

(2002) 02 AHC CK 0111
In the Allahabad High Court
Case No : Criminal Appeal No. 536 of 1981

Daya Nand Yadav (In Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 01-02-2002

Acts Referred:

Arms Act, 1959 — Section 25
Penal Code, 1860 (IPC) — Section 307

Citation : (2002) CriLJ 2230

Hon'ble Judges : U.S.Tripathi, J

Bench : Single Bench

Advocate : U.K. Misra, for the Appellant; A.G.A., for the Respondent

Final Decision : Allowed

Judgement

U.S. Tripathi, J.—This appeal has been directed against the judgment and order dated 12-2-1981 passed by 2nd Additional Sessions Judge, Azamgarh in S.T. No. 425 of 1979 convicting the appellant u/s 307 I.P.C. and sentencing him to undergo Rigorous Imprisonment for a period of four years.

2. The prosecution story, briefly stated, was that Khurmulli (P.W.I) as well as appellant Dayanand R/o Rasulpur, P.S. Doharighat district Azamgarh had their agricultural plots in the said village. The agricultural plots of the parties were irrigated through canal.

3. On the after noon of 25-8-1979 at about 2.30 P.M. Khurmulli (P.W. 1) was irrigating his plot through canal water. The appellant closed the flow of water going towards the field of Khurmulli (P.W. 1) and diverted the same into his plot. Khurmulli (P.W. 1) came to the appellant and asked him as to why he had blocked flow of his water and saying it he again opened the flow of water towards his plot. On it the appellant whipped out a country made pistol from his waist and fired on Khurmulli (P.W. 1) due to which he sustained injuries on his face and upper part of chest. Alarm raised by Khurmulli (P.W.I) attracted Laxmi Narain and

Indrasan who came to spot and chased the appellant. Sudama Singh (P.W.2) the then S.I. of P.S. Doharighat was at village Misrauli in connection with enquiry of an application. He also heard a sound of fire and rushed towards spot along with Constables Vikram Singh and Tikori Rai who were with him, The S.I., Constables and witnesses Laxmi Narain and Indrasan apprehended the appellant with a country made pistol in his hand. On his personal search the appellant was found in possession of one country made pistol, two live cartridges and one fired cartridge in the barrel of the pistol for which he was having no license. The country made pistol appeared recently fired as smell of gun powder was coming out from its barrel. S.I. Sudama Singh (P.W.2) prepared recovery memo (Ext. Ka-1) on the spot sealed the recovered articles and took the appellant to the police station. Khurmulli (P.W. 1) also went to the police station and there he lodged written report Ext.Ka-2 which he got prepared from Jugul Yadav. The chik F.I.R. Ext.Ka-4 was prepared by Head Constable Heera Lal who made an endorsement of the same at G.D. report (Ext-Ka-5) and registered a case u/s 307 I.P.C. against the appellant.

4. The injured Khurmulli (P.W. 1) was sent to Primary Health Centre, Doharighat where he was medically examined by Dr. Satish Chandra Pandey (P.W. 5) who prepared injury report (Ext.Ka-11)

5. The investigation of the case was taken up by S.I. Sri Shiv Murti Singh (P.W.3). He interrogated the appellant at the police station and thereafter he reached the village Rasulpur where he interrogated Khurmulli (P.W.I) and other witnesses. He inspected the place of occurrence and prepared site plan (Ext-Ka-6 and Ka-7).

6. The X-ray examination of head of Khurmulli (P.W.I) was conducted on 28-8-1979 by Dr. S.P. Gupta (P.W.4) at District Hospital, Azamgarh and three round radio opaque shadows of metallic density in the region of right side face were detected. The pistol recovered from the possession of the appellant and cartridge lying in its barrel were sent to Ballistic Expert for examination and report. The Director, Forensic Science Laboratory examined the same and submitted report to the effect that the cartridge in question was fired from the pistol.

7. On completion of investigation Sri Shiv Murti Singh (P.W.3) submitted charge sheet (Ext.Ka-8) u/s 307 I.P.C. and another charge sheet (Ext.Ka-9) u/s 25 Arms Act against the appellant.

8. The cognizance of the case was taken up by Judicial Magistrate and he committed the case to Court of Session.

9. The appellant was tried for the offence punishable u/s 307 I.P.C. in S.T. No. 425 of 1979 and for the offence punishable u/s 25 Arms Act in S.T. NO.425-A of 1979.

10. The appellant pleaded not guilty and contended that he had enmity with S.I.

Sudama Singh as he was investigating a case on the report lodged by one Mohan (D.W.I) in which he was witness S.I. Sudama Singh pressurised Mohan Singh to withdraw the case and the appellant not to give evidence. Mohan Singh moved an application for change of investigation. Annoyed with it he falsely implicated him in these cases.

11. Both the sessions trials were consolidated and S.T. No. 425 of 1979 was treated as leading case.

12. The prosecution in support of its case examined Khurmulli (P.W.I) and S.I. Sudama Singh (P.W. 2) as witnesses of facts besides S.I. Shiv Murti Singh, I.O. (P.W.3), Dr. S.P. Gupta (P.W.4) and Dr. Satish Chandra (P.W.5) as formal witnesses.

13. The appellant examined Mohan Singh (D.W.I) in his defence.

14. The learned Sessions Judge on considering the evidence of the prosecution held that the involvement of the appellant u/s 25 Arms Act was doubtful and he should be given benefit of doubt and be acquitted under said section. He further held that however as regards the involvement of the appellant u/s 307 I.P.C, there was no reason to disbelieve the case of Khurmulli (P.W.I) as the Court has to find out the truth from the heap of facts including falsehood and exaggerations. Therefore, the prosecution proved the guilt of the appellant for the offence punishable u/s 307 I.P.C.

15. With these findings he acquitted the appellant u/s 25 Arms Act, but convicted him u/s 307 I.P.C. and sentenced him to undergo R.I. for a period of four years.

16. Aggrieved with his above conviction and sentence the appellant preferred this appeal.

17. Heard learned counsel for the appellant and learned A.G.A and perused the evidence on record.

18. According to prosecution Khurmulli (P.W.I) sustained gun shot injuries on 25-8-1979 at about 2.30 P.M. at village Rasulpur P.S. Doharighat. The appellant had not disputed the gun shot injuries on the person of Khurmulli (P.W.I). Khurmulli (P.W.I) stated in his evidence that he sustained pistol shot injuries on the above date, time and place of occurrence. On the date of occurrence he was medically examined by Dr. Satish Chandra Pandey (P.W.5) who found following injuries on his person :-

1. Lacerated wound 0.5 cm x 0.5 cm x 0.5 cm on root of the nose right side. Pellet felt, blackening present.

2. Lacerated wound 0.5 cm x 0.5 cm on left side of forehead just above the outer angle of left eye blackening present.

3. Lacerated wound 0.5 cm x 05 cm on upper lip right side. Blackening present.

4. Abraded contusion 5 cm x 5 cm on right side face 4 cm away from the bridge

of the nose.

5. Abraded contusion 14 in number scattered on whole of chest and abdomen size 0.5cm x 0.5 cm. Blackening on 5 injuries present.

6. Abraded contusion 2 in number of 0.5 cm x 0.5 cm on back of right forearm in area 5 cm x 5 blackening present.

19. The Doctor opined that injuries were simple caused by firearm and fresh in duration.

20. Dr. S.P. Gupta (P.W.4) stated that he conducted X-ray of the face of Khurmulli (P.W.I) on 28-8-1979 in District Hospital, Azamgarh and found three rounded radio opaque shadows of metallic density in the region of right side face.

21. The above medical evidence has not been challenged by the appellant. It is, thus, clear that the prosecution has successfully proved that Khurmulli (P.W. 1) sustained gun shot injuries on the above date, time and place of occurrence.

22. The date, time and place of occurrence are also not seriously disputed by the appellant. Khurmulli (P.W. 1) stated that occurrence took place in the Sivan of village Rasulpur. The date, time and place of occurrence find support from the medical evidence. No doubt the I.O. had not recovered any blood from the sopt, but the injuries of Khurmulli (P.W. 1) were such that there was no possibility of falling blood on the spot. Assuming that some drops of blood had fallen the place of occurrence being the field, it might have been soaked in the earth. Therefore, the absence of blood on the sopt is not very much material in this case. Moreover, the appellant had also not suggested any counter place of occurrence. Therefore, there is no ground to disbelieve the place of occurrence as stated by Khurmulli (P.W.I).

23. On the manner of occurrence and complicity of appellant in the offence the prosecution has relied on ocular testimony of Khurmulli (P.W. 1) and S.I. Sudama Singh, (P.W. 2). Though it was stated by Khurmulli (P.W. 1) that when the appellant fired pistol shot on him he raised alarm and Laxmi Narain and Indrasan also came to the spot and above witnesses chased the appellant but Laxmi Narain and Indrasan have not been examined by the prosecution on the ground that they had been won over by the appellant.

24. The learned Sessions Judge observed that it is difficult to believe that S.I. Sudama Singh, (P.W.2) would have heard the sound of Katta fire came running to the spot and arrested, the appellant only at a distance of 50 or 60 paces from the place of occurrence. Therefore, the accused/appellant must have been arrested either from his house or from some other place. Having gone through the statement of S.I. Sudama Singh, (P.W.2) I do agree that his evidence is not reliable. According to evidence of S.I. Sudama Singh, (P.W.2) on 25-8-1979 he had gone to village Misrauli for patrol duty. When he was in village Misrauli he heard sound of fire and rushed towards the place of occurrence. There he found that 2-3 persons were chasing the appellant. He along with Constables Vikram

Singh and Tikori Rai with the help of Laxman and Indrasan Yadav apprehended the appellant who was having a Katta in his hand. On his personal search he was found in possession of two live cartridge and one fired cartridge in the barrel of pistol. He also observed that Khurmulli (P.W.I) had sustained injuries. In his cross examination he stated that he had not mentioned in the G.D. of his departure that he had to patrol in village Misrauli. He also admitted that occurrence took place in the Sivan of village Chakesar. Again he admitted that when he heard sound of fire he was in village Misrauli. The distance of village Chakesar from village Misrauli was one km. and the distance of village Rasulpur from village Misrauli was 2 km. In the F.I.R. it is mentioned that occurrence took place in village Rasulpur. It is so also mentioned in the charge. However, in the recovery memo which was prepared by S.I. Sudama Singh, he has shown the place of arrest of appellant at village Chakesar. But according to F.I.R. version incident of firing took place in village Rasulpur. As mentioned above according to admission of S.I. Sudama Singh (P.W.2) he was at village Misrauli when he heard the sound of fire. Meaning thereby he was at a distance of 2 km when he heard sound of fire. It is difficult to believe that SI. was in a position to hear the sound of fire from a distance of about 2 km that too in the day when there is disturbance in the atmosphere and audibility is lessened. Moreover, if he reached the spot after covering a distance of about 2 km, on the own showing of the prosecution the appellant was being chased by Khurumulli (P.W. 1), Indrasan and Laxmi Narain and he was also running. According to site plan appellant was apprehended on Chak road leading towards Belauly Sonbarsa at place "B" which was only at a distance of 70-80 paces from the culvert near which the occurrence took place. Therefore, by the time S.I. Sudama Singh, (P.W.2) would have reached the above chakroad the appellant would not have been available there and therefore, the entire evidence of S.I. Sudama Singh, (P.W.2) is belied by the evidence of Khurmulli (P.W.I), site plan and his own evidence.

25. Khurmulli (P.W.I) and S.I. Sudama Singh, (P.W.2) have stated that appellant Daya Nand was arrested on chak road near the place of occurrence. This part of prosecution story was disbelieved by the learned Sessions Judge. As mentioned above the place of arrest stated by Khurmulli (P.W. 1) and S.I. Sudama Singh, (P.W.2) is not believable. However, the learned Sessions Judge has observed that the accused must have been arrested either from his house or from some other place, but he was arrested soon after the incident. There is no evidence on record to support above observation of learned Sessions Judge. The place of arrest of the appellant alleged by the prosecution is not believable and therefore, it cannot be said that he was apprehended just after the occurrence. Since evidence of Sudama Singh (P.W.2) is not reliable, the entry in the General Diary report and recovery memo Ext. Ka-1 made on the basis of above evidence are also not reliable and if the above evidence and documents are ignored there is no evidence to prove that the appellant was arrested just after the occurrence.

26. There remains sole testimony of Khurmulli (P.W.I). It is true that the witness has sustained injuries and his presence on the spot cannot be doubted. But the

injuries on his person simply guarantees his presence and not the truthfulness of his evidence. Moreover, to base conviction on sole testimony of Khurmulli (P.W. 1) he must be a wholly reliable witness. The witness stated in his evidence that after sustaining injuries he along with Laxmi Narain and Indrasan chased the appellant up to the place of his arrest. As mentioned above the place of arrest stated by the witness has been disbelieved. Moreover, after sustaining injuries on his face near the eye, on the nose and chest, the witness was not expected to collect so much of courage to chase the appellant up to a distance of 70-80 paces. Therefore, this conduct of the witness is also improbable. The facts and circumstances of the case and nature and seat of injuries sustained by the witness lead to infer that after sustaining injuries he was not in a position to chase the appellant. Besides if the witness has given wrong place of arrest of the appellant. Therefore, the witness is not wholly reliable and to base conviction on his evidence, corroboration was needed. As mentioned above the evidence of S.I. Sudama Singh, (P.W.2) which could have corroborated the evidence of Khurmulli (P.W.I) is not believable. Therefore, despite Khurmulli (P.W.I) being injured his testimony is not corroborated by any other evidence and is not sufficient to base conviction of appellant.

27. It is true that principle of falsus in uno, falsus in omnibus is not applicable in India and the duty of the Court is to spare out grain of truth from heap of chaffs of falsehood, but in the instant case the falsehood and truth have been so intermingled, that it is difficult to spare out the grain of truth from the evidence of Khurmulli (P.W.I).

28. In view of above discussions and observations I find that the prosecution failed to establish the guilt of the appellant for the offence punishable u/s 307 I.P.C.

29. The appeal is, accordingly, allowed. Conviction and sentence of appellant u/s 307 I.P.C. is set aside and he is acquitted of the said charge. He is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged.