

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

Neutral Citation No. - 2023:AHC-LKO:85268-DB

Judgment reserved on 18.09.2023

Judgment delivered on 22.12.2023

Reserved

Case :- CRIMINAL APPEAL No. - 2937 of 2010

Appellant :- Gurdev Mali

Respondent :- State of U.P.

Counsel for Appellant :- Nagendra Mohan, Pravin Kumar Verma

Counsel for Respondent :- Govt. Advocate, Lalit Kishor Pandey

WITH

Case :- CRIMINAL APPEAL No. - 2938 of 2010

Appellant :- Nanha @ Raghunandan Yadav

Respondent :- State of U.P.

Counsel for Appellant :- Anil Kumar Sharma

Counsel for Respondent :- Govt. Advocate, Lalit Kishor Pandey

Hon'ble Rajan Roy, J.

Hon'ble Ajai Kumar Srivastava-I, J.

(Per: Rajan Roy, J.)

1. Heard Mr. Nagendra Mohan, learned counsel for the appellant - Gurdev Mali, Mr. Anil Kumar Sharma, learned counsel for appellant - Nanha @ Raghunandan Yadav, Mr. Lalit Kishor Pandey, learned counsel for the informant, learned AGA for the State and perused the records.

2. By means of these Criminal Appeals, the appellants have challenged their conviction vide judgment and order dated 10.11.2010 passed by the Additional Sessions Judge, Court No. 13, Lucknow in Sessions Trial No. 89 of 2004, arising out of case Crime No. 438 of 2003, Police Station Wazirganj, District Lucknow convicting the appellants for the offence punishable under Sections 302/34, 307 IPC and Section 4 of the Explosive Substances Act, 1908 (hereinafter referred as 'Act 1908') and sentencing them to undergo life imprisonment, seven years and five years imprisonment, retrospectively. All the sentences are to run concurrently.

3. The prosecution case, in nutshell, is that on 26.09.2003 at about 2.15 PM when the informant Nafees Khan along with his nephew Rizwan Ahmad had gone to attend Court proceedings in respect of case Crime No. 407 of 2002, under Sections 302, 506 IPC at the District Court, Lucknow wherein the informant was an accused for the murder of Sahdev Mali, brother of one of the accused of the case at hand, when the said persons had just sat on their motorcycle near the motorcycle stand and were about to move ahead, the accused, four in number, sitting in a Toyota Qualis car, came from behind, alighted therefrom, exhorted each

other on seeing the informant that he was Nafees Khan and should be killed and hurled bombs one of which hit the back of Rizwan Ahmad, both of them fell down from the motorcycle. Chaos ensued on account of hurling of bombs. Two passersby, namely, Tanveer Ahmad and Izharul Haq also saw the incident. The assailants rode away on the Toyota Qualis assuming that both of them had died. Rizwan Ahmad was taken to KGMU Hospital where he died.

4. Inquest was conducted on 27.09.2003 which started at 8.10 AM and ended at 13.13 PM.

5. Postmortem was conducted on 27.09.2003 at 2.30 PM.

6. The Investigating Officer inspected the scene of crime, collected remnants of bombs which had been hurled as also one live bomb which was recovered from the scene of crime. Recovery memos in this regard are Exhibit Ka-8.

7. Exhibit Ka-16 is the certificate issued by the Bomb Disposal Squad. Exhibit Ka-20 and Ka-21 are the forensic reports. Blood on the blood soaked soil collected from the scene of crime was found disintegrated, therefore, its origin could not be determined. As per Exhibit Ka-21, remnants of the bomb which had been hurled contained explosive substance. Site-plan of the scene of crime

was prepared which is Exhibit Ka-7. Toyota Qualis allegedly used by the assailants at the time of commission of crime was recovered on 23.11.2003 on the pointing of the accused Nanha @ Raghunandan Yadav. Its recovery memo is Exhibit Ka-9. The site-plan of recovery of vehicle is Exhibit Ka-10. Exhibit Ka-22 is the order of the District Magistrate granting sanction for the prosecution under Sections 4/5 of the Act 1908. This sanction was given on 24.04.2010.

8. The Investigating Officer recorded the statement of witnesses and submitted charge-sheet against four accused, namely, Nanha @ Raghunandan Yadav, Gurdev Mali, Mahendra Dwivedi and Ganga Prasad. While the names of Nanha @ Raghunandan Yadav and Gurdev Mali were mentioned in the Tehrir and FIR, the names of two other accused were not mentioned therein although it was mentioned that three-four persons had come by Toyota Qualis referred hereinabove.

9. Charge was framed against the aforesaid four accused under Section 120, 307, 302 read with 34 IPC by the Sessions Court. Charge was also framed against Gurdev Mali and Nanha @ Raghunandan Yadav under Sections 4/5 of the Act 1908 on

23.09.2004 in Sessions Trial No. 89 of 2004. The accused-appellants denied the charges, therefore, they were put to trial.

10. The prosecution produced as many as six witnesses. PW-1 Nafees Khan is the informant and the person who accompanied the deceased on the fateful day. PW-2 Izharul Haq is also a witness of the crime. He was known to PW-1 since prior to the incident and claims to have been passing by. PW-3 Dr. S.M.S. Yadav is the Doctor who conducted the autopsy. He has proved the postmortem report and injuries mentioned therein. PW-4 Avinash was the Chowki Incharge of Police Chowki Medical College, Police Station Chowk, Lucknow at the relevant time and had got the inquest report, etc. prepared. PW-5 Vishambhar Nath Dubey was posted as Incharge Police Station Wazirganj, District Lucknow and had investigated the case initially. PW-6 Indra Narain Mishra is the Senior Sub Inspector, Police Station Wazirganj, District Lucknow who had taken up investigation of the case after PW-5 and collected forensic report, etc. after filing of the charge-sheet by the PW-5 as also sanction order under Section 7 of the Act 1908.

11. Statement of the accused was recorded under Section 313 Cr.P.C. Two of the accused, namely, Mahendra Dwivedi and

Ganga Prasad claimed that they were in jail and were falsely implicated. These two accused have been acquitted by the Trial Court as there was no evidence pointing towards their involvement in the commission of crime. The other two accused, namely, Nanha @ Raghunandan Yadav and Gurdev Mali, appellants herein, claimed to have been falsely implicated on account of enmity. The appellants did not lead any evidence in their defense. The Trial Court convicted the appellants, namely, Nanha @ Raghunandan Yadav and Gurdev Mali, as already stated in the earlier part of the judgment.

12. Mr. Nagendra Mohan, learned counsel for the appellant Gurdev Mali submitted that FIR was ante-timed. It was lodged after deliberations and consultations. There are three versions as to the place of writing of Tehrir in the testimony of PW-1 which goes to show that Tehrir was written subsequently when he was called by the police and after deliberations. There is a prior enmity between the parties on account of which the appellant Gurdev Mali has been falsely implicated. There is no evidence of conspiracy. Two persons named as accused, namely, Mahendra Dwivedi and Ganga Prasad were in fact in jail at the relevant time which goes to show that the entire story has been cooked up and these two have

been acquitted. Without informant or eye-witness being present the inquest report mentions the names of the accused without any explanation as to how it is so. Although it is said that bombs were hurled with intent to kill PW-1 informant Nafees Khan who was an accused in the murder of the brother of appellant, Sahdev Mali, he did not sustain any injury and it was Rizwan who sustained injuries which is very unlikely and improbable and creates doubt upon the entire prosecution case, especially as, in spite of the aforesaid hurling of bombs the motorcycle was not damaged and no such traces of bomb blast were detected. PW-2 was known to the informant and his presence at the scene of crime is not only by chance but also highly improbable and it appears that he has been planted subsequently. His testimony is not at all reliable. As per medical evidence the bomb was hurled from close quarters, but, the witnesses have stated about the bombs being hurled from far away. It is a case of blind murder, no one saw the incident and after it happened PW-1 was called, who on account of prior enmity falsely implicated the appellant and other accused. There are various inconsistencies in the testimony of PW-1.

13. As regards the offence under Sections 4/5 of the Act 1908, he submitted there was no sanction/consent under Section 7 of

the Act 1908, therefore, the entire trial is vitiated and the said sanction was obtained only at the stage of argument which does not validate the entire trial. In support of his submissions, Mr. Mohan has relied upon a decision of Hon'ble the Supreme Court dated 17.10.2022 in ***Criminal appeal No. 1105 of 2010 (Md. Jabbar Ali & Ors. vs. The State of Assam.***

14. Mr. Anil Kumar Sharma, learned counsel for the appellant Nanha @ Raghunandan Yadav adopted the arguments of Mr. Nagendra Mohan. In addition, he submitted that PW-1 has not initially stated specifically as to who threw the bomb, but, in the Court he has made an improvement in this regard. Tanvir Ahmad the third eye-witness has not been produced. PW-2 who is a chance witness is unreliable. Medical evidence shows two injuries on the back of the deceased, but, only one bomb had been hurled. Presence of both the eye-witnesses is highly unreliable. There are inconsistencies and contradictions in the testimony of PW-1, PW-2 and PW-5 as to who took the injured Rizwan to hospital. There is no evidence of conspiracy. In the FIR colour of Toyota Qualis has not been mentioned apart from number not being mentioned. He submitted that it is possible that PW-1 had come to Court to attend the Court proceedings, but, he was not present when the incident

took place. There are no independent witnesses of the crime though hundred of persons were present in the busy area. Nanha @ Raghunandan Yadav was physically disabled. His right arm was injured, therefore, he could not hurl the bomb a fact which has been noticed by the Court itself, therefore, his involvement in the crime was absolutely impossible and he has been falsely implicated.

15. Mr. Lalit Kishor Pandey, learned counsel for the informant has opposed the appeals. He has submitted that as regards sanction/consent under Section 7 of the Act 1908 the opportunity to obtain the sanction was granted after hearing on an application filed by the prosecution and this decision was never challenged by the appellants, therefore, it is not open for them to challenge it now. The consent was granted prior to the decision of Hon'ble the Supreme Court in ***Deepak Khichi vs. State of Rajasthan; (2012) 5 SCC 284***. The fact that date was fixed in the criminal case in which PW-1 was an accused has not been rebutted nor any cross-examination has taken place, therefore, the presence of PW-1 on the said date is not only probable but in fact has been proved by the witnesses. Testimony of PW-1 regarding a bomb having been hurled which did not burst is corroborated from the recovery of live

bomb from the scene of crime. Merely because two of the accused were in jail at the commission of crime does not absolve the other two accused whose presence at the scene of crime and of having committed the crime is proved by evidence. FIR is prompt, therefore, there is no question of deliberations and consultations prior to its lodging. The alleged inconsistencies and contradictions in the examination-in-chief of PW-1 have been explained in the cross-examination itself. No suggestion has been made to the Investigating Officer PW-5 and and PW-6 regarding the FIR being ante-timed. General diary was produced by the Investigating Officer and has been proved. Bomb hurled by Nanha @ Raghunandan Yadav did not explode and was recovered. Minor contradictions in the testimony do not materially affect the prosecution case and are liable to be ignored. Place of occurrence has been proved. For all these reasons, the appeals should fail and are liable to be dismissed.

16. In support of his contentions, Mr. Pandey has relied upon the following decisions ***Bimla Devi vs. Rajesh Singh; 2016 (15) SCC 448, Radha Mohan Singh Alias Lal Sahewb and others vs. State of U.P.; 2006 (2) SCC 450, Hema vs. State, through Inspector of Police, Madras; AIR 2013 SC 1000, and Pedda***

Narayana and others vs. State of Andhra Pradesh; 1975 (4)

SCC 153.

17. Learned AGA also opposed the appeals on the same grounds as raised by the informant's counsel. He submitted that PW-1 Nafees was accused in the criminal case which was fixed on the date when the incident occurred and, therefore, who-else but he would know the date fixed in the said case. Moreover, in the statement under Section 313 Cr.P.C. the date being fixed in the said criminal case involving Nafees PW-1 has not been disputed. No suggestion has been made to the Investigating Officer with regard to the FIR being ante-timed. The general diary has been produced by the Investigating Officer and proved by him. It has come in evidence that the bomb hurled by Nanha @ Raghunandan Yadav did not explode and a live bomb was found from the scene of crime. Medical evidence corroborates the testimony of PW-1, therefore, it is sufficient to convict the appellants of the charge framed against them. Recovery of red Toyota Qualis on the pointing of one of the appellants Nanha @ Raghunandan Yadav which has been proved by the police witnesses also supports the prosecution case. Minor contradictions and inconsistencies in the testimony of witnesses

are liable to be ignored. The presence of PW-2 at the scene of crime is also not improbable and it is not to be disbelieved merely because he was known to PW-1. For all these reasons, the appeals should fail and are liable to be dismissed.

18. As per the postmortem report the deceased Rizwan Ahmad had following antemortem injuries on his body:

“1. Multiple lacerated wound 18cmX10cm present on RT back of chest just below RT scapula. Blackening irregular margin (inverted) are present on wounds.

2. Multiple lacerated wound 32cmX8cm anterior and posterior medial aspect of RT upper limb. Blackening irregular inverted margin are present on wound.”

The cause of death as mentioned in the postmortem report is shock and hemorrhage as a result of antemortem blast injuries as noticed.

19. PW-3 the Autopsy Surgeon has proved the postmortem report. He has stated that the bomb had been hurled upon the deceased from a close distance. In cross-examination he has opined that the injuries could have been caused by more than one bomb being hurled on him.

20. From the medical evidence on record, it is evident that it is a case of murder. The only question is as to whether the deceased was murdered by the appellants herein and also as to whether the

appellants attempted to murder Nafees Khan and committed the offence under Section 4, 5 of the Act 1908?

21. The case of the prosecution is of direct evidence based on the testimony of PW-1 and PW-2 apart from medical and other evidence on record.

22. PW-1 is the uncle of the deceased. He claims to have gone to the District Court premises on 26.09.2003 to attend a criminal case wherein he was an accused. He has stated that after getting the next date in the case he came out, took his motorcycle from the motorcycle stand and just when he along with Rizwan Ahmad had sat on the motorcycle he heard a challenge from behind and saw a Tyotoa Qualis in which 3-4 persons were sitting including Gurdev Mali and Nanha @ Raghunandan Yadav who were of his village. Both of them alighted and Gurdev Mali exhorted that 'he is Nafees who had killed his brother Sahdev, he should be killed'. Both Nafees and Rizwan turned around. Both Gurdev Mali and Nanha @ Raghunandan Yadav started hurling bombs on them with intent to kill. One of the bombs hit Rizwan who was sitting at the back and burst. There was a loud explosion and both PW-1 and Rizwan fell down from the motorcycle. There was smoke all

around. People were running helter and skelter. There was utter chaos.

23. At this stage it is relevant to point out that the defense was not able to bring out anything in the cross-examination to the contrary as regards the criminal case being listed in the District Court on the said date wherein the Nafees PW-1 was an accused nor any evidence was led to belie this contention, therefore, considering the statement of PW-1 about him having gone to attend the Court proceedings bearing No. 460 of 2002, this has to be accepted as there is no evidence to the contrary to belie the said statement.

24. In this context, we have examined the testimony of PW-1 in the light of the arguments advanced by the counsel for the appellants that he has given three different statements as to the place where he wrote the Tehrir or got it written as also who took the injured Rizwan to the Hospital whether the police or Advocates, etc. We find that in his examination-in-chief he has stated that when chaos ensued consequent to hurling of bombs Advocates and passersby collected and they took them i.e. PW-1 and Rizwan to Balrampur Hospital on a Rickshaw where the police also reached. He has thereafter stated that considering the serious

condition of Rizwan the Doctors at Balrampur Hospital referred him to Medical College. After getting Rizwan admitted in the Medical College, he wrote and prepared a Tehrir in the Medical College itself and put his signatures thereon and went to the Police Station Wazirganj to get the report lodged. He identified the Tehrir shown to him as the one written by him as aforesaid. However, thereafter, in the examination-in-chief itself, he has stated that after getting Rizwan admitted in Balrampur Hospital just when he was about to leave for Wazirganj Police Station to get the report lodged, the Doctors of Balrampur Hospital referred his nephew Rizwan to the Medical College whereupon he sent Rizwan to the Medical College and went to the Police Station Wazirganj to give his written Tehrir and after getting the Tehrir written reached the Medical College. His nephew died one hour after he had reached the Medical College. Then, he has stated that he had written/prepared the Tehrir/FIR at the Balrampur Hospital which is contrary to his earlier statement. In his cross-examination at one place he has stated - वजीरगंज में मैंने लिखकर तहरीर दी और एफ.आई.आर. दर्ज करायी। यह तहरीर इंस्पेक्टर ने लिखवाई। इस तहरीर पर (जो इंस्पेक्टर ने लिखवाई थी) उस केस का एफ.आई.आर. दर्ज हुआ। वजीरगंज थाने पर कुल 1 घंटे समय लगा। He has then stated that after the Police

Station he went to the Medical College. Thus, according to the appellants' counsel here he has stated that he wrote the Tehrir at Wazirganj Police Station and that it was got written by the Inspector.

25. Firstly, we have to keep in mind that the statement of PW-1 was being recorded on 21.08.2007 i.e. almost four years after the incident and lodging of report, secondly in the examination-in-chief also he appears to be using the words Tehrir and FIR interchangeably that is why in the examination-in-chief he has stated तहरीर लिखाने के बाद मेडिकल कॉलेज पहुँचा। We must keep in mind that after lodging the FIR at Wazirganj Police Station he went back to KGMU. Keeping in mind the lapse of four years since lodging of the FIR on the basis of the Tehrir submitted by the PW-1, the discrepancies being pointed out by the appellant's counsel do not materially affect the prosecution case. PW-1 has identified the Tehrir shown to him as the one written by him.

26. As regards his statement in cross-examination that the Tehrir was got written by the Inspector, as already stated, he appears to be using the term Tehrir and FIR interchangeably, therefore, not much mileage can be claimed by the appellants on this count itself. The incident happened on 26.09.2003 at 2.15 PM and the

FIR has been lodged at 3.30 PM on the same day, therefore, lodging of the FIR is prompt. In the intervening one and a quarter hours the injured Rizwan was taken to Balrampur Hospital which is situated very close to the scene of crime and from there he was taken to KGMU. After getting Rizwan admitted to the Medical College, PW-1 went to the Police Station Wazirganj and lodged the FIR which was registered at 3.30 PM. Thereafter, he went back to KGMU. Rizwan died one hour after PW-1 reached KGMU from Police Station Wazirganj, therefore, we are not persuaded by the arguments of learned counsel for the appellants that PW-1 having mentioned different places at which he wrote the Tehrir or got it written thereby discrediting the prosecution case.

27. Much was sought to be made out from the statement of PW-1 in cross-examination that the Inspector had got the Tehrir written. As already stated, PW-1 is not a legal person and would not know the difference between the term Tehrir and FIR. Moreover, lodging of FIR is prompt. Incident took place at about 2.15 PM. Injured was taken to Balrampur Hospital then KGMU and the FIR was lodged at Wazirganj Police Station at 3.30 PM on the same day. Once he has identified the Tehrir Exhibit Ka-1 as the one which he wrote down and which bears his signature then

there is no reason to disbelieve the prosecution case that it is PW-1, who was accompanying Rizwan, who wrote the Tehrir and gave information about the crime on which the FIR was lodged at 3.30 PM on 26.09.2003 by the police. Minor inconsistencies in this regard do not materially affect the prosecution case.

28. As regards the question as to whether the Advocates and others present at the scene of crime took the injured Rizwan to the Balrampur Hospital on a Rickshaw or the Police took him and inconsistencies in this regard in the statement of PW-1 vis-a-vis the statement of Investigating Officer PW-5 who has claimed that he and the Police personnel took him to Balrampur Hospital, is concerned, it has come in the testimony of PW-1 that once the bombs were hurled utter chaos ensued. The scene of crime is a busy place thronging with lawyers, litigants and passersby. He has stated that after hurling of bombs there was screaming and shouting. Advocates and passersby collected, they put them i.e. PW-1 and Rizwan in a Rickshaw and took them to Balrampur Hospital where the police reached. In the milieu it is quite possible that while they were being taken to Balrampur Hospital the police also reached. We may in this context refer to the statement of PW-1 in cross-examination that for ten minutes there was smoke and

chaos. After ten minutes of the incident the Advocate came. The police reached the scene of crime 20-25 minutes after the incident. He has in cross-examination stated that it is the policemen who took him and injured Rizwan to Balrampur Hospital. This is in tune with the testimony of PW-5 Investigating Officer that he along with other police personnel had taken them to the Hospital. In the milieu it is quite possible that the police personnel along with Advocates and passersby may have accompanied them to the Hospital, therefore, much cannot be made out on account of aforesaid alleged inconsistency/contradiction which is of very trivial nature.

29. As regards contention of counsel for the appellants that PW-1 has stated that his statement was recorded by the police at the Police Station whereas PW-5 has stated that it was recorded at the scene of crime, we have perused the testimony of PW-1 and PW-5, we find that PW-1 has stated in his examination-in-chief that he went to the Police Station for one hour on the date of incident thereafter he went to the Medical College. He was called to the Police Station several times. He was called the next day also. He did not remember when the police had inquired from him about the incident. Thereafter he has stated that his statement

was recorded at the Police Station, but, prior to it he has also stated that at the Hospital also he had narrated the incident to the police personnel who had taken notes, therefore, merely on account of the alleged inconsistency the entire prosecution case cannot be disbelieved as the police had accompanied PW-1 and injured Rizwan to Balrampur Hospital and thereafter PW-1 had gone to the Police Station also, therefore, this by itself will not discredit the entire prosecution case.

30. There are two injuries on the body of the deceased and PW-1 has spoken only about one bomb being hurled which hit Rizwan and burst. Mr. Sharma, learned counsel for the appellant Nannha @ Raghunandan Yadav submitted that this statement of PW-1 is not corroborated by medical evidence, according to which, there are two injuries. We are of the opinion that bombs were hurled from behind as stated by PW-1 himself. It is quite possible that splinters of the same bomb which burst caused two injuries or more than one bomb hit Rizwan, but, could not be seen by PW-1, but, this by itself does not persuade us to disbelieve the testimony of PW-1 or the prosecution case.

31. As regards the submission of Mr. Sharma that as per opinion of the Autopsy Surgeon the bomb was hurled upon the deceased

from close distance and there was blackening whereas ocular testimony is to the effect that it was hurled from a distance. We have perused the testimony of PW-1 and do not find any such mention therein that the bomb was hurled from a far away distance. In fact, he has stated that just when they had sat on the motorcycle there was a shouting from behind, when they turned, they saw the accused with bombs in their hands moving towards them and thereafter they hurled the bombs, therefore, this contention is not acceptable.

32. On a consideration of the testimony of PW-1 we find that his presence at the scene of crime on 26.09.2003 at about 2.15 PM has been proved in view of the date having been fixed in his case and nothing has been brought to the contrary in his cross-examination by the defense. There is no reason to disbelieve him merely because he himself did not sustain any injuries. In this regard, we find that Rizwan was sitting behind PW-1 and the bombs were hurled from behind. One of the bombs hit Rizwan and burst whereupon both of them fell down from the motorcycle, therefore, merely because PW-1 who was in the front did not receive any injuries does not mean that he was not present at the scene of crime and did not see the culprits, whom he knew before

hand, committing the crime. The ocular testimony of PW-1 is corroborated by medical evidence and no such major contradiction has been brought out in this regard so as to make his testimony unbelievable.

33. As regards the testimony of PW-2 Izharul Haq, on a reading of the same we find that he knew PW-1 since prior to the incident. Moreover, he claims to have been going towards Residency to meet one Asim on motorcycle when he saw the incident taking place and also saw Nafees. He had to take his friend Asim to meet his elder brother as the former wanted to do contractor-ship business. Asim used to reside at Charbagh whereas the brother of PW-2 used to work in the Jal Nigam Office near Surajkund and he was to take Asim to his brother at Surajkund. The scene of crime is not situated in between Charbagh and Surajkund. His statement that he was going to meet Asim at the Residency so as to take him to Surajkund is not acceptable. He himself has stated that this path which he had taken was just on the opposite side. He has then stated that there was apprehension of danger, therefore, he chose to go to the Residency through the Civil Court, but, he has not explained as to what was the apprehension faced by him so as to compel him to take a route which was absolutely offroute, if he

was to take Asim who was a resident of Charbagh to Surajkund but at that time supposedly at Residency to meet his brother at Surajkund. PW-2 himself was travelling from Begum Hazratmal Park, Hazratganj towards Residency whereas Surajkund is near Hazratganj, therefore, this statement is inexplicable. Asim has not been examined. For this reason itself his presence at the time of commission of crime appears to be doubtful. His presence at the scene of crime is too much of a chance, to be accepted. The Trial Court has erred in believing his testimony.

34. PW-2 has admitted to the fact that he had not told the Inspector that he was going to meet Asim at the Residency on the fateful day when he claims to have seen the incident. In fact in his statement under Section 161 Cr.P.C. with which he was confronted before the Court below, he had stated that on receiving information about the incident and on hearing the cries, he reached the scene of crime, which creates doubt as to his presence when the crime was actually being committed.

35. We, therefore, do not find the testimony of PW-2 to be credible, but, in spite of it we are of the opinion that the testimony of PW-1 itself is sufficient to prove the guilt of the appellants herein especially as it is corroborated by medical evidence.

36. Place of occurrence has been proved by PW-1 as also the forensic report Exhibit Ka-20, according to which, blood was found on the blood soaked soil and simple soil collected from the scene of crime.

37. The site plan is Exhibit Ka-7 has been prepared on the statement of PW-1.

38. Exhibit Ka-9 is the recovery memo of Toyota Qualis from a brick kiln which was used in the commission of crime. The said recovery is based on the pointing of the accused Nanha @ Raghunandan Yadav while he was in police custody.

39. Gurdev Mali had the motive to commit the murder as PW-1 Nafees who was to attend the Court proceedings on 26.09.2003 before the Fast Track Court II, Lucknow was an accused in the murder of his brother. No doubt it is Rizwan who was killed but the fact is that both Nafees and Rizwan were present at the scene of crime on the motorcycle when they were attacked by bombs and as Rizwan was sitting at back he was hit by the bomb which burst and died subsequently in the hospital. The vehicle used for commission of the crime was recovered when accused Nanha @ Raghunandan Yadav was taken on remand by the police and in the police custody he disclosed the place where the said vehicle

was parked and offered to get it recovered as is evident from the recovery memo Exhibit Ka-9 which has been proved by police witnesses, therefore, the recovery after a month has been explained.

40. Prior enmity can cut both ways. It can be a motive for commission of the crime as also for false implication, therefore, this by itself cannot be a ground for absolving the appellants who i.e. Gurdev Mali had a motive in this regard and the recovery of the vehicle allegedly used in the commission of crime is on the pointing of Nanha @ Raghunandan Yadav, his acquaintance.

41. There is no requirement in law of mentioning the name of the accused in the inquest report, therefore, mere mention of their names does not belie the prosecution case. Moreover, it has come in the testimony of police witness who has proved the inquest report that family members had come who had informed that the crime was committed by the accused, therefore, names were mentioned. The contention of Mr. Nagendra Mohan in this regard is, therefore, rejected.

42. Merely because PW-1 who was being targeted by Gurdev Mali had not sustained any injuries and it is his nephew Rizwan who sustained injuries does not persuade us to disbelieve the

prosecution case, once the presence of Nafees Khan has been proved at the scene of crime and the FIR has been lodged promptly. Considering the sequence of events narrated by PW-1, there is nothing unnatural in he not having sustained any injury as he was sitting in the front whereas the deceased was a pillion rider and the bomb was hurled from behind.

43. Merely because two of the accused Mahendra Dwivedi and Gaga Prasad have been acquitted by the Trial Court does not absolve the appellants against whom the charge of having committed the offence under Sections 302, 34, 307 IPC has been proved beyond reasonable doubt.

44. Mere non-production of the third eye-witness Tanvir Ahmad does not materially affect the prosecution case as it is the quality and not quantity which is important in the facts and circumstances of the case.

45. Another argument of learned counsel for the appellants was that right hand of the accused Nanha @ Raghunandan Yadav was injured/disable, therefore, the story set up by the prosecution that he was hurling bombs along with Gurdev Mali is unacceptable as it was impossible to do so in view of the said injury and reliance was placed in this regard on the observations of the Trial Court as

recorded in the cross-examination of PW-1. We have perused the said observations of the Trial Court and we find that the Court which had the benefit of observing Nanha @ Raghunandan Yadav from close quarter, has opined that in spite of the said injury/disability the arm was fine although it does not open completely. These observations do not help the appellant Nanha @ Raghunandan Yadav. This contention is also, therefore, rejected.

46. We are, therefore, in agreement with the judgment of the Trial Court in so far as it relies upon the evidence on record, except the testimony of PW-2, to hold the appellants guilty of having committed the murder of Rizwan punishable under Section 302, 34 IPC as also on attempting to murder PW-1 punishable under Section 307 IPC.

47. As regards offence punishable under Section 4/5 of the Act 1908 is concerned, Section 7 of the Act 1908 reads as under:

“7. Restriction on trial of offences.- No Court shall proceed to the trial of any person for an offence against this Act except with the consent of the District Magistrate.”

48. The trial commences on framing of the charges after cognizance has been taken. It is the admitted case of the prosecution as is revealed from the testimony of PW-6 that

sanction/consent was granted under the Act 1908 on 24.04.2010. The said sanction/consent is exhibited as Exhibit Ka-22. It has been exhibited on 19.07.2010. The charge under Sections 4/5 of the Act 1908 was framed against Gurdev Mali and Nanha @ Raghunandan Yadav on 23.09.2004, therefore, apparently on the date of framing of the charge there was no consent as envisaged under Section 7 of the Act 1908.

49. We have perused the judgment of the Trial Court in this regard and the reasoning given by it to the effect that the time was given for obtaining the requisite sanction/consent under the aforesaid Act 1908 on an application moved by the prosecution after hearing the parties and the same was obtained on 24.04.2010. It has been proved by PW-6. It has opined that the exercise of the committal of trial is not rendered invalid in view of absence of consent/sanction under Section 7 of the Act 1908, however, it has also mentioned that the trial in the absence of requisite sanction/consent is impermissible in law, but, it has then opined that there is no such provision in the Act 1908 that if the trial has commenced then sanction/consent cannot be obtained later. In this regard it has relied upon the judgment of Patna High Court reported in ***AIR 1951 185; Gopal vs. State*** wherein the

Patna High Court has stopped the Trial, cancelled it, but, granted permission to seek sanction at the stage of argument. The Trial Court has further opined that accused Gurdev Mali and Nanha @ Raghunandan Yadav were charged for the offence under Sections 302, 34, 307 IPC in addition to the charge under Sections 4/5 of the Act 1908 and trial was commenced accordingly for the said charges. At the stage of argument, after hearing both the parties, opportunity was granted to the prosecution to seek sanction/consent under Section 7 of the Act 1908, thereafter the said sanction/consent has been granted which has been proved by PW-6 who has been extensively cross-examined. The statements of the said accused were recorded under Section 313 Cr.P.C. and they have been given ample opportunity to defend themselves, therefore, it cannot be said that the sanction/consent granted under Section 7 of the Act 1908 is not as per law or that the trial is vitiated for the aforesaid reason.

50. We respectfully beg to disagree with the strained reasoning given by the Trial Court. The provision contained in the Section 7 of the Act 1908 is unambiguous. According to it, no Court shall proceed to the trial of an accused for the offence against this act except with the consent of the District Magistrate. The words 'no

Court shall proceed to the trial' leave no manner of doubt that unless there was sanction/consent under Section 7 of the Act 1908 cognizance of the offence could not have been taken and in any case charge could not have been framed against them nor the appellants could have been put to trial. In fact the statements of accused Gurdev Mali and Nanha @ Raghunandan Yadav under Section 313 Cr.P.C. were recorded on 11.03.2010 i.e. prior to the grant of said sanction/consent by the District Magistrate. Even if it was recorded subsequently it would not validate the trial as the very framing of the charge and the trial held thereafter would stand vitiated. It is not a case where after grant of consent/sanction under Section 7 of the Act 1908 on 24.04.2010 additional charges were framed against the appellants under Section 4/5 of the Act 1908 and thereafter trial was held, but, a case where the trial had already been held prior to grant of sanction/consent which, in fact, was granted at the stage of argument, therefore, the entire trial so far as these offences are concerned stands vitiated. It is a serious lapse on the part of the prosecution but one which cannot be brushed under the carpet.

51. In view of the above, we are of the opinion that so far as the judgment of the Trial Court convicting the appellants Gurdev Mali

and Nanha @ Raghunandan Yadav under Sections 4/5 of the Act 1908 is concerned it is liable to be set aside to this extent. This, however, does not affect our conclusion with regard to the guilt of the said appellants for commission of the crime punishable under Sections 302, 34, 307 IPC as we have acquitted them of the offence under Sections 4/5 of the Act 1908 only on the aforesaid technical grounds and not on merits of not being in possession of the explosive substances as it is clear that the remnants of the crude bombs which were hurled at the time of commission of crime as also a live bomb were recovered from the scene of crime and the said recovery has been duly proved by the police witness.

52. In view of the above, both the appeals are allowed in part so far as they relate to the conviction and sentencing of the appellants under Sections 4, 5 of the Act 1908, but, they are dismissed so far as the appeals relate to their conviction under Sections 302, 34, 307 IPC.

53. Let the Lower Court Records along with certified copy of this judgment be sent to the trial Court and the C.J.M. concerned for necessary action.

54. A copy of this judgment shall also be sent to the appellants who are lodged in jail.

[Ajai Kumar Srivastava, J.] [Rajan Roy, J.]

Order Date :- 22.12.2023

Santosh/-