross-examination has discarded the earlier statement when he stated that neither he heard about the occurrence nor he has seen the occurrence in second paragraph of his deposition, hence, contended that the appellant is entitled to benefit of doubt. It has, further, been contended that so far the injury report has been proved by the doctor, who has specifically stated in his evidence in the cross-examination that the injury report does not indicate that he was amongst the team of doctor who conducted the operation of the victim though he claims to be present at the time of operation of the injured and was one of the members of the team of doctors and, further, the operation made of the injuries is taken from the operative note mentioned in the bed head ticket of the victim, which is only a brief taken from the operation note and, further, the injury report proved as Exhibit 3 mentions that radiologist opinion as written on the bed head ticket by Dr. Mithilesh Pratap that a metallic shadow seen on the left side of the abdomen, hence, it has been contended that this report is based on the bed head ticket, but the bed head ticket, itself, has not been proved nor the doctor whose writing was there on the bed head ticket has come to depose nor the metallic pellet has ever been marked as Exhibit 4. he has also proved the operative mode, hence, has contended that this part of the evidence which has been taken note of from the bed head ticket or other report of other doctor can not be admissible in evidence and, further, neither the x-ray report has been proved nor the basis from which the fact reported has been mentioned, hence, the medical report could only be admissible to the extent regarding the injury 1" x 1/2' x cavity deep only accepted as a

middle evidence on the other part is hit by hear-say as it has only been proved to have been taken note of from the bed head ticket whereas the person who used writing on bed head ticket has not come to depose. The learned counsel for the appellant has, further, submitted that the place of occurrence has not been established and the investigating officer has not come for evidence and this has caused prejudice as the place of occurrence has not been well established.

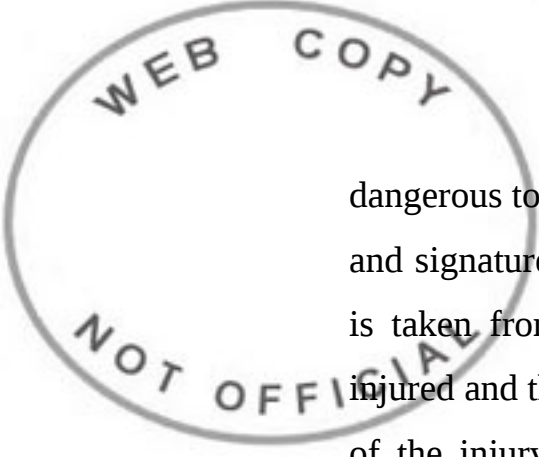
10. The learned counsel for the informant, however, contended that there is specific evidence regarding the shot and, further, this evidence is supported by corroborative evidence of P.W. 1 and doctor, P.W. 3, hence, there is nothing in the evidence and, further, the place of occurrence has well been established as a place in front of the house of Sukhdeo Prasad, hence, non-examination of the witness alleged does not cause prejudice.

11. Having respective submissions, the question for consideration, is whether the prosecution has been able to prove the charge or not.

12. However, it is apparent that the occurrence took place on 11.05.2002. The fardbeyan of Ramanand Prasad, P.W. 2, has been recorded by the investigating officer, Jagdish Prasad. However, the case of the prosecution, as per the first information report that the informant reached to the house of Sukhdeo Prasad, P.W. 1, to attend the sataisa of the grandson of Sukhdeo Prasad and there the feast was arranged and the informant sat on a char on which Binay Kumar, the appellant, started talking regarding election and in this conversion, the appellant become furious and started abusing and assaulting on which the people intervened and separated informant from the appellant and, then, Surajdeo Mahto took the victim to his house, on which Binay Kumar fired from his pistol causing injury in the left side of abdomen. P.W. 3 is doctor, who has deposed that on 11.05.2002, he was posted as Senior Resident Surgeon of Patna Medical College Hospital, Patna, and on that very day at 10.25

P.M. he examined Ramanand Prasad, a hindu male, aged 40 years and found the following injuries :

“Penetrating wound 1” x 1/2” x cavity deep over right lumber region on its back with charred margin.”



13. It has, further, been opined that the said injury was dangerous to life and caused by fire arm and the injury report is in his pen and signature. However, it is stated that the operation note of the injury is taken from the operative note mentioned in bed head ticket of the injured and the injury report was written down on 27.07.2002 on the basis of the injury register prepared at the time of entry. Hence, from the injury mentioned is only one injury alleged to have been caused by fire arm. However, though it is mentioned that the injury was dangerous, but, the injury report has though mentioned about the x-ray report and the operative note and the radiologist report has been given Dr. Mithilesh Prasad and, further, report that metallic pellet seen on the left side, but, the said x-ray report has not been brought in evidence and, further, finding Exhibit 3 got on the basis of x-ray report and operation who has not been stated to be in the hand-writing of P.W. 3, the doctor. However, from the evidence, it is apparent that the victim has received the fire arm injury in his abdomen and the doctor found the injury on the left part of the abdomen, which was a fire arm injury, hence, the evidence of the prosecution is corroborative regarding the injury on the person of victim as the occurrence took place in the night at 09.10 P.M. and the doctor examined injury at about 10.25 P.M., just within an hour of the occurrence.

14. P.W. 2 is the informant and he, in his evidence has specifically supported the prosecution case that at about 09.15 P.M. he went to the house of Sukhdeo Prasad at village Sandalpur to attend the sataisa of grandson of Sukhdeo Prasad and there he got some altercation regarding the election and, then, the appellant assaulted the informant by slaps and fists and abused and, thereafter, one Surajdeo Prasad took him

in his house and took dinner at his house and the informant came out of the house of Sukhdeo Prasad in the field, then, the firing taken place causing injury to P.W. 2. However, this witness in paragraphs 10, 11 and 12 has stated that this informant has gone to the house of Sukhdeo Prasad and has given the description of the place of occurrence and has stated that the place of occurrence is in the east, there is a gali, in the west the land of Dhurupdeojee, in the north there is nahar and talab and in the south there is houses of Surajdeo Singh and Sukhdeo Prasad, hence, from the evidence of this witness, it is apparent that the place of occurrence where the informant received the injury was the place of occurrence and to the south of the place of occurrence there was houses of Surajdeo Singh and Sukhdeo Prasad. From the evidence of P.W.1, it is apparent that the occurrence took place in the field while the diner was going on to the north of the house of Sukhdeo Prasad and Surajdeo Singh. There is nothing in the cross-examination of the witnesses to disbelieve this witness who has specifically deposed about the firing by the appellant causing injury to the informant and injury by fire arm has been confirmed by the evidence of the doctor. However, no criticism rose regarding the evidence of his part of the evidence. However the criticism raised that this witness in paragraph 19 where he deposed that he went to Patna Medical College Hospital and while reaching there he become unconscious and the information about the occurrence was given to his family members and the police in the same night on 13.05.2002 at 10.25 P.M., hence, it has been stated that criticism of the appellant regarding this statement that the information has been given to the family members and the Police Station, but, this information which was given to the Police Station has not been brought on record, hence, it is submitted that the real version has been suppressed. However, the evidence of this witness, however, taken in nut shell, which is apparent that this witness got injury, he was taken to hospital and he has only made even the reference that his family members and the police were informed in the

night, is false. However, there is no specific mention that he given any statement to the police and the evidence is quite vague and on this basis, itself, the prosecution case can not be brushed aside or held that investigation suffers from infirmity. However, from the evidence of this witness, it is apparent that he received a pellet injury, fired by the appellant by fire arm just when he came out from the house of Surajdeo Singh. From the evidence of this witness in paragraph 12 he has specifically mentioned that to the south of place of occurrence there is house of Surejdeo Prasad and Sukhdeo Prasad. It is material to mention that Sukhdeo Prasad is the person in whose house the informant has come to attend sataisa of the grandson of Sukhdeo Prasad where the occurrence took place and where the house of Sukhdeo Prasad there was abuse and assault and from this evidence it is apparent that in front of the said house there is field in which the feast was organized and the occurrence took place.

15. P.W. 4 is Sukhdeo Prasad. He is the person who organized the feast for sataisa of his grandson, the informant and the appellant had gone to attend sataisa. He has deposed that the occurrence took place on 11.05.2002. He has, further, stated that after hearing the sound of firing he came out of the house in the night and then saw Ramanand Prasad has received a fire arm injury. He has, further, stated that Ramanand Prasad disclosed that one Binay Kumar has shot and, then, people took Ramanand to hospital.

16. The motive of the occurrence alleged is discussion regarding the election. However, if the evidence of this witness supports the prosecution case corroborating the evidence of the informant who has deposed that he got received gun shot injury. A criticism has been raised that the informant, P.W. 2, has not stated in his evidence that he disclosed this fact about receiving the injury by fire arm made by the appellant and till the informant disclose in his evidence that he disclosed this fact to P.W. 1, the evidence of P.W. 1 is not an admissible evidence to

corroborate the evidence of P.W. 2. The criticism of the learned counsel for the appellant is not sustainable as it is apparent from the evidence of P.W. 2, the informant, that Binay Kumar shot him when he came out and, thereafter, Sukhdeo Prasad has stated that when he heard the sound of firing he came out and saw Ramanand Prasad injured by fire arm and Ramanand Prasad disclosed that Binay Kumar shot him and then the evidence of P.W. 1, Sukhdeo Prasad, admissible in evidence as a corroborative piece of evidence and this evidence is admissible under Section 157 of the Indian Evidence Act, 1872, where it has been held that the witness not stated in testimony in Court that he had made a former statement to the witnesses, who is corroborating and this view is supported in decision reported in **A.I.R. 1962 S.C., 424 (Ramratan and Ors. Vrs. State of Rajasthan)**. Hence, having regard to the fact that P.W. 2 has stated that he was shot by fire arm and, further, stated about the occurrence that he was taken to Patna Medical College Hospital. The doctor, P.W. 3, stated that he examined the informant and found the fire arm injury on his person in the abdomen, hence, the evidence of P.W. 2 is corroborated by the evidence of P.W. 3, the doctor, and, further, the evidence of P.W. 2 that sataisa was in his house and Ramanand Prasad and Binay Kumar had come to attend sataisa and when he came out of hearing the sound of firing and saw Ramanand Prasad having been injured besmeared with blood and disclosed that Binay Kumar has shot him, hence, the evidence of P.W. 2 is corroborated from the evidence of P.W. 3, hence, from this evidence, it is apparent that immediately after the occurrence the name of the appellant came in light. However, the criticism regarding the evidence of P.W. 2 in his cross-examination that when he asked Ramamand Prasad, then, he did not disclose regarding the person Station House Officer shot him and his evidence that neither he saw nor he heard about the occurrence. However, this witness P.W. 1 has specifically stated in his examination-in-chief that after hearing the sound of firing he came out of his house and saw Ramanand Prasad in injured

state by fire arm and Ramamand Prasad disclosed that Binay Kumar has shot him then Ramanand Prasad was taken to hospital. Hence, having specific assertion general and vague statement in cross-examination can not be deleted the specific averments made by this witness in his examination-in-chief.

17. However, if he accepted the evidence of P.Ws. 1, 2 and 3, then, from the evidence, it is apparent that Ramanand Prasad received injury by fire arm and, which has been corroborated by the evidence of doctor, who examined the appellant just within an hour of the occurrence at 10.25 P.M. and, further, the evidence of Sukhdeo Prasad that on the sound of firing he came out, then, Ramanand Prasad disclosed that it was Binay Kumar, who has shot.

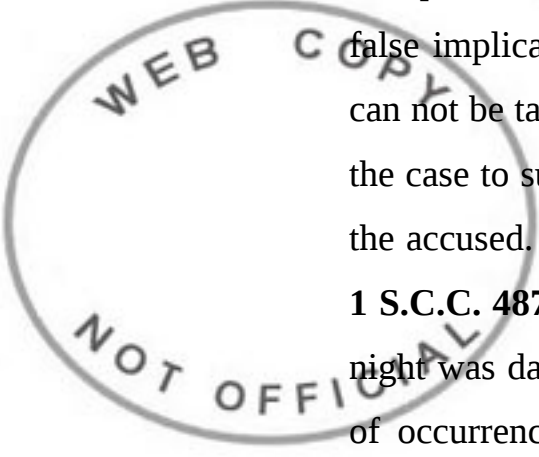
18. However, the criticism by the learned counsel for the appellant that there is delay in lodging of the first information report and there is delay in sending the first information report to the Magistrate. However, there is explanation for delay in lodging the first information report as it is stated that the informant was taken to the hospital and while reach the hospital he become unconscious and when he gained consciousness, he gave statement. However, the criticism of his evidence that this witness, P.W. 2, has stated that the police and the family members were informed in the night, itself, and the first information. However, evidence of the witness that the information was given to the police, it can well be said that this witness was not in a position to give information to the police in the Police Station and on the basis of this evidence the first information report can not be said to have discarded or on the basis of this evidence it can not be said that the earlier version has been suppressed. It is apparent that the informant having received pellet injury was not in a position to come to the Police Station.

19. However, the criticism has, further, been stated that this witness, P.W. 2, the informant, has stated that he was taken to Patna Medical College Hospital by Sakaldeo Prasad and Saryug Prasad, but,

Sakaldeo Prasad and Saryug Prasad having not been examined as witnesses. However, it is true that the witnesses required to be examined, but, merely for non-examination of the witness, the witnesses who come to depose can not be rejected on the ground that other witness has not been examined. However, in the evidence of P.Ws. 1, 2 and 3 are found to be cogent, reliable and unimpeachable evidence, then, their evidence can not be discarded on the ground that some of the witnesses have not been examined.

20. The criticism has, further, been stated that C.W. 1 is the brother of the informant and he has stated in his evidence that he got the information about the occurrence on the same night and then he rushed to Patna Medical College Hospital and found the informant in unconscious state and when he got consciousness then he gave his statement which was recorded as fardbeyan. However, the criticism of this witnesses is that he got the information, but, he did not immediately inform the police and he came to Patna Medical College Hospital and there the police personnel of Peerbahore Police Station were stationed and he orally reported the police, but, he can not give any proof, but, to a Court question he had stated that the police of Sultanganj Police Station had come to Patna Medical College Hospital while his brother was unconscious and so his statement was not recorded and he did not give any statement regarding the said occurrence. However, it is apparent that this witness was not an eye witness to the occurrence, he was only informed about the occurrence and, then, he came to Patna Medical College Hospital and this witness had stated that he was intimated about the occurrence as well as the name of assailant, hence, on the basis of evidence of this witness the evidence of this witness can not be discarded.

21. However, the learned counsel for the appellant has relied upon a decision reported in **(2002) 1 S.C.C. 487 (Thanedar Singh Vrs. State of M.P.)** for the proposition that the delay in lodging the first information report as well as delay in sending the same to the Magistrate,

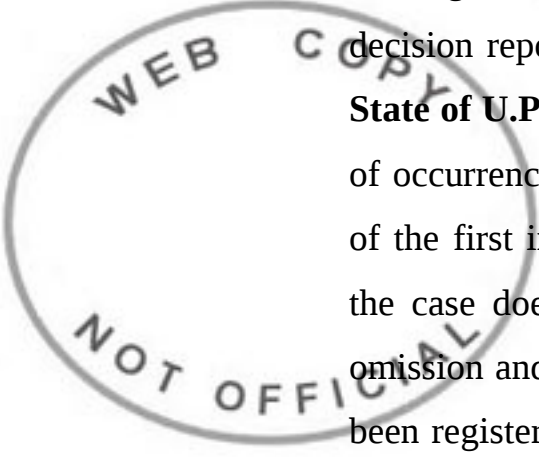


the presumption can be taken that the first information report is ante-time and ante-dated and the prosecution version may have been manufactured to rope-in the accused after some deliberation to suit the investigation for false implication. However, mere delay, itself, spoke such presumption can not be taken unless there is material in the facts and circumstances of the case to suggest that there is probability of manufacturing to implicate the accused. The facts and circumstances of the case, reported in **(2002) 1 S.C.C. 487** (supra) that “the occurrence took place in the night and the night was dark, the kith and kin and the villagers who came to the place of occurrence in the morning, the witnesses did not name any of the accused and whatever come in evidence the witnesses deposed the name of the person to whom the name of the accused was disclosed was not examined and in this context the defence version that first information report was not record at the time and date it was recorded to have been reported. The evidence regarding sending the copy of the first information report to the Magistrate was not adduced by the prosecution in spite of opportunity given to him and specific suggestion was given to the witnesses that first information report was prepared 2-3 days after the occurrence and this followed with the admission that no attempt was made to apprehend the accused on subsequent date and, further, no reference of the case number mentioned in the post mortem report or inquest report”. However, in the facts and circumstances, at hand, there is specific mention that the occurrence took place at about 09.15 P.M., the victim was immediately taken to the hospital and P.W. 1, Sukhdeo Prasad, in front of whose house the occurrence took place stated that on hearing the sound of firing he came out and the victim disclosed the name of the appellant to have fired and he saw the injury of fire arm on the victim-investigation. It was at the earliest point of time, hence, the facts reported in **(2002) 1 S.C.C. 487** (supra) is quite different from the fact in the case, at hand, to draw such inference.

22. The learned counsel for the appellant has, further, relied upon decision reported in **(2001)3 S.C.C. 147 (State of Rajasthan Vrs. Teja Singh & Ors.)** where also the same principle that the delay in sending the first information report to Magistrate. However, in the reported decision **(2001)3 S.C.C. 147** (supra) one of the eye witness was very old faced with eye problem and difficult to believe that he was really in a position to identify, the second eye witness, available in village, recorded after five days and for which the explanation of the investigating officer was not satisfactory, the third eye witness was also doubtful because he stated that he lifted the body of the deceased which was bleeding, but, the clothes having been blood stained was not recovered and the Sarpanch of the village stated that he told about the incident, but, these eye witnesses do not mention the name of the accused and in these facts it was held that there was delay in sending the first information report to the Magistrate. However, from the facts and circumstances of the case, it is apparent that the victim himself is the eye witness and he disclosed the name of the appellant at the earliest, just after the occurrence when P.W. 1 reached at the spot. In decision reported in **(2014)12 S.C.C. 312 (Sudarshan & Ors. Vrs. State of Maharashtra)** on the point regarding the delay in lodging the first information report and sending the same to the Magistrate where the fact remained where it was held that the delay in lodging the first information report was ante-time with sole intention to rope the appellant. However, the conduct in the facts and circumstances of the case that the complainant went to the house of Advocate, 15 K.M. away, after the occurrence instead of going to the Police Station and though there were 100 persons at the place of occurrence, but, the police did not make any effort to find out any independent witness and investigating officer accepted that he was not knowing the name of assailant till 08.00 P.M. whereas the occurrence took place in the after-noon, at about 12.30 P.M.

23. Further, reliance has been placed on **(2014) 12 S.C.C., 261 (Nallabothu Ramulla @ Seetharamaiah & Ors. Vrs. State of A.P.)**, however, the fact remained that the police came to the spot immediately within fifteen minutes and the injured were shifted to the hospital and one of the injured, P.W. 2 informed the police about the incidence, but, his statement was not recorded. The statements of other witnesses were also not recorded and so omission to record the statement of injured witnesses as first information report or statement under Section 161 of the Criminal Procedure Code hold to cast doubt while the police recorded the dying declaration of P.W. 1.

24. However, in the facts and circumstances of the case, mentioned above, decision reported in **1994 S.C.C. (Cri.) 1551 (Arjun Marik & Ors. Vrs. State of Bihar)** the fact remain that the Police Station was at a distance of only about 400-500 yards from the place of occurrence and it has come in evidence that one Subhnath Jha had gone to the Police Station and it was found improbable that though he went to the Police Station, but, not lodged the report and fardbeyan was recorded at 08.00 A.M. at the place of occurrence. The police though have admitted to have received the intimation about the murder of three persons and the sanha entry made is not produced, the inquest report prepared at 09.00 to 09.30 A.M. and in all the inquest reports the Police Station Case No. 112 of 1985 was mentioned and so it shows that the police has registered the offence in the Police Station and the house of the appellant raided at 03.00 P.M. after affecting seizure of article as article recovered from the house of the accused persons found to be exactly of same description and details as mentioned in the fardbeyan and first information report even weighed all the ornaments, cash seized tallied with the weight mentioned in the fardbeyan and first information report and hold that in the facts and circumstances it can not be inferred that fardbeyan and first information report do not record after the seizure of the article from the house of the accused persons and the accused persons



had not been name as accused till now and in the facts and circumstances the fact that the delay in recording the first information report and sending the same to the Magistrate cast a doubt about the incident. In decision reported in **(1994) 5 S.C.C. 188 (Meharaj Singh (L/Nk) Vrs. State of U.P.)** the fact remains that the investigating officer left the place of occurrence after the case has been registered on the spot, the number of the first information report has not been mentioned, even heading of the case does not find mention, no explanation furnished for the said omission and the reason was that no first information report had actually been registered at the time as alleged by the prosecution and P.W. 8 has reached the spot after some consultation and deliberation and, further, the copy of the first information report has not even been sent to the medical officer that the inquest report or dead body for post mortem examination and the explanation given was found to be unacceptable and in those facts and circumstances and the inquest report does not mention that now many shots have been fired and beyond giving weapons used is not seen by any of the eye witness and in that facts and circumstances that on the ground infirmity has not noticed, first information report lost its value and the same has been ante-time and has not been recorded till the inquest proceeding over at the spot.

25. Hence, from these, the case relied upon by the learned counsel for the appellant, it is apparent that mere delay in lodging the first information report or sending the first information report to the Magistrate under Sections 154 and 157 of the Penal Code is not of much consequence, if delay be explained or unless the circumstances indicates on the basis of which the entire prosecution may be said to have been inflicted and it all depends on the facts and circumstances of each cases. Hence, when the facts and circumstances of the case indicate that there is delay in lodging the case it has serious consequence indicating that there is manipulation in the prosecution story as have been circumstance to cook up.

26. It is noticed in the case, reported above, the facts and circumstances, were such, that the delay was taken into consideration it was found that circumstance shows that delay indicates due deliberation of looking prosecution case.

27. However, under the facts and circumstances of the case, at hand, it is apparent that the evidence of P.W. 3, the doctor, who examined the victim immediately within an hour of his arrival at the hospital and found the fire arm injury which corroborates the prosecution story about the injury received by fire arm and, further, the evidence of P.W. 1 when he deposed that just after the sound of firing he came out of the house and saw the informant having been injured by fire am and the informant disclosed that he received fire arm injury as the same has been fired by Binay Kumar, appellant, hence, the name of the appellant has come since about the time of occurrence and the evidence of P.W. 1 is corroborated evidence of P.W. 2, the informant. However, the criticism that the evidence P.W. 1 is that on the sound of firing he came out and saw the informant in injured state and the informant disclosed that name of the appellant to have fired causing injury to him.

28. The, further, criticism that the defence has taken the plea of alibi that the appellant was apprehended in another case at village Chausa. However, it is apparent that alibi is weak evidence. However, there is contradiction in the evidence of the defence that while D.W. 1 had stated that the appellant was apprehended and he was released on the same day whereas the suggestion has been given by the defence that the appellant remain in Hajat of Chausa Police Station and was released on provisional bail on the next day. However, D.W. 1, Sub Inspector of Police, Sasaram, come to depose that he released the appellant on 11.05.2002 at 08.00 P.M. and he recorded sanha no. 174 and 178, dated 11.05.2002. However, D.W. 1 stated that he did not ask for identification of the suspect. D.W. 2 is Ashok Kumar Saha, Advocate Clerk, and he has formally proved Exhibit "A" with objection and has stated that

Exhibit "A" has not been written before him. However, D.W. 1, in his evidence in paragraph 12 has stated that he can not say that Station Diary has been written in his writing or not and formally proved that he does not remember when he saw the Inspector in writing the page nor he has got any specimen and, further, stated that he can not say that Exhibit "A" has been written by him. Hence, defence took a plea of alibi, which is weak defence.

29. However, the evidence that P.W. 2, the informant, received the fire arm injury by the firing of the appellant and doctor supported the medical evidence and P.W. 1 corroborates the disclosure of name, but, the injury found is penetrating injury.

30. However, the further report is based on x-ray report on the radiologist's opinion written on bed head ticket, but, neither the x-ray report nor the bed head ticket has been proved and, further, though there is mention that metallic piece of shadow seen on the left side of the abdomen, but, neither the said report nor the doctor who conducted the operation nor the metallic bullet recovered has been brought in evidence, as material Exhibit, and the same has been taken from the operation note. P.W. 3, the doctor who examined that has stated though he was a member of the team of doctor who conducted operation, who conducted the operation, but, in his evidence, he has specifically stated that there is nothing in the record to suggest that he was the member of the team. Hence, in that view of the matter it was submitted with regard to the injury by fire arm may be accepted, but, so far the gravity of the offence is concerned, it is based on x-ray report and other reports which has not been proved, it is not to be fair to be relied upon this evidence when the x-ray report and the operation report by the person who conducted or reported has come in evidence to prove, hence, it is submitted that it is difficult to say that whether the injury was grievous or regarding the nature of injury in absence of these evidences.

31. Hence, I find that there is merit in the submission of the learned counsel for the appellant that neither the x-ray report nor the bed head ticket nor the bullet, which has been recovered has been marked as material exhibit nor the doctor whose operation note has been mentioned has appeared to depose devoiding the appellant of his right to cross-examination of those evidences. The submission that it is true that the weapon used is fire arm and the injury inflicted on one of the vital parts of the body, but, when nature of the injury is not proved to be dangerous or in view of the absence of evidence the appellant is required to benefit of doubt with regard to the finding that the injury was grievous in nature.

32. Hence, I find and hold that since the x-ray report, operation notes and the bed head ticket having not been proved nor the metallic bullet has been brought in evidence as material exhibit, hence, the conviction under Section 307 of the Penal Code is not sustainable and is converted to conviction under Section 324 of the Penal Code. Since, the appellant has remained in jail for about three years and six months, the ends of justice shall be served by sentencing the appellant for the period already undergone.

33. The appeal is **allowed in part.**

(Gopal Prasad, J)

SA/-