

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on: 29.8.2016

Judgment delivered on: 27.9.2016

Criminal Appeal No. 247 of 1999

Shravan Kumar alias Munna Tiwari, aged about 29 years, S/o Brahmanand Tiwari, residence of Sanjay Nagar, Purani Basti, Tikrapara, Raipur M.P. (Now C.G.)

-----Appellant

Versus

The State of Madhya Pradesh (Now Chhattisgarh)

----- Respondent

For Appellant : Mr.Surendra Singh, Senior Advocate with
Mr.Neeraj Mehta, Advocate

For Respondent : Mr.Vinod Deshmukh, Dy.G.A.

Hon'ble Shri Deepak Gupta, Chief Justice

Hon'ble Shri Justice Sanjay K. Agrawal

Sanjay K. Agrawal, J.

1. Three accused persons namely Shrawan Kumar @ Munna Tiwari, Santosh Pathak and Sushil Kumar Oza were tried by the 4th Additional Sessions Judge, Raipur, in Sessions Trial No.92/93 for commission of offence punishable under Sections 458, 398 & 506 Part-II of the IPC and Sections 25 & 27 of the Arms Act and upon trial Shrawan Kumar @ Munna Tiwari was convicted for offence punishable under Sections 458 & 398 of the IPC and Sections 25 &

27 of the Arms Act and sentenced him to undergo R.I. for 14 years and fine of ₹ 1000/-, in default of payment of fine to further undergo R.I. for three months, R.I. for seven years, R.I. for one year and fine of ₹ 500/-, in default of payment of fine to further undergo R.I. for two months and R.I. for three years and fine of ₹ 500/-, in default of payment of fine to further undergo R.I. for two months. However, other two accused persons namely Santosh Pathak and Sushil Kumar Oza were acquitted of the charges.

2. Case of the prosecution as unfolded during the course of trial are as under:-

- (i) On the date of incident i.e.7.10.92 at about 9 p.m. complainant Shyam Lal Tiwari, who was working as Assistant Sub-Inspector in Traffic Line while he was returning back to his home, he was informed by his wife Smt.Seva Devi (PW-12) that 3-4 persons armed with deadly weapons came to their house at noon hours and made enquiry about his presence and finding his absence they returned back. It is further case of the prosecution that at the same night when the complainant and other family members after having their meals sleeping, then at about 11.30 to 11.45 p.m. the above-stated accused persons entered into their house by pushing and dashing the door armed with deadly weapons and demanded ₹ 8000/- from him stating that he had spent ₹ 8000/- in prosecuting the criminal case as he was falsely implicated by complainant Shyam Lal Tiwari (PW-1) in Arson's case. On being refused, the

applicant demanded the complainant's service revolver and when again it was refused, then co-accused entered into bedroom and started searching service revolver in almirah and seeing this incident, complainant immediately took out his service revolver and threatened them to kill and on being threatened, all the accused persons left the room due to fear and came down through stairs. It has also been alleged that again all the accused persons attempted to enter into the house of the complainant, so the complainant first of all made blanket fire in the air, even then the accused continued their act, then the complainant fired towards the accused persons, in which Shailendra Chandrakar died. F.I.R. was made by Shyam Lal Tiwari (PW-1) in the Police Station City Kotwali, Raipur.

(iii) After registration of the offence, the police investigated the matter.

Statements of the prosecution witnesses PW-1 to PW-20 were recorded and documents Ex.P/1 to P/33 were exhibited on behalf of the prosecution in support of the prosecution case. The accused persons entered into defence and they have abjured the guilt. However, they have also exhibited the documents Ex.D/1 to D/4 in their defence.

(iv) The Additional Sessions Judge upon appreciation of oral and documentary evidence available on record, convicted appellant Shrawan Kumar alias Munna Tiwari for the above stated offences and sentenced him as as aforementioned. However, acquitted

other two accused persons namely Santosh Pathak and Sushil Kumr Oza of the charges.

(v) Appellant Shrawan Kumar @ Munna Tiwari has preferred this criminal appeal under Section 374(2) of the CrPC against his conviction.

3. Mr. Surendra Singh, learned Senior Counsel with Mr. Neeraj Mehta, learned counsel for the appellant, would submit that the judgment of conviction and order of sentence awarded by the learned trial Court is apparently contrary to the facts and law available on record. He would further submit that the prosecution has failed to prove the offence beyond reasonable doubt. There is no evidence to convict the appellant for offence under Section 458 of the IPC and also there is no evidence to convict him for offence under Section 398 of the IPC. Conviction under Sections 25 & 27 of the Arms Act is also bad as no seizure of pistol (deadly weapon) was made from physical possession of the appellant and it has been seized from dickey of the scooter, which was lying for whole night at the open place without any security arrangement and further, it was not proved that said pistol was in working condition as there is no report of Ballistic Expert to prove the said fact, therefore, conviction and sentence awarded against the appellant deserves to be set aside and he deserves to be acquitted of the charges.

4. On the other hand, Mr. Vinod Deshmukh, learned Deputy Government Advocate, would support the impugned judgment and

submit that the prosecution has proved its case beyond reasonable doubt and as such, the appeal deserves to be dismissed.

5. We have heard learned counsel appearing for the parties at length, considered their rival submissions, perused the judgment impugned and record of the trial Court with utmost circumspection.
6. Complainant is Shyam Lal Tiwari (PW-1). He has been examined as PW-1. He has stated that he was allotted Government Quarter at Tikrapara in the second floor. He stated that on 7.10.92 at about 11.30 to 12 p.m., someone pushed his door by force and appellant Munna Tiwari and two other accused persons whom he knew, came to his house, Munna Tiwari was armed with country-made pistol and Shailendra Chandrakar was armed with sword, Munna Tiwari demanded ₹ 8000/- from him as he had made a report for offence under Section 436 of the IPC against Munna Tiwari in which Munna Tiwari was arrested and ultimately bail was granted to him. When he refused to make payment, then Shailendra Chandrakar entered into room in which his family members were sleeping and scattered the household articles kept in almirah and when he caught-hold of his daughter's hand, then she shouted, at that time he took out his service revolver and threatened them to go, otherwise, he will kill, thereafter Shailendra Chandrakar while running out fell down, but Munna Tiwari again abusing him stated that he will go back after taking the money, then the complainant made two round fire in air and then four round fire was also made

in the open land/floor and thereafter, the accused persons flew away by bullet motor-cycle. Munna Tiwari and Shailendra Chandrakar fell down as road was not in good condition. In his cross-examination, he has stated that he is being prosecuted for murder of Shailendra Chandrakar and attempted to commit murder of appellant herein Munna Tiwari.

7. PW-2 is Rajaram, who is Traffic Constable and is neighbour of complainant Shyam Lal Tiwari (PW-1). He has not supported the case of the prosecution and he has been declared hostile.
8. PW-3 Paras Nath Mishra (PW-3) is also neighbour of complainant Shyam Lal Tiwari (PW-1). He has stated that on 7.10.92 he was taking rest after taking his meal at 12 p.m. he heard, then he saw that Munna Tiwari was standing in the complainant's house and other person was throwing the household articles, but he had not seen any weapons in the hands of two persons running from the spot.
9. PW-4 Ram Bahore Shukla (PW-4) is also Traffic Inspector. He is also neighbour and he has also not supported the case of the prosecution.
10. Likewise, PW-5 Sirotam Sahu (PW-5) has been declared hostile. PW-8 is Satendra Tiwari. He is son of Shyam Lal Tiwari (PW-1). He stated before the Court that on 7.10.92 the appellant and other two accused persons came and forcefully entered into their house by pushing the door, appellant Munna Tiwari was armed with country-

made pistol and Shailendra Chandrakar was armed with sword and demanded ₹ 8000/- from my father and on being refused they demanded service revolver of my father and thereafter Shailendra Chandrakar entered the room of the house and thrown clothes and other articles kept in almirah and on being stopped, threatened to kill him and when Shailendra Chandrakar caught hold of my sister's hand, then only my father threatened to kill by his service revolver, thereafter Shailendra Chandrakar while running out fell down, he went inside the room and when he came out after 7 to 8 minutes she saw that near road one scooter was lying and Shailendra Chandrakar found lying in the road.

11. PW-11 is Ku.Rekha Tiwari, daughter of complainant Shyam Lal Tiwari. She has also maintained the version that Shailendra Chandrakar caught hold of her hands, then she shouted and then accused persons run from his room. Thereafter, she has not made any statement.
12. PW-12 Smt. Sewa Devi is wife of Shyam Lal Tiwari. She has also maintained the prosecution story that Shailendra Chandrakar caught hold of her daughter's hand and her daughter shouted for help, then her husband also shouted and at that time Shailendra Chandrakar ran away from the room.
13. PW-17 is Hirendra Kumar Chaturvedi. He is investigating officer. He stated that place of occurrence is Traffic Colony in front of police line gate in the police quarter. He has seized one scooter

M.I.R. 1700 on 8.10.92 vide Ex.P/27 and from dickey of the scooter, he has seized book, undergarments, baniyan, one country-made pistol, two cartridges and other things. In paragraph 10, he has stated that used cartridges was recovered from the place whee one road goes to Budha Talab and other goes to village Mana.

14. PW-20 Raghuvir Singh is also neighbour. He also stated that appellant Munna Tiwari was armed with country-made pistil and he had seen that the accused persons abusing the complainant, but thereafter he has not seen and he has been declared hostile.
15. After having taken note of version of the prosecution witnesses, now the question would be whether the prosecution is able to prove the commission of offence under Section 458 & 398 of the IPC and 25 & 27 of the Arms Act beyond reasonable doubt.
16. Section 458 of the IPC is lurking house-trespass or house breaking by night having made preparation for causing hurt to any person or for wrongfully restraining any person. Lurking house-trespass is defined under Section 443 of the IPC which provides what whoever commits house-trespass having taken precautions to conceal such house-trespass from person who has a right to exclude or eject the traspasser from the building, tent or vessel which is the subject of the trespass is said to commit "lurking house-trespass." House trespass is defined under Section 442 of the IPC which provides whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any

building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass". Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment is punishable under Section 457 of the IPC.

17. In order to support conviction under Section 457 of the IPC, it is necessary to prove that there was lurking house-trespass by night or house-breaking by night. The said ingredient is that house trespass or house breaking was in order to commit offence punishable with imprisonment.

18. From the evidence led by the prosecution discussed hereinabove, there is no iota of evidence on record to show that the appellant took any precaution in concealing himself or causing any hurt to any person or for wrongfully restraining any person or for putting any person in fear of hurt or of assault, but certainly the appellant made house trespass by entering the house of the complainant as human dwelling and thereby committed the offence under Section 442 of the IPC punishable under Section 448 of the IPC for imprisonment of either description for a term which may extend to one year, or with fine. We hold accordingly.

19. Above determination brings us to the conviction of the appellant for offence under Section 398 of the IPC i.e. attempt to commit robbery or dacoity when armed with deadly weapons.

20. The prosecution witnesses have stated that the appellant was armed with country-made pistol, which has been seized from dickey of the scooter, which was lying in open place throughout the night without guard.
21. For offence under Section 398 of the IPC, the prosecution must prove that accused was with armed and weapon was deadly one and while so armed, he attempted to commit robbery or dacoity.
22. In the case in hand, Paras Nath Mishra (PW-3), Ram Bahore Shukla (PW-4), Ku.Rekha Tiwari (PW-11) and Smt.Seva Devi (PW-12) have not stated that the appellant was carrying any country-made pistol and pistol was seized from dickey of the scooter, which was lying in whole night of 7.10.1992 without being any security arrangement, therefore, it cannot be held that the appellant was armed with deadly weapon.
23. Offence of attempt to commit robbery or dacoity has also not been proved. It is the case of the prosecution that the present appellant was demanding ₹ 8000/- which he had spent for obtaining bail and prosecuting the criminal case for offence under Section 436 of the IPC, which was registered at the instance of the present complainant (PW-1). Even there is no evidence to prove that the appellant has gone to the place with object of committing robbery or dacoity, therefore, offence under Section 398 of the IPC is not made out.

24. In the matter of Chinnadurai vs. State of T.N.¹, the Supreme Court did not approve the conviction of the appellant therein for offence under Section 398 of the IPC as no property was recovered from the house and nothing belonging to the complainant was recovered from the accused.
25. The appellant has also convicted under Sections 25 & 27 of the Arms Act. Seizure of country-made pistol has been made from dickey of the scooter, which was lying in open place for entire night and it has not been seized from the possession of the appellant. Seized pistol was not sent to the expert to find out whether it was in working condition or not.
26. It is well settled that arm and ammunition should be tested before such a determination can be made and evidence of testing of such weapon is necessary to prove that such a weapon is falling within any of the categories as provided in the Arms Act (See Jagjit Singh vs. State of Punjab², Manoj Kumar Achhelal Brahman vs. State of Gujarat³ and State of A.P. vs S. Appa Rao and others⁴.)
27. Likewise, in the matter of Buta Singh vs. State of Punjab⁵, the Supreme Court has held that objects seized from the accused must be sent to the expert for opinion either to the ballistic expert or to any armourer. In absence of evidence on record to show that said

¹ 1995 Supp (3) SCC 686

² (1994) 4 SCC 726

³ (1998) 2 SCC 354

⁴ (2001) 10 SCC 648

⁵ 1997 SCC (Cri) 1217

objects satisfied the definition of 'arm' and ammunition' or 'firearm', conviction is not sustainable.

28. In view of the aforesaid discussion, we are unable to sustain the conviction of the appellant for offence under Sections 458, 398 of the IPC and 25 & 27 of the Arms Act. However, in place of conviction of the appellant under Section 458 of the IPC, he is hereby convicted under Section 442 of the IPC for house trespass and acquitted of the charges under Sections 398 of the IPC and Sections 25 & 27 of the Arms Act.

29. It is stated that the appellant was in jail since 13.1.1999 to 25.6.1999. The period already undergone by him is held to be sufficient sentence for offence under Section 442 of the IPC.

30. The appeal is allowed in part in terms stated hereinabove. The bail bonds of the appellant shall remain in force for a period of six months as provided in Section 437A of the IPC.

Sd/-
(Deepak Gupta)
Chief Justice

Sd/-
(Sanjay K. Agrawal)
Judge