

**HIGH COURT OF JUDICATURE AT ALLAHABAD
(LUCKNOW)**

Neutral Citation No. - 2023:AHC-LKO:68886-DB

Reserved on :- 15.09.2023
Pronounced on :- 19.10.2023

Court No. - 9

Case :- GOVERNMENT APPEAL No. - 307 of 1982

Appellant :- State of U.P.

Respondent :- Sultan And Others

Counsel for Appellant :- Government Advocate

Counsel for Respondent :- S.C. Bajpai, Ashok
Bajpai, Keshri Prasad Tripathi, Sudhakar Bajpai

Hon'ble Rajan Roy, J.

Hon'ble Ajai Kumar Srivastava-I, J.

(Per :- Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard Ms. Meera Tripathi, learned A.G.A. for the appellant/ State, learned counsel for the accused/ respondents and perused the entire record available before us.

2. Under challenge in this government appeal is the impugned judgment and order dated 23.09.1981 passed by the learned II Additional Sessions Judge, Sultanpur in Sessions Trial No.12 of 1980 titled as State vs. Sultan and others arising out of Case Crime No.188 of 1979, under Sections 147, 148, 149, 302, 307 and 323/34 of the

Indian Penal Code¹, Police Station Piparपुर, District Amethi whereby the surviving accused/ respondent No.2, Abdul Hamid was acquitted of the charges under Sections 148, 307 read with Sections 149, 302 read with Section 149 and 323 read with Section 149 I.P.C. and the accused/ respondent No.3, Mohd. Moid alias Achhey was acquitted of the charges under Sections 147, 307 read with Section 149, 302 read with Section 149 and 323 read with Section 149 I.P.C.

3. At the outset, it is relevant to mention that this appeal has been filed to assail the impugned judgment and order dated 23.09.1981, whereby five accused/ respondents, namely, Sultan, Abdul Hamid, Mohd. Moid alias achhey, Hazari and Rajjab were acquitted. However, from a perusal of record, we find that as per report dated 17.02.2022 furnished by the learned Chief Judicial Magistrate, Sultanpur, the accused/ respondents No.1, 4 and 5, namely, Sultan, Hazari and Rajjab respectively have died many years ago. The said report is accompanied with the report of Police Station Ramganj, District Amethi and a death certificate issued by Gram Pradhan concerned. Therefore, in view of aforesaid, the present government appeal is **abated** in respect of accused/ respondents No.1, 4 and 5, namely, Sultan, Hazari and Rajjab respectively. Thus, the present appeal survives in respect of accused/ respondents No.2 and 3, namely, Abdul Hamid and Mohd. Moid alias Achhey only.

¹ hereinafter referred to as "I.P.C."

4. The case of the prosecution in nutshell is that a written report was submitted by the first informant, at Piparpur, District Amethi stating therein that there existed animosity between the first informant and one Sultan S/o Mohammad. In the intervening night of 17/18.09.1979 at about 12:00 AM, the first informant and his family members were lying outside their house after having dinner. There was a lantern lit outside the house. The accused persons namely, Sultan and Abdul, who were armed with firearms (katta) and Mohd. Moid @ Achhey, Hazari, Rajjab and 7-8 persons armed with *lathis* came to his house. The accused, Sultan opened fire at his younger brother, Sher Ali. The first informant and Sher Ali raised alarm. The accused, Abdul Hamid opened fire at first informant's brother, Qamar Ali. He was also beaten by *lathi* and *danda*. Ramzan was also shot dead in this incident by accused, Sultan. Ramzan after receiving firearm injuries fell down and died. In this incident, Bahraichi and Asmatul Nisha also received firearm injuries. The entire incident was witnessed by the first informant and the witnesses in the light of lantern, which was lit and was as usual hung outside the house of the first informant. It was also mentioned in the written report, Ex. Ka-17 that the first informant can identify the unknown co-accused persons, who were present along with five named accused persons whenever he has occasion to see them again.

5. On the basis of aforesaid written report, Ex. Ka-17 submitted by the first informant, Mohd. Iqbal, the first information report, Ex. Ka-18 came to be lodged against

the accused/ respondents on 18.09.1979 for the offence under Sections 147, 148, 149, 302, 307 and 323, 34 I.P.C. at Police Station Piparpur, District Amethi.

6. P.W.-1, Dr. Saraswati Prasad Srivastava has examined the injured persons, namely, Mohd. Iqbal, who is the first informant, Smt. Matul, who is the wife of the first informant, Roshan, Bahraichi, Qamar Ali, Sher Ali and Smt. Asmatul Nisa and he has proved the injury reports of the said injured persons as Ex. Ka-1 to 7 respectively.

7. The inquest proceeding started on 18.09.1979 at 08:30 AM and got concluded on 18.09.1979 at 10:00 AM. The inquest report has been duly proved by P.W.-6, S.O. Dwarika Pd. as Ex. Ka-11.

8. The postmortem report of the deceased, Ramzan Khan has been proved by P.W.-1, Dr. Saraswati Prasad Srivastava as Ex. Ka-8. According to postmortem report of the deceased, Ex. Ka-8, the cause of death is reported to be shock & haemorrhage due to antemortem gunshot injuries.

9. The Investigating Officer recorded the statements of the witnesses under Section 161 of the Code of Criminal Procedure². He visited the place of occurrence and prepared a site plan thereof Ex. Ka-20.

10. Upon conclusion of investigation, the Investigating Officer submitted a charge sheet, Ex. Ka-24

² hereinafter referred to as "Cr.P.C."

against the accused/ respondents for the offence under Sections 147, 148, 149, 302, 307 and 323, 34 I.P.C.

11. Charges for the offences under Sections 148, 307 read with Section 149, 302 read with Section 149 and 323 read with Section 149 I.P.C. were framed against the accused/ respondent No.2, Abdul Hamid and charges for the offences under Sections 147, 307 read with Section 149, 302 read with Section 149 and 323 read with Section 149 I.P.C were framed against the accused/ respondent No.3, Mohd. Moid alias Achhey, who denied the charges and claimed to be tried.

12. In order to bring home guilt of the accused/ respondents, the prosecution has examined P.W.-1, Dr. Saraswati Pd. Srivastava as P.W.-1, Mohd. Iqbal, who is the first informant, as P.W.-2, Qamar Ali as P.W.-3, Hasai as P.W.-4 and Constable Mehdi Hasan as P.W.-5, S.O. Dwarika Pd. as P.W.-6.

13. The accused/ respondents in their statements recorded under Section 313 Cr.P.C. have stated the prosecution story to be false. They have also stated to have been falsely implicated in this case and they claimed to be innocent.

14. In defence, some documents were filed by the accused/ respondents, which were got exhibited also.

15. The learned trial court, after appreciating the evidence available on record adduced by the prosecution

and by the accused, acquitted the accused/ respondents as stated herein above.

16. In such circumstances referred to above, the appellant/ State is before this Court with the present government appeal.

17. Ms. Meera Tripathi, learned A.G.A. for the appellant/ State has submitted that the prosecution had proved its case on the basis of reliable testimonies of prosecution witnesses.

18. Her further submission is that though the time of incident is about 12:00 AM in the night, however there was sufficient source of light. Therefore, the first informant and other witnesses could identify the named accused persons in the light of lantern.

19. Her next submission is that the learned trial court has wrongly disbelieved the prosecution story by holding that it was not possible for the prosecution witnesses to have identified the accused persons, who were named in the first information report and to whom specific role was assigned in the first information report. She has, thus, submitted that the impugned judgment and order dated 23.09.1981 being perverse deserves to be set aside and the accused/ respondents deserve to be convicted.

20. Opposing the aforesaid contentions of learned A.G.A. for the State/ appellant, learned counsel appearing

for the surviving accused/ respondents No.2 and 3 has vehemently submitted that the incident occurred in the intervening night of 17/18.09.1979 at about 12:00 AM in the night. The number of accused persons is stated to be about ten in number. Five accused persons are named in the first information report and some of them has been assigned specific weapons and specific role has also been assigned to some of the accused/ respondents. The source of light is shown to be a lantern, which was hung outside the house of the first informant, therefore, keeping in view the aforesaid admitted facts, the learned trial court has rightly held that it was not possible for the first informant and other witnesses to have seen and identified the respondents. The finding of acquittal of accused/ respondents is well discussed, reasoned and is based on proper analysis of testimonies of witnesses of fact, namely, P.W.-2, Mohd. Iqbal, P.W.-3, Qamar Ali and P.W.-4, Hasai, which cannot said to be perverse. He, thus, submits that the present government appeal lacks merit and deserves to be dismissed.

21. Having heard the learned A.G.A. for the appellant/ State, learned counsel for the surviving accused/ respondents and upon perusal of record, we find that according to first information report, the time of incident is about 12:00 AM in the intervening night of 17/18.09.1979. Five accused persons, namely Sultan, Abdul Hamid, Mohd. Moid alias Achhey, Hazari and Rajjab are named in the first information report. From a perusal of written report, Ex. Ka-17, which has been proved by the

first informant, P.W.-2, Mohd. Iqbal, it appears that two persons were carrying firearms, which has been specifically mentioned in the written report, Ex. Ka-17 as *katta*. Other three named accused persons and five unknown persons are stated to be carrying *lathi*, *danda* etc. The postmortem report of the deceased, Ramzan Khan reveals that the cause of death of the deceased is reported to be shock & haemorrhage due to antemortem gunshot injuries. However, we do not find any such ballistic evidence on record to show that the firearm injuries sustained by the deceased, Ramzan Khan was caused by a countrymade firearm (*katta*).

22. Upon a close scrutiny of entire prosecution evidence available on record and the impugned judgment and order dated 23.09.1981, we find that in the written report, Ex. Ka-17, it was mentioned that the first informant and other witnesses saw this incident in the light of lantern, which was hung outside the house of the first informant. According to site plan, Ex. Ka-20, which has been proved by the investigating officer P.W.-6, S.O. Dwarka Prasad, the place of occurrence is shown to be outside the house of the first informant, Mohd. Iqbal. A lantern lit in the pitch dark night in the month of September would have very limited area of illumination. There was no mention in the written report, Ex. Ka-17 that the assailants were identified in the light of torches, which the assailants were carrying, however, this fact got improved in the testimony of P.W.-3, Qamar Ali during trial. We find this fact very strange because, in case, the

light emitted by the lantern was sufficient to identify the assailants, there would have been no need for the assailants also to light their torches while committing the incident and even otherwise, if a person flashes torch at another person, it would be difficult for anyone to see properly and identify the person flashing torch due to reflection of light. Under the aforesaid circumstances, the finding of learned trial court that it was not possible for the alleged eye witnesses to have seen the assailants and that too so closely to have deposed as to how many assailants were there on the date of incident and which specific weapon was carried by them individually. We have also been able to notice that though it is a prerogative of prosecution to examine any particular witness in support of its case, however, if it appears that some of the prosecution witnesses have been intentionally withheld for some ulterior reason, the same may give rise to adverse presumption as contained under Section 114(g) of Indian Evidence Act, 1872. The learned trial court has found that the injured persons, namely, Bahraichi and Smt. Asmatul Nisha have not been examined and the explanation offered for their non-examination was found by the learned trial court to be far from being satisfactory. The learned trial court has, thus, found the prosecution story to be unbelievable.

23. Hon'ble the Supreme Court in **R. Sreenivasa vs. State of Karnataka**³ has held as under:-

³ 2023 SCC OnLine SC 1132

"17. In the present case, given that there is no definitive evidence of last seen as also the fact that there is a long time-gap between the alleged last seen and the recovery of the body, and in the absence of other corroborative pieces of evidence, it cannot be said that the chain of circumstances is so complete that the only inference that could be drawn is the guilt of the appellant. In *Laxman Prasad v. State of Madhya Pradesh*, (2023) 6 SCC 399, we had, upon considering *Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116 and *Shailendra Rajdev Pasvan v. State of Gujarat*, (2020) 14 SCC 750, held that '... In a case of circumstantial evidence, the chain has to be complete in all respects so as to indicate the guilt of the accused and also exclude any other theory of the crime.' It would be unsafe to sustain the conviction of the appellant on such evidence, where the chain is clearly incomplete. **That apart, the presumption of innocence is in favour of the accused and when doubts emanate, the benefit accrues to the accused, and not the prosecution. Reference can be made to *Suresh Thipmappa Shetty v. State of Maharashtra*, 2023 INSC 749.**

18. That apart, in *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415, it was laid down that an appellate court, in the case of an acquittal, must bear in mind that there is a double presumption in favour of the accused. It was also emphasised that when two views are possible, the one favouring the accused is to be leaned on. The powers of the appellate Court have been recently summarised in *Jafarudheen v. State of Kerala*, (2022) 8 SCC 440 at Paragraphs 25-27. On these factors as well, the Impugned Judgment is untenable."

(emphasis supplied by us)

24. In view of aforesaid, we do not find any perversity in the finding of the learned trial court to the effect that the testimonies of prosecution witnesses, namely, P.W.-2, Mohd. Iqbal, P.W.-3, Qamar Ali and P.W.-4,

Hasai were not reliable. On the basis of evidence available before the learned trial court, the finding of acquittal of accused/ respondents appears to us to be probable and reasonable view, therefore, we do not find any infirmity in the finding of acquittal recorded by the learned trial court.

25. In the light of what has been discussed above, we are of the considered view that the appeal lacks merit which deserves to be dismissed and the same is hereby **dismissed.**

26. In compliance with the provision contained in Section 437-A Cr.P.C. the surviving accused-respondents No.2 and 3, namely, Abdul Hamid and Mohd. Moid alias Achhey are directed to furnish personal bonds and two sureties each to the satisfaction of the court concerned within a period of six weeks from today.

27. Let the lower court record along with a copy of this judgment be transmitted forthwith to the learned trial Court for information and necessary compliance.

(Ajai Kumar Srivastava-I, J.)

(Rajan Roy, J.)

Order Date :- 19.10.2023

cks/-