

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 25th, November 2009*
Judgment Delivered on: 4th, December 2009

+ **CRL.REV.P.646/2003**

BRIJPAL SINGHPetitioner
Through: Ms.Urmil Sharma, Mr.U.K.Sharma &
Mr.Sanjay Mishra, Advocates.

Versus

STATE ...Respondent
Through: Mr.Manoj Ohri, APP.

**CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. FIR No.198/92 registered under sections 286/304A of the IPC at police station I.G.I.Airport was on the complaint of Darshan Lal PW-7. As per his version, on 22.4.1992 he along with deceased Pali @ Ravinder was sitting near their canteen; deceased Pali was a taxi driver; suddenly a fire shot was heard and he saw that Pali had been hit by a bullet on his chest. He was removed to the hospital where he remained alive for about 4-5 hours; he succumbed to his death.
2. Statement Ex.PW-7/A of Darshan Lal was recorded which had set the investigation of this case into motion. H.Ct. Subhash Chand PW-2 along with SI Umesh Singh had reached the spot on receipt of information of this incident which had been recorded in DD No.40.

He took the rukka Ex.PW-2/A for the registration of the formal FIR Ex.PW-2/B.

3. Investigation had revealed that the fire shot had emanated from a SAF Gun which had been issued to Cont.Anil Kumar PW-3. PW-3 had deposed that he had handed over this SAF Gun to the accused along with the magazine after taking permission from H.Ct.Raj Kapoor PW-1 as he wanted to go to the toilet; ten minutes later when he came back he saw that the local police had already gathered there and the magazine of his gun contained only 19 cartridges, the 20th cartridge had been used.

4. H.Ct.Raj Kapoor had been examined as PW-1; on 21-22.4.1992 he was the duty constable outside the arrival hall of the I.G.I.Airport. As per his version at about 2.50 AM PW-3 has sought his permission to attend the call of nature; on the instruction of PW-1, PW-3 had handed over his SAF Gun to the accused who had been instructed to sit inside the booth along with weapon. PW-1 has further deposed that he was at the distance of 20-25 yards from the booth when he heard the sound of a gunshot; bullet injuries had been sustained by a taxi driver; police had been informed.

5. Dead body of the victim Ravinder Singh had been identified by his landlord Jaswant Singh PW-4. MLC of the victim had been prepared by Dr.Sanjiv whose signature had been identified by Bhuvan Ram PW-9 on Ex.PW-9/A. Ex.PW-9/A had noted one bullet entry wound one inch above and one inch medial to the right nipple. Cause of death had been opined by Dr.S.D.Diman PW-12 who had identified the signature of Dr.P.K.Kundal who had conducted the

post mortem of the deceased vide his report Ex.PW-11/A, cause of as being haemorrhagic shock following firearm injury. Ex.PW-11/A noted that the bullet which had been recovered from the thoracic vertebrae of the victim was duly sealed and handed over the Investigating Officer.

6. Mr.A.Day, Sr.Scientific Officer had examined the sten gun Ex.P-1 along with 9 m.m. cartridge case and 19 9 m.m. cartridges which had been sent to him for analysis; vide his report Ex.PW-8/A dated 31.7.1992 he noted that the sten gun was in a working order and the 9 m.m. bullet marked BC/1 of parcel no.4 i.e. the bullet retrieved from the dead body had been fired from this 9 m.m. sten carbine. It had further been opined that the bullet hole on the right front chest portion of the T- Shirt of the victim could have been caused by the 9 m.m. bullet i.e. mark BC/1 contained in parcel no.4.

7. On the basis of the aforestated evidence collected and proved by the prosecution the Trial Court vide impugned judgment and order of sentence dated 9.4.2003 and 10.4.2004 convicted the petitioner under Section 304 A of the IPC; he was sentenced to undergo RI for two years and to pay a fine of Rs.2000/- in default of payment of fine to undergo SI for one month.

8. In appeal before Additional Sessions Judge vide judgment dated 21.4.2003, while dismissing the appeal and maintaining the conviction no modification was made in the sentence either.

9. On behalf of the petitioner, it is submitted:

(i). That the judgment of both the Courts below suffers from inherent illegalities which has resulted in a

miscarriage of justice; both the Courts below had failed to appreciate that it was a pure and simple accident which had occurred; this act of the petitioner could not be qualified as either rash act or negligent in the absence of which the offence under Section 304 A of the IPC could not be sustained.

(ii). The Investigating Officer has not come into witness box and crucial documents i.e. seizure memo, the site plan had remained unexhibited and not proved.

(iii). Attention has been drawn to the seizure memo dated 22.4.1992 wherein it has been recorded inter alia as under:-

“ One sten gun, on the magazine catch of which Carbine Machine 9 m.m. A registered No.NN 1303 SAA 1972 is engraved.”

The weapon sent to the CFSL was not described in the forwarding letter and does not find mention in the report of the CFSL Ex.PW-8/A; it does not match the description given in Ex.PW-8/A i.e. the report of the CFSL vide which the sten gun had been received by the scientific expert for the consequent analysis. In this context attention has been drawn to the version of PW-8, CFSL Expert; PW-8 in his deposition has deposed that the sten gun bears an engraved signature; such a description given by PW-8 does not match the description given in the seizure memo.

(iv). There were twenty cartridges in the weapon; one had been fired; 19 live cartridges had been sent to the CFSL for analysis. This is also evident from the report of the CFSL and parcel no.2 which had described 19 cartridges having been received in the department. Out of these 19 cartridges, as per Ex.PW-8/A six cartridges of 9 m.m. had been test fired thereby leaving a balance of 13 cartridges. PW-8 in his deposition has stated that three cartridges were test fired which is not in conformity with the document Ex. PW-8/A.

(v). There is no explanation as to why the seizure which had been effected of this weapon on 22.4.1992 had been sent to the CFSL after such a inordinate delay; Ex.PW-8/A reflects that this parcel had been received in the department only on 22.5.1992 i.e. after a delay of one month. Counsel for the petitioner has placed reliance upon 1985(1) Cri 72 Suman Singh Vs. State of UP as also 1992 Crl.L.J. 1150 Khalaksingh & Ors. Vs. State of M.P. to substantiate his submission that long delay in sending the recovered cartridges from the Malkhana of the police station creates a suspicion about this recovery and the possibility of tampering cannot be excluded.

(vi). Attention has been drawn to the version of PW-3 Ct. Anil Kumar; it is submitted that his cross-examination had been deferred on 11.1.1995 for want of the ammunition register but in spite of opportunity this has not

been brought on record; obviously for the reason that they were discrepant entries which would have been gone against prosecution i.e. the reason why the prosecution had not coming forward with the said register. Adverse inference for not producing this relevant piece of evidence has to be drawn against the prosecution under Section 114 (g) of the Evidence Act.

(vii). This is admittedly a case of circumstantial evidence; there is no eye-witness. Even as per the case of PW-7 he had only heard the sound; he had not seen the actual firing. Prosecution has to stand on its own legs and prove its case beyond all reasonable doubt. Reliance has been placed 2001(1) CCC 221 Sohan Lal & Anr. Vs. State of Haryana & Anr. to support his submission. This proposition is not in dispute and has not been countered by the learned public prosecutor and calls for no further debate.

(viii). It has lastly been submitted that provisions of Section 80 of the IPC are attracted and the act of the petitioner is a lawful act falling within the general exceptions contained in Chapter-IV of the Indian Penal Code. Nothing is an offence which is done by an accident or misfortune; petitioner had no criminal intention or knowledge that by his act, this would be the resultant consequence; he is adequately protected by this exception.

10. Arguments have been countered by the learned public prosecutor.

11. Record has been perused and the submissions and counter submissions have been noted and appreciated.

12. It is not in dispute that on 22.4.1992 PW-3 was the lawful holder of this weapon of offence i.e. SAF gun; he had taken permission of PW-1 to attend the call of nature and in this intervening period to handover the weapon to the present petitioner i.e. Brij Pal. This has been reiterated by PW-3 on oath and has not been assailed in his cross-examination.

13. PW-1 has also corroborated this version of PW-3 and has deposed that PW-3 had sought his permission to hand over the weapon to Brij Pal as he wanted to attend the call of nature. PW-1 had instructed the petitioner to sit in the booth with the weapon. This version of Pw-1 has also not been challenged.

14. Evidence has established that on 22.4.1992 the victim Ravinder Pal Singh had received one bullet injury on the right side of his chest from a 9 m.m. SAF sten gun; the bullet mark BC/1 recovered from the thoracic region of his body and handed over by the Post Mortem Doctor i.e. Dr. P.K.Kundal to the Investigating Officer finds mention in the post mortem report Ex. PW-11/A. This bullet along with the sten gun Ex.P-1 had been sent to the CFSL for analysis. The CFSL vide its report Ex.PW-8/A had received seven parcels in its department. Parcel no.3 contained two articles and had been described as follows:-

i. One 9 m.m. Sten carbine (marked A/1 by me) bearing No.NN1303.

ii. One 9 m.m. Magazine.

15. This description of the 9 m.m. sten gun having no.NN 1303 finds mention in the seizure memo dated 22.4.1992 vide which this weapon of offence had been seized from the present petitioner; in this seizure memo also the weapon of offence has been described as a sten gun and on the magazine catch Carbine Machine 9 m.m. registered no.NN1303 SAF 1972 had been ascribed. This clearly establishes that the weapon seized was the same weapon which had been sent to the CFSL for examination.

16. Vide Ex.PW-8/A, PW-8 Dr. A. Day had opined that this weapon was in a working order. Dr.Day had also examined the 9 m.m. fired bullet mark BC/1, retrieved from the dead body of the victim; on this examination he had concluded that this bullet had been fired from this weapon i.e. 9 m.m. sten carbine contained in parcel no.3. He had further opined that the bullet hole on the right front T-shirt of parcel no.5 i.e. the T-shirt of the deceased victim could have been caused by this weapon.

17. This ballistic report has conclusively established that the weapon, custody of which was with the petitioner at the relevant time had fired the bullet mark BC/1 which was the cause of death of Ravinder Pal Singh. The bullet hole in the T-shirt of the victim was also the result of the firing from this weapon. This is a lethal piece of evidence and coupled with the ocular version of PW-1 and PW-3 has conclusively established that it was the act of the petitioner in firing the bullet from the sten gun Ex.P-1 which had caused the death of Ravinder Pal Singh.

18. In this context it would be relevant to state that in his statement under Section 313 of the Cr.P.C., the petitioner had made a bald denial and has stated that this sten gun had not been handed over to him by PW-3. This version in his statement under Section 313 Cr.P.C. is contrary to the defence taken by the accused that his act of firing is protected under Section 80 of the IPC. These varying and contradictory stands adopted by the accused clearly show that he is shifting his corners; he does not know where to stand; whether in corner A or corner B; neither appears to be of any help to him as evidence adduced and proved by the prosecution has established otherwise.

19. A false plea taken by an accused under Section 313 of the Cr. P.C. has to be read against such an accused. In 1981 Cr.L.J. 325, Shankralal Vs. State of Maharashtra the question of falsity of the plea taken by the accused in his statement under Section 313 of the Cr.P.C. the Apex Court had held that such a false plea is an additional circumstance lending support to the other impelling circumstances pointing out towards the guilt of the accused.

20. The question which now arises for decision is whether the act of the accused falls within the ambit and scope of Section 304A of the IPC or not; whether he is entitled to the consequent protection under section 80 of the IPC.

21. Section 304A of the IPC necessarily postulates a rash or negligent act; mere carelessness is not sufficient for a conviction under this section. Criminal rashness is hazardous or a dangerous or a wanton act with the knowledge that it is so, and that it may

cause injury, but without the intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

22. Weapon of offence is a sten gun. The sten submachine gun operates by “blowback” cycling, a common method of operation used by many firearms, including many low-powered rifles and pistols. The receiver, a metal tube which retains the operating components, contains a metal cylinder called the bolt, a powerful operating spring, and the sear, a hardened hook which controls the bolt. When ready for firing, the sear holds the bolt in a retracted position with the operating spring compressed. When the trigger is pulled, the sear releases the bolt, and the spring propels it forward at high speed, where it “feeds” a cartridge from the magazine and into the firing chamber. If the trigger is released, the sear catches and holds the bolt in the retracted position, halting the firing sequence. The sten gun fires at a rate of nine shots per second (550 rounds per minute), or, a thirty-round magazine load in 3.3 seconds. The mode of retaining the bolt retracted when not firing is known as “open bolt” operation, which is both easier to engineer, and also utilized for safety reasons.

23. In this context the cross-examination of PW-8 is also relevant. He has categorically deposed that the sten gun was found to be in a normal working order and no defect was found in it during the test firing; a cartridge cannot be fired without pressing the trigger of the fire arm; the safety lever has to be released and after pressing the trigger the system will work.

24. From the history of this weapon as detailed above as also the answers elicited from PW-8 in his cross-examination it is apparent that the sten gun has a safety device i.e. a safety lever and it is only after the safety lever is released and the trigger pressed, that the system will work and the cartridge will be fired.

25. It is in this background that the act of the petitioner has to be construed.

26. The petitioner himself was a police personnel i.e. of the rank of a constable. He was well conversant and in the know-how of dealing with a weapon of this kind i.e. a loaded SAF sten gun which was a dangerous weapon and he was fully aware of the hazards attached in handling such a weapon; he was also aware of the fact that the weapon was loaded. This weapon could not have been fired unless the safety lever was released followed by the pressing of the trigger. There were two overt acts which were required on the part of the petitioner before this gun could have released the cartridge. Even presuming that one of the two acts was accidental, the other could not have followed unless there was a active participation by the petitioner; it was his active overt act which had led to the incident.

27. In such a situation even if it is presumed that the intention to cause the injury is absent, yet the from the fact that there is a safety device attached to this weapon and unless this safety device is released, the weapon cannot be set in motion, it is a clear case where there was a wanton lack of care in handling this dangerous weapon; the hazards attached to it being well-known to the petitioner who was of the rank of a Constable and was dealing with such type of weapons in the normal course of duty. The act of the petitioner leading to the death of the victim was clearly without due care and caution, it was an act sufficient to be encompassed within the definition of `negligent`. The recklessness and indifference of the petitioner in handling this dangerous weapon is apparent and the consequences have flown from this negligent act. It is thus clear that in such a situation even in the absence of intention to cause injury, the doer of the act is guilty of a rash and negligent act. Death of the petitioner was the direct and proximate result of this act of the petitioner.

28. In AIR 1949 Lahore 85 Mohd. Sadiq vs. The Crown the accused who had a loaded pistol was demonstrating to the deceased by bringing the pistol into two different positions; there were facts showing possibility of the pistol exploding and killing the deceased. Accused was held guilty for an offence under this Section.

29. The exception contained in Section 80 of the IPC does not come to the aid of the petitioner. Besides the fact that the petitioner has taken conflicting stands and where as in his statement under

Section 313 of the Cr. P.C. he had made a bald denial and has denied that this weapon of offence had been handed over to him, yet in the same breath he had taken up his contrary plea that his act of firing from the weapon was a lawful act. For the sake of arguments, even while ignoring his first plea which had been taken up by him in his the statement recorded under Section 313 of the Cr. P.C., the second defence also does not come to his aid.

30. In J.T. 2009 (9) SC 413 Raj Kumar Vs. State of Maharashtra, it has been held by the Supreme Court that in order to bring the case within any one of the general exception under the IPC, under Section 105 of the Evidence Act, the burden of proving the existence of such a circumstance is upon the accused and in the absence of this the Court would be justified in presuming that there is no such circumstance in his favour.

31. In 1998 III AD (SC) 373 Atmendra Vs. The State of Karnataka Supreme Court had held that to claim the benefit of Section 80 of the IPC it has to be shown:

- (i) That the act in question was without any criminal intention or knowledge ;*
- (ii) that the act was being done in a lawful manner by lawful means;*
- (iii) the act was being done with proper care and caution.*

32. No such cross-examination had been done on the witnesses of the prosecution i.e. either of PW-1, PW-2 or PW-7; such defence has also not been raised by the accused in his statement recorded under Section 313 of the Cr.P.C. or at the opportune time of leading evidence in defence.

33. Submission of the learned defence counsel that the delay in sending the samples has caused prejudice to him is an argument without any merit; petitioner has failed to point out as to what is prejudice suffered by him; Ex.PW-8/A i.e. the report of the CFSL clearly states that the seven parcels received in the department were received with the seal intact and tallying with the specimen seal. No suggestion to the contrary has also been given to PW-8 or any of the other witness of the prosecution.

34. There is also no discrepancy in the number of the bullet which had been retrieved vide the seizure memo and the bullets which had been test fired; there were twenty bullets in the sten gun; one had been fired which had resulted in the death of the victim; 19 live cartridges had been seized and had been sent for necessary analysis to the CFSL; this is evident from the seizure memo, the report of the CFSL Ex.PW-8/A as also the version of PW-8. Ex.PW-8/A clearly recites that six 9 m.m. cartridges which were test fired, are being returned back in the same parcel i.e. the test fired bullets were also returned back in the cartridge cases in which they had been received. Oral version of PW-8 that three cartridges were test fired is an insignificant contradiction; this witness being a scientific expert has deposed in his official capacity; document Ex.PW-8/A prepared by him had noted that six cartridges had been test fired. This argument is also of no help.

35. The non-examination of the Investigating Officer and the non proof of the site plan has also not affected the merits of the case;

the Investigating Officer could not be examined in spite of the best efforts.

36. In 83 2000 DLT 476 Ambika Prasad vs. State Supreme Court had held that non-examination of the Investigating Officer even if it is without any justifiable ground would not be a ground for disregarding other evidence including testimony of witnesses whose presence on the spot has been established beyond all reasonable doubt.

37. Conviction of the petitioner for the offence for which he had been convicted calls for no interference.

38. Offence is related to the year 1992. Petitioner was a first time offender; he was a constable in the Delhi Police; he was a public servant; his one negligent act has made a world of difference in his life not only in his career but also in his personal life.

39. While considering the sentence, one of the prime considerations should be deterrence. But at the same time the Legislature has also kept in mind that for an offence under this Section a term of imprisonment is not a must and this section visualises the possibility of an offence falling under it being penalised by a fine alone. The severity to the sentence must depend to a great extent on the degree of callousness which is present in the conduct of the accused. The curative approach of sentencing must also be kept in mind.

40. The background of this case calls for a deterrent as also a reformatory approach. While maintaining the balance between the two approaches this Court is of the view that the sentence imposed

by the two Courts below calls for a modification. The RI of two years is accordingly modified to RI for six months. Fine is enhanced from Rs.2000/- to Rs.5000/- in default of payment of fine the petitioner will undergo SI for one month. Bail bond and surety bond of the petitioner stand cancelled. He shall surrender forthwith to suffer the sentence.

41. Petition disposed of in the above terms.

(INDERMEET KAUR)
JUDGE

December 04, 2009
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