

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

Neutral Citation No. - 2023:AHC-LKO:84586-DB

Reserved on :- 17.10.2023
Pronounced on :- 21.12.2023

Court No. - 9

Case :- GOVERNMENT APPEAL No. - 848 of 1989

Appellant :- State of U.P.

Respondent :- Shiv Pal Singh And Others

Counsel for Appellant :- Govt. Advocate

Counsel for Respondent :- J.N. Chaudhary

Hon'ble Rajan Roy,J.

Hon'ble Ajai Kumar Srivastava-I,J.

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

1. Heard Sri Pawan Mishra, learned A.G.A. for the appellant/ State, Sri Niteesh Kumar, learned counsel for the surviving accused/ respondents No.5, 7, 10, 11 and 12 and perused the entire record.

2. Under challenge in this government appeal is the impugned judgment and order dated 02.09.1989 passed by the learned IV Additional Sessions Judge, Unnao in Sessions Trial No.127 of 1987 titled as State vs. Shiv Pal and 11 others arising out of Case Crime No.138 of 1987, under Sections 147, 148, 149, 302 and 307 of the Indian Penal Code¹, Police Station Kotwali,

¹ hereinafter referred to as "I.P.C."

District Unnao whereby the surviving accused/ respondents No.5, 7, 10, 11 and 12, namely, Mahi Pal, Paratap, Om Prakash, Ram Kumar and Kamlesh were acquitted of the charges under Sections 148, 307 read with Section 149 and 302 read with Section 149 I.P.C.

3. It is not out of place to mention that this appeal has been filed to assail the impugned judgment and order dated 02.09.1989, whereby twelve accused/ respondents, namely, Shiv Pal Singh, Indra Pal, Nattha, Shri Ram, Mahi Pal, Kamal Kishore, Paratap, Pappu @ Brijendra, Satya Pal, Om Prakash, Ram Kumar and Kamlesh were acquitted of the charges levelled against them. However, we notice that according to report dated 02.11.2020 furnished by the learned Chief Judicial Magistrate, Unnao, the accused/ respondents No.1, 2, 3, 4, 6, 8 and 9, namely, Shiv Pal Singh, Indra Pal, Nattha, Shri Ram, Kamal Kishore, Pappu @ Brijendra and Satya Pal respectively have died. The said report is accompanied with the report of Police Station Kotwali Sadar, District Unnao as well as the statement of S.I. Vinod Kumar, Police Station Kotwali, District Unnao 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, 2, 3, 4, 6, 8 and 9, namely, Shiv Pal Singh, Indra Pal, Nattha, Shri Ram, Kamal Kishore, Pappu @ Brijendra and Satya Pal respectively. Thus, the present government appeal survives in respect of accused/

respondents No.5, 7, 10, 11 and 12, namely, Mahi Pal, Paratap, Om Prakash, Ram Kumar and Kamlesh only.

4. The case of the prosecution in short conspectus is that a written report was submitted by the first informant, P.W.-4, Surendra Kumar at Police Station Kotwali, District Unnao stating therein that on 17.03.1987 at about 1:30 P.M., Girija Shanker and Ganga Sagar were present in the house of Jagannath Yadav on the occasion of Holi. The presence of Girja Shanker and Ganga Sagar was disliked by the accused, Shiv Pal Singh. The accused persons, who were armed with country made firearms, started firing inside the house of Jagannath Yadav. As a result whereof, Girija Shankar and Ganga Sagar sustained firearm injuries. On hearing the sound of gunshot, various persons reached at the place of occurrence. The accused persons were firing indiscriminately, which caused death of the deceased, namely, Girijaa Shanker, Ganga Sagar, Chandra Nath and Kachol, who died on the spot where the incident took place while Gulab Chandra died in L.L.R Hospital, Kanpur. In this incident, Smt. Phoolmati also received firearm injuries.

5. The inquest proceedings in respect of deceased, Girja Shanker Yadav and Ganga Sagar were conducted, which have been duly proved by P.W.-10, S.I. Niranjan Prasad Gautam as Ex. Ka-29 and Ex. Ka-34 respectively.

5(A). The inquest proceedings in respect of the deceased, Kachol and Chandra Nath were also conducted, which have been duly proved by P.W.-11, S.I. Ram Bahadur Singh as Ex. Ka-39 and Ex. Ka-44 respectively.

5(B). The inquest proceeding in respect of of the deceased, Gulab Chandra was also conducted, which has been duly proved by P.W.-6, S.I. Nanhku Ram Pusker as Ex. Ka-9.

6. The postmortem reports of the deceased, namely, Ganga Sagar Yadav, Kachol, Girja Shanker Yadav and Chandra Nath were conducted by P.W.-1, Dr. Shyam Mohan Krishna, which have been duly proved by him as Ex. Ka-1, Ex. Ka-2, Ex. Ka-3 and Ex. Ka-4 respectively. The postmortem report of the another deceased, Gulab Chandra was conducted by P.W.-3, Dr. D. Bhatnagar, which has been duly proved by him as Ex. Ka-6.

6(A). According to postmortem report of the deceased, Ganga Sagar Yadav, Ex. Ka-1, the cause of the death is reported to be coma as a result of ante mortem gun shot injury. According to postmortem report of the deceased, Kachol, Ex. Ka-2, the cause of death is reported to be shock & haemorrhage as a result of ante mortem gun shot injury. According to postmortem report of the deceased, Girja Shanker Yadav, Ex. Ka-3, the cause of death is reported to be shock & haemorrhage as a result of gun shot injury. According to postmortem

report of the deceased, Chandra Nath, Ex. Ka-4, the cause of death of is reported to be shock & haemorrhage as a result of gun shot injury. According to postmortem report of the deceased, Gulab Chandra, Ex. Ka-6 the cause of death is reported to be shock & haemorrhage due to antemortem injuries.

7. On the basis of aforesaid written report, Ex. Ka-7 submitted by the first informant, P.W.-4, Surendra Kumar, the first information report, Ex. Ka-16 came to be lodged against the accused/ respondents on 17.03.1987 at 14:00 hrs for the offence under Sections 147, 148, 149, 307 and 302 I.P.C. at Police Station Kotwali Sadar, District Unnao.

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 Ex. Ka-49.

9. Upon conclusion of investigation, the Investigating Officer submitted a charge sheet, Ex. Ka-55 against the accused/ respondents.

10. Charges for the offences under Sections 148, 307 read with Section 149 and 302 read with Section 149 I.P.C. were framed against the accused/ respondents, who denied the charges and claimed to be tried.

11. In order to bring home guilt of the accused/ respondents, the prosecution has examined Dr. Shyam Mohan Krishna as PW-1, Dr. Jitendra Singh as PW-2, Dr. D. Bhatnagar as PW-3, Surendra Kumar, who is the first informant, as PW-4, Smt. Phoolmati as PW-5, S.I. Nanhku Ram Pusker as P.W.-6, Constable Shiv Prasad Saroj as P.W.-7, Mani Mohan Lal verma, the then head moharrir, as P.W.-8, Om Prakash Mani Tripathi as P.W.-9, S.I. Niranjan Prasad Gautam as P.W.-10, S.I. Ram Bahadur Singh as P.W.-11, Constable Prem Shanker Tiwari as P.W.-12, Head Constable Babu Ram as P.W.-13 and S.I. Har Bhajan Singh as P.W.-14.

12. 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.

13. D.W.-1, Ram Kishore Singh has been examined from the side of defence.

14. 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.

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

16. Sri Pawan Mishra, 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.

17. His further submission is that in this incident, five persons were brutally killed by the accused/ appellants. The prosecution witness of fact, namely, P.W-4, Surendra Kumar has deposed against the accused/ appellants in a consistent manner, therefore, learned trial court erred in disbelieving reliable testimony of prosecution witnesses, which renders the impugned judgment and order dated 02.09.1989 perverse.

18. His next submission is that even postmortem reports of the deceased persons corroborate the prosecution story. The deceased persons had sustained firearm injuries. Therefore also the acquittal of the accused/ appellants was not justified.

19. Learned A.G.A. for the State/ appellant has, thus, submitted that the impugned judgment and order dated 02.09.1989 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. 5, 7, 10, 11 and 12 has vehemently submitted that the prosecution witnesses are related witnesses. No

independent witness has been examined, therefore, testimonies of such related witnesses were rightly discarded by the learned trial court.

21. His further submission is that one of the injured witness in this incident, namely, P.W.-5, Phoolmati has turned hostile, who has not supported the prosecution case. Therefore, not only there is absence of corroboration of prosecution case; rather the prosecution case remains based on sole testimony of P.W.-4, Surendra Kumar. Though conviction can be recorded on the basis of sole testimony of a witness, however, for doing so, such witness has to be wholly reliable. He submits that the manner of commission of offence as stated by P.W.-4, Surendra Kumar does not get corroborated by the medical evidence. In the same vein, he argues that the testimony of P.W.-4, Surendra Kumar and medical evidence available on record are completely incompatible. Therefore also the judgment of acquittal recorded in favour of the accused/ respondents is sound and based on proper analysis of prosecution evidence wherein no interference by this Court is warranted.

22. His last submission is that the presumption of innocence of accused/ respondents has been fortified by a reasoned and well discussed judgment of acquittal of the learned trial court. Therefore, interference by this court is not warranted.

23. Having heard the learned A.G.A. for the State/ appellant, learned counsel appearing for the surviving accused/ respondents No. 5, 7, 10, 11 and 12 and upon perusal of record, it transpires that out of fourteen prosecution witnesses, P.W.-1, Dr. Shyam Mohan Krishna is a doctor, who conducted autopsy on the body of the deceased, namely, Ganga Sagar Yadav, Kachol, Girja Shanker Yadav and Chandra Nath, and prepared their postmortem reports, which have been duly proved by him as Ex. Ka-1, Ex. Ka-2, Ex. Ka-3 and Ex. Ka-4 respectively. P.W.-3 is Dr. D. Bhatnagar, who conducted the autopsy on the body of the deceased, Gulab Chandra, and prepared his postmortem report, which has been duly proved by him as Ex. Ka-6.

24. We also find that P.W.-6 is S.I. Nanhku Ram Pusker, who had prepared the inquest report of the deceased, Gulab Chandra and proved the same as Ex. Ka-9. P.W.-8, Mani Mohan Lal verma is the head moharrir, who has proved chick F.I.R. as Ex. Ka-16. P.W.-6 to P.W.-14 are the formal witnesses examined by the prosecution.

25. Thus, only two witnesses of facts have been examined by the prosecution. P.W.-4, Surendra Kumar is the complainant and son of the deceased, Girja Shanker Yadav whereas Smt. Phoolmati, P.W.-5 is an injured and eye witness of this incident.

26. Before proceeding further, it is not out of place to mention that P.W.-4, Surendra Kumar, who is the

complainant and son of the deceased, Girja Shanker Yadav is stated to be an eye witness of this incident also. Smt. Phoolmati, who was examined as P.W.-5, is a witness, who is stated to have accompanied the first informant, Surendra Kumar on the date of incident and who sustained firearm injuries opened by the accused/ respondents. However, P.W.-5, Smt. Phoolmati has been declared hostile, who has stated that she did not receive any injury in this incident. She has also stated that on the date of incident, she did not go anywhere and she had not seen anyone opening fire. Therefore, this leaves us with sole testimony of P.W.-4, Surendra Kumar, who being son of the deceased, Girja Shanker Yadav, is a related witness, whose testimony, according to settled legal position as held by Hon'ble the Supreme Court in **Dahari and others vs. State of Uttar Pradesh**² should be examined carefully. The manner of incident as narrated in the written report, Ex. Ka-7, in our considered opinion, does not appear to be probable having regard to the site plan, which has been proved by P.W.-14, Har Bhajan Singh as Ex. Ka-49, which was prepared on the identification of P.W.-4, Surendra Kumar itself. According to P.W.-4, Surendra Kumar, indiscriminate firing was opened by the accused including the surviving accused/ respondents, who were carrying firearms of different kind. Therefore, the manner of assault as narrated by P.W.-4, Surendra Kumar does not appear to be probable having regard to the seat of injuries on the body of the deceased persons.

² (2012) 10 SCC 256

27. We find that P.W.-4, Surendra Kumar in his testimony has stated that on 17.03.1987 at about 01:30 PM, he heard sound of fire. On hearing sound of fire, this witness rushed to the house of Jagannath where he saw his uncle, Gulab Chandra, Chandra Nath and Kachol running away in injured condition. This witness says that he was accompanied by his aunt, P.W.-5, Smt. Phoolmati, who, as discussed above, has denied to have gone with P.W.-4, Surendra Kumar on the date of incident. The witness, Smt. Phoolmati, P.W.-5 has not said that she received any firearm injury on the date of incident. She has also not supported the prosecution case to the effect that the accused/ respondents had opened fire on the date of incident causing firearm injuries to the deceased persons or to her. According to P.W.-4, Surendra Kumar, the accused/ respondents were firing from the rooftop of the house of Jagannath. However, the places, which have been shown in site plan, Ex. Ka-49 as F1, F2 and F3, are such places from where ordinarily any fire made by the accused/ respondents in all probability could not hit the deceased in the manner, in which they have been shown in the postmortem reports of the deceased persons. The incident is said to have occurred in the house of Jagannath, who has not been examined by the prosecution in support of its case. In our considered opinion, he was the best person to depose about the incident. The prosecution has failed to offer any plausible explanation for non-examination of such an important witness, which leads us to presume that by

not examining such an important prosecution witness, the prosecution did not want to come out with the actual mode and manner of incident-in-question.

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

*"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

³ 2023 SCC OnLine SC 1132

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)

29. Examined from aforesaid point of view, we do not find the sole testimony of P.W.-4, Surendra Kumar, who is the complainant and son of the deceased, Girja Shanker Yadav, to be reliable and also consistent with medical evidence available on record. Therefore, we do not find any perversity or infirmity in the finding of acquittal recorded by the learned trial court, which is a possible view.

30. 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**.

31. The surviving accused/ respondents No. 5, 7, 10, 11 and 12, namely, Mahi Pal, Paratap, Om Prakash, Ram Kumar and Kamlesh are on bail. Their bail bonds are cancelled. Sureties are discharged. They need not surrender, in case, they are not wanted in any other case.

32. In compliance with the provision contained in Section 437-A Cr.P.C. the surviving accused/ respondents No.5, 7, 10, 11 and 12, namely, Mahi Pal, Paratap, Om Prakash, Ram Kumar and Kamlesh

respectively are directed to furnish the personal bonds and two sureties each to the satisfaction of the court concerned within a period of eight weeks from today.

33. 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
cks/-