
(2016) 03 AHC CK 0067

In the Allahabad High Court

Case No : Criminal Appeal Nos. 1439 and 1490 of 2006

Diwakar Shukla and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 15-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, Section 313, Section 374,
Section 386, Section 428

Penal Code, 1860 (IPC) — Section 300, Section 302, Section 307, Section 34, Section
504

Citation : (2016) 03 AHC CK 0067

Hon'ble Judges : Surendra Vikram Singh Rathore and Pratyush Kumar, JJ.

Bench : Division Bench

Advocate : Jaikaran Nath Chaudhary, Amit Chaudhry, Ishan Baghel and Soniya Mishra, for the Appellant; Govt. Advocate, A.M. Shukla, Mohd. Khalid and Vivek Shrotria, for the Respondent

Final Decision : Allowed

Judgement

Pratyush Kumar, J.—1. These appeals arise out of the same judgment and order dated 28.07.2006 passed in Sessions Trial No. 438 of 2000 [State v. Diwakar Shukla and others], they have been heard together and decided by a common order.

2. In the aforesaid appeals the appellants Diwakar Shukla, Mannar @ Dilip Kumar, Vijay Shankar and Vijay Shankar have been convicted and sentenced as under:

U/s. 302/34 IPC

:

Life Imprisonment with fine of Rs. 10,000/- each

In default of payment of fine three years" RI.

U/s. 307/34 IPC

:

Ten years" RI with fine of Rs. 5,000/- each.

In default of payment of fine three years" RI.

3. In these appeals facts of the prosecution case may be summarized as under:

"That on 21st December, 1999 at 5.10 PM Bhawani Shankar, resident of village Etauli, P.S. Achalganj, District Unnao gave a written report at the police station stating therein that on that day at the culvert of the canal running on the north side of the village was being constructed and chakroad was being measured. Virendra Singh and Diwakar Shukla had some dispute regarding Nali, its measurement was also being made. At that time he, his son Ramu, grand son Pankaj and other villagers Bal Kishan, Pintu Tiwari, Uma Shankar Tiwari were grazing cattle, he had old enmity with Diwakar Shukla. At about 1.00 PM his son Ramu went to see the measurement at that Diwakar Shukla abused him, when his son asked not to do so, Diwakar Shukla exhorted "Maro Sale Ko" meantime Mannar @ Dilip Kumar son of Diwakar Shukla shot Ramu with his rifle. When they ran towards Ramu, Vijay Shankar with country made pistol, Rama Shankar with his licensed gun, Diwakar Shukla with his wives" gun started to fire on them, in the firing Pintu Tiwari sustained firearm injury in his right hand. Raising hue and cry, they withdrew meanwhile shots were fired by the assailants on them. When many villagers came running there, the accused persons had fled away towards the east. For saving the life of injured Ramu and Pintu Tiwari, he was bringing them to District Hospital, Unnao, on the way Ramu died, Pintu was hospitalized."

4. At this chick FIR was scribed, Case Crime No. 363 of 1999 under Sections 302, 307, 504 IPC was registered, requisite entry was made in the report of the general diary. Investigation was taken over by the Station Officer Chandra Shekhar Prasad, inquest proceedings were held, autopsy was performed, spot was inspected, gun and rifle were seized. After investigation charge-sheet was submitted against all the named accused persons.

5. Accused Mannar @ Dilip Kumar was charged under Section 302, 307/34 and 504 IPC. Other accused persons were charged under Section 302/34, 307/34, 504 IPC. They denied the charges and claimed to be tried.

6. In order to prove the charge on behalf of the prosecution, besides documentary evidence eight witnesses were examined in the oral evidence. Thereafter statements of the accused persons were recorded under Section 313 Cr.P.C. whereby they denied the facts stated by the prosecution witnesses, they pleaded ignorance about the death of Ramu and medical evidence. They claimed that the investigation was fictitious, they had been charged and prosecuted on account of enmity.

7. After hearing the arguments, the learned trial Judge found the prosecution version reliable, evidence of eye witnesses trustworthy, duly corroborated by the medical evidence and convicted the present appellants and sentenced them as above.

8. Feeling aggrieved these appeals have been preferred by the accused-appellants.

9. Heard Sri I.B. Singh, Senior Advocate, assisted by Sri S.H.A. Ibrahim, learned counsel for the appellants, Sri Sharad Dixit, learned Additional Government Advocate for the State-Respondent and perused the record.

10. In support of the appeals on behalf of the appellants, it has been argued that both the eye witnesses are highly inimical and interested, without corroboration, they have been erroneously believed, ocular version of the occurrence is contradicted by the medical evidence, prosecution story is fictitious and eye witnesses are planted. Injury of Pintu Tiwari was manufactured to give colour to the prosecution story.

11. On behalf of the State these arguments have been repelled and it has been argued that the prosecution has successfully proved its case beyond doubt. Both the witnesses have been rightly believed. There is no contradiction between ocular version and medical evidence.

12. Before we propose to deal with the arguments submitted by the respective parties, we would like to recollect the manner in which appeal against conviction is required to be considered by this Court and scope of jurisdiction conferred on the Court by Sections 374 and 386 Cr.P.C. Further we would like to refresh the observation made by the Apex Court in the case of *Ishvarbhai Fuljibhai Patni v. State of Gujarat* [, 1995 Supreme Court Cases (Cri) 222]. Para-4 of the judgment reads as under:

"4. Since, the High Court was dealing with the appeal in exercise of its appellate jurisdiction, against conviction and sentence of life imprisonment, it was required to consider and discuss the evidence and deal with the arguments raised at the bar. Let alone, any discussion of the evidence, we do not find that the High Court even cared to notice the evidence led in the case. None of the arguments of the learned counsel for the appellant have been noticed, much less considered and discussed. The judgment is cryptic and we are at loss to understand as to what prevailed with the High Court to uphold the conviction and sentence of the appellant. On a plain requirement of justice, the High Court while dealing with a first appeal against conviction and sentence is expected to, howsoever briefly depending upon the facts of the case, consider and discuss the evidence and deal with the submissions raised at the bar. If it fails to do so, it apparently fails in the discharge of one of its essential jurisdiction under its appellate powers. In view of the infirmities pointed out by us, the judgment under appeal cannot be sustained."

13. In the case of Lal Mandi, Appellant v. State of West Bengal, Respondent [, 1995 CRI.L.J.2659 (Supreme Court), 2659], the Apex Court in para-5 of the report has given the caution to the High Court reminding its duty in the matter of hearing of appeal against conviction. It would be gainful to reproduce the observation made in para-5 of the report, extracted below:

"5. To say the least, the approach of the High Court is totally fallacious. In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused. It is not correct to suggest that the "Appellate Court cannot legally interfere with" the order of conviction where the trial court has found the evidence as reliable and that it cannot substitute the findings of the Sessions Judge by its own, if it arrives at a different conclusion on reassessment of the evidence. The observation made in Tota Singh's case, which was an appeal against acquittal, have been misunderstood and mechanically applied. Though, the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal against an order of acquittal and in an appeal against conviction are distinct and separate. The presumption of innocence of accused which gets strengthened on his acquittal is not available on his conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An Appellate Court fails in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on the record and arrive at an independent finding based on the appraisal of such evidence."

14. First we would like to discuss the medical evidence which consists of statement of Dr. R.K. Srivastava P.W.5 and postmortem report Ext. Ka-10 and further statement of Dr. R.C. Dwivedi P.W.6 and injury report of Pintu Tiwari Ext. Ka-11.

15. At the time of postmortem examination of the dead body of the deceased only one firearm ante mortem injury was found, which reads as under

"Ante mortem injury

1. Firearm wound of entry 2.0 cm x 3.0 cm cavity deep present on super lateral aspect of left shoulder directing towards right, downward & posterior only. Underneath humerus bone fractured. Margins inverted."

16. According to Dr. R.K. Srivastava P.W.5 time since death was about one day. Second and third rib of left side, fourth, fifth and sixth rib on the right side were fractured, from there one metallic piece and five small metallic pieces were

recovered. According to doctor, death had occurred due to shock and haemorrhage as a result of ante mortem firearm injury. The witness has proved the postmortem report Ext. Ka-10. He was only questioned about the number of metallic pieces recovered and duration of death. The witness has admitted the suggestion that there could be variation of 6-8 hours about time of death on either side.

17. Virtually testimony of this witness remained unchallenged, facts stated by him are corroborated by the postmortem Ext. Ka-10, leaving aside his opinion we hold that the facts stated by the witness are established and death of Ramu could have occurred due to shock and haemorrhage as a result of ante mortem firearm injury.

18. Dr. R.C. Dwivedi P.W.6 has deposed that on 21st December, 1999 at 4.00 PM he medically examined Pintu Tiwari and on his person following injuries was found, which reads as under:

"1. 0.5 cm x 0.25 cm abrasion on right upper arm medial aspect 4.0 cm below front joint. No tailing present.

2. Complaint of pain in right upper arm."

19. According to the witness, the injured was also complaining about pain in his right upper arm. Injury No. 1 could have been caused by friction with hard object. Duration was fresh. It is incidental, he proved the injury report Ext. Ka-11. During cross-examination he deposed that the injured came by himself. The injury could have been half an hour old. It was superficial and could have been caused by friction with wood. He was specifically asked for and replied by him that this injury could not be caused by firearm or from pellet fired from long range because it had no tailing.

20. The evidence of this witness only reveals that at the stated date and time Pintu Tiwari was medically examined by the witness and one abrasion was found on inside of his right arm below shoulder joint. From the evidence of this witness it is also established that this injury could not have been caused by firearm.

21. Before we proceed further it would be gainful for us to have a glance on the deposition of the witnesses examined by the prosecution. Their summary is as under:

22. Before we inter into the merits of the respective arguments submitted before us, we would like to re-examine and re-appreciate the ocular version of the occurrence given by Bhawani Shankar P.W.1 and Pintu Tiwari P.W.2.

23. Bhawani Shankar P.W.1, immediately after the occurrence tried to take the injured to the hospital, this fact establishes that his presence at the spot is natural and probable. It was day hours, he was at the distance of about 20 steps from the place of occurrence, therefore, he had opportunity to see it. During his cross-examination his testimony remains unshaken. He is father of the deceased.

In spite of old enmity he would not spare the real culprits, who had murdered his son and falsely implicate the appellants with whom, he had no dispute for last twenty years. This fact has been admitted by him during his cross-examination, therefore, we find him to be trustworthy witness so far as fatal shot fired by Munnar @ Dilip Kumar on his son.

24. Considering the statement of Dr. R.C. Dwivedi P.W.6, injury report Ext. Ka-11 we do not find his testimony on the point of attempted murder of Pintu Tiwari trustworthy. From his testimony it transpires that three assailants fired from their firearms on several persons including the witness. It would not be possible for this witness to see what happened with them except vaguely recollecting that once one of them had fallen down.

25. From the evidence of Chandra Shekhar Prasad P.W.7 it transpires that Pintu Tiwari in his statement recorded under Section 161 Cr.P.C. has stated that he thought that when he fell down he was hurt by wood, this might be an explanation that why Bhawani Shankar could not see the firearm injury, therefore, this incorrect statement does not diminish his trustworthiness so far as murder of his son is concerned.

26. Pintu Tiwari P.W.2 has also narrated the prosecution version and claims that at the time of repeated shots he was running when he was sustained firearm injury. In view of medical evidence, it appears that he has sustained injury in his right hand when he fell down on a wood and it hurt him. He is also a natural and probable witness of the occurrence. He had opportunity to see the murder of Ramu. During cross-examination on this point his testimony remains unshaken. We also find him in reference to this charge to be truthful witness.

27. In reference to charge of attempted murder of Pintu Tiwari, we notice that the learned trial Judge has misread the evidence and observed that Dr. R.C. Dwivedi P.W.6 has opined that his injury would have been caused by the pellets. This observation is factually incorrect, for this reason, his finding is erroneous. As discussed above on this point evidence of Bhawani Shankar P.W.1 and Pintu Tiwari P.W.2 do not inspire our confidence. From the medical evidence it is established that no gun shot was sustained by Pintu Tiwari, therefore, charge under Section 307/34 IPC could not be proved by the prosecution against the appellants.

28. Both the witnesses have deposed that the appellants Diwakar Shukla abused the deceased Ramu. Though this fact is established from the testimonies of both the witnesses but the prosecution could not prove that such abuse was intended to provoke the deceased, so that breach of public peace might be disturbed. For this reason we find the charge under Section 504 IPC against the present appellants could not be proved by the prosecution beyond doubt.

29. Evidence of other witnesses such as Sub Inspector Ranvir Singh P.W.3, Head Constable Shriram Chaudhary P.W.4, Jabbar Singh P.W.8 is formal in nature. Evidence of Chandra Shekhar Prasad P.W.7 instead of strengthening the

prosecution case rather weakens it. We notice that he had recovered licensed rifle of Mannar @ Dilip Kumar and gun of Rama Shankar. When they were matched empty cartridge recovered from the spot were not found to have been fired from these weapons. Since report of the ballistic expert is mere opinion and ocular version is trustworthy, we find that against the present appellants therein enough trustworthy evidence to hold that Mannar @ Dilip Kumar killed Ramu on the stated date and time and stated place on the exhortation of Diwakar Shukla at that time all the appellants were sharing common intention for such an act.

30. From the prosecution version, we find that at the time of occurrence the appellants did not invite the deceased to see the measurement of their field. They had prior enmity. For this reason appellant Diwakar Shukla must have felt annoyed and abused the deceased and in provocation in the heat of passion Diwakar Shukla exhorted and the appellant Mannar @ Dilip Kumar fired gun shot from his rifle.

31. These facts go to show that incident had occurred at the spur of moment without any fault by the side of the appellants. It was not premeditated, it occurred in a sudden altercation in the heat of passion and the assailants have not taken any undue advantage or acted in a cruel or unusual manner, therefore, we find their case is squarely covered by Exception-4 of Section 300 IPC, which reads as under:

"Exception-4

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

32. In view of above, we come to the conclusion that the charge under Section 302 IPC framed against appellant Mannar @ Dilip Kumar requires to be altered into Section 304-I of IPC. So far as charge under Section 302/34 IPC against rest of the appellants is concerned, the appellants had no opportunity to share common intention with appellant Mannar @ Dilip Kumar, who fired the fatal shot. Though appellant Diwakar Shukla is alleged to have exhorted but against him, there is no physical evidence to show his complicity in the crime or prior meeting with appellant Mannar @ Dilip Kumar. The words used by appellant Diwakar Shukla are vague. They may name let us gave him a beating, let us finish him. Therefore, we think there is reasonable doubt whether Diwakar Shukla shared the common intention with appellant Mannar @ Dilip Kumar, for these reasons, we find it prudent to give rest three appellants benefit of doubt and acquit them from the charge of killing deceased Ramu.

33. To this extent we find that the learned trial Judge has committed error in holding the charge under Section 302/34 IPC to be proved against the present appellants rather they are held guilty of committing homicidal death not amounting to murder punishable under Section 304-I of IPC. To this extent conviction and sentence of the appellants requires to be modified, therefore,

conviction under Section 307/34 and 504 IPC deserve to be set aside and they are entitled to be acquitted on these two charges, therefore, appeal deserves to be partly allowed.

34. Resultantly, Criminal Appeal No. 1439 of 2006 is allowed and Criminal Appeal No. 1490 of 2006 is partly allowed. The impugned judgment and order dated 28.07.2006 passed in Sessions Trial No. 438 of 2000 [State v. Diwakar Shukla and others] are modified to the extent that the conviction and sentence of the appellant, Mannar @ Dilip Kumar under Section 302/34 IPC are set aside and he is now convicted under Section 304-I IPC and is sentenced to under go rigorous imprisonment of 10 years with fine of Rs. 10,000/-. The imprisonment already undergone by him would be adjusted in the sentence awarded by us in accordance with the provisions contained in Section 428 of the Cr.P.C.

35. The conviction and sentence of the appellants, namely, Diwakar Shukla, Vijay Shankar and Rama Shankar awarded by the learned trial Judge vide judgment and order dated 28.07.2006 passed in Sessions Trial No. 438 of 2000 [State v. Diwakar Shukla and others] under Sections 302/34, 307/34, 504 IPC are set aside and they are hereby acquitted from these three charges, however, conviction and sentence of appellant Mannar @ Dilip Kumar are set aside only in respect of charges under Sections 307/34 and 504 IPC and is acquitted from these two charges. They are on bail. They need not surrender, in case, they are not wanted in any other case.

36. Office is directed to certify this order to the court concerned forthwith for compliance and to send back the lower court record.