

Court No. - 86

Case :- CRIMINAL APPEAL No. - 2780 of 1986

Appellant :- Subhash And Others

Respondent :- State of U.P.

Counsel for Appellant :- Rajesh Ji Varma, Arjun Singh Solanki

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.
2. The accused persons, namely, Subhash and Pappu were convicted by the Court of Special Judge, E.C. Act, Etah in Session Trial No.83 of 1985, arising out of Case Crime No.63 of 1983, under Sections 324, 323, 34 IPC, Police Station Amapur, District Etah vide judgement and order dated 26.09.1986 and further they were sentenced for rigorous imprisonment of three years under Section 324 IPC and rigorous imprisonment for six months under Section 323/34 IPC, hence this Appeal.
3. The prosecution story, as culled out from the record, is that on 17.06.1983 at 08:45 AM, when some faecal matter was thrown by the wife of accused- Subhash in front of the door of the informant he protested to that and then named accused persons Subhash with desi pistol and Pappu with bricks came over there and on exhortation of the co-accused Pappu, accused Subhash opened fire upon him with intention to kill and he sustained firearm injuries in his right thigh and the injury

of brick made by the co-accused Pappu was also inflicted in the left hand of his wife. The F.I.R. was lodged and injured/informant- Ombir Singh and his wife Smt. Kundla were medically examined and after investigation, charge sheet under Section 307 IPC was submitted by the Investigating Officer against both the named accused persons.

4. The offence being exclusively triable by the Sessions Court was committed to the Court of Sessions by the Magistrate.

5. Charges under Sections 307 & 324/34 IPC were framed against the accused Subhash whereas co-accused Pappu was charged for the offence under Sections 307/34 & 324 IPC. The accused persons denied all the charges and claimed for trial.

6. The prosecution in order to prove its case relied upon the oral testimony of P.W.-1 Ombir Singh, the informant/injured, P.W.-2 Vijay Singh, eye witness, P.W.-3 Kundla Kumari, the injured wife of the informant, P.W.-4 Dr. Jafar Ali and P.W.-5 S.I. R.S. Gautam, the Investigating Officer and secondary witness for constable clerk.

7. To corroborate the oral evidence, documentary evidence has also been adduced by the prosecution and it has relied upon written report Ex.Ka-1, X-ray report Ex.Ka-2, injury report Ex.Ka-4, Chik F.I.R. Ex.Ka-5, G.D. Ex.Ka-6, site plan Ex.Ka-7, memo of recovery of

cartridges etc. Ex.Ka-8, memo of search Ex.Ka-9, charge sheet Ex.Ka-10 and X-ray plate material Ex.-1.

8. After completion of the prosecution evidence, the incriminating evidence and circumstances were put to the accused persons in their statement under Section 313 Cr.P.C. wherein they claimed the prosecution evidence to be false and fabricated and false implication due to animosity but however, they refused to adduce any defence evidence.

9. On the basis of the material on record and after hearing both the sides, the trial court recorded conviction of both the accused persons, namely, Subhash under Sections 324 & 323/34 IPC and Pappu under Sections 323 & 324/34 IPC and sentenced as mentioned here-in-above.

10. At the very outset, it is to be noted that during pendency of the present appeal, appellant no.2 Pappu died and the appeal was abated qua him vide order dated 15.02.2024. Hence, the instant appeal is operative only in respect of appellant no.1 Subhash.

11. P.W.-1 Ombir Singh is the informant and injured of this case. In his testimony, he has supported the prosecution version unfolded in the F.I.R. by stating that when some faecal matter was thrown in front of his house by the wife of the accused Subhash and it was protested by him, the accused-appellants Subhash and Pappu came over there carrying country made pistol and brick respectively and hurled abuses and on exhortation of accused Pappu, accused Subhash opened fire upon him

with the country made pistol with intention to kill him. He sustained firearm injuries upon his right thigh and her wife was also assaulted by accused Pappu with brick and she also sustained injuries in her left hand. He has named Vijay Singh and Maharaj Singh etc. as the eye witnesses of the incident. The written report Ex.Ka-1 has been proved by this witness, which was given by him to the police for lodging of the F.I.R. and he also affirms the factum of medical examination.

12. P.W.-2 Vijay Singh is the eye witness of the occurrence. His name finds place in the F.I.R. itself as a witness of fact. He has corroborated the testimony of P.W.-1 and also affirms the prosecution version in the same fashion. He also assigned the role of causing injury to the informant by firearm to appellant no.1 and also assigned the role of causing injury by brick hit to the wife of the informant to accused Pappu.

13. P.W.-3 Smt. Kundla Kumari is the wife of the informant and also the injured of this case. She also testifies the prosecution version and deposes in the same tone as P.W.-1 states. The factum of causing injuries by both the accused persons with the aid of country made pistol and bricks, the injuries, lodging of the F.I.R. and medical examination etc. has been corroborated by this witness as well.

14. P.W.-4 Jafar Ali is the x-ray technician who proves the x-ray report pertaining to the informant/injured and the x-ray plate as well and proves it as Ex. no.2 and

material Ex.-1 respectively. He also states that the x-ray report was prepared by Dr. Malpani and he himself performed the X-ray. He also states that in the X-ray report of the injured two radio opec shadows were found.

15. P.W.-5 S.I. R.S. Gautam is the Investigating Officer of this case, who has proved the proceedings of the investigation and further proves Site plan Ex.Ka-7, memo of recovery of empty cartridges Ex.Ka-8, memo of search Ex.Ka-9 and Charge sheet Ex.Ka-10.

16. As a secondary witness of constable clerk Ratan Singh, the scribe, he also proves chik F.I.R. and registration G.D. as Ex.Ka-5 and Ex.Ka-6 respectively.

17. Learned counsel for the appellants has assailed the impugned judgement and order on several grounds but ultimately he has concised his argument only up to the extent of sentence imposed upon the appellant no.1 and it has been submitted that even if the impugned judgement is taken to be genuine and legal, the sentence awarded by the learned trial court is very excessive and improportionate to the injuries caused to both the injured persons. Lastly, a submission has been made by the learned counsel for the appellant no.1 to release the appellant with the sentence already undergone by him in the case in hand along with some amount of fine.

18. On the other hand, learned AGA has vehemently opposed the aforesaid submissions made by the learned counsel for the appellant no.1.

19. To appreciate the submissions made by the learned counsel for the appellant no.1, a careful scrutiny of the evidence on record is required.

20. P.W.-1 the informant/injured has proved the prosecution version in his examination-in-chief. He has sustained gun shot injuries in his thigh and P.W.-4, the x-ray technician has proved the x-ray report and x-ray plate in his testimony and he also affirmed this fact that in the x-ray two radio open shadows were found in the injury of the injured, which shows that the injured sustained firearm injuries.

21. It is noteworthy that the genuineness of the injury report of injured Ombir Singh and Smt. Kundla has been admitted by the learned counsel for the defence during the course of trial. Hence, the aforesaid medical documents have been exhibited as Ex.Ka-3 & Ex.Ka-4.

22. In the injury report Ex.Ka-3, the doctor found following injuries to the injured **Ombir Singh**- two gun shot of 0.3 cm X 0.3 cm X depth, kept under observation, 2.5 cm apart from each other on the medial aspect of right thigh, middle 1/3, no chastity, no blackening advised x-ray, the injury KUO. The doctor has also opined that the injury was caused by firearm and the duration was half day old.

23. In the injury report of Smt. Kundla Kumari, the wife of the informant, the doctor has found abraded contusion 4 cm X 2 cm on the outer aspect of left forearm, lower 1/3. In the opinion of doctor, the injury was simple

caused by some hard object and the duration was about half day old.

24. The said medical examination was conducted on the basis of chhithi majroobi (letter sent by the police for medical examination to the Medical Officer) prepared by the police.

25. Since the genuineness of the aforesaid medical papers has been admitted by the learned counsel for the defence, this Court is not hesitant to hold particularly in the light of the oral and ocular evidence on record that injured Ombir Singh sustained firearm injuries in the incident whereas injury caused by hard and blunt object was sustained by the other injured Smt. Kundla Kumari. Hence, the prosecution case is well supported with the medical evidence.

26. In the cross examination of P.W.-1 & P.W.-3, the defence has tried to shake the credibility of the said witnesses but the entire testimony of P.W.-1 and P.W.-3 is intact and consistent. There are no twisted statements in their testimony regarding the name of the accused persons, place of occurrence, nature of the injuries and weapon used in the commission of the crime and the very inception of the occurrence has also been proved in a natural way not only by P.W.-1 & P.W.-3 but by the other eye witness P.W.-2 as well. From the testimony of P.W.-2 it appears that his presence over the place of occurrence is not natural and he appears to be a chance witness. In his cross examination, he states that his

village is situated at a distance of about two kose from the place of occurrence. He has no relatives in village Sarsait @ Gendpur nor he is a relative of the informant. On the relevant day, he had gone to village Gendpur for the sake of taking a buffalo and he had reached there in the morning at 08:00 AM. The factum of occurrence has been proved by him in the same fashion as P.W.-1, P.W.-2 prove. He further states that the Investigating Officer had interrogated him same day. He has proved the facts of the case and even if he is taken to be a chance witness, his evidence is sufficient to support the ocular evidence of P.W.-1 & P.W.-3.

27. In State of A.P. vs. K. Srinivasulu Reddy and another, (2003) 12 SCC 660 wherein the Apex Court has held that :

“(13).....In a murder trial by describing the independent witnesses as “chance witnesses” it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere “chance witnesses”.

28. So far as the injured witnesses of this case are concerned, there is no inconsistent in the testimony of P.W.-1 & P.W.-3. They have been cross examined on the point of place of occurrence but broadly speaking their

testimony is consistent with the site plan Ex.Ka-7 prepared by the Investigating Officer of this case. Even in their cross examination, they have corroborated the role of both the accused-appellants as the prosecution claims and if taking into entirety, their evidence is reliable and unblemished.

29. It is also to be noted here that P.W.-1 & P.W.-3 both are the injured witnesses. They have sustained injuries in the occurrence, which was inflicted by the accused persons. Their injuries are corroborated with the medical evidence as well. In a criminal trial, the evidence of an injured witness stands on a different and distinguished footing. The injuries sustained by the injured persons is a strong proof of his presence on the place of occurrence at the time of incident. It is also to be reminded that no evidence of false implication of the accused persons is found on record and it is to be borne in mind that if the injured persons had sustained injuries by assault of some other person, it was not plausible for them to falsely implicate the named accused persons deliberately leaving the name of the real assailants.

30. 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.

31. 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.

32. So far as the investigation of the case is concerned, some minor omissions and negligence may be seen on the part of the Investigating Officer but the same is not sufficient to hit the very root of the prosecution case. In view of the cogent and reliable piece of ocular evidence well supported by the medical evidence, the negligence and fault if any, on the part of the Investigating Officer is not sufficient to discard the prosecution version, which is otherwise proved by cogent evidence.

33. In view aforesaid discussions, I am of the considered view that there is no perversity or illegality on the part of the learned trial court to hold the appellants of this case held guilty and to sentence them accordingly. It is true that the charge under Section 307 IPC was framed against the accused persons but the learned trial court on analysis of the evidence on record found that the injury

was not inflicted upon the injured P.W.-1 & P.W.-3 with intention to kill. The injury was not caused on any vital part of the body of P.W.-1 and if the thigh part of the body was involved, it may be said that the motive on the part of the accused Subhash was not to do away with injured Ombir Singh but only to cause hurt with the help of some dangerous weapon and that is why the conviction of the accused persons was recorded not only Section 307 IPC but Section 324 IPC and I find myself in conformity with the view taken by the trial court that the prosecution case does not travel beyond the scope of Section 324 IPC. The conviction of the sole appellant under Sections 324, 323/34 IPC is, therefore, upheld.

34. So far as the sentence part is concerned, learned counsel for the appellant no.1 has made a gentle request that the accused-appellant may be sentenced for the period already undergone by him in this case along with some amount of fine and that will be sufficient sentence in the facts and circumstances of this case and in the peculiar facts and circumstances of the case in hand, I find myself in full agreement with the learned counsel for the appellant.

35. In the instant case, this fact cannot be lost sight of that the incident of the case in hand occurred in the year, 1983. The judgement was passed in the year, 1986 whereas the present appeal is pending since the year 1986. At the time of recording the statement under Section 313 Cr.P.C. in the year 1986, the age of the

accused appellant Subhash was 24 years, who as of now should be an old man of above 65 years of age. No doubt, he should be a repenting man and for the last 38 years, he is running to this Court for the paravi of this present appeal and in this way, he has already been punished sufficiently. There is nothing on record to show that the appellant no.1 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. It has been submitted and also finds support from the record that the appellant remained in custody for a considerable period of time. 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 for the offence under Section 324 IPC and six months imprisonment for the offence under Section 323/34 IPC, he may be sentenced for the period already undergone by him in this case and also with sufficient fine which would be an adequate punishment to him in the entire circumstances of this case.

36. Resultantly, the appeal is partly allowed. The conviction of the appellant for the offence under Sections 323/34 and 324 IPC is upheld but the sentence of three years rigorous imprisonment for the offence under Section 324 IPC and six months imprisonment for the offence under Section 323/34 IPC awarded by the trial court vide

impugned judgment and order is converted into the period already undergone by him alongwith a fine of Rs.1000/- and Rs.500/- for the offences under Sections 324 & 323/34 IPC respectively. Appellant is on bail. He need not 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 ten days simple imprisonment as default sentence.

37. A copy of this order alongwith trial court record be transmitted to the Sessions Judge, Etah for necessary compliance.

Order Date :- 29.8.2024

Sanjeet