SUPREME COURT OF INDIA

Dahari

Vs.

State of U.P.

Crl.A.No.1253 of 2008

(Dr. B.S. Chauhan and Fakkir Mohamed Ibrahim Kalifulla JJ.)

11.10.2012

JUDGMENT

Dr. B.S. CHAUHAN, J.

1. This appeal has been preferred against the judgment and order dated 27.4.2007 in Criminal Appeal No. 3990 of 2005 passed by the High Court of Judicature at Allahabad, partly allowing the appeal against the judgment and order dated 7.9.2005 passed by the Sessions Court, Azamgarh, in Sessions Trial No. 215 of 1991, convicting the appellants and the co-accused under Sections 302, 149 and 148 of Indian Penal Code, 1860 (hereinafter referred to as the `IPC') and sentencing them to undergo rigorous imprisonment for life, and also one year RI, under Section 148 IPC respectively and further, to pay a fine of Rs.10,000/- on each count, and in default of such payment, to further undergo a term of four months RI.

2. The facts and circumstances giving rise to this appeal are as follows:

> A. On 7.9.1990, Tej Bahadur (deceased) was travelling on a motor bike alongwith his friend Ashok at 9.00 a.m. and while doing so, he was followed by his two brothers, namely, Man Bahadur and Raj Bahadur who were both on a moped in the village of Kiratpur, district Azamgarh. The deceased was riding the motor cycle, while Ashok was the pillion rider. When they left the village, they saw the appellants and the other accused come out of a sugarcane field, armed with country made pistols with which they fired at

the deceased, killing him instantaneously. After this, they immediately ran away.

B. The incident was witnessed by one Rajesh Singh (PW.3) and also Shashi Bhushan (PW.5), alongwith some other persons. Man Bahadur (PW.1) and Raj Bahadur (PW.2) shifted the dead body of the deceased and laid it near a Mango grove, beside the road.

C. Man Bahadur (PW.1) then lodged an FIR at 10.05 a.m. at a police station which was at a distance of about 12 K.M. from the place of occurrence of the incident. Mr. Sarvdev Singh (PW.4), I.O. thereafter began investigation. He came to the said spot, recovered the dead body, the cartridges and pellets, blood stained earth etc. from the aforementioned place of occurrence and prepared the panchnama. The I.O. then also recorded the statement of witnesses and after concluding the said investigation, submitted a charge sheet against 7 accused persons.

D. The learned trial Court, after holding trial, vide judgment and order dated 7.9.2005 convicted and sentenced all the seven accused persons, as has been stated hereinabove.

E. Aggrieved, all seven accused persons preferred Criminal Appeal No. 3990 of 2005 before the High Court, and by impugned judgment and order of the High Court, dated 27.4.2007, the conviction and sentence of the appellants was maintained. However, three of the convicts namely, Bane, Patiram and Phool Chand were acquitted of all charges. Hence, this appeal.

3. Shri S.R. Singh, learned senior counsel appearing for the appellants submitted that the High Court committed an error by convicting the appellants under Sections 302, 149 and 148 IPC, as after the acquittal of three persons among the accused, the total number of accused in the said case, are only four. Therefore, the provisions of Section 149 IPC would no longer be attracted. Moreover, the prosecution withheld its most material witness, that is, Ashok, the pillion rider of the motorcycle ridden by the deceased, Tej Bahadur and no explanation whatsoever was furnished, by the prosecution for his non- examination. Furthermore, it was not possible to inflict upon the deceased, the said gun shot injuries in the presence of a pillion rider on the motor bike. Shashi Bhushan (PW.5), a prime witness to the incident, turned hostile and did not support the case of the prosecution. Man Bahadur (PW.1) and Raj Bahadur (PW.2) are the real

brothers of the deceased and therefore, their testimony should not be believed, as they are no doubt, interested witnesses. The evidence on record is insufficient to convict the said appellants. In view of the fact that the High Court acquitted three among the accused persons, dis- believing the testimony of the witnesses, there is no justification for the Court to convict the said appellants herein. Thus, the appeal deserves to be allowed.

4. On the contrary, Shri Pramod Swarup, learned senior counsel appearing for the State vehemently opposed the appeal, contending that the law does not require one to discard the testimony of witnesses who are closely related to the deceased/victim. Their evidence must in fact, be examined with due care and caution. The appellants must not be allowed to take the benefit of any technicalities. In case the High Court acquitted the three accused, it ought to have convicted the said appellants with the aid of Section 34 IPC. The appeal therefore, lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. In the post-mortem report, the following injuries were found on the person of the deceased.

> EXTERNAL: -
>
> 1. Gun shot wound of entry half cm x half cm x chest cavity deep irregular margin situated on left pectoral area five cm below left nipple.
>
> 2. Gun shot wound of exit Three cm x two cm x through eight cm lateral to thoracic-3, communicating to injury no one directing backward horizontally.
>
> 3. Gun shot wound of entry 2.4 cm x cavity deep situated over lateral part of back fourteen cm below and in line to left shoulder joint with irregular margin.
>
> 4. Gun shot wound of Exit 4 cm x 3 cm Through on right pectoral area eight cm above RT nipple at Ten O'clock position communicating to injury number three.

5. Gun shot wound of entry one cm x one cm x cavity deep with irregular margin situated on back at throaic-5.

6. Gun shot wound of Exit Two cm x one cm x through, ten cm lateral to left nipple communicating to injury number five.

7. Gun shot wound of entry one cm x one cm x bony deep irregular margin with multiple abrasion on right half of face and neck and fracture of scapula and humerus bone was found.

8. Gun shot wound of Entry one cm x one cm x muscle deep irregular margin, five cm left lateral to L4 spine.

9. Gun shot wound of Exit two cm x two cm x muscle deep situated on middle of Right Glutal area communicating to injury number eight.

The doctor opined the cause of death due to shock and haemorrhage as a result of ante- mortem injuries.

7. The medical evidence i.e. the deposition of Dr. A.K. Pandey (PW.6) corroborates the ocular version of events as has been given by the eye-witnesses, from which it can be understood that there were a total of five gun shot injuries. It was also stated that the deceased had fallen down and was then surrounded by the accused persons, who shot at him repeatedly. Thus, there is no incompatibility in the oral evidence and the medical evidence, on record.

8. In the instant case, the FIR was lodged within a period of one hour, at a police station which was at a distance of 12 kms. from the place of occurrence, and this goes to prove that Man Bahadur (PW.1) and Raj Bahadur (PW.2) were in fact, present at the place of occurrence and were in a position to see the accused from close quarters. They were also all known to the witnesses. The reason that they happened to be accompanying the deceased was because they were all going to the Azamgarh Court in relation to a criminal case, relating to the murder of one Gharbharan, in which Raghu Prakash, son of Raj Bahadur (PW.2), was the accused. There is nothing in the cross-examination of the eye- witnesses to cast a doubt upon the veracity of their testimony or to discredit it in anyway.

9. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made

to rest upon it, regarding the convict/accused in a given case. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (Vide: Himanshu v. State (NCT of Delhi),(2011) 2 SCC 36; Ranjit Singh v. State of M.P., AIR 2011 SC 255; and Onkar Anr. v. State of Uttar Pradesh, (2012) 2 SCC 273).

10. Man Bahadur (PW.1) and Raj Bahadur (PW.2) undoubtedly, are the real brothers of the deceased. They, at the time of the incident, were following the deceased on their 'Moped'. They have supported the case of the prosecution to the fullest extent, and even though they were thoroughly questioned by the defence in the course of cross- examination, they did not elicit anything which could shake their testimony. Thus, we do not see any reason to discard their testimonies.

11. So far as the non-production of Ashok, the most material witness to the case is concerned, it is evident from the record that during the cross-examination of Sarvdev Singh, I.O. (PW.4), none of the said accused voiced their concerns or raised any apprehension regarding the non-examination of Ashok. He was the only competent witness who would have been fully capable of explaining correctly, the factual situation. In such a situation, the appellants cannot be permitted to advance an argument stating that since the most material witness was withheld by the prosecution therefore, adverse inference should be drawn against them.

12. It has also been canvassed on behalf of the appellants that it seems rather improbable, that despite the fact that several injuries were caused to the deceased, the pillion rider did not receive a single injury, and therefore, the veracity of the entire case of the prosecution is doubtful. This very issue has been considered at length, by both the courts below. They have come to the reasoned conclusion that the pillion rider must have run away to save his life and hence, escaped injury. The evidence on record is to the extent that the deceased had fallen down and that he was then surrounded by the accused and fired upon. Thus, nothing turns in favour of the appellants based on this point raised by them.

13. In the instant case, there was undisputedly, prior ill-will existing between the parties, as criminal cases were pending between them and Ravi Prakash, son of Raj Bahadur (PW.2) was still in jail in connection with the same. Hence, there was sufficient motive for the appellants to kill the deceased.

14. Another question worth consideration is whether the appellants can be convicted under Section 302 r/w Section 149 IPC in the event that the High Court

has acquitted three persons among the accused and the number of convicts has thus, remained at a number that is less than 5, which is in fact, necessary to form an unlawful assembly as described under Section 141 IPC.

15. This Court in Amar Singh v. State of Punjab, AIR 1987 SC 826, held as under:

> "As the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of Section 141 IPC. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under Section 148 or Section 149 IPC for any offence, for, the first condition to be fulfilled in designating an assembly an "unlawful assembly" is that such assembly must be of five or more persons, as required under Section 141 IPC. In our opinion, the convictions of the appellants under Sections 148 and 149 IPC cannot be sustained." (Emphasis added)

16. Similarly, in Nagamalleswara Rao (K.) Ors. v. State of Andhra Pradesh, AIR 1991 SC 1075, this Court observed:

> "8. However, the learned Judges overlooked that since the accused who are convicted were only four in number and the prosecution has not proved the involvement of other persons and the courts below have acquitted all the other accused of all the offences, Section 149 cannot be invoked for convicting the four appellants herein…. It is not the prosecution case that apart from the said 15 persons there were other persons who were involved in the crime. When the 11 other accused were acquitted it means that their involvement in the offence had not been proved. It would not also be permissible to assume or conclude that others named or unnamed acted conjointly with the charged accused in the case unless the charge itself specifically said so and there was evidence to conclude that some others also were involved in the commission of the offence conjointly with the charged accused in furtherance of a common object. (Emphasis added)

17. Similarly, this Court in Mohammed Ankoos Ors. v. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, AIR 2010 SC 566, held as under:

"35. Section 148 IPC creates liability on persons armed with deadly weapons and is a distinct offence and there is no requirement in law that members of unlawful assembly have also to be charged under Section 148 IPC for legally recording their conviction under Section 302 read with Section 149 IPC. However, where an accused is charged under Section 148 IPC and acquitted, conviction of such accused under Section 302 read with Section 149 IPC could not be legally recorded. We find support from a four-Judge Bench decision of this Court in Mahadev Sharma v. State of Bihar, AIR 1966 SC 302…":

18. Undoubtedly, this Court has categorically held that in such a situation, a conviction cannot be made with the aid of Section 149 IPC, particularly when, upon the acquittal of some of the accused, the total number of accused stands reduced to less than 5, and it is not the case of the prosecution that there are in fact, some other accused who have not yet been put to trial. However, it is also a settled legal proposition that in such a fact-situation, the High Court could most certainly have convicted the appellants, under Section 302 r/w Section 34 IPC.

19. In Nethala Pothuraju Ors. v. State of Andhra Pradesh, AIR 1991 SC 2214, this Court while considering a similar case, held that the non-applicability of Section 149 IPC is no bar for the purpose of convicting the accused under Section 302 r/w Section 34 IPC, if the evidence discloses the commission of an offence, in furtherance of the common intention of such accused. This is because, both, Sections 149 and 34 IPC deal with a group of persons who become liable to be punished as sharers in the commission of an offence. Thus, in a case where the prosecution fails to prove that the number of members of an unlawful assembly are 5 or more, the court can simply convict the guilty persons with the aid of Section 34 IPC, provided that there is adequate evidence on record to show that such accused shared a common intention to commit the crime in question.

A similar view has been re-iterated in Jivan Lal Ors. v. State of M.P., (1997) 9 SCC 119; and Hamlet @ Sasi Ors. v. State of Kerala, AIR 2003 SC 682.

(See also: Willie (William) Slaney v. State of M.P., AIR 1956 SC 116; Fakhruddin v. State of Madhya Pradesh, AIR 1967 SC 1326; Gurpreet Singh v. State of Punjab, AIR 2006 SC 191; Sanichar Sahni v. State of Bihar, AIR 2010 SC 3786; Ors., (2011) 2 SCC 83; and Darbara Singh v. State of Punjab, JT 2012 (8) SC 530). In view of the above, we do not find any force

in the aforementioned submissions of the appellants and the same are not worth acceptance.

20. It is a broad day light murder at 9.00 a.m. on the main road. The eye-witnesses had been following the deceased on the 'Moped' as they had to attend the court's proceedings at Azamgarh. The enmity between the parties stood fully established as criminal cases were pending between them. The case of the prosecution stood fully corroborated by the medical evidence and the ocular evidence. It is not probable that the real brothers of the deceased who had been the eye-witnesses would implicate the appellants falsely sparing the real assailants, though false implication of some of the persons may not be ruled out. Thus, the High Court was justified in acquitting some of the convicts as they did not belong to the family of the appellants/assailants.

The appeal is hence, devoid of any merit and is therefore, accordingly dismissed.