

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.1488 of 2017

Arising Out of PS.Case No. -67 Year- 2011 Thana -SALKHUA District- SAHARSA

Santosh Yadav @ Santosh Kr. Yadav, Son of Dashrath Yadav,
Resident of Village-Mundichak, P.S. Salkhua, District Saharsa.

.... **Appellant/s**

Versus

The State of Bihar

.... **Respondent/s**

Appearance:

For the Appellant/s : Mr. Praveen Kumar Agrawal, Adv.

For the State : Mr. S.A. Ahmad, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 29-05-2018

Appellant, Santosh Yadav @ Santosh Kr. Yadav has been found guilty for an offence punishable under Section 307/34 IPC and sentenced to undergo R.I for 8 years as well as TO pay fine appertaining to Rs.8,000/- in default thereof, to undergo S.I for 3 months, additionally, under Section 333 of the IPC and sentenced to undergo R.I for 7 years as well as to pay fine appertaining to Rs. 5,000 in default thereof to undergo S.I for 2 month, additionally under Section 27 (1) of the arms Act and sentenced to undergo R.I for 5 years as well as to pay fine appertaining to Rs.3,000/- and in default thereof, to undergo S.I for 1 month, additionally, with a further direction to run the sentences concurrently vide judgment of conviction dated 25.3.2017 and order of sentence dated 28.3.2017 passed by 1st Additional Sessions Judge, Saharsa in Sessions Trial No.253 of 2011.

2. PW-1, A.S.I (Training), Saroj Kumar who was engaged in election duty and was deputed at Dinesh Chandra Inter College, Simri, Bakhtiarpur where counting was going on, gave his fard-



beyan on 23.5.2011 at about 5.00 P.M, over Salkhua Simri, Bakhtiarpur main road in an injured condition before the Officer-in-charge, Salkhua P.S disclosing therein that on the same day at about 4.00 P.M while he was in a way to Salkhua P.S. on a motorcycle and as soon as was proceeding ahead towards Matha Chowk one motorcycle being ridden by two persons came from behind, overtook and during course thereof, one of the occupants fired from behind causing injury over upper part of his shoulder. Just after receiving the injury, he stopped his motorcycle and then took out his service revolver and shot at miscreants who were ahead of him and were preparing to take another chance. On firing, they escaped. He had not identified them but, claimed to identify them. He had further shown the description of physical feature of the assailant as well as his associates who was driving the vehicle. He had not seen the registration no. of the motorcycle at the time of occurrence. The road was lonely.

3. After registration of Salkhua P.S Case No. 67/2011 investigation was taken up and as it appears from the LC record, appellant was apprehended in another case on account of recovery of loaded firearm as well stolen motorcycle and has been remanded in this case in the background of inculpatory extra judicial confessional statement allegedly made during course of apprehension whereupon charge-sheet had been submitted against him and that happens to be reason behind conduction of trial meeting with the ultimate result, subject matter of instant appeal.

4. 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. However, neither ocular nor documentary evidence has been adduced in defence.

5. In order to substantiate its case prosecution had examined altogether six PWs who are PW.1 informant, Saroj Kumar, PW.2-Dr. Kishore Kumar, PW. 3-Bashudeo Yadav, PW.4- Anil Kumar Yadav, PW.5- Rajendra Yadav and PW.6- Rabindra Yadav. Side by side, had also exhibited, Ext.1- fard-beyan, Ext.2- injury report, Ext.3-Formal FIR, Ext.4- inculpatory extra judicial confessional statement of the appellant. As stated above, nothing has been adduced in defence.

6. Coming to the materials available on the record, it is evident that PW.3, PW.5, shown their status to be hearsay witness without disclosing the source through which they came to know about assailant of Darogaji to be Santosh Yadav, son of Binesdeshwari Yadav and Santosh Yadav, son of Dashrath Yadav. That being so, their evidence became in admissible in the eye of law. More particularly on account of non-satisfaction of the criteria having prescribed under Section 6 of the Evidence Act. PW-4 is the witness who disowned himself to be an eye-witness to an occurrence and that being so, was declared hostile. Even during course of cross-examination, prosecution could not be able to procure relevant material.

7. PW-2 is the doctor who had examined the injured PW-1 on 23.5.2011 and found the following:-

Lacerated wound 1 ½ x ½ x muscle deep, margin inverted burn over left scapular area. Age within 6



hours caused by firearm. Nature grievous.

During cross-examination, it is evident that defence could not be able to challenge with regard to finding relating to the injury having been sustained by the injured.

8. Before coming to evidence of PW-1, injured it looks desirable to see the evidence of PW-6, the I.O. PW-6 had deposed that after recording fard-beyan of PW-1, Saroj, instituted a case and then, thereafter, took up investigation. He had visited the place of occurrence and accordingly detailed the road in between Mubarakpur to Mathachowk. Recorded statement of the witnesses, further statement of informant. Then had asserted that on the basis of inculpatory extra judicial confessional statement of Santosh Yadav who was apprehended on account of carrying unlicensed firearm as well as stolen motorcycle while his associates managed to escape, got him remanded in this case. He handed over charge on account of having been transferred. Also exhibited inculpatory extra judicial confessional statement of the accused/appellant. During cross-examination he had stated that FIR was registered against unknown. He had not arrested Santosh Yadav. He, did not put him on TI Parade. In para-3, he had further admitted that while Santosh Yadav was at Thana hazat, informant had seen him and then, disclosed that this accused happens to be responsible for causing injury upon him and on the basis thereof, appellant has been remanded in this case.

9. In the aforesaid background, now the evidence of PW-1, injured/informant has to be taken into consideration. He had deposed that on 23.5.2011 at about 4.50 P.M while he was in a



way to Salkhua Police Station from Bakhtiarpur where counting was going on and as soon as crossed Mubarakpur village, one motorcycle being ridden by two persons came from behind then, one of the occupant fired from behind and causing injury over his shoulder. He became injured. He parked the motorcycle and then fired whereupon, both the miscreants fled away. He telephonically informed Officer-in-charge to come, who recorded his fard-beyan, sent him to Saharsa hospital where he was treated. He had also claimed to identify the assailants and accordingly, identified the appellant in dock and further disclosed that he is the person who had shot at. During cross-examination at para-3, he had stated that firing was made from behind. He is unable to say the distance from which firing was made. After sustaining injury he parked motorcycle. After sustaining injury, he twisted his neck to see the assailants till then accused persons came forward and on account thereof, he inferred that these persons were the only assailants. No repeated attempt was taken up by the miscreants. In Para-4, he had stated that both the persons were armed with firearm. Only one round of firing was made upon him. He had also fired. Officer-in-charge came after 5-7 minutes and then there happens to be cross-examination relating to the subsequent activity.

10. After having parallel scrutiny of the evidence of PW-1 as well as PW-6, it is apparent that presence of appellant has been on account of identification by the PW-1 while appellant was inside Thana hazat though had not claimed by the informant PW.1. Such source of identification is not recognizable in the eye of law. Rather, it speaks a lot as is from influence from Ext.2 which is not



admissible in the eye of law, so far this particular case is concerned. As, the so alleged seized firearm has not been tested to find out that the cartridge which was recovered from the wound of the injured PW-1 was fired from the said arm. Apart from this, from the evidence of PW-1, it is evident that he was not at all in a position to identify his assailant and further in the background of the fact that he was not perceiving since before that he was going to be assaulted and so was very much alert, and further as per Para-3 of his cross-examination, he had himself admitted that as at the time of occurrence only this motorcycle had crossed so, he inferred that the occupants thereof happens to be his assailant. In the aforesaid background as well as in the background of activity having taken up by the prosecution as is evident from PW-6, I.O the conviction and sentence recorded by the learned lower court is hereby set aside. Appeal is allowed. Appellant is under custody, hence is directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	01.06.2018
Transmission Date	01.06.2018

