

Neutral Citation No. - 2023:AHC:202955

Reserved on 11.10.2023

Delivered on 19.10.2023

Court No. - 85

Case :- CRIMINAL APPEAL No. - 866 of 2021

Appellant :- Vivek Tiwari

Respondent :- State of U.P. and Another

Counsel for Appellant :- Surendra Tiwari, Ashok Malaviya, Rajrshi Gupta

Counsel for Respondent :- G.A., Aniruddh Kumar, Udai Chandani

Hon'ble Mayank Kumar Jain, J.

1. Heard Sri Dilip Kumar, Senior Advocate assisted by Sri Surendra Tiwari, learned counsel for the appellant, Sri Gopal Swaroop Chaturvedi, Senior Advocate assisted by Sri Udai Chandani, learned counsel for the respondent no.2 and Sri S. K. Ojha, learned A.G.A. for the State.

2. This criminal appeal under Section 14-A(2) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act has been preferred by the appellant with the prayer to set aside the bail rejection order dated 25.01.2021 passed by the learned Special Judge (SC/ST Act), Agra in Bail Application No. 145 of 2021, arising out of Case Crime No. 49 of 2020, under Sections 364, 506, 302, 201 I.P.C. & 3 (2) V of SC/ST Act, Police Station M.M. Gate, District Agra.

3. The case of the prosecution is that Dr. Yogita Gautam was the sister of the informant. She was a doctor in S.N. Medical College, Agra (O.B.S./ Gynaecology). She completed her post graduation on 18.08.2020. On

18.08.2020 at around 4:10 PM she called the informant and informed him that the appellant, who was posted as Medical Officer in a hospital in Jalaun at Orai, threatened to kidnap and then kill her and her family members. The appellant also threatened to get her degree cancelled. She sent the mobile numbers of the appellant to the informant through which these threatening calls were made. She sounded very low and was weeping. The informant immediately started for Agra and reached the room Dr. Yogita Gautam at 9:30 PM but found it to be locked. Basis the CCTV footage, the informant came to know that she left her room at 7:30 PM and some unknown person dragged her into a Tata Nexon car. The mobile number of his sister was found to be switched off since 6:30 PM and she was missing from 7:30 PM.

4. It is submitted by the learned Senior Counsel for the appellant that the appellant is innocent and has been falsely implicated in this case due to ulterior motive. On 19.8.2020 at 10:08 AM it was entered in the GD No.10 of the Police Station concerned that an information about a dead body was given by Maan Singh Chaukidar. He had received an information on 19.08.2020 at around 08:30 AM that a female dead body aged about 25 years was lying on the road near Kunj Bihari Colony leading to Ashma road. On the basis of this information, he further informed the concerned Police Station. It is submitted that the inquest of the dead body was conducted on 19.08.2020 at 10:40 AM and till then no FIR was lodged by the informant.

5. The learned counsel for the appellant vehemently argued that in the inquest report, the injuries found on the person of the deceased were mentioned as on her neck caused by the sharp edged weapon, the right side head and the left hand. No injury caused by firearm was noted. The dead body of the deceased was sent for post mortem on 19.08.2020 at 1:00 PM showing the approximate day and time of death as 18.08.2020

and 8:00 PM respectively but no FIR was lodged. It is also submitted that the post-mortem report disclose that an unsealed body was received for post-mortem while under the normal circumstances always a sealed body accompanied with relevant papers is sent for post mortem. The unsealed body of the deceased sent for post mortem also indicates the *malafides* of the investigating officer against the appellant.

6. Learned counsel for the appellant referred the inquest report brought on record narrating that in the recital “*Baal kaale hain baayen hath mein lage hain*” the words after “*Baal kaale*” were not found by this Court in the carbon copy of the inquest report when the original register was summoned by this Court. After the words “*Baal kaale*” the space was absolutely blank. The learned counsel argued that this interpolation with the record has deliberately been made against the appellant to falsely implicate him.

7. Learned counsel for the appellant submitted that by these argument he desires to indicate that the entire proceedings conducted before post-mortem were suspicious and it was only to falsely implicate the present appellant. He submitted that after the post-mortem, FIR was lodged on 19.08.2020 at 05:15 PM.

8. It is further submitted that false arrest and recovery of a Tata Nexon car of the appellant was shown on 20.08.2020 at 10:30 AM near Ramada Hotel Crossing Lucknow Expressway Agra which was entered in the GD no. 24 dated 20.08.2020 at 12:37 PM made by S.S.I. Ganga Prasad. However, memo of the alleged recovery of the vehicle Tata Nexon was not prepared. On the same day, the arrest of the appellant along with his vehicle was again shown to be made by the Circle Officer Kotwali Agra along with his team. The arrest and the recovery of the vehicle is not supported by any independent witness.

9. Learned Counsel for the appellant put forth his argument that the appellant was apprehended from his house/ residence in District Hospital, Jalaun at Orai by the Police (S.O.G.) on 19/20.08.2020 at about 9:00PM. Thereafter, he was taken to Agra by the Police. In the morning of 20.08.2020 in a daily newspaper 'Hindustan', a news article was published along with the photograph of the appellant sitting in S.O.G. office. Therefore, the arrest of the applicant and recovery of the vehicle on 20.08.2020 at about 10:30 AM is totally false. The car was parked in the house of the appellant in Kidwai Nagar, District Kanpur Nagar and it was lifted by the Agra Police on 19/20.08.2020 at about 2:00 AM in the presence of his mother and sister. This fact was supported with an information obtained under the RTI Act by the mother of the appellant, who also moved an application to SHO Kidwai Nagar about taking away of the car.

10. During the investigation, Section 3(2)(V) of SC/ST Act was added and the investigation was received by the Circle Officer.

11. It has been strenuously urged that the licensee revolver of the appellant was shown to be recovered upon pointing of the appellant. The first FSL report does not support the version of the prosecution as it has not been found that the bullet found in the body of the deceased was fired from the same revolver that belonged to the appellant. On the weapon and the swab, no conclusive opinion was given by the lab. Other articles sent to the FSL were also not found to be conclusively proved.

12. It is also submitted that no motive has been assigned to the appellant to commit the crime. The case is based on circumstantial evidence and none of the events form a complete chain to indicate that the appellant was the author of the crime. It is also submitted that the appellant is languishing in jail since 21.08.2020 having no criminal

history to his credit. The chargesheet against the appellant has been submitted on the basis of an unfair investigation.

13. The learned counsel for the appellant concluded his arguments by stating that the case of the prosecution rests upon the circumstantial evidence. Not a single event based on the circumstances of the case indicate towards the involvement of the appellant. He placed reliance upon **Sharad Birdhi Chand Sarda Vs State of Maharashtra, 1984 (4) SCC 116** and submitted that none of the conditions as laid down by the Hon'ble Apex Court in the aforementioned judgement is fulfilled in the present case. Each and every event of this case is doubtful and does not indicate towards the guilt of the appellant.

14. Per contra, learned Senior Counsel for the informant and the State and learned A.G.A. vehemently opposed the bail application and submitted that 12 prosecution witnesses have been examined so far and the witnesses of fact have categorically stated about the active involvement of the appellant in the crime. Only six prosecution witnesses are yet to be examined and the trial is nearing its logical end. So far as the arguments advanced by the learned counsel for the appellant are concerned, they are subject to adjudication by the Trial Court on the basis of appreciation of the evidence adduced before it.

15. It is also submitted that so far as the information obtained through R.T.I. is concerned, that would also be subjected to appreciation of evidence by the Court concerned. There is no reason to falsely implicate the appellant since the deceased Dr. Yogita Gautam was not inimical to the appellant. C.D.R. report discloses that number of calls were made by the appellant to the deceased. The appellant also called both the mother and the brother of the deceased before the incident.

16. It is further submitted that the deceased Yogita Gautam was last seen with the appellant in his TATA Nexon Car in the C.C.T.V. footage.

The informant was shown the photograph of the deceased and he immediately identified it to be of her sister Dr. Yogita Gautam. The appellant was arrested on 20.08.2020 alongwith TATA Nexon Car at 10.30 AM from Agra. The bullet was extracted from the body of the deceased at the time of her post-mortem which was fired from the licensee revolver of the appellant. On the pointing out of the appellant, a revolver, cartridge, mobile phone and purse of the deceased were recovered from his official residence at Orai. These articles so recovered were sent for forensic examination. The hair obtained from TATA Nexon Car and the hair of the deceased were also sent for D.N.A. testing.

17. It is also argued that CDR of the mobile number of the appellant disclosed that he called the deceased 20 times and sent multiple messages to her on 18.08.2020. He called Sweta Goyal, land lady of the deceased on 18.08.2020 from two different numbers and inquired about Dr. Yogita Gautam. The chain of circumstances are complete and enough to establish the complicity of the appellant/accused. S.S.I. Ganga Prasad and Jaibir Singh saw the appellant driving his vehicle on 18.08.2020 at the barrier of main gate of Lady Loyal Hospital near which the dead body of the deceased was lying. They also stated in their respective statements that they saw Dr. Yogita Gautam come and sit in the same TATA Nexon Car. The deceased Dr. Yogita Gautam was emotionally blackmailed and threatened by the appellant. It is also submitted that the statements of PW1 Dr. Mohindra Kumar (brother of the deceased), PW2 Ambesh Kumar (father of the deceased), PW3 Smt. Asha (mother of the deceased), PW4 Rahul Goyal & PW5 Sweta Goyal (land-lord and land-lady of the deceased respectively), PW8 Anil Kumar (witness of last seen evidence) have been recorded during the trial and they had deposed against the appellant. PW7 S.S.I. Ganga Prasad is also the witness of last seen evidence and he arrested the appellant. Learned counsel for the informant

placed reliance on [2020] 2 AILLJ 300, **R. P. Goenka Chairman M/s Gramophone Com Vs. State of U.P.** and submitted that newspaper report itself is not admissible in evidence because the same itself is a hearsay secondary evidence and not admissible unless reporter is examined or any person before whom the incident has occurred is examined and prove the fact as such.

18. Concluding their arguments, learned Senior Counsel and learned A.G.A. submitted that under the facts and circumstances of the case and evidence adduced so far by the witness of the prosecution and taking into consideration the entirety of the case, the appellant is not entitled to be released on bail.

19. In rebuttal, learned counsel for the appellant submitted that if Dr. Yogita Gautam was having an apprehension from the appellant, why she would accompany the appellant even after receiving threat call from him as alleged. So far as the allegation that the appellant is not co-operating with the trial is concerned, without the cooperation by the appellant, it would not be possible for the Trial Court to record 12 prosecution witnesses during the trial.

20. It is also submitted that in the first FSL report dated 29.09.2020, it was concluded that

“ विवादित 32 बोर बुलैट्स चिन्हित EB-1,EB-2पर 32 बोर रिवाल्वर नं० FG59588 चिन्हित [1/2020](#) से तुलना करके निश्चित अभिमत निर्धारित करने हेतु व्यक्तिगत विशेषतओं का अभाव है ” .

21. When the first FSL report did not support the version of the prosecution that the bullet which was extracted from the body of the deceased at the time of postmortem was fired by the licensee revolver of the appellant, the prosecution made another attempt and obtained

subsequent report from the forensic laboratory. In this report dated 14.10.2020, findings read thus:

“ परिणाम संख्या-2 के संदर्भ में व्याख्या के साथ स्पष्ट अभिमत निम्न है— विवादित 32 बोर बुलैट्स चिन्हित EB-1,EB-2,बोर Lands/Grooves की संख्या , Lands/Grooves की दृष्टि से तुलना की दिशा में एवं व्यास के सापेक्ष रिवाल्वर नं0.FG59588 चिन्हित 1/2020 से रिकवर की गयी परीक्षार्थ बुलैट्स चिन्हित TB-1,TB-2 से जातिगत विशेषताओं में समान है, अर्थात् रिवाल्वर नं0.FG59588 चिन्हित 1/2020 से चलाये जाने की संभावना प्रतीत होती है ”

22. The learned counsel relied on this report and stated that subsequent FSL report only described the category of 0.32 bore of the revolver but it does not indicate that licensee revolver was used in the crime. It indicates that the prosecution made its best effort to implicate the licensee revolver of the appellant in the incident. So far as the swab taken from the car and the body of the deceased are concerned, the F.S.L. report discloses that disintegrated blood was found.

23. Considering the facts and circumstances and the arguments advanced by learned senior counsel for the parties, documentary and oral evidence available on record, nature and gravity of the offence and complicity of the appellant, I do not find it to be a fit case for bail.

24. Since the trial court has passed the impugned order after appreciating the evidence available on record, there is no occasion to interfere with the finding of fact recorded by the trial court, hence, the present criminal appeal lacks merit and deserves to be dismissed.

Accordingly, the criminal appeal is **dismissed**.

25. Vide order dated 02.12.2022, the Register sent by the District Magistrate, Agra was kept in the safe custody of Registrar General of this

Court. Registrar General of this Court is directed to return the Register to the concerned authority forthwith. Registrar General be communicated to comply with the direction accordingly.

26. However, the trial court is directed to expedite the trial and make every endeavour to conclude the same expeditiously, preferably, within a period of six months from the date of receipt of certified copy of this order without granting any unnecessary adjournment to either of the parties subject to full co-operation by the appellant, if there is no legal impediment.

(Mayank Kumar Jain, J.)

Order Date-19.10.2023/Mohit & A.K.T.