

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

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**Neutral Citation No. - 2023:AHC-LKO:82527-DB**

**Reserved on:11.10.2023**

**Delivered on:15.12.2023**

**Court No. - 9**

**Case :- CRIMINAL APPEAL No. - 2953 of 2007**

**Appellant :-** Shishupal And Another

**Respondent :-** State of U.P.

**Counsel for Appellant :-** F.A. Osmany

**Counsel for Respondent :-** Govt. Advocate

A N D

**Case :- JAIL APPEAL No. - 1729 of 2012**

**Appellant :-** Om Prakash

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Jail Appeal In Person, F A Osmany, Ms  
Madhumita Bose, Ruhi Siddiqui

**Hon'ble Rajan Roy, J.**

**Hon'ble Ajai Kumar Srivastava-I, J.**

**(Per : Rajan Roy, J.)**

Heard Ms. Ruhi Siddiqui, learned counsel for the appellant in connected Jail Appeal No. 1729 of 2012, Shri F.A. Osmany, learned counsel for the appellant no. 1-Shisupal in Criminal Appeal No. 2953 of

2003 and learned A.G.A. for the State. Appellant No. 2 in Criminal Appeal No. 2953 of 2007 has already died.

These are Criminal Appeal and Jail Appeal under Section 374 Cr.P.C. preferred by the appellants challenging their conviction and sentencing vide judgment dated 02.08.2004 passed in Sessions Trial No. 237 of 2004 (State Vs. Shri Ram and Ors.) arising out of Case Crime No. 410 of 2004, under Sections 302/34 and 504 IPC, Police Station - Beniganj, District - Hardoi as also in Sessions Trial No. 238 of 2004 arising out of Case Crime No. 430 of 2003, under Section 25 Arms Act, Police Station- Beniganj, District- Hardoi.

The appellants have been convicted for the offence punishable under Section 302/34 IPC and sentenced to life imprisonment with fine of Rs.2000/- each failing which they would have to undergo additional imprisonment for six months. They have also been convicted under Section 504 IPC for which they have been sentenced to undergo imprisonment for one year with fine of Rs.500/- each failing which they would have to undergo further imprisonment for one month.

It is not out of place to mention that as per report of the Senior Superintendent, Central Jail, Fatehgarh dated 12.07.2023 the Appellant - Om Prakash in Jail Appeal No. 1729 of 2012 has already been released on remission on 15.08.2020, therefore, the question of his conviction alone is to be seen.

The prosecution case is that the incident which led to the investigation in trial is alleged to have occurred at 9.00 p.m. on 13.04.2003, but, no F.I.R. was lodged involving the alleged murder of deceased Ram Pal. An application was filed by the informant, who was a nephew of the deceased, before the Magistrate under Section 156(3) Cr.P.C. on 30.07.2003 on which an order was passed for registering of the F.I.R. on 13.10.2003. Thereafter, the case was investigated by the

Police and charge sheet was filed against four accused. Two of the accused, namely, Shri Ram and Kalloo have died. Om Prakash and Shishu Pal are still alive. As per the informant's case on 13.04.2003 at about 9.00 p.m. he heard the accused planning and conspiring to murder his uncle Ram Pal on account of prior rivalry between them. He informed deceased Ram Pal about the said conspiracy. Consequent to which, Ram Pal called Rakesh (PW-2) nephew of the deceased and Pramod (PW - 3) his son and all three of them went to the Pradhan to complain. When they reached near the house of Sambhu, the accused Shri Ram started abusing Ram Pal and shouting that matter would be end today whereupon the other accused Shishupal and Kalloo exhorted him to fire and kill him. As per the informant PW-1, he was also behind Ram Pal, Rakesh and Pramod, when, the accused Shri Ram aimed and fired at Ram Pal, who was at the front, from a country-made gun which hit Ram Pal on his face and he fell down. All the four accused ran away.

As per the informant's case he and one Puttu immediately went to the Police Station, but, the F.I.R. was not lodged instead the Police came to the scene of crime and to save Ram Pal took him on its jeep to the hospital at Hardoi and got him admitted there. Ram Pal was unable to speak. The injured Ram Pal was referred to the Medical College at Lucknow on 14.04.2003 where he died on 23.04.2003 on account of the fire arm injuries.

The inquest was conducted on 24.04.2003 so was the postmortem at 01.30 p.m. As already stated, on 30.07.2003 i.e. more than three months from the date of incident an application was filed under Section 156(3) Cr.P.C. before the Magistrate by the informant PW-1 and he has stated that he had been approaching various authorities for lodging the F.I.R. but the same was not lodged. Ultimately, it was lodged in pursuance of the order passed on 13.10.2003 as already referred.

All the four accused were charged of the offence punishable under Section 504, 302, 34 IPC. Accused Shri Ram was additionally charged under Section 25 of the Arms Act, 1959. They were convicted and sentenced as already stated earlier.

Learned counsel for the appellants contended that the incident is alleged to have taken place in the night. There was no source of light to facilitate the alleged eye-witnesses having seen the crime. No F.I.R. was lodged. The application under Section 156(3) Cr.P.C. itself was lodged three months after the incident. The F.I.R. was lodged after six months of the incident once an order was passed by the Magistrate on the aforesaid application. Thereafter, recovery of the country-made pistol has been shown, which is fake. There is no forensic/ballistic examination of the alleged country-made pistol and the pellets etc. recovered from the body of the deceased. He took us through the alleged inconsistencies and contradictions in the testimony of eye-witnesses, on account of which, he submitted that the same were unreliable. The prosecution has failed to prove the charges against the surviving appellants beyond reasonable doubt. The trial Court has erred in convicting the appellants on the basis of conjectures, surmises and presumptions without proper appreciation of the facts and evidence on record, therefore, the appeals are liable to be allowed.

Learned A.G.A. has opposed the appeals and submitted that the trial Court's judgment does not suffer from any error. The eye-witnesses have proved the guilt of the appellants. There is recovery of country-made pistol also, therefore, no interference is called for with the judgment of the trial Court.

As per the postmortem report the deceased had following ante-mortem injuries on the body of the deceased:-

"1. Multiple fire arm wounds of entry in an area of 18 cm x 12 cm present on forehead & face. Size varying from 0.5 cm x 0.5 cm x skin

deep to brain cavity deep margins inverted irregular. Collar of Abrasion ring present around the wounds along with blackening.

2- Abraded contusion 3 x 2 cm on present in outer aspect of Rt. upper arm just above Rt. elbow.

On opening :- Ecchymosis present underneath all the injuries mentioning above, frontal both parietal bone fractured & depressed. meningies and brain matter lacerated. S/D haematoma present all over the brain. 5 metallic pellets recovered from brain matter. 5 metallic pellets recovered from muscle of forehead face. Total 10 metallic pellets recovered and sent to SSP Lko. in a double sealed envelop through CP concerned."

The cause of death is mentioned as a result of fire arm injury to the head. The Autopsy Surgeon has been examined as PW-10. He has proved the post-mortem report. Based on the post-mortem and testimony of PW-10 it is proved that the deceased had received fire arm injures. He had multiple fire arm wounds on the forehead and face. Some were skin deep while the others were in brain cavity. There was blackening and tattooing around the wounds. There was one abraded contusion on the right hand. The skull had been fractured on the front and both sides of the parietal bone. Five pellets were found in the brain and five on the muscle of the face, thus, total of 10 pellets were recovered from the body of the deceased, however, the said pellets were not shown to the Autopsy Surgeon (PW-10) before the Court.

From the medical evidence on record it is proved that the death of the deceased Ram Pal was not natural. It was a homicide. The question is as to whether the appellants herein had committed his murder or not.

At this very stage it may be pointed out that after lodging of the F.I.R. on 13.10.2003 i.e. almost six months after the incident a country-made gun is said to have been recovered from the house of Late Shri Ram along with two live cartridges. The said gun was never sent for forensic/ballistic examination, although, pellets had been recovered from

the body of the deceased. This fact has been admitted by the Investigating Officer PW-12 in his testimony as also another Investigating Officer PW-11.

As this very stage it is also pertinent to mention that the two independent public witnesses of the alleged recovery of 0.12 bore gun from the house of the accused Shri Ram i.e. PW- 5 (Raghuveer) and PW- 6 (Suresh Pal) have turned hostile. In cross examination they have denied the prosecution case. PW- 5 has stated that he was made to sign on a blank paper by the Police inspite of his protest. PW- 6 has also stated that he was made to sign on a blank paper. He had not given any statement before the Police under Section 161 Cr.P.C. This creates a doubt about recovery of the gun. In any case the surviving appellants had not been assigned the role of firing from the said gun nor any recovery has been made at their pointing or from their possession.

The case at hand is one of direct evidence. The prosecution's case is based on the testimony of alleged eye witnesses PW-1 (Sarvesh Kumar ) who is informant, PW-2 (Rakesh) and PW-3 (Pramod Kumar). PW-1 and PW-2 are nephews of the deceased, whereas, PW-3 (Promod Kumar) is the son of the deceased. PW- 3 (Pramod Kumar) claims to have seen the commission of crime and also of being present at the time of its commission, but, inspite of the fact that he is the son of the deceased he is not the informant/applicant under Section 156(3) Cr.P.C.

PW-1 (Sarvesh Kumar) has stated about prior enmity between deceased Ram Pal and the accused. Enmity can cut both ways. It could be the motive for commission of crime as also for false implication depending upon the facts of a case. PW- 1 after narrating the incident which allegedly took place in the night of 13.04.2003 has stated that he went to the police station but the report was not lodged, however, he has also stated that the police came on a Jeep and took the injured Ram Pal to the Hospital at Hardoi which appears to be rather incongruous, as, if

the police admitted Ram Pal in a Government Hospital, Hardoi, then, they would have prepared a 'Majroobi Chiththi' and in that scenario there is no way that F.I.R. would not be lodged. Moreover, there is inconsistency in this story as mentioned by PW-1 vis-a-vis the son of the deceased PW-3 who also claims to have been present at the time of commission of crime but says that the deceased Ram Pal who was initially injured was not taken to the hospital in police jeep. The Jeep was of Barauri, however, he does not know whose jeep it was. He has clearly stated in his cross examination that his father Ram Pal was taken to the Hospital in a private Jeep. He has stated that charges for the jeep were given by the PW-1 (Sarvesh) which was 800 Rupees. He has stated that he had gone to the Hospital at Hardoi with his father Ram Pal for his treatment. Contrary to it, in the 'tehrir' and even in his application under Section 156(3) Cr.P.C. which was filed on 30.07.2003 he has stated that the police in order to save Ram Pal immediately spread a cloth inside the jeep and laid down Ram Pal in the jeep and took him to Hardoi Hospital and got him admitted there. This inconsistency creates reasonable doubt about the prosecution case.

Further, as per PW-1, he had heard the accused conspiring to kill Ram Pal in front of the house of the Satnu which was near his (PW-1's) house and had immediately informed Ram Pal about it and when all of them were going to the Pradhan to complain about it, they were accosted by the accused in front of the house of Shambhu Raidas at about 9.00 p.m. in the night. The accused Shri Ram started abusing Ram Pal whereupon the other accused exhorted him to fire and kill and ultimately Shri Ram fired from his country-made gun which hit the deceased on his face and forehead. He has stated that this incident was seen by PW-2 (Rakesh) and PW-3 (Pramod).

Now, when we read the testimony of PW-3 who is son of the deceased Ram Pal, he has a different story to tell. According to him, the firing at Ram Pal had taken place from top of the house of Shambhu.

Now, PW-1 says that the accused met them in front of Shambu Raidas's house which could only have been possible at the ground level. He does not speak of firing by Shri Ram from any roof or top of the house of Shambhu. Ram Pal was fired upon from the Colony which had been constructed. He had been fired upon from the roof of the Colony. Colony was 8-10 feet high. Thus, there is clearly an inconsistency in the narration of events by PW-2 and PW-3. Moreover, the story set-up of having seen the accused conspiring at the well situated in front of house of Satnu also appears to be unbelievable.

The incident is said to have occurred in the night at about 9.00 p.m. It has come in the testimony of PW-1 that he was able to identify the accused in the full moon night and light coming from the houses as also from their voices. In cross examination of PW-1 it has come that there was no electricity at the time of the incident. This apart, PW-1 has stated that while going to 'Pradhan' to lodge the complaint he had also accompanied Ram Pal (deceased), Rakesh (nephew) and Pramod the son of the deceased and he was 15 paces behind them. It was 9.00 p.m. in the night, yet, he claims to have seen Shri Ram shooting from his country-made pistol. We have to keep in mind that no F.I.R. was lodged about the incident on 13.04.2003 and the application under Section 156(3) Cr.P.C. was filed only on 30.07.2003 that too by the nephew and not the son, though, the son also claims to have seen the commission of crime and thereafter, the F.I.R. was lodged and investigation has been done.

Moreover, in cross-examination he has stated that the accused met them near the house of Ramendra. They were towards the South of the house of Ramendra. In examination-in-chief he has stated that they had met them near the house of Shambhu. Most important, in his cross - examination he has stated that when Ram Pal was hurt and fell down, he went to lift him up 15-20 minutes after the incident and thereafter, he went to the Police Station - Beniganj to lodge the F.I.R., which was not lodged, an aspect which has already been considered earlier.

As regards the injured Ram Pal, who subsequently died, being admitted at hospital at Hardoi, though, he has stated that police took him in a jeep and got him admitted which itself is incongruous for the reasons already stated hereinabove and had it been so then the police would have registered the F.I.R. considering the injuries, especially as, the Thana-incharge, as claimed by PW-1, was also with him, but, this apart, Ram Pal has also stated that as per medical records the name of his father and his brother was mentioned as the person who had brought the injured. If the police had taken the injured to the hospital, then, it would have been mentioned in the hospital's record. It is also intriguing as to why if the deceased was initially injured in the manner stated and was taken to a Government Hospital, the Doctors would not apprise the police about the said incident. It is said that on 14.04.2003 he was referred to the Medical College at Lucknow where he was treated and ultimately died on 23.04.2003. There are many loopholes in the prosecution story about which there is no explanation.

PW-1 has also stated that the gun shot had been fired from a distance of 10 feet. It was a country-made gun. In this context he has again referred that there was no lighting at Ramendra's house from where the shot was fired, however, it was full moon night. Now, if the shot was fired from a distance of 10 feet and PW-1 had seen the incident, then, there is no explanation for the recital in the postmortem report about there being blackening and tattooing around the fire arm wound which could be caused only if the gun is fired from short distance, especially, if it is country-made pistol.

PW-1 says that there was blood on the ground as a result of firing and he had shown it to Daroga. If it was so, then, the blood stained soil etc. would have been collected and F.I.R. would have been lodged. At this stage, it is pertinent to mention that the Head Constable PW- 4 who was stationed at Police Station- Beniganj on 13.10.2003 has clearly stated in his cross-examination that PW-1 had never come to the police

station to lodge the F.I.R. nor had any police force gone to the alleged scene of crime on the said date. F.I.R. was lodged only after the order being passed under Section 156(3) Cr.P.C. He was the Officer entrusted with the task of making entries in the police records and lodging of the F.I.R. He has denied PW-1 coming to the police station to lodge the F.I.R. As already stated earlier, in cross-examination he has stated that Ram Pal was shot towards the East of Ramendra's house. PW- 2 and PW-3 have spoken of firing near or from the roof of Shambhu's house. There are contradictions in the statement of PW-1 himself in this regard, as, in the earlier part he has stated that the accused had come from southern direction near Ramendra's house and then he has stated that shot was fired from the East of Ramendra's house. He has admitted to prior rivalry on account of land dispute and elections and lodging of a case under Section 107/117 Cr.P.C. in this regard between the parties.

The above discussion makes the presence of PW-1 (informant) at the scene of crime, highly doubtful. The testimony appears to be an after thought. It is full of contradictions and is also inconsistent to the testimony of other alleged eye witnesses.

As regards PW-2, the statement was also recorded six months after the incident for obvious reasons as the F.I.R. was lodged subsequently. He has stated in his testimony that he has not spoken about the conspiracy to kill Ram Pal to anybody, not even the 'Daroga', till recording of his testimony before the trial Court and he was stating this fact for the first time before the trial Court. Now, this is intriguing, as, he is nephew of the deceased and he was also present at the time of commission of crime which was preceded by the conspiracy as stated by PW-1, and PW-2 had also accompanied Ram Pal to complain in this regard to the 'Gram Pradhan', but, he has denied the prosecution case in his testimony before the Court so far as conspiracy is concerned, which gives credence to the fact that the story was cooked up by the informant and other alleged witnesses.

He has gone on to state that clothes of Ram Pal were blood stained. There is no such recovery of clothes of the deceased. Most important, he has also belied the statement of PW-1 that it is the Police who had taken the injured Ram Pal to the hospital at Hardoi. He, like PW-3, has stated that the injured Ram Pal was taken to Hardoi half an hour after the incident on the jeep of Rambhu resident of Barauni and the jeep was being plied for fare. He had not gone to the hospital on the said jeep. He was also not aware as to whether PW-1 had accompanied Ram Pal on the said jeep or not. He has stated that the deceased used to arrange gambling bouts and used to take money for arranging the same, however, he has denied that on account of it, he was murdered by somebody else.

Now, PW-3, the other alleged eye-witness, though, he is son of the deceased, he did not lodge the F.I.R. nor filed the application under Section 156(3) Cr.P.C. Though, he has accepted that he did not go to the police station at Hardoi to lodge the F.I.R. but has stated that he informed the Chowki at Pratap Nagar about the incident and that the injured was being taken to Hardoi. He has also stated that 'Daroga' had come to the village on the day of the incident at 10.30 p.m. This again, for the reasons already discussed, is highly improbable. Most important, he has stated that firing took place from top of the house of Shambhu which does not tally with the statement of PW-1 and even PW- 2 has not stated about this fact. As already mentioned, PW- 1 has referred to firing taking place near the house of Ramendra, whereas, PW-3 says the firing took place near the house of Shambhu. All this create a doubt on the entire prosecution case. This witness also admits to prior rivalry between the parties.

Moreover, considering the nature of the injury as the skull was fractured on the front as also on both sides on the parietal, it is highly doubtful as to whether such an injury could have been caused by the

kind of gun alleged to have been used by accused- Shri Ram for firing at the deceased.

In view of the above discussion, especially the filing of the application 156(3) Cr.P.C. almost four months after the incident, denial of PW- 4 the Head Constable/ Head Mohrrir who was posted at Police Station - Beniganj about PW-1 having come to the police station to lodge any F.I.R. and the police force having gone to the village on 13.04.2003, makes the entire story set-up by the informant and the eye-witnesses doubtful and unreliable. The entire story appears to have been cooked up subsequently. No doubt the deceased died an unnatural death but the accused appear to have been implicated on mere suspicion and there is no reliable evidence on record to indict them of the charge of murder framed against them. Both the independent public witnesses of recovery of the country-made gun from the house of appellant- Shri Ram, since deceased, were declared hostile and did not support the prosecution case. The recovery was also made immediately three days after the lodging of the F.I.R. on 13.10.2003, which, in fact, itself was lodged six months after the alleged incident. There is no forensic/ ballistic report available on record regarding examination of the alleged gun recovered from the house of appellant- Shri Ram, even though, pellets were recovered from the body of the deceased. There is inconsistency in the testimony of the three eye-witnesses as already discussed and contradictions in this regard.

The trial Court has failed to consider and appreciate relevant aspect of the matter as has been discussed hereinabove and has proceeded to convict the appellants of the offences with which they were charged believing the prosecution case to be gospel's truth and taking the evidence adduced including the evidence of alleged eye-witnesses as gospel's truth.

It is also pertinent to take note of the fact that though the injured Ram Pal remained alive from 13.04.2003 till 23.04.2003 when he died at Medical College, Lucknow, his statement or dying declaration was never recorded and no explanation has been offered in this regard. Why the Doctors at Medical College at Lucknow did not inform the Police considering the nature of injuries, is also inexplicable.

For the reasons already discussed, the findings and conclusions arrived at by the trial Court, are perverse. The prosecution has failed to prove the charges against the appellants beyond reasonable doubt. The judgment is liable to be set-aside. We accordingly, set-aside the judgment of the trial Court.

The Criminal Appeal and Jail Appeal are **allowed**.

The appellant- Shishupal in Criminal Appeal No. 2953 of 2007 is on bail. Appellant- Om Prakash in Jail Appeal No. 1729 of 2012 has been released on remission as recorded in our order dated 11.10.2023.

The sureties and bail bonds with regard to Appellant- Om Prakash in Jail Appeal No. 1729 of 2012 shall stand discharged.

The appellant- Shishupal in Criminal Appeal No. 2953 of 2007 is directed to file a personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of the Code of Criminal Procedure within six weeks from the date of release.

The original records shall be remitted back to the trial Court for necessary action, if any.

Learned Amicus, Ms. Ruhi Siddiqui shall be entitled to Rs.25,000/- (Rupees Twenty Five Thousand Only) from the High Court as fee for her services.

**(Ajai Kumar Srivastava-I,J.) (Rajan Roy, J.)**

**Order Date :-15.12.2023**

R.K.P.