

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.23 of 2013

Arising Out of PS. Case No.-4 Year-1979 Thana- DUMRAUN District- Buxar

Suraj Singh @ Suraj Narayan Singh S/o Late Lakshman Singh, Resident of
Village - Chougai, P.S. Murar, District - Buxar.

... .. Appellant

Versus

The State of Bihar

... Respondent/s

Appearance :

For the Appellant/s : Mr. Amish Kumar, Amicus curiae.

For the Respondent/s : Mr. Binod Bihari Singh, APP.

**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL**

ORAL JUDGMENT

Date : 07-09-2018

Heard Mr. Amish Kumar, learned Amicus Curiae
for the appellant as well as learned APP for the State on this
criminal appeal.

2. This criminal appeal has been preferred against
the Judgment and Order of conviction and sentence dated
05.12.2012 passed by Adhoc Additional District & Session
Judge-II, Buxar in Sessions Trial No. 188 of 1980 arising out of
Dumraon P.S. Case No. 04 of 1979, whereby the learned trial
court acquitted the accused persons, namely, Devendra @
Birendra Singh and Ram Lal Singh for the offence punishable
under Sections 307/149 and 148 of the Indian Penal Code and
Section 27 of the Arms Act and convicted the accused Sooraj
Singh under Section 307 of the Indian Penal Code and Section
27 of the Arms Act and sentenced him to undergo R.I. for five



years and also slapped him with the fine of Rs.5000/- and in case of default of payment of fine, to further undergo R.I. for three months under Section 307 of the Indian Penal Code. However no separate sentence was awarded for the offence under Section 27 of the Arms Act.

3. Factual matrix of the case is that Dumraon P.S. Case No. 04 of 1979 was instituted under Sections 148, 149, 307 and 380 of the Indian Penal Code and Section 27 of the Arms Act against the accused persons, namely, Munna Singh, Shyam Behari Singh, Brij Behari Singh, Hridya Nand Singh, Bharat Pandey, Devendra Singh @ Birendra Singh, Ram Lal Singh and Sooraj Singh on the basis of the fardbeyan of Alluddin Mian, Son of Nathun Mian recorded by A.S.I. Hridya Narain Singh of P.S. Dumraon at Dumraon Raj hospital on 07.09.1979 at 11:15 AM with the allegation in succinct that on 07.09.1979 at around 6 AM while he was sitting on his grocery and shoe shop, in the meantime Munna Singh, Sooraj Singh, Ram Lal Singh, Devendra Singh @ Birendra Singh, Shyam Behari Singh, Hridya Nand Singh, Bharat Pandey and Brij Behari Singh all armed with bhala descended at his shop. On the order given by Shyam Behari Singh, Munna Singh resorted firing on his right shoulder by means of country made gun.



Thereafter Sooraj Singh resorted firing on his right knee by means of country made gun inflicting injury thereon. Sustaining injury he fell down and Hridya Nand Sing intruding into his shop took away a bag containing Rs. 1100/-. In the meantime, on responding hulla, Rahim Mian, Ram Das Ahir, Ram Naresh and Mahmood Mian rushed there and witnessed the occurrence. They also forbade them from committing the occurrence, but in vain. The bone of contention is said to be that the informant had purchased 3 decimal land from Hyat Mian on 01.02.1975. Same land was purchased by Sooraj Singh from the wife of Hyat Mian in the year 1978 and since the date of purchase of land by the informant, all the accused persons kept extending threatening of dire consequence and commit loot. They also committed loot over the same land regarding which case is pending in the court.

4. Aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the aforesaid accused persons.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence against the aforesaid accused persons and committed the case to the court of sessions and after



commitment and on transfer finally the case came in the seisin of Adhoc Additional District and Session Judge-II, Buxar for trial. During the pendency of the case, Hridayanand Singh, Bharat Pandey, Brij Behari Singh and Shyam Behari Singh passed away, hence the proceeding against them were dropped by different orders of the court while Munna Singh was declared juvenile and his case was sent to Juvenile Justice Board for trial. So three accused persons namely Devendra Singh @ Birendra Singh, Ram Lal Singh and Sooraj Singh faced the trial.

6. Charge against the accused persons namely Devendra Singh @ Birendra Singh, Ram Lal Singh and Sooraj Singh was framed under Section 148 of the Indian Penal Code and Section 27 of the Arms Act and charge against Sooraj Singh was framed under Section 307 of the Indian Penal Code and further charge against the accused persons namely Ram Lal Singh and Birendra Singh was framed under Section 307/149 of the Indian Penal Code. Charge was read over and explained to them to which they pleaded not guilty and claimed to be tried.

7. During the course of trial in ocular evidence, the prosecution has examined altogether five prosecution



witnesses namely, Rahim Mian as PW-1, Md. Alam as PW-2, Fakira Mian as PW-3, informant Md. Allauddin as PW-4 and Nizamuddin as PW-5. Out of the aforesaid witnesses, Nizamuddin is a tendered witness. Besides aforesaid witnesses, two more witnesses namely Dr. Ram Vyas Singh as CW-1 and Sooraj Singh as CW-2 have been examined as court witnesses. Out of the aforesaid court witnesses, CW-2 Sooraj Singh happens to be formal witness who has proved the case diary marked as Exhibit-2. Prosecution has also filed and proved several documents by way of documentary evidence.

8. Statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence. Accused persons neither adduced any ocular nor documentary evidence in buttress of their case.

9. After hearing the parties and perusing the record, the learned trial court passed the aforesaid Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid Judgment and Order of conviction and sentence, the convict Sooraj Singh has preferred this Criminal Appeal.



11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charge levelled against the appellant beyond all reasonable doubts or not.

12. It is submitted by learned Amicus Curiae for the appellant that as per the prosecution case as mentioned in the fardbeyan, at the time of occurrence only informant was present at the shop, but in quite contradiction to the aforesaid prosecution case, informant has stated in his cross-examination that besides him Rahim Mian and Mahmood Mian were also present in the shop at that time. It is further submitted that occurrence is of early morning at around 6 AM of 07.09.1979 and as per the account of the witnesses, there was no customer in the shop by that time, but in quite contradiction to the aforesaid statement of the witnesses, informant has stated that customers were present in the shop at that time and he had sold out cloth and other articles worth Rs. 1100/- by that time which creates serious doubt about the prosecution case. It is further submitted that PW-4 happens to be informant, PW-1 Uncle of the informant, PW-2 nephew of the informant while PW-3 own brother of the informant. Thus all the aforesaid witnesses happen to be family members and highly interested witnesses



of the case. Informant as well as aforesaid witnesses are on inimical terms with the accused persons and several civil and criminal cases have been fought between them and there is also property dispute between them. There also appears to be vital contradiction between the testimony of the aforesaid witnesses which creates serious doubt about the sanctity of the testimony of the witnesses, hence the aforesaid witnesses are not worth reliable and no conviction can be held on the basis of their testimony. As per the witnesses account, several persons had congregated at the place of occurrence at the time of occurrence, but none of the aforesaid witnesses have been examined by the prosecution and no plausible and convincing explanation has been assigned by the prosecution for their non-examination. Thus the prosecution case remains uncorroborated by the independent witness and the appellant cannot be convicted relying upon the contradictory and inconsistent testimony of the interested witnesses of the case who are on inimical terms with the accused persons. It is further submitted that admittedly the appellant has given single fire arm blow on the right knee of the informant which is on on non vital part and there is no repetition of blow at the hand of the appellant and the doctor has opined the aforesaid injury



as simple in nature and not dangerous to the life. Hence offence under Section 307 of the Indian Penal Code is not made out against the appellant. It is further submitted that as per the witnesses account, blood was fallen on the attire of the injured and also on the seat of the shop. The attire of the informant bore the hole due to the pillet which was handed over to the I.O., but I.O. has not been examined by the prosecution and due to non-examination of the I.O., great prejudice has been caused to the defence as objective evidence could not be brought on record. Thus the prosecution has failed to substantiate the prosecution case by adducing convincing, worth credence and reliable ocular and documentary evidence. Hence, the appellant is entitled to be acquitted.

13. On the other hand, learned APP advocating the correctness and validity of the impugned Judgment and Order of conviction and sentence submitted that the learned lower court correctly appreciating the facts and evidence available on record has rightly passed the impugned Judgment and Order of conviction and sentence which is liable to be upheld and this appeal is shorn of merit and is liable to be dismissed.

14. From perusal of the fardbeyan of the



informant, it appears that as per the prosecution case as adumbrated in the fardbeyan, the informant was alone at his shop at the time of occurrence but in quite contradiction to the aforesaid prosecution case, informant (PW-4) has stated in para-4 of his cross-examination that Rahim Mian and Mahmood Mian were also present with him at his shop at the relevant time. Out of the aforesaid two witnesses Mahmood Mian has not been examined by the prosecution. Though Rahim Mian has been examined by the prosecution as PW-1 and he appears to have supported the prosecution case regarding resorting firing on the right knee of the informant by the appellant by means of gun inflicting injury on his knee. But he happens to be uncle of the informant and he also happens to be on inimical terms with the accused persons. As in para-2 of his cross-examination, he has stated that Md. Ajim had lodged a case against Sooraj Singh and others regarding the assault and trespass in the house two years back to the occurrence. He and Kasim had given deposition against the accused in the said case. Informant Alauddin had also lodged a case against Suraj Singh, Bibi Batulan, Hayat Mian and others in which he and Hasim had given evidence against the accused persons. Accused Munna Singh had also lodged a case against him,



Fakira and others regarding dacoity preceding to the case under hand which is still pending in this court. PW-2 Md. Alam who also happens to be nephew of the informant though also appears to have supported the occurrence of resorting firing by means of gun on the right knee of the informant by the appellant, but he also happens to be on inimical terms with the appellant and other accused persons as in Para-3 of his cross-examination, he has stated that the property in question is hailing to him which has been forcibly possessed by Sooraj singh. He had given deposition against the accused persons in the case in the court of Shri Bharat Mishra at Buxar.

15. From perusal of the para-7 of the cross-examination of PW-2 Md. Alam, it appears that the attention of the said witness was drawn towards the contradiction between his statement given before the court and that recorded by the I.O. under Section 161 Cr.P.C. I.O. of the case has not been examined by the prosecution, hence I perused the case diary and find the statement of this witness given before the court quite different to that given before the I.O. under Section 161 Cr.P.C regarding assaulting the informant by means of gun by the appellant. Thus PW-2 appears to have taken different stand regarding assaulting the informant by means of gun by the



appellant before the court and his testimony does not appear to be reliable and worth credence.

16. PW-3 Fakira Mian as per his account given in his examination-in-chief does not happen to be eye witness of the occurrence rather he had arrived at the place of occurrence responding firing sound and witnessed the accused persons escaping from the aforesaid place of occurrence armed with gun and other deadly weapons. Though he has claimed that on his arrival at the shop, informant divulged him that the appellant resorted firing on his right knee by means of gun. But from perusal of the para-4 of the cross-examination of the said witness, it appears that the attention of the said witness was drawn towards the contradiction between his statement given before the court and that recorded by the I.O. under Section 161 Cr.P.C. I.O. of the case has not been examined by the prosecution, hence I also perused the case diary and find the statement of this witness given before the court quite different to that given before the I.O. under Section 161 Cr.P.C regarding divulgence of the aforesaid occurrence of resorting firing on the informant by means of gun by the appellant to him by the informant. Thus PW-3 appears to have taken different stand regarding the aforesaid occurrence and complicity of the



appellant in the occurrence. He also appears to be on inimical terms with the appellant being own brother of the informant, hence the said witness also does not appear to be reliable and worth credence.

17. When the I.O. of the case is not examined by the prosecution and the attention of the witnesses has already been drawn towards their earlier statements and the Investigating Officer could not be brought to give his evidence, then in my considered opinion, the Court can peruse the case diary and find out as to whether or not the attention of the witnesses towards their previous statements were correctly drawn and to satisfy itself as to whether or not they had given similar statement before police. There are two parts of the case diary. First part contains such portion of the diary in which the Police Officer has recorded statement of the witnesses, about the incident or about other relevant facts which to that Police Officer, would be hearsay. The Second party of the case diary contains that portion in which the Police Officer has himself seen or heard a particular fact and has recorded a fact out of his own perception. To this category would come recording about the inspection of place of occurrence making of seizure of certain incriminating articles or in some cases, when the Police



Officer reaches the place of occurrence where the occurrence has not finished and he sees himself whole or part of the occurrence, recording of that. The latter part of the case diary cannot be used by the Court unless the Investigating Officer is examined because that would amount to using that portion of the case diary as evidence. Only the Investigating Officer can tell the Court in witness box as to what were his findings out of his own perception, so that he can be put to cross-examination over that. However the first part of the case diary consists, as already noted, the statement recorded by the witnesses. If the Investigating Officer comes to the Court for evidence and if he is asked to confirm those portion of the statement of the witnesses to which the attention of the witnesses was drawn, the Investigating Officer will say only what he has recorded as his statement in the case diary and cannot go beyond that. Now, the question is, whether that portion of the case diary can be looked into by the Court and used in the trial to aid the Court in reaching at a correct decision when the Investigating Officer is not brought before the Court. Sub-Section (2) of Section 172 of Cr.P.C. provides that the Court cannot only call for the case diary but may also use such diary to take aid in such trial. If the Court only has the power to look into the case diary and



whatever it peruses to keep it only in mind and then to proceed to record the judgment keeping such impression only in mind that, in my opinion, cannot be the intention of the legislation. In my considered opinion, if the Court peruses any such things and uses it to its aid in trial, this must go in black and white as part of the judgment. The only limitation is that the court cannot use any portion of the case diary as evidence. In view of the aforesaid proposition of law and in view of the contradiction between the statements of the witnesses, as recorded before the court and that given before the I.O. under Section 161 Cr.P.C., the testimonies of the aforesaid witnesses given before the court do not inspire my confidence to hold the conviction of the appellant relying upon the same.

18. Informant examined in the case as PW-4, as discussed by my hereinabove, has given altogether different and contradictory statement to the prosecution case as adumbrated in his fardbeyan regarding presence of Rahim Mian and Mahmood Mian with him at the shop at the time of occurrence and presence of customers at the shop at the relevant time which creates serious doubt about the prosecution case. Informant also happens to be on inimical terms with the accused persons as in Para-3 of his cross-examination he has



stated that the accused persons had filed 2-3 criminal cases against him preceding to the occurrence. He has also fought a consolidation case against the appellant Sooraj Singh regarding three decimal of land. He has also fought a mutation case against the appellant Sooraj Singh before the Circle Officer, Dumraon. He had also lodged a criminal case against the accused persons in which they were acquitted and against the said acquittal order he has filed an appeal in the High Court. In para-7 of his cross-examination he has further stated that in the murder case of the accused Shyam Behari Singh, he was convicted for two years. Accused Munna Singh has also filed a dacoity case against him which is pending in this Court in which witness Rahim Mian is also accused. Thus there appears to be number of the civil and criminal cases fought and pending between the parties. Besides the aforesaid cases, there is property dispute as well between them and the informant. Thus the informant appears to be arch enemy of the appellant.

19. As per the statement of PW-1 Rahim Mian given in Para-1 of his examination-in-chief, Ram Naresh Singh, Daroga Chaukidar, Nizamuddin, Ram Das and others witnessed the occurrence and as per the account of the informant as given in Para-1 of his examination-in-chief,



Rahim Mian, Mahmood Mian, Ram Naresh Singh and Nizamuddin have witnessed the occurrence. Out of the aforesaid witnesses, Ram Naresh Singh and chaukidar Jagdhari Ahir have passed away, but the rest witnesses namely Nizamuddin, Ram Das, Mahmood Mian and Daroga Chaukidar who happen to be independent witnesses of the occurrence have not been examined by the prosecution and no plausible and convincing explanation has been assigned by the prosecution for their non-examination. Hence adverse inference shall be drawn against the prosecution.

20. But against all odds, as the informant happens to be injured witness and he has eloquently stated that the appellant has resorted firing by means of gun on his right knee inflicting firearm injury on his right knee and nothing cogent and convincing has been elicited in his cross-examination having potential to discard his aforesaid testimony and Dr. Ram Vyas Singh examined by the court as CW-1 has also found multiple pillet injuries on right knee joint on dorsal surface of the informant caused by firearm. The aforesaid allegation of assault against the appellant stands substantiated by the prosecution by adducing ocular as well as documentary evidence. But as the doctor has found aforesaid injury caused



by pellets as simple in nature and not dangerous to life and that too on his non-vital part and there is no allegation of repetition of blow given by the appellant to the informant and moreover PW-1 has stated in Para-7 of his cross-examination that there was no repetition of fire in the occurrence and as per the prosecution case as alleged in the fardbeyan the informant was alone at his shop at the time of occurrence while the accused persons were nine in numbers and all were armed with firearms and there was no interfering circumstance so had the appellant and other accused persons intended to do away with the life of the informant they would have executed their intention but they did not do so, hence in my considered opinion, intention to do away with the life of the informant at the hand of the appellant by resorting firing by means of firearm is not made out. Hence appellant is convicted under Section 324 of the Indian Penal Code instead Section 307 of the Indian Penal Code and Section 27 of the Arms Act. As the learned Trial Court has not passed any separate substantive punishment under Section 27 of the Arms Act, hence this Court does not find it proper to award separate punishment under Section 27 of the Arms Act. However as the appellant is 75 years old and has been facing rigour of case for fairly long time of around 39 years, hence in



the facts and circumstances of the case, appellant is slapped with fine of Rs.25000/- instead of awarding substantive punishment which in my considered opinion would subserve the end of justice. The aforesaid fine amount would be payable by the appellant to the victim informant within two months from the date of this judgment. In case of default of payment of fine, he shall undergo S.I. for six months.

21. In the facts and circumstances of the case, the appeal is hereby dismissed with the aforesaid modification in the conviction and sentence.

22. Let a copy of the first and last page of this judgment be handed over to the learned Amicus Curiae, Mr. Amish Kumar and the learned Amicus Curiae be paid prescribed fee by the Patna High Court Legal Services Committee.

(Prakash Chandra Jaiswal, J)

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AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	15.09.2018
Transmission Date	15.09.2018

