

Nirmal Kumar

Vs

State of U.P.

Criminal Appeal No. 291 of 1989

(K. Jayachandra Reddy, R. C. Patnaik JJ)

18.02.1992

JUDGMENT

1. The appellant Nirmal Kumar alias Goggy was tried along with one Shyam Lal and four others for offences punishable under Sections 148, 302 read with Section 149, 201 and 120B read with Section 302 and 449 of Indian Penal Code. The learned Second Additional Sessions Judge convicted the appellant and Shyam Lal under Section 302 read with Section 120B, I.P.C. and sentenced the appellant to be hanged till death and the other accused Shyam Lal to undergo R.I. for life and to pay a fine of Rs. 5,000/-. They were also sentenced to some amount of fine and various terms of imprisonment under other counts. Both of them preferred appeals to the High Court and a reference was also made for confirmation of the death sentence. By a common judgment the High Court confirmed the convictions and sentences awarded by the trial Court. Shyam Lal has not preferred any appeal to this Court. It is only Nirmal Kumar, the present appellant who has preferred this appeal pursuant to the special leave granted by this Court.

2. The gist of accusation against the appellant and other accused was that on the intervening night of 14th and 15th February, 1983 they committed the murder of five persons inside the family house of the deceased situated in Mohalla Acharya Tola in the town of Lakhimpur-Kheri, a district headquarter in the State of U.P. Among the five persons killed, two were children. Roop Rani, one of the deceased was aged 60 years and was in possession of some properties. The appellant is the son of Lallu Ram who was also one of the accused. Smt. Surkhawati, another accused is the daughter of Lallu Ram. Shyam Lal, one of the accused is the real brother of Lallu Ram and uncle of Nirmal Kumar. Pushpa Devi, another accused is the wife of the appellant. Sitara Devi, another accused in the case is the daughter of Ram Lal, another brother of Lallu Ram and Shyam Lal. Ram Lal died before the trial commenced. Shyam Lal and Lallu Ram had two more brothers namely Gaya Prasad and Raghbir Prasad: Gaya Prasad died long time back. Roop Rani who was one of the deceased, was the widow of Gaya Prasad. Gaya Prasad and Smt. Roop Rani had no child. The other brother Raghbir Prasad is also said to have died long back. His widow Smt. Shiv Rani and three children Naresh, Mahesh and Dinesh were living in a separate house just in front of the house where the occurrence took place. Smt. Shiv Rani appeared as a witness as P.W. 4. Another deceased Dwarika Prasad was connected with the family of Roop Rani as her cousin brother. After the death of her husband, Roop Rani, out of love and affection, brought him to live with her and also helped him financially to set up a tea shop. Because of this, accused persons who were already in possession of considerable agricultural land, had apprehension that she would give away the property to Dwarika Prasad and his family members. This is said to be the underlined motive for the commission of the offence. Both the Courts below have held that there was motive to commit the

murders. On the night of occurrence it is stated that all the five deceased persons and P.W. 3, daughter of Dwarika Prasad, aged about seven years, were sleeping in the house. A lantern was burning the accused persons are alleged to have entered into the house from the front portion and inflicted injuries on all the five deceased persons and killed them. P.W. 3 saw the occurrence in the light of the lantern. She named only three persons namely the appellant, Shyam Lal and Ram Lal before the trial Court. Chandra Shekhar, advocate, who was living in the neighbourhood, on hearing the cries, visited the place of occurrence and found five dead bodies. He went to the Police Station and gave a report to the S. H.O. who registered the case. In the report no names are mentioned. The S. H. O. Reached the scene of occurrence and according to him, he recorded the statement of P.W. 3, the child witness, held the inquest, prepared the site plan and sent the dead bodies for post-mortem. The doctor who conducted the post-mortem found incised injuries and opined that the deceased persons died due to shock and haemorrhage. The accused were arrested and according to the prosecution at the instance of Shyam Lal, the weapon was recovered. After completion of the investigation the challan was filed. The prosecution examined as many as 19 witnesses and the case entirely rested on the evidence of P. W. 3. Accused pleaded not guilty and Pushpa Devi, one of the accused stated under Section 313, Cr. P.C. that dacoity was committed in that house and the sons of Shiv Rani i.e. Naresh, Mahesh and Dinesh used fire-arms and she was also received some fire-arm injuries. She was also examined by the doctor. Therefore the defence version is that some unknown persons along with Naresh, Mahesh and Dinesh used fire-arms and committed dacoity. Out of the 19 witnesses, P.W. 4 Shiv Rani is the widow of one of the brothers of Lallu Ram and she only deposed that she saw the appellant Ram Lal and Shyam Lal going towards the house. Some of the witnesses have spoken about motive part. P.W. 5 who spoke about the extra judicial confession has rightly been disbelieved by both the courts below.

3. From the above stated facts it emerges that the case entirely rests on the evidence of P.W. 3, the child witness. The learned trial Judge has administered oath to her and then he noted certain answers that have been given by her. To a question whether it is good to speak truth or lie, the witness did not give any answer. To another significant question she stated that she was living with her grandmother. The witness did not give any answer for a further question but on the persistent questioning, she came forward with an answer saying that she lived with her father. She, however, stated that lantern was burning and she was lying with her mother. The other members were also sleeping. She mentioned that Goggy, the appellant, Shyam Lal and Ram Lal had killed with sword and she identified the appellant and Shyam Lal in the Court. The learned trial Judge has noted that in spite of being asked time and again the witness did not answer but was seeing this way or the other and stood silent. In cross-examination it is elicited that she does not know the relationship of many of the persons figuring in the case. Coming to the F.I.R. it is mentioned that Chandra Shekhar, advocate, P.W. 2 came to the house and saw the dead bodies. But he, who is an independent witness, did not mention names of any of the persons who committed the crime either in his deposition or in the F.I.R. He simply stated that he is a neighbour and on hearing the cries, he went to the site and saw five dead bodies. Even in his deposition he did not mention about the presence of P.W. 3 nor about P.W. 3 having told him any names. The learned Judges of the High Court have bestowed considerable length of discussion on the question of law namely putting preliminary questions to a child witness and whether she was in a position to answer the same and whether an oath could be administered to her. We do not wish to go into those questions because we are satisfied that the evidence of P.W. 3 has not been properly appreciated by the Courts below. Both the Courts below have simply noted that she was present in the house and that some contradictions in her statement are not material. But we find, to a certain extent, many material infirmities in the evidence of P.W. 3. We find several contradictions in the evidence of P.W. 3 which are also material. Regarding the

lantern burning she has not stated before the police. It is elicited from the evidence of P.W. 19 the S.H.O. that P.W. 3 did not mention the names of Shyam Lal and Ram Lal. But P.W. 3 no doubt in the crossexamination says that she mentioned those names also.

4. The learned counsel for the State submits that the child must have been under shock and she might not have remembered all these names and her presence at the spot is not material. In a number of cases it has been observed that the evidence of child should be examined cautiously and courts should find some corroboration. The prosecution relied upon the evidence of P.W. 5 who spoke about the extra judicial confession but his evidence as rightly been disbelieved by both the Courts below. The only other corroborating piece of evidence is the recovery of weapon from Shyam Lal but such a recovery in a case of this nature would not be of much consequence. In the circumstances we are constrained to hold that the prosecution evidence is wholly insufficient and therefore benefit of reasonable doubt goes to the appellant. Though Shyam Lal is not before us but this finding should also apply to his case.

5. It is unfortunate that brutal murders are going unpunished. The gravity of the offence as such cannot in any way be a circumstance that can tilt when the prosecution evidence itself is not acceptable.

6. In the result we set aside the convictions and sentences awarded to the appellant as well as to Shyam Lal. Both of them shall be set at liberty forthwith. The appeal is accordingly allowed.

Appeal allowed.

</html