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Court : Delhi

Decided On : Jan-12-1982

Reported in : 21(1982)DLT256; 1982(3)DRJ258

Judge : J.D. Jain, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 34; Arms Act, 1959 - Sections 27

Appeal No. : Criminal Appeal No. 29 of 1981

Appellant : Narain

Respondent : State

Advocate for Pet/Ap. : R.P. Kathuria and; H.C. Gulati, Advs

Judgement :

J.D. Jain, J.

(1) The appellants in both the above mentioned appeals have been convicted of offences under section 307/34, Indian Penal Code as also under section 27 of the Arms Act by an Additional Sessions Judge, Delhi vide judgment dated 12th February, 1981. They have been sentenced to rigorous imprisonment for four years each on the first count and rigorous imprisonment for three years on the second count. Feeling aggrieved they have prefarred separate appeals against their conviction and sentence. Since common questions of law and fact are

involved, this judgment will dispose of both the connected appeals.

(2) The prosecution case succinctly is that on 21st March, 1980, S.I. Mehar Singh, Po ice Post (Railway), Shahdara, was on patrol Along with Head Constable Rajpal Singh and Constable Baru Singh. At about 8.10 A.M. they happened to be at platform No. 2, Railway Station. Shahdara when Janta Expresss came from Howrah side and halted at that platform. A person alighted form the train and imparted secret information to S.I. Mehar Singh that there were four persons in compartment No. 5683 who were having arms and ammunition for which they had no license. That person pointed out towards those persons when they got down from the compartment. The police party moved towards those persons but at the sight of police they took to their heels. The police party chased them through the railway lines. After they had covered a distance of about 3/4 furlongs Narayan-appellant asked his companion Krishan Lal to fire at the police party as they were about to catch hold of him. Thereupon, Krishan Lal tired at the police party from a country-made pistol but in order to save themselves members of the police party lay down in a pit. Thereafter, they overpowered the appellant; S.I. Mehar Singh apprehended Krishan Lal while Head Constable Rajpal Singh and Constable Baru Ram apprehended Narayan, appellants. Their other two companions, however, managed to escape. Kishan Lal was 'holding revolver Ex. Pi in his right hand at that time. The same had an empty cartridge Ex. P2 therein. Both these articles were seized and taken to possession by the police. Narayan was carrying a thaila which on search yielded revolver Ex. P3 and four live cartridges Ex.P4 to P7. After preparing sketches of the arms and ammunition recovered from the appellants, S.I. Mehar Singh sent two separate rukkas Ex. PW2/A and PW2/G for registration of cases, one under Section 307, Indian Penal Code and the other under Section 27 of the Arms Act. The arms and ammunitions recovered from the appellants were later on sent to Central Forensic Science Laboratory for Chemical examination and on receipt of their report Ex. PW5/D and completion of other formalities, both the appell- ants were challaned.

(3) Head Constable Rajpal Singh, PW1 .Constable Baru Singh, PW4 and S.I. Mehar Singh, PW5 are the only eye witnesses to the occurrence. All of them have deposed to the foregoing facts. I have gone through their depositions and I find

that they are fairly consistent and uniform, their being virtually no discrepancy worth the name.

(4) The learned counsel for the appellant has, however, canvassed with some fervour that implicit faith should not be pinned in the testimony of police officials alone in the absence of any corroboration by any indepen- dent witness. It is urged that the incident took place in the close vicinity of a railway station and near the godown and, thereforee, it was not at all difficult for the investigating officer to associate some members of the public to witness the recovery of incriminating arms and ammunition. However, the law is now well-settled that the evidence of police officials cannot be viewed with suspicion merely because they are interested in the success of their case and the same has to be appraised and evaluated having regard to all the circumstances of the case. In State of Kerala v.M.M.Mathewand another, : 1978 CriLJ1690 , the Supreme Court made the following observations :

'THE courts of law have to judge the evidence before them by applying the well recognised test of basic human probabilities. The evidence of the investigating officers cannot be branded as highly interested on ground that they want that the accused are convicted. Such a presumption runs counter to the well recognised. principle that prima facie public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case.

(5) In the instant case it would appear from the evidence that the accused persons were trying to flee in between the railway lines and they had to be chased for about 3 or 4 furlongs by the police party before they could be over-powered and apprehended. Evidently, there was hardly any occasion or even time at the disposal of the police party to associate members of the public as the chasing of the accused persons who had taken to heels at the sight of police party could not brook delay. In other words, it was not feasible to join members of the public in the chase. As for the recovery of the incriminating arms and ammunition, the same was effected in between the railway lines and all the police officials had stated that

they did not see any public witness nearby at that time. Even otherwise the peesence of a public witness is required if at all at the time of the actual recovery and not for attesting recovery memos prepared subsequent thereto. If no member of the public was present when the accused were apprehended and the arms and ammunition seized from their possession, there was hardly any necessity for calling members of the public thereafter. Hence, having regard to the peculiar situation and facts of the instant case the Explanationn furnished by the police officials is quite reasonable and worthy of credence.

(6) The learned counsel for the appellant then contended that to sustain a conviction under Section 307, Indian Penal Code, it must be proved that the act was done with such means read as would have constituted the act of murder if death had occurred. In other words, in an attempt to commit murder all the elements of murder must exist except, of course, the fact of death. There can hardly be any quarrel wiih this legal proposition so far as it goes. However, the intention or knowledge envisaged in Section 307 has to be gathered from all the surrounding circumstances. All the three police witnesses have stated categorically that the shot was fired at the police party. Further, during cross examination it was explained by S.I. Mehar Singh that the distance between them and the accused was about 2 or 3 feet when Kishan Lal, accused, fired at them. Under the circumstances, Kishan Lal can be well attributed with the knowledge that the shot fired by him may hit and even kill any police official even if intention to kill or to cause such bodily injury which may result in death or any of the police officials may not have been there. It may be that the shot was fired with a view to scare away the police officials who were chasing the accused but having regard to the close range from which the shot was fired and that it was aimed at the police party, the contention raised by learned counsel for the appellants loses all force. Sk. Mansuri Nizamuddin v. The State, : AIR1955 Pat330 and Hazard Sing and others v. State of Punjab, (1971) 3 Sgr 674, on which reliance has been placed by learned counsel for the appellants are distinguishable on facts. In the former case the accused had fired shots when the distance between him and the villagers was about a hund- red yards. So, on facts it was held that the accused was shooting at random for the purpose of frightening his pursuers and would be captors and it was not possible to hold that he had the means rea, i.e., he had infended to cause

death or knew that, in the circumstances, his act of firing was going to cause death to any of the villagers. In the second case, shots were fired in complete darkness when it was not possible for any member of police party to see the direction in which they were fired or the aim which was taken by the accused persons. The Supreme Court, thereforee, observed that it was not possible to say from the evidence that the accused had fired the shots in the direction of the police party or at them and the possibility that the shots were fired in the air could not be excluded. Surely, such is not the situation in the instant case. Hence, this argument too is of no avail to the appellants.

(7) The learned counsel for the appellant then invited my attention to the F.I.R. which was looged by none other than S.I. Mehar Singh himself to point out that the name of Narain-appellant as the person exhorting Kishan Lal to fire at the police party was not mentioned. Even the words of actual exhortation were not given in the F.I.R. Thus the argument advanced is that exhortation has been falsely imputed to Narain during the course of trial because the other two companions of the appellant had managed to escape and the exhortation could be conveniently ascribed to Narain. This argument, to my mind, is not without considerable force. All that was stated in the F.I.R. was that finding that the police party was close on heels of one of of their companions and there was every likelihood of his being apprehended and on his exhortation one of them took a pistol out of his thaila and fired at the police party in order to rescue him from being caught by the police. It is also significant to note that while there is a mention in the first information about Kishan Lal holding the pistol containing the empty cartridge in his hand as the person who had fired at the police, there is no such allusion with regard to the alleged exhortation. As observed by the Supreme Court in Jainul Haque v. State of Bihar, : 1974 CriLJ143 :

'THE evidence of exhortation is, in the very nature of things, a weak piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant by attributing lo that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant.'

(8) Applying this criterion to the facts of the instant case the prosecution version about Narain exhorting his co-accused Kishan Lat to fire at the police becomes highly doubtful and he is entitled to benefit thereof. It is equally doubtful that in the absence of any actual participation in the commission of the crime Narayan appellant can be convicted of offence under Section 307 by invoking the pninciple of constructive liability as incorporated in Section 34 of the Indian Penal Code. The said Section contemplates the doing of an act by several persons as principals and not as principal and agent. In other words, the role of the accused as envisaged in this Section is of a principal of offender and not of an abettor. It is a different thing that under the Penal Code abetment pure and simple is also punishable but that is on a different basis and by virtue of other provisions of the Code and not as a result of the operation of Section 34, participation in the crime being an essential condition for a person's liability under this Section. The learned Additional Sessions Judge seem? to have overlooked this aspect of the case. The question would, thereforee, arise whether the abetment on the part of appellant Narayan, assuming that he did exhort Kishan Lal to fire, was with the intention to kill the police party or any member thereof or was it with a view to frighten away the police party. In the absence of any clear evidence on the record Narayan-appellant is entitled to benefit of doubt on this score also.

(9) Lastly, the learned counsel for the appellant urged that the case of Narayan would, at best, fall under Section 25 of the Arms Act in as much as he did not use the arms and ammunition found in his possession for any unlawful purpose. In this context, it is also urged that the pistol recovered from him was not in working condition as found by the Ballistic Expert and in the absence of any evidence that it could be made serviceable after some repair it cannot be termed an arm within the meaning of the Arms Act. No doubt, report of the Ballistic Expert shows that the pistol recovered from Narayan was not in working order in its then condition but at the same time he has given the opinion that it is a fire arm as defined in the Arms Act. In Queen Express v. Jayarami Reddi, Ilr, 21 Mad 360, the question referred to a full bench of that High Court was whether the revolver which was of good make but the spring of trigger thereof was broken and as such it was not serviceable at the time it was found in the possession of the accused was an arm or not. It was also found that at the cost of a few rupees it could have been

repaired and rendered serviceable. On these facts the Full Bench held that:

'WE think there is no doubt that the revolver in the case is a fire-arm within the meaning of the Act. The question is not so much whether the particular weapon is serviceable as a fire-arm, but whether it has lost its specific character and has so ceased to be a fire-arm.'

(10) This authority was followed by the Allahabad High Court in The State v. Mohammad Ali, : AIR1955 All700 . However, their Lordships amplified the position further as below :

'IT is true that a weapon does not cease to be a fire-arm if it has not lost its specific character but the onus of proving that a weapon has not lost its specific character is upon the prosecution. Where doubts are entertained about it, it is necessary for the prosecution to satisfy the court that the weapon still possesses its specific character.'

(11) I am in respectful agreement with this view. Unfortunately for the prosecution there is no iota of evidence in the instant case that the pistol recovered from the possession of Narain could be rendered serviceable by effecting some repairs. In the absence of any such evidence it is difficult to draw a presumption that the pistol in question could be put in working condition by repairs or otherwise. Thus it did not satisfy the definition of firearm at the relevant time. That apart the said pistol not being in a working order it cannot be readily assumed without anything more that Narain was carrying the same with intent to use it for an unlawful purpose. Mere possession of four live cartridges) which were no doubt live, to would not warrant such an inference. Hence, his conviction under Section 27 of the Arms Act cannot be sustained and must be converted into one under Section 25 of the Arms Act. The position of Kishan Lal appellant, however, is entirely different inasmuch as he was not only found in possession of the pistol which was loaded with a cartridge but he actually fired it for an unlawful purpose. The Ballistic Expert has found that 12 bore cartridge case allegedly recovered from the pistol in his possession could have been fired from that pistol although a definite linking cannot be established for want of sufficient marks on the cartridge case. Thus, the Expert's opinion too lends support rather than not to the prosecution case.

(12) To sum up, thereforee, the conviction of Kishan Lal-appellant on both the counts viz. for offences under Section 307, Indian Penal Code and Section 27, Arms Act, is maintained. However, having regard to the fact that the shot fired by him did not actually hit any member of the police party, which is a mitigating circumstance, his sentence is reduced to rigorous imprisonment for three years on the first count. The sentence awarded by the trial court on the second count, however, is confirmed.

(13) As regards Narayan-appellant, his appeal succeeds in part, in that his conviction as well as sentence for offence under section 307/34. Indian Penal Code, is set aside. Further his conviction under the Arms Act is converted from one under Section 27 to that under Section 25 there of and he is sentenced to rigorous imprisonment for one year for the same.

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