

(2013) 03 AHC CK 0242

In the Allahabad High Court

Case No : Criminal Appeal No's. 3214 and 3092 of 1982

Barfi Lal

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 15-03-2013

Acts Referred:

Arms Act, 1959 — Section 25, 39
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 148, 149, 307

Citation : (2013) 2 ACR 1778 : (2013) 4 ADJ 518 : (2013) 5 ALJ 191 : (2013) 81 ALLCC 847

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : A.K. Rathore, Ajay Vikram Yadav, K.S. Chauhan, Kuldeep Singh Yadav and V.P. Srivastava, for the Appellant; Amit Rana, for the Respondent

Final Decision : Partly Allowed

Judgement

Sudhir Agarwal, J

1. Both these appeals arise out of judgment and order dated 19.11.1982, passed by Sri S.P. Lal, the then VI Additional Sessions Judge, Mainpuri, in Sessions Trial No. 256 of 1981, convicting and sentencing both the accused appellants as follows: one year's R.I. u/s 148 IPC; seven years' RI u/s 307 read with 149 IPC and one year's RI u/s 25 of Indian Arms Act. All the sentences were ordered to run concurrently. Both the appeals have arisen from a common judgment but Criminal Appeal No. 3214 of 1982 was heard on 20.11.2012 and judgment reserved but Criminal Appeal No. 3092 of 1982 could be heard only on 7.1.2013, since both the appeals have arisen from a common judgment, they being taken up together.

2. Prosecution story as per FIR and evidence on record runs as follows: While patrolling PW 1, S.I. Tilak Singh Yadav alongwith S.I. Munshi Lal Sharma, PW 2 S.I. Rakesh Kumar Rai and seven other constables in the intervening night of

8/9th January 1981, at about 12.45, when reached at Bhatta Kharja of Ratan Lal situated on Karhal Road, P.S. Ghiror, District Mainpuri, noticed some miscreants forming unlawful assembly armed with deadly weapons, who had lighted Bidi. The police party hid themselves behind the wall of culvert bridge and challenged miscreants, whereafter the miscreants opened fire on police party with intention to kill. Thereupon, Munshi Lal Sharma opened two V.L.P. fire which emanated enough light and on his command, PW 1; PW 2 S.I. Rakesh Kumar and Constables fired at them in their self defence. The accused started fleeing but out of six, the police party succeeded in arresting three accused. Arrested accused disclosed their names as Gyan Singh (appellant), Barfi Lal (appellant) and Rasua alias Shyam Charan. On search being conducted, a country-made pistol of .12 bore, two empty cartridges and four live cartridges were recovered from the person of accused appellant Gyan Singh; one country-made pistol of .12 bore, one cartridges entrapped in barrel of pistol and three live cartridges from right pocket were recovered from Barfi Lal; 2 live cartridges L.G. and one old iron sword were recovered from possession of third accused Rasua alias Shyam Charan. Recovered items were sealed in different packets and recovery memo prepared and deposited in Malkhana. FIR of incident was lodged. The case was registered at the police station Ghiror, on 9.1.1981 at 3.15 a.m.

3. Investigation was entrusted to S.I. Amir Ullah who prepared site plan, observed other necessary formalities including sanction for prosecution u/s 25 Arms Act. Usual investigation followed and ultimately, charge-sheet was submitted against the aforesaid three accused.

4. After the case was committed to Court of Sessions, the Sessions Judge framed charges against all the three accused (i) u/s 148 IPC for forming unlawful assembly in the intervening night of 8/9th January 1981 at about 12.45 O'clock at Bhatta Kharja, PS Ghiror, Mainpuri, in prosecution of common object of such assembly to cause death to members of police party headed by Sri Munshi Lal, thereby committing rioting and also armed with deadly weapons, an offence punishable u/s 148 IPC; (ii) in prosecution of common object on the aforesaid date time and place, all the three accused did an act by firing with their firearms with such intention and knowledge and under such circumstances, that if their act could have caused death of any member of police party and they would have been guilty of murder, and thus all the three accused committed offence u/s 307 read with Section 149 IPC.

5. All the three accused were also separately charged u/s 25 Arms Act.

6. Prosecution in support of its case examined two Sub-Inspectors, namely, PW 1 S.I. Tilak Singh Yadav, PW 2 S.I. Rakesh Kumar Singh and closed the evidence.

7. In the instant case, defence admitted genuineness of police papers and thus the same were admitted in evidence by the trial Court and formal witnesses were not examined.

8. Defence of accused appellants in their statement u/s 313 Cr.P.C. was of denial

of commission of offence and false implication. However, accused Rasua claimed that he has been implicated falsely owing to a litigation going on about abadi land with the villagers at whose instance he was got implicated and arrested when he went to Ghiror Bazar.

9. On scrutiny of evidence, Trial Court, finding story of prosecution trustworthy, to the extent, it related to accused appellant Barfi Lal and Gyan Singh, convicted and sentenced them as above. Believing the story of accused Rasua set out by him in his statement u/s 313 Cr.P.C., with respect to his false implication and also having regard to his age being 1617 years, he was held not guilty and acquitted.

10. I have heard Sri Ajay Vikram Yadav, Advocate for appellant Barfi Lal in Criminal Appeal No. 3214 of 1982 and learned A.G.A. Sri Shiv Ram Singh Advocate, holding brief on behalf of Sri Kuldip Singh Yadav argued for appellant Gyan Singh and Sri Amit Rana, A.G.A. on behalf of the State Respondent in Criminal Appeal No. 3092 of 1982.

11. Learned counsel for the appellants contended that there was no public witness. Moreover, the complainant was also not produced. Site plan was not proved and no motive has been shown as to why the appellants were sitting at the site of alleged commission of offence, hence it is contended that conviction of the appellant is based on conjectures and surmises and their false implication in the case cannot be ruled out. Reliance was placed on this Court's decision in Amar Singh and others v. State of U.P., 2003 (46) ACC 316, Mahabir Singh and others Vs. State of U. P., and Gyan Singh and others v. State of U.P., 2011 (75) ACC 710. He also contended that there is noncompliance of Section 39 of Arms Act and therefore, the conviction of appellants u/s 25 Arms Act is illegal. Reliance in support thereof is placed on a decision of Andhra Pradesh High Court in Mange Naik v. State of A.P., Criminal R.C. No. 47 of 2000 decided on 18.2.2002.

12. FIR case is that accused were caught on the spot about 1245 hours in intervening night of 8/9th January 1981. One country-made pistol was recovered from each of the accused appellants. Besides, live cartridges as well as empty cartridges were also recovered from their person. It is also alleged, when the accused and their accomplices were challenged by police party, they opened fire. PW 1, S.I. Tilak Singh Yadav was accompanying police party who challenged accused and their companions. He is also a witness to the entire incident and had been a participant in catching hold of accused with the aid of other police officers. He has proved prosecution case. In his cross-examination, there is nothing to discredit his statement.

13. Similarly, PW 2 S.I. Rakesh Kumar Singh was also a member of police party and he has also proved the prosecution case being himself a participant and an eyewitness to the entire incident.

14. Learned counsel for appellants drew my attention to the statement of PW 2 that the accused and others were sitting inside firing circle of brick kiln and the police party was on the other side of wall. It is contended, if the police party was

on the other wide of wall, the question does not arise that it could have seen the accused and could have challenged them. The alleged prosecution story is imaginary and no reason or occasion for such action is conceivable. The whole story set up by prosecution is apparently concocted and unbelievable.

15. However, I find that the documents exhibited by prosecution have been admitted by appellants. I do not find any apparent or ex facie improbability in prosecution case inasmuch as, it is a simple case of police patrolling on the date of incident. The patrolling party near a brick kiln found some suspicious activities in midnight. Thus they challenged the persons present in the circle of brick kiln. There was query from those assembled as to who the challengers were. Thereupon PW 1 said that he is a Police Inspector Immediately thereafter the accused persons opened fire. It is true that there was no preconceived intention or motive of those persons/accused to kill the men in uniform and on duty, but in the circumstances, they came across with the police party, apprehending their arrest, they opened fire. Obviously, it was indiscreet firing. Those who opened fire knew that had it struck, it might have resulted in casualty. The police party opened two VLP fire which illuminated the entire area, whereafter two fires opened by S.I. Rakesh Kumar and a Constable, in self defence. Due to illumination and police firing, accused persons coming in light, tried to escape but the appellants were caught by police near the spot. There is nothing on record to show that they were not caught at the site of incident but were arrested elsewhere and at some other time. Recovery of firearm, empty cartridges and other materials by police was admitted before Court below since the documents adduced by police not disputed which includes recovery memo also, and, there is nothing to doubt veracity thereof. It is not even suggested by appellants that those exhibits were subsequently planted by police.

16. Though in a casual fashion defence of animosity has been taken but nothing has been placed on record to fortify the same. The version of eyewitnesses PW 1 and PW 2 who were members of police party is corroborated not only by arrest of the accused appellants at the site and recovery of cartridges etc. from their possession, but also from the fact that there is no material or evidence to discredit any of the aforesaid things. When, in a particular case, the prosecution succeeds in proving its case, the defence of fabrication and false implication owing to enmity taken by the accused, has to be proved by them (accused). Onus also shifts on defence to support its stand, absence whereof further fortifies prosecution case. No motive or otherwise to the police party as well as two witnesses has been assigned and proved.

17. Since incident took place in the midnight, near a brick kiln, during patrolling by police, it cannot be said that absence of public witness would be fatal or would bear any relevance, for the reason that unless it is shown that there was a possibility of availability of public witness at that point of time and place, and despite that none of the witnesses has been examined. Mere absence of a public witness would not weaken the prosecution case. Moreover, in certain situation

and circumstance, like in the instant case, with which, during the course of routine patrolling, the police party is confronted, a quick decision according to wits, intelligence and presence of mind has to be taken by police party, as per requirement of circumstances, so that culprits may not succeed in escaping from the place of occurrence. In such exigencies, no question arises to first procure an independent public witness and only thereafter take action. As such, non-examination of public witnesses, in the facts and circumstances of the present case, would not vitiate the findings of Court below.

18. It is now well established that the statement of police officials is not to be necessarily disbelieved unless there are reasons creating doubt in the veracity of version of police officials.

19. More than half a century ago, in *Aher Raja Khima Vs. The State of Saurashtra*, , the Apex Court held:

The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefor. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration.

20. In *Nathusingh Vs. The State of Madhya Pradesh*, , the Court said:

The mere fact that they are police officers was not enough to discard their evidence. No reason was shown for their hostility to the appellant.

21. In *Tahir Vs. State (Delhi)*, , dealing with a similar question, Dr. A.S. Anand, J. (as His Lordship then was) stated:

Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case.

22. As a matter of rule, there can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during police raid would cast an added duty on the Court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of police officer is found acceptable, it would be an erroneous proposition that Court must reject prosecution version solely on the ground that no independent witness was examined. In *Pradeep Narayan Madgonkar etc. etc. Vs. State of Maharashtra*, , it was held:

Indeed, the evidence of the official (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigation of the prosecuting agency but prudence dictates that their

evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation, requires greater care to appreciate their testimony.

23. In *Balbair Singh Vs. State*, , the Court has repelled a similar contention based on non-examination of independent witnesses. The same legal position has been reiterated time and again by Apex Court vide *Paras Ram Vs. State of Haryana*, , *Sama Alana Abdulla Vs. State of Gujarat*, , *Anil alias Andya Sadashiv Nandoskar Vs. State of Maharashtra*, .

24. In *Kalpna Rai Vs. State (through CBI)*, , a Two Judge Bench of the Apex Court comprising of Hon"ble M. Mukherjee and Hon"ble K. Thomas JJ, in para 90 observed:

....We should not forget that the time of the raid was during the odd hours when possibly no pedestrian would have been trekking on the road nor any shopkeeper remaining in his shop nor a hawker moving around on the pavements.

25. In *State of U.P. Vs. Zakaullah*, , it is said:

The necessity for "independent witness" in cases involving police raid or police search is incorporated in the statute not for the purpose of helping the indicted person to bypass the evidence of those panch witnesses who have had some acquaintance with the police or officers conducting the search at some time or the other. Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or for any other matter, it cannot be said that those are not independent persons. If the police in order to carry out official duties have sought the help of any other personae would not forfeit his independent character by giving help to police action. The requirement to have independent witness to corroborate the evidence of the police is to be viewed from a realistic angle. Every citizen of India must be presumed to be an independent person until it is proved that he was a dependent of the police or other officials for any purpose whatsoever.

26. Referring to some of the aforesaid decisions, the Court in *Girja Prasad (Dead) by LRs. Vs. State of Madhya Pradesh*, , held:

It is well-settled that credibility of witness has to be tested on the touch-stone of truthfulness and trustworthiness. It is quite possible that in given case, a Court of Law may not case conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong

to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence. (para 25)

27. So far as the judgments cited on behalf of appellants in the instant case are concerned, I find none helps the appellants. In *Amar Singh and others v. State of U.P.* (supra), this Court though considered absence of public witness, as relevant aspect to find out credibility of prosecution case, but clearly observed that the Court does not mean to say that, as a matter of rule, prosecution version should not be accepted, unless supported by public witnesses. The incident therein took place in a Dharamshala and Court found it difficult to accept that in Dharamshala itself, no public witness could have been available. However, the Court did not rest its case only on this factor. There was no firing by accused, though they possessed firearm. Secondly, the prosecution case, that the accused were talking in such a loud voice, which was audible to police party, was also found unbelievable. These facts are clearly not applicable to the case in hand.

28. Similarly, in *Mahabir Singh v. State of U.P.* (supra), the Court found it difficult to believe that accused allegedly found to have assembled to commit dacoity and possessed fire-arms but did not resort to firing at all at police party and allowed some of dacoits to be apprehended by police without any resistance whatsoever. The story set up by police, was, therefore, found unnatural and unconvincing. The Court in para 13 of judgment observed that neither the police party fired nor dacoits fired any shot at police party. Having said so, it says "It is very unconvincing and understandable that the dacoits will allow the police party to apprehend them without any resistance."

29. Decision in *Gyan Singh and others v. State of U.P.* (Supra) was cited to contend that only three persons were caught and prosecuted out of which, one has been acquitted and hence, it cannot be said that there was any unlawful assembly. It is contended that in order to attract Section 148 IPC, guilt or proved involvement of five persons or more is a legal requirement. If participation of less than five persons could be proved, Section 148 will have no applicability. I find this submission meritless. Here, the prosecution case is that there were six persons found assembled, who had formed an unlawful assembly. When challenged, three ran away and three were caught by police. Even if one is acquitted, that would not mean that involvement of less than five persons has been proved. I, therefore, find no reason to hold that Section 148 will have no application here at.

30. Now advertent to last submission regarding sanction u/s 39 of Arms Act, I find that due sanction under the Arms Act has been obtained by Investigating Officer SI Amirulla and the same exhibited as Exhibits Ka-7, Ka-8 and Ka-9 before the Court below. Charge-sheets were submitted only after obtaining requisite sanction under the Arms Act. Nothing could be shown to controvert the

above findings.

31. In view of above, findings recorded by trial Court having not been shown perverse or incorrect, the conviction of accused appellants, recorded by trial Court under Sections 307, 148, 149 IPC and 25 Arms Act is upheld.

32. Then comes the question of sentence. It is contended that the alleged offence is of 1981 and this appeal is pending for the last more than thirty years. The appellant Barfi Lal was 22 years of age and Gyan Singh was 18 years of age at that time. Now both are aged about 50 years, a little less. They must have their family, may be grandchildren also. Such harsh punishment as awarded by Court below, at this stage would cause serious embarrassment and disturbance not only to appellants individually but to their family also.

33. The maximum sentence awarded to appellants by the Court below is seven years" RI u/s 307 read with Section 149 IPC, besides other punishments u/s 148 IPC and 25 Arms Act. It is true that there is no criminal history of appellants and it has also not come on record that after their involvement in the case in hand, they were found indulged in other criminal activities during the course they remained on bail or during pendency of these appeals.

34. Simultaneously, this Court also cannot ignore that the nature of offence committed is quite serious. The appellants have shown audacity of opening fire even on police patrolling party. The success of police in preventing any major crime, would not diminish the gravity of offence committed by appellants.

35. While considering the matters like the present one, on the question of sentence, the ground level reality must be known to a Court of law, if it has to do justice without becoming a party to the case. We are not sitting in ivory towers having no experience of society. We all have come from this very society, having common experience alike other members of public. We cannot shut our eyes to the stalked naked hard ground realities of our society and the system. The justice delivery system has to work and should be conducted, looking into these hard realities of our society in which we are living. The society includes a Judge as well as a member of society, as anybody else, and those who are prosecuting the case, also form part equally thereof. The only responsibility upon a Judge is that he should not have any preconceived notions or bias or conviction of a particular kind in his mind. He should be open to the case of both the sides. The version of both sides should be analysed and examined by the Court dispassionately and impartially. The duty laid in a well knit system of justice includes capacity of extracting truth from any complicated, haphazardly placed version(s), without getting involved in any kind of confusion created by any party to take undue advantage. The Court is neither a friend nor foe of anyone.

36. While the duty of Court is that an innocent person should not be convicted, a simultaneous obligation lies upon it that no criminal should be left unpunished taking advantage of weaknesses of legal system. The latter situation, if occurs frequently, will not only cause serious dent to the society but may also augment

crime and would make a mockery of justice system. It will become a laughing stock to the criminals.

37. No justice system can allow to reduce its efficacy so as to permit a criminal to go scotfree, despite committing an offence, simply because of deformities/ infirmities in society or weaknesses in prosecution agencies" functioning. We know that expectation from Judiciary is tremendously high and places heavy burden on it, but the system is well strengthened to bear this burden and deliver what is expected. Though it is a difficult task but not impossible. If the Courts have to maintain the kind of confidence, people have in the justice system, it has to rise to the occasion. However, it goes without saying that basic principles have to be adhered to. Only then the Courts can boast of having stood to its constitutional oath of upholding supremacy and majesty of rule of law.

38. A person who has been found guilty of committing a crime must receive adequate punishment therefor. Inflicting punishment upon a guilty person is not a revengeful attitude of society but the intention is to keep everybody, constituting the society, within limits of discipline, and also to give due message to discourage any deviation in the form of committing an offence. It is bounden duty of a Court of Law to do complete justice by awarding appropriate and suitable punishment commensurating to the nature of offence committed by accused. Sufferance of the victim and his family though cannot be wiped out in its entirety but a solace is given when an accused or offender receives appropriate punishment from a Court of law. It is not only deterrent but preventive also. Any leniency with overwhelming compassion and humanitarian touch would disbalance the scale of justice by doing favour to a wrongdoer, ignoring plight of the person suffering wrong.

39. Considering the entire facts and circumstances, discussion made hereinabove, and also having regard to age of appellants at the time of commission of crime and long period lapsed during pendency of appeal, in my view, the ends of justice shall meet if punishment u/s 307 IPC is reduced from seven years to three years" RI. Rest of sentences do not warrant any interference.

40. In the result, both the appeals are allowed in part. The conviction of appellants by trial Court under various Sections is maintained. The punishment awarded to them u/s 307 read with 149 IPC is reduced from seven years" RI to three years" RI. Sentences awarded to both the appellants by trial Court u/s 148 IPC and 25 Arms Act are confirmed. All the sentences shall run concurrently. The accused appellants Gyan Singh and Barfi Lal are in jail. They shall serve out the sentences passed against them. Certify this judgment to the lower Court immediately.