

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.819 of 2017

Arising Out of PS.Case No. -577 Year- 2002 Thana -KADAMKUAN District- PATNA

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Binay Kumar Son of Sri Naresh Singh, Resident of Village- Bojhma, P.S.-
Kashichak, District- Patna.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant : Mr. Devendra Prasad Singh, Advocate.
Ms. Uma Kumari, Advocate.
Mr. Krishna Pd. Singh, Advocate.
For the Respondent : Mr. Binay Bihari Singh, Addl. PP.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date: 03-01-2018

Heard the counsels for the parties.

2. Binay Kumar/appellant has been convicted under Sections 307/34, 324/34 of the Indian Penal Code and Section 27(i) of the Arms Act by judgment dated 07.02.2017 passed by the learned 9th Additional Sessions Judge, Patna in Sessions Trial No. 790 of 2003 arising out of Kadamkuan P.S. Case No. 577 of 2002 instituted for the offences under Sections 307, 324/34 of the IPC and under Section 27 of the Arms Act. By order dated 14.02.2017, the appellant has been sentenced to undergo rigorous imprisonment for seven years, to pay a fine of Rs. 10,000/- and in default of payment of fine, simple imprisonment for six months for the offence under Sections 307/34 of the IPC, rigorous imprisonment for three years to pay a fine of Rs. 2000/- and in default of payment of fine, to undergo one month simple imprisonment and for the offence under Sections 324/34 of the IPC as



well as rigorous imprisonment for three years for the offence under Sections 27(1) of the Arms Act, to pay a fine of Rs. 3000/- and in default of payment of fine, to further undergo simple imprisonment of one month. The sentences, however, have been ordered to run concurrently.

3. The appellant is alleged to have fired from his weapon leading to injuries on the person of Manju Devi (P.W. 3).

4. Mina Shankar (P.W. 4) had lodged the FIR on 24.09.2002 alleging that on the same day, four young persons had come to her shop which is run under the name and style of D.A. Brothers for returning an electronic article purchased by them. When they were made to understand that electronic articles are never returned, they insisted for the same and one of the accused persons fired from his weapon which did not hit anybody. Hearing the sound of firing, Manju Devi, mother of the informant who has been examined as P.W. 3, came out of the house situated behind the shop and she was hit by one of the bullets. It has further been alleged by aforesaid Mina Shankar (P.W. 4) that local people assembled and one of the accused persons was caught by the crowd and was severely assaulted. The mother of the informant was later taken by her brothers Dharamveer Kumar and Ajit Kumar who have been examined as P.Ws. 1 and 2 respectively to P.M.C.H. for treatment. On the basis of aforesaid statement of P.W. 4, Kadamkuan P.S. Case No. 577 of 2002



was registered for the offences under Sections 307, 324/34 of the Indian Penal Code and under Section 27 of the Arms Act.

5. The police after investigation submitted charge sheet against the appellant whereupon cognizance was taken and the case was committed to the court of Sessions for trial.

6. The trial court after examining six witnesses on behalf of the prosecution and none on behalf of the defence has convicted the appellant as aforesaid.

7. Dharamveer Kumar (P.W. 1), one of the brothers of the informant P.W. 4 has stated that on the day of the occurrence, while he along with Ajeet Kumar (P.W. 2) was present at the electronic shop, four persons came for returning a telephone set. When this request was not acceded to, one of the accused persons fired which did not hit anybody. In the meantime, the mother of the aforesaid witnesses viz. Manju Devi (examined as P.W. 3) came out of the house and she was hit by the stray bullet. Thereafter, it has been deposed by P.W. 1 that local people who had assembled at the place of occurrence caught hold of one of the accused persons. The aforesaid witness has not identified as to who out of the four accused persons who had come to the shop of the informant, had opened fire. In fact, he has categorically stated that he along with his brother, P.W. 2, had immediately left for the P.M.C.H. for treatment of his mother who had been hit by the bullet. From the deposition of P.W. 1, it



appears that one of the accused persons was caught on chase at a distance of about one kilometer from the shop of the informant. At the time of catching hold of the aforesaid accused person, P.W. 1 was not present and therefore, it cannot be said that he had identified the correct person as having fired at his mother.

8. Similar statement has been made by the P.W. 2, another brother of the informant who also claims to have gone along with P.W. 1 to P.M.C.H. for the treatment of P.W. 3. During the course of investigation, both of them had not identified the appellant as the assailant/the person who had fired, leading to injuries on the person of P.W. 3.

9. Manju Devi (P.W. 3) the injured has narrated about the occurrence but has not stated specifically that she could identify the appellant as the person who had fired upon her. A suggestion was given to her that only because one person was put on trial and at the instance of the prosecution she has identified the appellant as the shooter, but she has denied the aforesaid assertion of the defence. However, what stands established is that she did not know as to who had fired at her and her identification of the appellant was for the first time in court. Similar statement has been made by P.W. 4, the informant.

10. The injured P.W. 3 has suffered gun shot injuries.

11. Learned counsel for the appellant has however



stated that from the deposition of the witnesses certain important aspects come to the fore. Four persons had entered the shop of the informant and one out of them had fired once which did not hit anybody. Later the same person opened fire which hit in the mouth of the mother of the informant. From the deposition of the witnesses, it does not become clear as to which one of the four persons had fired from his weapon. Thereafter P.Ws. 1 and 2 who were present at the shop, immediately rushed to P.M.C.H.

12. The appellant was never put on test identification parade during the course of investigation and for the first time he was identified in the dock before the trial court. P.W. 3 has stated in her cross-examination that she had not spoken to the police that she would be in a position to identify the assailant if he is produced before her.

13. It has also been stressed upon by the learned counsel for the appellant that if the person who had fired was apprehended by the local people at a distance about one kilometer from the shop, from his possession firearm (weapon of assault) ought to have been recovered. Admittedly, nothing has been recovered from the appellant's possession. In case the appellant would have thrown away the weapon, that also would have been otherwise recovered. In the absence of the recovery of the weapon of assault from the possession of the appellant or from near the place of occurrence, the implication of the appellant in this case appears to be without any



basis.

14. Learned counsel for the appellant has further argued that but for the fact that four persons had come to the shop of the informant and one out of them had fired from his weapon, there is no other evidence as against the appellant that he only had opened fire. It has been argued that it could be a case of mistaken identity. The witnesses aforesaid have categorically stated that many persons started running for catching the miscreants. It is quite possible that somebody completely unrelated to the occurrence could have been caught by the crowd. The fact that the appellant was not put on test identification parade during the course of investigation of the case and none of the witnesses have claimed to identify him by any special sign or body appearance, the participation of the appellant in the crime becomes doubtful. There also appears to be some contradiction in the story put forward by the prosecution. The informant is also not aware as to what electronic article was attempted to be returned by the four accused persons. At one place, it has been suggested that a telephone set was requested to be returned whereas at other place it has been alleged that the miscreants wanted to return an iron. Thus, for all practical purposes, it has been argued, the witnesses are not quite clear about the participation of the appellant in the aforesaid occurrence. No doubt P.W. 3 has received gut shot injury but in the absence of any other material connecting the appellant with the crime, he cannot be



convicted for the offence.

15. The records further reveal that nothing was recovered from the possession of the appellant. In fact, the appellant was brutally assaulted by the local people, which fact becomes evident from the reading of the FIR itself. In any view of the matter in the absence of any definite material pointing towards only the appellant having fired at P.W. 3, his conviction does not appear to be justified.

16. For the reasons aforesaid, the judgment and order of conviction and sentence of the appellant are hereby set aside and the appellant is acquitted of all charges.

17. The appeal is accordingly allowed.

18. The appellant is directed to be released from jail if not wanted in any other case. The trial court records be returned forthwith.

19. A copy of the judgment be communicated to the superintendent of the concerned jail for information, compliance and record.

(Ashutosh Kumar, J)

KKSINHA/-

AFR/NAFR	NAFR
CAV DATE	NA
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