

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 515 of 2013

Arising Out of PS. Case No.-147 Year-2009 Thana- Danapur District- Patna

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Santosh Sonar @ Santosh Kumar, son of Lal Babu Prasad, resident of Kako Jehanabad, P.S. + District- Jehanabad.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

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Appearance :

For the Appellant	:	Mr. Rama Kant Sharma, Sr. Advocate Mr. Radhe Shyam, Advocate
For the Respondent	:	Mr. S. N. Prasad (A.P.P.)

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 05-10-2018

The sole appellant, who was convicted and sentenced in Sessions Trial No. 254 of 2010/Trial No. 07 of 2011 (arising out of Danapur P.S. Case No. 147 of 2009), has preferred the present appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'). The appellant by judgment dated 30-01-2013 passed by Sri Ram Priya Sharan Singh, learned Addl. Sessions Judge Vth, Danapur, Patna (hereinafter referred to as 'Trial Judge') was convicted for commission of offence under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.') and Section 27 of the Arms Act, 1959 (hereinafter referred to as 'Arms Act'). By



order dated 08-02-2013, the learned Trial Judge sentenced the appellant to undergo imprisonment for life and to pay a fine of Rs. 5,000/- (five thousand) under Section 302 of the I.P.C. and in default of payment of fine, the appellant was directed to further undergo rigorous imprisonment for one year. Under Section 27 of the Arms Act, the appellant by the same order i.e. order dated 08-02-2013 was directed to undergo rigorous imprisonment for three years and to pay a fine of Rs. 3,000/- (three thousand) and in case of default in payment of fine, he was directed to further undergo rigorous imprisonment for six months. Both the sentences were directed to run concurrently.

2. Short fact of the case is that Assistant Sub-Inspector of Police, Sri Ram Dayal of Pirbahore Police Station on 30-05-2009 at 12:30 PM recorded *fardbeyan* of Hari Sagar Ray (P.W.5). The said *fardbeyan* was recorded in Patna Medical College & Hospital (hereinafter referred to as 'P.M.C.H'). In the *fardbeyan*, the informant disclosed that opposite to the house of informant in Mainpura, there was a shop of the informant, which was leased out to one Sushil Sonar on rental basis. After getting employment, the said Sushil Sonar had handed over the said business to his cousin brother Santosh Sonar (appellant), resident of Jahanabad. On the date of occurrence, the appellant was running



the said shop. The informant's son Shashi Yadav (deceased) was rendering financial help to Santosh Sonar (appellant) and there was huge dues of rent as well as the amount given by his son. His son Shashi Yadav was repeatedly demanding his dues from the appellant. On 30-05-2009 at about 11:00 AM, in Mainpura near tea shop of Lakshman (not examined), informant's son again asked for due rent from Santosh Sonar (appellant) and thereafter, some altercation took place. In the meanwhile, Santosh Sonar (appellant), taking out country-made pistol from his waist, gave shot of firing on the head of informant's son. Informant's son thereafter received serious injury and he fell down and started squirming. Subsequently, Santosh Sonar (appellant) fled away from the place of occurrence. The informant disclosed that when the injured was brought to P.M.C.H., the doctor declared him dead. The informant claimed that said occurrence was seen by Lallu Sharma (P.W.1), Mantu Sah (not examined) and others. The informant claimed that Santosh Sonar (appellant), who was resident of district Jahanabad, in view of demand of dues made by the deceased, by pistol gave shot of firing on his son and killed him. The said *fardbeyan* was read over to him and after finding it correct, he put his signature. The *fardbeyan* was also got signed by



Raju Yadav (P.W.3) as witness to the *fardbeyan*. The informant has proved the *fardbeyan*, which was marked as Ext.3.

3. On the basis of said *fardbeyan*, on the same date i.e. 30-05-2009 at 2:30 PM, a formal F.I.R., vide Danapur P.S. Case No. 147 of 2009, was registered for offence under Section 302 of the I.P.C. and Section 27 of the Arms Act against sole appellant. After investigation and finding the case true, police on 17-08-2009 submitted chargesheet against the appellant and on 22-01-2010, learned A.C.J.M., Danapur took cognizance of the offence. After completion of formalities under Section 207 of the Cr.P.C., on 04-02-2010, the case was committed to the court of sessions and as such, it was numbered as Sessions Trial No. 254 of 2010. On 02-06-2010, charge under Section 302 of the I.P.C. and Section 27 of the Arms Act was framed against sole appellant, who denied the charge and claimed to be tried.

4. During the trial, to prove its case on behalf of the prosecution, altogether 9 witnesses were examined. Out of 9 witnesses, P.W.1 Lallu Sharma and P.W.5 Hari Sagar Rai (informant) were examined as eye-witnesses to the occurrence. P.W.2 Mahanand Rai, P.W.3 Raju Yadav, P.W.6 Rishi Rai and P.W.8 Rajesh Kumar were examined as hearsay witness. Doctor, who conducted *post-mortem* on the dead body of the deceased i.e.



Dr. Pankaj Kumar was examined as P.W.9. One Sirajuddin (P.W.4), though was declared hostile, in his examination-in-chief stated that after the occurrence, he heard that Shashi was gunned down by Santosh (appellant). P.W.7 Prabhat Kumar Sinha has investigated the case.

5. After conclusion of the prosecution evidence, statement of the appellant under Section 313 of the Cr.P.C. was recorded on 31-01-2012, in which, he claimed to be innocent and also claimed that he was falsely implicated and in defence, three witnesses were examined, who are D.W.1 Dina Nath Sao, D.W.2 Ajay Kumar and D.W.3 Lal Babu Swarnkar. All the defence witnesses have deposed, as if, the shop, which was earlier taken on rental basis by the cousin brother of the appellant, was forcibly taken into possession by the prosecution side in the year 2008 itself and claimed that due to such reason, the appellant was falsely implicated.

6. Sri Ramakant Sharma, learned senior counsel assisted by Sri Radhe Shyam, learned counsel for the appellant, after referring to entire evidence, has argued that the appellant was falsely implicated by the prosecution. Sri Sharma has highlighted that the witnesses, who have claimed to be eye-witness to the occurrence, were not actual ocular witness. According to him, none



had seen the occurrence. After the occurrence, in a well-designed manner, *fardbeyan* of the P.W.5 was shown to be recorded and this is the reason that though F.I.R. was lodged on 30-05-2009, it reached in the court on 01-06-2009.

7. It has been argued by learned senior counsel for the appellant that the learned Trial Judge has committed serious mistake by way of non-explaining entire circumstances and evidences to the appellant at the stage of recording his statement under Section 313 of the Cr.P.C. and as such, entire case has been vitiated. To substantiate his argument on the point that belated receipt of F.I.R. in the court as well as non-explaining entire evidence at the stage of recording statement under Section 313 of the Cr.P.C. to the accused is fatal to the prosecution case and on this very point, he has categorically referred to paragraph 12, 16 & 18 of an un-reported judgment of this Court dated 11-11-2017 passed in Cr. Appeal (DB) No. 399 of 2016 (Gopal Singh vs. The State of Bihar) and other connected appeals. Since emphatically, learned senior counsel for the appellant has referred to those paragraphs of the Division Bench of this Court, we think it proper to re-produce the aforesaid paragraphs i.e. paragraph 12, 16 and 18 of the said judgment i.e. judgment of this Court delivered in the case of Gopal Singh vs. State of Bihar, which are as follows:



“12. Mr. Rama Kant Sharma as well as Mr. Akhileshwar Prasad Singh have focused on the point of delay in sending the FIR as crucial in the instant case. They referred to various judgments of the Apex Court on the aforesaid point and submitted that in view of the well settled principles of law on the point of delay in sending the FIR, the prosecution case is liable to be disbelieved. They referred to the judgment of the Apex Court in the cases of **State of Punjab vs Tarlok Singh: (1972) 3 SCC 869, para-5** and **Ishwar Singh vs State of U.P. AIR 1976 SC 2423**, paras 5 and 9 to substantiate their submissions that the prosecution case is liable to be disbelieved in view of the principles laid down by the Apex Court in those judgments where the Apex Court noticing the delay of even few hours in sending the FIR to the Court was the ground for disbelieving the prosecution case. In the instant case the distance of the police station is hardly 10-12 KM yet there was delay of four days and as such the prosecution case is liable to be disbelieved.

16. Having heard Mr. Ramakant Sharma and Mr. Akhileshwar Prasad Singh, Senior Advocates appearing on behalf of the appellants and Mr. Ajay Kumar Thakur appearing for the informant and Mr. S.C.Mishra, for the State and going through the deposition of the witnesses, we find contradiction in the account of the eye-witnesses as to the manner of commission of offence and also noticed that the prosecution has not explained the reason for the delay in sending the FIR to the ACJM after four days of the recording of the formal FIR. The formal FIR was drawn on 8.7.2000 but it was produced before the Court of ACJM only on 12.7.2000 and the distance between police station and the ACJM court is only approximately 10-15 KMs. We find substance in the submission of the appellants in this regard as the judgment cited on behalf of the appellants support the case of the appellants. For ready reference the relevant



paras of the judgments of the Apex Court on which learned counsel relies are quoted below:

Para 5 of the Judgment of **State of Punjab Vs. Tarlok Singh, reported in (1972) 3 SCC 869** is quoted herein below for ready reference:

“5. First, the High Court noticed the suspicion created by the circumstance that the copy of the First Information Report purported to have been lodged at 3.45 p.m. did not reach the AIR 1976 SC 2423 Magistrate at Dasuya till 8 a.m. the next day, even though it was sent through a special messenger. The distance between the scene of occurrence & Dasuya was only 15 or 16 miles. The inference sought to be drawn is that, in fact, the report was not lodged at 3.45 p.m., but at a much later hour, after the police had arrived at the scene of occurrence and there were consultations to decide what version should be put forward and who should be implicated for the murder. The prosecution, in fact, made no attempt to explain this delay. Such delay, thus, casts doubt on the prosecution version that the Report was lodged at 3.45 p.m. without lapse of unnecessary time.”

Para 5 and 9 of the judgment of **Ishwar Singh Vs. the State of Uttar Pradesh, reported in AIR 1976 SC 2423** are quoted herein below for ready reference:

5. Mr. Frank Anthony appearing for appellant Ishwar Singh submitted that in affirming the Judgment of the trial Court, the High Court also overlooked certain important aspects of the case that the Sessions Judge had failed to consider. He pointed out that the F.I.R. which is stated to have been lodged at 9.05 A.M. on February 14, 1973 was sent out from the police station the next day, February 15; the time when it was despatched is not stated, but it appears from the record that the Magistrate received it on the morning of February



16. The Court of the Magistrate was nearby, which makes it difficult to understand why the report was sent to him about two days after its stated hour of receipt at the police station. Section 157 of the Cr.PC, 1898 as well as of 1973 both require the first information report to be sent "forthwith" to the Magistrate competent to take cognizance of the offence. No explanation is offered for this extraordinary delay in sending the report to the Magistrate. This is a circumstance which provides a legitimate basis for suspecting, as Mr. Anthony suggested, that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In this case the suspicion hardens into a definite possibility when one finds that the case made in Court differs at least in two very important particulars from that narrated in the F.I.R. Mahabir Singh, who lodged the first information report, stated in-Court that he had invited some people to his house to effect a settlement between him and Ishwar Singh, and that he had also sent Ghanshyam to call Ishwar Singh there. The F.I.R. does not mention anything like this. From the F.I.R. it appears as if the accused persons came uninvited to his house, demanded why he had demolished the drain, and started assaulting him and the other persons who were present there. It is also difficult to understand why Mahabir should invite anyone to his house for a settlement, if really Ishwar Singh had permitted him to demolish the drain as he claimed. Further, the F.I.R. does not mention that Mahabir and Satyapal wielded lathis in their defence when attacked and that this resulted in some of the accused getting injured; but that is what both Mahabir (P.W. 1) and Satyapai (P.W. 2) stated in their evidence in Court. These



variations relate to vital parts of the prosecution case, and cannot be dismissed as minor discrepancies. In such a case, the evidence of the eye-witnesses "cannot be accepted at its face value", as observed by this Court in *Mitter Sain v. State of U.P.*

9. We have pointed out that the trial Court in convicting the appellants overlooked certain significant features of the case, namely, the inordinate and unexplained delay in despatching the first information report to the Magistrate; the difference in the account given by the prosecution witnesses and as appearing from the first information report of the occurrence; the absence of any statement in the first information report as to the injuries received by some of accused, and the non-examination of material witnesses. The High Court in affirming the Judgment of the trial Court also failed to advert to these circumstances. We do not therefore think that the case against the appellants has been proved beyond reasonable doubt. The appeals are accordingly allowed and the Order of conviction and the sentences passed on the appellants are set aside. We direct that the appellants be set at liberty forthwith."

18. The Apex Court has occasion to discuss the object behind examination of the accused under Section 313 of the Code of Criminal Procedure. The Apex Court held out that failure on the part of the court not to confront the accused with all adverse situation goes to the root of the case and vitiates the entire trial. Reference in this connection may be made to the judgment of the Apex Court in the case of *Sukhjit Singh Vs. State of Punjab*: (2014) 10 SCC 270, paras 11 to 14 are relevant which are quoted below:

" 11. In this context, we may profitably refer to a four-Judge Bench decision in *Tara Singh v. The State* [AIR 1951 SC 441] wherein, Bose, J. explaining the significance of the faithful and fair compliance of Section 342 of the Code as it stood then, opined thus:



"30. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section 342 of the Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fail within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342 of the Criminal Procedure Code, is so gross in



this case that I feel there is grave likelihood of prejudice."

12. In *Hate Singh Bhagat Singh v. State of Madhya Bharat* [AIR 1953 SC 468], Bose, J. speaking for a three-Judge Bench highlighting the importance of recording of the statement of the accused under the code expressed thus:

"8. Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal PC. are among the most important matters to be considered at the trial. It has to be remembered that in this country an accused, person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box."

13. The aforesaid principle has been reiterated in *Ajay Singh v. State of Maharashtra* [JT 2007 (8) SC 644 : 2007 (12) SCC 341] in following terms:

"14. The word "generally" in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions



must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."

14. In view of the aforesaid enunciation of law, there can be no scintilla of doubt that the when the requisite questions have not been put to the accused it has caused immense prejudice to him, more so, when there is no evidence to establish his complicity in the alleged abduction."

8. Taking aid of aforesaid judgment of this Court, which is based on judgments of Hon'ble Supreme Court, it has been argued that this Court may consider to interfere with the judgment of conviction and sentence mainly on two points - (i) No explanation has been given that the F.I.R. was belatedly received in the court below and (ii) entire circumstances were not placed to the appellant at the time of recording his statement under Section 313 of the Cr.P.C. Besides this, it has been emphasized that actual occurrence was not seen by any of the witnesses and case was fabricated in a well-designed manner. Sri Sharma, learned senior counsel has also argued that the investigating officer has done



completely perfunctory investigation and prosecution has not been able to establish the place of occurrence.

9. Sri Satya Narayan Prasad, learned Addl. Public Prosecutor opposing the appeal, has argued that prosecution has established its case beyond all reasonable doubt. He has argued that evidence of P.W.1 and P.W.5, who are eye-witnesses to the occurrence, is sufficient to approve the judgment of conviction and sentence of the appellant. He has argued that oral evidence has been substantiated with the medical evidence. He further submits that *post-mortem* report also suggests the manner in which occurrence had taken place, which has been depicted by oral evidence of P.W.1 and P.W.5. Besides P.W.1 and P.W.5, other witnesses particularly P.W.6 Rishi Rai, who was own brother was the deceased, in simple manner has deposed that immediately after the occurrence, he reached the place of occurrence and he had not claimed to be eye-witness to the occurrence. It has been argued that had there been any reason for false implication of the appellant, at least P.W.6 Rishi Rai, who had immediately arrived at the place of occurrence after the occurrence, would have claimed to be eye-witness to the occurrence. Instead, the prosecution has produced only two witnesses to be eye-witness. Out of two witnesses, the informant (P.W.5) is the father of the deceased and P.W.1 Lallu



Sharma is the independent witness. Besides this, evidence of P.Ws. 2, 3 and 7 suggests that after the occurrence, those witnesses were informed that the appellant had shot at the son of the informant.

10. Besides hearing, we have minutely examined the entire evidence on record and after going through the same, we are, *prima facie*, of the opinion that the prosecution has established its case beyond all reasonable doubt and there is no reason to see prosecution case with any suspicion. The informant in the present case is none else, but father of the deceased.

11. The informant i.e. P.W.5 Hari Sagar Rai, in his examination-in-chief, stated that on the date of occurrence i.e. on 30-05-2009 at about 10-11 in the morning, he was present at the place of occurrence. He saw that his son was sitting on bullet motorcycle and Santosh (appellant) arrived there and started to talk with him. Thereafter, taking out pistol from his waist, he gave shot of firing on left temporal region of his son. His son, after being hit by the bullet injury, fell down from the motorcycle and started squirming. Santosh (appellant) again, after loading pistol & showing it, ran away towards southern area. In paragraph – 2, he stated that the reason for the occurrence was that Santosh (appellant) had taken huge amount from his son, his son was demanding the said money and this was the reason for killing him.



This witness further stated in paragraph – 3 of his evidence that at the place of occurrence, Lallu Sharma (P.W.1), Sirajuddin (P.W.4), Mantu (not examined) and others were also present, who had seen the occurrence. The occurrence had taken place near the tea stall of Laxman. Further, in paragraph – 4 of his evidence, he stated that his son (deceased) told that Santosh (appellant) had shot at him. He had carried his son to Hi-tech Hospital, from where, he was referred to P.M.C.H., Patna, where doctor, after seeing him, declared as dead. At the same place i.e. P.M.C.H., Patna, police recorded his *fardbeyan*, which was read over to him and thereafter, he put his signature. Alongwith him, Raju Lal (P.W.3) also put his signature on the *fardbeyan*. He claimed that the *fardbeyan* was recorded in the writing of Assistant Sub-Inspector of Police Ram Dayal and entire *fardbeyan* was marked as Ext.2. In paragraph – 3 of his cross-examination, P.W.5 stated that on the date of occurrence, there was *Matkor* (one of the ritual of marriage) of his daughter and his son (deceased) was going for distributing marriage cards. He further stated that to inform him something as well as for more distribution of cards, he had gone to meet him. In paragraph – 8 of his cross-examination, he further stated that while after injury, his son fell down near the tea stall of Laxman and when he (P.W.5) reached there, his son was squirming. He further



stated that he had seen one bullet injury on the person of his son (deceased). Blood had also fallen on earth. Despite the fact that this witness was cross-examined at length, no substantive material was brought on record to create any doubt on the evidence of this witness.

12. P.W.1 Lallu Sharma reiterated that occurrence had taken place on 30th May, 2009 in between 10-11 hrs. in the morning. He stated that after taking meal, he had come out near the road and he saw that Santosh (appellant) and Shashi Yadav (deceased) were talking with each other. Thereafter, both of them proceeded towards Saguna more. After five minutes they returned back. He further stated that Shashi (deceased) had asked him to remain there. In paragraph – 2 of his evidence, he stated that Shashi Yadav (deceased), after returning back, had started smoking cigarette. This witness asked him to proceed, then the deceased replied that after five minutes, he will accompany him. Thereafter, Santosh Sonar (appellant) from backside took out pistol and fired on Shashi (deceased). He further stated that on opposite side, Hari Sagar Rai (P.W5) was standing. At this juncture, it may be clarified that P.W.5 in his evidence has also stated regarding presence of P.W.1 at the time of occurrence. This witness further stated that Shashi (deceased) was carried to Patna Medical College Hospital,



but doctor declared him dead. He also stated that the reason for the occurrence was transaction of money. He further stated that before the police, he had also given information in writing and he proved his writing and signature, which was marked as Ext.1. In paragraph – 8 of his cross-examination, this witness stated that deceased till that time had not distributed cards. This witness was also cross-examined at length, but on examining the same, we do not find any fact, which creates doubt on the evidence of P.W.1.

13. P.W.2 Mahanand Rai was examined as hearsay witness and he deposed in his evidence that after the occurrence, he on mobile was informed by one Sanjay Verma that Santosh (appellant) had shot Shashi (deceased), but since Sanjay Verma was not examined as prosecution witness, the evidence of this hearsay witness becomes insignificant and no reliance can be placed.

14. Similarly, P.W.3 Raju Yadav was examined as hearsay witness. He too deposed that on mobile, he was informed by Mantu that Shashi was gunned down, however he did not name the appellant, but Mantu has not been examined as prosecution witness and as such, his evidence, on the point that he heard regarding injury of Shashi, may not be taken into account, but in his evidence, he has stated that after the occurrence, he went to the



place of occurrence where he got an information that Santosh Sonar (appellant) had given shot of firing on Shashi. He further deposed that the injured from Auto was carried to hospital with the help of Mahanand Rai (P.W.2), Lallu Sharma (P.W.1) and others. This witness has put his signature on inquest report and he proved his signature, which was marked as Ext.2. He also proved signature of Mahanand Rai (P.W.2) on the inquest report, which was marked as Ext. 2/1.

15. P.W.4 Sirajuddin in his examination-in-chief has stated that on the date of occurrence at 2:00 PM, he reached his house and then he heard that Santosh (appellant) had gunned down Shashi (deceased). He further accepted that police had inquired from him, thereafter he was declared hostile and his attention was drawn to his statement recorded under Section 161 of the Cr.P.C. Since this witness was declared hostile, other part of his evidence may not be relied upon, but to the extent that in examination-in-chief, he stated that he heard that Shashi was gunned down by the appellant, this part can be termed as admissible evidence.

16. P.W.6 Rishi Rai (brother of the deceased) in his evidence has stated that on 30-05-2009 at 10-11 hrs., he had gone out of house on motorcycle. In the meanwhile, he heard the *halla* that firing was made and his brother Shashi Yadav was shot at.



Thereafter, on his motorcycle, he reached Mainpura metal road NH-30 and saw that bullet had hit the head of his brother and he was lying and squirming and he was also saying that Santosh (appellant) had shot him. Thereafter, the victim (injured) was carried to Hi-tech Hospital, from where, the injured was referred to P.M.C.H., Patna, where doctor, after seeing, declared him dead. This witness was cross-examined at length and in paragraph-6 of his cross-examination, he stated that Sushil was given shop on rent in the year 1992-93, in which, he was running a jewellery shop. In his cross-examination, he further stated that his brother had given Rs. 26,000/- (twenty six thousand) as loan to the appellant, however he was not in a position to say exact month and year of the said loan. His attention was drawn to his previous statement recorded during investigation to the extent that whether before the police, he had given statement that his brother had named the appellant, this suggestion was denied by him.

17. P.W.8 Rajesh Kumar is also one of the hearsay witness and he, in his evidence, has stated that on 30-05-2009 about 11.15 hrs from his house, he was going to Danapur for purchasing seeds and while he reached on the road, he saw that his brother Shashi had received gun-shot injury and he was in pool of blood. He saw that the bullet had hit on the backside of head of his



brother, where Lallu Ji (P.W.1) was present. Lallu Ji (P.W.1) informed this witness that Santosh (appellant) had given shot of firing on Shashi, since Shashi had given Rs. 26,000/- as loan to him and he was repeatedly demanding the same from Santosh (appellant). This witness was also cross-examined, but nothing could be extracted from his evidence to create any doubt on his evidence.

18. P.W.9 Dr. Pankaj Kumar on 30-05-2009 was posted as Assistant Professor Forensic Medicine, P.M.C.H. and on the same date at 2:30 PM, he conducted *post-mortem* on the dead body of the deceased and he found following ante-mortem injury on the person of the deceased.

“(i) Multiple abrasion 4½” x ½” areas cavity right-side forehead and right maxillary area;

(ii) One entry wound ½” x ½”, 2” and ½” from left ear, 2” left from mid line on the left occipital area, cavity deep margin inverted and lacerated with seizing of hairs and blackening around the entry wound 1¼” x 1¼”, the entry wound formed a track pearsing the underline bone and brain matter, and one metallic object like bullet was recovered from the brain matter occipital low and was kept in a clear glass vile, properly levelled and sealed and handed over to the constable to hand it to the concerned I.O.

Haemotoma was found under scalp on left parietal and occipital area, brain matter was thoroughly pearsed.

Opinion:

- (I) Time since death: within 6 hrs. approx.
- (ii) cause of death- head injury
- (iii) Nature of violence- fire arm”



He also proved the post-mortem report, which was in his writing and signature and same was marked as Ext.7. On examination of the evidence of P.W.9 as well as on examination of the *post-mortem* report, there is no reason to raise any doubt on the oral evidence of the prosecution witnesses. Meaning thereby that oral evidence has been corroborated by the medical evidence.

19. P.W.7 Prabhat Kumar Sinha on 30-05-2009 was posted as Sub-Inspector of Police in Danapur Police Station and he was handed over charge of the investigation and he examined the *fardbeyan*. Thereafter, he rushed to the place of occurrence and in paragraph – 2, he has given the description of the place of occurrence, which is on the side of N.H.31 metal road. Just near to the place of occurrence, there was tea-shop of one Laxman. He found blood mark at the place of occurrence. He stated that since it was dry, he did not collect the same. Thereafter, he recorded statement of witnesses. In paragraph – 3, he stated that near the place of occurrence, the deceased was waiting for someone while sitting on bullet motorcycle. He was carrying marriage card. He in his evidence proved confessional statement of the appellant and he proved the same, which was marked as Ext.4. He also proved formal F.I.R., which was marked as Ext.5 and inquest report marked as Ext.6. This witness was cross-examined at length, but



on examination of his evidence, we did not find as to whether from the defence side any question was asked regarding belated sending of F.I.R. to the court. Since the investigating officer was examined during the trial, in absence of any attention, being drawn to the investigating officer and asking any question regarding delayed sending of the F.I.R., certainly at the stage of appeal, the appellant cannot take the plea that belated receipt of F.I.R. is unexplained. During the trial, if from the defence side any such question would have been asked, there was reason to come to the conclusion that there was no explanation for belated sending of the F.I.R. to the court and as such, since no question was put to the investigating officer to explain regarding such delay, at this stage, the appellant may not get any benefit on the plea that F.I.R. was received in the court belatedly.

20. Similarly, the learned senior counsel for the appellant, who has placed heavy reliance on Division Bench judgment of this Court, in which, judgment of Supreme Court was quoted, may not get any benefit. In the case, before the Division Bench i.e. **Gopal Singh's case (*supra*)**, the investigating officer was not examined, whereas, in the present case, investigating officer was examined as P.W.7 and during his evidence, no question was asked to explain regarding sending of F.I.R. belatedly



to the court. Accordingly, the appellant may not get any benefit from the said judgment of the Division Bench or judgments of the Supreme Court, which have been quoted in the judgment of **Gopal Singh's case** (*supra*).

21. After the evidence, circumstances were explained to the appellant at the time of recording statement under Section 313 of the Cr.P.C. Ofcourse, at the stage of recording statement under Section 313 of the Cr.P.C., exact motive was not explained to the appellant, but the appellant himself in statement recorded under Section 313 of the Cr.P.C. stated that he was falsely implicated due to the reason that he was running shop as tenant of the informant. Right from the very beginning, the prosecution has come out with a case that the appellant was a tenant in the shop of the informant. It is case of prosecution that since there was dues of rent as well as loan taken from the deceased and due to repeated demand from the deceased, appellant had committed the crime. Meaning thereby that by answering, the appellant himself has met with entire circumstances, which were brought on record during the trial. It is true that recording of statement under Section 313 of the Cr.P.C. is not only formality but entire evidence has to be explained, however; on examination of the statement of the appellant recorded under Section 313 of the Cr.P.C., it is evident that he was



asked as to whether he had heard evidence of all the witnesses or not. He was explained that witnesses had deposed that on 30th May, 2009 at 11:00 AM in Mohalla – Mainpura, P.S. Danapur, District – Patna near the tea-shop of Laxman (not examined) the appellant, through his illegal country-made pistol, had shot the son of the informant and he was done to death and he was also illegally possessing the pistol. Meaning thereby that in sum and substance, entire evidences, which were brought on record, were briefly explained to the appellant and as such, it cannot be said that it was glaring example of violation of provision contained under Section 313 of the Cr.P.C. Accordingly, the appellant may not get any benefit from the ratio, which has been laid down by the Supreme Court and noticed in **Gopal Singh's case (supra)**.

22. So far as submission of learned senior counsel for the appellant that prosecution has not been able to establish the place of occurrence, we are of the opinion that such submission is required to be noticed only for its rejection. In the present case, almost all the witnesses in categorical manner had described the place of occurrence. The investigating officer in his evidence has also stated that while he visited the place of occurrence, he noticed blood mark, but was dry and as such, he failed to collect the same. In such situation, on the plea that seizure of blood was not done,



the entire prosecution case, which is otherwise credible, may not be disbelieved.

23. After examining entire evidence as well as examining the judgment of conviction and sentence, we are of the considered opinion that the learned Trial Judge has committed no error in passing the judgment of conviction and sentence.

24. Accordingly, the judgment of conviction dated 30-01-2013 and order of sentence dated 08-02-2013 passed in Sessions Trial No. 254 of 2010/Trial No. 7 of 2011 (arising out of Danapur P.S. Case No. 147 of 2009) by learned Addl. Sessions Judge Vth, Danapur (Patna) does not require interference and same is approved.

25. The appeal stands dismissed.

(Rakesh Kumar, J.)

(Arvind Srivastava, J.)

Anay

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	27.10.2018
Transmission Date	27.10.2018

