

Neutral Citation No. - 2023:AHC-LKO:70019

A.F.R.

Reserved On:- 20.09.2023

Delivered on:-27.10.2023

Court No. - 15

Case :- CRIMINAL APPEAL No. - 30 of 2014

Appellant :- Saleem Ahmad

Respondent :- State of U.P.

Counsel for Appellant :- Nadeem Murtaza

Counsel for Respondent :- Govt. Advocate

Hon'ble Shamim Ahmed,J.

1. List of cases has been revised and the case is being taken up in the revised call for hearing.
2. Heard learned counsel for the parties and perused the record.
3. The instant Criminal Appeal under Section 374(2) Cr.P.C. has been moved on behalf of the appellant against the Judgment and Order dated 11.12.2013 passed by learned Additional Sessions Judge, Court No.7, Sitapur in Sessions Trial No.161 of 2008, arising out Case Crime No.107 of 2001, lodged at Police Station-Laharpur, District-Sitapur, whereby the appellant has been convicted under Sections 147, 148, 323/149 and 325/149 and sentenced under Section 147 I.P.C. for two years simple imprisonment and fine of Rs.1,000/- and in default of payment of fine, two months additional simple imprisonment, under Section 148 I.P.C. for three years simple imprisonment and fine of Rs.1,000/- and in default of payment of fine, two and a half months simple imprisonment, under Section 323/149, one years simple imprisonment and fine of Rs.500/- and in default of payment of fine,

fifteen days' simple imprisonment and under Section 325/149 I.P.C. for three years simple imprisonment and fine of Rs.2,000/- and in default of payment of fine, three months simple imprisonment.

4. The prosecution case in brief is that on 29.04.2001, the complainant Mukhtar Ahmad submitted a written report to the Police Station Laharpur, District Sitapur, wherein it had been stated that there was some old enmity in between the parties with respect to a Gramin Samaj Land, on which the accused persons were allegedly constructing a wall, which was not permissible. In this regard, the complainant made several complaints to the concerned authorities and the accused persons were stopped from constructing a wall over the said land. On the date of incident at about 07:00 P.M., the concerned officials visited the site and removed the boundary wall illegally constructed by the accused persons, thereafter, the concerned officials returned but this action of the concerned officials agitated the accused persons against the complainant. Thereafter, the accused persons reached the house of the complainant armed with deadly weapons and started abusing the complainant with caustic words, when the complainant stopped them to do so, they started beating the complainant and his nephew. In the said incident, the nephew of the complainant fell unconscious and the complainant also received severe injuries.

5. On the basis of written report, submitted by the first informant, the first information report was lodged as Case Crime No.107 of 2001, under Sections 147, 148, 323, 504, 506 and 308 at Police Station Laharpur, District Sitapur.

6. The case was handed over to Investigating Officer, who visited the place of occurrence, recorded the statement of the witnesses and prepared the site plan and after completing the investigation,

submitted the charge sheet against the appellants under Sections 323, 504, 506, 308 and 325 I.P.C.

7. On the basis of Charge-sheet appellant-accused were summoned by the Court and charges were framed against them under Sections 323/34, 325/34, 308/34, 504 and 506 I.P.C. The appellants-accused denied the charges and claimed to be tried.

8. Prosecution in order to substantiate the charges against appellants-accused examined Mukhtar Ahmad, the complainant as P.W.-1, Raees as P.W.-2, Munnawar as P.W.-3, Dr. M.H. Usmani as P.W.-4, Constable Umesh Kumar Dixit as P.W.-5, S.I. Retd. Ganga Ram Gautam as P.W.-6 and Dr. Sant Raj as P.W.-7.

9. After closing of the evidence, statement of accused / appellants under section 313 Cr.P.C. was recorded by the trial court explaining the entire evidence and other circumstances, in which the appellants denied the prosecution story and the entire prosecution story was said to be wrong and concocted.

10. No witness in defence was adduced by the accused persons before the trial court.

11. After having heard the rival submissions of parties, the Trial Court found appellants-accused guilty, therefore, convicted under Sections 147, 148, 323/149 and 325/149 and sentenced under Section 147 I.P.C. for two years simple imprisonment and fine of Rs.1,000/- and in default of payment of fine, two months additional simple imprisonment, under Section 148 I.P.C. for three years simple imprisonment and fine of Rs.1,000/- and in default of payment of fine, two and a half months simple imprisonment, under Section 323/149, one years simple imprisonment and fine of Rs.500/- and in default of payment of fine, fifteen days' simple imprisonment and under Section

325/149 I.P.C. for three years simple imprisonment and fine of Rs.2,000/- and in default of payment of fine, three months simple imprisonment.

12. Feeling aggrieved by the judgment of conviction and sentence passed by Trial Court, the appellant-accused has preferred this appeal.

13. Learned Counsel for the appellant has contended that the judgment and order passed by the Trial Court is wrong both on facts and law. The learned trial court had misread and misconstrued the statements of prosecution witnesses. The findings of the learned court below is based on conjectures and surmises. Benefits of latches of prosecution is accorded to the prosecution by the learned court below.

14. Learned counsel for the appellant has further contended that the learned court below has not considered the explanations of circumstances submitted on behalf of the defence while passing the impugned judgment and order of conviction. The learned trial court has not considered the fact that some of the prosecution witnesses have been declared hostile and had wrongly relied upon the fact that when a witness has been declared hostile, his statement could be relied upon with some extent. As such, he submits that the learned court below has erred in law and passed the impugned order, therefore, the same is liable to be set aside and the instant appeal is liable to be allowed.

15. Opposing the contention of learned Counsel for the appellant-accused, the learned A.G.A. has contended that sufficient evidence was given by the prosecution to prove the factum of assaulting the injured by the accused persons. The prosecution witnesses have also proved the commission of offence, as such, the impugned order does

not require any interference by this Court and the appeal is liable to be dismissed.

16. Through out the web of the Criminal Jurisprudence, one golden thread is always seen that it is the duty of the prosecution to prove the guilt of the accused. This burden of proof on prosecution to prove guilt is also known as presumption of innocence. The presumption of innocence, sometimes refer to by the latin expression "*ei incumbit probatio qui dicit, non qui negat*" (the burden of proof is on one who declares, not to one who denies) is the principle that one is considered innocence unless proven guilt. In criminal jurisprudence every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. The prosecution may obtain a criminal conviction only when the evidence proves the guilt of accused beyond reasonable doubt.

17. In the present case, almost all the prosecution witnesses have supported the prosecution story but PW-2 and PW-3 have been declared hostile. It is based on testimony of hostile prosecution witnesses from which guilt of accused may be inferred.

18. Witnesses may be categorized into three distinct categories. They may be wholly reliable. Similarly there may be witnesses who can be considered wholly unreliable. There is no difficulty in placing reliance or disbelieving his evidence when an evidence is wholly reliable or wholly un-reliable, but difficulty arises in case of third category i.e. where witness is neither wholly reliable nor wholly unreliable. Hostile witness ordinarily falls in category of those witnesses who are neither wholly reliable nor wholly un-reliable. Hon'ble Apex Court in *Khujji @ Surendra Tiwari Vs. State of M.P.* AIR 1991 SC page 1853 was pleased to observe as under :-

“The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether, but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.”

19. The term “hostile witness” does not find place in Evidence Act 1872 (here-in-after referred as Act of 1872 for brevity). It is a term borrowed from English Law. Though in English Law to allow a party to contradict its own witness was not acceptable view. The theory of contradicting its own witness was resisted on the ground that party should be permitted to discard or contradict his own witness, which turns unfavorable to party calling him, however, this rigidity of rule was sought to be relaxed by evolving a term “hostile” or “unfavourable witness” in common law.

20. It is relevant to quote Section 154 (1) of the Act of 1872, which reads as under:-

“the Court may, in its discretion, permit the person who calls a witness to put any question to him, which might be put in cross examination by the adverse party”.

21. Sub-Section (2) of Section 154 of Act of 1872, further provides that:-

“Nothing in this section shall disentitle the person so permitted under subsection (1), to rely on any part of evidence of such witness”.

22. Thus discretion is vested in Court to permit a person to put such question, which may be put by adverse party, if Court deems it appropriate. Thus the term “hostile witness” has been borrowed from English Law and developed in through case Laws.

23. The principle of “falsus in uno falsus in omnibus” (false in one thing, false in everything) has no application in India. It is duty of Court to separate grain from chaff. Keeping in view the above principles Hon'ble Apex Court in the case of **Sucha Singh v. State of Punjab, AIR 2003 SC 3617** was pleased to observe as under :-

“even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus (false in one thing, false in everything) has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, truth is the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.”

24. Similarly in **Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200** also Hon'ble Apex Court was pleased to observe as under:-

“When the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting embloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony”.

25. On perusal of the statement of witness P.W.-1: **Mukhtar Ahmad**; The Witness is the Informant of the case and is the relative of the Appellant and has dragged his name along with other Accused persons owing to political rivalry and land dispute existing between them. The witness in his entire testimony is silent about any specific role attributed to the Appellant. Moreso, the witness further states that the genesis of the case pertains to civil dispute with respect to alleged encroachment of a property between one Sagir, co-accused and this witness and aggrieved by the same he gave written complaint to the office of S.D.M, which enraged the co-accused Sagir who along with other co-accused persons allegedly assaulted the Informant and PW2. However, it is imperative to mention that in his cross-examination the witness has accepted that no documentary evidence was given to support the abovementioned action.

26. Moreover, the witness in his cross examination has categorically mentioned that the Accused persons assaulted him with lathi-danda for approximately 10 minutes, however, the ocular testimony is in complete contradiction with the medical evidence on record wherein as per the Medical Report, the PW1 sustained two injuries which are all simple in nature: This clearly shows that the way and manner in which the assault on the Informant is alleged to have taken place whereby as per allegation Informant was assaulted by 8 men with lathi and danda for 10 minutes, does not conform with the medical reports as nature of the injuries would be serious in nature. The medical evidence renders the ocular testimony of the Informant improbable.

27. In support of the abovementioned averment reliance is placed upon *Amar Singh v. State of Punjab, (1987) 1 SCC 679*, and the relevant portion of the judgment is extracted hereinunder.

"10.... Thus the evidence of PW 5 is totally inconsistent with the medical evidence. This Court in Ram Narain Singh v. State of Punjab [(1975) 4 SCC 497: 1975 SCC (Cri) 571 AIR 1975 SC 1727] has laid down that if the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence, this is a most fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case. There is no explanation for the apparent total inconsistency between the evidence of PW 5 and the medical evidence,"

28. The same principal was reiterated in ***Viram v. State of M.P., (2022) 1 SCC 341***, relevant portion is reproduced hereinunder:

"13. The oral evidence discloses that there was an indiscriminate attack by the accused on the deceased and the other injured eyewitnesses. As found by the courts below, there is a contradiction between the oral testimony of the witnesses and the medical evidence. In Amar Singh v. State of Punjab [Amar Singh v. State of Punjab, (1987) 1 SCC 679: 1987 SCC (Cr) 232], this Court examined the point relating to inconsistencies between the oral evidence and the medical opinion. The medical report submitted therein. established that there were only contusions, abrasions and fractures, but there was no incised wound on the left knee of the deceased as alleged by a witness. Therefore, the evidence of the witness was found to be totally inconsistent with the medical evidence and that would be sufficient to discredit the entire prosecution case."

29. Further, the Witness in his cross-examination has categorically accepted that the disputed land was sold by one Irfan and Gufran to the co-accused Sagir via Sale deed and the witness had filed a civil case against Sagir and others wherein he had lost the case. Further, the witness has also accepted that there was political rivalry between the Accused and Informant, this clearly shows the ulterior motive behind the registration of the FIR.

30. P.W.-2 **Raees (Declared Hostile)** is an alleged Eye-witness of the incident and also an injured witness, who is the nephew of the

Informant. The witness in his testimony before the Learned Trial Court on 24.06.2009 has supported the version of the prosecution, however, when the witness was recalled to testify in the light of Section 319 Cr.P.C. on 30.06.2010, the witness accepted that he was tutored by PW1, namely Mukhtar, who happens to be his uncle, and further he conceded that there exists political rivalry between the Accused persons and the Informant. The witness was declared hostile by the Learned Trial Court, however, the Learned Trial Court relied upon the testimony of the witness to the extent it was corroborated. Further. It is submitted that the corroborated part of the testimony does not level any allegation against the Appellant.

31. Further, the Court observed that the witness in his entire testimony has not leveled any specific allegation against the Appellant. The role of throwing the ita (brick) which caused the head injury has been assigned to co-accused Sagir. The witness has been declared hostile by the Prosecution. This further shows that he is an interested witness wherein he has concocted the entire story along with PW1 to falsely implicate the Appellant

32. Further PW3, **Munnawar (Declared Hostile)**, is an alleged eye-witness of incident. The witness in his testimony has categorically denied witnessing the alleged incident as he has stated that he was not present at the place of occurrence and did not see Accused persons assaulting the alleged victims with lathi-danda.

33. Further the PW-3, who has been declared hostile by the Learned Trial Court, and in light of the contradiction ought to efface altogether and no reliance could be placed on his testimony to convict the Appellant as the prosecution utterly failed to prove its case qua Appellant beyond reasonable doubt and if any benefit accruing out of it must be given in the favor of the Appellant.

34. PW4 **Dr. M.H. Usmani** is a formal witness who performed the medical examination of the alleged victim PW1, namely Mukhtar, on 29.04.2001. The witness in his testimony before the Learned Trial Court has stated that PW1 sustained two injuries, which were a simple in nature. The witness also examined PW2, namely Raees, who sustained 3 injuries, out of which one was inflicted was on the left side of the head and X-ray was recommended for the same. However, the witness categorically stated that the general condition of PW2 was normal, which clearly shows that the nature of injury sustained was not serious. The testimony of this witness highlights the discrepancies in the testimony of the alleged witnesses PW1 and PW2 rendering their testimony unworthy of any credence as PW1 has stated that PW2 was in an unconscious state for about 20 days, however, in the absence of any ocular, medical and documentary evidence to support, the same has no legs to stand.

35. PW5, **Umesh Kumar Dixit**, is the scribe of the FIR and he made the GD entry. The witness has stated that the informant, PW1, brought the written tehreer (Complaint) at the police station which again shows that the PW1 was not the scribe of the complaint and the FIR was an afterthought to falsely implicate the Appellant to settle his old rivalry.

36. P.W.-6 **Gangaram Gautam (Investigating Officer)**: The witness, now a retired police officer, is the investigating officer of the instant case. The witness also prepared the site map of the alleged incident at the instance of the Informant.

37. PW7: **Dr. Santraj** At the outset has mentioned that the X-ray of PW2, namely Raees, was performed by radiologist.

38. Dr. O.P. Pandey, who was summoned by the Learned Trial Court but could not be produced for his testimony to be recorded owing to his old age. On account of his absence, PW7, the then on duty radiologist was examined. Further, the opinion given by PW7 is based on the limited material which are X-Ray Plate and Medical Report

39. The witness in his testimony before the Learned Trial Court stated that Injury No.2 sustained by PW2 on the left side of the head caused the Parietal bone fracture. However, the witness during his cross examination has accepted that the Medical Report bears only the thumb impression not the name of the victim who was examined. Moreover, the Learned Trial Court owing to the absence of name of the victim examined on the X-Ray Report and the fact that the Doctor, namely Dr. O.P. Pandey, who had examined the witness could not be examined by the Learned Court, held that the Prosecution has failed to prove the injury sustained by PW2 on his head which resulted in parietal bone fracture was not proven beyond reasonable doubt.

40. In the light of the abovementioned facts, the negation of parietal bone fracture sustained by PW2 renders the Prosecution story unsustainable as the rest of the injuries sustained by the victims, namely Mukhtar and Raees, are simple in nature. In the instant case, the Learned Additional Sessions Judge has convicted the Accused persons under Section 325 as the injury attracted clause eighthly of grievous hurt defined in Section 320 IPC. The Learned Additional Sessions Judge has relied testimony of PW6, the Investigating officer, who stated that the alleged date of incident is 29.04.2001 and the statement of PW2 was recorded on 15.07.2011 after the passage of almost 2.5 months wherein he was unable to speak properly. The Learned Trial Court erred in solely relying on the testimony of investigating officer and further presumed that the delay in recording

the statement of PW2 was because of bodily pain. The Learned Additional Sessions Judge has erred in presuming the failure to record the statement can be because of some other unfavorable circumstances or owing to the busy schedule of the Investigating Officer, moreover, the failure to take into account the testimony of PW4, Dr. M.H. Usmani, who categorically stated that the general condition of PW2 was normal shows non application of judicial mind. Further, such presumption without any documentary evidence to show that the PW2 was admitted in Hospital for 20 or more days goes against the settled principle of law.

41. Since, the instant case is case where no direct evidence came forward during the trial, the Trial Court could not have based the conviction of the Appellant on conjecture and surmises. In the instant case the chain of circumstances which form the conclusion of guilt is to be drawn from the evidences brought on record which has not been fully established; however, the facts so established are to be consistent only with the hypothesis of the guilt of the accused and the circumstances should be of conclusive nature so as to rule out every possible hypothesis except the one to be proved i.e. the complicity of the accused.

42. Further, the instant case is a classic example of false implication of the Appellant due to personal vendetta wherein the entire Prosecution version is concocted and the reliance has been placed upon interested witnesses, further, Prosecution has failed to produce any independent witness for corroboration of its own version.

43. In view of the aforesaid discussions, it would be expedient in the interest of justice that the impugned Judgment and Order passed by the learned Trial Court is liable to be set aside and the Appellant be acquitted.

44. Thus in view of above, after analysis of circumstances of present case in the light of aforesaid settled legal principles, I come to the conclusion that the trial court has erred passing the impugned judgment and order, therefore, this appeal succeeds and is **allowed**. The judgment and order dated 11.12.2013 passed by learned Additional Sessions Judge, Court No.7, Sitapur in Sessions Trial No.161 of 2008, arising out Case Crime No.107 of 2001, lodged at Police Station-Laharpur, District-Sitapur is **set aside and reversed**. The appellants, namely, Saleem Ahmad is **acquitted** of charges under Sections 147, 148, 323/149 and 325/149 I.P.C. His personal bonds and surety bonds are canceled and sureties are discharged.

45. Let record of lower Court be sent back to Court concerned along with copy of judgment and order for information.

Order Date :-27.10.2023
Piyush/-