

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.527 of 2018

Arising Out of PS. Case No.-198 Year-2010 Thana- MOTIHARI MUFASIL District- East
Champaran

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Prem Mukhiya Son of Late Jamun Mukhiya, Resident of Hasuhan, P.S.-
Muffasil, District- East Champaran.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Umesh Chandra Verma, Advocate Mr. Abhishek Kumar, Advocate Mr. Hemant Ray, Advocate
For the Respondent/s	:	Ms. Shashi Bala Verma, APP

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**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

CAV JUDGMENT

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)**

Date : 18-10-2023

This appeal has been preferred by the appellant under
Section 374(2) of the Code of Criminal Procedure, putting to
challenge the impugned judgment of conviction dated 07.04.2018
and the order of sentence dated 09.04.2018, passed by learned 9th
Additional District and Sessions Judge, East Champaran at
Motihari in Sessions Trial No. 351 of 2011, arising out of Mufasil
P.S. Case No. 198 of 2010, whereby the appellant has been
convicted and sentenced as under:



Cr. Appeal (DB) No. 527 of 2018				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Prem Mukhiya	Under Section 302 of the IPC	For life	10,000/-	S.I for six months
	Under Section 27(1) of the Arms Act	R.I. for Seven years	3,000/-	S.I for six months

2. All the sentences have been ordered to run concurrently.

3. The informant (PW-4) of the connected Motihari Mufasil P. S. Case No. 198 of 2010, is the father of the deceased. A *fardbeyan* recorded by the Sub-Inspector of Police, C.M. Jha of Mufasil Police Station on 27.09.2010 at 07:00 am in ICU Unit of Dr. Rahman Hospital, Bhawanipur Zirat is the basis for registration of the FIR. According to the informant, an orchestra program was going on within the campus of the old building of a primary school to celebrate birthday of the grandson of one Ramdev Mukhiya. The informant's son, Lahwar Mukhiya (the deceased) was also watching the program with Vinod Mukhiya (PW-2), Surendra Mukhiya (PW-1), Dinu Mukhiya (not examined) and others. The accused, Sukhal Mukhiya and Prem Mukhiya (the appellant herein) were on inimical terms with Vinod Mukhiya (PW-2). Suddenly at 09:00 pm, accused Sukhal Mukhiya opened fire targeting Vinod Mukhiya but the shot missed the target. Second shot was fired by this appellant on Vinod Mukhiya which



hit the rear side of the head of the deceased, (Lahwar Mukhiya). He got seriously injured. The person who were watching the program witnessed the accused persons escaping after commission of the act. The informant was also sitting there and he had also seen the accused persons fleeing away. Within no time he (the informant) learnt that his son had sustained firearm injury. Thereafter, maneuvering the crowd, he reached near his son and found him lying unconscious. The deceased was brought to Dr. Rahman's hospital where he was undergoing treatment at the time of registration of FIR.

4. It further transpires from the records that the deceased was taken to PMCH, Patna for treatment, where he died while undergoing treatment. On postmortem examination the doctor found one entry wound on the occipital region. The bullet was found on the frontal bone below the skin. The cause of the death in the opinion of the doctor was hemorrhage due to shock. The bullet was handed over to one Shiv Lochan Rai, *chowkidaar*. The FIR was earlier registered for the offence punishable under Section 307 read with Section 34 of the IPC and Section 27 of the Arms Act. Consequent upon the death of the deceased, Section 302 of the IPC came to be added.

5. The police, upon completion of investigation submitted chargesheet on 07.12.2010 against this appellant and co-



accused Sukhal Mukhiya for commission of the offences punishable under Sections 307, 302 read with Section 34 of the IPC and Section 27 of the Arms Act where upon cognizance was taken. After committing the case to the court of Sessions, charge came to be framed against the appellant and co-accused Sukhal Mukhiya for commission of the offences punishable under Section 307, 302 read with Section 34 of the IPC and Section 27 of the Arms Act. The accused Sukhal Mukhiya absented himself from the court proceedings and accordingly after canceling his bail bonds, his trial was separated. The appellant denied the charge and claimed to be tried.

6. At the trial the prosecution examined 10 witnesses, namely, Surendra Mukhiya (PW-1), Vinod Mukhiya (PW-2), Nandu Mukhiya (PW-3), Devnand Mukhiya, the informant (PW-4), Vipni Devi (PW-5), the doctor who had conducted the postmortem examination (PW-6), Ram Prasad Mukhiya (PW-7), Tapeswar Mukhiya (PW-8), Munna Lal Mukhiya (PW-9) and the Investigating Officer (PW-10). In addition to the oral evidence of the aforesaid prosecution's witnesses, the prosecution brought on record following documentary evidences:-

Sl. No.	Description	Exhibit No.
1	Postmortem report	Exhibit-1
2.	Inquest report	Exhibit-2
3.	FIR	Exhibit-3



7. Learned trial court, after having appreciated the evidence adduced at the trial, reached a conclusion that the prosecution was able to prove the charge of commission of offence punishable under Section 302 of the IPC and Section 27 of the Arms Act and accordingly sentenced him to imprisonment and fine as has been noted above.

8. After closure of the prosecution's evidence, the appellant was questioned under Section 313 of the CrPC, so as to give him an opportunity to explain the incriminating circumstances emerging against him, based on the evidence adduced at the trial on behalf of the prosecution. We deem it appropriate to reproduce the questions put by the trial court to the appellant for his examination under Section 313 of the CrPC, which are as under:-

प्रश्न: क्या आपने गवाहों का बयान सुना है?

उत्तर : जी हाँ।

प्रश्न: आपके विरुद्ध साक्ष्य है कि आप दिनांक 26.09.2010 को करीब 09/10 बजे रात्रि में विनोद मुखिया को जान से मारने के नियत से पिस्तौल से गोली चलाया जिससे सूचक देवनन मुखिया बल्द स्व. पूरन मुखिया सा. हसुआहा थाना मुफस्सिल जिला पूर्वी चम्पारण का लड़का लहवर मुखिया की मृत्यु हो गयी?

विनोद मुखिया पर गोली चलायी थी?

उत्तर : जी नहीं।

प्रश्न : आपको सफाई में क्या कहना है?

उत्तर : निर्दोष हूँ।

9. Thus the only circumstance explained to the appellant by the trial court was that there was evidence to the effect that he



(the appellant) had opened fire, targeting Vinod Mukhiya, which hit the deceased, consequent upon which he died.

10. Assailing the impugned finding of conviction recorded by the trial court, Mr. Umesh Chandra Verma, learned counsel appearing on behalf of the appellant has submitted that the prosecution's witnesses are inconsistent in their evidence about the place of occurrence. He submits that whereas PW-1 and PW-2 deposed that orchestra program was organised at the government school building, PW-3 deposed that the said program was organised in the play ground of the school. PW-7 in his evidence deposed that the said program was organised inside the school, whereas PW-9 deposed that the orchestra program was organised near the school. The Investigating Officer deposed at the trial that the said program was organised in front of the school. He has further argued that the witnesses are not consistent in respect of time of occurrence also inasmuch as, whereas PWs-8 and 9 have described the time of occurrence at 11:00 pm, other witnesses deposed that the occurrence had taken place between 09:00-10:00 pm. Advancing his submissions further, he has contended that the depositions of the witnesses are contradictory. PW-2, a cousin of the deceased deposed that he was present at the place of occurrence and that after the occurrence he had raised his voice to ascertain the direction from where the gunshot was fired. PW-3



deposed that the gunshot was fired while orchestra program was going on and he had not seen this appellant firing the gunshot. The informant (PW-4) is also not an eyewitness, inasmuch as, he had merely heard the sound of firing and subsequently learnt that his son (the deceased) had sustained firearm injury. He has also submitted that from the evidence of PW-4, it will transpire that PW-2 (Vinod Mukhiya) and PW-3 (Nandu Mukhiya) were not present there at the time of occurrence. He contends that there is no consistent evidence that it was the appellant who had opened fire leading to death of the deceased. He further argues that the trial court has given undue weightage to the evidence, circumstantial in nature, adduced by the prosecution's witnesses that the deceased and the accused Sukhal Mukhiya were on inimical terms and that the appellant was seen fleeing away from the place of occurrence, soon after the occurrence.

11. Learned Additional Public Prosecutor appearing on behalf of the State has defended the finding recorded by the trial court and has submitted that it is incorrect to say that the witnesses are not consistent about the place of occurrence. Minor variance in their depositions while describing the place of occurrence is natural as every person is not expected to describe a particular place in the same way. She has further submitted that the witnesses have fully supported the prosecution's case that this appellant and



co-accused Sukhal Mukhiya fired upon Vinod Mukhiya. The shot fired by this appellant hit the deceased instead of Vinod Mukhiya, leading to his death while undergoing treatment.

12. We have perused the impugned judgment and order of the trial court as also the trial court's records and we have given our thoughtful consideration to the rival submissions advanced on behalf of the parties.

13. It is noted that PW-5, Vipni Devi declined to be having any knowledge about the occurrence and she has been declared hostile at the instance of the prosecution. The witnesses, other than the official witnesses have fully supported the prosecution's case of the occurrence having taken place when orchestra program was being performed and several persons of the village and other villages were watching the program. They have also supported the case that the deceased was shot at when he was watching the orchestra program.

14. PW-4, the informant supported the prosecution's case and deposed at the trial that he was also watching the program sitting behind in the audience when shot was fired by Sukhal Mukhiya and this appellant, injuring the deceased. From his evidence in paragraph 3 of his cross-examination, it can be easily noticed that he is not an eye-witness to the occurrence. After having heard the sound of gun shot, he learnt that his son (the



deceased) was shot at. He clearly deposed that he had not seen this appellant opening fire.

15. PW-1 deposed that the deceased and Vinod Mukhiya (PW-2) were watching the program amongst others. The appellant and the accused Sukhal Mukhiya were also watching the program. The appellant and the co-accused were sitting at a distance of about 7-8 arms-length behind Vinod Mukhiya (PW-2) and Lahwar Mukhiya (the deceased). Sukhal Mukhiya opened the fire first targeting Vinod Mukhiya, but the shot missed the target. Thereafter, this appellant opened fire targeting Vinod Mukhiya which hit the deceased in the rear portion of his head whereupon he fell down instantaneously. He further deposed that soon after the deceased sustained injury, the appellant was apprehended by the persons who were present there and was handed over to the police officer. From the evidence of PW-1, it transpires that he is the uncle of the deceased. In response to a question in cross-examination, he deposed that the sound of firing came from the eastern side and he had gone near the deceased immediately after hearing the sound of gunshot. Ten minutes after the shot was fired, he had gone near the deceased. He also deposed in his cross-examination that his statement was not recorded by the police during the course of investigation. It is evident thus, that PW-1



deposed at the trial for the first time, whose statement was not recorded during the investigation by the police.

16. PW-2 deposed at the trial that few days before the date of occurrence, both the accused persons had a fist fight with the deceased and they were pressurizing the deceased to join them, to which he was not agreeable because they were alcoholics. PW-2 is a cousin of the deceased and according to evidence of PW-2 both of them were sitting together. When the deceased sustained the gunshot, he had shouted to ascertain as to from which direction the gunshot was fired. Two-three minutes thereafter, someone came at the place where the deceased was lying unconscious.

17. We have no hesitation in reaching a conclusion based on the evidence of PW-2 that he cannot be said to be an eye-witness of the occurrence, i.e., the deceased having been shot at by the appellant.

18. Describing the occurrence, PW-3 deposed that the deceased, Vinod and Dinu were sitting in the front row and 2-3 steps behind them this appellant and Sukhal Mukhiya were sitting. Further at about 1-2 arms-length behind the appellant and accused Sukhal Mukhiya, PW-3 was sitting. With him, Surendra Mukhiya (PW-1), Munna Mukhiya (PW-9), Ram Prasad Mukhiya (PW-7) and several other persons were sitting. He deposed in his examination-in-chief that Sukhal Mukhiya opened fire on Vinod



Mukhiya but it missed the target whereafter this appellant opened fire which hit in the back side of the head of the deceased. PW-3 thus, claimed to have seen the occurrence as he was sitting behind the appellant and the deceased.

19. PW-7 deposed in his cross-examination that two minutes after the fire was shot, the appellant was caught by the persons who were present at the place of occurrence. In his cross-examination, he deposed that nothing was recovered from the possession of the appellant as he had abandoned the firearm which he had used.

20. PW-8, supporting the prosecution's case deposed that when the appellant attempted to flee away, he was apprehended by the public. In his cross-examination, he deposed that he had gone to watch the orchestra program at 11:00 pm. We notice at this juncture, apparent contradictions on the point of time of occurrence; (i) in the disclosure as made in the first information report, (ii) evidence of the other prosecution's witnesses and (iii) evidence of PW-8 who was not there at the place of occurrence before 11:00 pm when he had reached there to watch the program.

21. PW-9 also deposed at the trial that the appellant was apprehended soon after the occurrence.

22. The Investigating Officer (PW-10) deposed at the trial, *inter alia* that after recording further statement of the



informant, he had recorded statements of Vinod Mukhiya (PW-2), Chandan Mukhiya (not examined), Nandu Mukhiya (PW-3), Ram Prasad Mukhiya (PW-7). He had also recorded statements of Surendra Mukhiya (PW-1), Tapeswar Mukhiya (PW-8) and Munna Lal Mukhiya (PW-9). According to his deposition, he did not find any remnant present at the place of occurrence to suggest that there was any orchestra program held in the school. This appellant was apprehended by the villagers. No blood stain was found on the road, he deposed.

23. The doctor (PW-6) proved the postmortem report prepared by him which came to be marked as Exhibit-1.

24. On careful scrutiny of the witnesses, it transpires that though the prosecution can be said to have established that in an occurrence which had taken place during the performance of an orchestra program, the deceased sustained one firearm injury, prosecution witnesses do not appear to be the eye-witnesses to the appellant's act of firing at the deceased. Soon after the occurrence, the appellant was apprehended by the villagers as he was seen attempting to flee away. The fact remains that no firearm was recovered from his possession. The evidence of the prosecution's witnesses that firearm could not be recovered from him because he had abandoned the same is not acceptable for the reason that soon after the occurrence the appellant was apprehended and the police



had reached the place of occurrence. Further the witnesses in their depositions have given a vivid description of the manner in which the shots were fired. The deceased and PW-2 were sitting together. PW-2 in his deposition mentioned that there was about 'an arm's length' space between the two. One of the witnesses has deposed that the appellant and co-accused Sukhal Mukhiya were sitting 5-7 arm's length behind Vinod Mukhiya and the deceased. The first shot was fired by the accused Sukhal Mukhiya targeting Vinod Mukhiya.

25. The witnesses have deposed in a manner as if they were watching keenly the acts and the movements of the appellant and the co-accused. In our considered view, however, none of the witnesses appear to be the eye-witnesses. The only circumstance against the appellant is that he was seen fleeing away from the place of occurrence after gunshots were fired and subsequently apprehended by the villagers. No firearm was recovered from his possession. There is no cogent evidence to support the prosecution's case that the appellant was carrying a firearm. Such being the circumstance, we are of the considered view that the prosecution cannot be said to have established the charge of commission of offences punishable under Section 302 read with Section 34 of the IPC and Section 27 of the Arms Act against the appellant beyond all reasonable doubts.



26. Taking into account a cumulative effect of the facts and circumstances and the discussions noted above, in our opinion, the finding of conviction recorded by the trial court requires interference. The appellant deserves to be acquitted by giving him benefit of doubt.

27. Accordingly, the appellant stands acquitted of the charge of offences punishable under Sections 302 read with Section 34 of the IPC and Section 27 of the Arms Act by giving him benefit of doubt. The impugned judgment of conviction dated 07.04.2018 is hereby set aside. The order of sentence dated 09.04.2018 also stands set aside. This appeal is accordingly allowed.

28. The appellant is in custody. Let him be released forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

Nawneet Kumar Pandey, J: -

(Nawneet Kumar Pandey, J)

Nishant/Suraj-

AFR/NAFR	NAFR
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