

Court No. - 45

Case :- CRIMINAL APPEAL No. - 7886 of 2019

Appellant :- Shiv Kumar

Respondent :- State Of U.P. And Anr.

Counsel for Appellant :- Indra Pal Singh Rajpoot, Raj Kumar Vaishya, Sanjay Kumar, Satyendra Singh, Sunil Kumar Kushwaha

Counsel for Respondent :- G.A.

Hon'ble Saumitra Dayal Singh, J.

Hon'ble Dr. Gautam Chowdhary, J.

1. Heard Sri Indra Pal Singh Rajpoot learned counsel for the appellant and Sri Patanjali Mishra learned AGA-I alongwith Sri Nagendra Kumar Srivastava learned AGA for the State.

2. Present appeal arises from the judgment and order dated 26.08.2019 passed by Special Judge (SC/ST Act), Jalaun at Orai in Sessions Trial No. 47 of 2016 (State Vs. Shiv Kumar) arising out of Case Crime No. 388 of 2016 under Section 307 IPC read with Section 3(2)(v) SC/ST Act and Sessions Trial No. 48 of 2016 (State Vs. Shiv Kumar) arising out of Case Crime No. 400 of 2016 under Section 3/25 Arms Act, Police Station Kadaura, District Jalaun at Orai. The appellant has been convicted and sentenced to undergo life imprisonment for the offence under Section 307 IPC read with Section 3(2)(v) SC/ST Act and fine Rs. 10,000/- in default of payment of fine to further undergo three years imprisonment. He has been sentenced to undergo two years rigorous imprisonment for the offence under Section 3/25 Arms Act and fine Rs. 3000/- and in case of default of payment of fine to further undergo imprisonment of six months.

3. According to prosecution story, first informant Vijay Ahirwar son of Radhey Ahirwar (**P.W.-1**) the injured witness, lodged First

Information Report in Case Crime No. 0388 of 2016 on 04.09.2016 at about 12.05 noon under Section 307, 504, 506 IPC read with Section 3(2)(v) SC/ST Act disclosing that on that day at about 10.00 a.m., the present appellant reached the dwelling house of Vijay Ahirwar (**P.W.-1**) and started hurling verbal abuses at the first informant. When the latter reached the door of his dwelling house, the appellant demanded Rs. 500/- to buy liquor and chicken. Upon refusal by the first informant, he was shot at by the appellant on his right wrist with a countrymade pistol. The said occurrence was witnessed by the younger brother of the first informant Virendra (**P.W.-2**) and the wife of the first informant Mohini (not examined at the trial). The written complaint is **Ex.Ka-1**. The FIR is **Ex.Ka-3**. Upon recovery of the assault weapon, another FIR dated 06.09.2016 was registered at about 06.25 p.m. in Case Crime No. 400 of 2016. It was lodged by S.I. C.B. Verma alleging recovery of one 0.315 bore countrymade fire arm from the appellant upon information provided by an informer. That FIR is **Ex.Ka-5**. However, there is no independent witness of that recovery. Yet, the recovery memo dated 06.09.2016 is **Ex.Ka-7**.

4. The injured first informant Vijay Ahirwar (**P.W.-1**) was medically examined on 04.09.2016. The injury report is **Ex.Ka-2** wherein following injuries were noted.

"1. Lacerated wound on right forearm on antero-medial aspect measuring 2.3 cm x 1 cm. Margins inverted, blackening around margin present; 1.5 inch below wrist black coloured powder deposits present on sleeve of shirt, KVO sealed and handed over to Police for further examination (forensic expert opinion) (2 entry wound) oval shaped wound.

2. (2 exit wound)-lacerated wound, crusiated shaped on postero medial aspect of forearm 2 inch below (towards elbow) to wrist measuring 2.75 cm x 1 cm, margins enerted probing not done. KVO advised right forearm AP and cut and expert opinion bleeding on wound is present."

5. Though the recovery of the fire arm was claimed by the

prosecution, no ballistic report was obtained to support the allegation that that fire arm was used by the appellant to cause the fire arm injury giving rise to the prosecution of the appellant. Upon completion of investigation and fulfilment of legal requirements, chargesheet were submitted against the appellant both with reference to occurrence involving offence under Section 307 IPC read with Section 3(2)(v) SC/ST Act and Section 3/25 Arms Act. Accordingly charges were framed against the appellant in the above described two sessions trials.

6. At the trial, following witnesses of fact were examined by the prosecution:

(i) Vijay Ahirwar (first informant)-**P.W.-1**.

(ii) Virendra-**P.W.-2**.

(iii) Dr. Vinay Agrawal-**P.W.-3**.

(iv) Constable Jitendra Kumar (Police Clerk)-**P.W.-4**.

(v) S.I. C.B. Verma-**P.W.-5**.

(vi) C.O. Subodh Kumar Gautam, the investigating officer who completed the investigation-**P.W.-6**.

(vii) S.I. Surendra Kumar Singh, the investigating officer in the case arising under Section 3/25 Arms Act-**P.W.-7**.

(viii) C.O. Manoj Kumar Gupta, first investigating officer-**P.W.-8**.

7. Upon prosecution evidence being complete, statement of the accused was recorded under Section 313 Cr.P.C. Besides denying adverse circumstances, he sought to explain that a false prosecution had been lodged against him by the first informant Vijay Ahirwar (**P.W.-1**) for reason of monetary dispute arising from money earlier advanced by the appellant to the first

informant **(P.W.-1)** and that money being refused to be repaid, by the latter. One defence witness Brahm Prakash **(D.W.-1)** was also examined.

8. Insofar as the FIR is concerned, it was lodged promptly. As to the occurrence, Vijay Ahirwar **(P.W.-1)** stated that while he was sitting near the gate of his dwelling house, when the appellant reached that place and demanded money Rs. 500/- to purchase liquor and chicken. On being refused, the appellant used foul language and hurled caste specific expletives. Then, the appellant is disclosed to have fired a firearm at the first informant **(P.W.-1)** that caused an injury to the latter on his right arm. Virendra **(P.W.-2)** and Mohini (wife of the first informant who was not examined at the trial) had seen the occurrence. During his cross-examination, he admitted that he had not suffered any bony or fracture injury. He further stated that at the time of the injury being caused he had put his hand up. As to the place of occurrence, he did state that blood had spilled at that place.

9. As to Virendra **(P.W.-2)**, he described the occurrence, similarly. He added that the occurrence had been seen both by his mother as also the wife of the first informant **(P.W.-1)**. On being cross-examined, he stated that the firing continued for two minutes. As to the injuries. Dr. Vinay Agarwal proved the injury report as Ex.Ka-2. Jitendra Kumar **(P.W.-4)** proved the fact of the FIR being lodged whereas the other prosecution witnesses namely S.I. C.B. Verma **(P.W.-5)** proved the recovery of the firearm from the appellant whereas Subodh Kumar Gautam **(P.W.-6)**, the Investigating Officer who completed investigation proved that fact. Manoj Kumar Gupta **(P.W.-8)**, the Investigating Officer of the case giving rise to S.T. No. 47 of 2016 proved that investigation. Similarly, Surendra Kumar Singh **(P.W.-7)**, the Investigating

Officer in with reference to S.T. No. 47 of 2016 proved the investigation in that case.

10. In his statement recorded under Section 313 Cr.P.C., the appellant stated that he had been falsely implicated for reason of money dispute between the parties wherein the first informant **(P.W.-1)** had taken monetary advance giving rise to the dispute between the parties. One defence witness Brahma Prakash **(D.W.-1)** was examined. He claimed that his dwelling house was situated near the house of the first informant-Vijay Ahirwar **(P.W.-1)**, after one other house. He denied the occurrence as disclosed by the first informant.

11. Upon hearing the parties, the learned court below has found the appellant guilty of the offence alleged. Accordingly, it has awarded punishment of life imprisonment for the offence under Section 307 IPC read with Section 3(2)(v) SC/ST Act and also levelled fine. It has also found the appellant guilty of offence alleged under Section 3/25 Arms Act and awarded two years rigorous imprisonment together with fine.

12. Learned counsel for the appellant would submit, no independent/credible evidence exists as to the actual occurrence having been caused by the appellant. The injury is manufactured. Only for reason of other/monetary dispute between the parties, Vijay Ahirwar **(P.W.-1)** lodged false case against the appellant to dispute his monetary liability. Though injury is claimed to have been caused outside the dwelling house of Vijay Ahirwar **(P.W.-1)**, the first informant, there is no recovery of bloodstained earth to corroborate that occurrence. The firearm is claimed to have been recovered from the appellant in absence of any independent witness. Thus, that recovery has also been doubted. In any case no

ballistic report was ever obtained to establish the firearm injury that had been caused by the appellant with the weapon of assault, claimed to have been recovered. No independent witness was produced by the prosecution to establish the occurrence.

13. In the context of monetary dispute pre-existing between the parties, it has been urged, the testimony of P.W.-1 is of an interested witness and therefore unreliable. Alternatively, it has been submitted, no evidence was led by the prosecution to establish that any attempt was made by the appellant to cause any injury to Vijay Ahirwar (**P.W.-1**) as may in normal course have caused death. The only description contained in the prosecution story is that in the quarrel that had erupted between the parties, a gunshot was fired by the appellant that hit the first informant Vijay Ahirwar (**P.W.-1**) on his right wrist. Referring to the injury report, it has been submitted, no bony/fracture injury was noted. The injury though caused by a firearm was not life threatening or grievous. Therefore, merely because according to the prosecution, injury had been caused due to use of firearm, it did not warrant life imprisonment to be awarded to the appellant on the simple invocation of Section 3(2)(5) of the Act. As against the sentence of life imprisonment awarded, the appellant has remained confined from 2016 i.e. more than seven years.

14. On the other hand, learned AGA would submit, in the first place, the occurrence is real. It has been duly proved. It cannot be denied that the appellant used a firearm that caused the injury to the first informant Vijay Ahirwar (**P.W.-1**). Referring to Section 307 I.P.C. (II Part), it has been submitted that the case falls under the second part of Section 307 I.P.C. Therefore, by virtue of the mandatory provision of Section 3(2)(5) of SC/ST Act, the learned court below has rightly awarded life imprisonment.

15. Having heard learned counsel for the parties and having perused the record, in the first place, there is no delay in the FIR being lodged. As to the occurrence, the prosecution story remained consistent insofar as it was alleged in the FIR itself that the appellant caused the firearm injury to the first informant Vijay Ahirwar **(P.W.-1)** on 04.09.2016, outside the dwelling house of the first informant on his refusal to pay Rs. 500/- to the appellant. That fact was duly proven at the trial by two prosecution witnesses namely Vijay Ahirwar **(P.W.-1)**, the injured witness and Virendra **(P.W.-2)**. Though a minor discrepancy exists with respect to the FIR allegation inasmuch as though the FIR alleges that the appellant had first hurled verbal abuses and called Vijay Ahirwar **(P.W.-1)** and thereafter demanded money Rs. 500/- and further that the firearm injury was caused to the first informant Vijay Ahirwar **(P.W.-1)** after the latter refused to pay that money, at the trial, the first part of the occurrence of the appellant having hurled verbal abuses was not proven. Yet, the said witness stood by his statement that the appellant demanded Rs. 500/- from Vijay Ahirwar **(P.W.-1)** for liquor and chicken and that on refusal made, verbal abuses were hurled at him and a firearm was shot at him that hit him in his right wrist area. No doubt emerged as to that occurrence, during his cross-examination.

16. As to Virendra **(P.W.-2)** he also made similar statement. Upon his cross-examination as well, no inconsistency emerged as may lead as to doubt the basic occurrence of the appellant having visited the dwelling house of Vijay Ahirwar **(P.W.-1)** and on having asked for money Rs. 500/-. On that being refused, verbal abuses were hurled at the first informant Vijay Ahirwar **(P.W.-1)** and a gunshot was fired. That gunshot is described to have hit the first informant Vijay Ahirwar **(P.W.-1)** in his right wrist area.

17. As to the injury, there is no doubt that the injuries were examined by the doctor Vinay Agarwal on 04.09.2016 at about 2:25 p.m. The doctor clearly proved those injuries were examined by him in the manner described by the prosecution. Though it is equally true that no bony/fracture injury was noted in that medical report, nothing emerged in the examination of the doctor as may lead to the conclusion that such injury was not caused by a firearm.

18. Sub-Inspector Surendra Kumar Singh (**P.W.-7**), the Investigating Officer in case crime giving rise to S.T. No. 47 of 2016 admitted that no effort was made to obtain the ballistic report, to confirm that the firearm recovered from the appellant was used to cause the occurrence. He also admitted, there was no public witness of the recovery of the firearm.

19. Manoj Kumar Gupta (**P.W.-8**) the Investigating Officer who completed the investigation in Case Crime giving rise to S.T. No. 47 of 2016, proved the facts pertaining to that investigation. No question was put to him with respect to no recovery of blood soaked earth made from the place of occurrence described by the prosecution.

20. In view of the above, in the first place, it is concluded that the FIR was lodged promptly at about 12:00 noon with respect to the occurrence described to have taken place at 10:00 a.m. on 04.09.2016. In that, the basic FIR narration was duly proved at the trial of the appellant having visited the dwelling house of the first informant Vijay Ahirwar (**P.W.-1**) and having hurled verbal abuses at the latter - to demand Rs. 500/- to buy liquor and chicken. What may have preceded that demand is not the subject matter of trial. In any case, the appellant miserably failed to prove through any evidence that he had ever lent any money to Vijay Ahirwar (**P.W.-**

1) - the first informant/the injured witness. Thus the occurrence was duly proved on the strength of ocular evidence led by the injured witness namely Vijay Ahirwar (**P.W.-1**) and his brother Virendra (**P.W.-2**), as one caused voluntarily i.e. without any provocation, by the appellant. To the extent the said occurrence took place just outside the dwelling house of Vijay Ahirwar (**P.W.-1**) and Virendra (**P.W.-2**), therefore, presence was wholly natural. There is nothing to doubt the same. The deposition of the only injured witness, Vijay Ahirwar (**P.W.-1**) is wholly reliable.

21. Then, the above testimony of the two eye-witness is wholly consistent as to the actual occurrence of one firearm injury being received by Vijay Ahirwar (**P.W.-1**) from the unproved gunshot caused by the appellant. In that, it has been consistently described that such injury was caused with a country made firearm.

22. The evidence of the defence witness Brahma Prakash (**D.W.-1**) is of no relevance. He only stated that he was a neighbour of Vijay Ahirwar (**P.W.-1**) and that no such occurrence (as reported) had taken place. He never stated that he was present at the place and time of occurrence. Of his own, he further stated that he had heard from others that the injury had been caused to Vijay Ahirwar (**P.W.-1**) in another occurrence. However, he never specified the source of such information and no other person was examined by the defence to establish such other occurrence. In view of the above, we are unable to doubt the basic occurrence as described by the prosecution.

23. As to the nature and extent of injury, we may accept that there was no bony/fracture injury suffered by Vijay Ahirwar (**P.W.-1**). We also accept that it is not the prosecution case that the fire arm injury was attempted to be caused on any vital body part of Vijay

Ahirwar (**P.W.-1**) or that the appellant had taken aim to cause any particular bodily injury to Vijay Ahirwar (**P.W.-1**). In fact, the prosecution story is otherwise, on that limited aspect. According to the consistent prosecution evidence, the appellant first hurled verbal abuses on Vijay Ahirwar (**P.W.-1**) to extract money Rs. 500/-. On being refused, a gunshot came to be fired that hit the injured Vijay Ahirwar (**P.W.-1**) on his right wrist while the injured was trying to bolt the door of his house.

24. As to the injury, Dr. Vinay Agrawal (**P.W.-3**) clearly testified that no bony/fracture injury was noted and that injured was advised to be kept under observation. During his cross examination of the Investigating Officer (**P.W.-5**), it also emerged that no abnormality was detected upon X-ray test. Further, by squarely stating that he had not put his hand up at the time of being shot at, Vijay Ahirwar (**P.W.-1**) the injured witness clearly indicated that he was not trying to save himself when he was shot at. In fact, it is the own case of the injured Vijay Ahirwar (**P.W.-1**) and his brother Virendra (**P.W.-2**) that the shot came to be fired as the injured was trying to bolt the door.

25. In such circumstances, we may take note of Section 307 IPC and Section 3(2)(v) SC/ST Act. Those read as below:

" 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.

Section 3(2)(v) SC/ST Act

3(2) whoever, not being a member of Scheduled Caste or Schedule Tribe-

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine."

26. Section 324 IPC reads as under:

"324. Voluntarily causing hurt by dangerous weapons or means.—

Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

27. The upshot of the discussion made above is that Vijay Ahirwar **(P.W.-1)** was consciously hurt by the appellant by a lethal weapon namely a countrymade fire arm. The case may fall under Section 324 IPC. For that reason, the appellant could be punished for a maximum term of three years.

28. By virtue of Section 3(2)(v) SC/ST Act, the effect of automatic award of life imprisonment may arise and may have been visited on the appellant if (in the minimum), sentence over ten years had been found awardable to the appellant for reason of his guilt under Section 307 IPC. For that, reasons had to be assigned by the learned court below.

29. In the present case, we find no such reasons have been assigned. Even otherwise, as noted above the offence was under Section 324 IPC only. The injury suffered was on the right wrist area of Vijay Ahirwar **(P.W.-1)**. It did not involve any bony/fracture injury. According to the investigating officer, no abnormality was detected in the X-ray report. It was also not the

prosecution story that the fire arm injury was suffered by Vijay Ahirwar (**P.W.-1**) in his wrist area while he was trying to save himself from being hit on any other vital body part. Apparently, according to the prosecution case, he was shot at while he was using his hands to bolt the door, only.

30. It is uncontroverted on the basis of evidence that the injury was caused by a lethal weapon i.e. countrymade fire arm. Yet, that injury was neither fatal nor grievous. Hence, the offence may fall under the category of causing voluntarily hurt by dangerous weapon punishable under Section 324 IPC. No evidence was led by the prosecution to bring that 'hurt' within the offence definition under Section 307 IPC. In fact a non-grievous hurt was caused to the outstretched hand of the injured as he was trying to bolt the door. Thus, it seems proper to alter the charge from Section 307 to Section 324 IPC, only.

31. In **Kundan Singh Vs. State of Punjab (1982) 3 SCC 213**, it was observed as below:

"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 PW 6 and PW 7 were in the courtyard of their house when the appellant fired gunshots and he could not, therefore, have intended to injure them, the conviction of the appellant under Section 307 IPC was not justified. We think that the conviction of the appellant could be maintained only under Section 324 of the Penal Code, 1860 since PW 6 and PW 7 received simple injuries. We accordingly allow the appeal and alter the conviction of the appellant to one under Section 324 of the Penal Code, 1860 for causing simple injuries to PW 6 and PW 7."

32. Again, in **Ved Pal Vs. State of U.P. 1987 SCC OnLine SC 612**, it was observed:

"After hearing learned counsel for the parties, we find it rather difficult to sustain the judgment of the High Court convicting the appellant for having committed an offence punishable under Section 307 of the Penal Code, 1860 when he should, on the facts and circumstances brought out, have been convicted under Section 324. Although the learned Sessions Judge as well as the High Court were right in relying upon the testimony of PW 2 Sobaran Singh, the victim of the assault, showing that it was the appellant and no one

else who shot him with his gun, the fact remains that the injuries caused to him were of a superficial nature. The deposition of PW 4 Dr P.S. Yadav shows that he examined Sobaran Singh on the same day and found that he had two pellet injuries, one on the right eyebrow and the other on the shoulder, both of which were of a superficial nature. His evidence does not suggest that the injuries were of such a nature as were likely to cause death. We accordingly alter the conviction of the appellant Ved Pal from under Section 307 of the Penal Code, 1860 to one under Section 324. He is sentenced to undergo rigorous imprisonment for one year."

33. In view of the above alteration of charge to Section 324 IPC and in absence of any further specific allegation proved of offence committed under Section 3(2)(v) SC/ST Act, we further observe that against maximum punishment of three years awardable to the appellant, he has remained confined for more than nine years and four months.

34. With respect to the conviction under Section 3/25 Arms Act, 1959, in the first place the recovery of the fire arm is wholly doubtful. The recovery memo was not proved through any independent witness. Also, no ballistic report was obtained by the prosecution to prove that the fire arm claimed to have been recovered had caused the fire arm injury attributed to the present appellant. For those reasons, the conviction of the appellant under Section 3/25 Arms Act may not be sustained. The learned court below has erred in convicting the appellant for that offence. He is entitled to the benefit of doubt for that charge. Accordingly, the order of conviction under Section 3/25 Arms Act is set aside.

35. Thus, the order of conviction passed against the appellant is sustained on the altered charge of Section 324 IPC. Against maximum sentence of three years, the appellant has remained confined for more than nine years and four months. Also, he has no criminal history.

36. Accordingly, the appeal is **partly allowed**.

37. The appellant is in jail. He may be released forthwith in case he is not wanted in any other case and compliance of Section 437-A Cr.P.C..

38. For reason of excess imprisonment suffered, imposition of fine is deleted.

Order Date :- 24.1.2025
Faraz/SA/Abhilash

(Dr. Gautam Chowdhary, J.) (S. D. Singh, J.)