
(2014) 02 AHC CK 0051
In the Allahabad High Court
Case No : Crl. A. No. 3028 of 1986

Khichru

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 13-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 207, 208, 209, 313
Penal Code, 1860 (IPC) — Section 302, 323, 34

Citation : (2014) 2 ACR 1790

Hon'ble Judges : Vinod Prasad, J;Sheo Kumar Singh, J

Bench : Division Bench

Advocate : Ravindra Rai, G.S. Chaturvedi and Miss Ibha Sinha, Amicus Curiae,
Advocate for the Appellant

Final Decision : Dismissed

Judgement

Vinod Prasad, J.—In this appeal two appellants Khichru A-1 and Kashi A-2 have challenged their conviction under Sections 302, 302/34, 323/34 and 323, I.P.C. respectively and imposed order of sentence for life imprisonment for the charge of murder and three months R.I. for causing simple hurt vide impugned judgment and order dated 31.10.1986 passed by Sessions Judge, Varanasi in S.T. No. 132 of 1985. State v. Khichru and another, relating to P.S. Balua district Varanasi (now district Chandauli).

2. Narrated concisely, prosecution case against the appellants is that on the intervening night between 31.12.1984/1.1.1985, informant Akchhaibar alongwith his wife and sons were sleeping in a separate residential portion of his thatched house and in another thatched portion, which was separated by a small courtyard (agan), his parents Antu Kumari Devi and his sister Radhika Devi were sleeping. A lamp was lighting inside their room. At about mid night, four miscreants called Antu to open the door as they wanted to purchase a knitted bamboo basket (dauri). Deceased asked them to come following day morning but meanwhile, the miscreants had removed the arranged brick partition kept at the window and

from the opened space jumped inside the room where Antu, Kumari Devi and Radhika Devi were sleeping. Out of those four miscreants both the appellants. A-1 and A-2, who both were armed with long barrel country made pistols were identified by their names by the house inmates in the flickering of lamp flames, as both of them were co-villagers belonging to the same caste and were involved in the same vocation of knitting and selling bamboo stick baskets and consequently were very well known to the house inmates, whereas other two miscreants were identified by their faces. A-1 is the son of Pattar Dhirkar whereas A-2 is the maternal grandson (nati) of Bakheru. It is further alleged the initially they tried to molest Radhika Devi P.W. 3 and with that motive pushed her on the ground and when father Antu forbade them to desist from their lustrous overtures A-1 shot him dead from his country made pistol and then all the four culprits unlocked the room door and in the darkness escaped from the incident place towards north firing in the air and hurling threats that if any inmate will disclose their identity he will also be done to death. This murder incident of his father was witnessed by the informant Akchhaiber P.W. 7 in the torch light flashed by him from inside his sleeping room. Being terror stricken and due to darkness, the informant and the other inmates could not muster any courage to chase the murderers. After culprits left the house that the informant went inside the incident room where he found the corpse of his father lying on the ground and his mother Kumari Devi P.W. 1 in an injured condition who had sustained injury on her head. His sister Radhika Devi P.W. 3 also had an insignificant injury on her leg. Informant raised hue and cry attracting villagers at the scene of the incident. Two fired empty cartridges were found at the spot, which were collected by the informant P.W. 7. Because of night/darkness, informant P.W. 7 had no courage to go to the police station immediately but ensued next day morning, he slated F.I.R. Ext. Ka-3, and measured a distance of six miles to P.S. Balua where he lodged his F.I.R. at 9.30 a.m. against the named appellants and two unknown miscreants and also deposited both the empties at the police station.

3. H.C. Ram Lachchan Yadav P.W. 5 had registered the crime and had prepared chik F.I.R. Ext. Ka-5 and G.D. entry Ext. Ka-6. He had also seized both the empties, material Exts. 1 and 2, and had slated its recovery memo Ext. Ka-4.

4. S.O. Ram Prasad Rai P.W. 8 initiated investigation into the crime, copied chik F.I.R. and G.D. entry, recorded the statement of the informant and then arriving at the incident scene, performed inquest on the cadaver of the deceased and prepared chalan lash, photolash, police form No. 13. letters to R.I. and to C.M.O. etc., which all are Exts. Ka-8 to Ka-11. Sealing the dead body, it was handed over to constables Mannu Ram P.W. 6 and Onkar Nath Pandey to be carried to the mortuary for autopsy purposes. Injured P.W. 1 Kumari Devi was sent to P.H.C. Chahania for her medical examination. After penning down her statement, spot inspection was conducted and site plan Ext. Ka-12 was prepared. Blood stained and plain earth were also collected and recovery memo thereof Ext. Ka-13 was prepared. Recovery memo of the torch flashed by the informant is Ext. Ka-14 and recovery memo of the lamp is Ext. Ka-15. On the following day,

both the accused appellants were arrested from Moharganj. On 5.1.1985, statement of injured Kumari Devi P.W. 1 was recorded and thereafter, finalizing the investigation, Investigating Officer charge-sheeted both the appellants on 17.1.1985 vide Ext. Ka-16.

5. Dr. G.K. Agarwal P.W. 2, who had performed autopsy on the cadaver of the deceased on 2.1.1985 at 2.30 p.m., found the deceased to be about 60 years of age having a thin physic. Rigor mortis was present on all his limbs and following ante-mortem injuries were detected by the doctor on the dead body:

Multiple gunshot pellets wound of entrance present over the face in an area of 17 cm. x 13 cm. (on the forehead, eyes, chest and nose and lower lip). Frontal bone 2 cm. above right eyebrow and 1/2 cm. right side of mid line was fractured.

6. Internal examination revealed that clotted blood in an area of 7 cm. x 10 cm. was present on the head beneath the scalp. Many pellets were embedded underneath gunshot wound of entry. Cerebral hemisphere of the brain was lacerated and anterior cranial fosa was fractured. Membranes were torned of because of injury and lungs were pale. 100 grams of digested food was present in the stomach whereas small and large intestines contained digested food and fecal matters. Deceased had died one and half day prior to the autopsy examination and cause of his death was shock and haemorrhage, as a result of ante-mortem injuries, which was the result of a single gunshot caused by a country made pistol. According to doctor's estimation, deceased could have died at or about the time of the incident and sustained fire arm injury was sufficient in the ordinary course of nature to cause death. Nine pellets recovered from the scalp and brain were sealed and handed over to the constables to be taken to S.S.P. Office, Varanasi. Autopsy report of the deceased Ext. Ka-1 was prepared and signed by the autopsy doctor P.W. 2.

7. Dr. Ram Ji Pandey P.W. 4 had medically examined injured Kumari Devi P.W. 1 on 1.1.1985 at 11.45 a.m. and her medical examination report, Ext. Ka-2, depicts following injuries:

"1. Lacerated wound 3 cm. x 1 cm. x up to bone deep, 10 cm. above from right ear.

2. Abrasion 2 cm. x 1 cm. on the top of left shoulder joint."

8. Both the injuries were simple in nature, caused by blunt object and were half day old and could have been inflicted at about previous midnight.

9. Both the accused were summoned on the strength of submitted charge-sheet Ext. Ka-16 and in due course, their case was committed to the Sessions Court for trial after observing necessary committal procedural formalities under Sections 207 to 209, Cr. P.C.

10. Learned Sessions Judge/Trial Judge, Varanasi charged A-1 with crime under Sections 302 and 323/34, I.P.C. whereas A-2 was charged under Sections 302/34

and 323, I.P.C. Both the charges were abjured by the appellants after being read out and explained to them and since both the appellants pleaded not guilty and claimed to be tried, their trial commenced in accordance with Sessions trial procedure.

11. Prosecution examined three fact witnesses Kumari Devi (injured) as P.W. 1. Radhika Devi (injured) P.W. 3 and informant Akchhaiber P.W. 7. Autopsy doctor P.W. 2, Dr. Ramji Pandey P.W. 4, head constable Ram Lachchan Yadav P.W. 5, constable Mannu Ram P.W. 6 and Investigating Officer/S.O. Ram Prasad P.W. 8 were examined as formal witnesses.

12. In their examinations u/s 313. Cr. P.C., both the appellants stated a common defence of false implication due to caste rivalry. A-1 also stated that two years prior. his father had expired and he was chosen head of his clan. He had some brawls with the informant resulting in court litigation and because of the same he has been falsely implicated. What is important to take note of is the fact that both the appellants admitted relationships inter se between the informant, deceased and the witnesses and the fact that both of them were co-villagers being residents of the same village Bhalehata. They both further admitted that by caste both the factions were Dharikars, who were normally engaged in the vocation of knitting and sale of bamboo stick baskets. To probablise their defence suggestion that the deceased was done to death in an incident of dacoity committed same night and establish their defence plea of false implication due to caste rivalry that the appellants had examined four defence witnesses Manager Prasad Singh D.W. 1, Sechai D.W. 2, Minnu D.W. 3 and Kedar Nath Yadav D.W. 4. We hereby record that D.W. 3 is a sweeper cum watchman of Primary Health Centre, Chahania, who used to help the doctors in performance of their duty whereas D.W. 4 is the constable of police station of Lanka, District Varanasi, where records of corpse sent for postmortem examinations to B.H.U. Hospital are noted.

13. As mentioned in the opening paragraph learned trial Judge found the prosecution case against the appellants established to the hilt clear of all reasonable doubts and therefore convicted the appellants of the framed charges and sentenced them to life imprisonment and three months R.I. respectively for the charge of murder and causing simple hurt vide impugned order dated 31.10.1986 and hence, said decision, conviction and sentence has now been assailed by both the appellants in the instant appeal.

14. This appeal was filed in the year 1986 and after 27 years, when it came up for hearing, it was noticed that both the appellants have absconded. Non-bailable warrants of arrest were issued against them and firstly A-1 was arrested and was produced before this Court. On inquiry being made, A-1 requested for providing him with the help of an amicus curaie and, therefore, Miss Ibha Sinha was appointed as his amicus curaie to argue his appeal. Subsequently, A-2 was also arrested and produced before us and at his request the services of the same amicus curaie was also made available to him.

15. In the backdrop of the preceding facts, we have heard learned amicus curiae at a great length, who had taken us through the entire depositions of all the witnesses and the trial court record and has made extensive and elaborate submissions. We have also heard Sri Rama Shanker Yadav, learned A.G.A. for the respondent-State in opposition.

16. Assailing impugned judgment. learned amicus curiae incisively urged that incident had occurred in a wintry dark night with no source of light being available at the time of the incident and a case of dacoity was transformed into a murder incident due to caste and factional rivalry because of which both the appellants have been implicated in the incident after cooking up a mendacious story. Radhika Devi P.W. 2. who was already married and was having a son, was not present during incident night at the incident spot and was at her in laws' house and after being informed about the murder of her father that she had arrived at the incident village and consequently no reliance can be placed on her testimonies which are tutored and mendacious. F.I.R. is ante timed and is a fabricated and cooked up documents bereft of authenticity and corroborative piece of evidence. At the earliest opportunity, immediately after the incident, names of the appellants as murderers were not disclosed by the house inmates to the villagers, who had collected at the incident scene. There was no reason/motive for the appellants to commit murder of the deceased on such a trivial issue as alleged by the prosecution and, therefore, motive to commit the crime was none existent. It was further contended that the description of the incident as testified during the trial, by the fact witnesses, are unbelievable, unnatural and, therefore, should be discarded. Wrapping up her submissions, learned amicus curiae urged that the appeal of the appellants be allowed and they be set at liberty and be acquitted of all the charges.

17. Arguing to the contrary and snipping appellants' contentions, Sri Rama Shankar Yadav, learned A.G.A. incisively urged that there was no reason for the closest relatives, wife, son and daughter of the deceased to falsely implicate the appellants in the murder case of their most dear ones sparing real assailants. There was no enmity and no motive for the witnesses to tell a tale story against neighbours and persons of their own caste who were co-villagers. Postmortem report corroborates and is consistent with ocular version and presence of blood at the spot cements the place of the incident which is inside the room of the informant's house and, therefore, the presence of house inmates who are eye-witnesses of the incident, at the dead hour of wintry night, cannot be doubted. Since, no compelling reason existed for the eye-witnesses to fabricate a story nailing in the appellants, the appeal lacks merit and deserves to be dismissed.

18. We have given our thoughtful considerations to the arguments raised by both the contesting sides and have vetted through the entire evidences existing on the record. Before, we proceed to deal with various contentions, we would like to put on record the evidences of two fact witnesses. A priori, we note that both the appellants and the prosecution side consisting of informant and the witnesses

being co-villagers, neighbours and persons of the same caste involved in the same kind of vocation, with their houses lay in a close vicinity separated by only one or two houses in between, the acquaintances between them is a forgone indubitable conclusion. Informant has categorically stated that both the appellants resided in her village only one and two houses apart is a fact which is even admitted to the appellants. Besides confirming F.I.R. (Exhibit Ka-3) allegations she has evidenced that A-1 had pushed her daughter P.W. 3 on the ground and when her husband objected to the rankled act, he was shot dead. A-2 had slapped her forcefully because of which, she had fell down on the bricks and had sustained injuries. It has further been deposed by the informant that at the lime of the incident a lamp was lighting inside the house. It was also evidenced that there was no enmity between the appellants and the deceased, who were neighbours belonging to the same caste. It is categorical testimonies of the informant that during the incident none of the two appellants had veiled their faces. P.W. 1 has further admitted presence of her daughter P.W. 3 during the incident in the same room, where the murder was committed. For appellant A-1, it was deposed that he was married whereas A-2 was a bachelor on the date of the incident. P.W. 1 further stated that she had no time to raise hue and cry because no sooner removing the arranged bricks that the assailants had jumped inside the room. At that moment it was not dark but the lamp was lighting. On further probing, widow/P.W. 1 further deposed that in the incident night, deceased was sleeping on a cot whereas she and her daughter P.W. 3 were sleeping on a thatched bed on the ground. First information report was lodged by Akchhaiber P.W. 7, who had proceeded for the police station next morning and after the incident cadaver of the deceased was brought out by the informant son and was put at the door. At day break, P.W. 1 had gone for her medical examination. She has further evidenced that P.W. 3 was not medically examined nor from her injury any blood had oozed and tickled down at the spot. Investigating Officer had arrived at the spot on a motorcycle and he had left place of the incident alongwith cadaver of the deceased. P.W. 1 had empathetically refuted the defence suggestion that the murder was committed by the dacoits and because of clan dispute. she has falsely implicated the appellants.

19. P.W. 3 Smt. Radhika, wife of Banarsi, daughter of the deceased and P.W. 1 and sister of the informant P.W. 7, while corroborating version of P.W. 1 in its entirety, further deposed that first of all A-2 had entered into the room and had pushed her mother and when she objected, then A-1 had assaulted her because of which she had fell down. When her father had objected, A-1 took out a country made pistol and shot him dead. She further confirmed that both the appellants are her neighbours. Like P.W. 1, Smt. Radhika P.W. 3 also rebutted defence suggestion that deceased and informant P.W. 7 were residing separately. Concerning actual incident repeatedly insignificant questions were asked to this witness only to confuse her but she withstood all those questions and her answers do not erode credibility of her depositions. She had not budged at all

from her stand that it was A-1, who had fired upon her father in the company of three other miscreants including A-2. She had further stated that because she was weeping therefore she had not informed the villagers regarding the murderers. She was emphatic in her statement that she was not medically examined because her injury was insignificant and minor, which she has not shown even to the Investigating Officer. Some trivial omissions and contradictions, which do not touch the core issues of facts in question, were asked from this witness but they do not create any dent in the prosecution story. P.W. 3 has further deposed that both the appellants were also involved in the same vocation of knitting bamboo baskets and she could identify them even by their voices. She was also suggested that her father was murdered by the dacoits and she was not present at the incident place during its happening but all those suggestions, she has abjured in no uncertain terms.

20. Coming to the last fact witness informant P.W. 7, he has also stated those very facts, which had been divulged by his mother and sister and he has corroborated and confirmed his F.I.R. allegations. Informant had also rejected the defence plea that he was living separately from his father. He has also deposed that after the incident was over people of the locality had arrived at his house including D.W. 1. It has further been evidenced by the informant that he had informed the incident to the village Pradhan in the night itself but Pradhan had come to his house next day morning. He had further deposed that he had flashed his torch from inside his room after opening the door, which was a two cell torch. Informant was also suggested that because his father used to give his earnings to his daughter therefore, he was annoyed with him, but such a facetious suggestion was flatly rebuffed by the informant. From his entire cross-examinations, we have not been able to fathom out any other relevant material worth mentioning. His entire cross-examination is directed against insignificant and trivial issues without having any effect on the main substratum of the prosecution allegations nor does it affects the merits of the appeal at all and, therefore, do not deserve a detailed reference and discussion.

21. So far as formal witnesses are concerned, they have narrated those very facts, which have already been recorded hereinabove.

22. In the light of such evidences when we scrutinize the rival contentions raised before us, it becomes clearly apparent that both the sides were neighbours in the same village belonging to the same caste and having same livelihood activity and were very well acquainted with each other. No enmity whatsoever worth in name has been spelled out by the fact witnesses, which may generate any hostile feeling against the appellants. Defence, in spite of its searching and repeated cross-examinations has failed to get extracted any animus from all the fact witnesses nor any damaging piece of evidence which may even remotely suggest of them being perjurers. No reason for them to frame-in the appellants in a cooked up story sparing real assailants existed. Presence of lamp light at the scene of the incident is too well established from the infallible testimonies of all

the fact witnesses which is well corroborated by two seizure memos of the lamp and the torch prepared by the Investigating Officer vide Exhibits Ka-14 and 15. Defence has not been able to shatter these evidences. Otherwise, also it is quite natural and probable that when the parents alongwith a married daughter were sleeping in the same room, they will keep some faint light burning so as not to trample over other during the wintry night in case they awake. Removing arranged brick partition to trespass inside the room is a confirmed fact and P.W. 1 had sustained injury falling on those bricks after she was slapped. This version by the injured P.W. 1, that she was slapped by A-2 because of which she had fell down on the bricks and had sustained injury on her head, which goes unchallenged by the defence, on the one hand probablises existence of bricks at the spot and on the other hand cements presence of A-2 and his specific overt act and role in the incident. It also authenticates prosecution story that the accused had entered into the room after pushing the arranged bricks, which were kept for blocking access through the window. Deceased had sustained gunshot injury is also an established fact and according to the defence plea itself, he had died because of fire arm injury caused same day. same time, same place inside his house. In fact, summation of entire evidences leaves no manner of doubt concerning time, place and date of the incident and use of firearms, which all facts are admitted to the appellants themselves. Appellants have cross-examined the witnesses on most insignificant and unconcerned trivial issues and has not been able to dislodge their testimonies at all. No animus or hostile evidence have been brought on the record and what is culled out from vetting the evidences is that, in fact, there was no reason for the widow, the daughter and the son to name the appellants as the real murderers of their husband and father. It is absurd to think that the family will spare the real assailants in an incident which had occurred inside their house and falsely implicate innocent persons without any compelling reasons for the same. In our view, prosecution has anointed guilt of the accused to the hilt and learned trial Judge has committed no error whatsoever in convicting them of the charge of murder as well as of causing simple hurt to the widow P.W. 1. Both the witnesses P.W. 1 as well as P.W. 2 are illiterate and rustic village women. They would not be interested in sparing the real assailants. Appellants have failed to bring to our notice by pointing out any reliable material on the basis of which it can be concluded that fact witnesses are unreliable and untrustworthy witnesses. There never existed any reason to disbelieve their confidence inspiring and reliable testimonies. They have specifically named the appellants as the murderers and have deposed their specific acts. We are not at all impressed by any of the submissions raised by learned amicus curiae, as in our opinion those contentions are peripheral and ludicrous without denting the prosecution case at all.

23. We now advert to some other contentions like motives etc. as was canvassed by learned amicus curiae. So far as motive is concerned since this being an appeal based on eyewitness account of injured wife and daughter supported well by the son and incident place being inside their house during mid-winty night

when presence of all the witnesses of fact cannot be doubted, it relegates into insignificance. Conversely no motive existed for the widow, son and daughter to arraign appellants as main perpetrators of their husband and father's murder. Another submission that sound of fallen bricks had not attracted the neighbours is also a surreal and gibberish contention harangued only to be repelled. Further, no convincing material could be pointed out doubting presence of P.W. 3, daughter of the deceased, at the spot. No evidence worth in name could be introduced to remotely probablise any clan, caste or factional rivalry. F.I.R. was lodged with promptness without any unexplained delay and the excuse for not proceeding for the police station in the night is convincing and acceptable. None disclosure of the names of the assailants to the villagers in the night by the widow and daughter are convincingly explained. It is too much to expect a wife and a daughter to act like prudent women after witnessing their husband/father being done to death unexpectedly all of a sudden. Above all total absence of any reason to falsely implicate the appellants by the family members whose presence at the scene of the incident cannot be doubted is a very strong circumstance against them.

24. In epilogue, on an overall analysis, we find present appeal being devoid of any merit and liable to be dismissed and hence, dismiss it by confirming conviction and sentence awarded to both the appellants through impugned judgment and order. Both the appellants are in jail. They shall remain in jail to serve out awarded sentence through the impugned judgment and order.

25. Let a copy of this judgment be certified to the learned trial Judge for him to get this judgment complied with.

Appeal dismissed.