

A.F.R.

Neutral Citation No. - 2023:AHC:221487

Court No. - 75

Case :- CRIMINAL REVISION No. - 1468 of 1990

Revisionist :- Sankatha And Others

Opposite Party :- State

Counsel for Revisionist :- P.M.N. Singh, Anil Kumar

Verma, Deena Nath

Counsel for Opposite Party :- A.G.A.

Hon'ble Umesh Chandra Sharma, J.

1. Heard Sri Anil Srivastava, assisted by Sri Anil Kumar Verma, learned counsel for the revisionists, Sri Roshan Singh, learned A.G.A. for the State at length and perused the material available on record.

2. This criminal revision has been preferred against the judgment and order of conviction and sentencing passed by Assistant Sessions Judge, 5th Varanasi, in S.T. No. 183 of 1989 (State Vs. Sankata and four others) under Sections 147, 148, 149, 307 I.P.C. and Section 25 of the Arms Act and Crl. Appeal No. 27 of 1990 (Sankatha and Four Others Vs. State) dated 17th August, 1990 by the Sessions Judge, Varanasi.

3. The learned A.S.J. convicted accused Sankatha u/s 147, 148, 307 I.P.C. and Section 25 of the Arms Act and awarded one month's simple imprisonment u/s 147 I.P.C. three months simple imprisonment u/s 148 I.P.C. and 7 years rigorous u/s 307 I.P.C. and fine of Rs. 500/-. He also sentenced the accused Sankatha for five months of rigorous imprisonment and fine of Rs. 100/- u/s 25 of the Arms Act with default stipulation of three months simple imprisonment. The learned A.S.J.

convicted the rest of the accused persons u/s 147, 307 read with Section 149 I.P.C. and convicted accused Shobha, Pandhari, Subhash and Chhote Lal for one month's simple imprisonment under Section 147 I.P.C. and five years rigorous imprisonment to each of the accused under Section 307 read with Section 149 I.P.C. and fine of Rs. 200/- to each of the accused with default stipulation of one month's simple imprisonment.

4. The learned A.S.J. allowed the appeal partly and in place of Section 307 I.P.C. convicted the accused Sankatha u/s 324 read with Section 149 I.P.C. and sentenced him two years rigorous imprisonment with a fine of Rs. 200/- with one month's additional imprisonment in case of non deposition of the fine but acquitted him under Section 147 I.P.C. and maintained the conviction and sentencing u/s 148 I.P.C. and awarded three months simple imprisonment, maintained the conviction under Section 25 Arms Act and awarded five months rigorous imprisonment with a fine of Rs. 100/- and in case of default, one month's simple imprisonment.

5. Co-accused Shobha, Pandhari, Chhotelal and Subhash were convicted u/s 147, 324 read with Section 149 I.P.C. with a sentence of one month's simple imprisonment u/s 147 I.P.C. and two years rigorous imprisonment u/s 324 read with Section 149 I.P.C. together with a fine of Rs. 200/ and in case of default of payment, one month's simple imprisonment.

6. The revisionists have taken the grounds that the judgment and order of both the Courts below are against the weight of the evidence on record. They have failed to appreciate the evidence. Both the Courts have erred in relying upon the tented, interested, inimical, contrary and highly unreliable prosecution evidence and no conviction can be

sustained on such evidence. The impugned judgments are perverse and based on conjectures and surmises. No independent witness has been produced by the prosecution while several are named in the F.I.R. and the charge-sheet. No explanation for their non-examination has been offered, therefore, u/s 114 G of the Indian Evidence Act, an adverse presumption will have to be drawn.

7. The witness Laldhari, cousin of the informant/injured is an accused against the revisionist Sankatha which was pending in the Court of J.M. II Varanasi. No offence has been proved against any of the accused-revisionists. Four of the accused-revisionists were quite empty-handed and no overt role has been attributed to them. The only role is assigned to Sankatha because earlier to this incident, an F.I.R. was lodged by Sankatha against Lal Dhari and others about beating. No intention to kill the injured is proved against any of the accused-revisionist in view of the superficial injury of the informant on his foot alone and the possibility of manufacturing and self suffered injury can not be ruled out. No proper explanation has been offered by the prosecution to the numerous injuries suffered by the four accused persons in the incident. The prosecution could not prove the motive and recovery of the firearm and cartridges from the possession of accused, Sankatha. The Courts below have overlooked the fact that there was no source of light on the spot. The learned Courts have wrongly disbelieved the reliable defence version and have wrongly concluded that the place of occurrence is the house of the informant. Even the I.O. has not fixed the correct place of occurrence. The house of accused Sobha, much closer than the house of the informant has not been shown by the I.O. The place of occurrence is also doubtful, as no blood was found there.

8. The Courts below has not applied the principles of law correctly and have wholly ignored the contradiction with regard to the use of hockey and the deposit of katta in police station. The alleged Katta was not sent to the ballistic expert for examination. The witness Laldhari, has accepted the truth that the complainant had fired, but later on he corrected himself and twisted and falsely implicated the accused because of enmity. Both the Courts below failed to appreciate the fact that in case of country made pistols and cartridges, the standard distance for causing injury and charring is not applicable. The doctor has found blackening near the wound by mistake or error. The injury may not be a katta/gun shot injury.

9. The revisionists are young and have not previously been convicted. Both the Courts below have failed to consider the provision of Section 360 Cr.P.C. and the revisionists were not given the benefits of First Offenders Act for which they are entitled. Therefore, the revision be allowed and the judgment and order of both the Courts below be set aside.

10. In brief, facts of the case are that an altercation took place on 22.4.1987 regarding irrigation from the Government tubewell water between the complainant Suresh Prasad of village Machhli Gav , P.S. Phoolpur, Varanasi, due to this enmity Shobhnath, and other co-accused persons reached on the door of the informant at 9:00 P.M. On 22.4.1987, started abusing him and his family members. He also threatened to give a lesson to the complainant. Sankatha then fired from his pistol which caused firearm injury to the complainant's leg and he fell down. On his alarm when Lal Dhari, Vikrama, Baba, Dev Raj, Bhagwan Das and others came, accused started running away, but except Shobhnath, all were caught

hold on the spot. The accused Sankatha was found in possession of one country made pistol, two live cartridges and one empty cartridge. All the accused persons were brought to the police station and F.I.R. Ex. Ka-3 was lodged. After investigation charge-sheet was submitted. The case was committed to the Court of Sessions. The accused persons were charged under Sections 147, 148, 307 read with Section 149 I.P.C. The accused Sankatha was also charged u/s 25 of the Arms Act.

11. Following witnesses were examined by the prosecution:

i	P.W.1	Suresh Prasad, Informant
ii	P.W.2	Dr. P.K.Srivastava
iii	P.W.3	Laldhari
iv	P.W.4	Constable Ashwani Kumar
v	P.W.5,	S.I. Ram Siromani Upadhayay

12. Defence witness :

D.W.1	Dr. P.K. Srivastava
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13. Documentary Evidence by the prosecution:

i	Ex. Ka-1	written complaint
ii	Ex. Ka-2	Injury Report,
iii	Ex. Ka-3	Chik F.I.R,
iv	Ex. Ka-4	Carbon Copy G.D.

v	Ex.Ka-5	Site plan
vi	Ex. Ka-6	Recovery Memo
vii	Ex.Ka-7	Prosecution sanction u/s 25 Arms Act,
viii	Ex. Ka-8	Charge-sheet under Sections 147, 148, 149 and 307 I.P.C.
ix	Ex. Ka-9	Charge-sheet u/s 25 Arms Act.

14. Material Exhibits:

i	Ex. Ka-1 to Ex. Ka-4	Country-made pistol 12 bore, two live cartridges and one empty cartridge
ii	Ex. Ka-5	Truss of the above materials

15. Defence Evidence:

Ex. Kha-1 to Ex. Kha - 4	Injury reports of Chhote Lal, Subhash, Sankatha, Pandhari.
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Findings

16. The learned counsel for the revisionist has taken ground that though the names of several independent witnesses are mentioned in the F.I.R. and charge-sheet but none of them has been examined. Only Lal Dhari, the cousin of the informant/injured who is an accused in a case of Sankatha which is pending in the Court of J.M. II, Varanasi, has been examined as P.W.3. In this regard, it is submitted by the State that nowadays independent witnesses do not come forward to

be a witness due to the fear of enmity. Even in civil cases, hardly any independent witness comes forward for deposition in favour of the plaintiff or the defendant. He further contended that an injured witness is at high pedestal and his presence on the spot can not be denied. The only duty of the Court is to scrutinize his evidence with care and caution. When an offence is committed at the house of the injured/informant, he himself and his cousin would be natural witness and their evidence can not be thrown away because no independent witness has been examined.

(a) In ***Mukesh Vs. State for NCT of Delhi and Others, AIR 2017 SC 2161 (three Judge Bench), Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537, Sadhu Saran Singh vs. State of U.P., (2016) 4 SCC 357*** and in so many other cases, it has been held that if a witness examined in the Court is otherwise found reliable and trustworthy, the facts ought to be proved by that witness need not be further proved through other witnesses, though there may be other witnesses available who could have been examined but were not examined. Non-examination of material witness is not a mathematical formula for discarding the weight of the testimony available on record. However, natural, trustworthy and convincing it may be---- the court can convict an accused on the statement of a sole witness even if he is relative of the deceased and non-examination of independent witness would not be fatal to the case of the prosecution.

(b) In this case, P.W.1 is the injured witness and P.W.3 is the eye witness and the accused persons except one accused were arrested on the spot by the public.

(c) In ***Dharni Dhar Vs. State of U.P., (2010) 7 SCC 759; Dalbir Kaur Vs. State of Punjab (1976) 4 SCC 158*** it has been held that non-examination of independent eye witnesses is inconsequential if the witness was won over or terrorised by the accused.

(d) In ***State of Haryana Vs. Krishn, AIR 2017 SC 3125, Mukesh (supra) and Bhagwan Jagannath (Supra)***, it has been held that the deposition of an injured should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies for the reason that his presence on the scene stands established in the case and it is proved that he suffered the injuries during the said incident. In *Bhagwan Jagannath (supra)* it has also been held that the public prosecutor is not bound to examine all witnesses.

(e) From the evidence of P.W.1 and P.W.3, it has also been established that the accused persons were arrested on the spot by public after the incident and in the course of their arrest u/s 43 of Cr.P.C. Some injuries had occurred to them. For these injuries present on the persons of accused persons, the informant and his family members or P.W.3 or other public person were not prosecuted by the accused persons. It also establishes the presence of the accused on the date, time and place of the occurrence and thus the prosecution case is also proved beyond reasonable doubt. Thus, the plea that no independent witness has been examined by the prosecution is immaterial and is accordingly rejected.

17. The revisionist has taken the ground that a criminal case on behalf of revisionist Sankatha was pending against the witness P.W.3, Lal Dhari, in the Court of J.M.II Varanasi, therefore, the accused-revisionists were falsely implicated in

the case. According to this Court a previous enmity may be a reason to commit an offence and also to implicate falsely in a criminal case. In this case, the informant P.W.1 has received a firearm injury which cannot be said to be superficial or artificial in nature and the same cannot be made by bearing the pain or by taking the risk. This is a case of direct evidence for which proof of motive is immaterial. All the accused persons and the witnesses are the resident of the same village, they know and recognized each other. The witnesses have proved the immediate motive against the accused persons which occurred same day, which was the cause of the commission of the crime. Thus, the plea that the accused persons were falsely implicated on account of previous enmity with P.W.3 is rejected as it has no force.

18. A plea has been taken by the accused revisionists that no proper explanation has been offered by the prosecution to the injuries suffered by the four accused persons in the incident. It has already been concluded that in the course of arrest some injuries had occurred to the accused persons. The mob was furious as accused Sankatha had fired at the informant with a mala fide intention, but it did not hit the vital part of his person. Thus, the proper and plausible explanation has already been given by the prosecution with regard to the injuries suffered by the accused persons, therefore, the accused persons can not be benefited on account of such injuries.

19. A plea has been taken by the revisionists that there was no source of light on the spot, therefore, there was no occasion to recognize the accused persons. According to this Court, the persons of both the sides are the residents of same village. They recognize them since their birth, therefore, there

was no problem in their recognition. A resident of same village may be recognised by the villagers by gesture, voice, height, clothes etc. Except one accused when all accused persons were arrested from the spot at the time of the commission of crime, the plea that there was no source of light is of no avail. However, in the evening, lanterns and earthen lamps are commonly used by the villagers, which has sufficient light to identify any person. It is not a mid night incident that some unknown miscreants came and ran away after committing the crime. On the basis of the above discussion, the plea regarding lack of source of light, is also rejected.

20. A plea has been taken by the accused-revisionists that the place of occurrence has not been fixed and the same is not proved. According to this Court from the evidence of P.W.1 and P.W.3 and from the site plan and its related oral evidence, it has been proved beyond reasonable doubt that the place of occurrence is the same which has been mentioned in the F.I.R. Mere not showing the house of the accused Shobha is not fatal for the prosecution. The accused-revisionists have also not suggested any other place of occurrence, therefore, mere plea that the place of occurrence has not been fixed and proved by the prosecution is a mere plea which has been taken only for the sake of argument. Thus, this plea is also accordingly rejected.

21. A plea has been taken that no blood was found on the spot. According to this Court, it is not a case in which one or two litre blood oozed and fell on the earth. The place of occurrence was visited later on and several persons had wandered there. The alleged place of occurrence was not

restricted by any authority, hence if no blood was found on the spot, the same is not fatal for the prosecution.

22. A plea has been taken that country made pistol was not sent to the FSL or to the armourer for its examination. According to this Court, when two live cartridges, one empty cartridge and one country made pistol in running condition were found from the possession of accused Sankatha and it was not questioned by the accused persons, no such plea can be taken. P.W.2 Dr. P.K Srivastava, had examined the injured P.W.1, he had found three stabbed wounds on the left ankle, he had also found blackening with dried blood on the first wound and oozing blood on second and third injury. He opined that all the three injuries were caused by fire arm but were simple in nature. He also opined that even all the three injuries may be caused by one fire. Such injuries may occur when any fire has been made from a close range within 3-5 feet. The learned counsel for the accused revisionists argued that the standard provided in the books cannot be applied in a case where a country made pistol has been used. It is true that if a fire has been made from a country made pistol, the standard provided in books such as Modi Medical Jurisprudence and Parikh Medical Jurisprudence shall not apply literally but by and large there would not be much difference and the oral evidence would prevail. Thus, this plea is also rejected accordingly.

23. Both the Courts have given concurrent findings of the fact that the accused persons attacked the house of the informant and accused Sankatha fired at Suresh Prasad due to previous dispute occurred at 12:00 noon regarding irrigation of field from Government Tubewell. Except accused Shobhnath, rest were arrested on the spot by the villagers

alongwith weapons, which were later on handed over to the concerned police at the police station. The contradiction regarding the manner of arrest and providing the materials recovered from the possession of the accused persons are not material.

24. A plea has been taken that the accused persons and the arm alleged to be recovered from the possession of accused Sankatha are not in consonance as per the evidence of recovery memo and the evidence of P.W.1 and P.W.3.

25. As per Section 43 of the Cr.P.C., any private person may arrest an accused who has committed a non-bailable and cognizable offence in his presence.

26. For convenience Section 43 of the Cr.P.C is noted herein below:

Any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender; and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer; or, in the absence of a police officer.

27. From the above, it is concluded that since a cognizable offence had been caused by the accused persons, therefore the informant P.W.1, P.W. 3 and the villagers were entitled to arrest the accused persons on the spot and to hand them over to the concerned police station. Though in this regard some variations have been noticed but since the same are not material, therefore, the same are not fatal for the prosecution and the plea regarding this aspect, is also rejected.

28. From the perusal of the injury report, it comes out that all the accused persons are responsible for forming an unlawful assembly and committing crime in furtherance of a common object out of which one accused was armed with deadly weapon, therefore, all the accused persons would also

be liable for the offence committed by accused Sankatha. It does not appear necessary to discuss the law relating to Chapter VIII of the Indian Penal Code, as it has already been discussed and concluded by both the Courts at District level.

29. Though the fire arm injury had been caused to the informant, P.W.1 by a fire arm but the target was not the core of the body and it injured the left ankle of the injured, therefore, the learned Appellate Court has rightly found it to be a case under Section 324 I.P.C. It does not appear that the intention of accused Sankatha or other accused persons was to kill the informant Suresh Kumar, but it appears that they wanted to teach him a lesson and to demoralise him forever. But so far as the findings of the learned Appellate Court regarding conviction of the accused persons are concerned, it is not liable to be interfered with.

30. So far as the sentencing is concerned, since it is a case of 1987, more than 36 years have passed and the case remains under Section 148 and Section 324 read with Section 149 I.P.C. and Section 3/25 Arms Act, there is no previous or post criminal antecedent to the credit of the accused persons, therefore, it would be feasible and proper to release the accused persons on probation for good conduct as no useful purpose would be served by sending them to jail to serve the rest of the sentence.

31. Coming to the point of desirability of extending the benefit of Probation Act to the accused/revisionist in ***Sitaram Paswan and another Vs. State of Bihar, AIR 2005 SC 3534***, Hon'ble Supreme Court held as under:-

"For exercising the power which is discretionary, the Court has to consider circumstances of the case, the nature of the offence and the character of the offender. While considering the nature of the offence, the Court must take a realistic view of the gravity of the

offence, the impact which the offence had on the victim. The benefit available to the accused under Section 4 of the Probation of Offenders Act is subject to the limitation embodied in the provisions and the word "may" clearly indicates that the discretion vests with the Court whether to release the offender in exercise of the powers under Section 3 or 4 of the Probation of Offenders Act, having regard to the nature of the offence and the character of the offender and overall circumstances of the case. The powers under Section 4 of the Probation of Offenders Act vest with the Court when any person is found guilty of the offence committed, not punishable with death or imprisonment for life. This power can be exercised by the Courts while finding the person guilty and if the Court thinks that having regard to the circumstances of the case, including the nature of the offence and the character of the offender, benefit should be extended to the accused, the power can be exercised by the Court even at the appellate or revisional stage and also by this Court while hearing appeal under Article 136 of the Constitution of India."

32. In ***Mohd. Hashim Vs. State of U.P and others, AIR 2017 SC 660***, Hon'ble Supreme Court opined as under:-

"20. ...In Rattan Lal v. State of Punjab AIR 1965 SC 444. Subba Rao, J., speaking for the majority, opined thus:- "The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. Broadly stated, the Act distinguishes offenders below 21 years of age and those above that age, and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. While in the case of offenders who are above the age of 21 years absolute discretion is given to the court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case; including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Sections 3 and 4 of the Act."

33. As far as the conviction part is concerned, this Court does not find any illegality, perversity or infirmity in the order passed by the courts below but keeping in view the discussion made above, the sentence inflicted on the accused-revisionist requires modifications.

Order

34. The revision is partly allowed with the following modifications:-

The conviction of the accused-revisionists by courts at District level is upheld. The sentence of accused-revisionists is modified to the tune that they are provided benefit of Section 4 of the UP Probation of Offenders Act and are released on probation on the condition that they will keep peace and good conduct for two years from today and shall file two sureties to the tune of Rs.10,000/- each along with their personal bond before the district probation officer, Varanasi and also an undertaking to the effect that they shall maintain peace and good behaviour during the period of two years from today. In case of breach of any of the conditions mentioned above, the revisionists will be subjected to undergo the sentence as directed by the appellate court. The bonds aforesaid will be filed by the revisionists-accused within one month from today, before the District Probation Officer, Varanasi, U.P., under the intimation to the concerned court.

35. A certified copy of the order be also be sent to the court concerned and District Probation Officer, Varanasi, U.P., for compliance.

Order Date :- 22.11.2023
S.Verma/*Vinod*

{Umesh Chandra Sharma,J.}