
(2004) 02 AHC CK 0038
In the Allahabad High Court
Case No : Criminal Appeal No. 941 of 1981

Ahsan and Rais Ahmad (In Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 27-02-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 307, 34, 394, 397
Police Act, 1861 — Section 34

Citation : (2004) 02 AHC CK 0038

Hon'ble Judges : U.S. Tripathi, J;M. Chaudhary, J

Bench : Division Bench

Advocate : M.W. Siddiqui and Satish Chandra, for the Appellant; A.G.A., for the Respondent

Judgement

M. Chaudhary, J.—This is an appeal by the accused appellants from judgment and order dated 31st of March 81 passed in Sessions Trial No. 342 of 1979 State v. Ahsan and Anr. convicting them under Sections 302 and 307, each read with Section 34 IPC and Section 394 IPC sentencing each of them to imprisonment for life, five years" and seven years" rigorous imprisonment respectively thereunder.

2. Relevant facts of the case giving rise to this appeal necessary to be recapitulated for disposal of this appeal are as follows : Akbar Ali brother of the deceased lodged an FIR at police station Civil Lines District Aligarh on 16th of January 1979 at 7: 20 p.m. alleging that his house and the house of his brother Asgar Ali are situate adjacently as there is only one house in between their houses. One Kamruddin was in occupation thereof as tenant of Waker Ali. At about 6: 30 p.m. that very evening hearing the shrieks of his brother Asgar Ali that some bandits entered his house he taking lathi rushed to his brother's house; that one of the bandits fired at him and he had a narrow escape. In the meanwhile one Maskoor Ali, Chaman and Iqramuddin also reached there. After firing at Akbar Ali the miscreant ran away . Immediately Akbar Ali and the persons abovenamed chased the miscreant and recognized him in the light of

torch flashed as Rais residing in that very locality. At that very moment they heard sound of a shot from the side of the house of Asgar Ali and then they receded and rushed towards the house of Asgar Ali and saw him lying injured at the door of his house and blood oozing from the injury. At that very time two bandits were running away coming out of the house and they recognized both of them as Naseem and Ahsan residing in the same locality in the light of torch flashed. Ahsan was armed with country made pistol and Naseem was holding a single barrel gun. Khurshid daughter of his brother Asgar Ali told him that bandits had robbed the licenced gun and cartridges belt from the house. Immediately Akbar Ali taking his injured brother rushed to the hospital but he succumbed to the fatal injury sustained by him on the way. The police registered crime against all the three u/s 302 IPC and Section 394 read with Section 397 IPC and made entry regarding registration of the case in GD (Exts ka 2 and ka 3). Station officer SI Jahan Singh who took up investigation of the case in his hands visited the scene of occurrence, inspected the site and prepared its site plan map (Ext Ka 7). He also inspected the lantern hanging outside the chhappar and also the torch of Akbar Ali and prepared their memos (Exts ka 8 & ka 9): He also recorded statements of the witnesses and did other necessary things. On his direction inquest on the dead body of Asgar Ali was drawn by SI Rajendra Singh. He prepared the inquest report (Ext ka 11) and other necessary papers/The dead body in a sealed cover alongwith necessary papers was entrusted to constables Naimuddin and Kishan Pal for being taken for its post mortem.

3. Autopsy conducted on the dead body of Asgar AH by Dr N K Maheshwari Medical officer District Hospital on 17th of January 1979 at 3.00 p.m. revealed an ante mortem gun shot lacerated wound of entry rounded $1\frac{3}{4} \times 1\frac{3}{4}$ " x bone deep on middle part of vertebrae column in mid line, wounds surrounded by small rounded multiple gun shot wounds in an area of 2" x 2", blackening and tattooing found present around the injury.

4. On an internal examination left lung and pleura were found lacerated and 8th, 9th and 10th ribs on left side fractured. The doctor recovered ten pellets from left lung and 51 pellets from the pleural cavity and four wadding pieces from inside the wound. The doctor opined that the death was caused due to shock and haemorrhage as a result of ante mortem injury about one day ago.

5. After completing the investigation the police submitted charge sheet against the accused.

6. Only accused Ahsan and Rais were committed to the Court of Session by the Magistrate concerned. Since co accused Naseem was absconding he was not sent to the Court of Session for his trial.

7. After framing of the charge against the accused the prosecution examined Akbar Ali (PW 1) and Khurshid (PW 3) as eye witnesses of the occurrence. PW 1 Akbar Ali, the first informant also proved written report of the occurrence handed over by him to the police at the police station. Testimony of rest of the witnesses

is more or less of formal nature. PW 2 HC Mushtak Husain who prepared check report on the basis of the written report and made entry regarding registration of the crime in GD has proved these papers. PW 4 Dr N K Maheshwari who conducted autopsy on the dead body of Asgar Ali proved the post mortem report stating that the ante mortem injuries found on the dead body were sufficient to cause death in ordinary course. PW 5 constable Naimuddin to whom the dead body of Asgar Ali in sealed cover alongwith necessary papers was handed over for being taken for its post mortem has stated the said fact. PW 6 Inspector Jahan Singh who investigated the crime has proved the police papers.

8. On a conspectus of evidence and material on record the case of the prosecution commended itself to the learned Trial Judge who recorded conviction of the accused sentencing them as stated above.

9. Feeling aggrieved by the impugned judgment the appellants preferred this appeal for redress.

10. We have heard Sri Satish Chandra learned Amicus Curiae for the appellants and the learned AGA for the respondent State and gone through the record.

11. Learned Amicus Curiae for the appellants first argued that the accused appellants had no motive to commit the murder of Asgar Ali. Though in the case of direct evidence like the present one motive recedes into insignificance but in the instant case there was motive on the part of the accused appellants to commit the murder of Asgar Ali. It may be mentioned here that Waker Ali, Zafar Ali. "Asgar Ali and Akbar Ali were real brothers and Kamruddin was in occupation of the house in between the houses of Asgar Ali and Akbar Ali as the tenant of their brother Waker Ali. It has come in evidence that on 6th of January 1979 Kamruddin lodged a report at police station Civil Lines Aligarh that at about 7:00 p.m. that very evening he and Asgar Ali were returning from the house of Bulaki Khan and as they reached near their houses Rais alongwith one Shafiq and Naseem assaulted him and Shafiq gave him lathi blows and as Asgar Ali tried to save "him he also received lathi blows (Ext Ka 4). This fact was admitted By accused Rais in his statement recorded u/s 313 of the Code of Criminal Procedure. It is also contended that at about 10:00 p.m. on 8th of January 1979 appellant Rais in drunken state at Kela Nagar level crossing was indulging in nefarious activities and that then the police constables who were on patrol duty alongwith Asgar Ali and few others took Rais to the police station Civil Lines where he was challaned u/s 34 of the Police Act (Ext Ka 5). Accused Rais admitted in his statement recorded u/s 313 of the Code of Criminal Procedure that an incident had taken place that evening but he narrated that the alleged evening he was at his hotel and since Kamruddin alongwith his companions used to have meals, tea etc on credit he asked him to pay the money due from him on the said account, that immediately he and his associates created a scene there and took money kept at his hotel and that then he went to the police station Civil Lines to lodge an FIR of the said incident but his report was not taken down by the police. Thus admittedly there was animosity between the parties and Rais

was much aggrieved with Asgar Ali. In our opinion that constituted adequate motive to make murderous assault at Asgar Ali.

12. However learned Amicus Curiae contended that appellant Ahsan had no axe to grind against Asgar Ali and there was no occasion for him to join hands with Rais in the said heinous crime. No doubt nothing has come on the record that appellant Ahsan bore any grudge against Asgar Ali. However PW 1 Akbar Ali, brother of the deceased stated in his examination-in-chief that appellant Rais used to run a tea stall cum hotel and Ahsan and Naseem who were intimate with him used to sit at his hotel. He has not been cross-examined on the point. Thus there is nothing amazing if Ahsan and Naseem being bosom friends of Rais joined hands with him and participated in murderous assault at Asgar Ali as Rais yearned to wreck vengeance upon Asgar Ali by eliminating him. Thus the said argument advanced by the learned Amicus Curiae for the appellants has got no life.

13. Learned Amicus Curiae for the appellants levelled criticism against the reliability of the ocular testimony of eye witnesses Akbar Ali (PW 1) and Khurshid (PW 3). He also contended that FIR of the occurrence mentions a number of independent witnesses but the prosecution did not examine any of them in its support and therefore the interested testimony of PW 1 Akbar Ali, brother of the deceased and PW 3 Khurshid daughter of deceased can not form a sturdy basis to make the prosecution version worthy of credence. A close scrutiny of the statements of both these witnesses goes to show that they have given a truthful and honest account of the occurrence witnessed by them. Both these witnesses withstood firmly the test of cross-examination. Nothing tangible to discredit the testimony of these witnesses is brought on the record. There is absolutely no reason to doubt the sworn testimony of both these witnesses. Learned Trial Judge who had the opportunity of watching demeanour of these witnesses has not castigated their testimony in any manner. Sworn testimony of these two witnesses stands further corroborated by FIR of the occurrence which was lodged by Akbar Ali, the victim himself (as he had a narrow escape) at the police station promptly. The incident occurred on 16th of January 79 at about 6:30 p.m. and the FIR was lodged at police station Civil Lines Aligarh situate at a distance of two kilometers from the place of occurrence at 7:20 p.m. the same evening. Virtually there was no scope for any consultation or deliberations. Testimony of PW 3 Khurshid, daughter of the deceased stands corroborated by the medical evidence. She stated that as her father Asgar Ali started running from the chhappar towards outside Naseem exhorted Ahsan to shoot him and immediately Ahsan chased her father and fired at him from close range and sustaining the fatal injury her father fell down at the door of her house. A perusal of the post mortem report goes to show that the autopsy revealed an ante mortem firearm wound of entry rounded 1 3/4" x 1 3/4" x bone deep middle part of the vertebrae column in mid line and blackening and tattooing was found present around the wound. The autopsy also revealed dispersal of pellets in an area of 2" x 2" around the wound. The doctor recovered ten pellets from left lung and 51 pellets

from pleural cavity and four wadding pieces from inside the wound.

14. The ocular testimony of a related witness cannot be discarded merely because he or she is related to the deceased if on close scrutiny his or her testimony is found to be above reproach. Moreover if the witness is related to the deceased it would add to the value of his or her testimony if found reliable because he or she would naturally be interested in ensuring that the real culprits are punished and not screened.

15. Once evidence of the eye witnesses examined is believed non-examination of independent witnesses would not go to demolish or introduce an element of doubt in the prosecution case.

16. Learned Amicus Curiae for the appellants further argued that it is doubtful if the said occurrence took place at the place alleged by the prosecution as no blood was found by the investigating officer at the scene of occurrence. The said contention of the learned Amicus Curiae holds no water for the twofold reasons : (i) it has come in evidence that even at the time of occurrence it was drizzling and there were heavy rains for about two hours thereafter. Accused Rais also admitted in his statement recorded u/s 313 of the Code of, Criminal Procedure that it was raining the alleged night. According to prosecution case sustaining the fatal injury Asgar Ali fell at the door of his house in the open. And there is every possibility that due to heavy rains no blood was found by the investigating officer at the scene of occurrence; and (ii) a perusal of the inquest report and of post mortem report goes to show that at the time of occurrence the deceased was wearing shirt, woolen jersey, woolen long coat and trousers besides undergarments. Thus much blood oozed from the injury, must have been soaked by these clothes , worn by the victim.

17. Learned Amicus Curiae for the appellants also contended that there is no mention in the FIR that a lighted lantern was hanging in the chhappar at the time of occurrence. It is true that it is not mentioned in the FIR. It might have slipped from the mind of Akbar Ali, the first informant as his younger real brother having eight minor children was done to death and he must be under state of shock and horror. But this omission will not affect the prosecution case adversely. Since it was about 6:30 p.m. only when the incident took place apparently there must be some light in the chhappar where Asgar Ali with his wife and children was sitting. Regarding torch light it is mentioned in the FIR lodged promptly at the police station that Akbar Ali and other witnesses recognized the assailants in the light of torch Hashed. PW 6 Inspector Zahan Singh , the investigating officer deposed that he visited the spot the same evening at about 8:30 p.m. and inspected the scene of occurrence the same night and prepared its site plan map. He further deposed that he saw the lighted lantern hanging at the chhappar and the torch produced by Akbar Ali, inspected the same and prepared their memos (Exts Ka 8 and Ka 9) the same night . For the above, the said argument advanced by the learned Amicus Curiae is devoid of any force.

18. On a global consideration of the evidence and concomitant circumstances we endorse to the finding recorded by the Court below holding the accused appellants guilty of the offences punishable under Sections 302 and 307 each read with Section 34 IPC.

19. Regarding the offence u/s 394 IPC there is solitary evidence of PW 3 Khurshid, daughter of the deceased that co-accused Naseem robbed her father's licenced gun and cartridge belt containing cartridges from inside the room of her house. Subsequently at the stage of evidence it was developed that licence of the gun was also taken out from the box by co-accused Nascem. Nothing has come on the record to establish that Asgar Ali was licence holder of gun. Neither number and make of the gun nor number of licence has been brought on the record. The prosecution could have examined the Arms Clerk, Collectorate Aligarh who could authentically state if Asgar Ali was a licence holder of gun and if so, number and make of the gun and also number of the licence. Under these circurrstances we are of the view that it is not safe to maintain the finding recorded by the Court below that the accused appellants were guilty of the offence punishable u/s 394 IPC. Both the accused appellants are entitled to acquittal u/s 394 IPC.

20. In view of foregoing discussion we allow the appeal in part. The impugned judgment and order is modified to the extent that the accused appellants are acquitted of the charge levelled against them u/s 394 IPC. However conviction of the accused appellants under Sections 302 and 307 each read with Section 34 IPC and sentence of imprisonment for life and five years" rigorous imprisonment respectively thereunder awarded to each of them by the trial Court are maintained.

21. CJM Aligarh shall get both the appellants arrested and sent to Jail to serve out the sentence imposed Upon them.

22. Certified copy of the judgment alongwith record of the case be transmitted to the Court below immediately for compliance under intimation to this Court within two months from its receipt.