

Neutral Citation No. - 2024:AHC:163942

Court No. 86

Case :- CRIMINAL APPEAL No. - 2131 of 1985

Appellant :- Ram Narain And Others

Respondent :- State

Counsel for Appellant :- Prabodh Gaur, Pradeep Yadav, Rajesh Pratap Singh

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. The Court of IV Additional Sessions Judge, Azamgarh vide judgment and order dated 8.8.1985 passed in Session Trial No. 180 of 1980 (State Vs. Ram Narain and others) arising out of Case Crime No. 59 of 1977, Police Station Bardah, District Azamgarh recorded the conviction of accused persons namely, Ram Narain, Jeet Narain, Shyam Narain, Rana, Banshraj and Santraj under Sections 326/149, 147, 148 I.P.C. and sentenced them for rigorous imprisonment for three years under Section 326/149 I.P.C. and one year rigorous imprisonment under Sections 147, 148 I.P.C. each. All sentences were directed to run concurrently. Being aggrieved by the said judgment and order, the present appeal has been preferred by all the convicts.
3. During pendency of appeal, appellant nos. 1, 2, 4, 5 and 6 have died and present appeal was abated qua them and at present sole surviving appellant no. 3 Shyam Narain is contesting this appeal.
4. The prosecution story as disclosed in the F.I.R. is that on 14.08.1977 at about 8.30. A.M. Shiv Poojan, the son of the informant Bhagwati Singh was assaulted by accused Ram Narain with Garasa, Jeet Narain and Shyam Narain with lathi, Rana with Garasa, Bansraj with lathi, Santraj with Ballam while going to work in the field near the

tube-well of Ram Narain who sustained grievous injuries. The incident was witnessed by the informant and witnesses Rajendra Singh, Pataruvari, Chandrika and Doodh Nath etc. The injured Shiv Poojan was taken to the District Hospital, Azamgarh where he was medically examined and on written report of informant Bhagwati Singh, the F.I.R. was lodged on 14.08.1977 at 14.35 P.M. The investigation started and Investigating Officer after performing the proceedings of investigation, recording the statement of the injured himself and other witnesses of fact, inspection of spot, medical examination of the injured and also after collecting other sufficient and satisfactory evidence, submitted charge sheet against all the six named accused persons. The offence being exclusively triable by Sessions Court the case was committed to the Sessions Court by the Magistrate. All the accused persons were charged for the offence under Sections 147, 307/149, 326/149 I.P.C. They denied the charges and claimed for trial.

5. The prosecution in order to prove its case has examined as many as seven prosecution witnesses as oral evidence and to give support the oral evidence, the prosecution has relied upon the written report Ext. Ka-1, injury reports Ext. Ka-2 and Ext. Ka-2A, X-ray report Ext. Ka-3, F.I.R. Ext. Ka-4, registration G.D. Ext. Ka-5, letter to C.M.O. by S.P., Azamgarh Ext. Ka-6, memo of possession of medical papers Ext. Ka-7, charge sheets Ext. Ka-8 and Ka-10, site plan Ext. Ka-9 and X-ray plates material Ext. 1 to 4.

6. On completion of prosecution evidence, the incriminating evidence and circumstances were put to the accused persons in their statements recorded under Section 313 Cr.P.C. where they all in same tone claimed the prosecution evidence to be false and subsequently DW-1 Swami Nath Sharma has been produced by them as defence evidence.

7. On the basis of oral and documentary evidence and after hearing the parties at length and also analysing the evidence of the defence, vide judgment and order dated 8.8.1985, the learned trial court recorded

the conviction of the accused-appellants under Sections 326/149, 147, 148 I.P.C. and sentenced them as here-in-above mentioned.

8. The impugned judgment and order of sentence has been assailed by learned counsel for the appellant Shyam Narain on various grounds.

9. The first issue raised by the learned counsel for the appellant is that the medical evidence does not corroborate the prosecution version. No vital part of the body of the injured sustained grievous or serious injuries and fracture, which was found upon the arm, was also not inflicted upon any sensitive part of the body. It is further submitted that as per medical evidence no offence under Section 307 I.P.C. is made out. The learned trial court also found the same and accordingly, the appellant was not convicted for the aforesaid offence.

10. Further, he has contended that there is no independent witness of the occurrence and witnesses who have been examined to prove the occurrence as interested witnesses. It is further submitted that the present appellant has been assigned the role of causing injuries to the injured by use of lathi but the medical evidence shows that there was no injury of lathi upon the body of the injured. It is further submitted that the Investigating Officer of this case has committed gross error in the investigation and no weapon, which was allegedly used in the occurrence, was sent to Forensic Science Laboratory (F.S.L.) for scientific test and no such F.S.L. report is on record. It is further submitted that the F.I.R. of this case was lodged after due consultation and deliberations and it is not a genuine document. Several other submissions have been made by learned counsel for the sole surviving appellant Shyam Narain to assail the case of the prosecution and evidence adduced by it.

11. Per contra, learned A.G.A. has vehemently opposed the present appeal and has contended that the F.I.R. in this case was lodged promptly and on the same day when the incident happened. It is also submitted that the medical evidence is in full conformity with the prosecution case. The injuries found to be inflicted upon the body of the

injured by the doctor are actually the same as the prosecution claims. There is no possibility of the false implication of the appellant (appellants). It is also submitted that this is a case which rests upon reliable evidence of the injured himself which is well supported by the eye witnesses of the incident. No adverse inference can be drawn if the witnesses of fact belong to the same family. Their presence at the place of occurrence is natural and trustworthy. It is further urged that there is no such grave error committed by the Investigating Officer during investigation which may hit the very root of the prosecution case. On the basis of aforesaid submissions, a prayer to dismiss the present criminal appeal has been made.

12. To appreciate the prosecution case in this matter, it is desirable to examine and scrutinize the evidence adduced by the prosecution on record and in this exercise, the prosecution evidence may be seen in two parts; firstly, evidence of fact and secondly, the medical and other formal evidence.

13. PW-1-informant/eye witness and PW-2 injured are the two witnesses of fact who were examined by the prosecution to prove its case. Before analysing the evidence of PW-1 and PW-2, it must be borne in mind that the injured witness stands on a distinguished footing and he is the best person to disclose as to by whom, how, when and by use of which weapon the injury was caused to him and certainly he also discloses the place of occurrence where the incident happened. In the same fashion, the position of the informant regarding registration of the F.I.R. on the basis of his report is the same and he is the backbone of any prosecution case and if the informant is also an eye witness of the incident his evidence can be taken as more distinguished and reliable piece of evidence.

14. PW-1-informant is the father of the injured and eye witness of the incident as well. In his deposition he has disclosed the background of the incident and stated that a criminal case was already contested by both the sides as rivals prior to the present incident and secondly, in the

murder case of one widow Jwala Devi, the deceased Shiv Poojan stood as witness of the inquest proceeding and accused Ram Narain was wanted in that murder case and all the accused persons had suspicion that they were being falsely implicated in the murder case by Shyam Poojan, the son of the PW-1.

15. Narrating the incident PW-1 states that at the time of the incident when Shiv Poojan was going to his field he was attacked by Ram Narain with Garasa, Jeet Narain and Shyam Narain with lathi and Rana with Garasi, Bansraj with lathi and Santraj with Ballam who surrounded him on the chak-road and threatened for life. On noise he alongwith Patruvari, Doodh Nath and Rajendra reached the spot and accused persons fled away. The injured was taken to Sadar Hospital, Azamgarh by Taxi where he was admitted by doctor. He himself wrote down a written report which was proved by him as Ext. Ka-1. He has further stated that from District Hospital, Azamgarh the injured was taken to Banaras Hindu University, Varanasi after 3-4 days where it took a long time to be cured.

16. PW-2 Shiv Poojan is the injured witness himself. He started his deposition with the motive of the case and stated that in one criminal case under Section 436 I.P.C. Jeet Narain and Ram Narain were accused and his father was the informant. Besides it, when the murder of Smt. Lalita Devi, one lady of the village was committed, he himself stood as witness to the inquest and that was also a reason of animosity between both the sides and the accused persons who were involved in the said crime also, were having grudge to him.

17. Narrating the incident he has stated that on 14.08.1977 at 8.30 A.M. when he was going to his field, the accused persons Ram Narain and Rana with Garasa, Santraj with Ballam, Bansraj, Jeet Narain and Shyam Narain with lathi came there and by surrounding him near the tube-well they made assault upon him with their weapons and he sustained injuries. His father Bhagwati Singh, witness Patruvari, Chandrika Prasad and Doodh Nath etc. reached there and rescued him.

He was taken to District Hospital by Taxi where he was admitted and his treatment started. He was bitterly beaten by the accused persons and sustained serious injuries also having fracture in both of his hands. Subsequently he was referred to Banaras Hindu University, Varanasi where he was admitted for about 20 days.

18. To corroborate the version of the aforesaid witnesses of fact, formal witnesses have also been examined by the prosecution.

19. The medical evidence is a very crucial and important piece of evidence in any criminal trial where death or injury was caused to the injured or deceased. If the evidence of fact is corroborated with the medical evidence, there is all likelihood of the accused persons to be convicted.

20. PW-3 Dr. R.R. Rai has medically examined the injuries of the injured who was working as Medical Officer, Agra on 14.08.1977 at 1:20 P.M. and whatever he found in the medical examination of the injured has been mentioned hereinafter.

21. Likewise, PW-5 Iizharul Haq has performed X-ray of the injured which has been discussed as mentioned hereinafter.

22. PW-4 Head Moharrir- Amar Nath Tiwari has proved Chik F.I.R. and copy of registration G.D. as Ext. Ka-4 and Ka-5 respectively.

23. PW-6 S.I. Kailash Singh, second Investigating Officer of the case has stated in his deposition that on 20.07.1978, he was authorized by C.O., Deogaon to receive all the relevant documents in respect of admission and discharge of accused Ranaraj Singh from P.H.C., Jalalpur, District Faizabad. In compliance of the aforesaid direction, he went to P.H.C., Jalalpur, District Faizabad and received relevant papers from the doctor working there and a memo of possession of said papers was also prepared by him.

24. The letter of authorization which was endorsed on the letter sent by C.O., Deogaon to Chief Medical Officer, Faizabad, memo of

possession, relevant medical papers and supplementary charge sheet filed against accused Ranaraj Singh has been proved by him as Ext-6 Ka-7 and Ka-8 respectively.

25. PW-7 S.I. Mewa Singh is the first Investigating Officer of the case who has proved the proceedings of investigation in his evidence. He has recorded the statements of informant Bhagwati Singh, witnesses Rajendra Singh Pataruvari, Doodh Nath and made arrest of the accused persons. He also inspected the place of occurrence and site plan Ext. Ka-9 was prepared by him. He also proved the charge sheet Ext. Ka-10 submitted against all the accused persons except accused Rana.

26. In the light of the submissions made by learned counsel for both the parties the oral evidence as well as documentary evidence available on record was minutely examined by this Court and the views expressed by the learned Sessions Court were also taken into consideration.

27. The medical evidence adduced by prosecution in a case of injury or death gives force to the prosecution case. If the injured is medically examined promptly and the injuries found by doctor over the body tally with the statement of the injured witness deposed before the court, it may be taken as a safe condition for the prosecution to prove its case. In the case in hand, PW-2 injured has made specific statement that all the convicted persons carrying Garasa, Ballam and Lathi came to the spot and he was belaboured by them with the aforesaid weapons and he sustained serious injuries. The said factum of injuries inflicted by accused persons and sustained by the injured has been well corroborated by PW-1-informant, the father of the injured.

28. The injured Shiv Poojan was medically examined by Dr. R.R. Rai on 14.08.1977 at 1.20 P.M. in District Hospital, Azamgarh. Dr. R.R. Rai has been examined as PW-3 who in his deposition has proved the injury report of the injured as Ext. Ka-2 which is the true copy of the original injury report. The original injury report is also on record but in a torn

condition and it has also been proved by PW-4 as Ext. Ka-2A. The X-ray report was also proved as Ext. Ka-4 by the said witness. On examination of the injured, following injuries were found by the doctor:-

1. L.W. 6.5 x 0.8 cm. into bone deep on Rt. side head of cm. Above Rt. ear. Adv. X-Ray of skull & K.U.O.
2. Multiple abrasion in area of from top of Rt. shoulder to Rt. elbow joint in area of 32 cm. X 13 cm. on front of shoulder Rt. & Rt. upper arm. Adv. Rt. shoulder & Rt. forearm.
3. Punctured wound 0.8 cm. X 0.2 cm. in 0.8 cm. on front medical aspect inner part of Rt. forearm.
4. Traumatic swelling with contusion in area of 27 cm. x 10 cm. in front aspect of Rt. forearm suspected fracture Rt. forearm bone. Adv. X-ray Rt. forearm.
5. Abrasion 4 cm x 3 cm top of shoulder.
6. Abrasion 7 cm. 1 cm. on Lt. Upper arm 17 cm below from the shoulder out on front.
7. Traumatic swelling 20 cm. x 17 cm. with contusion on Lt. Forearm middle part suspected fracture. Adv. X-Ray Lt. Forearm.
8. L.W. 1.5 cm. 1.5 cm. on top of middle finger nail parallelly separated of the Lt. hand. Ad. X-ray.
9. L.W. 1 cm. 1.2 cm on top of ring finger of Rt. hand nail parrasially separated. Adv. X-ray.
10. Abrasion 17 cm. x 2 cm Rt. thigh outer aspect middle part.
11. Abraded contusion with swelling 12 cm. x 10 cm. on front upper part of Rt. leg. Adv. X-Ray Rt. leg.
12. Incised wound 2 cm. x 1 cm. muscles deep & bone deep on Rt. leg front lower part 10 cm. above from ankle joint.

13. Incised wound 2 cm. x 1 cm. x muscle deep and bone deep on front upper part of left leg 12 cm. below from Lt. knee joint. Adv. Lt. leg.

14. Abrasion 13 x 2 cm. on Rt. thigh outer aspect 27 cm. above from Lt. knee.

15. Contusion by multiple 15 cm. x 9.5 cm. on left back upper part. Adv. X-Ray.

16. Contusion by multiple 17 cm. x 11 cm. on right side of back upper part. Adv. X-Ray.

17. Contusion 23 cm. x 2.5 cm. on right side of back uplift in dimension.

18. Contusion 9 cm. x 4.5 cm. on the back just below the left scapula bone.

29. The injury nos. 1, 2, 4, 8, 9, 11, 15, 16, 17 and 18 were caused by some blunt object whereas injury nos. 12 and 13 were caused by sharp edged weapon and injury no. 3 by sharp parted weapon and except abrasions rest of the injuries were kept under observation.

30. In X-ray report, PW-3 further states that a fracture in the ulna bone of right upper forearm and fracture in between radius and ulna and lower thick part of lower arm were also found. X-ray report was proved as Ext. Ka-4 by PW-3 who also proved X-ray plate as material Ext.-1 but further explained that the number of X-ray plates is four which were mentioned by him in a single report.

31. In continuation of the same, X-ray of Shiv Poojan was performed by PW-5 Izzharul Haq who was working as X-ray technician in District Hospital, Azamgarh on 15.08.1977. He performed X-ray of right leg, skull, right upper forearm and right and left forearm and X-ray plates have also been affirmed by him. He has also identified the signatures of Dr. R.R. Rai over X-ray plates. He also affirms copy of X-ray report in his deposition before the court.

32. The learned trial court analysed the medical evidence on record in the light of ocular evidence of PW-1 and PW-2 and has drawn a conclusion that the injuries were inflicted upon the injured with the aid of weapons of the same nature and that too at the same time as the prosecution claims. In that way the manner of assault and the weapons used in the commission of crime have also been proved by the prosecution evidence.

33. The recovery of weapon used in the commission of crime is another point which has been questioned by the defence. This is an admitted case of the prosecution that no weapon, which was allegedly used in the occurrence, was sent for Forensic Test but in the opinion of this Court this is only an omission and negligence on the part of the Investigating Officer on the basis whereof, the prosecution case based upon cogent and reliable ocular and formal evidence as well cannot be wash off. In a catena of decisions it has been held by the Hon'ble Apex Court and by this Court as well that the prosecution case, which is proved otherwise on the basis of cogent and consistent evidence, cannot be thrown out on the basis of any omission or negligence made by the Investigating Officer of the case if it does not hit the very root of the prosecution case.

34. In **Hema Vs. State, (2013) 81 ACC 1 (Supreme Court)**, it has been held by the Hon'ble Apex Court that any irregularity or deficiency in investigation by Investigating Officer need not necessarily lead to rejection of the case of prosecution when it is otherwise proved. The only requirement is use of extra caution in evaluation of evidence. A defective investigation cannot be fatal to prosecution when ocular testimony is found credible and cogent.

35. Learned counsel for the appellant on the basis of statements made by PW-3 doctor in his cross examination has made an attempt for creating a doubt upon the use of weapons in the occurrence as alleged by the prosecution on the basis of nature of the injuries.

36. PW-3 doctor has undergone a lengthy cross examination by defence and so is the position of PW-4, the Technician. The defence has put many suggestions to the doctor PW-3 and PW-4, the Technician and on some suggestions the possibility as suggested by defence has been admitted by the doctor but at the same time, this fact cannot loose sight of that the prosecution case is based upon the ocular testimony of PW-1 informant and PW-2 injured himself. The evidence of doctor is only an opinion of expert which cannot overpower the trustworthy ocular version recorded before the court and this legal position has been settled in umpteen of cases.

37. In ***Ashok Kumar Chaudhary. Vs. State of Bihar 2008 (61), ACC 972 (SC)***, it has been categorically held that if the testimony of an eyewitness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected because certain insignificant, normal or natural contradictions have been appeared into his testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are only normal and not material in nature, then the testimony of an eyewitness has to be accepted and acted upon.

38. Further, the Hon'ble Apex Court in ***State of Haryana vs. Krishan, AIR 2017 SC 3125*** has held that the deposition of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of contradictions and discrepancies for the reason that his presence on the scene has been established in the case and it is proved that he suffered injuries during the incident.

39. The genuineness of the F.I.R. has also been assailed by learned counsel for the appellant. It has been vehemently argued that the F.I.R. was lodged belatedly without any plausible explanation for the same. It has been further argued that since the F.I.R. of this case is not a genuine document and was lodged ante-time, no reliance can be placed upon such an F.I.R. and since the basis of the prosecution case in the

form of the F.I.R. is shattered, the prosecution cannot stand upon its own legs.

40. In the light of the aforesaid particular issue raised by learned counsel for the appellant, this Court has occasion to take into the account the fact that the incident in the present case occurred on 14.08.1977 at about 8.30 A.M. and F.I.R. was lodged at 2.35 P.M. on the same day. It is pertinent to note here that the written report on the basis of which the F.I.R. was lodged, was proved by PW-1 as Ext. Ka-1. It has been specifically mentioned in Ext. Ka-1 that after the occurrence, the injured Shiv Poojan was taken to the District Hospoital, Azamgarh where he was admitted and medically examined and after the medical formalities when the informant got free, he immediately rushed to the police station where the F.I.R. was lodged. PW-1 in his cross examination clarifies that from the place of occurrence he straight way went to the hospital. The report Ext. Ka-1 was written by him in the hospital. PW-4 scribe S.I. Amar Nath Tiwari has proved the chik F.I.R. and registration G.D. as Ext. Ka-4 and Ka-5 as secondary witness for the original scribe Const. Moharrir Jawahar Singh with whom he had worked. PW-2 injured witness also affirmed the fact that when the accused persons fled away from the spot, his father took him to District Hospital where he was admitted for medical examination and his father lodged the report to the police.

41. In the aforesaid circumstances, the mental condition of PW-1 informant is quite understandable as a father whose son was assaulted by many accused persons with the aid of deadly weapons had no other option but to take his seriously injured son first for medical examination which was his first priority in order to save the life of his son and when he was free from the medical formalities relating to his son, he immediately rushed to the police station and lodged the F.I.R. The F.I.R. has been lodged about after six hours of the occurrence and in the facts and circumstances of the case and also from the statements of PW-1 and PW-2 it is found that the conduct of PW-1 in lodging the F.I.R. is self

explanatory. Every delay in lodging the F.I.R. is not fatal and the Court should look into the justification for delay on the basis of evidence on record and circumstances of a particular case. As soon as PW-1 got time after medical formalities, he lodged the F.I.R. same day and in that way, the delay in lodging the F.I.R. is well explained and the F.I.R. of this case may be taken as prompt F.I.R. in the facts and circumstances of this case.

42. In ***Mehraj Singh Vs. State of U.P., (1994) 5 SCC 188***, while emphasising the importance of recording a prompt F.I.R., the Hon'ble Supreme Court observed as under :

"FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story."

43. In ***Thulia Kali Vs. State of Tamil Nadu reported in (1972) 3 SCC 393*** the Hon'ble Supreme Court held as under.

".....first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the report can hardly be overestimated from the standpoint of the accused."

44. Similarly, in ***Kishan Singh through LRs Vs. Gural Singh and others reported in (2010) 8 SCC 775*** the Hon'ble Supreme Court held that "Prompt and early reporting of the occurrence by the informant with vivid details gives assurance regarding truth of its version. In case, there is some delay in recording the FIR the complainant must give an explanation for the same. Undoubtedly, delay in lodging FIR does not make the complainant's case improbable when such delay is properly explained."

45. Learned counsel for the appellant has further urged that the accused persons had no motive to cause the injuries to the injured. PW-1 on this point has admitted in his cross examination that prior to the present incident one criminal case was pending between Chandrika and accused Ram Narayan and said Chandrika was the witness in this case and the accused Sant Ram was the witness on behalf of accused Ram Narayan in the said criminal case. He has also admitted that he had been on inimical terms with accused Rana as well and a case under Section 436 I.P.C. was also lodged by the informant's side against the accused persons.

46. PW-2 the injured in his examination-in-chief has made categorical statement that he had old animosity with the accused Ram Narayan, Jeet Narayan Singh and Shyam Narayan Singh and since he was a witness of inquest in the case of murder of Lalita Devi wherein Ram Narayan Singh and Krishna Raj were the accused and the accused persons were having enmity with him for the same.

47. In respect of element of motive, it is trite law that when the prosecution case is based upon the ocular testimony which is trustworthy, the element of motive loses its significance. Emphasis may be laid down upon the decisions of Hon'ble Apex Court in *Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616*, *Anil Rai Vs. State of Bihar (2001) 7 SCC 318* and *Deepak Verma Vs. State of Himachal Pradesh (2011) 10 SCC 129* and so on.

48. Since the case in hand is based upon ocular evidence, the absence of motive in the prosecution case has no relevance at all. However, PW-1 & 2 make some statements regarding old grudge with them on the part of the accused persons which may be taken as a motive to commit the crime by the accused persons.

49. Learned counsel for the appellant has further argued that there are several contradictions in the depositions of PW-1, PW-2 and they have made several contradictory statements during investigation under

Section 161 Cr.P.C. and many statements made by them before the court are afterthought.

50. In the light of aforesaid argument advanced by learned counsel for the appellant, this Court has also gone through the entire testimony of PW-1, PW-2 and PW-7 the Investigation Officer and it was found that there are no material contradictions in the testimony of PW-1 and PW-2 and also no material contradiction was found in their testimony recorded before the Court and statement given before the Investigating Officer during investigation. The evidence of PW-1 and PW-2 is consistent in respect of the name of accused / participants, weapons used in commission of crime, nature of injuries sustained by injured, place and time of occurrence and other related facts. The law in this regard is settled that merely on the basis of some minor contradictions the consistent and unblemished evidence of the witnesses of fact cannot be thrown away.

51. The learned trial court has analysed and scrutinized the evidence on record in the lawful manner and this Court finds no perversity in the impugned judgment and order.

52. A peculiar objection has been raised by learned counsel for the appellant that the statement of the injured has been recorded by the Investigating Officer of the case very belatedly without assigning any cogent reason behind the same. In support of his contention, learned counsel for the appellant has placed reliance upon the judgments of the Apex Court in the cases of *Harbeer Singh Vs. Sheeshpal & ORS, 2016 (16) SCC 418* and *Jafarudheen & ORS. Vs. State of Kerala, 2022 LiveLaw (SC) 403*. PW-2 Shiv Poojan states in his cross examination that the Investigating Officer recorded his statement under Section 161 Cr.P.C. 5-6 days after the occurrence when he came back from Varanasi. It is earlier stated by the injured witness that he was sent to Banaras Hindu University, Varanasi for treatment where he had been admitted for about 23 days. At the first time he came to his house from

Varanasi for 5 - 6 days and subsequently again went to Varanasi where he had been admitted for 23 days.

53. PW-7 the Investigating Officer states in examination-in-chief that he recorded the statement of the injured Shiv Poojan on 20.08.1999 at his house, hence the contention of the learned counsel for the appellant that the statement of the injured was recorded belatedly in this matter by the Investigating Officer of the case finds no support from the record. The incident is said to be occurred on 14.08.1977. The injured was taken to Varanasi for better treatment and when he came back, his statement was recorded by the Investigating Officer on 20.08.1977, thus, the delay in recording the statement aforesaid has been well explained in the facts and circumstances of the case.

54. Hence, I do not find any suspicious circumstance or inordinate delay in recording the statement of the injured witness under Section 161 Cr.P.C. and case laws cited on behalf of the appellant do not offer any help to the appellant. In fact, if there is any delay on the part of the Investigating Officer in recording the statement of relevant witnesses, this fact alone is not sufficient to discredit the testimony of such witnesses and same may be relied upon if the delay is explained properly and statements recorded are cogent and credible.

55. The conviction of the appellant has been recorded by the learned trial court under Sections 326/149, 147 and 148 I.P.C. and he has been awarded the sentence of rigorous imprisonment for three years and rigorous imprisonment of one year respectively for the said charges.

56. It has been submitted by learned counsel for the appellant that the case of the prosecution does not fall into category of an offence under Section 326 I.P.C. It is further submitted that the role of assault with lathi has been assigned to the present appellant. A number of injuries have been found on the body of the injured by the doctor and injuries, which were referred for X-ray, might be inflicted by some weapons other than lathi and such weapons have been assigned to other co-accused

persons, who are now dead. Lathi is not a lethal weapon with reference to Section 326 of IPC, hence the appellant might be punished for an offence lesser than what is defined under Section 326 I.P.C.

57. Although D.W.1 Swami Nath Sharma has been produced by the defence, but D.W.1 only asserts that he found informant Shiv Poojan Singh on the way in an unconscious condition in Chakraudi and when he raised noise, the neighbours came there and he was taken to his house. It is to be noted that the prosecution witnesses who have supported the sequence of incident which was happened on spot, do not utter a single word for presence of D.W.1 Swami Nath Sharma on spot. There is cogent evidence on record that the occurrence was seen by the witnesses and from the place of occurrence the injured was taken by them on a cot to hospital. Hence in view of the said reliable evidence, I do not find any substance in the evidence of D.W.1 and the said witness does not provide any assistance to the defence.

58. The learned trial court after analysing the evidence on record made a categorical finding that although charge under section 307 IPC was framed against the accused persons but the prosecution miserably failed to prove the elements of the said offence.

59. It is a trite law that mens rea in the form of intention to kill is an essential ingredient to constitute an offence under section 307 IPC. It is always the intention which should be looked into to find out whether the case under section 307 IPC is made out or not. Learned trial court on the basis of evidence of fact on record discussed this issue and found that although a number of injuries were found on the body of the injured, but the nature of the injuries shows that the injured was not assaulted by the accused persons with intention to kill. Had they kept an intention to kill the injured, the weapons used in the occurrence would be used in such a manner that it would be capable of inflicting more serious injuries which is missing in the case in hand.

60. P.W.3, the doctor has opined that if the Garasa was used in more forcible manner, the injured might have sustained more grievous and deeper injuries which is not so in this case. On the basis of the ocular evidence and medical evidence on record, the learned trial court concluded that the essential ingredient of intention to kill is missing in this case and this failure of the prosecution brings this case out of the purview of section 307 IPC and that was the reason the accused persons were not convicted under section 307 IPC. On the basis of evidence on record, this Court also concurs with the view expressed by the learned trial court.

61. In the case of **State of M.P. v. Kanha, (2019) 3 SCC 605** it has been held that proof of grievous or life threatening hurt is not a sine qua non for offence under S. 307. Intention of accused can be ascertained from actual injury, if any, as well as from surrounding circumstances. Among other things, nature of weapon used and severity of blows inflicted, can be considered to infer intent.

62. In State of **Madhya Pradesh vs. Harjeet Singh and another, AIR 2019 SC 1120**, it was reiterated that Section 307 IPC does not require that injury should be on vital part of the body. Merely causing hurt with intention or knowledge of causing death is sufficient to attract Section 307 IPC, but it is not found so in the case in hand.

63. The learned trial court has also discussed the issue of place of occurrence and has made a conclusion that the occurrence happened at the same place where the prosecution claims. As per F.I.R., the incident happened near the tubewell of Ram Narain and a perusal of the ocular evidence, the site plan Ext. Ka - 9 and the evidence of the Investigating Officer also approve the same and corroborate the view expressed by the trial court and thus so far as the place of occurrence is concerned, the prosecution has been able to prove it on the basis of cogent evidence.

64. Learned A.G.A. submitted that the role of assault has been assigned to all the convicted / accused persons since they came on the spot after formation of an unlawful assembly with the common object to inflict grievous injury to the injured and in prosecution of common object of that assembly, grievous hurt was caused voluntarily by use of dangerous weapons to the injured. The role of present appellant cannot be taken separately for the use of weapon in the occurrence. The present appellant was rightly held guilty with the aid of Section 149 I.P.C.

65. The evidence on record shows that the submissions made by learned A.G.A. cannot be turned down and the conviction recorded by the learned trial court requires no interference.

66. The another legal point submitted by learned counsel for the appellant is that the incriminating circumstances and evidence appeared before the court during trial were not put to the appellant in proper and legal manner while recording his statement under Section 313 Cr.P.C. and for this major fault, the whole trial becomes vitiated. In support of his submission, the learned counsel for the appellant has relied upon the judgments of the Hon'ble Apex Court in the cases of *Basavaraj R. Patil Vs. State of Karnataka, 2000 (8) SCC 740* and *Nar Singh Vs. State of Haryana, 2015(1) SCC (Cri.) 699*.

67. The aforesaid plea specifically taken by the learned counsel for the appellant takes this Court to peruse the statement of the appellant recorded under Section 313 Cr.P.C. From perusal of the said statement, it appears that all the circumstances appearing in the evidence against the appellant have been put to him specifically in the form of different questions and whatsoever reply given by the appellant was recorded in the said statement and there appears no material fault in recording the said statement and no prejudice was caused to the appellant. All the questions put before him were unambiguous and understandable and the appellant as such is not permitted to take any advantage for the aforesaid plea. The Court also takes into consideration the fact that the

accused-appellant himself made cursory answers to many of the questions put before him under Section 313 Cr.P.C.

68. Learned counsel for the appellant has further made a submission that the appeal in hand relates to the year 1985. The session trial was decided on 08.08.1985 and occurrence is said to be occurred in the year 1977. It is further submitted that the sole surviving appellant is aged about 73 years at present. He is suffering from several old age ailments and should be a repenting man. Hence a prayer has been made for the lesser punishment to the sole surviving appellant.

69. The submissions made by the learned counsel for the appellant take me to the principles governing the rule regarding quantum of sentence.

70. The principle of law is well settled that the principle of proportionality between the punishment and crime cannot be brushed aside and the sentence must be just and proper. No doubt the concept of proportionality permits of discretion to the Court but the same has to be guided by certain principles. Hon'ble Supreme Court in **Raj Bala vs. State of Haryana & Ors (passed in Special Leave Petition (Crl.) Nos.4099-4100 of 2015)** and **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323**, in this context, has observed that neither the personal perception of a Judge nor self adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. There can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. Similarly an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment. A Court while imposing sentence has to keep in view the various complex matters in mind. In respect of certain offences, sentence can be reduced by giving adequate special reasons but the special reasons have to rest on real special circumstances.

71. In the instant case, criminal machinery came into motion about 47 years ago and the present appeal has been pending for a long period of about 39 years. At the time of recording of statement under Section 313 Cr.P.C., appellant was a young man and at present he is about 73 years old. There is nothing on record to show that the appellant is previous convict or having any criminal antecedents. Also the accused-appellant alone cannot be held responsible for long delay in disposal of this appeal. The appellant, who is an old man at present should be a repenting man. It has been submitted and also finds support from the record that the appellant remained in custody for some considerable period of time in this case.

72. Hence, considering all aspects of the matter, in my view, no useful purpose would be served by sending accused-appellant in judicial custody at this stage, rather in the aforesaid peculiar circumstances, it would be in the interest of justice if in lieu of three years rigorous imprisonment he may be sentenced for the period already undergone by him in this case and also sufficient fine may be imposed upon him which would be an adequate punishment to him in the entire circumstances of this case.

73. Resultantly, the Appeal is partly allowed. The conviction of the sole surviving appellant Shyam Narain for the offence under Sections 326/149, 147, 148 I.P.C. is upheld but the sentence of three years rigorous imprisonment for the offence under Section 326/149 IPC and one year rigorous imprisonment each for the offence under Sections 147, 148 I.P.C. awarded by the trial court vide impugned judgment and order dated 8.8.1985 is converted to the period already undergone by him alongwith a fine of Rs. 5,000/- under Section 326/149 IPC, out of which Rs.3000/- shall be paid to the injured of this case and in case he is not surviving, it shall be paid to his legal heirs.

74. Appellant is on bail. He need not to surrender. His bail bonds are cancelled and sureties are discharged. The amount of fine shall be deposited within two months from today failing which the appellant will

have to undergo for one month imprisonment as default sentence. The case property shall be disposed of by the concerned authority / court in accordance with relevant rules / law.

75. A copy of this order alongwith trial court record be transmitted to the Court concerned for necessary compliance.

Order Date :- 18.7.2024

Rmk/ss