

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.921 of 2017

Arising Out of PS. Case No.-7 Year-2002 Thana- IMADPUR District- Bhojpur

Bhisham Mishra @ Bisham Mishra Son of Late Vishandeo Mishra, R/o
Village- Bihta, P.S.- Imadpur, in the District of Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Ravindra Kumar, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE NANI TAGIA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 07-12-2023

Heard Mr. Ravindra Kumar, learned Advocate
for the appellant and Mr. Dilip Kumar Sinha, learned APP
for the State.

2. The appellant stands convicted under
Section 302 IPC and Section 27 of the Arms Act *vide*
judgment and order dated 20.06.2017/22.06.2017,
passed by the learned Fast Track Court, Bhojpur at Ara
in Sessions Case No. 101/2002, arising out of Imadpur
P.S. Case No. 7/2002. He has been sentenced to
undergo imprisonment for life, to pay a fine of Rs.



3000/- and in default of payment of fine, to further suffer imprisonment for six months under Section 302 of the IPC and R.I. for three years, to pay a fine of Rs. 500/- and in default of payment of fine, to further suffer imprisonment for six months under Section 27 of the Arms Act.

3.The sentences have been ordered to run concurrently.

4. Kapil Mishra (the deceased) is alleged to have been shot at by the appellant, a co-villager and an ex-army man. The appellant is said to have used his double-barrel licensed weapon to kill the deceased. He had attacked him at 11:30 A.M. on 21.02.2002 in the village while the deceased was coming back home from his flour-mill and was carrying seeds with him. On the sound of firing, his daughter, Abha Kumari (P.W. 4) came out of the house and reached the place of occurrence, but by that time, the deceased had already been shot in his thigh. P.W. 4 saw the appellant



assaulting the deceased in his leg by the butt of the weapon. By that time, several persons of the village including the wife of the deceased (P.W. 3) had arrived. All the accused persons, who were there, including the appellant and the deceased, went inside the house of one Laljhari (who has not been examined at the trial). When the police party arrived, the injured was taken to the hospital where he was declared dead.

5. The inquest was performed at the hospital. Later, the dead body was sent for post-mortem which was conducted at 4:30 P.M. on the same day by the Doctor Ram Raj Ravi (P.W. 9). In the hospital, P.W. 3 had also given her fardbeyan alleging that on the orders of one Nagendra and the exhortations of others, the appellant had fired from his licensed weapon, hitting the deceased. She had also talked about the old enmity and the deceased being pressurized for compounding the earlier case lodged against the appellant.

6. The aforementioned fardbeyan statement has



been brought on record as Ext. 1 but was not treated as FIR. The statement of daughter of the deceased, Abha Kumari (P.W. 4), which was recorded in the village of the occurrence, was treated as the FIR.

7. Only the appellant was made accused in the fardbeyan lodged by P.W. 4.

8. Perhaps, this was the reason for not treating the fardbeyan of P.W. 3, the wife of the deceased, which was recorded in the hospital only, as the FIR. If that were taken as the FIR, the other persons of the village also would have been made accused.

9. The purpose for limiting the accusation to the appellant remains unknown. Especially when the police also was complicit in the aforesaid act of keeping aside the first statement by the wife of the deceased and treating the latter statement by the daughter of the deceased to be the FIR.

10. The police after investigation submitted chargesheet against the appellant, whereupon he was



put on trial.

11. The Trial Court, after having examined ten witnesses on behalf of the prosecution, convicted the appellant as aforesaid.

12. Out of the ten witnesses, referred to above, Prabhu Ranjan (P.W. 5) and Kashi Sah (P.W. 10) have not supported the prosecution case. In fact, Kashi Sah (P.W. 10) has been declared hostile.

13. Ram Pravesh Mishra, a cousin of the deceased, who had also counter-signed the first statement made by the wife of the deceased in the hospital has been examined as P.W. 1 at the trial. The appellant also is directly related to him. Nonetheless, he claims to have seen the appellant firing from behind which hit the deceased. According to him, the deceased died after two hours of treatment in hospital. He has deposed before the Trial Court that in the hospital, the wife of the deceased had lodged the FIR (Ext. 1) which was counter-signed by him. The family of the deceased



and the appellant were having enmity from before.

14. However, according to him, apart from counter-signing the statement made by P.W. 3 in the hospital, he had not made any statement before the police and for the first time, he had deposed before the Trial Court.

15. Thus, if his version is to be accepted, he saw the appellant firing from behind, aiming at the deceased, which hit him in his thigh.

16. Similar statements have been made by Babita Devi (P.W. 2), another daughter of the deceased, who too claims to have come to the place of occurrence on hearing the sound of firing. She, as her other sister Abha Kumar (P.W. 4), had only seen the deceased bleeding from his leg and appellant assaulting him with the butt of his weapon. The actual part of the assault by gun-shot was neither witnessed by P.W. 2 or by P.W. 4.

17. This takes us to the deposition of the wife of the deceased (P.W. 3).



18. At the trial, she was not sure with respect to the use of the licensed weapon by the appellant. However, she talked of old enmity, the methods adopted by the appellant to get the old cases compounded and about her having seen most part of the occurrence before the victim (the deceased) was taken to the hospital.

19. One noticeable aspect in her deposition however is that according to her, the deceased had not died instantaneously. This assumes importance in analyzing the deposition of the witnesses. In her cross-examination, P.W. 3 has stated that when the police had arrived after the deceased was hit in his leg, she was not asked about the occurrence nor did she volunteer to say anything. The police officer had asked from her husband (deceased), who had made some statement but the same was never recorded. If this were true, then perhaps what the deceased told the police officer should be the most authentic information about the cause of



injury and death.

20. Moti Singh and Habi Hasan (P.Ws. 6 and 7 respectively) are witnesses to the seizure of the double-barrel licensed gun of the appellant. According to the investigator, Sanjay Kumar Verma (P.W. 8), he had searched the house of the appellant and had seized the double-barrel licensed gun along with cartridges. The seizure list bears the signature of P.Ws. 6 and 7. The weapon and the cartridges were sent for ballistic and forensic examination. The weapon was found to be ineffective as the barrel was broken and the cartridges were found to be live (Ext. 6).

21. Thus, the weapon which was seized and which stands in the name of the appellant, was not the weapon of assault. This makes the prosecution case somewhat doubtful. The occurrence had taken place in the village in front of many villagers. The appellant was arrested in a short-while. But the weapon which was seized from his house was found to be ineffective.



However, there is a gun-shot wound on the deceased. Therefore, a posteriori, it can be said with certainty that a firearm weapon had, for sure, been used.

22. However, we find that the weapon of assault could not be discovered. The double-barrel licensed gun of the appellant could not have been used as it had no carbon-shoots which is a definite sign of the weapon having been used in the immediate past. Since the appellant was arrested immediately, there was no occasion for him to have the barrel of the gun cleaned, if such weapon were used.

23. Nonetheless, it would be difficult for us to completely sideline the eye-witness account of P.Ws. 1, 2, 3 and 4 of the appellant having fired at the deceased.

24. We can only attribute the non-recovery of the weapon of assault to the inexperience and ineptitude of the police.

25. The investigation definitely was lopsided. We say so for the reason that the investigator ought not



to have cherry-picked the statement of P.W. 4 to be treated as FIR. An investigator is required to investigate the case in an impartial and objective manner.

26. Be that as it may, the medical testimony stands in favour of the accusation of the deceased having been shot at, but only in the leg.

27. The Doctor conducting the post-mortem examination did not find any lacerated injury which would surely have been caused on the person of the deceased, if P.W. 4 was to be believed. She has alleged that the deceased was assaulted a number of times on his leg by the butt of the weapon which was used by the appellant. The gun-shot was on the thigh.

28. If all the allegations are taken to be correct, while the appellant had used his weapon, the deceased was bare-knuckled. He was only carrying a packet of seeds from his flour-mill back home. There was no person available around who could have come to his aid and assistance. If there would have been any



intention of the appellant to have ended the life of the deceased, there was nothing to stop him. The deceased was first shot at only in his leg. Thereafter, there was no repeat blow. The butt of the weapon, if the witnesses are to be believed, was used by the appellant. We have no idea whether the appellant had run short of cartridges. The weapon was still in his possession. In fact, the persons who had assembled at the place of occurrence viz. the villagers did not try to stop anybody. In fact, all of them rushed to the house of Laljhari.

29. Had there been any intention to kill the deceased and the deceased would have sensed that, he would definitely not have rushed to the house of Laljhari, where all the villagers and the assailants also had taken shelter.

30. Was it an accidental fire?

31. It would not be absolutely off the line to think on those terms as well.

32. If the appellant had intended to kill the



deceased, the deceased would not have run to a villager's house where the appellant also had entered.

33. All this only leads to one conclusion that the appellant, for the enmity that he had had with the family of the deceased, fired at the deceased but only in his leg and never repeated the blow. He, therefore, was vindictive in his approach but never intended to kill the deceased. The time and the manner of actualizing the offence does not reflect the intention of the appellant to kill the deceased.

34. However, he should have and he actually knew the consequences of his act, making him liable for culpable homicide not amounting to murder. The act committed by him was with the knowledge that it was likely to cause death, but without any intention to cause death. However, it cannot be gainsaid that he would have intended to cause such bodily injury which was likely to cause death, thus bringing his case within the mischief of Section 304(1) of the Indian Penal Code.



35. We, accordingly, convert the conviction of the appellant from Section 302 to one under Section 304(1) of the Indian Penal Code.

36. Since the firearm weapon was used which was never recovered, the conviction under Section 27 of the Arms Act is sustained.

37. We have been informed at the Bar that the appellant has remained in jail for more than nine years. We, therefore, alter the sentence of the appellant to the period which he has already undergone in custody.

38. We have also not received any report regarding his bad conduct in jail. The appellant is in custody. He is therefore, directed to be released forthwith if not wanted or detained in any other case.

39. The appeal thus is partially allowed.

40. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.



41. The records of this case be returned to the Trial Court forthwith.

42. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Nani Tagia, J)

krishna/-

AFR/NAFR	NAFR
CAV DATE	NA
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