
(2016) 01 AHC CK 0100
In the Allahabad High Court
Case No : Criminal Appeal No. 154 of 1982

Ibrahim and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 22-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 147, Section 148, Section 149, Section 201, Section 302, Section 307, Section 324, Section 364, Section 452, Section 511

Citation : (2016) 01 AHC CK 0100

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

Bench : Division Bench

Advocate : Mithilesh Kumar Verma, Ashok Kumar Singh, D.R. Singh, Narendra Gupta, R.K. Sharma and S. Mirza, for the Appellant; Govt. Advocate and R.B.S. Rathaur, for the Respondent

Final Decision : Dismissed

Judgement

1. The instant appeal, filed on behalf of the appellants, is directed against the judgment and order dated 23.02.1982 passed by IInd Additional District & Sessions Judge, Sitapur in Sessions Trial No. 428 of 1979 (State v. Ibrahim and others) and Sessions Trial No. 429 of 1979 (State v. Madaru) whereby each of the appellants have been convicted and sentenced as follows:

U/Section 302/149 IPC - Life Imprisonment.

U/Section 147 IPC - Six months" RI

U/Section 148 IPC - One year"s RI

U/Section 452 IPC - Two years" RI

U/Section 364 IPC - Five years" RI

U/Section 201/511 IPC - Six months" RI

2. In the present case, prosecution version is that on 23.09.1979 at about 8.00 AM when Chhota Singh along with his family members was in his house at village Dharampur and he was tightening the rope of his cot, on account of enmity (doing pairvi on behalf of Maiku Lodh in a suit for cancellation of sale-deed executed in favour of pradhan Jumman), Ibrahim, Madaru, Baur, Nageshwar and Babu armed with Lathis and Chail Bihari and Ashgar armed with Katta entered the house of Chhota Singh, caught hold of Chhota Singh and whilst accusing him that he had murdered Jumman and Ram Chander son of Gajodhar and for that they would kill him, they dragged Chhota Singh outside the house following him, his wife Shrimati, daughter Sushila raised alarm. When they came out of their house, they saw 20-22 armed persons were standing there. Out of them, Jabbar, Bismillah, Nurul, Maddar were armed with Kanta, Hafiz, Amir Hasan, Kurban, Chotanna, Ram Chandra son of Ram Vilash armed with Lathi, Bhaggal and Tori were armed with gun, Paikarma was armed with half gun and accused Rauf was armed with Katta. Rest of those were also armed with Lathi, they were unknown to Shrimati and her daughter. The assailants threatened him not to come near them, on their shouts the elder brother of Chhota Singh, Dan Bahadur Singh along with Sri Krishan, Uma Shankar Mooley Singh, Lakkha Singh, Ram Jiyawan, Radhey Bihari, Kallu Singh and other villagers came there. After beating Chhota Singh there, the assailants dragged him to the field of Ram Bharosey, situated in the west of the Nala. The south eastern portion of that field was vacant and sugarcane leaves were stacked there. The assailants threw Chhota Singh on the sugarcane leaves and the accused Ibrahim set it to fire for burning the body of Chhota Singh. Shrimati and other persons present there tried to intervene and save Chhota Singh but they were threatened to be killed and Bhaggal, Tori and Paikarma also fired shots in the air to threaten.

3. Following the occurrence Shrimati lodged oral report at police station Sadarpur on the same day at 10.30 AM. At her information case crime No. 47A of 1979 under Sections 147, 148, 149, 452, 302, 201 IPC was registered and requisite entry was made in the report of the general diary. Investigation was assigned to Sri Vijay Bahadur Singh, the then Station Officer of the police station, who immediately recorded the statements of first informant Shrimati and other persons present there and reached the place of occurrence. After inquest proceedings the dead body was sent for postmortem examination. After completion of investigation charge-sheet was submitted against the named accused persons.

4. Thereafter case was committed to the Court of Session, where Ibrahim, Nageshwar, Madaru, Baur, Babu, Kurban, Chotanna, Hafiz, Amir Hasan and Ram Chander son of Ram Vilas were charged under Sections 147, 452, 364, 302/149, 201/511 IPC. Chail Bihari, Ashgar, Maddar, Jabbar, Bismillah, Nurul, Rauf, Paikarma, Tori and Bhaggal were charged under Sections 148, 452, 364, 302/149, 201/511 IPC. All the accused denied the charges and claimed to be

tried.

5. In support of the charges, the prosecution adduced documentary and oral evidence. Thereafter statements of the appellants were recorded under Section 313 Cr.P.C.. On behalf of the appellants relationships were not denied but prosecution version as well as facts stated by the eye witnesses were denied and they stated that the witnesses were deposing against them due to enmity.

6. In the defence Ram Charya D.W. 1 and Shatendra D.W. 2 were examined. The learned trial Judge after hearing the arguments of the parties recorded a finding that prosecution had successfully proved the motive against the accused appellants. Ocular testimonies of the eye witness were reliable. Defence case did not inspire confidence, thus, charges against the accused persons except Nageshwar, Ram Chandra, Torri, Ashgar, Bhaggal and Rauf have been proved beyond reasonable doubt. The complicity of these six accused in the crime was found doubtful, they were acquitted and rest thirteen were convicted and sentenced as above.

7. Feeling aggrieved the present appeal has been preferred.

8. At the very outset it has been informed that during the pendency of the appeal, appellant Nos. 2, 3, 5, 6, 7, 8 and 9, namely, Baur, Hafiz, Jabbar, Bismilla, Nurul, Amir Hasan and Chhail Bihari, have already died and vide order dated 12.01.2016 the appeal against them stood abated.

9. We have heard Sri Narendra Gupta, learned counsel for the surviving appellants and Sri M.Y. Ansari, learned Additional Government Advocate for the State and perused the record.

10. Learned counsel for the appellants has submitted that the prosecution has failed to prove the time of occurrence, place of occurrence, occurrence took place during the night hours witnesses are planted, motive could not be proved, independent witnesses have not been examined, FIR was anti timed, the learned trial Judge while ignoring all these facts has erroneously believed the prosecution version and convicted the appellants. In the last it has been submitted that acquittal of six co-accused having similar role shows that the prosecution could not prove the charges against the present appellants beyond reasonable doubt and being similarly placed, they are also entitled to be acquitted.

11. On behalf of the State, learned Additional Government Advocate has repelled all these arguments and argued that eye witness account is truthful. Four eye witnesses have been examined, time of occurrence, place of occurrence, motive for the crime have been successfully established against the appellants, the impugned judgments suffers with no infirmity.

12. Here we would like to refresh our memory by recalling 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. Having clarified our scope of scrutiny and obligations as an appellate Court, we would briefly glance at evidence adduced during the trial.

15. On behalf of the prosecution besides other papers, chick FIR Ext. Ka-1, copies of the report of the general diary and copy of chick FIR of case crime No. 47 of 1979 Exts. Ka-2, Ka-3, inquest report Ext. Ka-5, recovery memo Exts. Ka-9, Ka-11, site plan Ext. Ka-12, postmortem report Ext. Ka-15 have been filed.

16. In the oral evidence, eight witnesses have been examined. Out of these four are eye witnesses. Shrimati P.W. 1 is the wife of the deceased and the first informant, who has proved the FIR Ext. Ka-1 and supported the prosecution version. Km. Sushila P.W. 2 is the daughter of the deceased, who fully supported the prosecution version.

17. Kallu Singh P.W. 3 is an eye witness, who reached the place of occurrence after hearing hue and cry and from there he narrated the events which had taken place.

18. Shri Krishan P.W. 5 is an independent witness, who had reached the spot on hearing the shouts and supported the prosecution version from that moment.

19. Sukhdeo Singh, Head constable, P.W. 4 is the scribe of chik FIR, he has proved chik FIR and copy of the report of the general diary Ext. Ka-2 and also proved the copy of chik FIR of case crime No. 47 of 1979 lodged by Rasool about the kidnapping of Jumman and Ram Chander son of Gajodhar by Bharat Singh and others including deceased Chhota Singh. It has been marked as Ext. Ka-3.

20. Constable Ram Gulam Kanaujiya, is the bearer of the dead body from the place of occurrence to the mortuary. Vijay Bahadur Singh P.W. 7 is the Investigating Officer, who deposed the details about the steps taken in the course of investigation. He has stated that on the place of occurrence he found mound of ashes there, he took out the half burnt body of Chhota Singh along with his half burnt clothes. He has proved charge-sheet Ext. Ka-13. He has identified the material exhibits Ka-1 to Ka-5.

21. Dr. M.B. Pandey, P.W. 8 is the doctor, who conducted the postmortem examination on the dead body of Chhota Singh on 25.03.1979 at 4.45 PM. According to him, time since death was two days. Body was superficially and deeply burnt at places. Lower part of left leg and foot were missing and lying separately. During internal examination, he found fractures in right frontal bone, temporal and parietal bones. Third and fourth ribs on the right side were fractured, pleura and trachea were congested, stomach was empty. According to him, death was caused due to shock and haemorrhage as a result of extensive burn injuries. He has recorded three anti mortem injuries in the postmortem report Ext. Ka-15, they read as under:

"1. Contusion 3 cm x 2 cm with fracture of humarous joint of right arm middle.

2. Lacerated wound 3 cm x 2 cm bone deep right parietal temporal region 3 cm

above and behind right ear. The injury was oblique.

3. Lacerated wound 1 cm x 1/4 cm bone deep frontal region. Transverse 2 cm above nose."

22. Ram Charya D.W. 1 is the record keeper, S.P. office, Sitapur. He has proved the entry regarding case crime No. 90 of 1975, under Sections 147, 148, 149, 324, 307 IPC of P.S. Thangaon, District Sitapur lodged by Anil Kumar son of Bharat Singh against Gur Prasad and 28 others. According to him, in that case final report was submitted.

23. Satendra Kumar D.W. 2 is the clerk constable of P.S. Thangaon, he has also produced the register about the registration of the aforesaid case.

24. The medical evidence consists of statement of Dr. M.B. Pandey P.W. 8 and postmortem report Ext. Ka-15. Dr. Pandey was cross-examined on the point of time of death and whether injuries recorded by him were anti mortem or postmortem. He was also cross-examined about the stomach contents. Thus, death of Chhota Singh caused by burn injuries was not disputed. His opinion about the timing of anti mortem injuries and death was disputed. This dispute would be resolved by us when we will re-examine and re-evaluate the eye witness account. At present suffice is to say that we rely on the testimony of Dr. M.B. Pandey P.W. 8 duly corroborated by postmortem injuries Ext. Ka-15 and hold that Chhota Singh had died due to shock and haemorrhage as a result of extensive burn injuries and his death could have occurred on the stated date and time with possibility of variation of six hours on either side.

25. Now we will deal ocular evidence of the occurrence along with the arguments advanced in support of the appeal.

26. So far as intrinsic value of the testimonies of the eye witness is concerned, Shrimati P.W. 1 is the wife of the deceased, her presence on the alleged time and date on the alleged day of occurrence, in the house is natural and probable, she had every opportunity to see what was happening with her husband. It was the day time, she had ample opportunity to identify the assailants. During the cross-examination her testimony remained unshaken. There is no possible reason that she would spare the real murderers of her husband and falsely implicate the present appellants. Same is with the evidence of Km. Sushila P.W. 2, who is the daughter of the deceased. Her testimony also remained unshaken. She had no reason to falsely implicate the present appellants.

27. Kallu Singh P.W. 3 has given reason for his presence at the spot at the relevant time. He had opportunity to see the occurrence and identify the assailants. His testimony also remained unshaken. He has no reason to falsely depose against the present appellants.

28. Shri Krishan P.W. 5 has also given reasons to reach the place of occurrence and see the occurrence. He has given vivid description what happened with Chhota Singh, though he was cross-examined at length but his testimony

remained unshaken.

29. On behalf of the defence it has been suggested that on the pressure of Manna Lal, he had given false evidence but the suggestion was denied and remained unsubstantiated.

30. The crucial point to be examined by us is the time and place of occurrence. Had they are the same, testimonies of all the four witnesses would command our confidence. If they both differ from the prosecution version, we have to very carefully scrutinize the evidence of witnesses. According to the defence version, the deceased on account of murder of Jumman pradhan and Ram Chander, which had taken place on the previous night and the deceased while coming back after watching drama (at Dhanush Yagya Mela) organized at village Sujatpur was murdered in the night and seen by none. In order to substantiate this version, it has been pointed out during the postmortem examination that faecal matter was found present in the large intestine of the deceased and his stomach was empty though time of occurrence is alleged to be 8.00 AM.

31. Contents of the stomach form part of medical evidence. They can be helpful to appreciate ocular version, but they cannot make the ocular version doubtful, if found reliable.

32. We do not think that the deceased was ambushed while he was coming back from village Sujatpur to village Dharampur because whatever clothes he was wearing when he was formerly taken from his house and was burnt to ashes, consists of half burnt Baniyan, underwear, Muffler and Sadari. He was not wearing clothes which conveniently worn i.e. Dhoti and Kurta by person visiting festive mela. The recovered clothes would go to show that perhaps deceased was taken from his house where he was wearing only in formal clothes.

33. Further pradhan Jumman and Ram Chander son of Gajodhar disappeared on 22.08.1979 and as per defence version the deceased was involved in their abduction and murder. We do not think that had the defence version iota of truth, the deceased would never have risked visiting mela in another village and coming home all alone. Thus with this suggestion, the another suggestion that deceased was murdered in the night cannot be accepted. Further had he been burnt during the night, it could not have been remained unnoticed by the villagers. We find another reason that occurrence did not take place in the night, at the adjoining fields and part of the field of Ram Bharosey wheat crop were grown, had the incident taken place during the night hours the adjoining crops would have been damaged, which the investigation officer did not find. Keeping in view these facts we do not think that defence version has any substance.

34. The learned trial Judge has rejected this argument on the ground that eye witness account is trustworthy, which cannot be discarded only on the suggestion of the defence. The trial Judge has better opportunity to appreciate the evidence on account of the fact that before him witnesses appeared, he noticed their demeanours and recorded their evidence, we do not find any cogent reason to

differ from the view taken by him. He has given cogent reasons to hold the place of occurrence proved beyond doubt. According to him, only non examination by the chemical examiner of the blood stained earth could not falsify the trustworthy evidence of witnesses.

35. It has been contended that no specific role has been assigned to each of the surviving appellants. Seven assailants entered the house and rest remained outside, all were armed. When Chhota Singh was dragged from the house and given a beating and further dragged to the field where he was burnt, the assailants who were standing outside also participated. Thus, there can be no doubt that all had same object and if they showed the common object and formed unlawful assembly with a view to causing death of Chhota Singh and participated in burning him or were instrumental in threatening the persons desirous of saving Chhota Singh, they all are equally liable for the criminal acts of that assembly. When large number of persons participated in the commission of such crime, it is not expected from the eye witnesses to assign them specific roles, thus, we cannot accept the argument that since each of the surviving appellants have not been assigned specific role, therefore, their conviction cannot be sustained.

36. The learned trial Judge has held that it is a case of direct evidence, motive is not material. Though according to the prosecution, Chhota Singh was doing pairvi on behalf of blind Maiku against pradhan Jumman, for this very reason, he was murdered. Since it is a case of direct evidence, motive is not very material, we do not think conviction can be set aside on this count.

37. Non examination of independent witness can also not to be a ground to set aside the conviction of the surviving appellants. The Hon"ble Apex Court has repeatedly observed that testimony of relative witness is not inferior to an independent witness vide *Gali Venkataiah v. State of A.P.* [, 2009(3) SCC (Cri) 200].

38. Now the question remains acquittal of Ram Chander, Tori, Ashgar, Bhaggal, Nageshwar and Rauf, the learned Additional Government Advocate has replied that Ram Chander, Tori, Ashgar and Bhaggal were resident of Sujatpur and Shrimati P.W. 1 and Km. Sushila P.W. 2 never visited village Sujatpur, therefore, identification of these four accused was found doubtful, hence their acquittal is based on different ground. No help can be sought from their acquittal by the present surviving appellants.

39. He has further submitted that co-accused Nageshwar and Rauf though resident of village Dharampur were acquitted because Kallu Singh P.W. 3 did not name them.

40. From the record the submission of learned Additional Government Advocate appears to be well substantiated. We do not think that merely their names appeared in the FIR and examination-in-chief of the some of the eye witnesses, their participation in the crime cannot be distinguished, four assailants might not

have been known to Shrimati P.W. 1 and Km. Sushila P.W. 2, thus, their acquittal has some reasonable explanation, which distinguishes the case of the surviving appellants.

41. Acquittal of Nageshwar and Rauf cannot be distinguished on the basis of testimony of Kallu Singh P.W. 3, who did not allege their complicity in the commission of crime. However, we find that acquittal of these two co-accused was not well considered and perhaps erroneous. Since the State has not preferred any appeal against their acquittal, we can do nothing about it but the law does not permit us to further compound the mistake made by the learned trial Judge in this regard.

42. Thus, we think acquittal of co-accused and finality it has attained, cannot be made a ground to disbelieve trustworthy version of the eye witnesses. This ground is also rejected by us.

43. In view of above, we find that the arguments advanced on behalf of the surviving appellants have no substance. The appeal lacks merit and deserves to be dismissed.

44. Accordingly, the appeal is dismissed.

45. All the surviving appellant Nos. 1, 4, 10, 11, 12, 13, and 14, namely, Ibrahim, Maddar, Babu, Kurban, Chhotanna, Paikarma and Madaru are on bail. They are directed to surrender their bail before the Sessions Judge, Sitapur, who shall take them into custody and send them to jail to serve out their sentences. In case, appellants do not surrender within the stipulated time, the Sessions Judge, Sitapur, shall take appropriate steps to procure their attendance so that they will serve the sentences awarded to them.

46. Office is directed to communicate this order to the court concerned to ensure compliance and further sent back the lower court record.