
(2016) 07 AHC CK 0226
In the Allahabad High Court
Case No : Criminal Appeal No. 1753 of 1984

Jagdamba Singh	Vs	APPELLANT
State of U.P.		RESPONDENT

Date of Decision : 08-07-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302

Citation : (2016) 96 ACrC 157 : (2016) 4 CriCC 493 : (2017) 1 Crimes 526

Hon'ble Judges : Shashi Kant Gupta and Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : B.P. Gupta, Advocate, for the Appellant; D.G.A, Janardan Yadav and R.P. Singh Parihar, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Mr. K.J. Thaker, J.—Heard Sri Dilip Kumar, Sri Rajarshi Gupta and Sri Satya Prakash Singh, learned counsels for the appellants and Sri S.N. Tripathi, learned A.G.A. for the state.

2. This appeal has been preferred by the accused-appellants against the judgment and order dated 5.6.1984 passed by the Sessions Judge, Azamgarh in Sessions Trial No. 83 of 1983, convicting the appellants under Section 148 IPC and sentencing them to one year R.I. and further convicting the appellants under Section 302 read with Section 149 IPC and sentencing them to imprisonment for life.

3. The present appeal was filed in the year 1984 against the impugned judgment dated 5.6.1984 and it has come up for hearing before us after the lapse of period of 31 years.

4. Both the accused appellants are on bail. Although notice was issued to the counsel for the private-complainant, he did not remain present when the case was listed and heard.

5. The facts of the present case are that charge sheet was laid only against the present two appellants and three other miscreants were not found and have not yet been found even after 32 years have elapsed from the date of incident. Accused have been acquitted under Sections 307 and 149 IPC and the State has accepted the said decision and has not challenged the same.

6. The case of the prosecution as per written first information report Ext. Ka 2 is that the first informant, Lallan Prasad Singh son of Dudh Nath Singh is resident of village Bhairapur, P.S. Mahrajganj, District Mahrajganj. Lallan Prasad lived at the house of his maternal uncle Ram Jiyawan Singh (deceased) in village Rudrapur Mahuvi and used to look after Rakhi Medical Store situated at Bhimbar which was a medical store started by his maternal uncle. Nakchhed R/o Village Kakarahi Jaskarar was a co-sharer in the said medical store with the deceased and he also used to sit there. On 30.10.1981, Ram Jiyawan had gone to Sagari to pay off certain loan of bank, his return journey was delayed and so the first informant and Nakchhed waited for him at the aforesaid medical store. At about 8.30 p.m. Ram Jiyawan Singh reached the medical store with Rajdeo Yadav of village Terhawa. As it had become late, Nakchhed did not go to his house and accompanied the first informant and others. They left for the house of Rajiyawan situated in village Pudrapur Mahuvi. Ram Jiyawan was leading the party, behind him was Nakchhed and thereafter the first informant and then Rajdeo Yadav was walking. They were talking while going. When the party reached at the out skirt of village Karanpur near a pit of Gorakhbari at about 9.30 p.m. five persons suddenly appeared from the south west corner of the sugarcane plot of Dalchand Chaubey. The first informant and Nakchhed flashed their torches on them, they recognised accused Jagdamba Singh armed with knife and Shiv Prasad armed with country made pistol. They could not recognise three others but had seen their faces. Out of these three unknown persons two were armed with knives and one was armed with a country made pistol. The accused-Jagdamba Singh exhorted others to kill Ram Jiyawan to take revenge of his father. Thereafter, Jagdamba Singh started giving knife blows. His two companions armed with knives also started giving blows. Nakchhed wanted to save Ram Jiyawan but he was also assaulted by knives. Jagdamba Singh shouted at Shiv Prasad to kill all the four persons otherwise they would give evidence. Hearing this exhortation the first informant and others took to their heels raising alarm to save their lives. At that very time accused Shiv Prasad fired from his country made pistol, which fortunately did not cause injury to any body. However, after assaulting Ram Jiyawan they pushed him in a Gadha in which there was water. The first informant and others came running to the village and with Jaganath Singh, ladies of the house, Bangali and others came back in search of Ram Jiyawan with lantern and torches., The dead body of Ram Jiyawan was found in Arhar crop of Lalchand Chaubey which lies in village Chaube Barohi. There were several injuries on the dead body of Ram Jiyawan. Ramdeo and Shukurullah Chawkidars came in the night itself and the first informant and others remained near the dead body for all night. About one and a half years back a dacoity had been committed at the

house of Mahatam Singh in which Mahatam had been murdered. On that very date there was Harikirtan at the house of Ram Jiyawan (deceased). From that "Harikirtan" Mahatam Singh had come back to his house when a dacoity was committed and he was killed. Accused Jagdamba Singh and Sheo Prasad the two sons of Mahatam Singh were under the impression that murder of Mahatam Singh was committed within the knowledge of Ram Jiyawan. Because of that enmity accused and Shiv Prasad with the help of their friends committed the murder of Ram Jiyawan. Nakchhed sustained injuries. The written report Ext Ka 2 was lodged at P.S. Mahrajganj on 31.10.1981 at about 10.35 a.m.

7. The learned Sessions Judge after accused were summoned framed the charges which reads as follows :

"Firstly, that you, along with three others, on the 30th of October 1981, at about 9.30 p.m. in village Karampur Gorakhbari, within police circle Mahrajganj of this district, were members of an unlawful assembly, the common object of which was to commit the murder of Ram Jiyawan Singh and Nakshed and were at that time, armed with deadly weapons; you Jagdamba Singh with a knife and you Sheo Prasad Singh with a country made pistol, and thereby you committed an offence of rioting punishable under Section 148 of the Indian Penal Code, and within my cognizance;

Secondly, that you and your three associates, on the said date, time and place, in prosecution of the said common object of the assembly, committed murder of Ram Jiyawan Singh, resident of the said village, by intentionally causing his death, and thereby committed an offence punishable under Section 302 of the Indian Penal Code read with section 149 thereof and within my cognizance;

Thirdly, that you and your three associates, in prosecution of the common intention of the said assembly, on the said date, time and place, assaulted Nakched with such intention or knowledge and under such circumstances that if by that act you had caused the death of Nakched, you would have been guilty of murder, and thereby you committed an offence punishable under Section 149 thereof, and within my cognizance."

8. The accused pleaded not guilty and wanted to be tried. The prosecution examined the following witness :

1.

Deposition of Nakchhed

6.7.83

P.W.-1

2.

Deposition of Rajdevo Yadav

7.7.83

P.W.-2

3.

Deposition of Lallan Prasad Singh

21.9.83

P.W.-3

4.

Deposition of Ramlaut Chaudhari

6.10.85

P.W.-4

5.

Deposition of Dr. K.S. Misra

10.11.83

P.W.-5

6.

Deposition of Dr. Murai Lal Srivastava

19.12.83

P.W.-6

7.

Deposition of Ram Nagina Singh

13.2.84

P.W.-7

8.

Deposition of Ram Deo

19.5.84

D.W-1

9.

Deposition of Banke Singh

19.5.84

D.W.2

10.

Deposition of Sukaru

25.5.84

D.W-3

9. The prosecution examined witnesses and in support of its case produced following documentary evidence.

Documents :

1.

F.I.R.

31.10.81

Ex.Ka-3

2.

Written Report

31.10.81

Ex.Ka-2

3.

Recovery Memo of Torch

31.10.81

Ex. Ka-1

4.

Recovery Memo of Blood sustained and plain earth

31.10.81

Ex Ka-13

5.

Search memo of House

31.10.81

Ex.Ka-14

6.

Recovery memo of gun and cartridge

21.11.81

Ex.Ka-15

7.

Injury report

1.11.81

Ex.Ka.-6

8.

P.M. Report

1.11.81

Ex.Ka.-5

9.

Site Plan with index

31.10.81

Ex.Ka-12

10. Learned counsel for the appellants submits that the prosecution has utterly failed to prove its case beyond reasonable doubt. There is a substantial delay in lodging of the first information report, which is not satisfactorily explained. Even though the prosecution witnesses claims that immediately after the incident a large number of members (about 10-12 in number) belonging to the family of the deceased had gathered including the two Chowkidars of the village namely Ram Dev (DW-1) and Sukru (DW-3), none of them have been examined. The prosecution story has been completely contradicted by the two Chowkidars-DW-1 and DW-3 who have categorically stated in their testimonies that they had come to the place of incident on the call of the complainant party at 8.00 am. - 9.00 a.m. i.e. on the next day of the incident i.e. 31.10.1981. DW-1 even goes to say that the investigating officer had reached the place of incidence at 10.00 a.m. On 31.10.1981. The factum cumulatively gives rise to a strong probability that the first information report have been lodged anti time and certainly has been lodged after a unexplained long delay, giving rise to the inference that the witnesses had not seen the incident and after due deliberations have falsely implicated the accused persons who are inimical to the deceased and his family. He next contended that there is serious contradiction in the medical evidence viz-a-viz the ocular testimony of the prosecution witnesses, especially in light of the fact that the eye witnesses have not sustained any injuries while the deceased is alleged to have been assaulted by five persons the injuries could not be caused with the weapons which was alleged to be used by appellants.

11. It is next submitted by learned counsel for the appellants that the prosecution has utterly failed to prove that the accused persons had any motive of committing the offence and in fact the motive which they have brought forth is in complete contradiction to the material on record which clearly goes to show

that in the murder of Mahatam Singh, the father of the accused persons, the deceased Ram Jiyawan was in fact a prosecution witness and, therefore, there was no occasion for the accused persons to bear any grudge/enmity with the deceased in this regard. The prosecution has utterly failed to prove the vital aspect of motive for commission of offence as against the accused persons.

12. It is next submitted by the learned counsel for the appellants that the dead body was found at a distance of 120 meter from the place of incident also creates a doubt on the ocular version of PW-1 and PW-3 that they saw the accused assaulting the deceased with knife. The learned counsel has relied on the evidence of PW-5 so as to show that the injuries were not possible to be caused with knife but were by Ganasa and Ballam (lance).

13. It is submitted by learned A.G.A. for the State that the appellants-accused came together and they had common intention of committing murder. PW-3 though has been declared hostile prior to that he has identified both the accused and hence his that part of the evidence which is credible and helpful to the prosecution can be used against the accused. It is submitted that the FIR was scribed at the earliest and the other witnesses have deposed against the accused. They have been identified lawfully. The injuries which have been caused are by the weapon used by the accused only. It is further submitted that the finding of facts even after revaluating the evidence on record will not persuade this Court to take different view then that taken by the trial court as the facts prove the involvement of both the accused and presence of both the accused is proved . The witnesses were not planted nor are they chance witness just because the statement under Section 161 Cr.P.C. of one witness is taken after some days, cannot be said to demolish the case of the prosecution.

14. In the opinion of the doctor the probable age of the deceased was about 45 years and probable time since death was one and a half day. It was an body of average built person. Eyes and mouth were closed. Dry dust was present on the face. Rigor mortise had passed off from upper extremities but was present in lower extremities . Abdomen was not distended. The doctor found the following ante mortem injuries on the body of deceased- Ram Jiyawan :-

1. Incised wound 3 cm x 2 cm x bone deep on outer end of left eye brow.
2. Incised wound 6 cm x 3 cm x bone deep on the left lower lid.
3. Incised wound 5 cm x 3 cm x bone deep on left side nose.
4. Abrasion 3 cm x 2/10 cm 7/10 cm on left chest.
5. Incised wound 4 cm x ? cm x bone deep on right side chin . Fone was cut under injury.
6. Incised wound 9 cm x 3 cm x bone deep on front of neck . Trachea and oesophagus were cut underneath.
7. Punctured wound 1? x ? cm x chest cavity deep on the medial aspect of the

right nipple.

8. Incised wound 6 cm x 3 cm bone deep on left shoulder top.

9. Incised wound 5 cm x 3 cm x bone deep on left upper arm, 5 cm below left shoulder.

10. Incised wound 2 cm x 1 cm x muscle deep on lateral.

11. Incised wound 1 cm x ? cm x skin deep . 3 cm. Below injury no.1.

12. Multiple abrasion in an area of 3 cm x 2 cm x 4 cm. Below injury No.11.

13. Incised abrasion in an area of 3 cm x 2 cm x muscle deep on the left forearm front and at middle.

14. Multiple incised wounds four in number, in an area of 10 cm x 4 cm , 3 cm below injury no.13.

15. Incised wound 8 cm x 2? cm x bone deep on the dorsum and at the middel of left hand.

16. Incised wound 1 cm x ? cm x skin on the left forearm 6 cm below the left elbow.

17. Incised wound 2? cm x 1 cm x bone deep on left side of abdomen, 4 cm above left iliac.

18. Punctured wound ? cm x ? cm x muscle deep on left thigh lower one third part.

19. Punctured wound ? cm x ? cm on medial side of left leg at middle.

20. Punctured wound 2? cm x ? cm x bone deep , 6 cm medial to injury no.19.

21. Incised wound 3 cm x 1 cm x muscle deep on left thigh at middle.

22. Punctured wound 2? cm x ? cm x muscle deep on the right leg front, 3 cm above right ankle.

23. Incised wound 2 cm x ? cm x skin deep , 2? cm medial to injury no. 22.

24. Multiple punctured wound in an area of 6 cm x 3 cm on right leg upper third outer aspect.

25. Multiple incised wound in an area of 7 cm x 2 cm on right thigh at middle and front.

26. Abrasion 10 cm x 2/10 cm x 3 cm above injury no.25

27. Incised wound 8 cm x 3 cm muscle deep at right thigh 3 cm below right iliac crest.

28. Punctured wound 2 cm x ? cm x chest cavity deep on right side chest 13 below right maxilla.

29. Multiple incised wounds, four in number of various sizes on right forearm in an area of 14 cm x 3 cm at the middle.

30. Incised wound 4 cm x 3 cm x bone deep on the base and medial side of right index finger.

31. Multiple incised wound five in number, on right upper arm in an area of 1.8 cm x 5 cm at the outer aspect at middle.

32. Incised wound 1? cm x ? cm on right knee.

33. Multiple punctured wound 6 in number in an area of 16 cm x 4 cm on the buttock upper third.

34. Multiple punctured wound five in number on the right side back lower ?rd in an area of 15 cm x 8 cm.

35. Fracture of right femur on right knee at lower end.

15. In the opinion of the doctor the death had been caused due to shock and hemorrhage as a result of ante mortem injuries. Ext. Ka-5 is the post - mortem report.

16. Having heard the counsel for the parties it goes without saying that there were 30 incise wounds on the dead body. The Doctor's ocular version shows that the injuries were caused by the big weapon and not by the knife which was alleged to be with one of the accused. The F.I.R. is belated by 14 hours and there is no plausible reason why the FIR was given after such a long time. The learned Judge has not believed that the accused were involved in commission of offence under Section 307 IPC and their presence itself is doubtful. It is proved from the evidence that the injuries are not linked with the weapons alleged to be carried by the accused. It is an admitted position of fact that PW-2 was a chance witness and his evidence requires to be considered from the contradictions which emerged from his evidence. There is no recovery of the incriminating weapons used in the commission of the offence. The hostile witness did not recognise the assailants. Though, PW-1 claims to be injured, he did not go to any Dr. for treatment. The evidence of the first witness has to be looked with lot of suspicion. PW-2 did not see any Chowkidar at night whereas the other witnesses saw the Chowkidar at night. The Chowkidars categorically stated in their deposition that they were not present at the place of incident at night. On all these facts and the nature of grievous injuries sustained by deceased goes to show that the presence of accused is not established and, therefore, the accused cannot be held guilty for commission of the offence.

17. Dallan Prasad (PW-3) stated that when this witness, Ram Jiyawan Nakchhed and Rajdeo reached near the Garaha, five persons came out of sugarcane plot of Lalchand. Amongst them this witness recognised the two accused whom he knew from before. Jadamba had a knife and Shiv Prasad had a country made pistol with them. Out of the remaining three unknown persons, one had a country

made pistol and the others two had knives. Jadamba exhorted to kill Ramjiyawan to take revenge of his father's death. Thereafter accused Jadamba and his two companions started giving knife blows to deceased. Nakchhed wanted to save the deceased but he was also assaulted. Jadamba thereafter shouted at Shiv Prasad accused to kill this witness and others also otherwise they would appear as witnesses. Thereafter Shiv Prasad accused fired a shot. This witness and the two companions, however managed to escape and did not receive injury.

18. These facts creates a doubt about presence of the accused. Furthermore, PW3 has categorically stated that the weapon, with which the deceased was assaulted, was in fact knife of 7 to 8 fingers length and 2 fingers width and was sharpened on only one side. This fact does not find corroboration from the medical evidence, the doctor who conducted the postmortem PW- 5 has categorically stated in para 4 of his testimony that the knife would fall within the category of light cutting weapon and the injuries sustained by the deceased probablizes the usage of heavy cutting weapons like Gadansa, Dab, Talwar and Ballam. This material contradiction nullifies the presence as well as the testimony of PW-3 as also the testimony of witnesses. PW-1 who has claimed himself to be an injured witness, however, his injuries have been examined at a considerable delay without any proper explanation for the same. PW-6-Doctor who has examined the injures of PW-1 has categorically opined that the injuries sustained by PW-1 were in fact superficial in nature and on non vital parts and could have been easily manufactured by using a shaving blade. This factum clearly goes to show that the injury of PW-1 has been manufactured subsequently, in order to pose him as an injured eye witness to this whole episode and no reliance can be placed upon his testimony, especially in the light of the fact that he has been declared hostile by the prosecution. He next contended that all the witnesses are chance witnesses and in their normal course of affairs would have not accompanied the deceased, especially PW-2, who is the resident of some other village and had no occasion to have accompanied the deceased, on his return to the medical shop and then subsequently, on the way to the house of the deceased. PW-2 even has made a major contradiction in so far as saying that he accompanied the deceased from village Jainpur, while the prosecution case is consistent that the deceased had in fact visited the village Sagri Tehsil before his murder. Moreover, there are material contradictions in the testimony of the prosecution witnesses including contradiction from their previous statements under Section 161 Cr.P.C made before the police authorities. This coupled with the fact that they have not sustained any injury in the entire transaction, completely rules out their presence at the place of incident. There is no evidence of usage of any firearm weapon or its firing, as there is no recovery from the place of incident of any Bullet/Khokha/Kartoos etc. which completely belies the prosecution story which alleges that a shot was fired at PW2 and PW-3 by the accused Shiv Kumar, after the assault on the deceased. It is further submitted that the Trial Court has acquitted the accused persons under Section 307 read with 149 IPC disbelieving the prosecution story of assault on PW-1 as well as the

firing from the Country made pistol on PW-1 and PW-3 which makes a serious dent in the prosecution story and holding conviction under Section 302 IPC. The aforesaid vital aspect of the prosecution story cannot be sustained and is not justifiable.

19. It is proved that blind murder which took place at night. The weapons used have not been recovered from either the place of incident nor from the possession of the accused. The FIR is lodged belatedly after 14 hours. The incident took place, according to the FIR, on 30.10.1981 but the FIR has been lodged in the morning of 31.10.1981. Part of the story is not believed and the presence of both the appellants is doubted by the learned Judge and that is why the accused have been acquitted under Section 307 IPC read with Section 148 IPC. The injuries are not linked with the weapons used by the appellants. One of the submissions of the learned counsel for the appellants is that the Investigating Officer had enmity with the accused and he could not find the real culprits, therefore, the accused are booked in this case, though, they are innocent and unconnected with the offence. Neither any pellets nor any gun or any incriminating material has been found from the accused. It was very difficult to see the accused by PW-1 and PW-2 as the incident had occurred at night and the light was very dim. There was no exhortation by Shiv Prasad.

20. From the totality of the facts and circumstances of the case as they emerge the witness can be said to not tell the truth. There is no recovery to incriminating substance. In this case, there is no credible evidence on record which goes to show that the accused were actually present there. The totality of the facts will permit us to hold that the accused have been wrongly convicted. Based on the statement and evidence of the witnesses noticed herein above, the submission of learned counsel for the accused-appellants will have to be accepted suffice it to state that almost all witnesses have improved their statements. The prosecution has examined only relatives though other witnesses could have been examined. In this regard we will have to pursue the finding of facts ultimate conclusion arrived by the learned trial judge and on careful appreciation of the evidence which we have done in the earlier part of the decision, certain aspects, namely there is no recovery of any incriminating articles from the accused -appellants. The Doctor's evidence that injuries could have been by way of Ganasa and not by the knife which was with the accused . There are discrepancies in the evidence and they are not normal errors of observations and, therefore, a reasonable doubt has already been created. Once, we find that the evidence of eye-witness is contradicted in material particulars and the medical evidence we have to discard the evidence on that ground alone. Hence, we hold that the appeal requires to be accepted.

21. Considering the facts and circumstances of the case, we are of the considered opinion that the view taken by the Court below while convicting the accused-appellants Jagdamba Singh and Sheo Prasad Singh is palpably wrong and the findings recorded by the Court below are perverse, erroneous and can

not stand the scrutiny of law. In our considered opinion the reasons given by the Trial Court are not sufficient to convict the accused-appellants Jagdamba Singh and Sheo Prasad Singh.

22. In the facts and circumstances of the case and the evidence led by the parties renders the origin and genesis of the occurrence doubtful. The accused-appellants Jagdamba Singh and Sheo Prasad Singh are entitled the benefit of doubt.

23. On the basis of aforesaid discussion in our considered opinion and also applying the rule of caution, conviction of the accused-appellants namely Jagdamba Singh and Sheo Prasad Singh can not be sustained and is liable to be set-aside and in the circumstances of the case, the accused-appellants Jagdamba Singh and Sheo Prasad Singh deserve to be acquitted.

24. The impugned judgment and order dated 5.6.1984 passed by Sessions Judge, Azamgarh, in Sessions Trial No. 83 of 1983 is set-aside and the appellants namely Jagdamba Singh and Sheo Prasad Singh are acquitted of the charges levelled against them and their conviction and sentence are hereby quashed and set aside. The appellants namely Jagdamba Singh and Sheo Prasad Singh are on bail. They need not to surrender. Their personal and surety bonds are hereby cancelled and sureties are discharged from their liability.

25. Let a copy of this judgment along with the trial court record be sent to the court concerned for compliance.

26. In the result, the appeal is allowed.