(2012) 10 AHC CK 0178

Allahabad High Court

Case No: Criminal Appeal No. 918 of 2004

Rajesh		APPELLANT
	Vs	
State of U.P.		RESPONDENT

Date of Decision: Oct. 12, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 323, 325, 34, 506

Citation: (2013) 2 ALJ 377

Hon'ble Judges: Rakesh Tiwari, J; Anil Kumar Sharma, J

Bench: Division Bench

Advocate: S.K. Srivastava, I.K. Chaturvedi, Akhilesh Kumar, R.K. Singh and R.L. Deobanshi Amicus Curiae, for the Appellant;

Final Decision: Dismissed

Judgement

Rakesh Tiwari, J.

Heard Sri Raj Kumar Singh, counsel for the appellant in Criminal Appeal No. 918 of 2004 and learned A.G.A. Both these appeals challenge the judgment and order dated 29.1.2004 passed by Additional Sessions Judge (Fast Track Court No. 1), Fatehpur in Sessions Trial No. 468 of 1993, by which the appellants have been convicted under sections 302/34, 323/34, 325/34, 506(2) IPC and sentenced to life imprisonment with fine of Rs. 5000/- each u/s 302/34 IPC and in case of default in payment of fine, to undergo two years additional imprisonment, one year''s imprisonment u/s 323/34 IPC, seven years imprisonment with fine of Rs. 2000/- each u/s 325/34 IPC and in case of default in payment of fine, to undergo one year''s additional imprisonment and seven years imprisonment u/s 506(2), IPC. All the sentences were ordered to run concurrently.

2. Complainant Smt. Shyama Devi, wife of Ram Prasad, resident of village Pawarnupur Majre Simrai, Police station Lalauli, District Fatehpur, submitted a written report dated 12.4.1993 against the accused appellants that on 12.4.1993 at about 6 a.m., a quarrel

took place in respect of NAALI between her husband Ram Prasad and the accused Rajjoo, Rajesh and Rajeshanker alias Sadhoo, all sons of Sukhdeo, and the accused had threatened to kill her husband. On the same day at about 9 a.m. when her husband Ram Prasad after taking meal was going to Cooperative Bank at Bahua, Rajesh armed with an axe, Rajjoo, Rajeshanker alias Sadhoo and their father Sukhdeo armed with lathis, came and surrounded her husband. They started assaulting him with the weapons in their hands, as a result of the blows he fell on the ground. When she tried to rescue her husband, she was also beaten by lathi and received injuries. Akhilesh Kumar, son of her husband"s elder brother (JETH) Kallu Ram ran to call his father from the school situated about 100-150 yards who was also beaten by the accused when he came there. Ram Prasad died on the spot and the incident was also witnessed by her daughter Archana and Manoj Kumari daughter of Kallu Ram. She and Kallu Ram the JETH went to Primary Health Centre, Bahua about one and half miles and thereafter she has come to lodge the report.

3. On the basis of the written report, case crime No. 70 of 1993. was registered on 12.4.1993 at 13.00 hours under sections 302,325,323,506 IPC, Police Station Lalauli, Fatehpur against accused Rajjoo, Rajesh, Rajeshanker and Sukhdeo. Investigation of the case was taken up by Station Officer Sabhajeet Tripathi. The check F.I.R. was Ex. Ka-15 in the Court below.

4. Recovery memo of blood stained and plain earth was prepared by the Investigating Officer on the same day. Complainant Smt. Shyama Devi and her Jeth Kallu Ram were medically examined on the same date on 12.4.1993 itself. Four injuries were found on Kallu Ram whereas six injuries were found on Smt. Shyama Devi. Both the injured were also referred for X ray which was conducted on 14.4.1993 wherein fracture in proximal phalanx of right little finger was found in right hand of injured Kallu Ram and fracture in shaft of right clavicle was found in X-ray report of injured Smt. Shyama Devi.

5. Post-mortem examination of deceased Ram Prasad was conducted by P.W.-5 Dr. J.C. Sethi on 13.4.1993 at 4.25 p.m.. The doctor found that deceased had sustained external as well as internal injuries. In external inspection of the body, blood was found on mouth, nose and both ears and that rigor mortis had passed off from the body except the lower limbs. The deceased was found to have received ten ante mortem injuries as follows:

(Vernacular matter omitted....Ed.)

In the internal examination of the body of deceased Ram Prasad, the doctor reported that parietal bone on left side of head was found to have cut and fractured. Membrane was also found cut, brain congested, in which about one Oz. of clotted blood was also found. Teeth were 15/15, stomach contained 1 Oz. Semi digested food and bladder empty.

6. In the opinion of the doctor, the deceased had died as a result of shock and haemorrhage due to ante mortem injuries. Estimated time of death was one and half day

earlier and the death could occur at about 9 a.m. on 12.4.1993.

7. After investigation, charge-sheet was submitted against the accused appellants and the case was committed to the Court of sessions.

8. Charge was framed against the accused under sections 302/34, 323/34,325/34, 506, IPC. They denied the charges and claimed to be tried.

9. The prosecution examined P.W. 1 - Smt. Shyama Devi, P.W. 2-Kallu Ram, P.W.3-Akhilesh Kumar as witnesses of fact and P.W.-4 Dr. Harishchand, P.W.5- Dr. J.C. Sethi, P.W.6- Sabhajeet Tripathi and P.W.7-Sanad Kumar Singh as formal witnesses.

10. The accused appellants in their statements u/s 313, Cr.P.C. stated that on 12.4.1993 at about 6 a.m. they had not threatened Ram Prasad as alleged and had only objected to blocking flow of water in the Naali by Ram Prasad and Smt. Shyama Devi. Enmity was admitted as motive for falsely implicating them. The accused did not adduce any evidence in their defence. Accused Sukhdeo died during trial.

11. The trial Court after analysing the oral and documentary evidence on record and hearing the submissions of the parties, came to conclusion that prosecution has succeeded in fully establishing its case against the accused appellants beyond all reasonable doubts. The accused were accordingly convicted and sentenced as stated earlier.

12. Aggrieved, this appeal has been preferred by the accused appellants on the following grounds:

(1) that trial Court has not properly appreciated the evidence on record as statement of P.W.-3 completely belies the prosecution version. hence the order of conviction is against the weight of evidence on record as well as law, and

(2) that the prosecution story is suspicious and the appellants have been falsely implicated in the case.

13. Counsel for the appellants have argued that the F.I.R. is ante timed; that injury report of injured witness Smt. Shyama Devi-complainant is forged; that no witness of Panchayatnama was examined and that no recovery of weapon was made from the possession of accused Rajesh during investigation. It is urged that medical examination of complainant Smt. Shyama Devi and injured Kallu Ram was doubtful and the postmortem report does not tally with the time of lodging of the F.I.R. and that only those witnesses were examined by the prosecution in support of its case who were partisan or interested witnesses, which supports the defence that accused have been falsely implicated.

14. Counsel for the appellants has assailed the evidence of P. Ws.-2 and 3 stating that their evidence as eye-witnesses of the incident is doubtful. According to him, P.W.-2 Kallu Ram had reached the spot from the school which was 100-150 yards away after he was informed by P.W.-3 Akhilesh Kumar that accused are assaulting Ram Prasad with lathis and axe. He urged that conduct of Shyama Devi and Kallu Ram of getting themselves firstly medically examined by the doctor at 11.15 a.m. and 11.35 a.m. respectively leaving the body of the deceased unattended at the spot is unnatural. Their behaviour of travelling to the police station about 11 Kms. on a Buggy thereafter without any information of the incident at the police chowki, is sufficient to show that F.I.R. is ante timed. According to him, the deceased was killed by someone else on the previous night, as such the manner in which the crime is said to have been committed is improbable which also establishes that accused have falsely been implicated.

15. Learned A.G.A. has submitted that F.I.R. is prompt and not ante timed as alleged by the counsel for appellant. He submits that admittedly a quarrel had taken place with the accused at about 6 a.m. on 12.4.1993 that P.W.-2 has stated that he was in school when his son had informed him that the accused were assaulting Ram Prasad. Shyama Devi has also stated that Ram Prasad was going to bank at about 9 a.m. when he was assaulted, hence there is no scope for the argument on behalf of the accused that deceased Ram Prasad had been killed by some unknown persons the previous night. Further, P.W.-2 Kallu Ram in his cross examination has clearly stated that they had gone for medical treatment to Primary Health Centre, Bahua in a Buggy which is about 2 Kms. from the place of occurrence and had then gone to the police station on a tempo which took only 45 minutes'' time to reach there. It has not been denied that the hospital is about one and half miles (or about 2 Kms.) away from the place of occurrence and the police station is about 11 Kms., therefore, it is not improbable that the injured witnesses i.e. the complainant and P.W.-2 had lodged the FIR within reasonable time and after taking medical treatment of their injuries, they could have reached the police station well within time and lodge F.I.R. at 13 hours on 12.4.1993. It is stated that there is nothing unnatural in their conduct as the body of the deceased was not left lying on the road unattended as alleged since daughters of the family were there and that the injured had gone for medical examination with Atul Kumar son of Ram Prasad which is supported by the fact that the application for medical examination to the Medical Officer is written by him. P.W.-1 Smt. Shyama Devi was illiterate and P.W.-2 Kallu Ram, could not have written the report as he was injured and therefore the report was scribed by Chhitu Lal.

16. It is vehemently argued that it is a case of direct ocular evidence. Accused appellant Rajesh has been assigned the main role of assaulting the deceased by an axe and other accused by lathis. They had together assaulted Ram Prasad which is proved by all the witnesses of fact produced by the prosecution and any irregularity by the I.O. in the inquest, would not be fatal to the case if prosecution version is otherwise proved against the appellants. The distance of school from the place of occurrence is 100 to 150 yards and in a heinous incident like the present one. it is not improbable that P.W.-3 Akhilesh

Kumar could not have informed his father Kallu Ram that accused appellants are assaulting Ram Prasad (since deceased) by lathis and axe. P.W.-2 Kallu Ram could also have reached the place of incident on being informed by P.W.-3 within two minutes and see the assailants as has come out in the evidence. The fact that Kallu Ram and Shyama Devi were eye witnesses is supported by the fact that they were injured when they had tried to save Ram Prasad, so their presence at the spot is duly proved.

17. As regards only 1 Oz of semi digested food being found in the stomach of the deceased, learned A.G.A. clarified in villages, people normally sleep early in the night, early arise and take food in early morning. Ram Prasad must have taken some breakfast after freshening up at about 6 a.m. after which altercation had taken place between him and the accused when he was going to the cooperative bank. The food taken by him must have digested by 9 a.m. which was found in semi digested state in his stomach.

18. In connected criminal appeal No. 679 of 2004, Sri R.L. Deobanshi, Amicus Curiae, appearing for the appellants Rajjoo and Rajeshanker, has adopted the arguments advanced by the counsel for appellant in criminal appeal No. 918 of 2004. In addition he submits that occurrence is alleged to have taken place at 9 a.m. and medical examination of injured P.Ws.-1 and 2 was conducted at 11.15 and 11.35 a.m. respectively while the F.I.R. was lodged at 1 p.m. on 12.4.1993. Therefore time, place and manner of the occurrence in which it is said to have taken place, is highly doubtful. According to him, the occurrence had taken place earlier. In support of this submission, he relied upon the evidence of P.W. 1-Smt. Shyama Devi wherein she has stated that occurrence took place about five minutes after the Sunrise. He emphasized that occurrence had taken place at about 6 a.m. as semi digested food was found in stomach of the deceased and not at 9 a.m. as alleged by the prosecution.

19. It is next argued that the deceased had received all injuries on one side and therefore case set up by the prosecution that deceased Ram Prasad was assaulted by the appellants after surrounding him from all sides, is not established and the manner in which assaulting is said to have taken place, is not made out from the record. He has also relied upon the following portion of cross examination of P.W.-1 Smt. Shyama Devi for supporting his case that FIR was ante timed:

(Vernacular matter omitted.... Ed.)

As regards presence of 1 Oz. semi digested food found in the stomach of the deceased during post mortem examination, he argues that it shows that fresh food was not taken by the deceased and therefore the occurrence had taken place during the previous night after taking of the food.

20. It is next contended by the learned counsel that recovery memo shows that blood stained earth was taken from place "B" in the site plan and no blood was taken from the Chaarpai on which the dead body was kept. It was not even sent for investigation to the

forensic laboratory and in any case the recovery was not made in presence of the witnesses. According to him, bicycle was not shown in the recovery memo though it was alleged that the deceased was attacked by the appellants when he was going to cooperative bank on cycle. In fact, cycle was shown inside the house which is apparent from the site plan. He then brought to the notice of the Court that G.D. Entry No. 14 does not show presence of Chhitu Lal either at the place of occurrence or at the police station and it appears that Investigating Officer had taken the evidence of Chhitu Lal on the next day as he was an interested person being related to the deceased. It is stated that since the written report is said to have been got written by Chhitu Lal, and he has not been examined, therefore, story of the prosecution does not inspire confidence for all the aforesaid reasons.

21. Assailing the judgment it is pointed out by him that the Court below has not taken note of the fact that doctor had not proved the register in respect of the treatment given to the injured witnesses Smt. Shyama Devi and Kallu Ram. It was produced by the pharmacist who had not seen the injuries and no question was asked as to why secondary evidence was being produced and the register was not authenticated by the competent authority.

22. Referring to the averments made in the F.I.R. regarding the dispute and roles assigned to the appellants, counsel for the appellant contends that averments made therein are at material variance from the statement of P.W.-1. He also submitted that the motive for the dispute that quarrel had taken place with regard to Naali is too weak and in fact is not a motive at all. In this regard, he has also referred to question Nos. 1 and 2 put to appellant Rajjoo u/s 313, Cr.P.C., which read thus:

(Vernacular matter omitted..... Ed.)

23. On the basis of the aforesaid, it is argued that no threat was given by the accused and somebody else also could have killed Ram Prasad and that the statement u/s 313, Cr.P.C. shows that there was no dispute between the appellants and the complainant and her husband.

24. Learned A.G.A. in rebuttal submitted that the occurrence is fully proved, F.I.R. is prompt and guilt of the accused has been brought to the hilt by the prosecution. According to him, two incidents had taken place on 12.4.1993. The first at about 6 a.m. when some quarrel had taken place between deceased Ram Prasad and the appellants and the second at 9 a.m. when Ram Prasad was murdered by the appellants with axe and lathis in their hands. Their role in committing the offence is fully proved not only by direct ocular evidence of the injured witnesses in the incident but also from the medical, oral and documentary evidence produced by the prosecution.

25. After hearing the parties, and perusal of record it is evident that Akhilesh Kumar son of Kallu Ram was an eye witness of the incident. He had run to the school from the place of occurrence which is at a distance of only 100 to 150 yards from the place of

occurrence. At the time of occurrence, he was student of class 1st or 2nd and was mature enough to understand that his uncle Ram Prasad (since deceased) was being assaulted by axe and lathis which may cause his death. At the time of giving statement he was about 13 years of age. He stated that he was at a distance of 10 to 15 steps from the spot and had rushed to inform his father who was a teacher in the school and in this it took only about two to three minutes. His ocular evidence that his father Kallu Ram and his aunt Smt. Shyama Devi (wife of deceased Ram Prasad) had tried to save Ram Prasad, is supported by the medical evidence as Kallu Ram and Smt. Shyama Devi, wife of the deceased have received injuries in their hands by blunt object like lathi.

26. So far as injuries of the deceased on one side of his body are concerned, it is clear that the incident had taken place in a lane near wall, therefore, the accused appellants could have given blows from one side only and the deceased might have fallen on the ground exposing his right side of the body.

27. It is settled law that when there is direct ocular evidence and witnesses testifies an offence, motive pales into insignificance. If witnesses are related to the deceased, then their evidence is to be read carefully and with caution. Merely because the body of the deceased was put on the cot and cycle was brought in the house and not shown in the site plan or some irregularity is committed by the I.O. in the investigation, it would in itself not be fatal to the prosecution if its version is proved otherwise. The witnesses would not remember every detail of the incident vividly in fleeing moments after lapse of years. The incident had taken place in the year 1993 and P.W. 1 Shyama Devi and P.W.-2 Kallu Ram have been examined in November 2000 whereas P.W.3 Akhilesh Kumar son of Kallu Ram was examined on 16.1.2001. Looking at the age of Akhilesh Kumar and the time lapse between the date of incident and date of deposition of the witnesses, minor inconsistencies can be overlooked as the occurrence is proved by direct evidence of witnesses supported by the materials on record which brings home the guilt of the accused. In State of Rajasthan Vs. Kishore, as well as in Leela Ram (Dead) Through Duli Chand Vs. State of Haryana and Another, , the Apex Court has laid down the ratio of law that it is now a well settled principle that any irregularity or even an illegality during investigation ought not to be treated as a ground to reject the prosecution case and there is no necessity to dilate on this issue.

28. It is also apparent from the evidence of Smt. Shyma Devi that Chhitu Ram who has written the report, lived about 20 Kms. away from the village of the deceased. He had met Smt. Shyama Devi and Kallu Ram when they were going to the police station after taking medical treatment of their injuries. The incident had taken place at 9 a.m. and the injured witnesses Smt. Shyama Devi and Kallu Ram had been treated at 11.15 and 11.35 a.m., therefore, Chhitu Ram could have written the report and complainant Smt. Shyama Devi with Kallu Ram could have reached the police station within 45 minutes which was about 11 Kms. from the hospital and lodge the report at 13.00 hours.

29. In the facts and circumstances of the case, we are of the view that the judgment of conviction and sentence has rightly been passed by the trial Court as the prosecution has fully proved its case against the accused appellants and the same deserves to be upheld.

30. Consequently, the appeals fail and are dismissed.

31. Sri R.L. Deobanshi, Amicus Curiae would get Rs. 2100/- as remuneration which shall be paid to him within a month. A certified copy of the judgment be sent to the Court below forthwith through the C.J.M. concerned who is directed to ensure its compliance.