

(1996) 07 AHC CK 0114

In the Allahabad High Court

Case No : Government Appeal No. 2456 of 1980

The State of U.P.

APPELLANT

Vs

Shiva Pratap and Others

RESPONDENT

Date of Decision : 03-07-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 417
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (1997) CriLJ 1664

Hon'ble Judges : N.L. Ganguly, J;B.K. Sharma, J

Bench : Division Bench

Advocate : Dy. G.A, for the Appellant; V.C. Katiyar, for the Respondent

Final Decision : Dismissed

Judgement

N.L. Ganguly, J.—This Government Appeal against the order of acquittal dated 31-7-80 passed by the III Addl. Sessions Judge, Fatehpur in S.T. No. 249 of 1979. The State proceeded with the sessions trial against the opposite parties Shiva Pratap, Indrapal, Kallu and Kandhai, accused-respondents u/s 302/34 IPC. The Sessions Judge, Fatehpur was pleased to a quit the respondents of the charge.

2. We have heard Sri Mahmood, learned A.G.A. and perused the record in detail.

3. The F.I.R. of the case was lodged at 10.35 a.m. on 24-9-79 at P.S. Jahartabad Distt. Fatehpur for the occurrence which took place the same day at about 8 a.m. in Village Faizabad situated at a distance of 4 miles south of the police station. The prosecution case depended on the evidence of eye witnesses Ram Autar and Brij Lal, PW 1 and PW 5, respectively and the evidence of Dr. V.K. Tiwari (PW 2) who had conducted the post mortem examination. Besides the formal witnesses of PW 3 Ram Singh, Head Constable, PW 4 Ram Babu who carried the dead body for mortuary and I.O. Sri Jai Kishan Singh PW6.

4. The prosecution case, as disclosed in the F.I.R. was that on the date of

occurrence, the deceased Ram Asrey at about 8 a.m. had gone to his field for digging the corner to his field and also to collect some fodder from the field. He had carried with him a "fowra" and sickle. When he was going to the different field for cutting the fodder at about 8.30 A.M., he had reached the field of Ram Kishore. In the mean time from the southern side from the field of Jwar, Shiva Pratap, Indrapal, armed with country-made pistols, Kallu armed with an axe and Kandhai armed with a lathi, surrounded Ram Asrey. Shiva Pratap accosted to kill him and he may not be spared. Ram Asrey on seeing the accused-respondents, ran towards the field of Ram Kishore. In the mean time, accused Shiva Pratap fired at him. He fell down, after he had fallen Indrapal at very close range had fired on him. Shiva Pratap in the mean time refilled the country-made pistol and again fired at him. Kallu and Kandhai also assaulted Ram Asrey with kulhari, axe and lathi.

5. The informant and his brother Brij Lal (PW 2) was working in the other field. Ram Kishore, Raj Bahadur were working in the field of Ragi. The witnesses saw the occurrence. It is said that they had gone challenging the accused persons but the accused-opposite parties escaped threatening the witnesses. When the informant Ram Autar reached near the victim, Ram Asrey, saw that he was breathing his last and died there. Shiva Pratap Singh accused respondent is the son of the cousin of the informant. It is said that about the fields at Khairabad and tube-well there was dispute going on between the informant and Ram Asrey deceased and Shiva Pratap On account of this enmity, Shiva Pratap killed the brother of the informant. Two fired empty cartridges were recovered from the place of occurrence.

6. The prosecution examined two eye witnesses of fact Ram Autar PW 1 and Brij Lal PW 5 who was the brother of the deceased Ram Asrey.

7. After lodging of the FIR, the case was registered as proved by PW 3 Ram Singh. Thereafter investigation started, proceedings for inquest were taken, dead body was sent to the mortuary, after sealing the dead body in cloth-through Ram Babu PW 4 who identified the dead body before the Doctor who conducted the post mortem examination.

8. Dr. V. K. Tripathi PW 2 had conducted the post mortem examination of the dead body of Ram Asrey on 25-9-79 at 2 P.M. He found the following ante mortem injuries on the dead body of the deceased :

1. Multiple gun shot wound of entry in the area of 6" x 2" on the left side of lower part of face and left side of neck, upper part. They are brain cavity deep. Blackening and tattooing present.

2. Gun shot wound of exit 1" x 1/2" x brain cavity deep on the right side face near tragus of right ear. Margins lacerated and everted. It is enter communicating with injury no. 1 with fracture of right temporal and middle cranial fossae.

3. No injury has been put against serial No. 3.
4. Gun shot wound of exit 1" x 3/4" x nasopharynx x deep on the right side face, adjacent to right ear lobule inter-connected with injury No. 1.
5. Lacerated wound 2" x 1/4" x scalp deep on the right parietal region of head.
6. Lacerated wound 1" x 1/4" x scalp deep on the right side head 3" above the upper part of left ear.
7. Lacerated wound 1" x 1/2" x scalp deep on the occipital protruberance.
8. Abrasion 2" x 1/2" on the upper part of right anterior axillary fold.
9. Abrasion 3" x 2" on the tip of left shoulder.
10. Lacerated wound 1 1/2" x 1/2 " x muscle deep on the left shoulder.
11. Incised wound 2" x 1/2" x bone deep on the back of upper part of left scapular region.
12. Gun shot wound of entry 3 in number. Size 1/2" x diameter x muscle deep on the middle part of flexer aspect of left fore arm. Three gun shots found lodged in the external aspect of middle part of left fore arm.
13. Lacerated wound 1 1/2" x 1/2" x muscle deep on the dorsal side of left hand between middle and index finger.
Metacarpal area. Metacarpal bone of middle finger fractured.
14. Lacerated wound 1" x 1/2"x muscle deep on the palmer aspect of left arm in between middle and ring finger.
15. Contusion 3 1/2" x 1" on the posterior lateral aspect of middle part of left arm.
16. Gun shot wound of entry 1" x 3/42 x left chest cavity deep on the front side of chest left side 5" above the left nipple. Medial end of left clavicle fractured. Blackening and tattooing present. The piece of wadding material found lodged.
17. Gun shot wound of entry three in number on the left lateral side of chest. Each size is 1/4" x 14" x cavity deep underneath fracture of 7th and 8th ribs, fractured on left side outer part 6" below the axillary.
18. Gun shot wound of entry three in number in an area of 2" x 1" on left side of back 1/2" lateral to the 9th and 10th body of vertebra and there is fracture of 9th and 10th of left ribs on the posterior part, each quarter inch x 1/2" x chest cavity deep left side.
19. Multiple contusion on the upper third part of left side back.
20. Lacerated wound 1/2" x 1/4 x muscle deep on the back of base of right middle finger.

21. Contusion 3" x 1" x on the back in the right scapular region.

22. Contusion 4" x 3/4" on right side and outer side of chest.

9. Nine pellets were found in left chest and three in left fore-arm. In all 12 pea sized shots and wadding piece were taken out sealed in an envelope and were sent to the Superintendent of Police, Fatehpur through proper channel.

10. Internal examination revealed that the membranes were lacerated on the right side and so was of the brain. The base was fractured in middle cranial fossa right side fractured. Left pleura lacerated. Larynx, Trachea was also lacerated. Left lung, pericardium heart lacerated. Two pound and two ounce blood found in the chest cavity. The large intestine was full of fecal matter.

11. In the opinion of the Medical Officer, the death of Ram Asrey was caused due to shock and haemorrhage as a result of gun shot injuries. It was possible that Ram Asrey might have died at 8.30 A.M. on 24-9-79.

12. The learned A.G.A. placed the entire evidence on record and vehemently submitted that there was no justification for passing the judgment of acquittal when there are two eye witnesses namely Ram Autar PW 1 and Brij Lal (PW 5). The learned counsel submitted that the learned Sessions Judge while acquitting the accused-opposite parties had erroneously taken, number of gun shot injuries on the deceased and disbelieved the eye witnesses and committed a manifest error in appreciation of evidence. He submitted that the presence of PW 1 Ram Autar and PW 5 Brij Lal could not have been doubted and disbelieved. The learned counsel submitted that the appreciation of evidence by the court below is wholly perverse and no person of average common knowledge of law would interpreter in the manner the Court below has interpreted,

13. The learned counsel for appellant Sri Mahmood has not disputed the place of occurrence, rather submitted that the place of occurrence is fixed and the presence of the witnesses is established by the evidence on record. It would be necessary for this Court to appraise the evidence to see whether the findings arrived at by the learned Sessions Judge, are perverse.

14. A perusal of the judgment of the Court below shows that the accused-opposite party Shiva Pratap is related to Ram Asrey PW 1 and Brij Lal PW 5, as stated and there is no doubt about it. The sole crux if the matter would be whether the prosecution succeeded in proving the case beyond all reasonable doubts against the accused opposite parties, the manner of assault and the persons involved in the commission of the offence. A perusal of the ante mortem injuries on the person of the deceased shows that injury Nos. 1, 12, 16, 17 and 18 are five gun shots of entry. The learned A.G.A. submitted that it is true that in the F.I.R. and evidence of eye witnesses three specific gun shot injuries are said to have been caused. He submits that these five gun shots entry are from three shots. Five numbers of entry wounds are not sure test to arrive at a conclusion that five different shots have been given. He tried to show from the injury on the

person of the deceased that injury Nos. 12 and 16 were caused by one shot and injuries No. 17 and 18 were caused by the other shot and injury No. 1 was an independent shot. We have seen the ante mortem injuries in the post mortem report and the statement of the Doctor. At no stretch of imagination, it could be said that injury Nos. 12 and 16 were caused by same shot. Injury No. 12 was definitely from a distance whereas injury No. 16 which has blackening and tattooing and fracture of the clavicle bone clearly show that it would not be the dispersal of the pellets of the shots causing the injury No. 12. Similarly the site of injury Nos. 17 and 18 when carefully examined also shows that they could not have been caused by one shot. None of these could be caused by dispersal of pellets from the same shot. The learned Sessions Judge also arrived at a conclusion after appraisal of the evidence that there were distinct of 5 shots and the version given in the FIR and statement of PW 1 Ram Autar and PW 5 Brij Lal are contradictory. The medical evidence and the ocular evidence are in variance.

15. The legal position is quite settled and the Apex Courts repeatedly observed as in *Bahal Singh Vs. The State of Haryana*, which is quoted as under :

It is true that the powers of the High Court in considering the evidence on record in appeals u/s 417 Cr.P.C. are as extensive as its powers in appeals against convictions but that Court at the same time should bear in mind the presumption of innocence of accused persons which presumption is not weakened by their acquittal. It must also bear in mind the fact that the appellate judge has found them not guilty. Unless the conclusions reached by him are palpably wrong or based on erroneous view of the law or that his decision is likely to result in grave injustice, the High Court should be reluctant to interfere with his conclusion. If two reasonable conclusions can be reached on the basis of the evidence on record then the view in support of the acquittal of the accused should be preferred. The fact that the High Court is inclined to take a different view of the evidence on record is not sufficient to interfere with the order of acquittal.

This view had been taken relying the decision *Ram Jag and Others Vs. The State of U.P.*,

16. The learned counsel for the respondents Sri Amar Saran also pointed out that the post mortem report shows that large intestine of the deceased was full of fecal matter. He submitted that normally no person would go to work in the field without easing himself. The learned Sessions Judge also considered in his judgment. Since no specific question was put to the witnesses Ram Autar and Brij Lal, whether the deceased before going to work in the field had actually eased or not. No definite conclusion would be drawn. Since after appraisal of the evidence, we are satisfied that the learned Sessions Judge rightly arrived at a decision that presence of Ram Autar PW 1 and Brij Lal PW 5 was doubtful, we do not find any good reason to differ from the said finding. The learned Sessions Judge was right in arriving at a conclusion that the presence of informant Ram Autar and PW 5 Brij Lal was doubtful in the case at the time of the incident. The other two witnesses in the FIR said to have witnessed the occurrence, have not

examined in the case, as such no advantage could be given to the prosecution for their own omission. Since the prosecution has failed to prove the case against the accused-respondents conclusively beyond all reasonable doubt, we are of the view that the Government appeal is liable to be dismissed.

17. The appeal is dismissed.