

(2007) 04 PAT CK 0157**Patna High Court****Case No:** Criminal Appeal No. 341 of 2002

Rajesh Turha @ Chhotaka Turha

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision: April 27, 2007**Acts Referred:**

- Arms Act, 1959 - Section 27
- Penal Code, 1860 (IPC) - Section 302, 304, 307

Citation: (2007) PLJR 39**Hon'ble Judges:** Subash Chandra Jha, J; Shiva Kirti Singh, J**Bench:** Division Bench**Advocate:** Birendra Nath Mishra, Shaileendra Kr. Singh and Sanjukta Kumari, for the Appellant; Ashwani Kr. Sinha, for the Respondent**Final Decision:** Dismissed**Judgement**

Shiva Kirti Singh and Subash Chandra Jha, JJ.

This appeal is directed against the judgment dated 9th May, 2002 passed by learned 6th Additional Sessions Judge, Chapra in Sessions Trial No. 212 of 2000 whereby the appellant has been convicted for the offence u/s 302 of the Indian Penal Code and Section 27 of the Arms Act. The appeal is also against impugned order dated 13.5.2002 whereby after hearing the parties on the question of sentence the sole accused/appellant has been sentenced to undergo rigorous imprisonment for life and a fine of Rs. 1000/-and in default further sentence of two months rigorous imprisonment u/s 302 I.P.C. and rigorous imprisonment for three years u/s 27 of the Arms Act. The sentences have been ordered to run concurrently. The prosecution case is to the effect that in the morning at about 10 A.M. on 23.10.99 while some children were playing near a Bargad tree in Mohalla Daulatganj under Bhagwan Bazar Police Station district Saran the appellant came and from a close range fired causing through and through fire arm injury in the abdomen of deceased Ravindra Rai aged about 10 years and fled away. On hearing the sound of firing the informant

Ram Nath Rai the uncle of injured came and took the injured to Sadar Hospital, Chapra where his Fardbeyan was recorded on 23.10.1999 at 12.15 hours by Sub-Inspector of Police, R.A. Pandey of Bhagwan Bazar Police Station. In the Fardbeyan the informant has stated that when on hearing the sound of firing he went running to the place of occurrence he saw his nephew Ravindra Rai smeared with blood and on enquiry he disclosed that the sole accused had fired and had run away. It is further case of the prosecution that in course of treatment the injured died on the same day and hence the offence u/s 302 I.P.C. was added to the offence u/s 307 I.P.C. under which F.I.R. had been lodged on the date of occurrence.

2. It appears that after preparing inquest report and obtaining post-mortem report and recording the evidence of witnesses charge-sheet was submitted by the police against the accused/appellant. After cognizance the case was committed to the court of Sessions where charges were framed against him to which he pleaded not guilty. After trial he has been convicted and sentenced by the impugned judgment and order of the trial court.

3. In order to prove its case the prosecution has examined altogether 8 witnesses. Out of them P.W. 1, Bal Mukund Chaudhary, P.W. 2, Acchey Lal and P.W. 3 Amar Turha are children or persons of young age who have claimed that they were playing along with deceased and have claimed to have seen the occurrence. According to them this appellant came from east where his house is located at a short distance and fired from a country made pistol from a distance of 2-3 steps causing through and through gun shot injury in the abdomen of the deceased which caused profused bleeding and the injured was taken to hospital by the informant, Ram Nath Rai (P.W. 6) and some others.

4. P.W. 4, Umesh Kumar Yadav is a formal witness who has proved his signature on inquest report as Exhibit-1. P.W. 5 Chandrika Rai is also a formal witness who has proved his signature on the inquest report as Exhibit-1/1. P.W 6, Ram Nath Rai is the informant. He has fully supported the prosecution case as contained in his Fardbeyan and in cross-examination he has clarified that he had not seen the appellant firing with his own eyes because he was not present at the place of occurrence from before. According to his deposition he came to the place of occurrence running on hearing the sound of firing and has seen the appellant fleeing away with country made pistol in his hand and his injured nephew and other children present there had disclosed to him that appellant had fired at the injured and fled away. He disclosed that in course of treatment his injured nephew died. According to him the occurrence took place near the Bargad tree as disclosed in the fardbeyan at about 10-11 A.M. and he took the injured to hospital where he arrived at 11.30 A.M. He has denied the suggestion of the defence that on the date of occurrence on occasion of emersion of an idol of god people had displayed arms like Lathi, Bhala and Farsa and in course of the same deceased sustained a Bhala injury. He has also denied the suggestion that he has implicated the accused/appellant on

account of enmity.

5. P.W. 7, Dr. Binod Kumar Singh" held autopsy on the dead body of the deceased on 23.10.1999 at 5.10 P.M. and found a wound of entry in the abdomen which was a lacerated wound with charred margin 1/2" x 1/2" x abdominal cavity. He also found the wound of exit which was a lacerated wound 1" x 1/4" x cavity deep with averted margin on the right side of middle of back on lumber region. In the opinion of the doctor death was due to aforesaid two injuries which were communicating each other and had been caused due to fire arm, may be country made pistol. The postmortem report was proved as Exhibit-2.

6. P.W 8, Sub-Inspector of Police Ravindra Prasad Singh has deposed that on the date of occurrence he was posted in Bhagwan Bazar Police Station and on that date Sub-Inspector of Police R.A Pandey was also posted there who investigated the instant case. He has proved the Fardbeyan and the formal F.I.R. as Exhibits 3 and 4. It appears that after the witnesses had been examined, at a late stage the investigation was handed over to this witness who submitted charge-sheet against the accused/appellant. He has claimed to identify the hand-writing and signature of the earlier Investigating Officer in paragraphs 1 to 38 of the case diary and on that basis he appears to have deposed and has supported the prosecution case as regards the place of occurrence. He has denied the defence suggestion that any Khunta (peg) was noticed at the place of occurrence which could have caused injury to the deceased in accidental form.

7. The defence case as appearing from statement of as many as four defence witnesses is to the effect that on the date of occurrence the accused/appellant had gone out to purchase fish and had returned at 12.30 in the noon. His further defence is that on the alleged date and place of occurrence people were demonstrating display of arms like Lathi, Bhala and Chhura and in that process the deceased while displaying Chhura fell down and sustained injury in his abdomen. D.W. 1 Jaleshwar Turaha has deposed on the aforesaid lines and has admitted that he is father-in-law of the accused/appellant. D.W. 2, Jhawari Devi has claimed that accused/appellant has gone to village Enai to purchase fishes and had been there from 6 A.M. till 1 P.M. She has admitted that earlier the police (Sub-Inspector of Police) had gone to make enquiry but she never made any statement before any officer earlier. She has admitted that she is mother of the accused/appellant. D.W. 3, Manoj Kumar has also attempted to support the alibi of the appellant that he had gone to purchase fishes and came back at about 1-2 P.M. D.W. 4 Mahesh Turha has also attempted to support the said alibi. He has admitted that accused appellant is his brother-in-law and he has never made such statement before the police.

8. On behalf of appellant it has been submitted that the prosecution has to stand on its own strength and cannot be given any advantage on account of change in the defence from time to time. According to him the prosecution has failed to prove the place of occurrence, the time of occurrence and the prosecution witnesses are not

reliable for sustaining conviction of the appellant. In the alternative it was also argued that the prosecution has not alleged any pre-meditation or any motive and in such circumstances conviction should not have been u/s 302 I.P.C. but at best it could have been u/s 304 I.P.C.

9. On going through the evidence of the informant which is in accordance with the prosecution case contained in the fardbeyan and the evidence of five witnesses with P.Ws. 1, 2 and 3 we find that the prosecution has clearly proved the alleged place of occurrence as alleged the date and time of the occurrence. Even D.W. 1 has stated facts in his examination-in-chief which support the place of occurrence and time of occurrence. No material has been elicited in the cross-examination of the informant or the three eye witnesses noticed above so as to discredit their testimony in any material particulars. The age and occupation of the eye witnesses shows that they were quite young and there is no material on record to throw any doubt upon their trustworthiness. Even the questions put to them in cross-examination are such that raise no doubts regarding their earlier statements before the Investigating Officer and hence it is found that non-examination of the first Investigating Officer has not caused any prejudice to the defence.

10. The defence of alibi is largely based upon the partisan or related witnesses and the court below has rightly not placed reliance upon the same.

11. So far as the alternative submission advanced on behalf of appellant is concerned, we have given anxious consideration to the entire facts, circumstances and the surroundings in which the alleged offence took place. There is no material to show that there was any exchange of abuses or hot words or any kind of provocation for firing at the deceased. The firing has caused charring marks as found by the doctor and the same was from a close range which eliminated any reasonable doubt that the firing may have been accidental. No defence has been taken by the accused of accidental firing nor the deposition of eye witnesses disclose any circumstance which may support reasonable probability of accidental firing at the hands of the appellant. In absence of any material to support the alternative submission, we are unable to accept the submission that appellant could have been convicted only u/s 304 I.P.C. and not u/s 302 I.P.C. because of lack of any motive by the prosecution. In law it is well established that where the ocular and medical evidence is consistent and trust-worthy, the inability of the prosecution to find or prove motive is immaterial. Thus, on a proper consideration of entire facts and the submissions advanced we find no infirmity in the impugned judgment and order so as to interfere with the same. The conviction and sentence passed against the appellant are, therefore, confirmed. The appeal shall stand dismissed.