

Court No. - 82

Case :- CRIMINAL APPEAL No. - 694 of 1986

Appellant :- Karimullah And Others

Respondent :- State of U.P.

Counsel for Appellant :- N.N.Singh,Adeel Ahmad
Khan,Sudhanshu Pandey

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 present criminal appeal has been preferred by the appellants against the judgement and order dated 31.01.1986 passed by VI-Additional Sessions Judge, Gorakhpur in Session Trial No.154 of 1984 arising out of Case Crime No.143 of 1981, under Sections 147, 148, 323, 324 IPC, Police Station Ghugli, Gorakhpur, District Pilibhit and to undergo for rigorous imprisonment of six months under Section 147 IPC and to undergo six months rigorous imprisonment under Section 323/149 IPC. All the sentences shall run concurrently.
3. The prosecution story in brief as culled out in the First Information Report is that on account of some old village animosity, the accused persons Karimullah, Illtaf, Manjoor, Nesab, Riyaz and Rafiuddin etc. taken lathi, spade and gadasa etc. and hurling abuses came to the house of the informant. Nesab was carrying country made pistol and Manjoor was taking lathi and accused Nesab threatened the informant side for dire consequences and

meanwhile, the accused Karimullah threw gadasa on his head and he sustained serious injury.

4. On the basis of written report of informant, F.I.R. was lodged in this matter and after initiation of the prosecution, the accused-appellants Karimullah, Illtaf, Riyaz Manjoor, Rafiuddin and Nesab were held guilty for the offences under Sections 147, 323/149 IPC and were sentenced as mentioned here-in-above for six months rigorous imprisonment each for distinct offences.

5. At the very outset, it is to be noted that during pendency of the present appeal, appellant no.1 Karimullah, Appellant no.2 Illtaf, Appellant no.4 Manjoor, Appellant no.5 Rafiuddin and Appellant no.6 Nesab have died. Hence, appellant no.3 Riyaz is the sole surviving appellant now.

6. The investigation of the case was conducted by the Investigating Officer, who performed the proceedings of investigation, recorded statement of material witnesses and prepared site plan after making an inspection of the place of occurrence and submitted charge sheet against the accused persons.

7. Injured Riyasat Ali was medically examined on 07.07.1981 at 01:30 PM and the doctor found following injuries upon his body:-

“(1) कटा हुआ घाव 6 से.मी. X 0.8 से.मी. X हड्डी तक गहरा सर के दाहिने तरफ दाहिने भौ आठ से.मी. ऊपर । चोट का रंग लाल था । सीरम वह रहा था। चोट तिरछा था।

(2) छिला हुआ निलगू निशान 3.5 X 1. ½ से.मी. बाये कलाई के पृष्ठ तल पर कलाई के जोड़ से ठीक नीचे। चोट का रंग लाल था।

(3) नीलगू निशान 7 से.मी. X 1 ½ से.मी. बाये हाथ के पृष्ठ तल पर। जोड़ से ठीक नीचे। चोट का रंग लाल था।

(4) छिला हुआ निलगू निशान 3 से.मी. X 2 से.मी. स्करोटम के दाहिनी तरफ जिसमे सूजन एवं टेंडर का चोट का रंग लाल था।”

8. The accused persons appeared before the Court and they were charged for the offences under Sections 148, 323/149, 324/149 IPC by the Sessions Court. The accused persons denied of the charges and claimed for trial.

9. The prosecution to bring home the charges relied upon the oral evidence of P.W.-1 Riyasat Ali, P.W.-2 Dildar, P.W.-3 Nizamuddin, P.W.-4 Head Constable Bachcha Lal, P.W.-5 Rampati Ram and P.W.-6 Dr. R.K. Tiwari.

10. To corroborate the oral evidence, the prosecution further relied upon documentary evidence and as documentary evidence, the prosecution produced written report Ex.Ka.-1, Chik F.I.R. Ex.Ka.-2, Registration G.D. Ex.Ka.-3, site plan Ex.Ka.-4, charge sheet Ex.Ka.-5 and medical report Ex.Ka.-6.

11. The incriminating evidence and circumstances were put to the accused persons in their statement under Section 313 Cr.P.C. wherein they claimed the entire prosecution evidence as false and fabricated and requested for producing the defence evidence. In the defence evidence D.W.-1 Dr. R.K. Tiwari has been produced who proves the injury report Ex.Kha-I. Some other documents, copy of family register Ex.Kha-2, copy of judgement dated

23.08.1983 Ex.Kha-3, copy of written statement of Riyasat Ali in Case No.24 of 1985 Ex.Kha-4 were also produced as defence evidence.

12. P.W.-1 Riyasat Ali is the injured and informant of this case. In his statement he has elaborately explained the occurrence and named accused Karmullah, Nesab and Manjoor as the miscreants in this case. He also affirms the fact that accused Karmullah threw gadasa over him and he sustained head injury. The incident happened on 07.07.1981 at 12:40 AM. The written report given in the police station has been proved by him as Ex.Ka-1. In the same fashion, P.W.-2 Dildar who is said to be the eye witness of the occurrence supports the prosecution case in his evidence and further affirms that Riyasat Ali received head injury by the use of Gadasa. P.W.-1 and P.W.-2 both have made several statements with respect to the earlier dispute existing between both the parties regarding one house and it was brought to the notice of this Court by way of documentary evidence that proceedings under Section 145 Cr.P.C. are also pending between the parties. P.W.-2 further states that sphere and pistol were not used during the commission of the occurrence. He also states that no injury was seen by him on the person of Karimullah.

13. The aforesaid statement of P.W.-2 is in fact an attempt to conceal the origin and real facts regarding the incident. Interestingly P.W.-6 Dr. R.K. Tiwari who medically examined the injured Riyasat Ali, also medically

examined accused Karimullah on 07.07.1981 at 08:30 PM and found following injuries over his body:-

- “(1) छिला हुआ निलगू निशान 3 सेमी X 1 ½ सेमी दाहिने गाल के हड्डी वाले भाग पर। चोट का रंग लाल था।
(2) फटा हुआ घाव 2.5 सेमी X 0.5 सेमी X 0.4 सेमी सर पर बाएँ तरफ करीब नीचली लाईन में। चोट का रंग लाल था। खून के थक्के घाव के चारों ओर मौजूद थे।
(3) छिला हुआ निलगू निशान 4 सेमी X 1 सेमी बाएँ पैर पर। चोट का रंग लाल था।
(4) निलगू निशान 7.5 X 1.5 सेमी बाएँ तरफ पीठ पर पैरों की हड्डी के निशान सीरे से चार सेमी नीचे। चोट का रंग लाल था।
(5) निलगू निशान 6 सेमी X 0 ½ सेमी पीठ पर बायीं तरफ चोट नं० 4 सेमी से पीछे। चोट का रंग लाल था।
(6) निलगू निशान 3.5 सेमी X 1 सेमी चूतड़ पर बायीं तरफ। हड्डी के उपरी सीरे से 8Cm नीचे। चोट का रंग लाल था।
(7) निलगू निशान 8.5 सेमी X 1 सेमी पीठ पर दाहिनी तरफ करीब बीच में। चोट का रंग लाल था।”

14. He has further stated that all the injuries were simple in nature caused by some hard and blunt object. The injury report has been proved by him as Ex.Kha-1 and his statement is very relevant when he states that the injuries are likely to be caused on 07.07.1981 at about 10:00 AM and also states that if the injured falls upon any sharp edged weapon injury no.1 is likely to be caused.

15. In the light of the aforesaid injury report and evidence of P.W.-6 it is clear that the prosecution is trying to conceal the real facts in respect of the present occurrence and the witnesses are trying to conceal the factum of injuries sustained by accused Karimullah which are in a large number and cannot be fabricated.

16. P.W.-3 is also said to be an eye witness of the occurrence who in his examination-in-chief supports the F.I.R. version and admits that when the persons from

informant side were trying to protect themselves some injuries in defence were caused to Karimullah also. He further states that he had seen only one head injury to Riyasat Ali and no other injury was seen by him to Riyasat Ali. He has been cross examined on the point of place of occurrence and the manner he has sketched the spot is not inconsonance with the site plan Ex.Ka-4.

17. P.W.-4 Head Constable Bachcha Lal is the scribe who has proved the Chik F.I.R. and Registration G.D. as Ex.Ka-2 & Ex.Ka-3.

18. P.W.-5 S.I. Ramapati Ram is the Investigating Office of the case who proves site plan as Ex.Ka-4 and charge sheet Ex.Ka-5 and also affirms the proceedings of the investigation. This witness also admits the factum of cross case (State of U.P. Vs. Riyasat) wherein charge sheet was submitted by him.

19. P.W.-6 Dr. R.K. Tiwari medically examined the injured Riyasat Ali and found injuries upon his body and narrates that the injuries were likely to be caused by some sharp edged weapon and hard and blunt object as well. The medical report has been proved by him as Ex.Ka-6 and he also emphasises upon that the occurrence happened on 07.07.1981 at 10:00 AM and injury no.1 might be caused by the use of Gadasa.

20. A perusal of impugned judgement reveals that the learned trial court has devoted a lot of time and energy to settle the housing dispute between the parties. The said dispute has a little concern with the present case. In the

present criminal appeal, this Court has to find out as to whether it was a free fight or any one party was the aggressor and also that whether prosecution tried to conceal the origin and real inception of the incident since on the basis of prosecution and defence evidence, it is proved that both the sides sustained injuries in the alleged occurrence.

21. The learned trial court ought to have discussed the evidence on record to find out as to which party was aggressor. It is relevant to note here that the learned trial court also did not make any conclusion on the point as to which of the party was aggressor. It is true that the parties have some housing dispute as emerged out from the evidence on record but in this criminal appeal, this Court has not to settle as to which party is the real owner of the house in question. The learned trial court spent a lot of time and energy to find out as to which party was in the actual possession of the house in question and was entitled to its ownership. However, the defence papers Ex.Kha-2, Ex.Kha-3 & Ex.Kha-4 also throw some light upon the civil dispute between the parties.

22. Since the prosecution by ignoring the factum of injuries sustained by one of the accused has tried to conceal the origin and real facts relating to the occurrence, a legal question arises as to what should be the reasonable and logical consequence of the present matter. Some more facts and findings arrived at by the learned trial court are also relevant to be discussed.

Injured Riyasat Ali in his statement as P.W.-1 states that when the gadasa was thrown upon him it entered into his skull but the depth of the said injury is only 0.8 cm and the learned trial court laying emphasis upon this fact found that the gadasa was not entered into the head of the injured Riyasat Ali and he has tried to exaggerate the factual position. It is also to be noted that no gadasa has been retrieved by the Investigating Officer concerned during investigation. The absence of blood over the spot and on the clothing of injured Riyasat Ali as well also places the prosecution story in a state of suspicion.

23. The learned trial court has also paid its attention to the fact that if the accused persons visited the house of the informant with intention to kill him while they did not use the country made pistol, even the sphere which was also carried by the accused persons was not used in the commission of the crime. The learned trial court on the basis of this analogy has rightly concluded that no sphere, country made pistol or gadasa was used in the commission of the crime and probably the accused persons were not carrying such weapons with them. The statement of P.Ws. of fact that in defence accused Karimullah also sustained some injuries by the informant side but at the same time their contradictory statement that no injury was caused on the person of Karimullah again falsifies the prosecution story and it appears that P.W.-2 and P.W.-3 were actually not present on the place of occurrence at the time of incident.

24. From the perusal of the impugned judgement, it appears that the learned trial court has proceeded to examine the evidence on record as if there was a cross case to the present one but to establish the factum of cross case all the material documents F.I.R., site plan, charge sheet, injury report etc. ought to have been filed by one side. Since except the medial report of injured Karimullah no other document as mentioned here-in-above has been filed by the prosecution or defence, it cannot be said that the present case was a cross case as well.

25. In **Nand Lal and others Vs. State of Chhattisgarh (2023) 10 SCC 470**, the Hon'ble Apex Court has held that:-

“We will first consider the issue with regard to non-explanation of injuries sustained by accused No. 11 Naresh Kumar. In the case of Lakshmi Singh and Others v. State of Bihar, which case also arose out of a conviction under Section 302 read with Section 149 of the IPC, this Court had an occasion to consider the issue of non-explanation of (1976) 4 SCC 394 injuries sustained by the accused. This Court, after referring to the earlier judgments on the issue, observed thus:

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

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

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

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.”

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the court to rely on the evidence of PWs 1 to 4 and 6, more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. ”

26. Although P.W.-1 in this case is an injured witness and his evidence is placed upon a distinguished place and his presence over the spot cannot be disputed but in case of admitted previous enmity possibility of false implication cannot be ruled out. The prosecution was under obligation to explain the injuries sustained by accused Karmullah which was not discharged and thus the genesis of the incident is also found to be suppressed and in a situation where the injuries sustained by the accused are remained unexplained, the accused persons are certainly entitled for benefit of doubt.

27. Keeping in view the entire facts and circumstances and evidence on record, this Court is of the view that accused-appellant no.3- **Riyaz** is entitled for benefit of doubt.

28. Accordingly, the present criminal appeal is **allowed** and the impugned judgement and order dated 31.01.1986 passed by VI-Additional Sessions Judge, Gorakhpur in Session Trial No.154 of 1984, under Sections 147, 323/149, IPC, Police Station Ghugli, Gorakhpur, District Pilibhit is hereby set aside. The appellant is on bail. He need not surrender. His sureties are discharged and personal bonds are cancelled.

29. Let a copy of this order be sent to the court concerned for necessary compliance.

Order Date :- 12.11.2024

Sanjeet