

RESERVED

AFR

Court No. - 45

Case :- CRIMINAL APPEAL No. - 1496 of 1995

Appellant :- Kamal Singh

Respondent :- State of U.P.

Counsel for Appellant :- Mahesh Kumar Kuntal

Counsel for Respondent :- G.A.

Hon'ble Surendra Singh-I,J.

1. This criminal appeal has been instituted against the judgment and order dated 02.09.1995 passed by the VI Additional Sessions Judge, Mathura in Sessions Trial No. 94 of 1992 (State vs. Ratan Singh & others) arising out of Case Crime No.138 of 1990, under Sections 307 & 506 IPC Police station Farah, District Mathura. By the impugned judgment and order the trial court convicted appellant Kamal Singh under Section 307 IPC and sentenced him to three years rigorous imprisonment. He was acquitted of the charge under section 506 IPC.

2. The prosecution story in brief is that informant Shiv Singh s/o Than Singh r/o Mahuan, Police Station Farah submitted a written report dated 21.07.1990 in Police Station Farah, Mathura to the effect that he is a witness in the case relating to murder of Sohan Singh. On account of which residents of his village accused Ratan Singh s/o Pyare, Kamal Singh and Bharat Singh both sons of Ratan Singh have enmity with him. They have threatened him that if he gives evidence against them, he will be killed. In the intervening night of 20/21.07.1990 at about 12:00 pm, on the terrace of Rohan Singh s/o

Jyoti of his village, informant Shiv Singh was having conversation with Rohan Singh. The above-mentioned accused came on the terrace and threatened him that he should desist from giving evidence against them otherwise he will repent later on. Informant Shiv Singh told them that he will give evidence of the facts which he has seen. Hearing this, accused Ratan Singh exhorted his sons Kamal Singh and Bharat Singh to kill the informant by firing. On his exhortation, appellant Kamal Singh and Bharat Singh with the intention of causing death, fired two gun shots on the informant. The pellets from the bullet hit near the eyes of the informant Shiv Singh and on the chest of Rohan Singh. On alarm being raised by the informant and Rohan Singh, villagers Ram Hans s/o Netram, Soran s/o Nathiya, Man Singh s/o Ram Khiladi and Balram s/o Khachera reached at the place of occurrence. Accused ran away from the spot threatening the informant that today his life has been spared but on some-other day they will kill him.

3. Informant, Shiv Singh submitted his written report (Exhibit Ka-1) on 21.07.1990 at 06:15 am at Police Station Farah by which Case Crime No.138 of 1990 was registered under Section 307 and 506 IPC. The chick FIR is Exhibit Ka-4.

4. Injured Rohan Singh and Shiv Singh were medically examined on 21.07.1990 at 8:00 am and 08:30 am respectively by Dr. G.S. Awasthi in Primary Health Centre, Farah, Mathura. According to the injury report (Exhibit Ka-6), the following injuries were found on the person of Shiv Singh :

“1. Multiple abrasions of firearm on right side of face scattered, oval in shape size, 0.5 cm X 0.5 cm red in colour. Blackening is present, 3.5 cms above, from right angle of mouth.

2. Firearm abrasion on right side of forehead 0.5 cm X 0.5 cm, red in colour, oval in shape. Blackening is present, 1.5 cm above from right eyebrow.”

In the opinion of the doctor, injury nos. 1 and 2 were caused by friction. Injury was simple in nature, duration about half day old. Injuries could be caused by firearm.

5. According to the injury report (Exhibit ka-7), the following injuries were found on the person of Rohan Singh :

“ 1. Gun shot lacerated wound on right side, upper part of chest, oval in shape, size 0.5 cm X 0.5 cm X muscle deep. Blackening is present. Clotted blood around the injury, 3 cm away from medial end of collar bone, red in colour, present.”

In the opinion of the medical officer, the injury has been caused by blunt object and is simple in nature, duration about half day old. Injuries could be caused by fire arm.

6. The investigation of the case was done by S.I. Kishan Singh, who visited the place of occurrence and prepared site plan (Exhibit Ka-2), recorded statements of witnesses and after investigation submitted charge-sheet under Sections 307 and 506 IPC (Exhibit Ka-3) against accused Ratan Singh, Bharat Singh and Kamal Singh.

7. After committal of the case, on 03.07.1992 the Court framed charge under Sections 307/34 and 506 I.P.C. against accused Ratan Singh, Kamal Singh and Bharat Singh, who denied the charge and claimed trial.

8. During trial, accused Bharat Singh died and criminal case has been abated against him.

9. To prove the charge against the accused persons, the prosecution examined P.W.-1 Shiv Singh, P.W.-2 Rohan Singh, P.W.-3 Ram Hans and P.W.-4 Soran as witnesses of facts, who have deposed regarding the occurrence. The prosecution has also examined P.W.-5, Investigating Officer S.I. Kishan Singh and P.W.-6 Medical Officer, Dr. G.S. Awasthi as formal witnesses.

10. P.W.-1 Shiv Singh has proved his written report (Exhibit Ka-1), Investigating Officer S.I. Kishan Singh (PW-5) proved the Chick FIR (Exhibit Ka-4), site plan (Exhibit Ka-2) and the charge-sheet (Exhibit Ka-3).

11. On 22.06.1994 the Court recorded the statement of the accused under Section 313 Cr.P.C. They have denied the charge stating that the witnesses are giving false evidence against them. They have also stated that the injured have got forged medical report prepared and wrong charge-sheet has been submitted against them. The accused have further stated that due to village politics they were falsely implicated in a murder case which was earlier lodged against unknown accused. They did not produce any evidence in their defence.

12. It has been argued by learned counsel for the accused-appellant that according to the prosecution version the incident took place on 20/21.07.1990 at 12 o'clock at night but no source of light is stated in the written report and the Investigating Officer has not shown source of light in his site plan. Therefore, it is not possible for the witnesses to recognize the appellant-accused in the dark night. It has also been argued on behalf of the appellant-accused that according to the prosecution case, the accused-appellant Kamal Singh and co-accused Bharat Singh (since deceased) used firearm and caused injury to Shiv

Singh and Rohan Singh but according to the injury report of Rohan Singh, the doctor has opined that the injury was caused by blunt object and is simple in nature. There is no supplementary medical report or x-ray report, therefore, firearm injury is not proved. It has also been submitted that the police has not recovered from the place of occurrence empty cartridge or any other article related to the incident. No weapon or other article was recovered from the possession or the pointing out of the appellant. The Investigating Officer has also not recovered blood stained soil or plain soil from the place of occurrence. Therefore, merely on the basis of oral evidence charge against the accused is not proved.

13. Per contra, it has been argued by learned A.G.A. for the state that the injury report of both injured PW-1 Shiv Singh and PW-2 Rohan Singh clearly mentions firearm injuries on their person. The opinion of the doctor regarding nature of injuries is not conducive and not binding on the Court. No benefit to the accused appellant can be granted merely due to default on the part of Investigating Officer in not seizing/recovering weapons of offence, *Katta* and used or unused cartridges from the custody of accused-appellant or from the place of occurrence.

14. I have heard Shri Mahesh Kumar Kuntal, learned counsel for the appellant, learned A.G.A. For the State and perused the record.

15. The definition of attempt to murder and punishment therefor has been provided under Section 307 I.P.C. In the case of **Chimanbhai Jagabhai Patel vs. State of Gujarat, (2009) 11 SCC 273** considering the judgment in **State of Maharashtra vs. Kashirao, (2003) 10 SCC 434**, the Apex Court has held that the prosecution has to prove following elements to constitute an offence under Section 307 I.P.C.:

“20....The essential ingredients required to be proved in the case of an offence under Section 307 are:

(i) that the death of a human being was attempted;

(ii) that such death was attempted to be caused by, or in consequence of the act of the accused; and

(iii) that such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as : (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.”

16. To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some over act in execution thereof. To bring a case within the ambit of section 307, the prosecution has to make out the facts and circumstances envisaged by section 300. If the ingredients of Section 300 are wholly lacking, there can be no conviction under Section 307. The ingredients of the Section are (1)

intention or knowledge relating to commission of murder; and (2) the doing of an act towards it.

17. Attempt mentioned in Section 307 I.P.C. is an intentional preparatory action which fails in its object – which is so fails through circumstances independent of the person who seeks its accomplishments. In **Prakash Chandra Yadav vs. State of Bihar, (2007) 13 SCC 134** the Apex Court held:

“Doing of an act with intention or knowledge to cause death is a necessary ingredient. Receipt of injury by the victim is not a pre-requisite for conviction under the first part of Section 307 I.P.C. The second part is attracted when the victim receives an injury.”

18. The mere use of lethal weapon is sufficient to invoke the provisions of Section 307. It is not necessary to constitute the offence that the attack should result in an injury. An attempt is itself sufficient if there is requisite intention. An intention to murder can be gathered from circumstances other than the existence or nature of the injury.

19. In **State of M.P. vs. Kedar Yadav, 2011 (1) SCC (Cri) 108**, the Apex Court has held that:

“The section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Section 307 I.P.C., cannot be acquitted merely because the injuries inflicted on the victim were in nature of a simple hurt.”

In the light of the law propounded by the Apex Court, the evidence adduced by the prosecution is to be analysed.

20. Informant injured PW-1 Shiv Singh deposed in his evidence dated 27.11.1992 that the occurrence took place about two years four

months earlier. It was 12 p.m. night. He was having conversation with Rohan Singh on his terrace. Accused Kamal Singh, Ratan Singh and Bharat Singh came on their terrace. Ratan Singh threatened him not to give evidence in the murder case of Sohan Singh, otherwise he will have to repent later on. Shiv Singh answered him that he will give correct evidence what he has seen. Hearing this, accused Ratan Singh asked his sons to kill the informant, Shiv Singh. Acting on this, accused Bharat Singh and Kamal Singh with the intention to kill the informant, fired two gun shots upon the informant, which hit near the eyes of the informant and on the chest of Rohan Singh. The injured hid themselves and raised alarm, on which Ram Hans, Soran, Maan Singh and Balram of his village reached there, thereupon accused threatened that today you have managed to save yourself but on the next occasion you will not be spared and went back to their home. PW-1 Shiv Singh proved one of the country made pistol which was used in firing on them. He also deposed regarding lodging of FIR and also that injured were accompanied by the police to PHC where their medical examination was done.

21. PW-1 Shiv Singh deposed in his cross-examination that house of Rohan Singh is towards South of that of accused Ratan Singh. There are three or four rooms towards the east of Ratan Singh's house. Towards South of the house of Ratan Singh a *Kharanja* road is situated. Between the house of Ratan Singh and *kharanja* road a platform (*chabutara*) of 3-4 ft. width is situated. Towards the South of *kharanja* 4-5 ft. width platform (*chabutara*) of Rohan is situated. After Rohan's platform (*chabutara*), his house is situated which is of 8 ft. width. At the time of firing, PW-1 Shiv Singh and Rohan were sitting on the terrace of his house. P.W.-1 denied that towards the South of *Kotha* his rooms are situated. PW-1 denied that at the time of firing they were sitting in the room. He stated that he had told the

Investigating Officer about the place where they were sitting and that electric light was lit on in the *Kotha* of Rohan. PW-1 stated that he and Rohan were sitting in a bed on the terrace of *Kotha*. After firing, blood was spread on his clothes. The Investigating Officer did not ask or took possession of his blood stained clothes. PW-1 has also deposed in his cross-examination that the house of Ram Hans is adjacent to the place of occurrence. He has also deposed in his evidence that the motive of enmity between him and the accused was the murder of his son Sohan Singh. PW-1 has given the reason for not lodging the FIR soon after the occurrence. He said that due to fear of the accused he could not lodge the FIR instantly. He visited the police station in the morning. PW-1 denied that the distance between the house of Ratan Singh and the place of occurrence is 50-60 ft.

22. Thus, informant injured PW-1 has deposed in his evidence, the date, time, place of occurrence and the presence of injured Rohan Singh, Ram Hans and Soran Singh at the place of occurrence. He also proved the distance between the house of Ratan Singh and the place of occurrence which was about 15-20 ft. PW-1 has also deposed about the participation of accused and the manner of their causing injury to him and Rohan Singh.

23. Injured PW-2 Rohan Singh has deposed in his evidence dated 27.11.1992 that the occurrence took place about two years and four months back at 12:00 o'clock night, while he was having conversation with Shiv Singh on his terrace. Ratan Singh threatened Shiv Singh not to give evidence in Sohan Singh's murder case and in case he gave evidence, he will have to repent later on. Shiv Singh told that he will given evidence what he has seen, therefore, Ratan Singh exhorted his sons to fire and kill Shiv Singh. On his exhortation, Kamal Singh and Bharat Singh fired upon Shiv Singh. The pellet from their country

made pistol hit near the eyes of Shiv Singh and on his chest. PW-2 has further deposed that on their raising alarm Soran Singh, Ram Hans and other witnesses reached there. He deposed that at about 6-6:30 am report was lodged in police station concerned.

24. PW-2 has stated in his cross-examination that the distance between his house and that of accused Ratan Singh is about 15 ft. It was dark night but light was on in his house and that in the house of Shiv Singh. He has also deposed that he informed the Investigating Officer about the two firing shots done by the accused. He has stated that blood from the wound fell on the body as well as on the ground. He stated in his cross-examination that the witnesses reached immediately on the place of occurrence. Rohan Singh has also deposed that due to fear of the accused, they did not immediately visit the police station for lodging the FIR. PW-2 has emphatically denied that distance between his house and that of Ratan Singh is about 50-60 ft.

25. Thus, PW-2 injured Rohan Singh has corroborated the evidence of PW-1 Shiv Singh regarding the time, place, manner of occurrence, the participation of accused in the incident and the firearm used by them, injuries received by him and PW-1 Shiv Singh, lodging of FIR after the incident and his as well as Shiv Singh's medical examination done in the PHC Farah, Mathura.

26. P.W.-3 Ram Hans and PW-4 Soran reside adjoining the place of occurrence. Their presence at the place of occurrence is proved by the evidence of PW-1 Shiv Singh and PW-2 Rohan Singh. PW-3 Ram Hans has stated in his evidence that hearing the hue and cry raised by the family members of injured Rohan Singh, he reached at the place of occurrence. He has stated in his evidence dated 05.12.1992 that the

occurrence took place about two years four months ago at 12 o'clock at night. PW-4 Soran was present there. He saw bullet injuries below the eyes of Shiv Singh and on the chest of Rohan Singh. When he asked them about the injuries Rohan Singh told him that appellant-accused Kamal and co-accused Bharat (since deceased) had fired on him. PW-3 Ram Hans has stated in his evidence that electric light was lit on the terrace and in the room of Rohan. PW-3 Ram Hans admitted in his cross-examination that he had himself not seen the accused firing at the injured Shiv Singh and Rohan Singh. He reached there after hearing the hue and cry of the family members of Rohan. When he reached there, Rohan, his wife, brother and children were present on the terrace. Blood was spread outside on the terrace of the room.

27. PW-4 Soran has also given evidence regarding the date, time and place of occurrence. PW-4 Soran has stated that he awoke hearing the voice coming from the house of Rohan and Shiv Singh. He reached there after Ram Hans had reached there. Shiv Singh and Rohan had received injuries. Blood was oozing from the chest of Rohan and from the forehead of Shiv Singh. Both injured were telling persons present there that appellant-accused Kamal Singh and co-accused Bharat Singh had caused them injuries by firing on them. PW-4 stated that light was burning there. He has stated in his cross-examination that the Investigating Officer did not ask him about presence of light at the place of occurrence, therefore, he did not tell him about the light lit there. PW-4 Soran stated that when he reached on the place of occurrence, the injured were on the terrace and a *khat* (Cot) was lying there nearby on the terrace.

28. Thus, PW-3 Ram Hans and PW-4 Soran by their evidence have corroborated the evidence of PW-1 Shiv Singh and PW-2 Rohan Singh regarding the date, time and place of occurrence, participation

of accused, the manner of their causing injury to PW-1 Shiv Singh and PW-2 Rohan Singh, the lodging of FIR and medical examination of injured Shiv Singh and Rohan Singh in PHC Farah, Mathura. The evidence of PW-1 Shiv Singh, PW-2 Rohan Singh, PW-3 Ram Hans and PW-4 Soran is cogent, truthful and reliable. Nothing comes out in their cross-examination that may raise doubt regarding the truthfulness and reliability of their evidence.

29. A country made pistol is a lethal weapon. Firearm injury caused by country-made pistol may be fatal in nature. Appellant-accused Kamal Singh and co-accused Bharat Singh on the exhortation of their father Ratan Singh to kill Shiv Singh and Rohan Singh fired on them with country-made pistol causing them injury one on their forehead and chest, respectively. Considering the facts and circumstances of the case, weapon used in causing injury and the part of body on which injury was caused, it can be concluded that appellant-accused Kamal Singh with co-accused Bharat Singh fired on injured Shiv Singh and Rohan Singh with the intention to cause them to death.

30. Regarding the argument submitted on behalf of the appellant-accused regarding alleged default/irregularity by the Investigating Officer in doing the investigation, it has been established by a catena of judgments of Apex Court that such default cannot be the basis of acquittal and the accused will not get any benefit of it, if case is proved by other oral and documentary evidence.

31. The Apex Court in **Ranjeet Kumar Ram vs. State of Bihar, 2015 SCC OnLine SC 500** has held as under:

“21. It is well settled that in criminal trials even if the investigation is defective, the rest of the evidence must be scrutinized independently of the impact of the defects in the investigation otherwise the criminal trial will plummet to the level of the

investigation. Criminal trials should not be made casualties for any lapses committed by the investigating officer. In State of M.P. v. Mansingh, (2003) 10 SCC 414, it was held that even if there was deficiencies in the investigation that cannot be a ground for discrediting the prosecution version. The same view was reiterated in Sheo Shankar Singh v. State of Jharkhand, (2011) 3 SCC 654 and C. Muniappan v. State of Tamil Nadu, (2010) 9 SCC 567.”

32. In **Ram Bali vs. State of U.P.**, AIR 2004 SC 2329 the Apex Court has held as under :

“12. The investigation was also stated to be defective since the gun was not sent for forensic test. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.”

33. In **Dayal Singh and another vs. State of Uttaranchal**, (2012) 8 SCC 263 the Apex Court has propounded as under:

“34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a “fair trial”, the Court should leave no stone unturned to do justice and protect the interest of the society as well.”

34. PW-3 Ram Hans and PW-4 Soran, who reside adjoining to the place of occurrence and whose presence at the time of occurrence is proved by evidence of PW-1 Shiv Singh and PW-2 Rohan Singh have

also corroborated the evidence of PW-1 and PW-2 regarding the date, time, place of occurrence, manner, participation of accused, manner of their causing injury to PW-1 and PW-2, lodging of the FIR and medical examination of the injured Shiv Singh and Rohan Singh in PHC, Farah, Mathura. The evidence of PW-1, PW-2, PW-3 and PW-4 is cogent, truthful and reliable. Nothing comes out in their cross-examination that may raise doubt regarding the truthfulness and reliability of their evidence.

35. The oral evidences of PW-1 Shiv Singh, PW-2 Rohan Singh, PW-3 Ram Hans and PW-4 Soran have been corroborated by documentary evidence, written report, chick FIR, injury report of Shiv Singh and Rohan Singh, site plan and charge sheet filed against the accused Kamal Singh and Bharat Singh (since deceased).

36. Considering the facts and circumstances of the case in the light of the law propounded by the Apex Court regarding the defective investigation, the argument advanced by learned counsel for the appellant cannot be accepted and it is accordingly rejected.

37. As regards the argument advanced by learned counsel for the appellant that in the injury report of the injured Rohan Singh the doctor has opined that injury was caused by hard and blunt object and is in simple in nature, from the perusal of the medical report it is seen that it further mentions that “injuries could be caused by firearm”. Therefore, the argument of learned counsel for the appellant does not hold much ground. Apart from this, Medical Officer PW-6 Dr. G.S. Awasthi has stated in his evidence regarding Injury No. 2 found on the person of Shiv Singh and the injury found on the person of Rohan Singh it is possible that it may be caused on 20/21.07.1990 by firearm.

38. Considering the medical report along with oral evidence of Medical Officer P.W.-6, Dr. G.S. Awasthi the arguments of the learned counsel for the appellant on this point does not hold much ground and is not accepted.

39. From the analysis of the oral and documentary evidence on record it is concluded that the prosecution has proved beyond reasonable doubt that on the date, time and place of occurrence the accused-appellant Kamal Singh with co-accused with the intention to cause death, fired on Shiv Singh and Rohan Singh causing fatal injuries to them. The prosecution has proved beyond reasonable doubt charge under Section 307 I.P.C. against the accused-appellant and the Trial Court has rightly convicted the appellant-accused under that section.

40. Learned counsel for the accused-appellant has also submitted that in case the appeal is not allowed against conviction then considering that incident took place more than 32 years back in the year 1990 and that the appellant-accused has no criminal antecedent to his credit or he has not involved in any other criminal activity, he may be released on probation.

41. Learned A.G.A. For the State has opposed the prayer of the accused-appellant being enlarged on probation and submitted that the appellant has committed an offence under Section 307 I.P.C. which is punishable with life imprisonment, therefore, he is not entitled to the benefit of probation.

42. Considering the facts and circumstances of the case and the fact that the appellant-accused had asked injured P.W.-1 Shiv Singh not to give evidence in a case in which appellant-accused was undergoing trial for the murder of informant's (P.W.1) son Sohan and when

informant Shiv Singh refused to do so, the accused-appellant Kamal Singh with co-accused fired on Shiv Singh and Rohan Singh by a country-made pistol causing injuries to them on their vital parts. There is no ground to release the appellant on probation.

43. Considering the facts and circumstances of the case, especially that more than 32 years have passed since the offence was committed and prosecution has not produced any criminal history of the appellant-accused, the period of sentence awarded to appellant-accused is reduced from three years to two years rigorous imprisonment without modifying the fine imposed on him. The criminal appeal is partly allowed.

44. The appellant-accused will surrender before the Trial Court concerned within 30 days. The Trial Court shall take him into custody and sent him to appropriate jail for serving the sentence. The period which the appellant-accused has already undergone during investigation and trial shall be set off according to the provisions of Section 428 Cr.P.C. against the sentence awarded to him.

45. Let a copy of this judgment along with the trial court record be sent to the court concerned for compliance.

Order Date :- 09.05.2023
Brijesh Maurya

(Surendra Singh-I)