

(2009) 07 UK CK 0009

In the Uttarakhand High Court

Case No : Criminal Appeal No. 1481 of 2001

Naresh and Others

APPELLANT

Vs

State of Uttarakhand

RESPONDENT

Date of Decision : 21-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 207, 313, 374

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302

Uttar Pradesh Reorganisation Act, 2000 — Section 35

Citation : (2009) 3 UC 1626

Hon'ble Judges : Prafulla C. Pant, J;Brahma Singh Verma, J

Bench : Division Bench

Advocate : Shri Rajendra Singh,s, for the Appellant; Shri H.C. Pujari, A.G.A. for the State., for the Respondent

Final Decision : Dismissed

Judgement

Prafulla C. Pant, J.—This appeal, preferred u/s 374 of Code of Criminal Procedure, 1973 (herein after referred as Code of Criminal Procedure), is directed against the judgment and order dated 18.10.1995, passed by learned First Additional Sessions Judge, Haridwar, in Sessions Trial No. 39 of 1992, whereby Appellants namely Naresh, Tota Ram, Babla alias Dinesh, Ramesh alias Kallu and Gadha, have been convicted under Sections 147 and 302 read with Section 149 of Indian Penal Code, 1860 (herein after referred as I.P.C.). Each one of the convicts has been sentenced to rigorous imprisonment for a period of two years u/s 147 I.P.C., and imprisonment for life u/s 302 read with Section 149 I.P.C.

2. Heard Learned Counsel for the parties and perused the lower court record.

3. Prosecution story in brief is that Jitendra (deceased) was an accused in the case of murder of brother of accused/appellant Tota Ram. Due to this reason, Tota Ram harboured enmity with the deceased. On 01.12.1991, Jitendra (deceased) had gone to the house of Gulshan, resident of Bilkeshwar Colony. At

about midnight, the two namely Jitendra and Gulshan, started to proceed towards the house of Jitendra. When they reached near tea stall of one Suraj, opposite T.B. Hospital, accused/appellants Tota Ram, armed with stones, Naresh and Babla, armed with bricks, Ramesh alias Kallu and Gadha, armed with Bamboo lathies, surrounded Jitendra. Tota Ram said "blus gekjs HkkbZ dh gR;k dh gS bis tku Is ekj nksA" (HE HAS KILLED MY BROTHER. KILL HIM!). On this, five accused/appellants started assaulting Jitendra with bricks, stones and lathies. They continued to give blows to him till his head got badly crushed and he died. The incident was witnessed by Sanjay (P.W. 1) and Gyasi (P.W. 3). There was electric light at the place of the incident. Sanjay (P.W. 1), was a minor boy, aged 16 years, who gave information of the incident to Meghraj (P.W. 2), uncle of the deceased, in early hours on 02.12.1991. Thereafter, Meghraj went to the police station Kotwali, Haridwar, and lodged First Information Report (Ext. A-1), after getting it scribed through Ashok (D.W.1) at about 6:10 a.m. On the basis of said report, crime No. 1184 of 1991, was registered by the police, relating to offence punishable u/s 302 I.P.C. against all the five accused/appellants, and entry was made in the general diary at serial No. 7. The investigation was taken up by Senior Sub-Inspector Bagh Singh Negi (P.W. 7). Sub-Inspector Prem Lal Sharma (P.W. 5) accompanied the Investigating Officer, to the spot to take the dead body of the deceased in his possession, and prepared inquest report (Ext. A-3) at about 8:10 a.m. on the very day (02.12.1991). Police also got prepared sketch of the dead body (Ext. A-4), police form No. 13 (Ext. A-5), and other necessary papers and sent the dead body of Jitendra for post mortem examination. Dr. O.P. Sharma (P.W. 4) conducted post mortem examination on the dead body of the deceased on 02.12.1991, at 1:20 p.m. He recorded as many as 9 ante mortem injuries on the face and body of the deceased. He also found fractures in the bones of head and face, and prepared autopsy report (Ext. A-2). The Medical Officer opined that deceased had died of shock and haemorrhage due to ante mortem injuries. The Investigating Officer inspected the spot, where the incident had taken place, prepared site plan (Ext. A-9), and interrogated the witnesses. He also took blood stained stones and bricks from the place of the incident and prepared recovery memo (Ext. A-8) on 02.12.1991. After completing the investigation, the Investigating Officer submitted charge sheet (Ext. A-11), against all the five accused namely Tota Ram, Naresh, Babla alias Dinesh, Ramesh alias Kallu and Gadha, for their trial in respect of offences punishable u/s 147, 148 and 302 I.P.C.

4. The Magistrate, on receipt of the charge sheet, after giving necessary copies to the accused, as required u/s 207 of Code of Criminal Procedure. appears to have committed the case to the Court of Sessions, for trial. Learned Additional Sessions Judge, Haridwar, to whom the case was transferred, after hearing the parties on 07.05.1992, framed charge of offences punishable u/s 147 and 302 I.P.C. against all the five accused namely Tota Ram, Naresh, Babla alias Dinesh, Ramesh alias Kallu and Gadha. All the five pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W. 1 Sanjay (an eye-witness), P.W. 2

Meghraj (complainant), P.W. 3 Gyasi (an eye-witness), P.W. 4 Dr. O.P. Sharma (who conducted post mortem examination), P.W. 5 Sub-Inspector Prem Lal Sharma (who prepared the inquest report), P.W. 6 Sub-Inspector Tilak Ram (who prepared the check report-Ext. A-6 of the First Information Report), and P.W. 7 Sub-Inspector Bagh Singh Negi (Investigating Officer). The oral and documentary evidence was put to the accused in reply to which they alleged that the evidence adduced by the prosecution, was false. They pleaded that they have been falsely implicated in the crime. In defence, D.W.1 Ashok, was got examined, who stated that he scribed the First Information Report, after he was called by the police. After hearing the parties, the trial court, found all the five accused guilty of charge of rioting, punishable u/s 147 I.P.C. and that of murder with common object, punishable u/s 302 read with Section 149 I.P.C. After hearing the parties on sentence, the trial court sentenced each of the convicts to rigorous imprisonment for a period of two years u/s 147 I.P.C. and imprisonment for life u/s 302 read with Section 149 I.P.C. Aggrieved by said judgment and order dated 18.10.1995, passed by First Additional Sessions Judge, Haridwar, in Sessions Trial No. 39 of 1992, this appeal was filed before Allahabad High Court by the convicts on 15.11.1995, where it was admitted on 17.11.1995. The appeal is received by this Court u/s 35 of U.P. Reorganisation Act, 2000 (Central Act No. 29 of 2000), for its disposal.

5. Before further discussion, we think it just and proper to mention here the ante mortem injuries, recorded by P.W. 4 Dr. O.P. Sharma, on the dead body of Jitendra on 02.12.1991, which are mentioned in the autopsy report (Ext. A-2). The same are being reproduced below:

1. Incised wound 6cm X 3cm X bone deep on right side head, 6.5cm above right eyebrow (wound filled with mud).
2. Incised wound 2cm X 1cm right side of forehead, 2cm above right eyebrow (filled with mud).
3. Crushed wound 14.5cm X 12cm X mouth cavity deep, front bone at level of eyelid crushed and missing, both eyes, nose and all muscles of face and mouth missing. Fracture of upper jaw maxillar liqmark and temporal bone seen all missing. Mandible bone missing.
4. Incised wound 7cm X 2 cm X muscle cavity deep, just under and middle of the chin.
5. Incised wound 4cm X 2cm X bone deep at the level of trojan of right ear cut and missing.
6. Multiple contusion in an area of 20cm X 12cm on front and upper part of the chest varying in size from 8cm X 2cm to 4cm X1.5cm.
7. Multiple abrasions in an area of 12cm X 8cm on back of left hand and finger.
8. Multiple abrasions with swelling in an area of 10cm X 6cm on the back of left

hand and finger.

9. Incised wound 3cm X 1cm X bone deep on left leg at middle.

On further examination, the Medical Officer found fracture in the frontal bone of the skull. He further found fracture on the base of skull. P.W. 4 Dr. O.P. Sharma, at the end of the post mortem examination, opined in his report (Ext. A-2) that the deceased had died due to shock and haemorrhage on account of ante mortem injuries. The above evidence of the Medical Officer establishes on the record that Jitendra (deceased) was brutally murdered about half to one day before the post mortem examination. Now this Court has to see whether the accused/appellants namely Naresh, Babla alias Dinesh, Ramesh alias Kallu, Tota Ram and Gadha, committed rioting and murder of Jitendra with common intention.

6. P.W. 1 Sanjay, an eye witness, has stated that Jitendra (deceased) was friend of his brother Gulshan. He further stated that on 01.12.1991, at about 10:00 p.m., Jitendra came to meet Gulshan and after talking for some time, Jitendra left for his house along with Gulshan. The witness further states that he along with Gyasi (P.W. 3), and two others were also following them. When they reached near Suraj tea stall, opposite T.B. Hospital, accused/appellants Tota Ram, armed with stone, Naresh and Babla, armed with bricks, Ramesh alias Kallu and Gadha, both armed with bamboo lathe, surrounded Jitendra. Accused/appellant Tota Ram, said (HE HAS KILLED MY BROTHER, KILL HIM). Thereafter all the five started assaulting Jitendra, who cried and fell down, but the accused/appellants kept on beating him. After sometime, Jitendra voice got silent. P.W. 1 Suraj, further states that he and his other colleagues wanted to save Jitendra but the accused/appellants could not be stopped and they crushed the head of the deceased. In the cross examination of this witness, nothing could come out, which shakes the testimony of this witness. (It has come on the record that shop of Suraj was lying closed).

7. P.W. 3 Gyasi, is another eye-witness, who has fully corroborated the prosecution story, as narrated by P.W. 1 Sanjay. He has stated that he knew Jitendra (deceased) and the accused/appellants. This witness has also stated that on 01.12.1991, around midnight, he was in the house of Gulshan from where Jitendra and Gulshan left. According to this witness, he along with Sanjay and two others, followed Gulshan and Jitendra. When Jitendra reached opposite T.B. Hospital, accused/appellants Tota. Ram, Naresh, Babla, Ramesh and Gadha, armed with bricks, stones and lathies, assaulted Jitendra and killed him. The witness states that due to fear, he left the place soon after the incident. In the cross examination of this witness (on the earlier dates his examination), nothing came out, which could shake his testimony. This witness has further stated that his house is at a distance of one furlong from the place of the incident, but he was friend of Jitendra, Gulshan and Ors. as such, they all were sitting in the house of Gulshan, and left his house before the incident took place. He has further disclosed that he was hardly 20-25 steps behind Jitendra and Gulshan.

This witness was cross examined by the defence in the year 1993, and nothing came out in the cross examination, which could shake testimony of this witness. But it appears that by the year 1995, this witness was won over and got recalled for the purposes of re-examination on behalf of the accused/appellants, and he turned hostile. Since from the testimony given by this witness, and his statement recorded in the cross examination, in the year 1993, it is evident that he has given true account of the incident, his testimony in the year 1995, after being recalled, is nothing but false, as this witness clearly appears to have been won over by the defence. If the witnesses are recalled and re-examined in this manner, it will not be possible for the courts to do justice between the parties. We agree with the trial court that his evidence given after he was recalled and re-examined, inspires no confidence. After going through the oral evidence on record, it can safely be said that prosecution has successfully proved that the accused/appellants have committed rioting and murder of Jitendra with common object. Testimony of the aforesaid eyewitnesses is corroborated from the medical evidence already discussed by this Court.

8. Shri Rajendra Singh, Learned Counsel for the Appellants, submitted that First Information Report is ante time. However, on re-assessment of evidence on record, we do not find any reason to hold that the First Information Report is ante time. The incident had taken place in the midnight, i.e. the intervening night of 1st and 2nd December, 1991. P.W. 1 Sanjay, who was aged only 16 years on the day of the incident, could muster courage to inform Meghraj (P.W. 2), Uncle of the deceased, only in early hours next day (02.12.1991), relating to the incident occurred in the night, and P.W. 2 Meghraj lodged First Information Report at about 6:10 a.m. Inquest report (Ext. A-3) shows that it was prepared at about 8:10 a.m. on 02.12.1991. There is crime number mentioned in the inquest report, which shows that First Information Report had already been lodged by then. Not only this, post mortem examination was conducted by P.W. 4 Dr. O.P. Sharma on 02.12.1991, at 1:20 p.m. This further corroborates that First Information Report is not ante time.

9. The second argument advanced on behalf of the Appellants is that most of the injuries found at the time of post mortem examination report, are incised wound, as such, the prosecution case that accused/ Appellants killed the deceased with bricks, lathies and stones, does not appear to be true. After carefully going through the evidence on record, we find that P.W. 4 Dr. O.P. Sharma, has stated in his cross examination that ordinarily incised wounds get caused with a sharp edged weapons and not by stones, but where there are edges in the stones or brick pieces, incised wounds do occur. The Medical Officer has specifically denied the suggestion that the injuries found on the dead body of the deceased could not have been caused by stone.

10. As to the light in which the witnesses could see the incident, there is enough evidence on record that the incident was seen by the eye-witnesses in the light of the electric pole. P.W. 1 Sanjay has specifically stated in his cross examination

that there was electric light at the time of the incident. The site plan (Ext. A-9) prepared by P.W. 7 Sub-Inspector Bagh Singh Negi also shows the electric mercury lamp in the street. It is relevant to mention here that the incident had taken within the limits of Kotwali Haridwar, i.e. city area of Haridwar.

11. Learned Counsel for the Appellants contended that Appellants Gadha and Babla, were minors on the day of the incident. But no such suggestion was made to any of the witnesses nor is any evidence adduced in defence. Rather, the accused/ Appellants Gadha and Babla have disclosed their age 20 years on the day when their statement u/s 313 Code of Criminal Procedure. were recorded also makes out a case that their age was more than 16 years on the day of the incident. It is pertinent to mention here that on the day of the incident, and during the trial, Juvenile Justice Act, 1986, was applicable to the cases of Juveniles and not Juveniles Justice (Care and Protection of Children) Act, 2000.

12. For the reasons, as discussed above, we do not find any sufficient reason to interfere with the conviction and sentence, recorded by the trial court against accused/appellants u/s 147 and 302 read with Section 149 I.P.C. Accordingly, this appeal is liable to be dismissed. The same is dismissed. Accused/ Appellants are on bail. Their bail is cancelled. Lower court record be sent back to make Appellants serve out the sentences, awarded against them.