

**High Court of Judicature at Allahabad
(Lucknow)**

Neutral Citation No. - 2023:AHC-LKO:84585-DB

Judgment Reserved on 27.09.2023

Judgment Delivered on 21.12.2023

Court No. - 9

Case :- CRIMINAL APPEAL No. - 505 of 1982

Appellant :- Sewak Ram And Others

Respondent :- State

Counsel for Appellant :- R.K. Singh, Anurag Kumar
Singh, Indresh Kumar Mishra, S.C. Misra

Counsel for Respondent :- Govt. Advocate

Hon'ble Rajan Roy, J.

Hon'ble Ajai Kumar Srivastava-I, J.

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

1. Heard Sri Indresh Kumar Mishra, learned counsel for the appellants, Sri Rajdeep Singh, learned A.G.A. for the State and perused the entire record.

2. From a perusal of the record, it transpires that the appellant nos. 2 to 5, namely, Om Prakash, Mahesh, Chhotey and Swami Dayal have died and the appeal in respect of them has already been abated vide order dated 25.08.2023, therefore, this appeal survives with regard to appellant no. 1, namely, Sewak Ram only.

3. Under challenge in this criminal appeal is the impugned judgment and order dated 30.06.1982 passed by IInd Additional District & Sessions Judge, Hardoi in Sessions Trial No.628 of 1981, arising out of Crime No.110 of 1977, under Sections 302/149, 148, 323/149 and 307/149 of the Indian Penal Code¹, Police Station Baghouli, District Hardoi whereby the appellants, namely, Sewak Ram, Om Prakash, Mahesh, Chhotey and Swami Dayal have been convicted and sentenced to undergo life imprisonment for the offence under Section 302 read with 149 I.P.C. They have also been convicted and sentenced to undergo one year's rigorous imprisonment for the offence under Section 148 I.P.C. They have further been convicted and sentenced to undergo three months' rigorous imprisonment for the offence under Section 323 read with Section 149 I.P.C.

4. The Prosecution case, in nutshell, is that the deceased, Phoolchand was nephew of first informant Munshilal, P.W.-1. About 2-3 months prior to this incident, the first informant, P.W.-1, Munshilal had lodged a criminal case against co-convicts, Swamidayal and Lalmani. On the date of occurrence i.e on 21.04.1977, the first informant, P.W.-1, Munshilal and the deceased, Phoolchand were working in their agricultural fields situated in the southern part of the village. At about 4:00 P.M., all of a sudden, eight accused persons along with 3-4 unknown persons reached at the place of occurrence, who were armed

¹ hereinafter referred to as "I.P.C."

with guns. The accused persons hurled abuses, meanwhile co-accused, Nanhu fired a shot at Phoolchand which did not register on his body. However, the deceased, Phoolchand started running towards the north-east direction. The surviving accused/ appellant, Sewak Ram fired another shot which hit the deceased, Phoolchand, due to which, Phoolchand fell down on the ground and died on the spot. The accused persons again started firing, due to which, injuries were sustained on the body of P.W.-2, Dinesh Kumar & P.W.-3, Ram Naresh. Thereafter, the accused persons fled away from the place of occurrence. The dead body of the deceased, Phoolchand was placed on a cot and was brought to his house.

5. On the basis of aforesaid written report, submitted by the first informant, P.W.-1, Munshilal, the first information report, Ext. Ka-1 came to be lodged against the accused/ appellants on 21.04.1977 under Sections 147, 148, 149, 302 and 307 I.P.C.

6. According to the Post-mortem report, Ex. Ka-3 which has been proved by P.W.-6, Dr. A. N. Singh, the cause of death of the deceased is reported to be shock and haemorrhage as a result of ante-mortem firearm injuries. Besides other injuries, five firearm entry wounds were reported on different parts of the body of the deceased.

7. The injury reports of injured, Sunder Lal, Ram Naresh and Dinesh Kumar have been proved by P.W.-9,

Dr. L. P. Rawat as Ext. Ka-4, Ext. Ka-5 and Ext. Ka-6 respectively which reveal contusion, abrasion and lacerated wounds on the body of aforesaid injured persons.

8. The Investigating Officer recorded the statements of the witnesses under Section 161 Cr.P.C. He visited the place of occurrence and prepared a site plan thereof Ext. Ka-7.

9. Upon conclusion of investigation, the Investigating Officer submitted a charge sheet, Ex. Ka-9 against the accused/ appellants.

10. The accused persons including the surviving accused/ appellant were charged under Sections 148, 302/149, 307/149 and 323/149 I.P.C., who pleaded not guilty and claimed to be tried.

11. In order to bring home guilt of the accused/ appellants, the prosecution has examined Munshilal, complainant as PW-1, Dinesh Kumar as PW-2, Ram Naresh as PW-3, A.S.I., Jit Bahadur Singh as P.W.-4, Dr. A. N. Singh as P.W.-5, S. I. Maikulal as P.W.-6, S. I. Bidurjit Tripathi as P.W.-7, S. I., Mohammad Ahmad as P.W.-8, Dr. L. P. Rawat as P.W.-9 and Constable Ramchandra as P.W.-10.

12. The accused/ appellants, in their statements, recorded under Section 313 Cr.P.C., have stated the prosecution story to be false. They also stated to have

been falsely implicated in this case and claimed to be innocent.

13. No evidence in defence was adduced by the accused/ appellants before the learned trial court.

14. The learned trial court, after appreciating the evidence available on record, rendered the impugned judgment and order dated 30.06.1982 whereby the accused/ appellants came to be convicted as aforesaid.

15. Aggrieved by the aforesaid impugned judgment and order dated 30.06.1982, the accused/ appellants have preferred the instant criminal appeal.

16. Learned counsel for the surviving accused/ appellant has submitted that the finding of guilt of the surviving accused/ appellant arrived at by the learned trial court is perverse and contrary to the evidence available on record, therefore, it deserves to be set aside.

17. His further submission is that learned trial Court has erred in placing reliance on the testimonies of P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh for convicting the surviving accused/ appellant herein while two other co-accused have been acquitted on the basis of same evidence.

18. He has also submitted that learned trial Court has wrongly relied upon testimonies of alleged eye-

witnesses whose testimonies suffer from gross infirmities and are full of contradictions too.

19. He contended that the medical evidence is inconsistent with the eye-witnesses' account, therefore, the prosecution failed to prove its case beyond reasonable doubt.

20. He has also submitted that the prosecution also failed to examine independent witnesses, though, they were available. Therefore, adverse inference should be drawn against prosecution in terms of Section 114 (g) of Indian Evidence Act.

21. Per contra, learned A.G.A. for the State has submitted that the surviving accused/ appellant rightly came to be convicted vide impugned judgment and order dated 30.06.1982, which is well discussed and reasoned. The surviving accused/ appellant was named in the first information report and was also assigned the specific role of firing. The prosecution has proved its case beyond reasonable doubt on the basis of cogent and reliable testimonies of prosecution witnesses. Therefore, interference by this Court is neither warranted nor justified. He, accordingly, prays for dismissal of the instant criminal appeal.

22. Having heard the learned counsel for the surviving accused/ appellant, learned A.G.A. for the State and upon perusal of record, it transpires that the prosecution has examined P.W.-1, Munshilal, who is the

first informant, P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh to prove the prosecution case in respect of place, time and manner of incident which was allegedly committed by the accused/ appellants including surviving accused/ appellant herein. P.W.-1, Munshilal is an eye-witness, who has supported the prosecution case as contained in written report. P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh are injured witnesses, who have also supported the prosecution case in all material aspects. The prosecution case is based on ocular testimonies of aforesaid prosecution witnesses, who have consistently deposed that on 21.04.1977 the surviving accused/ appellant along with co-convicts fired at the deceased causing firearm injuries to the deceased. The other co-convicts also opened fire which caused injuries to the injured witnesses, P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh.

23. We have carefully examined testimony of P.W.-1, Munshilal, who is an eye-witness as also testimonies of P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh, who are not only eye-witnesses of this incident, but injured witnesses also. The injury reports of P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh have been proved by P.W.-9, Dr. L. P. Rawat as , Ext. Ka-6 and Ext. Ka-5 respectively, therefore, the presence of such injured witnesses on the date and place of occurrence cannot be doubted. Admittedly, P.W.-1, Munshilal is real uncle of the deceased Phoolchand, P.W.-2, Dinesh Kumar is son of the deceased whereas P.W.-3, Ram Naresh is nephew

of the deceased. They are, therefore, related to the deceased, Phoolchand. However, as we find the presence of P.W.-1, Munshilal, P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh on the date and place of occurrence to be natural and their testimonies to be reliable, therefore, the only fact that they are related to the deceased does not cause any dent in the otherwise proved prosecution story.

24. In order to ascertain veracity of testimonies of aforesaid three witnesses produced by the prosecution i.e. P.W.-1, Munshilal, P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh, we have also carefully examined the post-mortem report, Ext. Ka-3 of the deceased, Phoolchand and injury reports, Ext. Ka-5 and Ext. Ka-6 of injured witnesses which on a close scrutiny reveal that the injuries reported on the body of deceased, Phoolchand and on the person of injured witnesses, clearly support the manner of assault as contained in written report and it is also in consonance with the testimonies of P.W.-1, Munshilal, P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh. Therefore, having regard to reliable and cogent testimonies of P.W.-1, Munshilal, P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh, we find that the prosecution has been able to prove its case beyond reasonable doubt and has, thus, been able to prove that on 21.04.1977 the accused/ appellants including the surviving accused/ appellant, namely, Sewak Ram assaulted the deceased and in the process also inflicted injuries on the body of

injured witnesses, P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh.

25. Hon'ble the Supreme Court in **State of U.P. vs. Suresh** reported in **1982 CrI.L.J. page 850** has observed that the witness is wife of the deceased, is no ground for rejecting her evidence, though, her evidence is to be scrutinized with care.

26. Hon'ble the Supreme Court in **Shyam Babu vs. State of U.P.** reported in **AIR 2012 SC 3311** has held that the testimony of witness in a criminal trial cannot be discarded because the witness is a relative or a family member of the victim.

27. It is not out of place to mention that Hon'ble the Supreme Court in **Rohtash Kumar vs. State of Haryana** reported in **2013 CrI.L.J. 3183 SC** while explaining the provisions of Section 231 and 313 Cr.P.C. and Sections 114 and 134 of Evidence Act has observed that the prosecution need not examine its all witnesses. Discretion lies with the prosecution whether to tender or not all witnesses to prove its case.

28. Adverse inference against prosecution can be drawn only if withholding of witness was with oblique motive. It is the prosecution's prerogative to decide as to which particular witness they want to examine and unless it is proved that any particular witness was deliberately withheld and was not produced, no adverse

inference as provided under Section 114 (g) of Indian Evidence Act can be drawn against the prosecution.

29. Having held that on 21.04.1977, the deceased, Phoolchand was assaulted and killed by the the accused/ appellants including the surviving accused/ appellant, we notice that according to prosecution's own story, the surviving accused/ appellant, Sewak Ram had opened fire at the deceased after the deceased was already hit by the fire shot by co-accused, Nanhu.

30. Even after a careful scrutiny of testimonies of P.W.-1, Munshilal, P.W.-2, Dinesh Kumar and P.W.-3, Ram Naresh carefully, we have been unable to ascertain with certainty the seat of injuries caused by the subsequent fire opened by the surviving accused/ appellant, Sewak Ram. Therefore, we have no reason to hold that the firearm injuries caused by the subsequent fire opened by Sewak Ram was cause of death of the deceased.

31. Thus, in the facts of case at hand, we do find that the surviving accused/ appellant was present on the scene of occurrence, who was armed with firearm. He also fired a shot at the deceased causing firearm injury to the deceased after the co-accused, Nanhu had already fired at the deceased. The surviving accused/ appellant, therefore, had knowledge that firearm injuries might cause death of deceased. This fact has been proved by the prosecution beyond reasonable doubt. However, in want of any evidence to suggest that fatal injury to the deceased was caused by the surviving

accused/ appellant, we deem it appropriate to convict the surviving accused/ appellant under Section 304 Part II read with Section 149 I.P.C. in place of Section 302 read with Section 149 I.P.C. and sentence him to 10 years' rigorous imprisonment in place of life imprisonment. He is also sentenced to a fine of Rs.20,000/-. In default of payment of fine, he shall undergo further one year's additional imprisonment. The conviction of the surviving accused/ appellant for the offence under Sections 148 and 323 read with Section 149 I.P.C. and sentences awarded therefor by the learned trial Court are liable to be affirmed. His conviction recorded by the trial Court under Section 302 read with Section 149 I.P.C. and sentence to life imprisonment are liable to be set aside.

32. For the aforesaid reasons, we modify the conviction of the surviving accused/ appellant, Sewak Ram from Section 302 read with Section 149 I.P.C. to Section 304 Part II read with Section 149 I.P.C. and sentence the surviving accused/ appellant is modified to ten years' rigorous imprisonment in place of life imprisonment. He is also sentenced to a fine of Rs.20,000/-. In default of payment of fine, he shall undergo further one year's additional imprisonment. The conviction of the surviving accused/ appellant for the offence under Sections 148 and 323 read with Section 149 I.P.C. and sentences awarded therefor by the learned trial Court are affirmed. His conviction recorded by the trial Court under Section 302 read with Section

149 I.P.C. and sentence to life imprisonment are set aside. All the sentences shall run concurrently. The surviving accused/ appellant shall also be entitled to the benefit of provisions contained in Section 428 Cr.P.C.

33. The present appeal is, accordingly, **partly allowed.**

34. The surviving accused/ appellant is in jail, who shall serve out the remaining sentence awarded to him by this Court.

35. 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 :- 21.12.2023
Mahesh