
(2014) 04 AHC CK 0293
In the Allahabad High Court
Case No : Criminal Appeal No. 858 of 1982

Bhura	Vs	APPELLANT
State of U.P.		RESPONDENT

Date of Decision : 24-04-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 207, 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 34

Citation : (2014) 3 ACR 3138 : (2014) 85 ALLCC 852

Hon'ble Judges : Vinod Prasad, J

Bench : Single Bench

Advocate : J.N. Dubey, Anurag Pathak, Manvendra Nath Singh, Satya Prakash, Shashi Dhur Dubey, Shashi Dhar Pandey, V.K. Singh, Vinod Kumar Shukla, Santosh Kumar Srivastava and Abida Sayeed (A.C.), Advocate for the Appellant

Judgement

Vinod Prasad, J.—Appellants, who are four in number namely Bhura, Ramvir, Durjan and Laxmi have preferred this appeal against the impugned judgment and order dated 23.3.1982 passed by Special Judge (schedule offences), Mainpuri in S.T. No. 5 of 1982, State v. Bhura and others, P.S. Enka, District Mainpuri by which they have been convicted for offences under sections 148, 307/149 I.P.C. and are sentenced to 2 years RI u/s 148 I.P.C, Six years RI u/s 307/149 I.P.C. Their sentences has been directed to run concurrently. In nutshell, prosecution version was that on 3.8.1981, informant SI D.P. Gaur P.W.1 along with constables CP 49 Bhagwan Singh P.W. 2, and P.A.C. Personnel HC 3735 Rajpal Singh, Naik Shankar Lal, Consts. Himanchal Singh, Gopal Singh, Sita Ram, Rajbir, Shankar Kheda, and Keshav Singh started from police gang outpost Suraya, of P.S. Enka, district Etah, at 3.30 p.m. on a petrol duty in search of bandit gangs. When they reached near village Nagla Bali, they spotted the gang of Bhura dacoit along with his companions including the appellants and acquitted accused Babu and three unknown dacoits coming from the side of village Nagla Bali at 6 p.m. On inquiry being made by the police party, the dacoits resorted to firing in an attempt to annihilate them. Exchange of fire thereafter ensued

between the police party and the dacoits but taking advantage of the situation and concealing behind the standing crops and ensued darkness dacoits escaped from the place of the incident. Police party laid a chase to apprehend them but had to abort their attempt and they returned back empty handed. Appellants Bhura, Durjan, Lakshamai and Ramvir were identified by the police party who were known to them since before the incident. Informant collected empty cartridges fired by the police party in cross exchange of fires, material Exhibits 1 to 26, from the place of the incident, sealed them at the spot, prepared it's recovery memo, Ext. Ka-1 in the presence of present police personnel, and thereafter police party returned to gang police outpost Suraya and stayed there overnight. Following day 4.8.1981, they came back to the police station Enka district Mainpuri where, at 2 a.m., informant P.W. 1 lodged recovery memo Ext. Ka-1, on the basis of which, constable clerk Mahendra Singh P.W. 5, prepared chik FIR Ext. Ka-2 and GD entry Ext. Ka-5 and registered the offence as crime No. 115 of 1981, under sections 147, 148, 149, 307 I.P.C. against six named and three or four unnamed dacoits.

2. SI Yashvir Singh P.W.3 commenced investigation into the crime but he only slated down 161 Cr.P.C. statement of the informant. Further investigation was conducted by SI M.P. Singh P.W.4, who after receiving the intimation of surrender of all the accused on 19.12.1981 recorded their statements, conducted spot inspection and prepared site plan Ext. Ka-3 and wrapping up the investigation charge-sheeted the accused on 14.1.1982 vide Ext. Ka-4, directly before Sessions Court u/s 7(1)(b) of U.P. Dacoity Affected Areas Ordinance, 1981.

3. Accused were summoned and after observing legal formalities u/s 207 Cr.P.C. were charged with offence u/s 307/34 I.P.C. on 2.2.1982, but since all the accused abjured that charge, pleaded not guilty and claimed to be tried that to establish their guilt sessions trial procedure was undertaken by the learned trial court to prosecute them.

4. In the trial prosecution examined in all five witnesses, out of whom, informant SI D.P. Gaur P.W. 1, constable Bhagwan Singh P.W. 2 were fact witnesses. S.I. Yashvir Singh P.W. 3 (first I.O.) S.I. M.P. Singh P.W. 4 (second I.O.) and constable clerk Mahendra Singh P.W. 5 were produced as formal witnesses.

5. In their statements recorded u/s 313 Cr.P.C., all the accused stated defence plea of false implication due to enmity with the police personnel to whom they were known since before the incident but they did not lead any defence evidence.

6. Learned Trial Judge vide impugned judgment of conviction and order of sentence found prosecution version incredible and unreliable concerning accused Babu and consequently acquitted him of that charge. Respecting other accused, the present appellants herein, learned Trial Judge found the prosecution case creditworthy establishing the charged offence beyond all shadow of reasonable doubt to the hilt and consequently convicted them under sections 148 and 307/149 I.P.C. and sentenced them as aforesaid, which judgment and order

dated 23.3.1982 has now generated this appeal at the behest of the four appellants.

7. This appeal was filed in the year 1982 and nobody appeared to argue it on behalf of the appellants and, therefore, in consonance with the Apex Court decision rendered in Bani Singh and others Vs. State of U.P., , learned advocate was appointed as amicus curiae to assist the Court in disposal of the appeal. At this juncture, it would be appropriate to mention that out of four, three of the appellants namely Bhura, Ramvir and Laxmi are already dead and their appeals already stands abated vide order dated 30.11.2007, therefore, only the appeal of appellant Durjan is being considered by this decision.

8. I have heard learned amicus curiae for the appellants and Sri A.K. Saxena, learned AGA for the State. Both the Counsel have taken me through oral and documentary evidences extensively and have made their erudite and elaborate submissions.

9. Castigating the impugned judgment, learned amicus curiae incisively urged that prosecution has miserably failed to establish the charge against the appellant who has consciously and intentionally withheld some significant and valuable evidences necessary for proving the incident and, therefore, impugned judgment suffers from the vice of being a lop sided decision being based on suppression of material facts and on such incipient evidences appellants could not be held to be guilty and be convicted. No general diary (GD) entry of starting of police personnel from the police station or the police gang out post was proved nor any GD entry of their returned was brought on the record. It has also not been brought on the record as to how many firearms and the cartridges were taken by the police personnel along with them from the police out post/police station. During the incident 45 rounds of shots are alleged to have been fired by the police party but they were able to recover only 26 empties from the spot and, therefore, prosecution version of 45 round of shots being fired could not be digested with any pinch of salt nor can it be taken to be a gospel truth. Incident FIR was lodged very belatedly after 20 hours and the explanation offered for the delay is gibberish. Although the incident is alleged to have occurred at 6 p.m. on 3.8.1981, FIR was recorded on 4.8.1981 at 2 p.m. When the police party had a PAC conveyance at it's disposal and they had started from the police station in a PAC vehicle and distance of the police station was only 10 Kms. Incident had occurred at 6 p.m. and conceding all the time to the police party they could have lodged the FIR same night. Why the police party stayed at the police out post during the whole night has not been explained at all. Further it was urged that no independent witness has been produced by the prosecution to make its version creditworthy. Only two police personnel, who were interested, partisan and inimical have been examined in the trial as fact witnesses and analysis of their depositions makes them incredible and unreliable witnesses on whose testimonies no reliance can be placed harangued learned amicus curiae. Unless interested and partisan witnesses are authentically supported by independent

source lending credence to the charge, it will be very hazardous to accept prosecution witnesses depositions. Both fact witnesses and ultimately the prosecution has tried to intentionally and deliberately conceal and suppress significant facts without which prosecution story does not go down well at the alter of fathoming out the truth and to make their version acceptable and trustworthy. The story developed by the prosecution of not finding any empty cartridges fired by the miscreant dacoits because of water logging in the agricultural field is an after thought, feigned, wholly unacceptable and a fabricated excuse. None of the appellants had any criminal history or recidivist background, which fact is even admitted to the informant/P.W.1 Sub-Inspector and hence it is difficult to conceive that they were members of a gang of bandits. Next, it is urged that it is a case of no injury although, according to testimony of witnesses, for ore and half hours cross exchange of fires were resorted to in which thousands of shots are alleged to have been fired by the miscreants appellants. No source of light is mentioned nor any recovery memo of the torch as was prepared. Learned Counsel, therefore, submitted that it is one of the case, which is of a police encounter with no injury, which most of the time is an incredible and untrustworthy version and cannot be accepted at all. Wrapping up the submissions, learned amicus curiae vehemently contended that the appeal of the surviving appellant Durjan deserves to be allowed and he be acquitted of the charge.

10. Sri A.K. Saxena, learned AGA made best of his efforts to support the impugned judgment of conviction and sentence and contended that no enmity with the police party could be brought on the record by the accused, who had failed to state any reason for his false implication. Delay in lodging of the FIR is explained by convincing evidence and since the appellant was known to the police party since before the incident, there remains no doubt regarding his identity and participation into the crime. Concluding his counter reply, learned AGA submitted that the appeal lacks merit and be dismissed.

11. I have given a thoughtful consideration over rival submissions and have critically vetted through the oral and documentary evidences. The incident is alleged to have occurred on 3.1.81 at 6 p.m. but the prosecution has not brought on the record any documentary evidence in the form of general diary (GD) entry of starting of police personnel from the police station Eka or police gang out post Suraya. No document, except oral statement by the informant, has been produced by the prosecution to indicate leaving of police party on picket duty. Similarly it has not been brought on the record as to how much weapon and the cartridges were taken by the police personnel from the police station so as to substantiate the allegation that during the incident 45 round of shots were fired. Further, according to the statement of P.W.1 when they arrived near village Nagla Bali, they spotted 9/10 persons coming from it's side armed with firearms at 6 p.m. From a distance of 150 paces, the police party enquired when the miscreants/dacoits opened fire at them. Police picket had taken shelter behind a four feet high wall and exchanged defence fires with the dacoits who, thereafter

escape towards south. Although the police party chased them but they could not apprehend them. It is alleged that during this exchange of fires, appellants were identified by the informant, who were known to him since before. According to P.W.1 himself, he had made fourteen fires. According to examination-in-chief of the informant, more than 34 round of shots were fired during the incident but very queerly thirteen round of shots could not be found from the spot. P.W. 1 has proved the recovery memo of the empties Ext. Ka-1 and 26 empties as material Exts. 1 to 26. P.W.1 has also proved the chik FIR Ext. Ka-2. He had further deposed that he knew the appellants since before the incident while checking their characters and from his police station none of the appellants were accused of any crime. During his cross examination, informant P.W. 1 categorically stated that he had not made any GD entry regarding starting from his police out post nor he had mentioned reason of his leaving the police station in the GD. He also admitted that after the incident, he did not think it essential to mention in the GD where he had gone after the incident nor it occurred to him to mention his activities after leaving the police station. He also admitted that the recovered empties were sealed along with seal of his name but no such seal impression was found when the bundle containing the recovered empties was opened in the Court. Informant had also admitted that they had gone from the police station in a P.A.C. van and that his statement u/s 161 Cr.P.C. was recorded after 4/5 days of the incident. In his interrogatory statement, informant had not disclosed to the I.O. that he had overnight stayed at police out post Suraya. He has also admitted that no wads, pellets or empties fired by the miscreants could be recovered from the spot. He had not gone along with the I.O. for the purposes of getting the spot inspection conducted and site plan prepared. He had no knowledge when Bhagwan Singh accompanied the I.O. for the purposes of showing him the place of the incident. According to the informant, thousands of fires were made by the miscreants. In paragraph 11, P.W. 1 has made categorical testimony that concerning the character of the appellant, he used to visit the village but from his police station, none of the appellants were accused in any case. Concerning consummation of time during the incident, informant had testified that the incident continued for one/one and half hours and accused could not be apprehended because darkness had set in. He also admitted that he had not prepared any GD entry of his returned to the police station. A critical probe into such a depositions by the informant police Sub-Inspector does not inspire any confidence at all. His ipse dixit of exchange of fires with the dacoits for such a long period with thousands of shots fired during cross exchange of fires but without a single empty cartridge fired by the dacoits being recovered makes his version unreliable uncreditworthy and unacceptable. It seems that the informant was dangling on his imagination rather than actual incident. His depositions are pityably weird and does not inspire any confidence. It is not established at all as to whether police party encountered any dacoit group or not nor it is proved that any exchange of fires occurred between the bandits and police personnel. Entire prosecution story rests in a realm of imagination without any authenticity. No villager of the vicinity was examined by the prosecution at

least for telling a res-gestie evidence of occurring of the incident as alleged by the police party. According to the informant himself, the agriculturist and farmers present in the vicinity had left the place of the incident. Any one of them could have been examined by the prosecution to lend support to its version. Testimony of P.W.1 does not inspire any confidence. It is an incident of police encounter with, no injury according to the testimony of the informant himself, which does not instill confidence of being the reality. In my opinion whatever has been deposed by P.W. 1 is only an afterthought and incredible version on which no reliance can be placed.

12. Coming to the second fact witness constable Bhagwan Singh P.W. 2 although he had tried to support the informant P.W. 1 but from his cross examination, it is evident that his narration of incident is also full of imaginations. According to him, only 50 fires were made by the miscreants and for an hour the incident continued. No chase of the culprits dacoits was made because it had become dark. He also admitted that no empty wads etc. fired by the miscreants could be recovered from the spot. He deposed that 40-45 empties were handed over to the I.O. All his above statements are not only contrary to the depositions of the informant/PW1 but it also are belied by the recovery memo which mentions only 26 empties. It has further been deposed by him that he did not remember as to how many days after the incident his interrogatory statement u/s 161 Cr.P.C. was recorded. He admitted that he never visited the place of the incident along with the I.O. Thus what exists on record are the two contradictory, irreconcilable and unreliable depositions which do not inspire any confidence at all. Testimony of PW2 also gives an impression that the entire story put forth before the Court by the prosecution is afterthought and manipulated.

13. Out of two formal witnesses first Investigating Officer SI Yashvir Singh P.W. 3, only recorded 161 Cr.P.C. statement of the informant at the police station and besides that he has done nothing and, therefore, his evidence is absolutely worthless and is of no value in judging the guilt of the accused.

14. Second I.O. SI M.P. Singh P.W. 4 deposed regarding residue of the investigation conducted by him and preparation of site plan Ext. Ka-3. From his examination-in-chief and cross-examination, he had admitted that investigation was handed over to him on 19.12.1991 and because of the delay he could not recover anything concerning the incident from the spot. His testimony is deficient in all respects and his conducted investigation is incipient, deficient and just an eye wash and no reliability can be attached to it.

15. Last prosecution witness constable clerk Mahendra Singh P.W. 5 had prepared only chik FIR and CD entry Ext. Ka-5 and had mentioned deposit of the seized empty at the police station in Rapat No. 16, and his evidence does not improve upon the prosecution case at all.

16. Besides above view, no recovery of a single empty cartridge fired by the miscreants albeit, thousands of shots were fired leaves no room for doubt that in

fact no encounter took place and entire prosecution story is feigned and fabricated. In the site-plan ext. Ka-3 no field with water logging has been shown and hence explanation by the informant that due to water logging in the field those empties could not be found is a false excuse. Site plan only depicts fields of potato, wheat, maize, and gram. It is not the case of the prosecution that at any earlier day it had rained/drizzled. Thus police encounter story also seems to be fake.

17. Aforesaid analysis leaves no manner of doubt that it is impossible, most hazardous and extremely doubtful that prosecution has been able to establish its case beyond reasonable doubt. But for the oral testimony, no credible material has been brought forth by the prosecution witnesses so as to establish the charge of police encounter with no injury. On an overall analysis, I do not find any substance in the prosecution version. Only an oral narration without any credible material does not establish happening of the incident at all. Since both the fact witnesses, who are/were police personnel were interested, inimical, partisan, and they have not been supported by independent source that it is difficult to rely upon their testimonies without corroboration from any independent source.

18. In all the above respects, learned trial Judge fell in error in accepting ipse dixit of two fact witnesses without critically examining intrinsic inherent improbabilities of their evidences. The impugned judgment therefore is unsustainable and indefensible. The opinion by the learned Trial Judge that the testimonies of fact witnesses appears to be free from any reasonable doubt, is a far fetched opinion because learned trial Judge completely ignored the fact that none of the appellants had any criminal background and although the police personnel checked their character, time and again, no case was found registered against them. It is difficult to perceive that persons without any criminal proclivity and no crime to their credit will resort to firing at the police party without any rhyme or reason. It is to be noted here that no firearm or empty cartridge could be recovered from any of the appellants nor they were prosecuted for any crime under the Arms Act. During the investigation, not attempt was made by the I.O. to make any recovery. In such a view, the defence of the appellant that due to enmity with the police, he has been falsely implicated seems to be quite probable as such false implications are not unknown. Some times reasons of false implications are not apparent but they can be reasonably fathomed out from the evidences on record. Normally villagers are terrorized and terrified by the police and would like to keep themselves away from the police personnel who often takes undue advantage of their position of being a person of police force. It is not an uncommon that the police personnel take revenge and nail in those who refuse to oblige them or against whom they harbour animosity or ill will. To teach them a lesson that they are implicated in false cases.

19. Learned Trial Judge further committed an error in castigating defence

contention that the FIR in the present case is delayed. To say the least, if the police party had started from the police station in a P.A.C. vehicle, there was no difficulty for it to come to the police station by the same vehicle and lodge the FIR without any delay. No explanation has been given by the informant or any of the prosecution witness for such a lapse and, therefore, it cannot be said that incident FIR has been lodged without any delay. Nobody is injured in the incident and, therefore, the manner and the description of the incident as made by the prosecution witnesses do not inspire any confidence.

20. On an overall analysis, I find that the prosecution has miserably failed to substantiate its charge against the surviving appellant Durjan. The appeal of appellant Durjan deserves to be allowed and he deserves to be acquitted.

21. The residue is that the appeal preferred by appellant Durjan is allowed. His conviction and sentence order dated 23.3.1982 passed by Special Judge (schedule offences), Mainpuri in S.T. No. 5 of 1982, State v. Bhura and others, P.S. Eka, District Mainpuri for offences under sections 148, 307/149 I.P.C. are hereby set aside and he is acquitted of those charges. Appellant Durjan is on bail, he is set at liberty, he need not surrender, his personal and surety bonds are discharged.

22. Appeal of three other appellants namely Bhura, Ramvir and Laxmi already stands abated as they are dead. Personal and surety bonds of the three dead appellants are also directed to be discharged. Let a copy of this judgment be certified to the Trial Court for its intimation and necessary action.