

**(2010) 09 JH CK 0066**

**Jharkhand High Court**

**Case No:** Criminal Appeal (S.J.) No. 909 of 2005

Birbal Mahto

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

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**Date of Decision:** Sept. 20, 2010

**Acts Referred:**

- Arms Act, 1959 - Section 27
- Penal Code, 1860 (IPC) - Section 307, 326

**Hon'ble Judges:** Pradeep Kumar, J

**Bench:** Single Bench

**Advocate:** Surendra Prasad Sinha, for the Appellant; Tapas Roy, Assistant Public Prosecutor, for the Respondent

**Final Decision:** Allowed

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**Judgement**

Pradeep Kumar, J.

Heard the learned Counsel for the Appellants and learned Counsel for the state.

2. The instant appeal is directed against the judgment of conviction and order of sentence dated 11.7.2005 passed by Sri B.K. Sinha, 8th Additional Sessions Judge, Palamau at Daltonganj in Sessions Trial No. 74 of 2003 by which judgment Appellant has been convicted u/s 307 of the I.P.C and sentenced to undergo R.I. for 10 year.

3. It is submitted by learned Counsel for the Appellant that it is a case of single shot injury caused to the injured- informant, P.W. 5, Indardeo Mahto. He has also disclosed no cause of the occurrence because there was no fight between them. Injured has stated that the accused- Appellant asked him for "khaini" when he was going back to his house after easing and after some distance, the accused fired upon him. Hence, there was no intention on the part of the accused to cause the death of the injured, since one shot injury was caused. Since, the Appellant, who had no intention to cause the death of the informant is in jail custody for more than 5 years, so lenient view may be taken.

4. On the other hand, learned Counsel for the state has opposed the prayer and submitted that Appellant intentionally fired upon the informant without any provocation and as such, he is rightly been convicted.
5. After hearing both the parties and after going through the evidences on record, I find that the prosecution case was started on the basis of the fardbeyan given by the informant, Indardeo Mahto- P.W.5 stating therein that on 17.6.2002 at 9.30 in the night he had gone out of the house for easing, while coming back on the way he met with Birbal Mahto, who inquired about his health and asked him to give him some "khaini" to which he gave him "khaini", then while coming back at some distance accused- Appellant took out a pistol and fired upon him and ran away. He received injury on his hand, ribs. Hearing hulla, villagers came and took him to the hospital.
6. On the basis of the said fardbeyan, police registered a case u/s 324, 307 of the I.P.C and 27 of the arms act against the accused and after investigation submitted charge sheet u/s 326 and 307 of the I.P.C. Since, the case is exclusively triable by the court of Sessions, the case was committed to the court of sessions where charges were framed u/s 307/326 of the I.P.C. and thereafter, the case was tried by 8th Additional Sessions Judge, who found the Appellant guilty as aforesaid.
7. It appears that in course of examination the prosecution has examined 8 witnesses to prove its case.
8. P.W.1, Dukhni Kunwar is the mother of the informant who has stated that at 9.30 in the night her son had gone out for easing and on hearing hulla they went out and her son stated that Birbal Mahto has caused fire shot injury upon him. Then he was taken to the Daltonganj Hospital. In cross examination, she admitted that she has not seen the fire shot.
9. P.W.2, Ram Lal Mahto is maternal uncle of the injured. He has also stated that he got information that his nephew has been fired at by the Appellant.
10. P.W.3 Ram Nath Mahto is a co-villager. He has also stated that Inderdeo Mahto told him that fire shot injury was caused by the Appellant- Birbal Mahto. He had also not seen the occurrence.
11. P.W.4, Awadesh Mahto is the brother of the informant. He was also told by the injured- informant that fire was shot by Birbal.
12. P.W.5, Indardeo Mahto, injured and informant of the case has supported the F.I.R and stated that at 9.30 at night when was coming back after easing then he met with the Appellant, Birbal Mahto, who asked for "khaini, then he gave him "khaini" and then they came to some distance and thereafter, Birbal Mahto suddenly took out his pistol and fired upon him causing injury on the hand and panjra. On hearing hulla, villagers came and took him to the hospital. He proved his signature on the fardbeyan and also identified the accused. In his cross

examination, he has stated that he has got no dispute with the Appellant who is his co-villager. He stated that the road on which they were coming is busy road and fire took place on the road after 10 minutes. He has also stated that at the time of occurrence, there was no witness except him.

13. P.W.6, Dr. Ram Nath Choudhary has found injury of gun shot. First on the left arm which was the wound of entry, second was the wound of exit of the inner aspect of the arm, third wound was on the entrance of the chest cavity 1 1/2 inches. X-ray shows presence of bullet in the ninth thoracic vertebra which was extracted out by surgeon, P.W.8- Dr. Lalit Kapoor. According to P.W.6, two injuries were caused by one gun shot and might have been dangerous to life.

14. Thus, from the evidences, it is clear that there was no enmity between the Appellant and injured-P.W.5. There was no intention to cause the death and further there was no witness except P.W.5 himself.

15. In the facts and circumstances of the case, the finding of conviction of the Appellant, Birbal Mahto, passed by 8th Additional Sessions Judge, Palamau at Daltonganj in S.T. No. 74/2003 dated 11.7.2005 u/s 307 of the I.P.C is altered to u/s 326 of the I.P.C. and the period of sentence is reduced to the period already undergone by him during trial and appeal i.e. 5 1/2 years (4 months during trial and from 11.7.2005 till date). The Appellant is in jail custody. He is directed to be released forthwith, if he is not wanted in any other case.

16. Appeal is allowed in part.