

[AFR]

RESERVED ON:- 17.11.2023**PRONOUNCED ON:- 05.12.2023****Neutral Citation No. - 2023:AHC-LKO:79589****Court No. - 13****Case :-** CRIMINAL APPEAL No. - 19 of 2000**Appellant :-** Sushil Phari**Respondent :-** State of U.P.**Counsel for Appellant :-** S.Pradhan,Ram Mohan Mishra**Counsel for Respondent :-** G.A.**Hon'ble Karunesh Singh Pawar,J.**

1. Heard Sri Ram Mohan Mishra, learned counsel for appellant and Sri Alok Tiwari, learned A.G.A. for the State-respondents.
2. This appeal has been filed against the judgment and order dated 03.01.2000 passed by Special/Additional Sessions Judge, Rae Bareli in S.T. No.181 of 1998 and 182 of 1998 arising out of Case Crime No.255 of 1997, Police Station Bachhrawan, District Rae Bareli whereby the appellant has been convicted for offence under Section 307 IPC and sentenced to undergo 7 years rigorous imprisonment along with fine of Rs.2,000/- and in default of making payment of fine, appellant would further undergo 2 years rigorous imprisonment.
3. Prosecution is that on 09.12.1997 at around 05:40 pm in Kasba Bachhrawan, P.S. Bachhrawan, District Rae Bareli, Station House Officer F.S. Jafri who was patrolling along with Constable Triyugi Narain Mishra and Constable Mahesh Singh on Bachhrawan chauraha came to know through a secret informer that appellant-Sushil Phari who is a dreaded robber and has committed several incidents of robbery in Allahabad, Lucknow and Kanpur is present on Bachhrawan bus stop to perform yet another heinous offence along with his companion and if acted promptly, he can be caught. Believing on this information, the police officials along with informer reached at Bachhrawan bus stop at 05:40 pm and on the signal of informer as soon as the police team proceeded forward, appellant-accused by exhorting the police team with intention to kill started firing on the Station House Officer. The police party ran to catch him then accused ran towards Lucknow by making indiscriminate firing in the Bachhrawan bazar. Station House Officer, F.S. Jafri received bullet injury on his face but without being disturbed, the police party at a distance of 100 yards caught the accused. From the accused one country made pistol of 12 bore and two empty cartridges of 12 bore were recovered which were

taken into possession by the police. Two live cartridges were also recovered from the right pocket of the jacket worn by the accused. Due to this incident, there was stampede in the Bachhrawan bazar and traffic got disturbed. The accused failed to show the license. He was arrested and fard of recovered articles i.e. country made pistol and cartridges was prepared on the spot i.e. Ex.ka-1. Chik F.I.R. (Ex.ka-5) was lodged on the same day at 19:15 hours and Case Crime No.255/1997, under Section 307 IPC was registered along with Case Crime No.256/1997, under Section 25 Arms Act which was mentioned in the general diary *Rapat* No.32 dated 09.12.1997 at 19:15 hours, the carbon copy is Ex.ka-6. The injured F.S. Jafri was examined at PHC Bachhrawan on 09.12.1997 at 09:00 pm. The following injury was found on his person:-

“Examined Sri F.S. Jafri aged 37 years S/o Late A.S. Jafri R/o Station Officer (S.O.) Bachhrawan, Rae Bareli at 09:00 pm on 09.12.1997 B/B Self

M.I.: A raiseel blackish brown mole on right side forehead 1.6 cm above right eyebrow.

Injuries:- (1) Lacerated wound 1.0 cm X .5 cm X muscle deep on left side forehead, 1.0 cm above left eye brow. Advised X-ray skull for presence of pellet.

(2) Abrasion .4 cm X .5 cm on the left side forehead, 2.5 cm above the injury No.1.

Opinion:- All the injuries are fresh, injury No.1 is kept under observation and advised x-ray cause of injury No.1 is K.U.O. and rest are caused by friction against hard and rough object.”

The injury report is Ex.ka-8. The injuries were fresh and were kept under observation and x-ray was advised. The Investigating Officer, Gaya Prasad Mishra conducted the investigation who after completing the formalities prepared the site plan Ex.ka-2 took the statements of the prosecution witnesses and filed the charge-sheet under Section 307 IPC, Ex.ka-3 and charge-sheet under Section 25 Arms Act Ex.ka-4. The sanction for prosecution was taken by the Magistrate under Section 39 Arms Act which is Ex.ka-7. The charges under Section 307 IPC were framed by the Additional Sessions Judge, Rae Bareli on 15.04.1998. Charges were read over to the accused who denied the charges and prayed for trial.

4. To prove the charges, the prosecution has produced PW-1, F.S. Jafri, the injured and the eye witness of the incident, PW-2, Constable Mahesh Singh who was also eye witness. PW-3, Ajay Singh has been produced as an independent witness of the recovery. PW-4, Gaya Prasad is the Investigating Officer. PW-5, Dr. Suresh

Kapoor, the then in-charge Medical Officer, PHC Bachhrawan who has proved the injury report.

5. The accused was examined under Section 313 Cr.P.C. who has denied the incident and his defence was that while he was coming from Allahabad to Lucknow via zeep, on the way he stopped at Bachhrawan and was having tea then the police has arrested him from the zeep and has also taken Rs.2920/-, cloths, pant etc.

6. PW-1 has supported the prosecution story. He stated that incident is of 09.12.1997 at that time he was posted as S.H.O. Bachhrawan. He further stated that he along with Constable Triyugi Narain Mishra and Constable Mahesh Singh on Bachhrawan chauraha came to know through a secret informer that appellant-Sushil Phari is at bus station with intention to commit a heinous offence. Believing on this information, he along with other police officials and informer reached at Bachhrawan bus stop at 05:40 pm and on the signal of informer as soon as the police team proceeded forward accused by exhorting the police team with intention to kill started firing on him. The police party ran to catch him then accused ran towards Lucknow by making indiscriminate firing in the Bachhrawan bazar. The police party at a distance of 100 yards caught the accused along with country made pistol and cartridges. Due to this incident, there was stampede in the Bachhrawan bazar and shopkeepers, after shutting down their shops, ran away. On asking the name and address of captured robber, he told his name Sushil Phari and on his personal search one country made pistol of 12 bore, two live cartridges and two empty cartridges were recovered which were taken into possession. He stated that due to fear no one from the public came there. He has proved the recovered 12 bore country made pistol and two live cartridges and two empty cartridges which are Ex.1, 2, 3, 4 and 5.

In the cross, he has stated that from the police station, the place of occurrence was 15-100 yards. He along with the police team went to the place of occurrence on foot. He stated that inside the bus station, 24 hours there were almost 200-300 persons were present and they come inside and go outside the bus station. He asked people to give statement then they refused. He does not remember that as to from which side the accused fired. He has stated in the fard that one person has fired upon him. He had shown the place from where the fire was made to the Investigating Officer. The fire shot came on his face and treatment of this injury was done at PHC Bachhrawan. He denied the suggestion that no injury was caused to him. He also denied the suggestion that he did not receive the bullet injury. He

stated that on the left side of his forehead, he received the injury. The accused was caught in front of the canabees shop. He does not know the name of the owner of the shop. He did not tell the name of the owner of the shop to the Investigating Officer. He further stated that the distance between the place where the accused was arrested and empty cartridges were found was 100 yards. He stated that after lodging the case, he got himself treated at PHC Bachhrawan and by that time the blood was oozing out from injury No.1. He denied the suggestion that the accused was caught from the zeeep and was put behind the bars.

7. PW-2, Constable Mahesh Singh, has repeated the prosecution story in his examination-in-chief.

In the cross, he has stated that he does not know at what time he departed from the police station however, he reached at the place of occurrence at 05:40 pm. The accused was intermittently firing and running. He stated that accused was caught in the main bazar. The Bachhrawan main bazar was 250-300 yards from the Bachhrawan crossing. He further stated that at the time of arrest, one live cartridge was recovered from the country made pistol. At the same place, the PW-1 has searched the accused and prepared the recovery memo. When the recovery memo was being prepared, two independent witnesses were present namely, Mohan and Ajay Singh however, they were not asked to sign on the recovery memo. He stated that he cannot assign the reason why their signatures were not taken on the recovery memo. He further stated that PW-1 has not asked these two persons to sign on the recovery memo. He stated that accused was standing near the bus stop on the side of the road then he says that he was sitting in the zeeep. He further stated that accused got down from the zeeep and ran away. He further said that from the place where the accused was arrested, there were several shops of biscuit and cloths etc. and people used to come and go. He stated that when the accused fired on the S.H.O. (PW-1) no one else was injured except the PW-1. The PW-1 was bleeding. He stated that although the people were asked to give statement but no one was ready to become the prosecution witness. He denied the suggestion that he was not present on the spot. He further denied the suggestion that he has falsely implicated the accused appellant.

8. PW-3, independent witness, Ajay Singh, who is also the witness of recovery memo has completely denied the prosecution story. He has been declared hostile. He has denied that accused has fired at PW-1. He further denied that the injured received the firearm injuries. He has also denied the suggestion that accused ran

towards Lucknow and was caught by the police. He also denied that no statement under Section 161 Cr.P.C. was taken by the Investigating Officer.

9. PW-4, S.I. Gaya Prasad Mishra, the Investigating Officer has stated that on 09.12.1997, the investigation was handed over to him and he has taken the statement of the accused on the same day. On 10.12.1997, he took the statement of PW-1 and investigated the spot as well as recorded the statement of *here se* witnesses Ram Kumar and Arvind. On 15.12.1997, he has recorded the statements of formal witnesses. On 24.12.1997 he recorded the statement of Ajay Singh and Mohan, the independent witnesses. He proved the site plan as well as the charge-sheet.

In the cross, he has stated that he does not remember the date on which the sanction for prosecution has been taken from the District Magistrate. He has not mentioned the same and the date in the case diary also. The place of occurrence was not shown by him near the Parchune shop rather near the canabees shop. He denied the suggestion that accused was caught in the middle of the bazar.

10. PW-5, Dr. Suresh Kumar Kapoor, who medically examined the injured on the date of the incident i.e. 09.12.1997 while he was posted as in-charge Medical Officer, PHC Bachhrawan, Rae Bareli. He has stated in the examination-in-chief that he cannot assign the reason of injury No.1. The other injury was simple and could have come from blunt object. He further stated that these injuries could have come in the night of 09.12.1997. They can come from any hard object or by the dispersion of pellet.

In the cross, he has stated that injury No.1 could have come from falling, it cannot be self inflicted. He further stated that he has not seen any X-ray report in regard to the injury neither any supplementary medical report has been filed by him. He has denied the suggestion that he has prepared the injury report under pressure of the S.H.O.

11. Learned counsel for the appellant submits that appellant has been falsely implicated in this case. The prosecution has not been able to prove its case beyond reasonable doubt. Ingredients of Section 307 IPC are missing. Appellant was caught from the zeeep. No such incident took place as alleged by the prosecution.

12. Learned A.G.A., on the other hand, has stated that testimony of the injured which has supported the prosecution case is duly corroborated by the testimony of PW-5, Dr. Suresh Kumar Kapoor. He submits that testimony of the injured is intact.

The prosecution has successfully proved that accused fired gun shot by a country made pistol to the injured and which came on his forehead.

13. Perused the record.

14. A perusal of the injury report shows that injury No.1 is a lacerated wound 1.0 cm x 0.5 cm x muscle deep on the left side of forehead. X-ray was advised. Injury No.2 is abrasion i.e. 0.4 cm x 0.5 cm on the left side of the forehead. The entire case of the prosecution banks upon the allegation that a gun shot was fired by the appellant which came on the injured on his forehead however, a perusal of the statement of PW-5 shows that he has very clearly said in his examination in chief where he has stated that it is not possible to tell the reason of injury No.1. The other injury was simple. He further stated that this injury can come from dispersion of a pellet or any other hard object.

In the cross, he has stated that injury No.1 can come by falling and it cannot be self inflicted. He further stated that he has not seen any X-ray report neither has filed any supplementary report. From the statement of PW-5, it is evident that the doctor who has examined the injured on the date of the incident at PHC Bachhrawan has expressed his inability to assign the cause for the injury No.1. PW-3 who is independent witness of the recovery has denied the prosecution case. Another independent witness of the recovery namely, Mohan has been withheld by the prosecution. Although these two have been said to be the independent witnesses of the recovery however, admitted case of the prosecution is that they have not signed the recovery memo. No reason has been given by the prosecution as to why these two witnesses were not asked to sign the recovery memo by the police party. Coupled with the fact that PW-3 has denied the incident at all and has been declared hostile although the empty cartridges and live cartridges as well as the country made pistol have been recovered however, no scientific evidence has been laid by the prosecution to show that injury No.1 is a firearm injury received by the injured. The entire case of the prosecution is that the accused-appellant fired at PW-1 and he sustained a firearm injury however, the very fact that injured PW-1 has sustained a firearm injury could not be proved by the prosecution beyond reasonable doubt. Coupled with the fact that independent witnesses of recovery have not signed the recovery memo. So much so that one of the witnesses i.e. Mohan has been withheld by the prosecution which calls for taking adverse interference against the prosecution.

15. Apart from this, as per the statement of PW-1, there are 200-300 persons present 24 hours at the bus stop. The place is highly crowded and fire was made by

the accused by a country made pistol of 12 bore from a distance of few paces still no one from the public or from the police party received any bullet injury. According to statement of PW-2, at least two fires were made by the accused but still no one got injured. Coupled with the fact that even after sustaining injury No.1, the PW-1 conducted the search of the accused, recovered the country made pistol etc. and after preparing the recovery memo they went to the police station along with accused and all this time PW-1 was bleeding and was examined at PHC at 09:00 pm by PW-5. The incident occurred at 05:40 pm thus, for more than three hours the injured was bleeding but still there is no blood stained cloths of PW-1 neither there is any recovery of blood stained soil. Although, the normal course should have been that first the injured would have taken the medical treatment and thereafter, he could have prepared the fard. This is not the case according to the statement of PW-2 when the police party reached to arrest the accused, he was found standing beside the road near bus station then he says that he was sitting in the zEEP. Both the statements are contradictory and do not inspire confidence. The recovery made by the Investigating Officer under Section 27 of the Evidence Act does not inspire confidence as although there were two independent witnesses of the recovery. None of them have signed on the recovery memo. Coupled with the fact that one witness Mohan has been withheld and other witness i.e. PW-3 has turned hostile and has denied the prosecution story at all. The prosecution story that accused has caused a firearm injury to the PW-1 also becomes doubtful in view of the statement of the doctor PW-5 who says that it is not possible for him to tell the cause of injury No.1 sustained by PW-1. Coupled with the fact that recovery memo does not bear the signatures of two independent witnesses and one independent witness has been withheld and one who has been produced as PW-3 has not supported the case of the prosecution.

16. Learned trial court has convicted the appellant without discussing the evidence of PW-5, the doctor, who has conducted the examination of the injured. The statement of PW-5 has not been discussed at all while giving the finding by the learned trial court and straight away the finding has been written that PW-1 has suffered a firearm injury on his forehead. There is nothing on the record to suggest that prosecution has successfully proved the fact that injury No.1 has been sustained by PW-1 by a firearm. Prosecution has failed to prove beyond reasonable doubt that injury No.1 is a firearm injury. Once the prosecution could not prove that injury No.1 is a firearm injury, it was not open for the learned court below to have convicted the appellant under Section 307 IPC. It is true that to sustain a conviction under Section 307 IPC, it is not required that a fatal injury capable of

causing death could have been inflicted. The court while convicting the accused under Section 307 IPC has to see irrespective of the result of the act of the accused, the act must have been done with the intention or the knowledge and under the circumstances mentioned under Section 307 IPC. The said Section 307 IPC reads as under:-

“307. Attempt to murder.—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder; shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.”

17. The first part of Section 307 IPC provides that an act should be done by the accused with such intention or knowledge and under such circumstances if he by that act caused death, he may not be guilty of murder. The second part provides that if hurt is caused in that process to a person by such act, the offender shall be punished either to life or such punishment as mentioned in the first part of the section.

18. The evidence adduced by the prosecution does not establish that the injury sustained by PW-1 was caused by a firearm or injury has been caused by the appellant-accused. Coupled with the lack of forensic evidence to prove that PW-1 has sustained any firearm injury however, the entire case of the prosecution is that appellant has caused firearm injury to the injured. The prosecution has failed to establish first that it was a firearm injury secondly that the injury has been caused by the appellant. Coupled with the lack of forensic evidence, this Court is not inclined to hold the conviction of the appellant under Section 307 IPC. The act on the part of the accused itself has not been proved by the prosecution and without recording any finding on the statement of PW-5, the trial court has straight way given the finding that PW-1 has received firearm injury which is erroneous and thus, the judgment rendered by the trial court is liable to be set aside.

19. In this case, the prosecution has failed to prove beyond reasonable doubt that injured sustained a firearm injury. Coupled with the fact that recovery memo becomes doubtful as in spite of the fact that there were two independent witnesses present in whose presence the recovery memo was prepared there were not even asked to sign the recovery memo and before the court, one independent witness PW-3 has denied the prosecution case and the recovery memo and the second independent witness has been withheld.

20. Coupled with the improbabilities of the prosecution case as discussed above, this Court is of the view that prosecution has utterly failed to prove that injured sustained any injury of firearm or the accused had the intent or the knowledge of causing death of PW-1. In fact, the entire incident appears to be false. There is no evidence at all adduced by the prosecution to establish that there were any act done by the accused or he has caused a gun shot injury to the injured neither the injury received by the PW-1 has been proved to be a firearm injury. The entire case of the prosecution hinges on the point that accused has fired from some distance by a 12 bore country made pistol upon the police party and one fire shot came on the forehead of the PW-1. The statement of the doctor makes the prosecution story doubtful. The recovery memo is also doubtful. PW-3 who is the independent witness has denied the prosecution story at all. Except the testimony of PW-1 and PW-2 which are highly improbable there is nothing on the record to show that PW-1 received firearm injury.

21. The Hon'ble Supreme Court in catena of judgments has interpreted Section 307 IPC and has held that necessary ingredients must be proved by the prosecution for convicting the accused under Section 307 IPC.

22. The Supreme Court in the case of State of *Madhya Pradesh vs. Imrat & Anr. reported in [(2008) 11 SCC 523]* has held as under:-

"16. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC."

23. In *Manoj Kumar Soni vs. The State of Madhya Pradesh (Criminal Appeal No.1030/2023)* and another connected matter has held as under:-

"25.....The statements of police witnesses would have been acceptable, had they supported the prosecution case, and if any other credible evidence were brought on record. While the recoveries made by the I.O. under Section 27, Evidence Act upon the disclosure statements by Manoj, Kallu and the other co-accused could be held to have led to discovery of facts and may be admissible, the same cannot be held to be credible in view of the other evidence available on record."

26. While property seizure memos could have been a reliable piece of evidence in support of Manoj's conviction, what has transpired is that the seizure witnesses turned hostile right from the word 'go'. The common version of all the seizure witnesses, i.e., PWs 5, 6, 11 and 16, was that they were made to sign the seizure memos on the insistence of the 'daroga' and that too, two of them had signed at the police station. There is, thus, no scope to rely on a part of the depositions of the said PWs 5, 6, 11 and 16. Viewed thus, the seizure loses credibility."

28. *The testimony of the seizure witnesses, we are inclined to the view, is the only thread in the present case that could tie together the loose garland, and without it, the very seizure of stolen property stands falsified. We cannot overlook the significance of the circumstance that all four independent seizure witnesses (PWs 5, 6, 11, and 16), who were allegedly present during the seizure/recovery of the stolen articles from Manoj's house, having turned hostile and not support the prosecution case, the standalone evidence of the I.O. on seizure cannot be deemed either conclusive or convincing; the recoveries made by him under Section 27, Evidence Act must, therefore, be rejected."*

24. In State of **Madhya Pradesh vs. Kanha alias Omprakash reported in [(2019) 3 SCC 605]** has held as under:-

"12. In Jage Ram v State of Haryana reported in [(2015) 11 SCC 366], this Court held that to establish the commission of an offence under Section 307, it is not essential that a fatal injury capable of causing death should have been inflicted:

"12. For the purpose of conviction under Section 307 IPC, the prosecution has to establish (i) the intention to commit murder; and (ii) the act done by the accused. The burden is on the prosecution that the accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under Section 307 IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given, etc."

13. The above judgments of this Court lead us to the conclusion that proof of grievous or life-threatening hurt is not a sine qua non for the offence under Section 307 of the Penal Code. The intention of the accused can be ascertained (2015) 11 SCC 366 from the actual injury, if any, as well as from surrounding circumstances. Among other things, the nature of the weapon used and the severity of the blows inflicted can be considered to infer intent."

25. In **Sumersinbh Umedsinh Rajput vs. State of Gujarat reported in [(2007) 13 SCC 83]** has held as under:-

"7. Dr. Deepak Kumar examined himself as PW-5. He in his evidence proved the medical report. In his deposition for all intent and purport, he conceded the deficiencies in the prosecution case vis-`-vis the report prepared by him, stating;

"It is true that I have written history in certificate, that history was recorded in Yaadi. If vest has hole then shirt worn on that should have hole on it or if Bushirt is torn then shirt also should have hole on it or Bushirt worn is found torn. It is true that looking at trouser. I say that one circle is made on it with pencil. That is not

torn with bullet. It is true that looking at the trouser I say that, it is not entry cut. It is true that if vest has hole then two holes should have found, one is entry and other exit hole. Otherwise, in case of scratch, vest is found in similar torn manner. It is true that I have not mentioned fire arm's marks. It is true that if any injury is caused with fire arm or bullet then the edge has burn mark. In present case no burn injury is found. It is true that if shooter fires from point blank range then black colour is found near wound. When I saw injury of patient, it did not have such black mark on that. Shirt had black mark. It is true that scratch mark can occur due to rubbing on rough substance."

10. According to PW-8, he came to know about the firing on hearing of sound of fire. He had immediately put his finger in the trigger of the revolver and caught the appellant from his wrist. If the finger of the complainant himself was on the trigger of the revolver, it is difficult to believe that the appellant was responsible for the act complained of. According to him, seizure took place at the place of occurrence but panch witnesses contradicted him as according to them, they were made to sign the seizure list only at the police station....."

14. Even assuming that PW-8 received a fire arm injury which in the facts and circumstances of the case does not appear to be plausible, having regard to the positive evidence of the prosecution as has been stated by PW-4 Neelabhai it seems certain that a scuffle had ensued. A case of Section 307 of the Indian Penal Code, therefore, has not been made out."

26. Thus, in peculiar facts of this case, this Court is of the opinion that prosecution has failed to prove its case beyond reasonable doubt. For the reasons aforesaid, the judgment and order dated 03.01.2000 passed by Special/Additional Sessions Judge, Rae Bareli in S.T. No.181 of 1998 and 182 of 1998 arising out of Case Crime No.255 of 1997, Police Station Bachhrawan, District Rae Bareli is set aside.

26. Appeal stands **allowed**. Bail bonds, if any, are discharged. Accused is set free.

Order Date :- 5.12.2023

Saurabh Yadav/-