SUPREME COURT OF INDIA

Kanwarlal

Vs.

State of M.P.

Crl.A.No.107-109 of 2002

(Doraiswamy Raju and Shivaraj V. Patil JJ.)

10.09.2002

JUDGMENT

Shivaraj V. Patil J.

1. The appellants and six other co-accused were tried by Sessions Court for offences under Sections 148, 302, in the alternative under Sections 302, 148, 307 or 307/148, 323 or 323/149 IPC and the appellant No. 1 was also charged under Sections 25 and 27 of the Arms Act. After trial, death sentence was awarded to the appellant no. 1 finding him guilty of various offences and the remaining seven accused were sentenced to imprisonment for life besides imposing fine and imprisonment for other offences. On appeal, by the impugned judgment and order, the High Court acquitted the other six co-accused; the appellants were held guilty only under Section 302 IPC and were sentenced to imprisonment for life and death sentence passed against the appellant No. 1 was set aside. Aggrieved by their conviction and sentence passed by the High Court, the appellants are before this Court in these appeals.

2. In short and substance, the prosecution case was that on 31.5.1996 at about 7.30 A.M., deceased Dwarka accompanied by Prakash, Jeevan and Shambhu was on his way to Ramganj Mandi. When they were in the playground of Higher Secondary School of village Sandhara, the accused persons surrounded the deceased Dwarka and started assaulting him by means of lathi, ballam, axe etc. Shambhu (PW-12) came home and informed the family members about the occurrence; thereupon deceased Bheru accompanied by Kaniram, Nandlal, Jalam and Jaikishan reached the spot and when they tried to save Dwarka, they were also assaulted by the accused. Appellant No. 1 Kanwarlal allegedly fired gun shot at Bheru causing his instantaneous death. Kaniram lodged First Information Report on the same day at 9.30 A.M. at P.S. Bhanpur., Dwarka and other injured persons were sent to Civil Hospital, Bhanpura for treatment. Dwarka was sent to Civil Hospital, Mandsaur as his condition was serious but he died on the way. The police after investigation filed the charge-sheet. As already noticed above, the trial court after considering and appreciating the evidence on record held that the prosecution proved its case against all the eight accused persons and consequently they were convicted and sentenced. However, the High Court in appeal, acquitted six other co-accused and convicted and sentenced the appellants as already noticed above.

3. The learned counsel for the appellants urged that the impugned judgment and order cannot be sustained for the reasons more than one. There were inherent contradictions in medical evidence as recorded by Dr. Pramila Nahar (PW-18) and Dr. A.K. Gulati (PW-21); five prosecution witnesses have given different versions and mentioned different arms being used by the appellant No. 2; hence their evidence ought not to have been believed; the High Court having held that Kaniram (PW-1) and Jalam (PW-7) had no occasion to see as to who in fact caused injury to Dwarka and that there was no corroboration to their testimony, committed an error in holding appellant no. 2 guilty of offence under Section 302; despite recording a finding that the accused suffered injuries and it was some kind of free fight between two parties and no role was assigned to a particular accused and having held that Section 149 IPC was not attracted, the High Court erred in holding appellant No. 2 solely guilty for causing the death of Dwarka; since Dwarka died as a result of head injury, the High Court was not justified in convicting the appellant no. 2 on the basis of evidence of PW-10 and PW-12 inasmuch as PW-10 has stated in his deposition that the appellants were carrying rifles while PW-12 has stated that Kanwarlal had pierced the shoulder of Dwarka with spear and Laxminarayan had fired at Kaniram. The learned counsel also contended that the High Court committed a manifest error in convicting the appellant No. 2 on the basis of the evidence of witnesses having disbelieved their evidence with regard to the incident in which Dwarka was killed.

4. The learned counsel representing the State made submissions in support of the impugned judgment and order. According to her, the evidence against the appellant no. 1 is consistent as to firing gun shot at Bheru causing his instantaneous death; the contradictions pointed out on behalf of the appellants in the evidence of the prosecution witnesses were not material. According to the learned counsel, taking an overall view looking to the material placed on record, the impugned judgment and order is quite justified.

5. We have carefully considered the respective submissions of the learned counsel for the parties.

6. As can be seen from the impugned judgment, the High Court noticed that there was some discrepancy in the medical evidence but without examining further, the High Court held that the deceased Dwarka had only one head injury and in fact no fire arm injury was suffered by Dwarka; the incident had taken place in two parts; in the earlier part, Dwarka was assaulted, in the later part, Bheru was killed; the High court disbelieved the statements of PWs 1, 6 and 7 as to the assault on Dwarka but on the basis of evidence of PWs 10 and 12 found the appellant No.1 guilty having held that there was an attempt on the part of these witnesses to implicate majority of the accused falsely; these two witnesses testified that the appellant No. 2 and other accused assaulted the deceased Dwarka by means of lathis, farsis and ballams and PW-12 further stated that the appellant no. 2 gave lathi blows to the deceased. However, the medical evidence revealed that deceased Dwarka had no injury caused by cutting or pointed weapons like farsis and ballams. It may also be added that PW-12 was declared hostile in the trial court. The High Court has observed that the prosecution witnesses seem to resort to exaggeration, embellishment and padding up to support the story; the truth and

falsehood were so mixed up inextricably that it was not possible to disengage the truth from falsehood. The High Court with these observations and findings acquitted the other six co-accused but on the basis of the same evidence of the prosecution witnesses recorded conviction on the appellants. In para 13 of the impugned judgment, the High Court has observed thus:-

> "According to the learned trial judge, this accused Kanwarlal acted in a filmy style firing repeated shots at the complainant party. In fact that part of prosecution story appeared to be wholly unbelievable. Kanwarlal, it appears, only fired once at the deceased. His was a country made gun used with the help of gun powder and for every fire he was required to load the gun afresh. There was no occasion for using the gun in that manner. His was an act of plain shooting causing death of Bheru without there being any element of brutality in it."

7. The High Court has also noticed that PWs 1, 7 and 16 also received injuries in the incident. However, there was no specific evidence as to which of the accused caused these injuries; it is admitted by the witnesses that the stones were pelted from both the sides and injuries to these persons were caused by pelting of stones; it appears that there was some kind of free fight on the spot between the two parties; so unless it was shown that a particular accused caused these injuries, no one can be held responsible by taking recourse to Section 149 IPC.

8. The appellant no. 2 was held guilty principally on the basis of the evidence of PWs 10 and 12 who deposed that deceased Dwarka was assaulted by farsis and ballams. However, medical evidence shows no cut or pointed injuries. PW-1 denied even lodging of F.I.R. PWs 1, 6 and 7 stated to have reached the spot on hearing about the assault on Dwarka. It was held by the High Court that their evidence as to the assault of Dwarka could not be believed. They stated that Dwarka was assaulted by the appellant No. 2 by means of farsi but no cut injury was found on Dwarka as per medical evidence. As per the prosecution witnesses, several accused assaulted Dwarka but there was only one injury on his head. In the absence of any corroboration, the prosecution case could not be believed to hold that the appellant No. 2 was guilty for an offence under Section 302 IPC. Further, there are material contradictions in the evidence of these so-called eye-witnesses rendering the prosecution case doubtful and improbable in order to fix appellant No. 2 guilty for the offence under Section 302 IPC in relation to deceased Dwarka. The High Court having stated that there was an attempt on the part of the PWs 10 and 12 to implicate majority of the accused; that evidence of PWs 1, 6 and 7 did not inspire confidence; that there appeared to be a free fight between parties and it was not shown that a particular accused caused the injuries to have recourse to Section 149 IPC. In these circumstances, the impugned order convicting and sentencing the appellant No. 2 cannot be sustained as the High Court did not analyze and appreciate evidence objectively as it ought to be by the court of first appeal. The serious infirmities and contradictions found in the prosecution case were not duly considered. Consequently, the finding recorded by the High Court affirming the finding recorded by the trial court, in our view, is unsustainable having regard to the state of affairs found in the case.

9. Although there were serious contradictions in the evidence of the so-called eye-witnesses PWs 1, 6 and 7 in regard to the assault on deceased Bheru, one thing appears to be probable that appellant no. 1 fired a gun shot on deceased Bheru causing his instantaneous death. It is on record, as found by the High Court on the basis of evidence that there was a free fight between two parties for quite sometime and in that fight prosecution witnesses also received injuries. No offence was made out in convicting the appellants either under Section 34 or Section 149 IPC by the High Court. Under the circumstances, it appears that the appellant No. 1 fired a gun shot in a free fight suddenly under grave provocation when there was free fight between the parties for quite some time. In this situation, considering the facts and circumstances, we hold the appellant No. 1 guilty under Section 304(II) IPC instead of Section 302 IPC. We are informed that he is in custody for over six years i.e. from 4.6.1996.

In the light of what is stated above, we acquit the appellant No. 2 and convict the appellant No. 1 for an offence under Section 304(II) IPC instead of under Section 302 IPC and sentence him to imprisonment for the period already undergone. The appellants shall be released forthwith if they are not required in any other case. The appeals are ordered accordingly.