

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 36 of 2011**

Narendra Kumar Vaishnav S/o Puneshwar Vaishnav, Aged about 33 yrs.
R/o Village Keshavpur, Manjhapara, P.S. Gandhinagar, Distt.-Surguja, C.G.

---- Appellant

Versus

State Of Chhattisgarh, Through-Police Station Ambikapur, District-Surguja
(CG)Respondent

For Appellant	:	Mr. Surendra Singh, Senior Advocate with Mr. Neeraj Mehta, Advocate
For State	:	Mr. R.K. Mishra, Dy. A.G.

DB : Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Rajani Dubey

Judgment On Board by Manindra Mohan Shrivastava, J.

25.10.2018

Heard.

1. This appeal is directed against impugned judgment of conviction and order of sentence dated 06.01.2011 passed by Third Additional Session Judge (FTC) Surguja, Ambikapur (CG) in Sessions Trial No.105/2010, whereby and whereunder, the appellant has been held guilty of commission of offence and sentenced as described below :

Conviction	Sentence
Under Section 302 read with Section 34 of IPC	Imprisonment for life and fine of Rs.1000/-, in default of which, additional R.I. for 1 month.
Under Section 25/27 Arms Act	R.I. for 5 years and 7 years and also fine of Rs.500/- each, in default of fine 15 days each additional R.I. Both the sentence are run concurrently.

2. The prosecution story, as unfolded from the impugned judgment and records of the case, is that a morgue intimation in Ex.P/4 was given in the Police Station Ambikapur by one Sahdeoram (PW5) on 19.11.2009 at about 11:00 hrs. that his elder brother Gulabram, while going on road, met with an accident and hit by motorcycle, due to which, Gulabram died. Upon receipt of intimation, an FIR Ex.P/5 was recorded. The Police reached at the spot where the dead body was lying, gave notices to witnesses and prepared inquest over dead body, which was later on, sent for postmortem. Dr. B.P. Sonkar (PW13) conducted postmortem and prepared postmortem report in Ex.P/24 and gave an opinion that the Gulabram sustained a bullet injury on his head and died of bullet injury.

3. Till this time, those who had claimed to have seen the incident of accident and others including the police had an impression that Gulabram died in a road accident but upon receipt of postmortem report, the investigation turned to another direction suspecting murder of Gulabram and on suspicion, as per the prosecution story, the police took the appellant into custody and it is said that his memorandum statement was recorded and on that basis, a country made revolver (katta) along with three cartridges were seized from the possession of the appellant.

4. According to the prosecution, embedded bullet found in the body of the deceased, empty fired cartridges recovered from the spot of the incident, country-made pistol and three cartridges seized from the possession of the appellant were sent for report of the ballistic expert. The charge-sheet was filed after completion of usual investigation, alleging that it is the appellant, who had murdered the deceased by firing gunshot with the help of katta in his possession. The appellant having abjured guilt, was put to trial and the prosecution examined as many as 16 witnesses to prove its case. The appellant was thereafter, examined under Section 313 Cr.P.C. in respect of incriminating evidence and circumstances appearing against him in the evidence led by the prosecution. The appellant claimed to be innocent and stated that he has been falsely implicated. No defence witness was examined.

5. Learned Trial Court, however, relying upon the evidence led by the prosecution, held the appellant guilty of commission of offence and sentenced as described above.

6. Assailing correctness and validity of the impugned judgment of conviction

and sentence, learned Senior counsel for the appellant argued before this Court that the entire case of the prosecution rests only on the circumstantial evidence but the prosecution has failed to complete the chain of circumstances to prove involvement of the appellant in the alleged commission of offence and only on suspicious circumstances, conviction has been ordered. Learned counsel for the appellant contended before us that the prosecution witnesses, who are alleged to have seen the incident of accident and unknown person running away in the motorcycle, namely Parmeshwar Prasad (PW1), Vikas (PW2), Mahendra Prasad Sahu (PW3), Anil Agrawal (PW8) and Amit Vyapari (PW9), all have turned hostile and not supported the case of the prosecution that they had seen the incident of motorcycle of a particular number C.G.15 C.A.1013 running over the deceased. It is further contended that the circumstantial evidence relied upon to hold the appellant guilty is alleged seizure of katta and three live cartridges, whereas, the seizure, itself, has become highly doubtful because two independent seizure witnesses namely Anil Agrawal (PW8) and Amit Vyapari (PW9) both have not supported and have said that no memorandum was given nor any seizure was made in their presence. It is next contended that the Investigating Officer K.K. Nag (PW14) has not stated anywhere in his evidence as to whether the seized revolver and cartridges were sealed, as to whether they were kept in safe custody nor the prosecution has led any other evidence whatsoever as to who had taken the seized revolver and cartridges for examination of ballistic expert report. Therefore, no evidentiary value could be attached to the so called ballistic report as the very identity of the allegedly seized revolver and cartridges with those articles which were subjected to examination, has not been proved by the prosecution. It is further argued that as far as the report of ballistic expert is concerned, the said report could not be made a basis to hold the appellant guilty of commission of offence because the ballistic report dated 30.04.2010 was received by the trial Court directly from the office of Central Forensic Science Laboratory, at the stage, when the trial had reached the stage of argument and the appellant had already been examined under Section 313 Cr.P.C. After the receipt of the said report, if it was intended to be used as an incriminating evidence against the appellant, Section 313 Cr.P.C. mandatorily required and it was the duty of the trial Court to seek explanation of the appellant against this incriminating evidence, which was never done. Therefore, it is argued, on account of this serious violation of mandatory requirement under Section 313 Cr.P.C. report could not be looked into to prove allegations against the appellant. Lastly, it is submitted that even if the report is looked into, it does not connect the appellant with the commission of

offence because the expert has reported that gun has not capable of being fired despite repeated attempts. There is no report that the cartridges which could not be fired from the seized revolver were later on, fired from any other revolver. Therefore, there is no evidence that the cartridges seized from the possession of the appellant were live cartridges. In the absence of there being any report that the bullet found in the body of the deceased, was fired from the revolver allegedly seized from the appellant, the chain of circumstance is broken and the conviction of the appellant is unsustainable in law.

7. Learned counsel for the appellant would further argue that as there is no evidence that the gun was capable of being fired or that the cartridges seized were live, even no case for commission of offence under Section 25 of the Arms Act, would be made out. Reliance has been placed on the decision of the Hon'ble Supreme Court in the cases of **Jaspal Singh v. State of Punjab [(1998) 7 SCC 289]** and **State of Punjab v. Jagga Singh, [AIR 1998 SC 3113]**.

8. Per contra, learned State counsel, supporting the judgment of conviction and sentence argued that even though, present is a case of circumstantial evidence, the prosecution has proved incriminating circumstantial evidence which form a complete chain to lead to hypothesis of the guilt of the appellant. He would submit that on the basis of the memorandum statement and disclosure, revolver was recovered at the instance of the appellant from his own house along with three cartridges. The revolver and three cartridges were examined by the ballistic report and they were found of the same make and nature as that of the bullet found in the body of the deceased and empty cartridges found at the spot which provides sufficient connection to draw inference that the bullet found in the body of the deceased was fired by the revolver seized from the possession of the appellant. He would further submit that even if the independent witnesses of seizure of revolver and cartridges have turned hostile, they have admitted having signed the seizure document. Therefore, the evidence of Investigating Officer that he had seized revolver and cartridges from the possession of the appellant deserves to be believed because otherwise there is no requirement of law that recording of memorandum and seizure of incriminating article should necessarily be drawn only in the presence of Panch witnesses. Reliance has been placed on the decision of the Hon'ble Supreme Court in the cases of **Himachal Pradesh Administration v. Om Prakash [AIR 1972 SC 975]** and **Hari Shankar and etc. v. the State, [1985 CRI.L.J. 1700]**.

9. As we see from the medical evidence, postmortem report Ex.P/24 and the evidence of Dr. B.P. Sonkar (PW13), which is not substantially disputed, Gulabram died of bullet injury. The bullet was found embedded in his head. Dr. B.P. Sonkar (PW13) proving his postmortem report has stated that upon examination, he found following injury :

“3.....लाश पर निम्न चोटें पायी गयी: 1. बांये कान के नीचे गोलाकार चोट था उसका मार्जिन अंदर की ओर था घाव के किनारे कालापन था घाव की गहराई 11 से.मी. था जमा हुआ रक्त घाव के चारों ओर था घाव के पास मसल्टइशू दिखाई दे रहा था। 2. बांये कान पर जमा हुआ रक्त पाया गया था। बॉडी को खोलने पर जमा हुआ रक्त ब्रेन में पाया गया था। ब्रेन में बुलेट (गोली) पाया गया था जिसे सुरक्षित कर जांच हेतु उसी आरक्षक को सौंप दिया गया।”

10. In the cross-examination, this statement has not been controverted. The opinion of the doctor is that the cause of death was the injury caused in the brain leading to coma and death and the injury was caused by a firearm.

11. Parmeshwar Prasad (PW1) has not supported the case of the prosecution and has been declared hostile but states that during Holi festival, police people were checking vehicle near barrier. Vikas (PW2) has also not supported the case of the prosecution and says that he does not know who fell down nor he heard any noise nor could disclose the number of any motorcycle. Mahendra Prasad Sahu (PW3) has also not supported the case of the prosecution and has denied suggestion that he heard the noise of gunshot or that any motorcycle number C.G. 15 C.A./1013 was moving away with two persons riding thereon. Jagmenbai (PW4) is the wife of the deceased and she says that she reached the spot after having heard about death of her husband and later on, she came to know that her husband was shot dead. She does not know how accident had happened or how her husband sustained injury. Sahdeo (PW5), who is the brother of the deceased Gulabram, deposes that he was informed over telephone by his mother that his brother has suffered accident near the petrol pump and when he reached at the spot, he did not find anybody. He has been declared hostile and in his cross-examination, thereafter, he admits that he was informed by Anil Agrawal regarding his brother run over by unknown motorcycle. He further admits that at the time of accident, when he reached at the spot, there was a crowd gathered and nobody stated as to who hit his brother and everybody was under an impression that his

brother died because of the accident. Sukhdeo Ram (PW6), the father of the deceased only says that when he reached at the spot, he found that his son was lying dead on the road and he was informed that an accident had happened but later on, it was revealed that bullet was found in his head. Suresh (PW7) also makes similar statement but has not made any statement so as to implicate the appellant in the alleged commission of offence and he has also been declared hostile. Anil Agrawal (PW8) only says that he saw crowd near the place of the incident. He has said that in his presence, no memorandum statement was taken nor any seizure was made. Amit Vyapari (PW9) has also been declared hostile and has not supported the case of the prosecution. Abhilash Kumar Rajwade (PW10) is also one of the prosecution witness of memorandum and seizure but he has not supported the prosecution case and has said that no statement was given by the appellant nor any seizure was made in his presence though he admits his signature in the memorandum and seizure memorandum.

12. Thus from the aforesaid evidence of the prosecution witness, it would appear that the prosecution witnesses, who according to the prosecution, had seen the incident of deceased run over by motorcycle and the motorcycle numbered CG.15 CA /1013 moving away from the incident have not supported the prosecution case and thus there is no evidence to prove that at the time when Gulabram fell down on the road this particular motorcycle C.G.15 C.A./1013 was seen at the spot.

13. This is absolutely no evidence to prove that on the motorcycle, the appellant was seen leaving the spot immediately after Gulabram fell down on the road.

14. As far as seizure of revolver and three cartridges from the appellant is concerned, the two independent witnesses of prosecution namely : Anil Agrawal (PW8) and Abhilash Kumar Rajwade (PW10) both have not supported the case of the prosecution with regard to taking memorandum statement of the appellant and seizure of revolver and cartridges from his possession. Anil Agrawal (PW8) has stated that no enquiry was made by the police in his presence nor any seizure was effected in his presence, though, he admits his signature in the memorandum statement (Ex.P/11) and seizure memo (Ex.P/12). He has stated that he was called by the police people on the next day and signatures were obtained on plain paper. He has also denied that he had seen any motorcycle No.C.G. 15 C.A./1013 at the spot or that two persons standing near it.

15. Similar is the statement of Abhilash Kumar Rajwade (PW10), who also states that no memorandum statement was recorded in his presence nor any seizure was effected.

16. True, it is that the Investigating Officer K.K. Nag (PW14) in his statement has stated that he recorded the memorandum statement of the appellant and on the basis of the disclosure so made, recovered and seized revolver and three cartridges from the house of the appellant, we are of the view that in the circumstance, the recovery, itself, becomes doubtful. There is no quarrel with the legal proposition that even without support of independent seizure witness, seizure can still be proved from the evidence of the Investigating Officer but then the evidence of the Investigating Officer has to be reliable. In this case, we find that the Investigating Officer has only stated that he recorded a memorandum statement of the appellant and then at his instances, recovered a country made revolver along with three cartridges. However, thereafter whether those articles were sealed and if sealed, where it was kept in the custody and in whose custody, has not been deposed. He has not even stated as to who had taken those firearms and cartridges to the Central Forensic Science Laboratory wherefrom report dated 30.04.2010 is said to be received. We have, therefore, to hold that there is no evidence led by the prosecution with regard to sealing, safe custody and taking seized revolver and cartridges to the laboratory. The report of the laboratory dated 30.04.2010 states that seal impressions were intact and tallied with the specimen seal impressions provided but not specimen seal has been produced before the Court by the prosecution to prove that the articles carried to CFSL contained the same specimen seal which was found on the seal of the article kept in any safe custody. Therefore, in the absence of any evidence of such procedure of seal, safe custody and sending of articles led by the prosecution, the evidence of Investigating Officer becomes doubtful and it would not be safe to rely upon the same without corroboration of the independent witnesses of seizure.

17. Even if we were to accept the prosecution case of the seizure of katta and cartridges from the appellant, we fail to see how it connects the appellant with the alleged crime. The CFSL report shows that one of the cartridges seized were chambered in the cylinder of the country made revolver for conducting test firing in the Laboratory, but the cartridges could not be fired through even after repeated trials. The expert, therefore, formed an opinion that the country made revolver is

incapable of firing cartridges. There is no other material in the said report that one of the cartridges allegedly seized from the possession of the appellant were successfully fired from any other firearm. Thus, it is a case when not even evidence that the cartridges seized from the appellant were live cartridges.

18. We do not find that the prosecution has come out with armourer report or ballistic expert report that there were traces found in the revolver to draw inference that any bullet was fired from the said revolver. Merely, because the bullet found in the body of the deceased and the empty cartridges found at the spot, are of the similar nature of bullets which could be fired from revolver, it cannot be said that this alone would be incriminating circumstance to connect the appellant with the crime. In fact, the report that the revolver was incapable of being fired, demolishes the entire case of the prosecution and the chain of circumstance to the lead to hypothesis of the guilt of the appellant is broken.

19. There is another serious violation of mandatory provision contained in Section 313 Cr.P.C. which also dents the case of the prosecution. As we see from the order-sheet of the Court below, the report of the ballistic expert dated 30.04.2010 reached the trial Court, at the stage, when the case was being listed for final argument. On 20.12.2010, the report dated 30.04.2010 of the CFSL was produced before the Court by the officer of Police Station Ambikapur. The Court ordered that the copy of the same be given to the defence and then the accused was produced before the Court, an opportunity was given to the defence to raise his argument and the case was listed on 03.01.2011. Bail bond furnished by the accused were accepted, case was finally heard and judgment thereafter delivered on 06.01.2011. The ballistic report constituted the most incriminating circumstantial evidence and the learned Trial Court has passed the judgment of conviction mainly on the seizure of revolver and the ballistic report but then the accused appellant was not given an opportunity to explain regarding this incriminating evidence in the form of forensic report. This, in our opinion, resulted in serious violation of mandatory provision contained in Section 313 Cr.P.C. and denial of proper and reasonable opportunity of hearing to the appellant accused to offer his explanation against such incriminating evidence. The trial Court was duty bound to frame additional question and put the same to the accused to offer his explanation. In the absence of that having been done, the judgment of conviction and sentence must fall.

20. In view of two decisions of the Hon'ble Supreme Court in the case of *Jaspal Singh (supra)* and *State of Punjab v. Jagga Singh (supra)* cited by learned counsel for the appellant, the conviction of the appellant under Section 25 & 27 of the Arms Act also cannot be sustained in law because the firearm was found incapable of being fired and there is no evidence that the three cartridges seized from the possession of the appellant were live cartridges. The conviction of the appellant under the Arms Act also cannot be sustained. In the case of *Jaspal Singh (supra)*, it was held :

“2. Admittedly, no evidence was led by the prosecution to prove that the gun was in working condition and that the cartridges which were found from the person of the appellant were live cartridges. Neither ASI Balbir Singh had stated so nor was any report an expert obtained to establish that the gun was in working condition and that five cartridges were live. What was found in the gun were two empties and not live cartridges and, therefore, it was not proper to presume that it was in working condition. In the absence of any evidence to that effect, the conviction of the appellant under both these aforesaid sections cannot be upheld. We, therefore, allow this appeal, set aside the judgment and order passed by the Additional Judge, Designated Court, Sangrur, in Special Sessions Case No.55 of 1992 and acquit the appellant. He is ordered to be released forthwith if his presence is not required in jail in connection with some other case.”

21. In the case of *State of Punjab v. Jagga Singh (supra)*, also conviction was held unsustainable in the absence of forensic report or any other evidence to prove that the gun was in a working condition or that the cartridges were live cartridges. It was held :

“3. Aggrieved by the order of acquittal, the State has filed this appeal. We are of the opinion that Mr. Sodhi is right in contending that the view taken by the Designated Court that in absence of sanction for prosecuting an accused under the Arms Act, he cannot be prosecuted even under Section 5 of the TADA Act, is wrong. But it is not necessary to allow this appeal and remand the case to the Designated Court as the respondent deserves to be acquitted even otherwise on merits. Though the evidence of P.W.1 H.C. Baldev Singh and P.W. 3 Basant Singh establishes that the respondent was found in possession of one. 12 bore DBBL Gun and four live cartridges, there is no satisfactory evidence to show that the said Gun and the cartridges were sent for examination by the Central Forensic Scientific Laboratory. There is no report from the Forensic Scientific Laboratory nor any other evidence to prove that the said Gun was in a working condition or that the said cartridges were live cartridges. An entry made in the Malkhana register was relied upon by the prosecution. It does not mention that Gun bearing No.1411988 was sent to the Central Forensic Laboratory nor does it contain any description of the cartridges.

4. Therefore, in absence of any evidence to show that the respondent was found in possession of one. 12 bore DBBL Gun in a working condition and four live cartridges, the respondent cannot be convicted under Section 5 of the TADA Act.”

22. In the result, the appeal is allowed. The impugned judgment of conviction and order of sentence is set aside and the appellant is set at liberty forthwith, if not required in any other case.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Rajani Dubey)
Judge