

Court No. - 86**Case :-** CRIMINAL APPEAL No. - 2209 of 1987**Appellant :-** Brijendra Kumar**Respondent :-** State of U.P.**Counsel for Appellant :-** G.S. Chaturvedi, Chakshuvendra Pachauri**Counsel for Respondent :-** A.G.A., M.N. Singh**Hon'ble Nalin Kumar Srivastava, J.**

1. Heard Sri N.I. Jafri, learned Senior Advocate assisted by Sri Hari Prakash Mishra, learned counsel for the appellant, Sri Ajay Kumar Vashistha, learned counsel for the complainant as well as learned A.G.A. for the State and perused the records.

2. The present appeal has been preferred against the judgement and order dated 19.8.1987 passed by the Court of VIth Additional Sessions Judge, Etah, whereby convicting the present appellant-Brijendra Kumar under Section 307 IPC and further sentencing him to undergo three years R.I.

3. The prosecution story in brief is that on extortion of co-accused Laxmi Narain, appellant Bijendra Kumar shot fire from behind upon Vishnu Kant Paliwal, the informant, when he was taking medicine from the shop of Ram Avatar Kumar and the incident was witnessed by Harish Chandra, Ajay Kumar and Naresh Chandra Agarwal. The incident occurred on 2.6.1985 at 8:15 PM. The F.I.R. was lodged on the same day at 8:30 PM under section 307 IPC. The injured was medically examined and investigation started.

4. The I.O. during proceedings of investigation inspected the place of occurrence and prepared site plan and recorded the statements of injured, eye-witnesses and other witnesses and after collection of sufficient evidence charge-sheet was submitted against co-accused persons Lakshmi

Narain, Mahesh Chand and Bijendra Kumar. The offence being exclusively triable by the Sessions Court which was committed to the Sessions by the Magistrate and the Sessions Court proceeded to frame charges against present appellant Bijendra Kumar under Section 307 IPC and against co-accused persons Lakshmi Narain and Mahesh Chand under Section 307/34 IPC. All the accused persons denied all the charges and claimed for trial.

5. The prosecution in order to prove its case relied upon the oral evidence of P.W.-1, the informant/injured.

6. P.W.-2 Naresh Chandra Agarwal, the eye-witness, P.W.-3 Ajay Kumar, the eye-witness, P.W.-4 Dr. V.K. Sharma and P.W.-5 S.I. Chhattra Pati Singh, the I.O.

7. To corroborate the oral evidence, the prosecution has also relied upon documentary evidence and in documentary evidence, Ex. Ka-1 written report, Ex. Ka-2 injury report, Chik F.I.R. Ex. Ka-3, registration GD Ex. Ka-4, site plan Ex. Ka-5, memo of taking into possession the clothing of injured Ex. Ka-6 and Ex. Ka-7 charge-sheet.

8. After closing all the prosecution evidence, the incriminating circumstances and evidence adduced against the accused persons during trial were put to them and they named it as a false and concocted evidence. Accused Lakshmi Narain averred that he is a heart patient and is unable to move easily. However, they did not rely upon any defence evidence.

9. The learned trial judge after analysing and scrutinizing the evidence on record and after hearing both the sides recorded the acquittal of co-accused Lakshmi Narain and Mahesh Chandra and acquitted them of the charge under Section 307/34 IPC, whereas the present appellant Bijendra Kumar was convicted under Section 307 IPC and sentenced as mentioned above.

10. P.W.-1, the informant/injured in his evidence has corroborated the prosecution story and has averted that earlier a case for his eviction from the house was lodged by co-accused Lakshmi Narain and that was the cause of animosity between both the sides. Explaining the incident, he further states that at the time of incident the present appellant was carrying *desi* pistol with him and other accused persons were empty handed. On the extortion of co-accused Lakshmi Narain, present appellant shot fire upon him when he turned back, and he sustained firearm injury on the side of his left shoulder. Ajay Kumar and Harish Chandra who came there on his call witnessed the incident. He himself went to the police station by *riksha* and wrote down a return report which he proves as Ex. Ka-1. He further states that he was medically examined at District Hospital at Etah and his blood-stained clothes were taken into possession by the police.

11. P.W.-2 Naresh Chandra, the eye-witness of the occurrence and it was he on whose medical shop injured had visited at the time of the occurrence, but however, he has made a specific statement that when he heard the noise of firing, he immediately rushed inside the shop from where he heard the injured stating that his brother has shot fire upon him. He has clarified that a petromax light was existing there, however, this witness has been declared hostile by the prosecution.

12. P.W.-3 Ajay Kumar is also an eye-witness of the incident. He was going to market at the time of occurrence when he saw that on extortion of Lakshmi Narain, the appellant Bijendra opened fire upon Vishnu Kant Paliwal, which inflicted upon his left shoulder.

13. P.W.-4 Dr. V.K. Sharma examined the injuries of the injured on 2.6.1985 at 11:00 P.M. who was brought by a Constable and found following injuries :-

*“1. Abrasion 3cm X 3cm left side back of chest scapular region.
Around it there are multiple pin point abrasions in an area of 22*

cm X 13 cm on both sides of upper part of chest. No blackening oozing present.

Injury no.1 was kept under observation. Advised X-ray chest. During is fresh.”

14. He has proved the injury report as Ex. Ka-2.

15. P.W.-5 S.I. Chhattra Pati Singh, the I.O. of the case . He has also appeared as secondary witness for the S.I. H.M. Heera Singh. He and H.M. Heera Singh have identified the signature and handwriting. The chik F.I.R. and registration GD has been proved by this witness as Ex. Ka-3 and Ex. Ka-4 respectively. P.W.-5 further proves the proceedings of the investigation and has proved the site plan as Ex. Ka-5. The memo of taking into possession blood-stained clothes of the injured as Ex. Ka-6 and lastly he also proved the charge-sheet submitted by him as Ex. Ka-7.

16. The impugned judgment has been assailed by the learned counsel for the appellant on many grounds. It has been submitted that only due to the old animosity between the parties, the present appellant has been falsely implicated in this case. It is vehemently submitted that on the same set of evidence, the learned trial court proceeded to record the acquittal of co-accused Laxmi Narain and Mahesh Chandra, but unfortunately the present appellant was convicted, whereas it required parity on the part of the learned trial court. It is also submitted that the prosecution story is shaky and confusing on the point of existence of light on the spot. The petromax which according to the P.W.-2 was available on the place of occurrence has not been taken into possession by the I.O. of the case. The doctor has found no bullets or pellets in the so called firearm injury of the injured. P.W.-2 the alleged eye-witness of the incident has been declared hostile and his evidence fall into the category of hearsay evidence only. It has been further submitted that the medical evidence does not corroborate the prosecution version in material terms. It is also submitted that the appellant has undergone in the case in hand for a considerable period. He

has been imposed no fine by the learned trial court and since the prosecution case does not travel beyond the purview of Section 324 IPC, he may be acquitted only by imposition of reasonable fine over him. It is also submitted that the prosecution evidence of fact has been considerably shattered during course of cross examination.

17. *Per contra*, learned A.G.A. has vehemently submitted that the present case rests upon eye-witness account and even if P.W.-2 does not support the prosecution case P.W.-1, the injured himself and P.W. 3, the other eye-witness have convincingly corroborated the prosecution version. Particularly, the deposition of the injured finds corroboration from the medical evidence and the doctor has himself opined that the injury was caused by use of some firearm. The F.I.R. of this case is prompt and the place of occurrence is ascertained. Since the appellant resides in the same area where the injured resides, it was possible and natural for the injured to recognise and identify the accused appellant. On these grounds, a prayer to dismiss the appeal in hand has been made by the learned A.G.A.

18. To start with the scrutiny and analysis of the evidence on record, at the very outset, it is to be examined whether the prosecution case is capable of being placed under Section 307 I.P.C. The law on the subject is tried that for the sake of establishing the guilt under Section 307 I.P.C., the prosecution has to show that the assault was made with intention to kill and if this significant part is missing from the prosecution story and the evidence as well, no conviction under Section 307 I.P.C. may be made successfully. The law over this issue is established that this is never the injury which was inflicted upon the body of the injured, but the intention behind it is relevant to take a matter within the purview of Section 307 I.P.C.

19. In order to appreciate the prosecution case as to its capability to take it within the ambit of Section 307 I.P.C., a perusal of the mandate of Section 307 I.P.C. is desirable.

20. Section 307 IPC which defines the offence or attempt to murder is reproduced as hereunder:-

“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.”

21. So far as charge under Section 307 IPC is concerned, the settled law is that it is not necessary that injury, capable of causing death, should have been inflicted. What is material to attract the provisions of Section 307 of IPC is the intention or knowledge with which the all was done, irrespective of its result. The intention and knowledge are the matters of inference from totality of circumstances and cannot be measured merely from the results. In fact the important thing to bear in mind for determining the question as to whether the offence under Section 307 IPC is made out, is the intention and not the injury, even if it may be simple or minor. Question of intention to kill or knowledge of death is always a question of fact and not of law. The Hon'ble Supreme Court in ***Hari Kishan and State of Haryana vs. Sukhbir Singh, AIR 1988 SC 2127*** has held that the intention or knowledge of the accused must be such as is necessary to constitute murder. In ***State of Madhya Pradesh vs. Harjeet Singh and another, AIR 2019 SC 1120***, it was reiterated that Section 307 IPC does not require that injury should be on vital part of the body. Merely causing hurt with intention or knowledge of causing death is sufficient to attract Section 307 IPC.

22. In the light of the aforesaid legal proposition, it is to be found out whether the prosecution case comes within the purview of Section 307 I.P.C. or not.

23. P.W.-1 the injured in his examination-in-chief states that when on extortion of co-accused Lakshmi Narain to the present appellant to make fire upon him, he immediately looked behind and at the same time, accused Bijendra opened fire upon him, which sustained injury over the back of his left shoulder and then he fled away. Nowhere, in his statement P.W.-1, the injured states that fire was made by the accused-appellant with intention to kill. It is noteworthy that the firearm injury inflicted upon the shoulder of the injured which is not a sensitive part of the body. The intention of the accused-appellant may also be gathered from the circumstances of the case. The statement of P.W.-1 reveals that when the accused persons came on spot, no fire was made by the present appellant immediately when he found the informant taking medicine from a medical shop and it was only the result of extortion by co-accused Lakshmi Narain that the appellant opened fire upon him. Had the appellant intention to do away with the injured. It was easy for him to make another fire upon the injured to cause his death, but the evidence on record nowhere hints that any second fire was made by the appellant over the injured.

24. P.W.-2 Naresh Chandra the alleged eye-witness of the incident has not witnessed the incident of firing and he even did not see the assailants who made fire upon the injured.

25. P.W.-3 who testifies the ocular evidence of the occurrence also nowhere states that the fire was made by the appellant with intention to kill the injured. He also affirms the fact that after making one fire upon the injured inflicting firearm injury upon the shoulder of the

injured, the appellant fled away. P.W.-3 also nowhere states that the fire was made with intention to kill the injured.

26. P.W.-4 who medically examined the injured in his examination-in-chief states that there was no blackening surrounding the injury of the injured. Further, he states that in his cross-examination that he found no depth in the injuries which were superficial in nature.

27. As per medical jurisprudence if no blackening is found surrounding the firearm injury, it means that the fire was made not from a close range of about 4, 5 or 6 feet, but it was made from some more distance. It is again to be kept in mind that as per evidence of P.W.-1, the appellant was behind him when he was taking medicine from a medical shop and he was unable to see him at the very inception of incident. He could only saw him when an exhortation was made by co-accused Lakshmi Narain to open fire upon the injured to the present appellant. Hence, had the appellant kept some intention to kill the injured he could make another fire easily upon him from a very close range, but nothing like that was committed by him which again shows that the present appellant had no intention at all to do away with the injured.

28. P.W.-5, I.O. of this case, has been tested in the cross-examination by the defence, wherein he has stated that the informant did not make any statement regarding source of light on spot at the time of occurrence and no petromax was shown to him. The witness Naresh also made no statement regarding the light of petromax on spot. This witness further makes a significant statement that no empty cartridge was seen or found by him upon the shop of Naresh, Nannu Mal and Kapoor Chand and he did not get even any sign of fire over there. No sign of cartridge was also found by him in the

clothings of the injured and the aforesaid statement made by the I.O., P.W.-5, creates significant blow upon the prosecution story.

29. The law which travels in respect of scope and ambit of Section 307 I.P.C. if applied into the facts and circumstances of the case in hand, it can easily be found that in no case it was a matter under Section 307 I.P.C.

30. The learned counsel for the appellant in his oral argument has also submitted that the prosecution case cannot travel beyond the scope of Section 324 I.P.C. and it is never a case of Section 307 I.P.C.

31. This Court to this extent that the case of the prosecution does not fall within the purview of Section 307 I.P.C. finds itself in conformity with the submissions made by the learned counsel for the appellant as above.

32. In order to appreciate the submissions made by the learned counsel for the appellant that it is a case where conviction under Section 307 IPC may not be a plausible consequence of the prosecution of the appellant on the basis of facts and evidence on record, this Court also after giving a considerable thought upon the said submissions genuinely feels that the conviction of the present appellant in this case may be converted from Section 307 IPC to Section 324 IPC and the reason behind it is that the ingredients to establish an offence under Section 307 IPC are not being established on the basis of the evidence and facts on record rather the evidence on record sufficiently proves that it is a case, wherein the injured was voluntarily caused hurt by use of firearm by the present appellant. This Court also cannot ignore this fact that on the same set of evidence, co-accused Lakshmi Narain and Mahesh Chand were held not guilty for the offence punishable under Section 307/34

IPC and were acquitted of the same. The record of the case reveals that the present appellant has undergone for some considerable period of time during trial.

33. This Court also takes notice of the fact that the incident of this is said to be occurred in the year 1985 which was resulted into conviction of the present appellant in the year 1987 in Session Trial No. 277 of 1985 and the instant appeal is pending since the year 1987, for a period of more than 37 years. The present appellant is running to this Court in the *parvi* of the instant appeal and now the present appellant appears to be an old age person and may be a repenting person.

34. In the entirety of the facts and circumstances of this case and evidence on record, the matter can be sum-upped in the manner that the conviction of the accused appellant under Section 307 IPC is not tenable, but he is liable to be convicted under Section 324 IPC. The object of the justice may be obtained if the conviction of the appellant is modified from Section 307 I.P.C. to Section 324 I.P.C. It is also to be taken into mind that now after about 37 years of the initiation of prosecution against the appellant, no fruitful purpose may be solved, if the appellant is sent to jail to serve the sentence. The punishment as provided under Section 324 IPC imprisonment of either description for a term which may be extend to three years or with fine or with both. The facts and circumstances of the case in hand warrant that the appellant may be sentenced for fine only.

35. Resultantly, appeal is partly **allowed** in the aforesaid terms. The conviction and sentence under Section 307 LP.C. is converted into Section 324 IPC. and instead of recording a sentence for rigorous imprisonment for 3 years, he may be sentenced for fine of Rs. 3,000/- only which shall be deposited by the appellant within

three months from today and in default of which, he has to undergo fifteen days simple imprisonment.

36. Let the lower Court record be sent back along with the certified copy of this judgement for information and necessary compliance.

Order Date :- 8.8.2024
CS/-