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Reserved on 13.05.2024

Delivered on 13.06.2024

Court No. - 12

Case :- CRIMINAL APPEAL No. - 503 of 1998

Appellant :- Indramani Tiwari

Respondent :- State of U.P.

Counsel for Appellant :- A.N.Mishra,Deep Narayan Tripathi,S.K. Pathak

Counsel for Respondent :- Govt. Advocate

Hon'ble Saurabh Lavania,J.

1. Heard learned counsel for the appellant and Sri Ajay Kumar Srivastava, learned AGA for the State.
2. The present appeal has been filed under Section 374 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C.") against the judgment/order dated 07.09.1998 passed by Special Additional Sessions Judge, Sultanpur in Sessions Trial No. 192/91, under Section- 307 I.P.C., Police Station- Kundwar, District- Sultanpur thereby convicting the appellant and awarding him 10 years rigorous imprisonment and fine of Rs. 5,00/- and default of payment of fine, further to undergo six months' rigorous imprisonment.
3. As per the case of prosecution including the FIR, the appellant/ Indramani Tiwari caused firearm injury to Manoj Kumar at 5.30 P.M. and accordingly, the FIR was lodged on 07.12.1989 at about 7.20 P.M., at Police Station- Kundwar, District- Sultanpur. The appellant was apprehended and send to jail. Thereafter, upon completion of investigation, the Investigating Officer submitted the charge-sheet and the case was committed to sessions and registered as Sessions Trial No. 192 of 1991 (State vs. Indramani). The trial court after considering the material evidence on record collected by the Investigating Officer, framed the charge against the appellant under Section 307 IPC. Upon denial of charge, the appellant was put to trail.

4. To prove/establish its case, the prosecution examined Ashok Kumar, Shiv Prasad, Rajkumar Pathak, Manoj Kumar and Dr. Rajeev Srivastava as PW-1, PW-2, PW-3, PW-4 and PW-5, respectively. The documentary evidence was also placed on record of the trial court vis FIR, injury/X-ray report of the injured Manoj Kumar, which were proved by the witnesses.

5. Before the trial court, Ashok Kumar/PW-1, Shiv Prasad/PW-2, Ramkumar Pathak/PW-3 were declared hostile. However, Manoj Kumar/PW-4, injured witness, remained intact.

6. According to Manoj Kumar/PW-4, injured witness, the appellant caused firearm injury at right arm. In cross-examination, this witness could not be impeached.

7. Dr. Rajeev Srivastava/PW-5 proved the injury/X-ray report before the trial court. According to PW-5, the injury sustained to injured namely/ Manoj Kumar, who was examined by this doctor, can be caused by firearm including country made pistol.

8. Before conclusion of evidence of the prosecution, the trial court put questions to accused/appellant in terms of Section 313 Cr.P.C. and in response, he denied the offence and said that the story of prosecution is false and concocted and he has been implicated on account of political enmity. It appears from the record that to prove the defence taken at the stage of Section 313 Cr.P.C., no witness was produced by the appellant as defence witness.

9. The trial court thereafter heard the parties and pronounced the judgment of conviction awarding sentence of 10 years rigorous imprisonment and fine of Rs. 5,000/- and default of payment of fine, further to undergo six months' rigorous imprisonment. The relevant portion of the judgment and order dated 07.09.1998 in this regard on reproduction reads as under:-

"पी० डब्लू-५ मनोजकुमार मिश्र चोटहिल ने अपने बयान में कहा है कि अशोक कुमार मिश्र वादी मुकदमा उसके पिता के सगे बड़े भाई के लड़के हैं। उसका कहना है कि उन लोगों के बीच बटवारा हो चुका है। उसके बाबा को ससुराल ग्राम खाजापुर के अर्जुन प्रसाद तिवारी के यहाँ है। कथित घटना को दिनांक पर अर्जुन प्रसाद तिवारी के यहां ब्रम्हमोज था जिसमें वह अशोक कुमार के साथ अर्जुन प्रसादतिवारी के घर निमंत्रण खाने गया था। अशोक कुमार

आमंत्रित लोगों को भीजन परोस रहे थे और वह अर्जुन प्रसाद के मकान के बाहरी बरामदे में चारपाई पर बैठा हुआ था उसका कहना है कि उसका परिचित कोई व्यक्ति वहाँ नहीं था। उसकी चारपाई पर दूसरे किनारे पर एक दो आदमी बैठे हुए थे इतने में अभियुक्त इंद्रमदी ने उसके ऊपर कट्टे से फायर कर दिया जिससे उसके दाहिने बाजू पर चोट आई चोट खाकर वह चारपाई पर गिर गया। जिस समय इंद्रमणि ने कट्टे से फायर किया था उस समय 5:30 बजे थे। उसके गोहार और कट्टे की आवाज पर अशोक कुमार, राजकुमार पाठक, रामनाथ मिश्र, शिव प्रसाद मिश्र और कुछ लोग दौड़ कर घटना स्थल पर आ गए उन लोगों को आता देख मुल्जिम अपने साथी के साथ वहा से भागा उसकी चोट से खून चारपाई से छन कर जमीन पर गिरा था। अशोक कुमार तथा अन्य लोग उसे टेक्टर पर थाना कुड़वार ले गये। वहाँ पर आशोक कुमार ने लिखित रिपोर्ट थाने पर दिया। थाना से उसका डाक्टरी मुआइना हुआ था और चोटों का एक्सरे भी जिला अस्पताल सुलतानपुर में हुआ था दरोगा जी ने उसका बयान लिया था।

पी० डब्लू-5 डा० राजीव श्रीवास्तव ने अपने बयान में कहा है कि दि 7.12.89 को जिला अस्पताल सुलतानपुर में बतौर इमरजेन्सी डाक्टर कार्य कर रहे थे उस दिन 9.20 पी०एम०पर मनोज कुमार मिश्र के शरीर पर आई चोटों का मुआयना किया था निम्न चोटें पाई:-

फटा हुआ घाव 9 स. मी. x 5 स. मी. हड्डी तक गहरा दाहिने हाथ के बांह के बाहरी हिस्से पर कोहनी से बिल्कुल उपर ताजा खेनू बह रहा था। इठोसून एवं चरिंग चमड़ो को सतह पर मौजूद था।

अवधि चोटों की ताजा थी किसी आग्रेयं आस्त्र से पहुंचायी गयी थी को को निरीक्षण में रखा गया एक्सरे कराया गया तथा सर्जन को रेफर किया गया। चोट दिनांक 7.12.89 के सायं 5.30 बजे की हो सकती है। यह चोट देशी कट्टे से आना संभव है। इंजरी रिपोर्ट की साक्षी ने अपने लेख हत्ताक्षर में होना, प्रमाणित किया है प्रदर्शक-2 डाला गया।"

10. In the aforesaid background of the case, the present appeal has been filed before this Court challenging the judgment of conviction.

11. Impeaching the judgment, under appeal, learned counsel for the appellant submitted that the judgment of conviction passed by the trial court is liable to be interfered with by this Court being unsustainable in the eye of law, as except PW-4, all other witnesses including informant were declared hostile.

12. He also stated that the sentence awarded to the appellant is not just and proper, as the prosecution failed to prove essential ingredients to attract offence under Section 307 Cr.P.C.

13. In continuation, it is stated that to punish/award sentence under Section 307 IPC, the prosecution is under obligation to prove the intention and knowledge to cause death. However, the statement of injured witness/Manoj Kumar, which is on record, itself indicates that there was no intention to cause such bodily injury, which could cause death. Moreover,

the injury sustained was not on vital part of the body, as it was on the right hand of injured/Manoj Kumar.

14. He further stated that if the story of prosecution is taken as true even then the sentence of 10 years awarded under Section 307 IPC is not in consonance with the principles settled by the Hon'ble Apex Court in regard to awarding punishment.

15. Learned counsel for the appellant further stated that a perusal of the statement of injured witness, to which, as per settled principle of law, primacy should be given, it is apparent that on the date of incident, the injured and others were attending the function at the place of one Arjun Prasad Tiwari and it appears that in Harsh Firing (हर्ष फायरिंग), injury was sustained by the injured.

16. It is also stated that even if primacy is given to the statement of injured witness and the injuries sustained, proved by PW-5, the punishment to the appellant under Section 307 IPC is unsustainable in the eye of law. Prayer is to interfere in the judgment of conviction dated 07.09.1998.

17. Elaborating the aforesaid, it is stated that according to the statement of injured witness Manoj Kumar (PW-4) there was no enmity between the applicant and the injured and at the relevant time, the family members of Arjun Prasad Tiwari were bursting fireworks and some persons were firing. As such, punishment under Section 307 IPC is not sustainable. The relevant portion of the statement of injured/PW-4 is extracted hereinunder:-

"ब्रह्म भोज के समय मेरे रिश्तेदार अर्जुन तिवारी के परिवार के लोग आतिशबाजी छोड़ रहे थे। आतिशबाजी से मतलब गोला आदि से है। कुछ लोग उस समय फायर कर रहे थे। नहीं पता कि खुशी में कर रहे थे या रंजिश में। आसमान की तरफ करके फायर कर रहे थे। फिर कहा कट्टा फायर कर रहे थे। कट्टे एक या 1½ बिक्ता लम्बे थे। इन्द्रमणि से मेरी कोई रंजिश नहीं थी। इन्द्रमणि तिवारी ब्राह्मण है यह चीज मैं घटना के बाद जाना। चोट लगते ही मैंने सुना इन्द्रमणि भागो मैंने गरदन घुमाई देखा। इसी नाम लेने से मैंने जाना कि इन्द्रमणि ने मारा।"

18. Learned AGA submitted that in the facts and circumstances of the case particularly taking note of the statement of injured witness i.e. PW-4/Manoj Kumar, who specifically indicated the name of appellant and also stated that the appellant caused firearm injury, which was also proved

by PW-5/doctor concerned, who before the trial court stated that the injury so sustained can be caused by firearm including country made pistol, no interference is required in the present appeal by this Court.

19. Considered the aforesaid and perused the record.

20. Though learned counsel for the appellant has not disputed the finding of trial court that the appellant was involved in the incident in question, however I have gone through the record. The statement of injured PW-4/Manoj Kumar is quite clear and cogent and the same has been corroborated by PW-2 and PW-3. It is well established that the evidence of an injured witness must be given due weightage as being an injured witness, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he/she has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. [Vide: *Jarnail Singh v. State of Punjab*, (2009) 9 SCC 719; *Balraje @ Trimbak v. State of Maharashtra*, (2010) 6 SCC 673; and *Abdul Sayed v. State of Madhya Pradesh*, (2010) 10 SCC 259].

21. In the instant case the statement of injured witness PW-4/Manoj Kumar appears cogent and credible and is supported by medical evidence. There is no major contradiction or infirmity in the statements of witnesses. Considering the entire evidence it is apparent that it was appellant-accused, who has fired at the injured and caused injuries to PW-4/Manoj Kumar and thus, the finding of guilt of the appellant is based on evidence.

22. However, so far as the argument, that accepting the prosecution evidence as such, no case under Section 307 IPC is made out, is concerned,

it may be seen that the injured has sustained firearm injury at his right arm. The injury sustained was not on vital part and the facts and circumstances of the case do not indicate that the appellant had intention to kill the deceased. The question arises for consideration is whether the act of the appellant falls within the ambit of Section 307 of IPC.

23. The provisions of Section 307 of IPC reads as under:

"307. Attempt to murder.--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."

24. The first part of Section 307 refers to "an act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder". The second part of Section 307, which carries a heavier punishment, refers to 'hurt' caused in pursuance of such an 'act'. It may be stated that proof of grievous or life-threatening hurt is not a sine qua non for the offence under Section 307 of IPC. The intention of the accused can be ascertained from the actual injury, if any, as well as from surrounding circumstances. Among other things, the nature of the weapon used and the severity of the blows inflicted can be considered to infer intent.

25. For the conviction under this section more importance has been given to mens rea or the intention than the actus reus or the actual act itself. The attempt should arise out of a specific intention or desire to murder the victim. The nature of the weapon used, the manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted is all taken into consideration to determine the intention.

26. In *AIR 1982 SC 2013, Kundan Singh Vs. State of Punjab*, the Hon'ble Apex Court has observed as under:-

"We are of the view that having regard to the facts and circumstances of the present case and particularly in view of the fact that P.W. 6 and P.W. 7 were in the courtyard of their house when the appellant fired gun shots and he could not, therefore, have intended to injure them, the conviction of the appellant under Section 307, I.P.C. was not justified. We think that the conviction of the appellant could be maintained only under Section 324 of the I.P.C. since P.W. 6 and P.W. 7 received simple injuries. We accordingly allow the appeal and alter the conviction of the appellant to one under Section 324 of the I.P.C. for causing simple injuries to P.W. 6 and P.W. 7 and since the appellant has already suffered imprisonment for about 16 months, we direct that the sentence imposed on the appellant be reduced to that already undergone by him and that he may be set at liberty forthwith."

27. The Apex Court in *AIR 1996 SC 3236, Merambhai Punjabhai Khachar and others vs. State of Gujarat*, wherein in an attempt to commit murder by fire-arm, victim has suffered a pallet injury, the Apex Court held that Section 307 I.P.C. cannot be held to have been satisfied and the conviction was altered to Section 324 of IPC.

28. In *Ramesh vs. State of U.P., AIR 1992 SC 664 : (1992) 1 SCC 318*, wherein the injury was found on the back of the injured. Accused was tried along with two other was convicted under Section 307/34 I.P.C. and sentenced to undergo rigorous imprisonment for four years, while the two others were acquitted. The Apex Court altered from section 307 of IPC into Section 324 of I.P.C. and sentence was reduced to the period already undergone with fine of Rs. 3000/-, which was to be paid to the complainant as compensation. The relevant portion of the report on reproduction reads as under:-

"2. The incident took place at 10 p.m. on December 4, 1973. Enmity between appellant and complainant is found established. Prosecution relied on evidence of the injured, his father and a family friend Budh Singh examined as PW 4. The trial Judge did not attach much weight to the evidence of Bharat Singh, PW 3, father of the injured. The conviction was, mainly, based on testimony of Budh Singh, PW 4. The High Court while appreciating the evidence of Budh Singh observed that in cross-examination he admitted that the complainant did not disclose any name, immediately. He even could not disclose whether they were known persons or outsiders. But later on he gave out the name of the accused.

3. The learned counsel for appellant has assailed the finding recorded by the High Court and the trial Judge and has urged that the appellant was implicated due to enmity. He urged that even though the High Court held that in the FIR the main part was specifically assigned to the appellant and one Jagat Singh but in the evidence it was confined to the appellant as the relations between the two were strained. The learned counsel further urged that the case of the prosecution was that the complainant was bitten by Jagat Singh and there being no injury of biting, the High Court committed an error in maintaining the conviction. We are not impressed by the argument. The learned counsel then urged that the High Court committed an error in convicting the appellant under Section 307, Penal Code, 1860. We do not propose to decide it as a matter of law. But we agree with the learned counsel for the appellant that in peculiar circumstances of the case it being a case of single injury in the back of neck the conviction can be altered to be under Section 324, Penal Code, 1860.

4. In the result the appeal succeeds and is allowed in part. The conviction under Section 307/34, IPC is converted to under Section 324, IPC and the sentence is reduced to the period already undergone. The appellant shall deposit a sum of Rs 3000 as fine within six months which shall be paid to the complainant. In default of payment he shall serve out the entire sentence. On deposit of fine the bail bond shall stand discharged."

29. In the case of *Shyam Sharma vs. State of Madhya Pradesh and another*, (2017) 9 SCC 362, the Apex Court altered the sentence from Section 307 IPC into Section 324 IPC after considering the firearm injury sustained on non-vital part of the body. The relevant portion on reproduction reads as under:-

"2. The appellant Shyam Sharma was convicted by the Sessions Judge under Section 307 IPC and was sentenced to undergo three years' rigorous imprisonment along with a fine of Rs 1000 and in the event of default in payment of fine, he was directed to further undergo additional imprisonment of five months.

3. The contention of Mr V. Giri, learned Senior Counsel, appearing for the appellant, is that the independent witnesses Anoop Bhargava (PW 1) and Ramprakash (PW 4) did not support the prosecution case. Manjeet Singh (PW 3) is an interested witness. The appellant is a computer engineer and has no criminal background. At the most, the appellant can be convicted under Section 324 IPC. On the other hand, the learned counsel appearing for the respondents has supported the judgment of the High Court.

4. We have carefully considered the submissions of the learned counsel made at the Bar and perused the materials placed on record. As rightly submitted by the learned counsel for the

appellant, both Anoop Bhargava (PW 1) and Ramprakash (PW 4) have turned hostile. It was established that Manjeet Singh has sustained gunshot injury. Dr Vikram Singh Tomar (PW 2), on examination, found two entry wounds over the lateral aspect of left shoulder and interior aspect of upper part of left scapula region of Manjeet Singh. However, firearm injury suffered by Manjeet Singh (PW 3) could not be impeached in their cross-examination. It is also evident that the accused fired at Manjeet Singh without any premeditation. The injury suffered by Manjeet Singh was not on the vital part of his body. In our view, the prosecution has failed to prove that the accused intended to cause the death of the deceased. Therefore, the appellant can only be convicted under Section 324 IPC and not under Section 307 IPC. Therefore, the appellant is convicted under Section 324 IPC instead of Section 307 IPC.

5. The appellant has already been imprisoned for about four months. Having regard to the facts and circumstances of the case, it is just and proper to reduce the sentence to the period already undergone by the appellant Shyam Sharma. Ordered accordingly."

30. It would be apt to indicate that while dealing with the case related to offence under Section 307 IPC, the Apex Court in the case of *State of Madhya Pradesh vs. Saleem*, (2005) 3 SCC 554, observed that to sustain a conviction under Section 307 IPC, it was not necessary that a bodily injury capable of resulting in death should have been inflicted and also that the court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under the circumstances mentioned in the section.

31. The position that because a fatal injury was not sustained alone does not dislodge Section [307, IPC](#) conviction has been reiterated in *Jage Ram v. State of Haryana*, (2015) 11 SCC 366 and *State of Madhya Pradesh v. Kanha*, (2019) 3 SCC 605. Yet, in *Jage Ram (supra) and Kanha (supra)*, it was observed that while grievous or life-threatening injury was not necessary to maintain a conviction under Section [307, IPC](#), 'The intention of the accused can be ascertained from the actual injury, if any, as well as from surrounding circumstances. Among other things, the nature of the weapon used and the severity of the blows inflicted can be considered to infer intent.'

32. After considering above mentioned pronouncements, in the facts and evidence of the present case, it appears that the ingredients of sections 307 of IPC are not satisfied. For the reason(s) that the injured sustained firearm injury at his right arm. Medical report does not suggest that this injury was grievous in nature or was dangerous to life. The injury sustained was not on vital part and the facts and circumstances of the case do not indicate that the appellant had intention to kill the deceased. Thus, conviction of the appellant under Sections 307 of IPC cannot sustain and the appellant is liable to be convicted for the offence punishable under Section 324 of IPC.

33. So far as question of sentence to be imposed under Section 324 of IPC is concerned, perusal of record shows that occurrence took place in the year 1989 and on the date of incident, the injured and others were attending the function at the place of one Arjun Prasad Tiwari where the family members of this person were bursting fireworks and some persons were involved in Harsh Firing (हर्ष फायरिंग) and thus, it cannot be ruled out that the injury to the injured/Manoj Kumar could be sustained in Harsh Firing (हर्ष फायरिंग) and accordingly, at this juncture of time, sentencing the accused-appellant to a custodial sentence would not serve the end of justice.

34. In view of the aforesaid reasons, conviction and sentence of appellant under Section 307 of IPC is set aside. However, accused-appellant is found guilty for offence punishable under Section 324 of IPC. Considering all relevant facts of the matter, the accused-appellant is sentenced to the period already undergone along with fine of Rs.25,000/- under Section 324 of IPC. Out of the total fine so deposited, an amount of Rs. 20,000/ shall be paid to the injured PW-4/Manoj Kumar or his successor(s), as the case may be. In default of payment of fine, accused appellant shall undergo one year imprisonment. The fine shall be deposited by the appellant before the trial court within two months from the date of this judgment.

35. The appeal is *party allowed* in above terms. The appellant is stated on bail, his personal bond is cancelled and sureties are discharged.

36. Let a copy of this judgment and record be sent forthwith to the trial court concerned for compliance.

Order Date :- 13.06.2024/Arun/-