

Court No. - 86

Case :- CRIMINAL APPEAL No. - 3667 of 2003

Appellant :- Gaurav

Respondent :- State of U.P.

Counsel for Appellant :- Kapil Tyagi, Purnendu Bajpai, Rahul Singh Dahiya, Rajiv Lochan Shukla

Counsel for Respondent :- Govt. Advocate

With

Case :- CRIMINAL APPEAL No. - 3705 of 2003

Appellant :- Vikky @ Sachin

Respondent :- State of U.P.

Counsel for Appellant :- Vijaya Prakash, Purnendu Bajpai, Rahul Singh Dahiya, Rajiv Lochan Shukla

Counsel for Respondent :- Govt. Advocate

Hon'ble Nalin Kumar Srivastava, J.

1. The Court of Additional Sessions Judge / Court No.14, Ghaziabad vide judgment and order dated 30.7.2003 convicted the accused – Gaurav and Vikky @ Sachin under Sections 25 Arms Act in Sessions Trial No.318 of 2002 (State Vs. Gaurav) and Sessions Trial No. 319 of 2002 (State Vs. Vikky @ Sachin) respectively and sentenced them to undergo 2 years simple imprisonment under Section 25 Arms Act each with fine of Rs.5000/- with default sentence, feeling aggrieved of which the present criminal appeals have been filed by the appellants Gaurav and Vikky @ Sachin.
2. The prosecution case, as unfolded in the F.I.R., is that the named accused persons Gaurav and Vikky @ Sachin came to the

house of the informant Jagmohan Dubey on 17.8.2001 at 11:30 P.M. and called his son Anil Dubey and as soon as he came out, they started abusing him and when he protested, accused Gaurav made a fire upon him with intention to kill from his country made pistol. The injured sustained firearm injury over his right hand. About twenty days prior to the said incident also both the accused persons had made an assault upon his son. F.I.R. was lodged and during investigation the Investigating Officer arrested both the accused persons. One country made pistol alongwith empty cartridge 315 bore and one country made pistol 315 bore were recovered from the possession of accused Gaurav and Vikky @ Sachin respectively and they confessed before the police that the said country made pistols were used in the occurrence wherein the son of the informant sustained firearm injury.

3. The injured was medically examined and after investigation, charge-sheet under Section 307 IPC and two separate charge-sheets under Section 25 Arms Act were submitted against both the accused persons respectively.

4. The prosecution, in order to prove its case, relied upon the oral evidence of P.W.1 Jagmohan, the informant, P.W.2 Anil Dubey, the injured and the witnesses in respect of the charge under Section 25 Arms Act were further examined as Rohtash Sharma, the Investigating Officer of the case under Section 307 IPC and informant in respect of the cases under Section 25 Arms Act as P.W.3, Constable 96 Sunil Kumar as P.W.4, the witness of fact and P.W.5 S.I. Phohab Singh, the Investigating Officer.

5. The prosecution also relied upon the documentary evidence and Written Report Ex.Ka.-1, Chik F.I.R. Ex.Ka.-2, Site Plan Ex.Ka.-3, Injury Report Ex.Ka.-4, Registration G.D. for offence under Section 307 IPC Ex.Ka.-5, G.D., Charge-sheets, Site Plans, Prosecution Sanction are the other documents, which have been produced and proved by the prosecution in respect of the cases under Section 25 Arms Act and exhibited as Ex.Ka.-6 to Ex.Ka.-16.

6. The learned trial court proceeded to conduct the trial of the case under Section 307 IPC and two cases under Section 25 Arms Act together.

7. The incriminating circumstances and evidence were put to the accused persons in their statement under Section 313 Cr.P.C. wherein they pleaded for false implication due to previous animosity and misunderstanding but, however, no defence evidence was adduced by the accused persons.

8. The trial court analysed the evidence on record in two parts. In the first part, the evidence relating to charge under Section 307 IPC was discussed.

9. P.W.1 informant Jagmohan Dubey in his evidence stated that on the date and time given in the F.I.R., no person came to his house to call his son Anil Dubey and he is completely ignored of the fact that any person opened fire upon his son with intention to kill him. Further he states that some unknown person had committed the offence but the accused persons Gaurav and Vikky @ Sachin never made fire upon his son. P.W.1 proves the written report as Ex.Ka.-1, but he was declared hostile by the prosecution and in the cross-examination, he

denied of any of his statement recorded by the Investigating Officer of this case. Further he clarifies that on some assumption he had named Gaurav and Vikky @ Sachin in his report because some days prior to the occurrence they had made some assault upon his son. He further states that his son Anil Dubey, the injured never disclosed the enmity with the boys who had come to his house before him.

10. In the same fashion, P.W.2 Anil Dubey, the injured also does not support the prosecution version. Narrating the incident, he has deposed that on 17.8.2001, in the night, two boys came to his house to call him and when he came out, fire was opened upon him and the boys fled away. He has made a categorical statement that the accused persons standing before the court are not the assailants who opened fire upon him. P.W.2 has also been declared hostile by the prosecution. He also denies of any of his statement recorded by the Investigating Officer under Section 161 Cr.P.C. He further states that at the time of incident, his parents were sleeping in the house and he told them that some one has made fire upon him, but he had not told his father the name of the assailants. He further states that both the accused persons were named in the report on the basis of information given by his neighbours. Hence P.W.2, the injured also does not support the prosecution version.

11. The genuineness of prosecution documents in respect of the offence under Section 307 IPC has been admitted by the learned counsel for the defence and said documents have been exhibited.

12. The learned trial court discussed the evidence rendered by the prosecution to bring home the charge under Section 307 IPC and found that since the informant and the injured himself do not support the prosecution case in their respective depositions, no offence under Section 307 IPC has been proved against the accused persons by the prosecution beyond reasonable doubt. Since the acquittal of the appellants for the offence under Section 307 IPC has not been challenged by the State, I find no need to discuss the reasons and grounds of acquittal of the appellants of the said offence in the instant appeals.

13. So far as the charge under Section 25 Arms Act is concerned, the prosecution put forward a story that when the incident relating to Section 307 IPC was under investigation, the police on gasht arrested both the accused persons alongwith the country made pistols. They confessed before the police that the country made pistols were used in the incident wherein the son of the informant sustained firearm injury. On the basis of recovery of illegal arms and one empty cartridge, two F.I.R.s under Section 25 Arms Act against both the accused persons respectively were lodged by S.I. Rohtash Sharma, the Investigating Officer of the case under Section 307 IPC.

14. The cases under Section 25 Arms Act were investigated by S.I. Pohab Singh, who after collecting sufficient evidence and taking prosecution sanction from the District Magistrate, submitted charge-sheet under Section 25 Arms Act against both the accused persons separately.

15. P.W.3 S.I. Rohtash Sharma in his evidence has stated that when he was in search of the accused persons Gaurav and Vikky

@ Sachin during the course of investigation of the offence under Section 307 IPC, he received some information by an informer in respect of both the accused persons and then he took Constable Satendra Singh and Constable Sunil Kumar with him who were also on gasht and they saw two persons on CBZ Motorcycle bearing registration no.UP 14M 6888. Both the accused persons tried to fly away from that place but since the motorcycle could not start, they were held by the police. One country made pistol alongwith empty cartridges was recovered from the possession of accused Gaurav whereas one country made pistol was recovered from the possession of accused Vikky @ Sachin. They could not show any license for the same but confessed as well of the commission of the crime under Section 307 IPC. A memo of recovery and arrest was made on spot and F.I.R. was lodged against them. P.W.3 Rohtash Sharma in his statement proved the said memo, site plan and charge-sheet and also identified the country made pistols and empty cartridges before the court.

16. P.W.4 Sunil Kumar, who was accompanying P.W.3 at the time of the arrest of the accused persons and recovery of arms also deposes in the same tone like P.W.3 and he also identifies his signature over the memo of recovery. He further identifies the country made pistols and empty cartridges before the court.

17. P.W.5 S.I. Pohab Singh is the Investigating Officer of the case relating to Arms Act. He has proved the proceedings of the investigation and further site plan, charge-sheet, prosecution sanction order in his evidence as Ex.Ka.-8, 9, 10, 11, 12, 13, 14 & 15.

18. The learned counsel for the appellants vehemently submitted that the major offence under Section 307 IPC was not proved against the appellants. The evidence on record led the Court to make a conclusive finding that the offence under Section 307 IPC was not committed by the present appellants. The alleged recovery of firearms from their possession is a bogus and false story of the prosecution. It is further submitted that when no fire was made by the accused persons upon the injured with intention to kill him, as clarified by P.W.2, the injured himself, how could they make confession before the police that the country made pistols, which were retrieved from their possession by the police, were allegedly used in the commission of the crime under Section 307 IPC. It is also submitted that only to show the good work, the police falsely implicated them in this case relating to Arms Act. It is further submitted that the prosecution sanction order is not a valid paper and the evidence relating to the charge under Section 25 Arms Act is fabricated and unreliable.

19. Per contra, learned State counsel vehemently opposed the submissions made by learned counsel for the appellants. It has been submitted that as per legal position, if some portion of the evidence on record falls short of proving the offence for a particular offence, the remaining portion of the evidence on record may still be sufficient to prove the offence relating to some other punishable offences. He further argued that even if the evidence on record was not sufficient to prove the guilt under Section 307 IPC still it might sufficiently prove the offence committed by the accused persons in respect of Section

25 Arms Act. He further submitted that since the offence under Section 25 Arms Act is well proved by P.W.3 and P.W.4, the witnesses of fact, which was supported by the testimony of P.W.5, the Investigating Officer and the incriminating materials were also produced and exhibited before the court, the learned trial court committed no mistake in holding the appellants guilty for the offence under Section 25 Arms Act and the appeals, so far as the charge under Section 25 Arms Act is concerned, are liable to be dismissed.

20. To prove the charge under Section 25 Arms Act, the prosecution has relied upon the statement of P.W.3, P.W.4 and P.W.5. S.I. Rohtash Sharma, P.W.3 is the Investigating Officer of the case pertaining to Section 307 IPC where he is the informant in the case pertaining to Section 25 Arms Act.

21. P.W.3 S.I. Rohtash Sharma states in his statement that he was on gasht on foot in the night at about 2:00 A.M. when both the accused persons Gaurav and Vikky @ Sachin were arrested and illegal arms were recovered from their possession. At that time he was also accompanied with two police constables namely, constable Sunil Kumar and constable Satendra Kumar.

22. Learned counsel for the appellants vehemently argued that the prosecution story is neither plausible nor natural on the point that P.W.3 S.I. Rohtash Sharma was on gasht on foot and both the police constables, who were accompanying him, were also not having any vehicle. It is argued on behalf of the appellants that had the accused persons tried to fly away by motorcycle, how they could be chased by the police personnel as they were having no vehicle with them.

23. Another issue which was pertinent and was raised by the learned counsel for the appellants is that there is no rawangi G.D. on record. The police witness P.W.4 has admitted that in the police chowki, there is a G.D. to note the movement of the police but nowhere in the statement of all the three prosecution witnesses the G.D. note has been averred.

24. No doubt, rawangi G.D. is a very significant and relevant document to show that in fact the police party had left the police station for a particular purpose on a particular date and time. Since this G.D. is not available on record, the very inception of the prosecution case becomes doubtful and it certainly is a dent on the prosecution case. In the instant matter, the prosecution fails to prove the fact that the police party had left the police station for a particular purpose on a particular date and time. The reason behind it is that the prosecution was always under obligation to corroborate the factum of rawangi of the police party from the police station by way of production of the rawangi G.D. which, for the reasons best known to prosecution, was never produced before the trial court.

25. In **Rifaqat alias Fakkar vs. State of U.P., 2007 SCC OnLine All 1638**, this Court has held as under :

“15.....It is also worthwhile to mention here that P.W. 1 and P.W. 2 have stated in their testimony that they had proceeded on patrolling duty from their concerned police station and reached at the place of incident. He was apprehended by the police from his house as per suggestion. In such circumstances, it was essential that Rawanagi G.D. of P.W. 1 and P.W. 2 should have been proved on behalf of prosecution, so that it could be proved that they had proceeded from concerned police station and reached at the relevant place of incident. In absence of

producing Rawanagi G.D. of these witnesses, the presence of both the witnesses is liable to be suspicious at the place of incident. Therefore, search and seizure has become ultimately suspicious.....”

26. It is further submitted by the learned counsel for the appellants that there is no public witness of the said occurrence whereas the arrest of the accused persons and the recovery of firearms is said to be made from a public place.

27. Learned State Counsel has vehemently submitted that if the evidence of police personnel transpires confidence and is worthy of credit, it is immaterial whether their evidence is corroborated by the evidence of independent public persons or not. However, the learned counsel for the appellants vehemently countered the said plea and it has been submitted that the evidence of P.W.3, P.W.4 and P.W.5, the police personnel, is not trustworthy and the reasons behind it are obvious, firstly there is no rawangi G.D. on record to prove that P.W.3 S.I. Rohtash Sharma actually made an exit from the police station and proceeded for gasht and secondly, the prosecution story was not plausible on the point that all the three witnesses, who were police personnel, were on gasht on foot without taking any vehicle in the night.

28. It is also submitted that the place of occurrence in this case, as shown in the site plan Ex.Ka.-8 and Ex.Ka.-13, is not in conformity with the statement of prosecution witnesses. It is also submitted that in the statement of prosecution witnesses as well there are contradictory statements so far as the situation of place of occurrence is concerned. It is also submitted that as per site plan Ex.Ka.-8 and Ex.Ka.-13, it is a public place situated

under abadi of Ghaziabad city and it was not plausible that no member of public was present over there at the time of incident. It is further submitted that S.I. Rohtash Sharma, the informant of the case under the Arms Act, had left the police station after receiving an information by some informer and other two police persons met him on the way. It is argued that again the prosecution story is not plausible and natural on the point that even after receiving information regarding the miscreants, P.W.3 S.I. Rohtash Sharma without taking company of any police personnel left the police station all alone on foot.

29. It is also submitted that the prosecution sanction order has not been obtained in a legal manner. The said order has been proved as Ex.Ka.-11 and Ex.Ka.-12 by P.W.5 which pertains to accused Vikky @ Sachin and Gaurav respectively.

30. P.W.5 states that prosecution sanction from the District Magistrate Indrajeet Verma was obtained by him on 12.10.2001 which is Ex.Ka.-11 on record pertaining to accused Vikky @ Sachin and the same is found in respect of accused Gaurav as Ex.Ka.-12.

31. A perusal of the record reveals that Ex.Ka.-12, the prosecution sanction order relating to accused Gaurav bears no date as to when the said sanction was given by the District Magistrate. Hence, the statement of P.W.5 that on 12.10.2001, he went to District Magistrate to obtain prosecution sanction in respect of accused Gaurav does not find support from the documentary evidence.

32. The reliance and significance for grant of sanction in a case under the Arms Act has been emphasised by the High Court

of Madhya Pradesh in **Sukhlal Banshi Lodhi Vs. State of M.P.** reported in **1998(1) MPLJ 288** wherein the Court held as under :

“Section 39 of the Arms Act provides that previous sanction of the District Magistrate is necessary for the prosecution against any person in respect of any offence under Section 3. Section 3 provides for licence for acquisition and possession of firearms and ammunition. Thus, unless there is a previous sanction of the District Magistrate a person cannot be prosecuted in respect of any offence under section 3. Sanction is not a mere formality. It has to be proved that it was granted by the authority after applying his mind. It must be shown that the firearm or weapon with respect to which sanction was prayed was actually taken to the authority concerned and after looking to it, the relevant papers, understanding and after applying his mind sanction was granted.”

33. The learned counsel for the appellant vehemently argued that the prosecution has failed to prove that the arms, which were produced before the District Magistrate, were the same which were allegedly retrieved from the possession of the appellants. It has been further argued that there is no malkhana report as to when the said arms were taken from the malkhana to produce before the District Magistrate for the sake of obtaining prosecution sanction and subsequent to obtaining the same, it was again kept in the sealed condition in the malkhana. It is vehemently argued that no malkhana register has been produced before the court and the malkhana moharrir has also not been produced as prosecution witness. This, as submitted, is a serious lacuna in the prosecution case and it lacks link evidence as well. He also placed reliance on the judgment of the Hon'ble Supreme Court in the case of **State of Orissa vs Sitansu Sekhar Kanungo**, 2002 SCC OnLine SC 1296 wherein

the Hon'ble Apex Court in a similar matter held that the absence of link evidence in such cases vitiates the prosecution story and accused is entitled to get benefit of that.

34. Considering the aforesaid facts and circumstances of the case and particularly the fact that in the matter relating to Section 307 IPC, both the accused appellants have already been acquitted and the prosecution has miserably failed to prove that any attempt to murder was made on part of the present appellants in respect of the alleged injured of this case with the aid of country made pistols which were allegedly retrieved subsequently from the appellants and further the essential components to prove the case under Arms Act are completely missing in this case, this Court is not inclined to maintain the conviction of the appellants under the Arms Act.

35. For the foregoing reasons and discussions, I am of the opinion that the prosecution has failed to prove its case beyond reasonable doubt as regards the charge under Section 25 Arms Act. Thus the impugned judgment and order as regards the conviction of the accused appellants is not warranted by law and facts on record and the trial court has erred in convicting the accused appellants of the charge under Section 25 Arms Act.

36. Accordingly, both the Appeals are allowed. The impugned judgment and order of the Trial Court dated 30.07.2003 convicting and sentencing the appellants - Gaurav and Vikky @ Sachin under Sections 25 Arms Act in Sessions Trial No.318 of 2002 (State Vs. Gaurav) and Sessions Trial No. 319 of 2002 (State Vs. Vikky @ Sachin) respectively is hereby set aside and appellants are acquitted of the charge levelled against them.

37. Appellants Gaurav and Vikky @ Sachin are on bail, their personal bonds are cancelled and sureties are discharged. They need not to surrender, if not wanted in any other case.

38. The case property shall be disposed of by the concerned authority / court in accordance with relevant rules / law.

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

Order date : 27.09.2024.

SS