

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.1464 of 2017

Arising Out of PS. Case No.-785 Year-2012 Thana- KATIHAR District- Katihar

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Kundan Mishra Son of Rajnath Mishra, R/o Barmasia, Power House, P.S.-
Sahayak Katihar, District- Katihar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant : Mr. Pramod Kumar Singh, Advocate.
Mr. Sanjeev Kumar Singh, Advocate.
For the Respondent : Ms. Abha Singh, APP.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 21-03-2018

Heard the learned counsels for the appellant and the

State.

2. The appellant/Kundan Mishra has been convicted

under Section 307 of the Indian Penal Code and Section

27 of the Arms Act by judgment dated 10.04.2017 passed

by the learned Sessions Judge, Katihar in Sessions Trial

No. 70 of 2014, arising out of Katihar Sahayak P.S. Case No.

785 of 2012 and by order dated 13.04.2017, he has been

sentenced to undergo R.I. for a period of ten years, to pay a

fine of Rs. 5000/- and in default of payment of fine to further



suffer S.I. for a period of three months for the offence under Section 307 of the IPC and R.I. for a period of three years, fine of Rs. 2000/- and in default of payment of fine to suffer S.I. for a period of one month for the offence under Section 27 of the Arms Act; the sentences however having been ordered to run concurrently.

3. The informant is said to have been fired at and injured by the appellant in the night of 01.12.2012 at about 10:30 P.M.

4. Anil Kumar Das (P.W. 5) who is the informant/victim of the case has alleged that on 01.12.2012 in the night, the appellant and one Sanjay Kumar (since acquitted) along with two other unknown persons came inside his house and started abusing him. P.W. 5 was also divested of his personal belongings. When P.W. 5 protested, all the accused persons started assaulting him. On his cries, his uncle Shambhu Ravidas (P.W. 2) arrived and protested. He too was abused. The appellant is then alleged to have fired at his uncle (P.W. 2) but the shot did not hit him. In the meantime, two further rounds of firing were resorted to by the appellant and one such bullet hit him in his right leg in the thigh. All the four



accused persons were carrying pistols in their hand. The miscreants thereafter fled away. In the FIR, P.W. 5 has also stated that in the past also, the appellant had abused and threatened him. The appellant and his associates have visited jail earlier in connection with cases of kidnapping and snatching.

5. On the basis of the aforesaid fardbeyan/statement made by P.W. 5, a case vide Katihar (Sahayak) P.S. Case No. 785 of 2012 dated 02.12.2012 was instituted for investigation under Sections 452, 326, 307, 379, 504 and 506 of the Indian Penal Code. After investigation, charge sheet was submitted, whereupon cognizance was taken and the appellant along with one other co-accused viz. Sanjay Kumar (since acquitted) was put on trial.

6. The trial court, after examining eight witnesses on behalf of the prosecution and one on behalf of the defence, convicted the appellant as aforesaid. But, for the paucity of any evidence against co-accused Sanjay Kumar, the trial court acquitted him.

7. Mr. Pramod Kumar Singh, learned counsel for the appellant, while assailing the judgment and order of



conviction has submitted that the judgment of guilt arrived at by the trial court is against the weight of overwhelming evidence. The trial court did not correctly appreciate the deposition of the witnesses. It was not taken into account that almost all the witnesses offered on behalf of the prosecution were related to P.W. 5/informant. From their deposition, it was very obvious and clear that they had not seen the occurrence.

8. It has further been submitted that the occurrence took place in the dead of the night in the winter month of December and nowhere has it been stated that there was any source of light for the witnesses to identify the appellant or another. Even the injury suffered by P.W. 5 could not be proved to have been caused by a gun shot.

9. Lastly, it was argued that the I.O. of this case has stated that the other prosecution witnesses never stated before him about the occurrence in the manner as has been deposed by them during the trial.

10. In order to appreciate the contentions raised on behalf of the appellant, it would be necessary to first go through the deposition of P.W. 5/informant/injured. He has



supported his initial version during his deposition before the trial court. In his cross-examination, he has stated that the other witnesses are his relatives. The time of the occurrence was stated by him to be 10:30 P.M. and the place where the occurrence took place was stated to be near Modern Station Building. He has also admitted in cross-examination that the electric equipment shop of co-accused Sanjay Kumar is also situated near the railway station. He has denied the suggestion that because of some dispute regarding purchase of the grocery items from the shop of the brother of the appellant, a false case has been instituted.

11. Dr. Tushar Singh who has been examined as P.W. 6 has deposed before the trial court that he examined P.W. 5 on 02.12.2012 and found one entry wound and one exit wound on his right thigh. He had advised for X-ray and C.T. Scan. In cross-examination, he has clearly deposed that he did not mention in the report (Ext. 2) that the wound could only be caused by a gun shot or that any pellet was found in the wound. He did not even state whether there were charring of injuries. P.W. 5/informant was not accompanied by any



Chowkidar or police constable, but only one person who was his relative.

12. From the deposition of P.Ws. 5 and 7, it stands established that P.W. 5 was hurt in the occurrence. The fact that P.W. 5 has alleged that two shots were fired at him; one of which hit him in his left thigh and the doctor having found the injuries on the person of P.W. 5, establishes that the occurrence took place in which P. W. 5 was injured. However, for the P.W. 7 not having stated in his report that the injury could only be caused by firearm, it would be difficult to accept the proposition that P.W. 5 was hurt by the gun shot. The nature of injury also makes it difficult to believe that a gun was used in injuring the informant. The wound of entry is reported to be bigger than the wound of exit. Nonetheless what stands established and proved is that a brawl took place in the house of P.W. 5 in which he was injured. P.W. 5 was taken to hospital by his uncle (P.W. 2).

13. The injury on the person of P.W. 5 not being an old one also establishes the fact that the injury was during the course of altercation between the appellant and P.W. 5.



14. Other witnesses who have though supported the prosecution version, cannot be believed entirely. All the aforesaid witnesses viz. P.W. 2 Shambhu Ravidas, P.W. 1 Sanju Devi (the wife of P.W. 2), Raja Ravidas (P.W. 3) and Dhirendra Ravidas (P.W. 4) have, though, claimed to have seen the occurrence but from their deposition, it becomes very obvious that they arrived at the place of occurrence when the accused persons including the appellant had run away. All the aforesaid witnesses, in their cross-examination have stated that when they reached the place of occurrence, they saw P.W. 5 lying on the ground, bleeding.

15. In that view of the matter, no reliance can be placed upon them with respect to their having seen the occurrence. That apart, attention of their earlier statements have been drawn to the I.O. of this case viz. P.W. 8 who has categorically stated that none of the P.Ws. stated the manner of occurrence as deposed by them during the trial.

16. Thus, the only material left before this Court is the deposition of P.W. 5, the injured.

17. In the absence of any connecting link viz. the recovery of weapon of assault or the recovery of the pellets



from the place of occurrence or blood at the place of occurrence, it would be difficult to sustain the conviction either under Section 307 of the IPC or under Section 27 of the Arms Act.

18. The appellant can therefore, at best, be convicted under Section 326 of the Indian Penal Code.

19. Thus, the conviction and sentence for the offence under Section 307 of the IPC is set aside. The conviction of the appellant is altered under Section 326 of the IPC, instead.

20. The appeal stands partially allowed.

21. The appellant is in custody. He is directed to be released forthwith, if not required in any other case.

22. A copy of the judgment be transmitted to the Superintendent of jail for information, compliance and record.

(Ashutosh Kumar, J)

krishna/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	24/03/2018
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