

HIGH COURT OF JUDICATURE AT ALLAHABAD**RESERVED ON: 8.8.2025****DELIVERED ON: 21.8.2025****Court No. - 78****Case :- CRIMINAL APPEAL No. - 1538 of 1983****Appellant :- Brijendra Singh And Another****Respondent :- State of U.P.****Counsel for Appellant :- Bhishm Pal Singh, Brij Raj Singh, N.K.****Ray, V.S. Mishra****Counsel for Respondent :- A.G.A.****Hon'ble Anish Kumar Gupta, J.**

1. Heard Sri Brij Raj Singh, learned counsel assisted by Sri Piyush Chauhan, Advocate for the appellants and Sri Satyendra Nath Tiwari, learned A.G.A. for the State.

2. The instant criminal appeal has been filed by the appellants being aggrieved by the judgment and order dated 15.6.1983 passed by Special Judge, Manpuri in Special Trial no. 192/1982 whereby the appellants herein have been convicted for the offence under Section 148 IPC as well as for the offence under Section 307 read with Section 149 IPC. Both the appellants were directed to undergo 2 years rigorous imprisonment for the offence under Section 148 IPC and 4 years rigorous imprisonment for the offence under Section 307 read with 149 IPC.

3. Briefly stated the prosecution case is that the P.W.-1 R. S. Tyagi along with other police teams was in search of a gang of dacoits on 13.12.1981 and during the process the police team raided at village Nautka at 12 p.m. where they got an information that the gang of Anar Singh is taking refuge in the house of appellant no. 1 herein. Relying upon the aforesaid information, the police team divided into two parties and the in-charge of the first party was Sri Ram Saran Tyagi,

Circle Officer and the another team was led by SSI R. K. Singh and both the police teams tried to find out the public witness but due to fear of gang no public witness agreed to accompany them. Thereafter both the police teams surrounded the house of appellant no. 1 and was about the reach to the house of appellant no. 1. Then, eight to ten miscreants came out of the house of appellant no. 1 and seeing the police, they started firing and ran towards the east side. CO R.S. Tyagi cautioned them not to fire and stop as the police has already surrounded them and if they run and fire, then the police will be bound to kill them. Despite that, the miscreants continued to fire, then the CO R.S. Tyagi ordered the police team to fire and follow them. The appellant herein who was having a single barrel gun and was firing from the same handed over the said gun to miscreant Ravindra Singh, appellant no. 2 herein and he himself stopped. Both the police teams followed the miscreants who have escaped from the agricultural fields and the appellant no. 1-Bijendra Singh was arrested at 12:45 PM. He was searched and during the search, 3 live cartridges of 12 bores were recovered from the right pocket of his *kurta* which were seized and sealed by the police. The house of the appellants was also searched and in the house, it was found that various used utensils were lying, frying pan (*kadhai*) filled with ghee was there from which it was apparent that *puris* have been fried right now and around 2 kg *puris* were stored there. From the aforesaid fact, it is established that the gang has taken food in the house of Bijendra Singh, the appellant no. 1 and thus Bijendra Singh has harbored the gang. The police has also recovered three used cartridges from the passage in front of the house of Bijendra Singh, which was used by miscreants to assault the police team which were also seized and sealed by the police. The police has also identified the appellant no. 2. Rest of the miscreants were also seen by the police team and it was stated that they can be identified if they are brought before them.

4. The police has used the following cartridges: SSI R. K. Singh used 2 cartridges, SI Manik Chandra used 1 fire and 1 cartridge submitted, head constable Bhuj Raj Singh used 1 fire and 1 cartridge submitted, Constable Ganga Sagar has also used 1 fire and 1 cartridge was submitted, Constable Kunwar Pal has also used 1 fire and 1 cartridge was submitted by him. The used cartridges were also sealed and the incident was reported by SSI R. K. Singh at the Police Station Sikohabad, District Manpuri. It is stated in the FIR that the miscreants have fired at the police team with intention to kill them and the live cartridges were recovered from Bijendra Singh and it is alleged that he had harbored the gang of dacoits. After registration of the FIR, the matter was investigated and charge sheet submitted. Thereupon, the case was committed for trial against the appellants. No other person was apprehended by the police during the investigation.

5. In support of the prosecution case, the prosecution has examined three witnesses namely, CO R.S. Tyagi as P. W. 1, SSI R. K. Singh as P. W. 2 and Sri Ram Ji Lal Sharma as P. W. 3 who is a formal witness regarding registration of the FIR. Thereafter, the statement of all the appellants were recorded under Section 313 CrPC where they have denied the charges and submitted that the police has falsely implicated them due to enmity between the groups of the village. No independent witness was examined in the instant case to support the prosecution story. On the basis of the evidence of two police personnel namely, CO R.S. Tyagi and SSI R. K. Singh, the trial court has finally convicted the appellants for the offence under Section 148 and 307 read with 149 IPC and sentenced them as aforesaid. Being aggrieved by the same, the instant criminal appeal has been filed by the appellants.

6. Learned counsel for the appellants submits that the prosecution has proceeded against the appellant no. 1 herein solely on the basis of main allegation under Section 216A IPC with the

allegation of harboring a gang of dacoits by providing food to them. However, the prosecution has failed in proving its case under Section 216A against the appellant no. 1 for which he was acquitted by the trial court as the basic requirement of Section 216A was not fulfilled from the entire prosecution case alleged against the appellant no. 1. It is further submitted by learned counsel for the appellants that the sole allegation against the appellant no. 1 is that he was standing in front of his house and was firing from a single-barrel gun and subsequently, he has handed over the gun to the appellant no. 2 and after his arrest, three live cartridges have been recovered from his pocket. Though it is mentioned by the prosecution that the seizure memo with regard to said live cartridges has been prepared by the police; however, the same has not been produced before the trial court during the entire prosecution and that was not formed the part of the case diary and during the trial of the case, the said seizure memo has neither been produced nor been proved. Therefore, recovery of live cartridges cannot be relied upon against the appellant no. 1. There is no recovery of the gun allegedly used by the appellants and no efforts have been made by the prosecution to recover the same. Therefore, the prosecution of the appellants is without any basis. It is further submitted that even for the recovery as has been mandated by the Apex Court in recent judgments it is mandatory that two independent witnesses are required for the purposes of recovery of any incriminating material to believe that the recovery can be relied upon against an accused person. Since in the instant case neither the seizure memo has been produced before the trial court nor has been proved before the trial court nor there is any independent witness, thus the appellants are entitled for acquittal in the instant case and the prosecution story as such cannot be relied upon.

7. Learned counsel for the appellants further submits that the police authorities have picked up the appellant no. 1 on 13.12.1981 at

5:30 am from his house and a telegram to this effect was sent to the authorities on 13.12.1981 itself at 10:35 am and subsequently, the instant prosecution story has been cooked up by the police authorities and the appellants have been framed in the instant case. The copy of the telegram has been produced on record. It is further submitted by learned counsel for the appellants that the appellant no. 1 has been apprehended by the police from his house even as per the prosecution story while he was standing in front of his house though it has been alleged that he was firing from the gun and thereafter handed over the gun to appellant no. 2; however in the process no one has sustained any injury from both sides. Thus, even assuming that the appellant no. 1 was firing from the gun but it is not apparent that he had any intention to kill anybody or he has targeted anyone. Since the intention to kill is not reflected from the prosecution case, no offence under Section 307 IPC is made out in the instant case. So far as the appellant no. 2 is concerned, there is no averment whether he had fired from the gun received from appellant no. 1 targeting any of the police personnel. No such person has been examined by the prosecution. Therefore, both the appellants are entitled for benefit of doubt and they cannot be convicted for the offence under Section 307 read with 149 IPC. As the prosecution has failed to bring home the other miscreants as alleged by them, therefore, the prosecution of the appellants with the help of Section 149 IPC is also not sustainable.

8. Per contra, learned AGA submits that the appellant no. 1 was arrested on the spot and it is also categorically alleged and proved by the prosecution that the appellant no. 1 was using a single-barrel gun when the police team has raided his house and subsequent thereto, he has handed over the gun to appellant no. 2 who has also fired on the police team with intention to kill the police team. Thus, both the accused persons were firing on the police team; therefore, there was a categorical intention to kill on the part of the appellants, hence a

categorical case under Section 307 IPC is made out against the appellants. It is further submitted that there is recovery of live cartridges from the possession of appellant no. 1 by the police team on the spot immediately after arrest. The said recovered items were sealed and deposited in the malkhana.

9. Learned A.G.A. further submits that it was a gang of dacoits who were armed with the guns and they fired at the police team and escaped from the spot. Therefore, while they were firing at the police team, they had the clear and categorical intention to kill the police team, therefore, the offence under Section 307 read with 149 IPC is categorically made out against the appellants along with the other persons. Learned A.G.A. further submits that no specific *mala fides* have been alleged by the defence against the police team and the witnesses P.W.-1 and P.W.-2 for the false implication of the appellants, therefore, the testimony of P.W.-1 and P.W.-2 merely because they are the police personell cannot be doubted and their deposition is trustworthy; thus can be relied upon for the prosecution and conviction of the appellants

10. Having heard the rival submissions made by learned counsel for the parties, this Court has carefully gone through the records of the case.

11. From the record of the case, it is apparent that repeated applications were made on 16.2.1983 as well as on 21.2.1983 categorically stating that in the case diary and the charge sheet the seizure memo has not been produced before the trial court. The case diary was examined by the Court Master and it was reported on those applications that the seizure memo as well as the sealed items were not produced before the Court and were not found part of the record. The copy of the telegram send to the Senior Police officers on the date of incident itself at 10:35 am was submitted by the appellant no. 1- Bijendra Singh at the time of his filing the bail application and

subsequently, he has asked to return the same back vide an application dated 21.2.1982 wherein the office is reported the copy of the telegram was available and was returned to the appellant. As per the statement of P.W.-1 and P.W.-2, the police team after getting the information that Anar Singh gang is taking food in the house of appellant no. 1, they divided the police team into two groups and proceeded to the house of appellant no. 1 from both sides. Thereupon seeing the police persons, 8-10 persons of the gang escaped from the house of appellant no. 1 while making fires towards the police team and it is also alleged that the appellant no. 1 was also having a single barrel gun and firing from the same and thereafter, he handed over the said gun to appellant no. 2 and stood in front of his house where he was apprehended by the police team and three live cartridges were recovered from the side pocket of his *kurta*. Though the witnesses have stated categorically that the live cartridges were recovered from the possession of the accused-appellant no. 1; however no seizure memo has been produced in the instant case. Therefore, such seizure or recovery of live cartridges cannot be relied upon. The Supreme Court in recent judgements has categorically held that at least for the purposes of recovery to be relied upon in a prosecution, there must be two independent witnesses. In the instant case, there is no independent witness from the public; however non-presence of the public witness in the instant case can be understood that it was that time when dacoits and dacoity in the areas were very frequently prevalent and no public person would easily be available to depose against any of the gang members due to fear. Therefore, non-presence of the public witness in the instant case cannot be a ground for disbelieving the recovery; however since the seizure memo itself has not been produced on record, the recovery cannot be relied upon against the appellant no. 1.

12. So far as the other allegation that single barrel gun was used by appellant no. 1 and thereafter, handed over to appellant no. 2 and both of them have fired from the said gun and as per the prosecution case, all the miscreants who were 8-10 in numbers have fired from their guns and escaped from the spot, the police could recover only three empty cartridges used by the miscreants. Thus, the said used cartridges cannot be definitely attributed to the appellants herein.

13. Further, in the entire episode even as per the prosecution case, no person has sustained even a scratch what to say about the fire arm injury. Even if, it is assumed that the firing had taken place that appears to have taken place in the air without their being any intention to kill anyone. However, from the entire episode as has been narrated by the prosecution, intention to kill the police officers is categorically absent. Therefore, in the considered opinion of this Court, the conviction of the appellants herein for the offence under Section 307 IPC is not sustainable. Further, the prosecution has also failed to bring home the other accused persons who have allegedly fired while escaping from the house of appellant no. 1. Thus, in the entire prosecution case, there is no averment with regard to the fact that the appellant no. 2 has also fired. The only case of the prosecution is that Bijendra Singh has handed over the single-barrel gun to Ravindra Singh while they were being chased by the police party. Since the prosecution has failed to bring home other accused persons, nor any efforts have been made to apprehend the other accused person by the police team, therefore, the offence under Section 148 and 149 IPC are not attracted in the instant case. Accordingly, even if the deposition of P. W. 1 and P. W. 2 is taken on its face value, the offence under Section 148 and 307 IPC read with Section 149 IPC is not made out against the appellant herein.

14. Therefore, in the considered opinion of this court, the conviction of the appellants in the aforesaid offence is not sustainable

accordingly, the judgement and order dated 15.6.1983 passed by the Special Judge is hereby set aside and the appellants are acquitted for the charges under Sections 148 and 307 read with Section 149 IPC..

15. The instant criminal appeal is **allowed**.

16. Since the appellants are on bail, they need not surrender. Their bail bonds are canceled and sureties discharged.

17. Trial court record be sent back to be consigned.

Order Date :- 21.8.2025

Kirti

(Anish Kumar Gupta, J.)