

**Court No. - 86**

**Case :- CRIMINAL APPEAL No. - 2766 of 1987**

**Appellant :- Ram Ashrey and Others**

**Respondent :- State of U.P.**

**Counsel for Appellant :- N.N. Singh, Shailendra Kumar Yadav**

**Counsel for Respondent :- A.G.A.**

**Hon'ble Nalin Kumar Srivastava,J.**

1. This criminal appeal has been preferred by the appellants against the judgement and order dated 23.11.1988 passed by the Additional Sessions Judge / Special Judge, Azamgarh in Session Trial No. 248 of 1986, P.S. Gambhirpur, District Azamgarh convicting and sentencing the appellants for the offence under Section 147 IPC to undergo three months rigorous imprisonment, for the offence under Section 148 IPC to undergo three months rigorous imprisonment, for the offence under Section 323/149 IPC to undergo four months rigorous imprisonment and for the offence under Section 324/149 IPC to undergo four months rigorous imprisonment.

2. At the outset, it is to be noted that during pendency of this appeal, appellants Gullu, Salat, Nand Lal @ Nandi, Shyamdeo, Indrabali @ Indru died and appeal in respect of said appellants has been abated. Now, appellant no.1 Ramashrey, appellant no.6 Tribhuwan, appellant no.7 Tripurari, appellant no.9 Ram Bachan, appellant no.10 Lala and appellant no.11 Awadhu are the only surviving appellants and the Court proceeds to decide the appeal in their respect.

3. As per the prosecution story, on 27.1.1985 at about 10.30 a.m. while a commission had gone to inspect the spot in connection with the complainant's Suit, in the presence of the counsels for the parties, a dispute arose about the disputed land. In the meantime, Ramashrey armed with gandas, Gullu armed with barohha, Salat, Nandi, Shyamdeo, Tribhuwan, Tripurari, Indru, Ram Bachan, Lala and Awadhu armed with lathi came

there and assaulted the complainant Ram Nath and his brothers Jagannath, Yadunath, Raghunath and complainant's nephews Ram Adhan and Sudama Yadav. The finger of Yadunath was fractured. The incident was witnessed by many villagers.

4. On the basis of aforesaid facts, FIR under Sections 147, 148, 324, 325, 307, 323 IPC was lodged. Investigation started and after investigation charge sheet under Sections 147, 148, 323, 324 and 307 I.P.C. was submitted against accused persons. Concerned Magistrate took the cognizance. The case being exclusively triable by sessions court, was committed to the Court of sessions.

5. Accused persons appeared before the trial court and charges under Sections 147, 148, 325, 307 and 323 IPC were framed against them. They denied the charges and claimed their trial.

6. Trial proceeded and to bring home the charges against the accused persons, prosecution has examined in all five witnesses, who are as follows:

|   |                     |                              |
|---|---------------------|------------------------------|
| 1 | Ram Nath            | PW-1 - informant             |
| 2 | Shiv Nath           | PW-2                         |
| 3 | Raghu Nath          | PW-3                         |
| 4 | Ram Ayodhya Prasad  | PW-4 - doctor                |
| 5 | S.I. Rambali Mishra | PW-5 - Investigating Officer |

7. In support of oral version, following documents were filed and proved on behalf of the prosecution:

|   |                                                                  |                        |
|---|------------------------------------------------------------------|------------------------|
| 1 | Written report                                                   | Ext. Ka-1              |
| 2 | Injury reports of the injured                                    | Ext. Ka-2 to Ext. Ka-8 |
| 3 | Chik FIR                                                         | Ext. Ka- 9             |
| 4 | Extract of G.D.                                                  | Ext. Ka-10             |
| 5 | Site Plan                                                        | Ext. Ka-11             |
| 6 | Charge sheets                                                    | Ext. Ka-12 & Ka-13     |
| 7 | Copy order sheet dated 11.4.1985 passed in suit no. 574 of 1984  | Ext. Ka-14             |
| 8 | Copy of order dated 21.11.1984 passed in the suit no 574 of 1984 | Ext. Ka-15             |

|    |                                             |            |
|----|---------------------------------------------|------------|
| 9  | Copy of Form 40 prepared under U.P.C.H. Act | Ext. Ka-16 |
| 10 | Copy of plaint of suit no. 574 of 1984      | Ext. Ka-17 |

8. After conclusion of evidence, statements of accused persons were recorded under Section 313 of Cr.P.C., wherein they pleaded their false implication and refused to accept the prosecution evidence adduced against them. In support of its case, defence has examined DW-1 Suraj Prasad Srivastava and DW-2 Dr. S.P. Chaudhary and filed documents as Ext. kha-1 to Ext. kha-10.

9. PW-1, PW-2 and PW-3 are the witnesses of fact.

10. P.W-1, Ram Nath / informant in his oral testimony, has reiterated the F.I.R. version and proved the written report as Ext. ka-1.

11. P.W.-2 Shiv Nath did not support the prosecution case and he was declared hostile.

12. PW-3 Raghunath has also supported the statement given by PW-1.

13. PW-4 Ram Ayodhya Prasad, who examined the injured Sudama, Ramnath Yadunath, Jagannath, Raghunath, Ram Adhar at Mohammadpur Primary Health Centre, has proved the injury reports of the said injured as Ext. ka-2 to Ext. ka-7 and x-ray report as Ext. ka-8.

14. PW-5, S.I. Rambali Mishra, the IInd Investigating Officer has proved the proceedings of investigation in his evidence. As a secondary witness for scribe H.M. Om Prakash Chaubey he proves chik F.I.R. and registration G.D. as Ext. ka-9 and Ext. ka-10 and further for the Ist I.O. S.I. Raja Ram Pandey he proves site plan and charge sheet as Ext. ka-11 and Ext. ka-12 and also proves charge sheet Ext. ka-13 submitted by him against some of the accused persons.

15. The trial Court scrutinized and analyzed the whole prosecution evidence minutely and found that the prosecution

has fully succeeded in bringing home the charges against the accused/appellants beyond reasonable doubt under Sections 147, 148, 323/149 and 324/149 and the accused / appellants were convicted and sentenced, as mentioned here-in-above.

**16.** Heard Shri Shailendra Kumar Yadav and Shri N.N. Singh, learned counsel for the appellants and the learned AGA for the State.

**17.** The impugned judgment and order of the trial court has been assailed by the learned counsel for the appellants on various grounds. It is submitted that the evidence on record was not sufficient to hold guilty the appellants and to record their conviction and sentence. It is further submitted that there was a cross-case of the present matter and ample evidence was adduced by the defence on record in connection thereof and on the basis of prosecution evidence as well the existence of cross-case was well explained but the trial court was completely unjustified to discard and neglect the same. It is also submitted that the impugned judgment and order is confusing on the point as to whether the present case is the cross-case or not and there are contradictory findings on this point. It is also submitted that the accused persons also sustained injuries in the incident but the prosecution has miserably failed to explain their injuries. There are several loopholes and contradictory findings in the impugned judgment and order. The trial court, in fact, without considering the evidence on record in legal manner and without appreciating the factual scenario of the matter passed the conviction order in an arbitrary manner which is not liable to be sustained.

**18.** Per contra, learned AGA has contended that the prosecution case is fully supported by the medical evidence. The injured witness and also the informant / eye witness have fully supported the prosecution case. It is also submitted that the evidence rendered by the defence in order to establish the cross-case by

showing the injuries sustained by the accused persons is nothing-else but is merely an attempt to avoid the conviction on the basis of false and concocted defence evidence. F.I.R. is prompt and the prosecution has established the guilt of the accused persons beyond reasonable doubt. The trial court has committed no legal or factual error in passing the impugned judgment and order. The appeal has no merits and is liable to be dismissed.

**19.** The rival contentions of both the parties led this Court to go through the entire evidence on record and also the judgment of conviction recorded by the learned trial court.

**20.** Medical evidence in a criminal trial where either death is caused or injuries are inflicted upon the body of the injured has significant relevance in order to prove the prosecution case. In the case in hand six injured persons have been medically examined by PW-4, the doctor, who medically examined injured Sudama, Ramnath, Yadunath, Jagannath, Raghunath and Ram Adhar and has proved their injury reports as Ext. Ka-2 to Ext. Ka-7. Injured Yadunath was referred for x-ray and in the supplementary report Ext. A-8 fracture has been found in his right little finger and the doctor has opined that the injury was grievous in nature. The incident is said to be happened on 27.1.1985 at about 10.30 a.m. and all the injured persons were medically examined by PW-4 on the same day in the afternoon. The weapons used in the assault, as may be found in the statement of witnesses of fact, are lathi, danda, gandas and barchha etc. The doctor, who medically examined all the injured persons, has found lacerated wound, contusion and complain of pain over the body of the injured persons. The prosecution has made attempt to connect the injuries with the weapon used in commission of the crime and the nature of injuries and the weapon used on the basis of evidence of witnesses of fact and of medical evidence as well, as mentioned here-in-above, which are in consonance with each other and the injuries found upon the

body of the injured persons might be inflicted by use of weapons, which were assigned to the accused persons. PW-4 has been cross-examined by the defence but there is nothing in his testimony to disapprove his evidence even after passing through a lengthy cross-examination and it can safely be opined that the medical evidence fully supports the case of the prosecution so far as the nature of the injuries, weapon used, duration, which was found fresh, etc. are concerned.

**21.** Prompt F.I.R. is always a sign of genuineness of the prosecution case. In the present matter, F.I.R. of the case was lodged promptly. The occurrence happened in the morning of 27.1.1985 and the written report was given at the police station the same day and the F.I.R. was lodged on 27.1.1985 itself. The chik F.I.R. and registration G.D. have been proved by PW-5 S.I. Ram Bali Mishra, who has deposed as secondary witness for Head Moharrir Om Prakash Chaubey. Hence in this case, the F.I.R. was lodged with utmost promptness and virtually there was no delay in lodging the same, which eliminates the chance of false implication.

**22.** 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."*

**23. In Thulia Kali Vs. State of Tamil Nadu reported in (1972) 3 SCC 393 the Hon'ble Supreme Court observed 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."*

**24. Similarly, in Kishan Singh through LRs Vs. Gurpal Singh and others reported in (2010) 8 SCC 775 the 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."*

**25. So far as the factual aspect of the case is concerned, PW-1 Ram Nath, the informant, has proved the written report Ext. Ka-1. This report was dictated by PW-1 to Haridas Ram, who affixed his T.I. upon it and gave to the police for lodging of the F.I.R.**

**26. PW-1 has fully proved the facts of this case and he has stated in his deposition that a civil suit was pending between the parties and Advocate Commissioner was appointed by the Court. Shri Uma Charan on behalf of informant and Shri Abdul Mufeed on behalf of other side had visited the spot to complete the proceedings of Commission and during course of Commission, altercation took place between both the parties and the accused persons Ramashrey, Gullu, Salat, Nandlal @ Nandi, Shyamdeo, Tribhuwan, Tripurari, Indrabali @ Indru, Ram achan, Lala and Awadhu made assault upon him and other persons from his side with the use of lathi, danda, gandasi and barchha etc. and they**

sustained serious injuries. This witness has also been cross-examined at length but his evidence in entirety is consistent in respect of the participation of all accused persons in commission of crime, assault made by them and the weapons assigned to them. However, the evidence of this witness is unable to take the prosecution case within the purview of Section 307 IPC and if his evidence is taken into entirety the basic ingredient to constitute an offence under Section 307 IPC in the form of intention to kill misses completely. Only a verbal statement of PW-1 that the assault was made by the accused persons with intention to kill them is not sufficient to bring the case in the purview of Section 307 IPC, it scrutinized in context of the entire evidence on record, as concluded by the learned trial court.

27. It is notable that the factum of cross-case which was lodged against the informant side by the accused side was admitted by the PW-1 in his cross-examination.

28. PW-2 Shiv Nath, who is said to be the eye witness of the occurrence, did not support the prosecution version and he has been declared hostile by the prosecution but he makes a significant statement that it was a free fight between both the parties and both the parties inflicted injuries to each other.

29. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat***, 1999 (8) SCC 624 has held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole.

30. ***Ramesh Harijan vs. State of U.P.*** , 2012 (5) SCC 777, the Hon'ble Apex Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

**31.** In *State of U.P. vs. Ramesh Prasad Misra and another* , 1996 AIR (Supreme Court) 2766, the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon.

**32.** From the above propositions of law, it is evident that the evidence of a hostile witness cannot be ignored totally and the relevant portion of his entire testimony can also be taken into consideration. The evidence of PW-2 establishes the presence of accused persons at the place of occurrence and the factum of assault made by them upon the informant and other persons but on the other hand it also proves the assault made by the informant side as well upon the accused persons. In other words, from the statement of PW-2 it is clear that the assault was made not only by the accused side upon the informant side but at the same time by the informant and his associates upon the accused persons as well.

**33.** PW-3 Raghunath is another eye witness of this case. Corroborating the testimony of PW-1, he has also made statement that in the incident, assault was made on behalf of the accused persons upon the informant and other persons but relevant thing is that this witness also admits the pendency of cross-case running in the same Court and also makes a significant admission that he himself is an accused in the said cross-case.

**34.** PW-5 Sub-Inspector Ram Bali Mishra is the second Investigating Officer of this case and as a secondary witness for scribe he proves the chik F.I.R. and registration G.D. as Ext. Ka-9 and Ka-10 and also affirms the proceedings of investigation performed by the first Investigating Officer and proves the sketch map of the place of occurrence as Ext. Ka-11 and charge sheet

submitted by the first Investigating Officer, as Ext. Ka-12 and also by himself as Ext. Ka-13.

**35.** The trial court after analysing and scrutinizing the prosecution evidence on record has rightly concluded that the injured persons, who are six in number, itself denotes that it is not a case of false implication. Since the cross-case of this matter has not been decided alongwith the case in hand, this Court in appeal cannot appreciate the evidence adduced in both the cases simultaneously and as a matter of fact the trial court has not opined in explicit terms that the case in hand is also a cross-case.

**36.** In order to explain the defence case, it was stated by the accused persons in their statements under Section 313 CrPC, when the incriminating circumstances and evidence were put to them after closure of the prosecution evidence, that the injury reports of the injured persons are forged and fabricated documents. They also sustained injuries in the said incident but F.I.R. on their side was not lodged and they were compelled to move an application before the Senior Police Officers. Besides false implication, a specific defence has been taken by accused Nand Lal and Tripurari wherein they stated that they were assaulted by the informant side and sustained injuries.

**37.** To strengthen their case, two witnesses have been produced from defence side. DW-1 Suraj Prasad Srivastava, the Pharmacist, as a secondary witness, has proved the injury report of accused Ramasrey on the basis of medico legal register before the Court and identified the handwriting and signature of Dr. D.K. Sinha, who had examined the accused Ramasrey, and has proved it as Ext. kha-1.

**38.** From a perusal of the injury report Ext. kha-1 pertaining to the accused Ramasrey, it reveals that the doctor has found painful traumatic swelling on the medial aspect of left lower

forearm and an abrasion as well on the post aspect of left index finger. The injuries were simple and caused by blunt and hard object. The medical examination of accused Ramasrey was conducted on 28.1.1985.

**39.** In the same fashion DW-2 Dr. S.D. Chaudhary in his testimony has made a statement that on 27.1.1985 itself injured Ram Bachan, Chandrabali, Nandlal and Tripurari were medically examined by him and he had found the injuries in the nature of abrasion, lacerated wound, incised wound etc. upon the body of injured persons and weapon used for inflicting the said injuries might be sharp edged weapon and hard and blunt object and duration was less than half day. The medical examination was conducted at P.H.C. Thekma, District Azamgarh. The injury reports of the aforesaid injured persons have been proved by this witness as Ext. kha-2 to Kha-5.

**40.** To prove the factum of long litigation between both the parties the defence has also relied upon various documents (Ext. kha-6 to Ext. kha-10) which are the certified copies of the pleadings, copy of judgments and other applications pertaining to the dispute between the parties.

**41.** It is interesting to see that the prosecution has also supplied copies of revenue records and other proceeding of civil case as Ext. ka-14 to Ext. ka-17 to prove the element of previous litigation and enmity between the parties.

**42.** From the above, it is explicitly clear that though the informant side having six injured persons, who were assaulted and sustained injuries in the crime committed by the accused persons, but at the same time this fact cannot be ignored that the accused side also sustained injuries caused by informant side.

**43.** The learned trial court at page 11 of the impugned judgment has categorically mentioned that the main point for

determination is as to which party is aggressor. This view of the trial court denotes that the trial court was itself of the view that the case in hand was a cross-case but it is very interesting that the evidence adduced by the defence side has not been examined and scrutinized by the trial court as a cross-case and the trial court nowhere concludes that the case in hand has also a cross-case.

44. The Hon'ble Apex Court in *Munshi Prasad vs. State of Bihar, (2002) 1 SCC 351* has held that evidence adduced by the defence also gets the same weight as the prosecution evidence. In the present matter the trial court ignoring the settled principle of law has totally discarded the medical evidence adduced by the defence. The injury reports of the injured persons from the accused side have been proved in a legal manner by the doctor DW-2 and pharmacist DW-1. No doubt they have appeared as secondary witness for the original but that was not barred in law.

45. At the cost of repetition, it is to be noted here that DW-2 Dr. S.P. Chaudhary, who proves the medical reports in connection with the accused persons had assisted Dr. G.P. Sharma at the time of medical examination of the accused persons, who is now living abroad. Hence, the secondary evidence given by DW-2 Dr. S.P. Chaudhary is admissible in evidence, as per the relevant provisions of law of evidence.

46. The learned trial court at page 12 of the impugned judgment has also concluded that the accused persons were the aggressor which again denotes that the injuries caused to the accused persons were recognized by the trial court as well but it was hesitant to treat it as a cross-case.

47. During course of arguments, learned counsel for the appellants has submitted that the case filed by the accused side was based on a private complaint and that has ended into acquittal of the accused persons of that case.

**48.** The trial court in the impugned judgment and order after analyzing the evidence on record has drawn a conclusion that on the basis of evidence on record the accused persons are liable to be acquitted of the charges under Sections 307 IPC and 325 IPC and they were accordingly acquitted of the aforesaid charges and that is why the conviction of the accused persons / appellants has been recorded under Sections 147, 148, 323/149 and 324/149 IPC only.

**49.** After analyzing the entire evidence on record, this Court is of the view that the impugned judgment and order passed by the trial court was passed in a cursory manner and in fact the trial court itself was not confident as to whether the case in hand had a cross-case or not and how the accused persons sustained injuries at the same time when the occurrence of this case happened. For the reasons best known to the trial court it was little hesitant to get the injuries found on the body of the accused persons explained and the defence evidence from the appellant side in this regard was totally neglected and discarded by the trial court. On the one hand, the testimony of a doctor, who is deposing in favour of the prosecution to prove the medical reports of the injured persons from the prosecution side has been accepted by the trial court but however on the other hand in the same fashion evidence of another doctor who certifies the injuries caused to the accused persons as well was ignored and it was not fair on the part of the trial court at all to place reliance upon the injury reports affirmed by the doctor being produced as prosecution witness but at the same time to wash off the testimony of the doctor at the same level who was appearing as defence witness.

**50.** This Court has no hesitation to hold that though in the case in hand it was a bounden duty of the prosecution to prove the prosecution version beyond reasonable doubt but the evidence rendered by the prosecution is shaky in nature. The prosecution

witnesses of fact have tried to conceal the real picture of the story. No explanation of injuries sustained by the accused persons has been given by the prosecution, which in the facts and circumstances of the case like this, was necessary on the part of the prosecution. The impugned judgment and order is perplexed on the point of cross-case and without determining the present case to be a cross-case the trial court tried to find out as to which of the parties was aggressor.

**51. In Mohd. Khalil Chisti Vs. State of Rajasthan and others (2013) 2 SCC 541**, Hon'ble Apex Court quoting the observations earlier made by it in **Lakshmi Singh vs. State of Bihar** has held as under :

"30. In **Lakshmi Singh v. State of Bihar**, (1976) 4 SCC 394.

*"12. .... It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence."*

**52.** 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.

**53.** 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, 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 23.11.1987, which has been sought to be assailed, call for and deserves, interference. The criminal appeal is liable to be allowed.

**54.** Accordingly, criminal appeal is allowed and the conviction and sentence imposed upon the accused appellants Ramashrey, Tribhuwan, Tripurari, Ram Bachan, Lala and Awadhu for the offence punishable under Sections 147, 148, 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.

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

**Order Date :- 23.7.2024**

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