

Court No. - 44

Case :- CRIMINAL APPEAL No. - 455 of 2015

Appellant :- Sarvesh

Respondent :- State of U.P.

Counsel for Appellant :- Pankaj Satsangi, Sarvajeet Singh

Counsel for Respondent :- Govt. Advocate

Hon'ble Saumitra Dayal Singh, J.

Hon'ble Anil Kumar-X, J.

1. Heard Sri Pankaj Satsangi, learned counsel for the appellant and Sri Pankaj Kumar Tripathi, learned AGA for the State.
2. The present criminal appeal arises from the judgment and order dated 8.1.2015 passed by Sri Chandrapal Singh, learned Additional Sessions Judge/Special Judge (E.C. Act.) Budaun in Sessions Trial No. 1263 of 2008 (State vs. Sarvesh), under Section 302/34, 307/34 IPC arising from Case Crime No. 284 of 2008 P.S. Usawan, District Badaun and Sessions Trial No. 1264 of 2008 (State vs. Sarvesh), under Section 25 of Arms Act, arising from Case Crime No. 287 of 2008, P.S. Usawan, District Budaun. By that order, the learned trial court has convicted the appellant for offence under Section 302 IPC and sentenced him for life together with fine Rs. 20,000/- with default sentence six months. It has also convicted appellant under Section 307 read with Section 34 IPC and sentenced him for 7 years rigorous imprisonment together with fine Rs. 10,000/- with default sentence of three months. Further appellant has been convicted for offence under Section 25 Arms Act and sentenced for three years rigorous imprisonment together with fine Rs. 5,000/- with default sentence of one month.
3. At the outset, learned counsel for the appellant has informed that the appellant was never on bail and has remained confined for more than 17 years.

4. The prosecution story emerged on the strength of Written Report dated 23.5.2008, submitted by Rakshpal (PW-1), father of the deceased. It is Ex. Ka-1 at the trial. On his instance, the FIR was registered at Police Station Usawan, District Budaun at about 6:45 a.m. on 23.5.2008. The FIR is Ex. Ka. 2 at the trial. Thus, the prosecution story emerged that at about 11:00 pm on 22.5.2008, the deceased Rajveer and Rakshpal (PW-1) had gone to their agricultural field, to guard their crop of pumpkin. There, they found their cot and spade/*favda* missing. That occurrence was attributed to the nephews of Rakshpal (PW-1), namely Sarvesh, Ramveer, Bharveer, all sons of Ram Swaroop and Ved Ram, son of Umrai Kashyap. Those persons bore animosity with Rakshpal (PW-1) and the deceased, for reason of prior partition. On confronting the accused with the occurrence of disappearance of the cot and spade, the accused persons became angry. In that the present appellant-Sarvesh shot at the deceased, while Rajveer shot at the Rakshpal (PW-1). Allegedly, that shot hit Rakshpal (PW-1) on his head. On alarm being raised, others who were bringing food to the informant side, arrived including Karan (PW-2) and Shankar Lal (not examined at the trial). On being challenged, the assailants fled. Rajveer died on the spot. FIR could not be lodged in the evening, but it was lodged the next morning, because of lack of availability of transport.

5. On 25.5.2008 the appellant was arrested. S.I. Yogendra Singh (PW-9) recovered a firearm described to have been used in the occurrence. That Recovery Memo is Ex. Ka. 12. Also, on 23.5.2008 itself, S.I. Yogendra Singh (PW-9) recovered samples of blood-stained and plain earth, from the place of occurrence. That Recovery Memo is Ex. Ka. 21. On 23.5.2008, the injured Rakshpal (PW-1) was examined by Dr. Rajiv Naingiri (PW-4) at P.H.C. Usawan, Budaun. The said Medico Lego Report is Ex. Ka. 7 at the trial. For ready reference the injuries noticed by him and his opinion formed at that stage is quoted below:-

“1. Lacerated wound 7cm x 2 cm scalp deep on the right side of skull, 12 cm above right ear. Margins are lacerated, irregular invested, blood clots visible horizontal almost in shape, directing towards right downwards.

*2. Abrasion 0.7cm x 0.2 cm on the dorsal aspect of left palm, 2cm below the left middle finger
opinion- All above injuries are caused by one hard and blunt object and simple in nature. Duration is within about 24 hours.”*

6. On 23.5.2008 S.I. Yogendra Singh (PW-9) prepared the Inquest Report. It is Ex. Ka. 15 at the trial.

7. Also on 23.5.2008, Dr. Ashok Kumar Gupta (PW-5) conducted the autopsy examination on the dead body of the deceased Rajveer. He opined, death may have been caused due to haemorrhage and shock caused by ante mortem firearm injury. The Autopsy Report is Ex. Ka 8. In that the following ante mortem injuries were noted :-

(I) Firearm wound of entry present over left side of chest size 2cm x 1.5cm x chest cavity deep, 5cm below and medial to nipple at 7 O'clock position. No blackening/tattooing present around the wound.

On distance of chest muscles, vessels nerves and pericardium, heart and left pleurae 2 lung found lacerated and thoracic cavity and one long metallic bullet recovered from left side post wall of chest.

8. Arising from the recovery of firearm and blood-stained earth etc., reports were obtained from the FSL. Regarding the used/empty cartridge recovered with the firearm, there exists a report that those may have been used in the occurrence. However, there is no recovery of any empty cartridge from the spot.

9. In such circumstances, upon completion of investigation, S.I. Yogendra Singh (PW-9) submitted charge-sheet in the case. Thereafter, the case was committed to the Court of Sessions. It framed the following charges against the appellant :-

"यह कि दिनांक 22.5.08 को समय करीब 11 बजे रात स्थान ग्राम गोतरा पट्टी थाना उसाँवा जिला बदायूँ में आपने सामान्य आशय से वादी रक्षपाल के लड़के राजवीर को गोली मार कर उसकी हत्या कर मृत्यु कारित की इस प्रकार आपने भा०द०सं० की धारा 302/34 के अन्तर्गत दण्डनी अपराध किया जो इस न्यायालय के संज्ञान में है।

यह कि उपरोक्त दिनांक समय व स्थान पर आपने सामान्य आशय के अग्रसरण में आपमें से रामवीर ने वादी रक्षपाल को जान से मारने की नीयत से अपने हाथ में

लिये तमन्चे से उसपर फायर ऐसे ज्ञान आशय व ऐसी परिस्थितियों करके उसे घायल किया, कि यदि उसकी मृत्यु हो जाती तो आप हत्या के दोषी होते। इस प्रकार अपने भा०द०सं० की धारा 307/34 के अन्तर्गत दण्डनीय अपराध किया जो इस न्यायालय के संज्ञान में है।"

10. Another charge was framed under the Arms Act. At the trial, besides the above documentary evidence, the prosecution relied upon evidence of nine witnesses. In that, Rakshpal (PW-1) was examined as an injured witness and the first informant. He narrated that on the night of the occurrence, he along with deceased Rajveer reached their agricultural field, to guard their pumpkin crop. They found their spade and cot missing. At that time, his nephew namely appellant- Sarvesh along with Ramveer and Bharatveer and Ved Ram were also present.

11. Upon being asked about the cot and the spade, Sarvesh opened fire at Rajveer. It hit him on his chest. He died. The second shot was fired at Rakshpal (PW-1) by Rajveer. It hit him on his head. On alarm being raised, his relatives Karan (PW-2) and Shankar Lal, who were bringing food for the injured and the deceased, reached the place. On challenge raised by them, the accused fled. He went to the Police Station in the morning, as during the night, he was afraid and full of fear and also could not arrange transport. Thereafter, he proved the Written Report. Last, he proved, there existed some disputes between him and the accused arising from partition of land. He also proved in that regard, the informant side had been assaulted earlier as well.

12. Karan son of Anganlal was examined as PW-2. He proved that he was related to Rakshpal (PW-1) and was present at the residence of Rakshpal (PW-1). On the date of occurrence, he alongwith Shankar Lal brought food for Rakshpal (PW-1) and Rajveer, at their agricultural field. There the accused persons were also present. Quarrel arose between the two sides over the missing cot and spade.

13. On the accused party being questioned by the informant's side about those two missing items, Sarvesh opened fire at the deceased. He died on the spot. The second shot was fired by Ramveer, which hit Rakshpal (PW-1), on his head. On being challenged, the assailants fled.

14. Thereafter, Head Moharir Radheyshyam son of Chhote Singh was examined as PW-3. He proved the registration of the FIR and the relevant GD entry.

15. Dr. Rajiv Naingiri, the doctor who examined the injured was examined as PW-4. He specifically proved that the injured had suffered injuries from a hard blunt object within 24 hours of the injury report being prepared. He further proved the Injury Report (Ex. Ka-7).

16. Dr. Ashok Kumar Gupta, the doctor who conducted the autopsy examination on the dead body of the deceased Rajveer was examined as (PW-5). He proved the single gunshot injury received by the deceased.

17. S.I. R.K. Sehgal was examined as PW-6. He proved the arrest of the appellant and the other accused persons. S.I. R.K. Sehgal (PW-6), proved the submission of charge-sheet submitted in the main case under Section 302 IPC.

18. Rajesh son of Rakshpal (PW-1) the first informant/injured witness was examined as PW-7. He is a witness of recovery of the firearm.

19. S.I. Sharafat Hussain was examined as PW-8. He proved the investigation and submission of the charge-sheet in the second case (under the Arms Act).

20. S.I. Yogendra Singh was examined as PW-9. He proved the Recovery Memos and initial investigation.

21. Thereafter, statement of the accused was recorded under Section 313 Cr.P.C. In that state of evidence, the learned trial court has convicted the appellant and sentenced him, as noted above.

22. Aggrieved by the order of the learned trial court, the appellant has preferred this appeal.

23. Submissions of learned counsel for the appellant are two fold. First, it has been submitted, the FIR is belated. No one saw the occurrence. The injured witness never came to be injured in the manner disclosed, either in the FIR or as narrated by at the trial. In that, he did not receive any gunshot

injury. The only injury suffered by him was caused by a hard and blunt object. There are no pellet or bullet injuries suffered by him. Referring to the statements made by him during his cross-examination, it has been stressed, he used to stay at his house and not in the hut in the agricultural field. He further stated that the firearm injury had been caused from distance of 15-16 meters, late in the night, when there was no source of light available. Clearly, the witness had not seen the occurrence.

24. In that regard, it has been further asserted that it is a self-admitted fact of the prosecution that the occurrence was caused between 10:30-11:00 pm on 22.5.2008, whereas the FIR was lodged on the following day at 6:45 a.m.

25. In the First Information Report, Rakshpal (PW-1) only narrated that he could not approach the police due to lack of transport. That deficiency, he tried to cover by material improvement and he stated at the trial that he was also fearful during the night. That, statement is patently false. It is also the prosecution story that on challenge being raised by the injured and other relatives, namely, Karan and Shankar Lal, the assailants had fled from the spot.

26. It has been submitted that there is an inherent improbability in the prosecution story, inasmuch as it has also come on record during the cross-examination of PW-1 that the parties did not share a common boundary between their agricultural fields. Yet, the prosecution narrated that all were present on the agricultural field of the informant side. Merely on the allegation of cot and spade missing, the assailants are described to have shot at the deceased and the injured, without provocation.

27. Also, there is no force in the prosecution story, inasmuch as that nature of occurrence is wholly contradicted by the other account offered by the Rakshpal (PW-1) himself, wherein he narrated (during his cross-examination) that the occurrence was caused from a distance of 15-16 meters. Thus, nobody could have or had seen that occurrence, at that hour, and no such occurrence had been caused by the appellant.

28. Alternatively, according to the prosecution story, a sudden quarrel broke out between the parties and it was not preceded by any event that may amount to ingredients of premeditation or intention to kill. Therefore, in absence of any firearm injury suffered by injured, the occurrence may not travel beyond the ingredients of Section 304 IPC.

29. Learned AGA, would submit, there is no reason to doubt the ocular evidence of the injured eye witness. As the parties knew each other from before, they were clearly identified, in moonlight. That fact was also proved at the trial. To the extent the deceased and the injured had been assaulted with firearms, the case may never fall within the scope of Section 304 IPC

30. Premeditation may arise just before the occurrence itself. To the extent, the prosecution has successfully proven that the assailants were questioned by the informant side as to the missing cot and spade, the assailants shot at the deceased and injured another with two separate firearms. Therefore, the present appeal has no merit.

31. Having heard learned counsel for the parties and having perused the record, the prosecution has presented a case of direct evidence. In that it heavily relied on the testimony of the first informant Rakshpal (PW-1) who is described as an injured eye witness and Karan (PW-2) who is described to be a simple eye witness. The occurrence is of 10:30-11:00 p.m. on 22.5.2008. The place of occurrence is the agricultural field of Rakshpal (PW-1), away from his residence.

32. In the first place, Karan (PW-2) described himself to be a nephew of Rakshpal (PW-1). The relative of Rakshpal (PW-1), whose daughter was married to one of the sons of Karan (PW-2). He is not a resident of village Gauthara. In that circumstance, he claimed, he was present at the village where the occurrence took place. He did not disclose any reason for his visit. At the same time, in the context of that relationship disclosed, he further claimed that he reached the place of occurrence carrying the dinner/meal for Rakshpal (PW-1) and the deceased. As to his occupation, he described himself to be a manual labourer. Though he claimed to be present at the time of the inquest, he is not a *panch* witness either. During his cross

examination, he also admitted that after the occurrence and till his evidence was recorded about 16 months later, he never visited village Gauthara. Again, though no recovery of any empty cartridge was made from the place of occurrence, he tried to maintain that 3-4 empty cartridges were recovered from the place of occurrence.

33. In that context, we find that the presence of the said witness is wholly doubtful being purely chance and highly coincidental. He neither had any reason or business or occasion to be present at village Gauthara, nor his statement that he became a witness of that occurrence because he brought food for Rakshpal (PW-1) and the deceased, inspires any confidence. Being a pure chance witness, his presence may remain in the shadow of doubt. Remarkably, he neither intervened in the occurrence before the firearms came to be used i.e. when the informant side was inquiring from the assailants about the missing cot and spade, nor any threat or coercion was practised on him when the firearm came to be used. Thus, his presence is wholly doubtful. Also, his statement that he was a witness to the occurrence is otherwise doubtful, as the injured witness Rakshpal (PW-1) himself narrated that the said witness arrived after the occurrence had been caused i.e. after the second firearm had been used to cause injury to Rakshpal (PW-1). Thus, in any case, he had not seen the occurrence. In case of such discrepancies, that are material and in the context of his presence as a chance witness, we find his deposition to be unreliable.

34. Coming to the deposition made by the injured witness Rakshpal (PW-1), before his presence at the place of occurrence may be acknowledged and credence is given to him by treating his deposition on the higher pedestal i.e. that of an injured witness, the issue of injuries received by Rakshpal (PW-1) assumes great importance. Starting from the FIR, that was lodged about eight hours after the occurrence, it was narrated by Rakshpal (PW-1) that during the occurrence, Rajveer fired at him with a country-made pistol, that hit him on his head. A perusal of that statement also discloses that the firearm came to be shot at him in the course of the quarrel, that had erupted between the parties over a missing cot and spade. That being a verbal

quarrel, that was witnessed over the agricultural field of Rakshpal (PW-1), that too near the hut from where those two items were missing, it was clearly depicted by the prosecution that the parties were standing close to each other, when the firing took place. However, during his cross-examination, the said Rakshpal (PW-1) described that the firearm was shot from a distance of 15 to 16 meters. The firearm shot at him is described to have caused injury, towards the centre of his head.

35. Besides the discrepancy that clearly exists with respect to the firearm that has been used and the doubt that therefore arises and exists, in the present facts, there is absolutely no corroboration of such injuries suffered by the injured Rakshpal (PW-1), caused by a firearm.

36. We are aware that medical evidence or opinion may not itself be sufficient to discard ocular version. However, where the medical opinion is at complete variance with the occurrence, as narrated by the prosecution, due explanation of the variance may be relevant. Here, in the first place, though Rakshpal (PW-1) claimed he was hit on his head with a firearm shot at him (from whatever distance), at about 10:30-11:00 p.m. on 22.05.2008, it is a fact he was not medically examined till before 11:15 a.m. i.e. about 12 hours from the occurrence and about 4 hours after the FIR has been lodged. That itself creates a doubt if he was ever hit by a firearm. Had it been so, in normal course, effort would have been made to get medical attention, earlier. The above time gap assumes material importance because the injured is a resident of Village- Gautrapatti, P.S.- Usawan, Budaun and he was medically examined at P.H.C. Usawan, Budaun itself. Yet the gap of time arose. No explanation exists why such delay may have been caused, when the injured claimed to have been injured by a firearm, on his head.

37. Second, the description of the injuries is clearly recorded in the medico-legal report dated 23.05.2008. As noted above, they were only lacerated wounds, barely scalp deep, all caused by hard and blunt object. All injuries were disclosed to be simple in nature. Dr. Rajiv Naingiri (PW-4), during his examination-in-chief, proved the injury report and further introduced doubts in the prosecution story by clearly admitting that such injury may have been

caused to the victim upon being assaulted with a *lathi* or by a fall suffered by the injured or by a hard and blunt object. There is no narration of any such injury in the prosecution story. In that doubtful nature of opinion formed by the doctor, he also admitted another possibility that such injury may have been caused by pellets projectile fired from a firearm. At the same time, it is undisputed to the prosecution that no X-ray examination of Rakshpal (PW-1) was ever conducted and there is absolutely no recovery of any pellet projectile, that may have penetrated the said injured. Further, there is absolutely no recovery of any empty from the place of occurrence.

38. The upshot of the above discussion is that the firearm injury claimed by the Rakshpal (PW-1) is wholly doubtful. There is no material to believe the prosecution story beyond reasonable doubt, that the injury suffered by that witness had been caused with use of firearm from close distance, as narrated. Perhaps, because of that or perhaps for reasons not shown to the Court, Rakshpal (PW-1) first narrated that the occurrence was caused in the course of a quarrel between the parties and later, he disclosed that the firearm had been shot from a distance of 15 to 16 meters. That distance would practically be 45-50 feet. With the nature of firearm described-being country-made pistol, it again remains doubtful whether the nature of injury was wholly proven as caused in the manner disclosed.

39. Therefore, we are unable to place any reliance on the injury, claimed by the Rakshpal (PW-1), as one caused by firearm. These injuries that came to be suffered by Rakshpal (PW-1) were neither directly explained by the prosecution nor there is material on record, as may suggest the means or manner in which such injuries may have been suffered by Rakshpal (PW-1), in the course of the occurrence, as disclosed. At no point, the said witness disclosed that there was a physical assault witnessed between the parties, wherein any hard or blunt object may have been used to cause such injuries.

40. In absence of the manner of injuries caused being disclosed, we are unable to hold that the prosecution has established the presence of Rakshpal (PW-1), at the place of occurrence, at the particular time. That onus was squarely on the prosecution. Only because Rakshpal (PW-1) was presented

as an injured, the prosecution story proceeded on that premise or strength, as one flowing from an injured witness. Since, his injuries are wholly doubtful, that premise or strength, is lost to the prosecution.

41. What now survives is if Rakshpal (PW-1) had witnessed the occurrence. Once the presence of the witness is doubtful, there remains less reason to rely on his deposition. In that, we note, though in the FIR and during his examination-in-chief, Rakshpal (PW-1) disclosed that he along with Rajveer (deceased) had gone to their agricultural field to guard their pumpkin crop in the night of 22.05.2008, during his cross-examination, he made a doubtful statement as to his presence. In that, he first stated that he and the deceased used to stay in the hut on their agricultural field during the night, but then stated that he used to stay at his home from where he had left at about 7:30 p.m. and first gone to his wheat field and from there, to his pumpkin field. Probably, for those reasons, he had no occasion to see the occurrence.

42. Further, a discrepancy arose in his narration that the firearm was shot from a distance of 15 to 16 meters. At that stage, he specifically admitted that he did not have with him torch or any other source of light. We also note that suggestions were thrown at the said witness as to his involvement in certain other cases of trade in illicit liquor, and that there were other disputes with respect to his pumpkin crop. At the same time, he did maintain that no recovery of any empty was made from the place of occurrence.

43. Therefore, in view of the reasonable doubts that arise on the strength of prosecution evidence itself, both as to the presence of Rakshpal (PW-1) and Karan (PW-2), and the nature of occurrence narrated by them. The prosecution story is not found proven beyond reasonable doubt. Appellant deserves to be acquitted, on a benefit of doubt.

44. In view of the above, the present appeal is **allowed** and the appellant Sarvesh is acquitted of the charges.

45. Accordingly, judgment of conviction and order of sentence is set aside. The appellant Sarvesh is in jail. He may be released forthwith. However, appellant shall furnish bail bond in compliance of Section 437-A Cr.P.C. to the satisfaction of the Court concerned within two month from today.

46. The Trial Court's record be remitted back along with copy of this judgment.

47. Compliance report be submitted to this Court at the earliest. Office is directed to keep the compliance report on record.

Order Date :- 4.8.2025

Ujjawal

(Anil Kumar-X,J.)

(S.D. Singh,J.)