

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 27/10/2018****Judgment Delivered on : 26/11/2018****Criminal Appeal No. 1034 of 2013**

1. Pushpendra Chouhan @ Pushpendranath @ Manish @ Manoj @ Pappu @ Papa S/o Shatruhan Chouhan aged 30 years, R/o. Darrabhata, P.S. Baradwar, District Janjgir-Champa, Chhattisgarh.
2. Bablu @ Amit @ Gulab Singh Rajput S/o Lalman Singh, aged 30 years, R/o Ayodhyapuri, Jailgaon Chowk, Darri, District Korba, Chhattisgarh.
3. Dinesh Netam S/o Ramji Netam aged 27 years, R/o. Sumedha P.S. Bankimongra, District Korba, Chhattisgarh.

---- Appellants**Versus**

State Of Chhattisgarh through Station House Officer, Malkhorada,
District Janjgir-Champa, Chhattisgarh.

---- Respondent

For the Appellants	:	Shri Ajay Ayachi, Advocate.
For Respondent/ State	:	Shri Anil S. Pandey, G.A.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV JUDGMENT**

(1) Challenge in this appeal is to the judgment of conviction and order of sentence dated 12.9.2013 passed by Learned Second Additional Sessions Judge, Sakti, District Janjgir-Champa, Chhattisgarh in Criminal Case No. 1551 of 2009, whereby and whereunder the learned Second Additional Sessions Judge has convicted the appellants with a direction to run all the sentences concurrently, as under:-

CONVICTION	SENTENCE
Under Section 394/ 34 of the Indian Penal Code for the appellants.	RI for 10 years and to pay fine of Rs.10,000/-.
Under Section 397/ 394 of the Indian Penal Code for the	RI for 10 years.

appellants.	
Under Section 25(1)(A) of the Arms Act (appellants No.1 and 2)	RI for 3 years and to pay fine of Rs.1,000/-, with default stipulation.
Under Section 27 of the Arms Act (appellants No.1 and 2)	RI for 7 years and to pay fine of Rs.2,000/-, with default stipulation.
Under Section 307 of the Indian Penal Code for (appellants No.1 and 2)	RI for 10 years and to pay fine of Rs.10,000/-
Under Section 307/ 34 of the Indian Penal Code for (appellant No.3)	RI for 10 years and to pay fine of Rs.10,000/-

(2) Conviction is impugned on the ground that without there being any iota of evidence, the trial Court has convicted and sentenced the appellants as aforementioned and thereby committed illegality.

(3) As per case of the prosecution, in brief, on the date of incident i.e. 4.4.2009 at about 8:00 pm, the appellants came on motorcycles to Maa Durga Service Centre, the Indian Oil Petrol Pump in village – Chapora. They purchased some petrol for their motorcycles. Thereafter, the appellants entered into the office of the petrol pump and after brandishing a firearm, one shot was fired at Chandrika Sidar (PW-13) who got injured. They also made another attempt to injure the complainant (PW-7) who raised an alarm. Subsequent to which, the appellants looted Rs.1,000/- cash and fled from the spot. Unnumbered FIR Ex. P/ 39 was lodged in police station Malkhorada by Ghanshyam (PW-27). During investigation, the appellants were apprehended and at their instance, recoveries were made. Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short 'the Code'). The investigation was carried out and on completion of the same, the charge-sheet was filed before the concerned Court. After

obtaining sanction for prosecution under the provisions of Arms Act from the District Magistrate.

(5) During trial, the Court below framed the charges against the appellants under Sections 394/ 34, 394/ 397 and 307 of the IPC and Sections 25(1)(A) and 27(2) of the Arms Act. The prosecution examined 28 witnesses to prove the guilt of the appellants. No witness was examined in defence. Statements of the appellants were recorded under Section 313 of the Cr.P.C. wherein the appellants denied the circumstances appearing against them and pleaded innocence and false implication in the crime in question.

(6) After affording opportunity of hearing to both the parties, learned trial Judge convicted and sentenced the appellants as aforementioned.

(7) I have heard learned counsel for the parties, perused the judgment impugned and records of the Court below.

(8) Learned counsel appearing on behalf of the appellants submits that the prime witness - Ghanshyam (PW-27) has clearly stated that he had not identified the appellants because it was night at the time of incident and there was no light and he again stated that the persons who had come for filling petrol were not the appellants. He has not made any clear statement regarding identifying any of the appellants before the Executive Magistrate. The evidence given by the Executive Magistrate – Sanjay Somawar (PW-14) is of no consequence and thus, the appellants

have been falsely implicated in this case without there being any evidence of clear identification and the conviction against them is bad in law. It is also submitted that the witnesses of memorandum and seizure are not reliable. The appellants were arrested in connection with some other offence registered as Crime No. 191 of 2007. Statements given under Section 27 of the Evidence Act by the appellants in that case have been made use of for this case. Hence, this evidence has no reliability and trustworthiness. The sanction for prosecution under the provisions of Arms Act in this case is not in accordance with law. Hence, the appellants were entitled for acquittal in this case.

(9) Per contra, learned counsel for the Respondent/ State opposed the grounds raised in the appeal and submissions. It is submitted that the memorandum statement given by the appellants clearly shows their involvement in the crime in question. The important witnesses Awadhram (PW-1), Shatruhan Rathore (PW-4), Firturam (PW-10), Chandrika Sidar (PW-13), Sanjay Somawar, Executive Magistrate (PW-14), S.N. Sidar, Investigating Officer (PW-20) and Kaushalya Sahu, Investigating Officer (PW-21) have clearly supported the case of the prosecution in all respects. Hence, no case is made out for acquittal of these appellants.

(10) In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution.

(11) The lodger of First Information Report, Ghanshyam (PW-27) has narrated about the incident, in which it is stated that 4 persons came on

two motorcycles to buy petrol in the petrol pump. After filling of petrol, two of them entered into the office and then this witness heard a shot and then, all four of them came out and caught hold of this witness and Chandrika Sidar (PW-13) and took out cash from their pockets. Because of the bullet shot, Chandrika Sidar (PW-13) was injured in the abdomen. Thereafter, the culprits fled from the spot on the motorcycles. On the information given, the policemen reached the spot where the unnumbered FIR Ex. P/39 was lodged by this witness.

(12) Regarding identification of the culprits, Ghanshyam (PW-27) has stated that he was not acquainted with the appellants and explained that it was night and dark and then, he also made clear that the persons who had come for filling petrol were not the appellants. Regarding Test Identification Parade, he has given a statement that he had identified one person out of the persons present in the TIP but he cannot identify him as one of the appellants. With the permission of the Court below, this witness was cross-examined by the prosecutor but he has not made any statement to support the prosecution for any identification.

(13) Another important witness in this case is Chandrika Sidar (PW-13). He similarly narrated about the incident as has been stated by Ghanshyam (PW-27) and has not identified the appellants as the culprits of that incident.

(14) The witness of Test Identification Parade, B.S. Markam (PW-16), the Executive Magistrate has stated about conducting the TIP vide Ex.P/16 in which appellant No.3 - Dinesh Netam was identified. In cross-

examination, there is nothing to suggest otherwise. Labhoram (PW-8) is the witness of the TIP who has not supported the prosecution and the other witness Haran Kumar has not been examined by the prosecution. The evidence of TIP as described in Ex. P/16 has no reliability for the reasons that it has not been supported by the identifying witness and the other witness.

(15) Another TIP was conducted vide Ex. P/2 in this case for identification of appellants No.1 and 2 Pushpendra Chouhan and Gulab Singh regarding which, there is no support from the identification witness Ghanshyam (PW-27) in his Court statement. Although, Sanjay Somawar (PW-14), the Executive Magistrate has stated about conducting the identification parade vide Ex. P/2 and that the complainant had identified both the appellants in his evidence, but no support is found from the statement of the witnesses present in this TIP, namely, Awadhram (PW-1) and Govind Rai (PW-2). Hence, only on the basis of the statement given by the Executive Magistrate, the appellants were identified as the culprits in this case is not sufficient to come to a conclusion without the evidence of the complainant and the injured victim himself who had clearly denied the appellants as culprits in this case. Hence, the evidence in this case has no reliability.

(16) Inspector S.N. Sidar (PW-20) has recorded the statement of appellant No.1 – Pushpendra Chouhan vide Ex. P/6 and appellant No.2 – Gulab Singh vide Ex. P/8 and at the instance of appellant No.1 – Pushpendra Chouhan, he made a seizure of one motorcycle, one pistol, 10 numbers of cartridges, some cash, jewelery, ATM cards, SIM cards

and driving license vide Ex. P/7 and similarly, at the instance of appellant No.2 - Gulab Singh he made seizure of one pistol, ATM Cards, PAN Cards and cartridges vide Ex. P/9. The witness of the seizure Shatruhan Rathore (PW-4) has supported the Investigating Officer in his statement that the statement on memorandum was given by appellant No.1 vide Ex. P/6 and after seizure of articles were made from him vide Ex. P/7 and similarly, statement of the memorandum was given by appellant No.2 vide Ex. P/8 in his presence and seizure of articles were made vide Ex. P/9 before him. In cross-examination, he has admitted that some papers were prepared in the police station, which does not affect the statement about seizure, as a memorandum of seizure and statement given by any accused person under Section 27 of the Evidence Act is recorded for the purpose of refreshing the memory later on, such documents by themselves have no evidentiary value and it is the statement of the person who conducted the investigation and the witnesses is relevant and as such investigation has relevance and importance. There is nothing else in his cross-examination to suggest otherwise.

(17) Another witness of this procedure Firturam (PW-10) has not supported the prosecution case and was declared hostile by the prosecution and has been discredited by the prosecution. Hence, his statement has not going to affect the statement given by S.N. Sidar, Investigating Officer (PW-20) that he has falsely implicated appellants No.1 and 2. Hence, on this basis, it is found that the evidence regarding memorandum statement vide Ex. P/6 and seizure vide Ex. P/7 from appellant No.1 and memorandum statement vide Ex. P/8 and seizure

vide Ex. P/9 from appellant No.2 is reliable and trustworthy evidence.

(18) Inspector – Kaushalya Sahu (PW-21) has stated about the memorandum statement given by appellant No.3 – Dinesh Netam vide Ex.P/3 in which, he stated about sword concealed by him and on that basis, seizure was made vide Ex. P/29. She has completed the other investigation proceedings. Her statement regarding memorandum of seizure of appellant No.3 vide Ex. P/29 has remained unrebutted in her cross-examination.

(19) Awadhram (PW-1) has supported in his statement about the memorandum Ex. P/3 and his statement has remained unrebutted in his cross-examination. But another witness Mahadev (PW-7) has not supported the prosecution and he has been discredited by the prosecution and declared hostile.

(20) The evidence regarding seizure of sword has come only from Inspector Kaushalya Sahu (PW-21) but as the statement is unrebutted, the statement of memorandum is partly supported by one of the independent witnesses, I am of the view that the prosecution has succeeded to prove that appellant No.3 had given such memorandum statement and thereafter, led to the recovery of the sword vide Ex. P/29 which can be relied on.

(21) Inspector, K.S. Nagwanshi (PW-24) has given statement about receiving the information about the incident, arrived at the spot and recorded the unnumbered FIR Ex. P/39. On the basis of the information

given by Ghanshyam (PW-27) he also made seizure of one cartridge shell from the spot vide Ex. P/14 and thereafter, lodged numbered FIR Ex. P/14 in the police station. In cross-examination, his statement has remained unrebutted. Witnesses of seizure vide Ex. P/14 Santosh Kumar (PW-5) and Ashok Khetan (PW-6) have supported seizure of one blank cartridge and one life cartridge from the spot of incident. Supporting the statement of Inspector, K.S. Nagwanshi (PW-24) and the seizure of life cartridge and blank cartridge from the spot stands proved.

(22) Constable – Madanlal Marawi (PW-26) examined the seized firearm and reported vide Exs.P/20 and P/21 that all the firearms are in working condition.

(23) Dr. B.P. Pandey (PW-15) examined the injured Chandrika Sidar (PW-13) and reported vide Ex. P/22 regarding the bullet injuries caused to him.

(24) Vinay Patel (PW-17) is the clerical staff in the office of District Magistrate, Janjgir-Champa, who has stated about the grant of prosecution vide Ex. P/23 by District Magistrate. Shyam Singh Markam (PW-18), Patwari who has prepared the spot map vide Ex. P/28.

(25) After overall scrutiny of all the evidence present on record, though it appears that the incident of loot has occurred at the petrol pump where Ghanshyam (PW-27) and Chandrika Sidar (PW-13) were present. Chandrika Sidar (PW-13) was injured by a shot from firearm and the cash was looted from their possession, however, with regard to the fact that this act was committed by these appellants, there is no clear

evidence as the prime witness Ghanshyam (PW-27) and Chandrika Sidar (PW-13) have not identified them as the persons who had injured and looted them, hence, the important evidence in support of the charge under Sections 394/ 34 and 397 of the IPC is totally missing in this case because of which, the conviction of the appellants under Section 394/ 34 and 394/ 397 of the IPC is erroneous. Similarly, the offence under Section 307 of the IPC charged against the appellants is also found not proved as there is no evidence that the appellants are assailants in this case because of lack of evidence of identification. Hence, the conviction and sentence with respect to these offences needs interference.

(26) There is evidence that appellants no.1 & 2 were in possession of un-licensed firearms; regarding the amount, they have no explanation and the sword was a weapon of prohibited category. Hence, the conviction of appellants No.1 and 2 under Sections 25(1)(A) of the Arms Act is supported with evidence which can be regarded as beyond reasonable doubt. But as there is no evidence to believe that appellants no.1 & 2 were the assailants, the persons who injured and looted Chandrika Sidar (PW-13) and Ghanshyam (PW-27), this finding cannot be given that the firearms seized from appellants No.1 and 2 were used in this incident, because of which, the conviction under Section 27 of the Arms Act also appears to be bad in law and without support of any cogent and reliable evidence.

(27) In view of the aforesaid discussions and the findings arrived at, this appeal is allowed in part. The conviction and order of sentence against all the appellants under Sections 394/ 34, 394/ 397 and 307 is hereby set

aside. The conviction of appellants No.1 and 2 for the offence under Section 25(1)(A) of the Arms Act is upheld and maintained. The appellants are in jail and they be set at liberty forthwith after being satisfied under the requirement of Section 437A of the Cr.P.C.

(28) Accordingly, the appeal is disposed off.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE

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