
(2013) 01 SC CK 0013

In the Supreme Court Of India

Case No : Criminal Appeal No's. 1523 and 1524 of 2008

Ram Vishambhar and Others

APPELLANT

Vs

State of U.P. Through Home Secretary

RESPONDENT

Date of Decision : 11-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 301, 302

Citation : (2013) 1 ACR 707 : (2013) AIRSCW 628 : (2013) AIRSCW 4570 :
(2013) 2 ALJ 90 : (2013) 81 ALLCC 424 : (2013) CriLJ 1131 : (2013) 1 Crimes
143 : (2013) 1 JT 507 : (2013) 2 RCR(Criminal) 562 : (2013) 1 SCALE 309 :
(2013) 2 SCC 71 : (2013) 4 Supreme 634 : (201

Hon'ble Judges : Ranjan Gogoi, J;P. Sathasivam, J

Bench : Division Bench

Advocate : J.C. Gupta, Deepak Goel, Kamal Kumar Pandey, Rajesh, Dharm
Singh, Anurag Tomar and B.K. Agrawal, for the Appellant; S.R. Singh
Ardhendumauli Kumar Prasad and R.K.S. Yadav, for the Respondent

Final Decision : Partly Allowed

Judgement

Ranjan Gogoi, J.—Both these appeals arise out of the common judgment and order dated 23.8.2007 passed by the High Court of Allahabad whereby the conviction of the Appellants, (6 in number) inter alia, u/s 302 of the Indian Penal Code (here in after for short "the Code") has been affirmed. Each of the accused-Appellants in the two appeals under consideration have been sentenced to undergo RI for life besides to serve out further periods of imprisonment for commission of lesser offence details of which are being noticed here in after.

2. The prosecution case in short is that accused Jagdeo, Sahdeo, Jagroop and Manni Lal are the sons of accused Ram Vishambhar whereas accused Raj Bahadur is related to the accused Ram Vishambhar. On the other hand, complainant Bhagwat Prasad (PW-1) is the brother of one Rameshwar Prasad whereas Ram Sanahi (injured witness No. 2), Girija Shankar (PW-3) and Ram Khilawan are the sons of Rameshwar Prasad. Sarju Prasad (PW-4) and Mahendra

Kumar are the sons of Ram Khilawan while Km. Sheela (injured) and Km. Gayatri Devi (deceased) are the daughters of Ram Khilawan.

The relationship between the two families was strained and there were disputes between them. According to the prosecution, on 20.3.1981 at about 10.30 p.m. while Holi procession was taken out in the village hot words were exchanged between accused Raj Bahadur and Sarju Prasad (PW-4). When the procession had reached near the house of accused Raj Bahadur, allegedly, the aforesaid accused had threatened PW-4 Sarju Prasad with a country made pistol. Thereupon, Sarju Prasad fled to his house and complained to Bhagwat Prasad (PW-1), Rameshwar Prasad, Girija Shankar (PW-3), Ram Sanehi (PW-2) and Mahendra Kumar that the accused Raj Bahadur had threatened him. According to the prosecution, the accused persons then arrived at the house of the complainant. While accused Raj Bahadur and Manni Lal were holding Tamanchas (country made pistols), the rest of the accused had come armed with lathis. Thereafter, all the accused started abusing and beating Girija Shankar, Ram Sanehi, Sarju and Mahendra Kumar with lathis. As some resistance was offered by the party of the complainant, particularly Ram Sanehi (PW-2), accused Manni Lal fired at him as a result of which Ram Sanehi sustained injuries. According to the prosecution accused Raj Bahadur also fired at PW-4 Sarju Prasad. However, instead of Sarju Prasad, Km. Sheela was hit as a result of which she sustained injuries. Accused Raj Bahadur is reported to have fired a second shot at Sarju Prasad which once again missed the target and hit Gayatri Devi who died instantaneously. According to the prosecution, the accused persons thereafter entered the house of accused Ram Vishambhar and firing was heard inside the house of the aforesaid accused.

3. PW-1 Bhagwat Prasad dictated the written report (Exh. Ka-1) which was scribed by one Ram Kishore and the same was submitted in the Police Station Jafarganj at about 4.30 a.m. on 21.3.1981. On the basis of the said report the FIR (Exh. Ka-3) was registered and investigation was undertaken by one Jai Karan Singh (PW-8) who was posted as S.O. Jafarganj Police Station. Proceeding to the place of occurrence PW-8 found the dead body of Gayatri Devi lying at the door of house of Rameshwar Prasad. Inquest was held and the dead body was sent for postmortem examination. PW-8 also found injuries on the person of Ram Sanehi, Km. Sheela, Sarju Prasad and Mahendra Kumar who were sent for medical examination which was conducted on 21.3.1981 and 22.3.1981. PW-3 Girija Shankar, who also sustained injuries in the incident, was also sent for medical examination on 24.3.1981. Thereafter, on completion of investigation, chargesheet was submitted against all the accused persons under Sections 147, 148, 149, 307 and 302 Indian Penal Code. The offences alleged against the accused being exclusively triable by the Court of Sessions, the case was committed to the Court of the learned Sessions Judge, Fatehpur who framed charges against the accused Appellants under the aforesaid provisions of the Penal Code. As the accused persons denied the charges and claimed to be tried, the prosecution examined ten witnesses in support of its case besides exhibiting

several documents. Four witnesses were examined on behalf of the accused and two witnesses, i.e., Budh Behari Pandey and Dhani Ram Yadav were examined as Court witnesses. Thereafter at the conclusion of the trial while the accused Raj Bahadur was convicted u/s 302 read with Section 301 Indian Penal Code, the remaining 5 accused were convicted under the aforesaid section with the aid of Section 149 Indian Penal Code. Additionally, accused Raj Bahadur and Manni Lal were convicted u/s 148 and 307 as well as u/s 323 of the Code and the remaining co-accused, i.e. Ram Vishambhar, Jagdeo, Jagroop and Sahdeo were convicted u/s 147 and also Section 323 and 307 Indian Penal Code read with Section 149 Indian Penal Code. The sentences imposed on the accused-Appellants for the lesser offences need not be specifically noticed as all such sentences were directed to run concurrently alongwith the period of life imprisonment imposed on each of the accused persons u/s 302 Indian Penal Code. Aggrieved the two appeals in question have been filed by the accused Appellants.

4. We have heard Mr. Deepak Goel, Advocate for the Appellants in Crl. Appeal No. 1523/2008, Mr. J.C. Gupta, Sr. Advocate for the Appellants in Crl. Appeal No. 1524/2008 and Mr. S.R. Singh, Sr. Advocate for the State of Uttar Pradesh.

5. Before proceeding any further as the defence had put up a specific version of the incident and, in fact, a complaint in this regard was lodged before the police station (Exh. Ka-11) by accused Ram Vishambhar, the said defence of the accused may be noticed in some details.

According to the accused the complainant and his family members had celebrated Holi in the plot No. 1290 belonging to the accused Ram Vishambhar. When the said accused protested, PW-4 Sarju and Others had started beating him. Seeing the assault committed on their father accused Jagdeo, Manni Lal and Sahdeo arrived at the spot and warned PW-4 Sarju and others. Thereupon, according to the accused, PW-2 Ram Sanahi and PW-4 Sarju fired from the guns that they were carrying. Further more, PW-3 Girija Shankar was also armed with a gun which, however, fell on the ground. The aforesaid gun was picked up by some relation of the accused who fired two shots towards Ram Sanahi and Others, in defence. According to the accused, PW-2 and PW-4 had fired 3 more shots in the course of the incident and the same had hit the deceased Gayatri Devi as well as her sister Sheela who sustained injuries.

6. The argument advanced by the learned Counsel for the Appellants has delved upon the injuries sustained by the accused Jagroop, Sahdeo and Manni Lal, which though proved by the evidence of DW-2, had not been explained in any manner by the prosecution. Learned Counsel has submitted that the defence by examining DW-3 Jagdev Prasad has proved that the accused Jagdeo was not present at the place of occurrence. It is also urged that the evidence of DW-4 Ram Karan clearly discloses that it is the party of the complainant who were aggressors and who had fired upon the accused first. Learned Counsel has pointed out that though there was some firing by the accused the same was in

self defence and in any event the testimony of DW-4 clearly establishes that it is the shots fired by PW-2 Ram Sanahi and PW-4 Sarju Prasad which had accidentally injured Km. Sheela and had also hit deceased Gayatri who succumbed to her injuries. The evidence adduced by the witnesses examined on behalf of the accused, according to Learned Counsel, has not been shaken or discredited in any manner in the cross-examination. Coupled with the injuries suffered by the accused for which there is no explanation forthcoming the defence version is eminently acceptable. In any case the said version casts considerable doubt on the prosecution case. Learned Counsel has further submitted that the injuries sustained by the accused could not have been self-inflicted inasmuch as the accused were arrested immediately after the incident and their medical examination was conducted while they were in custody. Pointing to the previous enmity between the two families and the free exchange of assault and use of fire arms by either parties, it is submitted that no case for invoking the liability u/s 302 of Penal Code is made out so as to warrant the conviction of the accused-Appellants. In any case, according to Learned Counsel, Section 149 Indian Penal Code will have no application for the purpose of determination of the liability of any of the accused in the present case.

7. Opposing the contentions advanced on behalf of the Appellants, the learned State counsel has submitted that the prosecution witnesses, particularly the injured eyewitnesses, have given a consistent version of the occurrence and the precise and specific role of each of the accused. No inconsistency, muchless any contradiction, is discernible. On the other hand, according to the learned State counsel, the defence version is highly improbable. In the complaint lodged by accused Ram Vishambhar (Exh. Ka-11) there is no mention of the injuries sustained by any of the accused. Apart from the aforesaid vital omission Learned Counsel has pointed out the inconsistency between the version as stated in Exh. Ka-11 and the version narrated by accused Ram Vishambhar in his statement recorded u/s 313 Code of Criminal Procedure as regards the place of occurrence. It is also pointed out that the incident took place in the house of the complainant where the dead body of Gayatri Devi was found lying and not as claimed by accused Vishambhar either in the FIR (Ex-Ka-11) or in his statement recorded u/s 313 Code of Criminal Procedure. The above, according to the Learned Counsel, would go to show the utter falsity of the claim of the accused. Insofar as the injuries on the accused are concerned, Learned Counsel has pointed out that such injuries are simple in nature. Furthermore, the possibility of the said injuries being self-inflicted cannot be ruled out inasmuch as according to the prosecution witnesses a gun shot was heard from the inside the house of the accused Ram Vishambhar. It is also contended that the injuries sustained by the accused being simple, absence of any explanation there for will not erode the credibility of the prosecution version.

8. Five witnesses to the alleged crime were examined by the prosecution out of which PW-1 Bhagwat Prasad is the first informant who had lodged the FIR and PW-5 Rang Pal is an independent witness. PW-2 Ram Sanahi, PW-3 Girija

Shankar and PW-4 Sarju Prasad are the injured eye witnesses. The version of the aforesaid five witnesses is in substance the same. According to the aforesaid eye witnesses while the Holi Dahan procession was proceeding and had reached the house of accused Raj Bahadur, the said accused started abusing PW- 4 Sarju Prasad and had pointed a country made pistol at him i.e. PW-4. Thereafter, according to the witnesses, Sarju Prasad ran away to his house and informed about the incident to Rameshwar, Bhagwat Prasad (PW-1), Ram Sanehi (PW-2), Ram Khilawan and Girija Shankar (PW-3) who were sitting inside the house. While PW-4 Sarju was narrating the incident to his family members all the six accused persons came to the spot. While the accused Raj Bahadur and Manni Lal were armed with country made pistols the remaining four accused were armed with lathis. According to the eye witnesses the accused were shouting that the family of the complainant should be done away with as they were old enemies. It is the consistent version of the prosecution witnesses that the accused armed with lathis assaulted the family of the complainant and the accused Manni Lal fired at Ram Sanehi hitting him on his head. Thereafter accused Ram Bahadur fired at Sarju but the shot missed him and, instead, hit Sheela causing injuries on her arm. Thereafter accused Ram Sanehi fired a second shot at Sarju which once again missed him and instead hit Gayatri Devi who fell down and died instantaneously. Thereafter all the accused persons entered the house of Ram Vishambar. A little later firing was heard from inside the house of Ram Vishambhar. According to the eye witnesses all the accused could be identified as the incident had occurred on a moonlit night and further there was a lantern burning at the door of the house of Rameshwar.

9. The injuries sustained by PWs 2, 3 and 4 as well as those suffered by injured Sheela were proved by the prosecution by examining PW-9 Dr. G.S. Gaur and PW-10 Dr. Y. Vishwakarma who had examined the injured persons on different dates i.e. 21.3.1981, 22.3.1981 and 24.3.1981. The prosecution had also examined Dr. S.K. Singh (PW-6) who had conducted the post mortem of the deceased. On the basis of the evidence of the said witness i.e. PW-6 and the post mortem report (Exh. Ka-2) the prosecution had sought to establish that the deceased Gayatri had died on account of gunshot injuries.

10. As against the aforesaid evidence adduced by the prosecution to establish the charges levelled against the accused, the defence had examined four witnesses. The evidence tendered by DWs 2, 3 and 4 would require specific notice. DW-2 Dr. S.N. Mishra (Jail Doctor) had examined accused Jagroop on 23.3.1981 and accused Sahdeo and Manni Lal on 27.3.1981. He had certified that the injuries found on the accused were simple and superficial. DW-3 Jagdev Prasad had been examined to prove that the accused Jagdeo was not present at the place of occurrence and DW-4 Ram Karan was examined to prove that it is the complainant party who were the aggressors and it is on account of the firing resorted to by PW-2 Ram Sanehi and PW-4 Sarju that Gayatri Devi had died. Coupled with the above, the absence of any explanation on the part of the prosecution with regard to the injuries on the accused will also have to be

carefully weighed while considering the culpability or otherwise of the accused-Appellants with regard to the crime alleged against them.

11. Insofar as the evidence of DW-3 Jagdev Prasad and DW-4 Ramkaran is concerned there appears to be certain inherent lacunae which makes it difficult for us to accept the defence version so as to conclude that the same casts any serious doubt on the prosecution story. If accused Sarju, Ram Sanehi and Girija Shankar had suffered gun shot injuries in the course of the same incident, surely, the said fact would have found a mention in the complaint/FIR lodged by Ram Vishambar (Exh.Ka-11). The said fact, though goes to the root of the defence version, is conspicuously absent in Exh. Ka-11. Two different versions with regard to the place of the occurrence has been unfolded by the defence. While in statement recorded u/s 313 Code of Criminal Procedure accused Ram Vishambhar had stated that on the day of occurrence Holi Dahan was performed in his field at the instance of Bhagwat Prasad and Others and as he had asked them not to perform Holi Dahan, Sarju and his associates had beaten him with fists and kicks seeing which his sons Jagroop, Manni Lal and Sahdeo had came to his rescue whereupon they were fired at by Sarju and others. As against the aforesaid version, the FIR version narrated by accused Ram Vishambhar is to the effect that on 20.3.1981 at about 10.30 pm accused Jagroop was coming to his house from the place of Holi celebrations when PW-4 Sarju started abusing him and at that very time PW-2 Ram Sanehi and PW-3 Girija Shankar armed with guns and PW-4 Sarju armed with country made pistol had threatened him (accused Jagroop) with murder and had started beating Ram Vishambar and further that when accused Jagroop tried to rescue his father, Girija Shankar (PW-3) fired as a result of which Jagroop sustained fire arm injuries. Not only the said versions are inconsistent with each other both are belied by the fact that the dead body of the deceased Gayatri Devi was found in the house of Rameshwar.

12. The above lacunae, in our considered view, when considered in the backdrop of the consistent version of the prosecution witnesses makes the defence version unworthy of acceptance.

13. The next question that has to be addressed is the effect of the injuries sustained by the accused Jagroop, Sahdeo and Manni Lal. According to the defence the said injuries were sustained in the course of the same incident. All the said injuries have been proved by the evidence of DW-2 Dr. S.N. Mishra who had conducted the medical examination of the accused while they were in police custody. No explanation, whatsoever, has been offered by the prosecution with regard to the said injuries. On the aforesaid basis, it is contended that in the course of the incident in question there had been an exchange of fire from both sides. It is not possible to label the accused as the aggressors. Therefore, according to the defence no liability u/s 302 Indian Penal Code can be attributed to any of the accused. In any event, as there was a free exchange of fire between both the sides, common object to commit any particular offence cannot be attributed to the accused and Section 149 of Indian Penal Code cannot be

invoked in the present case.

14. We have carefully considered the above aspect of the matter. In this regard, we have scrutinized the evidence adduced by the prosecution witnesses as well as by the defence. The prosecution witnesses have been clear, consistent and categorical in stating that they could see and recognize each of the accused as the incident had occurred on a moonlit night and also there was a lantern burning in the house of Rameshwar. The said witnesses have been equally emphatic in saying that they had not noticed any injuries on any of the accused persons after the incident was over. The injuries suffered by accused, though gun shot injuries, have been stated by DW-2, Dr. S.N. Mishra to be simple and superficial injuries. Occurrence of firing inside the house of accused Ram Vishambar after the main incident was over has been deposed to by the prosecution witnesses with a fair amount of clarity and consistency. Despite the above we would not venture into the reasons that had led to the aforesaid injuries on the accused inasmuch as the nature of the injuries on the accused being simple and superficial the same can be ignored on the basis of principles of law laid down by this Court which have virtually set at rest the issue raised on behalf of the accused. In this regard the observations of this Court in Para 40 of the report in *Ram Pat and Others Vs. State of Haryana*, would be significant and therefore may be usefully extracted below:

40. It has furthermore well settled that whereas grievous injuries suffered by the accused are required to be explained by the prosecution, simple injuries need not necessarily be. Non explanation of simple injuries of the nature suffered by the accused would not be fatal. In *Hari Vs. State of Maharashtra*, this Court held:

30. On the other question, namely, non-explanation of injury on the accused persons, learned Counsel for the Appellant has cited a decision in *Lakshmi Singh and Others Vs. State of Bihar*, In the said case, this Court while laying down the principle that the prosecution has a duty to explain the injuries on the person of an accused held that non-explanation assumes considerable importance where the evidence consists of interested witnesses and the defence gives a version which competes in probability with that of the prosecution case.

31. But while laying down the aforesaid principle, learned Judges in paragraph 12 held that there are cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This would "apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries." Therefore, no general principles have been laid down that non-explanation of injury on accused person shall in all cases vitiate the prosecution case. It depends on the facts and the case in hand falls within the exception mentioned in paragraph 12 in *Lakshmi Singh* (supra).

15. In the present case, taking into account the evidence tendered by the prosecution witnesses and having regard to the nature of the injuries sustained by the accused, we are of the view that the absence of any explanation on the part of the prosecution with regard to the injuries suffered by the accused will not effect the core of the charges levelled against the accused-Appellants. All the six accused on the day of the occurrence had assembled in front of the house of Rameshwar. They were armed with lethal weapons and were threatening to kill the family members of the complainant. Initially the accused persons had assaulted the family members of the complainant with lathis. Thereafter accused Manni Lal fired at PW-2 Ram Sanehi from the weapon he was carrying and injured him. Accused Raj Bahadur fired twice at PW-4 Sarju. Both the shots had missed the target and had instead, caused injuries to Kr. Sheela and one of the shots fired by the said accused Raj Bahadur had resulted in the death of Gayatri Devi. On the said facts, we can find no error in the conviction of the accused Raj Bahadur u/s 302 read with Section 301 Indian Penal Code as well the conviction recorded against the said accused Raj Bahadur and accused Manni Lal u/s 307 Indian Penal Code. We are, further, of the view that the facts proved by the prosecution clearly establishes that the accused persons had formed an unlawful assembly the common object of which was to cause death of the members of the family of the complainant. The remaining accused, therefore, are liable u/s 149 Indian Penal Code for the death of Gayatri Devi and also for the lesser offences committed u/s 307 and 323/149 Indian Penal Code in the course of prosecution of the common object of the unlawful assembly. It is also our considered view that the conviction of the two sets of accused under Sections 147 and 148 Indian Penal Code has been correctly made. As the sentences for the lesser offences have been directed to run concurrently with the sentence of life imprisonment imposed on each of the accused there will be no occasion for us to cause any interference with any of the sentences imposed.

16. Accordingly, we find no merit in either of the appeals so as to warrant interference with the judgment and order dated 23.8.2007 passed by the High Court of Allahabad. Consequently, both the appeals shall stand dismissed and the convictions and sentences recorded against each of the accused shall stand affirmed.