

Court No. - 82

Case :- CRIMINAL APPEAL No. - 2608 of 1986

Appellant :- Dharamveer And Others

Respondent :- State of U.P.

Counsel for Appellant :- A.B.L. Gaur,Dharmendra Pratap Singh

Counsel for Respondent :- A.G.A.

Hon'ble Nalin Kumar Srivastava,J.

1. Heard Sri Dharmendra Pratap Singh, learned counsel for the appellants and Sri Nitesh Kumar Srivastava, learned A.G.A. for the State.
2. The validity and sustainability of the judgment and order dated 24.09.1986 passed by IV Additional Sessions Judge, Bulandshahr in Sessions Trial No.305 of 1985 (State Vs. Dharamveer and others) under Sections 307/34, 324 IPC, Police Station Narora, District Bulandshahr has been challenged by way of instant criminal appeal, whereby the appellants Dharamveer, Satvir, Omvir and Ramesh were convicted and sentenced to undergo one year and six months rigorous imprisonment each under Section 324/34 IPC.
3. During the pendency of appeal, out of four convict appellants, appellant no.1 Dharamveer is reported to have died and appeal qua appellant no.1 Dharamveer has already been abated vide order dated 12.2.2024. Now this appeal is being contested / pressed by surviving appellants no.2, 3 & 4 namely, Satvir, Omvir and Ramesh.

4. The prosecution version in brief, as unfolded in the F.I.R., is that on 27.6.1984 at about 12:30 in the afternoon, the informant Mushtaq and his son Rafeeq were assaulted by named accused persons Dharamveer, Ramesh, Satavir and Omvir, who were carrying country made pistols, sword and DBBL rifle, in the mango orchard for a demand of borrowed money and when they both tried to run away from the spot, accused Satvir made an assault with his sword on the left leg of the informant and rest three accused persons Dharamveer, Omvir and Ramesh opened fire upon his son Rafeeq, who sustained pellets injuries in his left hand and waist. The informant anyhow after chasing the assailants snatched the sword and one cartridge of 12 bore from the accused persons. The incident was witnessed by Taini son of Remli and Balbir son of Matru.

5. F.I.R. was lodged and the injured persons were medically examined after sustaining the injuries. The Investigating Officer of the case proceeded to record the evidence of witnesses of fact and formal witnesses. He also inspected the place of occurrence and prepared the site plan and after investigation, charge-sheet was submitted before the Court against all the four named accused persons under Sections 307, 324 IPC.

6. The accused persons appeared before the Court and the case, being exclusively triable by the Sessions Court, was committed to the Court of Session where charge under Section 307/34 IPC was framed against the accused persons namely, Dharamveer, Ramesh and Omvir and accused Satvir was separately charged for the offence under Section 324 IPC.

7. The prosecution, in order to prove its case, relied upon the oral evidence of P.W.1, Mushtaq, the informant / injured, P.W.2 Rafeeq, the injured, P.W.3 Taini, the eyewitness, P.W.4 Dr. Hans Kumar, who medically examined the injured persons and P.W.5 S.I. Rajendra Singh Chaudhary, the Investigating Officer of the case and further it also placed reliance upon the documentary evidence as well.

8. The incriminating evidence and circumstances were put to the accused persons in their statement under Section 313 Cr.P.C. to which they denied and claimed the prosecution evidence to be false and fabricated. It was also averred by them that to create some pressure in an earlier criminal case lodged against the informant side, they have been falsely roped in this case by the informant of this case. However, no defence evidence has been adduced by the accused persons.

9. P.W.1 Mushtaq, the informant, in his examination-in-chief, narrating the prosecution story, states that about 2 years 2 months before at 12:30 in the afternoon when he was present with his son Rafeeq in the orchard of Matru, accused Omvir having double barrel gun, Ramesh and Dharamveer having country made pistols and Satvir armed with sword came over there and on account of demand of some borrowed money, which was due upon the informant, they made an assault upon them. He sustained injuries upon his left knee by blow of sword which was taken by accused Satvir and the firearm injury opened by accused Omvir inflicted upon his son. Taini and Balbir witnessed the incident. Thereafter, he moved to police station and on the basis of his written report, F.I.R. was lodged.

He alongwith his son was medically examined. He also brought one cartridge and broken sword lying on spot to the police station. He proved the written report as Ex.Ka.-1 and the memo prepared at the police station as Ex.Ka.-2.

10. P.W.2 Rafeeq, the injured witness, narrates the same story like P.W.1 and assigns specific role of firing to accused Omvir upon him.

11. P.W.3 Taini is the eyewitness of the incident and he also states in the same tone like P.W.1 and P.W.2 and specific role of assault by sword has been assigned to accused Dharamveer and that of firing to accused Omvir by this witness.

12. P.W.4 Dr. Hans Kumar, who medically examined both the injured persons, in his deposition states that on 27.6.1984, he was working as Incharge Medical Officer, Narora. He medically examined injured Mushtaq at 3:15 P.M. and found following injury on his person :

(i) Incised wound 2 cm. x $\frac{1}{3}$ cm. skin deep on front of left knee joint. Injury was simple in nature and caused by sharp object. Duration of the injury was fresh.

13. P.W.4 further states that on the same day at 3:25 P.M., he also examined injured Rafeeq and following injuries were found upon his body :

(i) Lacerated wound 4 cm. x 1 cm. x muscle deep lateral side of left hand 2 cm. below to left wrist joint. X-ray advised.

(ii) Abrasion $\frac{1}{2}$ cm. x $\frac{1}{2}$ cm. on lateral side of left forearm 4 cm. above left wrist joint. X-ray advised.

(iii) Abrasion $\frac{1}{2}$ cm. x $\frac{1}{2}$ cm. on lateral side of left hip. X-ray advised.

All the injuries were kept under observation.

14. P.W.4 further states that the duration of injuries sustained by both the injured persons was fresh and injury sustained by injured Mushtaq was likely to be caused by sword and all the three injuries sustained by injured Rafeeq were the result of use of firearm.

15. P.W.4 proves the injury reports as Ex.Ka.-3 and Ex.Ka.-4 and further he states that on the same day at about 4:30 and 4:50 P.M., he medically examined injured Dharamveer and Satvir respectively and the injury reports of the duo have been proved as Ex.Kha-1 and Ex.Kha-2 by the said witness. He also states that the injuries are likely to be caused on 27.6.1984 at about 12:00 in the noon by some hard and blunt object and were simple in nature.

16. P.W.5 Rajendra Singh Chaudhary is the Investigating Officer of the case who has proved the proceedings of investigation. He further states that on the pointing out of the informant, he inspected the spot and prepared two site plans i.e. Ex.Ka-7 and Ex.Ka.-8 and after completing the investigation, charge-sheet as Ex.Ka.-9 was submitted by him.

17. As a secondary witness for Head moharrir Shiv Prakash, he also proved the Chik F.I.R. and Registration G.D. as Ex.Ka.-5 and Ex.Ka.-6.

18. P.W.6 Dr. M.M. Sharma, the radiologist, has proved the x-ray report and x-ray plate of injured Rafeeq and states that as

per x-ray report, he had sustained firearm injury. He further proves the x-ray plate as material Ex. Ka.-3 and x-ray report prepared by him as Ex.Ka-10.

19. It is relevant to note that no defence evidence has been adduced by the accused persons.

20. The prosecution story and evidence has been assailed by the learned counsel for the appellants on several grounds. It has been submitted that the prosecution in this case has not come forward with clean hands. The statement of P.W.4 Dr. Hans Kumar explicitly shows that accused persons / appellants Dharamveer and Satvir also sustained injuries on the same day and P.W.4 proves their injury reports but the prosecution nowhere explains or discloses the factum of injuries caused to the injured accused persons / appellants and it clearly shows that the prosecution is trying to conceal the real facts and origin of the alleged occurrence. The injuries to the accused persons / appellants have been caused almost at the same time which, as per prosecution case, is the time of occurrence in the present case. Further, it has been submitted that the learned trial court recorded the conviction of the appellants only on the basis of statements of the prosecution witnesses made in their examination-in-chief and it totally discarded the material contradictions and exaggerations occurred in the cross-examination of the witnesses particularly the witnesses of fact. It is further submitted that no witness who resides near the place of occurrence has been adduced by the prosecution as eyewitness of the incident. The so called eyewitness Taini is a chance witness and his evidence indicates that he is a false

witness and does not know anything about the incident. It is further submitted that the learned trial court has given a clear finding that no offence under Section 307 IPC is proved against the accused persons / appellants but on the basis of same set of evidence, conviction under Section 324/34 IPC against the accused persons / appellants has been recorded. It is also submitted that no offence of causing injuries to the informant and his son was proved on the basis of the evidence on record but the learned trial court in an arbitrary manner convicted all the appellants.

21. Per contra, the learned A.G.A. vehemently opposed the appeal and it has been submitted that the informant Mushtaq and his son Rafeeq both are injured persons. Their evidence is unblemished and consistent and they have elaborately narrated the whole story and have been specific in disclosing the name of the accused persons participating into the commission of the crime, weapon assigned to them and nature of injuries. All these significant factors have been successfully proved on the basis of evidence on record. The F.I.R. has been lodged promptly and there is no serious lacuna or negligence in the investigation of the case. The prosecution case is corroborated by the medical evidence as well. The appeal has no force and deserves to be dismissed, as prayed for by the learned State counsel.

22. The prosecution case if examined in the light of the evidence of fact and medical evidence as well it is found that consistent statements have been made by P.W.1 and P.W.2, the injured witnesses and evidence of independent witness P.W.3 Taini is also on record. P.W.1 categorically states that an assault

by sword was made on his left knee by accused Satvir and on the other hand accused Omvir opened fire upon his son, who also sustained injuries. His testimony finds support from the medical evidence rendered by P.W.4 as well.

23. Moreover, P.W.2 Rafeeq, the son of the informant and injured in this case also proves the prosecution version. In context with the role of the accused persons, he states that accused Satvir made an assault upon his father Mushtaq by sword and he himself sustained firearm injury inflicted by accused Omvir. He further clarifies in his cross-examination that besides Omvir no one opened fire by any rifle or desi pistol. In his cross-examination there is nothing to attract adversely the prosecution case.

24. In the same manner, P.W.1 in his cross-examination was tested by the defence and he states that none of the accused persons opened fire by country made pistol. Although he was controverted by his narration made in the report lodged at the police station and it appears that some exaggerated version is found in his evidence but on the basis of the same, the whole prosecution evidence cannot be washed of. P.W.1 and P.W.2 both admit that their blood stained clothes were not taken by the Investigating Officer although they had shown it to him.

25. P.W.3 Taini, who happens to be the relative of the informant as per statement of P.W.1 himself, is the eyewitness of the occurrence. He also assigns specific role of assault by use of sword upon Mustaq to accused Dharamvir and the role of firing by rifle upon Rafeeq to accused Omvir. He also submits that both the injured persons sustained injuries and besides him,

Balbir also witnessed the incident. In the cross-examination, he states that he is the real brother of Nawab who is accused in the case State Vs. Mushtaq. Learned counsel for the defence vehemently argued that P.W.3 was inimical to the accused persons as his real brother Nawab is the accused in a criminal case State Vs. Mushtaq and in this way the real brother of P.W.3 is the co-accused in a criminal trial registered against the informant Mushtaq. He further states that the Investigating Officer recorded his statement two months after the incident. He further explains that no other accused except Satvir and Omvir made any assault upon the injured persons.

26. This Court finds a major contradiction in the deposition of P.W.3. Contrary to what was deposed by P.W.1 and P.W.2, he assigns the role of assault by sword to Mushtaq to accused Dharamvir whereas P.W.1 and P.W.2 assign this role to accused Satvir.

27. Learned counsel for the appellants at this stage vehemently argued that the prosecution has not explained the injuries caused by the accused persons. P.W.3, the eyewitness of the case, categorically states that he had not seen any injury caused to the accused persons and further he states that Rafeeq and Mushtaq had not made any assault upon the accused persons.

28. Learned counsel for the appellants vehemently argued that there is a cross case in this matter and the facts thereof have been deliberately concealed by the prosecution. P.W.1, the informant in his cross-examination admits that one case State

Vs. Mushtaq and others is already pending in respect of same occurrence wherein he is an accused.

29. It is mentioned in the impugned judgment that a cross case (State Vs. Mushtaq) of this matter is also pending and the trial under Section 394 IPC is going on.

30. Learned counsel for the appellants during his arguments also impressed upon the fact that a cross case in this matter under Section 394 IPC is still pending in respect of the same occurrence but when this Court proceeds to examine the factum of cross case, it is found that the accused persons in their statement recorded under Section 313 Cr.P.C. have specifically averred that the case State Vs. Mushtaq is still pending and P.W.4 Dr. Hans Kumar, who examined both the injured persons in this case, also examined injured Dharamvir and Satvir as well, who were the accused in the present case and also sustained injuries. Their injury reports Ex.Kha-1 and Ex.Kha-2 have been proved by the same doctor P.W.4 Dr. Hans Kumar.

31. The statement of P.W.5, the Investigating Officer, is relevant in this context. In the concluding part of his cross-examination, P.W.5 states that he was the Investigating Officer in the case State Vs. Mushtaq also wherein he had submitted charge-sheet to the Court.

32. Further, P.W.4 Dr. Hans Kumar has also made some significant statements. As per P.W.4, on 27.6.1984, when he medically examined Mushtaq and Rafeeq, the injured persons in this case, he also medically examined injured Dharamvir and Satvir Singh who have been contesting appellants in this case. P.W.4 further states that two injuries were found in the medical

examination of injured / accused Satvir Singh performed at 4:50 P.M., which were as follows :

- (i) Lacerated wound 2 ½ cm. x ½ cm. x scalp deep on right of forehead 5 cm. above to right eyebrow.
- (ii) Swelling 5 cm. x 3 cm. on lateral side of right thigh lower part.

Both the injuries were simple in nature and were likely to be caused by any hard and blunt object on 27.6.1984 at 12:30 in the afternoon.

33. P.W.4 Dr. Hans Kumar further proves the injury report of accused Dharamvir, who was examined the same day at 4:30 P.M. and in the medical examination, following three injuries were found upon the body of accused Dharamvir :

- (i) Lacerated wound 1 cm. X 1/3 cm. x scalp deep on left side of head 10 cm. above left ear.
- (ii) Abrasion 1 cm. x ½ cm. on right side of head 6 cm. above right ear.
- (iii) Lacerated wound 3 cm. x ½ cm. x skin deep in lower side of penis at its middle part.

As per opinion of the doctor, all injuries were simple in nature caused by blunt object. Duration of the injuries was fresh.

34. The record of cross case State Vs. Mushtaq was made available before this witness wherein the original injury reports were placed, the copies of which have been proved as Ex.Kha-1 and Ex.Kha-2 by this witness.

35. Recovery of sword and cartridge is also averred in the prosecution evidence. It is mentioned in the F.I.R. itself that when the accused persons were fleeing away from the place of

occurrence, the informant chased them and snatched a cartridge of 12 bore and sword and went to the police station alongwith the said articles. The memo of entry of the aforesaid materials has been proved as Ex.Ka.-2. However, the prosecution evidence is self-contradictory on the point as to how sword and cartridge were found by the informant. P.W.1 Mushtaq, the informant / injured in his examination-in-chief corroborates the F.I.R. version with regard to the recovery of cartridge and sword. He states that when the accused persons fled away, he found one live cartridge and sword lying on the ground there. In his cross-examination as well he states that the cartridge and sword were not snatched by him but the same were lying on the ground which he had taken. However, he could not explain the contradictory averment found in the F.I.R. and his deposition. Further he states that the sword was not broken into two parts and it was in one piece. P.W.1 proves the sword and cartridge as Material Exts. Ka-1 and Ka-2.

36. P.W.3 also states that the sword and live cartridge were lying on the ground which were picked up by this witness.

37. The statement of P.W.3 with regard to assault made to the informant is in direct conflict with P.W.1 and P.W.2, who assign a specific role of assault by sword to accused Satvir and not to Dharamvir. It appears that due to some confusion the said statement has been made by P.W.3 because in the earlier part of the examination-in-chief he himself states that accused Dharamvir came on spot with is licensed gun and Satvir was having sword, hence sword was used by Satvir and not by Dharamvir.

38. P.W.5, the Investigating Officer makes a relevant statement that the place where the sword and cartridge were lying, was not shown to him.

39. Learned A.G.A. has submitted that when the sword and cartridge were taken to the police station by the informant himself and memo thereof was also prepared, hence it is immaterial whether the same were lying on the ground or snatched by the informant. Since the medical evidence corroborates the prosecution version in connection with assault made by Sword and DBBL Gun the aforesaid contradiction is not of much relevance.

40. Overall the prosecution story despite some minor contradictions found in the statement of witnesses is proved as the contradictions are not so serious or material that might hit the root of the prosecution case. No doubt, two of the accused persons have sustained injuries but in that aspect the trial is still going on as State Vs. Mushtaq and others and its fate shall be decided on the basis of peculiar and independent evidence produced in the record of the said trial. This Court also took notice of the fact that except two injury reports no other documents in respect of the cross case of this matter titled as State Vs. Mushtaq and others have been produced by the appellants before the trial court.

41. On the basis of the aforesaid discussions and appreciation of evidence on record, I find that the learned trial court has not committed any mistake in recording the conviction of appellants under Section 324/34 IPC. I agree with the finding given by the trial court that the accused persons were having no intention to

kill the informant or his son. Hence, the trial court rightly concluded that the prosecution failed to prove the case under Section 307/34 IPC and proceeded to hold the appellants guilty for the offence under Section 324/34 IPC.

42. The impugned judgment is the result of the thoughtful consideration and cautious scrutiny of the evidence on record, oral as well as documentary. Thus, this Court is of the view that the prosecution has been able to establish the guilt of the accused appellants under Section 324/34 IPC beyond reasonable doubt and to the satisfaction of the judicial conscience of the Court.

43. The part of sentence is also under challenge and viewed by this Court cautiously. Awarding sentence in a matter is always a difficult task which requires balancing of various considerations. 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 in **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323** 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.

44. In the instant case, criminal machinery came into motion about 4 decades ago and the present appeal has been pending for a long period of 38 years. Also the accused-appellants alone cannot be held responsible for long delay in disposal of this appeal. At present, appellant no.2 Satvir is about 63 years old, appellant no.3 Omvir is about 66 years old and appellant no.4 Ramesh is about 60 years old. Appeal qua appellant no.1 Dharamvir has already been abated as he died during pendency of the appeal and no role of assault has been assigned to accused Ramesh and Dharamvir (now deceased). It has been submitted and also finds support from the record that the appellants remained in custody for some considerable period of time in the instant case. Hence, considering all aspects of the matter, in my view, no useful purpose would be served by sending accused-appellants in judicial custody at this stage, rather in the aforesaid special circumstances, it would be in the interest of justice if in lieu of one year and six months rigorous imprisonment they may be sentenced for the period already undergone by them in this case which would be an adequate punishment to them in the

entire circumstances of this case. The appellants, who are old men at present should be repenting men.

45. Resultantly, the appeal is partly allowed. The conviction of the appellants for the offence under Section 324/34 IPC is upheld but the sentence of one year six months rigorous imprisonment awarded by the trial court vide impugned judgment and order is converted into the period already undergone by them. Appellants are on bail. They need not surrender. Their bail bonds are cancelled and sureties are discharged.

46. The case property shall be disposed of by the concerned authority / court in accordance with relevant rules / law and the live cartridge shall be seized in favour of the State.

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

Order Date :- 5.12.2024

SS