

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.18 of 2014**

Arising Out of PS. Case No.-34 Year-2010 Thana- MITHANPURA District- Muzaffarpur

Naresh Sahni Son Of Sita Ram Sahni Resident Of Village - Kanhauli (Mohan Sahni), P.S. - Mithanpura, District - Muzaffarpur.

... .. Appellant.

Versus

The State of Bihar

... .. Respondent.

Appearance :

For the Appellant	:	Ms. Archana Palkar Khopde, Amicus Curiae.
For the State	:	Ms. S.B.Verma, A.P.P.

CORAM: HONOURABLE MR. JUSTICE A. M. BADAR

and

HONOURABLE MR. JUSTICE SUNIL KUMAR PANWAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 26-04-2022

The appellant/convicted accused by this appeal is challenging the Judgment and Order dated 31.10.2013 and 02.11.2013 respectively passed by the learned 5th Additional Sessions Judge, Muzaffarpur, in Sessions Trial No.75 of 2011, thereby convicting him of the offences punishable under Section 302 of the Indian Penal Code as well as under Section 27 of the Arms Act and sentencing him to suffer imprisonment for life as well as directing him to pay fine of Rs.10000/- on the first count and sentencing him to suffer rigorous imprisonment for five years apart from payment of fine of Rs.5000/-on the second count. The default sentences are also awarded to him and it is



directed that the substantive sentences shall run concurrently. For the sake of convenience, the appellant shall be referred to in his original capacity as “an accused”.

2. Facts in brief leading to the prosecution of the accused can be summarized thus:

(a). According to the prosecution case, by using the firearms the accused has committed murder of Jitendra Kumar, son of Bishwanath Sahni, resident of village-Kanhauli Mohan Sahni Tola, Police Station-Mithanpura, District-Muzaffarpur, at about 03.00 P.M. of 28.02.2010. It is alleged by the prosecution that the accused, who is also resident of the same village, was assaulting to one Umesh Sahni, neighbour of the first informant Samudri Devi, who happens to be the mother of the deceased Jitendra Kumar. Looking that incident of assault, Jitendra Kumar tried to intervene and pacify the accused. However, the accused whipped out a pistol and fired a bullet which hit at the left eye of Jitendra Kumar. He fell down. He was then taken to the S.K.M.C. Hospital, Muzzafarpur, for treatment. From there, he was referred to Patna but while taking him to Patna, Jitendra Kumar succumbed to the injuries suffered by him.

(b). P.W.7 Samudri Devi, who happens to be the mother of Jitendra Kumar, lodged the F.I.R. of the subject crime at



about 08.00 P.M. of 28.02.2010 at S.K.M.C. Hospital, Muzaffarpur and that is how, this Crime No.34 of 2010 came to be registered against the accused at the Police Station-Mithanpura.

(c). After the death of Jitendra Kumar, inquest notes were prepared and the dead body was sent for post-mortem examination. Routine investigation followed and on completion thereof, the accused came to be chargesheeted.

(d). The learned trial court had framed the charge for the offences punishable under Section 302 of the Indian Penal Code as well as under Section 27 of the Arms Act. The accused pleaded not guilty and claimed to be tried.

(e). In order to bring home the guilt to the appellant/accused, the prosecution has examined in all nine witnesses. Sandhya Devi, aunt of the deceased, who claims to be an witness to the incident in question, is examined as P.W.1. Bishwanath Sahni, father of the deceased, is examined as P.W.2. He also claims to be an eye witness to the incident in question. Sita Devi, sister-in-law of the deceased, who also claims to be an eye witness, is examined as P.W.3. Surendra Kumar, a co-villager, is examined as P.W.4. Sugiya Devi, a co-villager, is examined as P.W.5 and she claims herself to be an eye witness



to the incident. Bhonu Kumar, a co-villager, who reached on the spot of the incident soon after the incident, is examined as P.W.6. First Informant Samudri Devi, mother of the deceased, who claims to be an eye witness to the incident, is examined as P.W.7. Raju Paswan, a co-villager, is examined as P.W.8. He is a hearsay witness. Rampadarth Ojha, Clerk of the Advocate, is examined as P.W.9, to prove the signature of Dr. Mumtaz Ahmad and his handwriting on the report of the Post-Mortem Examination of dead body of Jitendra Kumar.

(f). The defence of the accused was that of total denial. He, however, did not enter in the defence.

(g). After hearing the parties, the learned trial court was please to convict the appellant/accused and to sentence him, as indicated in the opening paragraph of this Judgment.

3. We heard Ms. Archana Palkar Khopde, the learned appointed Advocate, on behalf of the appellant/accused. She vehemently argued that the prosecution is resting its case only on the version of the interested witnesses, who are relatives of the deceased. Though evidence on record shows that many villagers were present at the scene of the occurrence, no disinterested witness has been examined by the prosecution. It is further argued that P.W.2 Bishwanath Sahni, who happens to be



father of the deceased, cannot be an eye witness to the incident as P.W.1 Sandhya Devi, has stated in her evidence that except a person named Shivbechan Sahni, no male member from the village was present at the spot of the incident. It is further argued that the prosecution has not brought on record seizure of blood stained clothes of the deceased as well as P.W.7 Samudri Devi nor the firearm was seized by the Investigating Officer. Evidence regarding the spot of the incident is also discrepant. Most important witness in the instant case can be Umesh but he is also not examined by the prosecution. The learned Advocate further argued that neither the doctor nor the Investigating Officer is examined by the prosecution and, therefore, the accused is entitled for benefit of doubt.

4. In the alternative, the learned Advocate for the appellant/accused argued that in the light of the Judgments in the matters of **Virsa Singh Vs. The State of Punjab, reported in AIR 1958 SC 465, Balkar Singh Vs. State of Uttarakhand, reported in 2009 (Suppl.) ACC 427, Kala Singh Vs. State of Punjab, reported in 2021(4) Crimes 119 (SC), State of U.P. Vs. Virendra Prasad, reported in AIR 2004 SC 1517 and Thangaiya Vs. State of Tamil Nadu, reported in AIR 2005 SC 1142**}, the case in hand cannot be a case for the offence



under Section 302 of the Indian Penal Code. The intention of the accused is not established from the evidence on record and the injury can be an accidental and unintended injury.

5. The learned A.P.P. supported the impugned Judgment and Order by contending that ocular evidence is consistent and cogent.

6. We have considered the submissions so advanced. We have also examined the records and proceedings.

7. The prosecution is resting its case on the eye witness account of the incident coming on record from the evidence of P.W.1 Sandhya Devi, P.W.2 Bishwanath Sahni, P.W.3 Sita Devi, P.W.5 Sugiya Devi and P.W.7 Samudri Devi. P.W.6 Bhonu Kumar is a witness who had seen the post-event happenings. Let us, therefore, examine version of these witnesses in order to ascertain whether they are witnesses of the truth and their evidence is trustworthy or not. No doubt, almost all of them are resident of the same village and are related to the deceased but by that itself it cannot be said that they are interested witnesses. Related witnesses and interested witnesses are two different concepts. Related witnesses can be the most natural witnesses to the incident if the incident took place in the vicinity of their residence and their presence on the scene of the occurrence is



normal and natural. However, a witness is interested when he is to gain some advantage by getting the accused prosecuted and convicted. A witness can be interested witness when he has desire of implicating the accused and is wishing for securing his conviction. Mere relationship with the victim of the crime in question cannot make relatives of such witness, interested witness. Similarly, as on behalf of the appellant, it was argued that only relatives are examined by the prosecution in the instant case and evidence of the independent witness is not forthcoming, it is apposite to put on record that in the matter of **Hem Raj and others Vs. State of Haryana reported in AIR 2005 SC 2110**, the Hon'ble Apex Court has held that non-examination of independent witnesses by itself may not give rise to adverse inference against the prosecution, but when the evidence of the alleged eye witnesses raises serious doubt on the point of their presence at the time of the actual occurrence, the unexplained omission to examine the independent witnesses would assume significance. It is, thus, clear that if the evidence of eye witnesses is satisfactory then non-examination of other witnesses, though available, is of no consequence. Let us, therefore, closely scrutinize the evidence of eye witnesses examined by the prosecution in order to ascertain whether their



testimony can be acted upon to uphold the conviction recorded by the learned trial court.

8. P.W.7 Samudri Devi is mother of the deceased Jitendra Kumar. She is the first informant of the instant case. It is in her evidence that at about 03.00 P.M. of the day of the incident, there was quarrel between one Umesh and accused Naresh. When her son Jitendra Kumar attempted to pacify that quarrel, accused Naresh fired a bullet which hit at left eye of Jitendra Kumar and Jitendra Kumar suffered a fall. He became unconscious. He was taken to the hospital from where he was referred to Patna but on the way at Hazipur, Jitendra Kumar died. His dead body was sent for post-mortem examination and after post-mortem examination, last rites were conducted. She further deposed that at the hospital, police came and recorded her statement. It was read over to her and then she put her thumb impression on it. Unfortunately, the prosecutor did not confront this witness with her F.I.R. and has failed to get it formally proved by exhibiting it. However, the fact remains that P.W.7 Samudri Devi has deposed about the incident in tune with the prosecution case. She withstood the cross-examination and reiterated that she was standing adjacent to her son when the bullet hit her son. In cross-examination, she stated that the



incident took place in front of house of Umesh. She also stated that she had given her blood stained clothes to the Investigating Officer. This is all, which is brought on record from her cross-examination. Her version about the incident in question is not shattered in the cross-examination. This is a case of one accused and one victim. P.W.7 Samudri Devi is the mother of the deceased. Ordinarily, she being a close relative of the deceased, it is hard to believe that she would screen the real culprit and would falsely implicate an innocent person. Such inference in a case relating to one victim and one accused can hardly be made.

9. P.W.5 is Sugiya Devi. She is aunt of the deceased. As per her version when she heard sound of commotion, she went near the house of Bishwanath and saw that there was quarrel between accused Naresh and one Umesh. She testified that then Jitendra Kumar intervened but accused Naresh Kumar took out a pistol and fired a bullet which hit left eye of Jitendra. As per her version, while taking medical treatment, Jitendra Kumar died. She stated in her cross-examination that the incident took place near the house of Bishwanath Sahni. She further stated that the incident was witnessed by P.W.2 Bishwanath, P.W.7 Samudri Devi, P.W.1 Sandhya Devi and



many other people from the village. In cross-examination, she further reiterated that when Jitendra tried to pacify the quarrel, a bullet was fired at him. Except this, there is nothing worth mentioning in the cross-examination of P.W.5 Sugiya Devi. As her version is not shaken in the cross-examination, merely because she is relative of the deceased, her evidence cannot be discarded. The same is cogent and credible. There is no foundation led by the defence to make out a plea of false implication. Thus, evidence of P.W.5 Sugiya Devi is corroborating the version of first informant/P.W.7 Samudri Devi.

10. P.W.1 Sandhya Devi is also aunt of the deceased residing in the same village. In fact, from her cross-examination, it is seen that house of the accused is just after three or four houses from her house. Her evidence is also to the effect that when deceased Jitendra attempted to testify the quarrel between the accused and Umesh, the accused fired a bullet at Jitendra which hit near eye of Jitendra and on the way to Patna, Jitendra Kumar died. In cross-examination, P.W.1 Sandhya Devi has stated that the accused is resident of the locality where she resides and she was present at the spot since before the incident of firing the bullet. She reiterated in cross-examination that the bullet was fired in her presence. From her cross-examination, it



is elicited that on the spot of the incident, more women were present and only male member present there was Shivbechan Sahni. With the aid of this admission, it was attempted to demonstrate that P.W.2 Bishwanath cannot be an eye witness to the incident. However, this stray statement on the cross-examination cannot be construed to mean that P.W.2 Bishwanath was not present on the scene of the occurrence. His testimony will have to be scrutinized independently. Normally, in such incident of murderous assault, a witness is over taken by events. P.W.1 Sandhya Devi might not have anticipated the murderous assault on her nephew and, as such, she might not be in a position to recall exactly as to who were present on the spot of the incident. So far as the mode and manner of the happening of the incident is concerned, evidence of P.W.1 Sandhya Devi is also congruous to the evidence of other eye witnesses discussed by us in the foregoing paragraphs of this Judgment.

11. P.W.3 Sita Devi is sister-in-law of the deceased Jitendra Kumar. It is in her evidence that in front of the house of Umesh, there was quarrel between Umesh and Naresh and when her brother-in-law Jitendra tried to intervene, accused Naresh fired a bullet at Jitendra and Jitendra died because of that injury. Cross-examination of this witness shows that she is



a natural witness to the incident because her house is situated at a distance of only one house from the spot of the incident. She has stated in cross-examination that at a short distance from the house of Umesh, the incident took place. This implies that the incident in question took place either in front of the house of Umesh or in the vicinity thereof. Thus, evidence of this witness regarding the spot of the incident is also in tune with the evidence of P.W.7 Samudri Devi.

12. P.W.2 Bishwanath Sahni is father of the deceased Jitendra Kumar. His evidence shows that his house is just adjacent to the house of Umesh Sahni. He stated that in front of the house of Umesh, there was quarrel between Umesh and Naresh and during the course of that quarrel, when his son Jitendra Kumar attempted to pacify the quarrel, accused Naresh fired a bullet from revolver at Jitendra Kumar and Jitendra Kumar suffered bullet wound at left eye. During the journey to Patna, Jitendra died. Cross-examination of this witness could not yield anything which would throw doubt on his evidence. He stated that he was on the spot of the incident when his son Jitendra was hit by the bullet. He further stated that many people from the village were present on the spot. This witness was not even suggested by the defence that he was not present



on the scene of the offence at the time of the incident. Hence, with the aid of stray admission of P.W.1 Sandhya Devi, presence of P.W.2 Bishwanath Sahni on the scene of the occurrence cannot be doubted.

13. P.W.6 Bhonu Kumar is a witness to the post-event happenings. His evidence shows that when he reached on the spot after hearing the shouts, he saw the accused holding a firearm and deceased Jitendra lying on the ground being hit by bullet at the eye.

14. P.W.8 Raju Paswan is a hearsay witness and his evidence is not of any assistance to the prosecution.

15. We have noted the evidence of eye witnesses so also that of P.W.6 Bhonu Kumar, who had seen the post-event happenings. Evidence of all witnesses of the prosecution is consistent and trustworthy. We could not find anything in their cross-examination which may render their evidence untrustworthy. We are unable to disbelieve them merely because they are relatives of the deceased. Close relationship of witness with the deceased is no ground to reject the evidence of such witness. [Refer- **Namdeo Vs. State of Maharashtra {AIR 2007 SC (supp) 100}**, **Vinay Kumar Vs. State of Bihar, reported in AIR 2008 SC 3276, Guli Chand and others Vs.**



State of Rajasthan {1974 (3) SCC 698}]. Similarly, evidence of the prosecution witnesses makes it clear that the incident in question did happen in the vicinity of the house of Umesh and there is nothing worth mentioning to doubt this spot occurrence. Non-examination of Umesh is of no consequence because we could not find anything doubtful in the version of the eye witnesses and more particularly in respect of the presence on the spot. Thus, evidence of these witnesses which we have discussed in the foregoing paragraphs of this Judgment makes it clear that there was quarrel between Umesh and the accused and when the deceased Jitendra attempted to pacify then the accused took out a firearm and fired a bullet at the face of Jitendra Kumar. That bullet hit head of Jitendra Kumar and Jitendra Kumar died because of the injuries suffered by him in the incident.

16. It is seen from the record that because of superannuation, presence of Autopsy Surgeon, Dr. Mumtaz Ahmad of S.K.M.C. Hospital could not be secured by the prosecution. Hence, in order to prove the report of post-mortem examination, the prosecution has examined P.W.9 Rampadarth Ojha, Advocate Clerk, who deposed that he was knowing Dr. Mumtaz Ahmad of Medical College, Muzaffarpur. This witness



has identified the handwriting as well as the signature of Dr. Mumtaz Ahmad on the report of the post-mortem examination of Jitendra Kumar, which is at Ext.2. The question is whether with this evidence, it can be said that the report of post-mortem examination of dead body of Jitendra Kumar can be read in evidence. On this aspect, clause (2) of Section 32 of the Evidence Act is relevant and it is reads thus:

“32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.-Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1).....

(2) **or is made in course of business.**- When the Statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities of property of any kind; or of a document used in commerce, written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.”

Perusal of this provision makes it clear that when the statement was made by a person in the ordinary course of business or in discharge of professional duty which consists of



memorandum made by him and if such person cannot be found or his presence cannot be secured without an amount of delay or expense then statement made by such person, a memorandum of which is made in the official document becomes relevant.

17. In the instant case, because of superannuation of that Autopsy Surgeon, the prosecution could not secure his presence. Memorandum of post-mortem examination was written by Dr. Mumtaz Ahmad in discharge of his professional duty and the handwriting as well as signature thereon is proved to be made by Dr. Mumtaz Ahmad. Therefore, the report of post-mortem examination of Jitendra Kumar can be read in evidence. As seen from this report, the dead body of Jitendra Kumar was having one oval shaped wound 1/4” in diameter with inverted margin on left side of face below the left eye. Left Zygomatic bone of the deceased was found fractured and one bullet was recovered by the Autopsy Surgeon from head of the dead body. The death was due to shock and hemorrhage caused due to firearm injury of rifle group. Thus, the prosecution has proved the death of Jitendra Kumar because of bullet wound to the head which is vital part of the body. The firearm is stated to be of rifle group. The ocular evidence is regarding firing from the pistol or revolver. Whether the injury was because of pistol,



revolver or the firearm of rifle group is irrelevant. What is relevant is that the wound was caused by firing bullet and this evidence is not in doubt. Thus, medical evidence is also corroborating the version of eye witnesses. Hence, with this evidence, the prosecution has proved that the deceased was done to death by the accused by firing a bullet on his head. Intention of the accused is reflected from the weapon used by him and the part of body of the victim chosen by him for firing the bullet.

18. Now, let us examine the merits of the contention of the learned Advocate of the appellant that the offence cannot travel beyond either Part-I or Part-II of Section 304 of the Indian Penal Code. In the matter of **Virsa Singh** (supra) relied by the learned Advocate for the appellant, the Hon'ble Supreme Court explained the meaning and scope of clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are



proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

It is further held therein that the question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness or intended serious consequences, is neither here or there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion.



19. Similar is the ratio of all other Judgments relied by the learned Advocate for the appellant. In those matters ratio laid down in the matter of **Virsa Singh** (supra) was quoted with advantage but facts of those cases are totally different from the facts of the case in hand wherein weapon used is a firearm and seat of wound is head of the deceased. That bullet had pierced head of the deceased and it was recovered from the head of the deceased during the course of post-mortem examination. Evidence on record suggests that when deceased Jitendra Kumar tried to pacify the quarrel, accused Naresh Sahni took out the firearm and fired a bullet at the face of victim Jitendra Kumar, who, ultimately, succumbed to the injuries. The case in hand as such is a case squarely covered by clause (1) of Section 300 of the Indian Penal Code as death of Jitendra Kumar was caused by the accused with an intention of causing his death. The case is not covered by any of the exception of Section 300 of the Indian Penal Code. There was no provocation much less grave and sudden provocation by the deceased to the accused.

20. In the result, we see no infirmity in the impugned Judgment and Order passed by the learned trial Court. The appeal is devoid of merit and is, accordingly, dismissed.

21. We record our appreciation for strenuous efforts



taken by Ms. Archana Palkar Khopde, the learned Advocate appointed to represent the appellant at the cost of the State, in assisting us for arriving at the correct conclusion in the matter. We quantify the fees payable to her at Rs.5000/- and direct the High Court Legal Services Authority to pay the said amount to Ms. Archana Palkar Khopde, the learned appointed Advocate.

(A. M. Badar, J)

(Sunil Kumar Panwar, J)

P.S./-

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