

High Court of Judicature at Allahabad
(Lucknow)

Neutral Citation No. - 2023:AHC-LKO:85046-DB

Reserved on: 06.12.2023

Delivered on: 22.12.2023

Reserved

Case :- CRIMINAL APPEAL No. - 384 of 1982

Appellant :- Maikoo Lal And Others

Respondent :- State of U.P.

Counsel for Appellant :- S.P. Tripathi, G.K. Mehrotra, Rishabh
Tripathi, S.K. Singh, Santosh Kumar Shukla

Counsel for Respondent :- Govt. Advocate

Hon'ble Rajan Roy, J.

Hon'ble Ajai Kumar Srivastava-I, J.

(Per: Rajan Roy, J.)

1) Heard Sri Pankaj Kumar, learned counsel for the surviving appellant no.2 and Sri Umesh Chandra Verma, learned A.G.A. for the State.

2) This is an appeal under Section 374(2) of the Code of Criminal Procedure, 1973 challenging the judgment and order dated 29.04.1982 passed by Sessions Judge, Gonda in Session Trial No.710/1981 arising out of Case Crime No.111/1981, Police Station-Kauria, District-Gonda convicting all the appellants for the offence under Section- 302/34 I.P.C. and sentencing them to undergo imprisonment for life and further convicting the appellant, namely, Indal under Section 323

I.P.C. and sentencing him to undergo one month's rigorous imprisonment.

3) Out of the four appellants, appellant no.1, namely, Maikoo Lal, appellant no.3, namely, Malahu and appellant no.4, namely, Indal have died. Appellant no.2, namely, Karam Chand is the only one alive.

4) The prosecution case in nutshell is that on 16.09.1981 at about 06:00 P.M. in the evening, Algoo and his son Tilak Ram were returning from a well to their home, carrying water. Ram Chander son of Algoo was filling water at the well (near the Shivala). When they reached the agricultural field of Ram Baran, assailants came out of the maize crop. Maikoo Lal was carrying an axe, Indal, Malahu & Karam Chand were carrying lathis. They assaulted informant's father i.e. Algoo with lathis and axe. They raised an alarm whereupon Ram Chander and others came rushing. By then, assailants had run away. There was prior enmity between the assailants and the informant's side.

5) After investigation, chargesheet was filed against all the four accused. Charges were framed against them under Section 302 read with Section 34 I.P.C., Section 323 read with 34 I.P.C.. They denied the charges and were put to trial.

6) The prosecution produced six witnesses. P.W.1-Dr. Om Prakash Srivastava is the Autopsy Surgeon. P.W.2-Tilakram is son of the deceased, informant & alleged eye-witness of the case. P.W.3-Sonpati is wife of the deceased and an alleged eye-witness. P.W.4-Dr. Ashok Kumar Pandey was present at the P.H.C., Rupaidiha when the deceased-Algoo was brought dead

at about 11:30 A.M. on 17.09.1981. He had medically examined injured witness i.e. P.W.2-Tilakram at about 11:45 A.M. on the same day. He also examined P.W.3-Sonpati on 19.09.1981 i.e. three days after the incident at 04:30 P.M. at P.H.C., Rupaidiha. P.W.5-Durga Prasad Shukla is the Constable who made requisite G.D. entries and had lodged the F.I.R. P.W.6-Ram Sanehi Agnihotri is the Investigating Officer of the case.

7) Though plain and blood-soaked soil is said to have been collected by the Investigating Officer, there is no forensic report exhibited in this regard. Post-mortem report is Ex.Ka.1. Injury report of Tilak Ram is Ex.Ka.4 and injury report of Sonpati is Ex.Ka.5. Inquest Report is Ex.Ka.14. Siteplan is Ex.Ka.20.

8) Statements of the accused were recorded under Section 313 Cr.P.C. where they denied the charges.

9) The trial court on a consideration of the evidence before it convicted the appellants of the offence under Section 302 read with Section 34 I.P.C. Appellant no.2-Karam Chand was acquitted of the offence punishable under Section 324 read with Section 34 I.P.C. in respect of the injuries caused to Tilakram as well as to Sonpati.

10) The contention of learned counsel for the appellant is that the F.I.R. was delayed. The incident is said to have occurred on 16.09.1981 at 06:00 P.M. but the F.I.R. was lodged the next day at 09:30 A.M. There is no explanation for the delay and this delay was utilized for deliberating, consulting and falsely implicating appellant no.2 on account of prior enmity between

the parties. The testimony of P.W.3-Sonpati who is wife of the deceased is not at all reliable. Her name is not mentioned in the tehrir given by P.W.2 on 17.09.1981 which is the basis for lodging of the F.I.R., nor is any injury mentioned as having been sustained by her. She has been medically examined subsequently and planted as an alleged witness by showing fake injuries. Her medical examination had taken place more than three days after the incident without any plausible explanation in this regard whereas medical examination of Tilakram (P.W.2) was undertaken on 17.09.1981 itself when Algoo was taken to the P.H.C. which itself goes to show that she has been planted as a witness as an afterthought. Although, in the tehrir it is submitted that on an alarm being raised by the informant-Tilakram, his brother i.e. Ram Chander and several others rushed and came to the scene of crime but neither Ram Chander i.e. brother of the informant nor any other independent witness / resident of the village has been examined. P.W.3 has stated about Ram Chander also having sustained injuries but there is no such evidence nor has he been produced as a witness. As regards statement of injured- Algoo, who died subsequently, under Section 161 Cr.P.C., the same is not at all reliable as from the statement of prosecution witnesses itself it has come that he was unconscious the entire night and the informant reached the police station the next day at 09:30 A.M. The Investigating Officer (P.W.6) has stated that he was given the investigation of the case at about 09:45-09:50 A.M. He, first of all, recorded the statement of P.W.2-Tilakram which took about 15 minutes and thereafter, statement of others were recorded. There is evidence on record to show that

when Algoo was taken from police station to P.H.C., Rupaidiha which is five kilometers away, the doctors declared him brought dead at 11:30 A.M., meaning thereby, he had already died prior to reaching the primary health centre. Considering the testimony of P.W.3 that Algoo was unconscious the whole night and the facts as mentioned hereinabove especially the nature of injuries sustained by him as is evident from the post-mortem report, it is not possible that he would have been in such medical condition as to give the statement as recorded under Section 161 Cr.P.C. It is not at all safe to rely upon the said statement as a dying declaration but the trial court has erred in doing so and also in basing the conviction of the appellants on the said testimony. No dying declaration of Algoo has been recorded as per law. The incident, in fact, appears to have occurred in the night and a delayed F.I.R. has been lodged falsely implicating the appellants on account of prior enmity. The trial court has erred in convicting the appellants.

11) Learned A.G.A. has opposed the appeal and submitted that explanation for the delay in lodging the F.I.R. has been given by P.W.2 and 3 which according to them was fear on account of the assailants and also as the chowkidar refused to take the body of the deceased to the police station in the night. As regards non-mentioning of name of Sonpati in the tehrir given by Tilakram, the explanation offered by Tilakram is that due to hurry, this fact could not be mentioned and it was mentioned subsequently in his statement under Section 161 Cr.P.C. The motive to commit the murder is with the appellants as there was a prior enmity between them. He has relied upon statement of injured-Algoo under Section 161

Cr.P.C. which according to him has rightly been treated as dying declaration by the trial court to convict the appellants. The statement of Algoo under Section 161 Cr.P.C. is in confirmity with the tehrir given by Tilakram. Algoo was alive and he was taken to the police station and the F.I.R. was lodged at 09:30 A.M. He died between 09:30 A.M. and 11:30 A.M. Therefore, it cannot be said that merely because of this, his statement is not reliable and cannot be treated as a dying declaration. Medical evidence corroborates the ocular testimony. P.W.2 and P.W.3 are injured witnesses whose testimony has to be accepted and given due weightage. The appeal lacks merit and is liable to the dismissed.

12) We have heard learned counsel for the parties and perused the records.

The incident is said to have happened at 06:00 P.M. on 16.09.1981. The distance of the police station from the scene of crime is about 04 miles. The incident happened in September. The sun does not set early at this time of the year. The explanation offered by P.W.2 and P.W.3 for not lodging the F.I.R. promptly is the fear of the assailants and secondly that the chowkidar declined to take the body to police station in the night. Both these explanations are not acceptable as if the incident happened at 06:00 P.M. and P.W.2 & P.W.3 were injured then not only there was no reason for not going to the police station in the evening itself especially as other villagers had also come to the scene of crime who could have taken them to the police station, but there was a need for emergent medical examination and treatment of the injured but neither

they went to the police station nor they were attended by any doctor. The F.I.R. was lodged the next day i.e. 17.09.1981 at 09:30 A.M. The F.I.R., therefore, is apparently delayed. The statement of P.W.3 that chowkidar declined to take the body to the police station in the night is also indicative of the fact that the incident, in fact, may not have happened at 06:00 P.M. As already stated, in the month of September, at 06:00 P.M., it is not very dark and if this statement that chowkidar refused to take the body and inform the police station in the night indicates that the incident may have occurred later in the night and not at 06:00 P.M. in the evening.

13) There was prior enmity between the informant side and the assailants which could cut both ways i.e. as a motive to commit the crime and also for false implication.

14) Though, it has been stated by P.W.2 and P.W.3 that one of the assailants -Maikoo Lal was carrying an axe, there is no injury of axe on the body of the deceased nor on the injured witnesses. Injury no.8 on the deceased is a punctured wound which could not have been caused by an axe. There is no recovery of axe or the lathis allegedly used in commission of crime.

15) It has come in the testimony of P.W.3 that Algoo-her husband was unconscious the whole night. In fact, in her statement, she has stated that not only her husband was unconscious through out the night but she was also unconscious. The tehrir was given by P.W.2 the next day in the morning and F.I.R. was lodged at 09:30 A.M. Prior to 09:30 A.M., Algoo was neither taken to the police station nor to any

doctor or hospital. If he was unconscious the entire night then how he was in a position to give a statement before the police between 09:30 A.M. to 11:30 A.M., is inexplicable, especially as, according to P.W.6-the Investigating Officer, he was handed over investigation of the case at about 09:45 A.M.-09:50 A.M. He recorded statement of P.W.2 which took about 15-20 minutes and thereafter, he recorded the statement of others. According to him, the distance from police station to P.H.C., Rupaidiha is five kilometers. The nature of injuries on Algoo as is borne out from the post-mortem report does not persuade us to accept the opinion of the doctor that even after such injuries, he would remain conscious and be in a position to speak especially when P.W.3- his wife had herself stated that he was unconscious the whole night. He had sustained as many as eight injuries. Injury no.1 is a lacerated wound 6cm x 1 cm bone deep oblique on right side head 11 cm above right ear. Injury no.5 is a contusion 12cm x 5cm oblique on right side back. These external injuries correspond to the internal injuries i.e. fracture of right side seventh, eighth and ninth ribs under injury no.5. Lower lobe of right lung was lacerated. There was laceration on the outer and back of the liver at two places as has come in the testimony of P.W.1-the Autopsy Surgeon and he died, as already stated, before reaching the P.H.C. at 11:30 A.M. Therefore, considering the sequence of events and medical condition of Algoo, it is not safe to rely upon his alleged statement recorded before the police under Section 161 Cr.P.C. and to treat it as a dying declaration especially as in his statement he has referred to presence of Sonpati at the time of commission of the crime and that she lay over him when

the assailants were beating him up. Whereas, P.W.3 herself nowhere states about this. She instead states she rushed to the scene after hearing the shouts of her sons. She stood there with folded hands, pleading the assailants not to hit her husband. She has then stated that she ran away which is very different from the statement attributed to Algoo under Section 161 Cr.P.C. when he was injured. Moreover, in the tehrir also, her presence has not been mentioned. In his statement under Section 161 Cr.P.C., Algoo has mentioned about axe being wielded by the assailants but there is no injury of axe. In view of this, his statement under Section 161 Cr.P.C. is not reliable and it is not safe to treat it as a dying declaration. The trial court has erred in doing so.

16) Though, P.W.6-the Investigating Officer has stated about having collected plain and sample soil from the scene of crime, there is no such forensic report on record in this regard.

17) There is no plausible explanation as to why Sonpati wife of the deceased if she was injured in the incident which took place at 16.09.1981 at 06:00 P.M. was medically examined on 19.09.1981 at 04:30 P.M. The statement of P.W.6-Investigating Officer that Sonpati i.e. P.W.3 was not ready to go for medical examination as both her sons had gone away and she was alone in the house is not acceptable as even if this was so on 17.09.1981, there is no explanation for not getting her medically examined when the sons returned and in fact, she was examined on 19.09.1981 at 04:30 P.M. Her injuries are also simple in nature as opined by the doctor himself. This gives credence to the contention of appellant's counsel that she

has been planed subsequently to strengthen the case by the prosecution especially as Tilakram was examined on 17.09.1981 at 11:00 A.M. itself.

18) As regards testimony of Tilakram, he is the informant. In the tehrir submitted by him, he had not mentioned the name of Sonpati as a witness to the crime nor that she had been injured. He has done so subsequently. He has stated that after his father was beaten up by the assailants, after the assailants fled, his father was brought to the house and out of fear of the assailants, they did not go to the police station. This is not an acceptable explanation for the delay in lodging the F.I.R. for the reasons already given hereinabove. He has accepted the fact that he went to the police station the next day and while going to the police station, he got the tehrir written in the market but he is unable to give the name of the person who is the scribe of the tehrir till the date of recording of his testimony in court. This gives credence to the contention of learned counsel for the appellant that tehrir was got written at the police station after deliberation and consultation and names of appellants were mentioned therein on account of prior enmity. He has spoken about Daroga having reached the scene of crime at 08:00 A.M. on 17.09.1981 whereas the Investigating Officer i.e. P.W.6 says that he did not meet Tilakram prior to he having come to the police station at 09:30 A.M. He has stated that there was a dispute with the assailants about a jackfruit tree and as those who were getting the report lodged stated that he should mention grove, therefore, they mentioned it as grove. This is also indicative of the fact that there were some persons who were dictating the tehrir and what should

be written therein which leaves scope for false implication after deliberation and consultation. Their names have not been disclosed by P.W.2. He has spoken about water pot being carried by his father but no such pitcher has been recovered. He has also stated in his cross-examination that he did not see his mother getting injured which corroborates the recital made hereinabove that P.W.3 was planted subsequently as a witness. No independent witness of scene of crime has been produced. Both the alleged witnesses are related witnesses and are also interested witnesses on account of prior enmity. The injuries on the body of P.W.2 are simple in nature. This is relevant in view of the delay in lodging the F.I.R. He has spoken about P.W.3 i.e. his mother lying down on the body of Algoo while he was beaten up but P.W.3 herself has not stated this fact. Instead, she stated that she ran away after she was hit. The Investigating Officer i.e. P.W.6 says that he saw Tilakram i.e. P.W.2 for the first time when he reached the police station on 17.09.1981 at 09:30 P.M. whereas P.W.2 says that his statement was recorded by the Daroga at his house when he came back. This is contrary to the statement of P.W.6 who says that statement was recorded at the police station. This inconsistency has also not been explained by the prosecution. Considering the delay in lodging the F.I.R. and other factors discussed hereinabove, we are of the opinion that testimony of P.W.2 is also not reliable for proving the offence punishable under Section 302 read with Section 34 I.P.C.

19) We have also perused the questions put to the accused under Section 313 Cr.P.C. and their replies to the same. We are shocked to see the nature of questions put to the accused

and also other accused. They were never specifically confronted with the statement of alleged eye-witnesses i.e. P.W.2 and P.W.3 so as to enable him to respond to the same. The questions are general and nebulous in nature. They are not in keeping with letter and spirit as also the object behind Section 313 Cr.P.C. Every question starts with the words "कहा जाता है की" without referring to the specific evidence which is being relied against the accused with which he is required to be confronted. There is no reference to specific testimony of P.W.2 and P.W.3 having been referred and shown to the accused eliciting their response as envisaged under Section 313 Cr.P.C. The alleged statement of injured Algoo under Section 161 Cr.P.C. which was subsequently treated as a dying declaration has also not been put to the accused in the manner it should have been done but the question put is as under:- प्रश्न 15. कहा जाता है कि घटना के वाकत अलगू ने मृत्यु के पहले दरोगा जी को बयान दिया था (Statement u/s 161 Cr.P.C.)। इसके बारे में तुम्हें क्या कहना है? to which he answered that he does not know about it. There is absolutely no compliance of Section 313 Cr.P.C. as per law. In this context we may refer to judgment of Hon'ble the Supreme Court in '**Maheshwar Tigga vs. State of Jharkhand**' reported in (2020) 10 SCC 108 wherein it has been held that circumstances not put to an accused under Section 313 Cr.P.C. cannot be used against him and must be excluded from consideration. The legal position in this regard is well settled. In a criminal trial, the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity of not only to furnish his defense, but also to explain the incriminating

circumstances against him. A probable defense raised by an accused to rebut the accusation without the requirement of truth beyond reasonable doubt. In the said reported case, reference has been made to an earlier decision in the case of **'Nawal Kishore Singh vs. State of Bihar'** reported in 2004 (7) SCC 502 wherein it was held that under Section 313 Cr.P.C. the accused should have been given an opportunity to explain any of the circumstances appearing in the evidence against him. At least the various items of evidence which had been produced by prosecution should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. The Court deprecated the practice of putting the entire evidence against the accused put together in a single question and giving the opportunity to explain the same, as the accused may not be in a position to give rational and intelligent explanation. The Supreme Court emphasized the necessity of the Trial Judge keeping in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and that Section 313 Cr.P.C. examination should not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defense and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to an accused is a part of fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence. The manner in which the accused has been confronted with the questions referred hereinabove without referring to the evidence and material against him specifically and properly shows that

the same has been done as an empty formality. The exercise was conducted in a slipshod manner without due and proper application of mind. Therefore, the said evidence/ material could not have been used against the accused-Karam Chand yet it has been done by the trial court erroneously and illegally.

20) The findings of the trial court regarding delay in lodging F.I.R., reliability of the statement under Section 161 Cr.P.C. of Algoo and it being treated as dying declaration as also the inconsistency in the testimony of witnesses etc are based on strained reasoning and are conjectural rather than based on proper appreciation of evidence on record. The same are perverse. The prosecution has failed to prove the charge against appellant no.2 of having committed the offence punishable under Section 302 read with 34 I.P.C. beyond reasonable doubt.

21) In view of the above discussion, we are of the opinion that learned trial court has erred in convicting appellant no.2 of the offence under Section 302 read with Section 34 I.P.C. It has already acquitted appellant no.2 of the offence punishable under Section 323 read with Section 34 I.P.C. Accordingly, the appeal is **allowed** as regards appellant no.2, namely, Karam Chand. The judgment of the trial court with regard to him is set aside. Appellant no.2 is already on bail. Bail bonds submitted earlier are cancelled and sureties are discharged. Appellant no.2 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.

22) A copy of this judgment along with original records be remitted to the court below for necessary, if any.

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

Order Date :- 22.12.2023

Shanu/-