

CASE NO.:
Appeal (crl.) 1696 of 2007

PETITIONER:
Sumersinh Umedsinh Rajput @ Sumersinh

RESPONDENT:
State of Gujarat

DATE OF JUDGMENT: 11/12/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 1696 OF 2007
[Arising out of SLP (Crl.) No. 2557 of 2007]

S.B. SINHA, J :

1. Leave granted.

2. Appellant was charged with and convicted for commission of offences under Sections 307 and 353 of the Indian Penal Code as also Section 25(1)(a) of the Arms Act; and sentenced to undergo rigorous imprisonment of five years and fine of Rs. 5,000/-, two years and fine of Rs. 1000/- and three years and fine of Rs. 1000/- respectively.

3. Prosecution case shortly stated is as under:

Appellant was a driver of a Tata Spacio Car. Three other persons were accompanying him. They were sitting on the back seat. The said car was intercepted by the complainant PSI Babaji Javanji Vaghela (PW-8) and other police officers. The said persons ran away. The complainant Vaghela tried to pull the appellant out of the car. Allegedly, he resisted. Force was applied to take him out of the car. A scuffle ensued, during which allegedly he snatched the service revolver of the complainant and fired at him. Injury suffered by the complainant Vaghela (PW-8) as appearing from the medical report, is as under:

"H/O Firing has (sic) done by accused from the service revolver.
(illegible) on right side of loin (illegible)
1 x = cm abrasion (illegible) superficial
Black gas seen on cloth and puncture and baniyan occurs"

4. The clothes of the complainant as also the revolver with the cartridges were sent for testing to the Forensic Science Laboratory. It was found:

"Sample-A: It is a pant. On being performing (sic) chemical analysis and microscopic examination of the hole on the pocket of the said pant, it suggests that the hole on sample A has occurred due to fire arms discharge. The hole on the said pant can take place with the help of bullet of sample F.
Sample-B: It is a shirt. On being performing chemical analysis of the black spot that is seen on the right hand side of the waist of the said shirt it is found that the black spot on the right hand side of the waist of the said shirt has occurred due to fire

arms discharge.

Sample-D: It is 0.38" revolver of Lama Company made in Spain.

On being analyzing barrel wash (before performing test firing in this laboratory) of the said revolver the presence of residuals of nitrate and lead of the fire arms were seen. It suggests that firing was done from the revolver of the said Sample D before it has been brought to this laboratory.

On being firing from the chamber of the revolver of Sample D by taking two cartridges of 0.38" revolver from the stock of this laboratory, the same has been fired successfully. It suggests that the revolver of the said Sample D is in working condition.

Sample-E: It is empty case of cartridge of K.F. 0.38" revolver. There was indentation mark on the percussion cap of the said empty case of the cartridge. While performing examination and comparison in the microscope about the characteristics of the indentation mark on the percussion cap of the said cartridge and firing pin mark on the percussion cap of the cartridge that was test fired from the revolver of Sample D, they were found similar. It suggests that sample of cartridge of Sample E is fired from the revolver of Sample D.

Sample-F: It is one copper jacketed bullet of 0.38" revolver cartridge. While performing examination and comparison in the microscope about the characteristics of rifling mark on the said bullet and rifling mark on the bullet that was test fired from the revolver of Sample D, they were found similar. It suggests that bullet of Sample F is fired from the revolver of Sample D.

Note: Two cases of cartridge test fired from Sample D and Bullet is enclosed with parcel D.

The test report of blood present on the banyan of Parcel B (Sample B) will be sent separately on being received from the biology department."

5. The complainant examined himself as PW-8. One Amratlal (PW-2) who is the PSI of CID and had allegedly accompanied the complainant sought to support the prosecution case. However, he did not have any personal knowledge about the incident. He heard thereabout only from the complainant. In regard to seizure of the article, PW-7 Khengarbhai stated:

"How many panchamas were prepared by police, that I do not know. I put my signature in 4 to 5. The panchnama with regard to clothes was prepared first, thereafter panchnama with regard to revolver was prepared. As soon as first panchnama was concluded, second panchnama was prepared. When I went to police station that time clothes and revolver were lying on table in police station. The police, who has prepared panchnama informed me that those clothes belonged to PSI Vaghela. Tharad Police has shown revolver. Vaghela was sitting there. The said revolver was empty however it did not open. How many cartridges were present inside, I have not seen them. I have seen hole ;in vest and

trouser. The hole was present in left side of trouser. It was small and round, whatever has been shown to me in round hole ;in our language. I do not remember now. Today, the trouser which is shown to me has hole on right side."

6. All the witnesses who were said to be independent witnesses, viz., PWs-3, 6, 7 and 10 turned hostile. According to them, they were made to become witnesses of seizure of the clothes, etc., which had been kept in the police station.

7. Dr. Deepak Kumar examined himself as PW-5. He in his evidence proved the medical report. In his deposition for all intent and purport, he conceded the deficiencies in the prosecution case vis-'-vis the report prepared by him, stating;

"It is true that I have written history in certificate, that history was recorded in Yaadi. If vest has hole then shirt worn on that should have hole on it or if Bushirt is torn then shirt also should have hole on it or Bushirt worn is found torn.

It is true that looking at trouser. I say that one circle is made on it with pencil. That is not torn with bullet. It is true that looking at the trouser I say that, it is not entry cut. It is true that if vest has hole then two holes should have found, one is entry and other exit hole. Otherwise, in case of scratch, vest is found in similar torn manner.

It is true that I have not mentioned fire arm's marks. It is true that if any injury is caused with fire arm or bullet then the edge has burn mark. In present case no burn injury is found. It is true that if shooter fires from point blank range then black colour is found near wound. When I saw injury of patient, it did not have such black mark on that. Shirt had black mark. It is true that scratch mark can occur due to rubbing on rough substance."

8. From the statements made by PW-5, it is evident that even in relation to the purported marks of entry of the bullet through the garments owned by the complainant, there existed a lot of discrepancies. Some sort of make-shift report was placed before him by way of "Yaadi", which prepared by the complainant and whereupon he completely relied. If no burn injury was found in the clothes, it is difficult to believe that some burn injury was noticed in the wound. Prosecution did not obtain any clarification from him as to whether the nature of the injury which the complainant suffered could not take place due to rubbing of the skin on a rough substance.

9. We must also notice that the injury received by the complainant was allegedly caused to his loin. How such a simple injury could be caused from a shot fired from a fire-arm is open to question. So far as the report of the Forensic Science Laboratory is concerned, the clothes had not been identified as belonging to the injured. It may also be recorded that two bullets were sent to the Forensic Science Laboratory, although the specific case of the prosecution is that only one shot was fired. Two bullet holes were, therefore, not possible to be caused, one in the trouser and other in the waist, by one shot of fire. It has not been disclosed as to wherefrom the bullet was recovered. The mazhar witnesses did not say that any bullet was recovered from the place of occurrence in their presence.

10. According to PW-8, he came to know about the firing on hearing of sound of fire. He had immediately put his finger in the trigger of the revolver and caught the appellant from his wrist. If the finger of the complainant himself was on the trigger of the revolver, it is difficult to believe that the appellant was responsible for the act complained of. According to him, seizure took place at the place of occurrence but panch

witnesses contradicted him as according to them, they were made to sign the seizure list only at the police station. In his statement before the investigating officer under Section 161 of the Code of Criminal Procedure, PW-8 stated:

"\005three persons were there in Spacio but they all started running in the farm by opening the doors of the vehicle and as the driver of the vehicle was sitting on the stirring (sic for steering) wheel, we along with police personnel get down from our mobile van and approach to catch the driver of Spacio\005"

11. He resiled from the said statement and built up another story in his examination \026 in \026 chief that other police personnel chased them and that they had fled away.

12. PW-9 Maan Singh in his deposition stated that Vaghela had held the hand of the appellant and had been asking him to get down from his vehicle only when the scuffle took place. The said witness stated that blood had oozed out but the vest of the complainant did not contain any blood stain. Significantly, PW-9 stated that the doors of the vehicle near the driving seat were locked.

In his deposition, he stated:

"That time I have not seen him pulling out revolver. However, I saw revolver in his hand. After firing sir hold his wrist. The hand of accused were tied from wrist. That time his hand were in up side. That time firing did not occur. That is not true. Accused has not done firing and sir did not get injury that is not true. Sir got scratch mark during scuffle. Three accused who escaped and ran away, they were not caught."

13. There, thus, exists a lot of discrepancies in regard to the manner in which the incident had taken place. The complainant himself in his evidence did not say that all the three persons, who had got down from the rear seat and ran away, were chased by anybody.

14. Even assuming that PW-8 received a fire arm injury which in the facts and circumstances of the case does not appear to be plausible, having regard to the positive evidence of the prosecution as has been stated by PW-4 Neelabhai it seems certain that a scuffle had ensued. A case of Section 307 of the Indian Penal Code, therefore, has not been made out. The ingredients of Section 307 are:

- (i) an intention of or knowledge relating to commission of murder;
- and
- (ii) the doing of an act towards it.

[See Parsuram Pandey and Others v. State of Bihar (2004) 13 SCC 189, Sagayam v. State of Karnataka (2000) 4 SCC 454 and Merambhai Punjabhai Khachar and others v. State of Gujarat AIR 1996 SC 3236]

15. If the prosecution case of attempt to murder of PW-8 by gun-shot injury fails, resultantly, the prosecution under Section 25 of the Arms Act would also fail.

16. Having regard to the facts and circumstances of this case, we are of the opinion that no case has been made out even under Section 353 of the Indian Penal Code. The appeal is allowed. Appellant is directed to be set at liberty unless wanted in connected with any other case.