

Sunil Kumar vs.state

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Court : Delhi

Decided On : Oct-31-2017

Appellant : Sunil Kumar

Respondent : State

Advocate for Def. : Ms. Radhika Kolluru

Advocate for Pet/Ap. : Ms. Geeta Luthra, Ms. Shivani Luthra, Mr. Altamish Ilyal Siddiqui

Judgement :

\$~ * + IN THE HIGH COURT OF DELHI AT NEW DELHI CRL. A. 193 of 2017
SUNIL KUMAR Appellant Through: Ms. Geeta Luthra, Sr. Advocate with Ms
Shivani Luthra and Mr Altamish Ilyal Siddiqui, Advocates STATE versus
.....Respondent Through: Ms. Radhika Kolluru, Additional Public Prosecutor for the
State CORAM: JUSTICE S. MURALIDHAR JUSTICE I. S. MEHTA

ORDER

3110.2017 % Dr. S. Muralidhar, J.:

1. This is an appeal filed by the accused, Sunil Kumar, against the judgment dated 28th September 2016 passed by the Additional Sessions Judge-3 (ASJ), South District, Saket Courts, New Delhi, convicting the Appellant under Section 302 of the Indian Penal Code, 1860 (IPC) and the order of sentence dated 17th October 2016 whereby the Appellant was sentenced to undergo imprisonment for life and

fine of Rs. 50,000/- and in default of payment fine, to undergo simple imprisonment for six months. Case of the prosecution 2. The story of the prosecution is that the Appellant was a constable with the Delhi Police. He was attached to the 7th Battalion at the Police Training School (PTS) at Malviya Nagar Police Lines. His colleagues were Constable Kalu Ram (PW-1), Constable Udham Singh (PW-5), Constable Himanshu (PW-8), Constable Sachin (PW-14) and Constable Dinesh Crl A193of 2017 Page 1 of 23 (deceased). They were part of the Rapid Interception Squad (RIS). The policemen assigned to the RIS would remain on duty for about three hours. There would be a change every three hours.

3. On the fateful day, i.e. 7th May 2012, the accused and the aforementioned constables were on CP (Reserve) duty for a period of 24 hours beginning 12 noon of 6th May 2012 and ending at 12 noon on 7th May 2012. They were provided accommodation on the third floor of Barrack No.4 on the North Side. The incident in which Constable Dinesh was killed by a bullet took place at the said accommodation. Four witnesses viz., PW-1, PW-5, PW-8 and PW-14 have spoken about the incident. Evidence of PW-1 4. Constable Kalu Ram (PW-1) stated in his examination-in-chief that on 7th May 2012 his duty hours between 9 am to 12 noon. At around 10.45 am, he went to his barrack on the third floor in the north side with his service self-loading rifle (SLR) and 30 rounds, out of which he had loaded five rounds in the SLR. The remaining 25 rounds were in his bandolier. He states that he had already kept the lunch in his barrack after collecting it from the mess.

5. PW-1 states that at around 10.45 am he picked up his lunch, went to the second portion of the barrack and sat on the cot of Constable Udham Singh (PW-5). He kept his service SLR by his side. Accused (Sunil Kumar) was sitting on the adjoining cot. PW-1 states that at that time, PW-8 (Constable Himanshu) and PW-14 (Constable Sachin) were also present in the barrack. PW-5 (Constable Udham Singh) was cleaning his box near the bathroom side just outside the barrack. Crl A193of 2017 Page 2 of 23

6. PW-1 stated that, in the meantime, Constable Dinesh, the deceased came from the bathroom and stood between the cot of Constable Sunil and his box. At the

time, suddenly Constable Sunil picked my service SLR gun from my side, and after cocking it, he aimed the gun towards the chest of Constable Dinesh. I cautioned him that the SLR gun was loaded and what was he doing. Constable Sunil however fired all of a sudden, and the bullet struck Constable Dinesh on the left side of his chest. Constable Dinesh fell down on the box of Constable Sunil. I immediately snatched back my SLR gun from Constable Sunil. Thereafter, I went to inform about the incident, to the Duty Officer on the ground floor.

7. In order to understand the relevant positions in the barrack of the accused and the deceased, it is necessary at this point to reproduce the site plan with its legend as under: Crl A193of 2017 Page 3 of 23

8. From the above plan, it can be seen that position A, which is the box on which Dinesh fell after receiving the gun shot, is immediately in front of the cot on which PW-1 Kalu Ram was sitting. The accused was sitting at position B on the cot adjacent to the one on which PW-1 was sitting. The position where deceased Dinesh was standing (F) was diagonally to the right of the accused, if the accused was sitting facing north. Dr. Sanjay Kumar (PW-24) who conducted the post-mortem, states that the single bullet that was fired pierced the upper left chest of Dinesh, and thereafter ejected from the back and finally hit an electric iron pipe at point G on the wall. The trajectory of the sole bullet is therefore established.

9. In his cross-examination, PW-1 states that the accused fired while sitting and he did not stand up. Importantly, he states that the accused was at a distance of 2- to 3 feet from me, on my right side. He states that I was facing south direction at that time. My food was in front of me, on the cot. He then states that Constable Dinesh came from my back side, from the bathroom, and at that time he was humming something. As soon as he came, Constable Sunil fired at him. I had kept my SLR near me, on my right hand side, on the cot. Constable Sunil was also sitting on my right hand side. Constable Dinesh was at a distance of about 5 feet from Constable Sunil. PW-1 also states that it is correct that bullet is not fired by merely cocking the SLR. The bullet will fire only after the trigger is pulled. However,, if the safety catch of SLR is on, then the bullet will not fire even after pulling the trigger. The safety catch of my gun was on. I had not stated in my

statement that the safety catch of my gun, was on. CrI A193of 2017 Page 4 of 23
10. Therefore, to break down the version of PW-1, he first states that he was sitting on the cot of PW-5. The accused was sitting in the adjacent cot. According to PW-1 he and the accused were facing each other, PW-1 facing south and the accused facing north. PW-1 states that the SLR was on the cot on which he was sitting on his right hand side. PW-1 states that Dinesh came and stood behind him. Unfortunately the site plan drawn up does not indicate the direction in which the accused and PW-1 were sitting.

11. The prosecution case rests essentially on the testimony of PW-1 as he is the only person, other than the accused, who was privy to what happened immediately prior to the firing. The other two persons in the barrack at that time i.e. PWs 8 and 14 were lying on their respective cots in the barrack at that time but observed the firing only when they heard the firing. Therefore, the only other version as to what happened immediately prior to the firing is that of the accused in his statement under Section 313 Cr PC, the relevant portion of which reads thus: Q.

46. Do you have anything else to say?. Ans. I am innocent and have been falsely implicated in this case. In fact, on that day, I had brought my meals and wanted to place my meals there. The SLR of Constable Kalu Ram was lying on my cot and I lifted the SLR in order to make place for my sitting for taking meals. Unfortunately, the trigger of the SLR was pressed by my finger and it is fired and hit Constable Dinesh. I did not know that it was loaded. Constable Kalu Ram was on duty from 9 am to 12 noon at Rapid Intervention Squad (RIS) duty and he was not supposed to present in the barrack. He was supposed to be on the ground floor. The SLR had been fired accidentally and I had no intention to fire upon Constable Dinesh or anybody else. I have been falsely implicated while Constable Kalu Ram was also suspended but this fact was concealed from the Court and I came to know of his CrI A193of 2017 Page 5 of 23 suspension only when PW Ombir appeared in the court where suspension order of Constable Kalu Ram was found mentioned in the record. I intend to produce the record of his suspension and DD No.14A, 7th Battalion PTS Malviya Nagar Mark X. 12. Therefore, we have the version of the accused who states that he merely lifted the SLR of PW-1, which was placed on the cot of the accused, in order to make place for his sitting for taking meals and

that unfortunately, the trigger of the self loading rifle was pressed by my finger and it fired and hit Constable Dinesh. The accused is very clear that he did not know the SLR was loaded. The accused does not say that he cocked the SLR, pointed it at Dinesh and then fired.

13. PW-1 is the most crucial witness for the prosecution for he is the only one who speaks about the accused having cocked the SLR after lifting it, pointing the SLR at Dinesh and then firing it. He is also the only one who speaks of having cautioned the accused that the SLR was loaded and asking him what he was doing. These actions of the accused as spoken to by PW-1 viz., first cocking the SLR, then pointing it at the deceased before pressing the trigger, and then pressing the trigger despite being told by PW-1 that the SLR was loaded reflected both the mens rea of the accused for the commission of the crime of murder as well as the knowledge that his action would in all probability caused the death of the person at whom he was firing. Therefore, these crucial actions attributed to the accused had to necessarily be proved by the prosecution beyond all reasonable doubt if the charge of murder as defined in Section 300 IPC had to be brought home to the accused. This, therefore, made it imperative that the evidence of PW-1 had to be carefully scrutinised as to its truthfulness and reliability. CrI A193 of 2017 Page 6 of 23 14. What the accused has suggested is that PW-1 was an interested witness since PW-1 had done something which he ought not to have viz., bringing a loaded SLR into the barrack and having left it on the cot of the accused in a cocked position without the safety catch being engaged. Further he was on duty till 12 noon on the ground floor and ought not to have come to the barrack at 10.45 am as claimed by him.

15. The evidence of DW1 Inspector Dhani Ram shows that PW-1 was not supposed to bring the SLR in the barrack at all in the first place. At the time when PW-1 deposed in the trial, i.e. 3rd May, 2013, in his examination in chief, he was under suspension pending completion of the disciplinary proceedings. DW-1 states that since PW-1 was found negligently mishandling his SLR with the result Constable Sunil had fired at Constable Dinesh, he was placed under suspension. Therefore, there was every reason for PW-1 to be anxious to absolve himself of any wanton neglect of his duties and of mishandling the weapon issued to him. If

he had merely brought the SLR to the barrack, there would be one level of breach. However, it would get aggravated if he had left on the cot a cocked SLR without the safety catch. That would be negligence of much higher order. It is quite possible that with a view to mitigating his dereliction of duty, PW1 attributed to the accused the act of actually cocking the SLR after lifting it and pressing the trigger despite being warned that the SLR was loaded. Law relating to interested witnesses 16. The evidence of an eye witness will become vulnerable if it is able to be CrI A193 of 2017 Page 7 of 23 shown not to be truthful or reliable. It can also become vulnerable if it does not receive corroboration from other eye witnesses. When it is, as in this case, an interested eye witness, the scrutiny is heightened.

17. In *Jayabalan v. UT of Pondicherry* (2010) 1 SCC199 the Supreme Court held as under: (SCC p. 213, paras 23-24) the court, while appreciating 23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency."

the evidence given accepting and 18. In *Raju v. State of Tamil Nadu* AIR 2013 SC983 the Supreme Court reviewed the case law and explained:

"The sum and substance is that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. However, this is only a rule of prudence and not one of law, as held in *Dalip Singh v. State of Punjab*, 1954 SCR145 and pithily reiterated in *Sarwan Singh v. State of Punjab* (1976) 4 SCC369 in the following words: The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without

corroboration. Crl A193of 2017 Page 8 of 23 Evidence of PWs 8 and 14 19. In light of the above legal position, the evidence of the two other crucial prosecution witnesses viz., PW-8 (Constable Himanshu) and PW-14 (Constable Sachin) are required to be examined. PW-8 states that he noticed PW-1 sitting on cot No.1 and taking his meal and on the next cot, the accused was sitting. The deceased Constable Dinesh was standing in front of him. PW-8 did not see the accused pick up the SLR, cock it and point it at Dinesh. Importantly he does not mention hearing the cocking of the SLR. PW-8 also does not state that he heard PW-1 cautioning the accused that the SLR was loaded and asking him what he was doing. PW-8 only says that Dinesh was standing in front of the accused and in the meantime, he heard noise of the bullet shot. PW-8 states that after Dinesh fell down on the iron box, PW-1 snatched his SLR from the hands of the accused. He crucially states that the accused also laid down on his cot and started to make noise.

20. In his cross-examination, PW-8 demonstrated by pulling the cocking handle from his left hand towards himself to show how the SLR was cocked. That portion of his testimony is relevant and reads as under: The witness has demonstrated after pulling the cocking handle from his left hand towards himself, and has stated that in this manner the gun is cocked. It will not be called loaded unless the rounds are there in the chamber of the gun. It is correct that the gun can be cocked, without there being any bullet in the gun. It is correct that no cocking is required in the case the bullet is already in the barrel and to fire that bullet, only trigger is to be pulled. It is correct that in case the safety catch is not in on position, and the trigger is pulled, the gun will fire, if the bullet is in the barrel. It is also correct that in case the safety catch is in on position, the gun will not fire even after pulling Crl A193of 2017 Page 9 of 23 the trigger. The process of cocking the gun is generally performed by left hand. Constable Kalu Ram was sitting on right side of the accused. 21. PW-8 fails to corroborate PW-1 on certain crucial aspects. PW-8 states: I did not hear the noise of the cocking of the SLR, before I heard the shot. It is correct that cocking the SLR, creates an audible clicking noise. Secondly he states: Constable Kalu Ram was facing towards North side, on which side the bathroom in the barrack was situated. Constable Sunil was also facing the same direction. This contradicts PW-1 who states that he was facing the south side. In other words, according to PW-1 he and the accused were facing each other while

sitting on adjacent cots, whereas PW-8 states that they were facing on the same direction. The latter appears more probable considering that PW-1 does not state he had to turn to see Dinesh standing behind him. Although PW-8 was examined sequentially after PW-1 the prosecutor does not appear to have any sought clarification or re- examination of this witness. Lastly, PW-8 does not mention about PW-1 cautioning the accused that the SLR was loaded and asking what he was doing. On this aspect, again the prosecutor does not appear to have sought any clarification from PW-8.

22. As already noted, the cocking of the SLR by the accused prior to pointing it and pressing the trigger despite knowing that the SLR was loaded was the key element of this case. If proved beyond reasonable doubt, it would reflect the state of mind of the accused as well as his knowledge of the consequences of his act. However, on this aspect there is no corroboration of PW-8 to the version of PW-1. Crl A193of 2017 Page 10 of 23 23. We then come to the next crucial witness PW-14. He too states that PW- 1 was sitting on the cot and eating food. The accused was sitting on the cot next to that on which POW-1 was sitting. He states that Dinesh was standing near the cot. His exact words are:

"All of a sudden, we heard bullet fire". He further states that Constable Sunil had an SLR in his hand and Constable Dinesh was bleeding from his chest and back. Constable Kalu Ram snatched the SLR from Constable Sunil. Therefore, even PW-14 did not hear the sound of cocking of the SLR. He too did not hear PW-1 caution the accused that the SLR was loaded. He too did not hear PW-1 ask the accused what he was doing. Considering the size of the barrack and that there were only five persons present, it is conceivable that if the accused had indeed cocked the SLR or if PW-1 had cautioned him that it was loaded, neither PW-8 nor PW- 14 would have heard it. PW-14 also did not see the accused pointing the SLR at Dinesh prior to the firing.

24. Even in the case of PW-14, no attempt has been made by the prosecution to get any clarification on the above crucial aspects on which he has failed to corroborate PW-1. This despite PW-14 admitting that it is correct that cocking SLR creates audible noise. I do not remember whether I had heard the noise of cocking

or not. However, he states that it is correct that even at the time of cocking, SLR can be snatched."

He states that there was no other person in that barrack at that time, except five of us. He also states that I had not seen the SLR on the cot, before I saw it in the hands of the accused. CrI A193of 2017 Page 11 of 23 25. It is submitted by Ms. Radhika Kolluru, the learned APP for the State that no suggestion was given by the defence to PW-1 in his cross-examination that the accused did not in fact cock the SLR before the trigger was pressed. This is not entirely correct. In his cross examination PW-1 states:

"It is wrong to suggest that the accused only pushed the SLR aside to make room to place his food on cot in front of him, and in the process, the SLR fired accidentally."

The word only in the above answer clearly shows that the version of the accused that all he did was to merely push the SLR aside and not to lift it, cock it and then point it at Dinesh, was put to PW-1. PW-1 neither truthful nor reliable 26. To summarise the reasons why PW-1 is neither a truthful nor a reliable witness: (i) PW-1 was an interested witness. The outcome of the trial and finding of guilt of the accused would have a bearing on the disciplinary proceedings faced by PW-1 for dereliction of duty. (ii) PW-1 has not been corroborated on the material aspects by PWs 8 and 14. Neither of them heard the sound of cocking of the SLR or PW-1 cautioning the accused that the SLR was loaded. (iii) PW-1 is not corroborated as regards the direction in which he was sitting on the cot. As already noticed, PW-8 states that PW-1 was facing in the same direction as the accused i.e., north whereas PW-1 states that he was facing south. No attempt has been made by the prosecution to explain this material discrepancy. CrI A193of 2017 Page 12 of 23 (iv) PW-1 made two improvements in his cross-examination. One was to say for the first time that the safety catch on the SLR was engaged. This was falsified by his failure to state that the accused disengaged the safety catch before cocking the SLR. The second improvement made was to suggest that there was a second bullet. This part of his testimony was disbelieved by the trial Court itself. Section 300 Fourthly IPC27 The main plank of the case of the prosecution is that the

offence committed by the accused fell within the definition of 'murder' under Section 300 IPC Fourthly which reads as under:

"300. Murder.-Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or- (Fourthly) -If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. Illustrations (a) to (c).... (d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual."

28. In order to prove the case against the Appellant for the offence of murder as defined in Section 300 IPC Fourthly and punishable under Section 302 CrP Act of 1973, the burden is on the prosecution to show that the Appellant knew that the act committed by him was so imminently dangerous that it would, in all probability, cause death or such bodily injuries as is likely to cause death. The second conditionality is that the act should be committed without any excuse for incurring the risk of causing death or such injuries. 29. Therefore, one of the essential conditions in attracting Section 300, Fourthly is the 'knowledge' of the accused that the act committed will in all probability cause death. The crucial element in illustration (d) is the fact that the gun used was 'loaded' viz., that the accused knew at the time of firing of the gun that it was loaded.

30. Arun Novalji More v. State of Maharashtra (2006) 12 SCC613 the Supreme Court explained:

13.The expression "the offender knows to be likely to cause death" occurring in clause Secondly of Section 300 IPC lays emphasis on knowledge. The dictionary meaning of the word 'knowledge' is the fact or condition of being cognizant, conscious or aware of something; to be assured or being acquainted with. In the context of criminal law the meaning of the word in Black's Law Dictionary is as under:

"An awareness or understanding of a fact or circumstances; a state of mind in which a person has no substantial doubt about the existence of a fact. It is necessary ... to distinguish between producing a result intentionally and producing it knowingly. Intention and knowledge commonly go together, for he who intends a result usually knows that it will follow, and he who knows the consequences of his act usually intends them. But there may be intention without knowledge, the consequence being desired but not foreknown as certain or even probable. Conversely, there may be knowledge without intention, the consequence being foreknown as the inevitable concomitant of that which is desired, but being itself an object of repugnance rather than desire, and therefore not intended."

In Blackstone's Criminal Practice the import of the word 'knowledge' has been described as under:

"'Knowledge' can be seen in many ways as playing the same role in relation to circumstances as intention plays in relation to consequences. One knows something if one is absolutely sure that it is so although, unlike intention, it is of no relevance whether one wants or desires the thing to be so. Since it is difficult ever to be absolutely certain of anything, it has to be accepted that a person who feels 'virtually certain' about something can equally be regarded as knowing it."

The Law Commission of United Kingdom in its 11th Report proposed the following test: is "The standard test of knowledge is Did the person whose conduct in issue either knows of the relevant circumstances or has no substantial doubt of their existence?."

31. In *Augustine Saldanha v. State of Karnataka* (2003) 10 SCC472 the Supreme Court held:

"19. Clause (c) of Section 299 and Clause (4) of Section 300 both require knowledge of the probability of the act causing death. Clause 4 of S. 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a

practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or bodily injury as aforesaid."

32. The question then arises as to whether, on the facts of the present case, when the accused lifted the SLR, he was aware that the very act of lifting the CrI A193of 2017 Page 15 of 23 SLR would in all probability would cause death.

33. At this stage it is necessary to refer to the literature on firearms in order to appreciate what an SLR is. In Forensic Science and Criminal Investigations and Trials, 4th Edition with a supplement of Dr. B.R. Sharma, in paragraphs 9.2.5.1 and 9.2.5.2, explains what an SLR is: 9.2.5.1 Self-loaders A firearm may be a self-loader (semi-automatic). When a self-loader firearm is fired, the fired cartridge case is ejected and a fresh cartridge from the magazine is loaded automatically. Thus, it is ready for a second fire. The process of extraction, ejection and reloading is repeated on second and subsequent fires till the magazine is exhausted. Pistols and modern service rifles belong to this case.

34. In the same volume in paragraph 10.1., under the title accidental death, the likelihood of a fire arm being prone to accident is discussed. A list of points is set out based on experience which might initiate the critical appraisal of the shooting case to decide whether it is an accident or not. The relevant portion of subparagraphs 11 and 12, thereunder, reads as under: 11. One of the most important causes of the accidents is the defective trigger pull of a firearm. The trigger pull cannot be made very heavy because a heavy pull affects the aim. It cannot be made very light because a light pull tends to cause accidents. The trigger may get pressed accidentally and it goes off. The energy required for the pull may come from some obstruction, jerk or fall. The firearm manufacturers, therefore, take great care to have proper trigger pulls in their firearms. They also protect the triggers with trigger guards.

12. Another important cause of accidents, is the negligence about the safety devices. Frequently, a safety device is in the form of a lever. It obstructs the fall of the hammer on the firing pin, hidden or visible. CrI A193of 2017 Page 16 of 23 The

shooter neglects to fix the safety device in the safe position when the weapon is not in use, due to negligence. The trigger gets pressed at some stage and the firearm goes off accidentally. Ordinarily, the firearm manufacturers do try to introduce some amount of safety margin in all the firearms, they manufacture. Even in the muzzle loading firearms a half cock position is introduced so that there is no accident while cocking the hammer. In the half cock position, even if the trigger is pressed, the firearm does not go off. In firearms with hammer, the cocking process acts as a safety measure. The firearm does not go off till the hammer is cocked. But quite a few accidents take place because the hammer is left cocked in a loaded firearm negligently, even when it is not to be used soon. The gun gets discharged when either the trigger is pressed or pulled accidentally or its gets jerked violently. The children not knowing that the firearm is loaded may cause accidents while playing with loaded firearms. 35. It is, therefore, clear that in an SLR, the cocking process acts as a safety measure. The firearm does not fire till the hammer is cocked. In other words, one cannot straightway pick up an SLR and shoot another person. It is a two-step process. Where there is a safety catch, it might become a three-step process. Assuming that the safety catch in the present case was in place, as was suggested by PW-1 in his cross examination, three steps would be necessary before the SLR could be fired. In the first step, the safety catch has to be disabled. The second step is the cocking of the SLR by using the left hand to pull the handle towards oneself. The third stage is that the actual firing of the gun by pressing the trigger Analysis and reasons 36. At this point, it is necessary to notice that as far as the SLR in question CrI A193of 2017 Page 17 of 23 was concerned, it would not be possible for the accused, by merely looking at the SLR, to discern whether it had been cocked or not. This is because after the cocking of an SLR, since it is controlled by a spring, the lever that is pulled goes back to the original position. In other words, A person picking up an SLR that is already cocked, without being told that it is cocked, runs the risk of the SLR accidentally going off when lifted with the finger on or near the trigger. If the SLR is not cocked and the person attempts to fire by pulling the trigger, it would simply not engage. This is one way of finding if the SLR is in fact cocked. In a second scenario, once an SLR is cocked and the person again tries to cock the SLR, the existing bullet in the chamber would get dislodged and fall off since the

trigger has not been pressed. That would be the other way of finding out if, in fact, the SLR had been cocked.

37. The long and short of this discussion is that, by visual inspection, it is not possible for a person to know if an SLR is already cocked or not. It is possible to put the safety catch on after cocking the SLR. This precaution will prevent an accidental pressing of the trigger. However, in the present case, it is obvious that there was no safety catch in place when the rifle was placed on the cot. Even PW-1 does not say during his examination-in-chief that the safety catch was on. He does not at any point of time suggested that the accused in fact disengaged the safety catch before cocking the rifle. It is, therefore, of significance that the SLR that was lifted by the accused did not, at that point in time, have any safety catch.

38. Why is this so crucial to this case?. As already noticed, it is only if the accused is shown to have actually cocked the rifle can knowledge of the CrI A193of 2017 Page 18 of 23 subsequent firing by him being likely to cause death in terms of Section 300 Clause Fourthly be attributed to him. However, the accused claimed that he did not know that the SLR was already in a cocked position, and that the mere lifting of the SLR by him would in all probability cause the death.

39. The evidence of PW1, PW8 and PW14 when read collectively and carefully leads to the unmistakable conclusion that it is consistent with the version put forth by the accused viz., that without knowing that the SLR was already cocked, he lifted it SLR and his finger accidentally pressed the trigger in that process. The existence in the present case of the ingredients of Section 300 Fourthly have, therefore, not been proved by the prosecution beyond all reasonable doubt.

40. The conduct of the accused, immediately after the firing, is an important aspect of the matter, considering that in the prosecution story no attempt is made to reveal what prompted the firing in the first place if at all it was pre meditated. PW-8 adverts to this. He states that immediately after the firing, the accused himself fell on his own bed in a shocked state. This is totally inconsistent with any theory of pre-mediated murder by the accused. The further conduct of the accused in not attempting to run away also explains the perhaps the mental state in which he was, having caused an accidental death. The entire evidence of the prosecution is

consistent with the theory of an accidental death and not the one of a pre-mediated murder as defined under Section 300 Fourthly IPC.

41. In sum and substance, the prosecution has miserably failed to prove that Crl A193of 2017 Page 19 of 23 the accused committed the act as described by PW-1 or that he committed it with the knowledge that it would in all probability cause the death of Dinesh. The trial Court errs 42. How has the trial Court approached the issue?. A perusal of the impugned judgment shows that the conclusion was based on the premise that none of the material prosecution witnesses who were police officials and cannot be expected to be biased against the accused have deposed that Constable Kalu Ram has put a self-loaded gun on the cot of Constable Sunil. This reasoning is strange since none of the witnesses other than PW- 1 even noticed where the SLR was prior to the firing. There were only two witnesses other than PW-1 and if they are entirely believed, they do not corroborate PW-1 on the material particulars, as noticed hereinbefore.

43. The Trial Court noticed the evidence of PW-31, Inspector Arvind Kumar who admitted in his cross examination that if a police official is on a Rapid Interaction Squad (RIS) duty, he has to keep his revolver loaded, if the said police official goes to his barrack, he cannot keep his revolver loaded. If that would be the position then in the absence of either PW-8 or PW-14 hearing the sound of cocking of the SLR by the accused, the only conclusion possible was that prosecution has failed to prove that the SLR was not already in a cocked position when it was kept on the cot. The trial Court has dwelt on the answer given under Section 313 of the Cr.P.C. by the accused to the question No.14 concerning the deposition of PW-5. PW-5 stated was that when he heard the noise of the bullet fired, he immediately ran into the Crl A193of 2017 Page 20 of 23 barrack and saw that Sunil had the SLR in his hand and it was pointed towards Constable Dinesh. From the affirmative answer of the accused to the above question, the trial Court concluded that an admission was made by the accused about PW5 having seen him having the SLR which was pointed towards Constable Dinesh and that these are vital admissions on the part of accused which proved his involvement in the crime. 44. Unfortunately, this is where the Trial Court appears to have misdirected itself. The fact that PW5 did rush into the room is not denied by anyone. The

accused, nowhere admitted was that he actually cocked the SLR, aimed at Dinesh and then pulled the trigger.

45. The Court is also unable to agree with the conclusion of the Trial Court that the negligent mishandling the said loading rifle by (the accused) caused death of Constable Dinesh deceased. It is not understood on what basis the Trial Court could have reached the above conclusion. It appears to have completely believed PW1 and concluded that the act of the accused in lifting the SLR from the cot of PW1 cocking it and firing it towards Constable Dinesh was the direct and sole cause of death. As already pointed out, this is the crucial aspect of accused cocking the rifle has not been proved by the prosecution beyond all reasonable doubt. Apart from the solitary version in this regard of PW1, there is no support from PW8 or PW14. Other offences not made out 46. If the offence is not under Section 300 Fourthly then could it be under CrI A193 of 2017 Page 21 of 23 Section 304 IPC i.e. culpable homicide not amounting to murder?. Having carefully examined the definition of culpable homicide not amounting to murder as occurring in Section 300 IPC, the Court finds that none of those situations stand attracted in the present case. It was not even the case of the prosecution, as an alternative, that if it was unable to prove the offence of murder punishable under Section 302 IPC, the accused could still be punished for the offence of culpable homicide not amounting to murder.

47. It was then suggested by the learned APP for the State that Section 304A IPC could be attracted, viz., causing death by negligence under Section 304 A IPC which reads as under: 304A. Causing death by negligence.-Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. 48. As explained in *Alister Anthony Pereira v. State of Maharashtra* (2012) 2 SCC648 the three things which are required to be proved for an offence under Section 304-A are: (1) death of human being; (2) the accused caused the death; and (3) the death was caused by the doing of a rash or negligent act, though it did not amount to culpable homicide of either description.

49. With the prosecution being unable to prove that the accused knew that the SLR was loaded and already in a cocked position, the accused cannot be said to have known that the mere lifting of the SLR would in all probability CrI A193of 2017 Page 22 of 23 cause death. That act of lifting the SLR cannot be said to be rash or negligent if the accused did not in fact know that it was loaded and cocked. On the other hand, what stands probabalized is the version of the accused that he merely moved the SLR and in that process accidentally pressed the trigger without knowing that the revolver was already loaded and cocked. Therefore, the said act of merely moving the SLR could hardly be said rash and negligent in the circumstances. The Court is, therefore, satisfied that the prosecution has failed to prove beyond reasonable doubt that the accused committed an offence under Section 304 A IPC. Conclusion 50. For the aforesaid reasons, the Appellant Sunil is acquitted of the offence under Section 302 IPC. The impugned judgment dated 28th September, 2016 and the Order on Sentence dated 17th October, 2016 are hereby set aside. The Appellant shall be set at liberty forthwith, unless required in any other case. The accused will nevertheless under Section 437A Cr PC furnish a personal bond in the sum of Rs. 10 ,000/- with one surety in the like amount to the satisfaction of the learned Trial Court to satisfy the requirement of Section 437 A Cr.PC.

51. The appeal is accordingly allowed but, in the circumstances, with no orders as to costs. OCTOBER31 2017 rm/rd S. MURALIDHAR, J.

I.S. MEHTA, J.

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