

**(2008) 09 AHC CK 0263**

**Allahabad High Court**

**Case No:** None

Ganga Tiwari and Ram Briksh Rai

APPELLANT

Vs

State of U.P.

RESPONDENT

---

**Date of Decision:** Sept. 18, 2008

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 148, 149, 302, 304, 323

**Hon'ble Judges:** Shiv Shanker, J; Ajai Kumar Singh, J

**Bench:** Division Bench

**Final Decision:** Allowed

---

### **Judgement**

Shiv Shanker, J.

This criminal appeal has been filed against the judgement and order dated 27.9.1982 passed by IIIrd Additional District and Sessions Judge, Gorakhpur in Sessions Trial No. 224 of 1981 convicting the appellants u/s 302 read with Section 34 I.P.C. and sentencing them to imprisonment for life.

1. Briefly, prosecution case is that Bhaskat Rai, complainant and his brother Sidheshwari Rai were returning from Karauni Bazar and when they reached near the boundary wall of Sanahi Sahu where Ganga Tiwari, Ram Briksh Rai. Ram Belas Rai and Vijay Bahadur Rai were standing and the same time, Ganga Tiwari fired with his gun and Ram Briksh, Ram Belas and Vijai Bahadur hurled bombs at complainant's brother. In the meantime, Daya Shankar Rai son of Badri Rai, Shankar Rai son of Shyam Sundar Rai of village Pali arrived and disarmed Ganga Tiwari with lathis and snatched the gun from the accused. They ran away from there and the brother of complainant died. On raising alarm, villagers arrived at the spot. The gun was taken in police custody and the report was lodged at the police station in presence of Sri Prakash Rai P.W.7 who was then posted as S.O., P.S. Bansgaon. Later on the Investigating Officer went towards place of occurrence. He appointed panches and

prepared inquest report vide Ext Ka 19. Thereafter, he interrogated Daya Shanker etc. and made spot inspection and prepared site plan vide Ext. Ka 2. Later on he got body of deceased and after sealing it, entrusted the same to Constable Vijai Shanker Pandey P.W.6 for onward transmission to mortuary. The investigation for the day was completed and he returned to the police station. On the next day on 2.5.80, he received post mortem examination report and injury report. Thereafter, he continued to make search for the three remaining accused who were not present. Later on, remaining accused persons surrendered before the court concerned.

2. After completion of investigation, the Investigating Officer submitted the charge sheet Vide Ext.Ka25. After commitment of the case to the Court of Sessions, the Sessions Judge has framed the charge u/s 302 I.P.C. read with Section 34 I.P.C. against accused persons namely Ganga Tiwari, Ram Briksh Rai, Ram Belas Rai and Vijai Bahadur Rai who pleaded not guilty and claimed to be tried. They have stated in their statements recorded u/s 313 Cr.P.C. that they have been falsely implicated in this case due to enmity.

3. Prosecution examined P.W.1 Dr. S.K. Srivastava, P.W.2 Daya Shanker, P.W.3 Bhaskar Rai , P.W.4 Ram Awadh Sirgh (S.I.), P.W.5 Basdeo Singh (head constable), P.W.6 B jai Shankar, P.W.7 Shri Prakash Rai (A.S.I.).

4. No any oral or documentary evidence has been adduced on behalf of accused persons on their defence.

5 Thereafter, two accused persons namely Ram Belas Rai and Vijai Bahadur Rai have been acquitted by the court below and accused Ganga Tiwari and Ram Briksh Rai have been convicted for the charge levelled against them and awarded the sentence as mentioned above. Both the accused appellants have filed the present appeal before this court.

6. The appellant Ganga Tiwari had died, therefore his appeal has already been abated vide order dated 10.9.2008.

7. Heard Sri P.N. Mishra, learned senior Counsel appearing on behalf of appellants and learned A.G.A. Usha Kiran as well as perused the whole evidence on record.

8. Learned Counsel for the appellant contended that P.W. 2 Daya Shankar has not named the appellant in his testimony. He has involved only co-appellant Ganga Tiwari and three other persons. P.W. 3 Bhaskar Rai has only given evidence against the present appellant. Therefore, the appellant has been convicted merely on his solitary evidence. He was the chance witness and his solitary evidence is not reliable and trustworthy. Therefore, no reliance could be placed upon it. However, the court below has wrongly convicted the present appellant merely on the basis of this witness.

9. It is further contended that old enmity has been shown in F.I.R. in between the appellant and P.W. 3 Bhaskar Rai prior to the incident. There is no immediate motive

in the case, therefore, he could not commit murder of deceased. It is further contended that the role of present appellant and co-accused Ram Belas Rai and Vijai Bahadur Rai has been attributed to throw bombs upon Sidheshwari Rai, brother of complainant who sustained only one injury according to the post mortem examination report. It has not been specified either in the F.I.R. or previous statement or evidence given by P.W. 3 as to whose bomb hit on the body of deceased.

10. On the basis of same evidence, co-accused Ram Belas and Vijai Bahadur Rai have already been acquitted by the trial court and State Appeal has not been filed against their acquittal. Therefore, such finding has become final. However, the appellant has been convicted by the trial court merely on the basis of old enmity. Medical evidence is also in conflict with the oral evidence. It is further contended that role of present appellant has also not been assigned for catching hold or exhortation.

11. Learnea A.G.A. has submitted that role of three persons including present appellant has been shown to throw bombs upon Sidheshwari Rai (deceased). Consequently he sustained one bomb injury on his dead body. There was an old enmity with the present appellant. Therefore, the trial court has rightly convicted the appellant deeming that his bomb would have been hit. It is further submitted that evidence of P.W. 3 is corroborated with the post mortem examination report of the deceased and the F.I.R. has also been lodged promptly. Motive is also established against him. In such circumstances, this appeal has no force.

12. We have considered deeply the contentions made by learned Counsel for both the parties. The F.I.R. Ext. Ka 2 was lodged by P.W. 3 Bhaskar Rai. P.W.2 Daya Shankar is also an important witness of this case who has not given any evidence against the present appellant Ram Briksh Rai. He has only stated against the appellant Gang a Tiwari and three other persons. He is the person who wielded with lathi upon Ganga Tiwari in snatching his gun. Therefore, presence of this witness cannot be doubted at the place of incident. However, he has not involved the present appellant in his deposition.

13. Now P.W.3 Bhaskar Rai is only solitary witness. There is settled principle of law that evidence of solitary witness may be as under:

(i). wholly reliable or

(ii) wholly unreliable or

(iii) partly unreliable or

(iv) partly reliable and corroborated with other evidence.

14. P.W.3 Bhaskar Rai has stated that the present appellant Ram Briksh Rai and co-accused Ram Belas and Vijai Bahadur Rai had thrown bombs upon Sidheshwari Rai (deceased). Consequently he sustained injuries. The post mortem examination report reveals that the following bomb ante mortem injury was found on the body

of deceased:

Blast injuries in an area of 7" x 9" on the right side of chest, cavity deep, with charred margins. Ribs No. 1 to 7 on both sides were burned. The clavicle bone also fractured.

Cause of death of deceased has been shown shock and Haemorrhage.

15. The above ante mortem injury was caused upon the body of deceased by one bomb but it has not been specified in the testimony of P.W.3 as well as in the F.I.R. as to whose bomb among the three accused hit on the body of deceased. Therefore, two persons have been falsely implicated in this case among the three persons as they have not caused any injury on the body of deceased. In absence of specific role of any accused among three persons, co-accused Ram Belas Rai and Vijai Bahadur Rai have been acquitted by the court below by giving benefit of doubt. The same evidence is also available against the present appellant. In such circumstances, he could not be convicted for the same evidence.

16. It is worthwhile to mention here that judgement and order of acquittal passed regarding co-accused Ram Belas Rai and Vijai Bahadur Rai has become final as the State has not filed any appeal against their acquittal.

17. The attention has been drawn by learned Counsel for the appellant towards the decision of Apex Court in case of Satish v. State of U.P. reported in 1991 SCC (Cri) 1076 : 1991 Supp (2)SCC 577, wherein it has been observed that "Court finding the eye-witnesses to be highly interested, partisan and inimical and acquitting all the 11 co-accused of offences under Sections 148, 324/149, 323/149 and 302, I.P.C.-Conviction by High Court of the appellant alone u/s 304 Part I, IPC on the basis of testimony of such witnesses which had already been rejected, held, improper".

18. Therefore, the above decision of Apex Court is applicable in this appeal and appellant is not liable to be convicted for the same offence on the same evidence which has already been discarded by acquitting other co-accused persons.

19. It is worthwhile to mention here that there is only one other evidence of an old enmity against the present appellant. There is no immediate motive to commit murder of deceased. An old enmity may be motive of the case but accused cannot be convicted merely on the basis of old enmity. There should be reliable and trustworthy evidence of the fact that the appellant has committed murder of deceased. There were two parts of the case, one is enmity and the second is commission of crime but the evidence adduced on behalf of prosecution regarding commission of crime has already been rejected by me trial court in acquitting the above co-accused persons. Therefore, the same evidence cannot be relied in convicting the present appellant merely on the basis of old enmity. Thus, the trial court has committed error and illegality in convicting the present appellant.

20. In view of discussions made above, this appeal has force and is liable to be allowed and judgement and order passed by the court below for his conviction,

deserves to be set aside by giving benefit of doubt.

21. Consequently this criminal appeal is allowed and impugned judgement and order passed by the court below against the present appellant Ram Briksh Rai is set aside and he is acquitted for the charge levelled against him by the court below. He is on bail. His bail bonds are cancelled and his sureties are discharged.