

(2011) 07 AHC CK 0179
In the Allahabad High Court
Case No : Criminal Appeal No. 1851 of 2001

Kallu

APPELLANT

Vs

State of Uttaranchal (Uttarakhand)

RESPONDENT

Date of Decision : 14-07-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 464, 465

Citation : (2011) 07 AHC CK 0179

Hon'ble Judges : Prafulla C.Pant, J and Sudhanshu Dhulia, J

Final Decision : Dismissed

Judgement

Prafulla C. Pant, J.—This appeal, preferred under Section 374 of the Code of Criminal Procedure, 1973 (for short Cr.P.C.), is directed against the judgment and order dated 30th of October 2001, passed by Addl. Sessions Judge, Roorkee, in Sessions Trial No. 28 of 1991, whereby said court has convicted accused/appellants Kallu, Shobha, Lala, Chhotan, Vedpal, Shyamlal, Brishpal, Jaipal and Ratiya under Section 323, 452, 302 read with Section 149 of the Indian Penal Code, 1860 (for short I.P.C.), and each one of them has been sentenced to fine of" 1.000/ under Section 323 of I.P.C., rigorous imprisonment for a period of one year under Section 452 of I.P.C., and imprisonment for life under Section 302 read with Section 149 of I.P.C.

2. Heard learned counsel for the parties and perused the lower court record.

3. It is a case of DOUBLE MURDER. Prosecution story, in brief, is that on 07.10.1997, one Kabadi (S/o appellant Shobha) of village Khata Khedi, molested a girl Bohari (D/o deceased Harchand) of his village. On 08.10.1987, a Panchayat was called, but no one turned up on behalf of Kabadi. On 09.10.1987, Harchand (deceased) gave an application to Addl. Superintendent of Police, Saharanpur, complaining about the incident. (Earlier Tehsil Roorkee was part of District Saharanpur). At 10:00 P.M. (on 09.10.1987), P.W. 1 Virendra along with his brother P.W. 6 Kali Ram, Harchand (deceased), and Kabool Singh (another deceased) were sitting in the house of Kabool Singh in connection with

preparation of his father Kanhaiya's TEHERVEE (the 13th day last rite ceremony). There was a lantern lighting the room. At that point of time accused / appellants Kallu, Shobha, Chhotan, Vedpal, Lala, Jaipal, Shyamlal, Brishpal and Ratiya, all armed with LATHIES came there, and started assaulting the persons sitting in the house of Kabool Singh. Hearing the she its many villagers, namely Ridka (P.W.1.), Sukkad, Raju (P.W. 3), Akhtar (P.W. 5) and others, came there. They tried to mediate but the accused / appellants did not stop and went on assaulting. Harchand and Kabool after receiving blows of LATHIES on their heads, fell down. In the incident, witnesses Manphool, Kali Ram (P.W. 6), Sunil Kumar (P.W. 13) also suffered injuries. P.W. 1 Virendra took the injured in a tractor trolley of one Khalil to Roorkee hospital, but Harchand succumbed to the injuries on his way to hospital. Condition of Kabool was also precarious, and he was referred to Chandigarh hospital. Some of the villagers, namely Manphool, Sunil Kumar (P.W. 13) and others, took dead body of Harchand back to the village, while others took Kabool to Chandigarh. But, he too died on the next day (10.10.1987) on his way to Chandigarh hospital.

4. A first information report (Ext. A 1) of the incident was got lodged by P.W. 1 Virendra at police station Jhabrera on 10.10.1987, at about 10:30 A.M. On the basis of said report, Crime No. 120 of 1987 was registered against accused Kallu, Shobha, Chhotan, Vedpal, Lala, Jaipal, Shyamlal, Brishpal and Ratiya, relating to offences punishable under Section 147, 148, 149, 452, 307, 323, 504, 506, 302 of I.P.C. A check report (Ext. A 6) was prepared and necessary entry was made in the General Diary by the then Head Constable Hari Prashad (P.W. 12). investigation was taken up by Sub Inspector R.S. Saraswat (P.W. 10), who went to the village Khata Khedi, took dead body of Harchand in his possession, and prepared inquest report (Ext. A19) on 10.10.1987, and other necessary papers viz. sketch of the dead body (Ext. A 20), sample seal, police form No. 13 etc. He got sent the dead body for postmortem examination. P.W. 8 Dr. K.P. Sarabhai conducted the postmortem examination on the dead body of Harchand on the very day (10.10.1987), at about 04:00 P.M., and prepared autopsy report (Ext. A4). He recorded two ante mortem injuries (one contused swelling on the parietal region and another abraded contusion on the forehead), and opined that deceased had died of shock, haemorrhage and coma due to ante mortem injuries. After death of Kabool Singh on 10.10.1987, his dead body was also brought to the village and inquest report (Ext. A 11) was prepared by the police, and the dead body was sealed. Necessary papers like police form No. 13 (Ext. A 12), sketch of the dead body of Kabool (Ext. A 13), sample seal etc. were prepared, and the dead body was sent for postmortem examination. P.W. 9 Dr. A.K. Jain conducted postmortem examination on dead body of Kabool Singh on 11.10.1987, at about 04:00 P.M., and prepared autopsy report (Ext. A5). He found three ante mortem injuries (two contusions on forehead and one contusion on the side of head), and opined that deceased had died of shock and haemorrhage due to ante mortem injuries. Meanwhile, the Investigating Officer interrogated the witnesses, and inspected the site. He took bloodstained soil and

simple soil from the place of incident, and prepared memorandum of the same. He also inspected lantern burning at the time of incident, and prepared memorandum (Ext. A2). After completion of investigation, the Investigating Officer submitted, charge sheet against all the nine accused, namely Kallu, Shobha, Lala, Chhotan, Vedpal, all sons of one Chooahad, and Shyamlal, Brishpal and Jaipal, all the three sons of Kallu, and Ratiya S/o one Kanha, for their trial in respect of offences punishable under Section 147, 148, 149, 302, 452, 323 of I.P.C.

5. The Judicial Magistrate, on receipt of the charge sheet, after giving necessary copies to the accused as required under Section 207 of Cr.P.C., committed the case to the court of Sessions for trial. On 22.04.1991, the trial court after hearing the parties, framed charge of offences punishable under Section 147, 452, 323 and 302 of I.P.C., against all the nine accused, to which they pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W. 1 Virendra (informant and eyewitness), P.W. 2 Ridka (declared hostile); P.W. 3 Raju (declared hostile); P.W. 4 Atra (declared hostile); P.W. 5 Akhtar (eyewitness); P.W. 6 Kali Ram (injured eyewitness); P.W. 7 Dr. Som Dutt Sharma (who examined injuries on the person of accused Chhotan); P.W. 8 Dr. K.P. Sarabhai (who conducted postmortem examination on dead body of Harchand); P.W. 9 Dr. A.K. Jain (who conducted postmortem examination on dead body of Kabool Singh); P.W. 10 Sub Inspector R.S. Saraswat (Investigating Officer); P.W. 11 Dr. Madan Mohan Nagar (who examined the injuries on the person of witnesses Sunil Kumar and Kali Ram); P.W. 12 Sub Inspector Hari Prashad (who prepared check report and made entry in the General Diary); P.W. 13 Sunil Kumar (another injured eyewitness); and P.W. 14 Sub Inspector Rarn Avtar Sharma (witness of preparation of inquest report). The oral and documentary evidence was put to the accused under Section 313 of Cr.P.C., in reply to which they alleged the evidence adduced against them as false. They pleaded that they have been implicated due to enmity. In defence, D.W. 1 K.D. Kuril (a Xray Technician); D.W. 2 S.K. Giri (a Pharmacist); D.W. 3 Dr. Som Dutt Sharma (who was earlier examined as P.W. 7, later recalled by defence for bringing on record injuries on the person of Kabadi); and D.W. 4 Constable Yogendra Singh (who brought the record relating to cross first information report registered after 20 days). After hearing the parties, the trial court found that prosecution has successfully proved charge of offences punishable under Section 323, 452, 302 read with Section 149 of I.P.C. against all the nine accused, and convicted them accordingly. After hearing on sentence, each one of the convicts, namely Kallu, Shobha, Lala, Chhotan, Vedpal, Shyamlal, Brishpal, Jaipal and Ratiya were sentenced to fine of" 1,000/ under Section 323 of I.P.C., rigorous imprisonment for a period of one year under Section 452 of I.P.C., and imprisonment for life under Section 302 /149 of I.P.C. Aggrieved by said judgment and order dated 30th of October 2001, passed by] Addl. Sessions Judge, Roorkee, this appeal is preferred by the convicts.

6. Before, further discussion, we think it just and proper to mention here the

ante mortem injuries recorded by P.W. 8 Dr. K.P. Sarabhai in autopsy report (Ext. A4), prepared by him after postmortem examination on dead body of Harchand. The ante mortem injuries on the dead body of Harchand are being reproduced below from the autopsy report:

"i) Contused swelling 15 cm X 1 cm on the right side of head temporal and parietal region, 2 cm above right ear. Clotted blood present, and coming from right ear.

ii) Abraded contusion 6 cm X 5 cm on left side front of head 2 cm above left eyebrow."

On internal examination, the Medical Officer recorded that communicating fracture between the right temporal and right parietal bone. Also, there was fracture in left parietal and right occipital bones. Middle cranial fossa was also found fractured. Meninges were found cut. P. W. 8 Dr. K.P. Sarabhai opined in the autopsy report (Ext. A 4) that Harchand had died of shock, haemorrhage and coma due to the ante mortem injuries. The aforesaid Medical Officer told before the court that the injuries on the person of deceased could have been caused on 09.10.1987, at about 10:00 P.M. He further stated that the two ante mortem injuries recorded above could have been caused by Lathies. As such, from the medical evidence on record it is established that Harchand (alias Harish Chand) has died homicidal death on 09.10.1987.

7. Now, we come to the ante mortem injuries recorded by P.W. 9 Dr. A.K. Jain, who conducted postmortem examination on the dead body of Kabool Singh, on 11.10.1987, at 04:00 P.M. The ante mortem injuries found on the body of Kabool Singh are being reproduced below from the autopsy report (Ext. A 5) :

"i) Contusion 8 cm X 4 cm right side forehead, 2 cm above right eyebrow.

ii) Contusion, right eye with subconjunctival haemorrhage.

iii) Contusion 5 cm X 4 cm on left side of head, 1 cm above left ear, indwelling foley's catheter in bladder.

iv) Contusion 6 cm X 4 cm on right side base of neck.

v) Contusion 3 cm X 1 cm left side upper lip.

vi) Contusion 5 cm X 4 cm on inner side of left elbow."

... On internal examination, P.W. 9 Dr. A.K. Jain found that there was fracture of both parietal bones, fracture of occipital bone, and fracture of left temporal bone. P.W. 9 Dr. A.K. Jain, after conducting postmortem examination opined that Kabool Singh had died of shock and haemorrhage due to the ante mortem injuries. In his examination the witness stated that the injuries could have been caused on 09.10.1987, at about 10:00 P.M. He has further stated that the above injuries could have been caused by Lathies or Dandas. As such, from the medical evidence on record it is also established that Kabool Singh also died homicidal

death in the incident to which this case relates. Now, we have to examine, whether accused / appellants formed unlawful assembly and in furtherance thereto committed murder of Harchand and Kabool Singh, or not. We have also to examine whether, while doing so they have trespassed in the house of Kabool Singh, and in the incident also assaulted and voluntarily caused hurt to P.W. 13 Sunil Kumar and P.W. 6 Kali Ram, or not.

8. P.W. 1 Virendra is informant as well as eyewitness of the incident. This witness has stated that before the incident in question, one Kabadi of the village molested

Bohari, D/o Harchand (deceased). He further stated that a Panchayat was held in the village in this connection, but no one turned up on behalf of Kabadi. On this, Harchand sent a complaint to the Superintendent of Police, Saharanpur. The witness (P.W. 1) states that thereafter at about 10:00 P.M., on the day of incident, preparations were on for TEHERVEE (the 13th day last rite ceremony of one Kanhaiya). And, in this connection, Kali Ram (P.W. 6), Harchand (deceased), Manphool, Sunil Kumar (P.W. 13), Kaboola (alias Kabool Singh) (another deceased) and the present witness P.W. 1 were sitting in the house of Kabool Singh. P.W. 1 Virendra further states that at that point of time accused (appellants) Kallu, Shobha, Lala, Chhotan, Vedu @ Vedpal, Ratiya, Shyamlal, Jaipal and Brishpal, armed with Lathies, came there, and said "tks nj[kkLr iqfyl dks nh gS mldk etk p[kk;sxs vkSj tku Is ekjsxs" (we will teach you lesson and kill you for the complaint you have made to police). Thereafter, according to this witness, the accused / appellants started assaulting Kabool Singh, Harchand, Kali Ram, Sunil and Manphool, all of whom suffered injuries. The witness (P.W. 1) has further stated that Harchand died of the injuries on his way to hospital (Roorkee), and Kabool Singh died on his way to Chandigarh on the next day. P.W. 1 Virendra has disclosed that at the time of the incident there was light of lantern in the house of Kaboola. The witness has further told that on hearing shouts, neighbours Ridka (P.W. 2), Sukkad, and Akhtar (P.W. 5) also reached there and saw the incident. This witness has further stated that he got lodged first information report (Ext. A 1). He also proved that lantern (Ext. 1) was handed over to the police in connection of which memorandum (Ext. A 2) was prepared. This witness was subjected to lengthy cross-examination, but nothing has come out in his examination, which creates doubt in his testimony.

9. Learned counsel for the appellants drew attention of this court to Section 256 of Cr.P.C. and submitted that the examination in chief of the witness though signed by him, was not signed by the Presiding Officer at the time of recording of the statement. The statement was got signed by the then Presiding Officer by successor of the Presiding Officer, who sent the statement for signatures of his predecessor, as such, the statement of P.W. 1 Virendra is not admissible in evidence. On going through the record we do not find that this fact is of any help to the appellants. Firstly, it is pertinent to mention here that part of examination in chief of Virendra was recorded on 03.06.1991, and on the very day it was signed by said witness. His examination continued and rest of his

examination was recorded on 27.10.1994, before succeeding Presiding Officer of the trial court on which date the defence counsel crossexamined him at length, and there was no suggestion that the statement recorded on 03.06.1991, on the record, is wrong. The Presiding Officer Sri V.S. Shukla, before whom examination in chief was actually recorded of P.W. 1 Virendra on 03.06.1991, had signed the order sheet that incomplete statement of P.W. 1 was recorded by him. However, it appears that due to inadvertence signatures on each page of that part of examination in chief could not be made by the then Presiding Officer, and record was later sent to him (which has come on the record) and Sri V.S. Shukla signed the statement on 16.10.2001. This kind of irregularity even if taken to be true, in our opinion does not vitiate the trial, and in view of the provision contained in Section 465 of Cr.P.C., since no failure of justice has occurred, the finding recorded by the trial court does not need interference on this ground, particularly when no objection was raised at the time of cross examination.

10. Prosecution story is further proved on record by P.W. 5 Akhtar, an independent eyewitness. He has stated that on the day of incident accused / appellants Kallu, Shobha, Lala, Ratiya, Chhotan, Shyamlal, Birsha @ Brishpal, Pala and Vedu @ Vedpal, armed with Lathies, assaulted Harchand, Kabool Singh, Kali Ram, Virendra and Manphool. The witness has stated that he reached in the house of Kaboola after hearing shouts. This witness is resident of the same village and his reaching at the spot at the time of incident appears to be natural.

11. Not only this, the prosecution story gets further corroborated and proved from the statements of P.W. 6 Kali Ram, an injured eyewitness, and P.W. 13 Sunil Kumar, another injured eyewitness. Both these injured eyewitnesses have narrated the entire prosecution story as done by other eyewitnesses. Their statements cannot be disbelieved as they have suffered injuries in the incident. P.W. 11 Dr. Madan Mohan has stated that on 10.10.1987, he was posted in Civil Hospital, Roorkee, when injured Manphool, Kali Ram and Sunil Kumar came there. The witness has stated that Manphool complained of pain. (He was not examined by the prosecution). As to the injuries of P.W. 13 Sunil Kumar S/o Kabool Singh, the witness has proved injury report (Ext. A 15) prepared by him after examining injuries on person of Sunil Kumar. The two injuries are (i) abrasion 2 cm X 1.5 cm on top of the right shoulder, fresh oozing, (ii) pink contusion 20 cm X 0.4 cm situated 2 cm below injury No. (i). P.W. 11 Dr. Madan Mohan has further proved injury report (Ext. A 16) relating to witness Kali Ram (P.W. 6), who was also examined by him in the Civil Hospital, Roorkee, on 10.10.1987, at 02:15 A.M. (in the intervening night of 9th and 10th of October 1987). According to said Medical Officer Kali Ram had suffered (i) traumatic swelling 6 cm X 3 cm over right dorsum of right hand, tenderness present, pink in colour. Other two injuries were complaint of pain.

12. Learned counsel for the appellants drew attention of this court to the statement of P.W. 7 Dr. Som Dutt Sharma (who was also examined as D.W. 3), and pointed out that accused Chhotan and one Kabadi (who is said to have

molested daughter of Harchand) had also suffered the injuries. Attention of this court is also drawn to statement of D.W. 4 Constable Yogendra Singh regarding registration of cross first information report, after obtaining orders under Section 156(3) of Cr.P.C. against Kali Ram, Kabool Singh, Harchand and Sunil, and it is argued that since the prosecution has not explained the injuries of Chhotan, as such, it cannot be said that incident has taken place in the manner suggested by prosecution. We have considered the oral and documentary evidence adduced on behalf of the defence and the statement of P.W. 7/D.W. 3 Dr. Som Dutt Sharma. In our opinion, on the basis of the injury suffered by Kabadi, prosecution story cannot be doubted for the reason that Kabadi is not an accused in this case, as such, prosecution is not required to explain injury on his person. As far as injuries on the person of Chhotan is concerned, though he has suffered two lacerations and one contusion, as is apparent from Ext. A 3, but there is nothing on the record suggesting that these injuries were grievous in nature, and could have been caused by the eyewitnesses in defence to save the lives of Kabool Singh and Harchand.

13. It is also submitted on behalf of the appellants that it is strange that the Investigating Officer has taken blood stained soil from the place of incident, while the nature of ante mortem injuries shown on the body of the two deceased were contusions and abrasions. However, on scrutiny of the evidence, we find that this submission does not carry weight for the reason that it has come in the statement of P.W. 8 Dr. K.P. Sarabhai, who conducted postmortem examination on the dead body of Harchand that there was clotted blood present near the ear of injury No. (i) suffered by deceased (Harchand). This bleeding is shown connecting the ante mortem injury No. (i) i.e. contused swelling suffered on the head. P.W. 6 Kali Ram, injured eyewitness, has stated that at the place of incident blood drops had fallen on the ground. Injury report (Ext. A 15) relating to Sunil Kumar read with statement of P.W. 11 Dr. Madan Mohan shows that [here was bleeding from the injuries suffered by the injured on the shoulder.

14. Lastly, it is argued on behalf of the appellants that there is defect in the charge, as Section 149 of I.P.C. is not mentioned with Section 302 of I.P.C. The charge on the record shows that as against all the nine accused charge relating to offences punishable under Section 147, 148, 323, 302 of I.P.C. were framed. The defect pointed out on behalf of the appellants, even if accepted, since it has not misled the defence, nor resulted in failure of justice, as such, the trial does not get vitiated on this ground. Section 464 of the Cr.P.C. provides that no finding sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge, unless in the opinion of the court of appeal, a failure of justice has in fact occasioned thereby.

15. For the reasons as discussed above, this appeal has no force, and the same is liable to be dismissed. The appeal is dismissed. The appeal on behalf of accused/appellants Shobha, Shyamlal and Brishpal, who are said to have died

during the pendency of this appeal, stands abated. The appeal of rest of the accused/appellants, namely Kallu, Lala, Chhotan,Vedpal, Jaipal and Ratiya is dismissed. They are on bail. Their bail is cancelled. Let the lower court record be sent back to make the surviving accused/appellants serve out the sentence awarded against them by the trial court.