

Criminal Appeal (D.B.) No. 1770 of 2003

[Against the Judgment of conviction dated 22.11.2003 and Order of sentence dated 24.11.2003, passed by learned Additional Sessions Judge-5th, Palamau, in Sessions Trial No.135 of 2003]

Vivek Kumar Gupta @ Vicky Gupta S/o Kanhaiya Lal Gupta,
Resident of Village Redma, P.S. Daltonganj(T), Distt. Palamu.

.... **Appellant**

Versus

The State of Jharkhand

.... **Respondent**

P R E S E N T

**SRI ANANDA SEN, J.
SRI PRADEEP KUMAR SRIVASTAVA, J.**

.....

For the Appellant : Mr. Jitendra Shankar Singh, Advocate

Mr. Randheer Kumar, Advocate

For the State : Mr. Shiv Shankar Kumar, Addl. P.P.

.....

C.A.V. on 11.12.2024

Pronounced on 20.12.2024

Per Pradeep Kumar Srivastava, J.

1. We have already heard, Mr. Jitendra Shankar Singh, learned counsel for the appellant as well as Mr. Shiv Shankar Kumar, learned Addl. P.P. appearing for the State.
2. This instant criminal appeal is preferred against the judgment of conviction dated 22.11.2003 and sentence passed on 24.11.2003 by learned Additional Sessions Judge-V, Palamau in S.T. Case No.135 of 2003, whereby and whereunder the appellant has been

convicted for the offence under Section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life.

3. Factual matrix giving rise to this appeal as depicted in the fardbeyan of informant namely Arun Prasad (P.W.5) is that informant is the eldest among three brothers, next brother Kanhaiya Lal aged about 44 years and youngest brother is Raj Kumar Gupta aged about 32 years. There is dispute regarding partition of family property between the parties. It is alleged that informant is running a General Merchant Shop in the name and style ‘Arun Kirana Bhandar’ situated at a distance of 100 yards from his house at Redma Ranchi Road. It is further alleged that on 07.05.2002 at about 07:00 am, informant went to open his shop, meanwhile his younger brother Kanhaiya Lal’s son namely Vinay Kumar Gupta came to the shop and protested against the opening of the shop by the informant. The informant went to his house and informed to his younger brother Raj Kumar about the said resistance caused by Vivek Kumar Gupta in the opening of the shop and returned to the shop along with him and started opening the shop but his brother Kanhaiya Lal who was suffering from kidney ailment, came with sword towards the shop but he was apprehended by the local persons present near the shop. Upon this Kanhaiya’s elder son Vivek Gupta @ Vicky (appellant) came to

the shop and started abusing and threatening to the informant and his younger brother. Upon some scuffle, Vicky also went away but within interval of 10 minutes returned with a pistol and fired a shot in air which hit no one. Thereafter, Vicky started loading second cartridge in the pistol then younger brother of the informant namely Raj Kumar caught hold of him but Vivek Gupta fired a shot causing injury on head from the close range as a result of which Raj Kumar Gupta fell down on the spot and the accused Vicky managed to flee away. The injured was brought to Sadar Hospital, Daltonganj where he was declared dead by the attending Medical Officer.

On the basis of above information, F.I.R. was registered as Sadar (T) P.S. Case No.121 of 2002 dated 07.05.2002 for the offences under Section 302/34 of the I.P.C. and Section 27 of the Arms Act against all the three accused persons namely Kanhaiya Lal, Vicky Kumar Gupta and Vinay Kumar Gupta.

4. After completion of investigation, the accusation was found true against present appellant only and other co-accused persons were not sent up for trial. Accordingly, charge-sheet was submitted against the sole appellant of this case for the offences under Section 302 of the I.P.C. and Sections 25(1)(b)A, 26 and 27 of the Arms Act. After cognizance, the case was committed to the Court

of Sessions. After hearing the prosecution and defence, the charge under Section 302 of the I.P.C. was framed against the appellant and no charge for the any of the Sections of Arms Act were framed. The accused denied from the charges and pleaded not guilty and claimed to be tried.

5. In the course of trial, altogether twelve witnesses were examined by the prosecution namely P.W.1 Dr. Kundan Prasad, P.W.2 Jay Prakash Tiwari, P.W.3 Ajay Prasad, P.W.4 Vinod Kumar Sao, P.W.5 Arun Prasad (informant), P.W.6 Umesh Singh, P.W.7 Ratan Kumar (I.O.), P.W.8 Lalit Kumar, P.W.9 Rakesh Tiwari @ Guddu Tiwari, P.W.10 Satyendra Tiwari, P.W.11 Manish Kumar and P.W.12 Ganga Ram.

Apart from oral testimony of above witnesses, following documentary evidence were adduced:

Exhibit 1 to 1/2 : Postmortem Report of the deceased.

Exhibit 2 and 2/1 : Signature of witnesses on inquest report.

Exhibit 3 : Signature of informant on fardbeyan.

Exhibit 4 : F.I.R.

Exhibit 5 : Inquest Report.

Exhibit 6 and 6/1 : Seizure List.

Exhibit 7 : Examination Report of material exhibit.

Exhibit 8 : Signature of Deputy Commissioner on
sanction report.

Exhibit 8/1 : Signature of scribe of sanction order.

Material Exhibit

Exhibit I : Revolver

Exhibit II : Blood stained soil

All the above documentary evidence have been marked exhibit without objection.

6. After completion of prosecution evidence, statement of accused under Section 313 Cr.P.C. was recorded. The case of defence is denial from occurrence and false implication, however, no oral or documentary evidence has been adduced by the defence.
7. The learned trial court after considering the testimony of ocular witnesses as well as documentary evidence available on record and the material exhibit produced during trial, found the appellant guilty for the offence under Section 302 of the I.P.C. for causing death of the deceased by shooting him and convicted for the offence under Section 302 of the I.P.C. and sentenced as mentioned above.
8. Learned counsel for the appellant assailing the impugned judgment and order of conviction and sentence of the appellant

has challenged the impugned judgment and order mainly on following grounds:

- (i) It is a case of murder caused by using firearm and shooting the deceased, but no charge under Section 27 of the Arms Act or any other relevant Sections of Arms Act were framed against the appellant and he is not convicted for any offence under Arms Act.
- (ii) In absence of non-framing of charge under Section 27 of the Arms Act, it cannot be believed that appellant has caused death of the deceased by using illegal firearm.
- (iii) The manner of occurrence is also not believable, in view of evidence of sole eye witness P.W.5 that the deceased was running towards the appellant head on with a view to prevent him from further firing but the injury sustained by the deceased has been caused on the posterior side which is not possible in the given situation. There may be possibility that anyone else might have fired from behind to the deceased or it may be accidental firing during scuffle between deceased and the appellant. If the evidence of sole eye witness who happens to be informant (P.W.5) is taken to be true, even then the genesis and manner in which the firing took place cannot be said that it was intentional. It is

admitted position that at first instance, there was firing in the air by the appellant with a view to frighten the informant party so that they should desist from opening the shop, which was disputed property and the second firing as alleged against the appellant was during the scuffle between deceased and the appellant which might be accidental and not intentional. Therefore, the offence comes under category of Section 304 Part II of the I.P.C. and it is not a case of murder punishable under Section 302 of the I.P.C.

- (iv) The seizure list has not been properly proved. The arms recovered from the place of occurrence and the cartridge does not correspond to each other having different bore and caliber.
- (v) There is no link evidence that the arms seized from the place of occurrence bore any finger prints of the appellant and was actually used in causing death of the deceased.
- (vi) In absence of cogent and reliable corroborative evidence, the testimony of sole eye witness P.W.5 cannot be believed and acted upon.
- (vii) In the alternative, it is submitted that the cumulative effect of the facts proved by the prosecution even by virtue of evidence of P.W.5, who is sole eye witness in this case,

there was no intention of the appellant to kill his own uncle rather overall episode happened under struggle. Therefore, the case falls under Section 304 Part II of the I.P.C. The appellant has undergone more than 9 years' imprisonment during trial/post-trial of this case and has sufficiently been punished for the offence committed by him.

(viii) The appellant was 22 years' old on the date of occurrence. As such, taking lenient view in the factual aspects of the case, the appellant may be sentenced with imprisonment already undergone and this appeal may be disposed of.

9. Per contra, learned Addl. P.P. controverting aforesaid contentions raised on behalf of the appellant has submitted that P.W.5 is the sole eye witness of the occurrence and there is no reason to disbelieve his testimony. The occurrence is of day time broad daylight. Fardbeyan of the informant, was promptly recorded and investigation started immediately. There is no legal force in the points of argument raised on behalf of appellant. The evidence of P.W.5 has been corroborated from the ocular testimony of other witness as well as medical evidence i.e. Postmortem Report of the deceased showing gunshot head injury caused to the deceased on head resulting in death of the deceased. Therefore, mere non-framing of charge under Sections 25, 26 or 27 of the Arms Act

against the appellant is not sufficient to absolve him from the liability under Section 302 of the I.P.C. It is a clear-cut case of causing death by using firearm which is well proved by the prosecution. The involvement of the appellant is also not disputed. Therefore, no prejudice has been caused to the appellant in his defence for the charge under Section 302 of the I.P.C. In this regard, the learned Addl. P.P. has placed reliance upon provision of Section 464 of the Cr.P.C. This appeal has no merit and fit to be dismissed.

- 10.** In view of the above submissions, we have to apprise and evaluate at the outset the evidence of P.W.5 Arun Prasad who happens to be informant-cum-sole eye witness in this case. According to his evidence, on 07.05.2002 (Tuesday) at about 07:00 am, scuffle took place between parties as regards opening of shop by this witness. He has further stated that incident of firing took place at 07:30 am while he was present at his grocery shop. This witness has further stated that scuffle took place at a distance of ten steps from his shop and firing also started from that place. This witness has further stated that he went to open his shop at about 07:00 am where his nephew Vinay Kumar Gupta was already present who protested against opening of shop unless partition is effected between the parties. Then this witness returned to his home and

informed to his younger brother Raj Kumar about the above incident. Thereafter, this witness along with his younger brother Raj Kumar Gupta (deceased) returned to his shop for opening the same, but Vinay Kumar Gupta desisted and started scuffle which was also seen by Kanhaiya Lal Gupta from his house sitting on roof. Thereafter, Kanhaiya Lal Gupta also came with sword but he was apprehended by neighbours. In the meantime, shop was opened by this witness due to intervention of local persons. He has further stated that just after ten minutes of the above incident, Vivek Kumar Gupta (appellant) came with a firearm and started abusing and threatening, but he also went away and again after ten minutes, he came armed with a pistol and opened a fire in the air from mid of the road. Thereafter, Vivek @ Vicky loaded second cartridge at this moment Raj Kumar (deceased) wanted to catch hold of him but could not succeed and second round fire was hit near his pinna then Vivek Kumar threw the pistol and fled away from the spot. Rajkumar Gupta was brought to hospital but after examination, the doctor declared him dead. The statement of this witness was recorded at Sadar Hospital by the police which was signed by him (Ex.3).

In his cross-examination, this witness has admitted that at first the accused fired in air and he was not intending to kill the deceased.

P.W.1 Dr. Kundan Prasad has conducted autopsy on the dead body of the deceased and found the following:

- (i) 1"x1/2" penetrating wound with blackening and singeing of hairs and wound of entry near the right mastoid process.
- (ii) On dissection, the right mastoid process and nearby bone was fractured paving the way for the bullet to enter the skull and the underneath brain matter was torn and lacerated along with the path of the bullet which was found lodged underneath the left mastoid process which was fractured as well. The bullet was extracted and handed over to the police constable.

It is also admitted in his cross-examination that **the above said injury might have been caused by firearm from a distance of 1 ft. to 2 ft.** There is no possibility to find the bullet inside the body.

P.W.2 Jai Prakash Tiwari is not an eye witness of the occurrence rather he heard hullah that Rajkumar has been murdered.

P.W.8 Lalit Kumar, P.W.9 Rakesh Tiwari @ Guddu

Tiwari, P.W.10 Satyendra Tiwari and **P.W.12 Ganga Ram** are hearse witnesses of the occurrence, who arrived at the place of occurrence after incident and heard about murder of deceased.

P.W.3 Ajay Prasad and **P.W.4 Vinod Kumar Sao** are witnesses of inquest report who went to hospital after hearing about the murder of the deceased where inquest report was prepared by the police.

P.W.6 Umesh Singh is a formal witness who has produced the material exhibits of this case which is a pistol (Ex.I) and blood stained soil (Ex.II). He also admits that the pistol bears MR No.18/2002 and he does not bear the signature of any witness or the I.O. rather only Ratan Kumar is scribed over it.

P.W.7 S.I. Ratan Kumar who was the then Officer-In-Charge of the Daltonganj (Palamau) Town Police Station who has proved the fardbeyan of the informant to be recorded by S.I. Jaglal Ram and formal F.I.R. as Ex.4. He has further proved the inquest report of the deceased as Ex.5 and two seizure lists as Ex.6 and 6/1. He said that send the dead body for postmortem examination and visited the place of occurrence at about 08:05 hours. He also seized the blood-stained soil and a country made pistol from the place of occurrence and prepared a seizure list in

presence of witnesses. He obtained Postmortem Report of the deceased and sanction for prosecution under Arms Act and finding sufficient evidence submitted charge-sheet against the accused. The pistol seized from the place of occurrence was smelling recently fired which was sent for examination to Sergeant Major and he obtained report from Sergeant Major which is proved as Ex.7.

In his cross-examination, this witness admits that in the seizure list, it is mentioned that pistol is of .315 bore but in the examination report (Ex.7), it is mentioned to be .303 bore. He expressed that in the seizure list, bore of the pistol was written on the basis of guess work.

P.W.11 Manish Kumar has proved the sanction for prosecution order issued from the office of the then Deputy Commissioner Shri Subodh Nath Thakur as Ex.8 and 8/1.

- 11.** We have given thoughtful consideration to the overall evidence available on record as discussed above. It is obvious **that except P.W.5 Arun Prasad**, there is no eye witness of the occurrence. It is undisputed that deceased died homicidal death caused by use of firearm. It is also obvious from the evidence of P.W.1 Dr. Kundan Prasad that the shot was fired from the close distance of 1 ft. to 2 ft. range. In the given situation, we cannot ignore the evidence of

P.W.5 Arun Prasad who has vividly described the genesis and manner of the occurrence. He has stated in clear terms that initially resistance was caused by accused persons in the opening of shop by the informant when he called upon his younger brother Raj Kumar (deceased), the opening of shop was again protested by the accused while he was armless but just after ten minutes, he managed a country made pistol and fired in the air with a view to frighten the informant party. The evidence of this witness further shows that while the present appellant again loaded the pistol, the same was protested by the deceased and the deceased caught hold of the appellant, meanwhile, the second fire was opened during scuffle between them. The overall situation as depicted by P.W.5, if taken to be entirely true, is indicative of the fact that the second round fire was opened in a sudden manner without any pre-meditation and intention of the accused to kill his own uncle. Above testimony of P.W.5 has remained intact throughout and appears to be free from any embellishment. In the above mentioned circumstances, non-framing of charge under the provisions of Arms Act against the accused does not hold much water. In view of unrebutted testimony of the sole eye witness that the firearm was used by the present appellant and fired upon the deceased and during postmortem report on the dead body of the

deceased also firearm injury was found caused from a close distance. Therefore, no doubt can be raised in the prosecution case solely on the ground that there is no conviction of the appellant for the offence under Sections 25(1)(b)A, 26 and 27 of the Arms Act and there was no such charge against him. He has all along faced the trial for causing death of deceased by using firearm and never taken to be surprised or prevented from his effective defence due to non-framing of charge under the provisions of Arms Act.

- 12.** Now the moot question arises for consideration whether the case falls under Section 304 Part II of the I.P.C. ?
- 13.** In the instant case, the facts proved reveals that there was dispute regarding partition of property between the parties and when the informant (P.W.5) was opening his shop, it was resisted by the accused. The informant called upon his younger brother and again started to open the shop which was again protested by the appellant but they succeeded in opening the shop. This caused annoyance to the appellant who returned from the place of occurrence, but again appeared at the place of occurrence with a pistol. He at first used the pistol, opening fire in air with intention to frighten the informant party so that they may close the shop, but it is admitted fact that when he was loading second round of

cartridge in his pistol that was interfered with by the deceased who caught hold of him, meanwhile, firearm opened causing injury to the deceased from posterior side of head and ear. Under such circumstances, if the appellant had intended to commit murder of his own uncle (deceased), he might have directly approached to him and fired upon him but the events are otherwise. It was the deceased, who intervened the second round firing, which might be again opened in the air, but under struggle, hit the deceased causing his death. Therefore, we are of the considered view that it is not intentional murder of the deceased by the appellant rather the case falls under Section 304 Part II of the I.P.C. for causing death of the deceased without intending to kill him but with the full knowledge that it is likely to cause death.

- 14.** In view of aforesaid discussion and reasons, we set aside the conviction and sentence of appellant for the offence under Section 302 of the I.P.C. and held him guilty for the offence under Section 304 Part II of the I.P.C. Since the appellant has already been in custody for more than nine years during trial of this case and more than 20 years have been lapsed from the date of occurrence and it was a family dispute between the parties regarding partition of properties. The appellant is sentenced to imprisonment already undergone by him.

- 15.** Accordingly, this appeal is **dismissed** with modification/alteration in the findings and sentence passed by the learned trial court.
- 16.** Pending I.A., if any, stands disposed of.
- 17.** Let a copy of this judgment along with Trial Court record be sent back to the concerned Trial Court for information and needful.

(PRADEEP KUMAR SRIVASTAVA, J.)

Per Ananda Sen, J. : I agree

(ANANDA SEN, J.)

Jharkhand High Court, Ranchi

Dated: 20/12/2024

Sachin / **NAFR**