

Court No. - 86

Case :- CRIMINAL APPEAL No. - 2910 of 1984

Appellant :- Raj Kumar And Others

Respondent :- State of U.P.

Counsel for Appellant :- K.K.Mishra,Jyoti Bhushan

Counsel for Respondent :- A.G.A.,Ram Deiv Gupta

Hon'ble Nalin Kumar Srivastava,J.

1. The present criminal appeal has been preferred against the judgement and order dated 28.9.1984 passed by 4th Additional Sessions Judge, Azamgarh in S.T. No. 219 of 1982 (State Vs. Raj Kumar & Ors.) convicting the accused appellants under Sections 147, 323, 149 I.P.C. and simultaneously releasing them extending benefit of Section 3 of the U.P. Probation Act.

2. At the very outset, it is to be taken into account that out of 12 convicts/ appellants, appellant nos. 1. Raj Kumar, 2. Harinath and 3. Ram Nayan are surviving appellants and 9 convicts/ appellants have died and the present appeal has been abated qua appellant nos. 4 to 12 namely Tribhuwan, Ram Samujh, Ramai, Bulaki, Jagga, Jivnath, Vishwanath, Buniyadi and Balraj.

3. The prosecution story as culled out from the FIR of this case in brief is as hereunder:

4. On 31.5.1979/ 1.6.1979 at about 1.00 am in the night the accused persons forming an unlawful assembly with intention to commit dacoity carrying ballam, gadasa, lathi and danda etc. with them came to the house of the informant, who was tied in his house and one air fire was made by co-accused Tribhuwan and when the door of the house was opened by the mother of the informant, an assault was made upon her and the accused persons entered into the house of the informant hurling abuses and threatening for dire consequences to them. Dacoity was also committed by them in the house of Chakkan. Later on when the aggrieved persons

went to police station their report was not lodged. The injured persons were medically examined and subsequently by order of the Court FIR was lodged and after investigation charge sheet was submitted before the Court.

5. The offence being exclusively triable by the Sessions Court it was committed to the Court of Session by the Magistrate. The Sessions Court proceeded to frame the charges against the accused persons under Sections 395, 397, 147, 323/149, 525/149 I.P.C. to which they denied and claimed for trial.

6. In order to prove its case the prosecution relied upon 8 witnesses and also upon the documentary evidence.

7. P.W.1 the informant Sirju narrated the prosecution story as mentioned in the FIR. He has categorically named all the accused persons and the weapons assigned to them and also identified the accused persons present before the Court except accused Tribhuwan, Jivnath, Ram Nayan and Sehti. He has further stated that the accused persons tied him with a cot and an air fire was made by Tribhuwan and when the door of the house was opened by his mother she was also assaulted and dacoity was committed in his house and some jewels and sari were taken by the accused persons. Later on they committed dacoity in the house of his uncle Chakku, who was also beaten along with his wife Jeevani. The occurrence was witnessed by villagers Suryabhan, Bheekho, Petu and Palakdhari. His report was not lodged in the police station and when they were coming back after their medical examination they were further threatened for dire consequences by the accused persons. Subsequently an application Ex.Ka-1 written by Chawai was sent to the District Magistrate through registry and later on application Ex.Ka-2 was also filed by him before the Court. He has further clarified that since all the accused persons were native of own village they were known to him. Further he has explained that they were identified in the light of lantern and dhibri and he had no prior animosity with the accused persons.

8. P.W.2 Chakku is the uncle of the informant, who corroborates the prosecution version in the same tone as P.W.1 states and proves the allegations of dacoity committed by the accused persons, the assault made by them and also the fact that the accused persons robbed some silver jewels and clothing from his house. The factum of assault made by the accused persons and the medical examination of the injured persons has also been proved by this witness. He further states that on the application written by Chawai he had also affixed his thumb impression.

9. P.W.3 Smt. Jivrati is the witness of fact. The factum of dacoity and assault committed by the accused persons and the weapons assigned to them have been explained by her in her deposition. She also explained that in the incident her two teeth were broken and she also sustained injuries in her thigh. She had identified the accused persons in the light of dhibri. She also states that she was medically examined and the incident was witnessed by Suryabhan, Bheekho, Petu and Palakdhari etc.

10. P.W.4 Smt. Jivti is the wife of P.W.2, who also states in the same tone as P.W.2 deposes.

11. P.W.5 Chawai @ Ramanand is the scribe, who states that whatsoever dictated by Sirju and Chakku he wrote down in the application and subsequently both Sirju and Chakku affixed their thumb impressions over it. The application was written in two copies and the first one was kept with him and subsequently it was submitted in the Magistrate Court in December, 1980 and he identifies his signature over Ex.Ka-1.

12. P.W.6 Dr. K.K. Jain medically examined the injured persons of this case and proves the injury reports pertaining to Smt. Jivti Devi, Chakku, Smt. Jivwanti Devi and Sirju in his examination-in-chief as Ex.Ka-3, 4, 5 and 6 respectively. This witness found three injuries as traumatic swelling, abraded contusion and contusion to the injured Jivti Devi, three traumatic swelling to the injured Chakku, abrasion, traumatic swelling and

contusion to the injured Jivwarti Devi and contusion and lacerated wound to the injured Sirju. P.W.6 further opines that all the injuries to the injured persons were simple in nature and inflicted by some hard and blunt object.

13. P.W.7 Wasiuddin was posted as English record keeper in June, 1979 and he affirmed the fact that one application dated 2.6.1979 was received by him which was sent to the office of S.S.P. Azamgarh by order of the District Magistrate on 11.6.1979.

14. P.W.8 Lal Chand, record keeper, police office, Azamgarh deposes in his evidence that he is appearing before the Court with the relevant register but however the said register is bearing no heading and P.W.8 is also not capable of reading page numbers which are written in urdu language. He further identifies the handwriting and signature of earlier record keeper Raghuwansh Prasad, but clarifies that all the applications up to the year 1979 have been weeded out.

15. No other evidence as oral evidence has been adduced by the prosecution.

16. In their statement under Section 313 Cr.P.C. when the incriminating evidence and circumstances were put to the accused persons they all denied the prosecution evidence claiming it to be false and fabricated and D.W.1 Dr. Vinod Tripathi has been produced by the defence in oral evidence.

17. Dr. Vinod Tripathi D.W.1 was posted as medical officer in District hospital Azamgarh who affirms the factum of medical examination of injured Chotey Lal, Bunyadi, Shivnath, Heeral lal, Smt. Durgawati and Smt. Kastori Devi which was conducted by him.

18. D.W.1 deposes that in the medical examination of Chotey Lal injury in his right eye was found wherein blood was present and the injury was kept under observation. In the like manner two abrasions were found in the injuries of injured Bunyadi whereas one abrasion was found in the injury of injured Shivnayan over the frontal portion of his head. He also

found one injury in the facial area of injured Heera Lal, who was advised for x-ray and in the same fashion one injury in the back portion of head of Smt. Durgawati Devi was also found and one contused swelling in the right leg and one contusion in the right thigh were also found in the medical examination of Smt. Kastori Devi. The aforesaid injury reports were proved by D.W.1 as Ex.Kha-2, 3, 4, 5 and 6 respectively. All the injuries as per opinion of D.W.1 were about 1 day old and caused by some hard and blunt object.

19. On the basis of the aforesaid evidence the trial Court came to the conclusion that no offence under Section 395, 397, 325/149 was made out against the accused persons but at the same time the learned trial Court recorded the conviction of the accused persons under Section 147, 323/149 I.P.C. Further in place of awarding any actual sentence to the accused persons they were admonished and released on probation by the learned trial Court.

20. Assailing the impugned judgement on many points the learned counsel for the appellants submits before the Court that the learned trial Court did not give any weightage to the fact that the accused persons also sustained injuries in the said incident and six persons from their side were injured who were medically examined as well. It is also submitted that when the accused persons were trying to defend themselves some simple injuries were caused to the informant and other persons on his side which is also connotative of the fact that in the alleged incident injuries were caused to the accused persons as well. It is also submitted that on the same set of facts and evidence learned trial Court recorded acquittal of the appellants under Sections 395, 397 and 325/149 I.P.C. but in an arbitrary manner they were held guilty under Section 147, 323/149 I.P.C. It is also submitted that evidence available on record adduced by the prosecution clearly shows that no specific role of assault has been assigned to the present surviving appellants. It is also submitted that according to the prosecution itself no incriminating article has been retrieved by any of the

appellants during investigation. On these grounds a prayer for quashing acquittal of the appellants has been made.

21. Per contra, learned A.G.A. vehemently opposed the prayer made by the learned counsel for the appellants and it is submitted that acquittal of all the appellants under Section 395, 397, 325/149 I.P.C. cannot form basis of their acquittal for any other offences which were made out on the basis of the evidence on record and the trial Court committed no illegality in recording the conviction of the appellants under Section 147, 323/149 I.P.C. It is further submitted that since the appellants had no criminal history to their credit they were granted benefit of probation and accordingly released on probation extending benefit of Section 3 of U.P. Probation of Offenders Act.

22. Before proceeding into this matter, it is desirable to put a glance over the provisions of Section 360 Cr.P.C., which reads as under:-

"Section 360-When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years, or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour;

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class forwarding the accused to or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by Sub-Section (2).

Where proceedings are submitted to a Magistrate of the first class as provided by Sub-Section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

In any case in which a person is convicted of theft, theft in a building, dishonest in is appropriation, cheating or any offence under the Indian Penal Code (45 of 1860) punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law;

Provided that the High Court or Court of Session shall not under this Sub-Section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

The provisions of sections 121, 124 and 373 shall, so far as may be apply in the case of sureties offered in pursuance of the provisions of this section.

The Court, before directing the release of an offender under Sub-Section (1) shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions. If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such

Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may after hearing the case, pass sentence.

Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders."

6. Section 4 of the Probation of Offenders Act, 1958 provides that:-

"(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not exceeding three years, as the Court may direct, and in the meantime to keep the peace and be of good behaviour: Provided that the Court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the Court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the Court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the Court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.

(4) The Court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a

bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the Court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The Court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

23. The learned trial Court made a categorical finding that no offence of committing dacoity or voluntarily causing grievous hurt is made out against the appellants but since they inflicted injuries to some persons from the informant side after forming unlawful assembly and in prosecution of common object of the said assembly they committed wrong and inflicted simple injuries to some persons from the informant side, they were convicted under Section 147, 323/149 I.P.C. However, the learned trial Court itself opined in the concluding part of the impugned judgement that the accused persons also sustained 11 injuries during the incident but the learned trial Court discarded the legal aspect of the matter that the prosecution at no juncture tried to explain the injuries sustained by the accused persons. The prosecution certainly is not under obligation to explain each and every minor injury sustained by the accused side but since in this matter there are six injured persons from the accused side who have sustained a number of injuries, the prosecution definitely was under obligation to explain as to how a number of injuries were sustained by the accused persons in this case.

24. Since the prosecution witnesses are silent on the point of injuries sustained by the accused persons it appears that they sustained injuries on account of assault made from the informant side which is indicative of the fact that the prosecution is deliberately trying to conceal the origin and real facts regarding the occurrence and in that way the prosecution has not

come forward with clean hands which makes the whole prosecution case as suspicious.

25. This Court as an appellate Court scrutinized the evidence rendered by both the sides available on record. It is found that on one side some persons from the informant side sustained injuries in the incident and the factum of injuries was proved by oral and documentary evidence rendered by the prosecution but at the same time some persons also sustained injuries from the defence side and as per evidence rendered by D.W.1 the time of sustaining injuries by the accused persons appear to be the same as the prosecution claims in its favour. The accused persons were medically examined by D.W.1 in the afternoon of 1.6.1979 and the injuries sustained by them were likely to be inflicted on 31.5.1979 at 7.00 pm as deposed by D.W.1. D.W.1 also clarifies that there may be a difference of 5-6 hours either side in the duration of the injuries sustained by the accused persons and this is the time which is also alleged by the prosecution in respect of its case. A close scrutiny of the facts and circumstances of the case reveals that the accused persons also sustained a number of injuries in the same occurrence. The prosecution has to explain as to how the injuries were sustained by the other side. No doubt the prosecution is not under obligation to explain each and every minor injury sustained by the accused side but if there are a number of accused persons who sustained a number of injuries as well and some of the injuries were further referred for x-ray as a case of suspected fracture the prosecution is always under obligation to explain the injuries sustained by the accused persons and other persons from their side and since this onus is not discharged by the prosecution in the case in hand this Court finds force in the contention made by learned counsel for the appellants that since the prosecution apparently is concealing the real facts relating to this case, a benefit of doubt genuinely arises in favour of the defence and they are further entitled for clear acquittal from the trial Court and the trial Court

was not justified even to grant the relief of probation to the accused persons.

26. P.W.1 in his cross-examination admits that accused Tribhuwan lodged report in P.S.-Gambheerpur against him and 18 other persons including Chakku and charge sheet was submitted by the police and the case was committed to the Sessions which was ended into their acquittal under Section 436 I.P.C. but they all were convicted for the offence of assault and rioting vide judgement and order dated 24.9.1981. He further explains that there was an animosity and dispute between the persons pertaining to schedule caste and schedule tribes in the village but still he does not clarify properly as to how injuries were caused to the accused persons. Although the said fact of animosity has been denied by P.W.2 but he also fails to explain the cause of the injuries sustained by accused persons. The fact of animosity was further admitted by P.W.3, the injured, who also admits the factum of conviction recorded against 19 persons of the village alike P.W.1 but her evidence is also silent on the point of injuries sustained by accused persons. P.W.4 deposes in respect of the injuries sustained by her and her husband and she also admits the factum of conviction recorded against her family members but how the injuries were caused to the accused persons she nowhere explains, hence, there is no iota of doubt that the prosecution witnesses deliberately concealed the factum of injuries sustained by the other side.

27. The Hon'ble Apex Court in **Nand Lal and Ors. Vs. State of Chhattisgarh (2023) 10 SCC 470** in almost similar circumstances where the factum of animosity between both the groups was proved by the evidence, held that in case of proven previous animosity a possibility of false implication cannot be ruled out. Referring to a judgement passed in **State of Gujrat Vs. Bai Fatima (1975) 2 SCC 7** it was held that, "there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are

minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the affect of the omission on the part of prosecution to explain the injuries. A similar view in respect of non-explanation of injuries has also been taken by Hon'ble Apex Court in **State of Rajasthan Vs. Madho (1991) SCC (Cri) 1048**, **State of M.P. Vs. Mishrilal (2003) 9 SCC 426** and **Nagarathinam Vs. State (2006) 9 SCC 57**.

28. Also, in **Laxmi Singh Vs. State of Bihar (1976) 4 SCC 394**, the Hon'ble Apex Court had an occasion to consider the issue of non-explanation of injuries sustained by the accused and it was observed as under:

“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.”

29. Hence, on the basis of the aforesaid discussions, this Court is of the considered view that the prosecution miserably failed to prove its case beyond reasonable doubt. The previous animosity between the parties is established which indicates false implication of accused/ appellants in the case in hand. The learned trial Court has left over several issues relating to the merits of the case unattended and has not met out with the same in right perspective. The number of injuries sustained by the accused/ defence side and at the same time non-explanation of the same on the part of the prosecution is also a valid point raised by the learned counsel for the appellants, which goes in favour of them. The trial Court at one place expresses its suspicion regarding the genuineness of the prosecution case but at the same time it also records conviction of the appellants on the basis of same set of evidence. So far as surviving appellants are concerned, no specific role has been assigned to them in the matter in hand. Since the prosecution story starts with the allegation of dacoity committed by the assailants and the story of the said dacoity was already found baseless by the trial Court it was not proper on the part of the trial Court to record the conviction of the appellants on the same set of facts and evidence.

30. Therefore, in the facts and circumstances of the present case, in my considered view the legal dictum promulgated in the decisions referred to herein above leads this Court to draw a conclusion that since the prosecution did not come with clean hand in this case and an attempt had been made on the part of the prosecution to suppress the real facts and origin of the occurrence, 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.

31. Since the charges levelled against the appellants were not proved beyond reasonable doubt there was no justification to hold them guilty

and further after admonishing them to release on probation by the learned trial court.

32. Accordingly, criminal appeal is **allowed** and the conviction recorded by the learned trial Court against the accused appellants for the offence punishable under Sections 147, 323, 149 I.P.C. is set-aside as the accused appellants are found not guilty for the aforesaid offences. They are acquitted of the charges framed against them.

33. Copy of this judgment alongwith trial court record be sent forthwith to the Court concerned at Azamgarh for necessary compliance.

34. The appellants will execute, a personal bond and two sureties each in the like amount to the satisfaction of the court concerned within a month in compliance of provisions of Section 437-A Cr.P.C. to the effect that they would appear before the higher court, as and when such court issues notice in respect of any appeal or petition filed against the judgment of this Court, and such bail bonds shall be enforced for six months.

Order Date :- 26.9.2024

Fhd