

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.509 OF 1993

Jaspalsingh Chohalsingh @ Mia .. Appellant
Versus
The State of Maharashtra .. Respondent

Mr.Bhavesh Thakur i/b S.R.Pasbola, Advocate for the appellant.

Mrs.M.R.Tidke, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 20th JULY, 2015

ORAL JUDGMENT :-

1 The appellant and the two others were prosecuted on the allegation that they had committed offences punishable under section 302 IPC r/w section 34 of the IPC, section 27 of the Arms Act, section 25(1)(b) r/w section 3 of the Arms Act, and section 135 of the Bombay Police Act.

2 One of the accused – accused no.3 Subramani Konar – died during the trial, and as such, case against him stood abated. After holding a trial, the learned Addl. Sessions Judge found the accused no.2 Abdul Mobin not guilty and acquitted him. The learned Addl. Sessions Judge found even the appellant – the accused no.1 in the said case, not guilty of the offence punishable under section 302 of the IPC r/w section 34 of the IPC, and passed an order of acquittal, so far as that offence was concerned. He,

however, held the appellant guilty of an offence punishable under section 27 of the Arms Act, and sentenced him to suffer RI for a period of 5(five) years and pay a fine of Rs.1500/- in default to suffer RI for 1(one) year. Being aggrieved by his conviction and the sentence imposed upon him, the appellant has approached this Court by filing the present Appeal.

3 I have heard Mr.Bhavesh Thakur, learned counsel for the appellant. I have heard Mrs.M.R.Tidke, learned APP for the State. With their assistance, I have gone through the impugned judgment carefully. I have glanced through the evidence.

4 The case of the prosecution was that the appellant and the other accused had committed murder of one Jagannath Shetty on 8th January 1990 in front of Indraprast Hotel, Andheri Kurla Road, Saki Naka, Mumbai-72 in furtherance of their common intention. According to the case of the prosecution, Umesh Shetty (PW 2), Suresh Shetty (PW 3) and Ravi Shetty (PW 5) were the persons who had seen the assailants. The prosecution case was not that any of these three witnesses had seen the actual assault, but the case was that these three persons had seen Jagannath Shetty speaking to some persons before he was attacked, and that, these three witnesses had identified those persons who were said to be assailants.

5 During the trial, none of them identified any of the accused before the Court. The case of the prosecution was that these witnesses had identified the assailants in a Test Identification Parade held earlier, but that was denied by these

witnesses. Anyway, the fact remains that there was no evidence about the identity of the appellant as one of the assailants, and no such evidence was adduced during the trial.

6 The assailants had, after the incident, gone away by a vehicle. The owner of the vehicle – Yuvraj Shetty – was examined as a witness (PW 7), but he said about having given the vehicle to the original accused no.3 who had died during the trial, and the case against whom, as aforesaid, stood abated.

7 The judgment of acquittal of the appellant with respect of an offence punishable under section 302 of the IPC read with section 34 of the IPC, as recorded by the learned Addl. Sessions Judge is, therefore, proper and legal.

8 The question is whether the conviction of the appellant with respect to the offence punishable under section 27 of the Arms Act is proper, legal and in accordance with law.

9 The prosecution case is that a pistol was recovered from the possession of the appellant on 13th February 1990. In the view that I am taking, it is not necessary to evaluate or assess the evidence in respect of the alleged recovery of a pistol from the person of the appellant.

10 Section 27 of the Arms Act provides for punishment *inter alia*, for 'using' arms of a certain type. The learned Judge has held that the appellant had 'used' the fire-arm in question.

11 Admittedly, the bullets that had entered in the dead body, had not been fired from the pistol allegedly found with the appellant. The empties found on the scene of offence which were seized in the course of investigation also, were not fired from the pistol said to have been recovered from the appellant. The ballistic expert's report which was tendered in evidence and was marked Exhibit-29 collectively, clearly says so.

12 I have gone through the reasoning of the Addl.Sessions Judge as reflected in the judgment in holding the appellant guilty of an offence punishable under section 27 of the Arms Act. It is based on the opinion of the ballistic expert that the pistol that was recovered from the appellant had been 'previously used', that the learned Judge held him guilty of an offence punishable under section 27 of the Arms Act. The learned Judge discussed at length the meaning of the word 'uses' as appearing in section 27 of the Arms Act, and also the provisions of section 106 of the Evidence Act. He came to the conclusion that since the pistol found with the appellant had been 'used' previously, it was for the appellant to explain by whom it was used, if it was not 'used' by him. The view of the learned Judge was that since the appellant had not explained this, it could be said that he had 'used' it, and that, therefore, the appellant was guilty of an offence punishable under section 27 of the Arms Act.

13 Though much can be said about the view taken by the learned Addl.Sessions Judge, it is not necessary to discuss the same. It is because before forwarding the pistol to the laboratory for examination by a ballistic expert, the police themselves had

test-fired from the same pistol. That is clear from the report of the ballistic expert itself. Therefore, on the basis that previously it had been 'used', it was not possible to hold that it was the appellant who had used the same. *There was no evidence that it had been used **prior** to it being test-fired by the police.* There was no evidence that it had been used prior to its recovery by the police.

14 The reasoning of the learned Addl. Sessions Judge and the conclusion arrived at by him, is patently incorrect.

15 The impugned judgment and the order of conviction needs to be set aside.

16 The Appeal is allowed.

17 The impugned judgment and order, in so far as it convicts the appellant of an offence punishable under section 27 of the Arms Act, is set aside.

18 The appellant is acquitted.

19 His bail bonds are discharged.

20 Fine, if paid, be refunded.

(ABHAY M.THIPSAY, J)