
(2009) 12 AHC CK 0377
In the Allahabad High Court
Case No : Criminal A. No. 2130 of 1981

Pearey and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 22-12-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 307, 34, 394

Citation : (2010) 2 ACR 1385

Hon'ble Judges : Poonam Srivastav, J

Bench : Single Bench

Advocate : Jeevanji Srivastava, Amicus Curiae, for the Appellant; A.G.A., for the Respondent

Judgement

Poonam Srivastav, J.—The instant appeal is preferred by four Appellants namely Pearey, Sheesh Ram, Sheesh Pal and Ganga Ram against the judgment and order dated 18.9.1981, passed by the II Ird Additional Sessions Judge, Moradabad in Session Trial No. 302 of 1980. They have been convicted u/s 307/34, I.P.C. and sentenced to five years R.I. and u/s 394, I.P.C. and sentenced to three years R.I.

2. Sri. Jeevanji Srivastava advocate was appointed as amicus curiae vide order dated 7.11.2009. He has appeared before this Court and argued the appeal at length.

3. According to the prosecution, alleged occurrence had taken place on 26.9.1979 at 6 p.m. and F.I.R. was registered on the same day at 11.30 p.m. by P.W. 1 Harpal son of Tikam Singh Jat against four unknown persons, scribe of the F.I.R. is P.W. 4 Harender Kumar.

4. Prosecution case in brief is that P.W. 2 Rasheed who was cloth merchant in the village, was going back from the market Sunwari to his village Chandan Kota alongwith Harpal Singh, Natthu and Amar Singh. He was on the back of his horse while other companions were going on foot. The accused came out from nearby

bajra field who stopped them and looted Rasheed and Harpal Singh, relieving Rasheed of his bundle of cloth and cash amounting to Rs. 475, Harpal Singh was relieved of a lady's wrist watch and cash amounting to Rs. 175. It is alleged that the accused Sheeshpal was armed with knife and Pearey was armed with danda. Rasheed tried to protest which resulted in knife and danda blows on his person. On an alarm raised by victim, Basheer P.W. 3, Shabbir also arrived from behind and challenged the accused who ran away with the looted property. Rasheed was taken to his house on a cot and from there he was taken to the police station Adampur in a Dunlop Cart. Harpal Singh P.W. 1 orally lodged a report of the occurrence on the same day at 11.30 p.m. and P.W. 4 Harender Kumar had written the report. He has been produced as scribe. He has also prepared chik report Ex. Ka-1 and a case under Sections 394 and 307, I.P.C. was registered.

5. Dr.A.P.Singh P.W. 6 who was on emergency duty at 3.30 a.m. examined injured Rasheed and found following injuries:

1. Lacerated wound 3-1/2 cm. x 1 cm. x bone deep on the left forehead at the hair line 3 cm. above the left eye brow 2 cm. away from median plain (under observation).
2. Lacerated wound 5 cm. x 1/2 cm. x bone deep on left side of skull 2 cm. above and inward to the injury No. 1 (under observation).
3. Lacerated wound 5 cm. x 1/2 cm. x 1/4 cm. on the left side of skull 1 cm. inward to the injury No. 2 (under observation).
4. Lacerated wound 2 cm. x 1/2 cm. x bone deep on the left side of skull 7 cm. above the outer angle of left eye brow (under observation).
5. Incised wound 4 cm. x 2 cm. x depth not probed on the left lower part of the chest 1 cm. above the xyphisternum and 1 cm. away from the median plain tailing inward(under observation).
6. Incised wound 3 cm. x 1 cm. x depth not probed on the left side of the chest 13 cm. down and out the left axilla at the posterior axillary line (under observation).
7. Incised wound 3 cm. x 1/2 cm. x bone deep on the palmer aspect at the distal I.P. joint of the left index finger. Full of dust, (under observation).
8. Incised wound 2 cm. x 1/2 cm. x bone deep on the palmer aspect at the metacarpophalangeal joint of the left ring finger. Full of dust (under observation).
9. Incised wound 2 cm. x 1 cm. x bone deep on the palmer aspect at the proximal I.P. joint of left little finger. Full of dist, (under observation).

6. Since the occurrence had taken place within the jurisdiction of police station Hayatnagar, the F.I.R. and copy of the G. D. extracts were sent from police station Adampur to the concerned police station.

7. The Appellants were arrested on 13.10.1979 and prosecution claims that after

their arrest they were kept baparda and were lodged in jail. Test identification parade was conducted on 18.12.1979 and memo of identification is Ex. Ka-10.

8. The prosecution examined three witnesses of fact, namely Harpal Singh P.W. 1, Rasheed P.W. 2 and Bashir P.W. 3. Formal witnesses are Harinder Kumar P.W. 4, H. C. Khan Chand P.W. 5, Dr. A.P. Singh P.W. 6, Investigating Officer S.I.H.C. Jain P.W. 7 and constable Hari Ram Tripathi P.W. 8.

9. The first argument of Sri. Jeevanji Srivastava is that there is nothing to connect the accused with the crime. Since there is no recovery from the possession of the Appellants and evidence of identification is also not reliable, therefore, conviction of the Appellants is without any evidence and is illegal and liable to be quashed. Four witnesses had gone to identify three accused save Ganga Ram but in his cross-examination he has unequivocally admitted that he had seen the accused after their arrest and, therefore, identification by Harpal Singh is of no consequence. Besides, it is also argued that test identification parade was conducted after lapse of 83 days and in view of the decision of the Apex Court the identification held after 43 days it is not very reliable. Two witnesses Amar Singh and Shambhu had gone to identify the accused but they have not identified any of the accused. P.W. 3 is the only witness who identified all the four accused. In the circumstances, in view of the result of identification parade, it is evident that there is only single good identification to connect the accused with the crime. Admittedly there is no recovery and, therefore, conviction on the basis of single identification cannot be upheld. On being questioned as to why the accused were falsely implicated, it is brought to the notice of the Court that there is partibandi in the village between Jatav and Tyagi community. The complainant and witnesses belong to Tyagi community whereas all the accused are of Jatav community.

10. Sri. Jeevanji Srivastava has also tried to demonstrate that the doctor admitted in his cross-examination that X-ray was performed, there was no internal damage caused to any organ or part of the body. However, this itself is of no consequence.

11. Learned A.G.A. has disputed each and every arguments of Sri. Jeevanji Srivastava and has submitted that since Rasheed has received 10 injuries and he was in hospital for considerable length of time and also substantiated by witnesses that the occurrence did take place and, therefore, the Appellants are liable for being convicted and they should not be absolved of from the crime.

12. After hearing the respective Counsels and taking into consideration the documents on record, I am of the view that no doubt the injuries have been caused to one of the witnesses Rashid. He has also been relieved of his property and occurrence cannot be disputed. The occurrence did take place but only question remains as to whether the present accused are involved in the crime or not. It is also true that the Appellants belong to a particular rival community and possibility of false implication and their participation cannot be ruled out but

unless and until the prosecution is able to connect the accused with the crime and make positive assertion that it is the Appellants who had committed crime, their conviction cannot be upheld. Yet if there is an iota of doubt, the accused are entitled for benefit of doubt.

13. In the instant case since only evidence is of single identification which is very weak and that too cannot be accepted in its totality and the F.I.R. do not give any detail of any assailants. It is only identification that was made by two accused but one of them admitted clearly that he had seen the witnesses at the time of his arrest and this was the reason he was declared hostile. Nothing was recovered from the possession of the Appellants and, therefore, I am of the considered view that conviction cannot be upheld.

14. In view of what has been stated above, prosecution has failed to establish its case so far the involvement of the Appellants is concerned and, therefore, they are entitled for benefit of doubt.

In the circumstances, the judgment and order dated 18.9.1981, passed by the II Ird Additional Sessions Judge, Moradabad in Session Trial No. 302 of 1980 is set aside. The appeal is allowed and the Appellants are acquitted. They need not surrender.