

Court No. - 44

Case :- CRIMINAL APPEAL No. - 2459 of 1984

Appellant :- Harish Alias Harsa

Respondent :- State of U.P.

Counsel for Appellant :- Nigamendra Shukla,P.N. Mishra

Counsel for Respondent :- D G A

Hon'ble Saumitra Dayal Singh,J.

Hon'ble Anil Kumar-X,J.

1. Heard Shri Nigamendra Shukla, learned Amicus Curiae on behalf of the appellant and Shri Surendra Singh, learned AGA for the State.
2. The present appeal arises out of judgment and order dated 1.9.1984 passed by Shri B.N. Misra, Sessions Judge, Budaun in Sessions Trial No. 301 of 1983 (State vs. Haaris alias Harsa) convicting the appellant under Section 302 I.P.C. and has sentenced him to life imprisonment.
3. The appellant was enlarged on bail by this Court vide order dated 5.9.1984. Almost 41 years have passed since then. The appellant has remained on bail. Earlier, owing to his non participation in these proceedings, notices/warrants were issued against the appellant, but they had not been executed, as the appellant remained untraceable.
4. The appeal itself is 41 years old. It is almost the oldest pending with this Court. Therefore, it has been considered proper to apply the procedure available to the Court in terms of proviso to Section 387 Cr.P.C. Accordingly, the appeal has been heard with the assistance offered by the learned Amicus Curiae.

5. Prosecution story emerged on the strength of the First Information Report lodged by Shahmir Khan (PW-1 at the trial) at Police Station-Allapur, District Budaun on 16.5.1983 at about 2:15 pm, wherein, the first informant, Shahmir Khan (PW-1), reported that at about 10:30 am that day, the accused-appellant Harish alias Harsa asked his uncle Akbar Ali to supply 10 Kg melons to him, on credit. Because the deceased refused to make that supply, the appellant lost his temper and threatened him to take revenge for the same. At about 12 noon, while the deceased was working on his agricultural field, the accused-appellant arrived at the scene holding a country-made pistol and shot at the deceased. The occurrence was witnessed by Shahmir Khan (PW-1) as also Sharafat Ali (PW-3) and Sham Dayar Khan (not examined at the trial). The witnesses tried to apprehend the appellant but he fled towards the west brandishing his country made firearm. At some distance, he left his slippers and ran bare feet. Akbar Ali died on the spot. The FIR is Ex. Ka-1 at the trial.

6. Arising from that FIR, samples of blood stained and plain earth were recovered from the spot by S.I. Vijai Pal Singh (PW-4 at the trial). That Recovery Memo dated 16.5.1983 is Ex. Ka-10. Also on 16.5.1983, S.I. Vijai Pal Singh recovered slippers of the deceased near the dead body. It is Ex. Ka-11. Also on 16.5.1983, another pair of slippers of the assailant was recovered by S.I. Vijai Pal Singh from about 55 feet from the dead body. It is Ex. Ka.12 at the trial. Thereafter, also on 16.5.1983, the inquest was conducted by S.I. Vijai Pal Singh (PW-4) between 3:20 and 4:50 pm. The Inquest Report is Ex. Ka-3 at the trial.

7. The next day, on 17.5.1983, Dr. S.R. Gupta (PW-2 at the trial) conducted the autopsy examination on the dead body of the deceased. The Autopsy Report is Ex. Ka-2 at the trial. In that, the following ante mortem injuries were noted :-

"1. Multiple gun shot wound of entry in the area of 18 cm. x 21 cm. over the left side of chest upto right border of sternum, and left side of abdomen, 3.5 cm. below left nipple and 5.5 cm. above umbilicus, each wound measuring 0.25 cm. x 0.25 cm. x cavity deep, some are skin deep. No blackening and tatooing present. Wound directing inward upward left to right.

2. Multiple gun shot wound of entry in an aron of 17 cm. x 5 cm. over the ulnar border and dorsal surface of left fore arm 4 cm. below elbow and 6 cm. above wrist. Each wound measuring 0.25 cm. x 0.25 cm. x muscle deep. No blackening & tatooing seen.

3. Multiple gun shot wound of entry (6) in number over left upper arm front aspect in an area of 8 cm. x 5 cm. x 5 cm. above elbow, each wound measuring 0.25 cm. x 0.25 cm. x muscle deep. No blackening and tatooing seen. On opening clotted blood was found present in an area of 8 cm. x 5 cm. x 5 cm. above elbow. Bach would measuring 0.25 cm. x 0.25 cm. x muscle deep. No blackening and tatooing was seen. On opening clotted blood was found present in the muscle under neath the above injuries. Pericardial cavity perforated. Heart perforated. 2 oz. clotted blood was present in the pericardial cavity. Left lung lacerated and cletted blood was present in the left pleural cavity. Peritoneal cavity perforated. Liver, stomach, spleen, left kidney, Lacerated."

8. Upon completion of the investigation, the Investigation Officer, S.I. Vijai Pal Singh (PW-4) submitted charge-sheet. Upon the case being committed for trial, the appellant pleaded not guilty to the following charge framed against him:-

"That you on 16.5.83 at about 12 noon at the out-shirts of village Kakraia P.S. Allapur, district Budaun, in the field of Qudrat Ali Khan did commit murder by intentionally and knowingly causing the death of Akbar Ali by a tanancha fire and you thereby committed an offence punishable u/s 302 1.P.C. and within the cognizance of this Court of Session."

9. At the trial, besides the above documentary evidence, the prosecution relied on five witnesses. In that, the first informant Shahmir Khan was examined as PW-1. Also Sharafat Ali was examined as PW-3. By way of formal witness, Dr. S.R. Gupta was examined as PW-2. Investigation Officer, S.I. Vijai Pal Singh was examined as PW-4 and Constable Rakesh Pal Singh was examined as PW-5 to prove the registration of the case and corresponding GD entry.

10. Shahmir Khan (PW-1) proved the prosecution story as narrated in the FIR. Further, he stated that after the firearm had been shot at the deceased, Sharafat Ali and Sham Dayar Khan arrived on the spot. They along with Shahmir Khan (PW-1) tried to apprehend the appellant but he fled towards the west. Leaving his father Sham Dayar Khan near the dead body, he went to the Police Station Allapur where he reached at around 2:15 pm and got the FIR recorded on his oral dictation. He proved the FIR.

11. Sharafat Ali (PW-3) proved that the occurrence was caused at around 12 noon, while he was attending to his sugar-cane field. As he neared the agricultural field of Qudrat Ali, he saw the deceased Akbar Ali and Shahmir Khan (PW-1) approaching from the south. The appellant Harish @ Harsa was approaching from the north. At that stage, he did not notice if the appellant was holding anything in his hand. When the appellant was about 17-18 paces from the deceased, he shot at him. Before firing that shot, the appellant uttered words to the effect that he was shooting at the deceased to teach him a lesson for refusing to supply melons on credit. He too stated that the appellant fled as the witnesses tried to apprehend him and that he left

behind his pair of slippers. The deceased died on the spot. Leaving Sham Dayar Khan with the dead body, he went with Shahmir Khan (PW-1) to the Police Station to lodge the police report. He proved the recovery of the slippers, preparation of Panchayatnama etc.

12. Dr. S.R. Gupta (PW-2) proved the Autopsy Report. In that, he did state, the deceased had suffered "three multiple gun shot wounds". He also proved recovery of 33 small pellets from inside the dead body of the deceased. Those were sealed in a tin container and handed over to the Constable.

13. Thereafter, Investigation Officer, S.I. Vijai Pal Singh was examined as PW-4. He proved the recoveries as also steps of investigation. Last, Constable Rakesh Pal Singh was examined as PW-5. He proved the registration of the case and the corresponding GD Entry. Thereafter, the statement of the accused-appellant was recorded under Section 313 Cr.P.C. In that, he narrated as below:-

"उत्तर - शराफत का लडका इसरार अली है उसके लडके से मेरी एक दो साल से यारी दोस्ती थी। वह मेरे साथ ताश खेला करता था। मछली मारने जाता था शराफत मुझसे कहता था कि तुम इसरार का क्यों साथ रखते हो फिर 6-7 रोज पहले शराफत ने फिर मुझसे कहा तो मैंने कहा कि तुम अपने लडके को क्यों नहीं रोकते हो। इस पर हम दोनों में गाली गलौच हुआ। इसी रंजिश से हमें झूठा फंसाया और समीर को आगे कर के रिपोर्ट लिखवा दी।"

14. No defence evidence was led. In that status of evidence, the learned lower court has convicted the appellant and sentenced him accordingly.

15. Submission of the learned Amicus Curiae on behalf of the appellant is that there is no eye witness of the occurrence. The prosecution story is wholly made up on the strength of false testimony offered by the two alleged eye witnesses, namely Shahmir Khan (PW-1) and Sharafat Ali Khan (PW-3).

Neither the first informant Shahmir Khan (PW-1) was aware of the location of the agricultural field of the deceased nor he had any knowledge about the same. Arising from criminal history of the deceased, as was clearly suggested and established during the cross-examination of Shahmir Khan (PW-1) as also from quarrel, that had been witnessed between the deceased and the accused-appellant about 6-7 days prior to the occurrence, the present appellant has been falsely implicated.

16. Complete lack of motive has been cited. Prior to the occurrence appellant had never purchased melons from the deceased. In that circumstance, merely because it is narrated that the deceased refused to supply 10 kg melons to the appellant on credit, no motive could arise to kill the deceased.

17. The falsity of the prosecution story is clearly established from the fact that the medical evidence completely contradicts the ocular account. While ocular evidence only proved a single gun/firearm and completely negated second or third firearm being shot at the deceased, the medical evidence clearly proves that there are three multiple gun shot wounds on three different body parts of the deceased-one that extended from left side of the chest towards the umbilicus, second slightly to the right; second on the left fore arm and, third on the left upper arm. In all 34 small pellets were recovered. Neither the prosecution has claimed three firearm injuries being caused nor it has explained how firearm injuries may have been caused on three distinct body parts of the deceased from such close range of about 5-6

feet. Reliance has been placed on the decision of the Supreme Court in

Gangabhavani vs. Rayapati Venkat Reddy & Ors. 2013 (15) SCC 298.

“... ”

It is a settled legal proposition that where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution case and unless it is reasonably explained may discredit the entire case of the prosecution. However, the opinion given by a medical witness need not be the last word on the subject. Such an opinion is required to be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all an opinion is what is formed in the mind of a person regarding a particular fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts, it is open to the Judge to adopt the view which is more objective or probable. Similarly, if the opinion given by one doctor is not consistent or probable, the court has no liability to go by that opinion merely because it is given by the doctor.

34. *“It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses’ account which had to be tested independently and not treated as the ‘variable’ keeping the medical evidence as the ‘constant’ ”.*

35. *Where the eyewitnesses’ account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses’ account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.”*

12. *Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence stands crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.*

18. On the other hand, learned AGA would submit, the present is a case of direct evidence. The murder has been caused in broad day light. The witnesses are wholly natural-one being the nephew of the deceased and the other a farmer who was present on his adjoining farm land. No doubt emerged during their cross-examination as may render their ocular account

improbable or doubtful. Second, it has been objected that the first informant Shahmir Khan (PW-1) was barely 15-16 years old on the date of occurrence. For reason of that young age, he may not have been able to describe with accuracy-details of ownership, exact location of the plot etc. At the same time, he made an honest statement to the court that he was not in a position to furnish answers to those questions. Therefore, no falsity may be attributed to his statements for reason of such honest stand taken. As to the occurrence, it has been submitted, all three injuries had been caused by single firearm projectile that was fired at the deceased. They pierced different body parts of the deceased. Because of the natural human body structure, those pellets hit the deceased on three different body parts, all adjoining the other while the deceased was standing. Thus, the left arm, chest and abdomen of the deceased were impaled with such pellets fired from a single projectile/cartridge. No doubt emerged during the cross-examination of Dr. S.R. Gupta (PW-2) to doubt the same.

19. Occurrence of prior dispute between the parties is a double edged weapon. Therefore, that may not create a reasonable doubt in absence of any other reasonable doubt raised by the defence. As to lack (of adequacy) of motive, it has been submitted, in a case based on direct evidence, that issue may remain non decisive or peripheral issue.

20. Having heard learned counsel for the parties and having perused the record, in the first place it is to be noted that the prosecution story is based on direct evidence. In that context of the occurrence described to have taken place at around 12 noon on 16.5.1983, the FIR was seen to have lodged

promptly at about 2:15 pm, the same day. There is no plea of ante timing of the FIR. In any case, corroboratively, recoveries, Inquest Report, autopsy examination, exist. There is no doubt that those proceedings were conducted consequent to the FIR being lodged. The time of death, as estimated by the doctor in the Autopsy Report was around 12 noon on 16.5.1983. It is corroborated by the FIR narration. Therefore, we find that the FIR is wholly prompt. It eliminates the inherent risk that FIR has been lodged by way of after thought.

21. As to ocular account, we find that the occurrence was duly proven by the first informant Shahmir Khan (PW-1) who was present at the time and place of occurrence. The issue of motive apart, he clearly disclosed that he was present with the deceased on the agricultural field to guard their melon crop, when the appellant arrived there and shot at the deceased.

22. During his cross examination, no pertinent query or line of reasoning arose to doubt his presence. Merely because he was unable to describe the ownership of the agricultural field on which the deceased had grown his melon crop and merely because the witness aged about 15-16 years was not able to describe the ownership of adjoining fields, it may not be inferred that therefore he was a planted witness. We note, the same witness did narrate that that crop had been sown by his father and the deceased and that some times his father also used to guard his crop. Further, he described that the agricultural field of the deceased was located about two fields away from the place of occurrence. He also described the size of agricultural plot of the deceased to be about 4-5 Bighas. Further, he proved that the agricultural

field of the deceased was irrigated through the bore well of one Shaukat Ali whose agricultural field was situated one field away. As to the reason for his presence, he further explained that the deceased and the witness were present on their agricultural field to remove spoilt fruits. He was also aware of the days when the crops were harvested and sold in the local market in which activity he used to participate with the deceased. Therefore, we find no reason to doubt the presence of the first informant at the place of occurrence. He come across as a natural witness who was present at the place of occurrence for reason of his participation in the agricultural activities with the deceased.

23. As to the occurrence, merely because he described that the deceased had been shot at with a country made pistol, it may not be readily inferred that therefore the firearm had been shot from very close range as may not allow for sufficient dispersal that may lead to pellets penetrating through different body parts of the deceased, namely, abdomen and his left upper limb. Suffice to note, no effective cross-examination exists to doubt that prosecution story. Though attractive argument has been made by the learned Amicus Curiae that such injuries may not have been caused by a single firearm shot, at the same time, the ocular witnesses did deny the defence suggestion that the occurrence had been caused from a distance of 12 paces. First, a simple villager such as Shahmir Khan (PW-1) or for that matter any witness of such traumatic occurrence may never be able to describe the exact position/distance from which the firearm may have been suddenly shot.

24. Where doctors and experts refrain from expressing opinion-as to the distance, common folk and witnesses may certainly have no ability to offer precise description of such distance. The Court will remain mindful of the status and position of the witnesses in these matters. Second, a “pace” is not a standard unit of distance. It is a commonly used expression to give a general idea of distance. It is also a perception that may vary from individual to individual. The defence did not question the witness as to how many feet would 5-6 paces may. Therefore, there is absolutely no basis to doubt the ocular version on the submission advanced that sufficient dispersal of the projectile (fired from a country made pistol), may not have been caused from a distance of 5-6 paces described by the witness. If at all the truthfulness of the prosecution witnesses is reflected in his categorical stand that neither he saw the accused load the country made pistol for the second time nor he described any other shot fired at the deceased. Projectile injuries suffered by the deceased in three distinct areas on two different body parts, does not falsify the occurrence as narrated by the ocular witnesses.

25. As to the second ocular witness Sharafat Ali (PW-3), we may agree with the learned Amicus Curiae that his version may not be accepted as an eye-witness of the occurrence inasmuch as during his examination-in-chief itself, he proved that he reached after the firearm injury had been caused. At the same time, we are not in a position to disbelieve his entire evidence, for that reason. Being located on an adjoining agricultural field, it is equally possible that the said witness reached in time to witness the appellant flee from the spot, leaving behind his slippers.

26. To the extent the ocular evidence exists and to the extent it bears a 'ring of truth', we do not find it contradicted by the medical opinion. Dr. S.R.Gupta (PW-2) (during his examination-in-chief), did not prove that the deceased had suffered three shots fired from a firearm. He only described that the deceased had suffered three multiple "gun shot wounds". We have seen the postmortem report as well. The doctor has clearly proven at the trial that he could identify three wound areas in three different regions on the dead body of the deceased-one on his left fore arm the other on his left upper arm and third on his torso slanting from his left shoulder to his umbilicus. 34 pellets were recovered from inside the body of the deceased. All came to be described as small.

27. Therefore, the projectile recovered from the dead body of the deceased is also of a single description. The total area of each wound recorded by the doctor was proven as 18 cm x 21 cm; 17 cm x 15 cm and 8 cm x 5 cm. Being on one side of the body and on area that may be described as adjoining the other, all on the upper body of the deceased, there is no inherent improbability in that nature of injuries suffered by the deceased, to disbelieve the ocular version. No effective/further cross-examination was conducted by the defence to establish through medical evidence that all three entry wounds had been caused by three different projectiles fired at the deceased, either from the same weapon or different weapon.

28. Thus, we do not find it a case where the principle laid down by the Supreme Court in **Gangabhavani (supra)** may be applied. We are not in a position to accept the submission advanced on behalf of appellant that the

medical evidence wholly contradicts the ocular version. Therefore, the ocular evidence would, to the extent it credibly narrates the occurrence, be relied and the medical evidence to the extent it corroborates and it does not contradict the ocular evidence may be seen in that regard.

29. As to lack of blackening and tattooing that may be caused if the firearm is used from a distance about 5-6 feet, is also a matter of expert opinion in individual facts. Since the prosecution is not relying and we are not confirming the conviction on the strength of exact distance from which the firearm may have been used, it may remain insignificant if not irrelevant in the context of the ocular evidence led by Shahmir Khan (PW-1). Therein he clearly described that the appellant reached the place of occurrence; drew his country made pistol at the deceased and shot at him from enough range to cause multiple firearm wounds proven by Dr. S.R.Gupta (PW-3).

30. As to lack of recovery, that too is not bounden duty of prosecution to first recover the firearm used and then seek conviction. Fortunately, that is not the law.

31. As to the criminal history of the deceased, we find that no inference is required to be drawn in face of strong ocular evidence led by the prosecution through Shahmir Khan (PW-1). What criminal history a person may have may remain a fact which may not be disputed. At the same time, it may not be cited to doubt the ocular evidence of the occurrence.

32. Last as to motive, we are equally not impressed inasmuch as in the first place, motive remains a double edged weapon and second, what may motivate an individual to commit an offence of this nature, is not measurable

on a standard scale. That issue would remain linked to the propensity of an individual and his personality and characteristic. No judgment is required on that issue, in face of ocular evidence considered by us.

33. Accordingly the appeal fails and is **dismissed**.

34. Since the appellant is absconding, let permanent warrant be issued. Learned court below is directed to pursue and ensure that the appellant is traced out and lodged in jail to serve out the remaining sentence.

35. Shri Nigamendra Shukla, learned Amicus Curiae appearing on behalf of the appellant has rendered his valuable assistance to the Court. He be paid Rs. 25,000/-, towards his fee for the able assistance provided by him in hearing of the present appeals.

36. The Trial Court's record be remitted back along with copy of this judgment.

37. Compliance report be submitted to this Court at the earliest. Office is directed to keep the compliance report on record.

Order Date :- 6.8.2025

Ujjawal

(Anil Kumar-X,J.)

(S.D. Singh,J.)