A VASUDEV

v.

STATE of M.P.

(Criminal Appeal No. 388 of 2021)

B FEBRUARY 1, 2022

[INDIRA BANERJEE AND J. K. MAHESHWARI, JJ.]

Penal Code, 1860 – ss.307/34 – Arms Act – s. 3/25(1B)(a) and s. 27/34 – The case of prosecution that Sub-Inspector (PW-6) along with SDOP (PW-10) reached a village on having information that an absconding accused 'R' was hiding with his associate members – The accused persons were hiding in a house – PW-10 challenged the accused to surrender – However, the accused persons opened fire on the police from inside the house – After retaliation from the police parties, the accused 'R' expressed his wish to surrender – Accordingly, the accused 'R' along with accused/ appellant surrendered before the police – After surrendering, one 315 bore rifle along with 19 live cartridges and 5 empty cartridges were recovered from 'R' and one 12 bore double barrel gun along with 20 live cartridges and 7 empty cartridges were recovered from accused/appellant – The Trial Court convicted the accused persons u/s. 307/34 IPC r/w. s.3/25(1B)(a) and s.27 of the Arms Act – Aggrieved, both the accused persons filed appeal before the High Court – During the pendency of appeal, accused 'R' died and his appeal was dismissed as abated – The High Court confirmed the judgment of the Trial Court and the remaining appeal of the appellant/accused was dismissed – On appeal, held; As per the testimonies of the prosecution witnesses PW-4, PW-5, PW -10, PW-14 and PW-16, it is apparent that an information of hiding by the deceased accused with his associate in a house was received, however, in their statements it is not said that appellant was with him – Further, PW-5 in cross-examination said that the firing was towards the hill area and not towards the police party – None of the witnesses saw appellant firing on police – So as per the said testimony, it is apparent that the intention and knowledge to commit an act by them towards the policy party was not proved beyond reasonable doubt – The arrest, seizure were prepared at the police

station and not on spot – Three independent witnesses, PW-7, PW-8 and PW-13 did not supported the case of prosecution – Further, as per FSL report, the right barrel of 12 bore gun, fire could not be done and the empty catridges, which were received were not fired from the left barrel – Therefore, use of 12 bore gun is not proved – Considring all these aspects, the ingredients of s.307/34 IPC and s.27 of the Arms Act were not proved by the prosecution beyond the reasonable doubt, proving the guilt of the appellant – The Trial Court and the High Court committed error in convicting the appellant u/s. 307/34 IPC r/w s.27 Arms Act – Therefore, the conviction and sentence for the said charges are set aside, except of the charge u/s. 25(1B)(a) of the Arms Act.

Partly allowing the appeal, the Court

HELD: First of all, it is required to be seen what are the ingredients to prove an offence under Section 307 of IPC. On perusal of the provisions, it is apparent that whoever does any act, with intention or knowledge, which may cause death and in furtherance to the said intention and knowledge, he was doing an act towards it. However, it is required to be seen by the evidence brought on record by the prosecution whether the ingredients to prove, the case of prosecution beyond reasonable doubt, the charge under Section 307/34 IPC have been established. In this regard, the star witnesses of the prosecution are ASI (PW 4), H.C. (PW5), SDOP (PW10), H.C. (PW14), S.I. (PW15) and S.I. (PW16). As per their testimonies, it is apparent that an information of hiding by the deceased accused 'R' with his associates in a house of village Mahoi Kala was received. In their statements, it is not said that appellant was with him. The police personnel of nearby police stations were called at Village Mahoi Kala. Thereafter, under the command of S.D.O.P. (PW10), police parties were prepared to apprehend the accused. The police parties were deputed in different directions and warning to surrender was given to 'R'. On such warning, as stated by them, firing was made from inside the house. H.C.(PW5) in cross examination clearly said that the said firing was towards the hill area and not towards the police party. None of the said prosecution witnesses have seen the appellant firing on police party, with intention or knowledge

A **to commit an offence, proving his guilt. Subsequently, as alleged, 'R' and appellant had surrendered along with guns before the police party. As per the said testimony, it is apparent that the intention and knowledge to commit an act by them towards the police party has not been proved beyond reasonable doubt.**
B **Simultaneously, as per the statement of prosecution witnesses, it has come on record that all the proceedings including the arrest, seizure have been prepared at the police station and not on the spot. However, defence as taken by the appellant appears to be plausible, and creates reasonable doubt in proving the guilt by prosecution. It is not out of place to mention that three**
C **independent witnesses PW7, PW8 and PW13, in whose house incident had taken place, had not supported the case of prosecution. As per the cross -examination of prosecution witnesses, it is apparent that one 'SS' was present on the spot. He was having good relations with the SHO and inimical with the**
D **'R'. However, being independent person, why in his presence, the seizure and the arrest were not made by police, is not explained and highly doubtful. There is no independent witness in any of the proceedings though may be available. The High Court, while convicting the appellant by the impugned judgment, merely observed that because accused were prized goons and were**
E **absconding and as per the deposition, it could not be said that the appellant No. 2 was not involved because he was arrested on spot and taken to police station. In this regard, it is required to observe that the prosecution is required to prove its case beyond reasonable doubt and the conviction cannot be based merely on the basis of presumption to rule out the presence of accused. It**
F **is to further observe that as per FSL Report Exb. P-17A, it is clear that from the right barrel of 12 bore gun, Exb. A -2, fire could not be done and the empty cartridges, which were received, have not been fired from the left barrel. Therefore, the use of 12 bore gun which was seized from the appellant is not proved along**
G **with live and empty cartridges. As the use of the gun itself is not established by the FSL report, therefore, the conviction under Section 27 Arms Act also is not justified. Considering all these aspects, in opinion of this Court, the ingredients of Section 307/**

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34 IPC and Section 27 of the Arms Act have not been proved by the prosecution beyond reasonable doubt, proving the guilt of the accused/appellant. [Para 7][520-C-H; 521-A-G]

Parsuram Pandey 6 and others v. State of Bihar, **AIR 2004 SC 5068 : [2004] 5 Suppl. SCR 475 – referred to.**

Case Law Reference

[2004] 5 Suppl. SCR 475 referred to Para 5

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.388 of 2021.

From the Judgment and Order dated 14.02.2020 of the High Court of Madhya Pradesh at Jabalpur in Cr. A. No.622 of 2009.

H. K. Chaturvedi, Ms. Anjali Chaturvedi, Sagan Chaturvedi, Ms. Megha Chaturvedi, Advs. for the Appellant.

Mukul Singh, Ankit Mishra, Gopal Jha, Advs. for the Respondent.

The Judgment of the Court was delivered by

J. K. MAHESHWARI, J.

1. Arising out of the judgment dated 14.02.2020 passed in Criminal Appeal No. 622 of 2009 by the High Court of Madhya Pradesh, judicature at Jabalpur, confirming the judgment dated 7.3.2009 in S.T. No. 185 of 2006 passed by the 6th Additional Sessions Judge (Fast Track Court), Chhatarpur, the present Special Leave Petition has been filed, in which leave was granted directing to call for the record. However, this appeal has been registered and heard on priority basis as the appellant being the senior citizen.

2. The case of the prosecution in brief is that on 15.6.2006, Sub Inspector R.S. Bagri (PW6) along with Sub-Divisional Officer Dr. Sanjay Agrawal (PW10) reached village Mahoi Kala on having information at Police Station Sarwai that absconding accused Rajesh Shukla was hiding with his associate members in the said village. It was also informed that accused Rajesh Shukla was beside the house of Jhallu Kachhi of the said village. The police personnel of nearby police stations were called at Village Mahoi Kala. Thereafter, under the command of S.D.O.P. Dr.

A Sanjay Agrawal (PW10), police parties were prepared to apprehend the accused. The police parties surrounded the house of Jhallu Kachhi. Dr. Sanjay Agrawal (PW10) challenged the accused persons to surrender and come out of the house of Jhallu Kachhi. The accused Rajesh Shukla did not surrender and open the fire on the police personnel from inside the house. The police parties retaliated the firing. After sometime, the B accused Rajesh Shukla expressed his wish to surrender. Accordingly, the accused Rajesh Shukla along with accused/appellant Vasudev Shukla surrendered before the police and they were taken into custody. After surrendering, one 315 bore rifle along with 19 live cartridges and 5 empty cartridges were recovered from accused Rajesh Shuka, whereas one C 12 bore double barrel gun along with 20 live cartridges and 7 empty cartridges were recovered from accused Vasudev Shukla. The first information was registered as Exb. P-18. The weapons, so surrendered, had been seized at the police station along with live cartridges Exb. P-4 to P-6. The accused persons were arrested vide arrest panchnama Exb. P9 and P10. After completion of the investigation, challan was filed. As D the case was triable by the Court of Sessions, therefore, it was committed to the competent court, where the charges under Sections 307/34 read with Section 3/25(1B)(a) and Section 27/34 of the Arms Act were framed against both the accused. The accused abjured their guilt and demanded trial by taking a defence of false implication. Appellant-Vasudev E specifically taken defence that after coming back from the jail, he had surrendered his son Rajesh in P.S. Sarwai. The police personnel have prepared a false case sitting in the police station, implicating the appellant and c-accused Rajesh Shukla in this case.

3. Prosecution has examined as many as 16 witnesses, while the F accused has not examined any witness in defence. Trial Court, after referring the statement of the witnesses, convicted the accused persons on taking pretext that they were aware regarding the challenge of the police party for surrender. Instead of surrendering, the accused persons fired gun shots, which were retaliated by the police party. After sometime, both the accused had surrendered throwing their guns. The Trial Court, G further observed that guns so seized, may fire and the used and un-used cartridges of 315 bore as well as a 12 bore double barrel gun were seized, which finds support from the FSL Report Exb. P-17A regarding use of the said guns. As the accused persons were holding the guns, without any license, therefore, they have been convicted for the charges H under Section 307/34 IPC read with Section 3/25 (1B)(a) and 27 of the

Arms Act and directed to undergo R.I. for four years with fine of Rs. 2,000/- and R.I. for two years with fine of Rs. 1000 and R.I. for three years with fine of Rs. 1000 respectively with default sentences. It was directed by the Court that the aforesaid sentences shall run concurrently.

4. The judgment passed by the Trial Court was challenged before the High Court by filing Criminal Appeal No. 622 of 2009. As the appellant Rajesh Shukla died on 19.2.2016, therefore, his appeal was dismissed as abated, while the appeal of the appellant Vasudev Shukla has been dismissed confirming the judgment of Trial Court in toto.

5. Shri H.K. Chaturvedi, learned counsel appearing for the appellant has argued with vehemence that as per the case of prosecution itself, there was no apprehension of abscondment of appellant. From the statement of prosecution witnesses, it is clear that deceased co-accused Rajesh Shukla was allegedly said to be hiding himself in the house of Jhallu Kachhi and not the appellant. The prosecution witnesses have not named and seen the appellant firing on them, having intention and knowledge to commit the murder. As per the seizure Exb. P-5, 12 bore double barrel gun, 20 live cartridges and 7 empty cartridges were seized from him. FSL report Exb. P-17A clearly indicates that there was disparity to match TC (A2 L.B.) for the firing pin impression to Exb. EC 6,7,8,9,12. Therefore, those five cartridges were not fired through the left barrel of 12 bore gun Exb. A-2. Similarly, the right barrel of 12 bore gun Exb. A-2 , had not been used in firing because it was cut and short by which weapon could not be matched with the cartridges. It is further urged that as per the testimony of the witnesses, it is clear that they had not seen firing any of the accused on police party. It is said the object of the fire was towards hill and not towards the accused persons as is apparent from the statement of H.C. Akbar Singh Gaur (PW5). In such circumstances, the prosecution has failed to prove the intention and knowledge to commit an act which may amounting to commission of an offence attempt to murder. In absence thereto, the conviction of the appellant for an offence under Section 307/34 of IPC is contrary to the settled proposition of law. In support of his contention, reliance has been placed on the judgment of this Court in the case of ***Parsuram Pandey and others vs. State of Bihar***, AIR 2004 SC 5068. It is further urged that the right barrel of 12 bore gun seized from appellant was cut and short, making it impossible to fire from this weapon and the empty cartridges have not been fired from left barrel as apparent from FSL

report Exb. P-17A. Therefore, the offence under Section 27 of the Arms Act has not been made out. Even assuming that the offence under Section 25(1- B)(a) is made out, sentence as awarded by the Trial Court is two years, which the appellant has already served as per the report available on record. Therefore, while setting aside the conviction and the sentence for an offence under Sections 307/34 and 27 Arms Act, appellant may be directed to be released

6. Per contra, Shri Mukul Singh, learned counsel representing the State submits that the Trial Court and the High Court have rightly convicted and sentenced the appellant by the impugned judgment, however interference in this appeal is not warranted in exercise of power under Article 136 of the Constitution of India.

7. After hearing learned counsel for the parties, first of all, it is required to be seen what are the ingredients to prove an offence under Section 307 of IPC. On perusal of the provisions, it is apparent that whoever does any act, with intention or knowledge, which may cause death and in furtherance to the said intention and knowledge, he was doing an act towards it. However, it is required to be seen by the evidence brought on record by the prosecution whether the ingredients to prove, the case of prosecution beyond reasonable doubt, the charge under Section 307/34 IPC have been established. In this regard, the star witnesses of the prosecution are ASI J.P. Verma (PW 4), H.C. Akbar Singh Gaur (PW5), SDOP Dr. Sanjay Agrawal (PW 10), H.C. Uday Raj Singh (PW14), S.I. Arvind Singh Dangi (PW15) and S.I. R.S. Bagri (PW16). As per their testimonies, it is apparent that an information of hiding by the deceased accused Rajesh Shukla with his associates in the house of Jhallu Kachhi of village Mahoi Kala was received. In their statements, it is not said that appellant was with him. The police personnel of nearby police stations were called at Village Mahoi Kala. Thereafter, under the command of S.D.O.P. Dr. Sanjay Agrawal (PW10), police parties were prepared to apprehend the accused. The police parties were deputed in different directions and warning to surrender was given to Rajesh Shukla. On such warning, as stated by them, firing was made from inside the house of Jhallu Kachhi. H.C. Akbar Singh Gaur (PW5) in cross-examination clearly said that the said firing was towards the hill area and not towards the police party. None of the said prosecution witnesses have seen the appellant firing on police party, with intention or knowledge to commit an offence, proving his guilt. Subsequently, as alleged, Rajesh

Shukla and appellant had surrendered along with guns before the police party. As per the said testimony, it is apparent that the intention and knowledge to commit an act by them towards the police party has not been proved beyond reasonable doubt. Simultaneously, as per the statement of prosecution witnesses, it has come on record that all the proceedings including the arrest, seizure have been prepared at the police station and not on the spot. However, defence as taken by the appellant appears to be plausible, and creates reasonable doubt in proving the guilt by prosecution. It is not out of place to mention that three independent witnesses Shivnath Anuragi (PW7), Barra (PW8) and Jhallu Kachhi (PW13), in whose house incident had taken place, had not supported the case of prosecution. As per the cross-examination of prosecution witnesses, it is apparent that Santosh Shukla was present on the spot. He was having good relations with the SHO and inimical with the accused Rajesh Shukla. However, being independent person, why in his presence, the seizure and the arrest were not made by police, is not explained and highly doubtful. There is no independent witness in any of the proceedings though may be available. The High Court, while convicting the appellant by the impugned judgment, merely observed that because accused were prized goons and were absconding and as per the deposition, it could not be said that the appellant No. 2 was not involved because he was arrested on spot and taken to police station. In this regard, it is required to observe that the prosecution is required to prove its case beyond reasonable doubt and the conviction cannot be based merely on the basis of presumption to rule out the presence of accused. It is to further observe that as per FSL Report Exb. P-17A, it is clear that from the right barrel of 12 bore gun, Exb. A-2, fire could not be done and the empty cartridges, which were received, have not been fired from the left barrel. Therefore, the use of 12 bore gun which was seized from the appellant is not proved along with live and empty cartridges. As the use of the gun itself is not established by the FSL report, therefore, the conviction under Section 27 Arms Act also is not justified. Considering all these aspects, in our considered opinion, the ingredients of Section 307/34 IPC and Section 27 of the Arms Act have not been proved by the prosecution beyond reasonable doubt, proving the guilt of the accused/appellant.

8. In view of the foregoing, the Trial Court and High Court committed error in convicting the appellant for the charge under Section 307/34 IPC read with Section 27 Arms Act. Therefore, we allow this appeal in part and set-aside the conviction and sentence for the said

A charges, and acquit the appellant for the same, except of the charge under Section 25(1B)(a) of the Arms Act. The appellant has already served the sentence for the charge under Section 25(1B)(a) of the Arms Act, therefore, if he is not required in any other case, be released forthwith from jail.

B 9. Accordingly, this appeal is allowed in part and disposed of.

Ankit Gyan Appeal partly allowed.