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NIRMAL SINGH AND ANR.

v.

STATE OF BIHAR

NOVEMBER 17, 2004

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[B.P. SINGH AND ARUN KUMAR, JJ.]

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*Penal Code, 1860/Arms Act, 1959—Section 302/Section 27—Prosecution under—Death caused by gun shot by one accused at the exhortation of another accused—Two other accused accompanying—Accused exhorting also armed with firearm—Prosecution case supported by eyewitnesses and medical evidence—Some discrepancies in the case—Conviction by Courts below of the accused who shot and who exhorted—Acquittal of the other two accused—In appeal, held : Conviction of accused who shot is justified as the case is supported by the version of eye-witnesses and medical evidence—Contradictions are not significant so as to doubt the prosecution case—However, in the facts of the case, appellant exhorting is acquitted by extending benefit of doubt by way of abundant caution.*

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Appellants-accused alongwith 2 others were alleged to have caused death of one person. According to prosecution appellants-accused and one of the two accused, armed with country made pistol and one accused armed with lathi had gone to the house of the deceased. Appellant-accused 'N' had shot at him at the exhortation of appellant-accused 'R'. The relatives of the deceased were eyewitnesses to the incident. PW-11, uncle of the deceased went to the police station to lodge FIR but the same could not be reported. Names of the accused were not mentioned either in the story narrated to the constable by PW-11 nor in the Inquest Report. Investigating Officer after arriving at the place of incident, recorded statement of PW-8 and sent it to Police Station for drawing up formal FIR. In report of Post Mortem Examination incised wound caused by sharp cutting weapon was found. Second Post Mortem Examination was directed and the same was conducted by a Board of Doctors. The Board could not give any definite opinion about the injury and recommended detailed investigation. In the further post mortem examination in Department of Forensic Medicines and Toxicology, a bullet was found in the 5th Lumbar Vertebra of the dead body. Version of the eyewitnesses was in consistence with the FIR. Trial Court relying

on the version of eye-witnesses and the medical evidence, convicted the appellants-accused while acquitted the other two accused. High Court affirmed the order of the trial Court.

In appeal to this Court appellants contended that non-mention of name of the accused in the earliest report by PW-11 to the constable at Police Station indicated that PW-11 did not know the assailants; that Post Mortem Examination Report of the doctor who stated that injury was caused by sharp cutting weapon created serious doubt about the prosecution case; that prosecution had not examined any forensic expert to prove that the injury was caused by a bullet; that prosecution failed to prove that the alleged place of incident was the real place as no blood stained earth was seized from that place; that as per the inquest report intestines were protruding and accordingly there must have been some bleeding; and that the case of appellant 'R' being more or less on the same footing as that of the acquitted accused could not have been convicted because the allegation of exhorting the other appellant to shoot, though himself armed with a pistol is highly unlikely.

Dismissing the appeal of appellant 'N' and allowing that of appellant 'R', the Court

**HELD :** 1.1. Courts below have not erred in convicting the appellant 'N' under Section 302 IPC and Section 27 of the Arms Act. The medical evidence supports the case of the prosecution that the deceased suffered a fire-arm injury and the evidence which conclusively proved this fact was the recovery of a bullet from the body of the deceased, which had got embedded in the 5th Lumber Vertebra and therefore; could not be detected by the medical team in the hospital. The report of the Board of Doctors who conducted the Post Mortem Examination is not inconsistent with the Report of PW-9 who conducted the Post Mortem in the Department of Forensic Medicines and Toxicology. They in fact, supplement each other. [151-C; 149-D, E]

1.2. The question as to whether the bullet was discharged from any of the weapons carried by the appellants is of no significance in the facts of the instant case since the weapons allegedly carried by the appellants were neither recovered nor seized. There was, therefore, no material on

**A** the basis of which the ballistic expert could have given his opinion as to whether the bullet had been discharged from the weapons carried by the appellants. [149-H; 150-A, B]

**B** 1.3. Though no blood stained earth was seized from the place of occurrence but there is also evidence of several witnesses including the Investigation Officer that no blood had fallen on the earth. Eye-witnesses explained that on receiving the injury the deceased pressed his wound with his hands whereafter a piece of cloth was tied around the wound which soaked the blood which may have come out. There was, therefore, **C** no likelihood of the earth getting blood stained. It may be that the intestines were protruding as described in the inquest report. But in view of the explanation offered by the prosecution witnesses it appears probable that no blood had fallen on the ground at the place of occurrence. In any event, if some blood had fallen at the place of occurrence which the Investigating Officer failed to notice, that by itself will not be fatal **D** to the case of the prosecution. Moreover, the investigation in this case has been most unsatisfactory and the Investigating Officer was not conscious of his responsibilities. [150-C, D, E]

**E** 1.4. Though the eye-witnesses are related to each other but that is to be expected since the occurrence took place in the dalan of the house of the deceased. The evidence of the eye-witnesses does not suffer from any infirmity, and appears to be convicting. No significant contradiction or infirmity has been brought to the notice of the Court. In the **F** circumstances, the case of the prosecution cannot be discarded only on account of some infirmities. There appears to be no reason why so many eye-witnesses should falsely implicate the appellants, and there is in fact, nothing on record to suggest that the witnesses had any reason to falsely implicate them. [150-H; 151-A, B]

**G** 2. The allegation against appellant 'R' is that he exhorted PW-1 to fire at the deceased. It is not the case of prosecution that though carrying a weapon, he fired at anyone. Moreover, if all the four accused had come with country made pistols, there was no need for appellant 'R' to exhort his companion to fire at the deceased. Without casting any reflection on the evidence of the eye-witnesses, and only by way of abundant caution, **H** benefit of doubt is extended to appellant 'R'. [151-D, E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 170-171 of 2004. A

From the Judgment and Order dated 5.9.2003 of the Patna High Court in Crl. A. Nos. 420 and 489 of 1999.

M.N. Rao, Santosh Kumar, Chandra Kant Nayak, Avinash Kumar and Atishi Dipankar for the Appellants. B

Saket Singh, Nitesh and B.B. Singh for the Respondent.

The Judgment of the Court was delivered by C

**B.P. SINGH, J. :** The appeals by special leave are directed against the common judgment and order of the High Court of Judicature at Patna dated 5th September, 2003 in Criminal Appeal Nos. 420 and 189 of 1999. The High Court by its impugned judgment and order affirmed the judgment and order of the 6th Addl. District & Sessions Judge, Chapra dated 13.9.1999 in Sessions Trial No. 136/98 whereby he had sentenced appellant, Nirmal Singh to undergo life imprisonment under Section 302 IPC and to undergo 5 years rigorous imprisonment under Section 27 of the Arms Act. Appellant, Ranjan Singh was sentenced to undergo life imprisonment under Section 302 read with Section 34 IPC and to undergo 5 years rigorous imprisonment under Section 27 of the Arms Act. D

Apart from the appellants, two others were put up for trial before the learned Addl. District & Sessions Judge, Chapra, but they have been acquitted by the trial court and no appeal was preferred against their acquittal. E

The case of the prosecution is that on 14th March, 1997 at about 8.00 p.m. in village Kudar Bagha, 4 persons including the appellants herein came near the house of the deceased. When the deceased emerged from its Angan and came to the dalan, appellant Ranjan Singh exhorted his companion, appellant Nirmal Singh to shoot the deceased, as a result of which appellant Nirmal Singh fired at the deceased and shot him in the abdomen. The case of the prosecution is that apart from the appellants, the other two were also armed, one with a country made pistol and the other with a lathi. Further case of the prosecution is that after the deceased was injured, the members of the family, who are the witnesses, chased them and while retreating all F

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A the three accused who were armed with country made pistols, fired at them but no one was injured. The assailants made good their escape. According to the prosecution, the motive for the occurrence was that 3 days before the incident deceased was returning to his house in village Kudar Bagha and while he was passing in front of the house of the appellant Nirmal Singh, the bundle carried by him on his head touched the roof of the house of appellant Nirmal Singh, which caused a slight damage to the tiles of his roof. This gave rise to an altercation and abuses were exchanged between the parties. It was on account of this incident that appellant Nirmal Singh bore a grudge against the deceased and committed the offence as alleged.

C The case of the prosecution is that after the incident PW-11 Nag Narain Singh, uncle of the deceased went on a bicycle to police station Garkha, at a distance of 7 kms. from the village/place of occurrence. Unfortunately, the station house officer or any other officer was not present in the police station and he told the constable and the chowkidar present there that he had come to lodge a report regarding the murder of his nephew. From his deposition, it appears that he narrated the incident to them but he did not name the accused. He was, however, told by the constable that since the sub-inspector was not present in the police station, no report could be recorded and that the sub-inspector will be informed when he returned to the police station and that he will thereafter take further steps in the matter. On being assured that the sub-inspector of police will come to the village and take further steps, PW-11 returned to his village and waited for the police party to arrive.

F According to Gopal Mishra, PW-10, the investigating officer when he came to the police station at about 1.00 a.m. he was informed by a constable that a murder had taken place in village Kudar Bagha and, therefore, after recording the station diary entry, he proceeded to village Kudar Bagha. There is some contradiction in his testimony as to whether he had proceeded to village Kudar Bagha on the basis of rumours, or whether the constable in the police station had informed him about the occurrence. The station diary entry does not support the version that he was informed by the constable. From the said entry, it appears that on the basis of rumours, he proceeded to the place of occurrence. This was at about 1.00 A.M. on 15th March, 1997. According to PW-10 when he was about 2 Kms. away from the village Kudar Bagha, he was PW-8 who on seeing the police party coming to the village also returned to the village. It is the case of the

prosecution that the fardbeyan of PW-8 was recorded at 1.30 A.M. and the same was sent to the police station for drawing up a formal first information report and registration of a case. It is further stated that formal first information report was registered at 5.00 A.M. The special report was sent to the Chief Judicial Magistrate, Chapra but the endorsement on the first information report shows that it was received on 15th March, 1997 though no time has been mentioned. It is also not in dispute that the police station is at a distance of about 19 kms. from Chapra.

According to PW-10 he held inquest over the dead body of the deceased at 3.00 A.M. PWs 1 and 3 are the witnesses to the inquest report. The inquest report does mention that death of the deceased has been caused by a shot discharged from country made pistol, though the names of the assailants are not mentioned in the inquest report.

The dead body of the deceased was sent for post mortem examination which was first conducted by Dr. Gupta, PW-13 on 15th March, 1997 at 12.00 noon. Dr. Gupta found an incised penetrating wound on the right side of the abdomen of the deceased which according to him had been caused by a sharp cutting weapon. It appears that the informant was aggrieved by the finding of the doctor PW 13 who conducted the post mortem examination and complained to the Chief Judicial Magistrate that the post mortem had not been fairly conducted. On the orders of the Chief Judicial Magistrate, a second post mortem examination was conducted by a board of 5 doctors which included Dr. Ganesh Mahto, PW-12, the civil surgeon. The second post mortem examination was conducted on 17th March, 1997 at 5.30 P.M. The finding of the medical board was that there was an oval wound on the right lumber of the area of abdomen anteriorly, size about 2"x(1½)" abdominal cavity deep. The margins were eaten away by the maggots. There was no evidence of blackening or tattooing on the abdominal wall around the wound or anywhere else on the body. The internal organs were in the stage of decomposition and partly eaten away by maggots. All the viscera of abdominal and chest cavity were palpated and dissected for search of metallic foreign body, but despite vigorous search no metallic foreign body could be found anywhere in the viscera or in the abdominal and chest cavity. The board could not give any definite opinion relating to injury on the body, but it recommended further detailed investigation and for that purpose recommended that the body be sent to the Department of Forensic Medicines and Toxicology, Patna Medical College Hospital, Patna. Accordingly, the

A body was sent to the Patna Medical College Hospital and on 20th March, 1997 and another post mortem was done by Dr. A.K. Singh, Tutor Department of Forensic Medicines and Toxicology, Patna Medical College Hospital, Patna. In his report he recorded as follows :

B “Erosion of the anterior surface of the 5th vertebra was noticed of ½" diameter. In view of the advise of the medical Board (C.S. Chapra) for Skiagram X-ray of Chest and abdomen, A.P. View was suggested which was done by the Radiology Dept. of P.M.H.C. Patna by a Portable X-ray machine, in the Mortuary. The report received from the radiology Dept. P.M.H.C. with two plates bearing C No. P.M./365 dt. 20.3.1997 which read as such—chest A.P. — No evidence of radio opaque shadow seen. N.V. Longitudunal foreign body shadow seen in left side. Abdomen with pelvis view A.P. A radio opeque shadow (F.B.) seen in L/5 level, left side, report was signed by Dr. (Mrs.) Aruna Jaiswal, Associate Professor, Dept, of D Radiology, P.M.H.C. Patna.

(2) The 5th Lumbar vertebra was opened and examined and a bullet was recovered from the body of vertebra which was kept in a glass vial properly levelled, sealed and handed over to constable no. 233 Dhaneshwar Yadav, P.S. Garkha with instruction to hand that over to the I.O. Immediately.” E

At the trial, the prosecution relied upon the evidence of the eye witnesses and other witnesses apart from the doctors who conducted the post mortem examinations and the police officers who conducted the investigation. The F witnesses examined by the prosecution are PWs 1, 3, 8 & 11 and PWs 4 & 5. PWs 1, 8 & 11 are the uncles of the deceased while PW-3 is a cousin of the deceased. PWs 4 & 5 are the aunts of the deceased being the wives of PWs 11 and 8 respectively. PW-6 the mother of the deceased does not claim to be an eye witness. It cannot be discharged that PWs 1, 3, 4, 5, 8 & 11 have consistently deposed in support of the case of the prosecution G and there is really no contradiction or infirmity in their evidence worth noticing. However, it was contended before us by counsel for the appellants that the entire case is a concoction. The deceased was murdered at some other place at night and the occurrence was not witnessed by any one. Only later with the help of the police, a false case was concocted in which the H appellants and two others were falsely implicated. It was also submitted that

the trial court acquitted two of the accused whose cases stood more or less on the same footing as that of appellant Ranjan Singh, inasmuch as though armed with a pistol, he had not fired at the deceased. The only charge against him is that he incited appellant Nirmal Singh to fire at the deceased, which according to learned counsel for the appellants was highly unlikely and only calculated to implicate appellant Nirmal Singh.

The first submission urged by the counsel for the appellants is that though PW-11, an uncle of the deceased immediately after the occurrence went to the police station, he claims to have returned without lodging a report on the specious plea that his report was not recorded by the constable present in the police station and instead he was assured that the police officer will come to the village and record his statement. According to him, the earliest report never saw the light of the day. He also highlighted the statement of PW-11 in the course of his deposition that though he had narrated the incident to the constable at the police station, he had not named anyone. This indicated that the names of the assailants were not known to PW-11 at the time when he had come to the police station i.e. at about 9.00 P.M. Obviously, therefore, he submitted, PW-11 was not an eye-witnesses.

Learned counsel for the State, however, explained that PW-11 is a truthful witness who has given a straight forward version of what actually happened. He had rushed to the police station but since the constable did not record his report and stated that only the sub-inspector of police, who was not in the police station, will record the report after he returns, he came back. He submitted that there is nothing to doubt the statement of PW-11.

We have perused the evidence on record and the least we can say is that the evidence in this regard is not very satisfactory. One fails to understand why the first information report could not be recorded by the constable who was the only police personnel present in the police station at that time. But there appears to be another serious infirmity. The police station diary discloses that PW-10 was present at the police station at 9.00 P.M. A suspicion, therefore, arises whether deliberately the report was not recorded, and the prosecution waited for the police to come to the place of occurrence and thereafter record a report in writing. PW-10 has offered no explanation on this aspect of the matter, having regard to the documentary evidence produced by the prosecution itself. He, however, states that he returned to the police station at 1.00 A.M. Thereafter, it is not clear as to whether he

A recorded the station diary entry on the basis of rumours which he had heard, or on the basis of statement made to him by the police constable in the police station to the effect that a murder had taken place in village Kudar Bagha. In the course of his deposition at one place he states that he recorded the station diary entry on the basis of rumours, whereas at another place he states that the matter was reported to him by the police constable in the police station. The diary entry no doubt supports the version that the report was recorded on the basis of rumours. Counsel submitted that this was only an effort on the part of the investigating officer to bring his case in line with the deposition of PW-11 who had stated that he had informed the police constable about the occurrence and, therefore, it was the police constable who had informed the investigating officer PW-10 about the occurrence.

We shall keep these facts in the background while we consider the other evidence on record.

D The first information report fully corroborates PW-8 the informant, who is also an eye witnesses. It is consistent with the version given by PWs 1, 4, 5, 8 & 11. The question is whether consistent evidence of so many eye witnesses must be discarded in the light of the suspicious circumstances pointed out by learned counsel for the appellants.

E We have already dealt with the earliest information alleged to have given to the police by PW-11. There is another aspect of the matter namely, the medical evidence on record which according to counsel for the appellants creates a serious doubt about the truthfulness of the prosecution case. According to him on the 15th March, 1997 itself at 12.00 noon, Dr. Gupta, PW-13 conducted the first post mortem examination on the dead body of the deceased. He has stated in clear terms that the injury on the abdomen was caused by a sharp cutting weapon, meaning thereby that the deceased had not suffered a fire-arm injury. No doubt this does support the case of the defence, but we cannot ignore the other evidence on record. The informant it appears, made a grievance before the Chief Judicial Magistrate that the post mortem examination was not fairly conducted and the report had been procured. The Chief Judicial Magistrate on being satisfied about the allegations directed a further post mortem examination to be held, which was to be conducted by a team of doctors. Accordingly, a team of 5 doctors including the civil surgeon Dr. Ganesh Mahto, PW-12 conducted the second post mortem examination on 17th March, 1997 at 5.30 p.m. The finding of

the post mortem board has been reproduced earlier in this judgment, from which it appears that though they did not find any evidence of gun shot injury, no definite opinion could be given on this aspect of the matter. The board recommended that further investigation such as scanning etc. ought to be done in the Department of Forensic Medicines and Toxicology, Patna Medical College Hospital, Patna. It was pursuant to the recommendation of the board of doctors that the body was sent to the Patna Medical College Hospital, Patna. From the evidence of PW-9, Dr. R.N. Kumar, it appears that X-ray reports disclosed the presence of a metallic substance and pursuant thereto on further probing a bullet was found on opening of 5th Lumbar vertebra. In the opinion of PW-9, the weapon used was a fire-arm and the cause of death was shock and haemorrhage. Obviously, this opinion is based on the finding that a bullet was found embedded in the 5th Lumbar vertebra of the dead body of the deceased.

It will thus be seen that the medical evidence does support the case of the prosecution the deceased suffered a fire-arm injury and the evidence which conclusively proved this fact was the recovery of a bullet from the body of the deceased, which had got embedded in the 5th Lumbar vertebra and therefore, could not be detected by the medical team in the hospital at Chapra. With the aid of modern equipment the bullet was found in the body of the deceased.

The report of the board of doctors who conducted the post mortem examination is not inconsistent with the report of PW-9 who conducted the post mortem in the Department of Forensic medicines and Toxicology, Patna Medical College Hospital, Patna. They in fact, supplement each other. The board of doctors had a suspicion that some thing may be found on further detailed examination, and that suspicion was found to be justified by the recovery of a bullet which was not visible to the naked eye since it was embedded in the 5th lumbar vertebra. We are, therefore, satisfied that the medical evidence on record does support the case of the prosecution.

It was then submitted that the prosecution has not examined any forensic expert to prove that the injury was caused by a bullet or that the bullet could have been fired from any of the weapons allegedly carried by the appellants and their companions. The fact that a bullet was found embedded in he vertebra of the deceased is by itself conclusive of the fact that the deceased had suffered a fire-arm injury. The question as to whether

- A the said bullet was discharged from any of the weapons carried by the appellants is of no significance in the facts of the instant case since the weapons allegedly carried by the appellants were neither recorded nor seized. There was, therefore, no material on the basis of which the ballistic expert could have given his opinion as to whether the bullet had been discharged from the weapons carried by the appellants.
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- Counsel then submitted that the prosecution has failed to prove that the dalan of the deceased was the real place of occurrence. This submission is based on the fact that no blood stained earth was seized from the place of occurrence. It is true that no blood stained earth was seized from the place of occurrence but there is also evidence of several witnesses including the investigating officer that no blood had fallen on the earth. Eye witnesses explained that on receiving the injury the deceased pressed his wound with his hands whereafter a piece of cloth was tied around the wound which soaked the blood which may have come out. There was, therefore, no likelihood of the earth getting blood stained. Counsel for the appellants submitted that the intestines were protruding as described in the inquest report, and in such a situation there must have been some bleeding. That may be so, but in view of the explanation offered by the prosecution witnesses it appears probable that no blood had fallen on the ground at the place of occurrence. In any event, if some blood had fallen at the place of occurrence which the investigating officer failed to notice, that by itself will not be fatal to the case of the prosecution. We must observe that the investigation in this case has been most unsatisfactory and the investigating officer was not conscious of his responsibilities. The blood stained piece of cloth which was wrapped around the wound of the deceased appears to have been seized by the investigating officer, but when questioned as to why it was not sent for chemical examination, he answered that he had hung that piece of cloth on a guava tree in the police station. The statement is comical but discloses the utter non-seriousness with which the investigation was conducted. We had expected better from the investigating officer who was investigating a serious case of murder. However, for this reason we will not reject the case of the prosecution entirely.
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- With these facts in the background, we have to consider whether the ocular testimony of Pws. 1, 3, 4, 5, 6, 8 & 11 should be discarded. It is no doubt true that the eye witnesses are related to each other but that is to be expected since the occurrence took place in the dalan of the house of the
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deceased. The evidence of the eye witnesses does not suffer from any infirmity, and appears to be convicting. No significant contradiction or infirmity has been brought to our notice. A

In these circumstances, we do not feel persuaded to discard the case of the prosecution only on account of some infirmities which we have noticed earlier. There appears to be no reason why so many eye witnesses should falsely implicate the appellants, and there is in fact, nothing on record to suggest that the witnesses had any reason to falsely implicate them. B

We are, therefore, satisfied that the courts below have not erred in convicting the appellant Nirmal Singh under Section 302 IPC and Section 27 of the Arms Act. C

So far as the case of appellant Ranjan Singh is concerned, the allegation against him is that he exhorted PW-1 to fire at the deceased. It is not the case of the prosecution that though carrying a weapon, he fired at anyone. Moreover, if all the four accused had come determined to kill the deceased and three of them were armed with country made pistols, there was no need for appellant Ranjan Singh to exhort his companion to fire at the deceased. Without casting any reflection on the evidence of the eye witnesses, and only by way of abundant caution, we are inclined to extend the benefit of doubt to appellant Ranjan Singh, @ Ranjan Singh appellant in Criminal Appeal No. 171/2004. D E

We are informed that appellant Ranjan Singh is in custody. He shall be released forthwith unless required in connection with any other case. His appeal is accordingly allowed. F

The appeal preferred by the appellant Nirmal Singh is dismissed.

K.K.T.

Appeal dismissed.