

Neutral Citation No. - 2023:AHC:213049-DB

Court No. - 46

Case :- CRIMINAL APPEAL No. - 816 of 2015

Appellant :- Ehsan

Respondent :- State of U.P.

Counsel for Appellant :- Vaibhav Prakash, Mumtaz Ali, Shad Khan

Counsel for Respondent :- Govt. Advocate, Samir Garg

Hon'ble Ashwani Kumar Mishra, J.

Hon'ble Syed Aftab Husain Rizvi, J.

1. The present appeal has been preferred by the accused appellant Ehsan against the judgment and order of conviction and sentence dated 07.02.2015, passed by the Additional Sessions Judge, Khurja, District Bulandshahr in Session Trial No.737 of 2012 (State of U.P. vs. Ehsan and another) arising out of Case Crime No.271 of 2012 and Session Trial No.740 of 2012 (State of U.P. vs. Ehsan) arising out of Case Crime No.448 of 2012 under Sections 25/27 Arms Act, Police Station Khurja Nagar, District Bulandshahr, whereby the accused appellant has been convicted and sentenced to life imprisonment under section 302/34 IPC with fine of Rs.50,000/-, in default whereof he is to further undergo one year additional imprisonment; under section 394 IPC for 10 years rigorous imprisonment with fine of Rs.30,000/-, in default whereof he is to further undergo six months additional imprisonment; under section 506 IPC (Part II) for two years simple imprisonment with fine of Rs.1,000/-, in default whereof he is to further undergo one month additional imprisonment and; under section 25(1-B)(a) Arms Act with for two years simple

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imprisonment with fine of Rs.2,000/-, in default whereof, he is to further undergo one month additional imprisonment. All the sentences are to run concurrently.

2. The prosecution case proceeds on a written report, according to which, the grandfather (deceased) of the informant (PW-1) had gone to Punjab National Bank with driver Udham Singh (PW-2) and had withdrawn Rs.15 lacs from the bank, which was kept in a blue bag. He was returning home on foot from J.S.K. Ground. At about 11.00 am three miscreants came on a Pulsar Motorcycle and tried to snatch the bag containing money. The bag fell on the ground and the grandfather of the informant tried to protect the amount but in the scuffle one of the miscreants fired on the grandfather and fled with the money. Pawan Kumar (PW-3) son of Raghuraj Singh and Naresh Pratap (PW-5) son of Dharamveer Singh allegedly saw the incident and when these two persons tried to apprehend the miscreants but they fled by extending threats and firing in the air. Informant's grandfather who sustained gunshot injury on his back was taken to the hospital and was later referred to Noida. On such written report/disclosure the First Information Report (Ex.Ka.1) was lodged at 12.15 pm on 12.03.2012 in Case Crime No.271 of 2012 under sections 394, 307, 506, 352 IPC, Police Station Khurja Nagar, District Bulandshahr.

3. The deceased was medically examined before his death on 12.03.2012 at 11.15 am. The injury report is exhibited as Ex.Ka.2. After the death of deceased the inquest (Ex.Ka.7) was started at 01.15 pm on 12.03.2023 and concluded at 01.30 pm. To ascertain the cause of death the dead body was sent for postmortem. The postmortem (Ex.Ka.15) was conducted at 4.30 pm on the same day.

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4. The Investigating Officer has made recovery of empty cartridge and bullet from the spot vide recovery memo (Ex.Ka.13). The clothes worn by the deceased and mobile held by him were sent for forensic examination. The Forensic Science Laboratory submitted its report on 10.04.14.

5. During investigation, a CCTV footage was obtained in which one of the miscreants has been identified as Mohd. Umar, who has not been arrested so far and is reported to be absconding. It is thereafter that statement under section 161 Cr.P.C. was recorded of Islam and Abid on 19.05.2012, according to whom, the offence was committed by Mohd. Umar alongwith accused appellant Ehsan and one Meharban. Islam and Abid were, however, not produced before the Court.

6. The Investigating Officer has recorded the statement of Pawan Kumar (PW-3) and Naresh Pratap (PW-5) under section 161 Cr.P.C., according to whom, the accused appellant Ehsan and Meharban came to the house of PW-3 on 25.05.2012 and confessed their crime. This extrajudicial confession was made in the presence of PW-5. It is thereafter that the accused appellant and Meharban were arrested by the police and on the pointing out of the accused appellant recovery has been made of a pistol and cartridge alongwith a sum of Rs.1,02,000/- in cash vide recovery memo dated 03.06.2012 (Ex.Ka.14). This recovery is alleged to have been made from the house of accused appellant. On the basis of such recovery a First Information Report was lodged against the accused appellant as Case Crime No.448 of 2012 under section 25/27A Arms Act.

7. After concluding investigation the Investigating Officer has submitted chargesheet (Ex.Ka.20) in Case Crime No.448

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of 2012 under section 25/27A Arms Act as also the chargesheet (Ex.Ka.17) in Case Crime No.271 of 2012 under sections 302/34394, 307, 302, 506, 352, 411 IPC on 31.08.2012. The Magistrate took cognizance on the chargesheet vide orders dated 19.07.2012 and 01.09.2012 and committed the case to the Court of Sessions where it got registered as Session Trial Nos. 737 of 2012 and 740 of 2012 of 2011. Both the session trials were consolidated and charges were framed against the accused, who denied the accusations made against him and demanded trial.

8. The prosecution in order to prove its case has exhibited various documentary evidence, noticed above. In addition to exhibited documentary evidence, the prosecution has also produced the oral testimony of informant Ashish Chaudhary as PW-1 as also the other witnesses of fact i.e. Udham Singh as PW-2, Pawan Kumar as PW-3 and Naresh Pratap as PW-5. The other prosecution witnesses i.e. PW-4 and PW-6 to PW-15 are the formal witnesses.

9. The accused appellant has been confronted with the above incriminating materials produced by the prosecution during trial for recording his statement under section 313 Cr.P.C. The accused appellant has stated that he has been falsely implicated in the present case and he is innocent.

10. It is on the basis of such evidence led during trial by the prosecution and upon consideration of the explanation furnished by the accused appellant under section 313 Cr.P.C. that the court below has come to the conclusion that the prosecution has established its case beyond reasonable doubt against the accused appellant and found him to be guilty of committing the offence. Ultimately, the court below has

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convicted and sentenced the accused appellant vide impugned judgment and order, while the accused Meharban has been acquitted since PW-3 and PW5 failed to recognize him when he was produced before the court during trial. Thus aggrieved, the accused appellant is before this Court in the present appeal.

11. Sri Shad Khan and Mumtaz Ali, learned counsels for the accused appellant submits that there is no evidence to implicate the accused appellant in the present case and that the extrajudicial confession made on 25.05.2012 before PW-3 and PW5 is wholly unreliable. It is further submitted that there are no independent witnesses of the alleged recovery which is not proved and, therefore, conviction of accused appellant is unsustainable. Learned counsel further submits that though a firearm is stated to have been recovered and is also sent for forensic examination but its report was never produced during trial. It is thus submitted that the recovery of firearm cannot be pressed against the accused appellant and even the recovery of cash amount is not established.

12. Learned A.G.A. for the State, on the other hand, submits that the court below has rightly convicted the accused appellant and no interference is required in the impugned judgment.

13. We have heard learned counsel for the parties and have perused the materials brought on record, including the original records of the court below.

14. From the materials brought on record it transpires that the incident occurred at 11.00 am on 12.03.2012 while the deceased was returning home on foot from the bank after having withdrawn a sum of Rs.15 lacs. According to the

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prosecution case three unidentified miscreants came on Pulsar Motorcycle and snatched the bag having Rs.15 lacs and also shot dead the deceased. However, the eye witness of the incident, who was with the deceased namely Udham Singh (PW-2), has turned hostile. In his deposition before the court he has stated that the accused appellant was not the person who has committed the offence. The testimony of PW-2 is, therefore, not available for the prosecution to implicate the accused appellant.

15. We have carefully examined the evidence on record so as to ascertain the basis on which the implication of accused appellant has surfaced in the matter. Record reveals that a CCTV footage was made available to the prosecution on 19.03.2012. In this CCTV footage one of the three miscreants, who had gone to the bank, has been identified as Mohd. Umar. According to the prosecution, two persons namely Islam and Abid, who allegedly made a statement under section 161 Cr.P.C. that the offence was committed by the accused appellant alongwith Mehraban and Mohd. Umar, have not been produced during trial by the prosecution. The basis to connect the accused appellant in the offence on the strength of statement of Islam and Abid is thus not established.

16. PW-3 and PW-5 are the persons who have been specified in the FIR as eye witnesses of the incident and have deposed against the accused appellant during trial. Their testimony thus forms the important piece of evidence to prove the prosecution case. PW-3 and PW-5 in their statement recorded under section 161 Cr.P.C. have specified the description of miscreants as unknown and no specific marks of identity has been disclosed to the police by these two witnesses. These

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two witnesses have also not informed the Investigating Officer that they have identified the other two miscreants or that they can identify those two accused.

17. The prosecution in order to establish the link between the offence and the accused appellant has placed reliance upon extrajudicial confession made by the two accused on 25.05.2012 before PW-3 and PW-5. As per PW-3 two miscreants came on motorcycle and confessed their role on the premise that they have been identified by PW-3 and PW-5 and on such basis the accused appellant has primarily been identified as being one of the miscreants, who had committed the offence.

18. We have examined the testimony of PW-3 and PW-5 with reference to alleged extrajudicial confession made by them. PW-3 and PW-5 have stated that they were sitting at the house of PW-3 on 12.05.2012 when three miscreants came on motorcycle at about 08.00 in the morning. The miscreants have stated that PW-3 and PW-5 have identified them and this fact has come to the knowledge of police. They admitted that they have committed big mistake and such fact be not disclosed to the police. It is also stated that one of the miscreants disclosed his name as Ehsan and others have not disclosed their name. It is on this very day that PW-3 and PW-5 have identified the accused appellant with reference to his name. The other accused namely Mehraban has not been identified by PW-3 and PW-5.

19. The evidence in respect of extrajudicial confession does not appear to be convincing. The two witness namely PW-3 and PW-5 in their cross examination have stated that when these miscreants came to their home they made no attempt

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to apprehend them nor any of the neighbours were called to confront these miscreants. PW-3 claims that he was sitting in the room and three miscreants did not enter the house but spoke to them outside the verandah. PW-3 and PW-5 neither noted the registration number of motorcycle nor informed the police on helpline no.100. Neither the informant nor anybody else was informed of such fact. This part of the testimony of PW-3 is relevant and is reproduced hereinafter:-

“जब बदमाश मेरे घर आये थे तो मैंने उन्हें पकड़ा नहीं था। मोहल्ले वालो को भी इकट्ठा नहीं किया था। जब बदमाश आये तो मैं अपने कमरे में बैठा था। बाहर वाले कमरे में ही बैठा था। उस कमरे में किबाड है। बदमाश अंदर नहीं आये थे। बाहर खड़े-खड़े ही बात हुई थी। इनकी मोटर साइकिल का नम्बर भी मैंने नोट नहीं किया था। और न ही 100 नम्बर पर टेलिफोन करके पुलिस को बताया था। मैंने वादी पत्र के भी किसी व्यक्ति को उस दिन सूचना नहीं दिया था। यह कहना गलत है कि एहसान के घर आने वाली बात व पहचानने वाली बात गलत हो।”

20. The extrajudicial confessed is an evidence of weak nature. We otherwise find it difficult to believe that the accused appellant for no reason would come to the witnesses i.e. PW-3 and PW-5, after three months and confess the crime. PW-3 and PW-5 otherwise are not influential persons, who could save the accused. So far as the implication of accused appellant on the basis of statement of Islam and Abid under section 161 Cr.P.C. is concerned, these two persons have not been produced in evidence to connect the accused appellant with the crime. It appears that the prosecution had to introduce an event of the kind so as to establish the identity of the accused appellant as being the perpetrator of crime. This is particularly so, as PW-3 and PW-5 in their first statement made to Investigating Officer, has not disclosed any mark of identity of the miscreants. Even the physical features of the miscreants were not disclosed to the police. This fact is

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clearly admitted by PW-3 in his cross examination during trial, which is relevant and is extracted hereinafter:-

“घटना वाले दिन पुलिस मुझे खुर्जा में जतिया अस्पताल में मिली थी। यह बात सही है कि पुलिस ने प्रथम बार मेरा बयान घटना के छः दिन बाद लिया था। मुझे ध्यान नहीं है कि मैंने पुलिस को अपने बयान में बदमाशों का हुलिया रंग-कपड़ा लम्बाई आदि बता दिया था या नहीं। गवाह को धारा 161 सीआरपीसी का बयान पढ़ाया गया तो उसने कहा कि दरोगा जी को दिये बयान में बदमाशों की लम्बाई चौड़ाई रंग रूप चेहरा, कपड़े वगैरह के बारे में कुछ नहीं लिखा है। यह बात सही है कि मैं बदमाशों को पहले से नहीं जानता हूँ। यह भी सही है कि मैं बदमाशों को पहले से नहीं जानता हूँ। यह भी सही है कि मुल्जिम एहसान को पहले से नहीं जानता हूँ। जेल में मैं मुल्जिमान की शिनाख्त करने नहीं गया था। मैं खुर्जा में जन्म से ही रह रहा हूँ। मुझे नहीं पता कि एहसान अभियुक्त मोहल्ला कस्सावान खुर्जा का रहने वाला है। मुझे अभि० एहसान के वल्लियत व पते की जानकारी नहीं थी और नहीं मैंने जानने की कोशिश की।”

21. Similar statement has been made by the PW-5 in his testimony. From the perusal of testimony of PW-3 and PW-5 we are persuaded to the view that in fact the extrajudicial confession has been introduced merely to implicate the accused appellant and that such extrajudicial confession is otherwise not reliable.

22. We may also note that no test identification parade has been conducted in the matter, otherwise, to establish the identity of the accused appellant.

23. So far as the recovery of firearm and Rs.1,02,000/- in cash from the house of accused appellant is concerned we find that there are no independent witnesses of such recovery. No disclosure statement has been recorded of the accused appellant in that regard. No panchnama has been prepared either. The contents of the disclosure have also not been established by the prosecution. The firearm recovered from the house of the accused appellant has been sent for forensic

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examination but its report has not been produced during trial. There is no explanation furnished by the Investigating Officer as to why such important piece of evidence has not been produced during trial. This is particularly so, as the Investigating Officer has admitted that the firearm was sent for forensic examination. Once that be so, it was expected that the report would be placed and an adverse presumption can be drawn against the prosecution for withholding the FSL report.

24. Coming to the recovery of cash amount Rs.1,02,000/- we find that the prosecution has made no attempt to get the recovered notes identified by any of the prosecution witnesses. The notes recovered were of denomination of Rs.500/- and were in two bundles of Rs.500/- each, having 100-100 notes with four loose note of Rs.500/-. There is no bank slip to connect the identity of these notes. The accused appellant in his statement under section 313 Cr.P.C. has specifically challenged the recovery on the ground of it being fake and manipulated. It was for the prosecution to establish the recovery. There is otherwise a gap of almost two and a half month between the date of incident and the alleged recovery.

25. Learned counsel for the appellant has placed reliance upon a judgment of the Apex Court in Amrik Singh vs. State of Punjab (2022) 9 SCC 402. Facts of this case are somewhat similar to the facts of the present case inasmuch as in Amrik Singh (supra) the appellant was implicated on the basis of recovery of Rs.1 lac and the accused were identified for the first time in court. No Test Identification Parade was conducted in that case also. The Supreme Court noticed the

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facts of the case in para 11 of the judgment, which is reproduced hereinafter:-

"11. At the outset, it is required to be noted that the appellant-accused have been convicted mainly on the identification of the accused by PW 1 in the courtroom and on the recovery of Rs 1 lakh each from the accused persons which were recovered from the places suggested by the accused. Thus, the conviction of the accused in the present case is solely on the identification of the accused by PW 1 in the courtroom. Prior thereto no TIP has been conducted by the investigating agency."

26. The observations made in paras 12 to 15 in Amrik Singh (supra) are relevant and are also extracted hereinafter:-

"12. Now so far as the conviction based on the recovery of Rs 1 lakh each from the accused is concerned, at the outset it is required to be noted that even the learned trial court has also specifically given the finding that the prosecution has failed to prove that the original complainant and the deceased were carrying Rs 5 lakhs cash in the dicky of the scooter as alleged. To connect the accused for having conducted the evidence of loot of Rs 5 lakhs, primarily the prosecution was required to establish and prove that the person from whom the amount which was having to have looted.

13. Thereafter the prosecution is required to establish and prove that the amount which is recovered from the accused is the very amount which the complainant/the person from whom the amount is looted. Even the learned trial court has also not given much stress on the recovery of Rs 1 lakh each from the accused. Be that as it may, we are of the opinion that when the prosecution has failed to prove that the complainant and the deceased were carrying Rs 5 lakhs cash in the dicky of the scooter and it was the very looted amount which was recovered from the accused, the accused cannot be convicted on the basis of recovery of some cash.

14. Now so far as the conviction of the accused on PW 1 — eyewitness identifying the accused in the courtroom and non-conducting the TIP is concerned, while appreciating the said aspect the averments in the FIR which were given by PW 1—eyewitnesses are required to be referred to. It may be true that as per the settled position of law the FIR cannot be encyclopaedia. However, at the same time when no TIP was conducted the first version of the complainant reflected in the FIR would play an important role. It is required to be considered whether in the FIR and/or in the first version the eyewitness either disclosed the identity and/or description of the accused on

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the basis of which he can recollect at the time of deposition and identify the accused for the first time in the courtroom?

15. Having gone through the FIR on the identity of the accused it is stated as under:

"I was driving the scooter and Gian Chand was sitting behind me. When we were at link road shaterwala from Fazilka Abohar G.T. road about 1-1½ kilometre ahead, three young persons reached with us on a scooter from the backside, out of them, two clean shaven young persons having ages of 30-35 years and one Sikh (sardar) who had tied a (Thathi) a piece of cloth having the age of about 30-32 years, who was sitting in the middle was having a .12 bore gun of small barrel all these three young persons while reaching with us tried us to stop. When we did not stop then a clean-shaven young person who was sitting on the rear seat of the scooter thrown chilli powder on our faces and eyes with his hand as a result of which we could not see and we stopped our scooter being helpless and opened our eyes after placing hand on the eyes. In the meantime these young persons stopped their scooters ahead of our scooter and came forward to snatch our scooter. We tried to prevent them, in the meantime, a Sikh young man fired a shot at Gian Chand in a strength way with his .12 bore gun hitting him on the chest as a result of which he fell down on the ground."

Thus, from the aforesaid it is seen that except stating that the accused were three young persons out of which two were clean shaven and the one Sikh (sardar) who had tied a (Thathi) having the age of 30-32 years no further description had been given by the complainant — PW 1. Nothing has been mentioned in his first statement that he had seen the accused earlier and that he will be able to identify the accused."

27. Relying upon the previous judgment of the court the Supreme Court proceeded to hold as under in paras 21 and 22 of the judgment, which are reproduced hereinafter:-

"21. Even applying the law laid down by this Court in the aforesaid decisions and looking to the facts narrated hereinabove, we are of the opinion that it would not be safe and/or prudent to convict the accused solely on the basis of their identification for the first time in the Court.

22. In view of the above and for the reasons stated above, we are of the firm opinion that both, the learned trial court as well as the High Court have committed a grave error in convicting the accused. The judgment and

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orders passed by the learned trial court confirmed by the High Court convicting the accused for the offence under Section 302 read with Section 34 and Section 392IPC, respectively are unsustainable and they deserve to be quashed and set aside and the accused are to be acquitted for the purpose for which they were tried.”

28. It may otherwise be noticed that the manner in which recovery is required to be proved in terms of section 27 of the Indian Evidence Act, 1872 has not been followed. In a series of judgments beginning from the celebrated decision of Privy Council in Pulukuri Kotayya v. King-Emperor AIR 1947 PC 67 till the recent decision of Supreme Court in Bobby Vs. State of Kerala, 2023 SCC OnLine SC 50, as reiterated in Rajesh & Anr. vs. State of Madhya Pradesh 2023 SCC OnLine SC 1202 it is consistently held that Section 27 provides an exception to the prohibition imposed by the preceding provisions and enables certain statements made by an accused in police custody to be proved. The discovery of fact has to be shown to be a consequence of information received from a person accused of any offence, in the custody of a police officer, and thereupon so much of information, as relates distinctly to the fact thereby discovered may be proved. The recovery, in the facts of this case, does not qualify to be evidence in terms of section 27 of the Evidence Act.

29. Although dock identification is a reliable piece of evidence in terms of section 9 of the Evidence Act, but before it could be relied upon the prosecution will have to establish, by producing cogent evidence, the connection of accused with the offence. The prosecution has not been able to establish the facts on the basis of which the accused appellant could be connected to the offence so as to be implicated, therein. The genesis of appellant's implication during the course of investigation is not substantiated or proved. Once the recovery is discarded and it is otherwise found that the

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identity of accused is not established with reference to his physical attributes or the mark of identification etc. the identification of accused for the first time in court would not be reliable.

30. For the discussions and deliberations held above, we have no hesitation in coming to the conclusion that the prosecution has failed to establish its case against the accused appellant beyond reasonable doubt. We have also found that the court below has not evaluated the evidence led during trial in correct perspective and, therefore, the impugned judgement and order of conviction and sentence is liable to be reversed.

31. Consequently, the appeal succeeds and is allowed. The judgment and order of conviction and sentence dated 07.02.2015 is hereby set aside. The appellant is acquitted of the charges levelled against him. Since the appellant is in jail, he shall be released forthwith and shall be set free, unless is wanted in any other case, subject to compliance of section 437A Cr.P.C.

32. Copy of this judgment shall be communicated to the Chief Judicial Magistrate concerned as also the concerned Superintendent of Jail for necessary compliance.

Order Date:- 06.11.2023
Ashok Kr.