SUPREME COURT OF INDIA

Nisar Khan @ Guddu and Others

Vs

State of Uttaranchal

Criminal Appeal Nos. 137 and 138 of 2005

(H. K. Sema and Dr. Ar. Lakshmanan, JJ)

25.01.2006

JUDGMENT

H. K. SEMA J.

These two appeals are directed against a common judgment of the High Court of Uttaranchal at Nainital dated 5-8-2004 confirming the order of the trial court convicting the five appellants under Sections 149, 302/149 IPC and a fine of Rs. 10, 000/-; in default two years' RI. They were further convicted under Section 25 of the Arms Act and Section 148 IPC and ntenced to three years' RI respectively.'iid a fine amounting to Rs. 1, 000/-; in .efault one year's RI. It was further directed; hat all the sentences would run concurrently.

2. Criminal Appeal No. 137 of 2005 has been preferred by three accused, Al-Nisar Khan alias Guddu, A-2-Gulzar Khan alias Pappu and A-3-Bhura alias Shakil. Criminal Appeal No. 138 of 2005 has been preferred by two accused, A-4-Rajesh Sharma and A-5-Navin Sharma. The trial court convicted A4-Rajesh Sharma and A5-Navin Sharma under Section 302/149 IPC and sentenced them

to death. However, on appeal the High Court set aside the death sentence imposed upon A-4 and A-5 and converted the death sentence into life imprisonment.

3. No appeal has been preferred by the State of Uttaranchal against the order of the High Court converting the death sentence of A-4 and A-5 into life imprisonment. The High Court has also acquitted all the accused of the charge under Section 25 of the Arms Act. Aggrieved thereby by the order of the High court confirming conviction recorded by the trial court the two appeals have been preferred by the five convicted accused by special leave.

4. We have heard the parties. It is contended by Mr. Jaspal Singh, learned senior counsel that no link has been established with regard to the owner of the offending Car bearing No. DL 3CB 0888 (Fiat N.E. Car) connecting the accused with the offence. He further contended that the recovery of the arms said to have been used by the accused has not been proved by the prosecution. All the three eye-witnesses who have said to have been direct witnesses of the scene of occurrence have turned hostile.

5. With regard to the Car bearing registration No. DL 3C B 0888 which was used by the accused in the course of the offence committed it has been established by the evidence of P.W.2 Mohd. Arif, He has categorically stated that all the accused named in the FIR had come to the office of the deceased Juned Alam armed with pistols/Katas entered inside and started firing indiscriminately. This statement has been corroborated by the evidence of P.W.l-Shoeb Alam and P.W.4-Naeem Babu. Therefore, there is direct evidence by he eye-witnesses. Non-recovery of the offending Car said to have been used by the accused will be no ground to disbelieve otherwise the creditworthy evidence of the prosecution witnesses.

6. Regarding the second contention that the recovery of arms has not been proved by the prosecution has also no substance. It is evidence on record that the accused were arrested on 17-12-1999 and pursuant to a disclosure statement made by them, the arms were recovered from the bank of Gaula River where these have been hidden under the sand and covered by the stones. All the arms were recovered as pointed out by each accused hidden under the stones. The High Court fell in error in holding that the recovery has not been proved as these were recovered from a place which is frequented by the public. This finding of the High Court is contrary to the evidence on record. It is now well settled principle of law that the recovery pursuant to the disclosure statement made by the accused under Section 27 of the Evidence Act is admissible in evidence. In Dhananjoy Chatterjee alias Dhana v. State of West Bangal 3, it is held that entire statement made by an accused person before the police in inadmissible in evidence being hit by Section 25 and 26 but that part of his statement which led to the discovery of the articles is clearly admissible under Section 27 of the Act. It is also held that the Court must disregard the inadmissible part of the statement and take note only of that part of his statement which distinctly relates to the discovery of the articles pursuant to the disclosure statement made by the accused. It is further held that the discovery of the fact in this connection includes the discovery of an object found, the place from which it is produced and the

knowledge of the accused as to its existence.

7. In the case of Gola Konda Venkateswara Rao v. State of A.P.[= 2003 (2) ALT 212 (SC:], this Court reiterated the view and held that, the discovery statement of an accused leading to recovery of crime articles from concealed place. Even though the discovery statement and the recovery memo did not bear the accused's signature. The fact of recovery from the well and dug out from a place which was pointed out by the appellant and, therefore, such discovery was voluntary. That the recovery was in consequence to the information given fortified and confirmed by the discovery of the wearing apparel and skeletal remains of the deceased and, therefore, the information and statement cannot be held false. In the present case on the recovery memo the signatures of all the accused have been obtained. In the case of Praveen Kumar v. State of Karnataka.] the same view has been reiterated.

8. As already noted, in the instant case the discovery of the arms was pursuant to the disclosure statement made by the accused immediately after the arrest and the offending arms were recovered at the place pointed out by each of the accused which were concealed under the sand and covered by the stones. The High Court in this regard fell in grave error by disbelieving the recovery memo solely on the ground that the place is a common place which is frequented by the public. The High Court failed to take notice that the recovery has been made from underneath the sand covered by the stones pursuant to the disclosure statement pointing out by each of the accused.

9. The other contention of Mr. Jaspal Singh that all the eye-witnesses turned hostile and the credibility of their testimonies are doubted. It is clearly apparent on the record that eye-witness P.W. 4 Naeem Babu had filed an application before the trial Magistrate (Ex.Kha-27) that he has been threatened and intimidated by the accused not to depose against them. So also P.W. 1 and P.W. 2 who eye-witnesses and supported the prosecution case consistently turned hostile. P.W. 1 and P.W. 2, direct eye-witnesses of the occurrence were examined, cross- examined and discharged on 4-1-2001. They were recalled on 7-1-2002 and re- examined by the defence on which date all of them turned hostile and resiled from the previous statement. It clearly appears that the eye-witnesses were won over by threat or intimidation after more then one year of their examination and cross-examination and ultimately when the eye-witnesses were won over by the accused they were recalled and re-examined on 7-1-2002. Even on re-examination on 7-1-2002 the eye-witnesses consistently supported the prosecution story with regard to the date and place of incident, the Car in which they came and the genesis of incident. They resiled from the previous statement only with regard to the identity of the accused. It is in evidence on record that the accused and prosecution parties are at loggerheads because of businesses rivalry and known to each other from before. Naturally, by the time the eye-witnesses were recalled, they were won over either by money, by muscle power by threats or intimidation. We are of the view that no reasonable person properly instructed in law would allow an application filed by the accused to recall the eye-witnesses after a lapse of more then one year that too after the witnesses were examined, cross-examined and discharged.

10. The other contention of Mr. Jaspal Singh is that the prosecution evidence discloses that all the accused, five in number, armed with pistol and Katas and five deceased were done to death by the gun shot. He further pointed out that in the postmortem report the deceased also suffered incised wound which cannot be caused by the gun shot injury. This contention has been examined by the High Court and repelled on the ground that it is on the evidence on record that such incised would could be caused by furniture, table and other articles lying inside the office where the murder has taken place.

Mr. Jaspal Singh contended that this view of the High Court is extraneous because the Doctor who conducted the postmortem was not confronted with this question. But from the original record we find that this question was confronted with P.W. 3 Doctor - R.A. Kedia. The Doctor-P.W. 3, in his cross-examination categorically stated that such incised wound could be caused if a table is fixed with nail and other steel material inside the office. From the postmortem report it also clearly appears that the deceased died of gun shot injury.

11. ln the facts and circumstances of this case as stated above we do not find any infirmities in the well reasoned concurrent finding recorded by the two courts below, These appeals, being devoid of merit, are accordingly dismissed.