

(2006) 07 P&H CK 0230

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal No. 15-DB of 2005

Ranbir @ Fauji and another

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: July 11, 2006**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 148, 149, 353

Citation: (2007) 1 RCR(Criminal) 339**Hon'ble Judges:** Amar Dutt, J; A.N. Jindal, J**Bench:** Division Bench

Advocate: Gorakh Nath and Mr. Rahul Vats, in Cr. Appeal No. 2414-SB of 2004 Mr. Surender Saini, in Cr. Appeal No. 116-SB of 2005 Mr. Kartar Singh Malik-I, in Cr. Appeal No. 76-SB of 2005 None, for the Appellant; B.S. Rana, D.A.G. Haryana, for the Respondent

Final Decision: Dismissed

Judgement

A.N. Jindal, J.

This judgment shall dispose of four Criminal Appeals No. 15-DB of 2005, 2414-SB of 2004, 116-SB of 2005 and 76-SB of 2005 having arisen out of the same judgment dated 6/9.11.2004 passed by Addl. Sessions Judge, Rohtak.

2. The accused appellants Ranbir @ Fauji son of Zile Singh, Balkar @ Kaku @ Tau son of Jit Singh, Sandeep son of Ranbir Singh, Naveen son of Rattan Singh and Ishwar Singh son of Ram Gopal faced trial under Sections 148, 149, 186, 353, 307, 307, 506 of the Indian Penal Code and 25 of the Arms Act and were sentenced as under :-

Ranbir @ Fauji was sentenced to RI for life and fine of Rs. 10,000/-, in case of default of payment of fine to further undergo RI for a period of three years for offence u/s 307 read with Section 409 IPC. He was further sentenced to RI for a period of one year and a fine of Rs. 1,000/-, in case of default of payment of fine to further undergo RI for a period of two months for offence u/s 353 read with Section 149 IPC. He was further sentenced for a period of two years and a fine of Rs. 2,000/- in

case of default of payment of fine to further undergo RI for a period of four months for offence under Sections 148 and 149 IPC. He was further sentenced to undergo RI for a period of two years and a fine of Rs. 2,000/-, in case of default of payment of fine to further undergo RI for a period of four months for offence punishable u/s 25 of the Arms Act.

The accused Balkar, Sandeep, Naveen and Ishwar were sentenced to RI for ten years and a fine of Rs. 5,000/- each, in case of default of payment of fine to further undergo RI for period of five months for offence u/s 307 read with Section 149 IPC. They were further sentenced to RI for a period of one year and a fine of Rs. 1,000/- each, in case of default in payment of fine to further undergo RI for a period of two months for offence under Sections 353 read with Section 149 IPC. They were further sentenced to RI for a period of two years and a fine of Rs. 2,000/- each, in case of default of payment of fine to further undergo RI for a period of four months for offence under Sections 148 and 149 IPC. All other accused persons except Ishwar were also sentenced to RI for a period of two years and a fine of Rs. 2,000.- each, in default of payment of fine to further undergo RI for a period of four months for offence u/s 25 of the Arms Act. All the sentences were ordered to run concurrently.

3. This case relates to cross firing between the accused and the police party in which except a passerby namely, Shamsher Singh, neither any accused nor any person of the police party, was injured.

4. On 19.9.2003, case was registered against the accused persons at the instance of ASI Ashok Kumar who in Ruqa Exhibit PJ stated that on 19.9.2003 at 7.30/8.00 p.m. when he along with ASI Kulbir Singh PW-8, HC Himmat Singh, EHC Raghbir Singh and Constables Azad Singh, Jai Pal and Jagbir Singh were present in their Jeep No. HR 12C/3721 near village Basantpur turning. Police party was armed with revolvers whereas Const. Jai Pal was having search light and Const. Azad Singh was having carbine with him. In the meantime, the accused came in an Indica Car bearing No. HR/26Q/7002 from the side of village Basantpur. On seeing the car, the police party signalled it to stop, but instead of stopping it, the accused took a U turn. Resultantly, the car reached at cement concrete squares, lying at the spot and stopped. When he (ASI Ashok Kumar) with the help of the police party tried to apprehend the occupants, then the accused started firing towards them. Police party took the positions and responded to the fire which lasted for 15 minutes. During the firing, two boys who were later on identified as Rajesh and Ishwar managed to escape taking undue benefit of the darkness. While escaping, they continued firing. Resultantly, tractor driver Shamsher Singh PW-7 suffered injuries on his eyes. However, accused Ranbir @ Fauji, Balkar, Naveen and Sandeep were apprehended along with their weapons of offence. They disclosed their identity accordingly. They also disclosed about the names of the absconders as Ishwar and Rajesh.

5. After apprehending the accused, their personal search was conducted and following recoveries were effected :-

(i) Ranbir @ Fauji was found in possession of loaded Mouser (Exhibit P-13) of 9 mm containing seven live cartridges (Exhibit P-14 to P-21) in its magazine and one pistol (Exhibit P-22) of 315 bore along with five cartridges of 9 mm bore. Rough sketches (Exhibit PQ/1) of the recovered mouser and (Exhibit PQ/2) of the recovered country made pistol were prepared and were taken into possession vide recovery memo (Exhibit PQ).

(ii) Accused Balkar Singh alias Tau was found in possession of Mouser (Exhibit P-26) of 9 mm with six cartridges (Exhibits P-28 to P-33) in its magazine and country made pistol (Exhibits P-27) of 315 bore with three live cartridges of the same bore (Exhibit P-34 to P-36). After preparing the rough sketch (Exhibit PR/1) of the Mouser and (Exhibit PR/2) of the country made pistol, the same were taken into possession vide recovery memo (Exhibit PR).

(iii) Sandeep accused was found in possession of country made pistol (Exhibit P-37) of 12 bore along with nine live cartridges of the same bore (Exhibit P- 38 to P-43) and also another country made pistol (Exhibit P-44) of 315 bore along with four live cartridges of the same bore. After preparing sketches (Exhibit PS/1 and PS/2) of the recovered weapons, the same were taken into possession vide recovery memo (Exhibit PS).

(iv) Naveen accused was found in possession of single barrel gun (Exhibit P- 46) of .12 bore and 15 live cartridges of the same bore (Exhibits P-47 to P- 61). After preparing sketch PT/1, the gun was taken into possession vide recovery memo Exhibit PT.

6. All the aforesaid recoveries were attested by ASI Kulbir Singh PW-8, Constable Azad Singh and ASI Ashok Kumar PW-10. ASI Ashok Kumar further stated that about 30-32 shots were fired by the police party and 42 to 42 shots were fired by the accused persons. However, only 14 cartridges were recovered from the spot which were taken into possession by him vide recovery memo Exhibit PV. The car of the accused was also taken possession vide recovery memo Exhibit PU. On receipt the Ruqa Exhibit PJ, which was sent through HC Himmat Singh, HC Satbir Singh recorded the FIR PJ/1. Special report reached the Illaqa Magistrate at about 5.15 a.m. on 20.9.2003. During the investigation, Investigating Officer prepared rough site plan of the place of occurrence Exhibit PY. Place of occurrence was also got photographed through Constable Surinder Singh PW-4. All the four accused were arrested by ASI Ashok Kumar on 20.9.2003. Statements of the witnesses were recorded and on completion of investigation, challan against the accused was presented in the Court.

7. All the accused were charged for the aforesaid offences and evidence against them commenced. In the meantime, out of Ishwar and Rajesh accused who had absconded, only Ishwar was arrested on 5.7.2004 by the Delhi police. Consequently, supplementary challan was presented against him and accused Rajesh was declared

as proclaimed offender. After commitment of the case against him, the Additional Sessions Judge, Rohtak, charged Ishwar accused for the aforesaid offences to which he also pleaded not guilty and claimed trial. Consequently, both the challans were consolidated, the evidence was recorded in the main case and both the cases were disposed of by way of impugned judgment.

8. In order to bring home the charge against the accused, the prosecution examined 18 witnesses. PW-1 Dr. Vikas Ahuja had medico-legally examined Shamsher Singh and proved the medico-legal report. PW-2 Ram Bhagat, Reader to District Magistrate, Rohtak has proved the sanction letters Exhibits PH in respect of Ranbir Singh @ Fauji, PM in respect of Balkar @ Tau, PN in respect of Sandeep, PO in respect of Naveen accused, issued by the District Magistrate, Rohtak regarding prosecution of the aforesaid accused u/s 25 of the Arms Act. PW-3 Constable Sumit Kumar proved the site plan Exhibit PC. PW-4 Constable Surinder Singh has proved the photographs Exhibits P-1 to P-6 and the negatives Exhibits P-7 to P-12 of the place of occurrence. PW-5 HC Jaidev Singh has given evidence by way of affidavit Exhibit PA regarding safe deposit of the case property with him. PW-6 Constable Baljit Singh has also given evidence on duly sworn affidavit Exhibit PB regarding taking of the case property to FSL Madhuban. PW-7 Shamsher Singh an injured eye-witness to the place of occurrence has not supported the prosecution version. He did not state as to who caused injuries. PW-8 ASI Kulbir Singh is the Investigating Officer. He besides narrating the incident (being an eye- witness) has proved investigation which he conducted from time to time. PW-9 Constable Ved Parkash has given evidence on sworn affidavit Exhibit PX. PW-10 ASI Ashok Kumar besides being the Investigating Officer, is also an eye- witness to the place of occurrence. He has corroborated the testimony of PW-8 ASI Kulbir Singh and has proved the recovery of weapons from the accused persons. PW-11 SI/SHO Vijender Singh has stated that he presented the challan against all the accused except Ishwar on 14.1.2004. PW-12 ASI Atam Parkash has disclosed about the arrest of Ishwar accused and has proved the disclosure statement made by him Exhibit PZ and in pursuance of which the country made pistol was recovered from him. PW-13 SI Mahinder Singh prepared the supplementary challan against Ishwar and presented the same in the Court. PW- 14 HC Virender Kumar is the witness to the recovery of country made pistol and ZEN Car No. HR-20C/7809 from Ishwar accused. PW-15 SI Sat Pal, Crime Branch Chankaya Puri, Delhi has also deposed about the arrest of Ishwar and recovery of weapon from him. PW-16 Rajesh is also an eye-witness to the place of occurrence. He has not supported the prosecution case. He is the nephew of Shamsher @ Samer injured. He has stated that Samer @ Shamsher had suffered injuries at the hands of police. PW-17 Dr. Jai Pal who examined Shamsher Singh @ Samer had proved his report Exhibit PE/1 declaring Shamsher Singh unfit to make statement. PW-18 Dr. Suchit who radio-logically examined injured Shamsher @ Samer and proved his report Exhibit PD and CT scan Exhibit PD/1.

9. After examining the aforesaid 18 witnesses, the prosecution closed its evidence. On closure of the evidence, the accused were examined u/s 313 Cr.P.C. in which all the incriminating circumstances appearing against them were put to them to which they denied and pleaded their false implication. The accused Ranbir @ Fauji has stated that he was picked up from his house on 19.9.2003 and was implicated in this case. The other three accused, namely, Sandeep, Balkar Singh @ Kaku @ Tau and Naveen explained that at the time of alleged recovery, they were in police lock up of police station Sadar, Rohtak in an assault case. During their defence, they examined Sub Singh DW-1 and closed the defence evidence. After scrutinizing the evidence on the record, the case went in conviction at the trial Court level and the accused were sentenced accordingly. Hence this appeal.

10. We have heard Shri Gorakh Nath, learned counsel for the appellants and Mr. B.S. Rana, learned Senior Deputy Advocate General, Haryana. Mr. Gorakh Nath has strenuously contended that the prosecution in order to prove charge against the accused under Sections 307, 353, 186, 148/149 IPC has mainly relied upon the testimony of four witnesses namely, PW-8 ASI Kulbir Singh, PW-10 Ashok Kumar, PW-7 Shamsher Singh @ Samer Singh and PW-16 Rajesh. Out of these four witnesses, PW-7 Shamsher Singh who had been injured during the cross-firing at the hands of the accused, have not supported the prosecution version, but he has stated that he cannot tell as to who had caused gun shot injuries to him. He had stated only that shot coming from the eastern side, hit him. It was night time. He suffered shot at his face as such he could not identify the accused. Therefore, obviously, he appears to be true to the extent that he did not see as to who caused him gun shot injuries. Rajesh PW- 16 has also not supported the prosecution case and has stated that the shots fired by the police, hit Shamsher Singh @ Samer Singh. In any case, when both the witnesses have resiled from their testimonies, therefore, their testimonies would be scrutinized very closely in order to sift the chaff from the grain. While delineating the scene of occurrence, it can be observed that it was a case of cross firing between the accused and the police party during the night time and the witnesses could not see as to who had caused gun shot injuries to Shamsher Singh @ Samer Singh.

11. The FIR in this case is prompt one as the occurrence took place at about 7.30/8.00 p.m. on 19.9.2003. There were four accused who could be arrested. They were carrying at least two weapons each. The accused were arrested. The recoveries of weapons were effected from them. Therefore, sufficient time must have been consumed in completing all the formalities. As such, the registration of the FIR in this case on the same day i.e. 19.9.2003 at 11.50 p.m. cannot be said to be delayed one. The occurrence has been fully proved by PW-8 ASI Kulbir Singh. Barring minor contradictions and discrepancies in the statements of witnesses, which are bound to occur in the statements of truthful witnesses, they are quite consistent in all material particulars. The factum of cross firing between the accused and the police party, has also not been denied by PW-7 Shamsher Singh and PW-16 Rajesh. The two

witnesses namely; ASI Kulbir Singh PW-8 and Ashok Kumar PW-10 have been cross-examined at length, but nothing fruitful could be elicited from their testimonies as to create a dent in the prosecution.

12. From the consistent testimonies of the aforesaid two witnesses which stand corroborated by other evidence on the file, the following facts stand established :-

(i) The police party consisting ASI Ashok Kumar, ASI Kulbir Singh, Const. Azad Singh, Const. Jai Pal and Const. Jagbir Singh, HC Himmat Singh and EHC Raghbir Singh were present in the area of Brahmanwas. They were armed with different weapons and were in Government Jeep bearing registration No. HR 12C/3721. The Jeep was driven by EHC Daryao Singh.

(ii) It was about 7.30/8.00 p.m. when the occurrence took place.

(iii) The accused Ranbir, Balkar, Sandeep, Naveen and two other persons (out of whom Ishwar was arrested lateron) came from the side of village Basantpur. The police party signalled them to stop, but instead of stopping, they tried to take a U turn. Resultantly, the car stopped after going over the stone pieces.

(iv) When the police tried to apprehend the accused then they opened fire and lateron out of the aforesaid six accused, two accused namely, Ishwar and Rajesh escaped while getting undue benefit of darkness and remaining four accused were apprehended.

(v) Admittedly, it was dark when the occurrence took place and the police party was on duty of checking the vehicles. No person out of the police party or from the side of the accused suffered injuries and it was indiscriminate firing.

(vi) The police party took shelter behind the wall as well as behind the jeep, 40-42 fires were shot by the accused out of which about 14 cartridges were taken into possession. The police party had narrow escape.

(vii) The accused were apprehended and the weapons were recovered from them.

13. Thus, it can be said to be established that about 14 fires were shot by 6 accused. The injured witnesses namely, Shamsheer @ Samer or the other eye-witness namely, Rajesh PW-16 did not support the prosecution case. Therefore, it will be deemed that Shamsheer Singh did not suffer injuries at the hands of the accused. The accused surrendered themselves and they were apprehended at the spot. The recovery of weapons was also effected from the four accused at the spot except Ishwar and Rajesh who had escaped while taking undue benefit of darkness. The recovery of weapon was also effected from Ishwar lateron after his arrest.

14. Now, the question for determination before us is whether the offences under Sections 307, 353, 186, 148 read with Section 149 IPC are made out against the aforesaid accused. First of all, we need to record essentials for criminal attempt as required to constitute an offence u/s 307 IPC, which are reproduced as under :-

- (a) Existence of an intent on the part of the accused to commit a particular offence;
- (b) some steps taken towards it after completion of preparation;
- (c) the steps must be apparently though not necessarily adapted to the purpose designed;
- (d) it must come dangerously near to success;
- (e) it must fall short of completion of the ultimate design.

15. While scrutinizing the evidence on the record, it is observed that prosecution has succeeded in proving the requisite constituents necessary for completion of the offence u/s 307 IPC. Both the witnesses, namely, Kulbir Singh PW-8 and Ashok Kumar PW-10 have stated that all the accused were armed with deadly weapons and they fired at the police party. They have further stated that when they tried to apprehend the accused then the accused opened fire at them. From this piece of evidence, the only inference which can be drawn is that the accused opened the fire with the intention to commit murder. Had any fire hit any of the police officials present there, the accused would have been guilty of murder. The circumstances reveal that the police party had a narrow escape.

16. It may further be mentioned that the cross firing between the police and the accused goes a long way to prove that the accused were ready to kill any one whosoever came in their way. To constitute an offence u/s 307 IPC, it is not necessary that one should be caused hurt but the court should determine the requisite intention and the overt act towards that intention. PW-8 ASI Kulbir Singh and PW-10 ASI Ashok Kumar have clearly stated that the accused opened fire at them with the intention to kill them. It is also in evidence that the empties were recovered from the spot and the weapons so recovered from the accused were workable and shots were fired from these weapons. It is not the case of the accused that they fired in the air. Thus, it will be safe to hold that the accused are held guilty for the offence u/s 307 IPC. The trial Court was justified in holding the accused guilty of the offence u/s 307 IPC.

17. As regards the unlawful assembly, it may be mentioned that the accused more than five in number, were armed with deadly weapons. In furtherance of the common object of such assembly, they committed obstruction in the duties of the public servants and also tried to create terror in the minds of the public and the police. It is not necessary that element of pre-mediation is a must to constitute unlawful assembly but the unlawful assembly can be formed at the nick of time.

18. Admittedly, the police party consisting of ASI Ashok Kumar and ASI Kulbir Singh assisted by other police officials, was on their duty to check the vehicles passing by their side. The accused did not stop their vehicle despite the direction issued by ASI Ashok Kumar. Rather, when the police party tried to go to them, they started firing at them. Assault on a public servant consists of assaulting or using criminal force on

a person who at the time of the offence is a public servant in the execution of his duty. As public servant is often exposed to considerable risk in the discharge of his official duties, and the law, therefore, throws around him a special protection by prescribing specially deterrent sentence to those who offend the majesty of the law of which he is a minister. The accused persons tried to create terror not only in the minds of the police party but also in the area, therefore, that amounts to sufficient assault on public servants so as to bring the offence within the purview of Section 353 IPC. As such, the accused persons, therefore, can undoubtedly be said to be guilty of the offences under Sections 353, 186, 148 read with Section 149 IPC.

19. As regards, offence u/s 25 of the Indian Arms Act is concerned, lot of arms and ammunition were recovered from the accused which stand duly proved by PW-8 ASI Kulbir Singh and PW-10 ASI Ashok Kumar and Atam Parkash PW-12. The accused were apprehended at the spot and they were carrying weapons either in their hands or in their pockets. PW-10 ASI Ashok Kumar also categorically stated that on apprehending Ranbir @ Fauji, a Mouser of 9 mm Exhibit P-13 with 7 cartridges Exhibits P-14 to P-21 was recovered from his hand and a country made pistol Exhibit P-22 of 315 bore was recovered from the right side of the pocket of his pant, after preparing sketches PW/1 and PQ/2. Both the pistols were taken into possession vide memo Exhibit PQ. Similarly, the recovery of Mouser Exhibit P-26 and cartridges Exhibits P-28 to P-22 and another country made pistol Exhibit P-27 along with three live cartridges Exhibits from P-34 to P-36 from Balkar accused, has been proved. The recovery of two country made pistols Exhibit P-37 and Exhibit P-44 and 13 lives cartridges from Sandeep accused had been proved. Recovery of pistol from accused Ishwar has also been proved by the aforesaid witnesses and their testimonies stand corroborated by PW-9 Const. Ved Parkash also. Not only this, these weapons were sent to the Forensic Science Laboratory, Madhuban. Shri L.S. Yadav, Senior Scientific Officer (Ballistic) observed in Exhibit PAE as under :-

1. Pistols marked W/1 & W/3 (each chambered for 9 mm cartridges), Country made pistols marked W/2 & W/4 (each chambered for .303" cartridges), W/5 (chambered for .12 bore cartridges), W/6 (chambered for .315" cartridges) and .12 bore SBBL gun marked W/7 are firearms as defined in Arms Act 54 of 1959. Their firing mechanisms were found in working order.

2. The country made pistols marked W/4 (chambered for .303" cartridges) & W/5 (chambered for .12 bore cartridges) had been fired through. However, scientifically, the time of their last firings cannot be given.

3. 9 mm fired cartridge cases marked C/2, C/3, C/5, C/8 have been fired from pistol marked W/1 (chambered for .9 mm cartridges) and not from any other fire arm even of the same make and bore/caliber, because every fire arm has got its own individual characteristic marks.

4. 9 mm fired cartridges cases marked C/1, C/4, C/9 and C/10 have been fired from pistol marked W/3 (chambered for 9 mm cartridges) and not from any other fire arm even of the same make and bore/caliber, because every fire arm has got its own individual characteristic marks.

5. 9 mm fired cartridge cases marked C/6, C/7 & C/11 have not been fired from pistol marked W/1 and W/3.

6. .303" fired cartridge case marked C/13 has been fired from Country made pistol W/2 (chambered for .303" cartridges) and not from any other fire arm even of the same make and bore/caliber, because every fire arm has got its own individual characteristic marks.

7. .315" fired cartridge case marked C/12 has been fired from Country made pistol W/6 (chambered for .315" cartridges) and not from any other fire arm even of the same make and bore/caliber, because every fire arm has got its own individual characteristic marks.

8. .12 bore fired cartridge case marked C/14 has been fired from .12 bore SBBL gun marked W/7 and not from any other fire arm even of the same make and bore/caliber, because every fire arm has got its own individual characteristic marks.

20. The prosecution has also proved on file the sanction letters Exhibits PM, PN, PQ and PH for prosecuting the accused under the Arms Act. Accordingly, we are in consonance with the observations of the trial Court that accused were in possession of illegal arms at the time of commission of crimes.

21. In the absence of any evidence in support of the plea of alibi raised by three accused namely; Balkar, Sandeep and Naveen, the same cannot be believed. The only witness to support the plea of alibi is Sube Singh DW/1 which is contradictory qua many material points and his testimony being of interested nature, cannot be believed. Moreover, no record of police station, Sadar, Rohtak has been summoned to prove the presence of these witnesses at a different police station on the date of occurrence as well as recovery of arms from them. It is also not proved that Ranbir accused was picked up from his house one day earlier to the date of occurrence. No evidence in the shape of the complaint which the accused or his relatives might have filed regarding wrongful confinement of Ranbir, has not been (has been ?) brought on record. As such, the defence plea raised by the accused ashes to the ground.

22. Before parting with the judgment, it requires to be mentioned that the trial Court while passing the sentence, ordered that the accused Ranbir, Balkar and Ishwar are not entitled to any suspension, remission or commutation of sentence u/s 433 Cr.P.C. on the ground that they are previous convicts; have been facing many criminal trials and seem to be gangsters. To our minds, these observations being without any basis, cannot be sustained and the Additional Sessions Judge

could not snatch the powers of the competent authorities to pass appropriate orders regarding the same as per provisions under law. Therefore, we are unable to uphold the aforesaid observations and leave it to the wisdom of authorities competent to deal with the same as and when they are seized of the matter.

23. For the foregoing reasons, we do not differ with the findings returned by trial Court. Consequently, the sentence passed against the accused is hereby maintained and the appeals filed by them are hereby dismissed.