

(2004) 01 JH CK 0041

Jharkhand High Court

Case No: Criminal Appeal No. 230 of 1998

Kudrat Ansari and Another

APPELLANT

Vs

State of Bihar (Now Jharkhand)

RESPONDENT

Date of Decision: Jan. 14, 2004

Acts Referred:

- Arms Act, 1959 - Section 2, 2(1), 25(1), 27, 3
- Penal Code, 1860 (IPC) - Section 302, 307, 34

Citation: (2005) 2 JCR 477

Hon'ble Judges: Vishnudeo Narain, J

Bench: Single Bench

Advocate: S.K. Chaturvedi, for the Appellant; T.N. Verma, for the Respondent

Final Decision: Dismissed

Judgement

Vishnudeo Narayan, J.

This appeal at the instance of the appellant has been directed against the impugned judgment and order dated 13.7.1998 passed in Sessions Trial No. 349 of 1997/Trial No. 10/1997 by Shri Anant Vyay Singh, 3rd Additional Judicial Commissioner, Ranchi whereby and whereunder both the appellants named above were found guilty for the offence punishable u/s 307/34 of the Indian Penal Code and they were convicted to undergo rigorous imprisonment for five years each u/s 307/34 of the Indian Penal Code. Appellant Kudrat Ansari was also found guilty u/s 25(1)(b) of the Arms Act and he was convicted and sentenced to undergo RI for five years. Appellant Jainul Ansari was also found guilty u/s 27 of the Arms Act and he was convicted and sentenced to undergo RI for five years. However, both the sentences were ordered to run concurrently.

2. The prosecution case has arisen on the basis of the written report (Ext. 2) of PW 1, Rajendra Prasad, ASI Kanke PS lodged before the said Police Station on 23.3.1997 at 22.30 hours regarding the occurrence which is said to have taken place at 21.30

hours on that very day 21/2 kms. north of Jumar River Bridge on Kanke Pithoria Main Road within Kanke PS, District Ranchi and this case was instituted against the appellant by drawing of a formal FIR on that very day at 22.30 hours. The formal FIR and the written report was received on 25.3.1997 in the Court empowered to take cognizance.

3. The prosecution case, in brief, is that PW 1, Rajendra Prasad, ASI, the informant was on patrolling duty along with armed force consisting of PW 2, Ram Narain Manki, Havildar, PW 3, Satya Narain Ram, PW 4, Dub Raj Sundi besides Sanika Munda all constables on 23.3.1997 on the pre-evening of the Holi festival and in course of patrolling the informant along with the armed force came to the bridge of river Jumar at 21.30 hours and there is a deserted house by the side of the said bridge and he heard the whispers emanating from the said house and he challenged the persons who were in the house and at this two persons came out from the house and started fleeing away towards the said river and he along with the armed force followed them. It is alleged that one of them was armed with a country made pistol and in the course of fleeing away he fired at them but it did not cause any injury to them as the charge did not go off and in spite of that the informant and the armed force continued to follow them raising alarms and in the meantime PW 7, Chandra Shekhar Mishra, O.C. Kanke PS came there from the opposite side along with constable Pulsit Mishra and they also chased them and one of the culprits fell down being dashed by a stone and sustained injury and he was caught by the informant and the armed force and his pistol was removed from his possession by them and the other culprit was also apprehended by PW 7, Chandra Shekhar Mishra along with constable Pulsit Mishra aforesaid. The prosecution case further is that in the meantime PW 6, Hare Ram Singh and PW 5, Ganesh Sharma came to the said bridge from the side of Pithoria and in their presence the aforesaid two apprehended persons disclosed their identity as appellant Kudrat Ansari and Jainul Ansari and their person was searched in their presence and one pistol loaded with 8 mm cartridge was recovered from the possession of appellant Kudrat Ansari and one dagger was recovered from the possession of appellant Jainul Ansari which was concealed under his full pant and a seizure list in respect thereof was prepared. It is also alleged that both the appellants were hiding themselves in the said deserted house with the intention to commit some serious offence and appellant Kudrat Ansari had fired on the members of the police force with intention to commit their murder.

4. The appellant has pleaded not guilty to the charges levelled against them and they claim themselves to be innocent and to have committed no offence and that they have been falsely roped in this case by the police.

5. The prosecution has in all examined seven witnesses to substantiate its case. PW 1, Rajendra Prasad, S.I. Kanke is the informant of this case. PW 2, Havildar Ram Narain Manki, PW 3, Constable Satya Narain Ram, PW 4, Dub Raj Sundi are the

constables and the member of the patrolling party with the informant PW 7, Chandra Shekhar Mishra is the O.C. Kanke PS who has also apprehended appellant Jainul Ansari when he was fleeing away and chased by the informant and said PW 7 Chandra Shekhar Mishra is also the IO of this case. All the aforesaid witnesses, however, claimed themselves to be the ocular witnesses. PW 6 Hare Ram and PW 5 Ganesh Sharma are the witnesses of alleged search of the appellants, recovery of the incriminating articles from their possession and seizure in respect thereof and the seizure list (Ext. 1) contains their signatures thereon which are Exts. 1/2 and 1/1 respectively. However, both the witnesses of seizure have turned hostile and they do not support the prosecution case. No oral and documentary evidence has been brought on the record on behalf of the defence.

6. In view of the evidence on the record the learned Court below came to the finding of the guilt of the appellants and convicted and sentenced them as stated above.

7. Assailing the impugned judgment if has been submitted by the learned counsel for the appellant that the conviction of appellant Kudrat Ansari u/s 25(1)(b) of the Arms Act is palpably illegal and unwarranted in view of the fact that no sanction has been accorded for their prosecution in this case by the competent authority and Section 39 of the Arms Act mandates that no prosecution shall be instituted against any person in respect of any offence u/s 3 of the said Act without the previous sanction of the District Magistrate. It has further been submitted that dagger is not a fire arms and it shall be construed to be a fire arm only when there is a notification to that effect of the Central Government duly published in the Gazette u/s 4 of the said Act and the learned Court below did not at all consider the relevant provisions of the Arms Act in respect thereof and erroneously came to finding of the guilt of appellant Jainul Ansari u/s 27 of the Arms Act. It has also been contended that seizure list (Ext. 1) is not an authentic document of the prosecution for the reasons that it does not disclose the fact that from which of the appellant loaded pistol and dagger was recovered and furthermore none of the seizure witnesses has in his evidence on oath substantiated the factum of the recovery of the loaded pistol and the dagger from the person of the appellants as alleged. It has also been submitted that the alleged seized pistol and the dagger have also not been brought before the Court and there is no report of the Ballistic Expert to indicate the fact that the said pistol was in working order and thus the alleged recovered arm cannot be termed as fire arms as defined u/s 2(1)(e) of the Arms Act and there is also evidence on the record appearing in the testimony of the informant that the charge did not go off when an attempt was made to shoot from the said pistol. It has further been contended that no offence u/s 307 of the Indian Penal Code is made out against the appellant in view of the fact that the charge did not go off from the pistol and in this view of the matter the finding of the learned Court below against the appellant Kudrat Ansari regarding his guilt u/s 307 of the Indian Penal Code is erroneous. It has also been contended that both the appellants were fleeing away in the course of the chase as per prosecution case and appellant Jainul Ansari was fleeing away to

some other direction and in this view of the matter it cannot be said that appellant Jainul Ansari has shared the common intention with appellant Kudrat Ansari in attempting to commit the murder of the informant as well as the other members of the patrolling party and as such charge u/s 307/34 of the Indian Penal Code is not substantiated against appellant Jainul Ansari. Lastly it has been contended that no independent witness has taken oath in support of the prosecution case when as per prosecution evidence a large number of the villagers had assembled at the place of occurrence which is a circumstance of unimpeachable character to cast a cloud of suspicion to the very credibility of the prosecution case. It has also been submitted that the learned Court below did not consider meticulously the evidence on the record coupled with the facts and circumstances of the case and has committed a manifest error in coming to the finding of the guilt of the appellant and as such the impugned judgment is unsustainable.

8. Refuting the contention aforesaid it has been submitted by the learned APP that the appellant Kudrat Ansari had fired from his loaded pistol at the chasing police party with intention to commit their murder and due to the intervening circumstances i.e. the charge did not go off and no injury was caused to the police party but the said appellant has attempted to shoot the members of the police force and appellant Jainul Ansari was in know of the fact that appellant Kudrat Ansari is armed with a loaded pistol and thus he has shared common intention with appellant Kudrat Ansari of attempting to commit the murder of the force aforesaid and in this view of the matter the finding of the learned Court below about their guilt for the offence u/s 307/34 of the Indian Penal Code is based on legal evidence on the record and there is no illegality in the impugned judgment in respect thereof. The learned APP has fairly submitted that the conviction of the appellants under Sections 25(1)(b) and 27 of the Arms Act respectively suffers from legal infirmities.

9. Let us now advert to the evidence on the record. PW 1 Rajendra Prasad, the informant has deposed that he was on patrolling duty along with armed force on Kanke Pithoria road on the pre-evening of the Holi festival on 23.3.1997 and in course of the patrolling duty when the informant was proceeding towards the bridge on Januar River, he heard the whisper emanating from a deserted house nearby the said bridge and on his challenge two persons came out from the said house and they started fleeing away towards the river side. His evidence is further to the effect that it was a moonlit night and he along with the armed force chased them and in course of the chase one of the appellants fired from his pistol but charge did not go off and, thereafter, he continued to flee away but he was dashed by a stone and fell down and sustained injury on his person and he was caught. He has further deposed that PW 7, Chandra Shekhar Mishra along with constable Pulsit Mishra who were coming from the opposite direction had caught the other appellant Jainul Ansari and said PW 7 along with them came to the bridge of the said river and on query both the appellants disclosed their name and their person was searched and a loaded pistol was recovered from the possession of appellant Kudrat

Ansari and a dagger was recovered from the person of the appellant Jainul Ansari in presence of PW 5 Ganesh Sharma and PW 6 Hare Ram Singh who had come to the said bridge from Pithoria side and a seizure list was prepared in their presence which was witnessed by them. In his cross examination PW 1 has deposed that he has not specifically mentioned the fact in the seizure list that from which of the appellant the said pistol has been recovered and as well as from which of the appellant the dagger has been recovered PW 2, PW 3 and PW 4 in their evidence on oath have materially corroborated the testimony of PW 1, the informant. The aforesaid witnesses have also deposed that appellant Kudrat Ansari attempted to fire pistol at them when he was fleeing away but the charge did not go off. PW 7, Chandra Shekhar Mishra has deposed that he was also on patrolling duty along with constable Pulsit Mishra at the relevant time and when he reached near the Jumar river, he saw the police party chasing a person and there was uproar and he found one other person fleeing towards him and he caught him and in the meantime he saw the patrolling party coming to the bridge from the opposite direction with one person apprehended by them and in the meantime two persons came there from Pithoria side and in their presence the person of both the apprehended persons were searched and a country made loaded pistol was recovered from appellant Kudrat Ansari and a dagger was recovered from the person of appellant Jainul Ansari and the seizure list was prepared in respect thereof which was witnessed by both the two persons aforesaid i.e. PW 5 and PW 6 and they were brought to the police station in his company along with patrolling party headed by the informant. He has further deposed that the person who was apprehended by him has disclosed his name as Jainul Ansari. From the evidence aforesaid it becomes an established fact that both the appellants were apprehended by the police patrolling party and aforesaid incriminating articles were recovered from their possession. It is also established from the evidence aforesaid that in course of chase appellant Kudrat Ansari had attempted to fire at the chasing police force but the charge did not go off from his loaded pistol. Now a pertinent question arises at this stage as to whether charge u/s 307/34 of the Indian Penal Code is made out against both the appellants in view of the fact when the charge did not go off from the loaded pistol when attempt was made to fire from the said pistol. To constitute an offence u/s 307 of the Indian Penal Code the prosecution has to establish that the death of a human being was attempted to be caused by or in consequence of the act of the accused and such act was done with intention of causing death or that it was done with the intention of causing such bodily injury as the accused knew or to be likely to cause death or was sufficient in the ordinary course of nature to cause death by doing an act known to him to be so eminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and the accused have no excuse for incurring the risk of causing such death by injury. In order that Section 307 of the Indian Penal Code should be attracted it is necessary to establish that if the victim would have met his death the offence would have been u/s 302. Here in this case attempt to fire by a loaded pistol at the chasing police patrolling party was

made and this shows the mens rea on the part of the appellant Kudrat Ansari in respect thereof and with that mens rea the fire was shot by them but; due to the intervening circumstances the charge did not go off from the said loaded pistol and no injury was caused to the police raiding party. In the case of Regina v. Francis Cassidy, 4 Bombay HC Criminal 17 it was held that in order to constitute the offence of attempt to murder u/s 307 of the Indian Penal Code the act committed upon person must be an act capable of causing in the natural and ordinary course of events, death. The said ratio was, however, not found favour with in the case of Queen Empress v. Niddha ILR 14 All 38 and also in the case of Vasudeo Balwant Gogte AIR 1956 Bom 434. Considering the ratio of the aforesaid cases the Apex Court in the case of [Om Parkash Vs. The State of Punjab](#), has observe which runs thus :

"In case of attempt to commit murder by fire arm, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot taking effect, the offence u/s 307 is made out. Expressions, in such cases, indicate that one commits an attempt to murder only when one has committed the last act necessary to commit murder. Such expressions, however, are not to be taken as precise exposition of the law, though the statements in the context of the cases are correct."

In view of the ratio of the Apex Court referred to above it is crystal clear that appellant Kudrat Ansari fired the shot from his loaded pistol at the patrolling police party with intent and that was the last possible act that he did towards the accomplishment of the offence of attempting to commit murder and, therefore, the intervening circumstances i.e., the charge not going off from his said pistol is of no help to him in the facts and circumstances of this case. Appellant Jainul Ansari as per the evidence on the record was with him in the deserted house near the bridge and he was in full know of the fact that appellant Kudrat Ansari was armed with a loaded pistol and they had assembled there with a view to commit an offence and in course of chase when they were fleeing together the fire was shot at the patrolling police party and in this view of the matter appellant Jainul Ansari had shared the common intention of appellant Kudrat Ansari in respect thereof and the firing was shot from the loaded pistol of appellant Kudrat Ansari is in furtherance of their common intention. Therefore, the offence u/s 307/34 of the Indian Penal Code is established in the facts and circumstances of the case against both the appellants. The learned Court below has rightly come to their guilt for the offence u/s 307/34 of the Indian Penal Code on the basis of the evidence on the record, the vagueness in the seizure list in view of the positive evidence on the record of PW 1 read with PWs 2, 3 and 4 cannot be viewed as a lacuna of the prosecution case. Both the seizure witnesses who have turned hostile, however, admit the presence of both the appellants at the bridge at the time of the search, recovery and the preparation of the seizure list and they also admit their signature on the seizure list. The non-production of the

recovered pistol as well as the absence of report of any ballistic expert in respect thereof though an omission on the part of the IO in this case cannot be viewed to jettison the prosecution case on that score. The non-examination of any independent witnesses in this case for the prosecution cannot also be viewed as a lacuna of the prosecution case. In view of the evidence on the record and the ratio of the Apex Court referred to above I see no reason to disagree with the finding of the guilt of the appellant recorded by the learned Court below and thus there is no illegality in the conviction of both the appellants u/s 307/34 of the Indian Penal Code.

10. Appellant Kudrat Ansari and appellant Jainul Ansari were also found guilty for the offence u/s 25(1)(b) and 27 of the Arms Act respectively by the learned Court below. A dagger is said to have been recovered from the conscious possession of appellant Jainul Ansari. Section 2(c) of the Arms Act defines arms which means articles of any description designed or adapted as weapons for offence or defence and includes fire arms, sharp edged and other deadly weapons and parts of any machinery for manufacturing arms, but does not include articles designed solely for domestic or agricultural uses such as lathi or an ordinary walking stick and weapons incapable of being used otherwise than as toys or of being converted into serviceable weapons. A dagger is a sharp edged deadly weapon but it is not a fire arms as defined u/s 2(e) of the said Act which has been recovered from the conscious possession of appellant Jainul Ansari. Section 4 of the Arms Act has its relevancy in this case which runs thus :

"4. Licence for acquisition and possession of arms of specified description in certain cases--If the Central Government is of opinion that having regard to the circumstances prevailing in any area it is necessary or expedient in the public interest that the acquisition, possession or carrying of arms other than fire arms should also be regulated, it may, by notification in the official gazette, direct that this Section shall apply to the area specified in the notification, and there upon no person shall acquire, have in his possession or carry in that area arms of such class or description as may be specified in that notification unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder."

Here in this case there is no iota of evidence on the record to show that the Central Government has regulated by notification in the official gazette of the acquisition, possession or carrying of arms other than fire arms in the area under the jurisdiction of the Kanke P.S. in the district of Ranchi and no such notification has been brought on the record by the prosecution also. In the absence of such notification no charge u/s 27 of the Arms Act against appellant Jainul Ansari is legally maintainable for possessing or carrying a dagger which was recovered from his possession as a result of search on the bridge of Jumar river. Therefore, the conviction of appellant Jainul Ansari for the offence u/s 27 of the Arms Act suffers

from legal infirmity and no offence u/s 27 of the Arms Act is made out against him and his prosecution for that is ab initio, illegal and void. So far the prosecution of appellant Kudrat Ansari for the offence u/s 25(1)(b) of the Arms Act is concerned there is a mandatory provision contained u/s 39 of the said Act which provides that no prosecution shall be instituted against any person in respect of any offence u/s 3 of the Arms Act without a previous sanction of the District Magistrate. Here in this case no sanction for the prosecution of appellant Kudrat Ansari for the offence u/s 25(1)(b) of the Arms Act has been accorded. The requirement of obtaining prior sanction from the District Magistrate is not an empty formality but is a condition precedent and the prosecution of the said appellant u/s 25(1)(b) of the Arms Act will be illegal in such a case in view of the provisions of Section 39 as there has been occasioned a failure to obtain sanction from the prescribed authority. Here in this case the prosecution did not obtain sanction for the prosecution of appellant Kudrat Ansari from the prescribed authority and it, therefore, vitiates his prosecution for the offence u/s 25(1)(b) of the Arms Act. The learned Court below did not consider the said aspect of the matter and thus has erred in coming to the finding of the guilt of both the appellants under Sections 25(1)(b) and 27 of the Arms Act respectively. Therefore, their conviction in respect thereof is also illegal, suffering from legal infirmities and viewed thus, the conviction of both the appellants under Sections 25(1)(b) and 27 of the Arms Act respectively cannot be sustained. Therefore, their conviction for the offence aforesaid under the Arms Act is hereby set aside and the impugned judgment of the learned Court below is, accordingly, modified. However, there is no illegality in the conviction of both the appellants for the offence u/s 307/34 of the Indian Penal Code which is affirmed.

11. There is no merit in this appeal and it fails. The impugned judgment of the learned Court below is hereby modified as indicated above. The appeal is dismissed with the modification as stated above. The bail bonds of the appellants are hereby cancelled and they are directed to surrender before the Court below to serve out the sentence as awarded u/s 307/34 of the Indian Penal Code. The learned Court below is also directed to take all coercive steps in accordance with law to apprehend the appellants for serving out the sentence.