

(2006) 04 RAJ CK 0030

In the Rajasthan High Court

Case No : Criminal Application No. 27 of 1985

Ghasita and Others

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 04-04-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 394
Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 326

Citation : (2006) CriLJ 2408 : (2006) 3 WLC 180

Hon'ble Judges : Khem Chand Sharma, J

Bench : Single Bench

Advocate : Praveen Balvada, Hemant Gajraj, H.K. Saini, Suresh Dhenwal and Santosh Jaiman, for the Appellant; Ashvin Kumar Sharma, Public Prosecutor, for the Respondent

Judgement

K.C. Sharma, J.—This appeal by appellants arises out of the judgment and order dated 22.1.1985 passed by the learned Additional Sessions Judge, Deeg, Bharatpur, whereby the learned Judge has convicted and sentenced the accused appellants in the following manner:

Appellant Ghasita:

For offence u/s 307 IPC:

Five years" rigorous imprisonment with a fine of Rs. 500/-, in default thereof to further undergo six months rigorous imprisonment.

Appellants Handu and Juharu:

For offence u/s 307/149 IPC

Each to undergo 2½ years rigorous" imprisonment with a fine of Rs. 250/-, in default thereof, to further undergo 3 months" rigorous imprisonment.

All the three appellants:

For offence u/s 148 IPC

Each to undergo 1 year's rigorous imprisonment with a fine of Rs. 200/-, in default thereof, to further undergo one month's imprisonment.

2. At the very outset, it may be stated that appellant No. 2. namely, Handu has died during pendency of this appeal as is evident from the endorsement dated 22-7-2003 at the back of warrant, made by the Station House Officer. A certificate certifying the death of appellant Handu, issued by the Sarpanch has also been annexed. This fact has already come on record. Since appellant Handu has died and none of his legal representatives has filed any application to continue with the appeal, as required by the provisions of Section 394 Cr. P.C., the appeal of deceased Handu stand abetted.

3. On 6.11.1981, PW 4 Hatti lodged a report, Ex. P1 at Police Station, Kaman with regard to an incident alleged to have taken place on 5-11-1981 at about 5.30 PM. It was alleged that while Hasmal was sitting in his Nohra, accused Ghasita, Usman, Dal Singh, Husaina, Mannu, Isaq, Chhaju, Bhoop Singh, Amar Singh, Handu, Jahur, Sukka and Sakin came there duly armed with Guns, lathis, Kattas and farsas with an intention to kill Hasmal. All the accused encircled the house of Hasmal. On being asked as to why they have encircled his house, accused Ghasita and Handu replied that they will kill him and his family members. When Hasmal tried to escape from the scene, the accused encircled him and Ghasita fired at his left leg. When Mst. Sesudan and Mst. Sarbati, daughter and wife, respectively of Hasmal came to his rescue, accused Handu and Zuhru also opened fire at them with Katta, with an intention to kill them, which hit at the walls of Nohra and house. The complainant alleged that when he tried to run towards Nohra of Hasmal, then accused Dal Singh and Bhoop Singh opened gun fire at him. According to the report, accused Husaina, Mannu, Isaq, Amar Singh, Chhaju and Sukha were armed with farsas and lathis were shouting that they have encircled and would not permit any one to enter into the Nohra.

4. On the above report, the police registered a case for offence under Sections 147*, 148, 447 and 307 IPC and proceeded with the investigation. After completion of investigation, the investigating agency did not find any substance in the allegations contained in the report and accordingly submitted Final Report. However, the learned Magistrate, vide its order dated 3-1-1983, disagreeing with the final report, took cognizance of the offence under Sections 307/34 IPC in respect of only 3 accused who are appellants before this Court and one of them has died during pendency of appeal.

5. On the basis of evidence and material available on record, the learned trial Court framed charges under Sections 147 and 148 IPC against all the accused appellants, u/s 307 IPC against Ghasita and u/s 307/149 against accused Juhuru. The appellants denied the charges and claimed trial.

6. In order to prove its case, the prosecution examined as many as 7 witnesses and got exhibited some documents. After the prosecution evidence was over, the

appellants were examined u/s 313 Cr. P.C. At the conclusion of trial, the learned trial Court convicted and sentenced the appellants in the manner stated hereinabove. Hence the present appeal against conviction.

7. Learned counsel appearing for the appellants has assailed the conviction of the appellant mainly on four grounds. The first ground of challenge is that learned trial Court has committed an error in relying upon the evidence of only interested witnesses. According to him, PWs 1 to 5 belong to the family of Injured and all of them being members of the Injured family, they are highly interested witnesses and therefore, their evidence could not have been believed by the trial Court. Second ground is that investigating agency has not been able to recover the weapon of offence alleged to be used in the commission of offence. The third one is that there was delay of one day in lodging the FIR and the prosecution has not been able to explain the delay satisfactorily. Lastly the learned Counsel contended that trial Court has fallen into error in not considering the plea of alibi, inasmuch as the appellants were not present at the time and place of incident.

8. Per contra, learned Public Prosecutor has supported the findings arrived at by the learned trial Court and has contended that the impugned judgment does not call for any interference as the conclusions of guilt are arrived at on proper appreciation of evidence.

9. I have given my anxious consideration to the rival submissions and have gone through the evidence and material on record.

10. In view of death of appellant Handu, now remains two appellants, namely, Ghasita and Juhuru, whose conviction is under challenge. At the beginning I shall deal with the arguments advanced by the counsel for the appellants. So far as first argument is concerned, suffice it to observe that mere relationship of the witnesses is not enough to discard their testimony. What is required is that evidence of such witnesses need to be examined with great care and caution. In accepting the testimony of PWs 1 to 5 the learned trial Court was firmly of the view that their evidence finds corroboration with the FIR and the medical evidence. Having scanned the evidence of these witnesses and taking into consideration the surrounding circumstances I do not see any ground, much less their relationship, to discard their testimony. The second argument is also of no help to the appellants inasmuch as the prosecution has been able to establish beyond doubt that injured sustained fire arm injury on his left leg and hence non-recovery of weapon in the given facts and circumstances of the case cannot be said to be fatal to the prosecution case. So far third argument as to the delay in lodging the FIR is concerned, the prosecution has successfully explained this delay of hardly 24 hours. The incident took place at 5.30 P. M. on 5-11-1981. It has come in evidence that accused had obstructed the way going to village Kama and that being so, the injured could not be taken to the Hospital at Kama and therefore, there was no option but to take the injured to hospital at Deeg, which took considerable time and since the condition of injured was precarious, the report came to be lodged on the next day. Lastly, the burden to prove the plea of

alibi was on the appellant and the appellant, in my considered view have not been able to prove it. The appellants have tried to prove the plea of alibi by examining two witnesses in defence and both of them have merely stated that about 3 years back the witnesses and accused had travelled together in a bus and that accused had alighted from the bus at their village.

11. It has now to be seen whether conviction of two appellants namely Ghasita and Juhuru can be sustained or not? So far as appellant Ghasita is concerned, the allegation against him is that he opened fire at injured Hasmal which hit at his left leg. PW1 Hasmal, injured himself has categorically deposed that it was appellant Ghasita who fired gun shot which hit on his left leg. PW2 Mst. Shesudan has also stated that appellant Ghasita opened fire, bullet of which hit on the leg of Hasmal. Similarly PW 3 Mst. Sharbati has also deposed that Ghasita opened fire which hit Hasmal. The statement of injured further finds corroboration by the statement of PW 4 Hatti PW5 Juhru who have deposed that Ghasita opened fire which hit on the left leg of Hasmal. The medical evidence further corroborates the evidence of injured. To be more specific, it would be profitable to quote the injury report, Ex. P 5, which reads as under:

Oval shaped lacerated wound, blackening and churning and inverted margins surrounded by blackened area 2" x 1-3/4" with bleeding on the back and outer surface and lower part of the left leg 1W above and back from the lateral malleolus of left leg. It is an wound of entry W x Vi" in size x deep up to wow of exit 3/14" deep. The direction of the wound is upwards towards front and medial side straight and slightly upwards.

Lacerated wound 3W x 2IA" on the front and medial surface and lower part of the left leg 11/2" above from medial malleolus of the left leg and the wound is deep up to the wow of entry. It is an wound of exit with profuse bleeding with multiple pieces of both bones of left leg at the site of injury with laceration of the muscles with everted margins of the wow of exit."

The injury has been stated to be grievous in nature. PW 7 Dr. P. L. Bansal who examined the injured has also deposed that this injury was grievous. PW 6 Dr. P. P. Singhal, Radiologist found fracture of lower 1/3rd of tibia and fibula and the report is Ex. P. 3 and X-ray plate is Ex. P 4. It is thus established that appellant Ghasita caused fire-arm injury on the left leg of injured Hasmal.

12. There is no evidence that the injury on the person of injured was sufficient to cause death of injured. Further, there is no allegation against appellant Ghasita that he repeated the gun fire, for which he had an ample opportunity. The only evidence against appellant is that he aimed gun shot only at the leg of injured, which resulted in fracture. In this view of the evidence it cannot be said that appellant Ghasita intended to cause death of injured or to cause such bodily injuries which may be sufficient to cause his death in the ordinary course of nature, so as to bring the offence within the purview of Section 307 IPC. Thus considering the part of body at which the gun shot was fired and taking in view

the fact that appellant did not repeat the shots, as also the fact that he fired gun shot at the leg and caused fracture, it must be held that appellant Ghasita voluntarily caused grievous hurt by dangerous weapon viz., the gun and hence he must be held liable for committing offence u/s 326 IPC.

13. Now remains the conviction of appellant Juhuru. On scanning the evidence, it appears that none of the prosecution witness has stated any specific act against appellant Juhuru. The evidence brought on record only discloses that he opened fire which hit on the wall of the Nohra of injured. Even PW 3 Mst. Sarbati, wife of injured has not stated that appellant Juhuru fired shot. That apart there are serious discrepancies in the statements of other eye witnesses as to the weapon of offence that was alleged to be used by this appellant. The witnesses are not confident in deposing about the nature of fire arm, whether it was "Katta" or was a "gun". In the circumstances, therefore, appellant Juhuru deserves to be extended the benefit of doubt so far as his conviction u/s 307/149 IPC is concerned. Even Juhuru could not have been convicted u/s 307/34 IPC for the reasons; (i) the witnesses have not stated about the weapon which was taken use of in commission of offence (ii) there is serious discrepancies about the allegation as to at whom this appellant fired and (iii) PW 3 Mst. Sarbati, wife of injured has not alleged anything against the appellant.

14. It may also be stated that earlier the investigating agency, after investigation, had submitted "Final Report". However, the learned Magistrate on the basis of material available before it took cognizance of the offence u/s 307/34 IPC and that too, against 3 appellants only and hence the appellants could not have been convicted either u/s 148 IPC or with the aid of Section 149 IPC.

15. Resultantly this appeal is partly allowed. The conviction of both the appellants u/s 148 IPC is set aside and they are acquitted of the charge. The conviction of appellant Juhuru u/s 307/149 IPC is set aside and he is acquitted of the charge. The conviction of Ghasita u/s 307 IPC is also set aside and he is acquitted of the charge. However, appellant Ghasita is convicted for offence u/s 326 IPC for voluntarily causing grievous hurt by fire arm and is sentenced to undergo rigorous imprisonment for 3 years with a fine of Rs. 1000/-. In default of payment of fine, he shall have to further undergo six months" imprisonment. Appellant Ghasita is on bail. His bail bonds are cancelled and he is directed to surrender himself before the trial Court to serve out the sentence. If he fails to surrender himself, the trial Court shall secure his presence by issuing warrant and then to send him to jail to serve out the sentence.