

Court No. - 91

Case :- JAIL APPEAL No. - 5752 of 2007

Appellant :- Gabbar Patel @ Dharmendra

Respondent :- State

Counsel for Appellant :- From Jail, Bhanu Pratap Singh A/C

Counsel for Respondent :- A.G.A.

Hon'ble Samit Gopal.J.

1. Heard Sri Satya Prakash Rathor, learned Amicus Curiae for the appellant and Sri S.B. Maurya, learned counsel for the State and perused the material on record.
2. This jail appeal has been filed by the appellant Gabbar Patel @ Dharmendra challenging the impugned judgement and order dated 25.09.2006 passed by Additional District & Sessions Judge, Court No. 14, Varanasi in Sessions Trial No. 784 of 2004, by which he has been convicted and sentenced under Section 307 I.P.C. to undergo three years and six months rigorous imprisonment.
3. The prosecution case as per the First Information Report lodged on 04.03.2003 at about 01:40 am is that the police informer informed the police that one person standing at Jalalpur Mod and is about to commit an incident who is having narcotics and a country made pistol with him, on which, the S.O. Sunil Kumar Bisnoi along with his accompanying police personnels proceeded towards the said person. They had torch with them. The said person all of sudden fired upon them to which they escaped and then they followed him after which near Jalalpur Mod he showed them his weapon but they arrested him on 03.03.2003 at about 23:40 hrs after overpowering him. They recovered a 12 bore country made pistol from his right hand and immediately upon opening its barrel found an empty cartridge. The said person was asked about his identity to which he disclosed that his name is

Gabbar Patel @ Dharmendra Patel and told his father's name and address. He further told them that he has diazepam tablets with him. He told them to take his search after which from his left pocket something wrapped in paper was found, on opening of which small tablets were recovered which were on counting found to be 300 tablets. The country made pistol, empty cartridge and the tablets were recovered and a recovery memo was prepared which was duly signed by him. The said recovery memo is Exb: Ka-1 to the records.

4. On the basis of the said recovery memo, a First Information Report was lodged on 04.03.2003 at 01:40 am as Case Crime No. 29 of 2003 under Section 307 IPC, Case Crime No. 30 of 2003, under Section 3/25 Arms Act and Case Crime No. 31 of 2003, under Section 8/22 of N.D.P.S. Act, Police Station Bada Gaon, District Varanasi.

5. The matter was investigated and a charge sheet no. 34 of 2003 dated 24.03.2003 was filed against the accused-appellant Gabbar Patel @ Dharmendra under Section 307 I.P.C. The same is Ex. Ka- 5 to the records.

6. Vide order dated 03.05.2005 passed by the Additional Sessions Judge, Court No. 14, Varanasi charge was framed under Section 307 I.P.C. against the accused Gabbar Patel @ Dharmendra. He pleaded not guilty and claimed to be tried.

7. In the trial, Sup-Inspector Ajay Srivastava was examined as PW-1. Amongst the prosecution documents, the recovery memo was produced as Exb: Ka-1, the Chik FIR was Exb: Ka-2, the GD of registration of the FIR was Exb: Ka-3, site plan was Exb: Ka-4 and the charge sheet was Exb: Ka-5 to the records.

8. After recording of the evidence of PW-1, the accused in his statement recorded under Section 313 Cr.P.C. in reply to question no. 4 stated that he committed a fault. He pleads guilty. Further, to question no. 6 he states that he is in jail since long time and as such leniency be shown.

The trial court thus after his confession under Section 313 Cr.P.C. concludes the trial as passed the impugned judgment by stating that on the basis of statement of PW-1 and the recovery memo along with the confession of the accused-appellant, the prosecution has succeeded its case beyond reasonable doubt and convicts him as stated above.

9. PW-1 Ajay Srivastaava was posted as Chowki In-charge Harhua, Police Station Bada Gaon, District Varanasi. On the day of the incident, he was standing with the S.O. at Jamalpur Mod and were talking about miscreants, on which, the police informer came and on his information and pointing out an effort was made to arrest the accused-appellant after which he fired upon the police party from his country made pistol but the police party was saved and no one received injury. He was overpowered and was apprehended along with 12 bore country made pistol, one live cartridge and one empty cartridge along with 300 tablets of diazepam. The recovery memo was prepared on the dictation of S.O. Sunil Kumar. The articles were sealed and the accused was brought to the Police Station and the First Information Report was lodged. He proves the handwriting of the Head Constable who transcribed the First Information Report. The investigation was given to Sup-Inspector Vipin Kumar Rai who concluded it and filed a charge sheet. He proves the handwriting of Vipin Kumar Rai also. No cross examination was done.

10. The accused then in reply to question no. 4 in his statement recorded under Section 313 Cr.P.C. was asked as to why a case has been lodged against him, to which, he states that he is at fault. He admits his guilt. In reply to the question no.1 with regards to his making a fire on the police party, he states that it is true. He further with regards to the recovery of the weapon and the recovery memo, does not say anything. Further, in reply to the documents and investigation he does not say anything. In the last reply to a question no. 6 as to whether he wants to say anything, he states that he is in jail since a long time and leniency be shown to him.

11. The trial court came to a conclusion that the prosecution has proved its case beyond reasonable doubts on the basis of the statement of PW-1 Ajay Srivastava, the recovery memo Exb: Ka-1 and acceptance of guilt by the accused in his statement recorded under Section 313 Cr.P.C. and thus convicts him as stated above.

12. Learned Amicus Curiae argued that the view as taken by the trial court is fully perverse and illegal. The prosecution has to stand on its own leg and prove its case beyond reasonable doubt. It is argued that admittedly the present case is a case of no injury. The recovery memo although is on record and has been exhibited by the prosecution but there is no corroborative evidence to show the use of the said weapon in the present case. There is no opinion of any expert or even evidence to the effect that the said weapon was sent for analysis to show that there was fire made by the accused-appellant. The corroboration in so far as the use of the said weapon is concerned, is missing. It is argued that even the prosecution has not come forward to show that the said weapon was sent to the ballistic expert for its testing which would go to corroborate its use in the present case. It is argued that merely by pleading guilty in the statement recorded under Section 313 Cr.P.C., the accused cannot be held guilty. At the stage of framing of charge, the accused had pleaded not guilty and claimed to be tried. It was the duty of the prosecution to stand on its leg to show the involvement of the appellant. It is argued that the impugned judgment and order deserves to be set aside and the appellant deserves be acquitted.

13. Per contra, learned counsel for the State opposed the arguments of learned Amicus Curiae and argued that the statement of PW-1 has clinched the issue. The implication of the appellant is there. He was apprehended at the spot with the weapon by which he made a fire. The accused has confessed his guilt in his statement under Section 313 Cr.P.C. The same are sufficient to reach to a conclusion of his being involved in the matter and convict him. Hence, the appeal deserves to be dismissed.

14. After having heard learned counsels for the parties and perusing the records, the issue involved in the present matter lies in a small compass. It is as to whether after pleading guilty in the statement recorded under Section 313 Cr.P.C. and the prosecution proving the recovery memo and one witness coming and the deposing against the accused who was one of the team members of the arresting team, is sufficient for conviction or not. Admittedly, the present case is a case of no injury. It is stated that the accused made a solitary fire but the same did not hit anyone. He was later on overpowered and apprehended and stated to be having a 12 bore country made pistol with one empty cartridge along with one live cartridge in his possession. The said articles were recovered from him.

15. The prosecution is silent as to whether the said weapon was sent to the ballistic expert for examination which would corroborate its use at that point of time. Mere recovery of a weapon and one empty cartridge would not be sufficient to prove the use of the said weapon without any corroborating evidence.

16. The next question which crops up is as to whether the accused if pleads guilty in his statement under Section 313 Cr.P.C. is also the circumstance to rest against him or not. In the present case, as has been stated above after charges were framed by the concerned court, the accused had pleaded not guilty and had claimed to be tried.

In his statement recorded under Section 313 Cr.P.C. he has not given any reply to certain questions and further states of his being guilty and then in addition states of the court taking a lenient view in the sentence as he is in jail since long time. Law as it stands undisputed is that the statement under Section 313 Cr.P.C. is not evidence. It is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. However, it cannot be said to be a substitute for the prosecution evidence. It is only the version or stand of the accused by way of explanation to a question put by the prosecution regarding incriminating

material appearing against him which are brought to his notice and he is given a chance to reply them. The statement is not made on oath. Yet it can be taken into consideration at the trial against an accused for arriving at his guilty or otherwise but the prosecution has to at the very first instance prove its case beyond reasonable doubts against him and then his explanation or answer to such incriminating circumstance should be looked into. It cannot be said that mere stating of being guilty in the statement under Section 313 Cr.P.C. will end the issue and would lead the route only to the guilt of the accused without prosecution establishing its case beyond reasonable doubt against him through cogent, reliable and admissible evidence.

17. In the present case, there is no other witness examined by the prosecution. Although, the quality of evidence is needed in a case and not the quantity. In the present case, only one witness was examined who was a member of the said police team. He has deposed for each and everything of the case. The corroboration of the use of the weapon is not present. The weapon was not sent for expert analysis. The case is a no injury case. It cannot be said that merely by pleading guilty in the statement under Section 313 Cr.P.C. the accused can be pinned down and a conviction can be recorded against him.

18. Looking to the facts and circumstances of the case and in view of the above discussion as done, the accused-appellant deserves to be extended the benefit of doubt and as such the present appeal is allowed. The appellant is acquitted of the charges levelled against him. The appellant if is in jail, shall be released forthwith.

19. Office is directed to transmit the lower court records along with the copy of this judgment to the trial court forthwith for its compliance and necessary action.

20. Sri Satya Prakash Rathor, learned Amicus Curiae who was appointed Amicus Curiae vide order dated 04.08.2022 passed by this Court assisted the Court in deciding the appeal.

21. Office is directed to pay a sum of Rs. 8,000/- for assistance of the Court to learned Amicus Curiae within two months from today.

Order Date :- 11.08.2022

M. ARIF

(Samit Gopal,J.)