

Neutral Citation No. - 2023:AHC:211046

Reserved On:20.07.2023

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Court No. - 50

Case :- CRIMINAL APPEAL No. - 4288 of 2018

Appellant :- Abrar

Respondent :- State of U.P.

Counsel for Appellant :- Sanjay Mishra,Santosh Kumar Giri

Counsel for Respondent :- G.A.

Hon'ble Ram Manohar Narayan Mishra,J.

1. Instant appeal arises out of the judgement and order dated 30.5.2018 passed by Additional District and Sessions Judge, Fast Track Court No.2, Fatehpur in S.T. No. 291 of 2015 (State vs. Abrar) arising out of Case Crime No.245 of 2015, under Section 307 IPC, Police Station Bindki, District Fatehpur as well as S.T. No.292 of 2015, under Section 3/25 Arms Act, arising out of Crime No. 250 of 2015, P.S. Bindki, District - Fatehpur, convicting the appellant under Sections 307) IPC and Section 3/25 of Arms Act and sentencing him as under:

(i) under Section 307 IPC to undergo 10 years rigorous imprisonment, with fine of Rs.10,000/- in default thereof he has to undergo one year additional imprisonment;

(ii) under Section 3/25 of Arms Act to undergo 1 year rigorous imprisonment, with fine of Rs.1,000/- in default thereof he has to undergo one month additional imprisonment. Both the sentences are directed to run concurrently.

2. Heard Sri Sanjay Mishra, learned counsel for the appellant, Sri Deepak Kapoor, learned AGA for the State and perused the material placed on record.

3. The factual matrix of the case in brief relevant for the present

appeal are that the de-facto complainant Rukhsana lodged an FIR at police station concerned on 18.7.2015 at 9:00 hours, on the basis of written report stating therein that his father Rashid had refused to give fish from his pond to accused Abrar on his demand and for that reason, the accused fired a shot at the father of the informant on 18.7.2015 at 7:00 hours in front of the house of Ahmad. He rushed his father to Governemnt Hospital, Bindki with assistance of Gram Pradhan and co-villagers. His father was referred to Kanpur for treatment. FIR was lodged under Section 307 IPC at police station concerned. On the basis of secret information, the Investigating Officer arrested the accused during the course of investigation on 22.7.2015 at 12:50 hours near the trisection of Sarkandi, main road and recovered a countrymade pistol of .315 bore, one live cartridge and one empty shell of .315 bore. The Investigating Officer of case under Section 307 IPC prepared an arrest and recovery memo and got the signature of the accused and police witnesses thereon. The accused has confessed before police team that he used this countrymade pistol (tamancha) while firing a shot on Rashid on 18.7.2015 at 7:00 AM but his life was saved. He also stated that the empty shell is of the cartridge, which was used in commission of offence of attempt to murder. The local witnesses declined to stand as a witness for personal reasons. An FIR under Section 3/25 of Arms Act was also lodged on the basis of recovery memo prepared by S.I. Krishna Kumar Mishra, who is Investigating Officer of case under Section 307 IPC on 22.5.2015 at 14:20 hours. The injured Hazi Rashid was admitted in Chandni Hospital, Private Ltd., Arya Nagar, Kanpur for treatment on 18.7.2015 at 9:40 AM having received gunshot injury and was discharged on 11.8.2015, as revealed from discharge slip of the hospital, which is Ex.Ka-12. He was also operated in said hospital on 18.7.2015, as he received gunshot injury on right chest wall. The operation papers were proved by concerned Doctor as Ex.Ka-13 and Ka-14. The countrymade pistol, one live cartridge and one empty cartridge shell were sent for ballistic examination to FSL, UP, Lucknow.

The report of FSL dated 22.6.2017 is placed on record, which is exhibited as Ex.Ka11, wherein it is stated that one countrymade pistol of .315 bore, one empty cartridge shell of 8mm K.F. and live cartridge of 8mm K.F. were received for forensic examination. Two .315 bore cartridges were used in test fire from said pistol and its pellets were also recovered. The difference was observed between the empty cartridge shell received for examination and the cartridge shells, which were collected after test fire by said pistol with regard to firing pin, breach marks and lack of personal characteristics were found and thus, the empty cartridge shell received for examination was not fired by the said pistol. One fired bullet of .315 was also not having similarity in personal characteristics with those cartridges which were used in test fire by said pistol. Thus, the FSL report reveals that one bullet recovered from the chest of the injured during operation as well as the empty cartridge allegedly recovered from the possession of the accused at the time of his arrest were not found to be fired by the pistol allegedly recovered from the accused.

4. Learned trial court framed charges under Section 307 IPC and 3/25 of Arms Act against accused on 28.7.2016. On commencement of trial, the prosecution examined PW-1 informant Rukhsana, PW-2 injured Rashid, PW-3 Constable Sarvesh Kumar Singh, who is author of Chik FIR of 245 of 2015, under Section 307 IPC, who proved the Chik FIR as Ex.Ka-2 and Extract of GD of Registration of case under Section 307 IPC on 18.7.2015 at 9:05 AM, as Ex.Ka-3. Whereas PW-1 Rukhsana proved her written report as Ex.Ka-1 during her evidence. PW-4, Head Constable Sabir Ali, is author of Chik FIR and Extract of GD of Registration of case under Section 3/25 of Arms Act, vide Crime No.250 of 2015 on 22.5.2015 and has proved these documents as Ex.Ka-4 and 5, as author of these documents. PW-5 Ram Kishore is author of Arrest and Recovery Memo dated 22.7.2015 regarding arrest of the accused and recovery of firearm and ammunition on personal search of the accused. He has proved the recovery memo as Ex.Ka-6 while evidence. PW-6 S.I. Arvind Singh is

Investigating Officer of Case No.250 of 2015, under Section 3/25 of Arms Act, who has proved the chargesheet filed by him in the case as Ex.Ka-7 and site plan of place of recovery as Ex.Ka-8 during his evidence. PW-7 Krishna Kumar Mishra, is Investigating Officer of the case under Section 307 IPC, who has proved site plan of the place of incident of attempt to murder as Ex.Ka-19 and has also proved the facts regarding arrest of the accused and recovery of firearm ammunition as team leader and stated that arrest and recovery memo bears his signature and same was prepared by him on which Ex.Ka-6 is already marked. He also proved chargesheet in his writing and signature as Ex.Ka-10 and FSL Report of said arm and ammunition as Ex.Ka-11. He produced the countrymade pistol, one live cartridge and one empty cartridge shell and proved these as material Exhibit Nos.2 and 3 by his evidence before the Court. He stated in his evidence that he sent arm and ammunition recovered from the accused to FSL, Lucknow for examination. The medico legal examination of the injured was not conducted at CSC, Bindki but the same was carried out at Chandni Hospital, Kanpur as the injured was taken to private hospital by the witnesses. The informant had not stated to him that when his father was shot at, she was standing 5 to 6 paces away from the place of firing. PW-8, Dr. C.K. Singh proved bed head ticket of the injured Hazi Rashid, aged around 70 years, dated 18.7.2015, by comparing the same with the original and Ex.12, 13 and 14 were marked on its photocopy, which is placed on record. He stated that the injured was having gunshot injury on his person, who was admitted to hospital at 9:40 AM at 18.7.2015. He suffered firearm injury on chest, which pierced his abdomen. During operation, it was found that the bullet got fixed near kidney after hitting the chest and piercing the spleen. Thus, the bullet recovered from the person of the injured was provided to the concerned police persons. Chest cavity was filled up with blood, which was drained out by placing a tube inside the chest. The patient was discharged on 11.8.2015. The medical examination of the injured was conducted by the Dr. R.P. Pathak. He

cannot state the nature of firearm by which the bullet, which was recovered from the body of the injured, was fired.

5. After conclusion of prosecution evidence, the statement of accused under Section 313 Cr.P.C. was recorded, in which he denied the factum of recovery of firearm and ammunition from his possession and stated that the witnesses had deposed against him falsely due to enmity in Gram Pradhan election. He has committed no offence. Wrong documents are prepared during investigation. He was challaned after arresting him from his house. He was not aware of the report of FSL. The investigation was done in wrong manner.

6. The accused has not laid any evidence in defence. His defence is of denial. Learned trial court after considering and hearing submission of learned counsel for the side of prosecution and defence, convicted and sentenced the accused for said charges as aforesaid, with finding that the accused Abrar assaulted the injured by opening a fire by his countrymade pistol on 18.7.2015 on said date and time of the incident with intention to kill him. No circumstance emerged from the evidence adduced during trial, which could be consistent with the hypothesis the innocence of the accused. This fact has also been proved beyond reasonable doubt that on 22.7.2015, the police team arrested the accused and recovered pistol of .315 bore, one live cartridge of .315 bore and one empty cartridge of .315 bore. Thus, the learned trial court has convicted and sentenced the accused appellant for both charges as aforesaid in impugned judgement and order.

7. Learned counsel for the appellant submitted that the learned trial court has measurably failed to appreciate the evidence on record. The accused appellant has been falsely implicated in the case due to village enmity. PW-1 the informant Rukhsana is not an eye-witness of the case. She has neither stated in FIR nor in her evidence before the court that she witnessed the incident. She has stated in FIR that her father was shot on

18.7.2015 at 7:00 AM on the way in front of the house of Ahmad. She has stated in her evidence that she lifted her father after the incident and at that time her mother and villagers reached on the spot. No independent witness has been examined in support of the prosecution case whereas in FIR as well as in the statement of PW-1 and PW-2, it is stated that the co-villagers had reached on the spot at the time of incident. Thus natural witnesses were concealed and interested witnesses have been examined to prove the prosecution case. The prosecution version is not corroborated by evidence of any independent witness. Thus, evidence of injured does not inspire confidence. By the report received from Forensic Science Laboratory, the prosecution failed to establish the case that the empty cartridge shell allegedly recovered from the possession of the accused at the time of his arrest and one fired bullet recovered from the body of the injured during operation carried out in the private hospital were fired by the same firearm allegedly recovered from the possession of the appellant at the time of his arrest, thus these facts create a reasonable doubt on authenticity of prosecution version. The appellant is held in jail custody since 22.7.2015 and has undergone more than 7 years imprisonment till date. The sentence awarded in impugned judgement is excessive and too severe. The impugned judgement is against the weight of evidence on record. The presence of PW-1 informant on the place of incident at the time of incident does not inspire confidence as she has not stated in FIR that she had witnessed the incident on her own. Therefore, the appeal is liable to be allowed and the appellant be acquitted from the charges, as aforesaid.

8. Per contra, learned AGA appearing for the State submitted that the prosecution case has been proved by the evidence laid during trial and is beyond reasonable doubt. PW-1 informant as well as the injured Rasheed have given eye-witness and personal account of the incident. The case is based on direct evidence. The motive is introduced in the FIR itself that prior to the occurrence, the accused had demanded fish from injured,

which was reared in pond of the injured and on refusal of the injured, he got infuriated and subsequently opened fire on him with intention to kill. The plea is liable to be dismissed.

9. The case is based on direct evidence of PW-1 informant as well as PW-2 the injured. There is no material or evidence on record to suggest that the accused has been falsely implicated by the injured in the case. FIR in the present case is lodged without any undue delay just after two hours of the incident, at the instance of PW1, who is daughter of the injured and she has stated that she is residing in her parental place for many years, thus her presence on the spot is also natural. This is a fact of common experience that the co-villagers feel shy of appearing as a witness in incident, which occurred between co-villagers to avoid enmity with the accused and consequent retaliation. Although, PW-1 informant has stated that she has witnessed the incident but in her Examination-in-chief she has stated that accused assaulted his father by countrymade pistol in front of the house of Ahmad on road, which hit him in the right side of abdomen. She was standing 5 to 6 paces opposite from his father at that time. He fell down after receiving firearm injury and the accused fled away from the place. She has lifted her father and co-villagers and her mother rushed to the spot. She got written report scribed by a person at the door of Gram Pradhan, who had read over the report to her and then she appended her signature and produced the written report at police station. She proved her written report as Ex.Ka-1, which form basis of lodging FIR for offence under Section 307 IPC. She also stated that the accused had taken free fishes prior to the incident for 2 to 3 time and for that reason, her father refused to oblige the accused last time, when the latter demanded fish from him again. In cross-examination, she has stated that her husand resides in Bombay where he works as a labour. The house of Ahmad is nearby her home. The accused ran by Yamuna river after firing a shot at her father. He fired at him from a distances of one meter. She is not aware of the directions. The investigating Officer had recorded

her statement.

10. PW-7, The investigating Officer has stated in cross-examination that the PW-1 informant has not stated him in her statement under Section 161 Cr.P.C. that she has witnessed the incident. However, no adverse inference can be drawn against the informant on account of version of PW-7, the Investigating Officer that she had not stated that she got the written report scribed by Gram Pradhan as she has not stated in her evidence that she got the written report scribed by Gram Pradhan but has stated that she got the written report scribed at the door of Gram Pradhan by some other person. No adverse inference can be drawn against the evidence of PW-2 Rasheed on account of the fact that the Investigating Officer has stated before the Court that the injured had not stated him that after the incident, he was not conscious. He recorded the statement of Rasheed on 9.8.2015, as he was not in a position to speak prior to that. Injured had not pointed any blood on the place of incident. This fact is noteworthy that huge gap is there between the date of incident and recording of the statement of injured, as just after the incident the injured was hospitalized where he was operated. The injured has suffered firearm injuries on his chest, which is vital part of the body and bullet was recovered by operating him, which was stuck in his kidney. This fact itself shows that had the injured not been timely and properly extended medical assistance, just after the incident, his life would be jeopardized. There is nothing in the statement of PW-2, who is star witness in the case which makes his testimony doubtful. He has given sequence of events in natural manner and has also proved motive introduced in FIR version in his evidence. He has also stated that his daughter got the written report scribed by some person at the door of Gram Pradhan. He was taken to Government Hospital Bindki by four wheeler and thereafter he was referred to Chandni Hospital, Kanpur, as his condition was serious. The accused used to ask for fish which he would give him but he did not pay its price. He would take fishes free of cost. He asked for fish one day

before the incident and as he refused to oblige him, he fired a shot at him. There was festival of Eid on the date of incident and he had left his home on that day to offer namaz in the mosque at around 7:05 to 7:10 AM. He neither supported nor opposed any candidate in election of Gram Pradhan. He is not aware that his family has voted for Rajjan or not. He is not aware that Abrar has been supporter of Mobin, who stood as rival candidate of wife of Gram Pradhan Rajjan. He denied the defence suggestion that Abrar had supported Gram Pradhan Election Candidate Mobin and a false story has been created against the accused in collusion with present gram pradhan. The pond from which fish was demanded by the accused is on lease, which is lying in the name of Ghaseete, who belongs to fishermen category. This lease was granted for ten years. The paper of lease lies in the name of Ghaseete but he alongwith Ghaseete had reared fish in said pond. He would also supervise the said pond. He could not see, from which direction the accused appeared on the spot. He fell down after having been hit by firearm being unconscious and regained consciousness at Bindki hospital. He was not in a position to speak after receiving injuries. He received on firearm injury. The fire shot at him from a distance of 5 to 6 paces. He has been involved in criminal cases. He shared half partnership in the said pond which lease lies in the name of Ghaseete.

11. Thus, on a meticulous examination of the evidence laid support of the charge under Section 307 IPC framed against the accused appellant, I find no factual or legal error in finding recorded by the learned trial court with regard to conviction of the appellant. The prosecution case has been proved beyond reasonable doubt against the accused for charge under Section 307 IPC, for which he has been rightly convicted.

12. So far as the charge under Section 3/25 of Arms Act is concerned, the learned trial court has not considered the facts and circumstance of the recovery of said firearm, one live cartridge and one empty cartridge shell from the possession of the appellant as well as evidence laid by the

prosecution to prove the said charge in proper manner. There was no occasion for the accused to keep the empty cartridge shell with him after the incident, just to inculcate him for charge under Section 307 IPC. The public witnesses have not been enjoined by the Arrest and Recovery Officer, even though they were present at the time of arrest and recovery. This creates serious doubt in the mode and manner of the recovery of said firearm and ammunition from the possession of the accused. The FSL report does not corroborate the prosecution case in this regard that said firearm was used in the commission of the offence of attempt to murder as the empty cartridge shell allegedly recovered from the possession of the appellant at the time of his arrest as well as used bullet recovered from the body of the injured during operation were not found to be fired by the countrymade pistol (tamancha) allegedly recovered from the possession of the accused. Thus, it cannot be held that the firearm allegedly recovered was used in commission of the offence of attempt to commit murder. The confessional statement of the accused before the police cannot be permitted to be proved due to the embargo created by Section 25 and 26 of the Evidence Act. The said recovery of firearm and ammunition is not based on disclosure statement of the accused, which could otherwise be covered under Section 27 of the Evidence Act. These facts and circumstances created reasonable doubt regarding mode and manner of the recovery of firearm and ammunition from the possession of appellant at the time of his arrest and the defence version that said firearm was planned against the appellant cannot be entirely brushed aside, thus, the appellant deserves to be acquitted by the charge under Section 3/25 of Arms Act on extending benefit of doubt with regard of said charge and the judgement of conviction and sentence of learned trial court for charge under Section 3/25 of Arms Act is not sustainable and the same deserves to be set aside.

13. However, in absence of proof of charge under Section 3/25 of Arms Act beyond reasonable doubt, the charge under Section 307 IPC is proved

by cogent and direct evidence of the injured and informant will not get affected.

14. Consequently, the conviction of appellant for charge under Section 307 IPC is affirmed and appeal fails with regard to said charge. The appeal is partly allowed in respect of charge under Section 3/25 of Arms Act. Conviction and sentence awarded against the appellant for said charge is hereby set aside.

15. The conviction of the appellant for charge under Section 307 IPC is affirmed however, keeping in view the totality of facts and circumstance and the fact that this is admitted fact that the injured received one firearm injury in the incident and the case is pending since year 2015 and the appellant is held in jail custody since inception of the case, the sentence awarded by the learned trial court deserves to be reduced in larger interest of the justice, thus, the sentence for said charge is reduced from 10 year to 7 years rigorous imprisonment.

16. Let a copy of this judgement be sent to Sessions Judge, Fatehpur for compliance and to Jail Superintendent concerned for compliance and for enforcement of sentence as modified by this order.

17. The appeal is **partly allowed**, accordingly.

Order Date :- 1.11.2023

Kamarjahan