

(2015) 07 AHC CK 0144
In the Allahabad High Court
Case No : Criminal Appeal No. 616 of 2013

Radhey Shyam and Others

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 06-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 173(8), 313
Penal Code, 1860 (IPC) — Section 307, 323, 324, 34, 352

Citation : (2016) 1 ACR 226 : (2015) 7 ADJ 356 : (2016) 1 ALJ 593 : (2015) 90 ALLCC 825

Hon'ble Judges : Ramesh Sinha, J

Bench : Single Bench

Advocate : Ashutosh Pratap Singh and Lokendra Pratap Singh, for the Appellant;
Ajendra Kumar, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Ramesh Sinha, J—The present Criminal appeal has been preferred by the appellants against the judgment and order dated 4.2.2013 passed by the Sessions Judge (D.A.A.), Etah, by which the appellants has been convicted and sentence under Section 323/34 IPC for six months simple imprisonment and under Section 307/34 IPC R.I. for 5 years R.I. and fine of Rs. 2000/-each, and in default of fine two months further imprisonment. The sentences were ordered to run concurrently. The prosecution case in brief is that a non cognizable report was lodged by the injured/informant Shankar Bhan on 28.2.2006 with respect to an incident dated 28.2.2006 taken place in the afternoon at 3.00 p.m., stating that he was roaming in his agricultural field and when returning to his house the accused appellants had fired at him from the back and further he was beaten by them with Lathi and Danda.

2. The N.C.R. was lodged at the concerned Police Station under Sections 352/323 IPC, which has been marked as Ex. Ka-4, on an application given by the informant. The investigation was conducted under the orders of Magistrate, in

view of provisions contained under Section 155(2) Cr.P.C.

3. The investigating officer started the investigation and prepared the site plan of the place of occurrence, which is marked as Ex. Ka-6. The medical report of the injured were prepared, and marked as Ex. Ka-8. The charge-sheet was submitted against the appellants under Section 323/352 IPC by the investigating officer, on which the learned Magistrate took cognizance of the same. A further investigation was also conducted under Section 173(8) Cr.P.C. and Section 307 IPC was added. Thereafter, the Magistrate committed the case to the Court of Sessions. The accused pleaded not guilty and sought their trial. The charges are framed against them under Section 323/307 IPC.

4. The prosecution in support of its case has examined P.W.-1 Shankar Bhan, P.W.-2 Rakesh, P.W.-3 Dr. Ethisham Ahmad, P.W.-4 S.I. Kamal Singh, P.W.-5 Constable Nirmal Singh, P.W.-6 H.C.P. Subedar Singh, and P.W.-7 Dr. Mehtaab Ahmad.

5. The statement of the accused-appellant Radhey Shyam was recorded under Section 313 Cr.P.C. wherein he has stated that due to election rivalry, the brother of the informant namely Rakesh @ Pratap Bhan had made an attempt to kill him and by fabricating the injuries lodged a false case against him. Similarly the other two appellants namely Babloo and Chhavendra also made a similar statements and submitted that due to rivalry of Pradhani election, they have been falsely implicated. The accused, in their defence produced a list of documents which was marked as Ex. Kha-160B which contains documents of cross case of S.T. No. 270 of 2007, which was filed against the brother of the informant namely Rakesh @ Pratap Bhan alongwith a copy of the charge-sheet and the injury reports of injured Mukesh and appellant Chhavendra. The P.W.-1 Shankar Bhan, who is the informant of the case has stated before the trial Court that on 28.2.2006 at about 3.00 p.m. when he was loitering in his agricultural field and reached to his house, the accused appellant Radhey Shyam, Babloo and Chhavendra arrived and all the three accused who were armed with 12 bore country made pistol, fired at him. On the alarm raised, Santosh, Satyabhan and his daughter Jyoti arrived, who intervened in the matter and the accused after firing assaulted the witness with lathi and danda fled away. He deposed that his brother Kamal Singh had informed the police from a P.C.O. on which the police arrived and took him to the police station and prepared Chhitthi Majrobi and sent him to Primary Health Centre, where he was medically examined, from where he was taken to district hospital Etah and further to Aligarh Medical College, for medical treatment. He proved the N.C.R. which was lodged by him, but refused to identify the written report on the basis of which the non cognizable report was lodged.

6. P.W.-2 Rakesh, who is the brother of the informant has stated that on 28.2.2006 at about 3.00 p.m. in the afternoon, he was working in his field and on hearing the fire shot he ran towards his house and saw that the accused appellants Radhey Shyam, Babloo and Chhavendra were firing at his brother

Shankar Bhan from 30-40 feet distance and Shankar Bhan had become unconscious and fallen, and he was also beaten them by lathi and danda. The incident was witnessed by Santosh, Satyabhan, Jyoti and other people, and he informed about the incident to his elder brother Kamal Singh on phone. He further deposed that he had gone to another village for taking a vehicle for his brother, but the police had arrived and taken the injured Shankar Bhan.

7. P.W.-3 Dr. Ethisham Ahmad, has deposed that on 21.3.2006 at about 1.20 a.m. in the night, he had examined the injured Shankar Bhan in J.L.N. Medical College, Aligarh, while he was posted as Emergence Medical Officer and had prepared the medical report Ex. Ka-2. He stated that four punctured wound with pellet marks, multiple in number are found on the back right side of neck and thigh with surrounding singed present on the wound, which was caused by gunshot. In his opinion the injury was found to be grievous. He could not specify that how many pellet marks were found on the injured. The injured was conscious and was in position to speak.

8. P.W.-4 S.I. Kamal Singh, who was the second Investigating Officer of the case has stated that he was entrusted with the investigation of the case by earlier investigating officer H.C.P. Subedar Singh. He carried out further investigation in view of the Section 173(8) Cr.P.C. and added Section 307 IPC and further submitted supplementary charge-sheet under Section 323/307 IPC against the appellants.

9. P.W.-5 constable Nirbhai Singh has proved the N.C.R. of non cognizance report, which was registered by him at the concerned police station, and he further admitted that on the said report there was no signature found of the informant Shankar Bhan. He further deposed that in said non cognizance report it was not mentioned that the injured received any injury of fire-arm.

10. P.W.-6 H.C.P. Subedar Singh, who was the first Investigating Officer has stated that he started the investigation and prepared the site plan and submitted charge-sheet under Sections 323/352 IPC against the appellants in the Court.

11. P.W.-7 Dr. Mehtaab Ahmad has approved the X-ray report Ex. Ka-9, which was prepared by Dr. Ruchi Prakash.

12. Heard Sri Hari Prakash Mishra, learned counsel for the appellants and Sri Avadesh Kumar Saxena, learned AGA for the State. Sri Ajendra Kumar, learned counsel for the complainant is not present though the matter was called out in revised list for final hearing.

13. It has been argued by the learned counsel for the appellants that a non cognizable report was lodged about the incident by the informant wherein, there was no mention that he received gunshot injury at the hands of accused-appellants, and it was only stated that the accused fired short at him and assaulted him with Lathi and Danda, and subsequently during the course of further investigation, charge-sheet has been submitted against the appellants

under Section 323/307 IPC. He submitted that there was cross version of the incident, which was lodged against the brother of the informant namely Rakesh @ Pratap Bhan, who was also put to trial in S.T. No. 270 of 2007, in which charge-sheet was submitted and from the side of the appellants one Mukesh and appellant Chhavendra also received injuries, but the said trial ended in acquittal. He submitted that only on account of election rivalry with the brother of the informant, the appellants have been falsely implicated in the present case on the basis of forged medical report. He submitted that as per N.C.R. which was lodged under Section 352/323 IPC, and the charge-sheet was submitted under Sections 352/323 IPC, but during the further investigation under Section 173(8), Section 307 IPC were added and the charges were framed against the appellants for the offence under Section 323, 307 IPC and the appellants have been tried. The trial Court has mis-read the evidence on record and has convicted the appellants under Sections 307/34 and 323/34 IPC, though from medical report of the said injured it is apparent that he received only pellet injuries on his person, and the trial Court has wrongly convicted the appellants under Section 307/34 IPC. He submitted that even if the prosecution case is taken on its face value, the case would not travelled beyond Section 324 IPC, hence the conviction of the appellants under Section 307/34 IPC be set-aside by this Court.

14. The learned AGA for the State on the other hand has strongly argued that the injured has received injuries of firearm on his person, for which he was medically examined by Dr. Ethisham Ahmad, P.W.-3 on 21.1.2006 at about 1.20 a.m., who found injuries of gun shot on the person of the injured and the injury sustained by the said injured cannot be said to be a fabricated one as multiple pellets were found in the wounds. He submitted that the statement of injured P.W.-1 Shankar Bhan who is also informant of the case. cannot be doubted at the place of occurrence who has deposed against the accused appellants to have fire shot at him He submitted that the trial Court has rightly convicted the appellant for the offences under Sections 307/34 IPC, but he could not dispute the fact that the injuries sustained by the injured are only pellet injuries.

15. Having considered the submissions advanced by the learned counsel for the parties and perused the record. It is an admitted case that a non cognizable report was lodged by the P.W.-1 Shankar Bhan against the appellants under Section 352/323 IPC, which was investigated under the orders of learned Magistrate, in view of Section 155(2) Cr.P.C. The charge-sheet was submitted against the appellants under Sections 323/352 IPC by the P.W.-6 HCP Subadar Singh, but it appears that a further investigation was carried out under Section 173(8) Cr.P.C. by the 2nd investigating officer P.W.-4, S.I. Kamal Singh, who after seeing the injury report of the injured has added the Section 307 IPC. The charges have been framed against the appellants under Section 323/307 IPC by the trial Court.

16. P.W.-1, the informant/injured Shankar Bhan has deposed before the trial Court that it were the appellants who have fired at him from the back, in which

he received gunshot injuries on his person and his presence at the place of occurrence cannot be doubted. The injuries sustained by him have been examined by P.W.-3 Dr. Ehtisham Ahmad, who has stated that the injured received punctured wound of pellet mark on the back, right side of neck and thigh with surrounding singed present on the wound, which were caused by gunshot. The nature of injury was though stated to be grievous by the doctor, but it appears from the injury report dated 1.3.2006 prepared by P.W.-3 Dr. Ehtisham Ahmad, at J.N.L. Medical College, Aligarh, that the injuries were simple in nature, and no abnormality was deducted. Moreover, the X-ray report, Ex. Ka-9 also shows that only radio opaque shadows were seen on the person of the injured, which shows that the injured received only pellet injuries on his person. No internal damage was caused to the injured nor the injuries were opined by the doctor to be dangerous to life.

17. The contentions of learned counsel for the appellants that considering the injuries sustained by the injured, the conviction of the appellants under Section 307/34 IPC appears to be against the evidence of record and the case would not travel beyond Section 324 IPC appears to have substance, hence the conviction and sentence of the appellants by the trial Court under Section 307 IPC is not sustainable from the evidence on record, the same is set-aside and the appellants are convicted under Section 324 IPC read with Section 34 IPC and they are sentence to three years R.I. The judgment and order of the trial Court is set-aside to that extent only.

18. The learned counsel for the appellants lastly submitted that so far as the appellant No. 1 Radhey Shyam is concerned, he has already served out two and half years in jail, as under trial and after his conviction, he is presently confined in jail, as he was not granted bail by this Court as he was previously convicted under Section 307 IPC and he has also filed an appeal against his conviction which is pending and he is on bail in the said case. He submitted that at present the appellants No. 1 is about 68 years old and is suffering from old age ailments, and rest of the two appellants who are sons of the appellant No. 1, they have also being in jail for a sufficient period, and they have also settled with their family and to send them in jail after at this stage would be to harsh, their rest of the sentence may be converted into fine.

19. Considering the facts and circumstances of the case, and taking into account the age of the appellant No. 1 Radhey Shyam who was aged about 63 years on 19.7.2010, when his statement under Section 313 Cr.P.C. was recorded and as on date he is aged about 68 years old and his period of detention in jail and further so far the appellant No. 2 Babloo and appellant No. 3 Chhavendra, who are the son of appellant No. 1 Radhey Shyam, and they have also settled with their family and to send them in jail after at this stage would also cause hardship to their families, hence be converted into fine. Therefore, the rest of the sentences of the appellant No. 1 Radhey Shyam is converted to a fine of Rs. 20,000/- and appellant Nos. 2 Babloo and 3 Chhavendra into a fine of Rs.

10,000/- each which shall be deposited by them in the Court of Chief Judicial Magistrate, Etah. The fine so deposited by the appellants, Rs. 35,000/- shall be paid to the injured Chandra Bhan, if alive or to his legal heirs in equal proportion, and Rs. 5,000/- shall go to the State, and if appellant No. 1 Radhey Shyam deposit the amount, he shall be released forthwith, if not wanted in any other case. So far the appellant Nos. 2 and 3, Babloo and Chhavendra are concerned, they shall deposit the fine of Rs. 10,000/- each within two months from today, failing which the appellant No. 1 Radhey Shyam shall served out sentence as has been awarded and modified by this Court.

20. In default of payment of fine by appellant Nos. 2 and 3 Babloo and Chhavendra, as directed above they shall be taken into custody to served out the sentence as has been awarded and modified by this Court.

21. The appeal stands partly allowed. Office is directed to send a certified copy of this order to the C.J.M., Etah for its compliance.