

Neutral Citation No. - 2023:AHC-LKO:58639

In Chamber

Case :- CRIMINAL APPEAL No. - 1062 of 2002

Appellant :- Manoj Kumar

Respondent :- State of U.P.

Counsel for Appellant :- Sunder Lal, Rakesh K. Tripathi

Counsel for Respondent :- Govt. Advocate

Hon'ble Umesh Chandra Sharma, J.

1. Heard Sri Rakesh K. Tripathi, learned counsel for the appellant and Sri Pawan Kumar, learned A.G.A. for the State.

2. This appeal has been preferred by the convict-accused-appellant Manoj Kumar against the judgment and order dated 24.7.2002 passed by learned Addl. Sessions Judge in S.T. No. 432 of 1994 arising out of Case Crime No. 142 of 1991 under Section 307 read with Section 34 and Section 506 I.P.C., Police Station -Majhila, District- Hardoi.

3. In brief, facts of the case are that the informant Nirmal Singh lodged a complaint that he was chaukidar/watchman at a liquor shop. Two days earlier, Manoj of his village had come there and asked for a liquor pouch which was denied by him. Thereafter in the night of 4.5.1991 on account of aforesaid enmity, accused Manoj with a rifle, Rati Ram with a gun, Shambhu with stick and Chotey Bhaiya @ Babu Singh with a countrymade pistol

came there and asked to open the shop, when he refused to open the shop and give liquor, the accused persons proceeded to open the shop and when he objected, accused Manoj with intention to kill him shot from the rifle which hit on his chest. Hearing his scream, owner of the shop Ramswaroop and his son Ramsagar reached there and saved him, they were also beaten by the accused persons. Hearing the commotion, when Naresh and other people of the village came there, the accused persons threatening to kill them, ran away towards south.

4. On the basis of above written complaint, a case under Section 307, 504 and 506 I.P.C. was registered at crime no. 142 of 1991 and after investigation charge-sheet was submitted by the I.O. After committal of the case to the Court of Sessions, accused Shambhu died, hence, the case against him was abated.

5. Following witnesses were examined by the prosecution to prove the guilt of the accused:

PW-1	Nirmal
PW-2	Ram Swaroop
PW-3	Naresh
PW-4	Rameshwar
PW-5	Ram Sagar
PW-6	Dr. S.K.Rastogi
PW-7	R.B.Singh, I.O.

6. Following documentary evidence were relied on by the prosecution:

Ex. Ka.-1	Written complaint
Ex. Ka.-2	X-ray report
Ex. Ka.-3 & 4,	Chik F.I.R. and Kayami G.D
Ex. Ka.-5,	Site plan place of the incident
Ex. Ka-6	Recovery memo of bottle lamp
Ex. Ka.- 7	Recovery memo of empty cartridge
Ex. Ka.-8	Recovery memo X-ray plate
Ex. Ka.-9	Charge-sheet

7. After closure of prosecution evidence, the statement of the accused u/s 313 Cr.P.C was recorded wherein he outrightly denied all the charges and incriminating evidence against him and claimed to be innocent.

8. In brief, evidence of the witnesses is reproduced hereinbelow:

(a) P.W.-1, Nirmal, informant, has reiterated the version of the complaint Ex. ka-1 and has proved it.

This witness has admitted in the cross-examination that it was a dark night, the liquor shop is opened in the morning and it would get shut at 10:00 'O' clock in the night. Due to threat of loot by the accused persons, the liquor shop had been closed in the noon on the date of

occurrence. Such threat was given before Ramswaroop, Ramsagar and Sunder. Ram Bharose used to work as salesman at the liquor shop. Accused persons had already chased him away. This witness admitted that in the election of Gram Pradhan, Ramawatar, accused Babu Singh and Rajkumar were the candidates. Ramawtar had won the election. This witness has further admitted that a case of arsoning was lodged against him, elder brother of Kripal Singh and Chottey by the village Pradhan Ramawatar. The matter was settled amicably. A case of theft was also lodged against him, Vishnu and Rajpal. This case was also amicably settled. He does not know as to whether accused Babu Singh was a witness in arsoning case or not. At the time of incident he was lying on the cot. Due to fear injured Ramswaroop and Ram Sagar were also lying 10 steps away to the east from floor mill. As soon as the accused reached there, Manoj pointed the rifle at him, he caught it. Manoj fired from rifle at him which hit his stomach below the right rib. Accused Manoj was having gun, Shambu had country made pistol and Rati Ram had stick. As soon as he made noise, owner Rameshwar and his son Ram Sagar ran to save him but they were also beaten by sticks. Accused persons fled to the south after threatening to kill him. The witness recognized his thumb impression on the written complaint which was exhibited as Ex.Ka-1.

(b) P.W.-2- Ram Swaroop, shop owner, has not supported the prosecution version and had been declared hostile. He was cross-examined by the prosecution in which he admitted that he had seen the injuries sustained by Ram Sagar and Nirmal on the date of incident. According to this

witness, at the time of incident he was in garden, when he reached at the place of occurrence, he had not seen the accused persons there.

(c) P.W.-3, Naresh, has not supported the prosecution version. He has admitted that on the date of occurrence at about 11:00 P.M., Nirmal had sustained fire-arm injury but he did not see anyone firing upon him as it was a dark night. In cross-examination this witness admitted that upon hearing noise of altercation and scuffle, he and Nanhe went there and saw that Rameshwar and Ram Sagar were saving Nirmal. He had neither seen any accused assaulting Nirmal nor had heard the sound of fire. This witness denied his statement recorded under Section 161 Cr.P.C.

(d) P.W. 4, Rameshwar, has deposed that on the date of occurrence at about 11:00 P.M. accused were abusing Nirmal, hearing which he and his son Ram Sagar went to resolve the dispute. In the meantime, a fire was shot which hit Nirmal and he fell down. He and his son Ram Sagar had not gone to save Nirmal. At the time of incident he was taking dinner. Accused persons present in the court had not hit Nirmal. This witness was declared hostile and was cross-examined by the prosecution in which he admitted that he and his son Ram Sagar had received injuries in the occurrence and they were treated in District Hospital, Hardoi. In the cross-examination by defence, this witness has deposed that it was a dark night and the assailants had masks on their faces due to which he could not recognise anyone.

(e) P.W.-5, Ram Sagar, refused from taking oath, therefore, the Court concluded him to be incompetent

witness.

(f) P.W.-6., Dr. S.K. Rastogi, deposed that on 6.9.1991 he had examined injured Rameshwar and had conducted X-ray of his left fore-arm. According to this witness, lower part of the soft of radius bone was fractured. This witness has admitted his signature on X-ray report, Ex. Ka-2, and has also proved X-ray plate as M. Ex.-1.

In cross-examination this witness admitted that if injured falls on a hard object from the right hand side, the bone may break.

(g) P.W.-7. R.B. Singh, I.O, has deposed that on the date of occurrence, he was posted as S.O., Police Station Majhila. This witness has proved Chik F.I.R. and Kayami G.D. Ex. Ka-3 and Ka-4 which was written by constable V.K. Shukla.

This witness has deposed that he started investigation on 5.9.1991, copied the chik F.I.R. and Kayami G.D., recorded the statement of informant and the injured Nirmal, Rameshwar and Ram Sagar, reached on the spot and recorded the statements of the witness Ram Swaroop and on his pointing prepared site plan Ex. Ka-5 in his handwriting and signature thereafter recorded the statement of Brij Kishor and Shiv Ram. He took bottle lamp in his possession and prepared recovery memo Ex. Ka-6. Recovered empty cartridge of 315 bore, sealed it and prepared recovery memo Ex Ka-7, recorded the statement of Smt. Mallo, wife of Nirmal. Received the medical report of injured Ram Sagar and endorsed it in the case-diary. He recorded the statements of Nanhe and Naresh and arrested the accused Shambhu on 20.9.1991 and also accused Chottey @ Babu Singh. He recorded the statements of

accused persons. He obtained X-ray report and endorsed in case-diary, took X-ray plate into his possession and prepared its first Ex.Ka-8. He recorded the statement of accused Rati Ram, witness of first Ram Kumar and head constable Raj Kumar Sharma.

On 26.11.1991, he sent the country made rifle, recovered from the possession of accused Manoj Kumar and empty cartridge sent for F.S.L. report. After completing the investigation, he submitted the charge-sheet Ex. Ka-9 against all the four accused.

9. After closure of the evidence, the statement of the accused was recorded under Section 313 Cr.P.C. in which he denied the allegations and charges levelled against them and has stated that the witnesses have given false evidence on account of enmity.

10. After closure of the evidence and after hearing the arguments, the learned Trial Court convicted the accused Manoj and acquitted the rest of the accused persons. Being aggrieved convict Manoj has preferred this appeal.

This appeal is decided as under:-

11. According to the FIR, the incident had occurred at about 11 P.M. in the dark night of 4/5.9.1991. A charge under Section 307 read with Section 34 IPC had also been framed mentioning that the offence had occurred at about 11 p.m. but in the statement, the injured informant Nirmal has deposed that the offence had occurred at about 8 p.m. thus there is vast variation in the statement of the injured informant PW-1 and the contents of the FIR. Contrary to the statement of P.W.-1, according to P.W.-2, P.W.-3 and P.W.-4, the offence had taken place at about 11 p.m. These three

witnesses have turned hostile and have not supported the prosecution version in their testimony. There is no evidence of any doctor to suggest that the occurrence could have occurred at about 8 P.M. or 11 P.M. on 4/5.9.1991.

12. According to the prosecution story the occurrence took place at about 11 p.m. in the night of 4/5.9.1991 while according to the injured informant P.W.-1 Nirmal it had occurred at about 8 p.m. The FIR had been lodged next day on 5.9.1991 at about 7.50 a.m. The injured PW-1 has given unrealistic statement at page-8 that after the incident he remain there whole night which appears to be impractical as if any person receives fire-arm injury below the rib on and over the stomach he would be immediately admitted to the hospital for treatment. According to the FIR, PW-2, 3 & 4 were present on the spot and PW-2, Ram Swarup and P.W.-4, Rameshwar had also received injuries but P.W.-1 has deposed that at the time of incident except he and his wife, none else was present in his house.

13. According to injury reports, Ram Sagar, Rameshwar and Nirmal had received injuries. These injury reports were on record but the same had not been proved by the concerned doctor. Even these injury reports have not been proved by way of secondary evidence therefore these injury reports cannot be read in evidence. Though only X-Ray report and X-Ray plate with regard to injured Rameshwar have been proved by PW-6 Dr. S.K. Rastogi but in absence of proof, the injury reports of the injured persons cannot be looked into. Though the learned trial court has blamed the Government Advocate for not proving the same but by saying so, the learned trial court cannot escape from his liabilities. In a criminal trial the Sessions Judge or the

Magistrate cannot sit as silent spectator. He has to play active role during the course of trial. There is no hesitation to conclude that the learned trial court has committed manifest error in not summoning the concerned witnesses for proving the relevant documents and medical reports etc. There is another adverse circumstance that injured witnesses P.W.-2, Ram Swaroop and P.W.-4, Rameshwar have not accepted that in connection of the present incident they had also received injuries.

14. It is the case of the prosecution that appellant Manoj hit the injured PW-1 by rifal or gun. There are variations in the evidence regarding weapon alleged to have been used by the appellant. According to FIR accused Manoj was having rifle in his hand and informant PW-1 has also given similar statement in his evidence but the same witness has deposed at page-6 that accused Manoj had gun in his hand from which he shot at him. Even at page-8 and 9 in the cross-examination this witness has deposed that he was shot by gun. Thus, it has not been clearly established that which weapon was used by appellant Manoj. However, the learned trial judge has tried his best to explain this point saying that since the informant PW-1 is a villager, therefore, he was not knowing the difference between a rifle and a gun. According to this Court, this explanation cannot be accepted when the informant has clearly mentioned in his FIR that accused Manoj was having rifle in his hand and rest of the accused persons were having country made pistol in their hands. Though the informant PW-1 is a villager but it is also noteworthy that he is claiming himself to be owner of half of the liquor shop. A liquor shop is such a place where generally rifle, gun,

revolver and pistol holders used to visit and a simple villager knows the difference and can differentiate the same easily. The alleged weapons were not the foreign articles and the holder of these arms are often seen in village areas.

15. It is also noteworthy that according to IO he had sent blood stained and plain soil, empty cartridge alleged to be recovered from the place of occurrence and the alleged gun recovered from the possession of the appellant Manoj but none of the reports is on record. No armorer's report is on record. Injury and injury reports with regard to the informant PW-1 have not been proved, therefore, it cannot be safely connected with this incident and it cannot be concluded that the injuries caused to the informant PW-1 had been occurred from the rifle/gun of the appellant Manoj.

16. It is also noteworthy that it was a dark night and only a country made lamp is said to have lighted. The place of occurrence is not a small covered room where a bottle made lamp would provide enough light to recognize the accused persons scattered in a large area.

17. It is also a case of defence that there were several enemies of the informant as he was running a liquor shop and the informant PW-1 has admitted in his evidence that there was also enmity on account of village Pradhan Election and he had also been accused in cases of arsoning and theft. At this score it is pertinent to mention that none of the lady family member of the injured PW-1 has been examined and PWs-2, 3 and 4 have not supported the prosecution version. PW-2, Ram Swarup has deposed that

at the time of incident he was not present on the spot when he reached on the spot, none of the accused was present there, only 10-15 persons were present there. Even he denied the presence of Rameshwar son of Ram Sagar there. Though this witness has admitted that Rameshwar and Nirmal were seen in injured state. PW-3, Naresh has admitted that in the night at about 11 p.m., Nirmal received fire arm injuries but he had not seen the assailants as it was a dark night. This witness was declared hostile and was cross-examined on behalf of the State in which he stated that Rameshwar and his son Ram Sagar were defending Nirmal but he has not seen the accused person attacking upon the injured Nirmal. According to him he had also not heard the sound of fire and had not seen any person using the fire arm.

18. PW-4, Rameshwar has given self-contradictory statement that accused persons were abusing the injured Nirmal meanwhile there was a fire which hit him and he fell down. Further this witness has clearly deposed that accused persons had not hit the injured Nirmal.

19. In this case material exhibits were not produced in the court and the same have neither been proved nor exhibited.

20. According to the informant injured P.W.-1, Nirmal he remain admitted for one month in the hospital for his treatment but neither such medical report in this regard has been submitted nor proved. It has already been mentioned that his medico legal report has not been proved.

Thus on the basis of above discussion, it is concluded

that neither the medical report nor the FSL report and the material exhibits have been proved. All the three witnesses of fact except the injured witness PW-1 have turned hostile. It was a dark night incident and the injured informant PW-1 had also criminal antecedents. Thus it could not be proved that accused Manoj had caused fire arm injury to the informant P.W.-1. In the aforesaid circumstances benefit of doubt goes in favour of the convict appellant. According to this Court there are no sufficient evidence on record to hold the accused Manoj guilty. The learned Additional sessions Judge has failed in appreciating the evidence in right perspective. The prosecution has miserably failed in establishing the prosecution case against the appellant beyond the reasonable doubt. Hence, the appeal succeeds and is liable to be allowed.

Order

The appeal is **allowed** and the order of conviction and sentencing dated 24.07.2002 passed by Additional Sessions Judge, Court No.5, Hardoi, is set aside. If the appellant is in jail, he would be set free immediately.

A copy of this judgment alongwith lower court records be sent back to the concerned court for consignment.

Order Date: 6.9.2023

S.Verma/Shehroz

(Umesh Chandra Sharma, J.)