

Court No. - 82

Case :- CRIMINAL APPEAL No. - 623 of 1982

Appellant :- Mahboob & another

Respondent :- State

Counsel for Appellant :- J.S Tomar,S.P.S. Raghav

Counsel for Respondent :- A.G.A.

Hon'ble Nalin Kumar Srivastava,J.

1. Heard learned counsel for the appellants and learned A.G.A. for the State and perused the record.
2. Feeling aggrieved with the judgment and order dated 26.02.1982 passed by VIth Additional Sessions Judge, Rampur in Session Trial Nos. 408 of 1980 and 407 of 1980 whereby the appellants were convicted and sentenced for the offence under Section 452 I.P.C. for two years rigorous imprisonment each, under Section 147 I.P.C. for six months rigorous imprisonment each, under Section 324/149 I.P.C. for four months rigorous imprisonment each, under Section 323/149 I.P.C. for three months rigorous imprisonment each and under Section 148 I.P.C. for eight months rigorous imprisonment each. All the sentence were directed to run concurrently.
3. At the very outset, it is to be noted that during pendency of the appeal, appellant Nos. 2, 3 and 4 Asgar, Chuttan and Nawabul respectively died and appeal was abated qua them. Now the present appeal is being contested only by surviving appellant No. 1 Mahboob and appellant No. 5 Ramzani only.
4. The prosecution story as culled out in the F.I.R. is that Smt. Mahashar Jahan, daughter of Gulam Prasad was married with informant Ali Jan despite her engagement with accused Ayub some days prior to the incident which took place on 29.04.1980 at about 9.00 P.M. The said Ayub alongwith his brother Mahboob and co-accused persons Asgar, Chuttan, Nawabul and Ramzani came to the house of the informant and tried to take away Smt. Mahashar Jahan and during course of incident

they made assault upon the informant and his other family members with the aid of country made pistol and lathi and they sustained serious injuries. All the accused persons were identified in the moon light and in the light of lantern. Smt. Mahashar Jahan wife of the informant was taken away by the accused persons. On the basis of oral report of the informant, F.I.R. of this case was lodged on 30.04.1980 at 2.00 A.M.

5. The injured persons were medically examined and during course of investigation Investigating Officer completed the formalities of the investigation, recorded the statements of the injured persons, informant and other witnesses, took into possession the plain and bloodstained soil, made inspection of place of occurrence and after completing the formalities submitted charge sheet before the court against five accused persons Mahboob, Asgar, Chuttan, Nawabul and Ramzani. The offence being exclusively triable by Sessions Court, the case was committed to the court of Sessions by the concerned Magistrate.

6. All the above five accused persons were charged under Sections 147, 148, 452, 323/149, 324/149 and Section 366 I.P.C. and further accused Mahboob was charged under Section 376 I.P.C. also. The accused persons denied of all the charges and claimed for trial.

7. The prosecution in order to prove its case relied upon the oral evidence of PW-1 Ali Jan the informant, PW-2 Talluk Hussain, PW-3 Mahashar Jahan, PW-4 Shabbir witness of fact, PW-5 Dr. Smt. Pratibha Gupta and PW-6 S.I. Ram Jeet Prasad the Investigating Officer.

8. The prosecution in order to support the prosecution version also adduced documentary evidence and report of informant Ext. Ka-1, injury reports Ext. Ka-2 and Ka-3, Ka-4, Ka-5, Ka-6, Ka-7, Ka-8, Ka-9, Ka-10, Site Plan Ext. Ka-11, memo of recovery of plain and blood stained soil, Ext. Ka-12, G.D. regarding arrest of accused Ayub and recovery of Mahshar Jahan Ext. Ka-13, charge sheets Ext. Ka-14 and Ka-15 material Ext.-1 and 2 plain and blood stained soil have been produced.

9. After closure of prosecution evidence the incriminating circumstance and evidence were put to the accused persons in their statements under Section 313 Cr.P.C. The accused persons alleged the prosecution evidence to be false and fabricated and it was also contended that the informant's side had made assault upon the accused persons after entering into their house to which a criminal case was lodged from the accused side and due to animosity of the said case, the accused persons have been falsely implicated in this case.

10. As defence evidence DW-1 Dr. M. Khan and DW-2 Constable Satish Kumar Sharma have been examined.

11. On the basis of evidence adduced by both sides and after scrutiny of evidence available on record, the learned trial court recorded conviction of the accused persons Mahboob, Asgar and Chuttan, Nawabul and Ramzani.

12. Criminal appeal was preferred by all the convict accused persons but during course of appeal three out of them died now only two of the accused persons Mahboob and Ramzani are alive and contesting the instant appeal.

13. The impugned judgment and order was assailed by the learned counsel for the appellants on several grounds. It has been vehemently argued that the F.I.R. of this case has been lodged after due deliberations and consultation and the delay in lodging the same has not been explained by the prosecution. It is further submitted that medical evidence does not corroborate the prosecution version and place of occurrence is also fluctuated. Oral evidence adduced by the prosecution was never sufficient to prove the case of the prosecution beyond reasonable doubt. There is no independent and reliable witness of fact. The Investigation of the case is faulty and the impugned judgment and order suffers from several other irregularities and legal lacunas which can not be sustained.

14. Per contra, learned A.G.A. vehemently opposed the contentions raised by learned counsel for the appellants and prosecution version and evidence adduced by it has been strongly averred by the prosecution.

15. The learned trial court on the basis of oral and documentary evidence adduced by the prosecution and evidence of DW-1 and DW-2 adduced from defence side recorded the conviction of the appellants alongwith three other accused persons who are not surviving.

16. At the very outset, an attention of the Court is drawn to the fact that Mahboob the present appellant no. 1 was also charged for committing offence of rape under Section 376 I.P.C. and acquittal of all the accused persons including the present appellants has also been recorded by the learned trial court under Section 366 I.P.C.

17. The prosecution story starts with the allegation that co-accused Ayub was earlier fiancé of Smt. Mahashar Jahan, daughter of Gulam Rasool whose marriage was subsequently solemnized with the informant Ali Jan and having grudge with that, an assault was made by the accused persons of this case upon the informant and his family members after entering into house and in the incident of cross case, Smt. Mahashar Jahan, wife of the informant was taken away by the accused persons with intention to have illegal intercourse with her and subsequently rape was also committed on her by the appellant no. 1 Mahboob.

18. PW-3 Smt. Mahashar Jahan is the most relevant witness in this case. Although she corroborates the prosecution version in her examination-in-chief and specifically states that the accused persons took her away forcefully from her house and she was kept in the village for about five days by the accused Ayub and Mahboob and subsequently she was taken to Rampur city where she was further detained for three months by the accused Mahboob but the most relevant part of her deposition is that no physical contact was made with

her by the accused persons. In her cross examination she has made some twisted statements in respect of recording her statement under Section 164 Cr.P.C.. She further clarifies that the accused persons were identified in the light of lantern at the time of occurrence. She further explained that she was never medically examined by doctor and she was held by the police with the accused Mahboob. Although she stated that prior to the occurrence her engagement was performed with Ayub but she was never married with him and about 20 days before the occurrence her marriage was solemnised with Ali Jan and since then she had not been in any contact with Ayub. She further explained that after her recovery by the police, she was released by the police and was given in supurdgi of her father and brother-in-law and then she went to Ramepur and Taharpur. The name of the accused persons, manner of assault and nature of injuries and name of injured persons have also been stated by her in her evidence and further she states that Yusuf and Ali Jan received no injury in the occurrence whereas Yasin, Munaur, Miyajan, Rehsana have received injuries which were inflicted with the use of knife and sword.

19. The learned trial court making emphasis upon the deposition of PW-3 recorded acquittal of all the accused persons for the charge under Section 366 I.P.C. and further appellant No. 1 Mahboob was acquitted of the charge under Section 376 I.P.C.

20. PW-1 Ali Jan is the informant of this case who also corroborates the prosecution case in his deposition and makes categorical statement to the fact that in the night of occurrence at about 9.00 P.M. accused persons Mahboob, Asgar and Chuttan, Ramjani and Nawabul carrying sword, knife, country made pistol, lathi etc. in their hands entered into his house and tried to take away his wife Mahashar Jahan forcefully and when she protested, the accused persons made assault upon the informant, his brother Miyajan and other persons Munauwar, Ashaf, Badloo and Rahsana. They were identified in the light of lamp while dragging his wife Mahashar Jahan. His report was lodged on oral

complaint in the police station which was written down by the police constable and write up has been proved by PW-1 as Ext. Ka-1. In his cross-examination PW-1 makes no statement adverse to the prosecution case and even in the course of lengthy cross-examination his evidence is constant on material points. In paragraph 21 of his cross-examination PW-1 admits the factum of enmity between the parties. Although he denied the suggestion put by defence in his cross-examination that a quarrel took place between the same parties about one hour before the present occurrence but further he admits that he had faced the trial of the said incident alongwith Munauwar and Asgar which was ended in an acquittal.

21. PW-2 Taluk Hussain is another witness of fact. He makes ocular version of the incident in his evidence and on the point of place and time of occurrence, weapons used, name of accused persons participating in the commission of crime, injuries etc. his evidence is in confirmity with the deposition of PW-1. He also corroborates that the accused persons took away Smt. Mahashar Jahan with them. He further admits that he is stepfather of informant Ali Jan. Significantly he admits that before one hour of the present occurrence police case was lodged by the present accused persons against Ali Jan in Rampur wherein Ali Jan had faced trial.

22. PW-4 Sabbir has been produced as eye witness of the case. He also supports deposition of PW-1 in his examination-in-chief. Further he claims to be an injured witness in the occurrence and states that the accused persons had come to the house of the informant carrying knife, country made pistol, lathi and sword in their hands and injuries were received by Smt. Rahsana, Miyajan, Ali Jan, Munauwar, Ashaf and Badloo. The accused persons forcefully took away Smt. Mahashar Jahan with them. He himself received injuries in the occurrence. This witness has also undergone a lengthy cross examination particularly on the point of place of occurrence but there is nothing in his testimony which goes adverse to the prosecution case.

23. PW-5 Dr. Smt. Pratibha Gupta medically examined Smt. Mahashar Jahan on 14.07.1980 in the District Hospital, Rampur and she states in her deposition that she found no mark of external injury over the body of Smt. Mahashar Jahan and she was pregnant by 32 weeks. She further proved medical report as Ext. Ka-10.

24. PW-6 S.I. Ramjeet Prasad is the Investigating Officer of the case who proved the proceedings of the investigation in his evidence. He has proved the site plan as Ext. Ka-11 and memo of recovery of plain and bloodstained soil as Ext. Ka-12 alongwith both the soil as material Ext. 1 and 2. G.D. of arrest of accused Ayub as Ext. Ka-13, Charge sheet Ext. Ka-14 and Ka-15. He also proves the registration G.D. as Ext. Ka-16 as secondary witness for the scribe Head Moharrir S.B. Singh.

25. In his cross examination PW-5 fairly admits that no statement under Section 164 Cr.P.C. of the abductee and even her X-ray was not performed. He further states that Smt. Mahashar Jahan was given in the custody of Gulam Saloor her grandfather. On the point of place of occurrence PW-6 has also been controverted with the site plan but his evidence is constant on this point. Notably PW-6 admits the fact that on a report of Asgar a criminal case was also lodged against Ali Jan.

26. On the basis of aforesaid evidence the prosecution undoubtedly has proved his case beyond reasonable doubt except in respect of charges under Sections 366 and 376 I.P.C. There is no material contradiction in the testimony of witnesses of fact PW-1, PW-2, PW-3 and PW-4 on any relevant point. All the witnesses have named the accused persons who participated in the commission of crime. The place of occurrence is the house of the informant as stated in the F.I.R. and the aforesaid witnesses alongwith PW-6 Investigating Officer has also narrated the same story so far as the fact of assault, weapons used, injuries and establishment of place of occurrence are concerned. In Ext. Ka-11 site plan all have been clearly shown and all the witnesses of fact and PW-6 Investigating Officer as well explained the same in their respective depositions.

27. So far as the factum of injuries are concerned, from perusal of record this Court finds place in the order-sheet of the court dated 27.01.1982 and accordingly the injury reports of all the injured persons have been exhibited. Although there are minor contradictions in the deposition of witnesses of fact in respect of the injuries sustained by several injured persons but the same does not hit the very root of the prosecution case.

28. The learned counsel for the surviving appellants has impressed upon the testimony of DW-1 and Dw-2 and it has been argued that the prosecution has tried to conceal the origin and true story behind the occurrence. It is argued that prior to the present incident an assault was made by the informant side upon the accused persons wherein the injured Asgar received injuries and in this connection a report was lodged in police station Sahabad, District Rampur on 04.03.1980 at 1.30 P.M. but the prosecution witnesses tried to conceal the factum of the aforesaid occurrence when they were cross examined by defence. It is vehemently argued that the prosecution has not come forward with clean hands and accused persons have been falsely roped in a false case.

29. DW-2 constable clerk Satish Sharma has proved the chik F.I.R. lodged by the accused side under Section 323, 324 I.P.C. which was proved by head Moharrir Prithvi Singh as DW-2 as secondary witness. Head Moharrir Prithvi Singh has proved the chik register as Ext. Kha-2. DW-1 Dr. M.M. Khan states in his evidence that on 30.04.1980 at about 3.45 A.M. he medically examined Asgar the accused in the present case who was cross examined by Rahsana and he received following injuries over his body.

(1) Lacerated wound 2.5 cm. x 0.5 cm. vertical over the upper part of middle of forehead, muscle deep.

(2) Abrasion 0.5 cm. circular over the left forehead, 5 cm. above from the right eye brow.

(3) Abrasion 1.0 cm circular over the left side of face 5 cm. in front of left ear.

(4) Lacerated wound 1.2 cm. x 0.5 cm. muscle deep, there is swelling over the right wrist joint. This injury is over the right wrist joint on lateral aspect on dorsal aspect, Ad. -ray, referred to District Hospital, Rampur.

(5) Incised wound 2.5 cm x 1.0 cm. over the upper part of abdomen 10 cm. above from the umbilicus ..., skin deep.

(6) Contusion 5.5 cm. x 1.6 cm. over the front part of right elbow joint, oblique red. There is swelling. Injury kept U.O. advised X-ray, referred to District Hospital, Rampur.

(7) Abrasion 2.0 cm x 1.0 cm oblique over the back of left elbow joint.

N.B. Injury Nos. 1, 2, 3, 5 & 7 are simple, Injury Nos. 4 & 6 are kept under observation.

Injury no. 5 is caused by some sharp edged weapon, while other are caused by some blunt object. Duration fresh.

30. He further states that injury nos. 1, 2, 3, 5 and 7 were simple in nature whereas injury nos. 4 and 6 were advised for X-ray and injury no. 5 was likely to be caused by some sharp edged object like knife. He further clarifies that some injuries were caused by like lathi, danda and all the injuries were fresh. The record of case Crime No. 691 of 1980 (State Vs. Ali Jan) under Sections 323, 324 I.P.C., Police Station Shahabad was summoned by the trial court which was available before DW-1 at the time of his evidence and the oral injury report available in the record of the aforesaid case was seen and affirmed by DW-1 and he proved the true copy of the said injury report as Ext. Kha-1.

31. In his cross examination DW-1 states that the injuries were likely to be caused on 29.04.1980 at 9.00 P.M. He further states that in the case relating to Crime No. 691 of 1980 aforesaid he was produced as witness and injury report was proved by him which he has affirmed in the present case.

32. The aforesaid documentary evidence reveals that the prosecution has tried to conceal the origin and real facts of the case. Injuries were also sustained by one of the accused persons and the F.I.R. in respect of the same was also lodged by the accused side. The prosecution was under legal obligation to show how injuries were inflicted on the accused side.

33. In **Nand Lal v. State of Chhattisgarh, (2023) 10 SCC 470**, the Hon'ble Apex Court has held that :

“**25.** We will first consider the issue with regard to non-explanation of injuries sustained by Accused 11 Naresh Kumar. In *Lakshmi Singh v. State of Bihar* [*Lakshmi Singh v. State of Bihar*, (1976) 4 SCC 394 : 1976 SCC (Cri) 671] , which case also arose out of a conviction under Section 302 read with Section 149 IPC, this Court had an occasion to consider the issue of non-explanation of injuries sustained by the accused. This Court, after referring to the earlier judgments on the issue, observed thus : (SCC pp. 401-402, para 12)

“**12.** ... It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it

is rendered probable so as to throw doubt on the prosecution case.

34. It is to be kept in mind that the accused Ashraf has sustained as many as seven injuries out of which one was referred for X-ray as well. It is true that the injuries have been caused to the persons relating to many persons from the informant's side but that generate to prosecution side that how the injuries were caused to the accused side. This is the serious things which bring the prosecution story into a shadow of doubt. Defence has adduced the witnesses as. It is needless to say that the evidenciary value of the defence is the same as that of prosecution evidence.

35. The prosecution witnesses of fact nowhere states in their defence that they have made many assault upon the accused persons.

36. The evidence of the abducted lady Mashahar Jahan is also shaky and does not inspire confidence. Crux of the prosecution story is that the accused persons have come to the house of the informant to kidnap Mashahar Jahan, wife of the informant but her evidence is shaky and she is not sterling witness. This Court can not overlook that the main object of the accused persons as per persecution, was to abduct Mashahar Jahan, the wife of the informant and she was undergone rape but the learned trial court proceeded to acquit all the accused persons from the charge under Section 366 I.P.C. and further the accused Mahboob was also acquitted for the charge under Section 363 I.P.C. Natural question arise in this situation that no incident of kidnapping of Mahshahar Jahan happened at the given time and place that was the motive for them to come to the house of the informant carrying with the weapons to them and belabour them. All these circumstances and evidence on record create a genuine suspicion regarding the involvement of the present accused persons in commission of the alleged crime and the learned trial court did not appreciate the evidence on record in right prospective but it appears that only for the sake of

recording conviction of the accused persons anyhow the impugned judgment has been passed.

37. From the close scrutiny and thorough analysis, the impugned judgment is not sustainable under law. It is a trite law that from the evidence on record, if two views are possible one in favour of the accused and the second against the accused, the Court should lean to adopt favourable to the accused. In ***Suchand Pal vs. Phani Pal, 2004 SCC (Cri) 220***, the Hon'ble Supreme Court held that if from the evidence on record and in the facts and circumstances of the case two views are possible, one pointing to the innocence of the accused and other to the guilt of the accused, the view which favours the accused should be preferred.

38. It is pertinent to mention here that the instant appeal is pending before this Court since 1982 i.e. for about 42 years. The incident occurred in the year 1980 and session trial was decided in the year 1982 and initially the appeal was filed by the five accused persons but by passage of time three out of them died and at present two appellants are only surviving who are aged about 65-70 years.

39. Hence, upon careful analysis and consideration of the settled legal position in the backdrop of the facts and circumstances of the present case, I am of the opinion that the conclusion taken by the Trial Court in the impugned judgment and order is not in accordance with law and the evidence available on record. The origin and genesis of the occurrence had been deliberately suppressed by the prosecution which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence. Thus, this Court is of the view that the prosecution has not been able to establish the guilt of the accused appellants beyond reasonable doubt. Therefore, the Court is inclined to grant benefit of doubt to the accused appellants on the ground of rule of caution.

40. In view of the above discussions, I am of the opinion that the prosecution has failed to establish the guilt of the accused appellants for the offence punishable under Sections 147, 148, 452, 323/149 and 324/149 IPC beyond reasonable doubt and to the satisfaction of the judicial conscience of the court. So, the impugned judgment and order of conviction and sentence dated 26.2.1982, which has been sought to be assailed, call for and deserves, interference. The criminal appeal is liable to be allowed.

41. Accordingly, criminal appeal is allowed and the conviction and sentence imposed upon the accused appellants Mahboob and Ramzani for the offence punishable under Sections 147, 148, 452, 323/149 and 324/149 is set-aside as the accused appellants are found not guilty for the aforesaid offences. They are acquitted of all the charges framed against them. Accused appellants are on bail, they need not surrender and their bail bonds are cancelled and sureties are discharged.

42. Copy of this judgment alongwith trial court record be sent forthwith to the Sessions Judge, Rampur for necessary compliance.

Order Date :- 16.10.2024

Rmk.