

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

**Criminal Appeal (SJ) No.282 of 2002**

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

- =====
1. Vyashmuni Dubey son of Deo Narayan Dubey
  2. Parmanand Dubey son of Deo Narayan Dubey
  3. Kritya Nand Dubey son of Deo Narayan Dubey
- All resident of village- Bakri Basauli, P.S.- Buxar, Mufassil, District- Buxar

.... .... Appellants

Versus

State of Bihar

.... .... Respondents

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**Appearance :**

For the Appellants : Mr. Damodar Pd. Tiwary, Adv.  
Mr. Virendra Kumar, Adv.  
Mr. Anirudh Mishra, Adv.

For the Respondent : Mr. Abhay Kumar, Spl. P.P.

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

**ORAL JUDGMENT**

**Date: 11-07-2017**

This appeal is directed against the judgment and order dated 16.4.2002 passed by Sri R.P.Rai, Presiding Office, Additional Court No.1, Buxar (Fast Track Court) in Sessions Trial No.211 of 1983 by which he has convicted the appellants under Section 323 of the Indian Penal Code (hereinafter to be referred as 'the I.P.C.') and further convicted appellant no. 3 under Section 27 of the Arms Act and sentenced appellant no.3 R.I. for three months under Section 323 of the Indian Penal Code and R.I. for one year under Section 27 of the Arms Act and all the other appellants had been released on probation.

2. The prosecution story is based on the Fardbeyan of



Hari Kumar Yadav, Chaukidar (P.W.5) of village Wasi Masauli stating *inter alias* that on 17.6.1982 when he came to his home at about 4.15 P.M he learnt that '*mar-pit*' has taken place in his village and 2-3 persons have injured and on that informant, he went there and saw Gupteshwar Dubey, Chandranand Dubey and Rajani Dubey lying in the injured condition in the lane situated in front of their house. Gupteshwar Dubey sustained fire arm injury in his abdomen and he and Chandranand Dubey received '*Bhala*' injuries in their abdomen and Rajani Dubey had sustained '*lathi*' injury on his head. He was informed by Gupteshwar Dubey that Krityanand Dubey was constructing path by raising wall and on protest, Krityanand Dubey fired with his gun causing fire arm injuries on him and Parmanand Dubey assaulted Rajani Dubey with '*lathi*', Deomuni Dubey (since deceased) ordered his sons to fire and assault the members of prosecution party.

3. On the basis of aforesaid fardbeyan Buxar (M) P.S.Case No.159 of 1989 was instituted under Sections 307, 324 and 34 of the Indian Penal Code as well as under Section 27 of the Arms Act.

4. The police after investigation submitted charge-sheet and cognizance of the offence has been taken and the case was committed to the court of Sessions.



5. It further appears from perusal of the record that during the course of investigation, accused Deomuni Dubey father the appellants died.

6. In this case charges have been framed against the appellants and others under Section 307 as well as under Section 324 of the IPC and against appellant Krityanand Dubey also under Section 27 of the Arms Act.

7. Defence of the appellant as appears from the cross examination as well as the statement made under Section 313 of Cr.P.C. is of false implication and they being innocent.

8. On conclusion of trial, the learned trial court has convicted the appellants under Section 323 of IPC and also convicted the appellant Krityanand Dubey under Section 27 of the Arms Act and released all the appellants on probation except appellant Krityanand Dubey, who has been sentenced as stated above.

9. This appeal has been preferred against the aforesaid impugned order and the order convicting the appellants.

10. Main contention of the learned counsel for the appellants is that in this case neither the I.O. nor the Doctor has been examined and the learned court below has itself held in the judgment



that the injury report has also not been legally proved. Apart from that there are contradictions between the evidence of witnesses from their earlier statements and in such a situation, non –examination of the I.O. has caused serious prejudice to the case of the appellants. Further, it is submitted that the conviction of appellant Krityanand Dubey is under Section 27 of the Arms Act, however, in absence of the non-examination of I.O. and not having any legal evidence that the injury was caused by the fire arm weapon, coupled with the facts that no seizure of blood stained soil from the place of occurrence and the arms have not been sent for ballistic examination to prove that the same has been used in the case, conviction of the appellant under Section 323 of the IPC as well a under Section 27 of the Arms Act is not sustainable in the eye of law and in support of his contention, the learned counsel for the appellants has cited a Division Bench decision of Patna High Court in the case of ***Mashi Das Mins & Ors. Vrs. State of Bihar*** reported in ***2000(1) PLJR 517***, in which the Hon’ble Court after consideration of the entire evidence available on record has come to the conclusion that non-examination of the I.O. and the Doctor where there are contradictions in deposition of the eye witnesses and not corroborated by the medical evidence due to non-examination of the Doctor in such a situation, the appellants are entitled for acquittal. The learned counsel for the



appellants has also cited a decision reported in the case of ***Ramakant Singh and Ors.- Vrs. State of Bihar***, where the Hon'ble Court has held that the gun not examined by the ballistic experts nor any reason assigned for the delayed examination by the Sergeant Major, the appellants are entitled for reasonable doubt. Appellants has also cited decisions of the Hon'ble Supreme Court reported in 1999 (2) PLJR SC 69, in which the Hon'ble Court considering the fact that there is contradiction, in the statement in the F.I.R. before police and evidence before the court held that such type of statements are not reliable and acquitted the appellants giving benefit of doubts on the basis of aforesaid submission the learned counsel for the appellants has prayed for setting aside the impugned order/judgment passed by the learned trial court.

11. The learned counsel for the State has contended that there are sufficient cogent and reliable materials available on the record, in support of the prosecution and the evidence clearly shows that the Krityanand Dubey fired from his gun causing injury to Gupteshwar Dubey and he has also assaulted by 'Bhala' to Gupteshwar Dubey and others and conviction under Section 27 of the Arms Act can be held even in the case of non-examination of the I.O. and the Doctor. Similarly, the conviction under Section 323 IPC can be held even in absence of examination of Doctor. It is also



argued that convictions of the appellant no.3 U/S 27 of the Arms Act and all appellants under Section 323 of the IPC are just and proper as there are sufficient and cogent materials available on record.

12. On the above argument, this Court is going to examine evidence available on the record and as to whether there are sufficient, cogent and consistent reliable evidence are available for conviction of the appellants.

13. On behalf of the appellant altogether seven witnesses have been examined, out of which P.W.1 Rajanikant Dubey, P.W.2 Rangnath Pandey, P.W.3 Chandranand Dubey, P.W.4 Gupteshwar Dubey, P.W.5 Gaurishanker Dubey, P.W.6 Hari Kumar Yadav and P.W.7 Murat Ram. Out of the aforesaid witnesses, P.W. 6 is Chaukidar of the village and informant of the case.

14. P.W.7 is a formal witness, who has proved injury report and P.W.1, 3 and 4 claim to be injured witnesses. Apart from the above evidences, the following documents have been brought on record as Exhibits and they are Ext.1 Seizure List, Ext. 1/1 Signatures on the Seizure List, Ext.2 Fardbeyan and Ext.3 Injury Report.

15. P.W.6 Hari Kumar Yadav is the Chaukidar of the village and informant of the case and as per his own admission, he is



not eye witness.

16. P.W.1 Rajanikant Dubey is one of the injured in this case and as per his examination-in-chief, the appellant came in the lane and appellant no.3 started putting pole on the road and when his father protested, Krityanand went inside his house and fired from his licencee gun causing injury in the leg of Gupteshwar Dueby and further stated that Parmanand Dubey has assaulted to Gupteshwar Dubey and Chandranand Dubey by '*Bhala*' and Vyasmuni Dubey also assaulted by '*Lathi*' to Gupteshwar Dueby and Chandranand Dubey.

17. P.W.2 has also supported the prosecution case. So far putting pole on the lane. He has further stated that Krityanand Dubey fired causing injury to Gupteshwar Dueby on his leg and Parmanand Dueby assaulted Gupteshwar Dueby on his abdomen and he has also stated that Chandranand Dubey assaulted by '*Bhala*' and Vyasmuni assaulted to Gupteshwar and Chandranand Dubey by '*Lathi*'.

18. P.W. 3 has supported the prosecution case in his chief and he also claims to be an injured witness, however, this witness has also admitted that Krityanand Dubey has also lodged a case for the occurrence on the same day.

19. P.W.4 is also injured witness and he has also supported the genesis of occurrence and manner of occurrence in



chief and he has stated in his cross examination that he received gun shot injury first and also received '*bhala*' injury and further stated that he was standing in spite of receiving gun shot and injury and fell down after receiving '*bhala*' injury on his abdomen, however, he has admitted that in para 13 of the cross examination that Krityanand Dueby has also lodged a case against them.

20. P.W.5 Gaurishankar Dubey is witness, on the point of search and seizure and he does not appear to be eye witness and his evidence discloses that house of Krityanand Dubey was searched in his presence and one broken *lathi* and blood stained *bhala* was also recovered and he has also stated about the seizure of small rod and empty cartridges and he has proved his signature on the seizure list as Ext.1/2. His evidence also discloses that house of Mohan Dubey was also searched and from the house of Mohan Dueby 12 bore gun and one cartridge was also recovered and he has proved the seizure list prepared and he has also proved his signature as Ext.2. A suggestion was given to this witness that nothing was seized in his presence to which he has denied.

21. As stated above, I.O. and informant has not been examined in this case. It further appears that the seizure list and the injury report has also not been legally proved rather they have been proved by the formal witnesses.



22. From perusal of the judgment, it appears that the learned trial court has not found the genesis of occurrence regarding fixing of pole in lane, proved in para 18 of judgment also found that the injury report has not been legally proved, however, he has convicted the appellants under Section 323 of the IPC and appellant no.3 under Section 27 of the Arms Act, finding there are sufficient, cogent and reliable evidence available and the prosecution has already proved the manner of occurrence. Learned court below has further held that even in absence of injury report, there are sufficient, cogent and reliable evidence available to show the occurrence took place and P.Ws. 1, 2 and 5 has received injuries.

23. On close scrutiny of the evidence of prosecution witnesses, it appears that there is contradiction in the statement of P.W.1, 2, 3 & 4 from their earlier statement made before the police. Attention of P.W.1 has been drawn towards his earlier statement made before the police and he has denied to have stated before the police that P.W.4 received injury in the abdomen. Similarly attention of P.W.2 has been drawn towards his earlier statement before the police with respect to manner of assault and he also denied the same in para 18. P.W.3 has also denied in para 16 about manner of assault and P.W.4 also denied in para 17 about manner of assault made before the police. Hence, the foresaid contradiction has been taken



from their earlier statement. In the present case, the Investigating Officer has not been examined, as such, defence did not get a chance to confront the Investigating Officer about the statement made earlier by P.Ws.1 to 4. Definitely a serious prejudice has been caused to the appellants.

24. It further appears that though P.W.5 has stated about the seizure of cartridges, *bhala*, *lathi* and gun and proved his signature on the seizure list but the contents over the seizure list has not been legally proved, whereas P.W.5 has stated that the gun was recovered from the house of Mohan Dubey.

25. Apart from the discussions as made above, there is nothing available on the record to show that the gun was even sent for examination and it was found in working condition or the cartridges recovered were fired from the above gun.

26. The Hon'ble Division Bench of this Court in the case of *Mashi Das Minz – vrs.- State of Bihar* reported in *2000(1) PJR 517*, after considering entire matter, has come to the conclusion in para 15 and 16 as follows :

***“15. For the reasons stated above, I am unable to agree with the learned Addl. Sessions Judge by taking into consideration the serious infirmities noticed above.***

***16. In the result, both the appeals are***



*allowed and the conviction of the appellants is set aside by giving benefit of doubt. They shall be discharged from the liability of bail bonds.”*

27. The Hon’ble Supreme Court in the case of *Ahmad Bin Salam – Vrs. State of Andhra Pradesh* reported in 1999(2) PLJR (SC) 69 has also held in para 5 as follows :-

*“.....This witness also in his 161 statement, unequivocally stated that the three persons came on a scooter and one got down and took out a box and pick up a bomb and threw it to the office of the P.W.1 which exploded loudly and it further stated that of the three persons who ran away one among whom was Sayeed but in court gave a totally different picture and on being confronted with his earlier version makes a clean denial. In this state of unsatisfactory prosecution evidence it is difficult for us to sustain the conviction of the appellant of a serious charge of murder and we have no hesitation to hold that the learned Sessions Judge as well as the High Court committed serious error by relying upon such untrustworthy witnesses. In our considered opinion the prosecution has totally failed to establish the charge against the appellant beyond reasonable doubt and the appellant is entitled to be acquitted. We accordingly, set aside the conviction and sentence passed against the appellant and acquit him of the charges levelled against. This criminal appeal is allowed. The bail bonds stand discharged”*

28. Considering the above discrepancies in the evidence of witnesses coupled with the fact that the neither seizure list and the injury report were legally proved, nor the Doctor has been examined to show that the injuries are of the gun shot injury, nor the gun has not been sent for examination and nor there is any evidence to show



that the aforesaid seized cartridges were fired by the same gun and coupled with the fact that the gun was recovered from the house of Mohan Dubey and not from Krityanand Dubey, which just makes the prosecution case suspicious and doubtful and creates suspicion and reasonable doubt about firing by the gun by appellant no.3 Krityanand Dubey.

29. Considering the entire discussions made above, it appears that so far conviction of appellant no.3 under Section 27 of the Arms Act is concerned, it does not appear to be sustainable, however, so far conviction under Section 323 IPC is concerned, it is well settled that the conviction can be based on the oral testimony of the witnesses even in absence of the evidence of Doctor and the injury report not being legally proved, where there are consist evidence that the injured were assaulted and the injuries were on their person.

30. In view of the discussions made above, so conviction of the appellants under section 323 of the IPC is concerned, appears to be just and proper, hence it is affirmed, however, conviction of appellant no.3 under Section 27 of the Arms Act is not sustainable in the eye of law, as such conviction and sentence of appellant no.3 is set aside.

31. All the appellants except appellant no.3 have been released on probation on executing bond and it appears that they have executed



bond, as such no order has been passed and the same is affirmed.

32. The appellant no.3 has been sentenced to undergo R.I. for three years under Section 323 of IPC, however, it appears that occurrence is of the year, 1982 and he has faced trauma of trial and pain for last 35 years and it further appears that at the time of impugned order he was aged about 55 years; as such now he must be aged about 68 years and the other accused persons have been released on executing bond on probation, hence, the sentence of R.I. for three months is modified and he is directed to be released on probation for a period of six months on executing bond of Rs.3,000/- (three thousand) for maintaining peace.

33. With the aforesaid observation, this appeal is partly allowed.

**(Vinod Kumar Sinha, J)**

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