IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA

&

HON'BLE SHRI JUSTICE RAJENDRA KUMAR (VERMA)

CRIMINAL APPEAL No. 557 of 2011

BETWEEN:-

AZAD S/O SUBHAN NAYATA, AGED ABOUT 33 YEARS, OCCUPATION: AGRI VILL.BALODA P.S.SADALPUR TEH.AND DISTT.DHAR (MADHYA PRADESH)

.....APPELLANT

(BY SMT. SHARMILA SHARMA - ADVOCATE)

AND

THE STATE OF MADHYA PRADESH GOVT. THROUGH P.S. SADALPUR, DISTT. DHAR (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI AMIT SINGH SISODIA - GOVERNMENT ADVOCATE)

Reserved on	**:**	**14/12/2022**
Pronounced on	**:**	**19/12/2022**

This appeal having been heard and reserved for judgment, coming on for pronouncement this day, JUSTICE SHRI VIJAY KUMAR SHUKLA pronounced the following:

JUDGMENT

The present appeal is filed under Section 374(2) of the Code of Criminal Procedure being aggrieved by the judgment of conviction and sentence by 2nd Additional Sessions Judge, Dhar dated 07.03.2011 in Sessions Trial No.111/2010 whereby the appellant has been convicted under Section 302 of the Indian Penal Code (hereinafter referred to as "IPC") on two counts and sentenced for life imprisonment and to pay a fine of Rs.1000/-in default to further undergo six months RI for the murder of Rafique @ Rashid. He has also sentenced for life imprisonment and to pay a fine of Rs.1000/-, in default to further undergo 6 months RI for the murder of Ahsan. He has also convicted under Section 27 of the Arms Act and sentenced to RI for 3 years and to pay a fine of Rs.1000/-, in default to further undergo 6 months RI.

2. The prosecution case in brief is that before 2 days back of the date of the incident i.e. 10.12.2009, the appellant/accused Azad and his second wife Pappi @ Rehana had quarrelled with Memuna, first wife of the appellant Azad (P.W.1) and had beaten her in village Baloda. Because of the said *Marpit* with her on 10.12.2009, Memuna telephoned her brother Ahsan and asked him to come. Ahsan came to the house of accused Azad along with his cousin brother Rashid. At 3 PM when they were talking with the appellant Azad, then suddenly accused Azad got angry and rebuked Ahsan and said why he was taking the side of his sister and slapped him. When Rashid tried to intervene, the appellant also had beaten him. It is alleged that Pappi @ Rehana brought a

12 bore gun from inside the house and gave it to the appellant and asked him to kill both of them. The appellant fired one bullet on the head of Ahsan and second bullet hit his right shoulder. One bullet also hit mandible of Rashid. Ahsan died on the spot. Upon the report of Memuna, Police Sadalpur registered the offences under Section 302, 307 and 34 of Indian Penal Code and under Section 25 of Arms Act in Crime No.310/2009 against the appellant and co-accused Pappi @ Rehana. During the course of treatment, Rafique @ Rashid also died on 11.12.2009. The police, Sadalpur arrested the appellant and co-accused Pappi @ Rehana and after investigation filed the charge-sheet in the Court. The appellant and co-accused Pappi @ Rehana abjured their guilt. The learned trial Court after the trial acquitted the co-accused Pappi @ Rehana, but convicted and sentenced the appellant as above.

3. On the report of Memuna, a report was registered at Police Station – Sadalpur vide Ex.P/1 by P.W.8 Devendra Singh Sengar, Thana In-charge, Sadalpur. The post-mortem of both the dead bodies was carried out on 11.12.2009 by Dr. Narendra Pavaiya (PW-7). He opined that the deceased Rafique @ Rashid died due to neuro-haemorrhagic wound caused by gun injury within 24 hours. The said death was homicidal in nature. The post-mortem report is Ex.P/14. Regarding the death of Ahsan, his post-mortem report is Ex.P/15. It was opined that he died due to neuro-haemorrhagic shock caused due to gun injury on heads and the said injury was caused within 24 hours of the examination. Devendra Singh Sengar (PW-8) prepared *Naksha*

Panchnama of dead body Ex.P/17 and Ex.P/18 is *Naksha Mauka*. From the spot, the blood-stained clothes, soil, one empty 12 bore cartridge and other 12 cartridges, pallets, plastic pieces and paper weight etc were seized by seizure memo Ex.P/11. The appellant and the other co-accused were arrested. On the disclosure statement of appellant, motorcycle was seized vide Ex.P/1 and on his statement, one 12 bore gun and cartridges were seized vide Ex.P/7. His gun licence was seized vide Ex.P/10. All the seized articles were sent to FSL Sagar. The FSL report is Ex.P/22 and the other reports are Ex.P/23 and P/24. The prosecution case is based on testimony of eyewitnesses, seizure of gun and FSL report. PW-1 Memuna, who is wife of appellant, deposed that the appellant had brought her after performing *Natra*. She stayed with the appellant for about 10-12 years after the marriage. Thereafter she was expelled from the house after quarrel with the appellant. The appellant married the other co-accused Pappi @ Rehana. She filed a case in the Court and when she succeeded, the appellant compromised and she was brought back to the house. In her statement, she stated that at about 3 PM, accused had called his brother Ahsan and Rashid to Baloda and asked them to take their sister along with them. At that time, accused Azad got angry and rebuked Ahsan and said why he was taking the side of his sister and slapped him. When Rashid tried to intervene, the appellant also had beaten him. It is stated that Pappi @ Rehana brought a 12 bore gun from inside the house and gave it to the appellant and asked him to kill both of them. The appellant fired one bullet at the head of Ahsan, second bullet hit his

right shoulder and one bullet also hit mandible of Rashid. Ahsan died on the spot and Rashid survived for sometime and during the course of treatment, he also died. In para-18 of the cross-examination, she had denied the suggestion of the accused that Rashid and Ahsan had come to his house to kill him and at that time, the accident of firing had taken place. She had also denied that the appellant had fired on the deceased persons in his right to private defence. PW-2 Bachchu stated that on the date of the incident, he had gone to the house of Sikandar at Village – Baloda and he was standing outside the house of Azad waiting for a bus. He had seen Ahsan and Rashid going to the house of Azad on a motorcycle. He further deposed that wife of Azad brought 12 bore gun and appellant Azad had fired on Ahsan on his head and he died at the spot. Thereafter the appellant also fired on Rashid, which struck on his hand. He had fired again which caused injury on the neck. Thereafter Rashid had also died. After the incident, he had also seen the appellant Azad going on a bike carrying 12 bore gun on his shoulders. The statement of this witness was challenged by the defence mainly on the ground that the brother of the deceased Rashid Dilawar is Sarpanch of the village and, therefore, PW-2 is stating incorrect facts before the Court and is falsely implicating the accused appellant.

4. Counsel for the appellant argued that there are contradictions in the statement of PW-1 Memuna and PW-2 Bachchu and, therefore, their testimony is not trustworthy. Upon going through the statement of PW-1 Memuna and PW-2 Bachchu, we do not find any material contradictions in

their statement. Both the witnesses are formed on the incident that the appellant had fired Ahsan and Rashid.

5. PW-7 Dr. Narendra Pavaiya, who had conducted the post-mortem report had stated that on left cheek, and left side of neck was badly injured. On the left auxiliary area, there was injury of the size of 2 x 3'' and 20 spots. There was penetrating smoking wound and on the backside 6 x 6'' wound and on the right arm, there was humorous fracture and 2 x 2" wound and on posterior wound 3 x 3", in which 3 pellets were found. He opined that he died because of fracture on maxilla bone, mandible and humorous and on the left side of armpit, 3 pellets were found. He had sealed viscera clothes and pellets and handed over to the police. The cause of death was neuro-haemorrhagic shock due to gun-shot injury. He proved post-mortem report Ex.P/14. He also deposed that he had done autopsy of deceased Ahsan. On his skull on half of the left side, there was a fracture wound and brain tissue had come out. On left frontal temporal, occipital, nosal and on left mandible, there was a fracture. On shoulder there were 8 blackening spot and there was exit wound 3 x 2" in which 4 pellets were found. On the left hand, on palm, arm wounds and radius were fractured. He stated that 4 pellets and cartridges were found in the body of deceased Ahsan. He had sealed viscera, clothes, pellets and cartridges and handed over to the police. Cause of death was neuro-haemorrhagic shock due to grievous gunshot injury. The death was homicidal. His autopsy report is

Ex.P/15. Thus, it is proved that the death of Ahsan and Rafique was due to gun-shot injury.

6. PW-8 Devendra Singh Sengar stated that on the disclosure statement of Appellant, he had seized one 12 bore gun and its license. From the spot, he collected bloodstained soil, empty cartridges and clothes and they were sent for chemical examination to FSL. The seizure witnesses are PW-3 Gama, PW-4 Sohan Patidar and PW-5 Esarail. The seizure witnesses have turned hostile, but there is nothing in the cross-examination of Devendra Singh PW-8 to suggest that his testimony is not trustworthy and the seizure of gun, empty cartridges, and the seizure of blood-stained soil is not proved. He in para-12 of his cross-examination, he has specifically stated the number of the gun which was seized from the accused vide Ex.P/7 and in the FSL report Ex.P/22 also the number of the gun has been mentioned. In the statement under Section 313 Cr.P.C., the accused admitted that the fire was made from the gun, but due to accident. Thus, on reading of the statement of PW-8 and the other evidences, the seizure of the gun and other articles cannot be doubted though the seizure witnesses have turned hostile.

7. The seized articles gun, empty cartridges, clothes and bloodstained soil were sent to FSL vide Ex.P/19 and Ex.P/20. The FSL report is Ex.P/22. As per the report, the gun was in working condition and recently, the fire was made from the gun which was Ex.A. It is further confirmed in the said report that the empty cartridges were fired from gun Ex.A/1. In the clothes,

jacket, T-shirt, banyan and pant of deceased Ahsan and Rashid, the gun whole were found which were caused by gun-shot.

8. The plea of right to private defence was taken. He has examined DW-3 Aashiq, who stated that the accused is his maternal uncle. He stated that Ahsan and Rashid had gone to the house of appellant Azad and at that time Azad was on the field. Azad, Ahsan, Rashid and Memuna were talking and at that time a quarrel had taken place and Ahsan and Rashid started beating Azad and Memuna was also beating Azad. At that time, Ahsan had taken out a pistol from his pocket and fired on Azad, but he escaped. Thereafter Ahsan, Rashid and Memuna entered into the house of the appellant Azad. Thereafter he had 2-3 gunshots. Then he had seen that Ahsan was lying there and he had received gunshot injury and one gunshot injury was on the mouth of Rashid. Thereafter Azad had gone there.

9. The story of the statement of DW-3 Aashiq is not trustworthy as it is the first time the said witness has stated that a fire was made by Ahsan from his pistol to the appellant. Further, the same cannot be pleaded in view of the statement made by the appellant under Section 313 of Cr.P.C. He had not taken the said plea. On the contrary, he stated that the fire was made accidentally. He had also not pleaded right to private defence and otherwise the defence has failed to prove its case of right to private defence.

10. The statement of eyewitness PW-1 Memuna is coupled with the seizure of gun, empty cartridges, clothes etc. from the appellant. The FSL

report has confirmed that the fire was made from the seized gun and as per the testimony of PW-7 Dr. Narendra Pavaiya, it is established that both the deceased died due to gun injury. The prosecution has proved its case beyond any doubt that the appellant has caused gun injury to the deceased persons Ahsan and Rashid and they died due to gun injury. The contradictions pointed out by the learned counsel for the appellant in the statement of PW-1 Memuna and PW-2 Bachchu are not material contradictions and, therefore, their testimony cannot be ignored. The ocular evidence is well corroborated with medical and chemical report. Thus, on assimilation of facts and evidence, we do not find any error in the order of conviction and the appeal is **dismissed**. The conviction is maintained.

11. Heard on sentence.

12. Learned counsel for the appellant submitted that the trial Court has not observed that the sentences shall run concurrently and, therefore, the sentence may be clarified that sentences have to run concurrently, otherwise the same shall be read as consecutively.

13. The learned counsel for the appellant has contended, while relying on the decisions in ***Nagaraja Rao v. Central Bureau of Investigation:*** (2015) 4 SCC 302 and ***Gagan Kumar v. State of Punjab***: (2019) 5 SCC 154, that it is obligatory for the Court awarding punishments to specify whether they shall be running concurrently or consecutively; and the omission on the part of the Trial Court and the High Court, to state the requisite specifications, cannot be

allowed to operate detrimental to the interests of the accused-appellants. The learned counsel has contended that though as per the mandate of Section 31 Cr.P.C, unless specified to run concurrently, the sentences do run consecutively but for that purpose, the Court is required to direct the order in which they would run; and no such direction having been given by the Trial Court or by the High Court, it cannot be said that the Courts were consciously providing for consecutive running of sentences. He referred the decision of the Apex Court in the case of ***O.M. Cherian alias Thankachan v. State of Kerala & Ors.***: (2015) 2 SCC 501 that it is not the normal rule that multiple sentences are to run consecutively.

14. The learned counsel for the appellant has referred to the decisions in ***State of Punjab v. Gurmit Singh & Ors***.: (1996) 2 SCC 384 and the ***State of Madhya Pradesh v. Anoop Singh***: (2015) 7 SCC 773 to submit that those too were the cases involving offences under Sections 363, 366 and 376 with victim being a minor; and therein, this Court has awarded the sentences running concurrently. He further referred to the order passed by the Apex Court dated 25.05.2021 in the case of ***Sunil Kumar @ Sudhir Kumar & Anr. v. State of of Uttar Pradesh*** [Criminal Appeal No.526 of 2021 (Arising from SLP (Crl.) No.3549 of 2018)] where the apex Court in exercise of the powers under Article 142 of the Constitution of India, modified the punishment awarded to the convicts and awarded them maximum period of imprisonment to be served by them in relation to offences in question shall be 14 years and not beyond.

Relying on the judgment passed in the case of ***Gagan Kumar*** (supra), counsel for the appellant submitted that it was necessary for the Magistrate to have specified in the order by taking recourse to Section 31 of the Cr.P.C. as to whether punishment of sentence of imprisonment so awarded for each offences would run concurrently or consecutively. In para-19 of the order, the Apex Court held that if the Magistrate failed in his duty, the Additional Sessions Judge and the High Court should have noticed this error committed by the Magistrate and should have corrected it and the interference was made in this regard.

15. Counsel for the respondent/State submitted that in view of the provisions of Section 31, since the Court has not stated that punishment is to be run concurrently or consecutively then it has to be consecutively. He further submitted that since it was a case of double murder, therefore, the Court has intentionally did not award the sentence concurrently and the order passed by the Supreme Court in the case of ***Sunil Kumar*** (supra) was in exercise of the powers under Article 142 of the Constitution of India which is not a binding precedent.

16. We have heard learned counsel for the parties on the said question.

17. The provisions of **Section 31 of Cr.P.C.** reads as under:-

> "31. Sentence in cases of conviction of several offences at one trial.—

(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

Provided that—

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."

18. From Section 31(1) of Cr.P.C., it is clear that unless and until the sentences are made concurrent, the sentences would run consecutively.

19. The Supreme Court in the case of ***O.M. Cherian Vs. State of Kerala*** reported in (2015) 2 SCC 501 has held as under :

12. The words in Section 31 CrPC

"..... sentence him for such offences, to the several punishments prescribed therefor which such court is competent to inflict; such punishments when consisting of

> imprisonment to commence the one after the expiration of the other in such order as the court may direct"

indicate that in case the court directs sentences to run one after the other, the court has to specify the order in which the sentences are to run. If the court directs running of sentences concurrently, order of running of sentences is not required to be mentioned. Discretion to order running of sentences concurrently or consecutively is judicial discretion of the court which is to be exercised as per the established law of sentencing. The court before exercising its discretion under Section 31 CrPC is required to consider the totality of the facts and circumstances of those offences against the accused while deciding whether sentences are to run consecutively or concurrently.

13. Section 31(1) CrPC enjoins a further direction by the court to specify the order in which one particular sentence shall commence after the expiration of the other. Difficulties arise when the courts impose sentence of imprisonment for life and also sentences of imprisonment for fixed term. In such cases, if the court does not direct that the sentences shall run concurrently, then the sentences will run consecutively by operation of Section 31(1) CrPC. There is no question of the convict first undergoing the sentence of imprisonment for life and thereafter undergoing the rest of the sentences of imprisonment for fixed term and any such direction would be unworkable. Since sentence of imprisonment for life means jail till the end of normal life of the convict, the sentence of imprisonment of fixed term has to necessarily run concurrently with life imprisonment. In such case, it will be in order if the Sessions Judges exercise their discretion in issuing direction for concurrent running of sentences. Likewise if two life sentences are imposed on the convict, necessarily, the court has to direct those sentences to run concurrently.

20. The Supreme Court in the case of *Muthuramalingam v. State*, reported in (2016) 8 SCC 313 has held as under :

> "7. A careful reading of the above would show that the provision is attracted only in cases where two essentials are satisfied viz.
>
> (1) a person is convicted at one trial, and

(2) the trial is for two or more offences. It is only when both these conditions are satisfied that the court can sentence the offender to several punishments prescribed for the offences committed by him provided the court is otherwise competent to impose such punishments. What is significant is that such punishments as the court may decide to award for several offences committed by the convict when comprising imprisonment shall commence one after the expiration of the other in such order as the court may direct unless the court in its discretion orders that such punishment shall run concurrently. Sub-section (2) of Section 31 on a plain reading makes it unnecessary for the court to send the offender for trial before a higher court only because the aggregate punishment for several offences happens to be in excess of the punishment which such court is competent to award provided always that in no case can the person so sentenced be imprisoned for a period longer than 14 years and the aggregate punishment does not exceed twice the punishment which the court is competent to inflict for a single offence."

8. Interpreting Section 31(1), a three-Judge Bench of this Court in O.M. Cherian case declared that if two life sentences are imposed on a convict the court must necessarily direct those sentences to run concurrently. The Court said: (SCC pp. 509-10, para 13) "13. Section 31(1) CrPC enjoins a further direction by the court to specify the order in which one particular sentence shall commence after the expiration of the other. Difficulties arise when the courts impose sentence of imprisonment for life and also sentences of imprisonment for fixed term. In such cases, if the court does not direct that the sentences shall run concurrently, then the sentences will run consecutively by operation of Section 31(1) CrPC. There is no question of the convict first undergoing the sentence of imprisonment for life and thereafter undergoing the rest of the sentences of imprisonment for fixed term and any such direction would be unworkable. Since sentence of imprisonment for life means jail till the end of normal life of the convict, the sentence of imprisonment of fixed term has to necessarily run concurrently with life imprisonment. In such case, it will be in order if the Sessions Judges exercise their discretion in issuing direction for concurrent running of sentences. Likewise if two life sentences are imposed on the convict, necessarily, the court has to direct those sentences to run concurrently."

> 9. To the same effect is the decision of a two-Judge Bench of this Court in Duryodhan Rout case in which this Court took the view that since life imprisonment means imprisonment of full span of life there was no question of awarding consecutive sentences in case of conviction for several offences at one trial. Relying upon the proviso to sub-section (2) of Section 31, this Court held that where a person is convicted for several offences including one for which life sentences can be awarded the proviso to Section 31(2) shall forbid running of such sentences consecutively.
>
> 10. It would appear from the above two pronouncements that the logic behind life sentences not running consecutively lies in the fact that imprisonment for life implies imprisonment till the end of the normal life of the convict. If that proposition is sound, the logic underlying the ratio of the decisions of this Court in O.M. Cherian and Duryodhan Rout cases would also be equally sound. What then needs to be examined is whether imprisonment for life does indeed imply imprisonment till the end of the normal life of the convict as observed in O.M. Cherian and Duryodhan Rout cases. That question, in our considered opinion, is no longer res integra, the same having been examined and answered in the affirmative by a long line of decisions handed down by this Court. We may gainfully refer to some of those decisions at this stage."

21. The Supreme Court in the case of ***Kuldeep Vs. State of Haryana*** reported in (2018) 18 SCC 652 and ***Gagan Kumar Vs. State of Punjab*** reported in (2019) 5 SCC 154 has also held that if more than one offences are committed in one transaction, then the sentences can be made concurrent.

22. Looking to the facts and circumstances of the case that the murder of 2 persons was committed in one transaction, this Court is of the considered view that the life sentences awarded by the trial Court for offence under Section 302 IPC on both counts must run concurrently. Accordingly, it is directed that

the sentence for life imprisonment awarded by the trial Court for offence under Section 302 IPC on both counts shall run concurrently.

23. With the aforesaid modification, the impugned judgment and sentence is hereby affirmed. Thus, the appeal is **dismissed** on merit, but is allowed in part to the extent of sentence and the sentences shall run concurrently.

(VIJAY KUMAR SHUKLA)
JUDGE

(RAJENDRA KUMAR (VERMA))
JUDGE

Soumya