

(2014) 10 AHC CK 0056

In the Allahabad High Court

Case No : Crl. M. Application (Leave to Appeal) No. 400 of 2014

Neeraj Kumar Kanaujia

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 31-10-2014

Acts Referred:

Arms Act, 1959 — Section 25, 3
Criminal Procedure Code, 1973 (CrPC) — Section 313, 372
Evidence Act, 1872 — Section 27, 32
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2014) 3 ACR 3510 : (2015) 89 ALLCC 160

Hon'ble Judges : Vijay Lakshmi, J; Rakesh Tiwari, J

Bench : Division Bench

Advocate : Gulab Chandra, Advocates for the Appellant

Judgement

Rakesh Tiwari, J.—Heard Sri Gulab Chandra, learned counsel for the appellant, learned A.G.A. for the accused-respondents and perused the record.

2. In view of the judgment rendered in the case of Lekhraj v. State of U.P. and others, Criminal Misc. Application under Section 372, Cr.P.C. (Leave to Appeal) No. 6 of 2014, decided on 10th October, 2014, no leave to appeal is required for the victim to prefer an appeal on the grounds mentioned in proviso to Section 372, Cr.P.C. as he has an indefeasible statutory right to file the appeal.

3. Criminal Appeal No. 400 of 2014 under Section 372, Cr.P.C. has been preferred challenging the impugned judgment and order dated 20.9.2014 passed by the Addl. Sessions Judge, Court No. 10, Allahabad in S.T. No. 757 of 2011, State v. Sunil Kumar Kaushik and another, alongwith connected S.T. No. 758 of 2011, State v. Sunil Kumar Kaushik, acquitting the accused-respondents of the charges framed against them under Section 302 read with Section 34, I.P.C. and Section 3/25 of the Arms Act.

4. The facts of the case as are culled out from record are that on 23.11.2010 at about 9.15 p.m. when complainant Neeraj Kumar Kannaujia was returning on his

motorcycle alongwith his father Ramesh Chandra Kannaujia after attending the marriage of daughter of his uncle at Transport Nagar, all of a sudden two persons came on a motorcycle and the fire was made by the pillion rider. After firing they fled away towards Karbala. On hearing the sound of firearm shots the people began to run away due to fear. The complainant brought his injured father to Colvin Hospital from where he alongwith his uncle and other persons was brought to Jeevan Jyoti Hospital for treatment. Dying declaration of Ramesh Chandra Kannaujia was recorded by the Police Officer at that hospital. The appellant-complainant then lodged an F.I.R. of the incident at P.S. Khuldabad, Allahabad on the same day.

5. Pursuant to the report, Case Crime Nos. 758 of 2011 and 77 of 2011 under Section 302 and Section 3/25 of the Arms Act were registered on 24.11.2010 at 00.10 a.m. at P.S. Khuldabad against unknown persons. During the investigation, the names of the accused persons came to light. Accused Sunil Kumar Kaushik while on police remand pointed a recovery of 315 bore tamancha and one blank cartridge used in the murder of Ramesh Chandra Kannaujia. After investigation, the Investigating Officer submitted charge-sheet against the accused persons under Sections 302, I.P.C. and 3/25 of the Arms Act.

6. The case on being committed to the Court of Session, the charge under Section 302 read with Section 34, I.P.C. was framed against accused-respondents Sunil Kumar Kaushik and Tinku Kaushik and a separate charge under Section 3/25 of the Arms Act was framed against accused Sunil Kumar Kaushik, who denied the charges and claimed trial.

7. In order to prove its case the prosecution examined eleven witnesses, namely, Neeraj Kumar Kannaujia (P.W. 1) Arjun Lal (P.W. 2), Dr. Santosh Kumar. Orthopaedic Surgeon, T.B. Sapru Hospital, Allahabad (P.W. 3), S.O. Anjani Kumar Mishra (P.W. 4), Hajari Lal (P.W. 5), S.I. Ram Asre Mishra (P.W. 6) S.O. Rajesh Kumar (P.W. 7), Retired Dy. S.P. Jitendra Nath Pandey (P.W. 8), Head Constable Shyam Lal (P.W. 9), Surendra Singh, Inspector Food and Civil Supplies, Varanasi (P.W. 10) and Dr. S.K. Dubey (P.W. 11) whereas the accused persons in their statements under Section 313, Cr.P.C. denied the entire circumstances appearing in story against them stating that they have been falsely implicated in this case. The accused-respondents also produced five defence witnesses, namely, Raj Kumari Devi (D.W. 1), Pradeep Chaudhari (D.W. 2), Suresh Mahajan (D.W. 3), Sri Apoorva Vrat Pathak, Dy. Jailer, Central Jail, Naini. Allahabad (D.W. 4) and Devendra Kumar Pandey (D.W. 5) in support of their case.

8. The impugned judgment is assailed on the ground that from the evidence of Neeraj Kannaujia (P.W. 1) and Arjun Kannaujia (P.W. 2) it is established that the accused-respondents were inimical with Ramesh Chandra Kannaujia (since deceased) on account of encroachment over the land of dhobi ghat which was motive for commission of crime; that accused Sunil Kumar Kaushik on remand had himself pointed out recovery of tamancha of 315 bore alongwith a blank cartridge used in the murder of Ramesh Chandra Kannaujia; that recovery memo

has also been proved by the concerned Police Officer and witnesses in the trial court which itself was sufficient to convict the accused-respondents in view of Section 27 of the Evidence Act; that deceased made his statement soon prior to his death in hospital before the Police Officer assigning the role of committing the murder to accused Sunil Kumar Kaushik on account of enmity arising out of encroachment over the land of dhobi ghat, which is valid under Section 32 of the Evidence Act but the trial court has not considered these facts and evidence on record while acquitting the accused-respondents. Learned counsel has placed reliance upon the judgment rendered in *Dharam Deo Yadav Vs. State of U.P.*, in support of these contentions.

9. It is also submitted that Neeraj Kannaujia (P.W. 1) who was with his father Ramesh Chandra Kannaujia on 23.11.2010 when murder was committed had identified accused Sunil Kumar Kaushik before the court. He also stated the manner and involvement of the accused in murder. It is stated that there is a clear, cogent and creditworthy evidence on record explaining the injuries sustained by the deceased which were illegally discarded by the trial court on ground of contradictions in the statement of witnesses and medical evidence, though minor contradictions cannot be a ground of acquittal as has been held in the cases of *Waman and Others Vs. State of Maharashtra*, ; *Rabindra Kumar Pal @ Dara Singh Vs. Republic of India*, and that as per the decision rendered in the case of *Kishore Shinde Vs. State of Maharashtra*, ; *Karnel Singh Vs. State of M.P.*, : *Dhanaj Singh @ Shera and Others Vs. State of Punjab*, ; *Paras Yadav and others Vs. The State of Bihar*, .

10. On the basis of aforesaid judgments counsel has argued that any irregularity in the investigation cannot be a ground for acquittal but the trial court has passed the impugned judgment of acquittal taking into account the irregularities and omissions in the investigation. Insofar as the dying declaration is concerned, it is submitted that it was not signed by the deceased or the doctor; that it is well established law that the F.I.R. is not an encyclopedia where facts to be mentioned but the trial court has discarded the prosecution story merely because of non-mentioning of the name of accused-respondents in the F.I.R. and that Ramesh Chandra Kannaujia (since deceased) was in a serious condition, hence, could not have given any declaration in that state. Therefore, the entire facts and evidence available on record clearly go to show that there is a strong prosecution story with creditworthy evidence proving the prosecution case, hence, the impugned judgment and order of the trial court based on illegal and perverse finding is liable to be set aside.

11. After considering the evidence, material on record and hearing counsel for the parties, the trial court acquitted the accused-respondents vide impugned judgment and order dated 20.9.2014 holding that the prosecution has failed to prove its case beyond all reasonable doubts.

12. On perusal of the impugned judgment of the trial court, evidence as well as the record it appears that the incident is said to have taken place on 23.11.2010

at about 9.15 p.m. at Chauphatka bridge whereas the report was lodged at P.S., Khuldabad on 24.11.2010 at 00.10 a.m. against two unknown persons. Complainant Neeraj Kumar Kannaujia (P.W. 1) in his evidence has stated that he had seen the assailants for the first time at dhobi ghat where he used to go off and on alongwith his father; that neither he nor his father were having any land in their name at dhobi ghat and that there was a dispute with the accused persons, who wanted to grab the land of dhobi ghat on which accused Sunil Kumar Kaushik had made encroachment and had started running a shop dealing in footwear. Ramesh Chandra Kannaujia (since deceased) had opposed this whereupon the accused persons had threatened him with dire consequences.

13. P.W. 1 has further stated in his oral evidence that when his father sustained bullet injuries he was in a conscious state and speaking but had not told the names of the assailants to him or any other members of his family. He also stated that he knew the names of the assailants from before. There is no reason given by him as to why he did not mention the names of the accused persons in the F.I.R. if he knew them from before.

14. Similar is the statement of Arjun Lal (P.W. 2) who is brother of the deceased-Ramesh Chandra Kannaujia. He has stated in his evidence that when deceased was got admitted in Colvin hospital he was speaking but neither he nor any persons present there, had enquired from the deceased as to who had attacked and caused bullet injuries. It may be pointed out here that if injured is in a conscious state and is aware of the assailants surrounded by his family members or well wishers as per prosecution story then he will certainly tell them the names of the assailants. Therefore, his statement of the witness appears to be very unnatural.

15. The dying declaration of deceased-Ramesh Chandra Kannaujia is said to have been recorded by Investigating Officer Sri Anjani Kumar Mishra on 24.11.2010 at 12.00 in the night. From the statement of Dr. S.K. Dubey, (P.W. 11) it appears that he was kept on ventilator. He has stated that the patient who is kept on ventilator, will not be in a position to speak. Doctor treating the injured at Jeevan Jyoti Hospital has not given any certificate that he was in a conscious state to give statement. The Doctor could have also recorded the dying declaration of the injured but he has not done so. From paper Nos. (Ex. Ka-21 and Ex. Ka-22) issued by Dr. Ashok Kumar Srivastava of Jeevan Jyoti Hospital it appears that the injured was not in a position to speak due to tubes in his throat and mask of ventilator covering his face but was also not examined by the prosecution to prove that the injured was in a position to speak. Arjun Lal (P.W. 2) has stated that the dying declaration of his brother was recorded by the Investigating Officer Sri Anjani Kumar Mishra (P.W. 4) in his evidence has stated that on 24.11.2010 at 12.30 when he reached Jeevan Jyoti Hospital in the night he had to take permission from the Doctor for going in the I.C.U. room. He has also stated that the dying declaration of injured was recorded by Munshi Purshottam Pandey on his dictation in the hospital but he was not examined by the

prosecution. In this situation, the Investigating Officer could have got his dying declaration recorded by a Magistrate but it has not been done in the instant case.

16. The Apex Court in the case of Muralidhar @ Gidda and Another Vs. State of Karnataka, , has held that if a dying declaration of the injured was recorded by a Constable on the dictation of Investigating Officer it will not be a dying declaration in the eye of law. Hence, in the facts of this case it is established from the statements of P.W. 2 and P.W. 4 that injured was not in a position to give his statement. The trial court has therefore, rightly disbelieved the dying declaration of the deceased recorded by the Investigating Officer. It is also significant to note that the blood stained clothes of the deceased were neither sent for forensic test nor the same were produced before the trial court.

17. Raj Kumari (D.W. 1) has stated in her evidence that accused Sunil Kumar Kaushik is the father-in-law of her daughter. He alongwith his family members had come to attend the tilak ceremony of Ramu on 23.11.2010 at 7.00 p.m. at Ashok Nagar. Dinner at tilak ceremony took place till 12.00 in the night and that she saw accused Sunil Kumar Kaushik had not gone anywhere else during this period, i.e., he had stayed there during the whole of the ceremony till 12.00 midnight. Pradeep Chaudhari (D.W. 2) and Suresh Mahajan (D.W. 3) in their statements have stated that on 23.11.2010 in the tilak ceremony of Ramu Gautam son of Banshi Lal at Ashok Nagar the accused persons were present and accused Sunil Kumar Kaushik had stayed there during the whole night. There is nothing in their statements which may indicate that the accused persons were not present in the tilak ceremony, the night of 23.11.2010 at between 8.00 to 9.30 p.m. when the murder of Ramesh Chandra Kannaujia was committed.

18. Insofar as the recovery of country made pistol from the possession of accused Sunil Kumar Kaushik is concerned, it has come in the evidence of constable Kalp Nath Singh (P.W. 7) that the colour of the country made pistol was white steel whereas S.I. Ram Asre Mishra (P.W. 6) in his evidence has stated that the colour of country made pistol was iron and not in steel colour. The rulings cited by the learned counsel for the appellant are not applicable to the facts and circumstances of the present case and are clearly distinguishable.

19. From the above discussions, we find that there are material contradictions in the statements of prosecution witnesses and the medical evidence. No independent witness has been examined by the prosecution.

20. In our considered opinion, the trial court has not committed any illegality or infirmity in acquitting the accused persons through the impugned judgment and order dated 20.9.2014, hence, requires no interference by this Court.

21. For the reasons stated above, the criminal appeal lacks merit and is dismissed at the admission stage itself.