

[2009] 9 S.C.R. 587

DEOMUNI SHARMA

v.

STATE OF JHARKHAND

(Criminal Appeal No. 718 of 2003)

MAY 26, 2009

[V.S. SIRPURKAR AND R.M. LODHA, JJ.]

Penal Code, 1860: s.307 r. w. ss.149, 147, 148 – Arms Act, 1959 – ss.27, 5 and 7 – Conviction by trial court – Affirmed by High Court inspite of arriving at a categorical finding that appellant fired in the air only with an idea to scare away the aggressors and in pursuance of right of private defence of property and life and that the accused 3 fired, resulting in death of 2 and injuries to others – On appeal, held: The act of appellant showed that he was not a member of unlawful assembly – Finding regarding s.149 must fail – Conviction u/s. 307 not maintainable as the act was committed individually by accused 3 by firing – Conviction u/s. 27 of Arms Act would also be of no consequence – For inviting conviction u/s. 27, it has to be proved that the fire arm was used in contravention of s.5 or s.7 – s.7 was not attracted as it was a licenced gun – Act on part of the accused in firing in the air to scare the aggressor would also not come within the mischief of s.5(1).

The trial court convicted appellant under s.307 r.w. s.149 IPC along with ss.147 and 148 and s.27 of Arms Act. He was not convicted u/s.302 with which he was charged. The other accused were convicted u/s.302 r.w. ss.149, 147 and 148 IPC and s.27 of Arms Act by the trial Court. The High Court held that the other accused persons exceeded the right of private defence and altered conviction to that of offence u/s. 304 Part 1 IPC, however affirmed the conviction of appellant under s.307

A r. w. ss.149, 147, 148 and s.27 of Arms Act. High Court gave finding that the appellant only fired in the air with an intention to scare away the aggressors so that they scatter. The finding of courts below was that only accused nos.3 and 4 had fired. Hence the appeal.

B Allowing the appeal, the Court

HELD: 1. It was nowhere stated in the judgments of courts below nor was it the case of any prosecution witness that the appellant had fired. It was only the accused no. 3 who had fired. Again, even the finding regarding the unlawful assembly cannot be sustained insofar as the appellant was concerned. Seeing the mob, the appellant and the other accused persons entered in the house and came back with the fire arms and even then the appellant fired in the air which according to the High Court was only for the purpose of scaring away the aggressors and to scatter them. Till that moment at least the appellant was not a member of unlawful assembly nor can the assembly itself be termed as unlawful assembly with a definite common object. If ultimately the High Court came to a conclusion that the other accused persons fired in pursuance of their right of private defence, then this act of theirs could not be said to be that attributable to an unlawful assembly. In the wake of the High Court's judgment the finding regarding Section 149, IPC must fail and with it the conviction for offence under Sections 147 and 148, IPC. Once that result is achieved, there is no question of convicting the appellant for the offence under Section 307, IPC which apparently was committed individually by accused no.3 alone by firing at the injured. It is also apparent that the offence under Section 304 Part I was committed by accused Nos. 3 and 4, individually and substantially by themselves alone. It was not in pursuance of any object of the unlawful assembly

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because there was no unlawful assembly at all. A
Therefore, the appellant cannot be even booked for
offence under Section 307 read with Section 149, IPC. He
must, therefore, be acquitted of that offence. [Para 15]
[596-G-H; 597-A]

2. Once it is a clear cut finding by the High Court that B
the appellant fired in the air only with an idea to scare
away the aggressors and in pursuance of right of private
defence of his property and life and once it is proved that
he also suffered some injuries, though superficial, his use C
of gun only for that purpose cannot be covered under
Section 27 of the Arms Act either. There is a specific
finding recorded by the High Court that even if he has
fired in the air, it was with an idea to scare away the
aggressors. The High Court also specifically found that D
the accused persons possessed the plot No. 97 and that
there was no injunction order passed against them nor
was any such injunction order either produced before the
Court or proved. If that was so, then the action of the
appellant would not have the colour of criminality and
hence even his conviction under Section 27 of the Arms E
Act would be of no consequence. There was no
discussion regarding Section 27, Arms Act either in the
judgment of the Trial Court or the High Court. No
evidence is discussed as to how the user of the fire arm
can come within the mischief of Section 5 of the Arms Act. F
Under such circumstances, there was no breach of
Section 5 of the Arms Act. Again, it was not the case of
the prosecution that this appellant did not have the
licence for the rifle that he is alleged to have used by firing
in the air. For inviting conviction under Section 27 of the G
Arms Act, it has to be proved that the fire arm was used
in contravention of Section 5 or Section 7 of the Arms
Act. Since it was a licensed gun, there was no question
of Section 7 coming in. Insofar as Section 5 is concerned,
an act on the part of the accused in firing in the air to H

A **scare the aggressors would not come within the mischief of Section 5(1) of the Arms Act. Therefore, the appellant is liable to be acquitted even of the offence under Section 27 of the Arms Act. [Para 16 and 17] [597-B-H; 598-A]**

B **CRIMINAL APPELLATE JURISDICTION : Civil Appeal No. 718 of 2003.**

From the Judgment & Order dated 19.9.2002 of the Jharkhand High Court of Judicature at Ranchi in Criminal Appeal No. 122 of 1996 (R).

C **S. Chandra Shekhar and Manoj Kumar for the Appellants.
Manish Kumar Saran for the Respondents.**

The Judgment of the Court was delivered by

D **V.S. SIRPURKAR, J. 1.** The appellant herein challenges his conviction for offence under Section 307 read with Sections 149, 147 and 148 of the Indian Penal Code as also under Section 27 of the Arms Act as affirmed by the High Court.
E Initially, the appellant along with four others, was charged for the offences under Sections 147 and 148 as also under Section 302 read with Section 149, IPC.

2. By a confused judgment, the original accused No. 2- Ram Pravesh Sharma, accused No. 3-Bijay Sharma, and accused No. 4-Ajay Sharma were convicted for offences under Section 302 read with Sections 149, 147 and 148 IPC and Section 27 of the Arms Act by Trial Court. Deomuni Sharma, who was accused No. 1, along with one Bimal Kumar-accused No.5, was found guilty of offence under Section 307 read with
F Sections 149, 147 and 148 as also under Section 27 of the
G Arms Act and was sentenced to undergo rigorous imprisonment for 10 years for the offence under Section 307 and 7 years for the offence under Section 27, Arms Act.

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3. In appeal before the High Court, original accused No.2- A
Ram Pravesh Sharma was acquitted on the basis of his plea
of alibi. Accused No. 3-Bijay Sharma and accused No. 4-Ajay
Sharma were convicted under Section 304 Part I, IPC. They
were, however, acquitted under Section 302, IPC. They were
sentenced to undergo seven years' rigorous imprisonment. The B
sentence of Bimal Kumar for offence under Section 307 was
also reduced to seven years. The sentence under Section 27,
Arms Act was reduced to three years. No separate order
seems to have been passed in respect of the present appellant
Deomuni Sharma, accused No.1. C

4. In short, though accused No. 1 Deomuni Sharma was
not convicted for offence under Section 302 read with Section
149 and was only convicted for offence under Section 307
along with accused No.5 Bimal Kumar, the High Court treated
as if he was actually convicted for the offence of section 302 D
and modified his non-existent conviction to Section 304 Part I,
IPC and reduced his sentence to seven years. In short, the High
Court did not even bother to realize that Deomuni Sharma was
only convicted for offence in respect of Section 307 read with
Section 149, IPC and not under Section 302, IPC. E

5. Again, the Sessions Judge though held in para 37 of
its judgment that the prosecution had proved its case beyond
shadow of reasonable doubts, chose to convict only Ajay
Sharma, Bijay Sharma and Ram Pravesh Sharma and did not F
convict Deomuni Sharma, the present appellant, of the offence
under Section 302 with which he was charged but convicted
him of the offence under Section 307/149, 147 and 148, IPC.
The Trial Court had not expressed anything about the acquittal
of this appellant Deomuni Sharma of the offence under Section G
302/149, IPC. In result, the present situation is that the present
appellant who was not convicted for offence under Section 302
read with Section 149, IPC and was convicted only for the
offence under Section 307 read with Section 149, IPC along
with Sections 147 and 148, IPC faced ten years' sentence for H

A offence under Section 307, IPC and seven years' imprisonment for the offence under Section 27 of the Arms Act which sentence was never bothered to be considered by the High Court under the wrong impression that he was convicted for offence under Section 302 and had exceeded the right of private defence. We are constrained to observe that the whole attitude has been extremely casual both on the part of the Sessions Judge as well as the High Court, resulting in such colossal confusion.

C 6. Ordinarily, we would have remanded the matter back but considering that the appellant is 75 years old, it will be futile to send back the matter all over again and, therefore, we are proceeding to decide this appeal which now presumably is only against the conviction for offence under Section 307-read with Sections 149, 147 and 148 IPC and Section 27 of the Arms Act.

D 7. Learned counsel appearing for the appellant has addressed us on the basis of these confused findings.

E 8. The prosecution case was that this appellant and the other accused resided at village Mauza Hirapur in there own common house. Plot No. 97, Khata no. 17 is appurtenant to this house. There was litigation going on between the complainants and the accused persons in respect of the possession and ownership of this plot No. 97. On 12.11.1994 at about 7 a.m. in the morning the accused persons started brick construction on the disputed land and thereby started changing the nature of that land. On getting this information, one Harihar Singh and his uncle Janardan Singh @ Chhedi Singh went there and obstructed the accused on the ground that they were violating an injunction order of the Court. The accused persons allegedly started abusing them. The present appellant Deomuni Singh threatened to kill them. Some others like Sushil Kumar Singh, his cousin brother Manoj Singh, his grandfather Ram Govind Singh, Shankar Singh, Nandji Yadav, Mahanth Yadav also came

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to the spot and tried to pacify the matter but the accused did not stop, instead they all went inside their house and came back armed with fire arms. While the accused Ajay Sharma and Bijay Sharma and the present appellant Deomuni Sharma were armed with rifles, Bimal Kumar and Ram Pravesh Sharma were armed with pistols. The appellant fired in the air. However, Ajay Sharma and Bijay Sharma fired at Harihar Sharma and Sushil Sharma. They both died on the spot. It was alleged that Ram Pravesh Sharma fired at Janardan Singh @ Chhedi Singh and Bimal Kumar had fired at Manoj Singh. The said Janardan Singh later on died in the hospital while Manoj Singh was injured. It was on this basis that all the accused persons came to be proceeded against before the Sessions Judge. Admittedly only two accused persons were arrested on the spot while others including the present appellant were arrested later on. Fire arms were seized from them. The accused persons claimed the right of private defence saying that the aforementioned plot No. 97 was owned by them and was in their possession and that the accused persons had tried to disturb the situation. They pointed out that there was no injunction order against them of any nature. They also urged that the complainant party which was more in number had tried to molest the lady folk of their house and also tried to remove their ornaments. They also pointed out that as many as three accused persons were injured in the attack and, therefore, they had to use the fire arms to defend themselves.

9. The Trial Court did not accept this plea. The Trial Court held that there was no right of private defence in favour of the accused persons and that the accused persons had committed the offence of murder. However, as has been stated earlier, it convicted only three accused persons for the offence of murder and the remaining two including the present appellant were convicted for the offence under Section 307/149, 147, 148, IPC and Section 27 of the Arms Act on the ground that they had, in furtherance of their common object, injured Manoj Singh.

A 10. In the appeal, however, the High Court came to the
conclusion that it could not be said that the accused party had
no right to private defence at all. The High Court categorically
gave the finding that the aforementioned plot No. 97 was very
much in the possession of the accused party and further due
B to the injuries suffered by the accused they had the right of
private defence. It was also found that the prosecution had not
brought any evidence of an injunction against the accused.
However, according to the High Court, the accused persons
had exceeded the right of private defence. Therefore, their
C conviction was liable to be altered to that of offence under
Section 304 Part I, IPC. On that count, they were awarded
punishment of seven years as has already been pointed out.
The High Court got confused about the present appellant and
never realized that he was never convicted for the offence under
D Section 302 by the Sessions Judge. However, the High Court
proceeded to dismiss the appeal filed by the present appellant.
Therefore, we are now left to consider as to whether the High
Court was right in dismissing the appeal of the present appellant
against his conviction for offence under Section 307 read with
E Sections 149, 147 and 148, IPC and Section 27 of the Arms
Act.

11. At the outset, it must be noted that the allegation
against the present appellant is not for firing at the
complainants. It was feebly suggested by the prosecution
F witnesses that he had fired in the air and exhorted the other
accused persons to attack the complainant party.

12. About that role the High Court has given the following
finding at the end of para 7 of its judgment:

G "When I look to the postmortem report of Harihar
Singh and Sushil Singh, I find that bullet injury was found
on their chest. It means that the intention was to end their
lives *but as the PW himself says that there was also firing
in air by Deomuni Sharma, which indicates that earlier*
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the intention of Deomuni Sharma was to scatter and scare away the aggressors, but even after firing the aggressor did not scatter then they took aim on their chest. Apparently, this aiming at the chest itself appears to be in excess of the right of private defence. Purpose of repelling could have been served by aiming least vital parts. Thus I have no hesitation in holding that in exercise of their right of private defence the alleged occurrence had taken place but the appellants exceeded their right of private defence."

(emphasis supplied)

13. In fact, on this finding itself the appellant, who was accused No.1 should have been absolved of the guilt. If apparently accused No.1 had fired only in the air with an idea to scare away the aggressors so that they should scatter then he has obviously committed no offence. It was nobody's case that he had fired at the two dead persons. The finding of both Courts is clear that only accused Nos. 3 and 4 had fired. The High Court dismissed the appeal of appellant Deomuni Sharma on the wrong impression that even he was convicted of the offence under Section 302, IPC substantively or with the aid of Section 149, IPC, one look at the Trial Court's judgment suggests that he was not so convicted. The Trial Court convicted him only of offence under Section 307 read with Section 149, IPC. Therefore, the very basis of the High Court judgment against the appellant is knocked down. The other appellants who were convicted for the offence under Section 304 Part I, IPC have not filed any appeal nor has the prosecution come up in appeal against this finding and the consequent conviction for offence under Section 304 Part I, IPC. Therefore, this finding has become final. Reading the finding as it is, along with the finding given in para 9, it is clear that the appellant's conviction which is also not specifically referred to by the High Court is per se incorrect as the appellant was never convicted for the offence under Section 302, IPC and even that finding of the

A Sessions Judge was never challenged by the prosecution.

14. That leaves us with the unanswered question regarding the conviction under Section 307 read with Sections 149, 147 and 148, IPC as also his conviction for offence under Section 27 of the Arms Act.

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15. We have very carefully seen the judgments of the Courts below. It is nowhere stated nor is it the case of any prosecution witness that the appellant had fired at Manoj Singh. It was only Bimal Kumar who had fired. Again, even the finding regarding the unlawful assembly cannot be sustained insofar as the present appellant is concerned. Seeing the mob, the appellant and the other accused persons entered in the house and came back with the fire arms and even then the appellant fired in the air which according to the High Court was only for the purpose of scaring away the aggressors and to scatter them. Till that moment at least the appellant cannot be a member of unlawful assembly nor can the assembly itself be termed as unlawful assembly with a definite common object. If ultimately the High Court has come to a conclusion that the other accused persons fired in pursuance of their right of private defence, then this act of theirs could not be said to be that attributable to an unlawful assembly. In the wake of the High Court's judgment the finding regarding Section 149, IPC must fail and with it the conviction for offence under Sections 147 and 148, IPC. Once that result is achieved, there is no question of convicting the appellant for the offence under Section 307, IPC which apparently has been committed individually by Bimal Kumar alone by firing at Manoj Singh. It is also apparent that the offence under Section 304 Part I was committed by accused Nos. 3 and 4, Ajay Sharma and Bijay Sharma individually and substantially by themselves alone. It was not in pursuance of any object of the unlawful assembly because there was no unlawful assembly at all. Therefore, the present appellant cannot be even booked for offence under Section 307 read with Section 149, IPC. He must, therefore, be acquitted of that

offence.

16. Once it is a clear cut finding by the High Court that the appellants fired in the air only with an idea to scare away the aggressors and in pursuance of right of private defence of his property and life and once it is proved that he also suffered some injuries, though superficial, his use of gun only for that purpose cannot be covered under Section 27 of the Arms Act either. In fact, we are doubtful about the prosecution version that he fired the gun in the air and exhorted the other accused to attack. This case of the prosecution has been found to be incorrect by the High Court as there is a specific finding recorded by the High Court that even if he has fired in the air, it was with an idea to scare away the aggressors. The High Court has also specifically found that the accused persons had possessed the aforementioned plot No. 97 and that there was no injunction order passed against them nor was any such injunction order either produced before the Court or proved. If that was so, then the action of the appellants would not have the colour of criminality and hence even his conviction under Section 27 of the Arms Act would be of no consequence. There is no discussion regarding Section 27, Arms Act either in the judgment of the Trial Court or the High Court. No evidence is discussed as to how the user of the fire arm can come within the mischief of Section 5 of the Arms Act. No such material was produced before us nor were we addressed on the issue by the learned counsel for the prosecution. Under such circumstances, we are not in a position to endorse the breach of Section 5 of the Arms Act. Again, it is not the case of the prosecution that this appellant did not have the licence for the rifle that he is alleged to have used by firing in the air.

17. For inviting conviction under Section 27 of the Arms Act, it has to be proved that the fire arm has been used in contravention of Section 5 or Section 7 of the Arms Act. Since it was a licensed gun, there was no question of Section 7 coming in. Insofar as Section 5 is concerned, we do not think

A that an act on the part of the accused in firing in the air to scare the aggressors would come within the mischief of Section 5(1) of the Arms Act. Therefore, the appellant is liable to be acquitted even of the offence under Section 27 of the Arms Act.

B 18. In result, the conviction of the appellant as recorded by the Trial Court and as wrongly confirmed by the High Court is bad in law and the accused is entitled for acquittal. He is accordingly acquitted. The judgments of both the Courts below are set aside.

C D.G. Appeal allowed.