

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 55 of 2004

1. Buddhiraj, aged about 27 years, S/o Lalchand Kurmi

2. Indrasan, aged about 29 years, S/o Lalchand Kurmi

Both r/o Camp-2, Near Nishad Sewa Samiti, P.O. Bhilai, District Durg, CG

3. Om Prakash, aged about 30 years, S/o Ram Kisun Lohar, r/o Shardapara, Near Nishad Sewa Samiti, Camp-2, P.S. Chhawani, P.O. Bhilai, District Durg, CG.

---- Petitioner

Versus

- State Of Chhattisgarh, through S.H.O. Chhawani, P.O. Bhilai, District Durg.

---- Respondent

For Appellants	:	Shri Manish Upadhyay, Advocate
For Respondent	:	Smt. Smita Ghai, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Ram Prasanna Sharma

Judgement

P. Diwaker, J

25/08/2017

1. This appeal has been filed against the judgment of conviction and order of sentence dated 4.12.2003 passed by the 5th Additional Sessions Judge, Durg in S.T. No.10/02 convicting accused/appellant No.1 under Section 302 of the Indian Penal Code (for short 'the IPC') and Section 25 / 27 of the Arms Act and sentencing him to undergo RI for life & fine of Rs.3,000/-, in default to undergo additional RI for 3 months, and R.I. for 1 year respectively. Accused/appellant Nos.2 & 3 have been convicted under Section 302/34 IPC and sentenced to undergo RI for life and fine of Rs.100/-, in default to undergo RI for 1 month.

2. In the present case name of deceased is Vinod Kumar Choudhary.
3. The prosecution story, in brief, is that on 18.11.1999 in between 7.30 & 7.45 a.m. accused/appellants No.1 & 2 herein caused gunshot injury to deceased Vinod Choudhary as a result of which he died on the spot itself. Another accused namely Omprakash is said to have helped other accused persons in commission of the offence. Immediately after the incident at 8.30 a.m. FIR (Ex.P-1) was lodged by PW-1 Rajkumar, brother of deceased and eyewitness to the incident, stating therein that when he was in his hotel, he was informed by someone that his brother is being beaten by the accused/appellants herein and absconded accused namely Ashok and when he reached the spot, he saw that the deceased was caught hold of by accused/appellant Omprakash and absconded accused Ashok and accused/appellant Buddhiraj & Indrasen had caused gun shot injuries to the deceased. He has further stated that his niece Poonam (PW-2) had also witnessed the incident. Immediately after the incident the report was registered at the instance of PW-1. Inquest was prepared over the body of deceased vide Ex.P-3 on 18.10.1999. Body of the deceased was sent for post-mortem examination which was conducted by Dr. A.K. Sahu (PW-11) and he noticed following injuries on the body of deceased:-
 - Abrasion over left knee of 3x2cm size, antero laterally.
 - Abrasion at right elbow of 1x1 cm size posteriorly.
 - Gun Shot injury present at left shoulder region at left mid anterior axillary fold, 4 cm below lateral end of left clavicle, diameter wound of entry is 1 cm, round in shape with inverted margins and having circular zone of abrasion & charring of skin, blood coming out from this wound.
 - Gun shot injury present on right side of back, at the level of D11 & D12, 4 cm laterally from vertebra, diameter of wound of entry is 1x1cm, round in shape, 5cm deep upto vertebra (vertebra deep), inverted margin and having circular zone of abrasion & charring of skin.

The doctor has opined that Injury No.1 & 2 were caused by hard and rough object and Injury No.3 & 4 were caused by gunshot and all the injuries were ante mortem in nature. The doctor has further opined that the cause of death was haemorrhage and shock as a result of ante mortem firearm injuries.

4. On completion of investigation, charge sheet was filed against the accused/ appellants and co-accused namely Ajay Kumar, Gopal Singh, Ranjeet Singh and one Ashok showing him to be absconding. The trial court framed the charge under Section 302, in alternative 302/34 IPC & Section 25 & 27 of Arms Act against accused/appellant No.1 Buddhiraj, whereas remaining accused persons have been charged with Section 302/34 IPC. Co-accused Ajay Kumar alias Bablu has been charged with Section 212 IPC. The prosecution in order to bring home the charges levelled against the accused persons examined 16 witnesses in all. Statements of accused persons were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication.
5. After hearing the parties, the Court below while acquitting co-accused persons of all the charges, convicted & sentenced the accused/appellants herein by the impugned judgment in the manner as described above.
6. Counsel for accused/appellant submits that;
 - the trial Court ought to have disbelieved the testimonies of Rajkumar (PW-2) & Poonam (PW-2), who are relatives of the deceased, for want of independent corroboration because the other two alleged independent eyewitnesses i.e. PW-6 & PW-7, have not supported the prosecution case in its entirety, particularly on the point as to who made gunshot.
 - country-made pistol is recovered at the instance of appellant No.1

only and therefore conviction of co-accused is not sustainable in law.

- lastly, it is submitted that only intention of the appellants was to cause injuries to the deceased and not his death and therefore even if the prosecution case is taken as it is, the appellants, at best, can be convicted under Section 304 Part -I or II of IPC and not under Section 302/34 IPC as has been done by the trial Court.
- the appellants had already remained in jail for a period of more than 7 years and therefore after converting their conviction under Section 304 Part-I of IPC, they may be sentenced to the period already undergone by them.

7. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction of accused/appellants is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court. He further submits that there is no reason before this Court to disbelieve the testimonies of Rajkumar (PW-1) & Poonam (PW-2) who had witnessed the incident. These witnesses have duly supported the prosecution case and their evidence cannot be discarded merely on the ground that they are relatives of the deceased. Though other two eyewitnesses namely Sunil Kumar (PW-6) & Chhotu alias Aarti (PW-7) have failed to make out the identity of real assailant but from their evidence it is clearly established that a quarrel took place between the deceased and accused/appellants and they had heard the sound of gunshot twice. He further submits that one country-made pistol along with live cartridges were sent to the FSL, which found the said country-made pistol in working condition and gave a report (Ex.P-14) to the effect that gunshot injuries on the body of deceased could have been fired through the country-made pistol sent for examination.

8. We have heard counsel for the parties and perused the evidence available on record.
9. Madhurlal (PW-1) is the Constable who did initial investigation in the matter.
10. PW-2 Rajkumar is the lodger of FIR and also an eyewitness to the incident. While supporting the prosecution case he has stated that on the fateful day when he was in his hotel, one person came and informed him that accused persons are assaulting the deceased. He rushed to the place where the incident was taking place and from a distance of about 10 feet, he heard the sound of gunshot. He has further stated that accused/appellant Buddhiraj had fired shot upon his brother which hit the chest of his brother Vinod. He has further stated that due to fear he ran away from there and lodged the report in the police station. In the lengthy cross-examination by the defence, this witness stuck to his version in the examination-in-chief and nothing emerges from his cross-examination which would help the defence.
11. Kumari Poonam (PW-3) is the niece of the deceased and another eyewitness of the incident. She has stated that on the fateful morning at about 7.30-8.00 a.m. while going to answer the call of nature, she saw her uncle (deceased) coming on the Yamaha motorcycle from the side of Milan Square. At that time his uncle was all alone. All the three accused persons tried to stop his motorcycle and when he slowed his speed, accused Buddhiraj kicked his vehicle. After pointing towards accused Omprakash, she has stated that he and absconding accused Ashok have caught hold of her uncle, remaining two accused were carrying different pistols and they had fired shot upon her uncle. She has further stated that she saw the smoke of gun powder coming out from the country-made pistol of accused/appellant Buddhiraj. After firing gunshot, the accused

persons fled from there. At the same time, her elder uncle Rajkumar came on the spot and thereafter he had gone to the police to lodge the report. Nothing could be elicited from the cross-examination of this witness to suggest that she had any reason to depose falsely against the accused.

12. Doodhnath (PW-3) is the father of deceased. He reached on the spot after the incident had happened. He is a witness to inquest (Ex.P-3). Shatruhan Lal (PW-5) is the police person who took the body of the deceased for post-mortem examination.
13. Suneel Kumar (PW-6) is the another eyewitness of the incident. He has stated that on the date of incident he along with Chhotu (PW-7) was going towards the temple, at the same time the deceased was coming on his motorcycle from the side of Sheetla Mandir road. He has further stated that accused Buddhiraj kicked the motorcycle of Vinod as a result of which he fell down from the motorcycle. He has stated that first he realized that they are simply quarrelling but subsequently he heard the sound of gunshot. He has further stated that he had seen country-made pistol in the hands of accused Indrasen and Mircha alias Buddhiraj. He heard the sound of gunshot twice. Upon hearing the sound of gunshot, he and his brother ran away from there and thereafter all the four accused persons also fled from there.
14. Chhotu alias Aarti (PW-7) is the another witness who had witnessed the incident. He has also deposed in the same fashion as that of PW-6 in regard to the incident.
15. Sainik Kumar (PW-9) & Guddu Sharma (PW-10) are the witnesses of memorandum statements (Ex.P-6 & P-8) and seizure memos (Ex.P-7)
16. Dr. A.K. Sahu (PW-11) is the doctor who performed autopsy on the body of deceased and noticed the injuries as described above. According to

this witness, the cause of death was haemorrhage and shock as a result of antemortem firearm injuries.

17. R.C. Trivedi (PW-12) is the investigating officer who has duly supported the prosecution case.
18. Bhawesh Sao (PW-13) is the witness who did initial investigation in the matter.
19. John Alam (PW-14) is the witness who was posted as Armourer at the relevant point of time. This witness had deposed that one country made pistol (katta) was produced before him for examination and after testing, the country-made pistol was found in working condition. He has further stated that he found one empty cartridge inside the country-made pistol and it appears that the gunshot was fired from the country-made pistol produced before him for examination. His report is Ex.P-12.
20. Ravindra Kumar Upadhyay (PW-15) is the police person who helped in the initial investigation. Lakhan Lal (PW-16) is the witness who proved the sanction for prosecution of the accused/appellants under Section 25 & 27 of the Arms Act.
21. Close scrutiny of the evidence, particularly of eyewitness Poonam (PW-2), makes it clear that it is the accused/appellants who assaulted the deceased on the date of incident with country-made pistol and gunshot injuries suffered by the deceased led to his instantaneous death. According to Poonam (PW-2), on the fateful day while going to answer the nature's call, she saw that accused Omprakash & Ashok (absconding accused) were holding his uncle (deceased) and accused Buddhiraj & Indrasen (appellants herein) had fired shot upon her uncle (deceased). At the same time, his uncle Rajkumar (PW-3) also reached on the spot and thereafter accused/appellants fled from there. Rajkumar (PW-1) has also corroborated the testimony of Poonam (PW-2) by saying that he saw

accused/appellant Buddhiraj firing from his country-made pistol at the deceased hitting on his chest. Statements of both the above witnesses find further support from the testimonies of Sunil Kumar (PW-6) & Chhotu @ Aarti (PW-7), who have though not named the person making the gunshot at the deceased but categorically stated that on the date of incident a quarrel between the accused persons and deceased was going on; accused Buddhiraj & Indrasen were having country-made pistol in their hands and that they have heard the sound of fire twice.

Statement of the above eyewitnesses (PW-2 & PW-3) that accused persons attacked the deceased gets further corroboration from the recovery of country-made pistol & live cartridges at the instance of accused/appellant Buddhiraj. PW-9 & PW-10, seizure witnesses, have duly supported the recoveries effected from the appellants. No explanation has been offered by the appellant concerned in his statement under Section 313 Cr.P.C. as to how he came into possession of firearms article seized from his possession. The defence has also not been able to elicit anything incriminating in the cross-examination of the eyewitness or other prosecution witnesses based on which their evidence can be disbelieved or discarded. Thus, there is no reason before this Court to disbelieve the testimonies of the prosecution witnesses.

The oral testimony of the eyewitnesses is also corroborated by the medical evidence and the report of FSL. As per the post mortem report proved by PW-11 Dr. A.K. Sahu, the following injuries were found on the body of the deceased:

- One gunshot injury at the left shoulder region at left mid anterior auxiliary fold, 4 cm below lateral end of left clavicle, wound of entry is 1 cm round in shape along with inverted margins & charring of skin;

- Gunshot injury on right side of back at the level of D11, D12, 4cm laterally from vertebra, diameter of wound of entry is 1x1cm, round in shape x 5cm deep upto vertebra, inverted margin and having circular zone of abrasion & charring of skin.

This witness has opined that the death of the deceased was haemorrhage and shock caused by firearm injury. The FSL Expert (PW-14) examined the weapon of offence which was recovered at the instance of appellant Buddhiraj vis-a-vis empty cartridges recovered and the bullet taken out from the dead body of deceased by the autopsy surgeon. According to him, one 315-bore country-made pistol (Desi Katta) was a firearm as defined under the Arms Act, he has examined his trigger excel etc. and was found it in working condition. Empty was found stuck in the country-made pistol and it appears that firing from that firearm had taken place. According to report (Ex.P-1) given by this witness, gunshot holes were present on the pieces of skin of deceased sent for examination and that the bullet (Article EB-1) could have been fired from the country-made pistol (Article A-1).

22. No doubt, it is true that eyewitnesses Rajkumar (PW-2) & Poonam (PW-3) are closely related to the deceased. However, on that ground their evidence cannot be rejected in toto. As per the settled principles of law what is required is to scrutinise such evidence with care and caution and while appreciating the evidence of such interested witnesses, the Court has to see whether their presence at the scene of offence was probable. In the instant case, from close and careful scrutiny of evidence of aforesaid witness it is clear that there is absolutely no circumstance to suggest that they would be interested in falsely implicating the appellants in this case and leaving out the real culprit whether he be know or not. Their testimonies are well corroborated by the medical evidence also.

Thus, there is no ground to disbelieve the creditworthy testimonies of these witness, which inspired confidence. Furthermore, having regard to the evidence adduced by the prosecution, which was cogent and corroborated, with the details mentioned in the report (Ex. P-1) lodged at the earliest point of time naming the appellants alone as the perpetrators of crime, the presence of above two eyewitnesses at the place of incident was also probable and cannot be disbelieved. Even the two independent witnesses i.e. PW-6 & PW-7, have also supported the aforesaid two witnesses related to the deceased i.e. PW2 & PW-3, but the only thing which could not be stated by them is as to who has made the gunshot. If this is small point is kept aside for a while, they have been throughout consistent in deposing the things.

23. So far as the submission of counsel for the appellants that as the firearm i.e. Katta, has been recovered only from possession of appellant Buddhiraja, therefore, other appellants cannot be held guilty for the offence under Section 302/34 of IPC is concerned, the law relating to Section 34 of IPC has been well clarified by the Hon'ble Supreme Court in different decision and what we gather from those decision is that mere presence of a person cannot rope him with the aid of Section 34 of IPC unless it is established from evidence that he shared the plan of commission of the offence and by his presence and action he actually facilitated the execution of the offence. In the instant case, from the statements of eyewitness namely Poonam (PW-2), it is clear that absconded accused Ashok and appellant Omprakash caught hold of the the deceased and only thereafter appellants Indrasen & Mircha alias Buddhiraja had shot fired at the deceased. Thus, having regard to the specific prosecution evidence, we are of the view that co-accused Omprakash, Ashok (absconding accused) & Indrasen have shared the

common intention with appellant Buddhiraja in murdering the deceased and the trial Court was fully justified in recording the conviction under Section 302/34 IPC against the appellants concerned.

24. Considering the nature and type of injuries caused to the deceased and also the manner in which they were inflicted clearly indicate the intention of the accused/appellant to cause death of the deceased. The evidence on record clearly established that all the accused/appellants came together on spot and attacked the deceased in furtherance of their common intention. In the light of the consistent and unimpeachable evidence of the eye-witnesses read with Ex. P-1 report lodged at the earliest point of time, which in all material particulars corroborated by the medical evidence, we are of the view that the prosecution has successfully established guilt of the accused/appellants.

25. For the foregoing discussions, we are of the opinion that the appeal has no substance, the same is liable to be and is hereby dismissed. Appellants are reported to be on bail. Their bail bonds stand cancelled. They be taken into custody forthwith to serve out the remaining jail sentence imposed on them by the trial Court.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(R.P. Sharma)
Judge

roshan/-