

Nawab Ali Jhinu and another

Vs

State of U.P.

Criminal Appeals Nos. 134 with 279 of 1983

(K. Jayachandra Reddy, N. Venkatachala JJ)

01.12.1993

JUDGMENT

1. Heard learned Counsel for the parties.

2. Both these appeals are filed against the common judgment of the High Court of Allahabad. Nawab Ali (original accused No. 2) is the appellant in the Criminal Appeal No. 134 of 1983 and Jhinu and Tajammul (original accused Nos. 1 and 5) are the appellants in the other appeal. These three appellants along with two others were tried for offences punishable under Ss. 147, 148, 302, 323/149, I.P.C. The trial Court acquitted original accused Nos. 3 and 4 but convicted these three appellants under Sections 304/149, 148, 323/149, I.P.C. and sentenced each of them to undergo six years, one year and one year's R.I. respectively. The sentences were directed to run concurrently. These three convicted accused preferred an appeal to the High Court. The State also preferred an appeal against the acquittal and all the five accused of the murder charge and a criminal revision was also filed by a private party. The High Court dismissed the appeal filed by the State and also the revision petition filed by the private party. The appeal filed by the appellants in these appeals were also dismissed by the High Court. Hence, the present appeal, The prosecution case is as follows:-

3. Appellant Jhinu and Ali brothers and Tajammul is the son of Nawab Ali. They are residents of village Bhangura, P. S. Dudhra, Dist, Basti. The other two acquitted accused are also the residents of the same village. Nawab Ali had a business in Bombay, his shop was adjacent to that of Sikandar Ali the deceased in the case. There were litigations resulting in both criminal and civil cases. The deceased was a resident of village Agya, P.S. Dudhra in the Dist. of Basti which is at a distance of about 6-7 miles from village Bhangura. On 15-4-1977, the deceased was sleeping at his Khaliyan lying at a distance of about half a mile from the abadi of his village. PWs 1 and 3 who had also their wheat crops stocked in that khaliyan, were also sleeping. PW-4 was sleeping from the southern side of the khaliyan. A lantern was burning. At about 11 p.m., eight persons armed with lathis, spears and iron rod reached there and inflicted injuries on the deceased, and when PWs 1 and 3 got up and tried to intervene, they were also beaten up. Hearing of the cries, the accused ran away. The injured was taken to the Police Station Bhudra and the deceased was still conscious and in the hospital he made a report and it was treated as FIR. The deceased, died on 17-4-77 at 5.10 a.m. and an alternate FIR was issued. The post-mortem examination on the dead body of the deceased was conducted by Dr. Verma (PW-8) on 17-4-77 at 3.30 p.m. On 16-4-77 at 2.30 p.m. a dying declaration of the deceased was recorded by PW- 12 -the Magistrate. Inquest was also held. Doctor (PW-8) who conducted the post-mortem found as many as eleven injuries. On internal examination, he found blood clots over an area of 5.4 cm. under injury No. 1 and a linear fracture in the frontal bone under injury No. 1. PWs 1 and 3 were also examined by the doctor (PW-7) and he found on both of them some contusions and lacerated wounds. After completion of the investigation, charge-sheet was laid.

4. The accused when examined under S. 313, Cr. P. C. denied the offence and Nawab Ali A-2 however, admitted that there was some dispute between him and the deceased and pleaded that he was at Bombay on the date of occurrence. This plea of alibi has not been accepted by both the courts below.

5. Both the courts below relied on the dying declaration as well as the evidence of PWs 3 and 4. The Sessions Court, however, acquitted A-3 and A-4, having doubted their participation in the attack and, particularly, due to the fact that the deceased mentioned only the names of the three appellants in the dying declaration. Both the courts below also held that having regard to the nature of the injuries, the intention was not to commit murder, but only to cause an offence which is a culpable homicide. In that view, they were convicted as mentioned above.

6. Shri Kohli, learned Senior Counsel, appearing for the appellants submits that the first report alleged to have been given by the deceased was not accepted by both the courts below on the ground that the deceased at that stage would not have given such a detailed report having regard to his mental condition, and, therefore, the subsequent dying declaration recorded by the Magistrate also suffers from the same infirmity, and the same cannot be accepted. His further submission is a perusal of the dying declaration shows that the deceased has made several incorrect statements in respect of the motive and the dispute between him and Nawab Ali and that itself would show that he was not coherent and he was stating on the tutored version. His further submission is PWs 1, 3 and 4 also have fallen in line with the fabricated version set up by the prosecution in the report.

7. PW-12, the learned Magistrate has recorded the dying declaration in the form of question and answers. We find that the deceased answered the relevant question in a coherent manner. Further, the doctor also certified that he was in a conscious state and good mental condition during recording of the dying declaration. Assuming that there are certain incorrect particulars regarding the motives, that by itself, in our view, will not affect the dying declaration which had been duly recorded. As already mentioned, in the dying declaration, he mentioned only the names of three appellants. Even assuming there was some infirmity, there is ample corroboration to the dying declaration from the evidence of PWs 1, 3 and 4. Out of whom PWs 1 and 3 are the injured witnesses. The injuries on them establish that they were present at the scene of occurrence and during the course of the same transaction they received the injuries. The learned Counsel, further submits that the assailants alleged to have inflicted these injuries have been acquitted. That, by itself, cannot be a ground to reject the evidence once we accept their presence and also other persons received injuries during the course of the same transaction. However, their evidence have been used only for corroboration in die dying declaration. The names of three appellants have been mentioned in the dying declaration and to that extent the dying declaration is also ; corroborated by the evidence of PWs 1, 3 and 4. Therefore, there is ample evidence in this case establishing the guilt of the three appellants.

8. The occurrence is said to have taken place in the year 1977 and Nawab Ali is now stated to be 91 years old. He is also suffering from heart trouble. In these circumstances, while confirming the conviction under Sec. 304, Part-II I.P.C. read with 149, IONIC. we reduce the sentence to four years. The other convictions and sentences are, however, confirmed and the sentences shall run concurrently. If the appellants are on bail, they shall surrender and serve out the remaining portion of sentence. Subject to the modification, the appeals are disposed of.

Order accordingly,

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