

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.478 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- BUXAR

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Ram Suresh Tiwari son fo Late Sheo Nandan Tiwari, resident of village Karsar,
P.S. Nawanagar, District- Buxar.

.... Appellant

Versus

State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Rajesh Kumar Sharma, Amicus Curiae

For the Respondent : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 30-03-2018

Appellant Ram Suresh Tiwari has been convicted under Section 304 (part II) of the Indian Penal Code by judgment and order dated 28.8.2003 passed by Sri Rajendra Prasad Rai, Presiding Officer, Addl. Court -1, Buxar in Sessions Trial No.738 of 1989 and sentenced to undergo R.I. for ten years and by the same judgment other accused have been acquitted from the charges levelled against them.

2. The prosecution case in short is that on the day of occurrence while the informant along with some others brought injured Munmun Tiwari under unconscious position on a cot at Sonbarsa Outpost and made statement that on the day at about 5.30 P.M. deceased and the informant were talking in front of the house at the same time, Ram Suresh Tiwari came and said that he has brought



a pistol on this Munmun Tiwari asked to show the pistol and Ram Suresh Tiwari took out the pistol and shown it to the deceased and also displayed for opening and locking the pistol which fired and hit Munmun Tiwari in the right side of the chest and the deceased fell down and accused Ram Suresh Tiwari fled away but on *hulla* made by informant, villagers and relatives came.

3. On the basis of the aforesaid statement, Nawanagar P.S.Case No.2/86 has been registered. It further appears from perusal of the record that a protest petition has been filed on behalf of the prosecution and on protest petition, the informant has also been made accused in this case. The case was ultimately committed to the court of sessions which ultimately came to the file of Sri Rajendra Prasad Rai, P.O. Addl. Court -1, Buxar for trial and disposal.

4. During trial altogether four witnesses have been examined, they are Asharafi Devi mother of the injured, P.W.2 Srikant Dubey appears to be hearsay witness, P.W.3 Chunmun Tiwari brother of the injured and P.W.4 Nagendra Narain Lal Advocate Clerk who has proved the Exts. 1 to 5.

5. Besides the above oral evidence, following documents have been brought on record, they are Ext.1 formal FIR, Ext.2 fardbeyan, Ext.3 case diary, Ext.4 inquest report and Ext.5 postmortem report.



6. In this case neither the I.O. nor the Doctor has been examined and the postmortem report has been brought on the record by a formal witness.

7. Learned trial court, vide impugned judgment and order has come to a finding that prosecution has been able to prove the manner of occurrence beyond all shadow of doubts as alleged in the fardbeyan and also come to a conclusion that evidence on record prove that Ram Suresh Tiwari caused death of Munmun Tiwari by accidental fire from his country-made pistol, however, he has convicted under Section 304(part II) of the IPC and sentenced him as stated above.

8. Learned Amicus Curiae assailed the judgment and submitted that in this case there is no eye witness of the occurrence as evidence of P.W.2 shows that he is hearsay witness and so far P.Ws.1 to 4 are concerned, their evidence is self-contradictory and does not appear to be reliable and furthermore the I.O. and the Doctor have not been examined in this case. It is further submitted that at best even if the prosecution case as alleged in the FIR is believed, no case is made out under Section 304(part II) of the IPC as the appellant has no intention to kill and having no knowledge that such occurrence will be caused and the learned trial court has also come to a finding that he died due to accidental fire and in such a



situation at best it is a case under Section 304 A of the IPC or Section 323 and 325 of the IPC but not under Section 304 (Part II) of the IPC.

9. Learned counsel for the state has submitted that evidence of P.W.3 shows that he is eye witness of the occurrence and his evidence disclose that Krishna Murari Dubey co-accused had given a pistol to the appellant and appellant fired at the deceased causing injury and the thereafter he succumbed to the injuries and evidence of P.W.1 and 2 also supports that the deceased died due to injury suffered on the day and time of the occurrence and as such conviction does not suffer from any infirmities.

10. On perusal of the record, it appears that later on informant had also been made accused on the basis of the petition filed by the prosecution, further it appears that P.W.2 heard sound of firing and he came there and saw the deceased in the injured condition, having received gun short injuries and so far P.W.1 is concerned, who is mother of the informant, she has stated that on firing she came and saw his son in injured condition and the accused persons were fleeing away from the place of occurrence. Her evidence further shows that his son disclosed the name of Ram Suresh Tiwari as the assailant in this case, however, the learned Amicus Curiae has drawn attention towards the statement made in



para 9 of her evidence that she had stated before the Darogaji that deceased prior to his death has disclosed name of the assailants in this case. The I.O. has not been examined in this case to confront him with the statement of this witness in para 9 and as such adverse inference has to be drawn against the prosecution and accordingly, this witness does not consider to be eye witness of the occurrence. So far other witnesses is concerned, P.W. 3 who is brother of the deceased has stated that he was at his house, enjoying bonfire and at that time, he saw Krishna Murari Dubey with his brother and Krishna Murari Dubey gave a country-made pistol to appellant who fired on his brother due to which he received injuries. P.W.3 claims to be eye witness of the occurrence. Learned Amicus Curiae has drawn my attention towards para 2 of his evidence wherein his attention has been drawn towards his statement made before the police and that shows that it is not correct to say that he deposed before the police and said that at the time of occurrence he was coming from the house of Hira Yadav and saw that his elder brother and Krishna Murari Dubey were talking with each other and Larpochan Kumar and one person else was standing and talking in the meantime appellant came and talked to his elder brother and fired on his brother and fled away towards his house and the learned Amicus Curiae tried to show that the evidence of the P.W.1 does not



appear to be reliable as it differs from contradiction from his earlier statement made before the Police.

11. Considering the discussions made above, his evidence discloses that he was at his *darwaza* whereas before the police he has stated that he was coming from the house of Hira and on way he saw the occurrence. Further submission of the Amicus Curiae is that evidence of P.W.1 discloses that she has reached the place of occurrence after sound but she has not named P.W.3 as the person who also reached there and in such view of the matter, evidence of P.W.3 also does not inspire confidence and does not appear to be trustworthy.

12. On close scrutiny of evidence of P.W.1, contention of the learned Amicus Curiae appears to be having same force in his argument as I find that P.W.1 in his entire evidence has not stated that P.W.3 was also present there.

13. However on consideration of the entire evidence, available on the record it appears that the witnesses are consistent on the point of Munmun Tiwari received injury on the day and time of occurrence and deceased succumbed to the injuries. However, earliest prosecution story is that while appellant was showing the gun to the deceased also displaying locking and opening of the pistol it fired and hit to the deceased.



14. Considering the aforesaid fact it does not appear to be a case where there was intention to cause death of the deceased or the appellant has any knowledge that such occurrence took place rather it appears to be a case of causing death due to rash and negligent act.

15. In case of *Sadhu Singh V. State of PEPSU* reported in AIR 1954 SC 271 in almost a similar facts considered this aspect of the matter and held as follows :-

“A, a mahant, went to the house of B who was having a drink party. B was respectful to A and was over-anxious to show all hospitality to him. B was anxious that the Mahant should not go away from his house without taking meals and spending the night with him, and seeing that he was going away, in all probability, B let go his gun without aiming it at the Mahant in order to prevent him from leaving his place by terrifying him to some extent. The shot hit A in chest and he died of the wound later on. The evidence of the eye witnesses and the first information report showed that the incident happened in a very short time and suddenly but the story that B took aim before firing at the Mahant....

Held that on the materials placed on the record it could not be held proved that B had any intention of firing at the Mahant. He seems to have pulled the trigger without aiming at the Mahant in a state of intoxication in order to see that by the gun fire the Mahant was prevented from leaving his place. It was a wholly rash and negligent act on B's part or at the worst was an act which would amount to manslaughter. It could not be held to constitute an offence of murder. B was, therefore, held guilty of an offence under Section 304A IPC.”

16. In the present case prosecution case does not show that



he fired rather it appears that it accidentally fired hitting the deceased and the learned trial court has also come by a finding as I have discussed above that Ram Suresh Tiwari caused death of Munmun Tiwari by accidental firing from his country-made pistol. In such a situation, it can not be said that the appellant was carrying any intention or having knowledge that act will be resulted into death of the deceased and at best as per the decision of the Hon'ble Apex Court it is punishable under Section 304A of the IPC.

17. In such view of the matter, conviction of the appellant is modified to conviction under Section 304A of the IPC.

18. Submission of the learned counsel for the appellant is that he has remained in custody for one year and six months and sufficiently may be punished. The occurrence is of the year, 1986 and as such lenient view may be taken and sentences may be reduced to the period already undergone.

19. Considering submissions and also the fact that the case is an old one and also submission is that he has remained in custody for 18 months, the sentences is reduced to the period already undergone in custody.

20. With the aforesaid modification in conviction and sentence, this appeal is disposed of.

21. The office is directed to hand over the first page and the



last page of the judgment to Sri Rajesh Kumar Sharma, Amicus Curiae.

(Vinod Kumar Sinha, J)

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AFR/NAFR	AFR
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