
(2018) 10 UK CK 0122

In the Uttarakhand High Court

Case No : Criminal Appeal NO. 81, 87 Of 2003

Saleem And Others

APPELLANT

Vs

State Of Uttaranchal And Others

RESPONDENT

Date of Decision : 25-10-2018

Acts Referred:

Indian Penal Code, 1860 — Section 307, 392, 397, 398, 411
Arms Act, 1959 — Section 25

Citation : (2018) 10 UK CK 0122

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : R.K.S. Verma, J.S. Virk, Mamta Joshi

Final Decision : Partly Allowed/ Allowed, Respectively

Judgement

Sudhanshu Dhulia, J

1. Criminal Appeal No. 81 of 2003 has been filed by the appellants Saleem, Sanjay Singh and Vikas Gupta challenging the judgment and order dated 21.02.2003 passed by the Trial Court, whereby the Trial Court had convicted and sentenced the appellants in different session trials as under:-

(A) In Session Trial No. 06 of 1996, the appellants Saleem, Sanjay Singh and Vikas Gupta have been convicted by the Trial Court vide judgment and order dated 21.02.2003 for offences under Sections 392, 398, 411 IPC and have been sentenced for rigorous imprisonment for a period of five years under Section 392 IPC, rigorous imprisonment for a period seven years under Section 398 IPC and rigorous imprisonment for a period of two years under Section 411 IPC.

(B) In Session Trial No. 289 of 1995, the appellants Sanjay Singh, Vikas Gupta and Saleem have been convicted by the Trial Court vide judgment and order dated 21.02.2003 under Section 307 IPC and have been sentenced for rigorous imprisonment for a period of five years.

(C) In Session Trial No. 290 of 1995, the appellant Sanjay Singh has been convicted by the Trial Court vide judgment and order dated 21.02.2003 for the offence under Section 25 of the Arms Act and has been sentenced for rigorous imprisonment for a period of two years.

(D) In Session Trial No. 291 of 1995, the appellant Saleem has been convicted by the Trial Court vide judgment and order dated 21.02.2003 for the offence under Section 25 of the Arms Act and has been sentenced for rigorous imprisonment for a period of two years.

(E) In Session Trial No. 292 of 1995, the appellant Vikas Gupta has been convicted by the Trial Court vide judgment and order dated 21.02.2003 for the offence under Section 25 of the Arms Act and has been sentenced for rigorous imprisonment for a period of two years.

2. Criminal Appeal No. 87 of 2003 has been filed by appellant Sauraj, who has been convicted by the Trial Court vide judgment and order dated 21.02.2003 for offences under Section 392/398/411 IPC in Session Trial No. 06 of 1996 and has been sentenced for rigorous imprisonment for a period of five years under Section 392 IPC, rigorous imprisonment for a period seven years under Section 398 IPC and a rigorous imprisonment for a period of two years under Section 411 IPC.

3. As per the case of the prosecution in the FIR lodged by the complainant on 30.08.1995 at 03:15 a.m. at P.S. Rani Pokhari, District Dehradun, the incident is of a few hours earlier of the same night of 29.08.1995 at about 08:00 p.m. Three persons of whom one was armed with a country made pistol, entered the house of the complainant and threatened the complainant, that he must part with all cash and ornaments in the house or otherwise he would be killed. At the relevant time, the complainant had some of his friends as well as the usual household staff also in the house. All the same, barring the complainant, others were not questioned. The rest were kept in a separate room of the house. The complainant was taken inside a room of his house and was asked to sit on a chair, to which he was tied. The accused then took away weapons of the house, such as a "Double Barrel Gun" and a ".22 Rifle", along with sizeable amount of ornaments and household utensils. According to the complainant, all the three accused had covered their face, but he recognised one of them, when his scarf fell down. This man Saleem, who had worked in the tubewell of his farm, a few days back, who belonged to District Saharanpur. Along with the three persons, there was another person who was standing outside the house at the gate. The complainant further states in the FIR that staff members had also identified Saleem and his accompanies.

4. Pursuant to the FIR lodged at the police station, the police started its investigation and out of the four accused, three namely Saleem, Sanjay Singh and Vikas Gupta were arrested on 31.08.1995. The fourth accused, namely, Sauraj Singh, who has filed the separate criminal appeal being Criminal Appeal

No. 87 of 2003 was arrested later on 29.09.1995.

5. The case of the prosecution is that the accused Saleem, Sanjay Singh and Vikas Gupta, resisted their arrest and opened fire on the police party, consequently the three were also charged additionally under Section 307 of IPC. Ultimately the trial court framed charges against accused Saleem, Sanjay Singh and Vikas Gupta for the offences under Sections 307, 392, 398/411 IPC and against Sauraj for the offence under Section 392 IPC.

6. The prosecution examined as many as 10 witnesses, out of which PW1 Raman Dev Singh (the complainant), PW 2 Musaddi Lal and PW 3 Raju are the witnesses who were present in the house of the complainant on 29.08.1995 when the incident happened. PW 1 is the complainant himself who was owner of the house where the robbery took place. According to PW 1, on 29.08.1995 at about 08:00 p.m., three persons entered into the house of the complainant armed with country made pistol, threatened the complainant that he must part with cash and ornaments otherwise he would be killed. He could recognise Saleem as he had worked at his tubewell few days back. Thereafter the complainant reiterates the narration which he stated in the FIR. There is a long list of articles which have been robbed, which is as under:

"1. DBBL Gun No. 1193

2. 022 Rifle No. 100

3. Video Camera - Sony No. 330734

4. Transistor - Sony- Sr. No. 73-850 9 band

5. Video Game - No. TV - P 31052472

6. Pocket T.V. Casio Model T.V. 470 CA No.3

7. Polaroid Camera -Sonar - 5000

8. VCR Beltech - No. 300- Vol. 0924

9. Two-in-one Sonio - 4 band No. 2361-72-03

10. Watches -12 1. Honda, 2. Orient, 3. Onkare, 4. Remond, 5. Omega, 6. Seko, 7. Fondator, 8. Sisora, 9. Everhod, 10. Titan and other two are unbranded.

11. Two old swords

12. Silver goods Sitar, Pan Dan - 2, Glass, Tea set, Boxes (Dibbe), flower pot, bowls, worship material, plate, and many decoration items, utensils of silver

13. two show piece

14. Gold ring, Gold top, Artificial Churi,

15. Three briefcases, two brown, one cream

16. Two bags, black and red, T.V. Bag

17. Bullets - .22 - 6

12 bore - 16

18. Two blankets - 1 black, 1 check"

7. Another witness is PW 2 Mussadi Lal, who is an employee of the complainant, corroborates the prosecution case. PW 1 had also recognised Saleem as he had worked at tubewell of the complainant few days back. He has further identified the other two accused in the identification parade.

8. Similar is the statement of PW3 Raju, who was also witness to the robbery and he is another employee of the complainant.

9. PW 4 Sunil Kumar and PW 5 Pravin Kumar are the witnesses of recovery, which has been done on the pointing out of the accused persons. Major recovery has been made on pointing out of Saleem, Sanjay Singh and Vikas Gupta, whereas there is some minor recovery which has been made on the pointing out of fourth accused, namely, Sauraj. The remaining witnesses are formal witnesses.

10. The statement of PW 1, PW 2 and PW 3 are consistent and there is no reason to disbelieve them. Nothing has come in their cross-examination as well which may cast doubt of the veracity of their statement. They all are the witnesses of the incident and their examination in chief and cross-examination, overall strengthens the case of the prosecution. As far as identification of the accused Saleem is concerned, that too is not in doubt as it has clearly come in the statements of witnesses that he had earlier worked in the tubewell of the complainant and therefore it was not difficult to identify him. Accused Saleem, Sanjay Singh and Vikas Gupta were nabbed by the police party on the next day of incident itself when they were together. The recovery of entire material robbed from the house of the complainant was made on their pointing out. Therefore, as far as reliability of the incident dated 29.08.1995 is concerned, the same is not in doubt. The role of accused Saleem, Sanjay Singh and Vikas Gupta has also been clearly established by the prosecution without any shadow of doubt.

11. The question, however, is as to the role of accused Sauraj in the crime. Further the question would also be whether the conviction of accused Saleem, Sanjay Singh and Vikas Gupta under Section 307 and 411 IPC is proper, as the learned counsel for the appellant Sri Raj Kumar Singh has submitted, after taking the Court to the entire evidence of the prosecution that the prosecution has not been able to establish its case beyond reasonable doubt as far as offence under Section 307 IPC is concerned. He would also argue that offence under Section 411 IPC in any case is not made out. Further and most importantly whether the conviction is liable to be made under Section 398 IPC against all the accused or only against Saleem.

12. As far as conviction under Section 307 IPC is concerned, the case of the

prosecution is that when the police party was in search of the accused, they opened fire on the police party. There are no injuries and the recovery of arms is also doubtful. The prosecution has not been able to establish its case under Section 307 IPC against any of the accused. To that extent their conviction is liable to be set aside.

13. Moreover, it is a case of robbery where admittedly as per the case of the prosecution there were less than 5 persons. The only question remains as to the conviction under Section 398 IPC against all the accused. Section 398 IPC reads as under:

"398. Attempt to commit robbery or dacoity when armed with deadly weapon. - If, at the time of attempting to commit robbery or dacoity, the offender is armed with the deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years."

14. The Hon'ble Apex Court in the case of Phool Kumar v. Delhi Administration reported in AIR 1975 SC 905 while making distinction between Section 397 and 398 of IPC has held that the term used in Section 397 and 398 of IPC is an offence against an "offender". Therefore whether it is under Section 397 or 398 IPC, the offence has to be committed by the "offender", i.e. the offender as an individual. In Section 398, conviction would be only against the offender, who has attempted to commit robbery or dacoity who was armed with a "deadly weapon". As per the case of the prosecution, amongst three persons, who entered the house of the complainant on the fateful night of 29.08.1995, only i.e. Saleem was armed with a "country made pistol". The remaining two accused were unarmed. Out of them one was carrying a rope. In any case, Section 398 IPC does not define any different category of offence. Section 398 IPC is nothing but a robbery or a dacoity, where the offender is carrying a deadly weapon. Therefore, the conviction under Section 398 IPC can only be made against Saleem, who was actually carrying a deadly weapon and not against accused Sanjay Singh and Vikas Gupta. The conviction against accused Sanjay Singh and Vikas Gupta under Section 392 IPC is proper as it has been clearly established, that they have committed robbery on that fateful day.

15. Consequently, Criminal Appeal No. 81 of 2003 is concerned, the same is partly allowed to the extent as stated below:

Conviction and sentence of all the appellants/accused in Criminal Appeal No. 81 of 2003 under Section 307 IPC cannot sustain and is hereby set aside. Similarly, conviction and sentence of all the appellants/accused under Section 411 IPC cannot sustain and is hereby set aside. As far as conviction and sentence of the appellants/accused in Criminal Appeal No. 81 of 2003 under Section 398 IPC is concerned, the same can only be sustained against Saleem for the reasons already stated above. To that extent, the conviction and sentence against the remaining appellants/accused such as Vikas Gupta and Sanjay Singh is hereby set aside. Conviction and sentence under Section 392 IPC is upheld against all

the appellants/accused in Criminal Appeal No. 81 of 2003. They shall undergo the sentence of rigorous imprisonment for 5 years as given by the trial court. The appellants Saleem, Vikas Gupta and Sanjay Singh are on bail. They shall be taken into custody forthwith and shall serve out the remaining sentence.

Similarly, conviction and sentence under Section 25 Arms Act is only upheld against Saleem and not against the remaining accused/appellants and to that extent the conviction and sentence of Vikas Gupta and Sanjay Singh under Section 25 of the Arms Act is hereby set aside. The appellant Saleem shall undergo the sentence of 2 years of rigorous imprisonment as given by the Trial Court. The appellant Saleem is on bail. He shall be taken into custody forthwith to serve the remaining sentence.

16. As far as accused Sauraj is concerned, his presence on the place of incident is extremely doubtful. The prosecution has not been able to establish its case beyond reasonable doubt against Sauraj. Since admittedly he has not entered in the premises, his identification by the witnesses is not possible. Moreover, not only this, the recovery shown by him is also doubtful. Therefore, considering the totality of the evidences, as far as Criminal Appeal No. 87 of 2003 is concerned, the same is allowed. Conviction and sentence of Sauraj under Section 392, 398 and 411 IPC is hereby set aside. Accused Sauraj is already on bail. He need not surrender. His sureties are discharged.

17. Lower court record along with a copy of this judgment and order be sent to the court concerned for onwards compliance.