

(2007) 04 AHC CK 0298
In the Allahabad High Court
Case No : Criminal Appeal No. 3990 of 2005

Dahari and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 27-04-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 148, 149, 302, 311
Penal Code, 1860 (IPC) — Section 148, 149, 302, 320

Citation : (2007) 04 AHC CK 0298

Hon'ble Judges : S.S. Kulshrestha, J; Barkat Ali Zaidi, J

Bench : Division Bench

Judgement

Barkat Ali Zaidi, J.—The appellants herein have been convicted by Additional Sessions Judge (Court No. 4), Azamgarh in S.T. No. 215 of 1991 for alleged commission of offences punishable under Sections 320/ 149, 148 I.P.C. on the allegation of forming an unlawful assembly and constructively committing murder of one Tej Bahadur Singh (hereinafter called the deceased) aged 28 years by causing fire arm injuries. The judgment was passed on 07.09.2005 whereby he awarded the sentence of imprisonment for life under Sections 302/ 149 I.P.C. and one year rigorous imprisonment u/s 148 I.P.C. and also to pay a fine of Rs. 10,000/- on each count, and in default to further undergo a term of four months rigorous imprisonment to all the accused appellants, all the sentences were made to run concurrently. Informant PW-1, Man Bahadur, PW-2, Raj Bahadur, Jay Bahadur, Narendra Bahadur and the deceased are real brothers, all residents of Village Kiratpur, District Azamgarh, PW-1 serving in P.W.D. Department, Ballia, while deceased Tej Bahadur was an operator in Nagar Palika, Azamgarh.

2. The prosecution case is that on 07.09.1990, some times prior to the occurrence, which took place at 9 a.m. in the morning, the deceased, his friend Ashok, Man Bahadur, Raj Bahadur, were in village Kiratpur. Tej Bahadur (deceased) and Ashok started on a Motorcycle. The deceased was driving the Motorcycle, Ashok was the pillion rider. Thereafter, Man Bahadur, Raj Bahadur started on a Moped, when they were on Kaccha Rasta, 30 yards behind the

deceased and Ashok, they saw that accused Harcharan, Hari, their father Dahari, Bane, Patiram Phool chand and the brother-in-law of Gharbharan all armed with country made pistols emerged from the cane field of Khelu Yadav on the way, and fired at the deceased killing him instantaneously. The accused thereafter ran away. The incident was witnessed by Shashi Bhushan, PW-3, Rajesh Singh and many others. Then they shifted the dead body of the deceased and laid it nearby a mango Tree besides the road.

3. The F.I.R., Ex. Ka-1 of the incident was lodged by Man Bahadur, PW-1 at 10.05 a.m. on 07.09.1990. The distance of Police Station from place of occurrence is 12 kms. Chik report Ex. Ka-4 on basis of the F.I.R. was written by PW-3, H.C.P. Shiva jee Goswami, who informed PW-4, S.O., Sarvdev Singh, who was in the town. Investigation of the case was commenced by S.O., PW-4, who went to the spot on 07.09.1990 at around 11 a.m., prepared Panchayat Nama lash and other related papers (Ex. Ka-7 to Ka-11) for post mortem and dispatched the dead body to the Hospital. PW-4 also seized one empty cartridge, two pellets of fired bullets (vide memo Ex. Ka-5) and also collected samples of plain and blood stained earth and Bullet Motorcycle of the deceased, vide memo Ex. Ka-5 and also prepared the site plan, Ex. Ka-6.

4. Post mortem of the dead body was conducted by PW-6, Dr. A.K. Pandey, a Surgeon of District Hospital, Azamgarh on 07.09.1990 at 4.30 p.m. by post mortem report Ex. Ka-13, and he found him half a day back dead, and the following ante mortem injuries, on the person of deceased.

EXTERNAL

5. Gun shot wound of entry half cm. x half cm. x chest cavity deep irregular margin situated on left pictorial area five cm below left nipple.

6. Gun shot wound of exit Three cm. x two cm. x through eight cm. lateral to thoracic-3, communicating to injury no one directing backward horizontally.

7. Gun shot wound of entry 2.4 cm. x cavity deep situated over lateral part of back fourteen cm. below and in line to left shoulder joint with irregular margin.

8. Gun shot wound of Exit 4 cm. x 3 cm. Through on right pectoral area eight cm. above RT nipple at Ten O'clock position communicating to injury number three.

9. Gun shot wound of entry one cm. x one cm. x cavity deep with irregular margin situated on back at thoracic-5.

10. Gun shot wound of Exit Two cm. x one cm. x through, ten cm. lateral to left nipple communicating to injury number five.

11. Gun shot wound of entry one cm. x one cm. x bony deep irregular margin with multiple abrasion on right half of face and neck and fracture of scapula and humerus bone was found.

12. Gun shot wound of Entry one cm x one cm x muscle deep irregular margin, five cm left lateral to L4 spine.

13. Gun shot wound of Exit two cm. x two cm. x muscle deep situated on middle of Right Gulta area communicating to injury number eight.

NOTE:- No Blackening, Tattooing present except injury no seven.

INTERNAL EXAMINATION:-

In thorax fracture of Vth left rib and fracture of left IVth rib pleura lacerated, both lungs injured, heart and pericardium injured.

About two litre of blood was present in thoracic cavity. In abdomen semi digested food material two fifty gm. Present in form of rice and pieces of Roti were identified.

Both intestines were filled with gases, pasty and faecal matter. Gall bladder was half full. The doctor opined the cause of death due to shock and Haemorrhage as a result of ante mortem injuries.

One cylindrical metallic body was recovered from right side neck on it's opening.

The earth, cylindrical metallic body along with the clothes collected from the dead body of the deceased were sent by the doctor to the Investigation Officer.

14. The charge sheet was filed by PW-4.

15. The case of appellants was one of denial simpliciter and that they have been falsely implicated due to prior ill will. No evidence has been led in defence.

16. To substantiate the charge the prosecution examined six witnesses namely Man Bahadur PW-1, Raj Bahadur PW-2, H.C.P. Shivaji Goswami PW-3, S.O. Sarvdev Singh PW-4, Shashi Bhushan PW-5 and Dr. A.K. Pandey PW-6 in its evidence before the court. Pws. 1, 2 & 5 were cited as eye witnesses. PW-1 & PW-2 supported the prosecution case in full. PW-5, Shashi Bhushan though in examination in chief supported the prosecution case in full, made a volte in his cross examination face and completely resiled from the earlier version. He was recalled by prosecution after more than a year, and was cross examined by the prosecution. It is not clear, why the witness was not declared hostile and why he was not cross examined immediately after his cross examination by the counsel for the accused. The counsel for the State seems to have gone into state stupor. Even the Trial Judge did not ask him, if he wanted to cross examine the witness.

17. In view of the consistent version given by PW-1 & PW-2 corroborated by medical evidence and the prompt FIR, the Trial Judge held that the prosecution had proved the guilt of the accused.

18. Counsel for the appellants contended that the whole prosecution story is highly improbable. Tej Bahadur was killed on earlier night by unknown assailants, whose dead body was found, the next morning nearby the Mango Tree and that

incident did not take place on alleged place of occurrence. It has also been argued by the counsel for the appellants that it has come in evidence that PW-1, PW-2, Narendra and deceased all these brothers were convicted by the Sessions Court in a murder case of one Shyam Dev Harijan, they were also prosecuted for murder of the son of accused Dahari and brother of accused Hari and Harcharan and brother-in-law of accused Hari Ram and, therefore, there is reason with them to falsely implicate the accused.

19. In this case, it cannot be disputed that there is prior ill-will between parties, which will appear from the statement of Man Bahadur, PW-1, who stated that prior to this occurrence, brother of accused Haricharan was killed and the accused and his brothers were detained in jail and in that connection the case is pending. PW-2, Raj Bahadur has also admitted that in the case of murder of Gharbharan, his son Raghu Prakash, Man Bahadur, Jai Bahadur were prosecuted but they were exonerated. He admitted during the cross examination that Ravi Prakash, son of Raj Bahadur, PW-2 is in jail. It will, therefore, appear that there is direct enmity between the informant's party and accused Harcharan, Hari, Dahari and Hari Ram. However, mutual distrust ill will is not a factor to be reckoned as significant for the defence, while on the one hand, it may be said that it provides ground for false implication, it may also be a motive for the accused to commit the crime. It is thus a double edged weapon, which cuts both ways.

20. Now coming to the evidence of PW-1 & PW-2, it will appear that both started together on a Moped for Azamgarh and according to them their Moped was following the Motorcycle of the deceased, which was being driven by him, Ashok it's pillion rider. Both claim to have seen the incident 30 to 35 yards away from the place of occurrence. According to them, when the Motorcycle of the deceased reached nearby the cane field of Khelu Yadav, accused Harcharan, Hari Ram, Hari, Dahari, Bane, Phoolchand, Patiram came out of the field, carrying country made pistols, and started discharging fires at Tej Bahadur, who fell down and died. PW-1 & PW-2 have stated that then they went to Tej Bahadur and lifted Tej Bahadur with a hope that they will take him to the Hospital, but when they found no sign of life, they placed his dead body besides the road under the Tree. Soon thereafter, PW-1 prepared the written report and they went to the Police Station, where PW-1 lodged the F.I.R.

21. Challenging the veracity of PW-1 & PW-2, it has been argued that it appears improbable that despite so many fires having been made, the pillion rider did not receive a single injury, which shows that the incident did not occur in the manner alleged by the prosecution because the deceased received injuries No. 3, 5, 8 and 2 as mentioned in the Post Mortem report in his back region With gun shots pellets flying around the pillion rider, he must have received an injury. The absence of injuries to the pillion rider, Ashok can be justifiably explained in the manner, that, after the first shot had been fired on the deceased, he stopped the Motorcycle as is there in the evidence of PW-1 & PW-2 and thereafter, the pillion

rider naturally ran away to save his life, and that is why, he did not receive injury. It is in the evidence of PW-1 that firing on the deceased stated from his front and thereafter he fell down from the Motorcycle, which finds corroboration from injury Nos. 1 & 7 found on the front portion of the deceased. That could not, therefore, hit the pillion rider and thereafter the pillion rider must have run away to save his life. The evidence is that after the deceased fell down, he was surrounded by the accused and fired upon, and there seems no reason, why their evidence with regard to the occurrence should not be relied upon.

22. It was argued from the side of the appellants that while PW-1 stated that the deceased was fired upon after being surrounded by the accused PW-2 has not stated this fact. When two persons describe an incident, they are not likely to be completely identical and some variation are bound to creep, which is very natural and do not injure the core of the testimony of the witnesses and cannot, therefore, be regarded as having any significance, if PW-2 has not specifically stated that the deceased was surrounded by the accused and they fired upon, it does not damage the prosecution version. It would be apposite to recall in this connection the observation made by the Hon'ble Supreme Court in the case of *Bharwada Bhogin Bhai Haji Bhai Vs. State of Gujrat*, 1986 Cr.L.J. 1096(SC) wherein it was observed:-

that a witness cannot be expected to adduce a photographic memory and to recall the details of an incident. It was further observed as follows:-

Ordinarily a witness cannot be expected to recall accurately the sequence of events which took place in rapid succession or in a short time-span. A witness is liable to get confused or mix-up when interrogated later on. It was further observed as follows:-

A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by the Counsel and out of nervousness mix-up facts and get confused regarding sequence of events and filling-up details from imagination in the spur of moments. The subconscious mind of the witness so operates on account of the fear of looking foolish or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him, as perhaps it is a sort of psychological defence mechanism activated at the spur of moment.

23. There is no inconsistency in the medical evidence and the ocular version as argued by the counsel for the appellants, who pointed out blackening, scorching and tattooing is found on injury No. 7 (Post Mortem Report) because evidence of PW-1 is that, ultimately after falling down, the deceased was surrounded by the accused and fired upon. Since there is no blackening, scorching in the remaining injuries, they were fired from a distance and as such there is no incompatibility in the oral evidence and the medical evidence.

24. It has to be seen that in this case, there is a prompt FIR, which was lodged within an hour and all the accused have been named therein. The distance of

Police Station from the place of occurrence is 12 kms. and this could only be possible when PW1 and PW2 were present on the place of occurrence, and were in a position to see the accused from close quarters and since all the accused were known to the witnesses. It is also to be noticed that there was reason and justification for PW-1 and PW-2, and also the deceased to be present there at the time of occurrence because they were going to Azamgarh as the remand proceedings in case of murder of Gharbharan in which Raghu Prakash son of PW-2 is the accused were fixed in the Court at Azamgarh on the date of occurrence. There is nothing in cross examination of PW-1 & PW-2 to cast doubt on the veracity of their testimony, and to discredit them.

25. It was also pointed out from the side of the appellants that the pillion rider Ashok and one other witness Rajesh Singh, who is named in the FIR have not been examined, which shows that the prosecution is suppressing evidence. The non examination of witnesses is not something, which may cause a fatal dent in the prosecution version, and the court has only to see, whether the evidence adduced before it is dependable and reliable and sufficient to justify conviction. It must, however, be recorded that the Trial Judge did not play the role of an active participant in the proceedings as he should have done, because he could have summoned the two witnesses u/s 311 Cr.P.C. but did not do so. However, as mentioned above that will not damage the prosecution version.

26. It was pointed out that deceased and his brother are criminals and that criminal cases were pending against them, as has come in the evidence and it is likely that some one may have killed the deceased because of enmity. It is not for the court by remote probabilities about which there is no evidence to say anything, and what the Court has only to see, whether evidence is sufficient to justify to conviction. As mentioned, there is a prompt FIR, the incident occurred in broad day light and the evidence is reliable.

27. Dahari, Hari, Harcharan, Hari Ram as regards these four accused, there is direct animus and they were actuated by ill-will in committing the murder, but as regards, the remaining three accused Phoolchand, Bane, Patiram, there is no sufficient reason for them, for having participated in the commission of crime. It cannot be denied that there is a tendency in our society to rope in other persons also because of ill-will in a crime, which they may have not committed. Courts, therefore, have to sift grain from the chaff, and be conscious where there are large number of persons involved in committing of murder. These aforementioned three accused Phoolchand, Bane, Patiram had no cause of action and no reason to involve themselves, in taking a life. Their involvement seems in the circumstances doubtful. They must be separated and exonerated. The appeal is partly allowed. Accused appellants Phoolchand, Bane and Patiram are found not guilty and are acquitted of the charges under Sections 302/ 149 and 148 I.P.C. The sentence awarded to them by the trial court is consequently set aside and they are set at liberty forthwith, while the conviction and sentence passed against accused appellants Dahari, Hari, Harcharan and Hari Ram by the trial

court shall remain intact.