

In Chamber

Case :- CRIMINAL APPEAL No. - 2049 of 2003

Appellant :- Bhaggal And Another

Respondent :- State Of U.P

Counsel for Appellant :- Sanjay Pandey,Rajiv Raman
Srivastava

Counsel for Respondent :- Govt.Advocate

Hon'ble Umesh Chandra Sharma,J.

1. Heard learned counsel for the appellants, learned AGA for the State and perused the record.
2. This appeal has been preferred against the order of conviction and sentencing dated 19.11.2003 passed by the Additional Sessions Judge, Court No.6, Sitapur in Sessions Trial No.689 of 1999 (State Vs. Ram Naresh and others) arising out of Case Crime No.187 of 1997, under Section 307 IPC, Police Station Ramkot, District Sitapur convicting the appellants Bhaggal and Ashok Kumar under Section 307 read with Section 34 IPC and sentencing to undergo rigorous imprisonment of 10 years each and Rs.5,000/- fine to each of the accused and to undergo six months simple imprisonment each in case of default of payment of fine.
3. During the pendency of appeal, appellant no.1, Bhaggal has died and the appeal in respect of appellant no.1, Bhaggal has been abated. Thus, the appeal survives only in respect of appellant no.2, Ashok Kumar.

4. In brief, facts of the case are that the informant Chandra Bhushan lodged an FIR on 17.08.1997 that the informant, his son Ram Gopal and Kalicharan alongwith Rakesh of his village had gone to purchase a buffalo. After seeing the buffalo of Devi Sahai Shukla when they were coming back and reached near the house of Gokaran Prasad Shukla at Village Arthana, Bhaggal, Ram Naresh, Anand and Ashok residents of village Arthana armed with country-made pistol reached and exhorted to kill them in revenge. Hearing this, Bhaggal fired upon his son from the country-made pistol with the intention to kill him which hit Ram Gopal and he fell down. After hearing hue and cries, the accused persons ran away towards their houses while firing from their country-made pistols. Several persons of the village have seen the occurrence and FIR was lodged.

5. Ram Gopal was medically examined by Dr. Ashok Agrawal, three firearm pellet injuries were found on the lower chest and upper abdomen and on left arm of the injured collar abrasion was also present. There was fresh bleeding from the wounds. Blackening and tattooing were not present.

6. After lodging the FIR, PW-7, investigating officer (IO) SI Umakant Upadhyay started investigation, recorded the statements, collected the oral and documentary evidences and submitted the charge sheet Ex.Ka-7 and Ex.Ka-8.

7. Following witnesses have been produced to prove the prosecution case:-

1	PW-1	Ram Gopal
2	PW-2	Kali Charan
3	PW-3	Sarvesh Kumar
4	PW-4	HC Rajaram
5	PW-5	Dr. AK Nigam, Radiologist
6	PW-6	Umashankar, SI
7	PW-7	Umakant Upadhyay, SI
8	PW-8	AK Srivastava, Radiologist

8. Following documentary evidences had been produced by the prosecution:-

1	Ex.Ka-1	Written Complaint
2	Ex.Ka-2	Chik FIR
3	Ex.Ka-3	Copy GD
4	Ex.Ka-4	Injury Report
5	Ex.Ka-5	
6	Ex.Ka-6	Site Plan
7	Ex.Ka-7-8	Charge Sheet
8	Ex.Ka-9	X-Ray Report
9	M.Exs.1-2	X-Ray Plates

9. Statements of the accused persons have been recorded under Section 313 CrPC in which they denied the allegations, evidence and charge. Accused Bhaggal stated that since he had testified himself against the informant, hence he has been falsely implicated. Accused Ram Naresh stated that he was the relative of Bhaggal, hence he has been falsely implicated. Accused Ashok stated that he was the real brother of Bhaggal, hence he has been falsely implicated.

10. In this case four accused were named in the FIR but only accused Bhaggal and Ashok have been convicted and sentenced. Rest two accused persons Ram Naresh and Anand have been exonerated and no appeal/revision has been filed by the State or the informant against the judgment and order of acquittal in favour of these two accused persons.

11. In this case PW-2, Kali Charan and PW-3, Sarvesh Kumar have completely not supported the prosecution version, hence this case is based only on the direct evidence of Ram Gopal, PW-1, the sole injured. The informant Chandra Bhushan had died before the examination of the witnesses, hence he could not be examined.

12. In brief, the evidences of the witnesses are reproduced herein below:-

13.(I) The informant, Chandra Bhushan has not been examined. PW-2, Kalicharan has deposed in his cross-examination that informant had been killed after this incident. It was not in the evidence that as to who killed the informant. Therefore, he could not be examined as eye-witness.

14.(II) Injured Ram Gopal has been examined as PW-1 who deposed that when he was coming back after seeing buffalo of Devi Sahai Shukla and reached near the house of Gokaran Prasad, accused Bhaggal, Ashok and two other unknown persons covering their faces armed with

country-made pistol came before them; Ashok exhorted on which Bhaggal fired upon him which hit in his left arm pit with the intention to kill him. The report was lodged by father of this witness. This witness recognized the signature of his father on the written complaint Ex.Ka-1 and proved it. In cross-examination this witness has disclosed old enmity with Bhaggal that sister of Bhikhari who was father of the accused Bhaggal had been kidnapped by his uncle Badkau for which they had enmity with each other. According to this witness, there was no enmity with regard to election. He has further deposed that at the time of such abduction of *bua* of the accused Bhaggal and Ashok they both were about 5-6 years old. He denied that Ram Naresh and Anand were the persons who had covered their faces at the time of occurrence. This witness had admitted that he was accused in a case under Section 307 IPC and Section 25 Arms Act. He expressed ignorance as to whether accused Bhaggal was a witness in the case under Section 25 of the Arms Act or not. This witness could not remember the day and time of the incident. This witness denied that he was fired from the distance of 16 steps. According to this witness, the shot would have been fired 2-3 steps away.

15. It is noteworthy that no blackening, tattooing, charring or scorching were found on the fire-arm wounds though collar abrasion was present. Though this witness and his father late Chandra Bhushan had stated to the IO that rest two accused persons were Ram Naresh and Anand. This witness has further deposed that due to fire

holes had been made upon shirt and blood had also been fallen on the shirt. This witness denied the statement given to the IO that rest two accused persons were Ram Naresh and Anand and they were present on the spot without covering their faces. According to him IO had not taken the blood stained clothes. This witness denied that one day before he had met with Bhaggal and others and an altercation had taken place while in the statement under Section 161 CrPC. The informant Chandra Bhushan had stated that one day before this incident an altercation had taken place between his injured son Ram Gopal and accused Bhaggal.

16.(III) PW-2, Kalicharan has not supported the prosecution version and has been declared hostile. This witness has accepted in cross-examination on behalf of the accused that the informant Chandra Bhushan had been killed after this incident. There are several criminal cases against the injured Ram Gopal.

17.(IV) PW-3, Sarvesh has also not supported the prosecution version and has been declared hostile.

18.(VI) PW-4, HCP Rajaram Yadav has deposed about the preparation of chik FIR Ex.Ka-2 and kaymi GD.

19.(VII) PW-5, Dr. AK Nigam, Radiologist had medically examined the injured PW-1, Ram Gopal and found three fire-arm pellet injuries on the left lower part of the chest and upper part of the stomach of the injured in an area of 20cm x 16cm which were almost muscle-deep. PW-2 had

one pellet muscle-deep wound 0.3cm. 0.3cm on the front of the upper left arm 5cm above from the elbow. PW-3 had two pellet muscle-deep injuries wound 0.3cm. 0.3cm on the upper part in front of upper part left forearm. Collar abrasion was present but no fresh blood, blackening or tattooing were present. This witness proved the injury report Ex.Ka-4 and opined that injury no.1 was on the vital part of the body. This witness could not state the distance from which these injuries would have been caused.

20.(VIII) PW-6, SI Uma Shankar had conducted the investigation. He deposed that he has copied the chik FIR, statement of writer and the informant, inspected the place of occurrence and prepared map Ex.Ka-5, proved the document Ex.Ka-5, searched the accused persons. Copied the injury report and the fact regarding surrender by the accused Bhaggal and Ashok in the court thereafter the investigation had been transferred to SIS, Sitapur by the order of SP, Sitapur. In cross-examination this witness has admitted that he neither inspected the clothes of the victim nor took it in his possession. Therefore, he cannot say the position of hole in the clothes. According to him, witness Gokaran Prasad resident of Village Arthana had confirmed the incident. Though he was not an eye-witness.

21.(IX) PW-7, SI Umakant Upadhyay, second IO has deposed that he had recorded the statement of Kalicharan, investigated the case and again he became IO on 03.11.1997. After that he recorded the statement of

injured Ram Gopal and after completing other formalities he submitted charge sheet no.7 of 1997 Ex.Ka-7 against the accused Bhaggal and Ashok under Section 307 IPC. He had also submitted a charge sheet no.7A of 1997 Ex.Ka-8 against the accused Ram Naresh and Anand.

22. In cross-examination this witness deposed that he had not recorded statement of the informant. He had not taken clothes of the injured. He admitted that what was the cause of commission of the crime, could not be ascertained. He further deposed that injured Ram Gopal had named accused Ram Naresh and Anand.

23.(X) PW-9, Dr. RK Srivastava, Radiologist has deposed that he had done X-Ray of the injured and had seen radio opec shadow on all the three injuries. This witness has proved the X-Ray report as Ex.Ka-9 and has also proved X-Ray plates as M.Exs.1, 2 and 3. In cross-examination this witness has deposed that as per X-Ray report, the radio opec shadow were not fatal. Though the chest and stomach are the vital part of the body.

24. After closure of the oral evidence the statement of the witness, accused persons were recorded under Section 313 CrPC in which accused Bhaggal (now deceased) had denied the charges and allegations and has stated that witness were deposing on account of enmity. Since he had given statement against Ram Gopal therefore he was falsely implicated. Accused Ashok has also denied the allegations and has said that since he is the real brother of the accused Bhaggal, therefore, he has

also been falsely implicated. Accused Ram Naresh has also denied the charges and has stated that since Bhaggal is his relative, sister of father of the accused Bhaggal had been wedded to his uncle, therefore, he has also been falsely implicated on account of enmity.

25. Accused Anand Kumar has also denied the charges and allegations and has stated that he has been falsely implicated.

26. After closure of the prosecution evidence argument were heard, accused Ram Naresh and Anand were acquitted from the charges under Section 307 read with Section 34 IPC and accused Bhaggal and Ashok were convicted under Section 307 read with Section 34 IPC and were awarded ten years rigorous imprisonment each with fine of Rs.5,000/- to each of the accused with an alternative punishment in case of default of payment of fine, they shall undergo six months simple imprisonment each.

27. In this case according to the prosecution accused Bhaggal had fired upon the injured on account of previous enmity that his *bua* had been taken away by uncle of the injured Ram Gopal. The victim PW-1 has admitted that at that time he was only about 2-3 years old and accused Bhaggal and Ashok Kumar would have been 5-6 years old. He has also deposed that no FIR had been lodged in this regard. The victim has also not mentioned this incident as a cause of this incident. There is no contradiction of injured PW-1 under Section 145 of the Indian Evidence

Act regarding an incident which appears to have occurred one day before this incident. Since the informant has died, hence he could not be examined and could not be controverted under Section 145 of The Indian Evidence Act who had stated to the IO under Section 161 CrPC that one day before the incident the victim had visited Village Arthana where an altercation had taken place between the victim and accused Bhaggal and the victim was warned by the accused Bhaggal for not visiting Village Arthana in future. Thus so far as the genesis of commission of this offence is concerned, it could not be established. Since it is a case of direct evidence, therefore, no motive is required to be proved by the prosecution. However, it has been proved from the office report dated 06.02.2023 that accused Bhaggal has died and the appeal remains only in respect of accused Ashok Kumar.

28. It has been proved from the evidence that no fire-arm injury has been caused by the appellant Ashok Kumar to the injured Ram Gopal. Though it has come in evidence that all the four accused persons had fired while leaving the place of occurrence but no empty cartridges were found on the spot. There is no recovery of any fire-arm from the accused Ashok. It is noteworthy that both the witnesses of fact have turned hostile and have not supported the prosecution version and there is no iota of evidence except the evidence of informant PW-1 that Bhaggal had fired upon him on the exhortation of appellant Ashok Kumar.

29. It is worth mentioning that in the FIR four persons have been named as accused and the informant as well as the victim have stated to the IO that in addition to Bhaggal and Ashok, accused Anand and Ram Naresh were also present on the spot and committed the crime and fired on the place of occurrence. It appears that some arrangements took place out of the court, therefore, the victim, PW-1 deposed that except accused Bhaggal and Ashok Kumar rest two accused persons had covered their faces, therefore, he could not recognize them.

30. According to the prosecution, accused Ashok Kumar had an illegal fire-arm but no such fire-arm could be recovered from his possession though the recovery of such fire-arm is not condition precedent to record a conviction under Section 307 read with Section 34 IPC.

31. According to this Court, generally in a day-light occurrence accused do not want to establish their identity. If two accused persons would have covered their faces, similar facility was also available for rest of the accused persons namely Bhaggal and Ashok Kumar. PW-1 deposed that Bhaggal has fired upon him with the intention to kill him. According to this witness Ashok Kumar had also fire-arm and he had exhorted his brother Bhaggal to kill him. If it was so and accused Ashok Kumar would have been present on the spot, he would also have fired upon the victim to get a positive result. There is no case of the prosecution that any fire-arm injury made by appellant Ashok Kumar had hit the victim. The accused Ashok Kumar has been assigned only role of exhortation. Since

according to the prosecution and the victim there was previous enmity between the family of accused Bhaggal, Ashok and the victim and the enmity is a double edged weapon, therefore, there is also a possibility of false implication of other accused persons in addition to the main accused Bhaggal. According to this Court since no active role or participation except the role of exhortation has been mentioned against the appellant Ashok Kumar which has not been corroborated by any independent evidence as the independent witnesses have been turned hostile, this court is of the view that the role of exhortation assigned to the accused appellant Ashok Kumar has not been proved beyond reasonable doubt from the evidence available on record.

32. In the above circumstances, the benefit of doubt must be given to the surviving accused Ashok Kumar. According to this Court, since there was enmity between both the parties, therefore, in absence of any corroboration from the independent witness it would not be proper to uphold the conviction and sentencing of the accused who had been assigned only the role of exhortation. Thus, the appeal is liable to be allowed and the order of conviction and sentencing passed in respect of the surviving appellant Ashok Kumar is liable to be quashed.

33. The appeal is allowed with regard to the accused appellant Ashok Kumar and the order of conviction and sentencing passed by the Additional Sessions Judge-IV, Sitapur is hereby set aside.

34. Let the bail bonds and personal bond executed on behalf of accused appellant Ashok Kumar are cancelled and sureties are set free.

35. A copy of this order alongwith lower court record be sent back to the court concerned.

Order Date :- 21.07.2023
Shahroz

(Umesh Chandra Sharma,J.)