

**High Court of Judicature at Allahabad
(Lucknow)**

Neutral Citation No. - 2024:AHC-LKO:7369-DB

Judgment reserved on 06.12.2023

Judgment delivered on 25.01.2024

Reserve

Case :- CRIMINAL APPEAL No. - 562 of 1983

Appellant :- Jogendra Singh

Respondent :- State of U.P.

Counsel for Appellant :- Divya Yadav, Nirmal Singh Yadav

Counsel for Respondent :- Govt. Advocate

Hon'ble Rajan Roy,J.

Hon'ble Ajai Kumar Srivastava-I,J.

(Per: Rajan Roy, J.)

1. Heard Shri Nirmal Singh Yadav, learned counsel for the appellant and Shri Pawan Kumar Mishra, learned AGA for the State and perused the record including the lower Court record.

2. By means of this Criminal Appeal the appellant has challenged his conviction vide judgment and order dated 30.07.1983 passed by the Special Judge, Lakhimpur Kheri in Sessions Trial No. 197 of 1983, arising out of case Crime No.

228, Police Station Pasgawan, District Kheri convicting the appellant for the offence punishable under Sections 302/34, 324/34 IPC and sentencing him to undergo life imprisonment and two years rigorous imprisonment, respectively. Both the sentences have been directed to run concurrently.

3. The prosecution case, in nutshell, is that on 10/11.12.1982 at about 11 PM the appellant and nine other accused came to the house of Om Prakash and his father Pooran (injured). Some of the accused tried to drag both of them out of the house, ultimately, when the latter tried to free themselves one of the accused Ram Singh exhorted that they are running away and should be killed, whereupon, he i.e. Ram Singh and the appellant herein Jogendra Singh, fired. Ram Singh was carrying a rifle and his gun shot hit Om Prakash and injured him whereas the appellant Jogendra Singh's gun shot hit the injured Pooran. The FIR was lodged at 5.20 AM in the morning and at about 8 AM while injured Om Prakash was being taken to the hospital, he died.

Consequently, the initial case which was lodged under Sections 147, 148, 149 and 307 IPC was converted to

Sections 147, 148, 149 and 302 IPC so far as the murder of deceased Om Prakash is concerned and for the injured Pooran the case was registered under Sections 147, 148, 149 and 307 IPC.

4. After investigation charge-sheet was filed against all the ten accused. Charges were framed against the accused Ram Singh, Khem Karan, Misri, Badri, Jalim and Jogendra Singh under Sections 148, 302 read with 149 IPC and Section 307 read with 149 IPC. As regards the other accused Natthu, Sirdar, Vijai Singh and Chet Ram charges were framed under Sections 147, 302 read with 149 and 307 read with 149 IPC. The accused denied the charges and were put to trial.

5. The prosecution produced seven witnesses. PW-1 Asha Ram is the uncle of deceased Om Prakash and cousin brother of PW-2 Pooran. PW-2 Pooran is the father of the deceased and is an injured witness. PW-3 Dhani Ram is a resident of the village and is said to be an independent witness. PW-4 Ram Charan Pandey was posted as Constable at PS Pasgawan on the relevant date. PW-5 Dr. A.K. Srivastav is the Doctor who conducted postmortem on the

body of the deceased Om Prakash. PW-6 Dr. A.K. Tripathi is the Doctor who medically examined the injured Pooran. PW-7 Jagat Singh is the Investigating Officer.

6. Exhibit Ka-04 is the first information report, Exhibit Ka-03 is the injury report of Pooran (PW-2) and Exhibit Ka-02 is the postmortem report. Exhibit Ka-09 and Ka-10 are the memos of recovery pertaining to plain and blood soaked soil as also 12 bore empty cartridges from the scene of crime. Exhibit Ka-02 is the inquest report. Exhibit Ka-08 is the site plan. Exhibit Ka-07 is the statement of deceased Om Prakash under Section 161 Cr.P.C. which was recorded by PW-7 allegedly just before his death after registration of the FIR.

7. The statements of the accused were recorded under Section 313 Cr.P.C.

8. The Trial Court on a consideration of the evidence on record convicted the accused Ram Singh, Badri and Jogendra Singh (appellant of the present appeal). Ram Singh and Badri had filed Criminal Appeal No. 554 of 1983 but on account of their death the same has been dismissed as

abated. As regards seven other accused they were acquitted of the offences with which they were charged. Even the appellant Jogendra Singh while he has been convicted for the offence under Section 302 read with 149 IPC, as regards the charge against him under Section 307 read with 149 IPC he has been acquitted, instead, he has been convicted under Section 324 IPC as already stated earlier.

9. The contention of appellant's counsel is that FIR is ante-timed. The incident is alleged to have taken place in the night intervening 10/11 December, 1982 at about 11 PM and the FIR is said to have been lodged at 5.20 AM whereas the informant in his testimony has stated that when he left the village to lodge the FIR the sun was about to rise and dawn was breaking. As it was month of December, therefore, there is no way this would be the situation prior to 5.20 AM nor at 5.20 AM. In fact sunrise took place on the said date at about 6.45 AM, therefore, clearly the FIR is ante-timed, but, the Trial Court has erred in rejecting this contention cursorily merely because in the GD entry, etc. the time is mentioned as 5.20 AM.

10. As regards the motive of the crime, which was attributed to the fact that the brother of PW-2 Prahalad had contested the Panchayat elections against the main accused Ram Singh on account of which he lost to the other contestant Nawab Singh, the same is absolutely belied from evidence on record as it is the admitted case of PW-2 that Prahalad his brother had secured only six votes which were of his family and the appellant had testified that Nawab Singh defeated the accused Ram Singh by over 86 votes, therefore, this could hardly be the reason for committing the crime. Submission was that the incident happened in the dead of the night and the appellant has been falsely implicated at the behest of Nawab Singh on account of political rivalry.

11. It was further submitted that the appellant Jogendra Singh did not have any common intention to murder Om Prakash. It is Ram Singh who fired upon Om Prakash from the rifle, resulting in his death. There is no allegation against the appellant Jogendra Singh of having fired upon Om Prakash.

12. As regards gun shot fired by the appellant Jogendra Singh upon Pooran, initially the charge was framed against him under Sections 307 read with 149 IPC, but, he has been acquitted of the said charge, instead he has been convicted of the offence punishable under Section 324 IPC which itself belies the prosecution case that the appellant Jogendra Singh was part of any common intention to kill or he fired with intent to kill either of the two. The single shot wound on Pooran is on non-vital part i.e. right thigh. Even exhortation for firing was by Ram Singh and not by the appellant Jogendra Singh, therefore, the conviction of Jogendra Singh for the offence punishable under Section 302 read with 34 IPC is not sustainable in law as it is based on conjecture, surmises and presumptions.

13. He submitted that FIR was lodged after deliberation and consultation and same has been ante-timed. He pointed out various contradictions, inconsistencies and embellishments in the testimony of the alleged eye-witness. The appellant was below 19 years of age at the time of the incident, as, on 26.07.1983 when his statement was recorded under Section

313 Cr.P.C. he was 19 years of age. He laid great emphasis on the fact that initially there were ten accused, out of whom seven have been acquitted which itself goes to show that the FIR was lodged with intent to falsely implicate so many people, as such, the evidence led by the prosecution is not at all reliable.

14. Learned AGA has opposed the appeal and submitted that the explanation for delay in lodging the FIR has been offered by the informant as also the other eye-witnesses as the fear of being accosted by the accused in the night. PW-1 informant being an illiterate person his statement as to the time when he left the village for lodging the FIR should not be taken on its face value and slight variation in this regard is permissible considering that he is a rural folk. He invited our attention to the statement of the injured Om Prakash, who died subsequently, under Section 161 Cr.P.C. as recorded by the police wherein he had testified about the guilt of appellant along with other accused and this has been treated as a dying declaration which is permissible in law coupled with the ocular testimony of other witnesses and the medical evidence

on record. The guilt of the appellant who was carrying a Tamancha in the dead of the night is clearly proved and, therefore, he had a common intention to murder the deceased as also the injured. According to him, the appeal is liable to be dismissed. In support of his contention, learned AGA has relies on the judgment dated 07.12.2023 of Hon'ble the Supreme Court in ***Criminal Appeal No. 2201 of 2011 (The State of Rajasthan vs. Gurbachan Singh & Others)*** and ***Goudappa and Others vs. State of Karnataka; (2013) 3 SCC 675.***

15. We have heard learned counsel for the parties and perused the records.

16. As regards timing of the FIR, the incident took place, as alleged, at about 11 PM in the night as has come in the testimony of informant PW-1 and the police station is situated about 1 or 1 and 1/2 kilometer away. He has stated in his cross-examination that when he left the village the sun had not dawned, but, the dawn was about to break. The redness in the sky at the time of dawn was visible. At 5.20 AM in the month of December this could not be possible, therefore, this

statement points towards the fact that he left the village later when dawn was just about to break which in the month of December could not be prior to 6.30 or 7 AM. This creates a doubt as to the time of lodging of FIR. He has further stated in his cross-examination that when he reached the police station the sun had already arisen 1-1 and 1/2 hours ago. This again creates a doubt as to the time of lodging of FIR, as, if this statement is accepted then he reached the police station sometime around 8 or 8.30 and could not have reached earlier. Scribe of the FIR Shyam Kishore has not been examined. The Trial Court has brushed aside this contention on the ground that there is a presumption about the time of lodging of FIR as per the entry made in the GD, etc. We do not appreciate nor accept this reasoning given by the Trial Court as ocular testimony of PW-1, the substantive evidence in this regard, belies the time of lodging of the FIR. It has been stated by PW-1 that he got the written Tehrir written by Shyam Kihshore who has not been examined.

17. From the medical evidence on record in the form of postmortem report which has been proved by PW-5 it is

amply proved that Om Prakash had sustained multiple firearm wounds on left side of the chest, lower part of abdomen and upper part of thigh and his death was caused due shock and haemorrhage as a result of antemortem injuries. Several metallic shots were taken out from his body. Om Prakash who died subsequently has made a specific statement that it is Ram Singh and not the appellant Jogendra Singh who had fired upon him. Of course, the witnesses have testified that prior to shooting from the gun the accused including Jogendra Singh dragged out Om Prakash and Pooran from their house. In this regard it has come in the testimony of Investigating Officer that PW-2 Pooran did not tell him about he and deceased being dragged out by accused including Jogendra Singh. In this regard the contention on behalf of the appellant is that this is an improvement in the testimony of PW-2 Pooran. There is no medical evidence/mark of dragging. Om Prakash had, however, stated about such dragging before the police. It has come in the statement of Om Prakash under Section 161 Cr.P.C. which has been treated as dying declaration that both of them tried to free themselves

whereupon Ram Singh exhorted to kill him and subsequently he fired with his rifle upon Om Prakash thereby injuring him. Om Prakash died subsequently. Om Prakash has clearly stated in his statement under Section 161 Cr.P.C. that Ram Singh fired upon him whereas Jogendra Singh fired upon Pooran. Ram Singh was carrying a rifle whereas Jogendra Singh was carrying a Tamancha. The witnesses have stated that both Ram Singh and Jogendra Singh fired but have nowhere stated that both fired upon deceased Om Prakash. Om Prakash has himself assigned specific roles as aforesaid in his statement which has been treated as dying declaration. Conviction of Jogendra Singh is with aid of Section 34 IPC.

18. Now, the medical examination report of Pooran is Exhibit Ka-3 and on its perusal we find that there were gun shot wounds in front of right thigh. The size of wound was 0.3 cm X 0.2 cm and it was muscle deep. Margins were lacerated and blackish but there was no burning, charring or tattooing present. The Doctor (PW-6) has opined that the shots were fired from a distance.

19. The gun shot wound upon the injured Pooran (PW-2) is on a non-vital part. It is relevant that initially the charge was framed against the appellant Jogendra Singh in this regard for the offence punishable under Section 307 read with 149 IPC, but, the Trial Court did not find said charge proved as it did not find any intention or knowledge nor the circumstance that such act as alleged to have been committed by the appellant Jogendra Singh would cause death, instead it has convicted the appellant for the offence punishable under Section 324 IPC.

20. From the sequence of events narrated by the eye-witnesses even if we take their testimony on its face value, the same does not reveal any such circumstance which could prove that the appellant Jogendra Singh was part of the common intention on the part of the three accused to kill Om Prakash who in fact was injured by the gun shot of Ram Singh and he died subsequently. In the statement of Om Prakash there is no allegation of Jogendra Singh having fired from his Tamancha upon Om Prakash. It is to be kept in mind that even after the gun shot fired by Ram Singh, Om Prakash

sat down and did not die immediately. The Investigating Officer who recorded the statement of Om Prakash has testified that injuries were not so grave as to indicate that he would die. If the intent was to kill they would have fired second time upon Om Prakash but there is no such allegation that appellant Jogendra Singh fired upon Om Prakash after Ram Singh had already fired and hit him. There is no such allegation that Jogendra Singh, in fact, fired more than once upon the injured Pooran. Om Prakash died subsequently.

21. As regards the statement of injured Om Prakash (who died subsequently) under Section 161 Cr.P.C., we have perused the statement of the appellant Jogendra Singh recorded under Section 313 Cr.P.C. and we find that he was never confronted with this statement of Om Prakash under Section 161 Cr.P.C. which has been treated as dying declaration and has been made basis for his conviction. As the appellant was never confronted with this material, therefore, it could not have been taken into consideration, but, the Trial Court has erred in ignoring this relevant aspect. In fact on a perusal of the questions referred in the statement

under Section 313 Cr.P.C. we find that these are of very general nature. Instead of referring to specific evidence such as the testimony of specific witnesses general question has been framed to the effect that there is an evidence of such and such fact thereby asking the appellant to give his version. This is not how questions are to be framed under Section 313 Cr.P.C. In any case once the statement of Om Prakash under Section 161 Cr.P.C. which has been treated to be dying declaration was never put to the accused/appellant Jogendra Singh at the stage of Section 313 Cr.P.C, then, it could not have been taken into consideration for convicting him under Section 302 read with 34 IPC.

22. Initially there were 10 accused named in the FIR, charge-sheet was also filed against them, but, ultimately 7 were acquitted and only 3 have been convicted out of which two have died and only the appellant Jogendra Singh survives.

23. In fact, Jogendra Singh was not confronted with testimony of any of the witnesses including PW-2 specifically at the stage of Section 313 Cr.P.C. Only general questions

were put which is not in terms of letter and spirit of Section 313 Cr.P.C. and law on the subject.

24. In view of the discussion already made hereinabove we are of the firm opinion that as far as murder of Om Prakash is concerned there is not enough evidence to establish beyond reasonable doubt that the appellant had the common intention of murdering him, therefore, his conviction for offence punishable under Section 302 read with 34 IPC is perverse. It is not a conviction *per se* under Section 302 IPC and there is no evidence in this regard against Jogendra Singh.

25. In view of the above discussion, the judgments relied by learned AGA in the case of ***Gurbachan Singh & Others*** (supra) and ***Goudappa and Others*** (supra) are not applicable in the facts of the present case.

26. However, as regards his conviction under Section 324 IPC, we find that the Trial Court judgment in this regard does not suffer from any error except for the fact that it has erred in convicting him under Section 324 read with 34 IPC as there is evidence of him and him alone of having fired upon Pooran

with a Tamancha resulting in hurt to the injured by means of a Tamancha, as envisaged in the said provision.

27. We accordingly uphold his conviction under Section 324 IPC, but, set aside his conviction under Section 302 read with 34 IPC. We also uphold two years rigorous imprisonment imposed by the Trial Court upon the appellant under Section 324 IPC. He shall serve out the sentence imposed for the offence punishable under Section 324 IPC unless he has already undergone the said sentence.

28. The judgment of the Trial Court as regards the appellant is set aside in so far as it convicts the appellant of the offence punishable under Section 302 read with 34 IPC. He is acquitted of the offence under Section 302 read with 34 IPC.

29. The appeal is, therefore, ***allowed*** in part.

31. The appellant is directed to file a personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of the Code of Criminal Procedure within six weeks.

32. Let the Lower Court Records along with certified copy of this judgment be sent to the trial Court and the C.J.M. concerned for necessary action.

33. A copy of this judgment shall also be sent to the appellant who is lodged in jail.

[Ajai Kumar Srivastava-I, J.] [Rajan Roy, J.]

Order Date :- 25.01.2024

Santosh/-