

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.970 of 2007

Arising Out of PS.Case No. -0 Year- null Thana -null District- SIWAN

=====

Md.Shahabuddin, son of S.M. Hasibullah, resident of village Pratappur, P.S. Hussainganj, District Siwan

.... Appellant

Versus

The State of Bihar

.... Respondent

with

Criminal Appeal (SJ) No. 916 of 2007

Arising Out of PS.Case No. -0 Year- null Thana -null District- SIWAN

- =====
1. Jahangir Khan, son of Md. Nayeem Khan, resident of village Sonbarsa, P.S. Manjhi, District Chapra
 2. Khalik Khan, son of Sekhwat Khan, resident of village Bagahi, P.S. Bihiya, District Bhojpur

.... Appellants

Versus

The State of Bihar

.... Respondent

Appearance :

(In CR. APP (SJ) No.970 of 2007)

For the Appellant/s : Mr.Y.V.Giri, Sr.Advocate with M/S Humayou Ahmad Khan & Fauzia Shakil, Advocates

For the Respondent/s : Mr. Abhimanyu Sharma, APP
(In CR. APP (SJ) No.916 of 2007)

For the Appellant/s : Mr. S.A.Alam with Ms. Anjum Perveen, Advocates

For the Respondent/s : Mr. Abhimanyu Sharma, APP

=====

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
CAV JUDGMENT

Date: 18-07-2017

Both the appeals are directed against the judgment of conviction dated 30.8.2007 and order of sentence dated 31.8.2007 passed by Sri Gyaneshwar Srivastava, 1st Additional District and Sessions Judge-cum-Presiding Officer, Special Court at Siwan Jail, Siwan, in Sessions Trial No. 320 of 2001, arising out of G.R.No.978 of 1996, Darauli P.S.Case No. 34 of 1996, whereby and whereunder



the appellants have been convicted for the offences under Sections 307/34 and 353/34 of the Indian Penal Code and Section 27(2) of the Arms Act read with Section 34 of the Indian Penal Code and have been sentenced to undergo rigorous imprisonment for ten years under Section 307/34 IPC and a fine of Rs.2000/- each and in default in payment of fine they have been directed further to undergo rigorous imprisonment for six months and for the offence under Section 353/34 IPC, the appellants have been directed to undergo rigorous imprisonment for two years with a fine of Rs.500/- to each and in default of payment of fine, they have been further directed to undergo simple imprisonment for one month and for the offence under Section 27(2) of the Arms Act read with Section 34 of IPC, the appellants have been directed to undergo rigorous imprisonment for seven years and a fine of Rs.1000/- each and in default of payment of fine they have further been directed to undergo rigorous imprisonment for two months. All the sentences have been directed to run concurrently.

2. The prosecution case, in brief, is that Sri Sanjeev Kumar Singhal, Superintendent of Police, Siwan (P.W.1) had lodged a written report stating, inter alia, therein that on 3.5.1996, he, in his staff car along with his bodyguard Diwakar Prasad Singh and Constables Raghunandan Jha, Ramesh Kumar Yadav, Amir Kumar and Ashok Yadav in a Police Gypsy, came to Darauli Police Station and came to know that there was tension in Darauli Mathia village and the Officer-in-Charge has gone there. Further prosecution case is



that thereafter the informant directed literate constable of the Police Station to send a platoon of B.M.P. Force and thereafter at about 17.15 hours he left Darauli Police Station for Siwan. The written report further discloses that when the informant along with his companions reached Don Bazar at 7.30 hours, he found four persons armed with rifles and on seeing his vehicle all the four boarded on a Mahindra jeep. He then ordered his constables to arrest them but by the time the constables reached near the jeep, it hurriedly moved towards the east of Don Bazar. Further case is that informant on his staff car and others on Gypsy followed the jeep and when his vehicle turned on the brick soling road, east of Don Bazar, he found a white coloured Maruti in front of his vehicle and he followed the abovementioned car and jeep for about 2-3 kilometers. It is also prosecution case that when the distance between the informant's vehicle and the vehicles going in front was reduced to 150 yards, firing started from the front vehicle but the informant continued to follow the vehicles, thereafter both the vehicles going in front of the informant stopped near the village Kamkar Tola on Biswania brick soling road, 15 armed persons stepped out of the vehicle, seeing them he stopped the vehicles. It is also the case that he identified Mohd. Shahabuddin, the MLA of Ziradai Assembly Constituency, and all the culprits were armed with rifles, pistols and automatic weapons and they started firing from their respective weapons. The informant also identified Hawaldar Jahangir Khan and Mohd. Khalique, who were



the members of Siwan District Police Force among the persons who were firing. Further prosecution case is that the informant instructed his companions to take position and he himself went by the side of his car and took position. The culprits thereafter boarded their respective vehicles and fled away towards the east. It is also the prosecution case that occurrence took place between 17.30 to 18.00 hours in the evening, Informant claimed that appellants along with other co-accused persons had fired at him in order to kill him and also obstructed them in discharge of their official duties.

3. On the basis of the aforesaid written report, Daraulli P.S.Case No. 34 of 1996 was instituted under Sections 307, 353/34 IPC and 27 of the Arms Act and police after investigation submitted charge-sheet against the accused persons. Cognizance of the offence was taken and the case was committed to the court of sessions, which ultimately came to the court of Sri Gyaneshwar Srivastava, 1st Additional District and Sessions Judge-cum-Presiding Officer, Special Court at Siwan Jail, Siwan for trial and disposal.

4. Charges were framed against the accused persons under Sections 307/34, 353/34 IPC and 27(2) of the Arms Act to which they pleaded not guilty. The learned trial court after conclusion of trial, vide impugned judgment and order, has convicted the appellants and sentenced them, as stated above.

5. Aggrieved by the above judgment and order, the appellant Shahabuddin has filed Cr.Appeal No. 970 of 2007 and



appellants Jhangir Khan and Khalik Khan have filed Cr.Appeal No.916 of 2007.

6. As both the appeals arise out of the same judgment and order, as such, for the sake of convenience both were taken up together and are being disposed of by this judgment.

7. From perusal of the record it appears that eight witnesses have been examined on behalf of prosecution, they are P.W.1, S.K.Singhal, the then Superintendent of Police, Siwan (the informant), P.W.2 Raghunandan Jha, P.W.3 Ramesh Kumar Yadav, P.W.4 Bachan Chaudhary, P.W.5 Ashok Kumar Yadav, P.W.6 Diwakar Prasad Singh, P.W.7 Indu Bhushan Prasad (one of the Investigating Officers) and P.W.8 Mohan Lal Razak (the then SDPO, Siwan and first Investigating Officer).

8. Out of them, P.Ws. 2 to 6 are police personnel, including bodyguards, driver and constables accompanying P.W.1, in staff car and Gypsy, P.W.4 is the seizure list witness and P.Ws.7 and 8 are the Investigating Officers. Apart from the oral evidence, following documents have been admitted into evidence as exhibits and they are Ext.1, signature of informant on his written report, Ext.2, written report, Ext.3, carbon copy of seizure list, Ext.4, FSL report of the seized cartridges.

9. On behalf of defence, no oral evidence has been adduced and they have got paragraph-13 of the case diary exhibited as Ext.A. Defence of the appellants as per their examination under



Section 313 Cr.P.C. is full of denial of the occurrence and of false implication.

10. P.W.1, the then Superintendent of Police, Siwan and informant of this case, in his evidence in chief disclosed that on 3.5.1996, he reached village Darauli Police Station, in connection with Darauli P.S.Case No. 33 of 1996 and also came to know the position that there was tension in village Darauli Mathia, as such, he ordered for sending platoon of B.M.P. Force. His evidence further discloses that he had gone in his staff car along with his bodyguard and driver, namely, Diwakar Prasad Singh and Nand Kishor Singh, and also accompanied by the driver Raghunandan Jha and constable Ashok Yadav, Amit Kumar and Ramesh Yadav in Gypsy. While coming back to Siwan, when he came to Don Bazar at about 5.30 P.M., he saw four persons, armed with rifles and on seeing his car, they boarded in Mahindra Jeep, as such, he ordered for chasing them but the vehicle proceeded and he suspects them as anti-social elements. Hence they were chased by him in the staff car and Gypsy. His evidence also disclosed that the Jeep turned towards east on brick soling road and then he saw that one Maruti car was moving in front of the Jeep and for one and a half kilometers chase, firing started from the front vehicle and near Kamkar tola, Nakri bridge, both the vehicles stopped and 15 persons, armed with fire arms came out, on which he stopped his staff car and the Gypsy and he identified Shahabuddin and his bodyguard Jahangir Khan and constable Khalid



Khan. His evidence further discloses that the miscreants were armed with 8 to 10 rifles and some had small arms also and Jahangir Khan was armed with Sten gun and Khalid was armed with revolver and at that time they were at the distance of 150 yards from him. His evidence further disclosed that on the instruction of Shahabuddin they started indiscriminate firing, on which he and his persons took position. This witness has been cross examined at length, however, in spite of rigorous cross examination, there appears nothing in his cross examination to discredit this witness. Even to a court query, this witness has stated that he tried to inform the police control room through wireless but did not succeed nor he contacted Darauli Police Station. His cross examination further disclosed that there was firing from A.K.series rifles. There are contradictions in his evidence from his earlier statement made before I.O. which is not so much relevance and does not go into the root of the case.

11. P.W.2, Raghunandan Jha, is the driver of the Gypsy and he has also stated that he along with other constables and bodyguard, had gone with P.W.1 in staff car and Gypsy on 3.5.1996 to Darauli Police Station. His evidence further disclosed that when they reached near Don Bazar, on seeing 4-5 persons variously armed, S.P. Sahab ordered for arresting them but those persons boarded on a Jeep and moved towards Bismania. His evidence further disclosed that in front of Jeep, there was one Maruti car and firing started from Maruti car once and twice. His evidence also disclosed that they had



chased them for three kilometers and when they reached Leza Tola, the miscreants got down from the jeep and car and they started firing, on which he identified the appellants. His evidence also disclosed that they have taken position and firing continued to 2-3 minutes. Even in his cross examination this witness has stated about firing by the accused persons.

12. P.Ws.3 and 5 had also supported the prosecution case in their evidence, as stated by P.W.1 relating to chase of the vehicles of accused persons by them and also supported the prosecution case of firing by accused persons, including appellants. Both P.Ws. 3 & 5 have also been cross examined on the point of their presence at the place of occurrence as being house guards, their duty is only to stay at the residence of S.P. and he is not supposed to accompany the S.P. on raid, but P.W.5 has stated in para-16 of his cross examination that he used to accompany the Superintendent of Police on his order.

13. P.W.6 was body guard of Superintendent of Police and he has supported the prosecution story as stated by P.W.1. His evidence also disclosed that firing was made by the accused persons and further disclosed that when the vehicle of the miscreants stopped, they also stopped their vehicle and took position. This witness has stated that miscreants were 10-15 in numbers and he identified Hawaldar Jahangir Khan, Md. Khalid as well as Md. Shahbuddin. His evidence further disclosed that they were armed with rifles and modern arms. Even in his cross examination, he has stated that the



miscreants were firing from 150-200 yards. He has admitted in his cross examination that in the occurrence, none received injury nor any damage was caused to any of the vehicles.

14. P.W.7 is the second Investigating Officer in this case and this witness has given description of the place of occurrence in paragraph-3 which shows that place of occurrence is in between Leza tola and Kamkar tola, on Don Bazar to Bishunpura road and road was 10 feet in width and there is “kacha” flank of 3 feet on both sides and there is Nikri bridge there and in both sides there were ditches. His evidence also disclosed that 18 empty cartridges and two live cartridges, seized by earlier Investigating Officer, were sent to the Sergeant Major as well as FSL for examination and on the basis of materials collected during investigation and after receiving FSL report he has submitted charge-sheet in this case. In his cross examination, he has stated that he received seized cartridges from the Malkhana and got it examined by Sergeant Major.

15. P.W.8 is the first I.O. and he has stated that in the year 1996 in the month of May, he was posted as Sub-Divisional Police Officer at Siwan, Sadar and he had taken over the investigation on 4.5.1996 and visited the place of occurrence situated between Leza Tola and Kamkar Tola and his evidence also disclosed that near Nikri Bridge he found two live cartridges and 18 empty cartridges, which were seized by him and he had taken signature of the witnesses Bachan Choudhary and Yugal Kamkar. He had proved the seizure list



as Ext.3.

16. P.W.4 is the seizure list witness and he has stated that while he was coming from “ristedari” 10 years prior he saw Darogaji picked up 1-2 empty cartridges and he came back and police personnel have taken his L.T.I. on a paper after asking his name and address and in his cross examination this witness has stated that he does not know on which paper, his signature was taken. However, his evidence shows that empty cartridges were being recovered and there is no cross examination by defence on the seizure.

17. On discussions of above evidence, it appears that P.W.1 has supported the prosecution story as stated in written report (Ext) and the same finds further corroboration from the evidence of other prosecution witnesses as well as report of FSL (Ext.4).

18. Learned counsel for the appellants in both the cases has assailed the judgment and their submission is that the whole prosecution story is full of absurdities and improbabilities, which will appear from the fact that it is the prosecution story that Superintendent of Police (P.W.1) had gone to Darauli Police Station in connection with supervision of Darauli P.S.Case No. 33 of 1996 but P.W.1 has himself stated that there is no document to show that he has gone to Darauli in connection with investigation of Darauli P.S.Case No. 33 of 1996 and even no witness has been examined to show that Superintendent of Police had ever visited Darauli Police Station on that very day. Further prosecution story is that he came to know about



tension at Daraulli Mathia but instead of going to Daraulli Mathia, to assess and control the situation, he returned back to Siwan that looks absurd as when he came to know about tension, he ought to have visited Daraulli Mathia. Secondly they saw 10-15 armed persons at Don Bazar, and P.W.1 then asked the police personnel to chase them, but prosecution has not brought a single witness of Don Bazar in support of the above prosecution story. Thirdly alleged firing took place in bridge between Leza Tola and Kamkar Tola, but there is no local witness of this occurrence and that creates serious doubt about prosecution story and they appear to be concocted and manufactured.

19. On perusal of prosecution evidence, it appears that there is categorical evidence of P.W.1 that he had visited Darauli Police Station in connection with supervision of a case and assessed the tension at Darauli Mathia and he did not found Officer-in-Charge of that police station and came to know that as there was tension in Darauli Mathia Officer-in-Charge had gone there. P.W.1, Superintendent of Police, had issued instructions for sending one platoon of BMP there and thereafter he started returning to Siwan. All the witnesses P.Ws. 2, 3, 5 & 6 have supported the above evidence of P.W.1 and there is nothing available on record to doubt the above prosecution evidence which appears to be consistent evidence. The conduct of P.W.1 also appears to be quite natural, as being satisfied that Officer-in-Charge, Darauli Police Station had gone to Darauli Mathia, he issued instruction for sending one platoon of BMP and



started returning to Siwan. In absence of Officer-in-Charge, supervision was not possible. Further as it does not relate to present occurrence for which FIR has been lodged, as such, even if no witness of Darauli Mathia has been examined that does makes prosecution story unbelievable.

20. So far non-examination of the witnesses of Don Bazar or of nearby village of place of occurrence, now a days it is quite common that local witness having no connection with the occurrence never comes forward to depose in favour of prosecution and present case relates to appellant Shahabuddin, who was local MLA of Ziradai Assembly Constituency and his influence can be gauged from the fact that he along with others fired upon the Superintendent of Police and his bodyguards. In such a situation if independent witnesses are not coming forward, on that score, consistent prosecution evidence cannot be brushed aside. Apart from that there is absolutely nothing in the entire evidence nor any evidence has been adduced by the appellants that P.W.1 has any grudge against the appellant Shahabuddin and others from before as such he has been implicated at the instance of P.W.1.

21. In this context, reference may be made to the decision of the Hon'ble Apex Court in the case of **Appabhai vs. State of Gujarat : AIR 1988 SC 696**, wherein it is observed as follows :

“Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They



think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. This Court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused. The Court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The Court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner.”

22. It has also been argued on behalf of the appellant in Cr.Appeal No. 970 of 2007 that according to the prosecution, seven persons were present, including Superintendent of Police in the police party, but only four witnesses out of them have been examined and they are P.W.2 Raghunandan Jha, driver of Gypsy, P.W.3 Ramesh Kumar Yadav, constable, P.W.5 Ashok Kumar Yadav, constable, P.W.6 Diwakar Pd. Singh, Bodyguard but rest three prosecution witnesses were not produced in court for their examination. It has also been submitted that out of the witnesses examined, P.W.3 constable Ramesh Kumar Yadav and P.W.5 constable Ashok Kumar Yadav were house guards of the Superintendent of Police and other witnesses, i.e., driver, bodyguard, who were closely associated to the Superintendent of Police, whereas other two witnesses, who were



other police constables have not intentionally been examined by prosecution and this will go against the prosecution as prosecution has intentionally withhold those witnesses, without any explanation.

23. So far non-examination of two constables is concerned, it appears that P.W.1 was accompanied by altogether five police personnel and four persons accompanying him have already been examined and they all as well as rest two witnesses are on the point of occurrence, and all of them have supported prosecution case. It is also well settled that it is not quantity of witnesses rather the quality of the witnesses counts.

24. It has also been argued that prosecution has failed to prove the time and place of occurrence as there are contradictions between evidence of prosecution witnesses with regard to place of occurrence, whereas P.W.1 has stated that when he reached near Nakri bridge, firing started. P.W.2 has stated that occurrence took place near Lezatola and P.W.7 & 8 have stated that place of occurrence was between Lezatola and Nakri bridge.

25. Prosecution case as per written report (Ext.) is that occurrence took place near Kamkar tola. Evidence of P.W.1 shows that occurrence took place near Nakri Bridge, near Kamkar Tola. As per evidence of P.W.2 occurrence took place near Leza Tola, whereas P.W.7 & 8 both I.Os. have found the place of occurrence between Leza Tola and Kamkar Tola. As such, this is a minor discrepancy, which is bound to occur when different persons are narrating a story



and that too after five years. Similarly there is nothing available to show that on the point of time of occurrence, there is any inconsistency in the evidence of P.Ws.

26. It is also well settled that the discrepancies which do not shake the basic version of the prosecution case can be discarded. At the same time, the errors due to lapse of memory may be given due consideration. It is also well established principle that when a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact unless it goes into the root of the matter so as to demolish the entire prosecution story. In the present case also P.W.1 has fully supported the prosecution story as stated in the FIR and his evidence finds further corroboration from the evidence of P.Ws. 2, 3, 5 & 6 as they have consistently supported the prosecution case. As such, even there is some minor discrepancy in the prosecution case that does not create any shadow of doubt in the prosecution case. Furthermore, the first I.O. (P.W.8) has also stated in his evidence that near Nakri bridge he found two live cartridges and 18 empty cartridges which were seized by him, cannot be discarded, that supports the prosecution story and P.W. 4 who is seizure list witness, though has been declared hostile but his evidence also shows that he and Daroga ji picked up two cartridges from the place of occurrence.

27. Learned counsel for the appellants has also argued vehemently that there is inordinate delay in lodging FIR as even



according to FIR occurrence took place in between 5.30 to 6 P.M. in the evening on 3.5.1996 but FIR shows that the same was instituted at 5.30 A.M. on 4.5.1995, as such, there is delay in lodging FIR of about 12 hours. It has also been submitted that Hon'ble Apex Court as well as various High Courts in several decisions has held that delay in lodging of FIR makes a case suspicious as prosecution had got a chance to manipulate and manufacture evidence in order to make out the case story against the accused persons and this also supports that appellants have been falsely implicated in this case. In support of the above argument learned counsel for the appellants has referred to decisions in the case of **Shankar Shridhar Kavale vs. State of Maharashtra : 1998 CRLJ 4491** (Bombay High Court, in the case of **Mukteshwar and another vs. State : 2004 CRLJ 1335** (Allahabad High Court).

On perusal of the judgments cited by learned counsel for the appellants, as above, it appears that in those judgments delay in filing FIR has been discussed and in the above judgments as well as in various decisions of Apex Court it was held that delay gives a chance of manipulation and makes prosecution story suspicious. In the present case also there is delay in lodging FIR of about 12 hours. According to prosecution version, occurrence took place in between 5.30 to 6.00 P.M. and FIR was registered on 4.5.1996 and the evidence of P.W.8, who was the first I.O., in paragraph-7 shows that he received information on 4.5.1996 at 5.30 hours and that clearly



shows FIR has been lodged after 6 to 7 hours and in the light of the settled principle it may create some doubt about the prosecution case unless the same has been properly explained.

28. It has also been argued by learned counsel for the appellants that the evidence of P.W.1, in paragraph-69 of his cross examination shows that on way to Siwan, Jiradai and Mairwa Police Stations fall but in spite of that P.W.1 did not choose to lodge FIR there immediately and instead of that he went back to Siwan and lodged the case and for that no explanation has been given. It has been argued that above conduct of P.W.1 makes the prosecution case suspicious and creates serious doubt about prosecution story. Learned counsel for the appellants has contended that on that ground alone, the prosecution case appears to be false and concocted and in support of his contention he has cited a decision of the Apex Court in the case of **Raghunath vs. State of Haryana : (2003) 1 SCC 398** in which in similar situation the Supreme Court has held in paragraph-11 of the judgment as follows :

“As already noticed, the FIR was lodged on 19.12.1994 at 2.30 a.m. for the incident said to have been taken place on 18.12.1994 at about 9.30 p.m. An accident is stated to have taken place in Village Teekli, which is stated to be at a distance of about 14 km from Gurgaon. It is in the evidence on record that Sadar Police Station, Gurgaon. It is in the evidence on record that Sadar Police Station, Gurgaon, and Police Post Badshahpur fall on the way from Village Teekli to General Hospital, Gurgaon. The complainant party did not stop at the two police stations and proceeded straight to General Hospital, Gurgaon. It is urged that the conduct of the complainant party is unusual and this has created doubt about the genesis of the



prosecution story. This contention has been rejected by the learned trial court that the complainant party was busy in getting the first and immediate aid to the injured persons of the family. We are of the view that in the ordinary circumstances, it is quite imperative that the complainant party could have stopped at the police station, sought necessary help from the police station and also given first-hand information to the police. From the evidence of PW 4 Dr. B.B. Sharma, it appears that the injuries suffered by the complainant party are simple in nature except that of Kundan Lal (deceased). In our view, therefore, there are no mitigating circumstances for not reporting to the police station at the first hour especially when the police stations are on the way to General Hospital.”

29. It is well settled principle that the decisions are based on the facts of particular cases and in the present case P.W.1, is the Superintendent of Police and his evidence and evidence of other witnesses are consistent on the point that appellants and others made indiscriminate firing on the police party and thereafter fled away and they identified appellant Md. Shahabuddin, the then MLA of Ziradai Constituency, Siwan and his bodyguards. Evidence of P.W.1 further shows in paragraph-13 that he came back to headquarters at Siwan and informed about the occurrence to his Senior officials and thereafter dictated the written report to his Steno and prosecution case is that thereafter, he sent the report to the police station. In such a situation, it appears that as the matter relates to a local sitting MLA of the Assembly, the conduct of the Superintendent of Police (P.W.1) to inform his Senior Officers first and thereafter dictated the written report and sent it to police station appears to be reasonable one and due to that it appears that there is delay in lodging the FIR. There



appears nothing abnormal in it and as such, in this case the delay in lodging FIR is not fatal.

30. In the present case appellants were convicted under Sections 307/34 IPC and **Section 307** provides that **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.**

31. Learned counsel for the appellants has assailed the conviction under Section 307 IPC and submitted that there is absolutely no evidence available on record to show that appellants and others fired with an intention to kill the Superintendent of Police or other Constables. Evidence also shows that there is no injury on the person of any of witnesses or others nor there is any damage to the vehicle nor there is any evidence available on record to suggest that firing was made, aiming the witnesses and other police personnel. In such a situation it cannot be said that firing was made with an intention to kill them rather it may be possible that in order to flee away, they have fired at the police party just to terrorize them. Learned counsel for the appellants has referred a decision of the Supreme Court in the case of **Hazara Singh vs. State of Punjab :**



(1971) 1 SCC 529 wherein in similar facts an accused fired shot at the police party and no one was injured and paragraph-6 of the judgment shows that possibility of firing to create confusion for the purpose of running away cannot be ruled out and learned counsel has also referred a case in the case of **Sagayam vs. State of Karnataka : (2000) 4 SCC 454** wherein appellant has tried to stab the police officer with sword but police officer escaped and the Hon'ble Supreme Court has held that no case is made out under Section 307 IPC.

32. Apart from that it has also been argued on behalf of the appellants that there is no injury on the person of any of the witnesses nor there is any damage to the vehicle nor there is evidence to show that firing was made aiming the witnesses and other police personnel and in such a situation it clearly appears that there was no intention of the appellants to kill the police personnel, which is essential pre-condition under Section 307 IPC to be gathered from the manner of weapon used and lack of motive and in this connection learned counsel for the appellants has referred to a case in the case of **Hari Kishan vs. Sukhbir Singh : (1988) 4 SCC 551**, which supports his above submission. Apart from that it has also been submitted that there is absolutely no motive of the appellants for killing police personnel and prosecution has failed to prove the motive behind the occurrence and in support of his contention being an essential ingredient, learned counsel has referred to a case in the case of **Sarju**



Prasad vs. State of Bihar : AIR 1965 SC 843.

33. On the other hand, learned APP has submitted that there is ample evidence available on record that there is indiscriminate firing by accused persons along with appellants and P.W.3 has also stated in his evidence that there was firing at the police party and in such a situation even if there has been no injury from the prosecution side and there was no damage to the vehicle it is only a scare chance that they are saved, otherwise there is ample evidence to show that firing was made to the police party in which it cannot be ruled out that there was change of having saved injury to the police party. Apart from that it has also been submitted that so far motive and intention are concerned, evidence clearly shows that police party were chasing the appellants and then firing was made, as such, it cannot be said that there was no intention of the appellants or there was no motive, as such, conviction under Section 307 IPC is sustainable in the eye of law.

34. On perusal of the judgment of Hazara Singh and others vs. State of Punjab (supra) it appears that considering the fact of the case Hon'ble Supreme Court has held in paragraph-6 of the judgment as follows :

“There can be no manner of doubt that if Hazara Singh and Bhajar Singh fired shots at the police party and even though no one was injured the appellants would be guilty of the offence with which they were charged. The real question is whether it had been proved beyond doubt that the shots were fired at the police party. There could be two possibilities in such a situation; one could be of the shots being fired in the direction of the police party or taking aim at them and



the other could be of the shots being fired in the air or in some other direction and not in the direction of the police party merely to create confusion for the purpose of running away. On the evidence of Inderjit Singh P.W.1 himself it was a moonlit night but owing to the weather being cloudy it was dark and light pistol shots had to be fired by Sub-Inspector Agya Ram on two occasions in order to provide sufficient light for seeing and identifying them. The light provided by these pistol shots admittedly lasted only for 2 or 2-1/2 seconds. If the shots which are alleged to have been fired by Hazara Singh and Bhajan Singh had been fired at the time when there was light as a result of the firing of the light pistol shots by Sub-Inspector Agya Ram then it could be said to have been established that the Deputy Superintendent of Police and the other witnesses could have seen in which direction the fire arms were fired by Hazara Singh and Bhajan Singh and their statement could have been accepted that the shots had been fired at them. But from the evidence of Inderjit Singh as also of Sub-Inspector Agya Ram who actually fired the light pistol shots which provided the light on two occasions it is quite clear that the shots which were fired by Hazara Singh and Bhajan Singh were not fired during the few seconds there was light as a result of the light pistol shots of Agya Ram. In other words the shots which are stated to have been fired by the aforesaid two appellants were fired in complete darkness when it was not possible for any member of the police party to see the direction in which they were fired or the aim which was taken by Hazara Singh and Bhajan Singh. It is not possible to say from this evidence that Hazara Singh and Bhajan Singh fired the shots in the direction of the police party or at them, and the possibility that the shots were fired in the air cannot be excluded. Thus the conviction under Section 307 of Hazara Singh and Bhajan Singh and of the other appellants under Section 307, read with Section 149, Indian Penal Code, cannot be maintained and they must be acquitted of that charge. It is unfortunate that the judgment of the High Court is very sketchy and there is hardly any discussion or examination of all the above material facts.”

Similarly in the case of Sagayam vs. State of Karnataka

(supra) the Hon'ble Supreme Court after considering the facts and



circumstances of the case has come to the conclusion that “a charge of this nature even there is not even an injury upon the victim cannot lead to an inference that there was any attempt to kill when the incident took place. It is possible that the accused confronted the ASI Rajanna but that by itself would not result in coming to the conclusion that it was an attempt to murder him”.

In the case of Hari Singh vs. Sukhbir Singh and ors (supra) the Hon’ble Supreme Court considering the facts and circumstances of the case has held in paragraph-7 of the judgment as follows :

“On the first question as to acquittal of the accused under Section 307/149 IPC, some significant aspects may be borne in mind. Under Section 307 what the court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of “attempt to murder”. Under Section 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gather from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which is is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention. In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused though armed with ballam never used the sharp edge of it. They used only the blunt side of it despite they being attacked by the other side. They suffered injuries but were not provoked or tempted to use the cutting edge of the weapon. It is very very significant. It seems to us that they had no intention to commit murder. They had no



motive either. The fight as the High Court has observed, might have been a sudden flare up. Where the fight is accidental owing to a sudden quarrel, the conviction under Section 307 is generally not called for. We, therefore, see no reason to disturb the acquittal of accused under Section 307 IPC.”

Similarly in the case of Sarju Prasad vs. State of Bihar (supra) the Hon’ble Supreme Court has considered the motive behind the occurrence and after considering the same has held in paragraph-6 of the judgment as follows :

“ All these decisions were considered by this Court in Om Prakash vs. State of Punjab and though Cassidy case was not expressly dissented from the actual view taken by this Court is more in consonance with the view taken by Beaumont, C.J. in Geogte case and the view taken by the Allahabad High Court in Niddha case than that taken in Cassidy case no injury was in fact occasioned to the victim Sir Earnest Hotson, the then acting Governor, due to a certain obstruction. Even so, the assailant Gogte was held by the court to be jointly under Section 307 because his act of firing a shot was committed with a guilty intention and knowledge and in such circumstances that but for the intervening fact it would have amounted to murder in the normal course of events. This view was approved by this Court. Therefore, the mere fact that the injury actually inflicted by the appellant did not cut any vital organ of Shankar Prasad is not by itself sufficient to take the act out of the purview of Section 307.”

In the case of Baleshwar Yadav alias Shyamji vs. State of Jharkhand (supra) the Hon’ble Supreme Court has also affirmed the ratio decided in above cases.

35. For constituting an offence under Section 307 IPC it is not essential that bodily capable of causing injury death should have



been inflicted. It is sufficient in law if there is present an intent coupled with some overt act in execution there, such act being proximate to the crime intended and if the attempt has gone so far that it would have been complete but for the extraneous intervention which frustrated its consummation. Even in the judgment cited above in the case of Hari Singh (supra) the Hon'ble Apex Court has held that "what the court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section and as such only because no bodily injury was caused it cannot be said that no offence under Section 307 IPC is made out. So far intention and motive is concerned, that has to be gathered or inferred from the facts and circumstances of the case. In the present case there is consistent evidence that when appellants were chased they indiscriminately fired on the police party and in such a situation intention and move for firing on the police party was either with an intent to cause bodily injury or to deter the police party from pursuing them. In this case I would like to refer a judgment of Hon'ble Supreme Court in the case of **Prakash Chandra Yadav vs. State of Bihar and ors. : (2007) 13 SCC 134** in which respondents were acquitted by the Patna High Court on the ground that no injury has been caused to the informant, P.W.7 and a case under Section 307 IPC is not made out and Hon'ble Supreme Court has held that the said finding is not legally sound in paragraph-10 of the judgment and explained the same in paragraphs 11, 12, 13 and from which it



appears that an intention of or knowledge relating to commission of murder and the doing of an act towards it are two ingredients for establishing a case under Section 307 IPC.

In such view of the matter, it cannot be said that bodily injury is necessary or even regarding intention or motive is essential for constituting an offence under Section 307 IPC rather intention or motive can be inferred from the facts and circumstances of the case.

36. In the present case there is consistent evidence that accused persons, including the appellants indiscriminately fired at the police party. I.O. has also seized empty and live cartridges from the place of occurrence. However, there is no injury on the person of police party nor is there any damage to the vehicle and the evidence also shows that after firing the accused persons fled away. Though P.W.3 has stated that firing was aimed at the police party at the vehicle but there is no other evidence in this regard. P.W.1 in paragraph-12 has stated that it is difficult to say that intention was for killing them or threatening them, but just one day earlier, he raided Pratappur village and during election three persons were killed, as such, he thought that the intention is to kill them. Evidence of P.Ws. also shows that after firing, they sat in the vehicle and fled away and in such a situation, it cannot be ruled out that firing was made in order to create confusion among police personnel so that appellants may be able to flee away from the place of occurrence. Hence, so far conviction under Section 307 IPC is concerned, the same is not free



from reasonable doubt.

37. Appellants have also been convicted under Section 353 IPC. **Section 353 IPC** provides that **whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.** It has been argued on behalf of the appellants that once prosecution has failed to prove its charge under Section 307 IPC the ingredient of force automatically goes and in such a situation charge under Section 353 IPC is automatically vanished.

38. I am unable to digest such argument advanced on behalf of the appellants, whereas there is consistent evidence available on the record to show that police party was chasing the appellants and other accused persons and evidence also shows that accused persons were armed with fire arms and on the order of Superintendent of Police, P.W.1, police personnel tried to catch them, they started to flee away and then they were chased. Evidence is also there that there was indiscriminate firing on the police party. In such a situation, when there was firing from the accused persons, including the appellants on



the police party it can safely be inferred that firing was made with intention to deter the police party from discharging their lawful duties. Hence, so far conviction under Section 353 IPC is concerned, there are ample evidence available on record to establish the offence against the appellants.

39. In the present case appellants were charged under Section 27(2) of the Arms Act read with Section 34 of the IPC. Section 27(2) of Arms Act provides that **whoever uses any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.**

40. The evidence is also there to show that firing was made by A.K.Series rifles and some by pistols. However, it has been argued on behalf of the appellants that there is nothing available on record to show as to whether those cartridges were seized in a proper manner and sent to Malkhana and there is also nothing available on the record that any entry was made in Malkhana and they were produced from Malkhana for examination and, in such a situation, apprehension of tampering with evidence and the seized articles cannot be ruled out. In support of contention learned counsel for the appellants has relied upon decisions in the case of **Baldev Singh vs. State of Punjab : (1990) 4 SCC 692**, **Kartar Singh vs. State of Punjab : 1993 Supp (2) SCC 740** and in the case of **Surender alias**



Babli vs. State (NCT of Delhi) : (2011) 15 SCC 546.

41. Further submission of learned counsel for the appellants is that seizure list (Ext.3) shows that articles were seized on 4.5.1996 and it appears from Ext.4 that the same was sent to FSL on 28.9.1996 as per letter No. 416 dated 27.9.1996, almost more than four a half months and in such a situation tampering with the seized articles cannot be ruled out, specially when articles were not sealed properly and in this connection learned counsel has referred a decision of Hon'ble Apex Court in the case of Kartar Singh vs. State of Punjab (supra) and also cited decisions in the case of Surender alias Babli vs. State (supra).

42 On the other hand, learned APP has submitted that there is consistent evidence available on the record to show that those seized articles were sent to FSL for examination and the delay in sending the same to FSL does not create any doubt about the report of FSL, rather evidence clearly shows that conviction of appellants under Section 27(2) Arms Act read with Section 34 IPC is just and proper.

43. FSL report has been brought on record as Ext.4 in this case and that shows fired cartridges were marked A1 to A5, B1 to B5, D1 to D2 and live cartridges marked E1 and F1 and the result of examination shows (a) Exhibits marked A1 to A5 noted in item (i) are fired cases of 8 mm caliber I.O.F. rifle cartridges. They contain regular shape firing pin marks on their percussion caps. These were examined under the comparison microscope. As a result of



microscopic comparison the following observations were obtained: (torn) firing pin and breech face markings on the percussion caps of (torn) A4 were found similar to each other, firing pin and breech face markings on the percussion caps of (torn) and A5 were found similar to each other. It is therefore concluded that the exhibits marked A1 (torn) fired from the same .315 caliber regular rifle whereas exhibits marked A2, A3 and A5 were fired from different .315 (torn) regular rifle. (b) Exhibits marked B1 to B5 were fired from 7.62 mm caliber regular AK family rifle (c) Exhibits marked C1 to C6 are fired cases of 9 mm caliber I.O.F. pistol cartridges and they contain regular shape firing pin marks on their percussion caps. These were examined under the comparison microscope, as a result of which it was found that those were fired from 9 mm caliber pistol, (d) Exhibits D1 and D2 are fired cases of .22 caliber foreign make rifle cartridges and they contain regular shaped firing pin marks on their percussion caps. These were examined under the comparison microscopic (torn) and they were fired from same (torn) regular rifle, (e) Exhibit marked E1 is live round (torn) caliber AK family rifle cartridge. It is an ammunition and can be used as such, (f) Exhibit F1 is a live round (torn) caliber I.O.F. pistol cartridge. It is an ammunition and can be used as such.

44. On perusal of the judgments as cited above it appears that Hon'ble Apex Court in the case of **Kartar Singh vs. State of Punjab : 1993 supp (2) SCC 740** (supra) in paragraph-8 of the



judgment has considered the delay in sending the articles as well as articles kept in parcels under seal and in paragraph-8 of the judgment it has been held as follows :

“8. having regard to the above material contradictions seen in the light of the delay in sending the arm for mechanical test coupled with failure to sent the cartridges to PW. 2 armourer we are disinclined to accept the version of the prosecution. We cannot merely rest our conclusion on the statement suffered by the accused during investigation as is done by the learned Judge of the designated court. Under these circumstances, we are obliged to reject the case of the prosecution, which means the appellant is entitled for acquittal.”

Similarly, in the case of **Surender Alias Babli v. State (NCT of Delhi)** (supra) the Hon’ble Supreme Court has held in paragraph-6 of the Judgment as follows:-

“6. The weapon was allegedly recovered at the instance of the appellant on 28.02.2001 as per the prosecution story, but curiously enough the bullet as well as the weapon was dispatched to the laboratory together on 3.4.2001. We are unable to fathom as to why the investigating agency did not deem it proper to sent the bullet to the laboratory soon after its recovery and the fact that they chose to wait for the weapon of offence to be recovered, casts a clear doubt as the sanctity of the recovery.”

The aforesaid judgments of the Hon’ble Apex Court found favour from in other decisions in the case of **Amarjit Singh vs. State of Punjab : (1995) supp (3) SCC 217** and in the case of **Jasbir Singh vs. State of Punjab : (1998) 8 SCC 252** from which it appears that to establish a case the articles have to be kept in proper way and sealed in proper manner and non-sealing of article and delay in sending the same to FSL create doubt about the seized articles and also cannot



rule out a possibility of its tampering.

45. In the present case, FSL report (Ext.4) shows that the same has been received in a small tin box covered by cloth with the seal impression. On perusal of evidence of P.W. 8, who is I.O. it appears that he has stated in his evidence in paragraph-6 that on 4.5.1996 he seized cartridges including live cartridges and used cartridges and this witness has been cross examined in paragraph 12 that he could not say as to what was done with the seized articles by Darogaji in presence of him he had not sealed the articles but it has not been suggested to this witness that articles were not seized and not properly kept in Malkhana and even the second I.O. (P.W.7) has stated that he obtained the seized cartridges from Malkhana on 25.9.1996 and got it examined by Sergeant Major but he has not entered inside the diary the entry number in Malkhana Register and he has not stated that it was sealed or not. I have stated above that FSL report itself shows that it was received in sealed condition in a small tin box and considering the above facts and in absence of any specific suggestion that the same was not sealed and not properly kept in Malkhana, to my opinion, it cannot be said that the articles were not sealed and properly kept in Malkhana. No doubt, in the present case there is delay in sending the articles to the FSL of about four and a half months and that may create some doubt about the recovery of the articles as well as may lead to some tampering also but in the present case those seized articles have been produced before the court of CJM



and the same was sent to the FSL for examination. No cross examination was made to either P.W.7 or P.W.8 that those articles mentioned in FSL report, have not been seized from the place of occurrence or there is any tampering with the aforesaid articles. On the other hand, report of FSL has been admitted into evidence without any objection and, as such, raising of the point of delay is an attempt to frustrate the whole prosecution case on the basis of the same.

46. FSL report shows cartridges were used cartridges of A.K.Series rifle and other rifles and pistols and two cartridges were unused cartridges, one of AK series rifle and one of pistol and AK Series rifle is prohibited arm and, as such, this corroborates consistent evidence of prosecution that firing was made by AK series rifles and some of by same pistols and rifles.

47. It is also well settled that any irregularity or illegality made during the investigation ought not to be treated as ground of rejection of prosecution case and the Hon'ble Supreme Court in the case of **Leela Ram vs. State of Haryana : AIR 1999 SC 3717** has held that "it is now a well settled principle that any irregularity or even an illegality during investigation ought not to be treated as a ground to reject the prosecution case and we need not dilate on the issue excepting referring a decision of this Court in the case of State of Rajasthan v. Kishore : AIR 1996 SC 3035".

48. In the present case cogent, reliable and consistent evidence is available on record to show that accused persons,



including the appellants fired at the police party and I.O. has found 18 empty cartridges and two live cartridges from the place of occurrence which were examined by FSL and they were found used by A.K. Series rifles and pistols, as such, brushing aside the evidence available on record on the ground of delay in examination will not be proper. Hence, the conviction of the appellants appears to be sustainable under Section 27(2) of Arms Act read with Section 34 of IPC

49. It has been argued on behalf of the appellants Jahangir Khan and Khalik Khan that there is nothing available on record to show that firing was made from Sten gun and pistol used by those two appellants and there is also no evidence to show that those Sten gun and pistol were used in the present case, there is no examination report of Sten gun and pistol and, as such, their conviction under Section 307 IPC or under Section 27(2) Arms Act read with Section 34 IPC is not sustainable in the eye of law. However, there is ample evidence on record to show that those appellants were present while firing was made and witnesses have named these appellants also and there is also nothing available on record to show that they had deposited their Sten guns or pistols, even no cross examination to both I.Os. (P.W.7 & P.W.8) in this regard. As such, conviction of these two appellants taking assistance of Section 34 IPC, offence under Section 27 of the Arms Act cannot be held to be illegal.



50. On the basis of the entire discussions made above, the conviction of the appellants under Section 307 I.P.C. does not appear to be sustainable in the eye of law. However, the conviction of the appellants under Section 353 IPC as well as under Section 27(2) Arms Act read with Section 34 IPC appears to be just and proper.

51. One alternative argument of the appellants is that appellants are in custody for more than five years and, as such, they are entitled to commutation of the period of sentence under Section 428 Cr.P.C. Section 428 of the Code of Criminal Procedure provides:

“S.428- Period of detention undergone by the accused to be set off against the sentence of imprisonment.- Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.”

52. So far application of Section 428 Cr.P.C. is concerned, the same has been considered in what was under consideration in several times before the Hon’ble Apex Court and before this Court also and this Court in the case of Prabhu Sah vs. The State of Bihar & Ors. has dismissed the point of setting off of Section 428 Cr.P.C. and after considering all the judgments of Hon’ble Apex Court has held in paragraphs-28, 29 & 30 of the judgment as follows :

“28.From the aforesaid judgments what we find the true interpretation of S.428 of the Code of Criminal Procedure is that the period of set off as



contemplated under Section 428, Cr.P.C. would be the period when in that case a person is first under remand custody as an under-trial and then he is sentenced. If there be more than one case, then, the remand period of each case would be set off against sentence in that case alone separately for each case even though the remand period may overlap, but the period spent as serving out sentence as a convict is one case cannot be taken into account as a remand period as an under-trial in another case.”

29. In our view, taking any other view would be contrary to the legislative policy. The legislative policy of Section 428 is not to reduce sentence or obliterate the period of punishment but to restrict the sentence effectually to the period awarded by giving benefit of pre-sentence detention in the case where he is ultimately sentenced otherwise as noticed in Atul Manubhai Parekh’s case (AIR 2010 SC (Supp) 429) (supra) it would lead to absurd and unintended results. A person on different dates would commit different and distinct offences but if multiple benefits were to be given on pre-sentence detention of one case to another then if he was ultimately sentenced on different dates for different offences for different periods which we may say to be 3 years, 4 years or 7 years, he will get away with only singular punishment of 7 years even though he has committed many more offences and was punished several times, he would go escort free unpunished so far as the other crime is concerned. That surely is not the legislative intent. The set off would ultimately be on a case to cases basis excluding period during which he is serving out sentence as substantively he is not then an under-trial. The distinction as repeatedly drawn by the Apex Court between the nature and status of detention has to be kept in mind.

30. If we apply this principle then the contention of the State in the present case has to be upheld. The remand period in the third case when he was already undergoing life imprisonment consequent to his conviction in the second case cannot enure to his benefit in terms of Section 428, Cr.P.C. That is the latest dictum of the Apex Court after noticing all the earlier case in the case of Atul



**Manubhai Parekh (AIR 2010 SC (Supp) 429)
(supra).”**

53. In view of entire discussions made above, judgment of conviction of the appellants under Section 307 IPC is not sustainable in the eye of law, hence conviction and sentence of the appellants under Section 307 IPC are set aside. However, the judgment of conviction and order of sentence of the appellants under Section 353 IPC as well as Section 27(2) of Arms Act read with Section 34 of IPC are affirmed. Accordingly, both the appeals are partly allowed.

54. So far commutation of sentence for the period of custody already undergone by the appellants, the same will be governed by the law laid down by this Court, as discussed above.

(Vinod Kumar Sinha, J)

spal/-

AFR/NAFR	
CAV DATE	03.05.2017
Uploading Date	18.07.2017
Transmission Date	19.07.2017

