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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl. A. No. 391/2002

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Decided on: 6th July, 2012

CHANDER JHA

..... Appellant

Through : Ms. Rakhi Dubey, Adv.

versus

STATE

... Respondent

Through : Mr. Mukesh Gupta, APP

A.K. PATHAK, J. (Oral)

1. Aggrieved by his conviction under Sections 307 I.P.C. and 27 of the Arms Act, appellant has preferred this appeal.

2. In brief, prosecution case is that on 19th October, 1998 at about 10.30 PM a secret informer brought to the notice of Inspector Ashwani Kumar, Additional Station House Officer, Police Station Adarsh Nagar that three persons armed with arms and ammunitions would come on a blue coloured two-wheeler Azadpur Mandi from Village Bharola side. On receiving this information, Inspector Ashwani Kumar constituted a raiding party comprising of himself, Sub Inspector Rakesh Kumar, Head Constable Om Prakash, Head Constable Virender Singh, Constable Yashpal, Constable Dharampal, Constable Ram Phal, Constable Hari Kishan and Constable Vinod Kumar. Thereafter, raiding party reached Sabzi

Mandi, Azadpur in a Government vehicle bearing no. DNH 5368 driven by Constable Suresh Kumar. Police party took position near a tomato shed. At about 11:15 PM three persons were seen coming on a blue coloured scooter from Village Bharola side. They were not wearing helmets. On the pointing of secret informer, Inspector Ashwani Kumar gave signal to the scooterist to stop. Scooter was stopped at about 20 meters away and thereafter all the three occupants started running towards Sarai Pipal Thala Bagh. Police party gave a chase to them. Appellant took out a revolver and fired towards Inspector Ashwani Kumar twice, however, he continued his pursuit and overpowered him. Other police officials apprehended remaining two accused, namely, Mohd. Chuttan and Jawahar Singh who were also armed with Desi Kattas. I need not to discuss about the role of co-accused since this Appeal is only on behalf of the appellant Chander Jha.

3. From the possession of appellant one loaded revolver was recovered. Four live cartridges were there in the revolver. Two empty shells of the fired cartridges were also recovered. Sketch of the revolver, live cartridges and empty shells was prepared. Thereafter same were sealed in pullanda with the seal of AKJ. Site plan was prepared. Case properties, that is, revolver, live cartridges and empty shells of fired cartridges as also the scooter were

deposited in the Malkhana. Pullanda containing revolver, live cartridges and fired cartridges were sent to CFSL, Chandigarh. As per CFSL, Chandigarh revolver was capable of firing and used cartridges had been fired from the same revolver.

4. Charge under Sections 307/34 IPC was framed against the appellant and other accused persons on 14th October, 1999. Separate charge under Section 27 of the Arms Act, 1959 was also framed against the appellant. Appellant pleaded not guilty and claimed trial.

5. Prosecution has examined 14 witnesses in all. PW5 Constable Vinod, PW6 Constable Yash Pal, PW7 HC Varinder Singh, PW9 HC Om Prakash, PW12 SI Rakesh Kumar and PW13 Inspector Ashwani Kumar are members of the raiding party. PW2 HC Sewa Ram was working as Malkhana Moharrar with whom case properties were deposited by Inspector Ashwani Kumar. PW4 Head Constable Manoj Kumar had taken the pullanda containing revolver, live cartridges and fired cartridges to CFSL, Chandigarh and had deposited the same there. Mr. B. Badanaya, Senior Scientific Officer, CFSL, Chandigarh has been examined as PW14. He has proved the CFSL report, according to which two .38 bore cartridges C-1 and C-2 had been fired from the revolver in question. Learned Additional Sessions Judge has found testimonies of the

aforesaid witnesses to be trustworthy and reliable and sufficient enough to conclude that it is the appellant, who had fired at the police party, thus, had committed an offence punishable under Section 307 IPC. He has further concluded that appellant was guilty of committing an offence under Section 27 Arms Act, 1959 for using the firearm.

6. I have also perused the statements of prosecution witnesses, recorded before the trial court. In my view, statement of PW5 Constable Vinod cannot be read against the appellant. This witness was partly examined on 3rd August, 2000 and his remaining examination was deferred. Thereafter, he has not stepped in the witness box. Thus, in my view, his testimony has to be ignored. PW6 Constable Yashpal though had supported the prosecution on material points but has wavered from his statement recorded under Section 161 Cr.P.C., thus, was cross-examined by the Additional Public Prosecutor. He had wrongly given the year of incident as 1997 and has clarified the date, month and year of incident in his cross-examination by the Additional Public Prosecutor to be 19th October, 1998. On certain other points also he has wavered. However, I need not to delve much on this point since even if the testimony of this witness is ignored sufficient material is there to establish the guilt of appellant beyond shadow of reasonable doubt.

Prosecution is armed with testimonies of remaining members of the raiding party, who have corroborated each other with regard to the incident, identity of the appellant as also recovery of fire arm from him together with live and fired cartridges. Testimonies of other witnesses, namely, PW7 HC Varinder Singh, PW9 HC Om Prakash, PW12 SI Rakesh Kumar and PW13 Inspector Ashwani Kumar have remained unshattered in their cross-examinations. All these witnesses have deposed in line with the prosecution case and have rightly been taken as trustworthy and reliable witnesses by the trial court.

7. PW13 Inspector Ashwani Kumar was heading the team. He has deposed that on 19th October, 1998 he was posted as Additional Station House Officer at Police Station Adarsh Nagar when he received a secret information at about 10:30 P.M. that three boys would come to fruit Mandi Azadpur from Village Bharola side and they would be carrying arms and ammunition. On receiving this information, he formed a raiding party comprising of SI Rakesh Kumar (PW12), HC Varinder Singh (PW7), HC Om Prakash (PW9), Constable Ram Phal, Constable Vinod (PW5), Constable Hari Kishan and Constable Yashpal (PW6). Thereafter, he alongwith them reached near the Sabzi Mandi in a Government vehicle bearing no. DNH 5368. Vehicle was parked near Sulabh

Sauchalaya, which was near the tomato shed. At about 11:15 PM informer pointed out towards a two wheeler scooter coming from the side of Village Bharola on which three persons without helmets, were sitting. He gave signal to the scooterists to stop at which scooter stopped about 20 meters away from the raiding party. Thereafter, occupants started running after leaving the scooter. Chander Jha took out a revolver from his pocket of pant and fired twice aiming the police party. However, he was apprehended by him. A revolver was recovered from Chander Jha. On checking it found containing four live cartridges. Two used cartridges were also there. Sketch of the revolver and cartridges were prepared. Revolver and cartridges were sealed. Scooter bearing no. DL-2SC-8980, which was being driven by Chander Jha, was seized. Later on, case properties were deposited in the Malkhana with Malkhana Moharrar. During the investigation, same were sent to CFSL, Chandigarh for examination. CFSL report Ex. PA was obtained. Sanction under Section 39 of the Arms Act, 1959 from the Deputy Commissioner of Police was obtained. Revolver recovered from Chander Jha has been identified by him in Court, which has been exhibited as Ex. P-6. The cartridges found in the revolver have been exhibited as Ex. P-7/1 to Ex. P-7/6. Testimony of PW13 has remained unshattered in his cross-examination.

8. PW7 HC Varinder Singh, PW9 HC Om Prakash and PW12 SI Rakesh Kumar have fully corroborated the version of PW13 on material points. Testimonies of PW7, 9 and 12 have remained unshattered in their cross-examination. In my view, trial court has rightly accepted their testimonies to hold that on receiving a secret information Inspector Ashwani Kumar constituted the raiding party comprising of aforesaid police officials, who took position near Sulabh Sauchalaya and at about 11:30 PM scooter driven by appellant on which the two co-accused were also sitting was seen coming from Bharola Village side and when signal was given to them to stop appellant stopped the scooter and all the occupants started running. They were given a chase at which appellant fired twice aiming the police officials. However, police party continued with its pursuit and Inspector Ashwani Kumar overpowered the appellant. The recovery of revolver, fired and live cartridges has also been proved from the statement of the witness.

9. MHC(M) PW2 HC Sewa Ram was working as Malkhana Moharrar has deposed that Inspector Ashwani Kumar had deposited pullanda sealed with the seal of AKJ containing one revolver with four live cartridges, two used cartridges. His testimony has remained unchallenged, inasmuch as, this witness has not even been cross-examined. CFSL report Ex. PA has confirmed that the fired

cartridges had been fired from the revolver recovered from the appellant. Testimony of this witness has proved that the case property was sealed at the spot and was deposited in the malkhana without any undue delay and later on, was sent to CFSL, Chandigarh. PW4 HC Manoj Kumar had taken the sealed pullanda to CFSL, Chandigarh and had deposited there. He has categorically deposed that till the time case property remained with him no one tampered the same. His this version has remained unshattered in his cross-examination.

10. Learned Amicus Curiae has vehemently contended that PW9 has failed to give the details of arms issued to him from the Malkhana, inasmuch as, no DD entry in this regard had been produced. This shows that revolver was planted on the appellant. I do not find any force in this contention of learned Amicus Curiae. In my view, arms and ammunitions issued to PW9, in no way, could have been planted on the accused. Revolver recovered from the appellant is not an official weapon. Learned Amicus Curiae has further contended that PW12 has failed to give the number of Government vehicle in which police party had gone to New Sabzi Mandi from the Police Station, this, itself shows that the whole case has been fabricated. In my view, testimony of PW12 cannot be discarded, merely because, he was not able to give the number of

Government vehicle, after about three years of incident. Memory of a person is not infallible. If a person fails to remember the minute details like vehicle number after three years would not mean that his testimony with regard to the incident has to be discarded as a whole. Even otherwise, appellant cannot derive any mileage from this, as every member of raiding party has given the number of government vehicle. It is further contended that appellant has taken a defence in his statement under Section 313 Cr.P.C. that he was picked up from his house and implicated in this case in order to solve FIR No. 277/1998 registered at Police Station Adarsh Nagar. I do not find any force in this contention either. This contention is nothing but an absurd proposition. In case the police officials wanted to implicate the appellant in any other pending investigation they could have done so without registering any new case against him. That apart, appellant has not led any evidence to show that he was picked up from his house.

11. Learned Amicus Curiae has further contended that the seizure memo of revolver and the cartridges does not bear signatures of the appellant which falsifies the recovery. In my view on seizure memo signatures of accused are not required. Learned Amicus Curiae has further contended that the PW4 has deposed that he had taken the case properties to CFSL, Chandigarh on 17th November,

1998, but the same was not accepted since CFSL needed more quantity of live cartridges for lab test purposes. He returned back and on 14th December, 1998 he again went to CFSL, Chandigarh along with other parcel containing freshly purchased cartridges sealed with the seal of AKJ and deposited the same. She has further contended that no document was produced to support this that live cartridges as desired by the CFSL had been purchased. This argument is of not much importance, in view of the statement of PW14 Dr. B. Badanaya who has deposed that the test fire was done from the live cartridges of .38 bore from which it was revealed that the fired cartridges sent for testing, had been fired from the same revolver. What is relevant is the question of tampering of the fired cartridges and not of the live cartridges. As regards tampering of the recovered revolver and fired cartridges are concerned, PW4 has categorically deposed that till the time case property remained with him, nobody tampered with the same. This statement has remained unshaken.

12. Learned Amicus Curiae has next contended that no one was injured thus ingredients of offence under Section 307 are not attracted. I do not find any force in this contention. To justify conviction under Section 307 IPC it is not essential that bodily injury capable of causing death, should have been inflicted and an

attempt in order to be criminal need not be penultimate act foreboding death. It is sufficient in law if intent is present coupled with some overt act in execution thereof, such act being proximate to the crime and if the attempt has gone so far that it would have been complete but for the extraneous intervention which frustrated its consummation. In *Om Prakash vs. State of Punjab*, AIR 1961 SC 1782, Apex Court held that in cases of attempt to commit murder by fire arms, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot taking effect, the offence under Section 307 IPC is made out.

13. Section 307 IPC of the Indian Penal Code reads as under:-

“307 IPC. Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to [imprisonment for life], or to such punishment as is hereinbefore mentioned.

Attempts by life convicts.—[When any person offending under this section is

under sentence of [imprisonment for life], he may, if hurt is caused, be punished with death.]”

14. Supreme Court in State of Maharashtra vs. Kashirao, AIR 2003(SC) 3901 has held thus, “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 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”. It was further observed that for the application of Section 307 IPC it is not necessary that the injury capable of causing death should have been actually inflicted.

15. In my view, if an accused does an act with sufficient guilty intention and knowledge and in circumstances, which do not from their nature afford a defence from a charge of murder, and if the act is of such a nature as would have caused death in the usual course of events but for something beyond the accused’s control which

prevented that result, then the case would fall within the Section 307 IPC. What Section 307 IPC really means is that the accused must do an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact the act would amount to murder in the normal course of events. In this case, appellant with co-accused persons started running in order to evade apprehension by the police party and with a view to stop them and in order to deter them from their continuous pursuit, he aimed towards the police party and fired on them twice. From the above circumstances, appellant's intention becomes clear that he had intended to cause such bodily injuries to one or more members of the police party by using fire arms, which would have been capable of causing death, had shots have hit any of the members of police party. It is only by the act of God that the aim taken by the appellant while running missed and fortunately enough for the police party that no one sustained injuries. In the facts of this case, in my view, offence under Section 307 IPC is made out and the trial court has held so rightly.

16. Revolver was recovered from the appellant, which has been used in the commission of crime. Sanction under Section 39 of Arms Act, 1959 has been duly proved by PW8 DCP Pal Dan. He has categorically deposed that from the material placed before him

he was satisfied that the offence under Section 27 of the Arms Act, 1959 was committed by the appellant, accordingly, he accorded sanction for prosecution of appellant. He has proved the sanction order as Ex. PW8/A. I find the same in order and to my mind, appellant, thus, has been rightly convicted by the trial court under the said provisions.

17. For the foregoing reasons, appeal is dismissed being devoid of merits. At the end, I must place on record my appreciation for the able assistance rendered by the learned Amicus Curiae. Fee of Amicus Curiae is fixed at ₹7500/- (Rupees Seven Thousand Five Hundred Only) to be paid by the Delhi High Court Legal Services Committee. Copy of the order be sent to Superintendent Jail for serving it on the appellant.

A.K. PATHAK, J.

JULY06, 2012

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