

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.171 of 2002**

Arising Out of PS.Case No. -null Year- null Thana -null District- PATNA

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Kesh Ranjan Mahto

.... .... Appellant/s

Versus

State of Bihar

.... .... Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Vijay Kumar  
Mr. Kapildeo Singh 1  
For the Respondent/s : Mr. Bipin Kumar

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**CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA**

**C.A.V. JUDGMENT**

**Date: 29-03-2017**

This appeal is directed against Judgment and order dated 11.04.2002, passed by Shri Chandra Shekhar Sharma, Additional Court No. 1, Patna, by which the appellant was convicted under Section 307 Indian Penal Code as well as under Section 27 of the Arms Act, 1959 and was sentenced to undergo rigorous imprisonment of ten years under Section 307 of the Indian Penal Code and rigorous imprisonment for three years under Section 27 of the Arms Act, 1959. Both the sentences were directed to run concurrently. However, the appellant was acquitted from charges under Section 148 of the Indian Penal Code. However, learned Trial Court had acquitted other accused persons from the charges under Section 307/149 and 148 of



the Indian Penal Code.

2. Prosecution case in short is that a fardbeyan was recorded on the basis of statement of the Ram Pravesh Mahto (informant) on 25.10.1983, that while he was digging earth in his court-yard, appellant-accused Kesh Ranjan Mahto, armed with gun along with other co-accused persons variously armed came there and asked him not to dig the earth, on which an altercation took place between the parties and in the meantime Nagina Mahto (P.W. -1) came there and tried to pacify the matter, thereafter, an order was given by the co-accused Nathuni Mahto to kill, upon which the appellant-Kesh Ranjan Mahto fired causing injury to the informant as well as Nagina Mahto (P.W. 1) and villagers Shiv Dayal Singh (P.W. 4) and Pankaj Singh. In the meantime, some witnesses came there and save the informant and others. It has also been alleged that present occurrence took place due to previous enmity.

3. On the basis of the said fardbeyan a case being Dhanarua P.S. Case No 157 of 1983 was instituted against the appellant and other co-accused persons under Sections 148, 149, 307 and 324 Indian Penal Code as well as under Section 27 of the Arms Act, 1959 and the case was committed to the Court of Sessions.

4. During trial five witnesses had been examined on behalf of the prosecution and they are; P.W. 1, Nagina Mahto, (injured) P.W.



2, Bhuneshwar Mahto, P.W. 3, Ram Parvesh Mahto (Informant) (injured) P.W. 4, Shiv Dayal Singh (injured ) and P.W. 5, Sheo Nandan Mahto, formal witness, who proved F.I.R. (Ext. 2.).

5. At the very outset, it has been submitted by learned counsel for the appellant that in this case neither the doctor nor the I.O. had been examined and also no injury report had been brought on record. Even the fardbeyan has also not been exhibited.

6. Defence of the appellant as well as other accused persons is of innocence and false implication, which will appear from the trend of cross-examination and suggestion that some other persons had also assembled there and had made firing, which hit the informant (P.W. 3), Nagina Mahto (P.W. 1) and Shiv Dayal Singh (P.W. 4) and others and the appellant and other co-accused persons have been made accused only because the parties had previous enmity.

7. Learned Trial Court after considering the above facts convicted the appellant under Section 307 of Indian Penal Code and under Section 27 of the Arms Act, 1959, and sentenced him to undergo rigorous imprisonment of ten years for the charges under Section 307 Indian Penal Code and rigorous imprisonment of three years for the charges under Section 27 of the Arms Act, 1959. However, learned Trial Court acquitted the appellant from charges under Section 148 Indian Penal Code. Further learned Trial Court



acquitted other co-accused persons from the charges under Sections 307/149 and 148 of the Indian Penal Code.

8. The aforesaid judgment and order has been challenged by the appellant in the present appeal on the various grounds.

9. it has been argued on behalf of the appellant that in spite of the fact that the occurrence took place in the broad day light and in the middle of the village but not a single independent witness has come forward to support the case of prosecution and all the witnesses who have been examined are interested witnesses and they are relative of informant and in such a situation non examination of I.O. becomes fatal, if he would have been examined, he would have exerted light about the place of occurrence as well as the presence of pellets at the place of occurrence and also about the injuries at the time of lodging of F.I.R. On the other hand, there is nothing available on record to show as to whether the arm used in the alleged occurrence has been recovered and seized by the I.O. and also there is nothing available to that if any arm was recovered and the same was sent to ballistic expert for examination. It has further been submitted that except ocular evidence of the witnesses neither injury report has been brought on record nor any doctor has been examined so as to ascertain the nature of injuries and in such a situation, the conviction of appellant under Section 307 Indian Penal Code is not just and proper as the ocular



evidence is not corroborated by the medical evidence. Furthermore, it has been submitted that even according to F.I.R, there is only one gun shot causing pellet injury to four persons and there is repetition of gun shot and even not aiming any person and that also makes the conviction of the appellant under Section 307 of the I.P.C. which is not sustainable in the eye of law. Learned counsel for the appellant has cited a case reported in 2000(1) PLJR 517 on the point of non examination of I.O and Doctor further he has also cited a decision in the case of **Kapildeo Thakur v. State of Bihar** reported in **1986 PLJR 448** on the point of non examination of Doctor.

10. Another submission of learned counsel for the appellant is that for conviction under Section 27 of the Arms Act, 1959, prior sanction is required but in this case, no sanction has been obtained from the District Magistrate as provided under Section 39 of the Arms Act, 1959, nor there is any evidence available on record to suggest that the aforesaid gun was seized or recovered and sent to ballistic expert for examination. There is no finding about the workable condition of the said gun. In such a situation, even the conviction of the appellant under Section 27 of the Arms Act, 1959, is not just and proper. In support of his aforesaid submission, counsel for the appellant has cited a judgment in the case of **Kapildeo Thakur v. State of Bihar** (supra). He further cited a decision in the case of



**Abhai Kumar & Ors. v. State of Bihar** reported in **1999 (3) PLJR 76** on the point of non-recovery of arms.

11. On the other hand learned counsel for the State has submitted that there is consistent ocular evidence available on the record to show that it is the appellant, who had fired causing injury to Nagina Mahto (P.W. 1) and due to which, he lost his eye sight of his left eye, the said gun shot also caused pellet injuries to other persons viz. Ram Pravesh Mahto, (P.W. 3 and informant), Shiv Dayal Singh (P.W. 4), one Pankaj Singh (not examined) and injury on Nagina Mahto, P.W. 1, is a grievous as he lost permanent privation of his one eye and hence injury is grievous as per provisions of Section 320 Indian Penal Code as such there are sufficient materials available before the court for convicting the appellant under Section 307 Indian Penal Code and as regards the non examination of I.O. and doctor is concerned, there are catena of decisions of Hon'ble Apex Court as well as of this Court, which clearly describes that even in absence of examination of I.O. and doctor, the conviction of accused under Section 307 is sustainable, where the evidence clearly shows that the intention of the accused to kill someone and he has acted upon in furtherance of his intention and causing grievous injury on the vital part of the body.

12. Argument of learned A.P.P. is that no previous sanction



is required in the present case under Section 39 of the Arms Act, 1959 and in support of his contention, he has cited a decision in the case of **Ratan Deo Singh v. State of Bihar** reported in **1989 PLJR 991 (R)**. It has been submitted that sanctioned is required only when there is violation of Section 3 of the Arms Act but so far Section 27 of the Arms Act, 1959, is concerned, it relates to a case in contravention of Section 5 and 7 of the Arms Act as such previous sanction is not required under Section 39 of Arms Act

13. In this case prosecution has come with a case that appellant and other accused persons came at the place of occurrence and asked the informant, Ram Pravesh Mahto (P.W. 3) not to dig the land on which an altercation took place and in the meantime one Nagina Mahto (P.W. 3) came there and tried to pacify the matter and thereafter on the order of one Nathuni Mahto, the appellant – Kesh Ranjan Mahto fired from his gun and the pellet hit the informant and P.W. 3, Ram Pravesh Mahto, Nagina Mahto, P.W. 1, Shiv Dayal Singh, P.W. 4 and one Pankaj Singh. On hulla, other people came there and the accused persons fled away. The aforesaid fardbeyan of the Ram Pravesh Mahto, P.W. 3 was recorded which is exhibit – 1 on the basis of which formal F.I.R ahs been lodged, which is exhibit -2. This Ram Pravesh Mahto has been examined as P.W. 3 in the present case and he in his evidence has stated that when he was digging earth



for plastering the boundary, in the meantime appellant and other accused persons came and tried to stop him but as he did not agree, appellant-Kesh Ranjan Mahto on the order of another co-accused Nathuni Mahto, fired and the pellet of said fire hit him as well as three other persons, who are P.W. 1, Nagina Mahto, P.W. 4 Shiv Dayal Singh and one Pankaj Singh and due to the said pellet injury, P.W. 1, Nagina Mahto, lost his eye sight of right eye and other P.Ws had also sustained pellet injuries. This witness has admitted in his evidence that he has taken the building from one Rajendra Mahto, for which a dispute was going on between him and appellant and accused persons. This witness in his cross-examination has also admitted that there was altercation between him and appellant and other accused persons and he has received injuries from a distance of 20 ft. It has also been admitted by him that adjacent to the place of occurrence, there was dalan of accused persons including appellant and at the time of occurrence, the accused persons were at his darwaza. A suggestion was given to this witness that some unknown persons over his land but he denied. Further the defence has tried to get an affidavit on proof by this witness in which it is said to be written that appellant was not present at the place of occurrence but he denied his signature on the said affidavit.

14. Apart from that P.W. 1, Nagina Mahto, in his evidence



has also stated that on hulla he went there and saw the appellant-Kesh Ranjan Mahto armed with country made gun and other accused persons were also armed and there was altercation, on which he tried to intervene but the appellant-Kesh Ranjan Mahto, fired from his gun and the pellet of the said fire hit him on his eyes due to which he lost eye sight of right eye and the said pellet also hit P.W. 3, Ram Pravesh Mahto, P.W. 4, Shiv Dayal Singh and one Pankaj Singh. In his cross-examination, this witness has admitted that he is the cousin brother-in-law (mamera bahnoi) of P.W. 3, Ram Pravesh Mahto and also admitted the fact that there was dispute between the accused persons and P.W. 3, Ram Pravesh Mahto with respect to a house from before.

15. P.W. 2, Bhuneshwar Mahto, has also supported the factum of occurrence in his evidence in chief and also stated about the injuries caused to P.W. 1, Nagina Mahto, P.W. 3, Ram Pravesh Mahto, P.W. 4, Shiv Dayal Singh and one Pankaj Singh due to gun shot fired by appellant-Kesh Ranjan Mahto. He has admitted in his evidence that he is own brother of P.W. 3 Ram Pravesh Mahto and there was a case going on between him and accused persons under Section 107 and 144 Indian Penal Code.

16. P.W. 4, Shiv Dayal Singh, is also one of the victim persons. He has admitted in his examination in chief that while he was going to hospital and when he reached near the house of one Charitar



Singh, he saw that there was an altercation going on between P.W. 3, Ram Pravesh Mahto and appellant-Kesh Ranjan and in between the appellant-Kesh Ranjan Mahto fired from his gun causing injuries to him and informant side. In his cross-examination he has stated in para -4 of his evidence that there is only one gun shot fired by the appellant -Kesh Ranjan Mahto and the arm that was used was country made gun and also he had admitted that he could not say that as to whom the appellant-Kesh Ranjan Mahto had aimed while firing.

17. In this case as stated above neither Investigating Officer nor Doctor has been examined nor injury report of the aforesaid four injured persons have been brought on record.

18. From discussions made above, it clearly appears that the prosecution witnesses and informant are closely related to each other and except P.W. 2 Bhuneshwar Mahto, and they had claimed to have sustained injuries. As such there are consistent ocular evidence. However, one of the injured, namely, Pankaj Singh, had also received injuries, had not been examined. Apart from that I.O. had also not been examined so there is nothing available on record to show that the gun which has been used in the said occurrence to show recovery or seizure of gun and also nothing to show that if the gun was recovered, the same was sent to ballistic expert for examination or not. There is also nothing available on record to show that I.O. has found any pellet



or any other materials on the place of occurrence.

19. Similarly, Doctor has also not been examined nor any injury report has been brought on record as such there is no corroboration of the ocular evidence by the medical evidence and though there is consistent evidence that they had received injuries but there is no medical evidence available on record to show those injuries are caused by firing and they are pellet injuries, hence, there is no corroboration of ocular evidence by medical evidence specially when all those persons are related witnesses.

20. As such defence is also prejudiced by non examination of Doctor. Further had the Doctor been examined in this case, the defence also would have an opportunity to cross-examine the doctor as to find as to whether those injuries are caused by the pellet of the gun or not and as to whether those injuries were grievous in nature and dangerous to life.

21. In this case appellant has been convicted under Section 307 Indian Penal Code and all other accused persons have been acquitted from the charge under Section 307/149 Indian Penal Code. In the facts and circumstances of the case, (i) when there is no medical evidence available on record to corroborate the ocular evidence and there is nothing on record to show injuries were dangerous to life (ii) when there is evidence available on record that



there is enmity between the parties with respect to a purchased house and accused persons including appellant was protesting for not plastering the boundary wall (iii) when there is evidence of P.W. 4 that there is only one gun shot by appellant (iv) when there is evidence of P.W. 4, Shiv Dayal Singh that he could not say as to whom the said gun shot was aimed. In such a situation, conviction of appellant under Section 307 Indian Penal Code is not just and proper, rather he may be convicted under Section 324 Indian Penal Code.

22. So far conviction of appellant under Section 27 Arms Act, is concerned, though it has been argued on behalf of the appellant that there was no previous sanction as provided under Section 39 of the Arms Act and has cited decisions as stated earlier in support of his contention but there was another decision cited by learned A.P.P. as stated above, which shows that previous sanction is not required for a case under Section 27 of the Arms Act. On bare perusal of Section 39 of Arms Act also, it appears that previous sanction is required only when there is contravention of Section 3 of the Arms Act whereas Section 27 of the Arms Act is with respect to contravention of Section 5 and 7 of the Arms Act as such I find no force in the argument of learned counsel for the appellant. However, in the present case, there was no recovery of the gun nor there is any report about the condition of gun. In such a situation, prosecution has



failed to prove its charge under Section 27 of the Arms Act beyond all reasonable doubts.

23. Considering the discussions made above, so far conviction of appellant under Section 27 of the Arms Act is concerned, it is not sustainable in the eye of law.

24. In this case appellant has also been convicted under Section 307 Indian Penal Code. However, on the findings as arrived above as there are injuries on the persons of injured, conviction of the appellant under Section 307 is modified and altered to Section 324 Indian Penal Code.

25. On the point of sentence, citing a decision reported in **2007 (Supplementary) PLJR 321**, it has been argued that the present occurrence is of the year 1983 and at that time the age of the appellant was assessed as 56 years so undoubtedly the present age of the appellant would be about 70 years and he has already faced the trauma of trial for thirty long years in such a situation, to my opinion, appellant deserves the lenient view so far sentence is concerned.

26. From perusal of the lower court record, it appears that the appellant had already remained in custody for about 15 days and now after such a long time, passing an order of sentence and sending the appellant under custody for serving the sentence, does not appear to be proper and justiceable rather the facts and circumstance



demands that instead of sending him back behind the bar, an appropriate fine may be imposed against him.

27. As such this appeal is partly allowed, conviction and sentence of appellant under Section 27 of Arms Act, 1959 is set aside and so far conviction of the appellant under Section 307 Indian Penal Code is concerned, the same is altered to Section 324 Indian Penal Code and the appellant is sentenced to imprisonment for a period already undergone by him with a fine of Rs. 10,000/- to be deposited within a period of six weeks from the date receipt of this judgment before the trial court and in default there of the appellant shall have to serve simple imprisonment of two months.

**(Vinod Kumar Sinha, J)**

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