

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.1161 of 2017**

Arising Out of PS.Case No. -27 Year- 2006 Thana -KHUDAGANJ District- NALANDA
(BIHARSHARIFF)

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1. **Vinay Mahto @ Vijay Kumar**, S/o Late Nathun Mahto,
2. **Vibha Devi**, W/o Vinay Mahto @ Vijay Kumar, Both resident of Jatiya, P.S.
Khudaganj, District - Nalanda

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Bimal Kumar-Advocate
Mr. Birendra Kumar-Advocate
Miss Maruti Kumari- Advocate
For the Respondent/s : Mr. S. A. Ahmad-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 28-08-2018

Appellants Vinay Mahto @ Vijay Kumar and Vibha Devi have been found guilty for an offence punishable under Section 307/ 34 of the I.P.C. and for that, Vibha Devi has been directed to undergo R.I. for three years while appellant Vinay Mahto @ Vijay Kumar has been sentenced to undergo R.I. for five years vide judgment of conviction and order of sentence dated 09.03.2017 passed by the Court of Fast Track Court No.2nd, Nalanda at Biharsharif in Sessions Trial No.1083 of 2006/ 170 of 2007.

2. Mahesh Prasad (PW-7) gave his fard-bayan on 03.07.2006 at about 4.50 p.m. near Hanuman Temple lying at village- Panhar along with Kailash Mahto and Awadhesh Prasad (PW-1 and



PW-4 respectively) disclosing therein that on the same day at about 2.00 p.m. while he was going to the place of Mantu Sao to give mutton of sacrificial goat and as soon as came in front of house of Awadhesh Prasad, Vinay Mahto and his wife Vibha Devi halted him and then, began to abuse, which was resisted by him. Vinay Mahto ordered his wife to bring pistol in order to kill, which was duly complied by his wife Vibha Devi and with an intention to kill, Vinay Mahto fired causing injury near inter-coastal region (right side). He became injured and fell down. Hearing sound of firing, so many villagers came seeing whom, both of them escaped there from.

3. The motive for the occurrence has been shown as son of Vinay Mahto was caught red-handed during course of committing theft in his house and for that, a Panchayati was convened wherein he was fined Rs.1200/- and the same was paid by him. Since the day of Panchayati, he became hostile.

4. After registration of Khodaganj P. S. Case No.27 of 2006, investigation commenced and after completing the same, chargesheet has been submitted, which happens to be basis of trial meeting with the ultimate result, subject matter of instant appeal.

5. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has further been pleaded that informant had sustained firearm injury at the different place in



different manner by different person, but being hostile and getting an opportunity, falsely implicated. However, nothing has been adduced in defence.

6. In order to substantiate its case, prosecution had examined altogether nine PWs, who are PW-1, Kailash Mahto, PW-2, Munna Prasad, PW-3, Deviyanti Devi, PW-4, Awadhesh Prasad, PW-5, Shobha Yadav, PW-6, Bhagirath Sao, PW-7, Mahesh Mahto, PW-8, Manish Ranjan and PW-9, the same Manish Ranjan as well as had also exhibited, Exhibit-1, signature of PW-4 over fard-bayan, Exhibit-2, signature of informant (PW-7) over fard-bayan, Exhibit-3 series, signature of O/c over the fard-bayan as well as formal F.I.R., Exhibit-4, Paragraph-41 of the case diary. As stated above, nothing has been adduced on behalf of defence.

7. While assailing the judgment of conviction and sentence, it has been submitted by the learned counsel for the appellants that the finding recorded by the learned lower Court is not at all substantiated from the materials available on the record. To justify the same, it has been submitted that irrespective of fact that PW-7, informant was suggested at the end of the appellants that he sustained firearm injury at different place in different manner by different person. Even then, it happens to be the prosecution, who has to prove its case. That means to say, it was obligatory on the part of the prosecution to have substantiated the nature of the injury and the



weapon by which the aforesaid injury was caused. Due to non-examination of the doctor, the same has not been brought up on record. Mere Paragraph-41 of the case diary exhibiting by a formal witness would spare the prosecution from its obligation. Also submitted that for want of exhibit of injury report, no offence under Section 307 I.P.C. is made out. So, the finding of the lower Court is found deficient one.

8. It has also been submitted that I.O. has not been examined. On account of non-examination of I.O., the inconsistencies, material development cropping in the evidence of the witnesses could not legally be brought up on record and in likewise manner, the inconsistency amongst the evidence of the witnesses relating to the place of occurrence also could not be properly tested causing prejudice to the interest of the accused/ appellants and that being so, on this score alone, the judgment impugned is fit to be set aside.

9. Now, coming to nature of the evidence, it has been submitted that PW-8 and PW-9 are formal in nature. PW-5 and PW-6 have not supported the case of the prosecution, whereupon they were declared hostile. Now, remains the evidence of PW-1, PW-2, PW-3, PW-4 and PW-7. PW-1 is the full brother of PW-7 and from the evidence, it is apparent that PW-3 is also related with him while PW-2 and PW-4 are the henchmen of PW-7. Accordingly, they all are members of coterie, who resolved and implicated the plan of



implicating the appellants and that being so, their evidences could not be accepted on being partisan, hostile as well as inimical. That being so, the judgment of conviction and sentence recorded by the learned lower Court is fit to be set aside.

10. On the other hand, learned Additional Public Prosecutor while supporting the finding recorded by the learned lower Court has submitted that irrespective of the fact that doctor has not been examined, I.O. has not examined, no dent is found in the prosecution case on that very score, more particularly in the background of the fact that there happens to be an admission at the end of the defence itself that PW-7 had sustained firearm injury. Irrespective of the fact that nature of injury has not been properly surfaced, but presence of firearm injury over the person of injured (PW-7) goes out of controversy. For the purpose of applicability of Section 307 of the I.P.C., the nature of the injury is immaterial as requirement is causing hurt as defined under Section 319 of the I.P.C. Apart from this, it has also been submitted that non-examination of I.O. has not caused prejudice to the interest of the appellant in the background of the fact that witnesses are consistent over the manner of occurrence, place of occurrence coupled with the fact that no material development has been found in the evidence of the respective witnesses, save and except minor omission without having any kind of adverse impact upon the prospect of the judgment impugned. That



being so, the appeal is fit to be dismissed.

11. PW-7 is the injured. So, first of all, his evidence has to be seen. During course of evidence, he had stated that he happens to be informant. He had instituted this case, occurrence is of dated 03.07.2006 at about 2.00 p.m. Then had stated that he was carrying sacrificial mutton to the place of Mantu Sao and during midst thereof, when he reached near the house of Awadhesh Prasad, Vinay Mahto began to abuse him. On his protest, Vinay Mahto directed his wife to bring pistol, which she brought, handed over to Vinay Mahto and then, Vinay Mahto shot at causing injury over right inter-coastal region. He had further stated that pellets still happen to be inside his body and was shown to the Court. He fell down, he was lifted to Khodaganj P.S. and then, to Islampur Hospital and then to P.M.C.H. Patna. His fard-bayan was recorded, which was read over to him over which he put his signature (exhibited). Then had deposed that the motive for the occurrence is in a Panchayati, Vinay Mahto was fined of Rs.1200/-, which he paid as his son was apprehended red-handed while committing theft in his house, identified the accused. During cross-examination at Para-5, it happens to be relating to Panchayati wherein he had stated that stolen money was not recovered from the possession of his son. In Para-7, he had stated that he used to pass through the house of accused. They have not quarreled before the instant occurrence. He had not sustained firearm injury before the



occurrence. He was passing through to go to place of Mantu Sao and he reached at the eastern side of darwaza of the accused, where he was present since before Gali. is about 5-6' width. He began to abuse. There was no scuffle, altercation took place 5-10 minutes. None came, though they were present in the surrounding. In Para-8, he had stated that there was no opportunity for him to slip there from even at the time, when Vinay Mahto had instructed his wife to bring pistol. He was not thrown over ground. Accused had abused from a distance of 15-20 feet. Accused fired aiming him. He got no opportunity even to move. Firing was made from his front side, whereupon sustained injury and then, became unconscious. In Para-9, he had stated that when he regained sense, he found himself over cot. He had also seen Awadhesh, Kailash, Munna, Damyanti Devi, but he was not able to talk. Then had stated that he was firstly examined at Islampur and then, to P.M.C.H. and then, to Rajeshwar Hospital. Then had denied the suggestion that he had not made statement that Vibha Devi was standing at the darwaza, but she had not spoken anything. Then had stated that he had made statement before the police that Vibha had handed over the loaded pistol to Vinay Mahto, which Vinay had asked for. Meat had fallen down and spread over at the spot. Then had denied the suggestion that he had falsely implicated the accused. Then had denied the suggestion that he had sustained firearm injury at different place in different manner, but falsely implicated the accused



in the background of prevailing animosity.

12. PW-1 is full-brother of the PW-7. He had stated that his brother was shot at more than a year ago at 2.00 p.m. At that very time, he was going to give meat at the place of Mantu Sao. When he reached near the house of Awadhesh, Vinay Mahto came in Gali from his darwaza, abused and then, shot at his brother causing injury over right inter-coastal region. He had further stated that about 10-15 days ago, son of Vinay Mahto was apprehended while stealing in the house of Mahesh and for that, Panchayati was convened wherein he was fined Rs.1200/-. He had further stated that pistol was handed over by Vibha Devi, who happens to be wife of Vinay Mahto, identified. PW-1 was not at all cross-examined, so his evidence remained intact.

13. PW-2 had stated that on the alleged date and time of occurrence, while Mahesh was going to the place of Mantu Sao to give meat and reached near the house of Vinay Mahto, which happens to be in the midst of way, Vinay Mahto, who was sitting at his darwaza since before along with his wife Vibha Devi seeing Mahesh, they both began to abuse and then, both parties have indulged in an altercation, whereupon Vinay demanded loaded pistol from his wife, which was handed over by her. Then Vinay shot at Mahesh causing injury over right inter-coastal region. Mahesh fell down. Then had disclosed the motive, identified the accused. During cross-examination at Para-6, he had stated that house of accused lies one



house after the house of informant, western side. House of Mantu Sao lies 1-2 house East to the house of Vinay. His house lies after two houses from Vinay at Southern side. Then at Paras-7,8,9, there happens to be cross-examination relating to the existing physical feature of the houses of different persons as well as location of Gali. In Para-10, he had stated that when Mahesh reached at the darwaza (Eastern side) of Vinay Mahto, at that very time, Vinay was sitting at his Dalan. In Para-11, he had stated that it is true that while he was sitting at his Dalan, he heard uproar. Then had stated that after hearing firing sound, he came to the darwaza of Vinay Mahto. He had seen Mahesh Prasad lying in the Gali. Then family members of Mahesh Prasad namely Kailash Mahto (PW-1), Daimanti Devi (PW-3), Soni Kumari (not examined) and wife of Mahesh Prasad (not examined) arrived there. Then thereafter, they lifted Mahesh Prasad to police station. He also accompanied. Then at Para-16, his attention has been drawn towards his previous statement wherein he had stated that wife of Vinay Mahto was pacifying him and was directing Mahesh Prasad to go there from, but Mahesh Prasad had not gone. Then had denied the suggestion that no such type of occurrence had ever taken place and being the henchmen of the informant, deposed falsely.

14. PW-3 had stated that on the alleged date and time of occurrence while Mahesh Prasad was going to the place of Mantu Sao with meat and reached near the darwaza of Awadhesh, Mahesh Prasad



and Vinay Mahto indulged in an altercation, whereupon Vinay Mahto directed his wife to bring pistol. Vibha Devi brought pistol and handed over to Vinay Mahto, Vinay shot at causing injury to Mahesh Prasad at right inter-coastal region. She had made statement before the police, identified. During cross-examination, she had admitted at Para-3 that though, she is Bhabhi of Mahesh, but they are separate having independent house, though contiguous to each other. In Para-4, she had admitted that after incident of theft, both the parties were carrying strained relationship. At Para-5, she had stated that at the time of occurrence, she was alone. She had shown presence of persons having in the boundary. In Para-6, she had stated that when quarrel began. She was present there as she was following Mahesh. She had stated that she was going to the place of Mintu. Wife of Mintu happens to be her Mameri (cousin) sister. In Para-7, she had stated that when she reached at the Eastern darwaza of the accused, quarrel begin. Lane lies five hand away from the darwaza of the accused. Mahesh Prasad was going ahead, she was behind him. Both the parties indulged in an altercation relating to Panchayati. Accused was saying that you extorted the money on the pretext of Panchayati. In Para-8, she had stated that altercation amongst them took place for about five minutes. Both abused each other, but they have not grappled, none came during the aforesaid event. After firing, people have assembled. Before that none came. In Para-9, she had stated that neither she tried



to remove her Dewar nor to Vinay Mahto. She had tried to pacify her Dewar. In Para-10, she had stated that even after Vinay having instructed his wife to bring pistol, her Dewar had not moved there from. She had also remained there. In Para-11, she had stated that Vinay Mahto had not gone inside his house even after instructing to his wife. He remained there. She had further stated that even seeing the wife of Vinay carrying pistol, her Dewar did not try to slip there from. Then had shown the distance in between Vinay and Mahesh. At that very moment, she was five hands away from Mahesh Prasad. As soon as pistol was handed over to Vinay, he fired. In Para-12, she had stated that cartridge was loaded since before. In Para-13, she had stated that at the time of firing, Vinay and Mahesh were in front of each other. In Para-14, she had stated that after firing, accused slipped inside their house. In Para-15, she had stated that after sustaining firearm injury, her Dewar fell down. He had not become unconscious. She carried him to house where his wife and daughters were present. Villagers came there and then thereafter, he was taken to hospital. In Para-17, she had stated that there was trailing mark at blood from the place of occurrence to his house. Blood had also fallen over his cloth. In Paras-18, 19, 20, there happens to be contradiction. Then at Para-21, she had been suggested that she is not an eye witness to occurrence.

15. PW-4 is Awadhesh Prasad. He had stated that on the



alleged date and time of occurrence, there was uproar. House of Vinay Mahto and his house is intervened by a Gali. After hearing uproar, he came out from his house and had seen Mahesh Prasad in an injured condition. On query, Mahesh had disclosed that Vinay Mahto had shot at. Mahesh Prasad had firearm injury over his right side of inter-coastal region. Then had shown the motive. Then had disclosed that Mahesh Prasad was taken to Islampur and from there to Patna. He had further stated that he had also accompanied him, identified the accused. During cross-examination at Para-7, he had stated that Gali lies at the Northern as well as Southern flank of his house. He had further stated that his house and Vinay's house is intervened by a Gali. It is a public gali and then, had shown the topography of the place under Paras-8, 9, 10 and 11. In Para-12, he had stated that he had not participated during course of Panchayati. In Para-13, he had stated that even after Panchayati, there was no dispute amongst the male members, but females were quarreling amongst themselves. In Para-14, he had stated that he had found Mahesh Prasad injured at the Eastern darwaza. Mahesh Prasad was lying about 15 feet north to the darwaza. Mahesh was in a Gali, which happens to be in between his house as well as house of Vinay. He was lying over the ground. He was lifted to his house and he was taken to police station. Before that Kailash had come, wife of Kailesh had also come. He had gone to inform. Cot was brought from the place of Kailash. In Para-15, he had



stated that about 15 persons have taken away the injured. In Para-16, he had stated that Mahesh remained in the Gali for half an hour. In Para-17, he had stated that no blood had fallen in the gali. Then had exhibited his signature over the fard-bayan. Then had denied that as he was not carrying good relation with the accused persons, on account thereof, he happens to be instrumental in getting the accused falsely implicated in this case.

16. From the evidence available on the record, it is evident that although there happens to be absence of the doctor while suggesting the informant, appellant had admitted presence of firearm injury over his person. So, it happens to be admission by way of suggestion. Furthermore, it is evident from the evidence of the witnesses that place of occurrence happens to be consistent. That being so, non-examination of doctor as well as I.O. is not at all found to be adverse to the prosecution case. It is also evident that PW-1, brother of informant remained unchallenged, who corroborated the evidence of the informant. Some sort of development has been perceived in the evidence of PW-2 under Paras-12, 15 and 16. PW-3 under Paras-18, 19, but that is only with regard to appellant Vibha Devi and is found further corroborated with the evidence of PW-7 under Para-10 and on that very score, appellant Vibha Devi is to avail the benefit of doubt, whereupon judgment of conviction and sentence recorded to the extent of her is hereby set aside. Appeal is allowed to



the extent of her interest.

17. Now, coming to status of appellant Vinay Mahto, first of all, the ingredients of Section 307 of the I.P.C. has to be seen. Section 307 of the I.P.C. attracts whenever there happens to be an action at the end of an accused with an intention that by such activity, he is going to cause murder or knowingly that his action will ultimately cost the life of the victim. For that purpose, Section has been bifurcated in two parts, first one suggests where action was completed, but without causing any kind of hurt while the later part deals with where hurt has been caused. Section 319 of the I.P.C. defines hurt. It never speaks with regard to nature of injury, may by an additional circumstance to judge the activity, intention, knowledge of the accused. Because of the fact that appellant had himself admitted presence of firearm injury irrespective of non-examination of doctor. The inconsistency amongst the evidence of PWs relating to Vibha Devi, had already been properly dealt with acquitting her, but the same is not at all found of any help to the appellant Vinay Mahto as apart from proper identification as sole assailant, P.O. is also found duly substantiated. Furthermore, the evidence of injured is not at all found shaded. Apart from this, Section 134 of the Evidence Act did not attract number to be relevant one. Furthermore, it is also evident that pistol happens to be a dangerous weapon and further, there was apparent motive for commission of the occurrence, in spite of the fact



that single shot was fired.

18. That being so, the judgment of conviction and sentence recorded against the appellant Vinay Mahto sans merit and is accordingly, dismissed. He is under custody, which he will remain till saturation of the sentence.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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