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**(2005) 07 AHC CK 0017**

**In the Allahabad High Court**

**Case No : Government Appeal No. 1475 of 1998**

State of Uttar Pradesh

APPELLANT

Vs

Brij Bihari and Bhoora

RESPONDENT

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**Date of Decision : 08-07-2005**

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 307, 324, 34

**Citation : (2005) 07 AHC CK 0017**

**Hon'ble Judges : M.C. Jain, J;M. Chaudhary, J**

**Bench : Division Bench**

**Advocate : Arun Kumar Mishra and R.S. Sengar and A.G.A, for the Appellant;  
Dharam Pal Singh and Prabhat Kumar Dubey, for the Respondent**

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## **Judgement**

M. Chaudhary, J.—This is a Government Appeal filed on behalf of the State of UP. from judgment and order dated 22nd of October, 1997 passed by 111 Additional Sessions Judge, Jalaun at Orai in Sessions Trial No. 61 of 1992 State v. Bhoora and Anr. acquitting both the accused of the charge levelled against them u/s 307 read with 34 IPC.

2. Brief facts giving rise to this appeal are that at 9:25 p.m. on 20th of June, 1991 Uma Shanker lodged an FIR at police station Kalpr situate at a distance of 3 kms. from village Deokali alleging that his cousin brother Durga Prasad @ Dularey was married with Lalita sister of Ram Sewak Pradhan, village Shekhpur Gurha and came to his matrimonial house yesterday after "Gauna" ceremony. One Bhoora resident of village Dadhen situate adjacent to village Shekhpur Gurha across the river was inimical with Ram Sewak and had asked Uma Shanker not to marry his cousin brother with Lalita but their marriage was settled and solemnized. At about 7:00 p.m. on 20th of June, 1991 Smt Lalita was silting on the roof of her matrimonial home that Bhoora went on the roof of the house ot Ram Narain and fired at her with countrymade pistol hitting at her forehead and thereafter went towards the house of Brij Bihari; that as Uma Shanker and Om Prakash chased Bhoora he entered the house of Brij Bihari and

that immediately Brij Bihari caught hold of Uma Shanker and in the meanwhile Bhoora succeeded in making his scape good. The said occurrence was witnessed by one Hari Shanker, Ram Ratan and Bhavanidin. Uma Shanker also alleged that Bhoora in collusion with Brij Bihari fired at Smt Laiita hitting at her forehead. The police registered a crime against both the accused u/s 307 IPC and made entry regarding registration of the crime in the general diary. Injured Lalita was medically examined by Dr Mumtaz Ali Siddik Medical Officer, Government Male Hospital Kalpi at 10:00 p.m. the same night. Htx medical examination revealed a small circular lacerated wound measuring 1/5 cm in diameter with inverted margins on right side of forehead 5 cm above medial end of right eyebrow and hairs around the wound were burnt. Swelling was present around the wound in the area of 4 cm x 4 cm. On probing the wound was found about 1 cm deep. The doctor opined that the injury was caused by firearm and the injured duration. The doctor advised x-ray of the skull and the injury was kept under observation. SI Nihal Singh to whom investigation of the crime was entrusted visited the scene of occurrence, inspected the scene and prepared its site plan map ( Ext Ka 4). He also picked up pellets lying at the scene of occurrence and also collected blood stained and simple grit therefrom and prepared their memos ( Exts Ka 2 & ka 3). He also recorded statements of the witnesses and did other necessary things. After completing the investigation he submitted charge sheet against the accused accordingly ( Exts ka 5 & ka 6).

3. After framing of charge against the accused the prosecution examined Smt. Laiita (PW1), Uma Shanker (PW 2 ), Ram Ratan (PW3) and Om Prakash ( PW 4) as eye witnesses of the occurrence. PW6 Dr Mumtaz Ali Siddiqi who medically examined Smt. Laiita, the injured has proved the injury report (Ext ka 9). PW5 SI Nihal Singh who investigated the crime has proved the police papers.

4. Both the accused denied the alleged occurrence altogether stating that they were not implicated in the case falsely on account of enmity.

5. On an appraisal of evidence and material on record the learned trial judge disbelieved the prosecution case and evidence and acquitted the accused of the charge levelled against them.

6. Feeling aggrieved by the impugned Judgment and order the State preferred this appeal assailing acquittal of the accused respondents.

7. We have heard learned AGA for the appellant and the learned counsel for the accused respondents and gone through the record.

8. Out of four eye witnesses examined by the prosecution PW3 Ram Ratan and PW4 Om Prakash have not supported the prosecution case against the accused. PW3 Ram Ratan deposed that the alleged evening he saw that wife of Durga Prasad @ Duiarey was being taken in the tractor to Kalpi but he could not say as to who fired at her. PW4 Om Prakash father-in-law of Lalita stated that at about 7:00 p.m. the alleged evening his daughter-in-law Lalita was sitting at the roof of his house when she received the firearm injury but he could not say as to who

fired at her. However he stated that that evening Bhoora had come to the house of Brij Bihari to attend some marriage. Both the witnesses were declared hostile and cross-examined by the prosecution with the permission of the court but to no use. PW1 Lalita, the injured deposed that at about 6:00 p.m. the alleged evening she was sitting at the roof of her matrimonial home that Bhoora came at the roof of Ram Narain and fired at her with countrymade pistol hitting at her forehead and ran away. She also deposed that her brother Ram Sewak was Village Pradhan of village Shekhpur Gurha and Bhoora got inimical with Ram Sewak as he used to ask him not to marry her with Durga Prasad but their marriage was settled and solemnized. PW2 Uma Shanker, cousin of Durga Prasad and the first informant deposed that at about 7:00 p.m. the alleged evening Smt. Lalita, wife of his cousin Durga Prasad was sitting on the roof of her matrimonial home that he heard the sound of a fire and saw Bhoora jumping from the roof of the house of Ram Narain adjoining to his, house; that immediately he went at the roof of his house and saw Lalita lying injured there; that then he chased Bhoora going towards the house of Brij Bihari and as he along with others chased him Brij Bihari caught hold of him saying not to apprehend him otherwise he would also fire at him and that in the meanwhile Bhoora succeeded in making him escape good.

9. Thus we see that PW1 Smt Lalita, the injured has stated nothing against accused respondent Brij Bihari. PW2 Uma Shanker too has stated only this much that at about 7:00 p.m. the alleged evening Smt. Lalita wife of his cousin Durga Prasad was sitting at the roof of her matrimonial home; that he heard the sound of a shot and saw accused Bhoora jumping from the roof of Ram Narain that immediately he went at the roof of his house and saw Smt Lalita lying injured and then he chased Bhoora running towards the house of Brij Bihari and that in the meanwhile Brij Bihari caught hold of him saying not to chase him otherwise he would also fire at him and Bhoora succeeded in making his escape good. Thus there is no evidence on the record to connect accused Brij Bihari with the crime in question and we find no good reason to interfere with the finding of acquittal so far he is concerned.

10. Learned AGA for State, the appellant vehemently argued that the finding of acquittal of accused Bhoora recorded by trial court is manifestly erroneous and contrary to evidence on the record. He contended that the trial court wrongly put much emphasis upon, the statement of PW4 Om Prakash who stated that accused Bhoora did not fire at Lalita and he could not say as to who fired at her. He having not witnessed the incident could not say at all that the accused did not fire at her. More so this witness was declared hostile by the prosecution. This argument advanced by learned AGA is not devoid of force. Evidently if a person did not witness the occurrence and he says that he could not say as to who fired at the victim he can not say in the same breath that a particular person did not fire at the victim unless he offers any plausible and convincing explanation that at that time that person was present with him elsewhere. Hence no value can be attached to the said statement of PW4 Om Prakash, and more so because he was

declared hostile by the Prosecution.

11. PW1 Smt Lalita, the injured deposed that accused Bhoora used to visit her parents' house when she was unmarried in order to impress upon her brother Ram Sewak who was the village pradhan that he should not marry her with Durga Prasad but her brother did not agree thereto and married her with Durga Prasad. Thus accused Bhoora was well known to her since before. In the month of June sunset takes place at about 7:30 p.m. or so. Thus at about 6-7 p.m. when the incident took place there was enough sunlight and there could be no question of mistaken identity. She was fired at from the front hitting at her forehead. The incident must have taken a few seconds and since the shot was fired from the roof of the adjoining house and the assailant ran away after jumping from the roof it is but natural that in the meanwhile the victim must have recognized the assailant in the day light. Her sworn testimony stands corroborated by the testimony of PW2 Uma Shanker who on hearing the sound of a shot and seeing Bhoora jumping from the roof after causing firearm injury to his younger cousin's wife Lalita chased him in order to apprehend him. PW2 Uma Shanker has deposed corroborating her on all material aspects. Both these witnesses were subjected to searching and gruelling cross-examination but nothing useful to the accused could be elicited therefrom. Both the witnesses appear to be truthful and straightforward witnesses who have given an honest account of the occurrence witnessed by them.

12. For the foregoing discussion, we are of the view that the finding of acquittal of accused Bhoora recorded by the court below cannot be sustained in law as it is based on faulty and erroneous appreciation of evidence resulting in miscarriage of justice. Hence the judgment and the order of the trial court is liable to be set aside to that extent. As to the offence made out, since accused Bhoora fired at Lalita from a considerable distance intention to cause her death cannot be imputed to him. Since the firearm injury caused to Lalita was simple accused Bhoora is held guilty for an offence punishable u/s 324 IPC. Learned counsel for the accused respondent contended that since accused Bhoora has already been in jail for quite a long period he may be sentenced to imprisonment already undergone. A perusal of the record of the lower court goes to show that on the request of accused Bhoora who stated that since his father had not come forward to support him in the case and he had no independent means of livelihood some counsel may be appointed to defend him at the State expense, amicus curiae was appointed to defend him in the case by the trial judge. A perusal of the record goes to show that he has been in jail in this crime for more than six months. A period of more than fourteen years has elapsed from the date the crime was committed. Considering all the facts we are of the view that ends of justice would be served if accused respondent Bhoora convicted u/s 324 IPC is sentenced to imprisonment for the period already undergone.

13. The Government Appeal is allowed in part to the extent that acquittal of accused Bhoora is hereby set aside and he is convicted u/s 324 IPC and

sentenced to imprisonment for the period already undergone thereunder.

14. Office is directed to send certified copy of the judgment and transimt record of the case to the lower court immediately for necessary compliance under intimation to this court within two months from the date of receipt of copy of the judgment.