

Kamaksha Rai and Others

Vs

State of U.P.

Criminal Appeals No. 323 of 1994 with No. 114 of 1996

(G. B. Pattanaik, N. Santosh Hegde JJ)

01.10.1999

JUDGMENT

SANTOSH HEGDE, J.:-

1. These two appeals arise out of the judgment dated 22-12-1993 delivered by the High Court of Judicature at Allahabad in Criminal Appeal No. 2803 of 1978. The appeal before the High Court of Allahabad, in turn, arose from the judgment of the first Additional Sessions Judge, Ghazipur, dated 03-10-1978 in Sessions Trial No. 102 of 1976.
2. In regard to an incident which took place in the early morning of 27-4-1975 in village Sherpur Kalan under Bhanwarkol Police Station, District Ghazipur, as many as 65 persons were tried for offences punishable under Section 302 read with Section 149, Sections 147, 364 read with Section 436 read with Section 149, Section 429 read with Section 149, Section 323 read with Section 149, Section 325 read with Section 149. Out of the said 64 accused persons, the trial court firstly convicted and sentenced A-1, A-9, A-26, A-33 and A-34 to imprisonment for life under Section 302 read with Section 149 for the murder of Radhey Shyam and Banarsi, and also convicted the above said accused persons under various other offences, particulars of which may not be relevant at this stage. Nextly, the trial court convicted and sentenced the above accused along with A-2, A-3, A-4 to A-8, A-10 to A-25, A-27 to A-32 and A-36 to undergo rigorous imprisonment (RI) for 10 years under Section 436 IPC read with Section 149 IPC for having committed arson and also sentenced them to undergo imprisonment for various other lesser offences. The sentences so awarded were directed to run concurrently.
3. These 36 accused preferred the criminal appeal referred to above to the High Court of Judicature at Allahabad and the High Court as per its judgment dated 22-12-1993 partly allowed the said appeal and held that the prosecution has not established the charge under Section 302 read with Section 149 and Section 364 read with Section 149 against the accused who were convicted under the said Sections, acquitted those appellants of the said charges but convicted all Appellants 1-36 for offences under Sections 147, 323, 325, 429 and 436 all read with Section 149 IPC, and also confirmed the sentences awarded by the trial court under Section 147, 323 read with Section 149 and Section 325 read with Section 149 IPC. The sentences awarded by the trial court under Section 429 read with Section 149 IPC in regard to these appellants were reduced to 3 years' RI and the sentence awarded by the trial court under Section 436 read with Section 149 IPC to RI for 5 years. The High Court also directed the sentences to run concurrently.
4. Being aggrieved by the judgment and conviction awarded against them, 30 out of the 36 appellants have preferred Criminal Appeal No. 323 of 1994, before this court and being aggrieved by the acquittal of the appellants of their charge against Section 302 and

connected offences referable to the first part of the incident, the state has preferred Criminal Appeal No. 114 of 1996. It transpires that either during the pendency of these appeals, the following accused have since died and their respective appeals, the following accused have since died and their respective appeals have abated in regard to: Shambhu Rai, Baliram Rai, Uma Rai, Janardan Rai, Chandrahas Rai, Harihar Rai, Abhai Rai, Chandradeo Rai, and Ayodhya Rai. Therefore, in effect, both the appeals are for and against 25 other accused persons.

5. The prosecution case, stated briefly, is that there was a continuing feud between the members of the upper caste and the Harijans of Sherpur Kalan Village within Police Station Bhawarkol Constabulary (PAC) was posted near about the village. In spite of the said security measures on 27-04-1975 at about the time of sunrise, Accused 1 to 34 forming an unlawful assembly armed with deadly weapons like spears, gandasas and lathis came to the Harijan Basti and forcibly took away Radhey Shyam, son of Muneshwar (PW-1) and Banarsi who belonged to the Harijan Community to the Khalihan of Ram Chander Rai where beneath a peepal tree the bodies of two persons named Ram Chander and Mangala Rai belonging to the upper caste were lying and belaboured the said Radhey Shyam and Banarsi mercilessly consequent to which the said two persons died on the spot. The attack on Radhey Shyam and Banarsi was witnessed by prosecution witness PWs 1,2,3 and 20. Thereafter, these 34 persons were joined by Accused 35 to 65 who together started proceeding towards the Harijan Basti. On the way, according to the prosecution, this group of upper case members was further joined by another group of nearly 500-700 people and they together indulged in assaulting the members of the Harijan basti, looting and setting ablaze the huts belonging to the members of the Harijan community. Consequently, a large number of hutments and cattle were destroyed in the fire and nearly 17 members of the Harijan basti were injured. The prosecution witness, as stated above, implicated Accused 1-34 before the trial court of having abducted Radhey Shyam and Banarsi and having accused various types of injuries on them and ultimately causing death of these 2 persons. They have implicated Accused 1-65 of having indulged in arson, causing hurt and destroying property in the Harijan basti along with another 500-700 members of the upper caste who were not brought to trial.
6. The prosecution case in regard to the murder of Radhey Shyam and Banarsi (Hereinafter referred to as "the first incident") and subsequent attack on the Harijan basti (hereinafter referred to as "the second incident") was due to a suspicion entertained by the accused in regard to the death of Ram Chander Rai and Mangla Rai which, according to the prosecution, had taken place sometime in the midnight between 26-4-1975 and 27-4-1975 at the Khalihan of Ram Chander which came to be known to the family of the said Ram Chander Rai and Mangla Rai in the early morning of 27-4-1975 and suspecting that the said murders must have been caused by deceased Radhey Shyam and Banarsi. Accused 1 - 34 took the law into their own hands and committed the murders of Radhey Shyam and Banarsi and in the company of A-35 to A-64 committed the offences alleged against them in the second incident.
7. The FIR in regard to the death of Radhey Shyam and Banarsi and subsequent attack on the Harijan basti was given by Muneshwar, PW1 by an oral complaint made to Ram Nagina Prasad Singh, PW 22 who was one of the investigating officers in the case. In the said FIR, PW 1 has named A-1 to A-36 along with 400-600 unnamed persons as members of the mob which committed the murder of Radhey Shyam and Banarsi and the subsequent attack on the Harijan basti. After investigation, the prosecution, as stated above challenged A-1 to A-34 for offences punishable under Section 147, 148, 364, 149, 302 and 149 and further

challenged Accused 1-65 for offences under Section 147, 323m, 436, 429, 323 and 325 read with Section 149 IPC with reference to the second part of the incident, namely, arson and attack on the Harijan basti. During the trial, the prosecution relied on the direct evidence of PWs 1,2,3 ad 20 with regard to the first incident and PWs 1 to 21 in regard to the second incident. During the trial, one of the accused by the name of Baikunth Upadhyaya died hence the trial proceeded against Accused 1-64 only.

8. The trial court accepted the evidence of the prosecution with reference to the first incident as against A-1, A-9, A-26, A-33, A_34 and convicted them of offence under Section 302 read with Section 149 along with lesser offences for their role in the murders of Radhey Shyam and Banarsi and accepted the case of the prosecution as against A-1 to A-34 in regard to their role with reference to the attack on the Harijan basti and sentenced them accordingly while acquitting the other accused persons.
9. In appeal, the High Court on reappraisal of the evidence did not accept the case of the prosecution in regard to the murders of Radhey Shyam and Banarsi as put forth by the prosecution and relying upon the material available on record, came to the conclusion that the death of Ram Chander Rai, Mangla Rai, Radhey Shyam, and Banarsi occurred at or about the same time as a sequel to the attack on each other by the two groups. According to known to the members of the upper caste on hearing the cries of one Jagdish Rai who was injured in the said attack and in the consequent attack and counter-attack, Ram, Chander Rai, Mangla Rai Radhey Shyam and Banarsi succumbed to the injuries suffered by them therefore, the High Court considered to the injuries suffered by them. Therefore, the High Court considered it not safe to rely upon the prosecution case with reference to the first incident and acquitted accused A-1, A-9, A-26, A-33 and A-34 of the charge of murder for which the court had awarded life imprisonment to these accused persons and acquitted them of other incidental charges found against these accused by the trial court, but accepted the case of the prosecution in regard to the second incident relying upon the evidence of the prosecution in regard to the second incident relying upon the evidence of the prosecution, confirmed the sentence awarded by the trial court on A-1 to A-36 on account of the second incident.
10. In Criminal Appeal No. 323 of 1994, Mr. U.R. Lalit, learned Senior Counsel appearing for the appellants has vehemently contended that the trial court as well as the appellate court have seriously in relying upon the partisan evidence produced by the prosecution and since there are serious omissions and contradictions in regard to the presence and participation of the various accused persons in the alleged incident and in view of the finding of the High Court that the genesis of the attack as put forth by the prosecution being doubtful, it is not safe to rely upon the prosecution evidence to base a conviction. He contended that the investigating agency was unable to implicate with certainty any of the assailants either in the incident leading to the death of Radhey Shyam and Banarsi or in the subsequent attack on the Harijan basti. Basing his argument on the evidence of PW 212 he pointed out that at the relevant time the government order mandated the investigating agency that only those cases in which the accused were "SAVARNAZ" and not "HARIJANS" were to be investigated. The police without investigating the murders of Ram Chander Rai and Mangla Rai proceeded against and challenged a large number of members of the upper caste by falsely implicating them in this case. At any rate, he contended that since in the incidents alleged, there was involvement of a large number of people convicted with the aid Section 149 IPC this Court should be extra cautious in scrutinising the prosecution evidence. He placed reliance on the decisions of this Court in the cases of Masalti Vs. State of U.P. and Binay Kumar Singh Vs. State of Bihar to support his contention that is cases where a large number

of people are accused of committing a crime and are said to be charges with the aid of Section 149 IPC, the Court should be extremely careful in scrutinising the evidence and prudence demands in such cases that at least the prosecution case should be sustained only if it is supported by two, three or more witnesses who give a consistent account of the incident. According to Mr. Lalit, in the instant case if the prosecution evidence is to be scrutinised on the basis of the said yardstick, hardly any of the appellants could be convicted of the offences they are now sentenced to. On behalf of the state, in support of its appeal, it is contended by Mr. A. A. Khan, learned counsel that the High Court seriously erred in acquitting the five accused who were convicted by the trial court on the charge of murder of Radhey Shyam and Banarsi. He contended that the reasoning of the High Court in allowing the appeal of these appellants, to the extent it has done, is contrary to the evidence on record and the conclusion of the High Court in regard to the genesis of the incident is not based on any material, hence, the same is liable to be set aside. He, however, strongly supported the finding of both the courts below in regard to the conviction of the accused with reference to the second incident.

11. He also challenged the decision of the High Court reducing the sentence awarded to those convicted under Section 429/149 and 436/149 IPC as being without any basis.
12. We will first take up the appeal preferred by the convicted accused i.e., Criminal Appeal No. 323 of 1994 for consideration. As stated above, in this appeal the surviving appellants have challenged their conviction as upheld by the High Court for offences punishable under Section 14, 323, 325, 429 and 436 all read with Section 149 IPC. It is also noted that the High Court while confirming the above conviction and sentence, reduced the sentence awarded under Section 429 read with Section 149 IPC to 3 years RI and under Section 436 read with Section 149 to 5 years' RI while maintaining the sentence awarded by the trial court in regard to the other mentioned offences.
13. The incident in regard to which the High Court confirmed the conviction on the appellants pertains to the attack on the Harijan basti which we have earlier termed as the second incident in which as many as 17 members of the Harijan community sustained injuries of varied nature and nearly as many heads of cattle were gutted in fire so also a large number of huts belonging to the members of this community were set on fire. This incident, according to the prosecution, took place immediately after the assault on deceased Radhey Shyam and Banarsi for which crime the prosecution has held the original accused A-1 to A-34 reasonable. It is the prosecution case that after the first incident at the behest of A-35, who is the Pradhan of the village, A-36 to A-64 joined hands with the original group comprising A-1 to A-34 and all of them proceeded towards the Harijan basti. On the way, they were joined by another 500-600 people; all belonging to the members of the upper caste and together they committed the offence which forms part of the second incident. The prosecution relies upon the evidence of PWs 1 to 21 to establish its case against the accused persons who were brought to trial with reference to the charges referable to the second incident. In regard to this incident, there were 65 persons originally named arrayed as accused persons out of which, as stated above, Baikunth Upadhyaya died. The trial court on consideration of the prosecution case, considered it unsafe to accept the evidence against A-37 to A-64 and accordingly acquitted them of the charges leveled against them. To this extent the prosecution has failed to establish its case in regard to the second incident even before the trial court. From the narration of the second incident by the prosecution, it is seen that a large number of people exceeding 500 in number were alleged to have taken part in this incident. Nearly 22 prosecution witnesses have supported this part of the prosecution case in which the courts below delivered the case of the prosecution in regard to only 36 of them,

who have been convicted for their part in the second incident. Taking into consideration the nature of attack and the possibility or otherwise of the identification of these accused persons by the prosecution witness and bearing in mind the principles laid down by this Court in the above - cited judgments, we are of the opinion that it is not safe to rely on the evidence of witnesses who speak generally and in an omnibus way without specific reference to the identity of the individuals and their specific overt act in regard to the incident that took place in the Harijan basti. In view of the large number of accused implicated in this incident and simultaneous nature of attack as stated by the prosecution witnesses, we think as a rule of prudence it is necessary to fix a minimum number of witnesses needed to accept the prosecution case to base a conviction. We have carefully perused the evidence on record and heard the counsel on this point and having bestowed our thoughts, we are of the opinion that PWs 1 to 3 in this case have implicated all the appellants uniformly of the offence charges against them. While their presence at the place of incident cannot be doubted, we find it difficult to accept the fact that these 3 witnesses could have noticed and identified all the accused numbering 64 out of nearly 500 participants in the second incident. The trial court has not accepted their evidence in regard to the involvement of A-37 to A-64; may be on the limited ground that their names were not mentioned in the FIR but the fact remains that these 3 witnesses have improved their case by implicating that many innocent people in their oral evidence. Therefore we are of the considered opinion that conviction cannot be based on the evidence of PWs 1 to 3 only in this case, and we have to look for corroboration of the evidence of PWs 1 to 3 (which we treat as anchor evidence) from witnesses who have guidance to the actual fact of the presence of the named appellants and of the overt act of those appellants in the second incident. For this purpose, we are of the opinion that if the evidence of PWs 1 to 3 is supported/ corroborated by one or more reliable witnesses, then a conviction can be safely based on the appellants in regard to the charge of which they stand convicted.

14. For the purpose of scrutinising the evidence against each of the accused with the aid of the above yardstick, we requested the counsel for the appellant to prepare a chart giving the particulars of the witnesses who have spoken with reference to the particular appellant, identifying his and specifying the overt act of that appellant. Learned counsel has prepared such a chart a copy of which was given to the learned counsel for the learned counsel for the State who was given time to cross-check the particulars given in the chart. After cross-checking the same with reference to the evidence available on record, the learned counsel for the State has agreed that the particulars given in the chart are correct.
15. In view of the fact that there is considerable confusion in the ranking assigned to the appellants /accused persons in the trial court, High Court and in this court, we consider it necessary to refer to the appellants by their names while discussing the merits of their individual cases in these appeals. The evidence of PWs 1 to 3 has not found any corroboration in regard to the appellants Basan Rai, son of Sukha Rao, Shri Rai, son of Sheomuni Rai. Singhasan Rai, Son of Brahmdeo Rao, Uma Rai, Son of Lodhi Rai, Lallu @ Lallu Rai, Son of Radhika Rai, Nand Kishore Rai, Son of Lakshmi Rai, Bindhyachal Rai, Son of Nandan Rai, Munni Lal Rai, Son of Radhika Rai, Chhabinath Rai, Son, of Bipin Bihari Rai, and Mahendra Rai, Son of Ram Naresh Rai. On the basis of the reasoning adopted by us herein above as against these appellants, it cannot be said that the prosecution has established its case beyond reasonable doubt as against these appellants.
16. With reference to Deena Rai, son of Brahmdeo Rai, apart from the evidence of PWs 1-3, Pw-5 has spoken about their presence at the time of the second incident and he has stated that these three persons were responsible for setting his house on fire. In cross- examination

apart from establishing the fact that his evidence was recorded 3 days after the incident which in a case of this nature we find not very unnatural we are of the opinion that there is corroboration in regard to the evidence of PWs 1-3 in regard to the participation of this accused person. In regard to Tarkeshwar Rai, son of Ram Prakash Rai, in addition to the evidence of PWs 1-3 there is the evidence of PWs. 10-12, 14 and 15 which corroborates the evidence of PWs 1-3, hence, we do not find any difficulty in coming to the conclusion that the prosecution has established the charges levelled against this accused with reference to the second incident.

17. In regard to Sivil Rai, Son of Baijnath Rai, apart from the anchor evidence, there is the evidence of PW-8. He has stated in his evidence that Sivil Rai was one of the persons who was present at the time of attack and had set his house ablaze. We find in the cross-examination nothing material has been elicited to disbelieve the evidence of this witness. Therefore, we find corroboration in the prosecution case in support of the evidence of PWs. 1 - 3 find this person also guilty of his participation in the second incident.
18. In regard to Kamaksha Rai, son of Chengan Rai apart from the anchor evidence, there is the evidence of PWs 11, 15 and 16 corroborating the same. Therefore, we do not find any difficulty in coming to the conclusion that this accused was present and had taken part in the second incident. The same can be said of Raja Ram Rai, son of Chengan Rai whose presence and participation is corroborated in support of the anchor evidence by PWs 10 and 16. Tarkeshwar Rai, son of Suraj Rai's participation in the second incident is spoken to by the anchor witness whose evidence is supported by the evidence of PW 10. She has in specific terms stated that two Tarkeshwar Rais i.e. Tarkeshwar Rai, son of Ram Raksh Rai and Junior Tarkeshwar Rai meaning thereby both the Tarkeshwars had set her house afire consequent to which she lost her house and two domestic animals. In her cross-examination, we find that the defence has not been able to establish any contradiction or doubt. Therefore, we have no hesitation in accepting her evidence. With reference to Harihar Rai, son of Dubari Lal apart from the anchor evidence PW6 has spoken in specific terms with reference to the act of this accused having set his house on fire. Therefore on finding corroboration, we find him guilty of his presence and participation in the second incident. In regard to Rama Rai, son of Kali Rai - the case against him is sought to be corroborated through the evidence of PW6 whose evidence we have already accepted with reference to Harihar Rai and this corroborating witness has also named this accused specifically with particulars of the overt act of burning his house. Therefore, his case stands on the same footing as that of Harihar Rai and we accept the prosecution case against this accused in regard to his presence and participation in the second incident.
19. In regard to Mukteshwar Upadhyaya, son of Rama Upadhyaya, PW5 apart from the anchor witnesses speaks about the presence of this accused at the time of the second incident. We have accepted the evidence of this witness with reference to Deena Rai above. On the same basis we find that this witness PW5 corroborates the evidence of the anchor witness in regard to this appellant, hence, we find him also guilty of the presence and participation in the second incident.
20. In regard to Sheomuni Rai, son of Chengan Rai, PWs 1 to 3's evidence is supported by the evidence of PW 8. Though we have accepted the evidence of PW 8 with reference to the participation of Sivil Rai, son of Baijnath Rai, we find it difficult to accept the evidence of this witness (PW8) with reference to this accused since there seems to be some confusion in regard to the name of this accused in the evidence of this witness as there is no witness to corroborate the evidence of the anchor witnesses. Apart from this witness, we consider it unsafe to rely upon the evidence of this witness. Hence, this accused is entitled to the benefit

of doubt.

21. Coming to appeal of the State wherein the State has challenged the acquittal of those 5 persons of the charges under Section 302 read with Section 149, Section 364 read with Section 149 and further reducing the sentence of all the respondents for the offences under Sections 429/149 and 436 / 149 IPC from 5 years to 3 years' RI and from 10 years to 5 years' RI, we have heard learned counsel for the State as well as for the respondents. We find the reasoning of the High Court that the incident leading to the murders of Radhey Shyam and Banarsi has not been established by the prosecution, as alleged by it. From the evidence on record the prosecution has failed to explain the circumstances in which Ram Chander Rai and Mangla Rai came to be murdered. The motive attributed in the present case having a direct bearing on the incident which led to the death of Ram Chander Rai and Mangla Rai, it cannot be said that the genesis of the attack has been properly brought forth in the prosecution case. The view taken by the High Court that both the sets of murder might have been the result of a fight between two groups of persons in the village which the investigating agency has not been able to unearth and present to the Court in its true perspective / sequence, cannot be said to be perverse and unreasonable so as to call for interference by this Court in these appeals. We are also of the opinion that taking into consideration all facts and circumstances of the case, the decision of the High Court to alter the sentence awarded by the trial court by reducing the same from 5 years to 3 years' RI for offence under Section 429 read with Section 149 and from 10 years to 5 years' RI for offence under Section 436 read with Section 149 IPC respectively cannot also be said to be erroneous and unreasonable so as to call for our interference. In the said view of the matter, the appeal of the State fails and is hereby dismissed.
22. Criminal Appeal No. 323 of 1994 is allowed in regard to appellants Basan Rai, son of Sukha Rai, Shri Rai, son of Sheomuni Rai, Singhasan Rai, son of Brahmdeo Rai, Uma Rai, son of Badan Rai, Sita Rai, son of Ramadeo Rai, Gurudatt Rai, son of Lodhi Rai, Lallu @ Lallu Rai, son of Radhika Rai, Nand Kishore Rai, son of Lakshmi Rai, Bindhyachal Rai, son of Nandan Rai, Munni Lal Rai, son of Radhika Rai, Chhabinath Rai, son of Bipin Bihari Rai and Mahendra Rai, son of Ram Naresh Rai and Sheomuni Rai, son of Chengan Rai. The conviction and sentence imposed by the trial court, as modified by the trial court, as modified by the High Court is set aside. If they are on bail, their bail bonds shall stand cancelled.
23. The appeal of accused Deena Rai, son of Brahmdeo Rai, Tarkeshwar Rai, son of Ram Raksh, Kamaksha Rai, son of Chengan Rai, Raja Ram Rai, son of Chengan Rai, Tarkeshwar Rai, son of Suraj Rai, Harihar Rai, son of Dubari Lal, Rama Rai, son of Kali Rai, son of Paramhans Rai, Uma Shankar Rai @ Bombay Rai, son of Sheomuni Rai, Kashi Rai, son of Bhardul Rai and Sudarshan Rai, son of Dubari Rai is dismissed, upholding their conviction as awarded by the trial court and confirmed and modified by the High Court. If they are on bail, they are directed to serve out the remainder of their sentences. For the reasons stated above, Criminal Appeal No. 114 of 1996 is also dismissed.