

**High Court of Judicature at Allahabad
(Lucknow)**

Neutral Citation No. - 2023:AHC-LKO:65235-DB

Reserved on 23.08.2023

Delivered on 10.10.2023

Court No.9

Case :- CRIMINAL APPEAL No. - 917 of 2011

Appellant :- Buddhu And Another

Respondent :- The State Of U.P

Counsel for Appellant :- Shishir Pradhan, Atul Verma, Jitendra Singh, Raj Kumar Tripathi, S H Ibrahim

Counsel for Respondent :- Govt. Advocate

WITH

Case :- CRIMINAL APPEAL No. - 936 of 2011

Appellant :- Raj Kumar

Respondent :- State of U.P.

Counsel for Appellant :- Neeraj Sahu, Atul Verma, Jaikaran, Mohd. Ali Shan, Qazi Sabih Ur Rahman, Rajesh Mishra, S.H. Ibrahim

Counsel for Respondent :- Govt. Advocate

AND

Case :- CRIMINAL APPEAL No. - 1072 of 2011

Appellant :- Laxmi

Respondent :- State of U.P.

Counsel for Appellant :- Mohsin Iqbal, Atul Verma, Brijesh Kumar Srivastava, Hemant Kumar Mishra, Jaikaran

Counsel for Respondent :- Govt. Advocate, Prem Kumar Singh

Hon'ble Rajan Roy,J.

Hon'ble Ajai Kumar Srivastava-I,J.

(Per : Hon'ble Ajai Kumar Srivastava-I, J)

1. Heard Sri Shailendra Tripathi, learned amicus curiae for the appellants in Criminal Appeal No.917 of 2011, Sri Jai Karan, learned counsel for the appellants in Criminal Appeal Nos.936 of 2011 & 1072 of 2011, Sri U.C. Verma, learned Additional Government Advocate for the State and perused the entire record available before us.

2. Since all these appeals arise out of Sessions Trial Nos.183 of 2007 & 184 of 2007, therefore, the same are being heard together and are proposed to be decided by a common judgment.

3. These appeals have been filed by the appellants to assail the judgment and order dated 28.04.2011, passed by Additional Sessions Judge, Court No.3, Raebareli in Sessions Trial No.183 of 2007, State vs. Buddhu and Others, arising out of Crime No.71 of 2006, under Sections 147, 148, 149, 307 & 302 I.P.C., Police Station Kotwali Dalmau, District Raebareli and Sessions Trial No.184 of 2007, State vs. Rajkumar, arising out of Crime No.72 of 2006, under Sections 3/25 of Arms Act, Police Station Kotwali Dalmau, District Raebareli, whereby all the appellants have been convicted and sentenced to undergo six months' rigorous imprisonment for the offence under Section 147 I.P.C. with the fine of Rs.500 each and in the event of default of payment of fine, they have further been directed to undergo two months' simple

imprisonment; one year's rigorous imprisonment for the offence under Section 148 I.P.C. with the fine of Rs.500 each and in the event of default of payment of fine, they have further been directed to undergo two months' simple imprisonment; five years' rigorous imprisonment for the offence under Sections 307/149 I.P.C. with the fine of Rs.2000/- each and in the event of default of payment of fine, they have further been directed to undergo six months' simple imprisonment; life imprisonment for the offence under Sections 302/149 I.P.C. with the fine of Rs.10,000/- each and in the event of default of payment of fine, they have further been directed to undergo two years' simple imprisonment. All the sentences have been directed to run concurrently.

4. The prosecution story, in brief, is that the first informant, Rameshwar S/o Jagan & Rajesh Kumar S/o Brijmohan resident of village Deenganj, District Raebareli submitted a written report, Ext. Ka-1, to the effect that on 05.06.2006 at about 11:00 PM while the first informant along with his grandson was returning to home from murai baag, they saw accused persons, namely, Rajesh Kumar, Rajkumar, Laxmi, Buddhu, Kamal & some unknown person carrying rifles & country made pistols, who started firing at the first informant, Rameshwar. In this incident of firing, grandson of the first informant, Sanjay Yadav got hit by bullets. In this incident, Shiv Dulari, daughter-in-law of Babu Gudiya also got injured by ricocheting bullets. On alarm being raised by her, Virendera, Amresh, Rajesh and some other villagers reached the spot. Thereafter, the accused persons fled away from the spot. In this incident,

one Virendra also sustained a bullet injury on his foot. The injured persons, namely, Sanjay Yadav and Shiv Dulari succumbed to their injuries while undergoing treatment at the hospital.

5. The inquest proceedings for ascertaining apparent cause of death of Shiv Dulari started on 06.06.2006 at 12:15 P.M. and got concluded at 1:30 P.M. The inquest report has been duly proved by Investigating Officer, PW-12, Kalyansingh as Ext. Ka-6.

6. The inquest proceedings for ascertaining apparent cause of death of Sanjay Yadav started on 06.06.2006 at 11:05 A.M. and got concluded at 12:00 P.M. The inquest report has been duly proved by Investigating Officer, PW-12, Kalyansingh as Ext. Ka-6.

7. As per postmortem report of the deceased, Sanjay Yadav, Ext. Ka-4, which has been proved by Dr. Y. Dayal, PW-5, following injuries were reported on the person of the deceased:-

1	Abraision 1 cm x 0.5 cm on tip of nose.
2	Multiple pellets wounds present in front of whole chest and in front of whole abdomen. Blackening & charring present around pellets wounds.
3	Multiple pellets wound on back of right upper arm in an area of 3 cm x 5 cm.

According to postmortem report of the deceased, Sanjay Yadav, Ext. Ka-4, the cause of death is reported to be shock and hemorrhage as a result of antemortem firearm injuries.

8. As per postmortem report of the deceased, Shiv Dulari, Ext. Ka-5, which has also been proved by Dr. Y. Dayal, PW-5, following injuries were reported on the person of the deceased :-

1	Contusion 5 cm x 3 cm on back of left ear.
2	Pellets wounds present on (a) right breast 5cm below right nipple. (b) right side of abdomen 2 cm right to umblicus. (c) right side of abdomen 3cm away from injury (b). (d) right side of abdomen 6cm away from injury (c). (e) right side of thigh 10cm above right knee.
3	Blackening & charring present around pellet wounds

According to postmortem report of the deceased, Shiv Dulari, Ext. Ka-5, the cause of death is reported to be shock and hemorrhage as a result of antemortem firearm injuries.

9. According to injury report of injured, Virendra Kumar Ext. Ka-16, which has been proved by Dr. R.K. Mishra, PW-7, following injuries were reported on the person of the aforesaid injured :-

1	Gunshot wound of entry 0.3 cm is diameter on the right medial thigh 19 cm above the right medial knee.
2	Gunshot wound of entry 1.1 cm x 0.7 cm x 1.5 cm directed anteriorly on the each of right middle thigh 14 cm above the right knee.

10. On the basis of aforesaid written report, Ext. Ka-1, the First Information Report, Ext. Ka-2 was registered as Crime No.71 of 2006, under Sections 147, 148, 149, 452 & 302 I.P.C. at Police Station Kotwali Dalmau, District Raebareli.

11. After registration of the case, the Investigating Officer recorded the statements of the witnesses under Section 161 Cr.P.C., prepared the site plan, Ext. Ka-19 and upon completion of investigation, charge-sheet, Ext. Ka-30 was also submitted for the offence under Sections 147, 148, 149, 307 & 302 I.P.C. of I.P.C. against accused-appellants.

12. The accused persons including the present appellants were charged for the offences under Sections 147, 148, 149, 307 & 302/149 I.P.C., which were read over and explained to them, to which, they pleaded not guilty and claimed to be tried. The accused-appellant, Raj Kumar was also charged for the offence under Section 3/25 Arms Act, however, by means of impugned judgment and order dated 28.04.2011 he has been acquitted of the charges under Section 3/25 Arms Act.

13. To bring home guilt of accused-appellants, the prosecution has examined as many as 13 prosecution witnesses i.e. PW-1, Rameshwar, PW-2, Munna @ Ramesh, PW-3, Virendra Jaishwal, PW-4, Sohanlal, PW-5, Dr. Y. Dayal, PW-6, S.S.I. Mohammad Surkhab Khan, PW-7, Dr. R.K. Mishra, PW-8, Shiv Narayan Upadhyaya, PW-9, Constable Mohanlal, PW-10, Constable No.461 C.P. Krishna

Chandra Shukla, PW-11, S.I. Ramesh Chandra Mishra, PW-12, Kalyansingh C.O. and PW-13, Jitendra Pratap Singh.

14. After conclusion of prosecution evidence, statements of accused-appellants were recorded under Section 313 Cr.P.C. The accused-appellants have stated the prosecution case to be false, claimed themselves to be innocent and also stated to have been falsely implicated.

15. No evidence in defence was adduced by the accused-appellants.

16. The trial Court concerned, after appreciating the evidence available on record, passed the impugned judgment and order dated 28.04.2011, whereby the accused-appellants came to be convicted as aforesaid.

17. Aggrieved by the impugned judgment and order dated 28.04.2011, the accused-appellants have preferred the instant criminal appeals.

18. Learned counsel for the accused-appellants has submitted that the appellants are innocent, who have been falsely implicated in this case. His further submission is that there is no evidence on record to warrant conviction of the appellants as aforesaid, therefore, the finding of guilt of accused-appellants is against the weight of evidence. His further submission is that the learned trial Court failed to appreciate the fact that general role of firing was assigned to various accused persons. There is no evidence to show as to which appellant was author of fatal injuries sustained by two deceased persons. Therefore, the conviction and sentence awarded by the

impugned judgment and order dated 28.04.2011 is not sustainable in law.

19. It has also been contended on behalf of accused-appellant, Rajkumar that he has been acquitted of the charges under Sections 3/25 Arms Act, therefore, the prosecution story that he participated in the alleged incident and opened fire stands belied.

20. Per contra, learned A.G.A. has opposed the submissions made by learned counsel for the appellants. He submits that the accused-appellants have been convicted by the learned trial Court after proper appreciation of evidence available against them.

21. Learned A.G.A. has further submitted that the prosecution has proved its case against the appellants on the basis of cogent testimonies of prosecution witnesses. The appellants have been convicted by the impugned judgment and order dated 28.04.2011 which is well discussed and reasoned, wherein no interference by this Court is warranted.

22. He has also submitted that the prosecution case is based on the testimonies of eye witnesses, PW-1, Rameshwar, PW-2, Munna @ Ramesh & PW-3, Virendra Jaishwal. The prosecution story stood proved in the light of cogent and reliable testimonies of aforesaid prosecution witnesses. Therefore, minor contradictions, if any, cannot dislodge otherwise reliable and proved prosecution case.

23. Having heard learned counsel for parties and upon perusal of the record, we find that according to

prosecution story as contained in written report, Ext. Ka-1, which has been proved by the first informant, PW-1, Rameshwar, the deceased, Sanjay Yadav & Shiv Dulari are stated to have been shot dead by the accused namely, Rajesh Kumar, Rajkumar, Laxmi, Buddhu, Kamal & some unknown persons on 05.06.2006 at about 11:00 P.M. The postmortem reports of the deceased, Sanjay Yadav, Ext. Ka-4 and deceased, Shiv Dulari, Ext. ka-5 have been duly proved by PW-5, Dr. Y. Dayal. The charge-sheet, Ext. Ka-30 has been proved by Investigating Officer, PW-12, Kalyansingh, who has also proved site plan, Ext. Ka-19. The cause of death of the aforesaid two deceased is reported to be shock and hemorrhage as a result of antemortem firearm injuries, which show that the death of the aforesaid two deceased persons was homicidal in nature.

24. The first informant, PW-1, Rameshwar is an eye witness. In his testimony, he has supported the prosecution case by stating that on 05.06.2006, his maternal grand child (nati), Sanjay Yadav and one Shiv Dulari were shot dead by accused, namely, Rajesh Kumar, Rajkumar, Laxmi, Buddhu, Kamal and two unknown persons. The accused-appellant, Rajesh Kumar shot at Sanjay Yadav first, thereafter, all accused persons fired, which hit the deceased Sanjay Yadav, Shiv Dulari and one Virendra. The accused persons were carrying country made fire arms, whereas accused, Lakshmi was carrying a gun. The unknown accused persons were carrying rifles. On commotion, Kamlesh, Mathura and Omkar came at the

place of occurrence. Thereafter, the accused persons fled away from the scene of occurrence.

25. PW-2, Munna @ Ramesh has stated in his testimony that the incident occurred on 05.06.2006 at about 11:00 P.M. This witness was also accompanying the first informant, PW-1, Rameshwar and deceased, Sanjay Yadav, who were returning to their home. According to him, he also witnessed the incident, in which, the deceased, Sanjay Yadav and Shiv Dulari were shot dead. According to this witness, he also sustained firearm injury in this incident.

26. PW-3, Virendra who, according to prosecution case, had also reached the place of occurrence, is stated to have sustained firearm injury. He has also supported the prosecution case by stating that he had seen the occurrence. His injury report, Ext. Ka-16, which has been proved by PW-7, Dr. R.K. Mishra, reveals presence of two firearm injuries on his body.

27. Upon close scrutiny of testimony of PW-2, Munna @ Ramesh, it appears that this witness is also stated to have witnessed this incident, however, his injury report is not available on record. We notice that he has supported the prosecution case in all material aspects therefore, the fact that his injury report was not collected by Investigating Officer is a lapse on the part of Investigating Officer. Having regard to the fact that his testimony is consistent with testimony of PW-1, first informant, who is also an eye witness and the reliable testimony of PW-3, Virendra who is an injured eye

witness, we do not find any substance in the submission of learned counsel for the appellants that the testimony of PW-2, Munna @ Ramesh is not reliable only because of the fact that his injury report was not collected by the Investigating Officer and the same was not brought on record.

28. As mentioned above, PW-3, Virendra has also sustained injuries in this incident, therefore, in absence of any material contradictions in his testimony regarding his presence at the place of occurrence on the date of incident, we find his testimony to be reliable. Similarly, we find that despite being maternal grandfather of the deceased, Sanjay Yadav, PW-1, Rameshwar though he is related witness, his testimony appears to us to be consistent and reliable and his testimony cannot be brushed aside only because of the reason that he happens to be maternal grandfather of the deceased, Sanjay Yadav.

29. In support of our aforesaid view, we may usefully refer to para no.11 of a judgment rendered by the Hon'ble the Supreme Court rendered in the case of **Dahari v. State of U.P., (2012) 10 SCC 256**, which reads as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. [Vide Himanshu v. State (NCT of Delhi) [(2011) 2 SCC 36 : (2011) 1 SCC (Cri) 593] , Ranjit Singh v. State of M.P. [(2011) 4

SCC 336 : (2011) 2 SCC (Cri) 227 : AIR 2011 SC 255] and Onkar v. State of U.P. [(2012) 2 SCC 273 : (2012) 1 SCC (Cri) 646]]"

(Emphasis supplied by us)

30. Hon'ble the Supreme Court in the case of **Shyam Babu v. State of U.P., (2012) 8 SCC 651** in para no.22 has held as under :-

"22. This Court has repeatedly held that the version of an eyewitness cannot be discarded by the court merely on the ground that such eyewitness happened to be a relative or friend of the deceased. It is also stated that where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the court to discard the statement of such related or friendly witnesses. To put it clear, there is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend, etc. These principles have been reiterated in Mano Dutt v. State of U.P. [(2012) 4 SCC 79 : (2012) 2 SCC (Cri) 226] and Dayal Singh v. State of Uttaranchal [(2012) 8 SCC 263] ."

(Emphasis supplied by us)

31. We are not oblivious of the fact that the incident occurred at about 11:00 P.M. in the night. However, it has come in the testimony of PW-1 and PW-3 that it was bright lunar fortnight (*Ujali raat*) and they witnessed this incident

in the light of tube-lights and bulbs which were lit by generators.

32. The recovery memo, regarding recovery of country made fire arm of .315 bore, on the pointing out of accused Buddhu, has been proved by PW-8, Shiv Narayan Upadhyaya as Ext. Ka-26 and the site plan of such recovery has also been proved by PW-12, Kalyansigh C.O. as Ext. Ka-27. As per recovery memo, Ext. Ka-28, a licensee D.B.B.L. gun of accused-appellant, Lakshmi was taken from Rajput Gun service on 21.06.2006.

33. We also find that, according to FSL report, Ext. Ka-33, the disputed 12 bore cartridge marked as E.C.-1 was found to have been fired by D.B.B.L. gun no.9259 C/6, which belongs to the accused-appellant, Lakshmi, whereas the disputed cartridges .315 bore recovered from the spot were not found to have been fired from the firearms recovered on the pointing out of other accused persons. One of the firearms was not found functional.

34. It is pertinent to mention here that in **Maqbool v. State of A.P., (2010) 8 SCC 359** Hon'ble the Supreme Court has held that even if the alleged weapon of assault, cartridges and pellets were not sent to ballistic expert for examination, the same would not be fatal to the case of the prosecution if the ocular testimony is found to be reliable and cogent.

35. It is also settled law that when there is ample unimpeachable ocular evidence corroborated by medical evidence, even non-recovery of weapon from the accused

does not affect the prosecution case relating to murder as held by the Hon'ble Supreme Court in **Mritunjoy Biswas v. Pranab, (2013) 12 SCC 796.**

36. Thus, having scrutinized the testimonies of PW-1, Rameshwar, PW-2, Munna @ Ramesh and PW-3, Virendra carefully, we find presence of PW-1, Rameshwar at the place of occurrence on 05.06.2006 at about 11:00 P.M. with his maternal grand child, Sanjay Yadav to be natural. PW-3, Virendra is an eye witness, who is also an injured witness and his injury report, Ext. Ka-16 and the postmortem reports of two deceased, Ext Ka-4 & 5, respectively corroborate the testimonies of PW-1, Rameshwar, PW-2, Munna @ Ramesh and PW-3, Virendra. We find their testimonies to be reliable and consistent. Therefore, based on such consistent and reliable testimonies of PW-1, Rameshwar, PW-2, Munna @ Ramesh and PW-3, Virendra, we do not find any perversity or infirmity with the impugned judgment and order dated 28.04.2011, whereby the accused-appellants have been held to be guilty of murder of two deceased with the aid of Section 149 I.P.C.

37. For the aforesaid reasons, the present criminal appeals lack merit and deserve to be dismissed which are hereby **dismissed**, accordingly.

38. Hon'ble Supreme Court in the case of **Budh Singh v. State of Haryana, (2013) 3 SCC 742** in para 10 has held as under :-

"10. On a detailed examination and scrutiny of the various dimensions of the question that had arisen

in Sarat Chandra case [AIR 1961 SC 334] , this Court upheld the view taken by the High Court and answered the question formulated by it by holding that: (AIR p. 336, para 4)

"4. ... the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched."

39. The fact that the accused-appellants have been given benefit of remission of their sentence by appropriate Government under Section 432 Cr.P.C. has not been disputed by learned A.G.A., therefore, having regard to the law laid down by Hon'ble Supreme Court in the case of **Budh Singh (supra)**, the accused-appellants need not surrender unless they are wanted in any other case.

40. Sri Shailendra Tripathi, learned amicus curiae, who has assisted the Court on behalf of the appellants in Criminal Appeal No.917 of 2011, shall be entitled to get the fees of Rs.15,000/- from the High Court.

41. Let the lower court record along with a copy of this judgment be transmitted forthwith to the learned trial Court for information and necessary compliance.

42. Let copies of this judgment be placed on the records of connected Criminal Appeals No.936 of 2011 & 1072 of 2011.

Order Date :- 10.10.2023

A.Dewal

(Ajai Kumar Srivastava-I, J)

(Rajan Roy, J)