

(2012) 05 GAU CK 0044

Gauhati High Court

Case No: Criminal Appl 51 of 2007

Md. Abdul Hannan

APPELLANT

Vs

The State of Assam

RESPONDENT

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**Date of Decision:** May 4, 2012**Acts Referred:**

- Arms Act, 1959 - Section 25(1), 27, 5
- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 307, 326, 34

**Hon'ble Judges:** C.R. Sharma, J; Adarsh Kumar Goel, J**Bench:** Division Bench**Advocate:** F.H. Laskar and Dr. B. Ahmed, for the Appellant; K. A. Mazumdar, Additional Public Prosecutor, for the Respondent

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**Judgement**

C.R. SARMA, J.

This appeal is directed against the judgment and order, dated 16/12/2006, passed by the learned Additional Sessions Judge (FTC), Karimganj, in Sessions Case No. 105/2004. By the impugned judgment and order, the learned Sessions Judge, held the appellant guilty of the offences under sections 326/307/34 of the Indian Penal Code (hereinafter referred to as the "IPC") and section 27 of the Arms Act and sentenced him to suffer rigorous imprisonment for life for his conviction u/s 307 IPC, undergo rigorous imprisonment for 10 years and pay a fine of Rs. 2000/- in default suffer simple imprisonment for further period of one year for his conviction u/s 326 IPC and suffer rigorous imprisonment for seven years and pay a fine of Rs. 2,000/-, in default suffer simple imprisonment for another period of one year for his conviction u/s 27 of the Arms Act.

Aggrieved by the said conviction and sentence, the convict, as appellant, has come up with this appeal. We have heard Mr. F. H. Laskar, learned Counsel appearing for the appellant and Mr. K.A. Mazumdar, Learned Additional Public Prosecutor, for the

State of Assam.

2. The prosecution case, as revealed at the trial, is that, on 28/9/2001, at about 4 P.M., the appellant, along with others, attacked Md. Abdul Latif (PW1), who was digging a hole in his land, for the use of his buffaloes and caused injuries to his person, by opening fire from a gun. The injured was shifted to the Hospital, where he was required to undergo treatment as an indoor patient. During his treatment, multiple entry wounds of pellets, multiple radio opaque metallic foreign objects were found and 15 numbers of pellets were removed from his body.

3. An FIR was lodged with the Police, on 28/9/2009, and the same was registered as Kalibari PS Case No. 67/2001 u/s 326/307/34 IPC read with section 25(1-b)/27 of the Arms Act. During the investigation, Police visited the place of occurrence, prepared a sketch map (Exhibit 6), recorded statement of the witnesses, seized the gun licence and a SBBL gun registered in the name of Haji Riyasor Ali vide Exhibit 7, seized 15 numbers of pellets recovered from the body of the injured, vide Exhibit 9. At the close of the investigation, Police submitted charge sheet against the appellant and three others under sections 326/307/34 IPC and section 25(1-b)/27 of the Arms Act. The charges were read over and explained to the accused persons to which they pleaded not guilty.

4. In order to prove their case, prosecution examined, as many as, ten witnesses, including the Medical Officers (PW5 and PW6) who examined the injured person and the Investigating Police Officers (PW9 and PW10). At the close of the evidence for the prosecution, the accused person was examined u/s 313 Cr.P.C. He denied the allegations, brought against him and declined to adduce defence evidence.

5. Considering the evidence, on record, the learned Sessions Judge, held the appellant guilty of the offences charged and accordingly convicted and sentenced him, as indicated above. The other accused persons were acquitted for want of evidence.

6. Mr. FA Laskar, learned counsel for the appellant, referring to the evidence, on record, has submitted that there are contradictions on material points, in the evidence of PW2, PW3, PW4 and PW7 and as such their evidence cannot be accepted. It is also pointed out that PW3, in the FIR, lodged by him, stated that 2 (two) young boys also went with the injured to dig hole and that four accused persons had attacked the injured, but PW4 and PW7 stated about involvement of the appellant and Md. Riasat. They did not indicate the presence of the other accused persons. They are silent regarding the presence of other accused persons and the young boys. It is also submitted that this witness stated that he could guess that bullet was fired from the western side. Therefore, it is submitted that the evidence of this witness is based on guess work only. It is also submitted that though PW1, PW2 and PW3 indicated the involvement of four accused persons, PW4 and PW7 stated about presence of only two (two) accused. Therefore, it is contended

that the said contradiction belies the prosecution version. It is submitted that there is contradiction in the evidence of PW1 and PW2 regarding the direction from which the accused persons came. It is also contended by the learned defence counsel that there is no expert evidence to show that the bullets were fired from the seized gun and therefore, the impugned conviction cannot be maintained. The learned defence counsel has further submitted that there is no substantive evidence against the appellant and as such the learned Trial Judge committed error by recording the conviction and sentence as indicated above. The learned defence Counsel has also submitted that due to failure of the prosecution to establish the case beyond, all reasonable doubt, the appellant is entitled to the benefit of doubt and as such the impugned conviction and sentence are liable to be set aside.

7. Refuting the said argument, advanced by the learned defence counsel, the learned Additional Public Prosecutor has submitted that there is sufficient evidence on material point indicating the involvement of the appellant with the alleged offence and as such the learned Trial Judge committed no error by recording the conviction as indicated as above. The learned Additional Public Prosecutor has also submitted that the contradictions and the discrepancies, pointed out by the learned defence counsel cannot be treated as material contradiction. It is submitted that considering the socio-economic back ground of the parties, the witnesses cannot be expected to give stereotype evidence. Therefore, it is submitted that minor discrepancies caused due to variation in observation and capability to appreciate may exist in the evidence given by the prosecution witness, but such minor discrepancies or omissions cannot be ground to reject the substantive evidence rendered by the witnesses. It is also submitted that a careful scrutiny of the evidence, on record, will lead to the findings that the appellant arrived at the place of occurrence with a gun, had shot at the injured, causing the injuries to him. Therefore, the learned Additional Public Prosecutor has submitted that the appellant committed the act with an intention to cause fatal injury which might have caused the death of the injured and that the prosecution could prove that the appellant had caused the injuries by firing from a firearm and as such the impugned conviction and sentence need no interference.

8. The allegation, made against the appellant, is that the appellant, using a fire arm (SBBL Gun), without any authority or licence, illegally fired upon the injured person i.e. PW1 with an intention to cause his death and thereby caused grievous injury to him.

In order to appreciate the counter arguments, advanced by both the parties and examine the correctness of the impugned judgment and order, we have perused the evidence on record.

9. Dr. Mrinal0 Talukdar (PW5) who examined the injured, on 29/9/2001 i.e. on the following day of the incident, found the following injuries in respect of the injured person.:

On examination, the following injuries were found:-

- (i) Multiple entry wound of pellets found over scalp, neck, left shoulder and left arm.
- (ii) Subconjunctival Haemorrhage of right eye with hyphema with loss of vision of right eye.

X-ray was done at X-ray Clinic, Ghungoor and Sun Light since SMCH's X-ray machine was out of order at that time.

The following are the findings of X-ray:-

X-ray of scalp:- Multiple radio opaque metallic foreign bodies. No obvious bony lesion found.

Cervical spine:- Radio opaque densities (Pellets in question) in the soft tissue of neck and face.

Left shoulder:- Radio opaque densities (pellets in question) in the soft tissue of arm and shoulder.

Bones and joints were found normal.

The said Medical Officer opined that the injury No. 2 was grievous and caused by firearm. He also opined that the injuries were fresh and 15 numbers of pellets were removed from the body of the injured, which were handed over to the Police. The said Medical Officer further stated that the injury caused on the right eye resulted loss of vision and that the injured was referred to the eye Department of the Silchar Medical College and Hospital, Silchar. He further stated that the injured was admitted in the Hospital, on 29/9/2011 and discharged, on 15/9/2011. He has exhibited the medical report as Exhibit 2 and his signature thereon as Exhibit 2(1) and Exhibit 2(2).

10. Dr. Gautam Paul, Assistant Professor, Department of Ophthalmology, Silchar Medical College and Hospital, Silchar, deposing as PW6, stated that he examined the injured, on 29/9/2001 and found the following injuries:

Visual acuity of right eye perception of light negative. On examination of left eye it is found that visual acuity was 6/12. On examination of both conjunctival sub-conjunctival haemorrhage was found. Anterior chamber of right eye was found full of blood. There was acleral perforation at 12 O" clock position in the ciliary body region as vitreous prolapse.

X-ray of scalp shows radio opaque foreign body in right orbit (two numbers) and left orbit (one number).

The injury as detected was grievous in nature and caused by blunt object. The duration of injury was fresh.

He has exhibited his report as Exhibit 3 and his signature thereon as Exhibit 3(1).

Though the Medical Officers aforesaid were cross examined by the defence, their evidence, with regard to the injuries sustained by the injured and removal of pallets from the body of the injured, remained undemolished. From the said medical evidence, it has been established that the injured sustained multiple injuries, caused by the pallets fired from a firearm and that he sustained grievous injury. The recovery of pallets, entry wounds of pallets fired from a gun and the oral evidence of the injured support the prosecution version. Therefore, it has been established by the prosecution that the injuries sustained by the injured were caused by means of a gun. This has been fortified by the seizure of a SBBL gun, registered in the name of Haji Riasor Ali (since deceased), who was one of the accused persons.

11. Now the substantial question is as to whether the appellant had caused the said injuries by firing through a gun. In the FIR (Exhibit 1), which was lodged on the day of the incident, it was clearly mentioned that the appellant had shot upon the injured with a gun.

12. The injured i.e. Md. Abdul Latif (PW1), deposing as PW1, stated that the appellant, who was armed with a gun had fired at him causing injuries to his person. He stated that the bullet, fired from the firearm, hit his right eye also. He further stated that the splinters of the bullet had hit him on his head, chest, abdomen, mouth cavity, hands and above the eyes. That the injured sustained injuries, caused by splinters (bullets), fired from a gun, has been substantiated by the medical evidence aforesaid. Therefore, there is sufficient corroboration in the evidence of PW1 regarding the injuries sustained by the injured and that the injuries were caused by pallets of a bullet, fired from a gun. PW1 clearly stated that a gun was used by the appellant. He further stated that hearing alarm, raised by him, witnesses namely Fakrul Islam, Aftabuddin @ Afaz Ali (PW7), Asab Ali (PW4), Almaruddin and Amoi Ali (PW3) appeared in the place of occurrence. This witness was duly cross-examined on behalf of the defence. His evidence that the appellant had fired from a gun and that he sustained injuries remained undemolished.

13. Mr. Fakrul Islam (PW2) stated that he saw the appellant, who was armed with a gun, running towards the PW1 along with other accused persons. He further stated that the appellant had fired upon the injured causing injuries to him. This witness was also corss-examined by the defence, but his evidence, regarding use of gun by the appellant, in causing the injuries to the injured, remained undemolished.

14. Md. Amoi Ali, deposing as PW3, in tune with the evidence of PW1 and PW2, stated that the appellant, who was armed with a gun had shot at the injured causing injuries in respect of his eye, face and head. He is the informant, who lodged the FIR, in this case. He has exhibited the FIR as Exhibit No. 1.

Even in his cross-examination, made by the defence, this witness clearly indicated the involvement of the appellant.

15. Mr. Asabuddin (PW4), supporting the evidence of PW1, PW2 and PW3 stated that the appellant had fired from a gun causing injuries to the injured.

16. Md. Aftabuddin @ Afaz Ali, deposing as PW7, also stated that he saw the appellant and Haji Riyasor Ali (since deceased) in the place of occurrence. According to this witness, the appellant, who was armed with a gun had shot at the injured, as a result of which the injured had fallen down. He further stated that due to the said gun fire, the injured sustained bleeding injuries in respect of his eye.

17. Md. Mehbub Hussain (PW8), who was a Police Nayak, stated that, on requisition from the Superintendent of Police, Karimganj, he examined a gun and 15 rounds of ammunition, seized in connection with this case and found that the gun was in serviceable condition.

From the above discussed evidence, rendered by the said prosecution witnesses, it is found that the appellant, being armed with a gun, had fired shot causing injuries to the said injured. There is no material discrepancy or contradiction in this regard.

18. Through PW3 failed to mention about the present of two young boys, this omission does not negate his evidence regarding use of a gun by the appellant and thereby causing injuries to the injured. PW4 and PW7 clearly stated about involvement of the appellant and Riyasor Ali (since deceased). PW1, PW2 and PW3 supporting the evidence of the said witness stated that the appellant, who was armed with a gun, had shot at the injured. In view of the above, considering the entire evidence, it is found that the appellant had caused the injuries by firing from his gun. Therefore, there is sufficient corroboration in the evidences of the said witnesses regarding the injuries caused by the appellant by using a gun.

19. In our considered opinion, the discrepancies regarding number of the other accused persons joining the appellant or the difference regarding the direction from which the accused persons had come, are not major contradictions. These are minor discrepancies pertaining to variation in individual observations. Therefore, the said discrepancies cannot be fatal for the prosecution.

In view of the forceful evidence given by the said prosecution witnesses, we do not find force in the contention of the learned defence counsel.

20. From the above discussed evidence, it is found to have been established that the appellant, being armed with a gun, unauthorisedly, shot at the injured and caused injuries to his person. From the medical evidence, it is found that the injuries sustained by the injured, at the hands of the appellant, was grievous in nature. According to PW5, the injuries sustained by the injured, in respect of his right eye resulted in loss of his vision and that the said injury was a grievous one. PW6, who was the Assistant Professor of the Department of Ophthalmology, Silchar Medical College, Silchar, supporting the contention of PW5 stated that the injury sustained by the injured was a grievous one. Therefore, the evidence, on record, clearly

indicates that the offence u/s 326 IPC has been committed.

As discussed above, we find sufficient corroboration in the evidence of PW1, PW2, PW3, PW4 and PW7, on material point, to believe that the appellant had caused the said grievous injury by firing from a gun.

21. The evidence of PW1 (injured), that a firearm was used in causing injury to him has been corroborated by PW2, PW3, PW4 and PW7, who claimed to have witnessed the act, committed by the appellant.

Despite cross-examination, made by the defence, no contradiction, on material point, could be elicited in respect of the evidence of the said witnesses. Therefore, we find sufficient corroboration, in the evidence of the said witness, inspiring confidence to believe that the appellant had fired upon the injured causing injury to his person.

22. It is the common knowledge of every person of ordinary prudence that a bullet fired from a gun, that too on vital parts i.e. eye, scalp etc., is likely to cause death of the person concerned. Therefore, considering the injuries sustained by the injured, it can be safely concluded that the appellant had fired the shot at the head of the appellant, which is a vital part of the body. Therefore, the nature and gravity of the injury and the nature of the weapon used, indicates that the intention of the appellant was to cause the death of the person concerned.

23. There is no difficulty in understanding that had the bullet or the splinters, fired from the gun, hit the brain part of the injured, death of the injured would have been caused. In view of the above, it stands established that the appellant had committed the offence u/s 307 IPC. As revealed from the evidence, rendered by the prosecution witnesses, it has been established that a fire arm i.e. gun was used by the appellant in causing the injury. The said firearm, which has been subsequently seized by the Police from its owner, Haji Riyasor Ali (since deceased) was not registered in the name of the appellant. Therefore, the use of the said firearm by the appellant was illegal and unauthorised. Hence use of the said gun without holding a licence, amounted to contravention of the provision of section 5 of the Arms Act. Therefore, the appellant committed the offence u/s 27 of the Arms Act.

In view of what has been discussed above, we have no hesitation in holding that the prosecution could established, beyond all reasonable doubt, that the appellant committed the offences under sections 307 and 326 IPC read with section 27 of the Arms Act. Therefore, we find no error in the findings arrived at by the learned Trial Judge. Accordingly, we find that the learned Trial Judge rightly convicted the appellant as indicated above.

At close of the hearing, an affidavit, purported to be sworn by the injured has been submitted. In the said affidavit, it has been stated that the injured has agreed to compromise the matter with the appellant on receipt of compensation and, subject

to grant of provision, he is willing to compound the matter. It has also been averred, in the said affidavit, that he has no enmity with the appellant and that they have mutually settled the matter. As the offences under sections 326 and 307 IPC are not being compoundable, no permission to compound the matter can be granted. In the present case the learned Sessions Judge has sentenced the appellant to suffer rigorous imprisonment for life u/s 307 IPC, rigorous imprisonment for 10 (ten) years with fine of Rs. 2,000/- u/s IPC and rigorous imprisonment for seven (seven) years u/s 27 of Arms Act. The maximum punishments, provided for the offence under sections 307 and 326 IPC are life imprisonment while the maximum punishment for the offence u/s 27 of the Arms Act is 7 years. From the record it appears that the appellant has undergone imprisonment for more than five years with effect from 16/4/2012. Therefore, considering the facts and circumstances of the case, the period of detention already undergone and the prospect of peaceful living of the parties, we are of the considered opinion that ends of justice would be met if the sentence is modified to the period already undergone. Therefore, while upholding the convictions aforesaid, we modify the sentences to the period already undergone. The sentences shall run concurrently. However, no interference is made in respect of the sentences relating to fine.

With the above direction, the appeal is disposed of.

Return the lower court records.