

Reserved

Neutral Citation No. - 2023:AHC:219016-DB

Court No. - 3

Case :- CRIMINAL APPEAL No. - 169 of 1998

Appellant :- Satish

Respondent :- State of U.P.

Counsel for Appellant :- R.B.Sharma,Dhirendra Kumar,Lal Mani Singh,Nitin Raj Singh,Raj Singh,Ram Babu Sharma,Ulajhan Singh Bind

Counsel for Respondent :- Govt. Advocate,Vijay Shyam Bhaskar

Hon'ble Siddhartha Varma,J.

Hon'ble Manish Kumar Nigam,J.

This Appeal has been filed against the judgement and order of the Special Judge & Additional Sessions Judge, Bulandshahr dated 24.1.1998 by which the appellant Satish has been convicted under Section 302 I.P.C.

Upon an alleged murder having taken place of one Dharamvir, a First Information Report was got lodged by his elder brother Satpal on 24.9.1993 at 21:10pm with an allegation that the deceased Dharamvir was killed by Satish S/o Prem and Satpal S/o Bheem Singh at 7:30 pm on 24.9.1993. It was alleged that Dharamvir (deceased) when had returned from the Mela (fete) at Jewar, he had gone to the Gher (assembly point) of the village and from there Dharamvir and the first informant Satya Prakash were going to the house, where they were residing, for having food. It has been alleged in the First Information Report that the deceased

Dharamvir was walking a little ahead of the first informant Satya Prakash and when the deceased reached the house of Chhidda Badhai then from the side of the house of Mohammad Shareef the accused Satish and Satpal who were having country made pistols in their hands accosted the brother of the first informant and after hurling abuses on him reached near him and Satish fired at him on his waist and at that point of time the deceased turned back and when he turned back Satpal also fired on the deceased and thereafter, the deceased fell on the *khadanja*. Upon a hue and cry being raised by the first informant, Udaiveer S/o Rati Ram and Rajveer S/o Vedram reached the spot. The first informant-Satya Prakash tried to apprehend the accused-assailants but they threatened him and ran away towards the eastern direction. It is alleged in the First Information Report that on the roof of Mohammad Sharif there was an electric bulb and in the light of the electric bulb the first informant alongwith Udaiveer and Rajveer had seen the whole incident. It has been stated that the first informant had left the dead-body with his relatives and had gone to the police station to get the F.I.R. lodged.

The F.I.R. was followed by an investigation and thereafter a charge-sheet was submitted by the Police. Upon the submission of charge-sheet, the Court of Additional Sessions Judge, Bulandshahar, on 02.02.1994 framed charges against Satish S/o Prem and Satpal S/o Bheem Singh under Section 302 read with

section 34 of I.P.C. When the accused persons, upon being told of the charges refused to admit to them, trial commenced.

During the trial, six prosecution witnesses were examined and thereafter, they were also cross-examined. PW-1 was the first informant-Satya Prakash and Rajveer (PW-2) was the person who, it was alleged, reached the spot upon a hue and cry being raised by the first informant and the deceased. PW-3-Jagpal Singh was the Constable who had prepared the chick. PW-4 Chandrapal Singh was the Constable who had taken the body for post mortem to the doctor. PW-5 Dr. Kishan Kumar had conducted the post mortem. PW-6 Charan Singh Malik was the Investigating Officer.

Upon analysing the evidence which came before the Court below, learned Sessions Judge acquitted the accused Satpal S/o Bheem Singh under Section 302 read with section 304 of I.P.C but convicted the appellant Satish S/o Prem under Section 302 of the I.P.C. Aggrieved thereof Criminal Appeal being Criminal Appeal No. 169 of 1998 was filed by Satish S/o Prem. Similarly against the acquittal of Satpal the State of Uttar Pradesh filed a Government Appeal being Government Appeal No. 1558 of 1998 which has already been abated by the order of this Court dated 20.3.2023.

The prosecution to prove its case, had produced six witnesses. PW-1 the first informant Satyaprakash had in his examination in chief stated that the accused Satish and Satpal were known to him and that they were friendly with him. Dharamvir was the younger brother of PW-1. He had stated while getting his statement recorded that around 9 months earlier at about 07:00 pm Dharamvir was coming back from Jewar after seeing a *mela* (fete). Dharamvir had come to the Gher of the village and similarly the first informant had also assembled at the Gher. It may be noted that Gher is an assembly point in various villages in our State. At around 07:15 pm from the Gher the first informant alongwith his younger brother Dharamvir proceeded to their house where they resided, for having food. The deceased Dharamvir who was the younger brother of the first informant was walking a little ahead of the first informant. When the two of them reached near the house of Chhedda Badhai then from the side of the house of Mohammad Sharif the two accused came and hurled some abuses on them. While this was happening Rajveer and Udaiveer who were also of the same village, came on the spot. Satish, it has been stated, with the firearm in his possession had fired on Dharamvir and when the bullet struck him, he turned around and when he turned around, Satpal who was the other accused hit Dharamvir on the forehead. It has been stated by PW-1 that he tried to apprehend the accused persons but he could not,

as he was threatened by the fire-arm. Consequently, the accused ran away in the eastern direction. PW-1 has stated that he had seen the incident with the help of the light which came from the electric bulb which was installed at the house of Mohammad Sharif. He narrated the whole incident to Ompal who had scribed the First Information Report. The PW-1 was cross-examined and in his cross-examination, he stood firm on what he had stated in the examination in chief. However, in the cross-examination, he had denied the suggestions which were made from the side of the defence that Dharamvir might have been killed on account of enmity between Dharamvir and certain other persons as there were certain criminal cases against Dharamvir. He has also stated that in the lane where the dead-body was lying, no tempo could have reached. He has also mentioned about the presence of a lantern at the site where the dead-body was lying. In his cross-examination, he has mentioned about certain individuals like Udaiveer S/o Nanka Singh and Rajveer S/o Haribansh Lal reaching the place of incident. During that statement which he made, he had stated that after Udaiveer and Rajveer had reached the spot then he had reached the place of occurrence.

PW-2 Rajveer who, it has been alleged, reached on the spot when the PW-1 and the deceased had raised a hue and cry had also stated that the incident had occurred at 07:30 pm on 24.09.1993 and he has also given the same version as was given

by PW-1 with regard to the abuses being hurled on Satya Prakash and the deceased. He has also stated that earlier Satish had fired on Dharamvir and thereafter when he turned to run away then Satpal had also fired a bullet on Dharamvir, because of which Dharamvir had fallen down. He also mentioned that when the incident had occurred, the first informant-Satya Prakash and Udaiveer were present. In the cross-examination, he also stood firm. However, he has stated that on the date of the incident the accused-Satish and the deceased Dharamvir had, on the same tempo, come back after seeing the fete at Jewar and he had also stated that he had in fact seen them together at around 07:00 pm. He has stated that the dead body was taken away on a Metador which is a four wheeled vehicle.

PW-3 the Constable, who had prepared the chick, proved the same. PW-4 who had taken the dead-body from the place of incident on a tempo, however, was declared hostile. PW-5 Dr. Kishan Kumar, who had done the post mortem, had proved the injuries and he had stated that there were three injuries. The injury no. 1 was an entry wound of 2.5 X 2.5 cm on the left side of the waist. He had stated that there was no blackening or tattooing. The doctor had proven the two other injuries and had stated that the injuries no. 2 and 3 had occurred because of the fact that the deceased had fallen down. PW-6 is the Investigating Officer, Sri Charan Singh.

The accused Satish and Satpal also gave their statements under Section 313 of Cr.P.C. and had denied having committed the crime.

Learned counsel for the appellant against the judgment of conviction with regard to Satish made the following submissions :-

- (i) He submits that as per the PW-1 and PW-2 there ought to have been two gun shot injuries as in the First Information Report and also in the statements of the PW-1 and PW-2, it has been clearly stated that two shots were fired but he submits that only one fire arm injury was found on the waist;
- (ii) Learned counsel for the appellant had submitted that though the PW-1 and PW2 had stated that the fire shots were from a close range, the doctor had stated that there was no blackening and tattooing and, therefore, he submits that it could not be said with conviction that the firing was done from a close range. Still further, while making his submissions, learned counsel for the appellant has stated that there was no exit wound which means that the firing was done from a distance and therefore, though the bullet entered the body of the deceased, it did not have enough force to come out of the body. He has, relying upon the statement of the doctor-PW-5, stated that the injuries no. 2 and 3 were on account of the fall which the deceased had sustained after the gun shots were made;

(iii) Learned counsel for the appellant has, relying upon the averment made in the First Information Report stated that the statement in the F.I.R. that the first informant and his brother had raised hue and cry could not be believed as when the gun was fired on the deceased, it was not possible for the deceased to have made any hue and cry. In fact he submits that if the firing was done from a close range then there was no possibility for the deceased to have raised any hue and cry and therefore, he submits that the presence of Udaiveer S/o Ratiram and Rajveer S/o Vedram, who allegedly had appeared on the spot, becomes doubtful.

(iv) Learned counsel for the appellant has further stated that even though in the First Information Report it has been stated that Udaiveer S/o Ratiram and Rajveer S/o Vedram had reached the spot, only Rajveer was brought in as a prosecution witness and Udaiveer was not brought in either as prosecution witness or as Court witness and, therefore, there was a big lacuna from the side of prosecution and this would go in favour of the defence. Had Udaiveer appeared in the witness box, he would have told the correct thing. Relying upon the statement made by PW-1 that the body was to be seen by a gas lantern, which statement he has made 19.09.1994 while being cross-examined, learned counsel for the appellant states that the statement made in the First

Information Report that there was an electric bulb at the house of Mohammad Sharif, becomes false.

(v) Learned counsel for the appellant again relying upon the statement made in the cross-examination on 19.09.1994 submits that the appellant had stated that he had in fact reached after Rajveer S/o Harbansh had reached the spot and therefore, he has stated that the whole case in the First Information Report gets falsified wherein he had stated that the first informant alongwith his brother alone were there at the place of occurrence.

(vi) Learned counsel for the appellant relying upon the statement made by PW-2 that Satish and Dharamvir were coming together from the fete which was being held at Jewar shows that the case put forth by the prosecution was a false one. Had Satish wanted to kill Dharamvir while he was coming from Jewar then he could have found an opportunity to kill him and finish him off there itself. He would definitely not wait to kill Dharamvir in the presence of his brother the first informant Sri Satya Prakash. Since the learned counsel very heavily relied upon the statement of PW-2 with regard to the fact that both Dharamveer and Satish had come together from the fete, the portion which is relevant is being reproduced hereunder :-

"घटना वाले दिन मैंने मुलजिम सतीश व मृतक धर्मवीर को उनके घर व घेरो में देखा था। यह दोनों एक टैम्पू से (Sic) से मेला देखकर आये थे। मैंने इन दोनों को शाम के लगभग 7 बजे देखा था। मैंने टैम्पू में यह नहीं देखा कि क्या कोई अन्य भी बैठा था या नहीं।"

(vii) Learned counsel for the appellant has read out the statements of PW-1 and PW-2 and has tried to lay stress on the fact that throughout PW-1 and PW-2 had given statements with regard to the distance of the dead-body from the houses of Charan Das and Mohammad Sharif and has stated that if the site plan is seen then the distances as were given by PW-1 and PW-2 were absolutely wrong. Thus, he submits definitely a doubt in the mind of the Court would be created. They were local people and they ought to have known the distances like the backs of their heads.

(viii) Learned counsel for the appellant, therefore, submits that the accused could not be convicted on the sole eye-witness account of PW-1. He states that when the statements of PW-1 & PW-2 with regard to the fact that another shot was fired by the co-accused Satpal was disbelieved, it would be unsafe to convict the appellant Satish.

(ix) Learned counsel for the appellant has stated that the PW-1 had very categorically stated that no tempo etc. would reach the spot where the dead-body was lying but he states that the PW-4 had, in his statement, stated that the dead-body was brought by a Metador. Learned counsel for the appellant has submitted that the PW-1 had stated that the spot where the dead-body was lying, no tempo could have reached. PW-2, however had stated that the dead-body was taken by a Matador but the PW-4 had stated that

the dead-body was taken by a tempo. Learned counsel for the appellant has further stated that PW-2 had stated that the dead-body was lying on the face (*pat*) but the Constable PW-4 had stated that dead-body was lying on the back (*chit*).

In reply learned A.G.A. for the State has submitted that it mattered little that the first informant-PW-1 and PW-2 had stated that there were two gun shot injuries but only one was to be found. He also states that it was of no consequence if PW-2 was stating that Satish and Dharamvir had been seen coming together from the fete at 07:00 pm by the PW-2. He also states that if there was a minor discrepancy with regard to the source of light i.e. the source of light from the electric bulb of Mohammad Sharif and that of the lantern that would not be of much consequence. He submits that the eye-witness account of PW-1 was there and that could not be disbelieved.

Having heard Sri R.B. Sharma, learned counsel for the appellant and learned A.G.A., we find that mention about the two gun shot injuries in the First Information Report and also in the statements of PW-1 & PW-2 were not believable. The statements of the witnesses PW-1 & PW-2 were consistent in their examination. However, the fact was that there was only one gun shot injury on the body of the deceased and this finding itself could be sufficient enough to acquit the appellant. The Court also finds that there was no blackening and tattooing, as had been

stated by the doctor PW-5. The only inevitable conclusion therefore would be that the shot was fired from a distant place. Here also the story of the prosecution that the gun shot was fired from a close range is falsified. Also we find that there was no exit wound. This also shows that the fire shot was made from a distance.

The other arguments which have been made with regard to the vehicle not entering the lane where the dead-body was lying; with regard to the statement made by PW-2 that Satish and Dharamvir were seen coming together from Jewar at 07:00 pm; about there being a discrepancy in the statement with regard to the source of light could also not be ignored by the Court. We also find that there were discrepancies in the injuries as were alleged by the PW-1 and PW-2 and the injuries which were actually there on the body of the deceased. Therefore, a doubt is definitely created in the minds of the Court that the PW-1 and PW-2 were not giving a correct picture. The story of the prosecution with regard to two fire shots is falsified. The source of light is definitely doubtful for the reasons as have been stated above. Also it is not clear as to how the dead-body was removed i.e. by a tempo, a Matador or by any other vehicle. Doubtful as it is as to which vehicle the dead-body was carried in, the Court also finds that the witnesses were definitely not clear as to how

wide the road was. PW-1 was not sure as to whether the four wheeled vehicle could reach the spot.

Definitely therefore upon going through the record we are convinced that PW-1 and PW-2 were not reliable witnesses. Also though PW-2 Rajveer was made to appear in the witness box, it remains a mystery why Udaiveer, who was also allegedly present, was neither made a prosecution witness nor was he called by the Court.

Definitely we find substance in the submission of the learned counsel for the appellant that the case which had been built up against the accused was a doubtful one and once a doubt has been created, as has been laid down in the Full Bench decision of this Court in **Rishi Kesh Singh vs. The State reported in AIR 1970 Allahabad 51 (FB)**, it becomes a case of clear acquittal. In the instant case definitely, the testimony of PW-1 and PW-2 become very shaky and doubtful.

Under such circumstances the Criminal Appeal No. 169 of 1998 is **allowed**. The appellant Satish is acquitted and he may be released forthwith if he is not required to be in jail in any other criminal case.

Order Date :- 17.11.2023
M.S. Ansari

(Manish Kumar Nigam, J.) (Siddhartha Varma, J.)